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The Real Party in Interest Statute in Missouri

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THE REAL PARTY IN INTEREST STATUTE IN MISSOURI.

The real party in interest statute was passed in Missouri in 1849 as a part of the practice act. Before that date two other statutes dealing with the question of parties plaintiff had been passed: a statute abolishing the straw plaintiff in actions of ejectment, and a statute providing that the assignee of a bond or note might sue in his own name. These statutes will be considered first.

I.

THE EJECTMENT STATUTE.

This statute was first passed while Missouri was still a territory, in 1807. The common law action of ejectment was originally an action by a lessee of land to recover damages against one who had wrongfully ejected him from the land; at first the lessee could recover only damages, but equity, taking jurisdiction to put the lessee back in possession, the common law courts, afraid of losing business, themselves ordered the lessee to be put back in possession by the sheriff. The old common law real actions for the recovery and the trying of title to land (such as the writs of right and of dower) were so cumbrous and dilatory and expensive that courts and lawyers were anxious to devise a substitute. This they accomplished by a series of fictions, with the action of ejectment as a basis. They did it in this way. Suppose A is in possession of land claimed by B. B would enter upon the land secretly, and make a lease of it for a term of years to C who would take possession. When A found C in possesssion he would eject him; C would thereupon bring an action of ejectment against A for the ouster. The parties to this action would be "C on the demise of B against A." In this action C would allege in his declaration (1) that B has title, (2) that B leased to C, (3) that C entered into possession, and (4) that A ejected him. Since the second, third, and fourth allegations were plainly provable, the only real contest came on the first, as to whether B had title as against A. If C was able to prove B's title, he

was put in possession and he then surrendered to B. Since it was unpleasant to have an actual ouster by A, the fiction of "the casual ejector" was introduced; instead of being ousted by A, C would be ousted by the casual ejector, whom we will call E, a person chosen by B for that purpose. The action of ejectment would be brought against E instead of against A; but of course it would not be fair to recover possession against A unless A had a chance to defend, so it was required that A be given notice of the suit and an opportunity to defend it. Finally it was decided that there was no use going through the farce of a lease to C, an entry by C, and an ouster by E; so A was compelled by rule of court to consent to admit the lease, entry and ouster and simply deny C's title. Hence the lease, entry, ouster, and casual ejector all became fictions; the name John Doe was generally used for the fictitious lessee and the name Richard Roe for the fictitious casual ejector.

The Missouri Statute of 1807 reads as follows: "In all actions of ejectment the plaintiff shall declare in his proper name and instead of the fictitious suggestion of lease, entry, and ouster, shall state that he is legally entitled to the premises and aver the ejectment and trespass of the defendant, etc." This statute with additions was re-enacted in 1825. In the revision of 1835 [1] the statute seems to be replaced by a simple provision that "the action shall be prosecuted in the real name of the parties thereto, and shall be brought against the persons in possession of the premises claimed." In the revision of 1845 [2] this is repeated, as also in all the revisions [3] since, except the revision of 1855, from which it was probably omitted by accident.

II.

The Bond and Note Statute of 1825.

The legal title to a chose in action cannot be transferred by the obligee unless the obligor consents thereto. This is because a chose in action is not, strictly speaking, property at

1. Revised Statutes 1834-5, p. 234, § 3.
2. Revised Statutes 1845, Chap. 55, § 4.

all, like a farm or a horse or a gold coin, but is merely a power to get property from the obligor. A chose in action consists of a relation between the obligee and the obligor; the obligor owes an obligation to the obligee and he may insist on performing that duty to the obligee and to no one else. The legislature may of course interfere and create a new duty to the assignee in place of the old duty to the obligee. Whether any statutes having that effect have been passed in Missouri will be discussed later in this article, but certainly none were enacted down to 1825 which could be possibly construed in that way.

Although the obligee could not pass legal title by his own act so as to make the transferee the owner, there was nothing in the nature of things to prevent his appointing another his attorney or agent to collect the chose in action and agreeing with him—in case either of sale or gift—at the time of appointment that the agent or attorney should keep what he collected; the legal title to the money or property thus collected would pass to the attorney at the moment of collection. Wherever the giving of such power of attorney was held valid and irrevocable there was an assignment which was practically efficacious, even though legal title did not pass and action had to be brought in the name of the assignor who was still the legal owner. This power or letter of attorney for the attorney's own use seems to have been employed as far back as 1309.[4] The effect of such use is thus stated by Professor Ames:[5] "Indeed so effective was the power of attorney as a transfer, that during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferor. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the 15th century, if not earlier, till near the close of the 17th

3. Revised Statutes 1909, § 2385.

4. Professor James Barr Ames in 3 Harvard Law Review 340, note 2. He quotes from Riley, Memorials of London: "Know ye that I do assign and attorn in my stead E, my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter *for her own profit* as well as ever I myself could have done in my own proper person."

century. The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property."

The effect of the modern commercial spirit demanding that debts, at least, be assignable, appears first in the equity courts. At some time in the 17th century equity began giving relief to the assignee where the assignee had paid value for the assignment,[6] the assignee suing in his own name. The common law courts, jealous of the growing jurisdiction of equity, overcame their scruples as to maintenance and gave relief to the assignee even though the assignee was not a creditor.

It is to be observed that where the assignee by power of attorney is to keep what he collects, the agency is of a very peculiar sort; since he is entitled to the proceeds, he owes no duty to the assignor; he is not a fiduciary as other agents are. The agency was used merely as a device to accomplish a particular end. At first it seems that the power to act as agent or attorney had to be given expressly, but commercial convenience was so greatly helped by the device that later a power of attorney was implied as a matter of fact from the very act of assignment. Still later the reason for the assignee suing in the name of the assignor rather than in his own name was forgotten, and the courts repeated the apocryphal reason invented by Coke that the non-assignability of choses in action was due to the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits." [7] It is to be observed that Lord Coke's reason explained only one thing, namely, why the assignee by power of attorney was not allowed to use it unless he was a creditor of the assignor. It did not explain why legal title did not pass; nor why under the modern common law an assignee may sue in the name of the assignor though not in his own; for it is impossible to see how the number of contentions and suits would be made any less by re-

5. 3 Harvard Law Review 331.

6. In *Squib* v. *Wyn* (1713) 1 P. Wms. 378, the court states that "choses in action are assignable in equity but not at law," as if it were then well settled.

7. *Lampet's Case* (1613) 10 Rep. 48a.

quiring the assignee to sue in the assignor's name rather than in his own. It is only within the last half century that Professor Ames,[8] apparently following a suggestion made by Mr. Spence in 1847, has shown the true reason as given above.

Besides the fact that the real reason for the assignee suing in the assignor's name was so long forgotten, there were two other matters that have tended to confuse the whole subject. Although equity apparently [9] only took jurisdiction where present [10] value was given by the assignor, and later—a little after 1800—abandoned jurisdiction [11] of simple cases of assignment to the courts of law where the remedy had become adequate, the courts and text-books still talk about "equitable assignment." Where one has a remedy at law and no remedy in equity it is certainly not accurate to say that his right is merely equitable; it is a legal right, though he has not the legal title, and the term "equitable assignment" should have been discarded in the interests of clear thinking. The third source of confusion is the ambiguity of the word "assign." Courts frequently say "choses in action were not assignable at common law." This is entirely and literally true of the early common law when an attempted transfer by the obligee to one other than a creditor had no legal effect whatever, because held to be within the prohibition at the maintenance statute; but certainly since about 1700 they have been practically assignable at common law by using the old device of power of attorney and allowing the suit in the name of the assignor; consequently the statement quoted is very misleading. Unfortunately we cannot by a single word discriminate between a

8. 3 Harvard Law Review 339. 2 Spence Equitable Jurisdiction 850: "But in regard to choses in action, as the same doctrine has been adopted in every state in Europe it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another."

9. *Carteret* v. *Paschal* (1733) 3 P. Wms. 197, there is a *dictum* that a gratuitous assignment is valid in equity.

10. In *Cator* v. *Burkes* (1785) 1 Brown's Chancery Cases 434, equity refused to take jurisdiction of a case of a simple assignment to a creditor on the ground that the remedy at law was adequate.

11. *Hammond* v. *Messenger* (1838) 9 Simon 327.

complete transfer of the legal title by consent of the obligor—that is, by novation—and a transfer without such assent where legal title does not pass but where the assignee gets a legal right to sue. On account of the poverty of our language both of these are termed "assignments." Where the assignment is without the consent of the obligor, the proper caption of the case is, apart from statute, as follows: "A (assignor) to the use of B (assignee) v. X (obligor)." There are several cases with this sort of caption in the early Missouri reports without any explanation being offered for it.[12]

Down to 1825, in Missouri, the assignee was compelled to sue in the name of the assignor in all cases. Where the assignor had intended to part with all his beneficial interest and the law gave effect to that intent, he became only a nominal plaintiff; though not a fictitious or straw plaintiff, as in ejectment cases at common law, yet he was a mere figure head whose duty was to do nothing and allow the assignee to have complete control of the action in his name. In 1825 the following statute [13] was passed:

"§ 2. All bonds and promissory notes, for money or property, shall be assignable, and the assignee may maintain an action thereon, in his own name, against the obligor or maker, for the recovery of the money, or property, specified in such bond or note, or so much thereof as shall appear to have been due at the time of the assignment, in like manner as the obligee or payee might have done.

"§ 3. The nature of the defence of the obligor, or maker, shall not be changed by the assignment, but he may make the same defence against the bond or note, in the hands of the assignee, that he might have made against the assignor.

"§ 4. The obligor, or maker, shall be allowed every just set-off and discount against the assignee, or the assignor, before judgment, unless it shall be expressed in the bond or note, that

12. The earliest example of this seems to be *Cleaveland to the use of Case and Marks* v. *Davis* (1834) 3 Mo. 234.

13. Revised Statutes 1825, p. 143. No case seems to have arisen under the statute and it was thought advisable to give above the statute as it appears in the Revised Statutes 1834-5, p. 105, divided into sections.

the sum therein specified shall be paid without defalcation or discount.

"§ 5. It shall not be in the power of the assignor, after assignment, to release any part of the demand; nor shall any assignee ever obtain any greater title to, or interest in, any bond or note, than the person had from whom he acquired it."

These sections were repeated in the Revised Statutes of 1845,[14] with two changes to be noted later; also in the Revised Statutes of 1855 [15] with an exception given in the footnote. In *Webb* v. *Morgan* [16] the court held that that statute was not repealed by the practice code of 1849; but none of the sections except the fifth [17] appears in the revision of 1865 or any succeeding revision, probably because the revisers thought that the provisions had been superseded and made unnecessary by the practice code.[18]

The limitations of the foregoing statute are obvious. It applied only to a certain class of choses in action; wherever it did not apply the assignee was still compelled to sue in the name of the assignor.[19] While the assignment might be on a separate piece of paper,[20] a general assignment of all the assignor's "goods and chattels, effects, and property of any kind" was held not to be such an assignment of a bond as would enable the assignee to sue in his own name; [21] the court also expressed the opinion that the assignment must be in writing to come within the statute, though the statute of 1835, which

14. Revised Statutes 1845, Chap. 21, §§ 2 to 5.

15. Revised Statutes of 1855, Chap. 21, §§ 2 to 5. § 4 was changed to read as follows: "An account for sums of money or for property due on contract may be assigned in writing, and the assignee shall have the same right of action in his own name which the assignor would have had subject to the same defenses and set-offs, which the debtor would have had against the assignor prior to notice of such assignment."

16. (1851) 14 Mo. 428.

17. Revised Statutes 1909, § 2775. The fourth section appears in altered form in the set-off statute, Revised Statutes 1909, § 1867.

18. *Long* v. *Herrick* (1870) 46 Mo. 605.

19. *Thomas* v. *Cox to use of Beltzhoover* (1840) 6 Mo. 506; a cause of action arising from a breach of covenant was held not to be covered by the statute and therefore that action was properly brought in the name of the assignor.

20. *Able* v. *Shields* (1841) 7 Mo. 120.

21. *Miller to use of Morrison and Perry* v. *Paulsell and Newman* (1844) 8 Mo. 355.

seemed to be then in force, did not expressly so provide. Later it was held [22] that the statute required an assignment in writing signed by the assignor, but this was after the revision of 1845, which amended section 2 to read: ". . . assignable by an endorsement on such bond or promissory note, etc." It was also held, although the statute said the assignee "may" sue in his own name, that the provision was mandatory, and suit could no longer be brought by the assignor in cases covered by the statute.[23]

Before the statute was passed the law was well settled everywhere that the assignee of a non-negotiable [24] chose in action took subject to any defense which the obligor had against the assignor before notice of assignment.[25] This, of course, was a natural holding; the assignee having only a power of attorney to collect from the obligor, could recover no more than his principal, the assignor, could have recovered. Sections three and four, and the latter part of section five of the statute were thus declaratory of the common law in preserving these defenses. On the other hand, it was well settled at common law before the statute that from the moment of notice to the obligor of the assignment the obligor's duty was to pay to the assignee; and if in violation of that duty he paid to the assignor, the assignee could either make the obligee pay again or compel the obligor to account for what he had thus wrongfully received. It is likely that the legislature thought that they were preserving the substantive law on this point in the first part of section five: "It shall not be in the power of the assignor after

22. *Ashworth* v. *Crockett* (1848) 11 Mo. 636.

23. *Jeffers* v. *Oliver to use of Bryans* (1838) 5 Mo. 433.

24. The statute of 1835 also had provisions placing negotiable promissory notes on the same footing as bills of exchange. Where a negotiable instrument payable to order is transferred by endorsement and delivery, or one payable to bearer is transferred by endorsement and delivery or by mere delivery, it is well settled law that the title passes, the obligor giving his consent to the transfer at the time of executing the instrument, by using the words "*or order*" or "*or bearer.*" It is also well settled that in case of such a transfer before maturity of the instrument to one who pays value in good faith the transferee takes free from equitable defenses of the obligor, such as fraud, failure of consideration, etc.

25. *Wolf for the use of Prim* v. *Cozzens* (1836) 4 Mo. 432, holding that if the assignor's creditor garnishees the obligor the garnishment judgment is a bar to an action brought by the assignee.

assignment, to release any part of the demand." But the language of the statute was ill chosen for that purpose; either the word "right" should have been used instead of the word "power," or the words "notice of" should have been inserted before the word "assignment." As the statute stands if the first part of section five is followed literally, a release given to the obligor after assignment but before notice of the assignment is no defense to the obligor who may thus be compelled, though innocent, to pay twice; this is contrary to the law before the statute and seems inconsistent with sections three and four and also with the last part of section five which provides: "Nor shall any assignee ever obtain any greater title to or interest in any bond or note than the person had from whom he acquired it." In the case of *Bates* v. *Martin* [26] it was held that the obligor must pay again. This aroused criticism [27] but instead of amending section five as suggested above, section four was amended so as to read: " . . . subject to the same defenses and set-offs which the debtor would have had against the assignor *prior to the notice of such assignment.*" [28] This has had the effect of nullifying the use of the word "power" in section five and in thus restoring the common law as it existed prior to the statute of 1825.[29]

III.

The Real Party in Interest Statute of 1849.

The third and most important statute regarding parties plaintiff was part of the practice code of 1849. This provided as follows:[30] "Every civil action must be prosecuted in the

26. (1834) 3 Mo. 367. See also *St. Louis Perpetual Insurance Co.* v. *Cohen* (1845) 9 Mo. 421, 422.

27. *Gates* v. *Kirby* (1850) 13 Mo. 157.

28. This change seems to have been made in the acts of 1849, p. 75; see *Bartlett* v. *Eddy* (1892) 49 Mo. App. 32, 53. It appears in the revision of 1855 at p. 322. In the revision of 1865, p. 602, it appears in the chapter on set-offs; also in later revisions; see Revised Statutes 1909, § 1867: "In actions on assigned accounts and non-negotiable instruments the defendant shall be allowed every just set-off or other defense which existed in his favor *at the time of being notified of such assignment.*"

29. *Powers* v. *Woolfolk* (1908) 132 Mo. App. 354, 361.

30. Laws of 1849, p. 75. The next section provided as follows: "In case of an assignment of a thing in action, the action by the assignee

name of the real party in interest except as otherwise provided in the next section." "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue in his own name without joining with him the person for whose benefit the suit is prosecuted." In the revision of 1855 this was amended to read as follows:[31] "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in the next succeeding section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract." "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." [32]

It has been universally admitted that the code provision just quoted applies to the assignment of choses in action. It is much broader than the statute of 1825 since it is not limited to bonds and notes and no particular form of assignment is required.[33] What effect did this have upon the enforcement of the assignee's rights?

A.

Are Tort Actions Assignable under the Code?

What is the meaning of the provision in our present code that "this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract?" Did

shall be without prejudice or other defense existing at the time of and before notice of the assignment; but this section shall not apply to bills of exchange, nor to promissory notes for the payment of money express on the face thereof to be for value received, negotiable and payable without defalcation." This did not appear in the revision of 1855 under the practice act, but the substance of it appeared in a bond and note statute on page 322. In the revision of 1865 and later revisions it appears in the chapter on set-offs. See *ante*, footnote 28.

31. Revised Statutes 1855, Chap. 128, p. 1217.

32. The same sections appear in Revised Statutes 1909, §§ 1729, 1730, with the single change of the word "must" to "shall."

33. See *Smith* v. *Sterritt* (1857) 24 Mo. 260; *Willard* v. *Moies* (1860) 30 Mo. 142.

the framers of this code of procedure intend thereby to change the substantive law as to what choses in action should be assignable or did they put in this provision merely as a safeguard to prevent any change?

Under the act of 1849, which did not have the provision just quoted, it was held[34] that an action for the conversion of a chattel was assignable because it would pass to the executor or administrator, and that the assignee might sue in his own name. The first case after the amendment of 1855 came up in 1881,[35] the court holding that under the amendment, an action for the conversion of a chattel was not assignable whether trover or assumpsit was brought, because it did not arise out of contract. Four years later the question came up again[36] and the first case was overruled. The net result of this and the decisions following it has been to restore the law on this point to what it was before the amendment. The test of assignability now laid down is that which represents the law generally:[37] "All causes of action arising from torts to property, real or personal—injuries to the estate by which its value is diminished —do survive and go to the executor as assets in his hands. As a consequence such things in action, though based on a tort, are assignable." [39]

34. *Smith* v. *Kennett* (1853) 18 Mo. 154.

35. *Wallen* v. *The St. Louis etc. Ry. Co.* (1881) 74 Mo. 521.

36. *Snider* v. *Wabash etc. Ry. Co.* (1885) 86 Mo. 613. This has become the leading case upon the subject in this state.

37. Missouri has the same rule by statute; Revised Statutes 1909, §§ 105, 106:

"For all wrongs done to property, rights or interests of another, for which an action might be maintained against a wrongdoer, such action may be brought by the person injured or after his death by his executor or administrator against such wrongdoer.

"The preceding section shall not extend to actions for slander, libel, assault and battery or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator."

39. Following this test these cases held that the tort action was assignable: *Doering* v. *Kenamore* (1885) 86 Mo. 588 (right to bring replevin for stolen mules); *Chouteau* v. *Boughton* (1890) 100 Mo. 406 (trespass to land); *Hamlin* v. *Carruthers* (1855) 19 Mo. App. 567 (conversion); *Dickson* v. *Merchant's Elevator Co.* (1891) 44 Mo. App. 498 (conversion).

In these cases the right of action was held not to be assignable: *Renfro* v. *Prior* (1887) 25 Mo. App. 402 (slander); *McLeland* v. *St. Louis Transit Co.* (1904) 105 Mo. App. 473 (unliquidated claim for personal injuries), *Beachwood* v. *Railroad* (1913) 173 Mo. App. 371 (same; and that

B.

Are All Actions Arising out of Contract Assignable?

As a matter of substantive law some contracts are still necessarily unassignable; for example all contracts which involve a close personal relation such as that of house servant. And it is doubtful whether the right of action for damages arising upon breach of such a contract is assignable. Apparent-

Revised Statutes 1909, § 5438, providing that rights of action for personal injuries, other than those resulting in death, shall survive to the personal representatives of the injured party, did not change the rule; but see the suggestion *contra* made by Woodson, J., in *Redmond* v. *Railroad*, (1909) 225 Mo. 721, 742).

A cause of action for deceit was held in *Baker* v. *Crandall* (1833) 78 Mo. 584, to survive to the personal representatives. But on the question of whether the right of action for fraud may be assigned the Missouri decisions are conflicting. The following cases held the action assignable: *Conn. Mutual Life Ins. Co.* v. *Smith* (1893) 117 Mo. 261 (suit in equity to recover the land of which the assignor had been defrauded); *Goodger* v. *Finn* (1881) 10 Mo. App. 226 (replevin for fraudulent conversion); *Dean* v. *Chandler* (1891) 44 Mo. App. 388 (action for deceit is assignable if arising out of contract); *Steel* v. *Brazier* (1909) 139 Mo. App. 319, 334 (same). In the following cases the action was held to be not assignable; *Hazeltine* v. *Smith* (1899) 154 Mo. 404 (the right in equity to set aside a deed obtained from the assignor by fraud); *Harrison* v. *Craven* (1905) 188 Mo. 590, 601; *Jones* v. *Babcock* (1884) 15 Mo. App. 149 (a naked right to bring an action in equity to set aside a foreclosure under a deed of trust); *Smith* v. *Harris* (1869) 43 Mo. 557, 562.

Two tests have been suggested for determining whether the action for fraud is assignable. In *Dean* v. *Chandler*, *ante*, the test laid down is whether the fraud arises out of contract. This test, if applied literally, would leave very few cases where the action for fraud would not be assignable. The other test is laid down in *Jones* v. *Babcock*, *ante*, as follows: "The assignment of the bare right to a bill in equity for fraud upon the assignor, is void, as against public policy, and savouring of the character of maintenance. Of course the case is different where the assignment is of something in the nature of property. Here the assignee takes not only the thing assigned, but whatever is necessary to enable him to possess and enjoy the same."

It seems impossible to reconcile all the cases with either of these tests. Since the effect of the fraud in all the cases which the writer has been able to find in Missouri has been to decrease the estate of the party defrauded, there would seem to be no valid reason why they should not all be assignable. In the rather rare cases where the deceit has caused damage to the person or reputation—as in the English case of *George* v. *Skivington* (1869) L. R. 5 Exch. 1—the action should be unassignable just as an action for assault and battery or libel is unassignable. The conflict in the decisions is not confined to Missouri but seems rather general; it may perhaps be accounted for by a feeling that an action for fraud, since it involves an attack on the character of the defendant, should be unassignable, somewhat in analogy to an action for libel which has to do with an attack on the character of the plaintiff.

ly no case involving this question has arisen. In *McQueen* v. *Choteau's Heirs*,[40] it was held that a contract to convey to A a quarter section of land to be selected by him cannot be assigned from A to B so as to enable B to make the selection; this was probably on the ground that B's choice might be very different from A's and therefore to the defendant's detriment. In *Steel* v. *Brazier* [41] there is a *dictum* that everything arising out of contract is assignable; the decision, however, is merely that an action of deceit arising out of contract is assignable. It is hardly to be supposed that an action for breach of promise to marry would be assignable, yet it certainly arises out of contract.

C.

Must the Assignee Sue in his Own Name?

Under the bond and note act of 1835, although the statute read "the assignee *may* maintain an action thereon in his own name," it was held that the assignee must sue in his own name and could not choose to sue in the old way using the name of the assignor.[42] Since the real party in interest statute says that the action "*must* [43] be prosecuted in the name of the real party in interest," it would seem clear that the assignee had no choice, but there is one case [44] which squarely held that he did have an option. The argument in that case was that if the assignor did not object to the use of his name, the defendant (obligor) should not. It is believed that this case has never been expressly overruled, but two later cases[45] are inconsistent with it, and the common practice at the present time is to bring the action in the name of the assignee.

40. (1855) 20 Mo. 223.
41. (1909) 139 Mo. App. 319, 335.
42. *Jeffers* v. *Oliver to the use of Bryans* (1838) 5 Mo. 433.
43. The present form, "shall," would seem to be equally mandatory.
44. *Labeaume to use of Chouteau* v. *Sweeny* (1852) 17 Mo. 153.
45. *Brady to use of Brady* v. *Chandler* (1860) 31 Mo. 38; *Long* v. *Heinrich* (1870) 46 Mo. 603, 605.

D.

The Rights of a Partial Assignee.

It is a fundamental principle of all systems of law that a cause of action shall not be split up into parts so as to oppress the obligor with more than one suit unless he consents to such division. The result of this principle is that if the obligee sues on a part only of a cause of action and takes judgment thereon, he cannot sue later to recover the remainder.[46] Perhaps it might be urged that the obligor should make his objection at the beginning of the suit and not later, but the rule seems to be well settled as stated above.

This being true where the obligee still remains the owner of the chose in action, what is the result where he has attempted to make an assignment of a part of it? The rule against harassing a debtor by more than one suit against his consent would clearly prevent the bringing of two suits, one by the assignor for his part and the other by the assignee for the part attempted to be assigned to him. On the other hand the attempted division ought not to result in the debtor escaping liability. The rule is settled everywhere,[47] therefore, that an attempted part assignment has no effect at common law unless the obligor agrees;[48] and hence the assignor may sue and recover as if no part assignment had been attempted. On the other

46. Ewart on Estoppel (4th ed.) 182, note. The rule applies even though the failure to sue for the entire demand was the result of mistake. *Wickersham* v. *Whedum* (1863) 33 Mo. 561.

47. See 4 Cyc., p. 27; *Love* v. *Fairfield* (1850) 13 Mo. 300. See the prior case of *Laughlin* v. *Fairbanks* (1834) 8 Mo. 367, 370, where an assignment of two-thirds of a judgment seems to have been considered valid at law; the partial assignee lost because no notice of the assignment had been given to the judgment debtor before payment by him to the assignor. This case must now be considered as overruled.

48. It is well settled that the debtor may consent to the division of the cause of action, in which case separate suits may be brought; *Gordon* v. *Jefferson City* (1904) 111 Mo. App. 23. See also *Bank* v. *Noonan* (1885) 88 Mo. 372, 377, where the debtor waived his right to object by failing to raise the question at the trial.

Only the debtor may object to the part assignment; if he does not object, the question cannot be raised as between two interpleaders both of whom are claiming to be the real assignee. *Johnson County* v. *Bryson* (1887) 27 Mo. App. 341.

hand, is there any reason why an equity court, which may deal with a three-sided suit, should not protect the partial assignee and thus carry out the intention of the parties? The obligor is the only one who could conceivably object to this; he might properly object if the suit in equity imposed a greater burden upon him than an action at law. While it may have been true that the burden was heavier some century and a half ago when an equity trial was by depositions and not in open court, it is no longer worthy of consideration, because in practically all jurisdictions the procedure and trial in equity do not differ substantially from a trial in a law court.

In most jurisdictions [49] the partial assignee is given this right to sue the other two parties in equity and the result of giving this right is that from the moment the obligor has notice of the part assignment, he is under obligation not to pay the whole amount to the obligee. While justice requires that the obligor shall have only one suit to defend, it is no substantial increase in his burden to require him to separate what he owes into two or more parts, paying part to the obligee and the rest to the partial assignee or assignees.

While the above statement represents the rule in the great majority of jurisdictions, Missouri holds that the partial assignee has no rights either in law or in equity.[50] This holding seems to have been due to a failure to realize the true ground for not allowing any rights at common law. It is contrary not only to the spirit of the code, but also to commercial convenience and should be overruled.[51]

49. The authorities are collected in 4 Cyc. 27 to 35. See also 4 Century Digest 1196 to 1203.

50. The leading case in Missouri is *Burnett* v. *Crandall* (1876) 63 Mo. 410. See also *Leonard* v. *Ry. Co.* (1896) 68 Mo. App. 48; *Bland* v. *Robinson* (1910) 148 Mo. App. 164, 169.

51. The following cases are to be carefully distinguished from cases of part assignment: one of two joint payees of a note may assign all his interest to another payee or to another third party; *Smith* v. *Oldham* (1838) 5 Mo. 483; *McLeod* v. *Snider* (1892) 110 Mo. 298. When a building contract provided for retaining 15% of the contract price until 90 days after the completion, this was held to be a separable, and, therefore, an assignable claim. *Adler* v. *Kansas City etc. Ry. Co.* (1887) 92 Mo. 242. Where two plaintiffs for the purpose of consolidating their two actions into one, each purchased a half interest in the other's claim, the part

E.

Does the Assignee get Legal Title?

Apart from statute the title to a chose in action cannot, because of the nature of the subject-matter, be transferred without the consent of the obligor. This consent may be given either at the time of or after the obligee's act of transfer, or it may be given in advance, as it is in negotiable instruments. The legislature may, and—as will be suggested at the end of this article—should provide that title shall pass without such assent by the obligor. Does the real party in interest statute have such an effect?

In assignment cases arising under the statute it is quite common to find the courts saying that the assignee has legal title.[52] In *Brady* v. *Chandler* [53] the court said: "The assignee must sue in his own name and not in the name of the assignor. . . . After the assignment there was no title in Brady and Brothers [assignors], legal or equitable. They, then, had no right to bring this action."

The following arguments may be urged to show that legal title does not pass to the assignee:

1. The statute itself does not provide expressly for the passing of title. Being a part of the practice act it would hardly be expected that any change in the substantive law was intended, and statements in the decisions that no such change was effected are quite common. On the face of it, the statute seems to assume that there are certain rights in existence and merely provides that in enforcing these rights the real party in interest rather than some one else shall be party plaintiff. If, therefore, legal title does pass, it must be by a very strained construction of the statute or by out and out judicial legislation.

assignment was held valid because it did not increase the number of actions for the defendant to litigate. *Beardsley* v. *Morgner* (1877) 4 Mo. App. 139, 144.

52. For example, see *Overall* v. *Ellis* (1862) 32 Mo. 322 ("assignee would have a good title to the notes . . . "); *Young* v. *Hudson* (1889) 99 Mo. 102 ("though title was passed to him only for collection . . . ").

53. (1860) 31 Mo. 28.

2. There seem to be no cases which have required the decision that the assignee has legal title, while there are cases which are rather difficult to reconcile with the passing of title. In *Brady* v. *Chandler*, *ante*, where the statement was clear and unequivocal the statement of the court was *obiter dictum*. All that was necessary to decide was that the statute was mandatory, requiring and not merely allowing the assignee to sue in his own name as the real party in interest. It is not unthinkable that one may have legal title and yet be prevented by statute from bringing suit thereon.[54]

3. If the assignee gets legal title, it would seem to follow that, if the chose in action is not yet due and the assignee has paid value in good faith, he would be protected against equitable defenses of the obligor.[55] This point, however, is covered by another statue [56] which provides that in cases of assignments of accounts and non-negotiable instruments the defendant shall be allowed every set-off and defense which existed at the time of his being notified of such assignment.

This statute, however, covers only defenses in favor of the obligor. If there are equitable claims of persons other than the obligor, it would seem that, if the assignee gets legal title, he would take free from these equities unless provided otherwise by statute. It is well settled that if land or chattels are held in trust by T for C, a purchaser from T who both gets title from T and pays for it before getting notice of C's equitable rights is protected. Now if T should hold in trust for C a chose in action against X and transfer that to a *bona fide*

54. Just as one may be prevented from exercising his legal title because of the doctrine of estoppel. To take a simple case by way of illustration: A represents, either by words or conduct, that his horse which is in the possession of B as bailee, does not belong to him; X relying on this representation buys the horse from B; the title is still in A, but he is estopped from asserting it as against X.

55. If a negotiable instrument is transferred according to the tenor of the instrument, before maturity for value, to a *bana fide* purchaser for value, the latter takes free from equitable defenses in favor of the obligor; if the transfer is made after maturity, legal title passes but subject to defenses; the fact that the holder is negotiating the instrument rather than collecting it is enough to put a purchaser on notice.

56. Revised Statutes 1909, § 1867. This statute is declaratory of the common law.

purchaser for value, it would seem to follow that if the assignee got legal title he would be protected from C's equitable claim regardless of whether the chose in action is due or not, and whether it is negotiable or non-negotiable. On the other hand, even if legal title did not pass, it would seem that, if the assignee has a legal right to sue and not a mere equity, he ought to take free from C's equitable claim.[57] The cases in Missouri on this point are in a very unsatisfactory condition. In a fairly early case [58] it was correctly held that a *bona fide* purchaser of a judgment held by A on a resulting trust from B took free from B's equity. On the other hand in *Turner* v. *Hoyle* [59] there is a *dictum* that the *bona fide* endorsee of a negotiable note after maturity took subject to all equities including that of a *cestui que trust.* This seems especially bad because title passed, the note being negotiable. Neither the counsel nor court alluded to the possibility of there being a difference between an equity in favor of the obligor and one in favor of the *cestui que trust.* This *dictum* has unfortunately been followed.[60]

If, instead of an assignment by a trustee, "the true owner of a negotiable note overdue or of a non-negotiable note clothe another with the usual evidences of ownership or with full power of disposition, and third persons are led into dealing with such apparent owner, they will be protected in their dealing." [61] In *Turner* v. *Hoyle*,[62] a trust case, the court attempted to

57. There are also strong practical commercial reasons for this. The assignee can look up the obligor and ascertain whether he has any defenses, because he knows or may know who he is; C, on the other hand, not being a party to the chose in action, the assignee has no means of knowing about this equity. For this reason it is common to speak of C's claim as a "*latent*" *equity.*

58. *Garland* v. *Harrison* (1852) 17 Mo. 282. It seems to be the only case of the assignment of a non-negotiable chose in action by an express trustee. The nearest case to it is *International Bank* v. *German Bank* (1879) 71 Mo. 183, 198. Apparently the *Garland Case* has not been cited in any later case.

59. (1888) 95 Mo. 337. It was only a *dictum* because the endorsee took with notice.

60. In accord see *Booher* v. *Allen* (1899) 153 Mo. 613, 633; *Payne* v. *The Bank* (1890) 43 Mo. App. 377, 381. *Mayer* v. *Bank* (1900) 86 Mo. App. 108, 113.

61. *Lee* v. *Turner* (1886) 89 Mo. 489. See also *Newhoff* v. *O'Reilly* (1887) 93 Mo. 164.

62. (1888) 95 Mo. 337, 346.

distinguish that class of cases from the trust cases as follows: "This is not a case, however, in which this principle, which operates by way of estoppel, can be invoked; Jamison [the trustee] was never clothed with full power to dispose of this overdue negotiable promissory note, or of the deed of trust given to secure it; his power of disposition was qualified and limited to the single purpose of disposing of it for reinvestment for the benefit of the trust." The error here lies in the failure to distinguish between "power" and "right." Of course a trustee has no *right* to do anything that would amount to a breach of trust; but it is difficult to see why he does not have just as much *power* to make a transfer to a *bona fide* purchaser and thus cut off equities as one has who, not being a trustee, is clothed with *indicia* of ownership. In fact the trust case seems, if anything, a little stronger case for the purchaser than the estoppel case.

4. If the assignee gets legal title one would naturally expect, in the absence of a statutory provision, that it would be within the power of the assignor to give a release to the obligor; yet it is well settled that if the obligor pays the assignor in good faith without notice of the assignment, he is protected. And this is true in spite of the statutory provision [63] discussed *ante*,[64] that "it shall not be in the power of the assignor of a demand after assignment, to release any part of it, nor shall any assignee acquire greater title thereto or interest therein than the person had from whom it was acquired." As previously explained the literal effect of this provision has been nullified by another statute,[65] so that the rule in Missouri is the same as if there were no statute on the point; namely, that while the assignor does not have the *right* to receive payment and give a release to the obligor, he has the *power* to do so and if the obligor has paid in good faith he is protected. If on the other hand, a negotiable chose in action is transferred even after maturity, so that the transferee takes subject to equities in favor of the

63. Revised Statutes 1909, § 2775. This was first passed in 1835.
64. See *ante*, pp. 9 *et seq.*
65. Revised Statutes 1909, § 1867. See footnote 28, *ante*.

obligor, the obligor must at his peril pay to the holder of the note as the one who has legal title.[66]

5. If the assignee gets legal title it would seem to follow that if the assignor subsequently attempted to assign the same chose in action to another person, the second assignee would get nothing. Yet it seems to be well settled that if the second assignee, being a purchaser for value without notice of the first assignment, should collect payment from the obligor; [67] or reduce the claim to judgment in his own name; [68] or effect a novation with the obligor, whereby the obligation in favor of the assignor is superseded by a new one running to himself;[69] or if he obtains the document containing the obligation where the latter is in the form of a specialty[70]—in all these cases the second assignee is protected. Further than that, in many jurisdictions, including Missouri, if the second assignee, being a *bona fide* purchaser of the first assignment, gives notice to the obligor before the latter receives notice of the first assignment, the second assignee is protected.[71] It is not impossible, of course, for one party to have legal title and another to have the power, though not the right, to destroy that legal title; but such instances are comparatively rare.[72]

66. There seem to be no cases in Missouri on this point. See Daniel on Negotiable Instruments (6th ed.) § 1233a, citing *Davis* v. *Miller* (1857) 14 Grat. 1.

67. *Bridge* v. *Conn. Co.* (1890) 152 Mass. 343.

68. *Judson* v. *Corcoran* (1855) 17 How. 612.

69. *New York Co.* v. *Schuyler* (1865) 34 N. Y. 30, 80.

70. *Fisher* v. *Knox* (1850) 13 Penn. 622 (judgment bond case). See Ames' Cases on Trusts (2d ed.) 328.

71. The leading case on this point is *Dearle* v. *Hall* (1828) 3 Russel 48. See *Murdock* v. *Finney* (1855) 21 Mo. 138; *Houser* v. *Richardson* (1901) 90 Mo. App. 134, 139. The doctrine has been much criticised, because it is difficult to find any sound common law basis for a duty on the first assignee towards a possible later assignee to give notice to the obligor. In Missouri the doctrine does not apply where the contract is between an assignee and one claiming under garnishment proceedings. The garnishee cannot take advantage of the rule. *Mo. Pac. Ry. Co.* v. *Wright* (1889) 38 Mo. 141.

72. In England one who has title to a chattel may lose it by a sale in market overt. In this country by registry statutes a transferee of legal title to land or chattels may, by failure to comply with the statute, be postponed to a subsequent *bona fide* purchaser who does so comply. A *bona fide* purchaser of negotiable paper payable to bearer or endorsed in blank is protected, though the transferrer has no title.

73. The obligor cannot object that the assignment was merely by way of gift. See *Barnes* v. *McMullins* (1883) 78 Mo. 260, 267, *semble.*

If the assignee gets legal title, then an assignment by way of gift *inter vivos* would be irrevocable from the moment of assignment.[73] There seem to be no cases in Missouri squarely in point. In *Vogel* v. *Gast*[74] it was held that where a chattel is in the adverse possession of another a mere verbal gift thereof—there being of course no delivery—was ineffectual to pass title to the chattel. The question of whether the legal title to get back the chattel might not thus pass by gift was not raised.

On the other hand, even if the gift is held to be irrevocable from the moment of assignment, it would not necessarily show that legal title did pass. The donee gets a legal right to sue, the failure to get legal title is not due to any act omitted by the assignor but to the nature of the subject-matter, and there is no good reason why the intention of the parties should not be given legal effect.

In the face of the above arguments it is difficult, if not impossible, to affirm that the legal title passes at the time of assignment. But it may be urged, that, though legal title does not pass then, it does pass upon notice being given to the obligor. It is certain that the substantive law fixes the extent of his rights at that moment, and in trying to express this courts not infrequently say that the title of the assignee is complete only when he gives notice. The difficulty with such a position is that whatever right the statute gives to the assignee—and it purports to make only a change in procedure by requiring him to sue in his own name—is given at the moment of assignment; of course such a right may be cut off either by the obligor paying the assignor in good faith before notice of the assignment, or by a later *bona fide* purchaser giving prior notice to the obligor; but this is by virtue of the law apart from statute, and not because of any provision of the statute. If legal title passes upon notice given to the obligor, what sort of right did he have before such notice was given? If he gets legal title at all it must be by force of the statute; the statute says nothing about giving notice and notice is not necessary before bringing suit.

F.

May An Assignee for Collection Sue in His Own Name?

So far it has been assumed that the assignment was by way of sale or gift. Suppose, however, that the assignment is for the convenience of the assignor in making collection, is the assignee in such a case the real party in interest?

The answer to this question is that this case is covered by the exception in the second section of the statute in regard to express trusts. An assignee for collection is primarily an agent —that is, one whose duty is to act for his principal. But the law of agency determines nothing in regard to his relation to his principal's property. The principal may give him mere possession—if it is a chattel, he becomes bailee, and, if land, probably a tenant at will or at sufferance; if, however, he receives title or the legal right of an assignee for the benefit of his principal he becomes trustee thereof. Being a trustee, it would seem to be clear that he may sue in his own name and collect. On this point the Missouri cases are all happily in accord with principle.[75] The contention *contra* has even been made in cases where the transferee for collection has received title of a negotiable instrument by endorsement; these cases have been decided similarly that the transferee may sue.[76] In some other states having similar statutes, there have been cases holding that the assignee for collection could not sue, because he was not beneficially interested and therefore not the real party in interest.[77]

G.

May a Cestui Que Trust Sue?

Suppose T holds in trust for C some land and chattels and choses in action; there is a provision of the statute that a trustee

74. (1885) 20 Mo. App. 104, 107.

75. *Webb* v. *Morgan* (1851) 14 Mo. 428; *Overall* v. *Ellis* (1862) 32 Mo. 322 (negotiable note payable to order, transferred by delivery); *City of St. Louis to use of Becker* v. *Rudolph* (1865) 36 Mo. 465; *City of Kansas to use of Enright* v. *Rice* (1880) 89 Mo. 685; *Guernsey* v. *Moore* (1895) 131 Mo. 650, 668.

76. *Beattie* v. *Lett* (1859) 28 Mo. 596; *Simmons* v. *Ball* (1865) 35 Mo. 461; *Young* v. *Hudson* (1889) 99 Mo. 102.

77. 64 L. R. A. 585, note.

of an express trust[78] may sue in his own name. Is the word "may" to be interpreted as "shall"[79] or is it to be given its literal meaning? If the latter, then it would seem that either the trustee or the *cestui* may sue for injuries to the land and chattels, or to collect the chose in action—the *cestui que trust* being the party benefited thereby.

The first case in which the question arose squarely was *Richardson* v. *Means*.[80] In that case the plaintiff's father had conveyed a female slave to one Jozner "upon trust that the said Jozner, his executor, etc., shall permit my said daughter to hold possession of and take the use, hire, and profit of the said Maria and her increase to her sole and separate use during her life, etc.; and at the death of my said daughter, the said Maria and her increase to be equally divided between her children." The plaintiff sued the defendant for the recovery of the slave and her two children. The court held that on this state of facts the plaintiff was not the proper party to sue, saying: "Under the old form of proceeding this suit must have been brought by the trustee at law, but if, from any cause, the legal ownership could not have been made effectual for the protection of the wife's equitable right, the court would at her suit, upon a proper statement of facts, all the necessary parties bring before them, and have administered the appropriate equitable relief. But it is supposed that all this is changed by

78. The term "express trust" is probably used here in order to exclude constructive—that is non-consensual—obligations to turn over property, called usually "constructive" trusts. They are called trusts because the remedy is similar to the remedy which a *cestui que trust* has against his trustee for failure to convey trust property upon the termination of the trust. An exact analogy to this equitable obligation to turn over specific property is the common law obligation in quasi contract to pay for the value of that which the defendant unjustly detains from the plaintiff. Hence, if the plaintiff prefers to get a general money judgment instead of the specific property, his remedy is indebitatus assumpsit the obligation is called quasi contractual because the remedy is contractual.

79. Such an interpretation is not without precedent in Missouri. The bond and note statute of 1825 provided merely that the assignee "may" sue in his own name, but the courts held that this was mandatory. *Jeffers* v. *Oliver to use of Bryans* (1838) 5 Mo. 433.

80. (1856) 22 Mo. 495. In *Gibbons* v. *Gentry* (1855) 20 Mo. 468, 477, the court said: "The plaintiffs show a deed of trust by which the legal title to the property appears not in them at least. Now these trustees if they accepted the trusts, must sue if they are alive. . . . "

the new code which is true to some extent. It must be observed, however, that the code has not changed the rights of parties, but only provided new remedies for their enforcement."

This case was followed in *Myers* v. *Hale*[81] in which the *cestui que trust* of land held under a deed of trust brought trover for corn which had been raised on the land. The court held that the plaintiff could not recover because the trustee had not refused to act and was therefore the only party who could sue.

In *McComas* v. *Covenant Mutual Life Insurance Co.*,[82] the plaintiff's husband had taken out a life insurance policy payable to him, his executors, etc., for the use and benefit of the plaintiff. The husband, and, at his death, his personal representative, became trustee of this chose in action against the insurance company for the benefit of the plaintiff, and according to the decision in *Richardson* v. *Means*, the plaintiff would not have been allowed to recover if the trustee was willing to act. The case of *Richardson* v. *Means* was not cited either by counsel or court and the decision was that under the code the widow was entitled to sue as a real party in interest, a recovery by her being a bar to another action by the trustee. The court cited as authority for this a case [83] which will be shown later in this article not to be a trust case at all.

The *McComas Case* has been followed in *Chouteau* v. *Boughton* [84] where the action was for injury to land held under a trust deed. Counsel for the defendant cited *Myers* v. *Hale*, but the court gave it scant consideration and allowed the *cestui que trust* to recover. In *Barton Bros.* v. *Martin* [85] the court lays down the rule of the *McComas Case* that the *cestui que trust* was held to be barred by a prior action brought by the trustee in which the trustee lost. In *Canada* v. *Daniel*,[86]

81. (1885) 17 Mo. App. 204, 210.
82. (1874) 56 Mo. 573.
83. *Rogers* v. *Gosnel* (1872) 51 Mo. 456. It was a case of a beneficiary of a contract, not the beneficiary of a trust.
84. (1890) 100 Mo. 406, 411.
85. (1894) 60 Mo. App. 351, 357. In the following cases where the action was brought by the trustee the rule of the *McComas Case* was laid down that either the trustee or the beneficiary of the trust could sue: *Snider* v. *Adams Express Co.* (1883) 77 Mo. 533; *Graham* v. *Allison* (1887) 24 Mo. App. 516, 523; *Anthony* v. *Ins. Co.* (1891) 48 Mo. App. 65, 70.
86. (Mo. App., 1913) 157 S. W. 1034.

where the trust consisted of land and chattels and the beneficiary sought to have trust funds restored which had been wrongfully paid by trustees to the defendant, the court assumed to follow the rule of the *McComas Case*; but the trustee had refused to sue, and hence, apart from any statute, the beneficiary would be entitled to sue, joining the trustee and the third party as parties defendant.

The reasoning of these two lines of cases is plainly contradictory and the courts have made no attempt to reconcile them. Nor does it seem possible to draw a distinction upon the facts which will fit all the cases. Oddly enough, the *McComas Case* was one of an active trust, it being the duty of the administrator as trustee of the chose in action against the insurance company to collect it and hand over the proceeds to the *cestui que trust*; while in *Richardson* v. *Means* the trust was a passive one. Nor can any distinction be drawn between trusts of real and trusts of personal property. In each of the cases just mentioned the trust was of personalty, whereas in *Myers* v. *Hale*, which followed the *Richardson Case*, and *Chouteau* v. *Boughton*, which followed the *McComas Case*, the trust property consisted of land. It is to be observed that the statute does not justify any such distinction between trusts as here suggested; so far as the statute is concerned it must be interpreted as allowing all trust beneficiaries to sue or none.

There being no way to reconcile the decisions, which line of cases is to be preferred? When it is considered that it is very easy in this state to get rid of a trustee who refuses to do his duty and get a new one appointed in his place,[87] and that it is the settled law of trusts apart from statute that if the trustee refuses to bring an action against a third party the beneficiary may sue the trustee for breach of trust and join the third party so as to complete the litigation in the one suit, there seems to be no need for the doctrine of the *McComas Case*. If the doctrine is retained it should be carefully limited to simple cases where the *cestui* or *cestuis* are of full age and *sui juris*, and, therefore, able to put an end to the trust at any

87. Revised Statutes 1909, §§ 11919, 11920.

time. In the *McComas Case* this was the situation, while in the *Richardson Case* two of the three beneficiaries were probably minors. It should be added that the courts paid no attention to these facts in making their decision in the two cases, and that the statute does not justify any such middle ground.

H.

May an Heir Sue?

The statute provides that an administrator or an executor may sue without joining with him the beneficiary of the suit. Does this mean that he must sue or that the heir may also sue? This question, so far as the statute is concerned, is similar to the question of whether a *cestui que trust* may sue, and so far as a reasonable construction of the statute is concerned, no middle ground is possible: either an heir cannot sue at all or he may always sue, either for injuries to the chattels of the decedent or for the collection of choses in action due to the estate.

The general rule is laid down in all the cases that the heir cannot sue.[88] If there is an administrator or an executor acting, there seems to be no exception to this; but in *Byers* v. *Weeks* [89] the court, while affirming this general proposition that the administrator must sue and not the heir, held that where the administrator had been discharged and afterward additional assets had been discovered, the heirs at law were entitled to a remedy in equity to collect these assets, there being no adequate remedy at law. In *McCrackin* v. *McCaslin*,[90] it was held that where the decedent left no debts and the heirs were of full age an administrator need not be appointed if the heirs could agree to a distribution of the property. This has been followed in

88. *Brueggeman* v. *Jurgensen* (1856) 24 Mo. 86, 89: "If the heirs were permitted to join in such an action a confusion would result which no court could disentangle." *Smith* v. *Denny* (1865) 37 Mo. 20; *Hillman* v. *Wellenkamp* (1880) 71 Mo. 407; *Griswold* v. *Mattix* (1886) 21 Mo. App. 282, 285; *Beecraft* v. *Lewis* (1890) 41 Mo. App. 546, 554; *Green* v. *Tillman* (1894) 124 Mo. 372, 377; *Perkins* v. *Goddin* (1905) 111 Mo. App. 429, 438.

89. (1903) 105 Mo. App. 72.

90. (1892) 50 Mo. App. 85.

Richardson v. *Cole.*[91] In *Griesel* v. *Jones,*[92] the question arose squarely, whether in such case the heirs might sue a debtor to the estate. It was held that they might as an exception to the general rule. The court said: "What is the condition under which an exception to this general rule should be permitted? Obviously it should embrace these three elemental facts: First, the absence of debts against the estate; Second, the legal age of each of the heirs entitled to share in its distribution; and Third, a unanimity among them as expressed by their agreement or acts to dispense with an administrator." The wisdom of the exception seems obvious; it is interesting to note that no attempt has been made to base it upon the real party in interest statute, but upon cases from other states.[93]

I.

"*A Person with Whom or in Whose Name a Contract is Made for the Benefit of Another.*"

The statute provides that "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." What does this mean?

If a person makes a contract, apparently acting for himself, but in reality acting as agent for another, either the agent or the undisclosed principal may sue thereon. The agent in such a case is really the trustee of the chose in action for his principal—not strictly an express trustee because no words showing an intent to be a trustee may be shown; but the fact that he is acting for his principal shows that he intends to use the contract not for his own benefit, but for the benefit of his principal. Thus the only difference between this trust and the ordinary express trust is the evidence by which it is proved. Hence the statute may well provide that the term express trust shall include such a case as this.

91. (1900) 160 Mo. 372, 377.

92. (1906) 123 Mo. App. 45, 55. See also *McDowell* v. *Orphan School* (1900) 87 Mo. App. 386, where the ancestor had been dead 35 years and the heirs sued to recover a legacy due to the ancestor.

93. The court in *McCracken* v. *McCaslin* cited cases from Alabama, Georgia, Michigan, Mississippi, and New Hampshire.

It was not always recognized that the agent in such a case was a trustee for his principal; this part of the law grew up as a part of the law of agency rather than of trusts, and hence we have, apart from statute, the anomaly that either the agent or the undisclosed principal may sue. The real party in interest statute seems to have made no change in this rule.[94] Cases where the agency and the identity of the principal are known, but the contract is nevertheless taken in the name of the agent, seem always to have been recognized as trust cases, and apart from statute, only the agent can sue.[95] It seems, therefore, a fair inference that the cases meant by the words "a person *with whom* a contract is made for the benefit of another" were these agency cases.

It is fairly clear also, that "a person *in whose name* a contract is made for the benefit of another" was meant to include another distinct class of cases. If A buys land from X but takes title in the name of B, it may be shown that B was not to take beneficially, but upon trust,[96] and unless B was a dependent of A's there is a presumption to that effect. This is usually called a resulting trust. So if A merely made a contract with X but had the contract made in the name of B instead of his own, there would be similarly a resulting trust of the contract.[97] This would be, literally, a contract made in the name of one person for the benefit of another; and since the resulting trust here is based on the intent of the parties, it is not wholly inappropriate to use the term "express trust" to include it.

J.

The Beneficiary of a Contract.

It seems clear enough that the agency and resulting trust cases just discussed are covered by the statutory definition of

94. *Snider* v. *Adams Express Co.* (1883) 77 Mo. 523, holding that an agent of an undisclosed principal may sue. See also *Draper* v. *Farris* (1893) 56 Mo. App. 417.

95. *Harrigan* v. *Welch* (1892) 49 Mo. App. 496, 504. On the other hand, unless the contract is clearly made with the agent, only the disclosed principal may sue. *White* v. *Bennet* (1821) 1 Mo. 102.

96. *Hall* v. *Hall* (1891) 107 Mo. 101.

97. There seems to be no case in Missouri squarely in point but a very similar case is that of *Garland* v. *Harrison* (1852) 17 Mo. 282, where A bought a judgment and took an assignment of the judgment in the name of B.

an express trust, and that they give a satisfactory answer to the question of what the definition means. There is, however, another class of cases which has been sometimes thought to be referred to.

If A makes a contract with B whereby A agrees to pay money to X, X, not being a party to the contract, was formerly not allowed to sue, and that is still the law in England and in some of the jurisdictions in this country.[98] There are two classes of cases depending upon whether the money to be paid to X is or is not in satisfaction of a claim which X has against B; if it is, then we may call X a payment beneficiary, because a performance of the contract will result in a payment of the claim which X has against B; if it is not, then X may be properly called a gift beneficiary because the performance of the contract will result in a gift from B to X. Within the past century about two-thirds of the American jurisdictions have changed the common law in this respect and allow the payment beneficiary to sue. The leading though not the earliest case on the subject was the New York case of *Lawrence* v. *Fox*.[99] In something like half the jurisdictions the gift beneficiary is also allowed to recover.

It is to be observed that the payment beneficiary was in need of a remedy against the promisor only in case B, the promisee—his debtor—became insolvent; and if B did become insolvent and legal execution became impossible, the payment beneficiary would be entitled—apart from the doctrine of *Lawrence* v. *Fox*,—to reach this asset by a creditor's bill for equitable execution. On the other hand, if the gift beneficiary is denied a remedy against the promisor, he has no remedy whatever; and furthermore, the promisee in such case could recover only nominal damages on the contract because nonperformance causes him no loss; he could recover substantial damages only by suing in quasi contract for the value of what the promisor had received from him on the face of the promise.

98. For a full discussion of the subject with exhaustive citation of English and American cases see an article by Professor Williston, 15 Harvard Law Review 767.

99. (1859) 20 N. Y. 268.

From the standpoint of principle it would have been better to give the equitable remedy of specific performance to the gift beneficiary; if this had been done the promisee could have been made a party and all three parties would have been concluded by the decree. The remedy which is actually given to both gift and payment beneficiaries is an action of special assumpsit based upon the promise.[100]

In Missouri the rule seems to be well settled that either kind of beneficiary can recover. The earliest case on the subject is *Robbins* v. *Ayres*;[101] this was a case of payment beneficiary, and it was held that where the contract was not under seal he could recover. This was followed in *Meyer* v. *Lowell* [102] and *Flannigan* v. *Hutchinson*.[103] *Robbins* v. *Ayres* was decided before the practice act of 1849; neither of the other two cases mentioned that act as having anything to do with their decision. In *Rogers* v. *Gosnel* [104] the court, after deciding upon the authority of some New York cases that a payment beneficiary might recover even though the contract was under seal, added: "I see no good reason for keeping up this sort of a distinction of contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name? The party in whose name the contract is made for the benefit of another, is declared by our practice act to be a trustee of an express trust and such trustee may sue in his own name. It does not follow that because a trustee is allowed to sue in his own name on such a contract, that the beneficiary is precluded from doing so. A recovery by either would be a bar to another action, whether brought by the trustee or beneficiary. In some classes of cases the trustee alone can sue, but this is not one of that character."

100. Or its code equivalent.
101. (1847) 10 Mo. 538. The question was discussed but not decided in *Bank* v. *Benoist* (1847) 10 Mo. 520.
102. (1869) 44 Mo. 328, 331.
103. (1871) 47 Mo. 237.
104. (1873) 51 Mo. 466, 469. The unfortunate *dictum* in this case became the basis for the decision in *McComas* v. *The Ins. Co.* (1874) 56 Mo. 573 that a *cestui que trust* may sue.

It must be admitted that the words of the statute defining an express trust may be construed to include the cases of the beneficiary of a contract; but was it so intended by the framers of the statute and is it a sensible interpretation? The following arguments would seem to compel a negative answer.

1. Such an interpretation must assume that the beneficiary of the contract is the real party in interest. Whatever may be said about the gift beneficiary this is certainly not true of the payment beneficiary; the promisee and the payment beneficiary are about equally interested in the performance of the contract, and neither can be called exclusively the real party in interest. Even in the case of the gift beneficiary, it can hardly be said that the promisee has *no* interest in the performance of the contract, where, in case of breach and failure of the gift beneficiary to sue, he is entitled to nominal damages in an action for breach of the contract, or to the value of the amount received by the defendant in an action based on quasi contract.

2. There is, on the part of the promisee, no intent, either express or to be implied from circumstances, to become a trustee. He undertakes no positive duty whatever. The money is to be paid to the beneficiary, not to him. Where the beneficiary is allowed an action, the promisee must account for any payment received by him, but this is because he has violated his negative duty to keep his hands off.

3. That the framers did not actually intend to cover these cases is a fair inference from the fact that before the statute a payment beneficiary was allowed to sue, and that it was apparently not till twenty-four years after the statute was passed that anyone thought of referring to it as having anything to do with the case. *Lawrence* v. *Fox*, which is the leading case on the subject in American law, makes no such reference.

4. The statute is avowedly a regulation of procedure merely. The difficulty in contract beneficiary cases has not been a question of *how* his right shall be enforced but really a question of substantive law—whether he has any right at all. Wherever he is given the right there seems to be no dispute in American

jurisdictions that his remedy is special assumpsit on the promise.[105]

5. Finally, no good whatever is accomplished by construing the statutory provision to apply to contract beneficiary cases, and much confusion of thought has resulted therefrom. As the substantive law on the subject has developed, a promisee has no right to either rescind or to collect after the beneficiary assents; and before the beneficiary assents he may either rescind or collect and disregard the beneficiary. In other words he never sues as trustee; he either has a right to sue as beneficial owner and as party to the contract, or has no right to sue at all. Then what possible good is accomplished by calling him a trustee of any sort?

Perhaps it may be suggested that although the promisee in these cases is not in any accurate sense an express trustee, he is a constructive trustee for the beneficiary, and that the statute—though awkwardly constructed—was meant to include these constructive trusts in its definition of express trust. If by the term "constructive trust" is meant that the legal title to the contract is in the promisee while the beneficial is in the beneficiary after he assents thereto, every one would probably agree. The futility of applying the statute to these cases, as pointed out in argument five *ante* is just as great whether they are called express or constructive trusts; and is it not objectionable to use such a term as constructive trust with such a meaning when the term fiduciary is quite adequate? It was apparently first used in this sense by Professor Keener who called the vendor of land under an enforceable contract a constructive trustee;[106] it must be conceded if the vendor of land is thus classified then the assignor of a chose in action —where legal title does not pass to the assignee—and the promisee in the contract beneficiary cases might almost as well be

105. In England where neither the payment nor gift beneficiary is allowed a remedy at law, the gift beneficiary in some cases has been allowed an equitable remedy, not upon the basis of specific performance, but by treating the *promisor* as a trustee. *Moore* v. *Darton* (1851) 4 De Gex & Smale 517. It is clear that there is no trust in any accurate sense of the term, because the promisor's duty is to pay money out of his general assets and not a duty to account for any specific fund.

106. 1 Columbia Law Review 1, 6.

included. The objections to such a usage may be stated briefly as follows: 1. The obligation of the vendor, assignor and promisee is in no sense constructive;[107] that is, the obligation is consensual, while a constructive obligation is properly one which the law imposes upon a party irrespective of, and usually *contra* to his intent, as in case of property obtained by fraud or mistake. 2. In none of these cases can there be said to be any unjust detention [108] of the property which is the basis of the real constructive trust. 3. In the assignor and promisee cases there is no equity jurisdiction.

107. The obligation of the vendor to convey upon the vendee's paying or securing the purchase price according to the terms of the contract exists at common law as well as in equity; the difference between common law and equity here consists merely in that equity gives specific redress while the common law gives only damages. The obligation of the assignor and promisee to keep their hands off and allow the assignee and beneficiary to recover is exactly according to their intent.

108. Until the purchase money has been received or secured according to the terms of the contract there is clearly no unjust detention of the property and therefore no obligation to turn over the property to the vendee because of any unjust enrichment. If the purchase money *has* been received or secured according to the contract the vendor is under an obligation to turn over the property, but it is not a constructive obligation in any sense but one which the common law imposes and for which equity gives specific redress according to the intention of the parties. In this latter case the obligation is more closely analogous to that of an express passive trustee whose duty is merely to convey; but it is not exactly that because there is no intention to become a trustee. Where the purchase money has not been paid or secured it is still farther from being an express passive trust because he has an interest in holding the property as security which is quite inconsistent with his being a trustee. The analogy of the common law mortgage is closer here but that is not a perfect one, because while a vendor may without judicial proceedings put an end to the vendee's right to specific performance in case of the latter's substantial default, such a right in the mortgagee is not generally recognized.

As to the assignor, there is clearly no obligation to turn over property to the assignee. The obligation is to do nothing. The assignor has done all he can do without the consent of the obligor. He is not detaining unjustly anything which in good conscience belongs to the assignee. The only reason why he has not transferred the legal title is because it is impossible—due to the nature of the subject matter—to transfer it by his own act.

As to the promisee, there is clearly no unjust detention of anything, because if the beneficiary recovers at all it is on the basis of a promise—he needs no transfer of anything from the promisee. If a payment beneficiary is not allowed to recover on the promise, and the promisee—his debtor—becomes insolvent, so that legal execution is impossible, the payment beneficiary may by creditor's bill for equitable execution have a constructive trust declared of the chose in action for his benefit; this

K.

Summary.

It is difficult to point out any salutary result of the real party in interest statute in Missouri except that the assignee of a chose in action is allowed to sue in his own name in all actions rather than in that of the assignor, and, therefore, need never go into equity as he was formerly compelled to do if the assignor refused to allow him to use his name. On the other hand, it has been productive of much confusion and some injustice. While it has had apparently little or no effect upon the rights of a contract beneficiary, it has—because of the awkward way in which the statute was drawn—been referred to in connection with those cases to the detriment of clear thinking. Following one of these unfortunate cases, the question as to whether the beneficiary of a trust may sue has been raised and the law on the point is now in a very unsatisfactory and unsettled condition; fortunately, the similar question as to whether an heir may sue has been dealt with without paying any attention to the statute. The substantive rights of the total assignee of a chose in action seem to have been affected not at all—at least the rights have not been increased thereby. The right of a partial assignee to sue has been denied, though perhaps in strict justice this unfortunate result should not be charged entirely to the real party in interest statute, but to the practice act as a whole in abolishing the difference in procedure between law and equity.

L.

Suggestions.

The power of attorney device has played a useful and necessary part in making choses in action practically assignable, and

obligation arises, however, only upon insolvency, and is based upon the unjust enrichment which would ensue if a debtor could escape having his intangible assets used to pay his debts because of the clumsiness of common law execution. To apply the real party in interest statute to a case of this sort and say that in such a case the promisee may sue for the benefit of a beneficiary is absurd; the promisee being insolvent, the creditor may prevent him from suing and insist on suing for himself. . . .

has done much to fix the rights of the assignee; now that the results are accomplished, however, there seems to be no further use for it; it has become an archaism which should be eliminated by making the assignee owner, and no longer a representative of the assignor. In view of the present confusion—not only as to the effect of the real party in interest statute, but in the use of such terms as "title," "equitable title," etc.—and the difficulty of finding a case where it would be necessary to decide whether or not legal title passed, the elimination can be accomplished satisfactorily only by a legislative act which will replace both sections of the present real party in interest statute. In such an act the following points should be covered:

1. That where by the substantive law a chose in action is assignable, the assignee shall become the legal owner thereof, either at the moment of assignment or at the moment of notice received by the obligor.[109] If the former point of time is chosen, his right should be made subject to the release of the obligor by the obligee for value. And if it be considered advisable to retain the present rule protecting the later *bona fide* assignee who first gives notice, this should also be fixed by statute.[110]

109. The English Judicature Act, 36, 37 Vict. c. 66, Sec. 25, Subsec. 6, passes title to the chose in action from the moment of notice to the obligor, provided the assignment and the notice are both in writing. The statute reads as follows:

"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities, which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: *Provided* always, that if the debtor trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

110. This would have the additional advantage of giving the rule a satisfactory basis, which it now lacks.

2. That the assignee, if a purchaser for value in good faith, should take free from latent equities of third persons.[111]

3. That a partial assignment be declared valid; that the partial assignee and his assignor may join as plaintiffs; in case the assignor refuses to join, that he may be made a co-defendant. The result of this would be to make the partial assignee co-owner of the chose in action, and correct the present rule on this point in Missouri.

In addition, the present uncertainty in regard to the right of a *cestui que trust* to sue should be removed by a statute; the right to sue should either be denied entirely—except as at present allowed apart from statute—or allowed only in certain instances; or it might be allowed in any case in the discretion of the court.

GEORGE L. CLARK.

111. The present set-off statute, previously referred to, provides that he shall take subject to defences of the obligor before the latter had notice.