Conflict of Laws - Corporations - Whether the Court of the Forum May Disregard Successorship to a Cause of Action for a Multistate Libel Validly Assigned Elsewhere by an Unincorporated Association to a Newly Formed Corporation into Which It Has Merged and Refuse to Permit Suit by the Corporate Successor Based on the Forum's Domestic Substantive Law

Alfred Avins
DISCUSSION OF RECENT DECISIONS

To remedy evils, the State legislature may move one step at a time. It may operate in one field and supply a remedy while it neglects others.

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CONFLICT OF LAWS—CORPORATIONS—WHETHER THE COURT OF THE FORUM MAY DISREGARD SUCCESSORSHIP TO A CAUSE OF ACTION FOR A MULTISTATE LIBEL VALIDLY ASSIGNED ELSEWHERE BY AN UNINCORPORATED ASSOCIATION TO A NEWLY FORMED CORPORATION INTO WHICH IT HAS Merged AND REFUSE TO PERMIT SUIT BY THE CORPORATE SUCCESSOR BASED ON THE FORUM'S DOMESTIC SUBSTANTIVE LAW—In Association for the Preservation of Freedom of Choice, Inc. v. New York Post Corporation, a New York court had before it a novel and important question in the area of conflict of laws involving increasingly significant problems in the multi-state libel situation.

The defendant published a libel about an unincorporated group called Association for the Preservation of Freedom of Choice, which had members in a number of states and the District of Columbia, on May 14, 1959. The defendant's newspaper with the libelous article was circulated into various states, including New York, and the District of Columbia. In August, 1959, the unincorporated organization, pursuant to a prior unanimous agreement that it should incorporate in the District of Columbia, and that upon incorporation the new corporation should succeed to all of the group's members, property, and claims, incorporated the group under the same name in the District of Columbia by having three residents of District who were members of the unincorporated association secure a charter with the same name and purposes as the unincorporated group pursuant to District of Columbia law from the Superintendent of Corporations there. Thereupon, the membership of the unincorporated group merged into the corporation, and the unincorporated group ceased to exist as a separate organization.

In May, 1960, the corporation brought suit as plaintiff in its own name as successor to the unincorporated group for libel against the defendant newspaper. The court dismissed the claim. It held that although a valid successorship might have been created in the District of Columbia, the question presented was "the ownership of the claim or who may sue under the law of the forum which governs the question of the capacity to sue." Since it held that a libel claim was not assignable in New York, the court concluded that "the resident of another State cannot avail itself of


1 35 Misc. 2d 65, 228 N.Y.S.2d 767 (1962).
such a claim by assignment where a resident may not do so.” Accordingly, it dismissed the claim for want in the corporation of capacity to sue on it.

The court’s decision raises seven issues, which are:

1. Does the case involve the procedural question of capacity to sue or the substantive question of the validity of the successorship and ownership of the claim?
2. If the question is substantive, what law governs?
3. Is the succession valid under District of Columbia Law?
4. Would an assignment be valid under District of Columbia law?
5. Would a foreign succession violate a strong New York policy?
6. Would a foreign assignment violate a strong New York policy?
7. Even if a foreign assignment violated a strong local policy, would the application of a local substantive statute to prevent suit on the valid foreign assignment make the statute, as so applied, violative of the United States Constitution?

These issues will be taken up under separate headings below.

1. Is the question procedural or substantive?

In order to determine whether the question is the procedural one of capacity to sue, or the substantive one of ownership of the cause of action, reference to the law of the forum is required to determine the meaning of the term “capacity to sue.” The New York Court of Appeals has defined the question of capacity to sue as one of personal status, and stated that all persons, natural or artificial, have capacity to sue all others except when under certain well-defined disabilities. In a leading case, the court declared:

There is a difference between capacity to sue, which is the right to come into court, and a cause of action, which is the right to relief in court. Incapacity to sue exists when there is some legal disability, such as infancy or lunacy or want of title in the plaintiff to the character in which he sues. The plaintiff was duly appointed receiver, and has a legal capacity to sue as such, and hence, could bring the defendants into court by the service of a summons upon them even if he had no cause of action against them. On the other hand, an infant has no capacity to sue, and hence, could not lawfully cause the defendants to be brought into court, even if he had a good cause of action against them. Incapacity to sue is not the same as insufficiency of facts to sue upon. . . . We think that the plaintiff had capacity to sue, but that his complaint stated no cause of action of which the county court had jurisdiction.2

Aside from those special instances in which a person attempts to sue in a representative capacity, such as administrator, executor, receiver,

trustee, and the like, and which entail a question as to whether the forum will recognize such a representative's appointment under foreign law and permit the representative, as such, to sue for the benefit of another, a person or corporation suing for its own account either has capacity to sue or has no such capacity. It cannot have capacity for some cases and no capacity for others. This follows from the proposition that all persons have full capacity unless under a well-defined disability, and may sue regardless of whether they have a cause of action. If disabled, they lack capacity in any case; if not, they always have such capacity.

A corporation is treated just like an individual. Ordinarily, it has capacity to sue regardless of whether it has any causes of action. However, for reasons similar to those of individuals, it may be incapacitated. For example, a war between the country chartering the corporation and the forum will incapacitate corporations from suing on valid causes of action just as alien nationals are incapacitated. Likewise, when a corporation is dissolved it loses its capacity to sue, just as an individual who dies loses his capacity. Even as to internal capacity, the law of the place of incorporation governs.

Whether the assignment of a cause of action is effective so as to give the assignee the legal ownership of the claim and divest it from the assignor is not a problem of capacity to sue. As one case held:

It appears to be assumed by both of the parties that legal incapacity of the plaintiff to sue may be shown by proof that she had made an assignment of her rights by virtue of the stockholders' capacity.

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3 Field v. Allen, 9 A.D.2d 551, 189 N.Y.S.2d 489, 491 (1959). Here the Appellate Division declared:

"Every citizen has the legal capacity to sue every other citizen excepting only when prevented by such personal disabilities as infancy or adjudicated incompetency; and the right exists without reference to the title or status of the plaintiff or of the defendant. A person having a capacity to bring a lawsuit may bring it, as Judge Vann noted, and get the defendant 'into court by the service of a summons' even if he had 'no cause of action.' Thus we think plaintiffs could bring this lawsuit or any other lawsuit against these defendants or any other defendants whom the summons of the court could reach."


"The phrase 'legal capacity to sue,' as used in a code provision, means that plaintiff must be free from general disability, such as infancy or insanity, or, if he sues as a representative, that he shall possess the character in which he sues. It has been stated, generally, that every natural person of lawful age has legal capacity to sue, and that persons under no legal disability, such as infancy, lunacy, or the like, have a legal capacity to sue. . . . . Thus, where an association has no corporate existence either de jure or de facto, and there is no estoppel, it cannot do any act whatever as a legal entity. It cannot . . . sue or be sued."

agreements referred to. I do not so understand the meaning of the expression—lack of "legal capacity to sue"—as used in Rules 106 and 107 of the Rules of Civil Practice. Assuming, as claimed by the defendants, that an assignment of her stock and rights is explicitly and plainly shown in the basic agreements relied upon by the plaintiff and annexed to the pleading, then the defect to be urged is that the complaint does not state a cause of action in favor of the one who is suing, the alleged assignor—not that the plaintiff does not have legal capacity to sue. Legal incapacity, as properly understood, generally envisages a defect in legal status, not a lack of a cause of action in one who is *sui juris*.8

Of course, it is true that the law of the forum generally, and absent federal compulsion, governs who are the proper parties to a lawsuit. But in so determining, it must necessarily refer to the law of the place which created the substantive right. This is clearly brought out in a decision of the Appellate Division, First Department, which held in one case as follows:

The complaint alleges that under the laws of Massachusetts a note made in the presence of attesting witnesses may be sued on by the original payee within twenty years after the cause of action arose. It further alleges that the foregoing provisions of the Massachusetts law mean that such suit may be brought in the name of the original payee for the benefit of the present holder.

Defendant moved to dismiss the complaint. . . . He contends that the law of the forum determines who are the proper parties to bring a suit. . . . We agree with defendant's contentions that the law of the forum applies to such matters. . . . Nevertheless, we deem the present complaint sufficient. Liberally construed, the pleading states facts from which it might be inferred that the foreign law created substantive rights rather than a remedy.9

The substantive question as to who owns a claim depends upon whether the assignee obtained good title in the place where it was assigned. In Peterson v. Chemical Bank,10 the New York Court of Appeals held as follows:

It follows that the plaintiff presented himself to the Superior Court as the owner by purchase and assignment of the debt against the defendant . . . . the validity of that title depended upon the law of Connecticut [where the transfer was made].11

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10 32 N.Y. 21 (1865).
11 Id. at 46.
If the assignee obtains good title in the place of assignment, the uniform rule is that he may sue in his own name in any forum. In a leading case, the Supreme Court of Pennsylvania said:

Whenever, however, by the lex loci contractus, the legal title passes, the holder of such legal title may sue in his own name in whatever forum he may bring his suit. The rule is recognized by Judge Story, in his Conflict of Laws, . . . In discussing the subject of transfers of choses in action, not valid by the law of the place where suit is brought, but valid by the law of the place where made, he says: "In such case it would seem that the more correct rule would be that the lex loci contractus ought to govern. Under such circumstances, to deny the legal effect of the endorsement, is to construe the obligation, force and effect of a contract made in one place by the law of another. It is not a question as to the form of the remedy, but as to the right."\(^\text{12}\)

According to these authorities, the question of legal capacity to sue is not only not related to the ownership of the claim, but is not involved at all. Whether the corporation is a proper party depends on whether it owns the claim, but this in turn depends on the validity and consequences of the successorship by the corporation of the rights of its predecessor in the District of Columbia. Accordingly, the question involved is substantive, and not procedural, and the judge was in error in treating it as a procedural matter governed by the law of whatever forum the plaintiff sued in.

(2) The governing law

Restatement of Conflict of Laws, § 377, states: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Section 378 states: "The law of the place of wrong determines whether a person has sustained a legal injury." Since in libel cases the last act or event necessary to make an act or liable is publication, it necessarily follows that the law of each jurisdiction into which the publi-

\(^{12}\) Levy v. Levy, 78 Pa. 507, 509 (1875). In Lanigan v. North, 69 Ark. 62, 63 S.W. 62, 64 (1901), the court likewise declared:

"Again, it is said that the accounts against the bank were not assignable, under our own statute, and that the assignors should have been made parties. But these debts were contracted by the bank in California, and were assigned to the plaintiff in that state. It was shown that such claims were assignable under the laws of that state. If they were assigned in that state, the assignment vested the legal title or ownership in the assignee, and he could bring an action in his own name either there or here. We look to the law of California in order to determine the effect of an assignment made in that state, and the effect of the assignment there was, as before stated, to vest the legal title to those choses in action in the plaintiff North. Being the owner of the legal title, he was, under our statute, as well as that of California, the real party in interest, and could bring this suit in his own name; for whenever by the lex loci contractus the assignment passes the legal title the holder of such legal title may sue in his own name in whatever forum he may bring his suit."
cation is circulated governs as to damages suffered in the jurisdiction. As Harper and James say: “The logic of this situation leads to the result that a defamatory article in a national magazine is governed by the law of every state in the Union if the place of publication is the proper law, as was early held.”

Those jurisdictions which follow the “single publication rule” as does New York hold that the law of each of the states into which a libel circulates governs the case insofar as damages are sustained therein in respect to all substantive law, both as to cause of action and defenses. It appears that New York also follows this rule.

The identical result is reached via another route. Since the tort is governed by the state in which the last act necessary for completion is done, and since the last act necessary for a libel is publication, each state governs insofar as the material was published in that state, and in the non-single publication rule states, an independent cause of action is created and is governed by that state’s law which New York State will recognize under traditional conflict of laws theory, although that state’s law is different from New York’s internal law. Indeed, although New York, as the forum, may constitutionally apply its procedure, including its statute of limitations, it would appear that New York is constitutionally compelled to apply sister-state substantive law under the Full Faith and Credit Clause.

The result of the foregoing analysis is that if the law governing the libel is used to determine the validity of the successorship or assignment to the corporation, the consequences will be chaos. The law of each state into which the libel has circulated may be different as to successorship and assignment, and as a result there may be as many different plaintiffs as there are states or foreign countries into which the publication circulated. At best, New York could only determine the effect of the successorship in respect to that part of the cause of action accruing in New York; as to other states, it would be unconstitutional for New York to attempt to do

13 2 Harper and James, The Law of Torts, § 30.7 (1956).
15 Hartman v. Time, Inc., supra, was cited with approval in Gregoire v. G. P. Putnam’s Sons, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948). This is persuasive that New York follows the Third Circuit’s rule.
so, since it has no contacts other than that of being the forum state. Thus, application of this rule would compel the splitting of a single cause of action for libel among several plaintiffs, a result contrary to the strong policy of New York's "single publication rule."\textsuperscript{20}

Nor can the "domicile" of the unincorporated organization be used. Since the A.P.F.C. had members in more than one state, it is impossible to say that it was domiciled in any one state. If the laws of all of the states wherein it had members are used, the same confusion would result. Manifestly, it is desirable that a uniform rule to determine the force and validity of the successorship be found.

The capacity of the corporation to take the claim is governed by the law of the place of incorporation.\textsuperscript{21} The same rule applies to unincorporated groups; capacity to take is determined by domicile.\textsuperscript{22} Indeed, it is doubtful whether any other rule would comport with Full Faith and Credit requirements.\textsuperscript{23}

The validity and effect of an assignment of a contract claim, whether voluntarily or by operation of law, is governed by the law of the place where the assignment is made.\textsuperscript{24} This is true although the claim is located elsewhere. In \textit{Republica de Guatemala v. Nunez},\textsuperscript{25} it was held that the validity of the assignment of the cause of action was governed by the law of the place of assignment, which was where the assignee was domiciled and where the assignment took place, although the cause of action was clearly in another jurisdiction. And in \textit{Mogul v. Jenkins Bros.},\textsuperscript{26} the New York Appellate Term held that "the question of the validity of the transfer of a claim . . . is governed by the law of the place where the assignment is made." Thus, even if the assignment would be invalid if executed in New York, like any other contract, New York courts will give effect to it if valid where made.\textsuperscript{27}

\textsuperscript{19} Home Insurance Co. v. Dick, 281 U.S. 397 (1930).
\textsuperscript{20} See Gregoire v. G. P. Putnam's Sons, supra, n.15.
\textsuperscript{21} 2 Beale, Conflict of Laws, § 165.5 (1936); George v. Holstein Friesian Assn., 238 N.Y. 513, 522, 144 N.E. 776 (1924). In St. Johns v. Andrews Institute for Girls, 191 N.Y. 254, 267, 83 N.E. 981 (1908), the court held: "The validity of the provisions of a will relating to a corporation devisee holding, investing, accumulating, and applying the property devised is for the courts of the domicile of the corporation to determine." It might be noted that the law of the District of Columbia is the same. Williams v. Protestant Episcopal Theological Seminary, 198 F.2d 595, 596 (C.A.D.C., 1952) cert. den., 344 U.S. 864 (1952).
\textsuperscript{25} [1927] 1 K.B. 669 (C.A.).
\textsuperscript{26} 208 Misc. 635, 129 N.Y.S.2d 585 (1953).
No reason appears why the same rule should not apply to assignments of tort claims as applies to assignments of contract claims. The few cases dealing with such assignments so hold. In *El Paso & S. W. Co. v. Hudspeth*, a cause of action under the Federal Employer's Liability Act, which contained no provision permitting or denying the right to assign, was involved. The court held: "The cause of action was transitory, the assignment was made in Texas and its validity is governed by the laws of that state." Likewise, in *United States v. Aetna Casualty & Surety Co.*, the United States Supreme Court recognized New York's statutory assignment under the Workmen's Compensation Act although a similar assignment in the District of Columbia would have violated a federal anti-assignment act forbidding the assignment of claims against the government. And by way of analogy, the New York courts have held that a statute where a contract is made governs liability for a tort occurring in another state. Thus, the transfer is governed by the law where made.

It is manifest that the members of the A.P.F.C., in agreement that the corporation should succeed to the collective rights of the unincorporated group, intended such succession to occur at the time and place of incorporation. Thus, succession can be said to have occurred in the District of Columbia at the moment of incorporation. It is clear that in the absence of evidence of intent to be bound by some other law, by incorporating in the District of Columbia the group members may be presumed to have intended to be bound by District of Columbia law as to the rights of the new corporation and its succession to the rights of its predecessor unincorporated group. Thus, applying *Auten v. Auten*, District of Columbia law governs the validity of the succession or assignment.

With the two principal incidents of succession determined by District of Columbia law, it seems logical to hold that all other incidents, including the assignability of the claim, are governed by that law. To determine different aspects of what is essentially one transaction by different laws is undesirable and would lead to confusion in the affairs of the corporation.

The transfer of a claim from an unincorporated predecessor to a newly formed corporation is in many respects similar to the transfer by will of personal property which, no matter where located, is by universal rule governed by the law of the testator's domicile to promote uniformity, and convenience. It is also similar to the well-settled New York and general rule that the law which creates the corporation governs the conduct

29 Id. at 774.
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of its internal affairs. The reason for the rule is that a single law for internal affairs of corporations is needed for certainty and ease. So here, without a single rule, the corporation would never know which claims of its predecessor it owned. Nothing but chaos would result.

The one New York Court of Appeals case in this area looks this way. In Russian Reinsurance Co. v. Stoddard, the court said:

If the existence of the [foreign] corporation, its capacity to sue, or the authority of its directors to represent it or to bring the action is challenged, we look to the charter and the law of its corporate domicile for the data upon which we may rest our determination of such questions. If it is claimed that the plaintiffs' rights or property have passed to another, we examine the laws of the particular jurisdiction which may regulate their transfer or devolution. (Emphasis supplied)

The law of the corporation's domicile will be given effect even if different from that of New York. New York recognizes special statutory assignments or successorships for causes of action for personal injuries, and out-of-state jurisdictions which do not ordinarily recognize assignments of tort claims have nonetheless given effect to such statutory assignments. Thus, one New Hampshire case declared:

If the award of compensation in New York had the effect under the law there, not to extinguish the right of action through the loss of property rights therein, but to permit its maintenance . . . by the insurer as its assignee, the rule of comity is equally available to adopt the legal character of the transaction which it has where it is entered into or takes place.

The fact that New York may restrict assignments more than some other states does not entitle the courts there to treat everything west of the Hudson as a legal wasteland. As Tufarella v. Erie Railroad Co. pointed out:

Since the statutory right to contribution is regarded in New Jersey as being a substantive right and since it may there be enforced under their procedural rule of court, we apprehend that we should

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34 The authorities are fully collected in Hausman v. Buckley, 299 F.2d 696 (2d Cir., 1962), cert. den., 360 U.S. 885 (1962).
36 240 N.Y. 149, 147 N.E. 703 (1925).
37 Id. at 154-5, 147 N.E. at 704.
40 Saloshin v. Houle, 85 N.H. 126, 155 Atl. 47, 49 (1931).
permit its enforcement here under our substantially similar proce-
dural provision. . . . The accident happened in New Jersey, and, save for matters of purely procedural nature, the law of that State is applicable. . . . "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."42

(3) Successorship in the District of Columbia

The general rule as to successorship by a corporation of the rights of its predecessor unincorporated organization is stated as follows: "If the members of an association unanimously vote to incorporate it, the creation of the corporation pursuant thereto ipso facto dissolves the association and transfers its property and rights to the corporation."43 This rule is supported by a wealth of cases.44 The reason for the rule was set forth in Citizens Mutual Fire & Lighting Ins. Co. v. Schoen45 as follows:

Its same officers remained in charge of its affairs. Its name, its mem-
ers, its business, the territory in which it operated, its purposes, and the laws which governed it remained the same. No change occurred except that a copy of its bylaws was filed in the office of the Secretary of State and $10 of its money was paid to the State Treasurer, in return for which it received a certificate of incorporation. The change in the status of this company did not affect the identity of the company or modify its purposes or method of operation. . . . The obligations of the members to the company did not cease when the change was made, but were carried into the business of the company and became part of its assets, as did all the other business of the company.46

Any other rule would result in manifest injustice, since if the old association were destroyed by merger, yet the new corporation did not take its claims, neither could sue, and the cause of action would be lost for want

42 Id. at 531, quoting from Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918).
45 105 S.W.2d 43 (Mo. App., 1937).
46 Id. at 46.
of a proper plaintiff, although substantial damage had been caused intentionally.\footnote{An analogous situation is pointed out in Crystal Pier Amusement Co. v. Cannau, 219 Cal. 184, 25 F.2d 839, 840-2 (1933). Here the court declared:

"The amusement company built the pier. Thereafter the holding company was organized and built the ballroom. The representations upon which recovery is sought were made to officers of the amusement company, before the holding company was organized. Hence, defendants argue, the holding company has no cause of action because no representations were made to it, or relied upon by it, in connection with the building of the ballroom. They conclude that since the amusement company did not build the ballroom, and the holding company was not defrauded, there can be no recovery by either party for the loss incurred as a result of the construction of the ballroom. . . .

"It would indeed be remarkable if the law proved so barren that legal principle could not be found to avoid such a result. It is, of course, obvious that the whole matter would have been settled by an express assignment of the cause of action for fraud by the amusement company to the holding company, . . . . A corporation comes into existence, as an artificial person, at a particular moment of time, but its rights and liabilities are largely dependent upon prior events."}

Although no District of Columbia case has squarely passed on the point, the District follows the general common-law as to associations.\footnote{Rose Campbell Mission v. Richardson, 64 App. D.C. 21, 73 F.2d 661, 663 (1934).} Indeed, at the time of the libel, which concerned an attempted incorporation in New York, it appears that District law would have considered the A.P.F.C. a de facto corporation, and the cause of action continued in it when it assumed full corporate status.\footnote{Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U.S. 568, 571-2 (1890).}

The power of a non-profit District of Columbia corporation to take property is very broad. The District of Columbia Code provides:

Upon filing their certificate the persons who shall have signed and acknowledged the same and their associates and successors shall be a body politic and corporate, and by the name stated in such certificate; . . . and may take, receive, hold, and convey real and personal estate necessary for the purposes of the society as stated in their certificate, and other real and personal property the income from which shall be applied to the purposes of such society.\footnote{District of Columbia Code, Title 29, § 602, Act of March 3, 1901, 31 Stat. 1284, Ch. 854, § 600, as amended by Act of April 20, 1992, 47 Stat. 87, Ch. 121.}

Under federal law, it has been repeatedly held that choses in action are "property,"\footnote{Farbenfabriken v. Sterling Drug Co., 251 F.2d 300, 301 (3rd Cir., 1958); Commissioner v. Kellogg, 119 F.2d 115, 117 (9th Cir., 1941); Thomas v. Winslow, 11 F. Supp. 839, 840 (W.D.N.Y. 1935); In re Berthoud, 231 Fed. 529, 533 (S.D.N.Y., 1916).} even if they are not assignable.\footnote{Bank of California v. Commissioner, 133 F.2d 428, 432 (9th Cir., 1943).} In \textit{Proper v. Clark},\footnote{357 U.S. 472 (1949).} the United States Supreme Court declared:

By the order appointing a permanent receiver, the claim of AKM against ASCAP was directed to be transferred from AKM to the
petitioner. From ASCAP's point of view, it was a debt; from AKM's a claim. The shift of obligation . . . was a transaction that involved "property. . . ."54

Accordingly, under District of Columbia law, the corporation had the power to, and did, succeed to the cause of action for libel against its predecessor unincorporated association.

(4) Assignment in the District of Columbia

Although the transaction here was one of successorship and not assignment, and although, as is more fully shown below, even if the transaction were characterized as an assignment, it would be an assignment of a claim for property damage and accordingly traditionally assignable under common law, nevertheless, it is relevant to note that under District of Columbia law even claims of libel against an individual person are now assignable. Thus, the transaction, no matter how viewed, was valid where carried out.

The District of Columbia has no statute on the point,55 and common law is the only guide. The general rule is stated in C.J.S. as follows:

So, by the weight of authority, statutes providing for the survival, to the executor or administrator, of causes of action for personal torts have been construed as rendering such rights of action assignable.56

The rule that assignability depends upon survival is supported by a wealth of cases.57 Thus, in a closely analogous case, a claim for fraudulent

54 Id. at 479-480.
55 The Act of March 3, 1901, 31 Stat. 1256, Ch. 854, § 433 is, of course, irrelevant. Prior to that statute, although assignments of claims were generally recognized, Judson v. Corcoran, 58 U.S. (17 How.) 612, 614 (1855), such assignments were only given effect in equity. Looney v. District of Columbia, 113 U.S. 258, 261 (1885); Spain v. Hamilton's Adm'r, 68 U.S. (1 Wall.) 604, 624 (1864). Hence, although an assignee could sue in his own name in equity, Young v. Kelly, 3 App. D.C. 296 (1894); he could not sue at law except in the name of his assignor. Karrick v. Wetmore, 22 App. D.C. 487 (1903); Davis v. Wyer, 7 Fed. Cas. 191, No. 3,660 (C.C.D.C., 1808). It is well-settled that the only effect of the statute was procedural, to permit the assignee to sue in his own name in a specified class of cases, and that the substantive question of what claims were assignable or in what manner they had to be assigned was left unaffected. District of Columbia v. Hamilton National Bank, 76 A.2d 60, 64 (D.C. Mun. App., 1950); Compton v. Atwell, 86 A.2d 623 (D.C. Mun. App., 1952); Koechle v. Harvey, 45 A.2d 780, 783 (D.C. Mun. App., 1946). Such substantive-law questions are still determined by common-law. Meyer v. Washington Times Co., 64 App. D.C. 218, 76 F.2d 988 (1935); cert. den., 295 U.S. 734 (1935). The modern procedural rules, such as Rule 17(a) of the Federal Rules of Civil Procedure and its local District of Columbia counterpart, have made it possible for all assignees to sue in their own name and rendered the statute obsolete.
56 6 C.J.S., Assignment, § 33, pp. 1081-2.
57 McWhirter v. Otis Elevator Co., 40 F. Supp. 11, 15 (W.D.S. Car., 1941) ("A right of action for personal injuries is assignable where it would, on the death of the assignor, survive to his legal representative"); Momand v. Twentieth Century Fox Film Corp., 37 F. Supp. 649, 651 (W.D. Okla., 1941) ("Assignability and survivability are convertible terms"); Deutsch v. Fairfield, 27 Ariz. 387, 233 Pac. 887, 891 (1925) ("The test of assignability of
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representations made to individuals was held to have been validly assigned to a corporation formed afterwards by them where the corporation was interested in the common venture, the court saying: "the test of assignability of a chose in action is whether it will survive and pass to the personal representative. If it will survive it can be assigned." 58

The rule of survival as the test of assignability was the law of New York prior to being changed by statute. 59 It is also the law of the District of Columbia. In Hutchinson v. Brown, 60 the Court of Appeals for the District of Columbia declared that "the general test of assignability seems to be, whether by the laws in force in the particular jurisdiction, the action is one that will survive." 61

Prior to 1948, actions for personal injuries or injury to reputation did not survive in the District of Columbia. 62 In that year, Congress passed a law which deleted the exceptions of personal injury and injury to reputation from those causes of action which would survive. 63 As the House of Representatives was told prior to the passage of the law, "this provides for the survivorship of tort actions." 64

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59 Zabriskie v. Smith, 13 N.Y. 322, 322-6 (1855).
60 8 App. D.C. 157 (1896).
61 Id. at 165.
62 Act of March 3, 1901, 31 Stat. 1227, Ch. 854, § 235: "On the death of any person in whose favor or against whom a right of action may have accrued for any cause except an injury to the person or to the reputation, said right of action shall survive in favor of or against the legal representatives of the deceased; but no right of action for an injury to the person ... or to the reputation, shall so survive."
63 Act of June 19, 1948, 62 Stat. 487, Ch. 508, § 1 (Public Law 677 of 1948): "Section 235 of the Act entitled 'An act to establish a code of law for the District of Columbia' approved March 3, 1901, as amended, is hereby amended to read as follows: Section 235. On the death of any person in whose favor or against whom a right of action may have accrued for any cause prior to his death, said right of action shall survive in favor of or against the legal representative of the deceased."
64 94 Cong. Rec. 7456 (1948). See also Senate Rept. No. 374, An Act to Amend Sections 235 and 327 of the Code of Laws for the District of Columbia, 80th Cong., 1st
Moreover, in *Soroka v. Beloff*,, Judge Holtzoff, author of the leading treatise on federal practice, stated:

It seems to follow that rights of action for injury to the person or for libel and slander, as well as all other rights of action, now survive in favor of or against the legal representatives of the deceased.

This case has not been overruled, and was subsequently cited with approval. Thus, in the District of Columbia, all libel claims, both those causing personal injury and property damage, may be assigned.

(5) *The Effect of a Foreign Succession in New York*

The justice at Special Term held, in effect, that the plaintiff could not sue in a New York forum because the transaction, carried out elsewhere, could not have been entered into in New York, and hence it violated New York's public policy. As has already been shown above, a mere difference in law does not constitute a violation of the public policy of the forum, let alone one strong enough to warrant denial of rights acquired out of the jurisdiction. Nevertheless, assuming this point arguendo, the justice was still in error since New York corporations could enter into the same transaction, and the forum cannot deem a foreign statute or transaction offensive when it has the same rule for domestic transactions.

Section 12 of the New York Membership Corporations Law provides:

An unincorporated association, society, league or club, not organized for pecuniary profit, may be incorporated under this chapter for the purposes for which it was organized . . . and thereupon the members of such association, society, league or club shall be members of the corporation so created, and all property owned by or held for it shall belong to and vest in the corporation, subject to all existing incumbrances and claims as if incorporation had not taken place.

Under the above section, it has several times been held that the new corporation succeeds to causes of action. In *Associated Alumni v. General Theological Seminary*, the Appellate Division, First Department said:

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*Sess. (1948)*, which stated: "The purpose of the bill is to permit the survivorship of a cause of action for personal injuries to run both in favor and against the estate of the decedent who in his lifetime caused or received such personal injuries." See also H.R. Rep. No. 2209, *An Act Amending Sections 235 and 327 of the Code of Laws for the District of Columbia*, 80th Cong., 2d Sess. (1948): "The purpose of this bill is to permit causes of action for personal injuries to run both in favor and against the estate of the decedent who in his lifetime caused or received such personal injuries."

66 Id. at 643.
The action taken by the unincorporated association was sufficient of itself to transfer to the plaintiff, when incorporated, all its rights. At the annual meeting of the association in 1899, a committee, appointed for that purpose, was directed to take all necessary proceedings to incorporate the association; and in obedience to this instruction, proceedings were taken which finally resulted in the incorporation of the plaintiff. This of itself was sufficient to vest in the plaintiff all the title and interest which the association had or to the fund.\textsuperscript{70}

On appeal, the Court of Appeals specifically upheld this holding, saying:

We hold with that court that the plaintiff is the successor in rights and interest of the voluntary association which gave the fund to the defendant.\textsuperscript{71}

Several other cases have likewise held that the corporation succeeds to its predecessor's choses in action.\textsuperscript{72}

The word "property" in the foregoing statute would appear to include all choses in action or claims for relief. General Construction Law, § 38 provides that "the term property includes . . . personal property." Section 39 provides: "The term personal property includes . . . things in action." Under these sections, and in a wide variety of circumstances, causes of action for personal injury have repeatedly been held to be property.\textsuperscript{73} Thus, in Wilson v. Aedian Co.,\textsuperscript{74} it was held that a chose in action for fraud was "property." In Bennett v. Bennett,\textsuperscript{75} the Court of Appeals declared:

The cause of action for personal injury to a married woman . . . belonged to her at common law . . . So in the case of an absolute divorce such rights of action remained the property of the wife.\textsuperscript{76} (Emphasis supplied.)

In Barry v. Village of Port Jervis,\textsuperscript{77} it was held:

\textsuperscript{70} Id. at 750.
\textsuperscript{71} Associated Alumni v. General Theological Seminary, 168 N.Y. 417, 420, 57 N.E. 626 (1900).
\textsuperscript{73} In Smith v. New York Consolidated Stage Co., 28 How. Prac. 277, 279-280 (N.Y. Co., 1865), Justice Cardozo, father of Chief Judge Cardozo, held: "But 'choses in action' are covered by the term 'property' which is a most comprehensive word." And in Re Westbrook's Estate, 228 App. Div. 549, 551, 240 N.Y.S. 301, 304 (1930), it was held: "This claim [for personal injuries] was property, therefore, which the decedent owned at her death. It passed by her will and was properly subject to tax."
\textsuperscript{74} 64 App. Div. 337, 72 N.Y.S. 150, 153 (1901), aff'd, 170 N.Y. 618, 63 N.E. 1123 (1902).
\textsuperscript{75} 116 N.Y. 584, 23 N.E. 17 (1889).
\textsuperscript{76} Id. at 593.
\textsuperscript{77} 64 App. Div. 268, 72 N.Y.S. 104 (1901).
The right of action which vested in the plaintiff under the con-
stitution and the common law [for personal injuries due to negli-
gence] . . . is property. It has value.78

Speaking of the libel of an unincorporated association in Kirkman v. Westchester Newspapers,79 Judge Desmond declared: “Is not that reputa-
tion the common property of its members as such?”80 Accordingly, a cause of action for libel is “property” to which New York membership corpora-
tions would succeed.

Any other rule would produce a pandora’s box of mischief. If an un-
incorporated association which was formed into a corporation passed some of its claims to the new corporation but not others, constant confusion and litigation among members would occur as to who owned which claims. Moreover, the demise of the unincorporated group might wipe out its tort claims completely, especially if by the time they were sought to be en-
forced the former members had died or resigned.81

Such a construction of Section 12 of the Membership Corporations Law would work an equally undesirable hardship on claimants against the unincorporated group. That section automatically vests in the corporation all property of the association, and makes it “subject to all existing . . . claims as if incorporation had not taken place.” If an unincorporated group had contract or tort claims against it, and its only substantial prop-
erty were its own tort claims against others, by incorporating it would force the claimants against it to proceed against the newly formed cor-
poration which had no property to satisfy any judgment, while the unin-
corporated group reduced its own tort claims to judgment and distributed the proceeds thus obtained free from the claims of creditors whose recourse against the new corporation was worthless. Such an absurdity should not be fostered by any restrictive reading of the word “property” in Section 12, even in the light of Personal Property Law, § 41.1(1). It cannot be pre-
sumed that the legislature, in enacting the latter statute, intended the mis-
chief of divided corporate succession to occur.82 Instead, where a particular statutory provision is inconsistent with a general provision, the particular will be considered as an exception to the general.83 Accordingly, the cor-

78 Id. at 114. In Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198, 201 (1918), Judge Cardozo said: “A right of action is property. If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him.”
79 287 N.Y. 373, 39 N.E.2d 919 (1942).
80 Id. at 380.
81 The general rule is that an unincorporated association which ceases to function as such is no longer in existence. Rose Campbell Mission v. Richardson, supra, n.48. Thus, the libel claim might be lost for want of a proper plaintiff even though the tort was intended to cause damage and did so.
82 Breen v. Board of Trustees, 229 N.Y. 8, 19, 85 N.E.2d 161 (1949).
poration would have succeeded to the rights of its predecessor had it been incorporated in New York, and the same result under District of Columbia law cannot be deemed to violate New York policy.

(6) The Effect of the Foreign Assignment in New York

The New York judge characterized the succession here as an assignment. While as shown above, this characterization is not correct, nevertheless, even if it were correct, if New York would permit this transaction, its occurrence in a foreign jurisdiction cannot be deemed to violate New York’s public policy. Thus, even if Section 12 of the Membership Corporations Law did not form an exception to Personal Property Law, § 41.1(1), the result would still be the same if the latter statute was not intended to cover transfers of claims of the type here involved.

New York Personal Property Law, § 41.1(1), makes “personal injury” claims unassignable in New York, and General Construction Law, § 37-a includes libel as personal injury. However, when read against its common law background, it is clear that only libels of natural persons are meant, and not libels of artificial entities which can, by their nature, cause only property damage.

The definition of “personal injury” in General Construction Law, § 37-a, goes back to 1876, and comes from common law. The general common law rule has been stated as follows:

More accurately, this rule [against assignment of tort causes of action] . . . is limited to torts in the nature of personal wrongs.

The real test, so far as tort actions are concerned, seems to have

84 In Association for the Preservation of Freedom of Choice, Inc. v. Shapiro, 9 N.Y.2d 376, 174 N.E.2d 487 (1961), the New York Court of Appeals impliedly recognized that the corporation could succeed to at least some of the personal rights of the prior unincorporated group. In that case, the Attorney-General argued that “insofar as the proceeding relates to section 10 of the Membership Corporations Law, petitioner is not the real party in interest within the meaning of section 210 of the Civil Practice Act and has not the legal capacity to sue for the benefit of others within the meaning of section 195 of the Civil Practice Act.” 9 N.Y.2d at 378 (reporters notes). The argument proceeded that since only the corporation was suing as the petitioner, it could not represent its New York members in respect to their application under Sec. 10, but only its own application, and since the members or their “president” or “treasurer” was not joined in the proceeding, but the petition merely stated that the A.P.F.C. was suing for itself and its New York subscribers, it followed that no consideration could be given to the claims of the New York subscribers. The A.P.F.C. argued, however, that since it was incorporated in the District of Columbia, it derived its powers from Congress, that New York must recognize these powers, and that regardless of New York law, it could represent its members where there was a close connection, under such cases as N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), and accordingly the claims of the New York subscribers had to be given consideration as well as its own. Judge Foster, in his opinion, stated that the appeal involved applications “made by petitioner-appellant and its New York subscribers,” thereby rejecting the Attorney-General’s argument, at least by implication. See 9 N.Y.2d at 379, 174 N.E.2d at 488. Thereupon, the Attorney-General made a motion for reargument limited to this point alone, which was denied. See 11 N.Y.2d 662, 180 N.E.2d 898 (1962).

been whether the injury on which the cause of action was based affected property rights, or affected the person alone.86

This was the common law rule in New York. In Smith v. Endicott-Johnson Corp.,87 the court held: "The general rule is that all rights of action in tort, which do not apply to the person strictly, but are for injury to one's property, or estate, are assignable."88 And in Keeler v. Dunham,89 the Appellate Division, First Department declared:

The question, therefore, comes down to whether or not an action for a deceit which has caused damage is a personal injury within section 1910 of the Code of Civil Procedure. I think it is not. The plaintiff's person has not been injured by this fraud, which has resulted in a loss to him of $6,000 . . . for the purpose of redressing the wrong with the least possible complications, the several rights of action were consolidated in the plaintiffs, who constituted the committee, and the action brought in a forum where redress for the wrong could be had in a single action. We think this course was commendable, and that it was better to treat this question and dispose of it in one action rather than to multiply it by eighteen. No law interposes to prevent such a proceeding; on the contrary, it supports it.90

The libel of an unincorporated association injures its goodwill. Goodwill is property.91 The courts have long protected the goodwill inherent in the name of unincorporated and incorporated non-profit groups by enjoining others from using their names.92

In Mutual Life Insurance Co. v. Menin,93 it was held that goodwill was property under New York law which inhered in the name of the corporation, and that when the corporation went into bankruptcy, the goodwill might be sold and transferred in bankruptcy, and the corporation might be stripped in bankruptcy, unlike the individual, of the right to do business under its old name to protect the purchaser of the goodwill.

88 Id. at 197.
90 Id. at 98-9. This case is manifestly inconsistent with American Restaurant China Mfg. Ass'n v. Corning Glass Works, 24 Misc. 2d 634, 198 N.Y.S.2d 366 (1960), but being in a higher court, it is controlling.
93 115 F.2d 975, 978 (2d Cir., 1940).
A libel against a corporation or unincorporated entity in New York has always been looked upon as an injury to its property right in its goodwill. Speaking of libel in *Kirkman v. Westchester Newspapers*, the Court of Appeals declared:

Is not that reputation the common property of its members as such? . . . this court said in 1906 of another corporate plaintiff in an action for libel . . . that its right to be protected against false and malicious statements affecting its property or credit was beyond question and that a corporation need not allege or prove specific damages, when the language complained of "is of so defamatory a nature as to directly affect credit and to occasion pecuniary injury." (Emphasis supplied)

Indeed, prior to *New York Society for Suppression of Vice v. Mac-Fadden Publications*, where the Court of Appeals recognized that non-profit organizations could be damaged in a pecuniary way by libels, the Appellate Division, First Department, had twice held that non-profit organizations could not maintain actions for libel per se because they had no "business" to be injured. As one case declared:

The conclusion follows that without the allegation of special damages the sufficiency of a complaint can be properly attacked when the slander complained of did not affect credit or occasion pecuniary injury. Here the plaintiff did not engage in business, and under section 2 of the Membership Corporations Law . . . could not. It therefore had no credit which could be affected; neither could it suffer pecuniary loss within the meaning of the authorities.

A very clear case showing that the only injury an entity can suffer from a libel is injury to property is *Duffy v. Gray*, where the court held that partners could sue for a libel independently of the libel to the partnership entity because "the only damages the partnership could have recovered was for the injury to their joint trade and business."

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94 287 N.Y. 373, 39 N.E.2d 919 (1942).
95 Id. at 380.
97 See *Stone v. Textile Examiners Employers' Assn.*, 137 App. Div. 655, 657, 122 N.Y.S. 460 (1910), holding: "the complaint fails to allege any injury whatever to the business or credit of the association, on whose behalf the action is brought. The only allegation is one of injury to the reputation of the plaintiff. Conceding the analogy between the rights of an unincorporated association and those of a firm or partnership, it still remains the law that even in the latter case partners cannot maintain a joint action for a libel or slander unless it is alleged and proved that it tends to injure the business or credit of the firm."
99 52 Mo. 528 (1873).
100 Id. at 529.
Since a libel of an organization is injury to its property in the goodwill of its name, when the name is transferred to a new corporation "it is well settled that a cause of action growing out of injury to property may be assigned especially when the assignee, as in this case, has acquired title to the property." 101 Thus, in Clark v. Lesher, 102 it was held that "the cause of action, being one for the fraudulent destruction of the goodwill of the newspaper, arose out of the violation of a right of property, and it was, therefore, assignable." 103

A case closely on point is Hansen Mercantile Co. v. Wyman, Partridge & Co. 104 In this case, defendant was sued by plaintiff corporation for malicious attachment. The defendant moved for judgment on the ground that subsequent to the attachment plaintiff was adjudged a bankrupt and that under federal law the trustee in bankruptcy became the statutory assignee of the plaintiff as to all property or "injury to his property." The lower court held for the plaintiff on the ground that this was a personal injury and hence, under settled federal law, not assignable or assigned to the trustee. The Supreme Court of Minnesota reversed. It said:

We think that the wrong here complained of was not an injury to the person, but was an injury to property. . . . In the nature of things, however, a corporation, a fictitious being, cannot bring an action ex delicto for a purely personal tort, nor be awarded purely personal damages. In its own capacity it cannot be seduced, or falsely imprisoned, nor can it sue for breach of promise of marriage, nor for personal injury. Damages for anguish of the soul or pain of body it cannot recover.

More specifically, in malicious prosecution, the original form of action was brought for the recovery of damages for injury to the person, and often upon a state of facts which also gave rise to a cause of action for false imprisonment. Obviously, no rational extension of the law could confer on a corporation a similar right. So mental suffering or impairment of health may be proper enough elements of damage when an individual has been the object of the malicious prosecution, but award of damages on their account to the corporation is obviously impossible. Nonetheless, when in reason a corporation has suffered harm because of the wrongful putting of the law in motion, the courts have awarded it the appropriate measure of damages. That wrong must in the nature of things be to the property of the corporation, and not to its person. Property, as thus used in fraud and defamation, as well as in malicious prosecution, has been widely defined. It may in-

101 State Road Dept. v. Bender, 147 Fla. 15, 2 So. 2d 298, 300 (1941).
102 46 Cal.2d 874, 299 P. 2d 865 (1941).
103 Id. at 870.
104 105 Minn. 491, 117 N.W. 926 (1908).
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The damages awarded a corporation may be, as the plaintiff insists, within the rule that "in an action on the case at common law for malicious attachment, when properly averred in the pleadings, the plaintiff may recover full compensation for loss of credit, breaking up of business, loss of customers and prospective profits, and injury to his reputation resulting from the wrongful and malicious attachment. . . ." In the case at bar it might be that a cause of action would exist because the injuries resulting from the attachment consisted in the destruction of the business and of the credit, reputation, and standing of the corporation and the driving away of customers. These injuries are not to the person of the corporation but to property. The tort was not a personal tort but a property tort. . . .

Plaintiff rests on the proposition that the rights of action for purely personal torts do not vest in the trustee in bankruptcy, as for . . . slander . . . . In none of these cases, however, was the party complaining a corporation. . . . It has . . . been held that a corporation may maintain an action for libel, so far as injury to property is concerned, and not for damage to person and character, for which an individual may recover . . . "a corporation has no personal character to be injured by the alleged slanderous allegation". . . . The authorities may be fairly regarded as having limited the right of recovery of a corporation to the injury to its property.105

The libel here did not injure any A.P.F.C. member personally, except insofar as he was personally named. It simply injured the group name and reputation. Goodwill built up by the labor of the organization's members, as by getting up circulars, a program, or such other activities as non-profit organizations engage in to attract new members and contributors, was dissipated by the libels. Each member not named remained with his personal reputation intact. Indeed, unless mentioned in the libel or revealed through other sources a reader would not know who the individual members were; they could start another group under a different name free from the imputations of the libel. Only the group name, built up by effort and expenditure, was damaged. This reputation or goodwill is the common property of the organization upon which its lifeblood of members and contributors depends. Accordingly, property damage and not personal injury was inflicted, and General Construction Law, § 37-a, has no application.

If Personal Property Law, § 41.1(1), has any policy basis at all, and is not, as one judge declared, "a relic-like remnant of the laws of a social system that one is happy is dead and buried,"106 it is designed to prevent

105 Id. at 927-8.
unscrupulous persons from making a business of buying up personal injury claims for a fraction of their true worth from needy persons who need cash immediately and making an enormous profit when these claims are liquidated by settlement or judgment while the injured persons who received only a fraction of their true damages were thrown on public relief. It is inconceivable that the legislature meant to prevent corporations which have been formed out of preexisting organizations from prosecuting their own claims in their new corporate name. Accordingly, since this libel claim would have been assignable in New York, transfer in the District of Columbia can hardly be deemed to be offensive to any New York policy.

(7) Constitutionality of the Statute as Construed and Applied

Even, however, were the foregoing analysis erroneous, and were the transaction to violate a public policy of New York, nevertheless, that state is not free to abolish claims created elsewhere, or to deny access to its courts for their enforcement. The United States Constitution limits a state's power in this regard, and its inhibitions and mandates must be obeyed regardless of local policies. In this case, the justice at Special Term has so construed and applied Personal Property Law § 41.1(1), as to render it unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment, the Full Faith and Credit Clause, and the Supremacy Clause. Each of these will be taken up in turn.

(a) Due Process Clause. In the instant case, the transfer of the multi-state libel claim took place in the District of Columbia. New York has applied its substantive law to restrict rights acquired under this transaction. For New York to apply its law to a transaction which occurred elsewhere and with which it has no significant connection violates the Due Process Clause of the Fourteenth Amendment. As early as New York Life Insurance Co. v. Head, the United States Supreme Court rejected, as a matter of federal constitutional law, "the doctrine contended for... that because a State has power to regulate its domestic concerns therefore, it has the right to control the domestic concerns of other states." And in Mutual Life Insurance Co. v. Liebing, Mr. Justice Holmes declared that "the Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and consequences of the act." Accordingly, application of New York law to abridge rights acquired under transfer in the District of Columbia violates the Due Process Clause.

Moreover, the New York court violated the Due Process Clause of the Fourteenth Amendment in still another way. It held that while denying

108 234 U.S. 149 (1914).
110 259 U.S. 209 (1922).
111 Id. at 214.
the plaintiff a New York remedy, plaintiff was free to sue in another jurisdiction. However, if the defendant is a New York resident, and service cannot therefore be obtained elsewhere, the closing of the New York courts does in actual fact deprive the corporation of any real remedy at all. Such a construction of the New York statute therefore makes that act, as so construed, violative of due process, for it is not consistent with due process to deny to a party a forum in which to litigate his claims. As one case held: "No one would contend that a law of a State, forbidding all redress by actions at law for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law."

(b) Full Faith and Credit Clause. If the action of the New York court be viewed as a refusal to hear the claim, rather than the holding that the claim is unenforceable, then the statute which it has construed as barring the Association from a New York forum violates the Full Faith and Credit Clause, and the statute implementing it. The New York courts are narrowly restricted by this clause in the claims they may refuse to hear, and evasion of full faith and credit obligations cannot be accomplished by the simple-minded expedient of closing the courts. As Mr. Justice Brandeis declared:

It is true that a State can legislate only with reference to its own jurisdiction, and that the full faith and credit clause does not require the enforcement of every right which has ripened into a judgment of another State or has been conferred by its statutes. But the room left for the play of conflicting policies is a narrow one. One State need not enforce the penal laws of another. A State may adopt such system of courts and form of remedy as it sees fit. It may in appropriate cases apply the doctrine of forum non conveniens. But it may not, under the guise of merely affecting the remedy, deny the enforcement of claims otherwise within the protection of the full faith and credit clause, when its courts have general jurisdiction of the subject matter and the parties. For the States of the Union, the constitutional limitation imposed by the full faith and credit clause abolished, in large measure, the general principle of international law by which local policy is permitted to dominate rules of comity.

(c) Supremacy Clause. The laws of the sister states must look to the Full Faith and Credit Clause for their efficacy elsewhere. Statutes in the District of Columbia stand on a higher footing. Legislative power in the

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District is exercised exclusively by Congress,\textsuperscript{117} and the laws in force there are statutes of the United States made by Congress.\textsuperscript{118}

Congress "possesses full and unlimited jurisdiction to provide for the general welfare of the District citizens by any and every act of legislation which it may deem conducive to that end,"\textsuperscript{119} and "the exclusive responsibility of Congress for the welfare of the District"\textsuperscript{120} includes both the power and the duty to provide its inhabitants with corporation laws by which they may create private corporations, and to confer on such corporations the power to sue and be sued, not only in the District courts, but elsewhere.\textsuperscript{121}

Nor may the question, if viewed as one of capacity to sue, be considered apart from the federal claim. The short answer to the contention that the capacity of a foreign corporation to sue is governed by the law of the forum\textsuperscript{122} is that the capacity of federally-created corporations to sue is governed by federal law because it is a federal question. As Chief Justice John Marshall said in \textit{Osborn v. Bank of the United States}:\textsuperscript{123}

\begin{quote}
The power . . . to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all of its actions and all its rights are dependent on the same law \textbf{***} the same reasons exist with respect to a suit brought by the bank . . . that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.\textsuperscript{124}
\end{quote}

Congress' power to create corporations has not been doubted since \textit{McCullough v. Maryland},\textsuperscript{125} dealing with the Bank of the United States. The first act incorporating that Bank, passed in 1791, only two years after ratification of the Constitution, by the first Congress which included many

\begin{itemize}
\item \textsuperscript{117} United States Constitution, Art. 1, § 8, cl. 17.
\item \textsuperscript{118} Metropolitan Ry. Co. v. District of Columbia, 182 U.S. 1, 9 (1889), where the court said: "The sovereign power . . . is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress. . . . Crimes committed in the District are not crimes against the District, but against the United States."
\item \textsuperscript{119} National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 601-2 (1949).
\item \textsuperscript{120} Id. at 590.
\item \textsuperscript{121} \textit{ Ibid}. It might be noted that while this case applies to District of Columbia citizens generally, the plaintiff actually was a District of Columbia corporation.
\item \textsuperscript{122} Cf. \textit{Mertz v. Mertz}, 271 N.Y. 466, 3 N.E.2d 597 (1936); \textit{Argentine Airlines v. Aircraft Dynamics Corp.}, 9 Misc. 2d 272, 170 N.Y.S.2d 600 (1957).
\item \textsuperscript{123} 22 U.S. (9 Wheat.) 738 (1824).
\item \textsuperscript{124} Id. at 823-6.
\item \textsuperscript{125} 17 U.S. (4 Wheat.) 316 (1819).
\end{itemize}
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framers of the "supreme law of the land," provided that the Bank would have capacity "to sue or be sued . . . in courts of record, or any other place whatsoever." As early as 1799, the New York Supreme Court held that the Bank had capacity by virtue of this act to sue in state courts, and the federal statute would be judicially noticed and need not be set forth. The second act incorporating the Bank was even more specific, and gave it capacity "to sue and be sued . . . in all state courts having competent jurisdiction." It has specifically been held that District of Columbia corporations may sue in any state. Indeed, one federal case held that a corporation's capacity to sue may only be asserted by a state, and not by a private litigant.

Capacity to sue is so basic to a corporation that even when the law incorporating it is silent on the subject, it is considered as a power tacitly annexed to the very incorporation itself. The capacity to sue of a corporation organized under Title 29, § 601 of the District of Columbia Code has never been doubted. Accordingly, federal and not state law governs this question.

The legislative power which Congress exercises when it legislates for the District is national power, and as early as 1821, in Cohens v. Vir-

126 Act of Feb. 25, 1791, 1 Stat. 191, Ch. 10, § 3.
127 Bank of the United States v. Haskins, 1 Johns. Cas. 132 (N.Y., 1799). It might be noted that it was not until Chancellor Kent's decision in Silver Lake Bank v. North, 4 Johns. Ch. 370 (N.Y., 1820), that it was held that foreign corporations generally might sue in New York courts, and it was not until Chief Justice Taney's celebrated opinion in Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839), that the principle that a foreign corporation might sue in a forum other than where it was chartered was generally recognized in the United States. This is persuasive that the Congresses which chartered the first and second Bank of the United States relied, in conferring capacity to sue on the Bank in state courts, on a constitutional power of the federal government which would have to be recognized as the supreme law of the land.
128 Act of April 10, 1816, 3 Stat. 266, Ch. 44, § 7.
131 9 Fletcher, Cyclopedia of Private Corporations § 4226 (1931). In Bank of the United States v. Dandridge, 25 U.S. (12 Wheat.) 64, 67 (1827), Mr. Justice Story said: "To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose: such as the power to plead and be impleaded, to purchase and alien. . . ." This is also the rule in New York. See Clarissy v. Metropolitan Fire Dept., 7 Abb. Pr. (N.S.) 352, 355 (N.Y., 1869).
133 In O'Donoghue v. United States, 289 U.S. 516, 539-40 (1933), the court declared: "The object of the grant of exclusive legislation over the district was, therefore, national in the highest sense, . . . In the same article which granted the powers of exclusive legislation over the seat of government are conferred all the other great powers which make the nation, including the power to borrow money on the credit of the United States. He
Chief Justice John Marshall said:

In the enumeration of the powers of Congress, which is made in the 8th section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government. This power, like all others which are specified, is conferred on Congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone that the constitution confers on them this power of exclusive legislation. . . .

The 2d clause of the 6th article declares, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all of the United States. Those who contend that acts of Congress, made in pursuance of this power, do not like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them.

No state is permitted to deny effect to a federal statute, or close its courts to federally-created claims on the grounds of an asserted state policy or on any other pretext whatsoever. Such a closing would presuppose a state policy at variance with federal policy, a legal impossibility. As the United States Supreme Court has pointed out:

The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power conferred to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from

would be a strict constructionist, indeed, who should deny to Congress the exercise of this latter power in furtherance of that of organizing and maintaining a proper local government at the seat of government. Each is for a national purpose, and the one may be used in aid of the other."

134 19 U.S. (6 Wheat.) 264 (1821).
135 Id. at 424-5.
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its own legislature, and should be respected accordingly in the courts of the state.137

When the New York justice declared that a District of Columbia corporation, deriving its powers from an Act of Congress, cannot sue in New York, but must sue "in the jurisdiction which confers capacity to sue" he overlooked one salient fact, that the corporation is in fact suing in the jurisdiction which conferred capacity to sue—it is suing in the United States—and until New York shall have successfully seceded from the Union, its capacity in New York is not one iota less than elsewhere.

(d) Characterization as It Affects Constitutional Issues. The New York court, in denying the right of the corporation to sue based on its successorship, in effect justified this decision by a characterization of the right of a successor to sue as "procedural" rather than "substantive," and hence determinable by the law of the forum. Such a characterization in no wise justifies use of the law of the forum beyond that otherwise constitutionally permissible, since the federal constitution does not permit a state court to engage in the bootstraps operation of justifying the use of its local law of a substantive nature through the device of calling it procedural. State court labels of "procedural" and "substantive" yield to federal constitutional scrutiny, and where the United States Supreme Court finds a rule of law to be substantive in effect, a determination by a state forum that it is procedural and hence governed by the forum's law will be overturned.138

Thus, in Home Insurance Co. v. Dick,139 the state courts treated the contractual limitation as going to the remedy only, and hence governed by the law of the forum.140 The United States Supreme Court, however, brushed this characterization aside. Mr. Justice Brandeis stated:

The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. Therefore, the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises Federal questions of substance; and the existence of the Federal claim is not disproved.

139 281 U.S. 397 (1930).
140 Home Ins. Co. v. Dick, 15 S.W.2d 1028 (Tex. 1929).
by saying that the statute, or the one-year provision in the policy, relates to the remedy and not to substance. 141

With the United States Supreme Court free to make its own characterization of the problem here, it seems clear that its choice would be in favor of characterization as substantive. A refusal to recognize the successor as a proper party in effect is a denial of the successorship, as far as the forum is concerned. "Clearly, 'substantive rights' are here so intertwined with 'form of remedy' or form of action that it is 'obvious' that we are not dealing merely with the 'means of enforcing the substantive rights.'" 142 Indeed, for related purposes the Supreme Court has even characterized burden of proof as substantive. 143 Here, refusal to recognize the corporation as the proper party is not merely a determination of the real party in interest. If, under District of Columbia law, the unincorporated group has merged into the corporation and the latter has succeeded to the claim, a refusal to permit the corporation to assert it must necessarily entail, as far as New York is concerned, a complete negation of the successorship effectuated elsewhere. This must necessarily be a substantive problem.

A comparison of the laws of the two jurisdictions shows this clearly. Under New York law, an unincorporated association may sue or be sued as an entity in the name of its president or treasurer. 144 In the District of Columbia, by common law an unincorporated association may likewise sue or be sued as an entity, but here it must do so in the common name of the group. 145 Which name is used is obviously a mere matter of procedure, governed by the law of the forum. But whether it is the corporation or the unincorporated entity which is suing is very much a matter of substance. It directly determines who shall receive the proceeds of the suit. The corporation would be considered a different entity from the unincorporated association in the District of Columbia. New York’s attitude is the same. Hence, the problem is substantive.

Moreover, even New York would characterize competency to sue as substantive. In Coster v. Coster, 146 the Court of Appeals said:

Her right to bring and to maintain the suit and to recover damages against her spouse is a substantive right, a part of her cause of action and not a mere matter of remedy. As to substantive rights, the lex loci, not the law of the forum, controls and will be enforced in the courts of the forum in a transitory action such as

141 281 U.S. at 407.  
145 Busby v. Electrical Utilities Employees Union, 147 F.2d 865 (C.A.D.C. 1945).  
146 289 N.Y. 438, 46 N.E.2d 509 (1943).
this unless our public policy forbids. But our public policy to permit the maintenance by one spouse of a suit against the other to recover damages for personal injuries does not require or authorize our courts to ignore foreign law affecting substantive rights where such law merely differs from our own. To render the foreign law unenforceable here as contrary to our public policy under such circumstances, it must additionally violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."  

Hence, traditional New York conflict of laws doctrine, in accord with general rules, would require reference to District of Columbia law. The Supremacy Clause serves here to reinforce this obligation.

Conclusion

The freedom of state courts to ignore deeply-rooted conflict of laws rules in favor of local parochialism is narrowly restricted by the federal constitution. In the recent case of Pearson v. Northeast Airlines, Inc., a majority of the Second Circuit held that New York might constitutionally apply its law to a New York contract of carriage even though a tort violative thereof fortuitously occurred elsewhere. By analogy, since the assignment was made in the District of Columbia, its law should apply regardless of the place of the libel. However, the majority further warned: "If, indeed, those connections are wholly lacking or at best tenuous, then it may be proper to conclude that the state has exceeded its constitutional power in applying its local law."

The rationale of the panel which had held the New York rule unconstitutional was even more emphatic that a state may not apply its local law to a transaction with which it is really not concerned. It said:

For the essence of the Full Faith and Credit Clause is that certain transactions, wherever in the United States they may be litigated, shall have the same legal consequences as they would have in the place where they occurred. . . . But if a transaction is so associated with one jurisdiction that the Constitution compels any forum in which the transaction is litigated to apply the law of that jurisdiction, is it not the Constitution instead of state conflicts law which determines what law the federal court shall apply?

Here, New York has no interest in the successorship. New York's courts lack any conceivable interest in whether out-of-state citizens or organizations may transfer their claims to out-of-state corporations. The state

147 Id. at 511-2.
provides only the forum. Constitutional requirements and elementary conflict of laws principles both point to the District of Columbia as the source of governing substantive law.

Accordingly, this case not only misconstrues its own law, but in the process renders its own statute unconstitutional on at least three different grounds. The result is to provide a striking example of twentieth-century provincialism whose result is all the more startling because it is so far at variance with New York's own law and public policy.

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