

1961

Automobile Insurance--Assignment, Subrogation and the Real Party in Interest Statute in Missouri

Joseph C. Greene

David H. Lloyd

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Joseph C. Greene and David H. Lloyd, *Automobile Insurance--Assignment, Subrogation and the Real Party in Interest Statute in Missouri*, 26 Mo. L. REV. (1961)

Available at: <https://scholarship.law.missouri.edu/mlr/vol26/iss1/11>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

AUTOMOBILE INSURANCE—ASSIGNMENT, SUBROGATION AND THE REAL PARTY IN INTEREST STATUTE IN MISSOURI

I. INTRODUCTION

A is involved in an automobile collision with B, with resulting damage to A's car. A has collision coverage with C insurance company, which fulfills its obligation under the insurance contract by paying some or all of the costs of repair. The insurance company then either commences, or causes to be commenced, a suit in A's name to recover the total amount of the damage. This suit is met by a motion to dismiss on the ground that the action is not prosecuted in the name of the real party in interest. Will or should the motion prevail?

A certain degree of uncertainty has arisen as to the answer to this question, but it seems that such motions are presently very often granted by the trial courts of Missouri.¹ The real party in interest statute, Section 507.010, Revised Statutes of Missouri (1949), sheds little light on the problem. The statute provides:

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, curator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party authorized by statute may sue in his own name in such representative capacity without joining with him the party for whose benefit the action is brought; and, when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Missouri.

It is submitted, however, that the uncertainty in this area is due in large part to a failure of the trial courts, and sometimes appellate courts, to distinguish the situation where, under a clause in an insurance contract, there is an assignment by the insured, and the situation where the insurer is subrogated to the rights of the insured, either as provided for by the terms of the contract or through the workings of the common law doctrine of subrogation.² The purpose of this comment is to show that the courts should distinguish between an assignment and a subrogation in applying the real party in interest provision and thereby to show that there is no need for the uncertainty in this area.

1. Information to the effect that such motions are quite frequently granted by the trial courts has been received through the subrogation offices of the insurance companies of Missouri.

2. There will be the problem in many cases of whether an instrument is an assignment of a claim or is only a reiteration of the common law principles of subrogation. There are of course no definite rules as to what words will constitute either an assignment or a subrogation, and the wording of each instrument must be considered independently. Nor is it the intention of the writers to lay down any such rules, but merely to assess the problem of the real party in interest once the court has determined which of these two—assignment or subrogation—is involved.

II. DISTINCTION BETWEEN ASSIGNMENT AND SUBROGATION

Appellate courts have incautiously used such language as: "There are many cases holding that an assignment, whether by subrogation or by written instrument does not transfer the cause of action";³ or, "The assignment of the owner's cause of action by operation of the principle of subrogation . . ."⁴ The use of such language has undoubtedly contributed to the trial courts' failures to consider fully the difference between an assignment under the insurance contract and a subrogation under contract or by operation of law when a motion is made by a defendant (being sued by the insured) for dismissal of the action on the grounds that it is not prosecuted in the name of the real party in interest. Under present Missouri law the sustaining of such a motion is improper unless this distinction is drawn, and a decision given accordingly.

Notwithstanding the faulty language sometimes seen in the appellate decisions, the leading Missouri cases in this area have recognized the distinction between assignment and subrogation.

In *Steele v. Goosen*⁵ a motion was made to dismiss an action for property damage brought by the insured, on the basis that the insured was not the real party in interest. The plaintiff-insured had received payment for less than his total property loss from the insurance company and had executed the following writing to the insurer:

And in consideration of said payment the insured *hereby assign* [*sic*] and transfer [*sic*] to the said company, such and *all claims, rights and demands* against any person, persons, corporation or property arising from or connected with such loss or damage, and said company is *subrogated* in the place of and to the claims and demands of the insured against such person, persons, corporation or property in the premises who may be liable or hereafter adjudged liable for the burning, theft, destruction, or damage to said property to the extent of the amount hereby paid.⁶ (Emphasis added.)

The court upheld the decision of the circuit court in dismissing the action, saying: "The document signed by the plaintiff constituted an assignment to the insurer of plaintiff's entire claim for property damage, although as the policy provided, plaintiff received \$50.00 less than the cost of repairs to his automobile."⁷ The court thus gave controlling effect to the language "hereby assign and transfer" and disregarded any reference to subrogation in the writing executed by the insured.

In *Hayes v. Jenkins*⁸ the Springfield Court of Appeals considered the case under the assumption that the plaintiff had been fully indemnified by his insurer for the damage sustained to his vehicle. The case apparently involved no express provision in the policy and a common law subrogation arose. A motion to dismiss

3. *Landau v. Schmitt Contracting Co.*, 237 Mo. App. 908, 920, 179 S.W.2d 138, 143 (St. L. Ct. App. 1930).

4. *Swift & Co. v. Wabash Ry. Co.*, 149 Mo. App. 526, 533, 131 S.W. 124, 125 (K.C. Ct. App. 1910).

5. 329 S.W.2d 703 (Mo. 1959).

6. *Id.* at 711.

7. *Id.* at 711.

8. 337 S.W.2d 259 (Spr. Ct. App. 1960).

on the ground that the plaintiff was not the real party in interest had been overruled by the trial court. On appeal the trial court's action was affirmed. The court held that the insured-subrogor could bring the action in his own name, stating: "The general rule is that a bare legal title to the action is sufficient to maintain an action at law."⁹ The court then went on to say that regardless of whether there was full or partial payment under the policy the result would be the same.¹⁰ The court recognized that the result would be otherwise in the case of an assignment, but pointed out that assignment was not involved.¹¹

These two well reasoned cases serve to illustrate the controlling difference in Missouri between the assignment of a claim, and a subrogation to a claim. When there is an assignment of an entire claim there is a complete divestment of rights from the assignor and a vesting of these same rights in the assignee.¹² In the case of subrogation, however, only an equitable right passes to the subrogee and the legal title to the claim is never removed from the subrogor but remains with him throughout.¹³ Within both areas, assignment and subrogation, there are, of course, refinements which must be made and problems which must be brought to light in view of the decisions of courts in both Missouri and other jurisdictions. Each area will be examined in turn.

A. Assignment

1. Assignability of a Chose in Action

A chose in action, "a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession,"¹⁴ was not assignable at early common law; in fact, non-assignability was its main characteristic. This characteristic was due in large part to the fact that such rights were considered personal in nature, and also was based on the doctrines against champerty and maintenance.¹⁵ The first relaxation of the general rule occurred when the courts of law began to allow an action by the assignee for his own benefit but in the name of the assignor when the former was appointed an attorney of the assignor to bring action for the debt.¹⁶ However, since objections were still being made on the basis of maintenance, before such actions would be allowed it was necessary to show the relationship of debtor-creditor between the assignor and assignee. But, by the eighteenth century, equity had come to recognize the validity of the assignment of debts and other choses in

9. *Id.* at 261.

10. ". . . [T]he test is not whether the injured party has been paid in full or in part, but whether the claim has been satisfied and released, or whether it has been assigned." 337 S.W.2d at 262.

11. ". . . [I]f the cause itself has been assigned the claimant would no longer have any interest and could not maintain it." 337 S.W.2d at 261-262.

12. See 3 WILLISTON, CONTRACTS §§ 432, 432(a), 446(a), 447 (3rd ed. 1960); 4 CORBIN, CONTRACTS § 858 (1951); RESTATEMENT, CONTRACTS ch. 7 (1932).

13. *Pringle v. Atlantic Coast Line R. Co.*, 212 S.C. 303, 47 S.E.2d 722 (1948) (leading case).

14. *Torkington v. Magee*, 2 K.B. 427, 430 (1902).

15. On the history of assignments of choses in action see Holdsworth, *The History of Choses in Action by the Common Law*, 33 HARV. L. REV. 997 (1920).

16. *Id.*

action and did not require a showing of a special relationship between the assignor and assignee in order to rebut the presumption of maintenance.¹⁷ Shortly thereafter the law courts took the same view with respect to the assignment of debts, although they still required the appointment of attorney, thus continuing in form the general rule against assignability of choses in action.¹⁸ Further inroads on non-assignability have been made, so that it is generally stated today that, "a right of action generally is assignable where it would survive to the assignor's legal representative."¹⁹ This general rule is subject, of course, to local statutes providing for survival or non-survival of certain actions.²⁰ A final erosion of the non-assignability doctrine occurred when the real party in interest statutes²¹ were enacted and the fiction of the appointment of attorney was thereby abandoned.

Thus, there has been almost a complete reversal from the historical position of non-assignability of a chose in action. Likewise, the courts have seemingly reversed themselves on the question of who is the proper party to bring the action, and it can now be said that:

It is no longer even 'proper' to sue in the name of A [assignor] in states where by statute the suit must be brought in the name of the 'real party in interest.' On proof that the right has been assigned, the suit will be dismissed unless it is shown that A is suing as agent and attorney of the assignee, C, and that C is the real plaintiff. So far from the assignee being the agent of the assignor, it now appears that the assignor can sue only as the agent of the assignee.²²

2. Effect of an Assignment

The Springfield court in *Hayes v. Jenkins* indicates the usual view as to what passes by an assignment by concluding "if the cause itself has been assigned the claimant would no longer have any interest and could not maintain it."²³ Perhaps it would be more indicative of the actual position of the parties if it were said that an assignment of an entire claim takes all rights, legal and equitable, which the assignor had in relation to the assigned claim, from the assignor and places those same rights in his assignee.²⁴ In Missouri and other "notice jurisdictions"²⁵ the assignor, even though devoid of any rights in the claim, is not devoid of any power, for under certain circumstances²⁶ an assignor may, by a subsequent assignment, defeat the rights of the prior assignee in the claim. It should be noticed that the doctrine which recognizes power in the assignor to defeat the rights of the

17. *Id.*

18. *Id.*

19. 6 C.J.S. *Assignments* § 30 (1937).

20. See §§ 537.010-.030, RSMo 1949, on survival of actions in Missouri.

21. See 3 WILLISTON, *op. cit. supra* note 12, § 446.

22. Corbin, *Assignment of Contract Rights*, SELECTED READINGS ON THE LAW OF CONTRACTS 724 (1934).

23. 337 S.W.2d at 261-262.

24. See authorities cited *supra* note 12.

25. See Chapter 410, RSMo 1949, for special statutes relating to notice of assignment.

26. See *Murdock & Dickson v. Finney*, 21 Mo. 138 (1855); Chapter 410, RSMo 1949. See also Annots., 31 A.L.R. 876 (1924), 110 A.L.R. 774 (1937).

assignee in certain cases, in no way recognizes any *rights* remaining in the assignor.

In light of these general rules relating to the effect of an assignment and keeping in mind the wording of the proof of loss in *Steele v. Goosen*,²⁷ which is indicative of the general language used in the assignment of such claims under an insurance contract, there is seemingly no inherent difficulty in reaching a decision as to the proper party to bring the action: undoubtedly the insurance carrier is the real party in interest in such a situation. If the assignor-insured makes a complete assignment of his entire claim he no longer has any legal or equitable rights therein, and thus no standing in court upon which to base an action.

3. Special Problem: Assignment of a Claim for Property Damages With Retention of a Claim for Personal Injuries

A commonly occurring situation concerns an assignment to the collision insurer of the entire claim of the insured against a third party for property damages where, in the same occurrence, the insured has suffered personal injuries as well. This necessitates a different analysis in applying the real party in interest statute. It is generally held by the courts, including those of Missouri,²⁸ that when a person sustains both personal injuries and property damage in the same collision there is but one cause of action accruing to the injured party. Thus, if the injured party brought action for personal injuries only and later attempted to bring a separate action to recover property damages the doctrine of merger and the principles against the splitting of a cause of action would be invoked against him. What is the situation under the real party in interest statute where there has been an assignment of a claim for property damages and a retention of the personal injury claim? Without more, it would seem that this would be a partial assignment and subject to special rules, to be examined hereafter;²⁹ but the Missouri courts seemingly have said that this is not so.

The general problem arose in *General Exch. Ins. Corp. v. Young*,³⁰ where the plaintiff was the collision insurer of the injured party who had received \$342 of \$367 property loss. The defendant was informed of the payment and of the fact that the insured had executed an instrument which purported to *assign* to the insurance company any claim which she might have against any person causing property damage. The insured had subsequently filed a separate petition asking \$5000 for personal injuries against the defendant. This suit had been dropped in consideration of \$500, and the insured had executed an instrument which purported to release the defendant from liability for *both* property damage and personal injuries. The court recognized that an assignment of a part of a single cause of action does not entitle the assignee to bring a suit at law unless the defendant gives his consent to such an assignment.³¹ The court also recognized that a person could not

27. See text accompanying note 6 *supra*.

28. See, e.g., *Coy v. St. Louis & S. F. R. Co.*, 186 Mo. App. 408, 172 S.W. 446 (Spr. Ct. App. 1914).

29. See note 37 *infra* and accompanying text.

30. 357 Mo. 1099, 212 S.W.2d 396 (1948).

31. *Id.* at 1104, 212 S.W.2d at 398-399.

sue for both property damage and personal injury in different suits when they arise from the same transaction; nevertheless the court allowed suit by the insurer, saying: "[T]he facts in the instant case furnish a reasonable exception to the rule against splitting or perhaps it is more accurate to say there has been no split of the cause of action, but the creation of two separate causes of action."³² The court further said:

Conceding, but not deciding, the claim cannot be split so as to authorize suits for property damage by both the owner and the insured, yet if the insurer either pays the insured his entire property loss³³ or pays him a sum less and receives an assignment of the whole claim, as was done in this case, the insured has no further interest in property damages. Under those circumstances the insurer is the real party and the only party interested in collecting property damages and should be permitted to sue in his own name. *Thus two separate causes of action may arise from the same occurrence.*³⁴ (Emphasis added.)

While it appears that the court here laid down two theories upon which its decision might be based, it would seem that the more practical basis for the decision would be to say that in such a situation two causes of action arise where only one existed before, rather than formulating exceptions to the rules against partial assignments and splitting causes of action. Of course if personal injury claims are not assignable in Missouri,³⁵ the assignment in the *Young* case can be distinguished from the usual partial assignment of a claim that is wholly assignable.

32. *Id.* at 1107, 212 S.W.2d at 400.

33. Is this dictum to the effect that where there is full indemnification by the insurance company, the suit must be brought in the company's name, even though only a subrogation is involved? The phrase "and receives an assignment of the whole claim" could be read to apply to both of the two immediately preceding phrases, which are in the disjunctive. But if this is so, what is the meaning of "as was done in this case"?

34. 357 Mo. at 1107, 212 S.W.2d at 401.

35. It is generally recognized in Missouri that the test of assignability of a chose in action is whether or not the claim will survive to the personal representative of a person in case of death. *State ex rel. Park Nat'l Bank v. Globe Indemnity Co.*, 61 S.W.2d 733 (Mo. 1933). Before the enactment of any statutes relating to survival of actions Missouri followed the common law rule that unliquidated claims for personal injuries would not survive, and hence were not assignable. *Davis v. Morgan*, 97 Mo. 79 (1888); *Schubert v. Herzberg*, 65 Mo. App. 66 (K.C. Ct. App. 1896); *Alexander v. Grand Ave. Ry. Co.*, 54 Mo. App. 66 (K.C. Ct. App. 1893) (dictum). Even after certain statutes were passed which seemed to provide that actions for personal injuries would survive, the courts maintained the rule of non-assignability. See, e.g., *McLeland v. St. Louis Transit Co.*, 105 Mo. App. 66, 80 S.W. 30 (St. L. Ct. App. 1904). In only one of the early cases was the effective statute even noted, and there it seems the construction was completely out of line with the wording of the statute. *Beechwood v. Joplin-Pittsburg Ry. Co.*, 173 Mo. App. 371 (Spr. Ct. App. 1913). Some of the early statutes admittedly might have been construed as providing for survivability only where an action had been commenced before the decedent's death, but not even this alternative was taken. In this regard see *Kramer v. Laspe*, 94 S.W.2d 1090 (St. L. Ct. App. 1936). See also § 5438, RSMo 1909; § 4231, RSMo 1919; § 3280, RSMo 1929; § 3670, RSMo 1939. The present Missouri statute, Section 537.020, RSMo 1949, would seem to say that a claim for personal injuries will survive to the decedent's representative; but apparently there have been no cases decided under this statute.

It should be noted that the court in *Steele v. Goosen*, in dismissing the action as to the assigned property damage and allowing the action to proceed as to the insured's personal injuries, followed the decision of the *Young* case, apparently holding that two causes of action existed rather than one.

4. Validity of a Partial Assignment

The decision in the *Young* case could be called an exception to the general rule relating to partial assignments. The Supreme Court of Nebraska well summarized the modern view of the majority of the courts³⁶ in this regard:

The common-law rule is that a creditor may not without the consent of a debtor split up the debt by assignment. The debtor is entitled to pay the debt in solido. Notice of the assignment does not destroy the right. In consequence of this rule, under the common law, an assignee of a part of a demand cannot enforce an assignment in an action at law unless there has been an acceptance on the part of the debtor. The general rule is that where there is an assignment of a fractional part of an entire right the assignee must resort to equity to enforce that right and in doing so bring before the court all parties in interest. The conclusion therefore is that an action at law upon a partial assignment may not be maintained against the debtor of an assignor alone in the absence of acceptance of the assignment by the debtor.³⁷

Professor Williston asserts that this limitation is founded on the theory of lack of legal title in the assignee.³⁸ He does point out that some courts do hold that where there is a partial assignment and the debtor makes no objection he thereby becomes liable to the partial assignee.³⁹

Missouri, however, has formulated a peculiar and substantially different doctrine in regard to the element of consent; otherwise Missouri is in accord with the majority of courts. It is the rule in Missouri apparently that a partial assignment is enforceable neither at law nor in equity unless the debtor gives his consent, and without such consent the assignment has no effect at all.⁴⁰

It seems, then, that where there has been a partial assignment, apart from the circumstances involved in the *Young* case, the assignor must bring the action to enforce the claim unless there has been consent to the assignment by the third party. This principle was applied in *Cable v. St. Louis Marine Ry. & Dock Co.*,⁴¹ which involved a boat which was lost through the negligence of the defendant. There was insurance on three-fourths of the boat and the part insured was abandoned by the plaintiff-owner to, and accepted by, the underwriters. The plaintiff-

36. See 3 WILLISTON, *op. cit. supra* note 12, § 442.

37. *First Nat'l Bank v. Gross Real Estate Co.*, 162 Neb. 343, 348-350, 75 N.W.2d 704, 708-709 (1956).

38. See 3 WILLISTON, *op. cit. supra* note 12, § 442.

39. *Ibid.* The jurisdictions Mr. Williston refers to are Minnesota, Oklahoma and Utah. He also asserts that Missouri follows this rule, citing a Kansas City Court of Appeals decision, *Friedman v. Griffith*, 196 S.W. 75 (K.C. Ct. App. 1917).

40. The earliest case on this point was *Burnett v. Crandall*, 63 Mo. 410 (1876). See also *Loomis v. Robinson*, 76 Mo. 488 (1882), approved *Webster v. Sterling Finance Co.*, 351 Mo. 754, 173 S.W.2d 928 (Mo. 1943).

41. 21 Mo. 133 (1855).

owner then brought an action for the entire amount of the loss. The defendant moved for dismissal as to the insured three-fourths on the theory that the right of action as to that portion was in the insurance company because the abandonment constituted an assignment of that part of his interest. The court agreed there had been a partial assignment but sustained the owner's right to sue, pointing out that the real party in interest provisions did not affect the common law rule regarding the legal title holder's right to bring action in his own name upon a claim. The court said that the assignee could bring the action only when he was the assignee of an entire claim.⁴²

In *Swift & Co. v. Wabash Ry. Co.*⁴³ the court was also concerned with a partial assignment. In that case property was damaged by sparks from a locomotive, and the owner of the damaged property had insurance with three separate companies, each of which paid one-third of the loss and took an assignment of one-third of the owner's claim against the railway company. The owner then brought action to recover for all damages sustained. The Kansas City Court of Appeals held that although the plaintiff had assigned its entire beneficial interest, it could maintain the suit. The court indicated, however, that had the full loss been reimbursed by only one insurer the suit could have been brought in that insurer's name. The court said:

The defendant did not consent to any assignment of plaintiff's cause of action, and the rule is well settled that, under the rule prohibiting the splitting of a cause of action, a portion of a debt, claim, or judgment is incapable of assignment in the absence of the debtor's consent.⁴⁴

Cable and *Swift* thus are in line with the Missouri rule regarding partial assignments, viz., that they are ineffective in the absence of the debtor's consent. They are also authority that the assignor of part of a claim retains legal title to his cause of action, and that this is sufficient to maintain an action. Therefore the partial assignor is in the same position as the subrogor-insured under the rule in the *Hayes* case.

B. Subrogation

Some authorities do not distinguish "assignment" from "subrogation" in connection with the real party in interest provisions. This position is sometimes said to be based on the practical consideration that the insurance carrier is, in either instance, entitled to the fruits of the action.⁴⁵ However, the Missouri courts have recognized this distinction as controlling in applying section 507.010.

Subrogation is a creature of equity and the right of subrogation is "called into existence for the purpose of enabling a party who has paid the debt to reap the benefit of all remedies which the creditor may hold against the principal debtor . . ."⁴⁶ In legal theory, in the insurance situation when there is payment to the insured the subrogor-insured remains the legal owner of the cause of action and

42. *Id.* at 135.

43. 149 Mo. App. 526, 131 S.W. 124 (K.C. Ct. App. 1910).

44. *Id.* at 533, 131 S.W. at 126.

45. Atkinson, *The Real Party in Interest Rule: A Plea for Its Abolition*, 32 N.Y.U.L. REV. 926 (1957).

46. VANCE, INSURANCE § 134 (3rd ed. 1951).

the insurance company becomes the beneficial owner thereof, to the extent of indemnification.⁴⁷ And legal title to a cause of action has always been held in Missouri to be sufficient to allow the holder thereof to bring suit in his own name as the real party in interest.⁴⁸ This principle was of course specifically applied to the automobile insurance subrogation situation in *Hayes v. Jenkins*. On the other hand, if at the time of indemnification the insured executes an assignment in favor of the insurer, a complete divestment of all rights occurs and as a result the insured-assignor is without any rights whatsoever.⁴⁹ A transfer of rights has occurred and the insurance company becomes the real party in interest, for the entire cause of action is in the assignee. The Missouri case of *Steele v. Goosen* applies this rule very clearly in the automobile insurance field.

This, however, is not the result reached in most jurisdictions. In a majority of states the courts take the position that there is no distinction between assignment and subrogation and the question of whether the insurer or the insured is the real party in interest turns on the finding as to whether the indemnification is full or partial. The conclusion usually reached in most jurisdictions is that the insured remains the real party in interest where he is only partially indemnified, whereas the insurer is the real party in interest where it has fully paid for the property loss.⁵⁰ The Missouri cases would not distinguish between partial and full indemnification of property loss in determining the real party in interest in the subrogation situation, i.e., where there is a policy provision merely reiterating the common law rights of subrogation⁵¹ or where there is no express policy provision and no assignment.⁵²

1. Partial Indemnification

Partial indemnification occurs most often in the situations where the policy provides for a deductible amount or where there is only collision coverage and personal injury also results from a collision. In these situations it is generally recognized, in Missouri⁵³ and elsewhere,⁵⁴ that, despite partial or full payment for

47. *Pringle v. Atlantic Coast Line R. Co.*, *supra* note 13.

48. *Matthews v. Missouri Pac. Ry. Co.*, 142 Mo. 645, 44 S.W. 802 (1897); *Beattie v. Lett*, 28 Mo. 596 (1859); *Cable v. St. Louis Marine Ry. & Dock Co.*, *supra* note 41; *Hayes v. Jenkins*, 337 S.W.2d 259 (Spr. Ct. App. 1960); *Meyer Jewelry Co. v. Professional Bldg. Co.*, 307 S.W.2d 517 (K.C. Ct. App. 1957); *Keeley v. Indemnity Co. of America*, 222 Mo. App. 439, 7 S.W.2d 434 (St. L. Ct. App. 1928); *Sexton v. Anderson Elec. Car Co.*, 234 S.W. 358 (K.C. Ct. App. 1921); *Foster v. Missouri Pac. Ry. Co.*, 143 Mo. App. 547, 128 S.W. 36 (Spr. Ct. App. 1910); *Swift & Co. v. Wabash Ry. Co.*, *supra* note 43; *Haysler v. Dawson*, 28 Mo. App. 531 (K.C. Ct. App. 1888).

49. See authorities cited *supra* note 12.

50. See Annot., 157 A.L.R. 1233 (1945), for a collection of the cases.

51. A standard automobile insurance policy reads as merely a reiteration of the common law right of subrogation: "Subrogation. In the event of any payment under this policy, the company shall be subrogated to all of the insured's rights to recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

52. *Hayes v. Jenkins*, *supra* note 48.

53. *Busch Latta Painting Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925); *Swift & Co. v. Wabash Ry. Co.*, *supra* note 43 (dictum).

54. See Annot., *supra* note 50.

the property loss involved, the right of action against the wrongdoer remains in the insured and the action (for the entire loss) may be brought by him in his own name. Indeed most courts would hold that the insured *must* bring the action where he is only partially indemnified and that the insurance company *cannot* bring an action in its own name.⁵⁵ Authority is scarce in Missouri on this point, though what there is would indicate that the state can be classified with the majority.⁵⁶ In such a case the insured may recover the full value of the property damage from the tortfeasor but as to the amount paid to him by the insurer he becomes a trustee, with the obligation to pay over to the carrier that amount.⁵⁷

This result seems sound. Its reasoning rests upon the right of the defendant not to have the cause split so that he is compelled to defend two actions predicated upon the same wrongful act. Such a severance is avoided where suit is brought in the name of the insured.

Although the insured is the real party in interest in the normal partial indemnification situation, if the insured settles with the tortfeasor to the extent of the unindemnified portion of the loss sustained,⁵⁸ or is reluctant to bring the action,⁵⁹ the right of the insurance company to proceed for its portion of the loss

55. *Id.*

56. Missouri early did no more than recognize that most jurisdictions followed the rule that a partial subrogee could not bring suit in its own name. Hartford Fire Ins. Co. v. Wabash Ry. Co., 74 Mo. App. 106, 115 (K.C. Ct. App. 1898). (However, compare the result in this case, where the insured had released his interest.) The Missouri Supreme Court has recognized the rule, but without discussion. Busch Latta Painting Co. v. Woermann Constr. Co., *supra* note 53. It was only dictum, however, for the reason that the court had only to decide that the partial subrogor *could* bring the action in his own name and not that the action *must* be so brought. In *Subscribers v. Kansas City Pub. Serv. Co.*, 230 Mo. App. 468, 91 S.W.2d 227 (K.C. Ct. App. 1936), the court seems to consider it a settled rule of law that a partial subrogee cannot maintain an action in its own name, but cites no authority that will support the proposition, except by analogy to the partial assignment cases. *Cf. Helderman v. Von Hoffman Corp.*, *infra* note 72.

57. *Baker v. Fortney*, 299 S.W.2d 563 (K.C. Ct. App. 1957); *Swift & Co. v. Wabash Ry. Co.*, *supra* note 43 (dictum).

58. Where the company partially indemnifies an insured, who thereafter purports to release to the tortfeasor the whole claim, the question of whether the insurance company can sue in its own name is in doubt. The Kansas City Court of Appeals held in *Hartford Fire Ins. Co. v. Wabash Ry. Co.*, *supra* note 56, that the insurance company could bring an action to recover in its own name, at least where there was notice to the tortfeasor of the company's rights. The release was held ineffective as to the company's rights on the theory that it was an attempted fraud on the insurance company. But in *Subscribers v. Kansas City Pub. Serv. Co.*, *supra* note 56, the same court held directly to the contrary; but the Hartford Fire Ins. Co. case was not cited, so perhaps it was not called to the attention of the court. *Subscribers v. Kansas City Pub. Serv. Co.* is questionable as authority also for the reason that the Supreme Court disapproved of its holding to the extent it is inconsistent with the opinion in *General Exch. Ins. Corp. v. Young*, *supra* note 30.

59. If the insured refuses to bring suit in his name, the insurance company may have an action against the insured for breach of the cooperation clause of the policy, the measure of damages presumably being that which the company would have gained if the policy holder had cooperated. This course of action necessitates

should not be defeated.⁶⁰ The result might be otherwise where the insured attempts to release the entire claim for a fair consideration, and the tortfeasor has no notice of the rights of the insurance company.⁶¹

2. Full indemnification

Where the insurance carrier indemnifies the insured to the full extent of the property damage sustained and is fully subrogated to the rights of the insured in respect thereto, either by operation of the law or by virtue of a provision in the policy merely reiterating what the law would provide in the absence of the provision, the earlier Missouri decisions indicated that the insured would remain the proper party to bring the suit.⁶² As a matter of fact, the early case of *Sexton v. Anderson Elec. Car Co.*⁶³ seems to have been a clear holding to that effect. There the plaintiff had been paid by his insurer for loss of his car, and had turned it over to the company with a bill of sale therefor. The plaintiff actually testified at the trial that the money to be recovered was for the insurance company and not for himself, that he merely allowed the company to bring the suit in his name as provided in the policy, and that he had no interest in the result of the lawsuit. The court recognized that "where the insurer pays to the assured the full amount of the loss, the insurer is subrogated by operation of law to all of the assured's rights of action against third persons who may be responsible for the loss,"⁶⁴ but concluded nevertheless that the insurer was the proper party to bring the suit. The court emphasized the fact that the plaintiff had retained legal title to the cause of action, the bill of sale for the car not being an assignment, and that the agreement between the insurance company and plaintiff as to division of money or how suit should be prosecuted against defendant was no concern of the latter. But the recent Springfield Court of Appeals case of *Hayes v. Jenkins* can be said to be the most definitive decision upon the precise question, for the reason that it followed so close in time *Steele v. Goosen*, and therefore the court was forced to consider more fully the difference between assignment and subrogation. The court in the *Hayes* case assumed there had been full payment to the insured but never-

a suit in the company's name, and may also be disadvantageous when the insured is impecunious. Many policies of course give the company the right to institute suit in the insured's name. Apparently there is no authority in Missouri recognizing that an insurance company can enforce its rights in equity.

60. See 8 APPLEMAN, INSURANCE LAW & PRACTICE § 4931 (1942).

61. *Ibid.*

62. *First Nat'l Bank v. Produce Exch. Bank*, 338 Mo. 91, 89 S.W.2d 33 (1935); *Meyer Jewelry Co. v. Professional Bldg. Co.*, *supra* note 48; *Glenn v. Thompson*, 228 Mo. App. 1087, 61 S.W.2d 210 (St. L. Ct. App. 1933); *Keeley v. Indemnity Co. of America*, *supra* note 48. See also the complete discussion of the subject of assignment and subrogation in *Swift & Co. v. Wabash Ry. Co.*, *supra* note 43. These cases should be compared with other cases in Missouri holding that where the insured has been indemnified for the whole loss sustained, regardless of whether the insurance company must bring the action in its own name, it can do so. *Lumberman's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co.*, 149 Mo. 165, 50 S.W. 281 (1899); *Aetna Ins. Co. v. Missouri Pac. Ry. Co.*, 123 Mo. App. 513, 100 S.W. 569 (K.C. Ct. App. 1907); *Foster v. Missouri Pac. Ry. Co.*, *supra* note 48 (dictum).

63. *Supra* note 48.

64. 234 S.W. at 359.

theless concluded that the subrogor-insured was the proper party to bring the action.

Why should the insurer-assignee be the real party in interest, as previously concluded, and the insurer-subrogee be outside the operation of the Missouri real party in interest provisions? To effect a solution to the problem it is first pertinent to inquire into the legislative motivation behind the real party in interest provisions, and in so doing examine the defects which the legislature sought to remedy by enacting the statute.

It has been said that the principal reason for the requirement that an action be prosecuted by the real party in interest was to protect the tortfeasor against multiple suits based upon the same wrongful act.⁶⁵ If this be so, a construction of the provisions should be directed towards attaining this end. Therefore, the question of who is the real party in interest should become: the discharge of a judgment in whose favor will fully protect the tortfeasor? A suit by the subrogor bars a subsequent suit by the subrogee;⁶⁶ this is the test as to who is the real party in interest according to our Supreme Court in *Quinn v. Van Raalte*,⁶⁷ wherein the court said: "[R]ecovery . . . will fully protect the defendant if another action be brought against him upon the same state of facts. These facts authorize the conclusion that the plaintiff is the real party in interest."⁶⁸ The Supreme Court therefore recognizes that the insured may sue, recover, (which will forever protect the defendant) and hold the proceeds for the benefit of the insurance company.

On the other hand, if the insurer-subrogee is named the real party in interest where it has fully indemnified the insured for his property loss, successive suits may be necessary if the insured is to be reimbursed for his whole loss, for the insurance company in any case is entitled to recover no more than the amount paid the insured. But the insured may have other rights, for instance in the typical automobile collision case a right to recover for loss of use⁶⁹ and other miscellaneous damages.⁷⁰ If the insured could proceed independently to recover for these items, this would involve an additional action, the necessity of which is directly contrary to the intention of the legislators in enacting the real party in interest statute to avoid a multiplicity of suits. As a practical matter, this would place an unnecessary burden on the parties to the insurance contract, the defendant, and the courts.

But under present Missouri law it would seem that the insured could not proceed independently to recover for miscellaneous damages above and beyond loss

65. *Powers v. Ellis*, 103 N.E.2d 907 (Ind. 1952).

66. *Glenn v. Thompson*, *supra* note 62, and cases cited therein.

67. 276 Mo. 71, 205 S.W. 59 (1918). This was also recognized as the test for determining the real party in interest in *Matthews v. Missouri Pac. Ry. Co.*, *supra* note 48; *Glenn v. Thompson*, *supra* note 62; *Keeley v. Indemnity Co. of America*, *supra* note 48; *Guerney v. Moore*, 131 Mo. 650, 32 S.W. 1132 (1895).

68. *Id.* at 103, 205 S.W. at 68.

69. See, e.g., *Weller v. Hayes Truck Lines*, 335 Mo. 695, 197 S.W.2d 657 (1947).

70. The most important items are the costs of towing and storage. Recovery for these items is allowed. *Gilwee v. Pabst Brewing Co.*, 195 Mo. App. 487, 193 S.W. 886 (K.C. Ct. App. 1917); *Conley v. Kansas City Rys. Co.*, 259 S.W. 153 (K.C. Ct. App. 1924).

in value of his automobile. The Missouri Supreme Court has said that causes of action which are not independent and distinct are not permitted to be severed and prosecuted separately.⁷¹ Property damage and resulting loss of use, towing and storage expenses, etc., would not seem to be of such a nature as to be considered independent and distinct. Naming the insurer-subrogee the real party in interest then would give the defendant a windfall by allowing him to avoid responsibility for loss of use and other miscellaneous damages and at the same time deprive the injured party of an amount to which he would ordinarily be entitled. For this reason it would seem that in any case where the insured seeks to recover damages for loss of use, towing, storage and other items as to which he has not been indemnified under the insurance contract, and for which he would usually be allowed to recover, in addition to loss in value, the court should conclude that the insured is the real party in interest.

Admittedly joinder of the insurer and insured under the Missouri rules⁷² might be a solution to the problem, but this is not an entirely satisfactory answer because of possible jury prejudice where the insurance company is present in the case. It also might be seriously questioned whether, while the procedural rules may permit such a joinder, the policy underlying the real party in interest statute is such as to compel it.

There is another right recognized by Missouri law of which the insured might be deprived if the insurer-subrogee is named the real party in interest. This is the right of an innocent party to recover punitive damages in certain cases. And in this area under existing Missouri law the possible solution of joinder of the insured and insurer in one action is even less likely to be available. In *Carnes v. Thompson*⁷³ the Supreme Court determined that actual damages, either substantial or nominal, must be found as a predicate for recovery of exemplary damages. If the insurance company is named the real party in interest after having fully indemnified the insured for property loss, the carrier can proceed only for the amount paid and

71. See *M.F.A. Mut. Ins. Co. v. Hill*, 320 S.W.2d 559 (Mo. 1959), and cases cited therein.

72. Mo. R. Civ. P. § 52.05 (1960). This section provides in part: "All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. . . ."

In *Helderman v. Von Hoffman Corp.*, 260 S.W.2d 333 (St. L. Ct. App. 1953), the court did allow joinder of the insurance company and the insured. But in that case suit was by the insurance company seeking to recover only property damages resulting from collision occasioned by a bailee's negligence, and by the bailor seeking to recover only for theft of tools from the car while bailed, and by bailor guests for loss of personal property from the car. The court said joinder was proper because no splitting was involved since separate claims were presented, notwithstanding all arose from the same occurrence. Actually the decision seems to be nothing but a logical extension of *General Exch. Ins. Corp. v. Young*, *supra* note 30. It should be noted, however, that *Helderman* is not authority for the proposition that the insurance company and insured can be joined where the former seeks to recover for property damages and the latter seeks to recover for resulting loss of use and other miscellaneous damages.

73. 48 S.W.2d 903 (Mo. 1952).

the insured is excluded from recovering such damages, for he cannot satisfy the condition precedent of actual or nominal damages. Once the balance of conflicting policy considerations has been struck in favor of allowing recovery of punitive damages, it may be questioned whether the right should be denied merely because of payment pursuant to an insurance contract.

In line with the same general legislative policy of reduction of the number of suits, if the defendant seeks to assert a counterclaim, and the insurance carrier is prosecuting the action, the defendant will not be permitted to do so, for the insurance carrier under the collision contract is not liable to respond to claims based on the fault of the insured.⁷⁴ In this connection, the question arises as to the effect of the Missouri compulsory counterclaim provision which provides that all counterclaims arising out of the same transaction *must* be asserted at the time of the principal suit.⁷⁵ This question remains unanswered by Missouri courts.

Another of the announced purposes in enacting the real party in interest statute was to simplify pleadings in the single court system.⁷⁶ Before consolidation of the courts of law and equity two rules were in existence: the common law rule of nominal parties and the equitable rule of real parties in interest. The codifiers chose to adopt the equitable rule.⁷⁷ But the codes were not promulgated with the intention of varying the substantive rights in any respect, i.e., to give a new cause of action where none before existed or to deprive one of a cause of action where one did exist previously. That holding the insurer-subrogee is the real party in interest may in many cases interfere with the substantive rights of the insured has been illustrated above, and therefore in those cases such a holding would also be contrary to this announced purpose of the legislature.

The Missouri cases seemingly have never commented at length on the purpose of this state's real party in interest provision, section 507.010. It can be seen that in many cases,⁷⁸ typified by *Quinn v. Van Raalte*,⁷⁹ the courts have emphasized multiplicity of suits as the evil sought to be remedied by the statute. Most of the Missouri cases comment on the purpose of the statute only negatively. For instance in *Hayes v. Jenkins* and in a great many cases decided previously⁸⁰ the attitude of the court (never expressed) seems simply to be that it was not the purpose of the statute to abrogate the long-standing principle that legal title is sufficient to enable one to bring an action. In the *Hayes* case and the earlier cases one can also see the more or less negative approach that it was not the purpose of the statute to make that which was foreign to the case—the existence of an insurance contract and payment pursuant thereto—a live issue. This attitude of the courts can be

74. Admittedly in many, if not most, cases the collision carrier also provides liability coverage; but this is immaterial in states such as Missouri not having a direct action provision, for the liability carrier is not obligated to respond until the claim against the insured is reduced to judgment. See §§ 379.195-200, RSMo 1949.

75. Mo. R. Crv. P. § 55.45 (1960).

76. Atkinson, *supra* note 45.

77. *Ibid.*

78. See cases cited *supra* note 67.

79. *Supra* note 67.

80. See cases cited *supra* note 48.

criticized insofar as cases cited to support it⁸¹ in the main involve the question of whether indemnity of the plaintiff under an insurance contract will either defeat or reduce a defendant's liability. The defendant in the cited cases was not contending that the insurance company was the real party in interest, or that his obligation, if any, was owed to someone else, but rather that his liability to the plaintiff, if any, should be reduced to the extent that plaintiff had already been indemnified on the theory that otherwise plaintiff would receive double compensation.⁸²

There is another policy consideration which should perhaps be recognized in applying the real party in interest statute. This is the danger of jury prejudice resulting from the presence of the insurance company-subrogee as plaintiff. Traditionally there exists a policy against disclosing the fact of insurance to the jury.⁸³ This policy is founded upon the reasoning that insurance is not relevant in the case and upon the belief that juries will be inclined to favor the party opposing the insurance company. If the policy against such disclosure is strong, as it appears to be in Missouri, there is no reason why the court should not consider the matter when construing and applying the real party in interest provision, even though the policy against disclosure originally arose to protect the interests of a defendant and here it would be utilized to protect the affirmative right of an insurance company. In light of the language of the court in the *Hayes* case,⁸⁴ it is possible that this consideration was weighed in the balance in favor of sustaining the prosecution of the suit by the insured-subrogor in preference to disclosing the insurance company's interest.

III. METHODS OF AVOIDING DISCLOSURE

If the *Steele* case is not confined to assignment situations, but rather extended to subrogation cases as well, or if the insurance companies wish to avoid the question of real party in interest altogether, they may attempt to utilize certain devices currently in use elsewhere⁸⁵ to avoid compulsory prosecution of suits in the companies' names.

Insurance companies have utilized the device of the "loan receipt" as the substitute for a payment which would give rise to subrogation, as well as the device of "assignment-reassignment," which reverts in the insured the legal title to the

81. See, *e.g.*, the cases cited by the court in *Hayes v. Jenkins* when it evinces this attitude. 337 S.W.2d at 261.

82. See especially *Wells v. Thomas W. Garland, Inc.*, 39 S.W.2d 409 (St. L. Ct. App. 1931), *Ormsby v. A.B.C. Fireproof Warehouse Co.*, 214 Mo. App. 336, 253 S.W. 491 (K.C. Ct. App. 1923), and *Erhart v. Wabash Ry. Co.*, 136 Mo. App. 617, 118 S.W. 657 (K.C. Ct. App. 1909), all three of which were cited in the *Hayes* case.

83. See, *e.g.*, *Sherwood v. Arndt*, 332 S.W.2d 891 (Mo. 1960); *Murphy v. Graves*, 294 S.W.2d 29 (Mo. 1956); *Whitman v. Carver*, 337 Mo. 1247, 88 S.W.2d 885 (1935); *Ryternsky v. O'Brine*, 335 Mo. 22, 70 S.W.2d 538 (1934).

Professors Wigmore and McCormick have been the most open critics of this traditional position. See 2 WIGMORE, EVIDENCE § 282a (3rd ed. 1940); MCCORMICK, EVIDENCE § 168 (1954).

84. 337 S.W.2d at 261.

85. See Annot., *supra* note 50.

action. The validity of these devices, and their effect as far as the real party in interest provisions are concerned, has been questioned, with various results depending on the jurisdiction and peculiar facts of the particular case.

A. *Loan Receipt*

The transaction involving the loan receipt⁸⁶ has been construed by numerous courts as being a loan or advancement to be recovered back, which does not subrogate the insurance company to the rights of the person to whom the money has been advanced or loaned.⁸⁷ By the utilization of the loan receipt device as a substitute for payment, the end effect is to create an extrinsic contract and rights flowing therefrom in favor of the insurance company to recover from the insured to the extent of the loan. Being a wholly separate transaction, no question concerning subrogation arises at all, since the loan is not construed as a payment for the loss.⁸⁸

The Missouri Supreme Court has recognized the validity of the loan receipt device, but has not directly passed upon the question of whether or not it gives rise to any rights by way of subrogation. In *Halferty v. National Mut. Cas. Co.*⁸⁹ the court, while apparently sanctioning use of the loan receipt, resolved the real party in interest question solely upon the narrow ground that legal title to the cause of action remained in the insured. This conclusion of course does no more than recognize that the insured is in at least the same position as where unconditional payment is received and the insurance company is subrogated to the rights of the insured to the extent of payment.

At least one jurisdiction, New York, requires that the loan provision be in the contract of insurance and a transaction resulting in a loan receipt not so provided for will be treated as unconditional payment.⁹⁰ New York courts have also taken the position that where the insurance policy provides that the insurer might discharge its liability to the insured either by loan or by payment, the loan receipt does not constitute payment; but where the policy does not authorize the insurer to discharge its liability to the insured by a loan, but only by payment, the loan has the legal effect of payment.⁹¹ Missouri has not yet determined this question, and to say whether the receipt unconnected with a corresponding provision in the contract would be treated as payment by the Missouri courts would be mere conjecture. It is difficult to see how the question would arise in Missouri, for the question in this state is not whether unconditional payment has been made, but whether legal title to the cause of action has been transferred.

86. The "Loan Receipt" generally provides: "The insurer may discharge its liabilities to the insured either by payment or by loan; in the event the company elects to discharge its liabilities by way of loan, such loan will be repayable only from any recovery on account of the loss."

87. See Annot., *supra* note 50.

88. See the discussion of this proposition as approved by other jurisdictions in *Halferty v. National Mut. Cas. Co.*, 296 S.W.2d 130 (K.C. Ct. App. 1956).

89. *Id.*

90. *Adler v. Bush Terminal Co.*, 161 Misc. 509, 291 N.Y. Supp. 435 (1936); *Lee v. Barrett*, 82 Misc. 475, 144 N.Y. Supp. 941 (1913).

91. *Lee v. Barrett*, *supra* note 90.

B. *Assignment-Reassignment*⁹²

In Missouri an assignment of a claim for the purpose of suit only, obligating the assignee to account for the proceeds to the assignor, enables the assignee to sue in his own name.⁹³ This is on the theory that the assignee is trustee of an express trust; as such he would fall within an exception to the real party in interest provision.⁹⁴ In *Petrikín v. Chicago, R. I. & P. R. Co.*⁹⁵ the federal court, purporting to follow Missouri law, said that where there was an assignment under a collision insurance contract of all rights against the tortfeasor, they were divested by the insurer's reassignment of the claim to the insured for the purpose of suit and the insurer was not the real party in interest in an action against the tortfeasor.

The legal effect of such an assignment is to revest in and restore to the insured the entire legal title to the original claim that the insured had against the defendant as a result of the collision, consequently divesting the insurance company of legal title. Under Missouri law after such a reassignment the insured would be the real party in interest.

IV. CONCLUSION

In Missouri in connection with the assignment of claims the law may be summarized as follows. Where there is an assignment of the entire claim, the assignee must appear in the action as the real party in interest. But when there is only a partial assignment of the claim further distinctions must be drawn. Where the insurer is assigned a property damage claim and personal injuries arose out of the same occurrence, the company may be able to bring an action separate from that brought by the insured although there is the possibility of having the parties joined in a single suit. In the other partial assignment situations the assignor must bring the action, for legal title to the entire claim remains with him, and in Missouri this is the criterion for determining the real party in interest.

If the company indemnifies the insured and is subrogated to his rights under common law rules of subrogation, or by virtue of a contract provision merely reiterating what the law would otherwise provide, the following conclusions are reached by Missouri cases. If there is partial indemnification, far from the insurance company being forced to bring suit in its own name, there is some authority that the company cannot do so. And even if the insured is fully indemnified for property loss, and the damages sought do not exceed that amount, suit can still be brought in the insured's name, he remaining the holder of legal title. It may be

92. The reassignment provisions generally provide: "This assignment to reinvest in the insured all rights, claims, and causes of action (which had existed prior to this assignment in the insurance company) for the purpose of collection, suit, and action thereon and if any recovery is had as a consequence of said action, plaintiff is primarily responsible to the assignor to the extent of the amount paid under the policy."

93. *Schepman v. Mutual Benefit Health & Acc. Ass'n*, 231 Mo. App. 651, 104 S.W.2d 777 (K.C. Ct. App. 1937).

94. *Haysler v. Dawson*, *supra* note 48; *Webb v. Morgan*, 14 Mo. 428 (1851); *City of St. Louis* to use of *Becker v. Rudolph*, 36 Mo. 465 (1865); *City of Kansas* to use of *Enright v. Rice*, 89 Mo. 685 (1880).

95. 15 F.R.D. 346 (D.C.W.D. Mo. 1954).

questioned whether this last conclusion conflicts with the spirit of the real party in interest statute. Nevertheless there are other policy considerations which lend support to this conclusion, such as avoidance of disclosure of the insurer's interest in the cause, protection of the insured's right to recover damages for loss of use and other miscellaneous items, avoidance of any attempt at bringing a multiplicity of suits, and affording the defendant the opportunity to press any counterclaim he might have.

It would appear that an insurance company can avoid appearance in a suit in Missouri if that is its desire. But the insurance companies must become cognizant of the fact that they cannot have their cake and eat it too. The court's very summary handling of the question of construction of the instrument executed in favor of the insurance company in *Steele v. Goosen* stands as a warning to other insurance companies to check the wording of their policies and proofs of loss or equivalent instruments very carefully.

If the *Steele* case is not confined to assignment situations or if the insurance companies wish to avoid the question of real party in interest altogether, there are certain devices which may be available. The loan receipt is one such device, but since its use may well leave the insurance company in no better position than if it had to rely on the doctrine of subrogation, the loan receipt possibly will not serve the purpose for which it would be intended. The assignment-reassignment device would seem to be better adapted to use as a method of avoiding disclosure for its validity seems to be clear. This device will probably find greater use by the insurance companies of Missouri as they become aware of the state of the law on this particular point.

JOSEPH C. GREENE
DAVID H. LLOYD