No. 8671

Supreme Court of Illinois

Nicholas W. Casey

---

vs.

Valentine B.Horton,Jr.

Nicholas M Casey
vs
Val B Horton jr
} Error to Alexander Co

Defendants Brief

The pltff in Error sued out an attachment in the Common Pleas Court city of Cairo for July term 1863. Filed the ordinary attachment Bond. - at the October term 63. Defts appeared filed their affid avit that the Pltff was non resident &c when Suit was brought &c and moved to dismiss the proceedings on the ground - that Pltff being non resident Could not sue by attachment, without filing a "Bond for Costs" under the Cost act Sections 1845 Sec 1st The Court sustained defts Motion - dismissed Said suit & pltff now seeks to reverse this decision -

To ascertain what the law is it is necessary to Examine & Construe the attachment Law. & the Cost act

Sec 4. P 227. Scates St.

It is provided by Sec 4 P 229 Scates St. that - "Every Clerk before granting an attachment to Shall take bond and security from the party for whom the same shall be issued, his or their agent or attorney payable to the defendant in double the sum sworn to be due Conditioned for satisfying all costs which may be awarded to such defendant. or to any other interested in said proceedings all damages &c &c"

Sec 1st P 244 Scates Statute.

It is provided by Sec 1st P 244 Scates Statute. that "In all actions on office Bonds &c" and in all cases in Law or Equity where the pltff or person for whose use the action is to be commenced Shall not

&c

[Rec'd 1-1]

"a resident of this State - the pltff &c shall before
"he institutes Such Suit file or cause to be filed with
"the Clerk of the Circuit or Supreme Court in which
"the action is to be commenced an instrument in
"writing of some responsible person being a resident
"of this State, whereby such person shall acknowledge
"himself bound to pay or cause to be paid all Costs
"which may accrue in Such action, either to
"the opposite party or to any of the officers of such
"Court"

Now the pltff in order to sustain his Suit must make
it appear to the Court, first that the attachment act when
Complied with Secures all the objects of the Cost act
and is Equivalent to it - or secondly that the Cost
act is not applicable to and does not govern
cases of attachment

To make myself understood allow me to premise
that there are two General Classes of Remedies -
Ordinary and Extraordinary - or perhaps I
should with better propriety Say there are two General
Classes of process by which actions may in
certain cases be begun. Ordinary & Extraordinary
The first include those which issue upon Common
principles filed in Court. as in actions of assumpsit
debt trover Ejectment &c - The second include the
process of attachment created by Statute, not bound
upon the Common law & intended to provide
a remedy to Secure as well as Collect a debt &c

In Either Case however it is beyond dispute a clear legal proposition that both the ordinary & the Extra ordinary processes are but the means by which actions or "Cases in Law or Equity" may be Commenced - Cases whether the are made of the other be used the result from the issuing of the process is the beginning or Commencing of "a case in ~~it~~ Law or Equity" In the one case the process may be used, & be voided without the attachment bond the Suit be begun in the other Case the bond must be filed before the process issues - before the Suit is begun - But neither can be used in any form of action. Unless it be in Some "Case at Law or in Equity"

I therefore insist that it will be impossible to Escape the Conclusion that the first section of the Cost act, requiring a Cost bond in all Cases at Law or in Equity where the pltff is nonresident is applicable to a Suit by Attachment. It is a general law of the State - And when the facts Exist to make it operate - to wit When the plaintiff is non resident it must operate in all cases without Exception at Law & in Equity -

But to avoid the result of this unsustainable Conclusion it is insisted by the pltff in Error. And attempted to be argued that the attachment bond reaches all the objects of the Cost bond and supplies the place thereof - In other words he has attempted to Establish that the Legislature by changing the Law of 1827. (See Sec 7. P. 69.) by adding to the 4th section of Said act the words - "or to any other

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interested in said proceedings" Move to for modified the same as to (by the bond) secure the costs. the same as a cost bond. - this is the argument - the pltff does not insist that by the law of 1827. the attachment bond did secure the costs to any except the defendant in attachment. and indeed it is fairly deducible that pltff admit from their reference & argument that the bond under the Laws of 1827. did not secure costs to the "others interested in said proceedings" for if the old law did secure such persons then why add these words in the laws of 1845. that are not in the law of 1827. I take it therefore as admitted by pltff that the old law only secured by Bond the costs to deft. & no other person. It did not secure costs to garnishees - nor to parties interpleading - nor to "the officers of Court" -
What then was the change made in the law. And who was it that the law of 1845 was intended to secure in their costs that were not before secured? - the words of the statute answer the question - it was changed to secure "any other interested in said proceeding". But who are the "others" spoken of in the statute - the pltff admits & so do I. that garnishees are now secured in their costs - whereas by the law of 1827. they were not. so persons interpleading &c. who were not before but was an Evil to be avoided - a defect in the law to be remedied And the legislature applied the remedy by the addition of the words "or to any other interested in said proceedings"

the Law authorizes the process of Garnishment to issue to Compel third parties (persons who were neither party or deft in the attachment.) to come into Court. And deliver Money or property of defts - they Clearly then were "interested in said proceedings - So interpleading was authorized. & the interpleader then became "interested in said proceedings" But as the old Law Stood it matters not how great the Wrong was done them by such Garnishment. or unlawful seizure of property by said attachment they were not secured their Costs Even by the attachment bond & two damages either - An insolvent party Could take an attachment as an insolvent defendant give Her so good a bond - have the attachment levied on property (not belonging to defendant) of third persons or garnishee them. Compel them to expend Costs to vindicate their Cause or Claim and yet they had no remedy on the bond of party This Could Easily be used to abuse the process - and hence the Change - It is but fair When the Law authorizes the use of an Extraordinary writ. that the Law Shall also protect all from its abuse - this is Effected by the Statute as it now Stands - But it is insisted that the Statute as it now Stands not only does this but more - that it not only secures the Costs of the "opposite party" and "any other interested in said proceedings" but also any officers of such Court" - In other words it is insisted that the

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words "any others intended in said proceedings" make the attachment bond as broad (so far as the officers of the Court are concerned) as a Cost bond would be if filed - The obvious answer to this is that the Statute does say so - and if it was intended to include the "officers" why did they not say so. In the Cost act (Sect 4) they have used the words "any of the officers of such Court and he know a Cost bond: secures them - However let the argument be met fairly - they insist that the officers of Court (the Clerk & Sheriff) are part of the "others intended in said proceedings" - This I deny - the officers of Court are not any of the "others" intended to be included in those words. - In what sense are they or can they be said to be "intended" do they gain or loose any thing by the result of the Case - no are they rendered incompetent to testify for pltff. deft. or garnishee? no. Yet a party intended in said proceedings" would be disqualified as a witness - How then are they "intended" the apply of pltff in their Costs - I reply to that that the Law is that the Costs are presumed to be paid by each party as they are made. In contemplation of law the pltff is advanced such Costs as they make during the progress of the Cause

vide Morgan vs Griffin
1st Gill P566

And hence the form of the judgment in all
Cases for a party is that he "recover all his
Lawful costs by him Expended" &c In truth
The term "Costs" is a technical term. and
means only such lawful sums as a party has
Expended in the prosecution or defence of his
Cause, and which being lawfully expended he
is adjudged to recover back - The Court adjudges
no Costs in the case to the clerk or sheriff -
but only to a party. & this always upon the
presumption that they are or have been paid
by the party who has them adjudged - How then
can the officers of the Court be said to be
"interested in said proceedings." It may be that the
Costs are actually advanced as the case proceeds
does that or would that make the officer interested
in the proceedings - I think that would Extinguish
an interest if it had Existed. - But suppose the
Costs are not paid or advanced as the Case
proceeds does the right which the Law
gives an officer to have his fees paid
him ^make him an "interested in the proceedings" * I can
in no just or legal sense see how the Law
can be so construed - And hence
I insist that an attachment bond
even if made as broad as the
attachment law requires is not as broad
as a cost bond. - [in this respect] And that therefore the
~~the Law~~ Cost act is so framed ^and ought to be so applied as to protect & Secure

* Webster defines the term Proceedings to mean in Law - "the steps or measures in the prosecution of an action"

all the officers of our courts in their lawful fees in attachment cases as well as other cases - and this the attachment law accomplishes does not.

And why should not this be the law? Why is not the cost act to govern a non resident plff in attachment cases as well as in ordinary cases. It is a suit at law and yet it is insisted that no bond for costs under this section is necessary in this extraordinary mode of suing - When all admit that a cost bond is a prerequisite to the use of ordinary processes - In other words they argue a non resident may enforce his rights under the laws of Illinois by its extraordinary process without a cost bond - when if he uses the common process he must file a bond with a special class of security. Now is it fair to conclude that the legislature would interpose fewer safeguards to the use of the extraordinary process than to that of the ordinary process.

But there are other reasons for requiring a cost bond in attachment cases as well as attachment bonds. The cost act requires the surety on the cost bond to be a resident of the State of Illinois. Whilst nothing of this kind is required under the attachment law. The plff however insists that the practice is to require resident sureties in attachment cases - Suppose it has

been the practice. if the law does not require it. there is nothing Obligatory - and hence Non resident Securities may be offered & given - & not only so. a pltff could as a legal right demand if he offered Non resident Sureties who were responsible. that the bond for his attach ment be accepted - and he could sue the Clerk for refusing them if he was thereby damaged - Whilst the Statute is Clear that on a Cost bond the Surety must not only be responsible but residing in the State. There is a reason for this - and it is found in a Subsequent Section of the Law See Sec 24 Cost act - By this Section a fee bill with the force of a fifa may issue against the Security for costs. But what Effect will a fee bill have or what good can be accomplished if the Security & his Effects be out of reach out of the state - And Yet if the Cost act Does govern attachment cases brought by Non residents. Such would be the result - And the officers and Witnesses would be deprived of the Certain Clear & Speedy remedy to Recover their Costs -

But again officers Witnesses & parties interested may all be deprived in getting their Costs. in Such Cases if no Cost bond is

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bond is necessary. Suppose a non resid
ent pltff sues out an attachment (and
gives non resident Surety) for 50$ dollars
levies it upon property - in possession of
a third party - the bond will be for 100$
penalty - no Surety can be held liable above
the Sum named in the bond - This bond
is then the only Security the deft has for
his damages & Costs - the only security
the Gomishee or interpleader has for his
Costs - - & the only security the Witness &
officers have for their - Suppose (&
it is not unlikely) that the Case is litigated
until the Costs overrun the penalty of
the bond, And amounts to more than
100$. What remedy is there then for the
Costs - This is going upon the presumption
(assumed by pltff) that a fi fa will may
issue against a Surety on an attachm
ent bond (where & any) If a Bond
for Costs under the act is filed the
remedy is clear - for the Surety is
then liable for all the Costs, And
being resident successive fi fas may
issue and be collected - And this is
what is intended by the Cost act -
But if no bond for Costs is filed then
as Soon as the 100$ penalty is exhausted

the defts and all others will then be
in Court as Suitors. Compelled to litigate
without any Security for pltff for
Costs – at all; and be a nonresident
For these reasons I respectfully
Submit that the Court did not
Err. in its decision below

I. T. Haynie
for defts in Error

Note. The word "Proceedings" being defined means
the "Steps or Measures in an action" – Then
the Condition in the attachment bonds if it
be Construed to be as broad as the 4th
Section of the act So as to include and Secure
Costs to "Any others interested in Said proceedings"
will not Secure the "officers" of Court – for
they are not interested in the "Steps" or
"Measures" taken in an action – they are
only interested in having the fees paid. – If the fees
are not paid it is a debt due the officers collectable
by fee bill or suit – If the fee be paid then
it becomes Costs – & is adjudged to the Successful
party – & a fee due an officer is no part of the
Steps or Measures of an action or suit

[illegible]

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Argument of

Defts Counsel

Nicholas Dr Leary

by

Valentine B. Horton

Filed. Nov. 16. 1864.

N. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Clerk of the ~~Circuit Court for the County of~~ Court of Common Pleas of the City of Cairo Greeting:

Because, In the record and proceedings, as also in the rendition of the judgment of a plea which was in the ~~Circuit Court of~~ ~~county, before the Judge thereof between~~ Court of Common Pleas of the City of Cairo before the Judge thereof between Nicholas N. Casey Jr. plaintiff and Valentine B. Horton Jr. defendant it is said manifest error hath intervened to the injury of the aforesaid Nicholas N. Casey as we are informed by his complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly without delay send to our Justices of our Supreme Court the record and proceedings of the plaint aforesaid; with all things touching the same; under your seal, so that we may have the same before our Justices aforesaid at **Mount Vernon**, in the County of Jefferson, on the 1st Tuesday after the 2nd Monday in November next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twenty-fifth day of July in the year of our Lord one thousand eight hundred and sixty four

Noah H. Purston
Clerk of the Supreme Court.

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17

SUPREME COURT.

First Grand Division.

Nicholas W. Casey

Plaintiff in Error,

VS.

Valentine B. Horton Jr.

Defendant in Error.

WRIT OF ERROR.

Issued & FILED - July 25. 1864

N. Johnston Clk

State of Illinois,
SUPREME COURT,
First Grand Division. } ss

The People of the State of Illinois,

To the Sheriff of Alexander County.

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the ~~Circuit Court of county, before the Judge thereof between~~ Court of Common Pleas, of the City of Cairo, before the Judge thereof between Nicholas N Casey plaintiff and Valentine B. Horton Jr defendant it is said that manifest error hath intervened to the injury of said Nicholas N. Casey as we are informed by his complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at Mount Vernon, before the justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you, that by good and lawful men of your county, you give notice to the said Valentine B. Horton Jr. that he be and appear before the justices of our said Supreme Court, at the next term of said Court, to be holden at **Mount Vernon**, in said State, on the first Tuesday after the second Monday in November next, to hear the records and proceedings aforesaid, and the errors assigned, if he shall think fit; and further to do and receive what the said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said Valentine B. Horton Jr notice together with this writ.

WITNESS, the Hon. P. H. Walker Chief Justice of the Supreme Court and the seal thereof, at MOUNT VERNON, this twenty-fifth day of July in the year of our Lord one thousand eight hundred and sixty four.

Noah Johnston

Clerk of the Supreme Court.

[2471-9]

17

SUPREME COURT.

First Grand Division.

Nicholas W. Carey

Plaintiff in Error,

vs.

Valentine B. Horton Jr

Defendant in Error.

SCIRE FACIAS.

FILED.

1864

The within named Defendant Valentine B Horton Jr was found in Bay County this 27th day of July 1864

O Green Sheriff by Deputy

State of Illinois
First Grand Division } ss

In the Supreme
Court Nov Term 1864.

Nicholas M Casey
vs
Valentine B Horton Jr } Error

We do hereby enter ourselves Security
Costs in this cause, and acknowledge
ourselves bound to pay or cause to be
paid all costs which may accrue in
this action, either to the opposit party
or to any of the officer of this court
in pursuance of the laws of this State
Dated this day July A.D. 1864

D. T. Linegar
W. H. Green.

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17

In the Supreme Court
of Illinois First Grand
Division Nov Term 1864

Nicholas W Casey
vs
Valentine B Horton Jr

Bond for costs

Filed July 25. 1864.
N. Johnston Clk

State of Illinois
First Grand Dunsan } S.S.

In the Supreme and
November Term 1864

Nicholas M Casey
vs
Valentine B Horton jr } Error

David P Lincoln, atty for Plff in Error being first duly sworn according to law upon his oath says that the Said Valentine B Horton jr defendant in error in the above entitled cause is a non resident of the State of Illinois and not within the reach of process from this court and further Sayeth not

David P Lincoln

Subscribed and sworn to
before me this 20th day of
July A.D. 1864
Alex H Irwin
Clerk & Com Pleas
City of Cairo.

P. O. Adress
Valentine B Horton jr
Rumsey
Ohio

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17

In the Supreme court
November Term 1864

Nicholas W Cusey
vs
Valentine B Horton

Affidavit for publication

Filed July 25th 1864.
N. Johnston Cl
"

D T Sawyer
W. H. Green
Attys for Plff

D. T. LINEGAR,
ATTORNEY AT LAW,
CAIRO, ILLS.

OFFICE IN POST OFFICE BUILDING.

Cairo Ills

July 27–1864

Sir

Yours of the 25th inst received.

Enclosed pleas and writ with Sheriffs return. Is it not addressed to the wrong officer. I incline to the opinion that it should be directed to the Marshall of the city of Cairo as he is the officer of the common pleas. See Rule 5 Sup-court. If I am correct pleas and writ addressed accordingly dated same as the one enclosed. I am not satisfied that I am wrong but suggest the question to you as I know you have had long experience

Please return to me the abstract home if you can or send copy. I can have it printed much cheaper here I can have it done ~~there~~ here for $2.50 & and I wish to add further references & authorities. If you can have it printed there for that price have it done there for that price you can have it done and I will send you the money to pay the bill. The abstract is a very short one and the Rules of the court

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says 20 cts per 100 words. I suppose that rule does not bind the printer but it is my duty to have it done as cheap as I can

Your Obt Servt

Hon Noah Johnson
Clerk Sup. Ct.
Mt Vernon Ills

D. L. Linegar

D. T. LINEGAR,
ATTORNEY AT LAW,
CAIRO, ILLS.
Egyptian Block
OFFICE ~~IN POST OFFICE BUILDING~~.

July 19-186 1864

Clerk Supreme court
First Grand Division

Sir Enclosed I send you fifteen dollars to pay costs in the case of Casey vs Horton if it is not enough please notify me by return mail

Please send me papers containing notice and have the publisher to be sure to address them to Horton in accordance with Rule of court. His address is Valentine B Horton Jr.
Pomeroy Ohio

Yours &c
D. T. Linegar

State of Illinois
First Grand Division } ss

In the Supreme Court
November Term 1864

Nicholas H Casey
as ⅓ attachment
Valentine B Horton Jr } Error from the Cairo
Court of Commons
Pleas

The clerk of the Supreme Court
of Illinois First Grand Divison
will please issue writ of error
and Scire facias Returnable according
to law and oblige

D. L. Lingan &
W. H. Green
Attys for Plff
in Error

[illegible]

17

In the Supreme Court
First Grand Division

Nicholas W Casey
vs } Error
Valentine B Hartsuff

Precipe for writs

Filed July 25. 1864.
N. Johnston Clk

State of Illinois, ss.

In the Supreme Court of said State.

First Grand Division.

17.

Nicholas W. Casey.
Plaintiff in error.
vs
Valentine B. Horton Jr.
Defendant in error

} Error to the Court of Common Pleas, of the City of Cairo.

The said defendant in error, Valentine B. Horton Jr. is hereby notified that the said plaintiff in error has filed in the Clerk's office of this Court a transcript of the Record of the Court of Common pleas of the City of Cairo in this Cause, and sued out his writ of error therein, returnable on the first day of the November term, 1864, of this Court, that a Scire facias has been issued against said defendant, directed to the Sheriff of Alexander County, returnable on the first day of the next term of this Court, to be holden at the Court house in Mount Vernon, On the first Tuesday after the second Monday in November, 1864, and an affidavit having been filed, showing satisfactorily that the said defendant, Valentine B. Horton Jr. does not reside in the State of Illinois, he is therefore hereby notified to appear before this Court on

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the return day of the Scire facias aforesaid, and join in the error assigned herein, otherwise, judgment will be entered against him by default.

Witness, Noah Johnston, Clerk of said Court, this 25th day of July A. D. 1864.

Noah Johnston, Clk

D. S. Seagar &
M. A. Green.
Att'ys for Pltff in error

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Casey

v

Horton

1864

8671

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State of Illinois, ss.

Supreme Court of said State
1st Grand Division.

Nicholas M. Casey
vs
Valentine B. Horton Jr.

John N. Satterfield, Editor and proprietor of the "Mount Vernon Star," a newspaper published in the Town of Mount Vernon, Jefferson County, and State aforesaid, being first duly sworn, says the annexed notice to the defendant, in the above entitled cause, commanding him to appear before the Supreme Court of Illinois at the Court House in Mt Vernon on the first Tuesday after the second Monday of November 1864, was first published in the issue of said "Star" of the 15th of July A.D. 1864 and thence afterwards for four consecutive weeks as appears by the file of the said papers preserved in the Office of said "Star," the first insertion of said notice having been not less than sixty days before the return day mentioned in said notice, that is to say, not less than sixty days from the 15th day of November A.D. 1864.

Sworn to and subscribed before me, this 3d day of November A.D. 1864.

N. Robinson Clk

John N. Satterfield
Editor & Publisher

[8671-16]

No 17 —

N. W. Casey.
vs
D. B. Horton Jrs.

Printers affdt as to
publication of Notice
and Receipt for
pay Thereon —

Filed, Nov. 3. 1864
N. Johnston Clk

State of Illinois,
ss.
In the Supreme court of said State,
First Grand Division.
Nicholas W. Casey, Plaintiff in Error,
vs.
Valentine B. Horton, Jr., Defendant in Error.
Error to the Court of Common Pleas,
of the City of Cairo.

The said defendant in error, Valentine B. Horton, Jr., is hereby notified that the said plaintiff in error has filed, in the clerk's office of this court, a Transcript of the Record of the court of Common Pleas of the city of Cairo, in this cause, and sued out his Writ of Error therein, returnable on the first day of the November Term, 1864, of this court, that a SCIREFACIAS has been issued against said Defendant, directed to the Sheriff of Alexander county, returnable on the first day of the next Term of this court, to be holden at the court-house, in Mt. Vernon, on the first Tuesday after the second Monday in November, 1864, and an Affidavit having been filed, showing satisfactorily that the said Defendant, Valentine B. Horton, Jr., does not reside in the State of Illinois, he is therefore hereby notified to appear before this court, on the return day of the SCIREFACIAS aforesaid, and join in the errors assigned herein, otherwise judgment will be entered against him by Default.

Witness Noah Johnston, Clerk of said Court, this 25th day of July, A. D., 1864. Noah Johnston, Cl'k.

D. S. Linegar & W. H. Green, Attorneys for Pltff. in Error.

This 29th July, 1864.

ARGUMENT AND BRIEF.

NICHOLAS W. CASEY,
vs. ERROR.
VALENTINE B. HORTON, JR.

In the Supreme Court,
First Grand Division.---Nov. Term, 1864.

This was an action of attachment commenced at the July Term of the Common Pleas Court of Cairo, by filing affidavit and attachment bond. No service for the July Term. At the October Term, the defendant appeared by his attorney, ~~filed an affidavit setting up the non-residence of the plaintiff,~~ and moved the Court to dismiss the cause for want of a cost bond, which motion was sustained and cause dismissed, and is now brought to this court by writ of error to reverse the judgment of the Court of Common Pleas.

The attachment law of this state was passed at the session of the Legislature in the year 1827. The ordinary cost bond law was passed at the same session.

The attachment bond had in it two conditions. The first, security for costs, the second, indemnity to the defendant for any damages he might sustain by reason of the wrongful sueing out of the attachment.

The first condition of the attachment bond was as follows: "CONDITIONED FOR SATISFYING ALL COSTS WHICH MAY BE AWARDED TO SAID DEFENDANT, IN CASE THE PLAINTIFF SUEING OUT THE ATTACHMENT THERIN MENTIONED, SHALL BE CAST IN HIS SUIT." See Law 1827, page 69, sec. 7.

This condition remained in the statutes unchanged until the year 1845, when it was amended to read as follows, to wit: "CONDITIONED FOR SATISFYING ALL COSTS WHICH MAY BE AWARDED TO SUCH DEFENDANT, OR TO ANY OTHERS INTERESTED IN SAID PROCEEDINGS."

This amendment materially changed the condition referred to, and the legislature had some object in making the change, and what was it? It must have been to perfect the attachment bond as a cost bond, as well as a bond of indemnity to the defendant.

The law of 1827 limited the liability of the security for costs upon the attachment bond to the defendant, and the casting of the plaintiff in his suit. So the cost condition of the attachment bond under the law of 1827 was very imperfect. The defendant may recover costs against the plaintiff, and still the plaintiff not be cast in his suit, by reason of continuances, amendments, &c., and he is entitled to have such costs secured.

Under our attachment law there may be others than the defendant interested in the proceedings in attachment, and recover costs, and are also entitled to have their cost secured, such as interpleaders and garnishees.

If A. sues out an attachment against B. and it is levied upon the property of C., C. may interplead and set up his right to the property, and the Court will direct a Jury to be empaneled to enquire into the rights of the property, and if the property be found to belong to C he recovers his cost against A. See statute 45, page 68, sec. 21. Laws '27, page 75, sec. 19.

In this case C is not a willing suitor, but is compelled by the wrongful acts of A to come into Court and interplead in order to secure his rights and recover possession of his property, and is entitled to be secured in his costs, but the condition in the attachment laws of 1827, in relation to costs does not secure him in his costs.

If a garnishee denies indebtedness, and an issue is formed to try the fact, the proceedings assume all the nature and formalities of a suit between the plaintiff and garnishee, and all the consequences of a suit attend the proceedings. The garnishee in that event may summon witnesses, obtain continuances, &c., and if he sustains his denial of indebtedness is entitled to costs against the plaintiff. See Laws 27, page 74, sec. 17, stat. 45, page 67, sec. 19. Drake on att'ch., 678.

The garnishee is not a willing suitor in Court and should have his costs secured, but they are not under the 7th sec. of the attachment law of 1827. The proceedings in both these instances grow directly out of the proceedings in attachment, and the garnishee and interpleader are both interested parties in the proceedings.

Hence the amendment of the law in 1845. The condition for costs in the amended law is as broad as the English language can make it. It is not limited to the defendant, nor is it necessary that the plaintiff should be cast in his suit to render the security for costs liable upon the bond. If the defendant recovers costs by continuance, amendment, or in any other way, they are secured by the first condition in the present attachment bond, and that part of the first condition which says, "or any others interested in said proceedings," will by any fair construction secure an interpleader, garnishee, or an officer of Court, in any costs that may be awarded to him.

Then the first condition in the attachment bond is a full and complete bond for costs in all attachment suits, whether the plaintiff be a resident or non-resident of the State. It is the most extensive and comprehensive bond for costs that can be given in an attachment case, and the only one known to the statute that will fully and completely secure the costs in such cause, and is substantially a compliance with the ordinary cost bond statute. The cost bond law is not imperative as to the form of the bond to be given, but says, "which instrument in writing may be in the form," &c. It is only imperative as to its requirements, that a bond for costs shall be filed before the writ issues, which is sufficiently answered by filing the attachment bond. See statute 45, p. 126, sec. 1. The object of this statute is simply to secure the costs of the opposite party and the officers of the Court.

This statute was also passed by the Legislature in 1827, and has remained unchanged to this date, consequently the first condition of the attachment bond as it now stands is a later law and supercedes the necessity of filing a cost bond in attachment in any case. Suppose for example an attachment is sued out by a resident plaintiff and the defendant move to rule the plaintiff to give security for costs, because of his insolvency, would not the cost condition of the attachment bond be a sufficient answer to the defendant's motion? Would not the Court be compelled, admitting the plaintiff's insolvency, to say that all parties interested were amply secured in their costs? It appears to me there could be no question on this point, notwithstanding the second section of the statute upon costs in relation to insolvent plaintiffs, is just as imperative as the first section in relation to non-residents, &c. If such is not the true construction of the statute, then the attachment bond is no security for costs whatever, and is a dead letter upon the statute book. And for the sake of argument let us admit that it is not a cost bond at all, and see then what condition will the costs in an attachment case be placed. A non-resident sues out an attachment, files his cost bond with the condition to pay all costs which may accrue to the opposite party, or to any of the officers of the Court. Now who is the opposite party that is secured in his costs? It is none other than the defendant in attachment. The attachment is levied upon the goods of a third party and he is compelled to interplead in order to save his property, gets judgement for the return of his property and costs, but he is not secured in his costs, because he is not the opposite party nor an officer of the Court, and the plaintiff lives out of the jurisdiction of the Court and the interpleader must pay his own costs.

A party is summoned as a garnishee, denies indebtedness to defendant, and an issue is formed to try the fact. The garnishee summons witnesses and continues the case as he may, and finally sustains his denial, and has judgment for costs, but he is not secured in his costs because he is not the opposite party mentioned in the cost bond, and the plaintiff cannot be reached by a fee bill from the Court.

But they are both parties interested in the proceeding in attachment, not voluntary interested parties, but made so by the actions and probably bad conduct of the plaintiff, and under a fair construction of the fourth section of the attachment law, they are secured in their costs, and if officers are entitled to costs, they are interested parties in the proceedings and are likewise secured in their costs. I think I have fairly sustained the assertion that the attachment bond is the only bond that does fully and amply secure the costs in an action of attachment.

If an attachment be commenced and a bond filed without any condition for cost, the Court would dismiss the cause, not because the bond was informal, but because it would be defective in substance and would not be regarded as an attachment bond.

But it may be contended that the remedy for cost under the attachment bond and ordinary cost bond are different; that to recover costs under the attachment bond, suit must be brought upon the bond while under the ordinary cost bond, the fee bill may issue against the security, and this furnishes a reason for filing a cost bond in an attachment case where the plaintiff is a non-resident. But such is not the law. The fee bill may issue against the security for costs in the attachment bond, as well as against the security upon the ordinary cost bond. The Court in the trial of an attachment fully adjudicates as to the costs. The amount, against whom they shall be assessed, and in whose favor they shall be adjudged. Then there could be no reason for an action upon the atttachment bond in relation to costs.--- The statute provides as follows:

"In all cases where there is security for costs, or an attorney liable for costs, or an action brought for the use of another, and the plaintiff shall be adjudged to pay costs, either before or upon final judgment, it shall be lawful for the clerk to make out and tax a bill of costs so adjudged to be paid against the party adjudged to pay the same, and against his security for costs, or other persons liable for the payment thereof, or either of them," &c., &c. See stat. 45, page 129, Sec. 24.

Now the security named in the attachment bond is a security for costs and liable to pay them whenever they are adjudged against the plaintiff, and the fee bill may issue against him under the above section of the law.

It may be insisted on that the fourth section of the attachment law does not require the security in the attachment bond to be a resident of the State, and that both the plaintiff in the attachment and the security may be non-residents, but such an argument is untenable. The long and unvarying practice of the Courts to require all securities to live within the jurisdiction of the Court is a law as permanent and binding as though it was written in the statute. The clerk must exercise a sound discretion as to the solvency of the security, and how can he judge of the solvency of a security that resides in another State. The security upon an attachment bond must at least reside within the State, and if he does not a motion to dismiss, based upon affidavit setting up the non-residence of the security must prevail.

The filing of the ordinary cost bond does not secure one cent of costs in an attachment that is not already secured by the attachment bond and the filing of the additional cost bond would be confusing and encumbering the record to no purpose. Suppose the cost bond is filed, no one will deny that the security for costs upon the cost bond may be a different person from the one on the attachment bond. If judgment goes against the plaintiff, which of these securities are liable for the costs? Against which should the fee bill issue? Could the security for costs in the attachment bond excuse himself from paying the costs, because a cost bond had been filed and another person was responsible for costs, and vice versa.

There is no reason for filing an additional cost bond in an attachment suit, whether the plaintiff be a resident or non-resident.

"Reason is the soul of the law and when the reason of any particular law ceases, so does the law itself." The Court erred in dismissing this cause for want of a cost bond.

D. T. LINEGAR, Att'y. Pl'ff. in Error.

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8671-17

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In the Supreme Court
Nov. Term 1864

Nicholas M Leusy
vs
Valentine B Horton Jr.

Abstract of Boies

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Filed, Nov. 14. 1864,
N. Johnston Clk

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ABSTRACT.

Nicholas W. Casey,
vs.
Valentine B. Horton, Jr.

Pages 1, 2 & 3 — This suit was commenced by filing with the Clerk of the Common Pleas Court, of the city of Cairo, on the 6th of June, 1863, an affidavit and attachment bond, as required by the attachment law.

Pages 5 & 6 — Writ of attachment issued against the defendant June 6th, 1863, and returned at the July term of the said Court of Common Pleas, 1863. Served by levying upon the Ferry boat Wilson, on the 11th day of June, 1863.

Page 7 — Continued at the July term of said Court, 1863, for service upon defendant.

Pages 8 & 9 — Declaration filed Sept. twenty-fifth, 1863.

Pages 10 & 11 — Service by publication in the Cairo News. The first publication on the 23d day of July, 1863, and the last publication on the 27th day of August, 1863.

Pages 12 & 13 — At the October term of said Court, the defendant appeared by his attorney and moved the Court to dismiss the writ of attachment for want of a cost bond, the plaintiff being a non-resident of the State.

Which motion was sustained by the Court and the cause dismissed at the plaintiff's cost. To which ruling of the Court the plaintiff by his attorney then and there excepted.

ERRORS ASSIGNED.

1st. The Court erred in sustaining the motion of the defendant to dismiss the attachment for want of a cost bond.

2d. The Court erred in rendering judgment against the plaintiff for costs.

3d. The record does not show that the defendant's motion was based upon an affidavit.

See Laws 1827, page 69, Sec. 7. Revised Laws, 1833, page 34, Sec. 6. Revised Laws, 1845, page page 64, Sec. 4. Fifth Gillman 304.

W. H. GREEN,
D. T. LINEGAR,
Atty's. Plff. in error.

{821-18}

In the Supreme Court
New Trial 1st Dep

Nicholas M Casey

vs

Valentine B Horton Jr

Abstract

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Filed, Nov. 4 - 1864.
S. Johnston Clk
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W H Green
D J Sweeny
Attys Pffs

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

VALENTINE B. HORTON,
vs.
NICHOL W. CASEY.
} Error to Alexander County.

Brief of Defendant in Error.

Every Clerk before issuing an attachment shall take bond to *Def't.* Conditioned to satisfy all costs awarded *Def't.*, or "any others interested in said proceedings. Vide Sec. 4, p. 227. Scates St.

In all cases at *Law or Equity* where the Plaintiff is *non resident* he must *before* suit give bond, signed by some "*resident of this State,*" securing *all costs* which may *accrue*" to the *opposite party* or any "*officers of such Court.*" By these sections *a cost* bond is filed *before* suit is instituted an attachment bond is a subsequent step in the suit, the filing an affidavit is commencement of an attachment suit. Vide Pulliam vs Nelson, 28 Ills., 116. A ~~case~~ bond is required *first*—2d, affidavit; 3, attachm't bond; 4, process; &c Sec. 1st, p. 244, Scates' St.

Cost,

There is a difference between these bonds; they do not answer the same end.

One secures the costs to be "*awarded.*" The other secures all that may "*accrue.*" The one secures costs to Def't or any other *interested* in said *proceedings.* The other all costs which may accrue to the opposite party or *any officer* of Court. The one only requires bond and *security* to be taken, &c. The other requires the bond of a RESIDENT of Illinois. The one bond by its penalty only secures money to the extent of double the debt sued for. The other secures *all costs,* if it is ten times the debt sued for.

The attachment bond only secures costs to Def't—garnishees and interpleaders—not to officers of Court—for the former only are "*interested* in said *proceedinys.*" What interest has a Clerk or Sheriff in the attachment *proceedings?* Do they gain or lose by the event of the suit? Are they disqualified as witnesses? What are the "*proceedings?*" Webster defines *proceedings* to be "steps or measures in prosecuting a cause;" is the Sheriff interested in the *steps* or *measures* a Pl'tff, or Def't, or Garnishee may take in the case? The *fee* due a Sheriff is no interest in the writ. *It is a debt* due him—he may sue for it—when it is PAID him it then *becomes costs* and is adjudged to the successful party, &c. A cost bond secures the officers of Court as well as others interested.

But the *remedies* on the lands are *different*—a fi fa may issue against security for costs on cost bonds. Vide Sec. 24 of Cost Act.

Who ever heard of a fi fa being issued against the *obligors* on an attachment bond without a judgment in *suit on the bond.* The subterfuge is too apparent on part of Plaintiff's counsel to need refutation.

For these causes it is insisted that a *non resident* Plaintiff, sueing by attachment, is clearly beginning a case "*at law,*" and must give a cost bond before suit. The cost act is a General Law, intended to guard and protect our own officers and citizens from loss from the acts of *non residents.* The evil that existed before the cost act was the loss to our citizens and officers from *suits by non residents.* The remedy provided was a *cost bond* in all cases *at law and equity.* Vide Freeman's Practice. P.

[8671-19]

If our own residents sue by attachment, *they* must give *attachment bonds*. Is nothing more required of a *non resident?* If a resident sue in assumpsid by *summons*, he *files no bond*; yet a non resident so doing *must file bond*. Then why shall not more be demanded of a *non resident* than of a *resident*, when the extraordinary process is used? When a mere summons is served notifying our citizen to defend a claim, &c., a cost bond is demanded But when notice is served in suit by non-resident and *property seized*, too, Plaintiff says no costbond is demandable. If this is not bad logic, it is very bad law and should be changed.

The case in 5th Gill is referred to. That case only decides that a bond in the form *proscribed* by law is good, and answers the end intended by law. It is not held to be a cost bond. Indeed the Court there evades construing the bond.

But it is urged that—since the attachment act requires an attachment bond, and is silent as to a cost bond—the latter is not required. I reply that here the *general law* steps in and says this is an *action at law* and if plaintiff is a *non-resident* he shall give a *cost bond*. How to get an attachment is shown by the attachment law, but how to *secure costs* is shown by the cost act.

The chancery act says file your bill in chancery and the Clerk *shall issue*. Does it mean without bond from a non resident? Vide Sec. 5, Rev. L., 1845, P. 93.

The replevin act says file your affidavit and execute bond to Sheriff and you may replevy property. Does it mean without cost bond from a *non resident?* Vide Laws, 1845, P. 134, Sec. 34.

The right of property act Rev. Laws, P. 474, Sec. 1st, requires Sheriff on notice of claim to summons jury, &c. Does it mean without a cost bond if claimant be a non resident?

In all these cases I answer *no*, because the General Law comes in and says these *are cases in Law or Equity*, and in all such cases *non residents* before they can be *privileged* to sue must give cost bond—there is no exception in attachment or any other case.

HAYNIE,

For Defendant in Error.

17

Defts Brief + Points

A. H. Casey

vs

Val. B Horton Jr

Offer

Julia, Nov. 16 - 1864.

A. Johnston Atty

ARGUMENT AND BRIEF.

NICHOLAS W. CASEY,)
vs. ERROR. } In the Supreme Court,
VALENTINE B. HORTON, JR. } First Grand Division.---Nov. Term, 1864.

This was an action of attachment commenced at the July Term of the Common Pleas Court of Cairo, by filing affidavit and attachment bond. No service for the July Term. At the October Term, the defendant appeared by his attorney, filed an affidavit setting up the non-residence of the plaintiff, and moved the Court to dismiss the cause for want of a cost bond, which motion was sustained and cause dismissed, and is now brought to this court by writ of error to reverse the judgment of the Court of Common Pleas.

The attachment law of this state was passed at the session of the Legislature in the year 1827. The ordinary cost bond law was passed at the same session.

The attachment bond had in it two conditions. The first, security for costs, the second, indemnity to the defendant for any damages he might sustain by reason of the wrongful sueing out of the attachment.

The first condition of the attachment bond was as follows: "CONDITIONED FOR SATISFYING ALL COSTS WHICH MAY BE AWARDED TO SAID DEFENDANT, IN CASE THE PLAINTIFF SUEING OUT THE ATTACHMENT THERIN MENTIONED, SHALL BE CAST IN HIS SUIT." See Law 1827, page 69, sec. 7.

This condition remained in the statutes unchanged until the year 1845, when it was amended to read as follows, to wit: "CONDITIONED FOR SATISFYING ALL COSTS WHICH MAY BE AWARDED TO SUCH DEFENDANT, OR TO ANY OTHERS INTERESTED IN SAID PROCEEDINGS."

This amendment materially changed the condition referred to, and the legislature had some object in making the change, and what was it? It must have been to perfect the attachment bond as a cost bond, as well as a bond of indemnity to the defendant.

The law of 1827 limited the liability of the security for costs upon the attachment bond to the defendant, and the casting of the plaintiff in his suit. So the cost condition of the attachment bond under the law of 1827 was very imperfect. The defendant may recover costs against the plaintiff, and still the plaintiff not be cast in his suit, by reason of continuances, amendments, &c., and he is entitled to have such costs secured.

Under our attachment law there may be others than the defendant interested in the proceedings in attachment, and recover costs, and are also entitled to have their cost secured, such as interpleaders and garnishees.

If A. sues out an attachment against B. and it is levied upon the property of C., C. may interplead and set up his right to the property, and the Court will direct a Jury to be empaneled to enquire into the rights of the property, and if the property be found to belong to C he recovers his cost against A. See statute 45, page 68, sec. 21. Laws '27, page 75, sec. 19.

In this case C is not a willing suitor, but is compelled by the wrongful acts of A to come into Court and interplead in order to secure his rights and recover possession of his property, and is entitled to be secured in his costs, but the condition in the attachment laws of 1827, in relation to costs does not secure him in his costs.

If a garnishee denies indebtedness, and an issue is formed to try the fact, the proceedings assume all the nature and formalities of a suit between the plaintiff and garnishee, and all the consequences of a suit attend the proceedings. The garnishee in that event may summon witnesses, obtain continuances, &c., and if he sustains his denial of indebtedness is entitled to costs against the plaintiff. See Laws 27, page 74, sec. 17, stat. 45, page 67, sec. 19. Drake on att'ch., 678.

The garnishee is not a willing suitor in Court and should have his costs secured, but they are not under the 7th sec. of the attachment law of 1827. The proceedings in both these instances grow directly out of the proceedings in attachment, and the garnishee and interpleader are both interested parties in the proceedings.

Hence the amendment of the law in 1845. The condition for costs in the amended law is as broad as the English language can make it. It is not limited to the defendant, nor is it necessary that the plaintiff should be cast in his suit to render the security for costs liable upon the bond. If the defendant recovers costs by continuance, amendment, or in any other way, they are secured by the first condition in the present attachment bond, and that part of the first condition which says, "or any others interested in said proceedings," will by any fair construction secure an interpleader, garnishee, or an officer of Court, in any costs that may be awarded to him.

Then the first condition in the attachment bond is a full and complete bond for costs in all attachment suits, whether the plaintiff be a resident or non-resident of the State. It is the most extensive and comprehensive bond for costs that can be given in an attachment case, and the only one known to the statute that will fully and completely secure the costs in such cause, and is substantially a compliance with the ordinary cost bond statute. The cost bond law is not imperative as to the form of the bond to be given, but says, "which instrument in writing may be in the form," &c. It is only imperative as to its requirements, that a bond for costs shall be filed before the writ issues, which is sufficiently answered by filing the attachment bond. See statute 45, p. 126, sec. 1. The object of this statute is simply to secure the costs of the opposite party and the officers of the Court.

This statute was also passed by the Legislature in 1827, and has remained unchanged to this date, consequently the first condition of the attachment bond as it now stands is a later law and supercedes the necessity of filing a cost bond in attachment in any case. Suppose for example an attachment is sued out by a resident plaintiff and the defendant move to rule the plaintiff to give security for costs, because of his insolvency, would not the cost condition of the attachment bond be a sufficient answer to the defendant's motion? Would not the Court be compelled, admitting the plaintiff's insolvency, to say that all parties interested were amply secured in their costs? It appears to me there could be no question on this point, notwithstanding the second section of the statute upon costs in relation to insolvent plaintiffs, is just as imperative as the first section in relation to non-residents, &c. If such is not the true construction of the statute, then the attachment bond is no security for costs whatever, and is a dead letter upon the statute book. And for the sake of argument let us admit that it is not a cost bond at all, and see then what condition will the costs in an attachment case be placed. A non-resident sues out an attachment, files his cost bond with the condition to pay all costs which may accrue to the opposite party, or to any of the officers of the Court. Now who is the opposite party that is secured in his costs? It is none other than the defendant in attachment. The attachment is levied upon the goods of a third party and he is compelled to interplead in order to save his property, gets judgement for the return of his property and costs, but he is not secured in his costs, because he is not the opposite party nor an officer of the Court, and the plaintiff lives out of the jurisdiction of the Court and the interpleader must pay his own costs.

A party is summoned as a garnishee, denies indebtedness to defendant, and an issue is formed to try the fact. The garnishee summons witnesses and continues the case as he may, and finally sustains his denial, and has judgment for costs, but he is not secured in his costs because he is not the opposite party mentioned in the cost bond, and the plaintiff cannot be reached by a fee bill from the Court.

But they are both parties interested in the proceeding in attachment, not voluntary interested parties, but made so by the actions and probably bad conduct of the plaintiff, and under a fair construction of the fourth section of the attachment law, they are secured in their costs, and if officers are entitled to costs, they are interested parties in the proceedings and are likewise secured in their costs. I think I have fairly sustained the assertion that the attachment bond is the only bond that does fully and amply secure the costs in an action of attachment.

If an attachment be commenced and a bond filed without any condition for cost, the Court would dismiss the cause, not because the bond was informal, but because it would be defective in substance and would not be regarded as an attachment bond.

But it may be contended that the remedy for cost under the attachment bond and ordinary cost bond are different; that to recover costs under the attachment bond, suit must be brought upon the bond while under the ordinary cost bond, the fee bill may issue against the security, and this furnishes a reason for filing a cost bond in an attachment case where the plaintiff is a non-resident. But such is not the law. The fee bill may issue against the security for costs in the attachment bond, as well as against the security upon the ordinary cost bond. The Court in the trial of an attachment fully adjudicates as to the costs. The amount, against whom they shall be assessed, and in whose favor they shall be adjudged. Then there could be no reason for an action upon the atttachment bond in relation to costs.---The statute provides as follows:

[8671-21]

"In all cases where there is security for costs, or an attorney liable for costs, or an action brought for the use of another, and the plaintiff shall be adjudged to pay costs, either before or upon final judgment, it shall be lawful for the clerk to make out and tax a bill of costs so adjudged to be paid against the party adjudged to pay the same, and against his security for costs, or other persons liable for the payment thereof, or either of them," &c., &c. See stat. 45, page 129, Sec. 24.

Now the security named in the attachment bond is a security for costs and liable to pay them whenever they are adjudged against the plaintiff, and the fee bill may issue against him under the above section of the law.

It may be insisted on that the fourth section of the attachment law does not require the security in the attachment bond to be a resident of the State, and that both the plaintiff in the attachment and the security may be non-residents, but such an argument is untenable. The long and unvarying practice of the Courts to require all securities to live within the jurisdiction of the Court is a law as permanent and binding as though it was written in the statute. The clerk must exercise a sound discretion as to the solvency of the security, and how can he judge of the solvency of a security that resides in another State. The security upon an attachment bond must at least reside within the State, and if he does not a motion to dismiss, based upon affidavit setting up the non-residence of the security must prevail.

The filing of the ordinary cost bond does not secure one cent of costs in an attachment that is not already secured by the attachment bond and the filing of the additional cost bond would be confusing and encumbering the record to no purpose. Suppose the cost bond is filed, no one will deny that the security for costs upon the cost bond may be a different person from the one on the attachment bond. If judgment goes against the plaintiff, which of these securities are liable for the costs? Against which should the fee bill issue? Could the security for costs in the attachment bond excuse himself from paying the costs, because a cost bond had been filed and another person was responsible for costs, and vice versa.

There is no reason for filing an additional cost bond in an attachment suit, whether the plaintiff be a resident or non-resident.

"Reason is the soul of the law and when the reason of any particular law ceases, so does the law itself." The Court erred in dismissing this cause for want of a cost bond.

D. T. LINEGAR, Att'y. Pl'ff. in Error.

[2671-21]

17

In the Supreme Court
November Ter 1864

Nicholas McCasey
vs
Valentine B. Horton

Abstract & Brief

17

Affirm

~~Reverse~~
Argued -

Filed, Nov. 14 - 1864
N. Johnston Clk

ABSTRACT.

Nicholas W. Casey,
vs.
Valentine B. Horton, Jr.

Pages 1, 2 & 3 — This suit was commenced by filing with the Clerk of the Common Pleas Court, of the city of Cairo, on the 6th of June, 1863, an affidavit and attachment bond, as required by the attachment law.

Pages 5 & 6 — Writ of attachment issued against the defendant June 6th, 1863, and returned at the July term of the said Court of Common Pleas, 1863. Served by levying upon the Ferry boat Wilson, on the 11th day of June, 1863.

Page 7 — Continued at the July term of said Court, 1863, for service upon defendant.

Pages 8 & 9 — Declaration filed Sept. twenty-fifth, 1863.

Pages 10 & 11 — Service by publication in the Cairo News. The first publication on the 23d day of July, 1863, and the last publication on the 27th day of August, 1863.

Pages 12 & 13 — At the October term of said Court, the defendant appeared by his attorney and moved the Court to dismiss the writ of attachment for want of a cost bond, the plaintiff being a non-resident of the State.

Which motion was sustained by the Court and the cause dismissed at the plaintiff's cost. To which ruling of the Court the plaintiff by his attorney then and there excepted.

ERRORS ASSIGNED.

1st. The Court erred in sustaining the motion of the defendant to dismiss the attachment for want of a cost bond.

2d. The Court erred in rendering judgment against the plaintiff for costs.

3d. The record does not show that the defendant's motion was based upon an affidavit.

See Laws 1827, page 69, Sec. 7. Revised Laws, 1833, page 34, Sec. 6. Revised Laws, 1845, page page 64, Sec. 4. Fifth Gillman 304.

W. H. GREEN,
D. T. LINEGAR,
Atty's. Plff. in error.

In the Supreme Court
Nov Term 1864

Nicholas Meany

vs

Valentine B Horton

Abstract

17

Offer

Tallt, Nov 4 1864.

N. Johnston Atty

In Supreme Court, State of Illinois,

FIRST GRAND DIVISION,

NOVEMBER TERM, 1864.

VALENTINE B. HORTON,
vs.
NICHOL W. CASEY.
} Error to Alexander County.

Brief of Defendant in Error.

Every Clerk before issuing an attachment shall take bond to *Def't.* Conditioned to satisfy all costs awarded *Def't.*, or "any others interested in said proceedings. Vide Sec. 4, p. 227. Scates St.

In all cases at *Law or Equity* where the Plaintiff is *non resident* he must *before* suit give bond, signed by some "*resident of this State,*" securing *all costs* which may *accrue*" to the *opposite party* or any "*officers of such Court.*" By these sections *a cost* bond is filed *before* suit is instituted an attachment bond is a subsequent step in the suit, the filing an affidavit is commencement of an attachment suit. Vide Pulliam vs Nelson, 28 Ills., 116.

Cost

A ~~case~~ bond is required *first*—2d, affidavit; 3, attachm't bond; 4, process; &c Sec. 1st, p. 244, Scates' St.

There is a difference between these bonds; they do not answer the same end.

One secures the costs to be "*awarded.*" The other secures all that may "*accrue.*" The one secures costs to Def't or any other *interested* in said *proceedings.* The other all costs which may accrue to the opposite party or *any officer* of Court. The one only requires bond and *security* to be taken, &c. The other requires the bond of a RESIDENT of Illinois. The one bond by its penalty only secures money to the extent of double the debt sued for. The other secures *all costs*, if it is ten times the debt sued for.

The attachment bond only secures costs to Def't—garnishees and interpleaders—not to officers of Court—for the former only are "*interested* in said *proceedings.*" What interest has a Clerk or Sheriff in the attachment *proceedings?* Do they gain or lose by the event of the suit? Are they disqualified as witnesses? What are the "*proceedings?*" Webster defines *proceedings* to be "steps or measures in prosecuting a cause;" is the Sheriff interested in the *steps* or *measures* a Pl'tff, or Def't, or Garnishee may take in the case? The *fee* due a Sheriff is no interest in the writ. *It is a debt* due him -he may sue for it—when it is PAID him it then *becomes costs* and is adjudged to the successful party, &c. A cost bond secures the officers of Court as well as others interested.

But the *remedies* on the lands are *different*—a fi fa may issue against security for costs on cost bonds. Vide Sec. 24 of Cost Act.

Who ever heard of a fi fa being issued against the *obligors* on an attachment bond without a judgment in *suit on the bond.* The subterfuge is too apparent on part of Plaintiff's counsel to need refutation.

For these causes it is insisted that a *non resident* Plaintiff, sueing by attachment, is clearly beginning a case "*at law,*" and must give a cost bond before suit. The cost act is a General Law, intended to guard and protect our own officers and citizens from loss from the acts of *non residents.* The evil that existed before the cost act was the loss to our citizens and officers from *suits by non residents.* The remedy provided was a *cost bond* in all cases *at law and equity.* Vide Freeman's Practice. P.

[8671-23]

If our own residents sue by attachment, *they* must give *attachment bonds*. Is nothing more required of a *non resident?* If a resident sue in assumpsid by *summons*, he *files no bond*; yet a non resident so doing *must file bond*. Then why shall not more be demanded of a *non resident* than of a *resident*, when the extraordinary process is used? When a mere summons is served notifying our citizen to defend a claim, &c., a cost bond is demanded But when notice is served in suit by non-resident and *property seized*, too, Plaintiff says no costbond is demandable. If this is not bad logic, it is very bad law and should be changed.

The case in 5th Gill is referred to. That case only decides that a bond in the form *proscribed* by law is good, and answers the end intended by law. It is not held to be a cost bond. Indeed the Court there evades construing the bond.

But it is urged that—since the attachment act requires an attachment bond, and is silent as to a cost bond—the latter is not required. I reply that here the *general law* steps in and says this is an *action at law* and if plaintiff is a *non-resident* he shall give a *cost bond*. How to get an attachment is shown by the attachment law, but how to *secure costs* is shown by the cost act.

The chancery act says file your bill in chancery and the Clerk *shall issue*. Does it mean without bond from a non resident? Vide Sec. 5, Rev. L., 1845, P. 93.

The replevin act says file your affidavit and execute bond to Sheriff and you may replevy property. Does it mean without cost bond from a *non resident?* Vide Laws, 1845, P. J34, Sec. 34.

The right of property act Rev. Laws, P. 474, Sec. 1st, requires Sheriff on notice of claim to summons jury, &c. Does it mean without a cost bond if claimant be a non resident?

In all these cases I answer *no*, because the General Law comes in and says these *are cases in Law or Equity*, and in all such cases *non residents* before they can be *privileged* to sue must give cost bond—there is no exception in attachment or any other case.

HAYNIE,

For Defendant in Error.

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Defts Brief & Points

N W Leasey

vs

Val B Horton Jr

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N. Johnston Clk