

1941

Procedure: The Status of the Assignee for Collection under Real Party in Interest Statutes

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Recommended Citation

Frederick Dugan, *Procedure: The Status of the Assignee for Collection under Real Party in Interest Statutes*, 2 Mont. L. Rev. (1941).

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ticularly where a domiciliary is evading the jurisdiction of the court. If it be felt that such service should be strictly limited, this is done by the express terms of the statute which require that a diligent search be made, with supporting affidavit. Also, where the defendant receives actual notice, there doesn't seem to be the same reason for requiring proof of a diligent search as in the case of publication.

—Murray D. Syverud

**PROCEDURE: THE STATUS OF THE ASSIGNEE FOR
COLLECTION UNDER REAL PARTY IN
INTEREST STATUTES**

The "Field Code" of 1848 gave rise to an entirely revised form of procedure intended to combine in one form of action, the civil action, pleading at both common law and equity.¹ The general statutory form stating the rule for parties plaintiff to this civil action as adopted by many states is: "Every action must be prosecuted in the name of the real party in interest. . . ." Following this general statement there are exceptions which vary in different states in phrasing and contextual setting. However, the words with regard to the "real party in interest" used in the statutes mean the same thing.² It is the purpose of this comment to consider whether the assignee of a chose in action assigned *for the purpose of collection*³ is the real party in interest within the meaning of R. C. M. 1935, Section 9067 or similar statutes in other states.

In the leading case of *State v. Merchants' Credit Service*,⁴ the Montana court held that such an assignee for collection only was not the real party in interest and therefore was not entitled to sue in its own name. Although the court made some point of the fact that the collection agreement was set out in the assignment instead of being "a collateral agreement" as is

that a court of that state may be empowered to render a personal judgment against him which is valid, even though he is not personally served within the state."

¹ *Brumback v. Oldham* (1878) 1 Idaho 709; POMEROY, CODE REMEDIES (5th ed. 1929) §§4, 50, pp. 5, 6, 83.

² *Id.* §§51, 53, 63, pp. 83, 86, 97. See also *fn. 9, infra*.

³ This comment does not deal with assignments "for security" and assignments of negotiable instruments. The former involve a pre-existing interest in the assignee and the latter involve highly specialized rules of the Law Merchant. This distinction was made in *State v. Merchants' Credit Service* (1936) 104 Mont. 76, 66 P. (2d) 337; and see 1 WILLISTON ON CONTRACTS (1924) §406, p. 754.

⁴ (1936) 104 Mont. 76, 66 P. (2d) 337.

usually the case, the tenor of the decision was not to limit the rule to the situation where the agreement is fully expressed in the assignment; and in *Streetbeck v. Benson*,⁵ the court peremptorily dismissed the suit of an assignee for collection mainly upon the authority of the *Merchants' Credit Service* case, citing it as standing for the proposition that an assignee for collection is not the real party in interest. In *Northern Montana Association of Credit Men v. Hauge*,⁶ the rule was limited to a record showing that the agreement was entered into for the purpose of escaping the effect of the *Merchants' Credit Service* case.

An examination of the recent authorities reveals that while what is stated as the "majority" rule holds that the assignee for collection only is the real party in interest,⁷ another view has been taken in at least isolated cases that in this situation the assignee is not the real party in interest.⁸ The decisions are not distinguishable upon the basis of essentially different statutes.⁹

⁵ (1938) 107 Mont. 110, 80 P. (2d) 861.

⁶ (1940)—Mont.—, 105 P. (2d) 1102.

⁷ POMEROY, *op. cit. supra* note 1, §70, p. 106; WILLISTON, *op. cit. supra* note 3, §440, p. 841; CLARK ON CODE PLEADING (1928) §23, p. 101 (part reprinted in 34 YALE L. J. 264); 5 C. J. *Assignments*, §94; 64 L. R. A. 581 (1904). See the cases collected therein.

⁸ Burtnett v. Gwynne (1855) 2 Abb. Prac. 79 (N. Y.). (New York later adopted the "majority" view. *Meeker v. Claghorn* (1871) 44 N. Y. 349; *Allen v. Brown* (1870) 51 Barb. 86, 44 N. Y. 228). In *Kansas, Stewart v. Price* (1902) 64 Kan. 191, 67 P. 553, 64 L. R. A. 581 was overruled by *Manley v. Park* (1904) 68 Kan. 400, 75 P. 557, 66 L. R. A. 967, 1 Ann. Cas. 832. North Carolina, Nebraska, and Ohio are the best authority for the "minority" position today although the latter two are represented by but one decision in point. *Hoagland v. Van Etten* (1888) 22 Neb. 681, 35 N. W. 869, Re-aff. 23 Neb. 462, 36 N. W. 755; *Abrams v. Cureton* (1876) 74 N. C. 523; *Ravenel v. Ingram* (1902) 131 N. C. 549, 42 S. E. 967; (see also *Martin v. Mask* (1912) 158 N. C. 436, 74 S. E. 343, 346, 41 L. R. A. (N. S.) 641); *Brown v. Ginn* (1902) 66 Ohio St. 316, 64 N. E. 123. See KERR'S PLEADING AND PRACTICE (1919) §§584, 586, pp. 786, 791 and *fn. 41 infra*.

⁹ The court in the *Merchants' Credit Service* case seems to suggest at p. 98 of 104 Mont., 341 of 66 P. (2d) that our statute differs materially from that of those code states in which the real party in interest and "exception" clauses are separated into two sections. It would seem that this separation should not alter the legal effect. Most codes in which the clauses are in separate sections provide: "Every action must be prosecuted in the name of the real party in interest, except as provided in section —"; or "except as otherwise provided by law." POMEROY, *op. cit. supra* note 1, §51, pp. 83, 84. The following section or sections are thus as effectively incorporated as if physically included. This combination of the sections originated with Ch. 416, N. Y. SESS. LAWS (1877) amending Ch. 448 CODE OF CIVIL PROCEDURE (1877) Ch. 448, §449. CAHILL N. Y. CIVIL PRACTICE (1937) §210. California adopted the change in amending its CODE OF CIVIL PROCEDURE, §367 in CODE AMENDMENTS (1880) p. 63 and the form continued until

The rule of construction is recognized by the leading authorities that the intention of the code writers was to adopt the equity theory of parties rather than the legal theory, and to apply it to the one civil action in all cases, whatever be the nature of the primary right to be protected or of the remedy to be obtained.¹⁰ The codes were not intended to change substantive law but to give to one who at common law or equity had a cause of action, the right to bring the action in his own name. It is therefore suggested that if one had a cause of action either in his own name or in the name of one merely a nominal party either in courts of law or equity before the codes, that party who then had the cause of action must be the real party in interest under the combined code procedure."

The law of assignments of choses in action had a gradual development in the law courts culminating in the Code.¹¹ Very early in the English law, the rights and ownership of the assignee were recognized and sanctioned only in the Chancery Courts and there only with regard to a limited type of chose in action to which a property right was attributed.¹² With a relaxation of the maintenance rule and the use of the express formal power of attorney, assignees obtained relief in the common law courts by bringing action in the name of the assignor. From about 1800¹³ the American equity courts came to recognize that the assignee was adequately protected at law and from then on chose to deny the assignee an equitable

STATS. (1901) p. 126 in which it was again divided. In 1895 Montana adopted the section in this form from California. REV. STAT. UTAH (1933) §104-3-1 was adopted from R. C. M. 1935, §9067. REV. CODE ARIZ. (1928) §3727 also combines the two clauses although the specific exceptions differ somewhat. These four states have uniformly held the assignee for collection as real party in interest. Greig v. Riordan (1893) 99 Cal. 316, 33 P. 913; Hopins v. Contra Costa County (1895) 106 Cal. 566, 39 P. 933 (these in the period when California had the "joined" section and before Montana adopted it); Mosher v. Bellas (1928) 33 Ariz. 147, 264 P. 468; Wines v. Rio Grande W. Ry. (1893) 9 Utah 228, 33 P. 1042; Moss v. Taylor (1928) 73 Utah 277, 273 P. 515; Perkes v. Utah Idaho Milk Co. (1934) 85 Utah 217, 39 P. (2d) 308; Walcott v. Hilman (1898) 23 Misc. Rep. 459, 51 N. Y. S. 358; Friedman v. Schulman (1905) 46 Misc. Rep. 572, 92 N. Y. S. 801.

¹⁰POMEROY, *op. cit. supra* note 1, §50, p. 83.

¹¹CLARK, *op. cit. supra* note 7, §22, pp. 97, 98; 4 AM. JUR., *Assignments*, §28, p. 251.

¹²Cook, *Alienability of Choses in Action*, 29 HARV. L. R. 816 (1916); WILLISTON, *op. cit. supra* note 3, §405, p. 753, §408, p. 756; CLARK *op. cit. supra* note 7, §21, pp. 94-96.

¹³Prosser v. Edmonds (1835) 1 Younge & Coll. Ex. 481, 496, 160 Eng. Rep. 196, 202.

¹⁴Russell v. Cornwall (1794) 2 Root (Conn.) 122; Booth v. Warner (1797) rep. in 4 Day (Conn.) 6, 18 (1809).

remedy, at least where the only relief sought was a money claim.¹⁵ A Connecticut case in 1818¹⁶ said:

“It is a well settled principle of common law in Connecticut, that the property in a chose in action, may be assigned; and the courts of law have long since recognized the property in the assignee as fully as courts of chancery. . . . The old form of bringing the suit on the note, in the name of the obligee, is, indeed, continued; but it is now mere form. . . .”

And in 1831 a Maine decision¹⁷ held:

“The assignee is to be recognized as the owner, and all acts of the assignor subsequent to the assignment, and affecting the validity of the contract are fraudulent. He has no more power over it, than a stranger. . . .”

It was a primary purpose of the code provisions for suits by the real party in interest to make it clear that there is no longer necessity for the assignee to sue in the assignor's name.¹⁸

The cases before the Code in which the problem of assignments of choses in action for collection arose are few in number. In *Napier, Rapelje & Bennett v. McLeod*,¹⁹ two partners attempted to give to a third partner an irrevocable power of attorney to collect the partnership debts. Although the intention to convey the cause of action as a property right might have been inferred,²⁰ the court treated the plaintiff as having a mere agency not coupled with an interest and held that the transfer did not render inoperative a release subsequently executed by one of the other members of the firm to one of the debtors who had notice of the execution of the power of attorney. An earlier case involving partnership property was distinguished on grounds that the recitals in the instrument proved the “whole interest” to be in the assignee, “at least until the settlement of the partnership concerns.” In *Weakley v. Hall*,²¹ an inter-

¹⁵Hayward v. Andrews (1882) 106 U. S. 672, 27 L. Ed. 271, 1 S. Ct. 544.

¹⁶Colbourn v. Rossiter (1818) 2 Conn. 503, 508.

¹⁷Hackett v. Martin (1831) 8 Greenl. (Me.) 77, 78.

¹⁸CLARK, *op. cit. supra* note 7, §23, pp. 100-102.

¹⁹(1832) 9 Wend. 120 (N. Y.).

²⁰*Assignments*, 5 C. J. §61 says: (In general) “no particular mode or form is necessary to effect a valid assignment, and any acts or words are sufficient which show an intention of transferring or appropriating the owner's interest . . . there must be a present transfer of the assignor's right, a transfer so far complete as to deprive the assignor of his control over the subject of assignment.”

²¹(1844) 13 Ohio 167, 42 Am. Dec. 194. The court said at p. 175 of 13 Ohio, p. 196 of 42 Am. Dec.: (The replication shows) “clearly there was no absolute transfer of the entire interest in the chose to (the assignee). The extent of his interest was to depend on circumstances,

esting early case of collection assignment, the assignee's title was considered an undivided interest (tenancy in common). However, the assignee's interest was held unenforceable for champerty. In *Porter v. Davis*,²² an admission of the assignor of a judgment that no consideration passed and a receipt given by the assignee stating that the assignor was entitled to the amount of recovery less expenses of suit were admitted in evidence; and the court held that the assignment did not create such an ownership in the judgment that the assignee could set it off against a judgment recovered against him by the defendant in the judgment assigned. The court said that the "owner beneficially" was not in fact the assignee but the assignor. In *Langdon v. Langdon*,²³ it was held that the assignee of a non-negotiable note for collection was a mere agent under a power which had been revoked by subsequent payment to the assignor, although the payment was made with notice of the assignment.

These cases seem to justify the conclusion that the courts before the Codes regarded the assignee for collection as possessing no property right in the cause of action, but regarded him as a mere agent. The trend of cases after the procedural Codes is definitely contrary;²⁴ and if the authorities are right that the adoption of the real party in interest statute involved no change in substantive rights, there must be some explanation other than the presence of these statutes. There has been almost no attempt by the courts to explain why they hold the assignee for collection the real party in interest other than merely to say that he has a "legal title." It is suggested that the explanation for this change of view lies in commercial usage and its influence on the courts. Now that it was no longer necessary for the non-collector assignee to use the name of the assignor in bringing suits, the door was opened for recognition as real party in interest of the assignee for collection only. He apparently had the cause of action and the courts which follow the "majority" rule say he has a "legal title." However, these words are insufficient to describe the different own-

limited by his allowances and liabilities, and his share of the claim. (Assignor and assignee), therefore, were tenants in common in this chose in action against (the debtor), as between themselves. Each had a distinct interest, and there was, therefore, something which (the assignor's) release could operate upon and discharge, notwithstanding this assignment. . . ."

²²(1845) 2 How. Prac. 30 (N. Y.).

²³(1855) 4 Gray (70 Mass.) 186.

²⁴See *fn.* 7. The "majority" view is taken in cases involving non-negotiable choses in action by the following "code" states: Arizona, California, Colorado, Idaho, Iowa, Kansas, Kentucky, Minnesota, Missouri, New York, Oregon, South Dakota, Utah, Washington, Wisconsin, Wyoming.

erships and powers which an assignee may be considered to have.²⁵ Further differentiation is necessary and the inquiry is one involving a subjective consideration of property rights.

The ultimate question of who is the real party in interest will be resolved, whether the answer is "not sufficient ownership" or "sufficient ownership," by what the courts will consider a valuable property interest transferable by assignment.²⁶ Then what is the substance of that property interest? If we break down the concept of "property interest" in a chose in

²⁵The inaccuracy of this term is manifest on a reading of WILLISTON, *op. cit. supra* note 3, §§446a, 447, pp. 854-860. Certain characteristics imposed upon assignments by courts of equity have been, and should be, retained in the courts of law although equity no longer gives a remedy to the assignee in general. The word, "legal" is insufficient to describe the multitude of different ownerships and powers to which the term has been indiscriminately applied. One of the difficulties of describing the assignee as a legal title owner is manifest in this situation of an assignment for collection, where the assignor is more vitally interested in the outcome of the suit than the assignee. Further differentiation is necessary to explain why some courts have concluded he has full ownership for the purpose of suit, while others have treated him as a mere agent. See also Cook, *The Alienability of Choses in Action—Reply to Williston*, 30 HARV. L. REV., 449 (1917). As a common denominator for the two divergent views, the words, "property interest" seem to be the most nearly accurate description of the *res* assigned which has the qualities of transferability and value under the "majority" view but does not possess these qualities under the "minority" view. In another sense the words are inaccurate. Value of a right is generally expressed in terms of benefits running directly from its exercise. *Cf.* JEROME HALL, *THEFT, LAW AND SOCIETY*, (1935) *fn.* 86, p. 66. A collection agreement fee may vary from a fixed percentage measured by the judgment or recovery out of court to a gratuity, and the courts treat them alike. The "value" to the collector arises not directly out of exercise of the right but indirectly out of the collateral arrangement. The mere power to go into court and sue would be a burden to the possessor in a strict economic sense. But analogy may be taken to a special power of appointment which is considered a valuable transferable property right although the possessor clearly obtains benefits only collaterally.

²⁶The ultimate differentiation used here has rarely been expressed by the courts. Perhaps the leading case for the "minority" view and one of the most ambitious attempts to analyze the problem was *Stewart v. Price* (1902) 64 Kan. 191, 67 P. 553, 64 L. R. A. 531. Doster, Ch. J. in the specially concurring opinion said: "It is legally impossible for one to transfer to another the mere right to bring a law suit,—that and nothing more—and that was all that was attempted in this case." The majority decision was based in large part on an interpretation of the words "real party in interest" as disassociated from their context. This is clearly revealed in the specially concurring opinion of Pollock, J. citing a dictionary definition of the words as controlling. There was a strong dissent by four judges and the case was preemptorily overruled in *Manley v. Park* (1904) 68 Kan. 400, 75 P. 557, 66 L. R. A. 967, 1 Ann. Cas. 832 and is not the Kansas law today. *Cf.* *State ex rel Coffey v. District Court* (1925) 74 Mont. 355, 258, 240 P. 667 *supra*; *Hammell v. Superior Court in and for Los Angeles County* (1932) 217 Cal. 5, 17 P. (2d) 101, 103.

action into two major elements—namely, (1) a right to sue and enforce a claim and the correlative duty of the debtor to respond in damages, and (2) the economic value of a judgment recoverable in suit—we may more fully analyze the content of a legal cause of action to which normally would attach the privilege of suing in one's own name.²⁷ If (1) is regarded as a property separately transferable by assignment without (2), then the court will regard it as sufficient property interest to maintain suit in the assignee's name. The courts which say the assignee has the "legal title" and is therefore privileged to sue in his own name²⁸ regard the assignment of the mere power to go into court and bring suit as a sufficient property to make the assignee the real party in interest. Those courts which say "the beneficial ownership is in another"²⁹ are simply insisting that the conveyance of (1) alone is of no effect apart from (2).³⁰ If the court gives effect to the transfer of (1) alone, the one having a share or even all of (2) has no standing in court as he has simply bargained away his right to sue the debtor. It may well be that his contract with the assignee has invested him with a separate chose in action (or right to sue) against his assignee for any breach of that contract, but that does not mature until after the primary law suit.³¹

In the final analysis the concept is molded by whether the court considers the interest of all concerned to be better served by treating the bare cause of action as a transferable property right.³² Many courts have stated the interest in terms of

²⁷*Cf.* language of State *ex rel* Coffey v. District Court, *supra*, note 26: "While courts, text-writers, and legislators have not always distinguished sharply between the right to recover and the thing to be recovered, there cannot be any question that the right to recover is comprehended in the term 'chose in action'."

²⁸*Brennan v. Weissbaum* (1926) 77 Cal. App. 120, 245 P. 1104; *Chase v. Dodge* (1901) 111 Wis. 70, 86 N. W. 548; *Ballinger v. Vates* (1914) 26 Colo. App. 116, 140 P. 931; *Cottle v. Cole* (1866) 20 Iowa; 6 C. J. S., *Assignments*, §94.

²⁹*Stewart v. Price* (1902) 64 Kan. 191, 67 P. 553, 64 L. R. A. 581.

³⁰*Cf.* *Hoagland v. Van Etten* (1888) 22 Neb. 681, 35 N. W. 869, *Re-aff.* 23 Neb. 462, 36 N. W. 755, where gratuitous assignments for collection were differentiated from where a fee was to be taken out of the proceeds of suit, the latter being placed in the same category with an assignment for collateral security. The court asserted that it was conceded the assignee was not the real party in interest and then peremptorily dismissed the question. The case did not inquire into the problem to any appreciable depth.

³¹*Allen v. Brown* (1870) 51 Barb. 86, 44 N. Y. 228, 231.

³²*Cf.* language in *Chase v. Dodge* (1901) 111 Wis. 70, 86 N. W. 548 holding that plaintiff was the real party in interest but recognizing that the controlling consideration was the interests of all concerned. It was said that inquiry as to whether the transaction was merely colorable "might become material if the rights of creditors were in-

defendant's position, feeling he is the only one to lose." These courts do not refer to the creditor's interest, but assume that the assignee is acting in the best interests of the assignor. The "minority" courts do not make that assumption but in effect take the position that "this plaintiff is not the beneficial owner", apparently feeling that the defendant is not the only one to lose but that the "beneficial owner" would be damaged by the suit.

Also, certain common law doctrines have been considered by the "minority" as preventing suit by an assignee for collection. Today the rule that an interested witness has no capacity to testify has been generally repudiated,³⁴ but certain early cases refused to give effect to the assignment for collection on this ground.³⁵ The doctrine, "covenants run with the land", influenced one later case.³⁶ The doctrines of champerty and maintenance have been largely abandoned except in the law regulating legal practice.³⁷ However, this has been one of the largest single factors influencing assignments for collection.³⁸

involved or upon the right of interposing some defense or counterclaim supposed to be cut off by the assignment."

³⁴*Sheridan v. New York* (1876) 68 N. Y. 30; *King v. Miller* (1908) 53 Ore. 53, 97 P. 542; *Brumback v. Oldham* (1878) 1 Idaho 709. The typical opinion is (*Sheridan v. New York*): "A plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor." But see *Abrams v. Cureton* (1876) 74 N. C. 523 which held the assignee merely an agent for collection. The reasoning was that the real party in interest statute was enacted to let in all defenses that the debtor had against the creditor and to save a resort to another action. The court must have ignored its counterpart of R. C. M. 1935, §9068, *i. e.* 1 CONSOL. STATS. (1919), §446, which allows all such defenses to be raised.

³⁵See 2 WIGMORE ON EVIDENCE (3d Ed., 1940), §575, p. 674; 5 JONES COMMENTARIES ON EVIDENCE (2d Ed. 1926), §2117, p. 3982. R. C. M. 1935, §10535 (3, 4) provide that both the assignee and the assignor are incompetent witnesses within the limited scope of that section.

³⁶*Burnett v. Gwynne* (1855) 2 Abb. Prac. 79, (N. Y.); *Cf. Crawford v. Brooke* (1846) 4 Gill. 163, (Md.) under statute.

³⁷*Ravenel v. Ingram* (1902) 131 N. C. 549, 42 S. E. 967. See WILLISTON, *op. cit. supra* note 3, §406, p. 755.

³⁸*Haley v. Hollenback* (1917) 53 Mont. 494, 499, 165 P. 459; 10 AM. JUR., *Champerty & Maintenance*, §7, p. 554 *et seq.*, §15, p. 561; 14 C. J. S., *Champerty & Maintenance*, §§3, 5, pp. 358, 359.

³⁹*Ravenel v. Ingram* (1902) 131 N. C. 549, 42 S. E. 967; *Brown v. Ginn* (1902) 66 Ohio St. 316, 64 N. E. 123; *Stewart v. Welch* (1885) 41 Ohio St. 483, 503; *Norton v. Tuttle* (1871) 60 Ill. Rep. 130; *Weakley v. Hall* (1844) 13 Ohio 167, 42 Am. Dec. 194. *Brown v. Ginn* laid great emphasis on the statement that plaintiff's "apparently beneficial interest was in reality a contingent interest." Did it mean contingent *fee*? Here an

The justification for the "majority" rule is commercial expediency. For by commercial practice and understanding, a chose in action not represented by a negotiable instrument has come to be regarded as freely transmissible and valuable in a sense independent of the original debtor-creditor relation. Such a development makes possible the entire separation of the original creditor from the suit, allowing the chose in action to be transmitted for collection to the residence of the debtor. An individual small claim may not justify an action for its collection but if many are assigned to one party, it may become economically feasible to bring action to enforce them.

The Montana statutes do not require a different interpretation of real party in interest with regard to collection assignments than the "majority" rule. Statements of the Montana court in the *Merchants' Credit Service* case would indicate the court may believe that the California, Arizona, and Iowa statutes specifically allowed the assignee of a chose in action (in general) to sue in his own name while Montana statutes do not. Examination of our statutes reveals that by our substantive law, choses in action are clearly assignable, and that the procedural code recognizes the assignee (in general) as the real party in interest.⁴⁵ However, the court decided upon the basis of the decision of four states which do not have the real party in interest statutes and Ohio and North Carolina cases⁴⁶ as well as the doubtful statements made by Mr. Kerr,⁴⁷

attorney took the assignments and the court said if it was a "real transfer" it was champertous.

⁴⁵In substantive law, R. C. M. 1935, §§6804, 6805, 7394, 7395, 7414, 7415 define a chose in action, render it transferable by assignment and enforceable in the courts, and no limitation is placed on the transfer by these sections. *Winslow v. Dundom* (1912) 46 Mont. 71, 82, 125 P. 136; *Schaeffer v. Miller* (1910) 41 Mont. 417, 420, 109 P. 970; *Barbarich v. Chicago, M. St. P. & P. R. Co.* (1932) 92 Mont. 1, 12, 9 P. (2d) 797. The assignment of a chose in action is clearly recognized in the Code of Civil Procedure by R. C. M. 1935, §9068, and it would seem clear that action by the assignee is contemplated, the section setting out defenses which may be set up in an "action by the assignee." *Haupt v. Burton* (1898) 21 Mont. 572, 55 P. 110, 69 Am. St. Rep. 698; *Genzberger v. Adams* (1922) 62 Mont. 430, 205 P. 658, held an assignee (general) the real party in interest. The latter case said: "It having been made apparent that plaintiff was vested with the legal title, he was the real party in interest within the meaning of the statute and could maintain the action" citing R. C. M. 1921, §9067. See also POMEROY, *op. cit. supra* note 1, §64, p. 98.

⁴⁶Alabama, Connecticut, Illinois, Maine, Tennessee, and Texas decisions, although sometimes cited in connection with this problem, are not authority for the question as these states do not have the real party in interest statute. See ALA. CODE (1923), §5699; CONN. GEN. STATS. (1930), §5516; SMITH HURD ILL. STATS. (1936), Ch. 110, §§145, 146 and note; REV. STAT. MAINE (1930), Ch. 96 and particularly §154; CODE OF TENN. (1932), Part III, Title 1, Ch. 3, pp. 1908, 1909; 5

that the concept of real party in interest did not include the assignee for collection.

If the collection assignment is void because of illegality, it, of course, would not make the assignee the real party in interest. This illegality might arise by virtue of the nature of the subject matter or the purpose of the contract.⁴⁴ This objection might well be raised by the debtor in a civil action against him where the action is based on an assignment permitting the lay practice of law.⁴⁵ But *State v. Merchants' Credit Service* was a disciplinary proceeding against a corporation for contempt, and the issue was whether a corporation had practiced law in certain civil suits previously brought by it. It would not seem to raise fairly the question whether a debtor might object to the illegality of assignments. However, the court went into the real party in interest question to aid in its

VERNON'S TEXAS STATS. (1926), §1980 *et seq.* See the extended enumeration of real party in interest statutes in POMEROY, *op cit. supra* note 1, §51, *fn.* 1-5, pp. 83, 84. See *fn.*s. 33, 36, 38 *supra* for explanation of North Carolina and Ohio cases.

⁴⁴KERR, *op. cit. supra* note 8, §§584, 586, pp. 786, 791. After careful examination of the cases cited by Mr. Kerr in support of the arguments used in the Montana case, it cannot fairly be said that they in any way support the position taken by Mr. Kerr.

⁴⁵WILLISTON, *op. cit. supra* note 3, §417, pp. 776-779; 13 C. J., *Contracts*, §353, p. 423. See the dissenting opinion of *State v. Merchants' Credit Service* (1936) 104 Mont. 76, 117, 66 P. (2d) 337, 349 for interpretation of R. C. M. 1935, §8980. Space does not permit adequate consideration of this section but it is submitted that it appears too ambiguous in connection with the sections to which it relates to be given much effect. If given any effect it should be construed in relation to R. C. M. 1935, §8983 as being a prohibition against one not an attorney buying a claim with the concurrent intention of bringing an action thereon and acting in person as attorney. See also *Perkes v. Utah Idaho Milk Co.* (1934) 85 Utah 217, 39 P. (2d) 308 interpreting a similar statute.

⁴⁶The courts have held proceedings a nullity where based upon lay practice. *Stevens v. Smith Lumber Co.* (1929) 54 S. Dak. 170, 222 N. W. 665; *Clifton v. Carson Naval Stores Co.* (1924) 32 Ga. App. 51, 122 S. E. 639; *Colton v. Oshrin* (1934) 155 Misc. 383, 278 N. Y. S. 146; *Bennie v. Triangle Ranch Co.* (1923) 73 Colo. 586, 216 P. 718. An agreement to engage in such law practice is unenforceable in the courts. *Johnson v. Davidson* (1921) 54 Cal. App. 251, 202 P. 159; *In re Lynch's Estate* (1935) 154 Misc. 260, 276 N. Y. 939; *Crawford v. McConnell* (1935) 173 Okla. 520, 49 P. (2d) 551. *Sheldon v. Pruessner* (1895) 52 Kan. 579, 35 P. 201, 22 L. R. A. 709 held an assignment of a note for the purpose of evading payment of taxes due the state, invalid at the suit of the assignee saying: "Whatever tends to interfere with the beneficial operation of the statute is unlawful, as against the policy of the law. Whatever tends to obstruct duty by defeating the letter or spirit of the law is also unlawful; and the courts will not enforce any agreement or contract for the benefit of one through whose direction or assistance the law is violated, or public policy contravened. The law attempts to close the doors to temptations by refusing such parties recognition in the courts."

determination that the corporation unlawfully *practiced law*. The purpose of the inquiry was to find that when the defendant in this contempt proceeding sued on such claims it sued in a representative capacity." Why did the court need to inquire into a procedural incident of civil actions in this quasi-criminal contempt proceeding? Although the court did not cite the section, it must have felt that R. C. M. 1935, Section 8988 allowed any *party* to an action to act as his own attorney and that it must show that the defendant here, was not a proper *party plaintiff* in those civil actions which it brought on assigned claims." Had the court construed R. C. M. 1935, Section 8988, allowing any party to appear "*in person*" or by attorney as it construed R. C. M. 1935, Section 9629, allowing "any person" except the process server to act as attorney in Justice Court, the inquiry would not have been necessary. The court's ultimate finding was that the defendant's acts constituted the practice of law and that since it was a *corporation*, it was not relieved by R. C. M. 1935, Section 9629. But construing R. C. M. 1935, Section 8988 in the same way, a corporation has no personality and could not prosecute "*in person*." The court's construction of R. C. M. 1935, Section 5903, that the practice of law was not one of the proper purposes for formation of a corporation would support this construction also." If a broad rule were required, the court could have relied on the common law public policy against allowing laymen to practice law." R. C. M. 1935, Section 9629 should be construed together with R. C. M. 1935, Section 8944 (the statutory definition of the practice of law). The interpretation of R. C. M. 1935, Section 9629 might then well be that "any person" acting as an attorney in Justice Court means a regularly licensed attorney-

⁴Merchants' Credit Service case at lines 12 and 24, p. 100, of 104 Mont., lines 1 and 18, p. 342 of 66 P. (2d).

⁵Compare the special concurring opinion at pages 104, 105 of 104 Mont., p. 344 of 66 P. (2d). Note that this opinion does not rely upon the procedural point and depends mainly upon R. C. M. 1935, §§8944 and 5903 to show that defendant improperly practiced law.

⁶Compare the opinion and authority cited at pp. 100-102 of 104 Mont., p. 342 of 66 P. (2d). It would seem that if a corporation may not practice law indirectly by employing an attorney and "splitting fees" with him, it would not be able to do the same through any lay agent. *People v. People's Stockyards State Bank* (1931) 344 Ill. 462, 176 N. E. 901; 73 A. L. R. 1331 note; 15 CALIF. L. REV. 243 (1926).

⁷Compare the special concurring opinion at pp. 104-108 of 104 Mont., pp. 343-345 of 66 P. (2d); *Childs v. Smeltzer* (1934) 315 Pa. 9, 171 A. 883; *Rhode Island Bar Ass'n v. Automobile Service Ass'n* (1935) 55 R. I. 122, 179 A. 139, 100 A. L. R. 226. This policy is reflected in the CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION. Canons 34, "Division of Fees" and 35, "Intermediaries" are directed against the indirect practice by laymen by means of control over the licensed attorney or active participation in his practice.

at-law or the occasional friend or neighbor who acts for another without charging a fee." Otherwise he would be guilty under R. C. M. 1935, Section 8944 of practicing law."

"Compare *McCargo v. State* (Miss. 1887), 1 So. 161, where it was held: "A retired attorney who conducts but one suit in court for a friend or neighbor, without fee or reward, is not thereby brought into the classification of a practicing lawyer. . . ." In *Freeling v. Tucker* (1930) 49 Idaho 475, 289 P. 85, an attorney from another state was held not to have violated a statute against the practice of law for rendering services twice in a probate court since the statute was aimed at the *business* of practicing law. *State v. Bryan* (1887) 98 N. C. 644, 4 S. E. 522, held that the defendant in a disciplinary proceeding was not shown to be practicing since there was no evidence that he charged anything for appearance in court on behalf of another or that he held himself out as a practicing attorney. See also *Paul v. Stanley* (1932) 168 Wash. 371, 12 P. (2d) 401, differentiating gratuitous and compensated services on the basis of a statute penalizing the practice of law for doing "work of a legal nature for compensation."

"Acts such as the defendant was shown to have done in the principal case have been held to constitute the practice of law. Defendant necessarily held himself out as being skilled in appearances in Justice Court which involve a certain legal skill and knowledge. Its appearances as attorney in the J. P. action were such acts as are usually done by an attorney-at-law in his practice. Defendant also solicited this legal business. See *In re Phillips* (1922) 64 Mont. 492, 210 P. 80; 41 *YALE L. J.* 84-90 (1931). Defendant prepared and filed the pleadings in the Justice Court actions and those pleadings were the basis for appeals taken to higher courts. These acts are such as are usually done by, or under the supervision of, an attorney. The courts have frequently held that the drawing of such pleadings, examining witnesses, and preparing causes for trial constitute the practice of law. *Johnson v. Davidson* (1921) 54 Cal. App. 251, 202 P. 159; *People v. People's Stockyards State Bank* (1931) 344 Ill. 426, 176 N. E. 901; *Childs v. Smeltzer* (1934) 315 Pa. 9, 171 A. 883; *Land Title Abstract & Trust Co. v. Dworken* (1934) 129 Ohio St. 23, 193 N. E. 650; *Paul v. Stanley* (1932) 168 Wash. 371, 12 P. (2d) 401; *Crawford v. McConnell* (1935) 173 Okla. 520, 49 P. (2d) 551. In the last case the court said: "The preparation for a money consideration of legal instruments to be shaped from a mass of facts and conditions involving the application of intricate principles of law which can only be applied by a mind trained in existing laws in order to insure a specific result and to guard against other undesirable results comes within the term 'practice of law'." In the *Merchants' Credit Service* case, the court at p. 102 of 104 Mont., pp. 342, 343 of 66 P. (2d) relies strongly upon the demanding of attorney's fees as constituting something "usually done by a licensed attorney in his practice." It would seem that demanding and taking *any* fee based in part or entirely upon legal services rendered in court would constitute performance of such acts as an attorney does in his profession. Thus, taking an additional percentage, where recourse to the courts is necessary and the collection agent acts as an attorney, would be receiving an attorney's fee. This would be equally true where a "flat rate" is charged which envisages the contingency of taking the case into court and is so computed as in the long run to cover the cost of this additional service. See *In re Newman* (1916) 172 App. Div. 173, 158 N. Y. S. 375. The Montana court might have exercised more of the wide discretion which it has for the purpose of defining

Therefore, so much of the opinion as declared that an assignee for collection was not the real party in interest was not pertinent to the action, framed by the pleadings, or necessary to the determination eventually reached and might well be regarded as *obiter dictum*. However, in *Streetbeck v. Benson*, *supra*, defendant debtor raised the defense that plaintiff was an assignee for the purpose of collection only. The court found plaintiff was not the real party in interest relying almost wholly upon *State v. Merchants' Credit Service*, which it viewed as establishing a public policy for the state against all assignments for collection. It is submitted that the public policy established by the *Merchants' Credit Service* case was against the lay practice of law and that the *Streetbeck* case misconstrued the effect of the former case.

In general, it would seem that whether the assignee for collection is to be treated as possessing a full ownership for the purpose of suit, as being an agent, trustee, or tenant in common⁸² is immaterial, if it be recognized that he owns the cause of action. This would seem to be true although the cause of action be the limited right to sue and enforce a claim and the duty of the defendant to respond in damages—that and that alone.⁸³

—Frederick Dugan.

and punishing the unauthorized practice of law. In re Unification of the Montana Bar Ass'n (1939) 107 Mont. 559, 87 P. (2d) 172. In Rhode Island Bar Ass'n v. Automobile Service Ass'n (1935) 55 R. I. 122, 179 A. 139, 100 A. L. R. 228, it was said that a criminal statute specifying acts constituting the practice of law, does not define practice of law for all purposes nor take the control and supervision over the matter from the Supreme Court. At least in construing R. C. M. 1935, §8944, it would not be necessary to imply the limitation, "in any court of record" (there relating to *appearances* as attorney) as applicable to the clauses relating to acts usually done by an attorney or to the holding out as an attorney clause.

⁸²The tenancy-in-common view taken by *Weakley v. Hall* (1844) 13 Ohio 167, 42 Am. Dec. 194, has not been followed under the Code for good reason, as its practical application by the courts would be more difficult and confusing than concepts of "legal title." It might require both parties to appear as real parties in interest.

⁸³It is submitted that the more accurate definition of real party in interest should be: "That party who has the cause of action, whether it be the mere right to sue and require that the defendant respond in damages, or whether it include also the right to the thing sought by means of the action." Such definition would resolve the doubt which arises in the minds of the court if too much emphasis is put on the words, "real . . . interest" as separated from their context and usage by the courts. The "real interest" for the purpose of the suit is ownership of the right to sue, whether it arises by transfer, operation of law, or contract.