

DONAHUE *v.* ARKADELPHIA MILLING COMPANY.

Opinion delivered April 22, 1929.

1. GUARANTY—FAILURE TO SUE PRINCIPAL.—Under Crawford & Moses' Dig., §§ 8287-8, providing that a surety may by notice in writing require a person having a cause of action against his principal to sue thereon, and that a failure to commence suit within 30 days after such notice shall exonerate the surety, a guarantor who notifies the creditor to sue his principal within thirty days is exonerated by such creditor's failure to sue.
2. GUARANTY—EXONERATION OF GUARANTORS.—Under Crawford & Moses' Dig., §§ 8287-8, where the principal and his guarantors were joined by a creditor in an action on a bond, but the summons was returned *non est* against the principal, the guarantors had the right at any time before trial to demand that suit be brought against the principal and proceeded with to judgment, in default of which they were entitled to exoneration from liability.
3. GUARANTY—EXONERATION OF GUARANTORS.—Guarantors may plead exoneration, under Crawford & Moses' Dig., §§ 8287-8, by amendment on the trial of the cause anew after remand on a former appeal, where the 30 days had not elapsed after notice to sue the principal at the time of the former trial, and no effort was subsequently made by the creditor to sue the principal by attachment on the nonresident principal's property and constructive service, as authorized by §§ 1159, 1160.

Appeal from Pulaski Circuit Court, Second Division;
Richard M. Mann, Judge; reversed.

STATEMENT BY THE COURT.

This is the second appeal of this case, a statement of which, including the bond sued on, is reported in the opinion on the former appeal in *Arkadelphia Milling Co. v. Goddard*, 176 Ark. 958, 4 S. W. (2d), 923.

The judgment on an instructed verdict was reversed, the court construing the contract and holding that, under the testimony, the jury might have found that the execution of the bond by satisfactory and sufficient sureties

was the only condition precedent to putting the contract for the sale of the merchandise into full force and effect, regardless of the date of the bond and contract, which should be treated as contemporaneous instruments, under the circumstances, although they bore different dates. Upon remand of the cause, appellants, defendants in the suit and sureties on the bond, pleaded a release from the obligation of the bond and exoneration from liability thereunder because of the plaintiff's failure to bring and prosecute to a judgment a suit against the principal debtor, upon notice requiring him to do so, duly given on May 13, 1927, under §§ 8287 and 8288, C. & M. Digest.

The undisputed testimony shows that the notice was given to appellee milling company on that day, less than 30 days before the first trial of the case, wherein it was not pleaded as a defense on that account.

It appears also that this suit was brought against Goddard, the principal, and themselves as sureties, and that a summons had not been served upon Goddard, who was a resident of Memphis, Tenn., the sheriff making a *non est* return.

Goddard, the principal in the bond, continued a non-resident of the State, residing in Memphis from then until after the trial. He owned property here in the State at the time, personal and real, of substantial value, worth from \$3,500 to \$4,500, as the testimony tended to show.

No suit was brought by the milling company against the appellees after the notice requiring it to be done was given. The testimony also showed that, although the bond upon which appellees were sureties had been executed and delivered on June 1, 1923, before the sales contract was signed on June 12, 1923, the terms of the contract had already been agreed upon and the first merchandise sold on June 8, 1923, to Goddard, under the contract, the performance of which the bond was given to secure.

Each of the parties asked an instructed verdict, the appellants requesting an additional instruction that, in no event, could the jury find against them for the merchandise sold to Goddard on June 8, before the execution of the written contract on the 12th.

The court directed a verdict for the milling company, saying it was not the duty of the plaintiff to go to another State and sue the defendant in order not to release the sureties, these defendants, and from the judgment for the full amount of the claim rendered thereon this appeal is prosecuted.

Ben F. Reinberger and J. A. Tellier, for appellant.

Barber & Henry, Troy W. Lewis and Clayton Freeman, for appellee.

KIRBY, J., (after stating the facts). Appellants insist that the court erred in not directing a verdict in their favor, and in directing a verdict against them, and the contention must be sustained. The bond and the obligation sued on is such a one as the statute (§§ 8287 and 8288, C. & M. Digest) applies to, and from liability upon which the sureties or guarantors may be exonerated upon compliance with its terms. *Thompson v. Treller*, 82 Ark. 247, 101 S. W. 174; *Shores-Mueller Co. v. Palmer*, 141 Ark. 64, 216 S. W. 295.

The sureties or guarantors had the right, under the statute, which is part of every such contract, to demand, any time after the action accrued on the bond and before the trial of suit brought thereon against them, that suit be brought against the principal and proceeded with to judgment, etc. *Barnett v. Alexander*, 150 Ark. 478, 234 S. W. 938.

It can make no difference that the principal was made a party to the same action in which they were sued, since the summons had been returned *non est* against him, and the suit could not be proceeded with, before the notice was given, and the fact that they did not plead the notice and demand for exoneration from liability in the suit brought at the first trial constituted

no waiver of the right to do so, since 30 days had not elapsed between the giving of the notice and the time of the trial. Certainly the plea could properly have been made by amendment on the trial of the cause anew after it had been remanded to the circuit court. Suit could have been brought against the nonresident principal, after the notice had been given, by an attachment upon his property in the State and constructive service had by the publication of a warning order, but this was not attempted to be done. C. & M. Digest, §§ 1159-60; *Boynnton v. Chicago Mill & Lbr. Co.*, 84 Ark. 203, 105 S. W. 77; *Frank v. Frank*, 175 Ark. 285, 298 S. W. 1026.

The undisputed testimony shows that the principal in the bond was a nonresident of the State, having property in the State that could be attached at the time the notice was given by appellant's demanding that he be sued, and no such suit having been brought, as was required should be done under the terms of the statute and notice given, the sureties, appellants here, were exonerated from liability upon the bond, and the court erred in not so directing the jury.

The judgment is accordingly reversed, and judgment in their favor will be entered here. It is so ordered.
