ADAMS ET AL. *vs.* ROANE ET AL.

A written notice to sue, given by the security, and served upon the clerk of the trustees of the Real Estate Bank, is not sufficient service, under the statute, upon the trustees, to exonerate the security upon suit brought after the thirty days; nor, although the clerk informs one of the trustees that such notice has been served upon him.

Appeal from the Circuit Court of Johnson County.

THIS was an action of debt brought by Sam C. Roane and others, trustees of the Real Estate Bank, against James B. Harris, Samuel Adams and Wesley Garrett, determined in the circuit court of Johnson county, at the September term, 1845, before BROWN, judge.

The action was founded on a promissory note, made to the plaintiffs, as trustees of the bank, by Harris as principal, and Adams and Garrett as securities, payable at the office of the bank in Van Buren.

Harris made default. Adams and Garrett filed a joint plea alleging that they had given notice in writing to plaintiffs, after the note sued on fell due, requiring them forthwith to bring suit against the principal, Harris, or they would claim to be exonerated as his

securities; and that plaintiffs failed to bring suit within thirty days as required by statute.

Garrett filed a similar, separate plea. Plaintiffs took issues to the pleas, the cause was submitted to the court sitting as a jury, and the court found in favor of, and rendered judgment for plaintiffs. Defendants moved for a new trial, which was refused, they excepted, and took a bill of exceptions, setting out the evidence, which follows:

Edward A. Scott, a witness for defendants, stated that he was the clerk of plaintiffs, and that about the first of March, 1845, he received a notice in writing from the defendant Garrett to the plaintiffs, the precise wording of which he did not recollect, stating that he did not design being held further liable on the note sued on, and which witness understood to be a notice to commence suit on said note, and that he as clerk of plaintiffs so received said notice; and accordingly informed John Drennen, one of the plaintiffs, that said notice had been given. This was done in a day or two after witness received the notice. That he also, as clerk of plaintiffs, informed Thomas W. Newton, the cashier and secretary of the board of trustees of said bank, that said notice had been received, requiring suit to be brought on said note; who requested witness to send him the note, but witness did not recollect whether he sent it to Newton or Albert Pike Esq. the attorney of plaintiffs, but that he sent it to one or the other of them to commence suit upon; and the present suit was brought (1 July 1845). This was all the evidence.

D. WALKER, for the appellants. The issue in this case was whether the securities had given the assignees of the bank notice to sue more than 30 days before suit brought. The proof is positive that such notice was given to the clerk of the plaintiffs who communicated it to part of the plaintiffs and the attorney. No exception was taken to the evidence; therefore, even if considered secondary, it is conclusive unless it had been objected to at the trial. *Bank vs. Watkins,* 6 *Ark. R.* 123.

The clerk of the plaintiffs is the keeper of the records of the bank; the notice was well given to him; it never was contemplated nor is it allowable that the bank should assign her effects to divers individuals and force the securities to hunt them up with notice: notice left at the bank-house or with the keeper of the records is sufficient.

If the court should be of opinion that the clerk was the proper person with whom to leave notice, the issue was clearly proven and the court should have found for defendant, Garrett.

E. H. ENGLISH, for Adams. Was the service upon the clerk of the plaintiffs sufficient? The clerk was their agent.

Notice of the dishonor of a bill left at the counting house of the endorser, or handed their agent, is sufficient. *Byles on Bills of Exchange, page* 165. (*Law Library Vol.* 16.)

If an agent comes to the knowledge of a fact while he is concerned for the principal, this operates as constructive notice to the principal himself. *Paley on Agency,* 199. Payment of the note to the clerk would have been good, *Ibid.* 212, and why not the service of notice to sue upon him? See *Ibid.* 264.

The note was payable at the office or branch of the bank at Van Buren, and Scott was clerk for the plaintiffs then.

If the service on Scott was not good, he handed it to Drennen, one of the plaintiffs. Certainly defendants were not bound to hunt up all the trustees of the bank, and serve notice on each of them. The relation existing between the plaintiffs, as trustees, is analogous to that between partners.

Every partner is *an agent* for the partnership. *Story on Partnership, p.* 182. So notice *to* or by *one* of a firm is deemed notice to or by all of them. *Ibid* 160. These principles should be applicable to the trustees of the R. E. Bank. It would be a troublesome work to have to hunt them all up, to give them notice &c. But to make the matter still surer, Scott wrote to Newton, the principal secretary of plaintiffs, and informed him of the request to sue. Yet suit was not brought until July, some five months after the notice.

The notice being good in substance, and well served, Garrett of course is released, the jury should have found in his favor, and the court should have granted a new trial because they did not.

Garrett being released, it is clear that Adams is, for if the creditor release one security, do any act, or omit to do any which releases him, it releases the co-securities. This rule is well settled.

The plaintiffs having released Garrett by failing to sue the principal as he requested, if Adams had paid the debt, he could not have gone on Garrett for contribution. Hence the release of one is the release of all.

PIKE & BALDWIN, contra. Surely no notice was proven to have been served on the plaintiffs, at all; and the notice which was sent to Scott is not proven to have been a notice forthwith to commence the suit. It was merely a declaration by Garrett that he did not intend to be longer held liable on the note. *Rev. St.* 722. A security, to be released under this law, must strictly comply with it. He must put the creditor in default. He must serve his notice on the creditor and not send it to a clerk, or else the creditor might not receive it, and might innocently suffer the thirty days to elapse. It does not appear that any one of the plaintiffs ever saw the written notice.

And the notice must expressly require the creditor to sue forthwith. If the security does not choose to require this but simply informs the creditor that he does not intend to be longer liable, it is his own fault, and the creditor may disregard the declaration. Any other construction of the law would make it an engine of fraud. It only relieves securities when the creditor refuses to comply with their peremptory demand.

The suit must be commenced within thirty days after notice served. A notice sent or handed to a clerk is no notice at all; at least, unless it is sent or handed to him at the counting-room, store, or place of business of his principal.

As to the other point, the court properly defaulted Harris; where a writ is served more than fifteen and less than thirty days before court, and no defence is interposed, judgment goes. *Rev. St.* 626.

JOHNSON, C. J. The error complained of is, that the circuit court disallowed the defence set up by the appellants, and gave judgment in favor of the appellees. The statute provides that any person bound as security for another in any bond, bill or note for the payment of money, or the delivery of property, may at any time after action hath accrued thereon by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable, and that if such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence in the ordinary course of law to judgment and execution, such security shall be exonerated from liability to the person notified. The testimony is that the service was made upon the clerk of the trustees, and that he informed John Drennen, one of the trustees, that he had received the notice. It certainly cannot be contended that a service upon the clerk could operate as a notice to the appellees. The clerk cannot be said to have the right of action. It does not appear that Drennen was served with the notice in accordance with the statute, as he was only informed by the clerk that he himself had received such notice. The record does not inform us how far the clerk was authorized to waive or control the rights of the trustees, and we are not at liberty to take judicial notice of any such power. We are clear that no notice has been served upon the trustees, and that therefore the judgment of the circuit court ought to be affirmed.

Judgment affirmed.