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## Partial Assignments in Missouri

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## PARTIAL ASSIGNMENTS IN MISSOURI\*

General usage of partial assignments in business and commerce attests to their convenience. Yet, because of a series of odd confusions, Missouri courts, in contrast to practically all other courts in the United States, have consistently held that partial assignments are not enforceable except in a few rare circumstances. A brief outline of the history of the assignability of choses in action, an analysis of the Missouri law on partial assignment and a comparison of that law with that prevailing in other jurisdictions should make clear that Missouri's law is aptly called backward.

### HISTORY

#### A) *The Total Assignment*

The history of the transfer of choses in action shows that they have become increasingly assignable. In the early common law choses in action were not assignable, because the relation between the original obligor and obligee was regarded as a vital contractual part of the obligation, which could not be changed.<sup>1</sup> However, for practical reasons chancery at an early stage recognized the validity of an assignment of a chose in action; after receiving notice of the assignment, the debtor was regarded as owing the debt directly to the assignee.<sup>2</sup> Eventually, during the 18th century, the assignment became enforceable at law; the assignee was allowed to sue in the name of the assignor by employing the fiction of a power of attorney.<sup>3</sup> The law courts so completely took over this field that with a few exceptions the equity courts, finding that the assignee was adequately protected at law, refused to receive any suits brought by him.<sup>4</sup> Now the assignee is generally recognized as the legal owner of the claim or chose in action.<sup>5</sup> And under many modern codes he is allowed

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\* Much help has been derived in the preparation of this note from an unpublished thesis by Milton Moldafsky, entitled "Partial Assignments of Choses in Action in Missouri." Many of his ideas have been incorporated into this paper; however, the writer takes full responsibility for the work, and has expressed different opinions on a number of points.

1. 2 Williston, *Contracts* (Rev. ed. 1936) 1166, §405; Ames, *The Inalienability of Choses in Action* (1912) 1 *Sel. Ess. in Anglo-American Legal History* 580; reprinted in *Lectures on Legal History* (1913) 210. This discussion and the development of the law is discussed in Cook, *The Alienability of Choses in Action* (1916) 29 *Harv. L. Rev.* 816.

2. Cook, *The Alienability of Choses in Action* (1916) 29 *Harv. L. Rev.* 816, 821 and note 6.

3. *Id.* at 821 and 822.

4. *Id.* at 822 and 823.

5. *Id.* at 828 et seq.

to sue in his own name.<sup>6</sup> In Missouri, the assignee is in this way given complete protection.<sup>7</sup> Thus, Missouri courts may be said to follow the modern and progressive method of treating total assignments.

### B) *The Partial Assignment*

The history of the recognition of partial assignments of choses in action in many respects parallels that of the total assignment. Yet, although the common law came to recognize a total assignment of a chose in action, it refused to recognize a partial assignment, because a chose in action was not allowed to be split into two or more enforceable claims.<sup>8</sup> The common law doctrine was

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6. See Clark, *Code Pleading* (1923) 100 et seq., and cases cited there. In code states the statutes require all actions to be brought in the name of the "real party in interest." See R. S. Mo. (1939) §849. "The effect of our new code of practice, in abolishing the distinction between law and equity, is to allow the assignee of a chose in action to bring suit in his own name, in cases where, by the common law, no assignment would be recognized. In this respect, the rules of equity are to prevail, and the assignee may sue in his own name." *Walker v. Mauro* (1853) 18 Mo. 564, 565-566.

7. See note 6, supra. See Clark, *The Real Party in Interest Statute in Missouri* (1914) 4 Law Ser. Mo. Bull. 3, 18 et seq.

8. It is important to distinguish between the total assignment and the partial assignment. In a situation in which *A* assigns the entire chose to *B*, who is to turn over a portion of the proceeds to *A* when he (*B*) enforces the claim, there is in effect a total assignment as far as the collection of the claim is concerned. *B* is the owner of the entire claim and after collection becomes trustee of *A*'s share of the proceeds. The true partial assignment occurs in a situation in which *B*, the assignee, is authorized to demand from the debtor directly, payment of his share only, and not payment of the whole. It is this latter situation which will be referred to by the use of the words, "partial assignment," in this paper. Often mistakenly referred to as a partial assignment is the case in which *A* is to collect the entire chose in action and pay over a part of what he collects to *B*. Here, there is no assignment at all, but merely an equitable lien on the claim when collected. Williston, *Contracts* (Rev. ed. 1936) 1283, §441.

Since no basis existed for permitting the assignee to collect the entire obligation, the fiction of the power of attorney successfully used in upholding the validity of total assignments at common law could not be applied to partial assignments. In addition, the assignee could not sue for his partial share of the chose in action, because the common law declined to permit a chose in action to be split into two or more enforceable parts. *Mandeville v. Welch* (U. S. 1820) 5 Wheat. 277. Common law rules regulating the joinder of parties were inflexible and would not permit an assignee to join with the assignor in a suit brought in the assignor's name, even though it was manifest that the suit was brought for the benefit of the assignee. If the common law courts had admitted that the partial assignee had legal ownership of a portion of the claim, it would be either a joint ownership or an ownership in common with the assignor. Joint ownership had incidents which were not adapted to the end sought; and if the assignor and assignee were tenants in common, each had a separate interest. Thus, on the basis of common law principles they could not join. In addition, to

first stated in the United States in *Mandeville v. Welch*.<sup>9</sup> Mr. Justice Story, speaking for the Supreme Court, held that to permit a partial assignee to sue at law would allow a creditor to harass his debtor by a multiplicity of actions, thus permitting him to accomplish indirectly that which he is not permitted to do directly, *i. e.*, to divide the cause of action. This would violate the contract, for such a deviation was not contemplated by the debtor in his agreement with his creditor.<sup>10</sup> It is noteworthy, however, that under the *modern* theory of novation the partial assignee may sue at law provided the debtor has consented to the assignment.<sup>11</sup> The Missouri courts have gone this far in recognizing the partial assignee, and, as is discussed in a subsequent section, they have progressed very little further.<sup>12</sup>

As in the case of the total assignment, the effect of the harsh rule of the law courts laid down in *Mandeville v. Welch* was mitigated by equity. Under its elastic procedure, which permitted all parties interested to be brought before the court, and which settled the liability of the debtor in one proceeding, the reasons for not allowing a partial assignment at law disappeared.<sup>13</sup> In equity the debtor did not suffer any added cost or hardship because of the partial assignment. As one court said:

The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it.<sup>14</sup>

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maintain the position that the partial assignee was the legal owner of a part of the claim would subject the debtor to an indefinite multiplication of claims. Consequently, the common law courts refused to allow the enforcement of partial assignments.

9. (U. S. 1820) 5 Wheat. 277.

10. Judge Story used the following language: "A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons." *Mandeville v. Welch* (U. S. 1820) 5 Wheat. 277, 288-289.

11. See 2 Williston, *Contracts* (Rev. ed. 1936) 1285, §442. The cause of action is not on the assignment, but on the promise of the debtor to pay the partial assignee.

12. See notes 26 and 44, *infra*.

13. See cases cited, Williston, *Contracts* (Rev. ed. 1936) 1287, §443, note 5.

14. *National Exchange Bank v. McLoon* (1882) 73 Me. 498, 505, 40 Am. Rep. 388.

After the debtor had notice of the partial assignment, an equitable duty was imposed upon him to pay the assignee the extent of his interest in the chose in action and to pay the assignor the remainder, which was the extent of the latter's interest.<sup>15</sup> This duty arose regardless of the acquiescence of the debtor. It was enforceable in a suit brought by the assignee provided he joined the assignor and any other partial assignees as plaintiffs.<sup>16</sup> In effect, this equitable doctrine gave to the assignor and assignee, respectively, their separate interests. With the exception of Missouri and two or three other states, this result has been obtained in all jurisdictions in the United States and in England, although somewhat different theories have been used to justify it.<sup>17</sup>

Just as the common law finally took over the protection of the total assignee from equity, so in the United States the courts under modern codes have come to protect the partial assignee. In reliance on "real party in interest" clauses in civil procedure statutes, a few courts permit the partial assignee to join with the assignor in a suit at law.<sup>18</sup> Where all interested parties are brought before the court, the common law objection is obviated, because the whole matter is settled in one suit, and the debtor is not subjected to the hardship of a multiplicity of suits, or to the inconvenience of having to pay in parts.<sup>19</sup> More-

15. See note 13, *supra*.

16. *Ibid*.

17. *Ibid.*, and see *Dulles v. Crippen Mfg. Co.* (C. C. 1907) 156 Fed. 706; *In re Macauley* (D. C. E. D. Mich. 1907) 158 Fed. 322; *City Nat'l Bank v. Friedman* (Ark. 1933) 62 S. W. (2d) 28; *Schwartz v. Messinger* (1897) 167 Ill. 474, 47 N. E. 719; *National Exchange Bank v. McLoon* (1882) 72 Me. 498, 505; *Campbell v. Hildebrandt* (1887) 68 Tex. 22, 3 S. W. 243, 246, 2 Am. St. Rep. 467. See also 6 C. J. S. 1088, §40; (1932) 80 A. L. R. 413 and cases cited; *Williston, Contracts* (Rev. ed. 1936) 1287, §443, note 5. See also note 19, *infra*. The theory that the partial assignment is an equitable charge or lien is also argued. For discussion, see *Dickinson, Gratuitous Partial Assignments* (1921) 31 *Yale L. J.* 1, 12-13. It has also been called an equitable property interest. *Chase National Bank v. Sayles* (1926) 11 F. (2d) 948, 48 A. L. R. 207; 3 *Pomeroy, Equity Jurisprudence* (4th ed. 1918) 1280 and cases cited.

18. *Evans v. Durango Coal Co.* (1897) 80 Fed. 433 (applying Colorado code); *Gaugler v. Chicago Ry. Co.* (1912) 197 Fed. 79 (applying Montana code); *Union Fire Ins. Co. v. Denver R. Co.* (1913) 44 *Utah* 26, 137 *Pac.* 658. See *Cook, The Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 *Harv. L. Rev.* 449, 482, especially note 108. The partial assignee may intervene in an action by the assignor against the debtor. *Wells v. Crawford* (1912) 23 *Colo. App.* 103, 127 *Pac.* 914. The essential feature is that all parties be before the court. 2 *Williston, Contracts* (Rev. ed. 1936) 1287, §443; *Restatement, Contracts* (1932) §156. Note that most states still consider this action the modern code equivalent of an equitable action. *Williston, Contracts* (Rev. ed. 1936) 1287, §443.

19. See note 13, *supra*. 2 *Moore, Federal Practice* (1938) 2054, and cases cited in notes 18 and 19. There is some disagreement as to whether

over, while a complaint by a partial assignee alone is almost universally held to state no cause of action, the New York courts under their modern code have modified this rule. Under the New York view, if the debtor does not take advantage of the defect by a motion to correct the pleadings, he waives it.<sup>20</sup> The New York position is justified under its modern code of procedure because new parties may be added at any stage of the action at the request of either party; and where any person who is a plaintiff in interest refuses to be joined as plaintiff, he may be made a party defendant.<sup>21</sup> The New York doctrine may be said to be the last word in the development of the law of partial assignments.<sup>22</sup>

## MISSOURI LAW OF PARTIAL ASSIGNMENT

### A) *The Establishment of the Rule*

In spite of the logical and pragmatic sanction of the view permitting a suit in equity or an action at law by the partial assignee, Missouri has refused to recognize the partial assignee's

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the partial assignee may sue the debtor who paid the assignor subsequent to notification of the partial assignment. The prevailing view permits recovery on the theory that the partial assignee has an equitable right against the debtor which is not extinguished by the payment to the assignor. See 2 Williston, *Contracts* (Rev. ed. 1936) 1290, §444, note 3 for cases, and 1289, note 2 for the minority view. See also Williston, *Is the Right of an Assignee of a Chose in Action Legal or Equitable?* (1916) 30 Harv. L. Rev. 97, especially 104 et seq. A few courts hold that a trust is created, the debtor becoming trustee for the assignee. *Smith v. Bates Machine Co.* (1899) 182 Ill. 166, 55 N. E. 69; *City Nat'l Bank v. Friedman* (Ark. 1933) 62 S. W. (2d) 28. Williston, *Contracts* (Rev. ed. 1936) 1289, §444. Restatement, *Trusts*, Mo. Annot. (1930) §16. If the debtor is compelled by the judgment of the court to pay the partial assignor the entire debt, he is not held liable to the partial assignee, since obviously it would be a hardship upon him to require him to pay any part of the debt a second time. See *Shenandoah Valley R. R. v. Miller* (1885) 80 Va. 821, 833.

The courts of Kentucky and Wisconsin hold that a partial assignment is not enforceable even in equity. *Henry Clay Fire Ins. Co. v. Denker* (1927) 213 Ky. 68, 290 S. W. 1047. (See criticism of case in Note (1938) 26 Ky. L. Rev. 250); *Skobis v. Ferge* (1899) 102 Wis. 122, 78 N. W. 426; *Dugan v. Knapp* (1900) 105 Wis. 320, 81 N. W. 412; *Thiel v. John Week Lumber Co.* (1908) 137 Wis. 272, 118 N. W. 802; *Black Hawk State Bank v. Kinzler* (1927) 194 Wis. 20, 215 N. W. 433. But see *Pease v. Landauer* (1885) 63 Wis. 20, 22 N. W. 847; *Baillie v. Currie* (1897) 95 Wis. 500, 70 N. W. 660. See, for general discussion, Note (1932) 80 A. L. R. 413, 428.

20. *Farmers' etc. Ins. Co. v. Lane Construction Corp.* (1925) 212 App. Div. 528, aff'd (1926) 244 N. Y. 523, 155 N. E. 831. Notice that Utah has adopted the same principle. *Nat'l Union Fire Ins. Co. v. Denver, etc. R. R.* (1913) 44 Utah 26, 137 Pac. 653.

21. See Clark, *Code Pleading* (1928) 105, 106 for discussion of this rule; 2 Moore, *Federal Procedure* (1938) 2054 and 2055; Restatement, *Contracts* (1932) §156.

22. *Ibid.*

right to sue either in equity or at law. *Love v. Fairchild*<sup>23</sup> was the first case in which the Missouri Supreme Court, relying on *Mandeville v. Welch*, refused to recognize the partial assignee at law. In the case of *Burnett v. Crandall*,<sup>24</sup> the court, acting as a court of equity, relied upon *Mandeville v. Welch* to state that partial assignments were not enforceable even in equity without the consent of the debtor. A number of courts in other states made the same error; they did not limit the holding of the *Mandeville* case to law.<sup>25</sup> The case of *Burnett v. Crandall* is relied on by the Missouri courts as the leading authority.<sup>26</sup> However, it may be argued that the doctrine that partial assignments were not enforceable without the debtor's consent in Missouri was expressed by way of *dicta*. The claim upon which Burnett sued was not liquidated at the time the case was decided, and was declared, therefore, not to be assignable. The court had confidence in this ground for its decision, and relied primarily on it; it was dubious of the correctness of its statement that a partial assignment was not valid in equity.<sup>27</sup> The court also failed

23. (1850) 13 Mo. 300, 53 Am. Dec. 148.

24. (1876) 63 Mo. 410. In this case the assignor was joined as a party defendant. The assignor had settled with the debtor, and had promised to save him harmless from action brought by the assignee.

25. For example, *Weinstock v. Bellwood* (1876) 75 Ky. 139. See also Note (1927) 13 Corn. L. Q. 129.

26. The following cases follow it as the leading authority: *Beardslee v. Morgner* (1880) 73 Mo. 22; *Loomis v. Robinson* (1882) 76 Mo. 488; *Fourth Nat'l Bk. v. Noonan* (1885) 88 Mo. 372; *Johnson County v. Bryson* (1887) 27 Mo. App. 341; *Turner v. Lord* (1887) 92 Mo. 113; *Rice v. Dudley* (1889) 34 Mo. App. 383; *Missouri Pac. Ry. v. Wright* (1889) 38 Mo. App. 141; *Alexander v. Grand Avenue Ry.* (1893) 54 Mo. App. 66; *Leonard v. Missouri, K. & T. R. R.* (1896) 68 Mo. App. 48; *Kiddoo Bros. v. Ames & Robins* (1898) 73 Mo. App. 667; *Bland v. Robinson* (1910) 148 Mo. App. 164, 127 S. W. 614; *Swift & Co. v. Wabash R. R.* (1910) 149 Mo. App. 526, 131 S. W. 124; *Pickett & Sexton v. School Dist. of Kansas City* (1916) 198 Mo. App. 519, 186 S. W. 533; *Halvorson v. Commerce Trust Co.* (Mo. App. 1920) 222 S. W. 897; *Taylor v. Dollins* (1920) 205 Mo. App. 246, 222 S. W. 1040; *Howard Undertaking Co. v. Fidelity Life Ass'n* (Mo. App. 1933) 59 S. W. (2d) 746; *Stewart v. Kane* (Mo. App. 1938) 111 S. W. (2d) 971; *Subscribers, etc. v. Kansas City Pub. Ser. Co.* (1936) 230 Mo. App. 468, 91 S. W. (2d) 227. See *Wabash R. R. v. Bowring* (1903) 103 Mo. App. 158, 171, 77 S. W. 106, 109; *Boyer v. Hamilton* (1886) 21 Mo. App. 520, 524; *Turner v. Lord* (1887) 92 Mo. 113, 117, 4 S. W. 420, 421. See Restatement, *Contracts*, Mo. Annot. (1933) §156. See Clark, *Real Party in Interest Statute in Missouri* (1914) 4 Law Ser. Mo. Bull. 3, 16, 17, where the Missouri rule is attacked. See *Service Purchasing Co. v. Brennan* (1931) 226 Mo. App. 110, 42 S. W. (2d) 39 where it was held that an assignment of 5 days' wages already earned but not payable until the end of two weeks, was not a partial assignment.

27. The court expressed itself as follows: "Here 'the obligation to pay the assignor' had never been admitted, nor was the judgment, at the time the compromise was effected, a 'liquidated demand capable of being en-

to perceive completely the importance of the protection which equity was peculiarly able to give the debtor. The extent of the court's confusion is indicated in the following quotation:

The learned judge and accomplished author who delivered the opinion in *Mandeville vs. Welch* \* \* \* would seem to have expressed a somewhat different view in his admirable work on Equity Jurisprudence (2 Sto. Eq. Jur., §1044); but it will perhaps be found, on close examination of the authorities cited in the margin in support of the text, that they scarcely give sanction, in all its broadness, to the idea that a creditor, in ruthless disregard of the wishes or interests of his debtor, may divide and assign the debt into as numerous portions *as there are dollars in the indebtedness*, and yet successfully appeal to a court of conscience to countenance and enforce such oppressive and inequitable transfers. For if you once grant the premise that a creditor, without the consent of his debtor, may split and assign the debt into *two* portions, you thereby pave the way for the inevitable corollary that no bounds can be fixed or limits assigned, in this regard, to the *creditor's gracious option*. The mind of every just man might well hesitate before adhering to such a doctrine, however sustained by precedent or fortified by authority.<sup>28</sup>

*Beardslee v. Morgner*,<sup>29</sup> the second case which came before the Supreme Court of Missouri involving a partial assignment, is frequently cited for the same proposition stated in *Burnett v. Crandall*. However, it was actually decided upon a pleading question; the court found that since the plaintiffs had filed three petitions which were each insufficient, plaintiffs should have had judgment automatically rendered against them under section 3540 of the Missouri statutes.<sup>30</sup> The supreme court stated only

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forced in a court of justice,' for the bond was given, appeal taken and cause pending in this court. What might have been the ultimate result of such appeal, it is impossible now to determine, and therefore the whole matter was manifestly one remaining to be settled 'by negotiation or suit at law.' This shows very plainly that this case falls within the principle of the rule laid down by Mr. Justice Miller, and consequently fully authorizes and gives validity to the compromise which Geiss, without Crandall's consent, effected. So that should it be urged that our conclusion as to the first point considered was incorrect, still our second conclusion, supported as it is by high authority, remains intact." *Burnett v. Crandall* (1876) 63 Mo. 410, 417.

28. *Burnett v. Crandall* (1876) 63 Mo. 410, 413-414.

29. (1880) 73 Mo. 22.

30. Now R. S. Mo. (1939) §948, which reads thus: "If a third petition \* \* \* be filed and adjudged insufficient \* \* \* no further petition \* \* \* shall be filed, but judgment shall be rendered."



by way of *dicta* that a partial assignment is not enforceable without the debtor's consent because the debtor has "the right to discharge his debt as an integer, and not otherwise, unless he so desires."<sup>31</sup> However, in the circumstances of this case, there was no danger of the debtor's having to pay twice. Each of the plaintiffs held a note of the defendant. In order to consolidate their suits against the defendant, their mutual debtor, each had assigned the other a half interest in the note of defendant held by him. Thus, actually all interested parties were before the court; two valid suits were amalgamated into one; all this should be convenient for the debtor. The appellate court realized that the sense of the rule laid down in the *Crandall* case (*viz.*, the avoidance of a multiplicity of suits and of payment in multiple parts) manifestly did not apply to facts such as these. The appellate court, having first decided that the defendant had waived his rights under section 3540 of the code, held that a partial assignment under these circumstances was valid.<sup>32</sup> The supreme court, in overruling the appellate court, did not bother to contest the latter court's arguments against the application of the rule making partial assignments unenforceable, but accepted explicitly the authority of *Burnett v. Crandall*.<sup>33</sup> Thus, the two first cases establishing the Missouri rule against partial assignments are poorly reasoned in so far as they consider the rule; moreover, they state the rule only by way of *dicta*. In this remarkable fashion Missouri's peculiar rule became established. Later cases have uniformly followed the doctrine expressed in these two cases.<sup>34</sup>

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31. *Beardslee v. Morgner* (1880) 73 Mo. 22, 25.

32. The court of appeals said: "We do not think, therefore, that this judgment should be reversed on the purely technical grounds that these two plaintiffs are each the holders of half a note. Together, they hold the whole debt; and the assignment was made, not to create, but to escape, the mischief which is the only reason of the rule invoked by appellant. \* \* \* The claim is not really split in this case, but consolidated; and the defendant is not harassed by multiplicity of actions, but two suits against him are by this means consolidated into one." *Beardslee v. Morgner* (1877) 4 Mo. App. 141, 144.

33. Thus the supreme court used the following language: "But aside from the point just referred to, one equally fatal to this appeal confronts us: Without the consent of the defendant, it was altogether out of the power of Mary Weiss to assign to her co-plaintiffs one-half of the sum due her by the note of defendant, and as much beyond their power to assign to her one-half the sums specified in the notes made payable to them. The matter was so ruled in *Burnett v. Crandall*." *Beardslee v. Morgner* (1889) 73 Mo. 22, 25.

34. See cases cited note 26, *supra*.

### B) Subrogation

The Missouri courts employ the partial assignment cases as authority for partial subrogation cases.<sup>35</sup> The analogy between the two situations is perfectly natural. However, because this analogy has not been seen, many states have reached the following confusing result: Though they allow the partial assignee to sue as the "real party in interest," on joining the assignor, they do not recognize the partial subrogee as a "real party in interest," and require him both to join the subrogor and to sue in the latter's name.<sup>36</sup> Paradoxically an expression of Judge Dillon in an early case under the Missouri code is largely responsible for the fact that the analogy was not accepted in other states.<sup>37</sup> The Missouri law is expressed in the recent case, *Subscribers Reciprocal Exchange by Dodson v. Kansas City Public Service Company*.<sup>38</sup> In that case the insurance company had paid the insured all but fifty dollars of the damage suffered in an automobile collision, under a fifty dollar deductible policy; the insured then gave the defendant, the street car company whose car had wrecked the insured's car, a release for the entire claim in exchange for fifty dollars, after the insurance company had notified the defendant of its right to subrogation. When the insurance company sued in its own name, the supreme court held that where only a part of the damages have been paid by the insurer on an assignable cause of action, such cause of action can be maintained by the insurer in its own name only where the defendant consents to the splitting of the cause of action.<sup>39</sup> Under our Missouri code provision for suit by the

35. See *Hartford Fire Ins. Co. v. Wabash Ry.* (1898) 74 Mo. App. 106; *Howard Undertaking Co. v. Fidelity Life Ass'n* (Mo. App. 1933) 59 S. W. (2d) 746.

36. See Clark, *Code Pleading* (1928) 112, and cases cited in note 96; Note (1936) 96 A. L. R. 864, 881 et seq.; 2 Moore, *Federal Procedure* (1938) 2055 et seq.

37. *Aetna Ins. Co. v. Hannibal & St. J. R. Co.* (C. C. E. D. Mo. 1874) Fed. Cas. No. 96. This case is criticized by Clark, *Code Pleading* (1928) 111.

38. (1936) 230 Mo. App. 468, 91 S. W. (2d) 227. See Comment (1936) 1 Mo. L. Rev. 285.

39. The court said: "In all other instances [i. e., except where the debtor has given his consent], suit must be brought in the name of the insured against the defendant third person who becomes a trustee for the insurer for the amount recovered in its behalf; and such insurer is not a necessary party to the action. *Anzer v. Humes-Deal Co.*, 332 Mo. 432, 58 S. W. (2d) 962; *McKenzie v. Missouri Stables*, 225 Mo. App. 64, 34 S. W. (2d) 136; *Matthews v. Missouri Pac. Ry. Co.*, 142 Mo. 645, 44 S. W. 802; *Fourth National Bank of St. Louis v. Noonan*, supra; *Cable v. St. Louis Marine Ry. & Dock Co.*, supra; *Pickett v. School District of Kansas City*, supra; *McLeland v. St. Louis Transit Co.*, supra; *Alexander v. Grand Avenue R.*

"real party in interest," there seems to be little to commend the decision. In this case, the supreme court does not so much expound on the extreme injustice to the debtor if the claim is divided, but rather it relies on the hard and fast rule that only one cause of action may spring from a single wrongful act to justify the particular decision. The answer to this argument is the same as that previously stated: the debtor is completely protected under the code provisions or equity rule allowing the joinder of all parties interested in the suit.<sup>40</sup> There is then really one judgment against the debtor, where all parties are before the court. The better law in subrogation cases is analogous to the majority view of the law in partial assignment cases. The subrogee is allowed to sue in his own name upon joining the subrogator as a party plaintiff.<sup>41</sup> It is interesting to note that this latest Missouri case conflicts with *Hartford Fire Insurance Company v. Wabash Railway Company*,<sup>42</sup> where under very similar facts, it was held by a court of appeals that since the insured, after payment of the fifty dollars by the tortfeasor, had been completely compensated for his damage, there was only a single claim remaining upon which the insurer could sue in his own name.<sup>43</sup>

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Co., supra; *Poor v. Watson*, 92 Mo. App. 88." *Subscribers, etc. v. K. C. Pub. Service Co.* (1936) 230 Mo. App. 468, 91 S. W. (2d) 227, 231; See *Illinois Power & Light Corp. v. Hurley* (1931) 49 F. (2d) 681, 691, and cases cited. See also Comment (1922) 7 ST. LOUIS LAW REVIEW 141, where *Sexton v. Anderson Elec. Car. Co.* (1921) 234 S. W. 358 was discussed. In that case the insurance company was allowed to sue in its own name in accordance with general American law.

40. See discussion by Clark, *Code Pleading* (1928) 110 et seq.

41. See Clark, *Code Pleading* (1928) 110, and cases cited in note 89; Note (1935) 96 A. L. R. 864, 876 and 881; 2 Moore, *Federal Procedure* (1938) 2057 and 2058.

42. (1898) 74 Mo. App. 106. See Comment (1936) 1 Mo. L. Rev. 285, where it is argued that on these facts the insurer should be considered the real party in interest.

43. It is questionable whether an insurance company can sue under Missouri's Workmen's Compensation Act in the name of the insured against the "defendant third person who becomes a trustee for the insurer for the amount recovered in its behalf." Cf. *Anzer v. Humes-Deal Co.* (1933) 332 Mo. 432, 58 S. W. (2d) 962; *McKenzie v. Missouri Stables* (1930) 225 Mo. App. 64, 34 S. W. (2d) 136; *Sylcox v. Nat'l Lead Co.* (1931) 225 Mo. App. 548, 38 S. W. (2d) 497, 501; *Superior Minerals Co. v. Mo. Pac. R. R.* (Mo. App. 1932) 45 S. W. (2d) 912, 916. For the employer is subrogated to the employee's rights against a tortfeasor under the act. *R. S. Mo.* (1939) §3699. Certainly the insurance company can join with the subrogated employer, or the employee. See cases cited, supra. This would benefit the insurance company if only these latter could not settle as they desired.

The insured can sue for his whole damage, although the insurance company has paid him for part of it. *Matthews v. Missouri Pac. Ry.* (1898) 142 Mo. 645, 44 S. W. 802; *Matthews v. St. Louis & S. F. Ry.* (Mo. 1893) 24 S. W. 59.

### C) Consent of the Debtor

The only chance the partial assignee and, it seems, the partial subrogee have in Missouri is to get the consent of the debtor, and sue on the theory of novation.<sup>44</sup> Such consent has been found in the following circumstances: payment of an assigned portion of the debt by the debtor to a previous assignee,<sup>45</sup> acceptance of the partial assignment by the debtor without objection,<sup>46</sup> or an interpleader of the parties claiming to be the real partial assignee.<sup>47</sup>

A conflict appears in the Missouri cases as to whether a party other than the debtor can raise the defense that there has been no acceptance by the debtor of the partial assignment.<sup>48</sup> The question arises when the debtor interpleads and deposits the fund into court and both the partial assignee, to whose assignment there has been no acceptance by the debtor, and a third party, such as an execution creditor of the assignor or a subsequent total assignee, claims the fund. Some cases have held that the debtor is the only one who may object.<sup>49</sup> If he does not do so, and pays the money into court, he waives his objection, and the partial assignee may recover. Other cases, however, have held that other parties, such as a subsequent assignee who has obtained the full title or subsequent execution creditors, may raise the defense.<sup>50</sup> In one of these cases, *Pickett and Sexton v. School*

44. See, e. g., *Fourth Nat'l Bk. of St. Louis v. Noonan* (1886) 88 Mo. 372; *Turner v. Lord* (1887) 92 Mo. 113; *Taylor v. Dollins* (1920) 205 Mo. App. 246, 222 S. W. 1040. *Denis v. Grand River Drainage Dist.* (1934) 74 S. W. (2d) 58; *Stewart v. Kane* (Mo. 1938) 111 S. W. (2d) 971.

45. *Gordon v. Jefferson City* (1905) 111 Mo. App. 23; *Halvorson v. Commerce Trust Co.* (Mo. 1920) 222 S. W. 897. See also *Fourth Nat'l Bk. of St. Louis v. Noonan* (1886) 88 Mo. 372, 377.

46. See note 44, *supra*. Also see *Taylor v. Dollins* (1920) 205 Mo. App. 246, 222 S. W. 1040; *Friedman v. Griffith* (Mo. 1917) 196 S. W. 75, where the failure of obligor to object within a reasonable time after acceptance was held to constitute a waiver. This view is criticized by Professor Williston, who declares, "To give silence the effect of assent to a novation in the absence of special circumstances seems to enlarge too much the possibility of making contracts by tacit acceptance." 2 Williston, *Contracts* (Rev. ed. 1936) 1285, §442.

47. *Johnson County v. Bryson* (1887) 27 Mo. App. 341, *Halvorson v. Commerce Trust Co.* (Mo. 1920) 222 S. W. 897. The court said that the debtor did not make any objection and the right to object to splitting a single debt into many is one which the debtor may waive by placing the money in the court. See also note 49, *infra*.

48. See notes 49 and 50, *infra*.

49. *Whiteside v. Longacre* (1901) 88 Mo. App. 168; *Halvorson v. Commerce Trust Co.* (Mo. 1920) 222 S. W. 897. Cf. *Stewart v. Kane* (Mo. 1938) 111 S. W. (2d) 971 (a lawyer's lien case). See *Dennis v. Grand River Drainage Dist.* (1934) 74 S. W. (2d) 58.

50. *Pickett and Sexton v. School District of Kansas City* (1916) 193 Mo. App. 519, 186 S. W. 533; *Missouri Pac. Ry. v. Wright & Co.* (1889) 38 Mo. App. 141.

*District of Kansas City*<sup>51</sup> the court reasoned thus: Even if in some circumstances the partial assignee will be recognized, he will never be allowed to recover at the expense of hardship to the debtor. Since the subsequent total assignee obtains the whole title, and gets the legal rights of the debtor, no partial assignment should be enforced which is against the rights and equities of the subsequent total assignee. Therefore, the latter's consent would appear as necessary as the debtor's before him.<sup>52</sup> Very much the same reasoning was used in another interpleader case, *Missouri Pacific Railway Company v. Wright & Co.*,<sup>53</sup> in order to allow the attachment creditor with his legally acquired lien to triumph over the partial assignee, whose rights were still inchoate since the debtor had not accepted.<sup>54</sup> This argument and result Williston terms "monstrous."<sup>55</sup> However, although the result is manifestly unfair, because of its complete disregard of the interests of the partial assignee, yet the conclusion is logically sound, pro-

51. (1916) 193 Mo. App. 519, 186 S. W. 533.

52. The court said: "It should also be observed that even if, in some circumstances, courts of equity will enforce rights acquired under partial assignments, they will not enforce them unless they can do so 'without working a hardship upon the debtor.' 4 Cyc. 29. A fortiori, they will not enforce such partial assignments to the hardship or against the rights and equities of a subsequent assignee who has obtained the whole title." *Pickett & Sexton v. School Dist. of Kansas City* (1916) 193 Mo. App. 519, 186 S. W. 533, 536.

53. (1889) 38 Mo. App. 141.

54. The court reasoned thus: "It is, however, contended that the filing of the bill of interpleader, long subsequent to the acquisition of the lien of the unsuccessful interpleaders on the fund under their process of garnishment, has the effect of an acceptance of the order by the drawee, and rendered the assignment binding. This contention is discountenanced by the cases just cited. Surely it cannot be that a bare rudimentary assignment, void in law and equity, can after, the lien of the garnishing creditors has attached, obtain validity by the filing of a bill of interpleader by garnishee and thus operate to displace and postpone the liens of the garnishing creditors. If this act is equivalent to the acceptance of the order, at what time does the lien of such an assignment become operative? From the date of the order or from the date of the filing of the interpleader? If from the former it can only be by operation of some fiction of the law, which does not exist, because at that time it was inoperative as a lien both in law and equity; and if by the latter, then it was subsequent in time to the garnishment liens." *Mo. Pac. Ry. v. Wright* (1889) 38 Mo. App. 141, 148.

55. Williston, *Is the Right of a Chose in Action Legal or Equitable?* (1916) 30 Harv. L. Rev. 97, 104 and 105, where Williston said: "It is almost, if not quite, universally admitted that a partial assignee has merely an equitable right. If then, the total assignee has a legal right, a subsequent total assignment prevails over a prior partial assignment. This monstrous result has actually been reached on this reasoning, under the Georgia Code, which is held to give the total assignee legal ownership." The Georgia case referred to is *King Bros. & Co. v. Central of Georgia Ry.* (1910) 135 Ga. 225, 69 S. E. 113.

vided the initial proposition is accepted that a partial assignment is unenforceable against the debtor until the latter accepts.<sup>56</sup> The fact that it is logically sound once more attests to the imperative necessity of changing the Missouri doctrine of partial assignment.

#### D) Protection of the Lawyer's Fees

Shortly after the case of *Burnett v. Crandall*,<sup>57</sup> which involved a suit by a lawyer to collect as his fee an assigned portion of a total judgment against the defendant, the lawyers in Missouri were successful in having a law passed which protected them from the unfair Missouri rule against partial assignments.<sup>58</sup> This statute gave successful plaintiffs' lawyers a lien on the fund owed by the defendant.<sup>59</sup> At the same time, it legalized the contingent fee.<sup>60</sup> Of course, such a contingent fee, without the benefit of statute, was unenforceable against the debtor, the defendant, though it was enforceable against the plaintiff, the assignor and client. This law has relieved a great deal of the hardship of the rule against partial assignments in Missouri. However, there seems to be no good reason why the lawyers should have the benefit of such a statutory rule and not the insurance companies in subrogation cases nor any innocent person who takes a partial assignment from his debtor in satisfaction of a debt.<sup>61</sup>

#### CONCLUSION

The modern tendency of the cases, in line with logic, reason, and good commercial usage, is toward a more complete protec-

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56. Whereas Williston uses this bad result to argue that a total assignment should be considered equitable rather than legal, Cook employs it to contend that the partial assignment should be treated as concurrently equitable and legal at the time the debtor receives notice of it, under "real party in interest" clauses of procedure codes. Cook, *The Alienability of Choses in Action: A Reply to Professor Williston* (1917) 30 *Harv. L. Rev.* 449.

57. (1876) 63 Mo. 410.

58. Mo. Laws of 1901, p. 46.

59. R. S. Mo. (1939) §13337, which reads as follows: "The compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained in law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

60. Mo. Laws of 1901, p. 46; R. S. Mo. (1939) §13338.

61. The employer in Workmen's Compensation is also protected by being subrogated to the right of the compensated employee or his dependent against a tort-feasor, R. S. Mo. (1939) §3699.

tion of the rights of the partial assignee.<sup>62</sup> The Missouri law, in the face of the doctrine of *stare decisis*, is so well settled that there is little chance of its being overruled by judicial decision. Since *Erie Railroad v. Tompkins* has established the rule that the state's interpretation of the common law shall prevail, the importance of making this change has increased.<sup>63</sup> Therefore, it is suggested that the legislature adopt a statute allowing a partial assignee of a chose in action to sue either at law or in equity. A submitted statute is:

*Partial Assignments of Choses in Action Validated*

Except where otherwise provided by law, no transfer by assignment or by subrogation of a part of a chose in action shall be unenforceable merely because it is an assignment of a part thereof without the consent of the party liable.

This statute, taken in conjunction with the Missouri Code of Civil Procedure, should enable the partial assignee of a chose in action to sue the debtor at law or in equity, by joining the partial assignor and any other partial assignees as parties plaintiff. If the partial assignor or other partial assignees refuse to join in the action, they may be joined as parties defendant. In this manner, the debtor would be amply protected from a multiplicity of suits, since all the parties would be before the court. Such a statute would not only put Missouri in line with the rest of the country as to the law of partial assignments of choses in action, but would also rid the state of some unreasonable and undesirable law.<sup>64</sup>

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62. Clark, *Code Pleading* (1928) 110 et seq.; Restatement, *Contracts* (1932) §156; Note (1932) 80 A. L. R. 413. Cook, *The Alienability of Choses in Action* (1916) 29 Harv. L. Rev. 816.

63. *Erie R. R. v. Tompkins* (1938) 304 U. S. 64.

64. These conclusions are in agreement with and partly based upon the unpublished thesis of Milton Moldafsky.