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it would seem that the Montana view has considerable support and is better reasoning. It is doubted that any state would follow the dictum of the Montana court in holding that the mere fact that the promisee could not take until the creditors had been satisfied would be a sufficient reason to grant specific performance. Of course, it is apparent that if there was an actual intent that the claimant would be compensated for the "reasonable value" of the services, a different problem would be presented.

There is a danger present in filing a claim as a creditor as it may have the effect of precluding an action for specific performance as an election of remedy. It is generally held, in the absence of extenuating circumstances that such presentment of a claim as a creditor is a bar to an action of specific performance.⁸⁵ Montana would no doubt follow the general rule, but certain facts can be presented whereby the filing does not constitute a final election.⁸⁶

It must be kept in mind, however, in determining what procedure will best benefit your client, that an election to bring suit for specific performance may place the claimant in a worse position than if a claim is filed against the estate for breach of contract. Should the estate be insolvent, the creditors will be satisfied first and the claimant will share with the distributees on a pro-rata basis from the remainder; thus the situation may arise whereby he will receive nothing at all, or possibly only a reduced amount.

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⁸⁵Laird v. Laird, 115 Mich. 352, 73 N.W. 382 (1897); Reich v. Misch, 316 Mich. 264, 25 N.W. 2d. 57 (1946); Ballou v. First National Bank, 98 Colo. 101, 53 P.2d. 592 (1935).

⁸⁶Rowe v. Eggum, 107 Mont. 378, 87 P.2d. 189 (1938). It is not an election of remedies so as to bar an action for specific performance when made under a mistake of rights.

SUBROGATION CLAIMS IN INSURANCE AND THE REAL PARTY IN INTEREST STATUTE

The purpose of this article is to discuss the Real Party in Interest Statute, and its particular application to Insurance Law. Almost every state in the union now has a statute, which in effect is a real party in interest statute. Section 93-2801, *Revised Codes of Montana*, 1947 provides:

"Every action must be prosecuted in the name of the real party in interest, except . . ." (Exceptions not applicable).

This statute had as its origin the New York Code, where this pro-

vision was adopted in 1848. The framers of that code said that "he who has the right, is the person to pursue the remedy. We have adopted this rule."¹ The Supreme Court of Montana has stated the purpose of the statute. In *Federal Land Bank of Spokane v. Green*,² the court said that the purpose is to protect the adversary from another suit for the same cause of action, but by a different party. Again, the court defined the real party in interest statute in *Lefebure v. Baker*,³ stating that the party whose right has been invaded is the person in whom is the right of action. The court further stated that if no right or interest in the subject matter of the controversy is present, either personal or fiduciary, then a cause of action cannot be stated concerning that subject matter.

Subrogation is an equitable doctrine that has become well established in the law. It protects one secondarily liable, by allowing him to recover against the principal obligor, in the same capacity as could the creditor in the first instance. Subrogation applies to Insurance Law, as well as other fields. "An insurer required by contract to indemnify the insured for any loss suffered is entitled to be subrogated to any legal rights belonging to the insured at the time of loss by virtue of which he might have compelled another to make compensation in whole or in part for such loss."⁴

Who may or must bring the action against the wrongdoer becomes of major import where the insurer is subrogated to the rights of the insured.

At Common Law, the rights of action were very limited. The court would only recognize certain causes of action, and only those parties who had legal title to the specific choses in action could sue thereon. Generally, the courts at common law said that an action against the wrongdoer must be brought by the insured; later the court allowed such an action to be maintained by the insurer in the name of the insured. The legal capacity of the insurer himself, however, was never recognized at common law. The *Potomac*,⁵ an early Federal case, said that the action must be brought in the name of the insured, because he had legal title. The action had to be maintained in the name of the one who had a legal estate in the property damaged. Another Federal case⁶

¹Clark, *Real Party in Interest*, 38 Yale L.J. 259, (1925).

²(1939) 108 M. 56, 90 P. (2) 489.

³(1923) 69 M. 193, 220 P. 111.

⁴Vance on Insurance, Third Edition, at page 786.

⁵105 U.S. 630, 26 L.Ed. 1194 (1882).

⁶*Aetna Ins. Co. v. Hannibal & St. J.R. Co.*, 3 Dill. 1, Fed. Case No. 96 (1874).

held that the action must be brought in the name of the insured, because he had legal title, and the wrongful act was single and indivisible, giving rise to only one cause of action. A recent Canadian case, *Brown v. B.C. Electric R.C.*,⁷ shows that this rule at common law still exists, the court holding that an insurer who has not taken an assignment of the policy is neither a proper nor a necessary party plaintiff, but must maintain the action against the wrongdoer in the name of the insured.

Equity, from very early time looked through these procedural requirements to the substance, allowing those who had an interest in the controversy to appear before it, so as to settle the dispute in one hearing with speed in the administration of justice.

The Codes of Civil Procedure abolished the distinction between law and equity. There was to be only one court, administering both what had been known as law and equity. This merger resulted in one court adjudicating the cause of action, whether it existed at common law or in equity. The main requirement established by the framers of the codes was that the plaintiff be the real party in interest. As Clark says, "The real party in interest is he who by substantive law has the right of action. The codes were not intended to change substantive law. Thus, in this view, whoever formerly had a legal or equitable right of action has such right still."⁸

In *Gaugler v. Chicago, M. P. S. Ry. Co.*,⁹ the federal district court sitting in Montana said that insurers, upon payment giving rise to subrogation, are equitable assignees. The court said:

"These insurers by subrogation are equitable assignees, proportionate to the payments by them made to the insured, of parts of the insured's right of action against defendant, the insured retaining part to himself. This assignment takes on all the aspect, in effect, of one by the most formal and express deed. (Citing cases)."

This quotation emphasizes the necessity of reference to assignment cases in order to draw analogies between them and cases involving subrogation of insurance claims.

Under the merged procedure of law and equity, an assignee of a complete debt has the right to maintain the action therefor in his own name, as the real party in interest. In *Puterbaugh v. McCray*,¹⁰ the California Court of Appeals said that when an as-

⁷(1925) B.C. 3 Dom. L.R. 734.

⁸Op. Cit., note 1.

⁹(1912) 197 F. 79 (D. Mont.).

¹⁰(1914) 25 Cal. App. 469, 144 P. 149.

signment is complete so as to vest the entire beneficial interest in the assignee, that person is the real party in interest, and entitled to maintain the action in his own name, whether the assignment be designated as legal or equitable. The Indiana Court said, in relation to a right to inspect a corporation's books, "The assignee to whom the entire beneficial interest in the shares had been transferred by an equitable assignment, which needed only a presentation of the certificate to convey the legal title, was the real party in interest in an action with relation to the stock so assigned. (Citing cases)"¹³ Montana has held in line with this, provided the assignment is real and substantial as distinct from simulated or sham, regardless of whether the assignee receives a legal or equitable interest.¹⁴ The contrary view was expressed in *Farmers' Exchange v. Walter M. Lowney Co.*,¹⁵ in which the Vermont Supreme Court said that an assignee could maintain an action in his own name, under a statute so authorizing it, only if he were the assignee of a legal assignment. Vermont at this time had separate courts of law and equity, which would explain and distinguish this case from the other authority cited. The view expressed by Vermont Court has been taken by those courts holding strictly with the common law, but the majority rule under a merger of law and equity is contrary.

When an insurer is completely subrogated to the claim against the wrongdoer, by payment of the entire loss to the insured, the general rule is that the insurer is the real party in interest, and any action therefor must be maintained in his name.¹⁶ The Oregon Supreme Court, in *State Ins. Co. v. Oregon R. & Nav. Co.*,¹⁷ held that when the payment is equal to or exceeds the value of the property, the insured no longer has any pecuniary interest in the action against the wrongdoer. The California Appellate Court, in *Lebet v. Cappobiacho*,¹⁸ held that the action must be brought in the name of the insurer because the insured is no longer the real party in interest. One case of interest is *Cummingham & Hinshaw v. Seaboard Air Line Ry. Co.*,¹⁹ in which the North Carolina Court said, in denying a suit by the insured for damages when he had been paid in full by the insurer, that the insurer was the sole real party in interest under the statute.

¹³*S. F. Bowser & Co. Inc. v. State ex rel Hines*, 192 Ind. 462, 137 N.E. 57 (1922).

¹⁴*State ex rel Freebourn v. Mer. Credit Ser.*, 140 M. 76, 66 P.(2) 337 (1937); *Streetbeck v. Benson*, 107 M. 110, 80 P.(2) 861 (1939).

¹⁵95 Vt. 445, 115 A. 507 (1921).

¹⁶See *Words & Phrases*, 201-214 for cases so holding.

¹⁷(1891) 20 Ore. 563, 26 P. 838.

¹⁸(1940) 38 Cal. App. (Supp) (2) 771, 102 P.(2) 1109.

¹⁹(1905) 139 N.C. 427, 51 S.E. 1029, 2 L.R.A. (NS) 921.

This case emphasizes the general rule as stated previously, showing that the insured has been divested of any interest in the cause of action, so cannot be the real party in interest. Justice Pound, in *Lord & Taylor v. Yale & Towne Mfg. Co.*,¹⁸ said:

“The action properly should have been brought in the name of the insurance company alone. No other party has any interest in the claim. (Citing cases) The practice of joining the insured as a plaintiff when it retains no interest in the subject matter of the action is not to be commended.”

The rule expressed by the majority of the courts applies whether the insurer pays the whole loss to the insured, or the insured has been partly paid by the insurer and partly by the wrongdoer. In *City of New York Ins. Co. v. Tice*,¹⁹ the Kansas Supreme Court said, in reference to the right of action being vested in the insurer, in his own name:

“This is equally true whether the loss has been fully covered by insurance or partly covered by the insurance and partly by payment by the wrongdoer. The essential fact is that the insured no longer has a financial interest in the outcome. It also follows that in such a situation the consent of the insured to action by the insurer is not necessary.”

This should preclude any valid controversy over the problem of the real party in interest when an insurance company makes payment to the insured of his entire loss. But some courts have held contrary. In *Illinois Cent. Ry. Co. v. Hicklin*,²⁰ the Kentucky Court of Appeals said that the wrongdoer was not entitled to the benefit of the insurance taken out by the insured. Consequently, he could not defend an action by the owner for damages, on the ground that he was not the real party in interest. The court cited an early English case and an early Tennessee case as authority.²¹ In those cases, the opinion of the justices was that the insured had legal title, had paid premiums, and therefore the action should be prosecuted as if no insurance was involved, or as if no payments had been made to the insured. This position does not seem to be consistent with either the purpose of the real party in interest statute to prevent multiplicity, or the definition of that statute as referring to the person who is entitled to the

¹⁸(1920) 230 N.Y. 132, 129 N.E. 346.

¹⁹(1944) 159 Kan. 176, 162 P.(2) 836, 157 A.L.R. 1233.

²⁰(1909) 131 Ky. 624, 115 S.W. 752, 23 L.R.A. (NS) 870.

²¹*Mason v. Sainsbury*, 3 Doug. 61 (1781); *Anderson v. Miller*, 96 Tenn. 35, 54 Am. S. Rep. 812 (1896).

fruits of the action. The Kentucky case might have been decided upon other grounds if the court had distinguished complete payment of the loss from payment of less than the loss. It appears that in that case, the insurer was actually not the sole real party in interest, but rather, the insured retained an interest in the subject matter and had a right to maintain the action.

This introduces the discussion of the second class of cases involved when subrogation claims are in controversy. First an examination of the cases involving partial assignments will be made before reference is made to cases involving partial subrogation or payment of less than the loss.

In *Risley v. Phoenix Bank of City of New York*,²² the New York Court said:

“The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well-settled rule in this State. (Citing cases). The point was ruled in the same way by the court of the King’s Bench in *Tibbits v. George*. The tendency of modern decisions is in the direction of more fully protecting the equitable rights of assignees of choses in action, and the objection that to allow an assignment of part of an entire claim might subject the creditor to several actions to enforce a single obligation, has much less force under a system which required all parties in interest to be joined as parties to the action.”

In the *Gaugler* case,²³ Judge Bourquin said:

“The point here involved does not seem to have been expressly decided by the Montana Supreme Court, but in *Caledonia Ins. Co. v. Railway Co.*, an insurance company appears to have maintained without question an action, in its own name and alone, against a trespassor for recovery for a partial loss payment by it made to the insured. And it is common knowledge of the bench and bar of Montana that, on the theory that assignees in whole or in part of a chose in action are real parties in interest within the statutes of the state, since the enactment of said statutes, assignees of entire choses have sued in their own names and assignees of part thereof have sued jointly with their assignors in the names of both, either without question or questioned unavailingly.”

Therefore, it would seem that a partial assignee could maintain the action for a debt or obligation in his own name, as the real party in interest. It is true that the language of the Montana

²²(1880) 83 N.Y. 318, 38 Am. Rpts. 421.

²³Op. Cit., note 9.

Supreme Court, in *LaBonte v. Insurance Co.*,²⁴ seems to indicate a contrary view. In this case, the court said that a partial assignment was not valid against a debtor unless the debtor consented. This conclusion was based upon the theory that to decide otherwise would allow a material change in the obligation, subjecting the debtor to two claims. But in this particular case, the court had previously determined that there was no assignment because there was no acceptance by the assignee. The case has never been cited as authority for the proposition that there cannot be a partial assignment without the consent of the debtor, and would seem to be very doubtful authority.

The problem of partial subrogation occurs frequently. The tendency of insurance companies to issue deductible policies, where the insured pays the initial loss before the insurer becomes liable upon the contract of insurance, the fact that several insurance companies may be joined in the coverage of a particular property, and the principle of over insurance²⁵ all contribute to this situation.

The weight of authority in the code states, when payment is less than the loss, is that the action must be maintained by the insured, or in his name. In *Harrington v. Central States Ins. Co.*,²⁶ the Oklahoma Supreme Court sustained this proposition, stating that there is but one right of action, and it could not be split. This contention by the majority of the courts appears to be based upon the theory that the insured retains legal title in the cause of action, and in order to bring about a complete settlement of the controversy in one case, it being single and indivisible, the insured must bring such an action. The proceeds will be divided between the insured and the insurer according to their *pro rata* interests, because the insured will be required to hold the proceeds as a trustee for the insurer. The cases holding with the majority cite *Aetna Ins. Co. v. H. & St. J. R. R. Co.*,²⁷ in which Judge Dillon said:

“The property destroyed exceeded in value the amount insured and the rule of law has been long settled

²⁴(1925) 75 M. 1, 241 P. 631.

²⁵It is well established Insurance Law that insuring one's property for more than its actual value is not proper. The reason for this is that the purpose of insurance, indemnity, would not be fulfilled; rather gambling for a possible gain would result. But attention should be called to Section 40-905, R.C.M., 1947, in relation to over-insurance, which sets up a presumption that the face value of the policy is the value of the property lost. No decision has been reported construing the effect of this section.

²⁶(1934) 169 Okla. 255, 36 P.(2) 738, 96 A.L.R. 859.

²⁷Op. Cit., note 6.

that the insurance company, on the payment of the loss, cannot sue the wrongdoer who occasioned it, in its own name. The suit, though for the use of the insurer, must be in the name of the person whose property was destroyed. The wrongful act was single and indivisible and gives rise to but one liability. If one insurer may sue, then, if there are a dozen, each may sue for the balance. This is not permitted. . . . But it is insisted that the provision of the Missouri statute, that every action shall be prosecuted in the name of the real party in interest, though it declares that the provision shall not authorize the assignment of a thing in action not arising out of a contract, changes the rule. However, it might be if the amount paid by the insurer to the assured had equalled or exceeded the value of the property, and the assured had made a full assignment, it is plain that this case falls within all the reasons of the rule itself, and which is the foundation of the law on this subject.”

It should be noted that the court gave leave to amend, but because this would destroy diversity of citizenship it was impracticable, and the plaintiff submitted to a nonsuit. This indicates that the real issue was over nonjoinder and not real parties in interest.

It appears, upon an analogy with partial assignments, that the majority rule is not sound. Mr. Clark says:²⁸

“It would seem perfectly natural to proceed with the analogy of subrogation to assignments in those frequent cases where the insurance does not cover the loss, and to determine the real parties in interest as with partial assignments. This theory would make both insurer and insured necessary parties, permitting each to sue on joining the other as plaintiff or defendant. (Citing cases).”

In *Caledonia Ins. Co. v. N.R.R. Co.*,²⁹ the Supreme Court of Montana allowed an action to be maintained by the insurer, when the payment was less than the loss suffered by the insured. There the insured's building was destroyed, having a value of \$1,068. The insurer paid the full face value of the policy, \$800, and sued the wrongdoer for the sum, plus interest thereon. This suit was maintained in the name of the insurance company, without joining the insured, even though the insured had a substantial interest in the recovery against the wrongdoer. A judgment was returned for the insurer, with the interest prayed for. The court said:

“If the Insurance Company had purchased Mrs.

²⁸Op. Cit., note 1.

²⁹(1905) 32 N. 46, 79 P. 544.

Harn's (Insured) entire cause of action against the Railway Company, it would have been placed in her shoes, and entitled to assert whatever claims she might have asserted, and that claim, as we have seen, was one for the value of the property destroyed, and interest thereon, if in their discretion the jury saw fit to allow interest; and we are unaware of any principle of law or reason which will deny the Insurance Company its pro rata interest in that right, when, as in this instance, it became subrogated to only a portion of the claim instead of the whole of it."

Under the *Federal Rules of Civil Procedure*, a similar result has been reached. In *State Farm Mut. Liab. Ins. Co. v. U. S.*,⁸⁰ the Circuit Court of Appeals for the First Circuit held:

"In view of the universally recognized equitable principle of subrogation, an insurance company having paid the whole loss, is the real party in interest within the meaning of Rule 17(a), *Federal Rules of Civil Procedure*, (Citing cases) . . . In the case at bar, appellant is only a partial subrogee, which may involve a problem of splitting causes of action. We think that a partial subrogee is a real party in interest, under Rule 17(a), and as such has standing to sue in his own name, subject only to the right of the defendant, by making timely objection, to insist upon joinder of the other parties in interest in order to avoid a split-up of the cause of action. (Citing cases) The United States was not put to the necessity of insisting upon such joinder in the present case, because the partial subrogee and the insured, on their own initiative joined in a single complaint which brought all the parties in interest before the court below. We see no possible objection to this procedure."

Although the main question in the *Caledonia* case was whether the insurance company was entitled to interest, through its right of subrogation, it surely should stand as authority that the insurer is a real party in interest even though he is only a partial subrogee. Since, however, the issue of parties in interest was not raised, the weight of the case as authority is somewhat limited. The exact point has not been before the Supreme Court of Montana, but in the *Gaugler* case, *supra*, the issue was raised, and the federal court held that a partial subrogee is a real party in interest. In the *Tice* case,⁸¹ the Kansas Supreme Court, in setting future standards as a guide to the bar, said:

"1. Where the loss has not been fully covered by

⁸⁰(1949) 172 Fed. (2) 737.

⁸¹Op. Cit., note 19.

the insurance payment, and the property owner still asserts a claim against the wrongdoer. In this case both he and the insurer are real parties in interest, but action should be brought by the property owner, who will hold as trustee for the insurer in respect to such part of the amount recovered as the insurer has been compelled to pay under the policy. If, in such a situation, the property owner refuses to bring action, justice requires that the insurer be permitted to bring the action.”

This quotation supports the proposition that the insurer paying part of the loss to the insured, is a real party in interest, and as such, should be able to maintain the action therefor in his own name. The argument against splitting of causes of action would be avoided by application of the compulsory joinder statute, and all parties necessary to the complete determination of the controversy could be brought before the court.

These authorities would lend support to Clark's analogy, *supra*, and cases of partial subrogation would be treated on the same basis as cases of partial assignment. The partial subrogee or assignee would be a real party in interest and could maintain an action for recovery, subject only to the right of the defendant to require joinder of the parties united in interest. Montana Statutes contain a compulsory joinder provision,⁸³ requiring that all parties united in interest be joined as plaintiff or defendant. Certainly, this would be a better result than that reached by the majority of the courts; giving effect to the reason for and purpose of the real party in interest statute, without becoming confused with problems with respect to joinder of parties.

In this connection, the effect of failure to answer or demur on the ground that the plaintiff is not a real party in interest should be considered. The *Revised Codes of Montana* provide that the defendant may demur to the complaint, when it appears upon the face thereof either that there is a defect or misjoinder of parties plaintiff or defendant, or that the complaint does not state facts sufficient to constitute a cause of action;⁸⁴ and they also provide that when these matters do not appear upon the face of the complaint, the objection may be taken by answer.⁸⁴ Further, if no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only that the objection that the complaint does not state

⁸³Section 93-2821, R.C.M., 1947.

⁸⁴Section 93-3301, R.C.M., 1947.

⁸⁴Section 93-3305, R.C.M., 1947.

facts sufficient to constitute a cause of action.⁸⁵ In *Lefebure v. Baker*,⁸⁶ the Montana Supreme Court said:

“An action at law implies by its very terms the existence of a person who has the right to bring the action. . . .

A cause of action is the right which a party has to institute a judicial proceeding (Citing cases), and to state a cause of action the plaintiff must disclose his interest in the subject matter of the litigation; or, in other words, he must make it appear that he is the real party in interest. It is elementary that the complaint must not only disclose a complete cause of action against the defendant, it must also show a right of action in the plaintiff.”

The plaintiff both in his pleading and in his proof must show that he is the person entitled to recovery on the cause of action before he can do so. It is not sufficient that the right of action be in someone, it must be in the person suing.

This language seems to indicate that the necessity of being a real party in interest goes to the very essence of the right to maintain an action. If this be true, then the failure to object to the same, by demurrer or answer, should not effect the defense. The objection that the complaint does not state a cause of action is never waived,⁸⁷ and may be raised for the first time on appeal.⁸⁸ The defect of misjoinder or nonjoinder is a different matter and is waived by failure to demur or answer.

In conclusion, it appears that the real party in interest statute will effect actions by insurers who have paid losses. Payment of the entire loss makes the insurer the sole real party in interest; but payment of less results in both the insured and the insurer being real parties in interest. Either should be able to maintain the action against the wrongdoer for the damages caused by his negligence. This right in either party to maintain the action should be subject only to the right of the wrongdoer to require joinder of necessary additional parties, under a compulsory joinder statute, so as to prevent multiplicity by having all the parties before the court in the one suit. Failure of the defendant to raise the issue should not constitute a waiver of the right of the defendant to successfully defend a suit by the

⁸⁵Section 93-3306, R.C.M., 1947.

⁸⁶Op. Cit., note 3.

⁸⁷*Clark v. Ore. Short Line RR Co.*, 38 M. 177, 99 P. 298 (1909); *Hand v. Heslet*, 81 M. 68, 261 P. 609 (1927).

⁸⁸*Tracy v. Harmon*, 17 M. 465, 43 P. 500 (1896); *State ex rel Chi. etc. Ry. Co. v. Dist. Ct.*, 105 M. 396, 73 P. (2) 204 (1937).

insured who has been paid in full; but failure of the defendant to raise the issue of defect of parties should constitute a waiver of the right to object to suit by either the insured or the insurer alone, in case of partial payment for the loss by the insurer.

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