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CIVIL PROCEDURE-PARTIES-REAL PARTY IN INTEREST WHEN INSURER HAS EQUITABLE INTEREST IN CLAIM

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CIVIL PROCEDURE—PARTIES—REAL PARTY IN INTEREST WHEN INSURER HAS EQUITABLE INTEREST IN CLAIM—Plaintiff sued for damages to his fruit and grocery market which were allegedly caused by the negligence of defendant. Interrogatories were submitted by defendant designed to determine whether or not plaintiff had been paid the full amount of his loss by an insurance company and had assigned his claim to that company. The trial court sustained a motion to strike the interrogatories. On appeal, *held*, reversed, two judges dissenting. Although a tortfeasor cannot defeat an action by the insured by showing full subrogation of the insurer, he can plead an assignment of the insured's claim to show that the insured is not the real party in interest under the provisions of the Indiana statute,[1] so interrogatories for discovering the fact of assignment are proper. *Powers v. Ellis*, (Ind. App. 1952) 103 N. E. (2d) 907.

Nearly every state today has a code provision[2] or a rule of procedure[3] requir-

[1] Ind. Stat. 1933 (Burns' 1946 Replacement) §2-201: "Every action must be prosecuted in the name of the real party in interest. . . ."

[2] 2 Neb. Rev. Stat. (1943) §25-301; Mich. Comp. Laws (1948) c. 612.2. Some provisions are merely permissive: Fla. Stat. Ann. (1943) §45.01.

[3] Colo. Rules of Civil Procedure (1941) rule 17(a).

ing all actions to be brought in the name of the real party in interest.[4] There is, however, little agreement among the courts as to the meaning and purpose of such provisions. It has been said that they are intended: (1) to prevent the owner of the bare legal title to a chose in action from suing;[5] (2) to protect the defendant from being again harassed for the same cause[6] and; (3) merely to eliminate certain technical rules of procedure, such as the requirement of a "use plaintiff."[7] In insurance cases the problem arises when an insurer has paid the injured party for his loss in full or in part, thereby becoming subrogated pro tanto to the rights of the insured,[8] or when the insured has effected an assignment of his claim against the wrongdoer to the insurer. Where the insurer is subrogated in full,[9] the courts are in irreconcilable conflict as to whether or not the insured is a real party in interest. Some courts hold that the insurer is the only proper party;[10] some say the suit may be brought in the name of the insured for the use of the insurer;[11] and others permit either party to sue in his own name without joining the other.[12] If the insurer has received an assignment, and if by the substantive law of the jurisdiction an assignment of a tort claim is valid, it appears to be an almost universal rule that the insured cannot maintain a suit against the tortfeasor.[13]

[4] For a compilation of "real party in interest" provisions see 3 MOORE, FEDERAL PRACTICE, 2d ed., 1306, n. 4 (1948).

[5] Thompson Heating Corp. v. Hardware Indemnity Ins. Co. of Minn., 72 Ohio App. 55, 50 N.E. (2d) 671 (1943).

[6] Giselman v. Starr, 106 Cal. 651, 40 P. 8 (1895); Stevens v. Sharpe, 183 Okla. 312, 82 P. (2d) 672 (1938).

[7] Simes, "The Real Party in Interest," 10 KY. L.J. 60 (1922); Cook, "The Alienability of Choses in Action," 29 HARV. L. REV. 816 (1915). Depending upon which of these purposes a particular court emphasizes, the real party in interest may be the person who owns the beneficial interest in the claim (note 5 supra), or the person whose recovery against the defendant will effect a complete discharge of the claim (note 6 supra), or the person who under substantive law, whether by statute, common law, or equity, has a right of action (Simes and Cook, supra this note).

[8] 6 APPLEMAN, INSURANCE LAW AND PRACTICE 517 (1942).

[9] As to partial subrogation, the insured is generally held to be the real party in interest, holding in trust for the insurer the amount the insurer has paid. McGeorge Contracting Co. v. Mizell, 216 Ark. 509, 226 S.W. (2d) 566 (1950); Burgess v. Trevathan, (N.C. 1952) 72 S.E. (2d) 231.

[10] Gas Service Co. v. Hunt, (10th Cir. 1950) 183 F. (2d) 417; Waters v. Schultz, 233 Mich. 143, 206 N.W. 548 (1925); Hill v. Leichliter, 168 Kan. 85, 211 P. (2d) 433 (1949); Cocoa Trading Corp. v. Bayway Terminal Corp., 290 N.Y. 697, 49 N.E. (2d) 632 (1943); Hermes v. Markham, (N.D. 1951) 49 N.W. (2d) 238.

[11] Hume v. McGinnis, 156 Kan. 300, 133 P. (2d) 162 (1943); McMahan v. McCafferty, (Okla. 1952) 240 P. (2d) 443. See also Fidelity & Guaranty Fire Corp. v. Silver Fleet Motor Express Co., 242 Ala. 559, 7 S. (2d) 290 (1942).

[12] Montello Shoe Co. v. Suncook Industries, 92 N.H. 161, 26 A. (2d) 676 (1942); Greene v. M. & S. Lumber Co., (Cal. App. 1951) 238 P. (2d) 87; Devers v. Harris, 238 Ala. 610, 193 S. 110 (1940); Williamson v. Purity Bakers of Ind., (Ind. App. 1935) 193 N.E. 717; Ill. Central R. Co. v. Hicklin, 131 Ky. 624, 115 S.W. 752 (1909).

[13] Brush v. Harkins, (D.C. Mo. 1949) 9 F.R.D. 604; John A. Boyd Motor Co. v. Claffey, 94 Ind. App. 492, 165 N.E. 255 (1932); Baxter v. Hart, 104 Cal. 344, 37 P. 941 (1894); F. S. Bowser & Co. v. Hines, 192 Ind. 462, 137 N.E. 57 (1922); Stuckey v. Fritsche, 77 Wis. 329 (1890). *Contra:* Cottle v. Cole & Cole, 20 Iowa 481 (1866).

In the principal case the majority of the court felt that a distinction between subrogation and assignment should be retained, reasoning that in the former the tortfeasor had no standing to object as to which party was suing him, inasmuch as he would be protected from future claims by the other party by res judicata, but that in the latter the insured had parted with all interest in the claim and therefore had no standing to sue. The dissent wished to destroy the distinction and to permit the insured to sue (or the suit to be brought in his name) in either case, because the wrongdoer would be protected by res judicata in any event. It is doubtful that either the majority opinion or the dissent was on solid ground historically. At common law and in equity an assignor of a chose in action and a subrogor were in precisely the same position procedurally. Although an action could be brought at law in either situation in the name of the insured (assignor-subrogor), the insurer (assignee-subrogee) had control of the action and was treated by both law and equity as the only party having any interest in the claim.[14] The "real party in interest" statutes, it seems, did nothing more than require the assignee or subrogee to bring the action in his own name, a merely formal change from the common law rule and exactly the same as the equity rule.[15] Even though the subrogor may today retain legal title to the claim, the same was true at common law (as it was also with the assignor) and even at common law the subrogor did not in reality have a right to sue. It has been suggested that the reason for the common law's refusal to permit the wrongdoer to plead payment by the insurer as a bar to an action brought in the name of the insured was that if the plea were permitted, the result would be complete freedom from suit.[16] Such would clearly not be the result today, inasmuch as the insurer may bring an action in his own name,[17] just as was true in equity. In effect the view of the majority gives to the subrogor a right of action, which is a substantive right, by virtue of a statute which has repeatedly been called procedural.[18] The dissent's view does the same for both the subrogor and the assignor.[19] Furthermore, if

If the chose in action is nonassignable, the insurer cannot sue. Old Colony Ins. Co. v. Kansas Public Service Co., 154 Kan. 642, 121 P. (2d) 193 (1942).

[14] POMEROY, CODE REMEDIES, 5th ed., 96 et seq. (1929); 2 POMEROY, EQUITABLE REMEDIES §922, n. 92 (1905); CLARK, CODE PLEADING, 2d ed., 167 et seq. (1947); Cook, "The Alienability of Choses in Action," 29 HARV. L. REV. 816 (1915).

[15] CLARK, CODE PLEADING, 2d ed., §22 et seq. (1947).

[16] Dissent of Traynor, J., in Anheuser-Busch v. Starley, 28 Cal. (2d) 347, 170 P. (2d) 448 (1946).

[17] Notes 10, 11 and 12 supra.

[18] Williston, "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" 30 HARV. L. REV. 97 at 105 (1916); CLARK, CODE PLEADING, 2d ed., §22 (1947); Simes, "The Real Party in Interest," 10 KY. L.J. 60 (1922).

[19] This is not to suggest that an owner of a bare legal title ought not be permitted to sue under any circumstances. A trustee or an assignee for collection probably can sue in his own name even in absence of specific statutory authority. CLARK, CODE PLEADING, 2d ed., 159-160 (1947). Many "real party in interest" statutes make specific provision for these persons. For example, see Neb. Rev. Stat. (1943) §25-304 and Archer v. Musick, 147 Neb. 1018, 25 N.W. (2d) 908 (1947).

the purpose of the "real party in interest" statutes is to protect the defendant from future suits on the same cause, it appears they make no change in the common law. Moreover, permitting the insured to sue in his own name without joining the insurer offers little safeguard against circuity of action.[20] There is thus little to commend the view of the majority as to the subrogation situation or of the dissent as to both the assignment and the subrogation matters. However, it may be that the unexpressed realization that an insurance company suing in its own name has a peculiarly difficult task in obtaining a judgment against an individual tortfeasor affords much of the impetus for saying that the tortfeasor cannot object to the person who sues as long as he is properly protected from future suits. It is clear that in those jurisdictions where the suit cannot be brought in the name of the insured the device of a "loan receipt" is common to permit the omission of the name of the insurance company from the trial of the cause.[21] The principal case, as well as the dissent, renders the use of the "loan receipt" unnecessary and the result is perhaps justifiable on the ground that requiring an insurance company to sue in its own name is too harsh a policy.

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[20] It would seem desirable to require joinder of the insurer to preclude the necessity of a later suit by the insurer against the insured. Simpson v. Hartranft, 283 N.Y.S. 754, 157 Misc. 387 (1936).

[21] The insured delivers, after receiving a loan, a signed receipt acknowledging that the insurer has loaned a specified sum to the insured, to be repaid only to the extent of any recovery by the insured from the tortfeasor. The insured promises to institute suit against the tortfeasor at the expense and under the control of the insurance company. Such arrangements are generally upheld as being loans as distinguished from payment, thereby permitting the suit to be brought in the name of the insured without joinder of the insurer. Klukas v. Yount, (Ind. App. 1951) 98 N.E. (2d) 227; Blair v. Espeland, 231 Minn. 444, 43 N.W. (2d) 274 (1950); Green v. Johns, (Ga. App. 1952) 72 S.E. (2d) 78. N.Y. Civ. Prac. Act (Cahill-Parsons 1952 Supp.) art. 24, §210, expressly permits this device.