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DILIGENCE REQUIRED TO HOLD AN ASSIGNOR OR  
GUARANTOR.

*Scope of this Article.*—It is the design in this article to touch upon the question of diligence required in the holders of certain paper, to collect of a guarantor, an endorser, or an assignor; the steps that are necessary to hold them, and when they are excused from taking any steps to keep the contract of guaranty, of endorsement, or of assignment, good.

*A Guaranty of Collectibility.*—And first we will limit the discussion touching a guarantor's liability to those cases where he has only guaranteed the collection of the note, or that it can be collected from the principal when it falls due. It is well to observe that this is the usual guaranty, but that there are others where due diligence, in collecting the instrument from the principal is excused by reason of apt words used in the guaranty. See Brandt on Suretyship and Guaranty, sect. 86.

*Connecticut Notes.*—There is a law in Connecticut appertaining to the blank endorsement of a note, that, it is believed, is peculiar to that state. The status of these notes has been very well expressed by Ch. J. HOSMER, who, in an early case, said: "By uniform and long continued usage in this state, as well as by repeated determinations, a blank endorsement on a note not negotiable,

contains a warranty that the note is due ; that the maker shall be of ability to pay it. when it reaches maturity ; and that it shall be collectible by the use of due diligence : *Bradley v. Phelps*, 2 Root 325 ; *Williams v. Granger*, 4 Day 444 ; Swift's Ev. 342. The holder may not write over the endorser's name a direct and absolute promise, nor insert any special contract, repugnant to the nature of a blank endorsement, as it has always been understood ; for it is not to be presumed, that the assignor, by an endorsement in blank, intended anything more than a power of attorney with warranty, accompanied by a transfer of the money, when collected : *Huntington v. Harvey*, 4 Conn. 128. In another case, the same judge quotes Ch. J. SWIFT, after stating that his long acquaintance with the usage and determination of courts of that state on the subject, gave him a familiar knowledge of the law, as saying that " a blank endorsement contains a warranty that the note is collectible, and that the maker is of sufficient ability to pay it ; that is, to make the endorsee satisfaction of the note according to its tenor : " Swift's Ev. 342. And elsewhere in this case it is said that the endorsee must use " due diligence " if he would hold the endorser, in collecting it of the maker : *Welton v. Scott*, 4 Conn. 532 ; *Gillespie v. Wheeler*, 46 Id. 410 ; *Holbrook v. Camp*, 38 Id. 23 ; *Perkins v. Catlin*, 11 Id. 213.

*Paper peculiar to other States.*—There is a class of paper, usually non-negotiable promissory notes (although sometimes bonds are included), peculiar to the states of Virginia, Maryland, Kentucky, Indiana and Illinois, in allowing the assignee to collect the amount due from the assignor when he has used due diligence to collect it from the maker, or other person primarily liable, and has failed. The first case of this kind arose in Virginia in 1796, and is reported in Washington's Reports (*Mackie's Ex. v. Davis*, 2 Wash. 219 ; s. c. 1 Am. Dec. 482). It was " an action on the case, brought by the assignee of a bond, to recover of his immediate assignor, compensation on account of the non-payment of the bond of the obligor. " The case turned on the question " whether an action can be maintained against the assignor of a bond, without a particular undertaking on his part to insure the payment. " A statute was then, and had been for a long time, while the state was a province of Great Britian, in force, allowing the assignee of an assigned instrument to sue in his own name, and consequently collect the amount due on

the instrument; in fact, so long as he was the assignee and holder, no one else could sue upon it. In disposing of the case, one of the judges put it upon this ground: "The right of the assignee to resort back to him from whom he acquired the bond, is bottomed upon the principles of common law. There is an implied agreement by the assignor, that the money which he sells, and for which he receives an equivalent, shall be received by the purchaser, as much so as if any personal property whatever were the subject of the contract. There is no reason why an implied warranty should not exist in the sale of bonds, as well as in the sale of other property." Another judge, in admitting these propositions, also adds, that it is the common "understanding of those who enter into obligations of this sort would be sufficient to make the assignor liable." This same judge also said, that he thought that the extent of the assignor's liability was the sum actually paid him for the obligation by the assignee; which principle, as will be shown, has crystallized into a well-settled rule. Elsewhere in this case it was said that the assignment need not be in writing, to render the assignors liable; a statement doubted at the present day. The case of *Lambert v. Oakes*, as reported in Lord Raymond's Reports was cited (1 Ld. Raym. 443: s. c. 12 Mod. 244; 1 Salk. 127; *sub nom. Lambert v. Pack*, 1 Salk. 118; *sub nom. Anonymous*, 12 Mod. 126. In some of the reports, the instrument referred to is called a bill; but Mr. Kyd has shown beyond controversy, that it was a note. Kyd on Bills 169), which was a case by the assignee of the note, against the assignor, who was the payee, that arose previous to the statute of Anne, in the year 1699. Oakes, as payee, endorsed a note to Lambert, and the latter sued Oakes for the money. Ch. J. HOLT said that "he ought to prove, that he had demanded, or done his endeavor to demand, the money of R. (the maker), before he can sue Oakes upon the endorsement. The same, if the bill was drawn upon any other person, payable to Oakes or order. And the demand to entitle Lambert to his action, must be after the endorsement." "If the endorsee does not demand the money payable by the bill, of the person upon whom it is drawn, in convenient time, and afterwards he fails, the endorser is not liable." In another English case it is said that the endorsement is a warranty that the note will be paid: *Fenner v. Meares*, 2 W. Bl. 1269. As to due diligence required to collect a bill, see *Heylyn v. Adamson*, 2 Burr. 669. This rule of the Virginia case has been steadily followed in that state, and upon

it has been engrafted many other subordinate rules, which can be nothing less than "judge made law." This decision is followed in Kentucky, although the court, in laying down other rules subordinate to the principal one, have departed widely from the current Virginia decisions. In Indiana and Illinois, early statutes probably first introduced it: *Bullitt v. Scribner*, 1 Blackf. 14. So in Maryland the same rule seems to have been adopted; and as early as 1763, a statute was passed upon this subject. This antedates the Virginia decisions. (See the note of great research on the negotiability of notes, collating all the authorities, in Appendix A of 1 Cranch's Rep.) In some of the cases it is said that the assignor holds the money he has received in trust for the assignee, to be paid to him in the event that he cannot collect the amount of the note from the maker (see 1 Domat 72, 79), and in others that "the assignee takes the assignment on the credit of the assignor, and having paid a consideration, has a right to resort to the obligee, having used due diligence to recover the money from the obligor: *Parrott v. Gibson*, 1 H. & J. 398. In Kentucky the right of the endorsee to recover from the assignor, is put "upon the general liability of parties to contracts or agreements, to refund that which they may have received on a consideration which has happened to fail:" *Smallwood v. Woods*, 1 Bibb 542; see *Drane v. Scholfield*, 6 Leigh 397; *Ward v. Haggard*, 75 Ind. 381.

*Statutes.*—The statutes, at least the early ones, of Virginia, made no reference to "due diligence" in the assignee to allow him to collect from the assignor; but simply permitted him to sue the maker in his own name. The first statute of this kind was passed as early as 1705; but the statutes most cited are those of 1730, 1748 and 1786. The Maryland statute of 1763 allowed the assignee to sue the obligor in his own name; "and if the obligor shall be unable to pay the debt mentioned in the obligation, or cannot be found in the place or country of his usual abode, or any other thing or casualty should happen whereby the assignee should not be able to recover his debt from the obligor, an action may be maintained by the assignee against the obligee in such obligation, unless the assignee be a security therein; provided, that where any debt shall be lost by the negligence or default of the assignee, the assignor shall not be liable." Rev. Code 1878, p. 595, sect. 48. In Indiana there are two kinds of notes in which the liability of an endorser are quite different. The first are those kinds payable to

order or bearer in a bank in that state, and they are negotiable as inland bills of exchange, and the payees and endorsees may recover as in case of such bills. Rev. Stat. 1881, sect. 5506. The second are those not payable in bank, upon which any assignee "having used due diligence in the premises, shall have his action against his immediate or any remote endorser." Rev. Stat. 1881, sect. 5504. This statute has been in force in that state ever since 1818 (Act 1818, p. 233), at least; and probably a similar rule prevailed in the courts of that state while she was a part of the Northwest Territory. This statute is deemed as "merely declaratory of the common-law principles, according to" the construction placed upon it by the Virginia and Kentucky courts: *Bullitt v. Scribner*, 1 Blackf. 14. A similar statute is in force in Illinois. In Maryland there was said to be a right of action independent of the statute: *Crawford v. Berry*, 6 G. & J. 63. For Illinois statute, see 2 S. & C. Annotated Stat., p. 1658, sect. 7. Iowa statute requires "due diligence:" 1 McClain Ann. Stat., sect. 2091. The assignment of a judgment obtained by the assignee against the maker of a note does not transfer to the assignee the cause of action theretofore existing against the assignors on their contract in endorsing the note. That contract is merged in the judgment: *Ward v. Haggard*, 75 Ind. 381.

*Liability denied in some States.*—There are states, however, where the liability of the assignor of a bond, or other instrument, to the assignee, in case the obligor fails to pay the debt is denied; and no recovery is allowed the assignee, however diligent he may be. This is true in New Jersey: *Garrettsie v. Van Ness*, 1 Pennington 20; s. c. 2 Am. Dec, 333 (a bond); *Harris v. Clark*, 1 Pennington, 116 (a sealed bill); *Davenport v. Barness*, 1 Id. 153 (a bond); *Boylan v. Dickerson*, Id. 326 (a sealed bill); *Stout v. Stevenson*, 1 South. 178 (a sealed bill); South Carolina: *Parker v. Kennedy*, 1 Bay 398. It seems that the existing fact that brokers (evidently Englishmen of means), had purchased a large amount of bonds and other obligations during the Revolutionary war, of persons holding them, whose ill-condition had compelled them to sell, had much to do with this decision; for it was said that if the law was as it was contended, hundreds of people would be broken up by being compelled to pay the debt the obligor should pay, but who was hopelessly insolvent. This evidently had much to do with the result reached. An earlier case had held that

the assignor was liable, because his liability was admitted: *Bay v. Freazer*, 1 Bay 66; *Tryson v. DeHay*, 7 Rich. L. 12; *Walker v. Scott*, 2 Nott & McC. 286; *Benton v. Gibson*, 1 Hill 56; Pennsylvania (in the absence of fraud): *Jackson v. Crawford*, 12 S. & R. 165; s. c. 14 S. & R. 290; and Tennessee, unless the assignor represented the maker solvent when he knew him to be insolvent: *Looney v. Pinckston*, 1 Overton 384; *Lawrence v. Dougherty*, 5 Yerg. 435; *Kirkpatrick v. McCullough*, 3 Humph. 171; *Whiteman v. Childress*, 6 Id. 303; *Simpson v. Moulden*, 3 Coldw. 429.

*Reason for requiring Due Diligence.*—By the assignment the assignor loses control over the instrument assigned; he cannot collect the amount due, nor bring suit upon it. “The assignee of a bond acquires a legal right to bring suit upon it, and to receive the money, discharged from any control of the assignor over the subject.” He takes the place of the assignor or payee, and is expected to use the same diligence as if he were a prudent man collecting his own debt. He cannot lie still, thus prohibiting its collection, and when he has lost his debt, demand it of the payee. This would be a palpable fraud upon the payee or assignor: *Mackie’s Executor v. Davis*, 2 Wash. 219; s. c. 1 Am. Dec. 482. The law does not suppose that the assignor would lie still, if he had the instrument, and lose his debt for lack of energy to collect it: *Nixon v. Weyhrich*, 20 Ill. 600; *Smallwood v. Woods*, 1 Bibb 542; *Robinson v. Olcott*, 27 Ill. 181.

*The same degree of Diligence.*—It is to be observed and must be borne in mind that the same degree of diligence is referred to in the Connecticut cases, the case upon the guaranty of the collectibility of a note or other instrument, and in those cases following the law peculiar to Virginia and a few other states. It is a “due diligence” to collect the debt from the obligor on the part of the assignee, whatever that may be; and it is reasonable to suppose that what is “due diligence” in the one case is “due diligence” in the other two. But it will be shown that this is not true, comparing one court with another; and that what is due diligence in one forum is considered negligence in another. And it may be remarked that the test of “due diligence” in some of the cases has been likened to that degree of diligence required of the holder of a bill to seek the drawee and present it for payment if he would hold the drawer: *Heylyn v. Adamson*, 2 Burr. 669. But the great majority of cases have gone far beyond this test in strictness.

*Liability of Remote Endorser.*—Some of the statutes allow the assignee not only “his action against his immediate” endorser, but against “any remote endorser.” Rev. Stat. of Indiana 1881, sect. 5504. Unaided by statute, however, there can be no recovery against a remote endorser. The reason of this is that the action “can only be sustained by and against the persons to and from whom the law implies such a promise to have been made. As the assignment is made to a particular person, the law implies a promise to that person, but raises no promise to any other. There is no fact on which to imply such promise. In the language of the books, there is a privity between the assignor and his immediate assignee; but no privity is perceived between the assignor and his remote assignee. The implied promise growing out of the endorsement, is not considered as having been made assignable by the Virginia act of assembly, and, therefore, the assignor of that promise cannot maintain an action of *indebitatus assumpsit* upon it:” *Mandeville v. Riddle*, 1 Cranch 290. See *Dunlop v. Silver*, Id. 367; *Caton v. Lenox*, 5 Rand. 31.

But a remote endorser always has his remedy against his immediate endorser: *Caton v. Lenox*, 5 Rand. 31. And if that immediate endorser is compelled to pay the debt, and uses due diligence to collect of the maker, no doubt he could recover of his immediate endorser; and so on as long as endorsers remained to be sued: *Dunlop v. Harris*, 5 Call 16. And for this reason one suit against several endorsers cannot be maintained at the same time: *Given v. Merchants' Nat. Bank*, 85 Ill. 442; *Ewing v. Sills*, 1 Ind. 125. For actions under a statute against remote endorsers, see *Willson v. Binford*, 81 Ind. 588; *Huston v. First Nat. Bank*, 85 Id. 22. All endorsers may be sued together: *Marshall v. Pyeatt*, 13 Ind. 255. But courts of equity permit the holder to sue both his immediate and remote assignor jointly in one action and hold all liable to him: *Dorsey v. Hadlock*, 7 Blackf. 113; *Riddle v. Mandeville*, 5 Cranch 322; *Bank of U. S. v. Weisiger*, 2 Pet. 331; *McFadden v. Finnell*, 3 B. Mon. 121.

*Endorsement without Recourse.*—An endorsement without recourse of a Connecticut non-negotiable note, or of a note under the Indiana statute, has the same effect as a like endorsement of any bill or note—the endorser is not liable: *Crawford v. McDonald*, 2 H. & M. 189. And this is true if the instrument endorsed is a

forgery: *Id.* This is, of course, not true if the endorser knew it to be a forgery: *Glass v. Read*, 2 Dana 168.

*Due Diligence means Ordinary Diligence.*—In Virginia, the rule requiring the assignee to use due diligence to collect the note from the obligor, before resorting to the assignor, was established in an early case: *Lee v. Love*, 1 Call 497. In an earlier case it was intimated that the assignee need not sue the obligor until requested to do so by the obligor: *Barksdale v. Fenwick*, 2 H. & M. 113 n. He is not required, however, to do more than the obligor would probably do: *Saunders v. Marshall*, 4 Hen. & Munf. 455. Thus, where a note was assigned on the day of its execution, and it was due one day after date, it was held that the endorsee was not bound to sue at once, but it was presumably the intention of the parties the maker have a reasonable time to pay it, the length of which is inferable from the transaction: *Clark v. Merriam*, 25 Conn. 576; *Forbes v. Rowe*, 48 Id. 413. He is required to use the diligence only of a reasonable man: *Bestor v. Walker*, 4 Gilm. 3. But if he omit any opportunity of collecting the money of the maker, before he proceeds against the endorser, he is guilty of such laches as will discharge the latter:” *Bledsoe v. Graves*, 4 Scam. 382. This, however, as will be shown, does not refer to any of those extraordinary remedies sometimes resorted to in order to collect desperate claims. For, in another and later case from the same state, it is said that “due diligence means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs:” *Nixon v. Weyhrich*, 20 Ill. 600; *Young v. Cosby*, 3 Bibb 227; *Bard v. McEtroy*, 6 B. Mon. 416. It does not require the holder to sue for an instalment of interest falling due: *Peay v. Morrison*, 10 Gratt. 149. Nor compel him to resort to extraordinary diligence: *Bard v. McEtroy*, 6 B. Mon. 416. But if the obligor is in a doubtful condition, and the holder knows it, or has brought to his knowledge such facts as would put a prudent man on inquiry, he must exercise greater diligence than ordinarily: *McKinney v. McConnel*, 1 Bibb 239. This does not require him to go out and actively inquire when he takes the note assigned if the obligor is or is not in failing circumstances. In a Pennsylvania case it is said that due diligence cannot be less than such as a vigilant creditor ordinarily employs to recover a debt for which he has no other security than the obligation of the debtor: *Hoffman v. Bechtel*, 52 Penn. St. 190.

*Showing Diligence.*—Before the assignee can hold the obligor, he must show that he has used due diligence to collect the claim from the obligor; and the same is true with respect to a guarantor. The burden of proving it is upon him: *Drane v. Scholfield*, 6 Leigh 393; *Thompson v. Govan*, 9 Gratt. 695; *Parrott v. Gibson*, 1 H. & J. 398.

The facts constituting due diligence must be alleged; and stating that "due diligence was used," is not sufficient: *Leas v. White*, 15 Ia. 187; *Harrington v. Witherow*, 2 Blackf. 37.

If a judgment and return of *nulla bona* is relied upon, it must be shown when the action was brought, that it was prosecuted vigorously; that execution was issued forthwith, and diligence used with unavailing search made for property. A general allegation of these facts is insufficient: *Williams v. Nesbit*, 65 Ind. 171; *Hanna v. Pegg*, 1 Blackf. 183. If the complaint show a lack of diligence when the obligation fell due, the statement of any amount of diligence after that will not constitute it a good cause of action: *James v. Nicholson*, 6 Blackf. 288; *Herald v. Scott*, 2 Ind. 55.

*Question for Jury.*—It has been held that "what shall amount to due diligence, is a question of law for the decision of the court, arising upon the facts of the case:" *Boyer v. Turner*, 3 H. & J. 285; *Crawford v. Berry*, 6 Gill & J. 63. But there are other cases which hold that it is a question for the jury under the instructions of the court: *Ish v. Mills*, 1 Cr. C. C. 567; *Hoffman v. Bechtel*, 52 Penn. St. 190; *Rudy v. Wolf*, 16 S. & R. 79; see *Hanna v. Pegg*, 1 Blackf. 183; *Bryden v. Bryden*, 11 Johns. 187; *Tindal v. Brown*, 1 T. R. 167; *Johnson v. Lewis*, 1 Dana 182.

*Returning Obligation.*—In one case it was said that if the assignee is not bound to pursue the obligor, on account of his insolvency or otherwise, he should return the obligation to his assignor: *Wilson v. Barclay*, 22 Gratt. 534.

*Forums in which an Action must be brought against the Obligor before suing the Guarantor or Endorser.*—In certain states it is an indispensable pre-requisite that suit be brought against the obligor, and a return of *nulla bona* be procured, before an action can be brought against one guaranteeing its collection, or against the endorser, such as reference has been made to in this article. Total insolvency of the obligor is no excuse. Judge COOLEY has lent the

weight of fame as a jurist to this view, saying, "We believe that rule to be reasonable, and to accord with the general understanding of parties, when such guaranties are given. The undertaking that a note is collectible, means that if proceedings for collection are diligently prosecuted at law, they shall result in collection. It does not mean that the maker of the note is responsible, or shall remain responsible, but that the debt shall be collected if the proper steps are promptly taken for the purpose. It may be that an officer would find attachable property, where the witnesses know of none; it may be that by reason of the large exemptions allowed by law, the debtor would choose to make payment, rather than have the judgment against him, even when payment could not be enforced:" *Bosman v. Akeley*, 39 Mich. 710; s. c. 33 Am. Rep. 447, approving *Dwight v. Williams*, 4 McLean 586: see *Aldrich v. Chubb*, 35 Mich. 350.

In New York the same rule was approved by a divided court. It was there held that the guaranty of the collection of the debts, embraced an agreement to commence a suit against the debtor, "within a reasonable time after the debts fall due, and in default thereof, that the surety shall be released." Not only this, "but that it shall be carried to consummation:" *Craig v. Parkis*, 40 N. Y. 181. In the same case it was said that "the plaintiff had no right to determine, on his own responsibility, whether the debt was collectible. That was a question which the defendant had made incumbent on him to ascertain, by recourse to the ordinary rules provided by the law for the collection of debts. If the debtor's insolvency is an excuse for the delay, at all, there is no reason why it should not be such, as long as the insolvency continues, and thus the liability of the surety would be, for an indefinite period, controlled by the opinion of witnesses, as to the ability of the principal to pay the debts, and not by the standard or means fixed by the parties themselves, for ascertaining that fact." In other cases in this state, the same rule is adopted: see *Moakley v. Riggs*, 19 Johns. 69; s. c. 10 Am. Dec. 196; *Thomas v. Woods*, 4 Cow. 173; *Taylor v. Bullen*, 6 Id. 624; *Cumpston v. McNair*, 1 Wend. 457; *White v. Case*, 13 Id. 543; *Loveland v. Shepard*, 2 Hill 139; *Vanderveer v. Wright*, 6 Barb. 547; *Newell v. Fowler*, 23 Id. 628; *Gallagher v. White*, 31 Id. 92; *Mosier v. Waful*, 56 Id. 80; *Cady v. Sheldon*, 38 Id. 103; *Bent v. Horner*, 5 Id. 501.

In a number of other states the same rule is followed, as Wisconsin: *Borden v. Gilbert*, 13 Wis. 670; *Day v. Elmore*, 4 Id. 190;

*Dyer v. Gibson*, 16 Id. 557; *French v. Marsh*, 29 Id. 649. Texas: *Shepard v. Phears*, 35 Ia. 763; *Johnson v. Mills*, 25 Id. 704; *Evans v. Bell*, 45 Id. 553. Kentucky, as against both endorser and guarantor: *Ely v. Bibb*, 4 J. J. Marsh. 71; *Wynn v. Poynter*, 3 Bush 54; *Smith v. Bacon*, 3 J. J. Marsh. 312; *Trimble v. Webb*, 1 T. B. Mon. 101; *Chambers v. Keene*, 1 Met. (Ky.) 289; and Iowa: *Voorhies v. Atlee*. 29 Ia. 49.

*Forums where Action against the Obligor is not a condition requisite to suing a Guarantor or Obligor.*—There are forums in which an action against the obligor is not a pre-requisite to a suit against a guarantor or endorser; and these are by far the most numerous. In a leading case it was said that “the condition to which the plaintiff was pledged, was the practice of due—that is, proper, just, reasonable—diligence; not the performance of acts which were obviously useless, and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence. This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognised by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit:” *Camden v. Doremus*, 3 How. 515, 533. In another case it was said, “To warrant that a debt is collectible, is to warrant that it is legally demandable, and that the debtor is of competent ability to answer it—not that he will pay it when demanded by execution:” *McDoal v. Yeomans*, 8 Watts 361. This rule is founded upon the maxim that the law does not require the performance of an idle act: *Bull v. Bliss*, 30 Vt. 127. “The law requires no man, in the pursuit of his rights, to do a vain and futile thing, useful to nobody, and hurtful to himself by the needless expense and trouble it would impose. The court was, therefore, right in instructing the jury, that if, at the time of the maturity of the guaranty, Mrs. McKinley (the principal debtor) was so utterly insolvent as not to make it worth while to sue her, a suit against her, was unnecessary; that would be unnecessary cost and trouble on a man for nothing. Insolvency, hopeless or utter insolvency, may be proved like everything else depending on facts, by parol as well as by record, and we cannot hold that it is necessary to sue a beggar:” *McClurg v. Fryer*, 15

Penn. St. 293. The rule of these cases has been adopted with reference to endorsers : *Bozell v. Hauser*, 9 Ind. 522 ; *Cransh v. Hall*, 15 Ill. 267 ; *Coines v. Hansbarger*, 4 Leigh 452 ; and to a Connecticut endorser : *Welton v. Scott*, 4 Conn. 527. The rule is recognised in the United States courts : *Osborne v. Smith*, 18 Fed. Rep. 126 ; *Terry v. Tubman*, 2 Otto 156 ; *Yeaton v. Bank of Alexandria*, 5 Cranch 49 ; *Violet v. Patton*, Id. 142 ; *Dulany v. Hodgkin*, Id. 333 ; *Parker v. Culvertson*, 1 Wall. Jr. 149 ; Indiana : *Bozell v. Hauser*, 9 Ind. 522 ; *Williams v. Oborn*, 75 Id. 280 ; *Dick v. Hitt*, 82 Id. 92 ; *Huston v. First National Bank of Centreville*, 85 Id. 21 ; Ohio : *Stone v. Rockefeller*, 29 Ohio St. 625 ; Pennsylvania : *McDoal v. Yeomans*, 8 Watts 361 ; *Woods v. Sherman*, 71 Penn. St. 101 ; *McClurg v. Fryer*, 15 Id. 293 ; Massachusetts : *Marsh v. Day*, 18 Pick. 321 ; *Sanford v. Allen*, 1 Cush. 473 ; Vermont : *Wheeler v. Lewis*, 11 Vt. 265 ; *Sylvester v. Downer*, 18 Id. 32 ; *Bull v. Bliss*, 30 Id. 127 ; *Dana v. Conant*, Id. 246 ; Maine : *Gillighan v. Boardman*, 29 Me. 79 ; Maryland : *Hunters v. Patten*, 20 Md. 28 ; *Lewis v. Hoblitzell*, 6 Gill & J. 259 ; Virginia : *Goodall v. Stewart*, 2 Hen. & Munf. 105 ; *Smith v. Triplett*, 4 Leigh 590 ; Connecticut : *Perkins v. Catlin*, 11 Conn. 213 ; *Ranson v. Sherwood*, 26 Id. 437 ; *Welton v. Scott*, 4 Id. 527 ; *Gillespie v. Wheeler*, 46 Id. 410 ; Minnesota : *Brackett v. Rich*, 23 Minn. 485 ; s. c. 23 Am. Rep. 703 ; *Lambertson v. Windom*, 18 Minn. 506 ; North Carolina : *Ashford v. Robinson*, 8 Ired. 114 ; *Farrow v. Respass*, 11 Id. 174 ; Tennessee : *Jones v. Greenlaw*, 6 Coldw. 342 ; Illinois : *Crouch v. Hall*, 15 Ill. 263 ; *Robinson v. Olecott*, 27 Id. 181 ; *Kayser v. Hall*, 85 Id. 511 ; West Virginia : *Nichols v. Porter*, 2 W. Va. 13 ; and Georgia : *Pittman v. Chisolm*, 43 Ga. 442 ; *Kiwbob v. Bank*, 49 Id. 419.

*A legal proceeding may be contracted for.*—The assignor, by the assignment, may especially contract for legal proceedings against the maker ; and if the assignee agree to it by accepting the instrument as assigned, he will be bound to pursue the usual legal remedies at least, even in those forums where insolvency is accepted as an excuse for not prosecuting the obligor. Such was the case where the guaranty was “good and collectible after due course of law :” *Moakley v. Riggs*, 19 Johns. 69 ; s. c. 10 Am. Dec. 196. No excuse can be urged, unless he is afterwards relieved by the conduct of the guarantor or assignor : *Jones v. Greenlaw*, 6 Coldw. 342 ; *Dwight v. Williams*, 4 McLean 581. But in those states

where insolvency may be plead as an excuse generally, it may also be successfully plead, even though there is an express contract for the pursuing of the maker with all legal remedies: *Heralson v. Mason*, 53 Mo. 211.

*When a nulla bona is relied upon.*—If the assignee, or the holder, relies upon a suit and return of a *nulla bona* to establish the liability of an endorser or guarantor, he is bound by the same rules with respect to diligence as if he were peremptorily compelled to first sue the obligor before resorting to the endorser or guarantor. The rule in one forum is applicable to all other forums. It will then be the better plan to first treat of this branch of the subject.

*When suit must be brought.*—Due diligence requires the holder to sue the obligor at the first term of the court having jurisdiction of his person after the obligation falls due, if he can bring him into court at that term. Any delay on his part will be fatal, unless a reasonable excuse for the delay is shown: *Bullitt v. Scribner*, 1 Blackf. 14; *Merriman v. Maple*, 2 Id. 350; *Kelsey v. Ross*, 6 Id. 536; *Nance v. Dunlavy*, 7 Id. 172; *Spears v. Clark*, 7 Id. 283; *Frybarger v. Cockefair*, 17 Ind. 404; *Litterer v. Page*, 22 Id. 337; *Miller v. Dever*, 30 Id. 371; *Roberts v. Masters*, 40 Id. 461; *Markel v. Evans*, 47 Id. 326; *Pennington v. Hamilton*, 50 Id. 397; *Patterson v. Carrell*, 60 Id. 128; *Binford v. Wilson*, 65 Id. 70; *Williams v. Nesbit*, 65 Id. 171; *Davis v. Leitzman*, 70 Id. 275; *Voorhies v. Atlee*, 29 Ia. 49; *Prentiss v. Danielson*, 5 Conn. 175; *Raplee v. Morgan*, 2 Scam. 561; *Chalmers v. Moore*, 22 Ill. 359; *Thompson v. Armstrong*, Breese 23; *Lusk v. Cook*, Id. 53; *Crawford v. Berry*, 6 G. & J. 63. Thus, where a note fell due on October 22d, and court began November 2d, a failure to sue at that term was held fatal, the obligor not becoming insolvent until November 18th, although service of the writ must have been made ten days before the first day of the term: *Roberts v. Masters*, 40 Ind. 461. So thirty days is sufficient to release an endorser, where no showing for the delay is made: *Merriam v. Maple*, 2 Blackf. 350. So will a two years' delay: *Thompson v. Gowan*, 9 Gratt. 695.

A delay of three days will not, however: *Raplee v. Morgan*, 2 Scam. 561. Nor six: *Foster v. Barney*, 3 Vt. 60; but seven has been held fatal: *Kelsey v. Ross*, 6 Blackf. 536.

But where the assignee commenced the action in the first court to sit after the note fell due, and the legislature, after the suit was

commenced, postponed the term of the court in which it was pending until after the sitting of another court, it was held that due diligence did not require the assignee to dismiss that suit and commence again in the other court, where he would obtain judgment earlier: *Miller v. Dever*, 30 Ind. 371. The delays referred to were those that had the effect to delay the rendition of the judgment; for any delay, however long, that does not operate as a delay in obtaining the judgment, is not fatal. Thus the commencement of an action a month later than it could have been commenced will not delay the rendition of a judgment after; for the obligor is any way brought into the first term of court. The action must be commenced at that period of time which will enable the holder to obtain a judgment the earliest; and this done, it is sufficient.

*Delay on assignor's or guarantor's request.*—If, however, the assignor or obligor has requested the assignee to grant the obligor time, a delay will not release such endorser or guarantor, unless he requests him to sue and he fails to do it within a reasonable time, or the delay is longer than was requested. This delay may be inferred from the transaction; or, in the instance stated, where a note was assigned which was payable one day after date. So, where the assignor said the obligor was an honest man, and if he would wait awhile, he, the assignee, would get his money, it was held that the jury might infer a request on the part of the assignors to delay suit a reasonable length of time: *Brown v. Robbins*, 1 Ind. 82; *Ege v. Barnitz*, 8 Penn. St. 304; *Coiner v. Hansbarger*, 4 Leigh. 452.

*Securing preference by the early institution of an action.*—The institution of an action often has the effect to secure for the plaintiff a lien upon the defendant's property from the date of the issuing of the writ; and, in some states, a remedy of this kind may be brought in preference to the ordinary action of notice by summons. If the holder is bound to proceed in this manner where he has an option, usually he must proceed without delay as soon as the obligation matures; and the same is true in those states where the commencement of the usual action is by attachment, or has the effect to secure a preference over subsequent actions brought; or else be prepared to show that no liens, by the bringing of actions or preferences, were secured between the time he could have brought the action and the time he actually did so.

*In what courts action must be brought.*—The action must be brought in the county where the obligor resides, in a court that will have jurisdiction of the subject-matter. If there is more than one court in that county that will have jurisdiction, then the action must be brought in that court which will sit first; but if the defendant cannot be brought in at the first term of that court, then the other court must be resorted to. And in this particular the courts, in passing upon the question of due diligence, will take notice which court sits first: *Roberts v. Masters*, 40 Ind. 464. If, however, the docket of the court first sitting is so overcrowded, or the rules of the court are such that it would be reasonably probable that a judgment could not be taken in that court before one could be obtained in the court sitting later, due diligence would probably require the holder to proceed in the latter: *Allison v. Smith*, 20 Ill. 104. It must be remembered, however, that the court sitting first may have power to render judgment but not enforce satisfaction out of the peculiar property owned by the obligor, while the other court could. In those forums where insolvency is a good excuse for not proceeding against the obligor, the holder may justify his action in not suing in the first court; but where such evidence is not admissible, he probably could not. In Illinois the holder relied upon the fact that he had sued the obligor in a Kentucky court where the note was executed and the maker resided, and that the proceedings resulted in a return of *nulla bona*. The allegation was not that he sued at the first term of the court which had jurisdiction, but sued within a reasonable time. It was held that the complaint was ill for not setting out when the terms commenced: *Thompson v. Armstrong*, Breese 23; *Lusk v. Cook*, Id. 53. Due diligence requires the holder to commence an action before a justice of the peace, if that court has jurisdiction, and thereby he will secure an execution the sooner; but if the action would have been unavailing, that may be shown as an excuse: *Allison v. Smith*, 20 Ill. 104; *Brown v. Pease*, 3 Scam. 191. And if the obligor has no real estate it is not necessary to procure a transcript and file it in a higher court, and from these procure an execution: *Thomas v. Dodge*, 8 Mich. 51; *Backus v. Shipherd*, 11 Wend. 629. In Illinois the return of *nulla bona* by a constable is sufficient: *Raplee v. Morgan*, 2 Scam. 561. In Kentucky it is not: *Barker v. Curd*, 1 Met. (Ky.) 641. If the debt is secured by a lien, such as the assignee is bound to pursue, then he is not excused

by suing in a justice's court and procuring a *nulla bona*; he must pursue the lien in a court having jurisdiction to foreclose it: *Rives v. Brown*, 81 Ky. 636. And where the assignee entered suit before a justice, and procured the return of a *nulla bona*, a plea by the assignor that the obligor at the time of the return was seised in fee of two hundred dollars worth of real estate situated in the county, was held good; for it was the duty of the assignee to have taken a transcript and sold the real estate: *Foresman v. Marsh*, 6 Blackf. 285. The action between the assignee and obligor may be submitted to an arbitrator; but judgment on the award will not be conclusive upon the assignor: *Scates v. Wilson*, 9 Leigh 473.

*Prosecution with Diligence.*—Not only must the action be begun in due time, but it must be prosecuted with due diligence; such diligence as is commonly exerted by prudent men in prosecuting their claims. A continuance, if voluntary, may be fatal: *Marr v. Smith*, 7 B. Mon. 189; *Robinson v. Olcott*, 27 Ill. 181; *Drane v. Scholfield*, 6 Leigh 393; *Peck v. Frink*, 10 Iowa 193. And if the action fail on account of an informality, the assignee is without remedy, unless he is in a forum where he may show that the assignor suffered no harm thereby: *Beach v. Bates*, 12 Vt. 68; *Bronaugh v. Scott*, 5 Cal. 78. Judgment must be taken at the first term if possible: *Bestor v. Walker*, 4 Gilm. 3. And if there are several obligors, all must be pursued with the same diligence: *Aldrich v. Chubb*; 35 Mich. 351. Where it is permissible to be shown, a delay that does not prejudice will not excuse the assignor: *Peay v. Morrison*, 10 Gratt. 149.

*Absence of the Obligor.*—The assignee must follow the obligor into whatever county of the state, in which the assignment was made, he may go, if by due diligence and inquiry of persons whom, and at places where, he would be most likely to ascertain his presence he would be enabled to serve him with a writ, and obtain judgment. And he may here seek the assignor, demand of him that he find the obligor; and if the latter refuse to make search for him, the assignee to a great extent will be relieved of any further search. Search in the county alone, where the note was executed, or assigned, or both, is not sufficient: *Tarlton v. Miller*, Breese 68; see *Judson v. Gookwin*, 37 Ill. 286. But if the obligor is a resident of the state where the assignee resides when the assignment is made, and afterwards the former removes from the state before the

maturity of the obligation, the latter is not bound to pursue him to a foreign jurisdiction and there prosecute him to insolvency. He may, if he chooses to, and rely upon those proceedings; but it would be folly for him to do so when he has a better or more easy excuse for resorting to the assignor: *Towns v. Farrar*, 2 Hawks 163; *Humphreys v. Collier*, 1 Scam. 53; *Bledsoe v. Graves*, 4 Id. 386; *Pierce v. Short*, 14 Ill. 144; *Shuttler v. Piatt*, 12 Id. 417; *Cranch v. Hall*, 15 Id. 263; *Hooe v. Wilson*, 5 Cal. 76; *Bronaugh v. Scott*, Id. 93; *Bard v. McElroy*, 6 B. Mon. 416; *Clay v. Johnson*, Id. 644; *Spratt v. McKinney*, 1 Bibb. 596; *Stapp v. Anderson*, 1 Marsh. 538; *Barber v. Bell*, 77 Ill. 490. In Connecticut it is intimated that he probably must pursue the obligor if he knows where he is: *Clayton v. Coburn*, 42 Conn. 348; *Bernitz v. Stratford*, 22 Ind. 320; *Holton v. McCormick*, 45 Id. 411; *Patterson v. Carrell*, 60 Id. 128; *Titus v. Seward*, 68 Id. 456; *Stevens v. Alexander*, 82 Id. 407. And a temporary absence when the obligation falls due, is sufficient to excuse the bringing of the action earlier, unless service of process would be obtained by leaving copy at the last and usual place of residence: *Oldham v. Bergan*, 5 Litt. 134. So, absence in the war of the Rebellion, was held a sufficient absence to excuse the assignee: *Kinyon v. Brock*, 72 N. C. 554. But if the obligor is a non-resident at the time the assignment is made, the assignee must pursue him at least at the place where he resided when the assignment was made, and probably wherever he can be found with reasonable search; for there is an implied agreement on the part of the assignee when he receives the instrument, to pursue him in a foreign forum, or at least in the forum of his residence when the transfer was completed: *Drane v. Scholfield*, 6 Leigh 386; *Couch v. Hall*, 15 Ill. 263; *Simpson v. Daniel*, 1 B. Mon. 250; *Patterson v. Carrell*, 60 Ind. 128; *Stevens v. Alexander*, 82 Id. 407; *Mason v. Burton*, 54 Ill. 349. Yet if the absence at the time of the assignment is unknown, then the assignee is excused from suing the obligor, so long as he remains a non-resident: *Smallwood v. Woods*, 1 Bibb 542.

A note was assigned before due, and at the time the maker resided at the place of its assignment and when it was executed. Before due, he left for New Orleans with a cargo of produce, part of which he disposed of there, and part at Charleston. He then proceeded to St. Louis, and disposed of the funds he had received in payment of his debts, and had no property left out of which any

part of the debt could have been made. Afterwards he returned to the place of its execution, Indiana, and was sued the next day, and regularly prosecuted to judgment and execution, without any benefit to the holder. It did not appear to have been known when the maker left where he was going, the length of time he intended to be absent, nor that he was taking his property with him. It was held that assignor was liable under the circumstances: *Watson v. Robinson*, 8 Blackf. 386.

Likewise, where the maker left the state after the assignment, and before maturity of the note, became a resident of another state, but temporarily returned to settle up his business, having some property at the place of his former residence, it was held that suit against the maker was not a pre-requisite to a suit against the assignor: *Titus v. Seward*, 68 Ind. 456. So, where an action was commenced in the county in which the maker resided at the time of the assignment of the note, and there was a return of not found because of his removal from the state, on his return to another county, it was held that the holder was not bound to commence a suit in that county in order to save his rights against the assignor: *Bard v. McElroy*, 6 B. Mon. 416. In Virginia it is said that if the assignee refuses to follow the obligor beyond the state, he must return the instrument assigned, and demand a return of the consideration paid for it; and if he does not do so, he elects to hold the obligor liable, and must pursue him in the forum of his residence, wherever that may be: *Drane v. Scholfield*, 6 Leigh 386. This is to enable the assignor to pursue the obligor and recover on the instrument signed. It is a reasonable rule, for otherwise the assignor may hold the obligation, and prevent the assignor from suing, although he himself refuses to sue; and thus cause the assignor to lose the debt by reason of the obligor becoming insolvent in the meantime, while he himself still remains liable.

To show an excuse on account of the absence of the obligor, the complaint must contain an allegation that he left the state after the assignment, or it will be ill: *Stevens v. Alexander*, 82 Ind. 407.

*Place and Time of Endorsement.*—The place of the endorsement determines the liability of the endorser or guarantor; even though the paper is merchantable paper at the place of its execution: *Nichols v. Porter*, 2 W. Va. 13; *Rose v. Thames Bank*, 15 Ind. 292; *Hyatt v. Bank*, 8 Bush 193; *Snyder v. Oatman*, 16 Id. 265; *Cranch v. Hall*, 15 Ill. 263; *Greathead v. Walton*, 40 Conn.