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Pleading - Insurance - Subrogee - Insurer Required to Sue in Own Name Where Insured Was Indemnified in Full

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A substantial number of states have consistently refused to follow the majority rule. Instead they have held payment to the de facto officer does not bar the de jure claimant from recovering his salary.[21] This view is predicated on the belief that the salary should follow the "title" to the office.[22]

Iowa, in 1904, adopted the majority view in holding that a de jure officer after obtaining possession of the office, could not recover from the county the salary paid to the de facto officer.[23] In subsequent years the majority view has been applied to policemen,[24] sanitary inspectors,[25] and an employee of the Iowa State Highway Commissions,[26] all of whom, upon reinstatement, were denied back pay. The instant case, in departing from the aforementioned decisions, rests upon the failure of the applicable statute [27] to state that dismissal works a forfeiture of the salary. In reply, the dissenting justice stated, "What constitutes a good defense to plaintiff's claim is not the order of suspension but the fact that plaintiff never performed the duties of the office . . ." [28] It is submitted that the apparent ambiguity, as to the legislative intent, should be resolved in favor of the firmly established rule. Such an adjudication would relieve the taxpayer, through his municipal corporation, from the onerous duty of paying twice for the same service.

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PLEADING — INSURANCE — SUBROGEE — INSURER REQUIRED TO SUE IN OWN NAME WHERE INSURED WAS INDEMNIFIED IN FULL. — During trial of an action resulting from an automobile collision, the defendant sought to file an amended answer asserting that the nominal plaintiff was not the real party in interest. This proposed amendment alleged that the named plaintiff had already been indemnified in full by insurance and that all rights accruing to that plaintiff from the collision had been transferred to the insurance company through assignment and subrogation. Counsel for the defense contended that only the insurer retained a beneficial interest in the matter. Therefore, maintained the defense, the suit could not be prosecuted in the name of the insured. This argument convinced the North Dakota Court which *held* that the proposed amended answer alleged facts which, if true, went to the merits of the case and justified allowing the amendment. The court stated that when an insurance company has paid the injured party's damages *in full,* and the latter has assigned to the insurer his entire right of action, only the insurer has a sufficient interest in the matter at issue to support an action. *Hermes v. Markham,* 49 N.W. 2d 238 (N.D. 1951).

This case brought North Dakota one step closer to a clearly defined policy

21. *E.g.,* Andrews v. Portland, 79 Me. 485, 10 Atl. 458 (1887); Ness v. City of Fargo, 64 N.D. 231, 251 N.W. 843 (1933); Cooke v. Roberts, 335 Pa. 561, 7 A.2d 357 (1939).

22. Ness v. City of Fargo, 64 N.D. 231, 235, 251 N.W. 843, 844 (1933) "The salary of a public official is an incident to the office, and the legal right to receive or enforce the payment thereof goes with the legal title to the office."

23. Brown v. Tama County, 122 Iowa 745, 98 N.W. 562 (1904) (further held that per diem payments to de facto officer out of public treasury did not alter the rule).

24. Harding v. Des Moines, 193 Iowa 885, 188 N.W. 135 (1922).

25. Glenn v. Chambers, 48 N.W.2d 275 (Iowa 1951).

26. McClinton v. Melson, 232 Iowa 543, 4 N.W.2d 247 (1942).

27. See note 1, *supra.*

28. Hild v. Polk County, 49 N.W.2d 206, 212 (1951).

in applying its real party in interest statute[1] to cases involving insurance companies. It must be noted at the outset, however, that the instant case involved, not the ordinary situation of partial payment under "deductible" collision insurance, but *full* compensation by the insurer. As to this type of case North Dakota is now in accord with the general rule[2] that an insurance company which has paid the full loss becomes the real party in interest and must sue in its own name.[3]

The underlying problem in cases like *Hermes v. Markham* is to provide a fair and impartial trial before a jury quite likely to be over-sympathetic toward a private citizen who is sued by an insurance company. Courts recognize that an insurance company must overcome a decided handicap to win a jury verdict and often hold that unnecessarily revealing an insurance company's interest in a negligence action calls for a reversal[4] or mistrial.[5] In many jurisdictions the insurance companies have circumvented the problem of jury prejudice by using loan receipts[6] in settling insurance claims.

The decision in *Hermes v. Markham* has already induced several insurance companies to begin settling North Dakota claims on the loan receipt basis. The loan receipt device provides an insurance policy holder immedi-

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1. N.D. Rev. Code §28-0201 (1943): "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, 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 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 may be brought in the name of the State of North Dakota."

2. American Fidelity & Casualty Co. v. All American Bus Lines, 179 F.2d 7 (10th Cir. 1949), *cert. denied*, 72 Sup. Ct. 79 (U.S. 1951); John A. Boyd Motor Co. v. Claffey, 94 Ind. App. 492, 165 N.E. 255 (1929) (holding that the bare legal title retained by the insured is insufficient to support an action); *See* United States v. Aetna Surety Co., 338 U.S. 366, 381 (1949) citing 3 Moore, Federal Practice, 1339 (2d ed. 1948); See Clark, Code Pleading 174 (2d ed. 1947) and cases cited.

3. In reference to related problems of partial and full subrogation and the insurer's right to sue in its own name see note 26 N.D. Bar Briefs 167 (1950).

4. Butnea Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947) *semble;* Jeddeloh v. Hockenhull, 219 Minn. 541, 18 N.W.2d 582 (1945); Burgess v. Essler, 261 App. Div. 1042, 25 N.Y.S.2d 814 (4th Dept. 1941); Zeller v. Pikovsky, 64 S.D. 544, 268 N.W. 729 (1936); *See* Ramage v. Trepanier, 69 N.D. 19, 24, 283 N.W. 471, 472 (1938).

5. Tacktill v. Eastern Capitol Lines, 260 App. Div. 58, 21 N.Y.S.2d 14 (1st Dep't. 1940) (additional grounds present and considered in the decision); *See* Merrimack Mfg. Co. v. Lowell Trucking Corp., 182 Misc. 947, 46 N.Y.S.2d 736, 737 (1944); *Cf.* Packard v. Moore, 9 Cal. 2d 571, 71 P.2d 922 (1937) (not objectionable where the reference to insurance was indirect and elicited incidentally as a result of the defendant's own action).

6. Typical loan receipt form is the following: *LOAN RECEIPT AND AGREEMENT*
Received from the.....Insurance Company the sum of .....Dollars, ($.....)
as a loan, repayable only to the extent of any net recovery the undersigned may make from.....on account of damage and loss to the following described property:.....
.....The said loss being due to a collision which occurred .....19....., and as security for such repayment, the undersigned hereby pledges to the said.....
Insurance Company the said recovery and agrees to deliver to it all documents required for same and further agrees to enter and prosecute suit against the said.....
.....on said claim with all due diligence at the expense of and under the exclusive direction and control of the said.....
.....Insurance Company.
Dated at....., this.....day of .....19.....
.....
Witnesses: .....
.....

ate compensation for his loss, while at the same time frustrating operation of the doctrine of subrogation with its attendant transfer of real party in interest status to the insurer.[7] The transaction is simple. Instead of final, outright payment, the insured receives indemnification in the form of a conditional loan. In return for this loan the insured delivers a signed loan receipt to the insurance company. Typically a loan receipt acknowledges that the insurer has loaned a specified sum to the insured, to be repaid only to the extent of any recovery by the insured from the tort-feasor. Further, the insured promises to institute suit against the tort-feasor, but at the expense, and under the direction and control of the insurance company.

The loan receipt idea emanated from the struggle between common carriers and insurance companies in which each sought to shift to the other the burden of compensating shippers for goods lost in transit.[8] In federal courts,[9] including the United States Supreme Court,[10] loan receipts have long been recognized as valid and enforceable. Early doubts among state courts[11] have been resolved by more recent cases which uniformly affirm the validity of the loan receipt transaction.[12] In one such late case the Indiana court declared that the leading authorities have made the question of validity of each loan receipt turn on the hinge of intent; that is, the question whether the parties actually intended only a loan, and not final payment, was said to be decisive of the real question, whether the court would accept the loan receipt as a bona fide contract.[13] Particularly hectic has been the history of the loan receipt in New York where the conflict of case law[14] on this subject was finally settled by a 1950 statute[15] authorizing use of the loan device.

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7. "It is creditable to the ingenuity of business men that an arrangement should have been devised which is consonant both with the needs of commerce and the demands of justice." Brandeis, J. in Luckenbach v. McCahan Sugar Co., 248 U.S. 139, 149 (1918).

8. See Note, 1 A.L.R. 1522 (1919).

9. Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co., 3 F.R.D. 440 (S.D. N.Y. 1944); Pennsylvania R. Co. v. Burr, 130 Fed. 847 (2d Cir. 1904).

10. Luckenbach v. McCahan Sugar Co., 248 U. S. 139 (1918).

11. *Compare* Roos v. Philadelphia, W. & B. R. Co., 199 Pa. 378, 49 Atl. 344 (1901), which left the question of the loan receipt's validity to the jury and allowed the jury to declare the transaction invalid, *with* Gulf, C. & S.F. Ry. Co. v. Zimmerman, 81 Tex. 605, 17 S.W. 239 (1891), where the court ruled the loan receipt was valid.

12. *E.g.* Heuer v. Truck Ins. Exchange, 51 Cal. App.2d 497, 125 P.2d 90 (1942); Sullivan v. Naiman, 130 N.J.L. 282, 32 A.2d 589 (1943) (held loan receipt a valid exercise of right to contract); Phillips v. Clifton Mfg. Co., 204 S.C. 496, 30 S.E.2d 146 (1944).

13. Klukas v. Yount, 98 N.E.2d 227 (Ind. 1951) cited the leading authorities, analyzed them, and concluded that they had decided the validity of the loan receipt in each case according to the intent of the parties.

14. *Compare* Merrimack Mfg. Co. v. Lowell Trucking Corp., 182 Misc. 947, 46 N.Y.S.2d 736 (1944); Balish v. Advance Fuel Oil Corp., 266 App. Div. 683, 40 N.Y.S.2d 410 (2d Dep't. 1943); *and* Adler v. Bush Terminal Co., 161 Misc. 509, 291 N.Y.Supp. 435 (1936), all upholding and recognizing loan receipts, *with* Purdy v. McGarity, 262 App. Div. 623, 30 N.Y.S.2d 966 (3rd Dep't. 1941); *and* Yezek v. Delaware, L. & W. R. Co., 176 Misc. 553, 28 N.Y.S.2d 35, (1941), both declaring the loan receipt void.

15. Thompson's Laws of New York, Civ. Prac. Act, Art. 24, §210 (Supp. 1950). Action to be brought in name of real party in interest. "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, an insured person, corporation, joint stock association or other unincorporated association which has executed to his insurer either a loan or suborgation receipt, trust agreement, or other similar instrument, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted." As amended. Cited and supplied in A. S. Barnes and Co. v. Remington Optical Corp., 198 Misc. 746, 101 N.Y.S.2d 267 (1950).

Whether the use of such a device in North Dakota, in situations of the *Hermes v. Markham* type, would be successful, is a question furnishing ground for interesting speculation.

JIM R. CARRIGAN

STATUTES — TORTS — APPLICABILITY OF ANTI-ASSIGNMENT ACT TO SUITS UNDER F. T.C.A. — Plaintiffs brought an action under the Federal Tort Claims Act [1] for damages to realty bought by the plaintiffs after the damages had occurred. The assignor had leased part of the tract to the United States Government and the unleased portion had been damaged by the government's agents. Plaintiffs took title as a result of a tripartite contract to which the government was a party and which reserved to the plaintiffs the claim against the government. Plaintiffs joined the assignor as party defendant. The government contended that the assignment was void under the Anti-Assignment Act.[2] The district court allowed recovery which the circuit court affirmed [3] on the ground that the assignment was a "mutual mistake of law" and equity would grant relief from the hardship that would otherwise ensue. The Supreme Court granted certiorari and *held* that the Anti-Assignment Act made the voluntary assignment void. The court rejected the equity theory and found that the claim did not fall within any of the exceptions contemplated by the statute. The dissent felt that the Anti-Assignment Act should not be a bar since all the parties were before the court and payment of a just claim would be binding upon all parties so as to foreclose the possibility that any of the purposes of the Anti-Assignment Act would be violated. *United States v. Shannon*, 72 Sup. Ct. 281 (U.S. 1952).

During the ninety-nine year history of the Anti-Assignment Act,[4] the courts have recognized involuntary assignments as exceptions to the broad sweep of the statute (aside from voluntary assignments made in accordance with the provisions of the statute [5] or waiver of the statute by the United States by payment to the assignee [6]). Assignments by operation of law include assignment in bankruptcy,[7] by will or by death,[8] and by subrogation.[9] The early cases held that the statute applied to equitable and legal claims alike,[10] and also that the assignment was void and unenforceable as be-

1. 60 Stat. 842, 28 U.S.C. (1946) §§921-946, as amended, 28 U.S.C. (1946 Supp. III) §§1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2402, 2411, 2412, 2671-2680.
2. 54 Stat. 1029 (1940), 31 U.S.C. §203 (1946).
3. 186 F.2d 430 (4th Cir. 1951).
4. 10 Stat. 170 (1853) R.S. §3477 (1875), as amended, 54 Stat. 1029 (1940) 31 U.S.C. §203 (1946). The Act provides that "All transfers and assignments made of any claim upon the United States . . . shall be absolutely null and void, unless . . . made . . . after the allowance of such a claim and ascertainment of the amount due and the issuing of a warrant in payment thereof."
5. See note 4 *supra*.
6. Freedman's Savings Co. v. Shepherd, 127 U.S. 494 (1888); Bailey v. United States, 109 U.S. 432 (1883); Goodman v. Niblack, 102 U.S. 556 (1880); McKnight v. United States, 98 U.S. 179 (1878); Thayer v. Presser, 175 Mass. 225, 56 N.E. 5 (1900).
7. National Bank of Commerce v. Downie, 218 U.S. 345 (1910); Erwin v. United States, 97 U.S. 392 (1878).
8. *See* note 7 *supra*.
9. United States v. Aetna Surety Co., 338 U.S. 366 (1949).
10. Spofford v. Kirk, 97 U.S. 484 (1878); United States v. Gillis, 95 U.S. 407 (1877).