THE

AMERICAN LAW REGISTER.

APRIL 1887.

DILIGENCE REQUIRED TO HOLD AN ASSIGNOR OR GUARANTOR.

(*Continued from March Number, p.* 147.)

From of Action to be brought against Obligor.—Cases are to be met with in which it is said that the holder must pursue "all legal remedies" to collect from the obligor: *Benton* v. *Fletcher*, 31 Vt. 418; *Rives* v. *Brown*, 81 Ky. 636; *Welton* v. *Scott*, 4 Conn. 533; *Sheldon* v. *Ackley*, 4 Day 460.

And in Kentucky it is said that "to enable the assignee to recover against his assignor, upon the implied contract resulting from the assignment, it is indispensable that the assignee should have prosecuted, with reasonable diligence, all his remedies, legal and equitable, against the debtor; and the evidence of the insolvency of the debtor, which is furnished by an execution, and the return of *nulla bona*, is, in general, indispensable:" *Chambers* v. *Keane*, 1 Met. 289. In another case it is said that the "remedy by law must be pursued in all its ramifications, and to its full extent:" *Trimble* v. *Webb*, 1 T. B. Mon. 101. With the exception of Kentucky, this is not strictly true; for the holder, as will be shown, is not bound to resort to those extraordinary remedies that creditors sometimes do to coerce payment. Thus,

(*a*) *Attachment.*—If the defendant has left the state after the assignment, leaving ever so much property liable to attachment,

the assignee need not commence proceedings in attachment; and the same is true if the property has been conveyed with the design of defrauding creditors: *Iles* v. *Watson*, 76 Ind. 359; *Titus* v. *Seward*, 68 Id. 456; *Holton* v. *McCormick*, 45 Id. 411; *Sims* v. *Parks*, 32 Id. 363; *Hubler* v. *Taylor*, 20 Id. 446; *quære* as to garnishment: *Pierce* v. *Short*, 14 Ill. 144; *Barber* v. *Bell*, 77 Id. 490.

In Kentucky, however, an attachment must be resorted to if the holder knows of property attachable, or by the use of due diligence would have discovered it, perhaps; otherwise not: *Clay* v. *Johnson*, 6 T. B. Mon. 644.

And in Connecticut, where an attachment is the usual process, it must be resorted to; but with this distinction: only personal property need be attached and not real estate, for the reason that "it is the contract of the endorsee, that, by due diligence, he shall be able to obtain payment of the note *according to its tenor;* and, of consequence, if payable in money, that he shall be satisfied in this medium." Land is not money; and, therefore, the holder is not bound to take it: *Walton* v. *Scott*, 4 Conn. 527, 533; *Forbes* v. *Howe*, 48 Id. 413; *Holbrook* v. *Camp*, 38 Id. 23; *Allen* v. *Rundle*, 50 Id. 588; *Prentiss* v. *Danielson*, 5 Id. 175. Not only must a writ of attachment be brought, but search made for property whereon to levy the writ: *Holbrook* v. *Camp*, 38 Conn. 23. The Connecticut rule prevails in Vermont: *Foster* v. *Barney*, 3 Vt. 60.

(*b*) *Vendor's Lien.*—So, if the instrument assigned is secured by a vendor's lien, the holder is not compelled to resort to it to secure the payment of his debt: *Sayre* v. *McEwen*, 41 Ind. 109; *Cheek* v. *Morton*, 2 Id. 321.

(*c*) *Mortgage.*—If a mortgage was taken to secure the obligation guaranteed, a resort to this must first be had, before suing the guarantor: *Barman* v. *Carhart*, 10 Mich. 339; *Baxter* v. *Smack*, 17 How. Pr. 183. And this is true of an assignment: *Levi* v. *Evans*, 7 B. Mon. 115. See *Brainard* v. *Reynolds*, 36 Vt. 614; *Chalmers* v. *Moore*, 22 Ill. 359; *Wilson* v. *Barclay*, 22 Gratt. 534.

(*d*) *Equitable Liens.*—It is undoubtedly true that in most states, equitable liens need not be resorted to, as in case of vendor's liens; but such is not the case in Kentucky, where all equitable liens must be exhausted: *Graham* v. *Chatoque Bank*, 5 B. Mon. 49; *Morri-*

son v. *Glass*, Id. 240; *contra*, *Cheek* v. *Morton*, 2 Ind. 321. See *Brainard* v. *Reynolds*, 36 Vt. 614; *Chambers* v. *Keene*, 1 Met. (Ky.) 289.

(*e*) *Arrest of Debtor.*—In Connecticut, if the debtor has not sufficient property to pay the debt in full, the assignee must arrest him: *Welton* v. *Scott*, 4 Conn. 533; and in Virginia, even though he have not sufficient property out of which the claims can be paid in full, it was intimated that imprisonment may be necessary; for a man would not go to prison if he have money: *Hooe* v. *Wilson*, 5 Call 76. But this is pushing the question of diligence to the very verge, and requiring of the holder the performance of an act that few are willing to do, even though it be their own business, and they have no other security. In Maryland, it was held that the holder need not arrest an insolvent debtor, and keep him at his own expense; but if he were solvent it was not decided whether it would be necessary or not: *Crawford* v. *Berry*, 6 G. & J. 63. So in Virginia it is said not necessary to hold to bail: *Harrison* v. *Raines*, 5 Munf. 456; see *Johnston* v. *Hackley*, 6 Id. 448, where it was held that if the holder does arrest the obligor, so long as he is under arrest no action against the assignor can be commenced: but in Kentucky it is (*Smallwood* v. *Woods*, 1 Bibb 546), and the result of the arrest must be shown in the complaint: *Owings* v. *Grimes*, 5 Litt. 332; *Smith* v. *Bacon*, 3 J. J. Marsh. 312. It should here be observed that several of the cases relate to taking the body of the defendant in execution, after judgment obtained; but the principle involved applies to the rule stated in the text.

(*f*) *Fraudulent Conveyance.*—Nor is the holder bound to bring an action to set aside a fraudulent conveyance of real estate, to subject it to the satisfaction of his execution against the obligor; neither need he seek this relief in the original action brought against such obligor; for these are extraordinary measures, not required of the assignee: *Iles* v. *Watson*, 76 Ind. 359. Such is not the rule, however, in Kentucky: *Taylor* v. *Ficklin*, 5 Munf. 25.

(*g*) *Bill of Discovery.*—In Kentucky, if the assignee knows of property of the debtor that can only be reached by a bill of discovery, he must resort to it; otherwise, not: *McFadden* v. *Finnell*, 3 B. Mon. 121. But this is probably the only state in which a proceeding (or its kindred proceedings supplemental to execution) of this kind is required; for such are extraordinary measures.

(*a*) *Proceedings against Bankrupts' and Decedents' Estates.*—In those states where resort must be had to the obligor if any part of the claim can be made, it is necessary to resort to the assignee in bankruptcy of the obligor, before suing the assignor or guarantor; or else be prepared to show that the estate will not pay any dividend. And if utter insolvency is averred, it may be answered that the estate will pay a dividend: *Hayne* v. *Fisher*, 68 Ind. 158. If the complaint shows that the obligor is a bankrupt, it must further aver lack of assets, applicable to the payment in whole or in part of the obligation assigned or guaranteed: *Somerby* v. *Brown*, 73 Ind. 353. Where the issue was on the allegation of the insolvency of the obligor, it was held not competent for the assignor to prove that the estate of the maker in bankruptcy would pay a percentage of his debts: *Williams* v. *Nesbit*, 65 Ind. 171. The assignor should plead such fact specially. Although in Indiana, from which state these citations have been taken, the courts are usually liberal in this respect; yet they have here gone beyond all the other states in strictness: for in no state, it is believed, is it necessary to proceed against the obligor's estate in bankruptcy, unless the assignment in bankruptcy preceded the assignment of the obligation endorsed or guaranteed: *Tucker* v. *Fogle*, 7 Bush 290; *National Bank of Commerce* v. *Booth*, 5 Biss. 129. This is put upon the ground that to require the assignee to file the obligation assigned against the estate, would be to require him to go into a foreign jurisdiction to litigate the case: *Booth* v. *Storrs*, 54 Ill. 472. And if proceedings in bankruptcy are pending at the time of the assignment, suit against the maker is not necessary: *Roberts* v. *Atwood*, 8 B. Mon. 209.

(*b*) But if the maker has died either before or after the assignment, the obligation must be filed by the assignee as a claim against his estate: *Dole* v. *Watson*, 2 Ind. 177; *Bernitz* v. *Stratford*, 22 Id. 320; *Hardesty* v. *Kinworthy*, 8 Blackf. 304; *Zekind* v. *Newkirk*, 12 Ind. 544; *Hayne* v. *Fisher*, 68 Id. 158; *Huston* v. *First National Bank of Centreville*, 85 Id. 21; *Taylo* v. *Bullen*, 6 Cow. 624. It seems that in Kentucky, if the obligor is dead and insolvent, no action is necessary: *Clair* v. *Barr*, 2 Marsh. 256. And in Virginia, if the obligor die leaving no executor, and no administrator is appointed, an action is not necessary —somewhat similar to the law of Kentucky referred to in the note below: *Hooe* v. *Wilson*, 5 Call 76; *Bronaugh* v. *Scott*, Id. 93.

But in Indiana, if the administrator die or resign before the estate is settled, the assignee must procure the appointment of an administrator *de bonis non*, or else sue the heirs, or be prepared to show that the estate would have paid no dividends, and that an action against the heirs would have been unavailing: *Litterer* v. *Page*, 22 Ind. 337; *Dole* v. *Watson*, 2 Id. 177; *Black* v. *Wilson*, 7 Blackf. 532. And where the assignor conveyed all his property to pay his debts, and died, it was held that the assignee could file a bill in equity against the trustee for a sale of the property, no one having administered on the assignee's estate: but it was not said that he was bound to do so: *Taylor* v. *Ficklin*, 5 Munf. 25. Due diligence does not require the assignee of an insolvent mutual insurance company to sue the maker of the premium notes: *Hubler* v. *Taylor*, 20 Ind. 446.

Pursuing Bail and Collateral Security.—Even in Kentucky the assignee is not bound to exhaust the collateral security given to secure the payment of the note: *Bonta* v. *Curry*, 3 Bush 678; but if bail has been given, it must be exhausted (*Hume* v. *Long*, 6 T. B. Mon. 116), by taking judgment against him: *Battle* v. *Blake*, 1 Dev. L. 381. In Virginia, the contrary, however, is held: *Caton* v. *Lenox*, 5 Rand. 31. And there is no doubt in those states where the entry of bail or stay of judgment or execution has the effect of a judgment rendered, the assignee must pursue the bail with ordinary diligence, by suing out an execution against him. But if the endorser is secured, in case he is compelled to pay, diligence against the maker is not necessary, unless a failure to proceed should result in an actual loss to the assignor: *Prentiss* v. *Danielson*, 5 Conn. 175.

Series of Notes Assigned.—Of course the maker cannot be sued before the notes are due. Sometimes it happens that a series of notes are assigned. Where such a series, falling due at different dates, were secured by a mortgage, and the mortgage was foreclosed on the first note falling due, it was held that the amount realized on sale of the mortgaged premises under the decree of the sale, should be first applied to the payment of the principal due, interest and costs, and then to the residue secured by the mortgage and note due; and an attempt of the assignor to have a different application made of the proceeds of sale, must fail. It was also held that the assignee's failure to use due diligence in the prosecution of his judgment against the maker, upon the notes then due, was no defence

in the action against the assigns upon the notes which afterwards fall due: *Willson* v. *Binford*, 81 Ind. 588; *Binford* v. *Willson*, 64 Id. 70.

Failure of Consideration—Illegality.—It is part of the assignor's warranty that the maker is liable upon the obligation assigned. And in an action against the maker by the assignee, if the latter fail, on the ground that the note had been obtained without consideration, the endorser is not bound by the judgment declaring the invalidity of the note, unless notice was given to him of the pendency of the suit; and the endorser, if not served with notice, may show in bar of the assignee's action against him, that there was a good consideration for the note: *Howell* v. *Wilson*, 2 Blackf. 418; *Maupin* v. *Compton*, 3 Bibb 214; *Marshall* v. *Pyeatt*, 13 Ind. 255. But see *Tam* v. *Shaw*, 10 Id. 469, as to notice.

And where the consideration of the note has failed, or it was executed without any, the endorsee may, as soon as he discovers the imposition, sue the endorser for having assigned him a note which the maker is not liable to pay, without waiting for the maturity of the note, or bringing an action against the maker: *Howell* v. *Wilson*, 2 Blackf. 418; *Caton* v. *Lenox*, 5 Rand. 31; *Marshall* v. *Pyeatt*, 13 Ind. 255; *Fosdick* v. *Starbuck*, 4 Blackf. 417; *Stutsman* v. *Thomas*, 39 Ind. 384; *Kirkham* v. *Boston*, 67 Ill. 599; *Tam* v. *Shaw*, 10 Ind. 469.

So, if the note in any way is illegal, so that the maker may avail himself successfully of the illegality, the assignee need not sue him: *Curtis* v. *Gorman*, 19 Ill. 141. So, if the note is void as executed by a married woman: *Houston* v. *First National Bank*, 85 Ind. 21; *Mathers* v. *Shank*, 94 Id. 501: *Hughes* v. *Brown*, 3 Bush 660. But it is not the rule in Kentucky that the assignee, in such instances, need not sue the maker before resorting to the assignor. Thus where the maker plead a *non est factum*, it was held that the assignee may not dismiss his action before trial, but must proceed to judgment: *Wynn* v. *Poynter*, 3 Bush 54. And if there be no consideration for the note, he must also sue and proceed to judgment; for the maker may not urge his defence. But in Indiana, the assignee need not sue the maker to recover a part of a note that is usurious: *Johnson* v. *Blake*, 3 Ind. 542.

Set off—Note Paid.—Where the assignor receipted a judgment after he had assigned it, the assignee was allowed to recover back the amount he had paid for the judgment: *Hurd* v. *Slaten*, 43 Ill. 348. And if the assignee is enjoined because of an equitable set-

off he has against the assignee, he may recover of the assignor on making such a showing: *McClung* v. *Arbuckle*, 6 Munf. 315. But in Kentucky it is no excuse for not suing the maker, that he held a set-off against the maker more than the amount of the note assigned: *Hunt* v. *Armstrong*, 5 B. Mon. 399. Even though a note assigned was paid at the time of assignment, an assignment without recourse will not relieve the assignor from liability: *Mays* v. *Callison*, 6 Leigh 230. But see *Glass* v. *Read*, 2 Dana 168. See *Snow* v. *Baker*, 3 Gilm. 258, where a judgment was assigned and reversed, and recovery allowed of the consideration paid. See also *Roberts* v. *Jordans*, 3 Munf. 488, for judgment.

No Authority to Assign.—If the assignor had no authority to assign, and there is no express stipulation that he shall not be liable on his assignment, there is a right of action in favor of the assignee against the assignor, as soon as the assignment is made, without resorting to the obligor: *Emmerson* v. *Claywell*, 14 B. Mon. 18.

Promise of Guarantor or Assignor after Maturity of Obligation.—If a guarantor gives a note after the maturity of the obligation, guaranteed to secure the contract of his guaranty, the burden of showing that the payee could have made the money off the maker, is thrown upon the guarantor: *Teller* v. *Bernheimer*, 3 Phila. 299. So a promise of the guarantor, after the obligation guaranteed is due, to pay, excuses laches in the holder: *Tinkum* v. *Duncan*, 1 Grant Cas. 228; *Barclay* v. *Weaver*, 19 Penn. St. 396.

But an assignment after due, does not waive the requirement of due diligence in collecting it: *Broun* v. *Hull*, 33 Gratt. 23. It may be added in this note that contingencies which are remote, do not enter into the contract of guaranty, unless specially stated: *McDoal* v. *Yeomans*, 8 Watts 361.

Special Promise to Pay.—An assignor may, in his endorsement, bind himself primarily to pay the obligation assigned; and in such an instance it is not necessary to first proceed against the maker. Thus, where the assignment was in blank, but the assignor executed a mortgage at the same time to the assignee, to secure his contract of assignment, conditioned that if the assignor "shall pay said notes according to their tenor and effect, or cause the same to be paid," the mortgage should be void, it was held that the holder could sue both the maker and assignor in one action, obtain a per-

sonal judgment against both defendants for the amount due on the assigned obligation, foreclose his mortgage against the assignor, and have execution over against the maker for any part of the judgment remaining unsatisfied by the sale of the mortgaged premises, without first proceeding against the maker alone: *Robertson* v. *Cauble*, 57 Ind. 420; see *Josselyn* v. *Edwards*, Id. 212; *Zekind* v. *Newkirk*, 12 Id. 544; *Burnham* v. *Gallentine*, 11 Id. 295; *Watson* v. *Beabout*, 18 Id. 281.

Protest and Demand.—The mere fact that a note is protested for non-payment, is no excuse for not suing the maker: *Ranson* v. *Sherwood*, 26 Conn. 437; for the note need not be protested because of non-payment, nor any demand made upon the assignor for its payment before suit brought against him: *Hawkinson* v. *Olson*, 48 Ill. 277; *Couch* v. *First Nat. Bank*, 64 Ind. 92; *Burnham* v. *Gallentine*, 11 Id. 295; *Woolley* v. *Van Volkenburgh*, 16 Kan. 20; *Offutt* v. *Hall*, 1 Cr. C. C. 572; *Ish* v. *Mills*, Id. 567; even though payable at a certain place: *Barber* v. *Bell*, 77 Ill. 490.

Issuing Process to collect Amount of Judgment.—With the same diligence the assignee or holder must prosecute the maker to judgment; he must pursue him with an execution, or other process, for the collection of the amount due on the judgment. He must use due diligence in taking out an execution and placing it in the officer's hands: *Saunders* v. *O'Briant*, 2 Scam. 370; *Nixon* v. *Weyhrich*, 20 Ill. 600; *McKinney* v. *McConnell*, 1 Bibb 239; *Rives* v. *Kumler*, 27 Ill. 290; *Marr* v. *Smith*, 7 B. Mon. 189; *Raplee* v. *Morgan*, 2 Scam. 561; *Minnis* v. *Pollard*, 1 Call 226; *Towns* v. *Farrar*, 2 Hawks 163; *Gay* v. *Rainey*, 89 Ill. 221; *Hume* v. *Long*, 6 T. B. Mon. 116; *Summers* v. *Barrett*, 65 Iowa 292; *Peck* v. *Frink*, 10 Id. 193; *Bishop* v. *Yeazle*, 6 Blackf. 127; *James* v. *Nicholson*, 6 Id. 288; *Spears* v. *Clark*, 3 Ind. 296.

Where execution was issued fourteen days after the close of the term, it not being possible to issue it during term, this was held to show due diligence in the absence of proof of any loss by the delay: *Spears* v. *Clark*, 3 Ind. 296; s. c. 7 Blackf. 283; but it was shown that the makers were insolvent on the date of the rendition of the judgment. So a delay of twenty-four days was held not to be fatal: *Dorsey* v. *Hadlock*, 7 Blackf. 113; *Hanna* v. *Pegg*, 1 Id. 181; *Clark* v. *Spears*, 8 Id. 302; *Nance* v. *Dunlavy*, 7 Id 172; *Miller* v. *Deaver*, 30 Ind. 371.

But a delay of thirty days was held fatal: *Merriman* v. *Maple*, 2 Blackf. 350; *Willson* v. *Binford*, 54 Ind. 569; *Trimble* v. *Webb*, 1 T. B. Mon. 100; of two months: *Rives* v. *Kumler*, 27 Ill. 290. So a delay of five months: *Gwin* v. *Moore*, 79 Ind. 103; *Parker* v. *Owings*, 3 Marsh. 59; of six months: *Bishop* v. *Yeazle*, 6 Blackf. 127; *Trimble* v. *Webb*, 1 T. B. Mon. 101; of seven months: *James* v. *Nicholson*, 6 Blackf. 288; *Treadway* v. *Drybread*, 4 Id. 20; *Markel* v. *Evans*, 47 Ind. 326; *Dole* v. *Watson*, 2 Id. 177. And in Kentucky a delay of six days was held fatal: *Bard* v. *McElroy*, 6 B. Mon. 416. So a delay of seventeen days was held inexcusable: *Marr* v. *Smith*, 7 B. Mon. 189. Where the action was brought in the wrong county, a judgment obtained and execution issued forthwith, and after four months another execution was issued to another county, upon which there was a return of *nulla bona*, it was held that there was a fatal negligence in the prosecution of the action: *Burk* v. *Morrison*, 8 B. Mon. 131. And it is required of the plaintiff to issue an execution to the county in which the judgment was rendered: *Saunders* v. *O'Briant*, 2 Scam. 370, but he is not bound to issue it to another county: *Bestor* v. *Walker*, 4 Gilm. 3; *Judson* v. *Gookwin*, 37 Ill. 286; unless he knows of property there liable to the execution: *Gilbert* v. *Henck*, 6 Casey 205; *Hoffman* v. *Bechtel*, 52 Penn. St. 190. If the assignor does not know of any property liable to the execution, still the holder must use diligence in making the collection: *Clayes* v. *White*, 83 Ill. 540. If the debtor has property in several counties, an execution must be issued to each county, if necessary, to satisfy the debt; but the assignee is not bound to issue to any other county than that of the debtor's residence, upon a mere supposition that he may have property elsewhere: *Bard* v. *McElroy*, 6 B. Mon. 416; *Goodall* v. *Stuart*, 2 H. & M. 105.

Diligence in satisfying Execution.—In Connecticut, the assignee need not give any directions to the officer holding the writ; the command of the writ itself is sufficient: *Welton* v. *Scott*, 4 Conn. 533; nor is the officer bound to levy on or attach land, as has elsewhere been stated: *Mix* v. *Page*, 14 Conn. 329. In Pennsylvania, he need not show property to the officer, "unless he has some special knowledge relating to it:" *Kirkpatrick* v. *White*, 5 Casey 176; *Hoffman* v. *Bechtel*, 52 Penn. St. 190. The execution must remain out until dead: *Chalmers* v. *Moore*, 22 Ill. 359; but where it is permissible, an excuse may be set up, that keeping it out any

longer would be useless. There is, however, no presumption, after the giving of the excuse, that, if allowed to remain out it would have been satisfied; but it may be shown that there was property after its return and before it would have expired: *Hamlin* v. *Reynolds*, 22 Ill. 207. Mortgaged property must be exhausted: *Bestor* v. *Walker*, 4 Gilm. 3; *Chalmers* v. *Moore*, 22 Ill. 359; unless it is mortgaged to its full value: *Pierce* v. *Short*, 14 Ill. 144; and then it must be shown beside this that the mortgage secured a valid debt: *Clayes* v. *White*, 83 Ill. 540; *Roberts* v. *Haskell*, 20 Id. 59. If the property levied upon is replevied, the assignee must prosecute it to a finality, or show that it was not liable on the execution: *Levis* v. *Evans*, 7 B. Mon. 115.

It is not necessary after return of *nulla bona* to issue a *capias ad satisfaciendum*, as has been elsewhere stated: *Cowles* v. *Litchfield*, 2 Scam. 356. (The reader is referred to the section on kind of action to be brought, for other citations.) Where an execution was quashed, because of the bankruptcy of the maker, it was held not necessary to issue a second one: *Tucker* v. *Fogle*, 7 Bush 290. Diligence in bringing the property to sale must be used. Thus where a levy was made, and a return of the execution made for want of buyers, and five months afterwards an alias execution was issued, instead of a *venditioni exponas*, and no sale was effected, this lack of diligence was held fatal: *Macy* v. *Hollingsworth*, 7 Blackf. 349. See *Barksdale* v. *Fenwick*, 2 Hen. & Munf. 113 n.

When delaying the issuing of Execution does not injure, or is excused.—In those forums where insolvency may be shown as an excuse for not suing, the execution need not issue, if it would be "wholly unavailing, precisely as for the same reason he would be excused from commencing suit:" *Bestor* v. *Walker*, 4 Gilm. 12, and any delay that works the assignor no injury is not fatal: *Gay* v. *Rainey*, 89 Ill. 221; *Gwin* v. *Moore*, 79 Ind. 103. So, if the execution is delayed by consent of the assignor, he cannot complain: *Crawford* v. *Berry*, 6 G. & J. 63; *Nance* v. *Dunlavy*, 7 B. Mon. 172; *Davis* v. *Leitzman*, 70 Ind. 275; *Huston* v. *First Nat. Bank*, 85 Id. 21; *Sims* v. *Parks*, 32 Id. 363; *Schmied* v. *Frank*, 86 Id. 250; *Peay* v. *Morrison*, 10 Gratt. 149. D. assigned a note to H., and agreed therein not to take any advantage by reason of indulgence to the maker. H. assigned it to M., who delayed its collection unnecessarily. D. was held not only liable to H., but to M.; *McLaughlin* v. *Duffield*, 5 Gratt. 133.

The Return of Nulla Bona.—A *nulla bona* may be entered after suit commenced against assignor, and used as evidence, "whenever made, it showed, *prima facie*, due diligence:" *Woods* v. *Sherman*, 71 Penn. St. 101. Such a return is only *prima facie* evidence of insolvency and not conclusive upon the assignor: *Hooe* v. *Wilson*, 5 Call 76; *Levis* v. *Evans*, 7 B. Mon. 115; *Dana* v. *Conant*, 30 Vt. 246; *Hanna* v. *Pegg*, 1 Blackf. 181; *Owings* v. *Grimes*, 5 Litt. 332.

In all such instances, when sued, the assignor or guarantor may show that the maker had property liable to the execution; but he must show that ordinary search would have found it, or, at least, that the execution plaintiff knew of it: *Lumen* v. *Neete*, 3 B. Mon. 165. In Kentucky, on a return of *non est inventus*, if demandable, he must demand bail, and if he does not, he is guilty of negligence: *Sprott* v. *McKinney*, 1 Bibb. 595. In Virginia, however, the return of *nulla bona* is conclusive upon the assignor: *Smith* v. *Triplett*, 4 Leigh 590; *Goodall* v. *Stewart*, 2 H. & M. 105. In Kentucky, said to be conclusive, if returned from county where debtor resided; if returned from county where he did not reside, not even *prima facie*: *Thompson* v. *Caldwell*, 2 Bibb 290.

False Return of Nulla Bona.—If the sheriff make a false return of *nulla bona*, in those states where he is bound by it, the assignor may sue him the same as if he were the execution plaintiff: *Smith* v. *Triplett*, 4 Leigh 590.

Waste by Officer.—The question was raised, that if the officer waste the maker's property, could the assignee go back on the assignor, or must he pursue the sheriff: *Barnitz* v. *Stratford*, 22 Ind. 320. This would probably be requiring of the assignee extraordinary diligence. But in Kentucky, if the officer so conduct himself that the action proves a failure, he must first be sued. Such would be the case where he liberated the maker from arrest on the process: *Johnson* v. *Lewis*, 1 Dana 182; *Wright* v. *Strange*, 5 B. Mon. 250; or a bond he had taken was quashed for an irregularity: *Young* v. *Cosby*, 3 Bibb 227. See *Trimble* v. *Webb*, 1 T. B. Mon. 100.

Discharge under Insolvent Laws.—Showing a discharge under the insolvent laws is a *prima facie* showing of the assignor's liability; and equivalent to a return of *nulla bona*: *Bullitt* v. *Scribner*, 1 Blackf. 14; *Bank of U. S.* v. *Weisiger*, 2 Pet. 331. And where the debtor takes the customary oath, and files a schedule of

property, in a suit against the assignor, the assignee must produce the schedule and show the amount of property, and that he is not bound to pursue it: *Oldham* v. *Bengan*, 2 Litt. 132. A discharge in another action is no excuse for not proceeding against the maker: *Parker* v. *Owings*, 3 Marsh. 59. See, generally, *Brown* v. *Ross*, 6 Munf. 391; *Lee* v. *Love*, 1 Call 497; *Saunders* v. *Marshall*, 4 H. & M. 455.

The Record of the Proceedings as Evidence against the Assignor.—Showing a return of *nulla bona*, and all the other attendant circumstances to show diligent prosecution, makes out a *prima facie* case, in favor of the assignee, in a suit against the assignor: *Bullitt* v. *Scribner*, 1 Blackf. 14. This was held true, even in a case of a justice of the peace's proceedings: *Raplee* v. *Morgan*, 2 Scam. 561; but this not always true, as has been elsewhere shown: *Foresman* v. *Marsh*, 6 Blackf. 285. But the record of the proceedings against the maker may be given in evidence against the assignor or guarantor, to show diligence: *Harmon* v. *Thornton*, 2 Scam. 351; *Raplee* v. *Morgan*, Id. 561; *Williams* v. *Nesbit*, 65 Ind. 171; *Mackie* v. *Davis*, 2 Wash. 219.

If it is alleged that the action of the assignee was defeated because the maker plead a want of consideration, the record is not admissible: *Howell* v. *Wilson*, 2 Blackf. 418. The judgment in the proceedings against the maker, cannot be attacked collaterally by the assignor: *Williams* v. *Nesbit*, 65 Ind. 171.

Equal to a Protest.—In a Virginia case, it was said that the return of a *nulla bona* was equal to a protest upon a bill of exchange or promissory note, as evidence of non-payment or non-acceptance: *Goodall* v. *Stuart*, 2 H. & M. 105.

Failure of Property to sell for full Value.—If the property levied upon does not bring its full value on execution sale, the assignor cannot complain, even though it sell for only a nominal sum; for, as between him and the assignee, the price it brought at such sale must be taken for its full value: *Markel* v. *Evans*, 47 Ind. 326. And this was held true, although the assignee purchased in the property, and the attempt was made to hold him as trustee for the assignor: see *Schmied* v. *Frank*, 86 Ind. 250.

Recovery of Costs by Assignee.—If the action against the maker has proven futile, the assignee may recover whatever costs he has laid out and expended: but perhaps not his attorney's fees. *Hunt*

v. *Chambers*, 12 Bush 155; *Butler* v. *Suddeth*, 6 Mon. 542; *Ewing* v. *Sills*, 1 Ind. 125; so may a guarantor: *Woodstock Bank* v. *Downer*, 27 Vt. 539; but not for protest fees, for they are unnecessary: *Woolley* v. *Van Volkenburgh*, 16 Kan. 20.

What kind of Insolvency excuses Suit against Maker.—It has been already stated that the insolvency of the maker, in many forums, will excuse the holder or assignee from suing him before resorting to the assignor or guarantor. The insolvency, however, that will excuse the bringing of an action against the maker, is not a general insolvency, an inability to pay his debts in the ordinary course of his daily transactions: *Herrick* v. *Borst*, 4 Hill 652; *Buchannan* v. *Smith*, 16 Wall. 308; *In re Bininger*, 7 Blatchf. 264; *Rogers* v. *Thomas*, 20 Conn. 69; *Lee* v. *Kilburn*, 3 Gray 600. To excuse the holder from suing the maker, requires an utter insolvency in him. In an early case it was said that, "when any probability exists that payment can be enforced by means of a suit, it ought to be brought; but when it is certain that nothing can be obtained, it would be injustice to the assignor to commence an action:" *Bronaugh* v. *Scott*, 5 Call 93. This principle is engrafted in some of the statutes, where they provide that if the action against the maker would have been "wholly unavailing," it need not be brought: *Bestor* v. *Walker*, 4 Gilm. 15. "The term 'open and notorious insolvency,' therefore, when used in connection with this question, imports something more than when used in common parlance. It implies, not the want of sufficient property to pay all of one's debts; but the absence of all property within the reach of the law, applicable to the payment of any debt:" *Hardesty* v. *Kinworthy*, 8 Blackf. 304. "He is not required to sue the maker, unless the latter has property out of which he can enforce the payment of some part of his claim:" *Williams* v. *Osbon*, 75 Ind. 285.

This is the language of many of the cases, in a few of which the exact point is decided; but in many it is stated only as a *dictum*: *Somerby* v. *Brown*, 73 Ind. 353; *Herald* v. *Scott*, 2 Id. 55; *Sering* v. *Findlay*, 7 Id. 247; *Dugdale* v. *Marine*, 11 Id. 194; *Roberts* v. *Masters*, 40 Id. 461; *Hayne* v. *Fisher*, 68 Id. 158; *James* v. *Nicholson*, 6 Blackf. 288; *Hanna* v. *Pegg*, 1 Blackf. 181; *Zekind* v. *Newkirk*, 12 Ind. 544; *Bernitz* v. *Stratford*, 22 Id. 320; *Markel* v. *Evans*, 47 Id. 326; *Brown* v. *Ross*, 6 Munf. 391; *Saunders* *Marshall*, 4 H. & M. 455; *Sanford* v. *Allen*, 1 Cush. 473; *Crouch*

v. *Hall*, 15 Ill. 263; *Sherman* v. *Smith*, 20 Ill. 350; *Thompson* v. *Armstrong*, Beecher's Breese 23; *Luck* v. *Cook*, Id. 53; *Holbrook* v. *Camp*, 38 Conn. 23; *Clark* v. *Merriam*, 25 Conn. 582; *Ranson* v. *Sherwood*, 26 Id. 437.

In none of these cases has it been decided that the holder may credit on the note the amount of property liable to be applied to the payment of the note, and then sue the assignor or guarantor for the remainder. Such a rule would be a reasonable one, and of no more uncertainty than the question of utter insolvency, when property of the maker is mortgaged to its full value, and it is necessary to make proof of that fact to establish the futility of taking and selling it on execution. But the courts have been cautious and very conservative in extending the rule of insolvency as an excuse for not suing. In speaking of the rules requiring suit and return of *nulla bona*, or proof of utter insolvency, one court has said: "We know of no decision which has carried the privilege of the assignee beyond this:" *James* v. *Nicholson*, 6 Blackf. 288. If, however, only sufficient property could be seized to pay the costs of the action, that would be an utter insolvency in the maker; for the action would result in no benefit either to the maker, or the assignor, or guarantor. These are such costs, however, as are given by statute, and not those contracted for, as in the case of attorneys' fees in the latter instance.

Connecticut Rule.—The rule referred to in the preceding section is not the law of Connecticut. The law governing the assignment in that state is that the maker will be able at the time the note falls due, or when the proper process can be brought against him, to pay the whole obligation assigned, the same as in any other states; but it is also a part of the contract of assignment, that if he shall not be able to pay the whole debt when due, the contract is broken and an immediate right of action exists in favor of the assignee against the assignor. "The endorser contracted that the whole bill, not a part of it, should be collectible. If only a part could be collected, the contract was broken." This was said in answer to the claim set up that even though the property of the debtor be insufficient, suit must be brought against him: *Gillespie* v. *Wheeler*, 46 Conn. 410; *Welton* v. *Scott*, 4 Id. 527; *Clark* v. *Merriam*, 25 Id. 576; *Holbrook* v. *Camp*, 38 Id. 23; *Rhodes* v. *Seymour*, 36 Id. 1; *Greathead* v. *Walton*, 40 Id. 226; *Clayton* v. *Coburn*, 42 Id. 345; *Prentiss* v. *Danielson*, 5 Id. 175; *Bradly* v. *Phelps*, 2 Root 325;

Williams v. *Granger*, 4 Day 444; *Allen* v. *Rundle*, 50 Conn. 9; *Sheldon* v. *Ackley*, 4 Day 458; *Perkins* v. *Catlin*, 11 Conn. 213; *Laflin* v. *Pomeroy*, Id. 440; *Hnntington* v. *Harvey*, 4 Id. 124. The law of this state is said to be anomalous: *Ætra Nat. Bank* v. *Charter Oak Life Ins. Co.*, 50 Conn. 169. This rule has much in its favor; and is only a logical result of those cases excusing suit against the maker, because of his utter insolvency. In requiring the assignee to bring suit against the maker, if any part of the obligation can be made, it is virtually making him the agent of the assignor, for the collection of the amount received from the maker, which in law, he is not: *Welton* v. *Scott*, 4 Conn. 527.

When Insolvency must occur.—Many expressions are used to the effect that the insolvency to excuse suit against the maker must occur when the obligation falls due; but such is not the rule, and no court has so held. For a maker may be perfectly solvent at the time the action against him accrues, and insolvent before process of collection can be secured. The true rule is that if the insolvency occurs before the time judgment could be first recovered against the maker, and process of collection be levied or become a lien upon his property, or the judgment become a lien thereon, it is sufficient to bind the assignor or guarantor. The maker's insolvency at the maturity of the note does not fix the rights of the parties, although it is an important fact to be considered in determining the liability of the assignor or guarantor: *Reynolds* v. *Jones*, 19 Ind. 123; criticising *Dugdale* v. *Marine*, 11 Id. 194; *Markel* v. *Evans*, 47 Id. 326; *Roberts* v. *Masters*, 40 Id. 461; *Nichols* v. *Porter*, 2 W. Va. 13; *Clayes* v. *White*, 83 Ill. 540; *Kayser* v. *Hall*, 85 Id. 511; *Robinson* v. *Olcott*, 27 Id. 181; *Teller* v. *Berheim*, 3 Phila. 299; *Hoffman* v. *Bechtel*, 52 Penn. St. 190; *Crawford* v. *Berry*, 6 G. & J. 63. If the obligation is assigned after due, and the maker is then insolvent, his solvency when it fell due before the assignment does not release the assignor: *Kestner* v. *Spath*, 53 Ind. 288.

Continuous Insolvency.—If suit against the assignor or guarantor is delayed, after the obligation of the maker falls due, it must be alleged and proven that there was a continuous insolvency from the time judgment and process of collection could have been obtained, if suit had been brought, up to the time of bringing the action against such assignor or guarantor; and if the complaint or declara-

tion does not contain such an averment, it will be fatally defective on demurrer: *Bonnell* v. *Holt*, 89 Ill. 71; *Brackett* v. *Rich*, 23 Minn. 485; *Sanford* v. *Allen*, 1 Cush. 473; *Voorhies* v. *Atlee*, 29 Iowa 49; *Nichols* v. *Porter*, 2 W. Va. 13; *Violett* v. *Patton*, 5 Cranch 142; *Riddle* v. *Mandeville*, Id. 322; s. c. 6 Id. 86; 1 Cranch C.C. 95; "when he sues the endorser he must show that the institution of a suit against the maker would have been unavailing, at any time intermediate between the maturity of the note and the commencement of proceedings against the endorser. If he is not bound to show continued insolvency of the maker, he may, with the same propriety, select one period of the intermediate time as another, when he may establish that insolvency:" *Bledsoe* v. *Graves*, 4 Scam. 386; *Humphreys* v. *Collins*, 1 Id. 53; *Coiner* v. *Hansbarger*, 4 Leigh 452. If insolvency intervenes between time of taking and issuing execution, it must be averred: *Hamlin* v. *Reynolds*, 22 Ill. 207. Where a *nulla bona* is relied upon, it is not necessary to show an insolvency between its return and the institution of the action against the endorser: *Speals* v. *Clark*, 3 Ind. 296.

Averment of Insolvency.—Insolvency is an affirmative question, and must be averred and proven by the plaintiff: *Couch* v. *First Nat. Bank*, 64 Ind. 92; and a plea of property in the maker is, therefore good: *Foresman* v. *Marsh*, 6 Blackf. 285; *Hamlin* v. *Reynolds*, 22 Ill. 207; although it is not necessary for the assignor to allege it, for the assignee has the burden of showing that there is none. Stating that the maker "was wholly insolvent at the time the obligation fell due and still is, having no property subject to execution," is sufficient averment of insolvency: *Schmied* v. *Frank*, 86 Ind. 250; *Reynolds* v. *Stratford*, 22 Id. 320; *Reynolds* v. *Jones*, 19 Id. 123; *Stevens* v. *Alexander*, 82 Id. 407; *Patterson* v. *Carrell*, 60 Id. 128; *Holton* v. *McCormick*, 45 Id. 411; "wholly and notoriously insolvent," seems to be a sufficient averment of insolvency: *Smythe* v. *Scott*, 106 Id. 249; *Gwin* v. *Moore*, 79 Id. 103. See *Shepard* v. *Phears*, 35 Tex. 764; *Humphreys* v. *Collier*, 1 Scam. 47; *Crouch* v. *Hall*, 15 Ill. 263; *Sherman* v. *Smith*, 20 Id. 350. To aver merely that suit would have been "unavailing" is not sufficient: *Crouch* v. *Hall*, 15 Ill. 263. Of course the allegation in Connecticut should be that the maker did not have sufficient property out of which the assignee could have collected his claim.

Exemption.—In considering the question of insolvency of the maker, his right of exemption must be taken into consideration. Even though he have enough property out of which he could pay the claim, yet, if it is exempt, he is, to all intents and purposes, insolvent. And this too where the exemption could only be claimed by the debtor after execution issued and levy made, by filing with the officer a sworn schedule of the property desired to be freed from the execution; *Williams* v. *Osborn*, 75 Ind. 281; *Bozell* v. *Hauser*, 9 Id. 522; *Campbell* v. *Gould*, 17 Id. 133; *Dick* v. *Hitt*, 82 Id. 92; *Simpkins* v. *Smith*, 94 Id. 470; *Pierce* v. *Short*, 14 Ill. 144.

Proof of Insolvency.—Proof of insolvency by reputation cannot be made: *Herald* v. *Scott*, 2 Ind. 55; *Sering* v. *Findlay*, 7 Id. 247; *Reed* v. *Thayer*, 9 Id. 157; *Markel* v. *Evans*, 47 Id. 326; *McKinney* v. *McConnel*, 1 Bibb 239; *Trimble* v. *Webb*, 1 T. B. Mon. 101. It must be proven as a fact by showing that there was no property subject to execution. The jury draws the conclusion as to solvency or insolvency: *Schmied* v. *Frank*, 86 Ind. 250. The fact that the maker was reputed to be insolvent, is no excuse for not suing him: *Roberts* v. *Masters*, 40 Ind. 461. Under a general allegation of insolvency, an adjudication in bankruptcy against the maker of the note is admissible: *Wills* v. *Claflin*, 92 U. S. 135. In Virginia general reputation of insolvency is admissible, from which the jury may draw the conclusion of absolute insolvency: *Saunders* v. *Marshall*, 4 H. & M. 455; *Barksdale* v. *Fenwick*, 2 H. & M. 113 n.; *Lee* v. *Love*, 1 Call 497, and a like rule prevails in Maryland: *Lewis* v. *Hoblitzell*, 6 G. & J. 259; *Crawford* v. *Berry*, 6 Id. 63; *Griffith* v. *Parks*, 32 Md. 1. If it appears that the debtor had property not exempt shortly after the obligation fell due, the presumption is that it would have been made: *Roberts* v. *Haskell*, 20 Ill. 59. If insolvency is shown at the date the note fell due, continued insolvency may be presumed until suit brought: *Markel* v. *Evans*, 47 Ind. p. 332.

Joint Action against Maker and Assignor or Guarantor.—Where it is permissible to show the insolvency of the maker, without bringing suit against him, the assignor or guarantor and maker may be sued in one action, and a joint judgment taken against them, in some forums: *Mix* v. *State Bank*, 13 Ind. 521; *Couch* v. *First Nat. Bank*, 64 Id. 92; *Robertson* v. *Cauble*, 57 Id. 420.