McGUIRE, ADM'R OF KELLEY, *vs.* NEWKIRK & OLDEN.

By the law of Louisiana, which must govern the liability of parties to a contract made there, a guarantor cannot be held liable unless the creditor uses reasonable diligence to make a demand on the original debtor, and gives notice of non-payment to the guarantor—as held in Ringgold, adm'r, vs. Newkirk & Olden, 3 Ark. R. 96.

What constitutes reasonable diligence, must depend upon the peculiar circumstances in each particular case.

Where the guaranty was executed at New Orleans, in March, 1833, the creditors resided there, or at N. York, the principal debtors at Van Buren, and the guarantor at Batesville, Ark., and the demand was not made until the summer of 1836, and no reason given why it was not made sooner—held that the

creditors were guilty of laches; that reasonable diligence was not exercised by them in making a demand on the principal debtors, and that the guarantor was not liable under that state of case.

Appeal from the circuit court of Independence county.

THIS was an appeal from the probate, to the circuit court of Independence county, determined before the Hon. THOMAS JOHNSON, then one of the circuit judges, at the August term, 1843.

Newkirk & Olden originally sued John Ringgold, as administrator of Charles Kelly, deceased, in the probate court, upon the following instrument:

"$806.12 *New Orleans, March* 6, 1833.

We hereby guarantee the payment of bill of this date to Newkirk & Olden, by Randolph & Keethley, for eight hundred and six dollars twelve cents. MONTGOMERY, KELLY & CO."

Judgment was obtained in the circuit court against Ringgold, and he appealed to this court, where the judgment was reversed, because there had been no demand on Randolph & Keethley, and notice to the guarantors. See 3 *Ark. R.* 96.

On the return of the case, Ed. R. McGuire was substituted as administrator in place of Ringgold, and the case was submitted to the court, sitting as a jury. The court found for the plaintiffs, in damages $1310.42, and rendered judgment accordingly.

The defendant moved for a new trial, which was overruled, he excepted, and set out the evidence in his bill of exceptions; which, in substance, follows:

H. R. Hynson stated that the plaintiffs sent the instrument sued on to him for collection, some time after the death of Kelly, but *when* he did not recollect; and that he placed it in the hands of Wm. F. Denton, an attorney, for collection. He also proved the instrument to be in the hand-writing of Kelly.

John Ringgold stated that he was a member of the firm of Montgomery, Kelly & Co. That in the year 1836, Denton presented the instrument to him for payment. That he refused to pay it, denying Kelly's right to bind the firm; and told Denton he must look to Randolph & Keethley or Kelly's estate. He had no dis-

tinct recollection that payment was ever demanded of him as the administrator of Kelly.

Wm. F. Denton stated that he received the claim of Hynson, for collection, in 1835 or early in 1836, and shortly after presented it to Ringgold, one of the firm of Montgomery, Kelly & Co., to which Ringgold responded as above stated. He soon after presented the claim to Randolph & Keethley—they acknowledged it to be just, and promised to pay, but did not. He saw Randolph several times during that summer, and presented the claim to him; he still promised to pay, but did not. He subsequently told Ringgold that he had presented the claim to them, and they had not paid it, and demanded payment of him. Ringgold told him he must resort to Kelly's estate; whereupon he sued, in the fall of 1387. He did not recollect at what time he made the demand of Ringgold as administrator. Plaintiffs lived in New Orleans or New York, and Randolph & Keethley in Van Buren, Ark., and had no property that he could hear of, after he got the claim. After presenting the claim to them, Ringgold told him he might perhaps find some property of theirs, and requested him to try and get it out of them, and that if he could not, he must go on Kelly's estate; on which account he held the claim for some time, hoping to get it out of them. This, with the instrument of guaranty, was all the evidence—the defendant offered none.

The defendant appealed to this court; and assigns as error, among others, that the court below erred in overruling the motion for a new trial.

Pope & Byers, for appellant.

Pike & Baldwin, contra.

Johnson, C. J , not sitting.

Oldham, J., delivered the opinion of the court.

A number of questions are raised by the assignment of errors, and the argument of counsel; several of which we deem it unnecces-

sary to notice, while others were decided or passed over, as of not sufficient importance to require consideration, when this case was previously in this court. See *Ringgold, adm'r, vs. Newkirk & Olden,* 3 *Ark. R.* 96. We will confine our attention to the questions raised subsequently to the previous decision in the case.

In this case, *Ringgold, adm'r, vs. Newkirk & Olden,* the court held that, upon the guaranty sued upon, the plaintiffs were not entitled to a recovery against the defendant, unless they had used reasonable diligence to make the demand of the principal or original debtor, and given notice of non-payment to the guarantor. "That the stipulation is to pay in case the original debtor does not, and is an auxiliary obligation: that the right of the security to refer the creditor to the discussion of the principal debtor, is a right in equity as well as in strict justice: that the creditor ought not to be allowed to enforce the payment of the security without notice of the non-payment of the principal debtor: that a debt should be paid rather by those who are the principal debtors, and who have profited by the contract, than by those who are debtors for others, a security or guarantee being but an engagement collateral to and arising out of the original obligation." And these principles thus laid down, seem to be sustained by the civil law authorities relied upon by the court in the decision.

The appellees ask the court to review the questions thus decided, whether the guarantor is entitled to a demand of payment of the original debtor, and notice of non-payment by him. This we deem unnecessary in the present case. This was a contract made in Louisiana. The *lex loci contractus* must govern in the construction of the contract and in the liability of the parties. The authorities of the civil law in force in Louisiana, relied upon by the court, as before remarked, fully warrant the construction given to the contract under consideration. Whenever a case arises depending alone upon common law authority for its construction, the court may then, if it is thought necessary and proper, review the principle decided in *Lane vs. Levillian,* 4 *Ark. R.* 76.

It being thus determined that the guarantor in this case is not

responsible before a demand made of the principal debtor, and notice of non-payment, we will proceed to inquire whether there has been sufficient demand made of Randolph and Keethley, and due notice given to the guarantor or his legal representative. The guaranty, upon which this suit is brought, is dated March 3d, 1833, and was brought to Batesville in 1836, and placed in the hands of Denton, a lawyer, for collection. Denton presented it to Ringgold as one of the firm of Montgomery, Kelly & Co., for payment, but payment was refused upon the ground that Kelly had no authority to sign the partnership or firm name to such an instrument, and Denton was informed that he must look to the estate of Kelly alone for payment. During the summer of 1836, Denton presented the claim to Randolph and Keethley who resided at Van Buren, Ark., and requested payment, which was not made, of which fact he subsequently notified Ringgold as the administrator of Kelly's estate.

Do these facts disclose a sufficient demand of Randolph and Keethley? The bill purchased of Newkirk & Olden by Randolph and Keethley was not in the hands of Denton, he had no order on them for the money; nothing appears to have been in his hands but the guaranty given by Montgomery, Kelly & Co., and to which Randolph & Keethley were not parties. *Quere,* Did these facts authorize Denton to make the demand in question? But passing this question by, did the appellee use due diligence in making demand of the principal debtors and in giving notice of non-payment to the guarantor so as to hold him responsible? What constitutes due diligence must depend upon the peculiar circumstances in each particular case. In this case the contract was executed in New Orleans in March, 1833; the creditors resided either in New Orleans or New York, the principal debtors at Van Buren, and the guarantor at Batesville. The demand was not made until the summer of 1836, more than three years from the making of the contract. No reason is given why a demand was not sooner made. Under these circumstances we hold that the creditors were guilty of laches, and that reasonable diligence was not exercised by them in the premises, and that the guarantor cannot be held responsible

under this state of the case. Wherefore, we are of opinion that the circuit court erred in not granting a new trial, for which reason the judgment is reversed.