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THE REAL PARTY IN INTEREST.

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"Every action must be prosecuted in the name of the real party in interest." This familiar statute appears in the so-called reformed codes of procedure of nearly thirty states. And in spite of its simple, conservative character, nearly three-quarters of a century of judicial interpretation and textbook exposition have given it such varied and diverse meanings, and in some cases have attributed to it such revolutionary results, as to make a consideration of its real import altogether pertinent.

A glance at a few authorities will show this diversity. Some have clearly taken the ground that this provision changes substantive law. In speaking of its effect on the assignment of choses in action, one writer says, "It would seem that the property of the assignee is now strictly legal." Another, speaking of certain decisions on this statute, uses these words: "This, of course, departs from the common law and is another example of a change of substantive law due in part at least to the Code provision referred to." Others have expressed the view that this section affects only procedure. A common statement in the decisions, particularly the earlier ones, is that the real party in interest is one having the equitable interest or title.

The full text of the statute as given in the California Code is as follows: "Sec. 367. Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this code.

"Sec. 369. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." California Code of Civil Procedure, Kerr's Code of 1908, Part I.

For the form of the statute in other states see Sunderland's Cases on Code Pleading, pgs. 25-28.

2 Pomeroy's Code Remedies (3rd ed.), Sec. 124.
4 "The statute itself works no innovation. It introduces only a change in procedure." Article by Ames on Disseisin of Chattels, III Anglo-American Legal Essays at page 555. I Williston on Contracts, Sec. 446.
5 "Those who have read the Code of Procedure need not be informed that the old distinctions between suits at law and in equity are abolished, and that the action must now be brought in the name of the party who has the equitable right to the money or thing in controversy." Oneida Bank vs. Ontario Bank, 21 N. Y. 490 at 499. Winnemucca State Bank & Trust Co. vs. Corbell, 178 Pac. 23, 42 Nev. 373.
6 "The holder of the legal title to property is the real party in interest." Koch vs. Story, 107 Pac. 1903, 47 Colo. 338.
We even find such loose expressions as this: "The real party in interest is the one who is to be benefited by the judgment in the case." On the other hand, it has been said, and with entire accuracy it would seem, that "A party to be 'interested' in an action need not be one who may gain or lose something therein."

As a suggested resolution of the difficulties involved in this piece of legislation, we submit that it should be interpreted to mean simply this:

*That the party to whom the substantive law of the case gives the right to bring and control the action must sue in his own name.* For convenience in discussion, this rule may be divided into three parts: (1) The real party in interest is the one to whom the substantive law of the case gives the right to bring and control the action. (2) The real party in interest must sue. (3) The real party in interest must sue in his own name. And it is submitted that only the third part of the rule represents any innovation.

Who is the real party in interest is not a question of the law of parties or procedure at all. You cannot answer it that way. It is simply a matter of determining the person to whom the substantive law of the case gives the right to sue and control the action. If you are suing in a court of law, the real party in interest will ordinarily be the man who has the legal right, not because the holder of a legal right is necessarily or always the real party in interest, but because as a rule the branch of the substantive law under which you are suing gives the holder of the legal title the right to control the suit. On the other hand, if you come into a court of equity and state a cause of action which can exist only in favor of one having an equitable interest, then the holder of the equitable right is the real party in interest, not because there is any rule that the real party in interest is the holder of the equitable title, but because the substantive law under which you are suing gives the right of action to the holder of an equitable interest. "The test of whether one is the real party in interest within the meaning of the statute," say some of the best authorities,

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1 Simpson v. Miller, 94 Pac. 252; 7 Cal. App. 248; Jackson v. McGilbray, 148 Pac. 703, 46 Okla. 208.
“is, does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?”

Having defined the real party in interest, our next proposition is that he must sue. Now there is nothing new about that rule. From time immemorial courts both of law and of equity required the person who had the substantive right, to sue on it. “We think a case cannot be found decided in a court of law,” says a court in a jurisdiction whose laws are unencumbered by the real party in interest statute, “where a person having no legal interest in the subject matter of the action has been allowed to maintain an action at law alone or with others. It is impossible that he can since by his own showing he has nothing for which to sue.” Indeed the conclusion of the court seems quite obvious. And in fact in the very nature of things it is difficult to conceive of any system of law where the rule would be otherwise. Courts of equity have uniformly laid down the rule that suits must be maintained by the real party in interest. The Federal Equity Rules have codified this provision in almost the precise language of the reformed codes of procedure. Indeed it is clear that the code makers believed that they were borrowing a rule of equity pleading. On the other hand we find a similar rule laid down for courts of law. “The general rule is,” says Chitty, “that the action should be brought in the name of the party whose legal right has been affected.”

Evidently the real party in interest rule changed no substantive law. Its changes were purely procedural. And it is believed that all that was intended was to abolish certain technical rules such as those providing for a “use plaintiff” in case of suit by the assignee of a chose in action. In other words, whereas the real party in interest...
always has and always must sue, he has not always been required to sue in his own name. By the codes, however, he must now sue in his own name. This is indeed a slight innovation. But its effect can hardly be of more consequence than if the legislature were to pass a statute requiring all persons to sue in their Christian names instead of their surnames. The same person controls the suit as before. But in furtherance of simplicity he now always sues in his own name.

It must be admitted that some of the courts have not interpreted the real party in interest statute in any such simple, conservative manner. But it is submitted that the confused state of the authorities is due to two things: (1) courts have proceeded under the erroneous assumption that they could decide who was the real party in interest by a rule of procedure; thus they have defined and redefined the real party in interest, when they should have been deciding whether the law of choses in action gives any substantive rights to a man who takes an assignment for collection only, or whether the law of agency gives a right of action to an agent with reference to his principal's property in his possession. (2) The other error is the theory that this is a rule adopted from courts of equity and that therefore one must have the beneficial or equitable interest in order to be the real party in interest. On the basis of this latter assumption, some courts were under the impression that the statute gave totally new remedial rights to persons having equitable interests—as for example the line of cases holding that an insurance company may sue a tort feasor in a court of law in its own name, when it is entitled to be subrogated to the rights of the insured. They seem subconsciously to feel that a transformation analogous to that effected by the statute of uses had taken place and that the holder of an equitable title was, by the magic of this simple enactment, given all the remedial rights which formerly appertained to the holder of the legal title. This error was made the more easy because of the statute enacted in nearly all the codes to the effect that there should be one form of action at law and in equity. Of course, if distinctions between law and equity had been abolished, then perhaps the holder of an equitable interest might have had additional remedial rights. But if so, he would not have acquired them.

16 In Allen v. Miller, 11 Ohio St. 374, 377, Brinkerhoff, J., says: "By the provisions of the code, the assignee of an account is its legal holder; his title is not a mere equitable title, as before the adoption of the code but a legal title."
by reason of the real party in interest statute. And it is very evident that the distinctions between law and equity have not been wiped out in toto. It is worthy of note that several states have entirely receded from the position originally taken that one must have a beneficial interest in order to be a real party in interest.

Having thus stated the principles relied upon in interpreting this statute, we shall now take up some of the principal kinds of cases in which its meaning has been declared, and examine the actual state of the law.

ASSIGNEE OF CHOSE IN ACTION.

In considering the effect of this statute on the matter of suing on a chose in action it is not necessary to go into the substantive law concerning the assignability of choses. If choses in action were assignable in equity or at law before the codes, they still are; if they were not, they still are not. It is perfectly clear that the same equitable defenses against the assignor may be set up as before. Indeed this has often been specifically provided in connection with the real party in interest statute. And perhaps the clearest illustration of the fact that this provision is purely procedural and changes no substantive law is found in the rule that where the law of another jurisdiction is applied, the real party in interest rule is not followed unless it is the law of the forum. In the simplest situation, that of a total beneficial assignment of a chose in action, the assignee is everywhere held to be the real party in interest. But it is submitted that the assignee was the real party in interest before the

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17 Illustrations of this change of position are found in the decisions of Iowa (see Knadler v. Shar, 36 Iowa 232, 233), Kansas (Stewart v. Price, 61 Kan. 311; Manley v. Park, 63 Kan. 460), Nebraska (Roarland v. van Etten, 23 Nebr. 472; Alexander v. Overton, 26 Nebr. 560), and New York (Kilmore v. Culver, 24 Barb. 656; Allen v. Brown, 44 N. Y. 229.)

18 Beckwith v. Union Bank of New York, 3 N. Y. 211; Myers v. Davis, 2 N. Y. 228; Beckwith v. Union Bank of New York, 3 N. Y. 211; Myers v. Davis, 2 N. Y. 228. And see in general numerous cases from code states in the group of citations in 5 Corpus Juris 592, 593.

19 For example the California Code of Civil Procedure, Sec. 383 (which section immediately follows the real party in interest statute) is as follows: "In case of the assignment of a thing in action, the action by the assignee is without prejudice to any set off or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity."


21 Cases so holding are legion. See them grouped by states in 39 Cyc. 47, note 2.
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cods,—or to say the least he was a real party in interest. As pointed out by a recent writer, common law jurisdictions permit the assignee to control the suit, receive the proceeds, and in fact do practically everything any other plaintiff could do except use his own name. Indeed at common law, the assignee was for many purposes regarded as the actual plaintiff.

Far more difficulty has arisen where the assignment is for collection only. The overwhelming weight of authority is that the assignee is the real party in interest. But the arguments pro and con have been much beclouded, and some of the courts adopt a contrary holding. Instead of frankly recognizing that the substantive law gives such an assignee the right to sue and that the assignor's rights are purely against the assignee, the courts have sometimes attempted to decide the matter exclusively by this statute. Some authorities have strenuously objected to the obvious injustice, as they say, of nullifying the real party in interest statute by permitting one to sue who is not beneficially interested. "The camouflage of a simulated transfer," says Mr. Kerr, "cannot make the transferee the real party in interest—with all due respect to the decisions which under a forced construction hold otherwise." With all due respect to Mr. Kerr, he is trying to decide a question of substantive law by a procedural statute. If the substantive law gives no such rights to the transferee on such a simulated transfer, all well and good, then he should not be allowed to sue. But cases already cited to the effect that he is the real party in interest, take the position that the transfer itself, not the real party in interest statute, did give him certain substantive rights. Indeed, tho there is little direct authority on the proposition, it seems

25 Contra: Martin v. Mask, 165 N. C. 436, 74 S. E. 343; Ravenal v. Ingram, 131 N. C. 549, 42 S. E. 567; Brown v. Gunn, 65 Ohio St., 316, 64 N. E. 123.
clear that before the codes an assignee for collection could (barring possible objections as to champerty) acquire the same rights as any other assignee. If, then, the assignee for collection acquires substantive rights, it is difficult to see why he is not a real party in interest.

In accordance with the principles already expressed, it is held that in the case of a negotiable instrument payable to order and transferred by delivery, the transferee, whether beneficially, or for collection, is the real party in interest. The same result is also arrived at by virtue of the Uniform Negotiable Instruments Law.

It is also the decided weight of authority that where a chose in action, either negotiable or non-negotiable, has been transferred for collateral security, the transferee is the real party in interest.

PARTIAL ASSIGNMENT OF CHOSE IN ACTION.

As preliminary to the cases involving partial assignments of choses, care should be taken to distinguish them from the case where A assigns to B the whole chose with a proviso that B shall collect and return to A a given percentage. Clearly in all those cases B is the one to sue. But it is difficult to see how, in an action either at law or in equity, the partial assignee may sue without joining his assignor.
Nearly all the cases hold that the assignor may sue, either alone or with the partial assignee.30 One may well raise the question as to why the partial assignee should be joined at all. This, of course, can be justified if the action is equitable in character. Before the codes the partial assignee was regularly recognized in a court of equity, and was permitted a recovery on bringing in the assignor and other interested parties. But in a court of law no action was brought by a partial assignee since he had no standing whatever.31 Following the principle heretofore stated that the real party in interest statute gave no one a right to sue who could not have done so before, it would seem that the partial assignee would be an improper party in an action at law. Where the opposite conclusion has been reached, it is due principally to the statutes in the reformed codes. Most code states have a provision that there shall be but one form of action. And one at least provides that law and equity may be administered in the same action. This sometimes makes it unnecessary to determine whether the action is legal or equitable in character.32 There is usually also a statute providing that persons having an interest in the subject of the action and the relief demanded may be joined.33 This could well be interpreted to make the partial assignee a proper party at law.

In other words, barring a few minority holdings, the decisions on partial assignment of choses in action do not in any way disprove the theory that the real party in interest statute is purely procedural in character.
A question on which a variety of opinion has been rendered is that of a suit by an insurance company against a defendant for his negligence in causing the loss to the insured, where the insured has already been reimbursed by the insurer. As a rule such a cause of action is not assignable, and the insurer is permitted to sue only by reason of his being subrogated to the rights of the insured against the tortfeasor. Of course, in jurisdictions where an assignment is permitted and this has been made, the rulings already discussed apply. The weight of authority is that the insurer may, if he pays the total loss, sue in an action at law. Some say the insurer may sue alone.34 Others say he must join the insured.35 There is, however, some authority to the effect that the insured is still the real party in interest, and it is submitted that this is the sound rule.36 This is not like the case of a total assignment of a chose in action; in that case the court of law recognizes the rights of the assignee. But the subrogee has no standing whatever in a court of law. His rights are purely equitable, and he should be compelled to file a bill in equity to secure their recognition.37 When the court permits him to sue at law it is giving him a totally different kind of substantive right. Before the code his rights were against the insured only; under this view he gets a right against the tortfeasor. True, the practical difference between an action at law and a suit in equity in a case like this is very slight.

26 Alaska Pac. S. S. Co. v. Sperry Flour Co., 94 Wash. 227, 162 Pac. 26; Illinois Central R. R. Co. v. Hicklin, 131 Ky. 624, 115 S. W. 752. (Both these cases were actions by the insured; and the courts went, in part, on the theory that, whatever may have been the rights of the insurer, the defendant could not object if the insured sued, since he would thereby be protected from another suit. Both cases, however, squarely decide that the insured is the real party in interest. In Missouri the courts take the view that either the insured, or the insurer who has paid all the loss may sue, and the defendant cannot object, but that as between insured and insurer, the latter is the real party in interest. Foster v. Missouri Pacific Railroad Co., 123 Mo. App. 67, 128 S. W. 32.
27 Memphis & Little Rock R. R. v. Dow, 139 U. S. 27 at 301: "The right of subrogation is not founded on contract, it is a creature of equity; is enforced solely for the purposes of accomplishing the ends of substantial justice; and is independent of any contractual relations between the parties." See also St. Louis, etc. Ry. v. Commercial Ins. Co., 139 U. S. at 225. There is a little authority for the proposition that the right of subrogation would be recognized in a court of law. Baker v. American Surety Co., 131 Iowa 634, 109 N. Y. 1044. In general see 37 Cyc. 325, note 29, and 334, notes 28, 29 and 37.
under the codes. If it were filed as an equity action, the court would be but enforcing a common law right anyway. But the equity court would be enforcing it in favor of one whom the court of law does not recognize. No doubt the code rule providing for one form of action at law and in equity had something to do with the conclusions the courts have reached. Nearly all of them say the plaintiff gets his right by subrogation, and then calmly hand it to him in an action at law. It is submitted that whether the action be at law or in equity, the insured is a necessary party.

In a case where the loss exceeds the total insurance paid, the courts are almost unanimous in holding that the insured is the real party in interest. Some say the insurer may join; while others deny this. And the same rule is applied where the loss is insured with several insurers, no one of whom pays the entire loss, but all together do so. But where the loss exceeds the insurance paid, but the insured releases to the defendant, it has been held that the insurer is the real party in interest. It is submitted that in all these cases the insured is the one and only real party in interest in an action at law because the substantive law gives him alone a right of action.

In some few cases the right of the insured to sue has been put on the ground that he is the trustee of an express trust, it being provided in all the real party in interest statutes that such rule does not bar the trustee of an express trust from suing. It has, however, been denied that the insured is the trustee of an express trust, on the ground that it is a trust imposed by law, and therefore not express.

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15 Pratt v. Radford, 52 Wis. 114, 8 N. W. 606 (holding assured and insurer are "united in interest.") Shawnee Fire Ins. Co. v. Cosgrove, 85 Kan. 298, 115 Pac. 616; Aetna Ins. Co. v. Hannibal, etc. R. Co., Fed. Cas. No. 96; Kansas City, etc. Co. v. B. S. Blaker Co., 63 Kan. 344. See also 5 Joyce on Insurance (2nd ed.) Sec. 3558.


18 Hartford Ins. Co. v. Wabash R. Co., 74 Mo. App. 106; Connecticut F. Ins.


20 Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; Broderick v. Puget Sound, etc. Co., 56 Wash. 399, 150 Pac. 616.
When we come to the case of contracts for the benefit of a third party, the theories herein suggested are perhaps as nearly followed as in the case of any application of the real party in interest rule. In most-cases the courts discuss purely the principles of substantive law, and assume without discussion that the real party in interest statute does not affect the situation. Such indeed has been the conclusion of every eminent authority. It is particularly not worthy that the leading case holding a payment beneficiary can sue, Lawrence v. Fox, which is regarded as having fixed the majority view of the law in America, was decided in a code state with a real party in interest statute, several years after that statute had been enacted; yet no reference whatever is made to the statute in this decision. In fact the courts of several code states have limited the scope of the rule permitting the beneficiary to use, without any reference to the real party in interest statute.

Some few, however, have persisted in the old error of deciding substantive law by a procedural statute, and have said the third party could sue because he is the real party in interest.
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It should be remembered also that, in most jurisdictions, the real party in interest statute, after providing that the real party in interest may sue, adds that a trustee of an express trust "may sue without joining with him the person for whose benefit the action is prosecuted," and make "a person with whom or in whose name a contract is made for the benefit of another" a trustee of an express trust "within the meaning of this section." This evidently implies that a third party beneficiary might have some rights, but it can hardly be said to give him any. Apparently all it means is that, if by the substantive law the third party beneficiary is a real party in interest, this is an exception to the usual rule that such party must always sue.

Reference should be made to the fact that in the code of substantive law of some states, it is provided that "a contract made expressly for the benefit of a third party may be enforced by him." In such jurisdictions, of course, any question of the effect of the real party in interest statute on such a case would be beside the point.

MISCELLANEOUS CASES

The application of the real party in interest clause has been made to a wide variety of cases in addition to those already discussed. But they have not drawn the attention of judicial opinion to anything like the extent that the classes of cases already referred to have done. In the main they are in accord with the theories of the real party in interest statute which we have sought to set forth; though the conclusions have not been entirely uniform.

The following examples will suffice. Where A grants real estate to B, X being in adverse possession, in a jurisdiction where B's title is void as to X, A is the proper person to sue in ejectment. And...

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48 See note 1, supra.
49 This is provided in the codes of California, North and South Dakota, Idaho, and Montana. See Sec. 65, 1 Williston on Contracts.
50 Steeple v. Downing, 60 Ind. 473; Burk v. Andis, 83 Ind. 59; (the Indiana law was afterward changed by statute so as to permit the grantee to sue; see Chapman v. Jones, 149 Ind. 454, 47 N. E. 3055; Peck v. Simms, 129 Ind. 345, 29 N. E. 317; Galbraith v. Faino, 12 N. D. 364, 26 N. W. 235; Schneller v. Plankinton, 12 N. D. 561, 28 N. W. 77; Gannon v. Johnston, 40 Okla. 695, 140 Pac. 420 (statute not referred to.).
In New York it was doubted whether the grantor could be the real party in interest, and the doubt was resolved by amending the code so as to permit the grantee to sue in the name of the grantor in a case like this. Hamilton v. Wright, 37 N. Y. 592; Dever v. Hagar, 169 N. Y. 481, 62 N. E. 536.
Of course, in a case where the deed is not void, the grantee is the real party in interest and cannot sue in the name of the grantor. Miller v. Grayson, 64 Okla. 12, 165 Pac. 1077.
where A has land to which a water right is appurtenant, and grants it to B in order that B may litigate to determine the extent of the water right, B having agreed thereafter to reconvey to A, B is the real party in interest to sue adverse claimants to the water right.\textsuperscript{51} A remainderman is not the real party in interest to recover possession of land from third parties during the continuance of the life estate.\textsuperscript{52} It is held that the real party in interest statute does not permit an undisclosed principal to sue on a contract under seal made by his agent.\textsuperscript{53}

In conclusion, it may be said that a review of the decisions convinces one that the mass of litigation on the real party in interest statute is but another illustration of the sort of "much ado about nothing" which is all too frequent in legal discussion. Instead of going to the heart of the matter and deciding why the substantive law gives a litigant a right, courts have dodged behind this statute and said, "Oh, well, anyway he is the real party in interest, so, of course, he can sue." In most cases it might be said with equal penetration that he is the one to sue because he is rightfully the plaintiff. All the statute proposes to do is to eliminate a few instances where one man sued in the name of another; and to reiterate a rule of law as ancient as it is axiomatic that the man with the substantive right is the man who can sue. And while a few jurisdictions still make use of this statute as a means of muddling questions of substantive law, the majority are coming more and more to the view that it is purely procedural.

\textsuperscript{51} Smith v. Logan, 18 Nev. 149, 1 Pac. 678.
\textsuperscript{52} Blount v. Johnson, 165 N. C. 255, 80 S. E. 882.
\textsuperscript{53} Schaefer v. Henkel, 75 N. Y. 378.