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ASSIGNMENT OF CONTRACT RIGHTS AND DUTIES IN KENTUCKY AND THE RESTATEMENT

We are informed in the Restatement¹ that a right may be assigned unless (a) such assignment would cause a material variation in the duty of the obligor, or increase materially the burden or risk imposed upon him or impair his chances of obtaining a return performance, or (b) the assignment is forbidden by statute or by the policy of the common law, or (c) is prohibited by the contract creating the right. It will be recalled that at the earlier common law, contractual rights were not assignable. In 1798 a statute was passed in Kentucky² dealing with assignment, providing that all bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee and making provision for defenses. It seems to have been the view of the court that in all cases coming under the statute the legal title to the writing passed, but where there was an assignment of writings that did not come within the statute, only an equitable title passed.³

Many of the statements found in the Restatement are not applicable in Kentucky because of this early statute which

¹Sec. 151.

²The earlier statute passed in 1796 was very broad and made all writings assignable (1 Litt. Dig., p. 509); in 1798 the following statute was enacted: "Be it enacted by the General Assembly, that all bonds, bills, and promissory notes, whether for money or property, shall be assignable, and it shall and may be lawful for the assignee of any such bond, bill or note, to sue for the same in the same manner the original obligee or payee might or could do. Provided always, that the defendant shall be allowed all discounts, under the rules and regulations prescribed by law, he can prove at the trial, either against the plaintiff or the original obligee or payee, before notice of the assignment. And provided always, that nothing in this act contained, shall be so construed as to change the nature of the defense, either in law or equity, that any defendant or defendants may have against an assignee or assignees, or the original assignor or assignors." (2 Litt. Dig., p. 75, Sec. 1). See also Morehead and Brown (1834), pp. 150, 151. With substantially no change this statute appears as Section 471 of Carroll's Kentucky Statutes (1922). For earlier legislation in Virginia see 1 Hening's Statutes at Large, p. 314, Act XI (1644); 2 ib., p. 87, Sec. VII (1748); 10 ib. 60 (1779) making warrants and certificates of survey assignable; 10 ib. 467, Sec. III (1781) making loan office certificates assignable. Tort actions were not assignable. See *Francis v. Burnett*, 7 Ky. Law Rep. 715 (1886); *Enterprise Mfg. Co. v. Taulbee*, 142 Ky. 783, 785 (1913).

³*Anderson v. Bradford*, 5 J. J. Marsh. (28 Ky.) 69 (1830); *Yantes v. Smith*, 12 B. Mon. (51 Ky.) 395 (1851); *Forepaugh v. Appold*, 17 B. Mon. (56 Ky.) 625 (1856); *Taylor's Ears. v. Gibbs*, 3 B. Mon. (42 Ky.) 316 (1843); *Miller v. Field*, 3 A. K. Marsh. (10 Ky.) 104 (1820).

strictly limits assignments at law. However, so-called equitable assignments have been so far countenanced here that the Restatement becomes a helpful guide.

1. ASSIGNABLE CONTRACTS UNDER THE STATUTE.

The following are among the cases that were held to come within the statute so that the assignee could sue in his own name: ⁴an obligation evidenced by a copy of the record of town trustees signed by the clerk and the treasurer directing the latter to pay a sum of money to a creditor of the town.⁴ In *Snelling v. Boyd*⁵ a covenant for the sale and conveyance of land was held to be assignable, but as the covenantees had a joint interest it was necessary for all to join in the assignment in order to pass the legal title to the covenant. So is a lease assignable by the lessor if it contains only a promise for the payment of money, but not if it imposes other obligations on the lessee.⁶ So also, where the holder of a certificate of stock has been given a guaranty against loss and transfers the certificate and the guaranty, the assignee may recover on the guaranty in his own name;⁷ and the assignee may recover from the maker of a contract who promised to pay a certain sum of money in notes.⁸ Under the declaratory judgment act it was held that "all the proceeds" of a tobacco crop were assignable and included the common stock issued in a warehousing corporation and everything that was, or might be due from tobacco or a sale of it.⁹ Contrary to the usual view, it has been held in Kentucky prior to the Negotiable Instruments Law that a check amounts to an assignment of the fund on which it is drawn.¹⁰

⁴ *Carnegie v. Trustees*, 13 Ky. Law Rep. 431 (1891).

⁵ 5 T. B. Mon. (21 Ky.) 172 (1827); *Conn v. Jones*, Har. (3 Ky.) 9 (1805); *Neyfong v. Wells*, Har. 571 (Ky. 1808). So is an option contract assignable. See *Chesbrough v. Vizard Inv. Co.*, 156 Ky. 149 (1913). See Restatement, Sec. 155. But in *Bowman v. Frowman*, 2 Bibb. (5 Ky.) 233 (1810), and *Craig v. Miller*, 3 Bibb (6 Ky.) 440 (1814), it was held that agreements for the transfer of land do not come within the statute. cf. *Madeiras v. Catlett*, 7 T. B. Mon. 475 (1823).

⁶ *Helburn v. Mofford*, 7 Bush. (70 Ky.) 169 (1870). See also *Lewis v. Ringo*, 3 A. K. Marsh. 247 (1821). But see *Haynes v. Adams*, 3 A. K. Marsh. 149 (1820).

⁷ *Rogers v. Harvey*, 143 Ky. 88, 136 S. W. 128 (1911).

⁸ *Sirlott v. Tandy*, 3 Dana (33 Ky.) 142 (1835). Cf. *Bledsoe v. Fisher*, 2 Bibb. 471 (1811).

⁹ *Carpenter v. Dummit*, 221 Ky. 67, 297 S. W. 164 (1927).

¹⁰ *Taylor v. Taylor*, 78 Ky. 470, (1880); *Merchants Natl. Bank v. Robinson*, 97 Ky. 552 (1895); cf. *Bank of the Republic v. Millard*, 10 Wall, 152 (U. S. 1869); *Van Buskirk v. State Bank*, 35 Col. 142 (1905) contra. See also *infra* notes 109-111. On an order as an assignment see Restatement, Sec. 163.

Sometimes the court decides the question of assignability on general principles and fails to comment, save indirectly, upon the bearing of the statute. So in *Enterprise Mfg. Co. v. Taulbee*¹¹ the court held that where a lease had been assigned the assignee could sue for the breach of the lease contract though the action was not on a "bond, bill or note for money or property."

In *Shultz v. Johnson's Admr.*¹² a covenant between the parties whereby A was to furnish B with "six successive crops of hemp of his own raising embracing all the hemp he can raise upon not less than one hundred nor more than one hundred and sixty acres of land each year" etc., was held not to be performable by the administrator of A. The court was of the opinion that a delegation of performance was not possible, because parties specifically contracted for performance by the obligor.¹³ No reference was made to the assignments statute.

2. CONTRACTS HELD NOT ASSIGNABLE UNDER THE STATUTE.

On the other hand, various contracts are not assignable under the statute, and while generally enforceable if necessary in equity, at law the action must be brought in the name of the assignor, or else he must be joined as a party in equity.¹⁴ There are many illustrations of cases which are beyond the purview of the assignment statute, and the common law rules apply in spite

¹¹152 Ky. 783 (1913). Here the lessee of a mill was to make certain attachments to it and pay his rent in this way. After using the mill for a sufficient time to pay himself for the attachments he abandoned the premises and removed the attachments. It was held that the assignee of the lessor could sue the lessee for breach of contract, since the assignee could perform as well as the lessor the obligations under the lease. "It is well settled that a written contract is generally assignable unless forbidden by public policy, or the contract itself, or its provisions are such as to show one of the parties reposes a personal confidence in the other which he would have been unwilling to repose in any other person." See Restatement, Sec. 152 (1). See Carroll's Kentucky Statutes (1909), Sec. 474.

¹²5 B. Mon. 497 (1845).

¹³See Restatement, Sec. 160 (3), (c).

¹⁴*Hicks v. Doty*, 4 Bush (67 Ky.) 420 (1868); *Dougherty v. Maple*, 4 Bibb 557 (Ky. 1817). See *Pond Creek Coal Co. v. Lester*, 171 Ky. 811 (1916). (Coupon books giving right to trade at obligor's store were assignable in equity. By Kentucky Constitution Sec. 244 and by Statute Sec. 2738 employers of ten or more must pay in money, and if coupon letters of credit are issued they must be redeemed in cash when presented after the wages are due. A stipulation for payment in merchandise only and against assignment was invalid.) See Restatement Sec. 152 (1).

of the real party in interest statute.¹⁵ Thus a covenant both to pay rent and to make improvements is not within the statute;¹⁶ nor a contract to pay the hire of a slave and to clothe him;¹⁷ nor a promise to pay money and to perform certain labor;¹⁸ nor replevin bonds;¹⁹ nor judgments;²⁰ nor the right to reclaim a sum of money paid as usury;²¹ nor the right arising from a covenant to collect money and pay it over;²² nor the right to sue an assignor for breach of his implied warranty.²³ The assignment of the note of an insolvent agent who fraudulently failed to disclose his principal carries with it the right to sue the principal also, but the assignment is equitable only.²⁴ A master cannot assign his claim against his apprentice for service;²⁵ nor can the duty to collect money and pay it over be assigned;²⁶ nor

¹⁵ The so-called "real party in interest" statute took effect in Kentucky in 1851. See Acts of the General Assembly of the Commonwealth of Kentucky (1850), p. 116 Tit. III, Secs. 57, 58, which read as follows: Sec. 57. "Every action must be prosecuted in the name of the real party in interest except as provided in Sec. 60."

Sec. 58. "In the case of an assignment of a thing in action, the action of the assignee is without prejudice to any discount, set-off or defense now allowed. *And when the assignment is not authorized by statute* the assignor must be a party, as plaintiff or defendant. This section does not apply to bills of exchange, nor to promissory notes placed upon the footing of bills of exchange, nor to common orders or checks."

It thus appears that this is not a "real party in interest" statute in any significant sense. See for Kentucky practice, Pomeroy on Code Remedies (fifth ed. 1929), Sec. 73, and cases cited; and *ib. sec. 149*, page 245. See also 1 Newman's Pleading, Practice and Forms (third ed. 2 vol. 1916), Sec. 122b.

¹⁶ *Hicks v. Doty*, supra n. 14. Some of the cases, it will be noted antedate "the real party in interest" statute.

¹⁷ *Boyd v. Rumsey*, 5 J. J. Marsh. (28 Ky.) 42 (1830).

¹⁸ *Marcum v. Hereford*, 8 Dana (38 Ky.) 1 (1839); see also *Henry v. Hughes*, v. J. J. Marsh, (24 Ky.) 453 (1829); *Halbert v. Deering*, 4 Litt. 9 (1823).

¹⁹ *Anderson v. Bradford*, supra n. 3; *Yantes v. Smith*, supra n. 3.

²⁰ *Crawford v. Duncan*, 7 Ky. Law Rep. 134 (1885); *Millar v. Field*, supra n. 3; *Anderson v. Bradford*, supra n. 3; *Robinson v. White*, 4 Litt. 237 (1823); *Elliott v. Waring*, 5 T. B. Mon. 238 (1827).

²¹ *Breckinridge v. Churchill*, 3 J. J. Marsh, (26 Ky.) 11 (1829).

²² *White v. Buch*, 7 B. Mon. (46 Ky.) 546 (1847).

²³ *Mardis v. Tyler*, 10 B. Mon. (49 Ky.) 376 (1850).

²⁴ *Wilson v. Thompson*, 1 Metc. (58 Ky.) 123 (1853). The tort claim against the agent was not assigned by implication. Cf. *Yankton College v. Smith*, 226 N. W. 584 (S. D. 1929), and case note in 43 Harv. Law Rev. 316 (1929).

²⁵ *Hudnet v. Bullock*, 3 A. K. Marsh, (10 Ky.) 299 (1821). See Restatement, Sec. 152.

²⁶ *Force's Admr. v. Thomason*, 2 Litt. (12 Ky.) 166 (1822); *Jones v. Commonwealth*, 2 Litt. 357 (1822). See Restatement, Sec. 152.

debts due on account;²⁷ nor debts due by parol;²⁸ nor future earnings under an existing contract;²⁹ nor claims for fees due a sheriff;³⁰ nor the "made net earnings" of stock in a corporation.³¹ Naturally, the claim of an obligee against one only of two joint obligors is not assignable.³² Nor can two joint obligees transfer a bond, one to one assignee and the other to another, so as to bring the assignment within the statute.³³ The assignment of a right to have a partition deed corrected passes an equitable interest, and the statute does not apply.³⁴

Salaries and fees of various municipal officers have been held not to be assignable in Kentucky, such assignments being regarded as in conflict with public policy.³⁵ The same principle applies to a pension claim.³⁶

Contracts involving personal liability or a relationship of personal confidence, or those which call for the skill or experience of one of the parties, are not assignable even in equity by the promisee though he may waive, the right to personal performance.³⁷

3. DEFENSES OF THE OBLIGOR AND CLAIMS OF FORMER OWNERS.

The Uniform Negotiable Instruments Act became a law in Kentucky in March 1904. It appears that notes for the payment of money were not negotiable prior to that time, at least in the

²⁷ *Forepaugh v. Appold*, supra n. 3; *Graham v. Tiltford*, 1 Metc. (58 Ky.) 112 (1858) (only an equitable interest passes).

²⁸ *Jarman v. Howard*, 3 A. K. Marsh. (10 Ky.) 383 (1820).

²⁹ *Boone v. Connelly*, 12 Ky. Law Rep. 190 (1890). Cf. *Levi v. Lovenhart*, infra n. 56. See Restatement, Sec. 154 (1).

³⁰ *Jones v. Commonwealth*, 2 Litt (12 Ky.) 357 (1822).

³¹ *Petty v. Hagan*, 205 Ky. 264, 265 S. W. 787 (1924). But a dividend is assignable before it is declared.

³² *Lyon v. Lyon*, 4 Bibb. (7 Ky.) 438 (1816).

³³ *Snelling v. Boyd*, supra n. 5.

³⁴ *Mitchell v. Owings*, 3 A. K. Marsh. (10 Ky.) 312 (1821).

³⁵ *Field v. Chipley*, 79 Ky. 260 (1881); *Dickinson v. Johnson*, 110 Ky. 236, 61 S. W. 261 (1901); *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 107 (1911); *Holt v. Thurman*, 111 Ky. 84, 63 S. W. 280 (1901); *Francis v. Burnett*, 7 Ky. Law Rep. 715 (1886); *Coburn v. Currens*, 64 Ky. 242 (1866). These cases overrule *Mantly v. Ritzer*, 91 Ky. 596 (1891); Cf. *Webb v. McCauley*, 4 Bush (67 Ky.) 8 (1868). See Restatement, Sec. 151 (b). For assignment of wages by a janitor employed by a schoolboard see *Oberdorfer v. Louisville School Board*, 120 Ky. 112 (1905).

³⁶ *Trimble v. Ford*, 5 Dana (35 Ky.) 517 (1837).

³⁷ *Hoag v. Reichert*, 142 Ky. 298, 134 S. W. 191 (1911); see also *Pulaski Stave Co. v. Miller's Creek Lumber Co.*, 138 Ky. 372, 128 S. W. 96 (1910). See Restatement, Secs. 160, 161, 164.

sense that equities of defense were cut off when such instruments had come into the hands of bona fide purchasers for value.³⁸

*Prather v. Weisiger*³⁹ was decided in 1873. In that case the court held that the purchaser of such a note when indorsed was not protected from the defenses of the maker, and declared that Kentucky had not followed the Statute of Anne making such instruments negotiable. The only general statutes having any bearing upon the transfer of such instruments were the assignment statute already recited⁴⁰ and the act of 1865 making notes payable at and discounted by a bank, negotiable. Again, in the year 1900, the court, in *Richie v. Cralle*⁴¹ declared that the

³⁸In 1865 the following statute was enacted: "Promissory notes, payable to any person or persons, or to a corporation and payable and negotiable at any bank incorporated under any law of this Commonwealth, or organized in this Commonwealth under any law of the United States, which shall be indorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks in this Commonwealth, as above specified, shall be and they are hereby placed on the same footing as foreign bills of exchange." See Bullock and Johnson's General Statutes of Kentucky (1873), Chap. 22, Sec. 21, P. 252; Bullitt and Feland's General Statutes of Kentucky (1881), Chap. 22, Sec. 21, p. 252; Carroll's Kentucky Statutes (1922), Sec. 493, repealed by the Negotiable Instruments Act of 1904.

Miller in his treatise on the Negotiable Instruments Law of Kentucky, page 210, indicates that there were certain special provisions in the charters of various banks adopting the provisions of the Statute of 4th Anne C. 9 which he says were supplanted by the Act of 1865. He does not cite the Acts where such provisions were made. Certainly the Act of 1865 is far from adopting that statute. Such a statute seems to have been unknown to Judge Prior, who wrote the opinion in *Prather v. Weisiger*, *infra* n. 39. An interesting act was passed in 1817 for the purpose of preventing the circulation of private notes. See 1 Morehead and Brown Statute Law of Kentucky, p. 236. For an act in 1841 concerning the negotiability of "bills, drafts and checks" see Acts of 1841, p. 54, chap. 239.

³⁹10 Bush (73 Ky.) 117 (1873); see also *Drake v. Johnson*, Har. 226 (1808). See Miller, "Kentucky Negotiable Instruments Law" (1915), p. 19.

⁴⁰*Supra* n. 2.

⁴¹108 Ky. 483, 56 S. W. 963 (1900). For bill of exchange case see *Finnell v. Nesbit*, 16 B. Mon. (55 Ky.) 351 (1855), where purchaser was not one for value, and see also *Ely v. Horine*, 5 Dana 398 (1837). See accord *Chiles v. Corn*, 3 A. K. Marsh, (10 Ky.) 230 (1821) *Schooling v. McGee*, 1 T. B. Mon. 233 (1824); *Porter v. Breckinridge*, Har. 23 (1805); *Markham v. Todd*, 2 J. J. Marsh, 364 (1829). *Hopper v. Hottelau*, 2 Ky. Op. 665 (1868), holds that where a note is assigned after maturity it is subject to all defenses it would have been subject to in the hands of the original payee. This seems to imply the possibility that if the note had been assigned before maturity a different result would follow. The opinion is very brief and there is no description of the instrument other than that it is called a negotiable note. Perhaps it comes within the statute of 1865.

assignment statute did not make promises coming within it negotiable so as to cut off defenses, and further says that the assignment of contracts with the exception of bills of exchange does not cut off defenses of the maker, though the instrument is in the hands of a purchaser for value without notice. In the case of a bill of exchange⁴² it was held that the assignee of the payee in insolvency proceedings must permit a set-off to the amount of the maker's deposit in the bank because the assignee was not a purchaser for value.

If the maker pays the assignor without notice of the assignment, he is protected;⁴³ but not so if he pays the assignor after such notice.⁴⁴ So usury has been held to be a good partial defense to an action on a note by the assignee.⁴⁵ The fact that a note was given for a gaming debt was also held to be a real defense against the assignee long before the Uniform Negotiable Instruments Law was thought of.⁴⁶ The power to assert a real defense to a negotiable note given for a gaming debt may be lost by conduct which works an estoppel,⁴⁷ but in an early case it was held that the maker could defend against the assignee of such a note even though the note was accompanied by a declaration that the debt was just and there was no defense to it.⁴⁸ So where a lightning rod agent obtained not only a note by fraud, but also a similar recommendation for the note by fraud, the

⁴² *Finnell v. Nesbit*, supra n. 41; see *Ely v. Horine*, supra n. 41.

⁴³ *Gibson v. Pew*, 3 J. J. Marsh. (26 Ky.) 222 (1830); *Clark v. Boyd*, 6 T. B. Mon. 293 (1827).

⁴⁴ *Johnson v. Lewis*, 1 A. K. Marsh. 401 (1818); *Marr v. Hanna*, 7 J. J. Marsh. 642 (1832), holding that a release by the assignor after notice to the obligor of the assignment is ineffective even at law. This case also holds that if the assignor release after the assignment, and the court dismisses the action brought by the assignee in the name of the assignor the former may have a writ of error because of his interest in the action. See *Welsh v. Mandeville*, 1 Wheaton 233 (U. S. 1816).

⁴⁵ *Chambers v. Keene*, 1 Metc. (58 Ky.) 289 (1858); *True v. Triplett*, 4 Metc. (61 Ky.) 56 (1862).

⁴⁶ *Thompson v. Moore*, 4 T. B. Mon. (20 Ky.) 79 (1826). A statute making gaming contracts void was passed in Kentucky in 1798. See 2 Morehead and Brown (1834), pp. 751-755. After the Negotiable Instrument Law was enacted a gaming consideration was held to be a real defense. The statute cited avoiding gaming contracts was Sec. 1955, passed in 1903. But this statute is substantially the same as the earlier one. See also *Bohon v. Brown*, 101 Ky. 354 (1897); *Alexander v. Hazelrigg*, 29 Ky. Law Rep. 1212 (1906).

⁴⁷ *Holzbog v. Bakrow*, 156 Ky. 161 (1913).

⁴⁸ *Pace v. Martin*, 2 Duv. (63 Ky.) 522 (1866).

maker was allowed to assert his defense against the assignee.⁴⁹ But the substantial equivalent of negotiability (before the enactment of the Negotiable Instruments Law) was reached where the note, though obtained by fraud of the suave lightning rod agent, was accompanied by a recommendation of the note by the maker to the effect that the note was valid and there was no defense to it.⁵⁰

(a) Equities of defense.

It is to be understood that defenses in the note cases prior to the Negotiable Instruments Law are indicative of those generally applicable to other contracts. So the assignee of a non-negotiable chose in action is subject to the equities of defense the obligor may have at the time of notice of the assignment.⁵¹ There are two types of relief which the obligor may seek when sued by the assignee. He may wish to assert that the whole obligation or a part thereof is invalid, or he may admit it is valid but may seek a set-off against it. Some cases of the first class have already been noted. Other cases may be found as follows: fraud on the part of the assignor in obtaining the note;⁵² the running of the Statute of Limitations in favor of a surety although assignee did not know that defendant was a surety when he took an assignment of the note.⁵³ A promise to the assignee to pay after the assignment has taken place does not preclude the obligor from asserting equities that already existed but were unknown to him when he made the promise.⁵⁴ In one case the judgment creditor garnished the debtor of the judgment debtor, and the garnishee did not make an appearance. Judgment was taken against the garnishee followed by levy of execution. Later the garnishee asked that judgment be vacated on the ground that notes representing his obligation to the judgment debtor had been assigned by the judgment debtor, and that he did not know

⁴⁹ *Hill v. Thixton*, 94 Ky. 96 (1893).

⁵⁰ *Crabtree v. Atchison*, 93 Ky. 338 (1892). Cf. *Wells v. Lewis*, 4 Metc. 269 (Ky. 1863); *Morrison v. Beckwith*, 4 T. B. Mon. 73 (1826); *Woodridge v. Cates*, 2 J. J. Marsh. 221 (1829); *McBrayer v. Collins*, 18 B. Mon. (57 Ky.) 833 (1857). See also *Short v. Jackson*, Sneed (2 Ky.) 192 (1802) (benefit of estoppel accrues to subsequent assignees).

⁵¹ Restatement Sec. 167 (1).

⁵² *Chiles v. Corn*, 3 A. K. Marsh. (10 Ky.) 230 (1821). Cf. *Pace v. Martin*, supra n. 48, and *Hill v. Thixton*, supra n. 49. See also *Chenault v. Bush*, 84 Ky. 528 (1886).

⁵³ *Day v. Billingsly*, 3 Bush (66 Ky.) 157 (1867).

⁵⁴ *Clay v. McClanahan*, 5 B. Mon. (44 Ky.) 241 (1844).

this fact when he failed to appear in the garnishment proceedings and permitted judgment to issue by default. It was held that this is not sufficient ground for vacating the judgment, inasmuch as he will have a valid defense to the notes after he has paid the judgment in garnishment proceedings. Of course the assignee must rely upon the instrument assigned, and cannot recover upon the original consideration.⁵⁵

In *Levi v. Lovenhart*, A being in the employ of B, assigned to his creditor, C, a certain portion of his weekly wages to which assignment B assented and under which he made certain payments. Later A received a discharge in bankruptcy whereupon, on the refusal of B to make further payments, C sued B. It seems that the claim of C on an implied contract of A not to revoke the assignment is not provable in bankruptcy proceedings, and so should not be discharged. The court held, however, that the order to pay was valid only so long as the debt remained unsatisfied.⁵⁷

(b) *Set-offs.*

As to set-offs, the obligor, when sued by the assignee, may set-off any contract claim he had against the assignor which had matured at the time of notice.⁵⁸ But a note not matured at the time of suit, cannot be set-off either under the statute or in equity, even though the assignor is then insolvent.⁵⁹ In *Chenault v. Bush*,⁶⁰ A, B, and C had been partners, C having a one-half interest. They borrowed money to carry on their business. A and B had been partners in a different business, and as such had sold certain chattels to C for which C gave his notes. A and B being insolvent, assigned

⁵⁵ *Cason v. Wallace*, 4 Bush (67 Ky.) 388 (1868).

⁵⁶ 138 Ky. 133 (1910).

⁵⁷ See 1 Williston on Contracts, Sec. 414; Restatement Sec. 167 (1).

⁵⁸ See set-off Statute of 1796 in 2 Morehead and Brown, p. 1448. Cf. Carroll's Kentucky Civil Code (7th ed. 1927), Secs. 95, 96. See Restatement Sec. 167 (2) and (3); *Millett v. Swift*, infra n. 116; *Henderson Natl. Bank v. Lagow*, 3 K. L. R. 173 (1878). See 1 Williston on Contracts, Sec. 434.

⁵⁹ *Graham v. Tilford*, 1 Metc. (58 Ky.) 112 (1858); *Merchants Natl. Bank v. Robinson*, supra n. 10; *Walker v. McKay*, infra. n. 61. Case holds, however, that an assignment may be taken by the obligor purely for the purpose of set-off against the obligee and as such is good against the obligee's assignee even though the obligor must account to his assignor for the proceeds.

⁶⁰ Supra n. 52. This case illustrates both on original defense and a right of set-off.

their property to X, and X sued C on his notes at a time when the obligation of the three for borrowed money had not yet become due. C, however, paid off this obligation before it became due, and asserted the right to set-off his claim for contribution against these notes given by him for the chattels of A and B. His right of set-off was recognized and the case was distinguished from *Walker v. McKay*.⁶¹ A somewhat similar problem arises in the case of sales of land. Thus in *Taylor v. Ford*⁶² A sold a bond for the conveyance of certain land to B, who gave his note in part payment therefor, and became insolvent after again assigning the bond. A sold B's note to C, but had to redeem it. A then asked to have his vendor's lien re-asserted. The court seems to have regarded the giving of a bond as equivalent to the conveyance of the land. Hence, though a vendor may have an equitable lien until the vendee conveys away, he cannot assert such an equitable lien against a purchaser for value of the land or bond. Presumably the vendor must execute a conveyance according to his bond and could make no defense. Perhaps this claim for a lien more nearly resembles a defense than a set-off. If, however, the sub-purchaser has not paid his vendor fully, the original vendor may assert a lien against such sub-purchaser to the extent that his own claim equals the debt of the sub-purchaser.⁶³

In *Harrison v. Burgess*⁶⁴ the situation is complicated, but for our purpose the following facts will suffice. A and R were sureties for C on a note. C held a note against A. C assigned his A note to R to indemnify R against loss on his suretyship obligation. At the same time R executed a receipt and a promise to restore to C the A note so soon as he (R) should be released. This acknowledgment of collateral was assigned by C to plaintiff, who gave notice to R. A, however, having been surety for C in still another transaction, made a settlement of it and thereafter obtained from C an order on R for the surrender of his (A's) note, and it was surrendered to him. Thereafter plaintiff sued C, R and A. It was held that A received possession

⁶¹ 2 Metc. (59 Ky.) 294 (1859).

⁶² 1 Bush (64 Ky.) 44 (1866). See also *Anderson v. Wells*, 6 B. Mon. (45 Ky.) 540 (1846), and *McBrayer v. Collins*, supra n. 50.

⁶³ *Hunt v. Brand*, 5 B. Mon. (44 Ky.) 562 (1845).

⁶⁴ 5 T. B. Mon (21 Ky.) 417 (1827); see Restatement Sec. 155 for conditional right.

of the acknowledgment of R without notice of the claim of plaintiff, and was liable only for such balance as he might still owe A on the note, and his right of set-off was vindicated though possession of the R acknowledgment did not pass legal title to the note. It seems clear that he would have had the right of set-off, however, even if he had never obtained possession of R's written statement and promise. In *Harlan v. Lumsden*⁶⁵ it was held that when an action is brought on behalf of the Commonwealth against a deputy sheriff for taxes collected by him and not paid over, he may set-off a claim which he has against the sheriff for the sum he had been obligated to pay as surety for the sheriff.

Of course, where the assignee brings an action and the obligor sets off another claim against the assignor, if the assignee withdraws his action the suit cannot go on as to the set-off or counter-claim, since the proper defendant is not before the court.⁶⁶

(c) *Latent Equities.*

The Kentucky cases so far as they have been examined, seem to agree with the Restatement⁶⁷ that prior equities of ownership or latent equities are cut off by the sale to an assignee for value and without notice.⁶⁸ It seems to follow that the obligor cannot resist payment because of lack of interest in the assignee, whether consideration has been paid by him or not,⁶⁹ nor where the token or writing was delivered without consideration.⁷⁰

4. LIABILITY OF THE ASSIGNOR.

It has already been observed that notes for money or property were assignable under the statute of 1798 and that there

⁶⁵ 1 Duv. (62 Ky.) 86 (1863).

⁶⁶ *Brown v. Young*, 4 Ky. Op. 701 (1872).

⁶⁷ Section 174.

⁶⁸ *Newby v. Hall*, 2 Metc. 530 (Ky. 1859); *Taylor v. Ford*, supra n. 64; *White v. Prentiss*, 3 T. B. Mon. 449 (1826). It is not always easy to reconcile this rule with the rule of priority of assignments discussed infra.

⁶⁹ *Henderson Natl. Bank v. Lagow*, 10 Ky. Op. 103 (1878); *Wilhamson I. Yager*, 91 Ky. 282 (1891); 34 A. S. R. 184 note.

⁷⁰ *Pawlings v. Speed*, Litt Sel. Cas. 77 (Ky. 1808); Restatement Sec. 150 (2).

was no general acceptance of the doctrine of negotiability of promissory notes for cutting off defenses until the enactment of the Negotiable Instruments Law in 1904. This phenomenon is accompanied by another, namely, the extreme extent of the liability of the assignor to the assignee.⁷¹ It is sometimes said that the seller of a chose in action assumes the same liability to the buyer as does the seller of a chattel.⁷² But it is evident that if the seller of a chose warrants the solvency of the obligor at the time of the assignment, his liability is much greater than that of the seller of a chattel. In Kentucky the rule seems clearly to be that the assignor promises to repay the assignee the consideration paid by the latter⁷³ if the latter uses due diligence in collecting from the obligor and fails.⁷⁴ That is to say, the seller warrants the solvency of the obligor at the time of the assignment.⁷⁵ This rule is acknowledged not to be the common law rule, but rises from the Statute on Assignments.⁷⁶ This extreme liability is applicable to assignments under the statute and not to other assignments usually called equitable assignments.⁷⁷

But the assignee must use due diligence in seeking to recover from the obligor.⁷⁸ What is due diligence? If both the Quar-

⁷¹ See Restatement Sec. 175; 1 Williston on Contracts, Sec. 445. The assignor's implied warranties are substantially the same as those of a qualified indorser.

⁷² *Crawford v. Duncan*, supra n. 20; *Gilmore v. Green*, 14 Bush (77 Ky.) 772 (1879).

⁷³ *Buckner v. Curry*, 1 Bibb. 477 (1809); but Cf. *Butler v. Suddeth*, 6 T. B. Mon. (22 Ky.) 541 (1828).

⁷⁴ *Smallwood v. Woods*, 1 Bibb (4 Ky.) 542 (1809). For a different measure of damages, see *McKinney v. McConnell*, 1 Bibb, 239 (1808); *Stafford v. Steele*, 7 J. J. Marsh, 342 (1832). See *Morehead v. Prather*, 1 A. K. Marsh. 542 (1819); *Spratt v. McKinney*, 1 Bibb. 595 (1809); *Davis v. Harrison*, 2 J. J. Marsh. 189 (1829). See also *Stapp v. Anderson*, 1 A. K. Marsh. 535 (1819); *Clay v. Johnson*, 6 T. B. Mon. 644 (Ky. 1828); *Crews v. Dabney*, 1 Litt. 278 (1822). See additional cases cited from Kentucky in 5 Corpus Juris, Assignments, Sec. 158, p. 969, note 59.

⁷⁵ *Anderson v. Bradford*, supra n. 3. Cf. Restatement Sec. 175 (2).

⁷⁶ *Crawford v. Duncan*, supra n. 20; *Campbell v. Hopson*, 1 A. K. Marsh. 228 (1818).

⁷⁷ *Smallwood v. Woods*, supra n. 74. This statute is borrowed from Virginia. The court cites *Mackie v. Davis*, 2 Wash. 219 (Va. 1796), and an earlier Kentucky case, *Boals v. McConnell*, Sneed (2 Ky.) 130 (1802). Cf. as to the liability of the assignor of a judgment, *Robinson v. White*, 4 Litt. 237 (1823); as to bond for conveyance of land see *Moredock v. Rawlings*, 3 T. B. Mon. 73 (1825); *Bedal v. Stith*, 3 T. B. Mon. 290 (1826); *Stafford v. Steele*, supra n. 74.

⁷⁸ *Bonta v. Curry*, 3 Bush (66 Ky.) 678 (1868); *Coleman v. Tully*, 7 Bush (70 Ky.) 72 (1869); *Green v. Cummins*, 14 Bush (77 Ky.) 174 (1878); *Hurst v. Chambers*, 12 Bush (75 Ky.) 155 (1876).

terly Court and the District Court have jurisdiction, suit must be brought in that court which first holds a term after the debt is due.⁷⁹ A delay of two terms does not show due diligence. In fact, if the obligor lives a long way from the court house and in the country, it is not sufficient diligence to put process in the hands of the sheriff which must be served within a period of four or five days.⁸¹ It is not sufficient to sue the obligor in a county where he does not reside, and after judgment to wait four months before levying execution.⁸² In fact, to delay without excuse two months to levy execution does not show due diligence.⁸³ If a foreign corporation is the obligor it should be sued at its place of business instead of in a state where it has no assets. There must then be a levy of execution and a return by the sheriff *nulla bona* to warrant recovery from the assignor.⁸⁴ Mere insolvency of the obligor is held not a breach of the assignor's warranty, and there must be a judgment and return *nulla bona*,⁸⁵ in order to fastern liability on the assignor; and thereafter he must be sued within the period of the Statute of Limitations.⁸⁶ All legal and equitable remedies available against the obligor must be exhausted in order to hold the assignor on his warranty.⁸⁷ Thus due diligence requires that the assignee demand bail where bail is demandable, and obtain a *capias ad satisfaciendum* or a return *non est inventus*, and then proceed against the surety on the bail bond⁸⁸ A stay of execution by plaintiff after levy discharges the assignor.⁸⁹

⁷⁹ *Rogers v. McHenry*, 5 Ky. Op. 255 (1871); Cf. *Brinker v. Perry*, 5 Litt. 194 (1824); *Oldham v. Bengan*, 2 Litt. 132 (1822); *Markley v. Withers*, 4 T. B. Mon. 14 (1826); *Thomas v. Taylor*, 2 J. J. Marsh. 217 (1829). As to the form of the return, see *Hall v. Roberts*, 3 J. J. Marsh. 323 (1830).

⁸⁰ *Rives v. Brown*, 81 Ky. 636 (1884). See also *Trimble v. Webb*, 1 T. B. Mon. 100 (1824).

⁸¹ *Bays v. Patton*, 8 B. Mon. (47 Ky.) 228 (1847).

⁸² *Burk v. Morrison*, 8 B. Mon. (47 Ky.) 131 (1847). See also *Hogan v. Vance*, 2 Bibb. 34 (1810).

⁸³ *Chambers v. Keene*, supra n. 45.

⁸⁴ *Citizens National Bank v. Hubbert*, 97 Ky. 768, 31 S. W. 735 (1895).

⁸⁵ *Francis v. Gant*, 80 Ky. 190 (1882).

⁸⁶ *Gilmore v. Green*, supra n. 72.

⁸⁷ *Burk v. Morrison*, supra n. 82; *Chambers v. Keene*, supra n. 45.

⁸⁸ *Smallwood v. Woods*, supra n. 74. See *Young v. Cosby*, 3 Bibb 227 (Ky. 1813); *Smith v. Bacon*, 3 J. J. Marsh. 312 (1830).

⁸⁹ *McGinnis v. Burton*, 3 Bibb 6 (1813). See *Johnson v. Lewis*, 1 Dana 182 (1833), for recovery by assignee against an officer, for misconduct, and its bearing on the liability of the assignor.

Even a married woman obligor must be sued before the assignor is liable, since she might not plead her coverture.⁹⁰ A remote assignor is not directly liable to the remote assignee,⁹¹ but the latter may sue him in the name of his assignor.⁹² An assignment of a claim protected by a mechanic's lien carries the lien with it to the assignee.⁹³

The assignor, even he who assigns without recourse warrants that the claim is a subsisting obligation, but if he demands the privilege he is entitled to control the action against the obligor. Otherwise he is excused from liability even though judgment may be rendered in favor of the obligor when sued by the assignee.⁹⁴

The rule of due diligence, however, is not applicable to an assignor who induces the assignee to delay bringing the action;⁹⁵ nor where the assignor did not own the chose even though the assignee at the time knew there was another claimant to it;⁹⁶ nor where the name of the obligor was forged.⁹⁷ Due diligence does not require the assignee to sue an obligor who became bankrupt after the assignment, but before the obligation became due.⁹⁸ It is, of course understood, that the above discussion does not apply to instruments controlled by the Kentucky Negotiable Instruments Act.

⁹⁰ *Hughes v. Brown*, 3 Bush (66 Ky.) 660 (1868). See Restatement Sec. 175 (b).

⁹¹ *Short v. Trabue*, 4 Metc. (61 Ky.) 299 (1863); *Drake v. Johnson*, supra n. 39. Cf. *Wood v. Berthoud*, 4 J. J. Marsh. 303 (1830).

⁹² *Mardis v. Tyler*, 10 B. Mon. (49 Ky.) 376 (1850).

⁹³ *Sower v. Cumming*, 6 Ky. Op. 216 (1872).

⁹⁴ *Samuel v. Hall*, 9 B. Mon. (48 Ky.) 374 (1849). Restatement Sec. 175 (b). *Coffman v. Allin*, Litt. Sel. Cas. 20 (1815), holding that the assignor of a forged bond who "assigns" without recourse is not liable to the assignor is perhaps overruled by implication.

⁹⁵ *Samuel v. Hall*, supra n. 94; *Cope l. Arberry*, 2 J. J. Marsh. (25 Ky.) 296 (1829).

⁹⁶ *Emmerson v. Claywell*, 14 B. Mon. (53 Ky.) 15 (1853).

⁹⁷ *Ware v. McCormack*, 96 Ky. 139 (1894). *Wynn v. Poynter*, 3 Bush (66 Ky.) 54 (1867), contra is overruled.

⁹⁸ *Roberts v. Atwood*, 8 B. Mon. (47 Ky.) 209 (1847); see *Parker v. Owings*, 3 A. K. Marsh, 59 (1820), Cf. *Clair v. Barr*, 2 A. K. Marsh, 255 (1820), where maker is dead when note becomes due.

5. PARTIAL ASSIGNMENT.

In harmony with the common law rule, a partial assignee cannot sue at law in his own name.⁹⁹ Nor can he join in an action with the partial assignor unless authorized so to do by statute.¹⁰⁰ But such partial assignees are protected in equity so as to be preferred over subsequent garnishments,¹⁰¹ and are fully protected whenever the debtor consents to the assignments.¹⁰² Such assignments bind the obligor¹⁰³ when all the parties are before the court¹⁰⁴ It has been held¹⁰⁵ that an order to pay an entire claim (not assignable under the statute) was an equitable assignment and presumably may not be withdrawn even before the assignee has given notice to the obligor, but an order assigning a part of such claim may be withdrawn before acceptance by the obligor.

A distinction should be drawn between a partial assignment and the assignment by a co-partner of his entire severable interest.¹⁰⁶ In *Elledge v. Strughn*,¹⁰⁷ A assigned a part of a debt due from B to C and later the residue to D. It was held that the action against B must be brought in the name of A and not in the name of D for the reason that the term "residue" indicated that the assignor was transferring merely the balance of his beneficial interest, but not the legal title that he held as trustee for C.

One case of partial assignment in Kentucky created a very

⁹⁹ *Columbia Finance Co. v. First National Bank*, 116 Ky. 364, 76 S. W. 156 (1903); *Weinstock v. Belwood*, 12 Bush (75 Ky.) 139 (1876); *Bank v. Trimble*, 6 B. Mon. (45 Ky.) 599 (1846). (The partial assignor sues as trustee for the partial assignee and a right of set-off against the partial assignor, acquired after notice of the partial assignment, is not available to the obligor.) A partial assignee is entitled to such portion of the security as the fraction of the claim assigned to him bears to the whole. *Lee Carlisle v. Juniper*, 81 Ky. 282 (1883). Cf. 1 Williston on Contracts, Sec. 432. Cf. *Pelly v. Bowyer*, 7 Bush 513 (1870); 34 Yale L. Jour. 258, 266 (1925); Restatement, Sec. 156; The Real Party in Interest, by Professor L. M. Simes in 10 Ky. L. J. 60, 66 (1922); Gratuitous Partial Assignments by Professor E. D. Dickinson, 31 Yale L. J. 1 (1922).

¹⁰⁰ *Hubbard v. Prather*, 1 Bibb 178 (Ky. 1808).

¹⁰¹ *Lutter v. Grosse*, 82 S. W. (Ky.) 278 (1904).

¹⁰² *Columbia Finance Co. v. First National Bank*, supra n. 99.

¹⁰³ *Lexington Brewing Co. v. Hamon*, 155 Ky. 711 (1913).

¹⁰⁴ *Kentucky Lumber and Millwork Co. 1. Montz*, 158 Ky. 328, 164 S. W. 935 (1914). Cf. *Philadelphia Veneer & Lumber Co. v. Garrison*, 160 Ky. 329, 169 S. W. 714 (1914), and *Miller v. Malony*, 3 B. Mon. (42 Ky.) 105 (1842).

¹⁰⁵ *Wallins Creek Collieries Co. v. Saylor*, 214 Ky. 206, 282 S. W. 1095 (1926).

¹⁰⁶ *Philadelphia Veneer and Lumber Co. v. Garrison*, supra n. 104.

¹⁰⁷ 2 B. Mon. (41 Ky.) 81 (1841).

great hardship on the partial assignee and reached a very unhappy result.¹⁰⁸ A had sold a certain house and lot to B and had given credit for a portion of the purchase price. B insured the premises in his own right. The house was destroyed by fire and thereafter before payment of the loss by the insurance company B assigned out of the proceeds so much as would complete the payment of the purchase price. The insurance company, after notice of the partial assignment, paid the entire sum to B, who was insolvent at the time, and who disappeared. It was held that the partial assignee had no rights which the obligor was bound to recognize.

Prior to the Negotiable Instruments Act our court held that a check was an assignment,¹⁰⁹ and that the assignee might sue the drawee for refusal to pay when in funds.¹¹⁰ It therefore seems that prior to that act such a partial assignee could sue the drawee bank in his own name.¹¹¹ That law does not now prevail.

6. SUCCESSIVE AND GRATUITOUS ASSIGNMENTS.

It is well understood that under the English rule as represented by *Dearle v. Hall*¹¹² where there are successive assignments of choses in action, the assignee who first gives notice to the obligor prevails. The Restatement, however, follows the so-called American rule recently adopted by the Supreme Court of the United States,¹¹³ and favors the prior assignee.¹¹⁴

¹⁰⁸ *Henry Clay Fire Ins. Co. v. Denker*, 218 Ky. 68, 290 S. W. 742 (1927). For the contrary view which is declared to be the great weight of authority, see 1 Williston on Contracts, Sec. 444. The Restatement, Sec. 156, illustration page 190, seems to suggest that the obligor with notice should pay the whole sum into court if he does not wish to make partial payments. For a case on all fours with the principal case and reaching the contrary results see *Todd v. Meding*, 56 N. J. Eq. 83, 38 Atl. 349 (1897).

¹⁰⁹ *Taylor v. Taylor*, 78 Ky. 470 (1880). Not so a bill of exchange, *Hart v. Dixon*, 5 Ky. Law Rep. 669 (1884). See *Boswell v. Citizens Savings Bank*, 123 Ky. 485; 1 Williston on Contracts, Sec. 425; Restatement, Sec. 163. Note in 14 Minn. Rev. 157 (1930).

¹¹⁰ *Lester v. Given*, 8 Bush 357 (Ky. 1871). The rule was changed under the Negotiable Instrument Law of 1904. See *First Natl. Bank v. Hargis Com. Bank*, 170 Ky. 690 (1916).

¹¹¹ Cf. *Buckner v. Sayre*, 18 B. Mon. 745, 746 (57 Ky. 1857), where a bill of exchange was also held to be an assignment but perhaps it was intended to assert that the assignment was not effective until acceptance.

¹¹² 3 Russ. 1, 48 (Ch. 1928).

¹¹³ Sec. 173 (c).

¹¹⁴ Cf. Criticism of this section by McDowell, "Risks of an assignee under the Restatement of the Law of Contracts," 17 Ky. L. J. 339, 344.

The Kentucky cases are in harmony with this rule,¹¹⁵ and of course the prior assignee prevails as to subsequent attaching creditors.¹¹⁶ In *Harrison v. Burgess*¹¹⁷ the subsequent assignee of a conditional promise to re-deliver a chose in action was protected mainly because he was also the obligor of the chose and had an available set-off to it. The conditional promisor who delivered to the second assignee was not liable because no injury had resulted from the act.

Under the Restatement a gratuitous assignment passes title to the chose in action that is revocable^{117a}. In Kentucky a gratuitous assignment also passes title^{117b}. It has been held however, in Kentucky, that if there is a delivery of the instrument death does not revoke the gift of notes, savings bank passbooks; and it is also held that the delivery of a receipt given by one who holds notes and bonds is a delivery of the latter and is irrevocable by death. Even if the delivery of account books passes the title to the claims represented by them and death does not revoke the transfer^{117c}. The Restatement declares that gifts of choses in action are irrevocable only where there has been a delivery of some tangible token or writing, the surrender of which is required by the obligor's contract for its enforcement.

What authority there is in Kentucky accords with the Restatement respecting the effect of gratuitous assignments. One case holds that an assignment without consideration passes the title to the assignee and he may sue the obligor^{117d}.

¹¹⁵ *Columbia Finance Co. v. First Natl. Bank*, supra n. 99; *Lexington Brewing Co. v. Hamon*, infra n. 119; *Carlisle v. Jumper*, 81 Ky. 282 (1883). See additional cases cited in Corp. Juris, "Assignments," p. 954 n. 37.

¹¹⁶ *Taylor's Bars. v. Gibbs*, 3 B. Mon. (42 Ky.) 316 (1843); *Forepaugh v. Appold*, supra n. 3; *Millett v. Swift*, 138 Ky. 408 (1910).

¹¹⁷ 5 T. B. Mon. (21 Ky.) 417 (1827).

^{117a} Restatement, Sec. 158.

^{117b} *Henderson National Bank v. Lagow*, supra n. 58.

^{117c} *Southerland v. Southerland*, 5 Bush. 591 (1869); (note); *Merriwether v. Morrison*, 78 Ky. 572 (1880) (note); *Turpin v. Thompson*, 2 Metc. 420 (Ky. 1859) (note); *Stephenson v. King*, 81 Ky. 425 (1883) (receipt for notes and bonds payable to assignor); *Ashbrook v. Ryon*, 2 Bush 228 (1867) (holds that delivery of a commercial bank passbook is not sufficient but agrees with the other cases as to a note). *McCoy v. McCoy*, 126 Ky. 783 (1907) (delivery of savings bank passbook makes an irrevocable assignment and dictum that there is no difference as to commercial bank passbooks); *Jones v. Moore*, 102 Ky. 591 (1898) (account books).

^{117d} *Bank v. Lagow*, supra n. 58.

7. FORM OF ASSIGNMENT.

The Restatement declares¹¹⁸ that a right can be effectively assigned either orally or in writing. Our court has held that a prior parol partial assignment to the debtor is sufficient as against a subsequent entire assignment¹¹⁹ and as against subsequent attaching creditors.¹²⁰ Prior oral assignment carries with it a superior claim for the benefit of a surety who takes the assignment for indemnification as against a subsequent garnishing creditor. It follows that an assignment may be in writing and on a paper separate from the instrument assigned.¹²¹

In general, any written form of assignment is sufficient which indicates an intention to part with the right assigned.¹²² In one case the assignor purported to assign the claims which he held against certain Germans obligated by indentures for the performance of service. It appears that the Germans were released by the court on *habeas corpus* proceedings. In an action against the assignor for the price paid by the assignee it was held that there was no liability on the part of the former because the release was due to a faulty form of assignment used, but this form had been insisted upon by the assignee.¹²³

SUMMARY.

The Statute of 1798 making "bonds, bills, and promissory notes whether for money or property" assignable so that the assignee might sue on them in his own name, has undoubtedly had much to do in retarding the free assignability of contractual rights. Since by its terms it included promissory notes, any development toward making such note negotiable was effectually prevented. Our court has held that many promises which could not be regarded as "bonds, bills and promissory notes whether

¹¹⁸ Sec. 157.

¹¹⁹ *Lexington Brewing Co. v. Hamon*, supra, n. 103. Cf. *Gray v. Briscoe*, 6 Bush (69 Ky.) 687 (1869); and *Evans v. Stratton*, 142 Ky. 615, 134 S. W. 1154 (1911).

¹²⁰ *Vernon v. Chestnut*, Ky. Law Rep. 428 (1886); *Lutter v. Grosse*, supra n. 101; *Fields v. Chipley*, 79 Ky. 260 (1881). See also *Beard v. Sharp*, 23 Ky. Law Rep. 1582 (1901); *Lockett v. Lockett*, 26 Ky. Law Rep. 300 (1904); *Little v. Berry*, 113 S. W. 902 (1908).

¹²¹ *Armstrong v. Flora*, 3 T. B. Mon. (19 Ky.) 43 (1825). Cf. *Instone v. Williams*, 2 Bibb (5 Ky.) 83 (1810).

¹²² *Forepaugh v. Appold*, supra n. 3; *Cravens v. Hopson*, 4 Bibb. 286 (Ky. 1815); *Frankfort Bank v. Hunter*, 3 A. K. Marsh, 292 (1821); *Ashcraft v. Brownfield*, 7 T. B. Mon. (23 Ky.) 123 (1828).

¹²³ *McKee v. Hoover*, 1 T. B. Mon. (17 Ky.) 32 (1824).

for money or property" might still be assignable in equity, whatever that may mean. One thing it seems to have meant was that the assignor must be a party whenever litigation on the obligation became necessary, and the real party in interest statute did not dispense with that necessity, but rather required it. Until 1904 there was no generally effective way of cutting off defenses to obligations arising from promissory notes, save those that were payable at and discounted at a bank. Equities of ownerships however, were cut off.

Under this same statute on assignments there arose an extreme liability on the part of the assignor to repay the assignee for losses that accrued from the latter's inability to recover from the obligor if he pursued the latter with "due diligence." One Kentucky case at least adopts the general rule as to assignments without reference to the statute.

Kentucky has in general agreed with the Restatement regarding rights of the partial assignee. One case holding that the obligor with notice may at will entirely disregard the partial assignee, is not believed to be in harmony with the spirit of the prior decisions and the court should not find it over difficult to overrule that case.

Our court has consistently followed the American view as represented in the Restatement regarding successive assignments and has repudiated the English view. Our decisions also fall in line as to the manner of executing assignments to the effect that they may even be oral.*

ALVIN E. EVANS.

*Acknowledgment is here made of valuable suggestions made by Judge Robert H. Winn, of Mt. Sterling, Kentucky.