

breadth of amending power was available to corporations organized prior to 1927 by reason of the "reserved power" provision of § 82, following the decision in *Davis v. Louisville Gas & Elec. Co.*, 16 Del. Ch. 157, 142 Atl. 654 (1928), which had involved changes in dividend rights for future years but not accumulated unpaid dividends.

It was apparently clear that the 1927 amendment had been intended to apply to existing corporation. Any contention by minority stockholders of such corporations that the statute could not have this effect must be based upon the argument that to give the statute such an operation would interfere with his contractual rights. But the original statute, including § 82 as well as § 26, must be considered as having been written into any contract between the stockholders or between a stockholder and the corporation. Fletcher, *Corporations* § 3674 (perm. ed. 1931). The crucial question, therefore, is one of the proper construction of the "reserved power clause" in § 82. It has sometimes been suggested that the reservation should be considered as authorizing only changes in the "contract" between the corporation and the state and not changes in shareholders' contracts. *Garey v. St. Joe Min. Co.*, 32 Utah 497, 91 Pac. 369 (1907); *Avondale Land Co. v. Shook*, 170 Ala. 379, 54 So. 268 (1911). This suggestion affords no solution, however, since any change necessarily affects rights of shareholders. It has frequently been said that the reserved power does not extend to changes which affect "vested rights." *Yoakam v. Providence Billmore Hotel Co.*, 34 F. (2d) 533 (D.C. R.I. 1929); Fletcher, *Corporations* § 3680 (perm. ed. 1931). Such a statement, of course, begs the question, and neither the courts nor other legal writers have been able to state with any definiteness the proper scope of the power. Dodd, *Dissenting Stockholders and Amendments to Corporate Charters*, 75 U. Pa. L. Rev. 585, 722 (1927); Curran, *Minority Stockholders and the Amendment of Corporate Charters*, 32 Mich. L. Rev. 743 (1934). In general it has been agreed that changes in which the state or the public may have an interest will more readily be found to fall within the reserved power. The stockholders may be said to have been put on notice that such changes might later be forced on the corporation or authorized by the legislature. The Delaware court in the principal case and the *Davis* case cited above has been able to find a public interest behind changes in preferred stock rights which may facilitate financing or improve corporate credit. Other courts have taken a contrary view. *Yoakam v. Providence Billmore Hotel Co.*, *supra*; *Pronick v. Spirits Distributing Co.*, 58 N.J. Eq. 97, 42 Atl. 586 (1899).

The objecting stockholders' contention becomes a constitutional one when he relies on the prohibition of state legislation impairing the obligations of contracts. On the constitutional issue, the state courts' construction of the reserved power provision as written into the stockholders' contract would not be conclusive since in applying the contract clause of the Constitution the United States Supreme Court will adopt its own construction of the contract so as to prevent nullification of its jurisdiction. *Jefferson Branch Bank v. Skelly*, 1 Black (U.S.) 436 (1861).

The principal case probably goes farther than any previous case in extending the reserved power to cover authorization of changes affecting relative rights of existing classes of shares. The trend in this direction has been noted. Berle and Means, *The Modern Corporation and Private Property*, 213 ff. (1934).

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Corporations—Assignability of Claim against Directors for Breach of Fiduciary Duty—[Massachusetts].—Minority stockholders of X corporation brought a suit in the right of the corporation against its directors for breach of their fiduciary duty. Shortly after the bill was filed the directors, with the consent of the stockholders, sold and con-

veyed all the property of X corporation to Y corporation. Thereafter, the defendants claimed that the cause of action vested exclusively in Y corporation. The court assumed the conveyance amounted to an attempted assignment of this cause of action. *Held*, the cause of action was not assignable and remained in X corporation. *Baker v. Allen*, 197 N.E. 521 (Mass. 1935).

When a cause of action is assignable and when it is not is surrounded with uncertainty. A general rule has been laid down that all causes of action which may be enforced against the estate of the decedent defendant are, in general, assignable. 3 Pomerooy, *Equity Jurisdiction* § 1275 (4th ed. 1918). But in the instant case the court assumed that the liability of the defendants would survive. In general wrongs such as malicious prosecution, slander, and the like, are not assignable before final judgment because only the injured party can urge to the jury his pain, or suffering, or humiliation, which are the bases for part or all of the damages. 5 C.J. 887 § 53b. Even when the injury is to property, but merely in the sense of a depletion of the general estate of the wrong party, as when he gives up property on the false representations of the defendant, the same result is reached although the same considerations are not present. *Hooker v. Fargo*, 45 Mich. 153, 7 N.W. 758 (1881). See also *Murray v. Buell*, 76 Wis. 657, 45 N.W. 667 (1890) (injury to business by a conspiracy not assignable). But when the injury affects a specific property, the cause of action is regarded as an injury to property, not a personal tort, and is assignable. *Byrnie v. Wood*, 24 N.Y. 607 (1862). And when the cause of action sounds in contract it is generally assignable. *Hicks v. Steel*, 126 Mich. 408, 85 N.E. 1121 (1901).

Most courts conclude that a director's breach of his fiduciary duty gives rise to an assignable cause of action. *Bigelow v. The Old Dominion Copper Mining and Smelting Co.*, 74 N.J. Eq. 457, 71 Atl. 153 (1908) (so held without a discussion of the point). Some courts to avoid calling it a personal cause of action utilize the theory that a property right is violated. *Baker v. Sutton*, 47 Ga. App. 176, 170 S.E. 95 (1933); *Shulz v. Christman*, 6 Mo. App. 338 (1878). Others regard the wrong as an injury to contract rights. *Denman v. Richardson*, 284 Fed. 592 (1921).

In Massachusetts the principal test of assignability is the effect of the wrongdoing upon the estate of the wrong party. If it results in an injury to specific property it is assignable; if it merely depletes the general assets, it is not assignable. *United Zinc Co. v. Harwood*, 216 Mass. 474, 103 N.E. 1037 (1914) (a case squarely in accord with the principal case). But the court has not been consistent in the application of the rule. Thus in two cases, in each of which defendant was being sued for his actions in inducing a third party to break the latter's contract with the assignor, the court reached opposite results. *Lee v. Fisk*, 222 Mass. 418, 109 N.E. 833 (1915) (injury to specific property); *Bethlehem Fabricators Inc. v. H. D. Watts Co.*, 286 Mass. 556, 190 N.E. 828 (1934) (injury merely depleted general assets). And in any case the distinction seems artificial and tenuous when the practical result is a simple money loss to the wronged party.

It would be better to discard the various rules and tests for assignability of causes of action in favor of the simple, practicable rule, that a cause of action is assignable unless the injury to the reputation, or the pain, humiliation, or suffering of the wronged party comprises a part of the measure of damages. This would seem a desirable rule since even a strictly personal cause of action is assignable after final judgment and the damages are no longer dependent upon the feelings of the party. Under such a rule a corporate cause of action would usually be assignable except, perhaps, in the case of tortious injuries to corporate credit, etc.