Weaver, James R: Admin of Weaver, James vs. Horn, William R: Admin. of Horn, Caleb; 1855 Greene Co. 207/5

71/10

- 400 note, payable in cattle
- filed for a nonsuit on grounds that def was not a resident of MO
- Def. wintered in TX for his health

The Clerk of the Supreme court will please issue a writ of Error to the Circuit Court returnable to the Jan. Term of the Supreme court in the case of Weaver's Ex. vs Harris Ad. on behalf of Weaver's Ex.

Nov. 18th 1853.

L Hundley atty for Weaver

The transcript being already returned the writ can be appended without sending it to the clerk of the Cir. court. It was made out in anticipation of the writ by my directions.

L Hundley

Weaver's Ex.

vs. Application for Wrt of Error

Horn's Ad.

filed Nov. 22 '58
Wm E Drummond
Clerk

Hendrick

THE STATE OF MISSOURI, ss.

The State of Missouri, To the Judge of the Nineteenth Judicial Circuit in said State, GREETING:

WHEREAS, In the Record and Proceedings in a certain cause lately pending in the Circuit Court of Greene County in the Judicial Circuit aforesaid

wherein Jno. R. Weaver Ex'r. of Jno. Weaver decd. was plaintiff and Wm R Storm adm'r of Caleb Storm decd. was defendant

in an action of ..... manifest error hath intervened, to the great damage of the said plaintiff as by his complaint, we are informed.

NOW, we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf, COMMAND YOU, that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the same remain of record before you in said Court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the county of Cole, in said State, on the second Monday in January next, so that our Judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness, WILLIAM E. DUNSCOMB, Clerk of our said Supreme Court, at office, in the City of Jefferson, the twenty second day of November in the year of our Lord one thousand eight hundred and fifty five

Wm E Dunscomb

SEAL OF THE SUPREME COURT OF MISSOURI

1

Be it Remembered that on the 30th day of December 1857. The following Petition was filed with the Clerk of the Circuit Court of Greene County Missouri

John Weaver Plff } In the Circuit Court of
against } Greene County in the
Caleb Horn Deft } State of Missouri

Plaintiff states that by his promissory note hereto annexed dated on the 27th day of March 1857. promised for value Recd to pay him (said plaintiff) three Hundred dollars which might be discharged in Cattle under eight years old on or before the first day of September then next following

Plaintiff states that said note has long since became due and payable & although he demanded payment thereof of & from Defendant at his place of Residence in said County of Greene when due and payable yet the same has not been paid & the same with interest remains due for all of which Plaintiff asks Judgment

I Hendrick atty for Plff

John Weaver the plaintiff makes oath and says the above Petition & the matters ~~as~~ therein as stated he believes to be true That after allowing all just credits and offsets said defendant is justly indebted to him by note in the sum of

Three Hundred dollars. And that he has good reason to believe & does believe said defendant is not a resident of or residing in the State of Missouri

Sworn to & subscribed before me Dec 30th 1852
S Davis Clerk

John Weaver

On or before the first day of September next we or either of us promise to pay John Weaver Three Hundred Dollars which may be discharged in Neg cattle under Eight years old for value received of him this the 27 day of March 1852

Caleb Storm
Oliver P Cates

The Plaintiff also on the day aforesaid filed the following Bond

Know all men by these presents that we John Weaver as principle and Allen Fullen as security are held and firmly bound unto the State of Missouri in the sum of Six Hundred & Fifty Dollars for the payment of which we bind ourselves firmly by these presents signed with our hands and sealed with our seals on this 30th day of December 1852

The condition of this Bond is as follows

3

Whereas said John Weaver is about to commence suit against Caleb Horn by attachment in the circuit court of Greene county in said State Now if said John Weaver shall prosecute said action without delay and with effect refund all sums of money that may be adjudged to be refunded to said defendant or formerly to have received by said plaintiff & not justly due to him and pay all damages that may accrue to any defendant or garnishee by reason of the attachment or any process or proceeding in said suit or by reason of any judgment or process thereon then this bond is to be void

John Weaver
Allen Fullilen

Endorsed on which was the following
I approve of the sufficiency of the penalty and the solvency of the security of the above bond
Given under my hand this 30th Decr 1852.

Joshua Davis Clerk

Whereupon an attachment was issued which is in the words & figures as follows

"The State of Missouri
To the Sheriff of Greene County Greeting
We command you to attach Caleb Horn by all and singular his lands and tenements goods chattles moneys credits and effects or so much thereof as shall be sufficient to secure

4

[65]

the sum of Three Hundred dollars with interest and costs of suit in whose hands or possession soever the same may be found in your bailiwick and that you summons the said Cobb Hood that he be and appear at the next Term of the circuit court of Greene county before the Judge thereof on the first day of said Term to be holden at the court house within and for the county of Greene on the 5th Monday after the 4th Monday in April AD 1853 then and there to answer unto John Wearn of a plea of Debt to the damage of said plaintiff Three Hundred Dollars

And have you there and then this writ

Witness Joshua Davis clerk of our said court with the seal thereof hereto affixed done at office in the City of Springfield this 31st day of December AD 1852.

(Seal)

Joshua Davis Clerk

On which said writ of attachment is the following return

I Thos Potter Sheriff within and for the county of Greene and State of Missouri do hereby certify that I levy the within writ of attachment on the Sw qr of the Sw qr of Section No. Twenty one (21) of Town No Twenty seven (27) of Range No Twenty one (21) on the 2 day of Jany 1853 done at the county of Greene

Thos Potter Sheriff

By S K Gibson D Shff

I Thos Potter Sheriff in and for the county of Green

5 State of Missouri certify that I executed the within by reading the same to and within the hearing of the within named Caleb Horn done at Greene County this 13th day of June 1853

Thos Potter Shff.

I Thos Potter Sheriff within and for Greene County do certify that I served the within writ of attachment on the One undivided half part of a certain horse Paul Jones on the 1st day of February 1853 also the South west quarter of the South west of Section Twenty one Township No Twenty Seven (27) of Range No Twenty one (21) on the 13th day of January 1853 and summoned I David as a garnishee on the 20th Jany 1853 done at the County of Greene

Thos Potter Shff
By Henry Fulbright Deptg

After which at the July Term of the Court Court 1853. the following entry was made

John Weaver
against } attachment
Caleb Horn

This day come the defendant in this cause and by leave of the Court files herein his plea in this cause

6 which said plea is in the words following

John Weaver
vs
Cabel Storm } In the Circuit Court Shum County

And now at this day comes the deft in this cause and by leave of the court for a plea in this behalf says it is not true that defendant is a non-resident of nor resides in the State of Missouri as alledged by plaintiff in his affidavit filed in this cause at the commencement of this suit nor was it true at the time of making and filing the same and of this issuing the writ of attachment in this cause and of this he puts himself on the country

Price atty for Deft

And on the same day the following

7

and afterwards on the same day the following Entry was made to wit

Sam
vs } attachment
Same

This day comes the defendant in the cause by his attorney and by leave of the court files herein his motion in this cause.

which motion is in the following words and figures, to wit

Caleb Horn
vs motion } In the Circuit Court of Greene
Thos Potter } County July Term 1853

And now at this day comes the said Horn to order Thomas Potter Sheriff of Green County to refund to him the sum of Two Hundred and seventy four 50/100 Dollars the proceeds of the sale of the property of said Horn arising on the sale of the same by order of this court under an attachment heretofore established by John Weaver against said Horn and which said attachment was dismissed at at Last term of this Court

W C Pine atty for Plff

And afterwards to wit on the 29th July 1850. The following Entry was made

John Weaver
against } attachment
Cobb Horn

This day comes the defendant in this cause by his attorney and by leave of the court files herein his motion to quash the alias attachment awarded in this cause

Which said motion is in the following words

J Weaver
vs } attachment
C Horn

The deft moves the court to quash the alias writ of attachment ordered to be issued in this cause

Because it does not show to the court that a cause existed authorizing the same to be issued

Because there is no authority on the statement of facts shown the court authorizing the same to be issued

Pine for Deft

Afterward to wit on the 16th day of August 1853 at the adjourned July Term the following entry was made

John Weaver
against } Attachment
Cobb Horn } The plaintiff moves the court to set aside the order awarding an alias attachment in this cause which said motion is sustained

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(25)

And afterward to wit on the 19th of August 1853 at said adjourned Term the following order was made

John Weaver
against } Attachment
Caleb Storrs

This day comes again the aforesaid parties by their respective attorneys and the motion for alias attachment heretofore filed coming on to be heard and all and singular the premises being seen and by the court well understood it is considered by the court that the said motion be overruled And it is ordered by the court that the Sheriff of Greene County refund to the said defendant Caleb Storrs the amount of money raised of said defendants by sales of Defendant property or otherwise by virtue of an attachment sued out by plaintiff against said defendants which said attachment was quashed at the last term of this court and that the said defendant have and recover of and from said ~~defendant~~ plaintiff his costs expended for all of which execution may issue

And afterward on the 13th day 1854 at the Jan Term of said court the following entry was made

John Weaver
vs } Civil action writ of attachment
Caleb Storrs } Now at this day comes the defendant by his attorney and by leave of the court files herein a motion to

10 quash the writ of attachment in this cause and to dismiss this suit.

which said motion is in the words following.

John Weaver
vs } Attachment
Caleb Horn

The Defendant by attorney moves the court to quash the writ of attachment & dismiss said suit be cause there is no Bond in this cause

Because no bond as required by law was filed before the writ issued in this cause Price for deft

and afterward on the 17th of Jany at said term the following Entry was made.

John Weaver
vs } Civil action
Caleb Horn

Now at this day comes the plaintiff by attorney and files an affidavit verifying that the original attachment Bond filed in this cause has been lost and by leave of the court files herein a new attachment Bond and the Court doth approve the same

which said affidavit & Bond is in the words following

11

647

State of Missouri }
County of Greene } ss

This day personally appeared before the undersigned an acting justice of the peace in and for the county aforesaid John Weaver who being duly sworn according to law on oath states that purpose to commence a certain suit in the Greene circuit court in his name by attachment at present pending in said court against Caleb Storrs that before commencing said suit at present pending he entered an attachment Bond with Allen Fulkerson as his security which Bond was filed with the clerk of the Greene circuit court before the said writ of attachment issued which Bond and security was approved of by said clerk and filed in his office Allen Fulkerson being also sworn by me state the facts above stated are true

John his + mark Weaver
Allen Fulkerson

Sworn to and subscribed
before me this day of
1854
Peter Apperson J.P.

Know all men by these presents that I, John Weaver as principle and

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as security are held and firmly bound to the State of Missouri in the sum of Twelve Hundred dollars for the payment of which sum we bind ourselves our heirs executors admrs and assigns by these presents sealed with our seals and dated this day of

The condition of the above obligation is such that said John Weaver has sued out an attachment against Caleb Horn now if said Weaver shall prosecute his action without delay and with effect refund all sums of Money that may be adjudged to be refunded to the defendant or forwarded to have been ruined by the plaintiff and not justly due him and pay all damages that may accrue to any defendant or garnishee by reason of the attachment or any process or proceeding in the suit or by reason of any judgment or process thereon then the above Bond to be void otherwise to remain in full force

John Weaver Seal
Allen Fielden Seal

Afterward to wit on the 20th day of January 1854 at said court the following proceedings was had (to wit)

13

John Weaver
vs
Caleb Horn

Now at this day comes the parties by their respective attorneys and having announced themselves ready for trial thereupon come a jury to wit Elam P Gott, John R Earnest, W A Bagley H J Cain, R B Coleman R H Williams, Shadrick Dickens W H Frazier W J Camfax R B Owen Joshua M Bailey A M Ingram twelve good and Lawfull men duly elected tried and Sworn, to well and truly try the issue joined in this cause after hearing the evidence and arguments of counsel and retiring to consider of their verdict do upon their oath say that they cannot agree upon a verdict and by consent of parties were discharged

The following are the instructions given by the Court

Weaver
vs } attachment
Horn

The Court instructs the jury as to the first issue they are required to find whether or not defendant resided in the State of Missouri on the 30th day of Decr 1852.

That in order to change one residence there

14 must be a leaving with an intention not to return & that absence from home ~~whether with~~ or without his family is not of its self evidence of that fact

That it is the intention that changes the residence & not absence from home and that while there is doubt on the persons mind whether he will change or not & his residence remains the same

The absence of deft at the time the attachment issued is no reason in favor of the attachment unless the deft had left the state with the intention not return

That although the jury may believe the deft was not absent so long as to prevent the service of process before the then next term of the circuit court

Yet if from the defendants own declarations after he had started he left the impression that he would not return in time for or any process to be served on him then the jury ought to find the second issue for the plaintiff

~~After words on the 21st of January 1858 at the same term of said court the following proceedings were had to wit~~

15 ~~John Weaver~~
~~vs~~
~~Caleb Horn~~ } ~~Attachment~~

~~This day comes the parties by attorneys and by leave of the court defendant files herein a demurrer to plaintiffs amended affidavit.~~

On the same day the following affidavit was filed by the plaintiff

John Weaver
against } Attachment in the Greene Circuit
Caleb Horn } Court

This affiant John Weaver the above plaintiff makes oath and says that at the time of the commencement of this suit when he made the affidavit in this cause he had good reason to believe and did believe said Horn was not residing in nor resident of the State of Missouri that he was indebted to the plff after allowing all just credits & offsets in the sum of three Hundred Dollars, he also had good cause to believe and did believe that said Horn was about to remove his property and effects out of this State with intent to hinder and delay his Creditors and said affiant now has good cause to believe and does believe said Horn is not a resident of this State and said affiant also states that at the commencement of this suit

16 he had cause to believe and did believe that said Horn had absented himself from his usual place of abode in this state so that the ordinary process of law could not be served John Weaver

Sworn to & subscribed before me this 20th day of January 1854

A G McCracken Clk

By W H Graves D C

Afterwards on the 21st of said month of January 1854 at said Term the following proceedings were had

John Weaver
vs } attachment
Caleb Horn

This day comes the parties by attorney and by leave of the court defendant files herein a demurrer to plaintiff amended affidavit which was by the court sustained so far as relates to matters transpiring since the filing of the original affidavit

Which demurrer or motion is in the words following to wit

John Weaver
vs } attachment
Caleb Horn

Deft by atty moves the Court

17 to strike out that part of Plaintiff amended affidavit that is contradictory to the original facts stated in said affidavit and the facts that are inserted in the amended affidavit that did not exist at the time of making the original affidavit or issuing of the writ of attachment

Price for Deft

And on the day appears the following Entry

John Weave
vs
Cabel Horn } attachment

This day again came the parties by attorneys and having announced themselves ready for trial thereupon comes a jury viz William E Williams David D Martin John Booker Benj F Butler William Hunt John C Bigbee Joseph Brown Bennett Fox, Bennett Cook James M Johnson James H Fagg and G Young twelve good and lawfull men duly elected tried and sworn to will and truly try the issue joined in this cause after hearing the evidence and arguments of counsel and having retired to consider of their verdict do upon their oath say that they cannot agree and by consent of parties were discharged

~~Afterwards to wit on the 21st day of August 1854 at the adjourned July Term of said court the following entry was made (to wit)~~

18 The following are the issue which were given to the jury. and are in the words following

Issues to be tried by the jury.

The first fact is that on the 30th day of Dec 1852 the defendant was not a resident of nor resided in the state of Mississippi

Is that fact true or not true

The second fact is that at that time the the defendant had absented himself from his usual place of abode in this state so that the ordinary process of law could not be served on him

Is that fact true or not true

The following instruction was given to the jury

That if Deft left this state or his usual place of abode in Sept 1853 & returned to his usual abode in this state in the spring of 1853. and remained at the same until the fall of 1853 it is not true that deft had left his usual abode in this state so that the ordinary process of law could not be served on him & that if you so find they will find the second issue for the Defendant

After word to wit on the 21st August 1854. at the adjourned July term of said court the following entry was made

19 John Weaver
vs } Civil action
Caleb Horn

This day comes the attorney for the parties in the above cause and suggests that since the last term of this court both the parties in this cause have died

Afterwards to wit on the 17th day of March, 1855 at the March Term of the said court the following entry was made

John Weaver
vs } Civil action
Caleb Horn

Now at this day comes the parties by their attorney and by agreement John R Weaver (Executor of Plff) and Wm R Horn (Administrator of Defendant) and by order of the court are made parties in the above cause

Afterward to wit on the 29th of March at the same term of said court the following entry was made.

John R Weaver Executor of (John Weaver Dec'd)
vs } Civil action
Wm R Horn admr of (Caleb Horn Dec'd)

Now at this day comes the parties

20 by their attorney and having announced themselves ready for trial thereupon come a jury to wit, James Robinson John Breedlove Joseph D Haden Daniel Gray James Rowan J H Freeman Allen Wallace Mathew Wallace John K Pace Joel Fagg Robert Forester & C A Jameson Twelve good and lawfull men being duly elected tried and sworn to will and truly try the matters at issue between the parties proceeded to hear the testimony which having been concluded thereupon comes the plaintiff and says he will not further prosecute his said suit but will take a non-suit thereon It is therefore ordered by the court that the plaintiff take nothing by his said suit and that the Defendant have and recover of and from the plaintiff his costs laid out and expended for which Execution may issue and leave is granted plaintiff to file his motion to set aside said non suit

and afterward to wit on the 30 day of March at said term the following Entry was made

John R Weaver Ex of John Weaver Dec } civil action
v
Wm R Horn Admr of Caleb Horn Dec }

Now at this day comes the plaintiff by his attorney and by leave of the

21 Court files herein his motion to set aside the non suit taken in this cause and reinstate the same on the Docket and all and singular the premises being seen and by the court fully understood said motion was by the court overruled

Which said Motion is in the words following

John Weaver Exec of Plff
Estate of John Weaver Decd
vs
Wm R Horn Administrator of
Estate of Caleb Horn Dec Deft

} Attachment
Plea in abatement

Plaintiff by his attorney moves the Court to set aside non suit and reinstate the case upon the docket for the following reasons

Because the court gave improper instructions for defendant

Because instructions given for defendant was not warranted by the Testimony in the Cause

Because the court refused to give proper Instructions for Plaintiff

Hendrick & Crawford
for Plff.

and afterwards to wit on the 19th day of Sept 1855 at the September Term of said Court the following entry was made

John R Marw adr
vs
Wm R Storm Exr.
} Civil action

Now at this day comes the plaintiff by attorney and moves the Court that the Bill of Exceptions filed in this cause at the last term of this Court be entered of Record Nunc protunc.

Which said Bill of Exceptions is in the following words to wit

John R Weaver Executor of Estate of John Weaver dcd Plff
vs
Wm R Storm admr of Estate of Caleb Storm dcd Deft

Be it Remembered that on the trial of the above cause the following was all of the testimony introduced

It was proved on part of Plaintiff by John N Ruyle that sometime in the latter part of September in the year 1852, he was at Frazers distillery where was Wills and Sousee on their way moving to the State of Texas he also met

23 Caleb Horn there who was going with his family in company with Wells and Jones to Texas and when he went to part with Caleb Horn he asked Horn when he expected to return from Texas and Caleb Horn him he never expected to return to Missouri. It was also proved on the part of Plaintiff by Regin G. Wells that something was said in regard to Horns not returning from Texas but could not Recollect exactly what it was. Fulton testified also that he was at Harris house when he started to Texas and he understood from Horn that he did not intend to return that he went to see Horn for the purpose of going to Texas with Horn and furnishing part of the outfit and Horn informed him that he would like to have his company but he did not intend to return from Texas. It was in proof by all of these Witnesses that Caleb Horn did leave the Country and said he was going to the State of Texas and also that they did not see him in this state until sometime in the month of April 1853. probability about the last of the Month

It was proved by Defendant

That sometime in the latter part of September 1852 he was at Horns house the night before Horn was to start to Texas

24. And that Horn made a contract with a man by the name of Brown renting his farm to him Horn was to find every thing (except the Horses to work the farm) and was to pay one half the crop for rent. He employed Brown to gather his corn fatten Kill and Bacon his hogs. take care of his cattle and his household and Kitchen furniture Brown was to give up the house to Horn if he returned in the Spring and Horn was to get him another house The same facts last above stated as proved on part of Defendants were proved by two witnesses It [illegible] also proved by one witness who was married to Horns niece that he said he would return in the Spring certain of life Lasted. Left his Stallion some 7 or 8 head of cattle and his hogs on the farm on which he resided. At witness request he said he would write to him and when he came back he would tell him all about Texas as he expected to explore that country. Horn made no further declarations to this witness till he returned with his family about the first of April 1833

It was proved on part of Defendant by Wm H Brown that Horn Started to Texas on the 15th day of September 1832 and that he moved into Horns house the next day that he rented his farm. was to take care of his

25— Stock & Grain and was to assist Oliver P. Kates in Gathering up the cattle that was due him for the services of his Horse that year to pay John Weaver the debt he had against him and Kates for a Stallion called Paul Jones, If they could not gather cattle sufficient to pay the debt he was to take cattle off the farm. He was to cover the Stud Stable and keep the Stallion Paul Jones till Spring at which time Kates was to take him and keep him through the Season Horn said if it was an open Winter he might return from Texas in December 1852. Horn returned with his family in April 1853 And took possession of his house again furnishing Wm. another Horn when he left for Texas. left a part of his household and Kitchen Furniture When he started he said he was going to Texas for his health and to see the Country ——

James K. Horn on the part of Deft stated that he went with Horn when he started as far as Frogins Still House. and heard him say he was going to Texas for his health and to see his wifes relations in Texas and that he expected to return in the Spring and that he did return in April 1853, He was there before Mills and Screven Waggons got there and while they were there waiting for the waggons

26 to come up he heard Horn say he was coming back in the Spring Upon Cross examination of James K Horn he stated that he did not recollect how or who introduced the subject of his return but it was talked about and no person was present but Horn himself and A P Cates. that witness and defendant had often conversed about his going to Texas before that time. That he was nephew to defendant and intimate with him It was proved on part of the Defendant by Absolom Kellner that Horn Slayed all night at his house the night before Horn and he went to the Distillery that he did not recollect the time when Horn Started. Supposed the date stated by other witnesses. to be correct. Horn told me during the time he stayed with me that he was to meet Wells and Journes. Waggons at Frazers Still House and from some cause they did not come on the day appointed Horn then drove to my house and Slayd all night next morning we went to the Distillery Horn heard of Wells Journes waggons coming and we Stopped there till the waggons come up Horn had some understanding about where he would meet the waggons and we returned to my house got his waggon and started They were to meet some place on Jams beyond the Distillery He told

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me sometime while he stayed at my house this time and I cant say at what time he said it that his object in going to Texas was his health. He also told me he calculated to return next Spring. and if the country agreed with him he intended to stay there whether he it or not. On cross examination he stated that John McRyle Regin Ellis Elisha Smart and others were at the State House while he was there. Upon re examination witness stated that he married Defendant cousin and that his Brother married Horn sister that he and defendant were on intimate terms and that he dont recollect that he and Horn had any conversation about going to Texas after they started from the Distillery to his House William R Cox on part of Defendant stated that the last he saw of Horn previous to his going to Texas was while Horn was on his way to Texas sometime in September 1852, on the Delaware trace before they got into the State road, between McCullough and James. He went with Maxey to overtake Horn while he was on his way to Texas, and having heard of them they stayed all night at McCulloughs and started next Morning, to meet Horn and met him as above stated

He met Horn not less than ten miles nor more than

fifteen miles west of Frazers. Still Horne then was a conversation between Weaver and Horn and appeared to be a good deal excited at first conversation was about what Horn owed Weaver in which asked Horn. why he did not come to see him before he started I. Dont recollect Horns answer but during the conversation Horn told Weaver he thought that he ought to be satisfied. that he had left his Stock. his Stallions and the Books & accounts for his Services. and he thought he ought not to be uneasy. His statement did not appear to satisfy Weaver. but Weaver proposed that if James Horn his father would put his name to the note, he would let it rest, till Horns return in the Spring, Horn wrote a few lines to his father and handed it to Weaver. Horn stated that he was going to Texas and would return in the Spring. He said he had left his Stallions and the accounts for his services his stock of cattle and hogs and his farm. On cross Examination. of John N Ruyle he stated he could not positively say whether it was the bad health of Horn was the reason of his saying he never expected to return or whether he intended to make Texas his residence But Horn made the impression on Ruyles mind that he did not intend to return

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Ira Dalton further stated that it was about a week before Doorn started that the conversation with him

The Plaintiff then asked the court to give the following instructions viz

1st The court instructs the jury that if they believe from the evidence that the defendant left home in Sept 1852 and said he was going to the State of Texas and did absolutely go off and not return until the Spring following that is evidence of his absence out of the State and if he said that he expected or intended never to return that is evidence that he did not after that reside in or was a resident of this State until his return

2d That although Deft may have told some persons as he was starting that he intended to return yet if after that he told John Ryle & Mr Smart that he intended or expected never to return to this State but remain in Texas that is conclusive evidence against the defendant that he was not then nor afterward until his return a resident of nor residing in this State

3d That if the Defendant told some persons he was coming back and others that he was not coming back his contradictory statements are to be taken strongly against himself & the jury are warranted

in coming to the conclusion that he did not intend to return

4th That unless the Jury believe from the evidence that Storm was to return from Texas and did return fifteen days before the return day of this writ in this court so that the ordinary process of Law could be served on him they will find for the plaintiff

5th That it was necessary in order to constitute service of the ordinary process of Law that the writ and declaration should be read to the defendant or a copy of the writ and declaration should have been to him or a copy of the writ and declaration should have been left at his usual place of abode with some white person of the family over the age of fifteen years

That said service could be made by some Sheriff of the State of Missouri only.

Which were by the court refused

To the refusing of to give the above instructions plaintiff Excepted

The court Gave on part of the Defendant the following instructions

31

~~Ira Fulton further stated that it was about a week before Horn started that the conversation with him.~~

~~The Plaintiff then asked the court to the following instructions viz:~~

Mears
vs
Horn

1st The court instructs the jury that in order to changed a married mans residence he must not only lay his residence with an intention never again to return to it but he must actualy have acquired another residence and though he may have left his former residence with an intention never to return yet if he have not actualy acquired another his old residence continues to be his residence in contemplation of law.

2d That the declarations and acts of Deft at the time he left home and in his preparation to leave and on his way to Texas after he left home as well as the circumstances of his having his property at home are the facts from which the jury are to gather Defendants having or not abandoned his home with an intention to acquire a new and different one and although the jury might

32 find that deft left home with the intention never to return yet if they further find deft did not acquire a new home out of this State and settle himself on it they must find first issue for Deft

3D. That if the Jury find that Deft returned with his family to his home in this ~~State~~ County in 1853 in April that they must find the Second Issue for Deft,

To which plaintiff Excepted Plaintiff also filed a motion to set aside non-suit and reinstate the cause upon the docket which motion was by the Court overruled

To all of which decision of the Court the plaintiff Excepted and prays this his Bill of Exceptions may be signed sealed and made part of the record in this cause which is accordingly done

C G Yancy Ct Judge Seal.

State of Missouri }
County of Greene } ss.

I A G McCracken Clerk of the County Court within and for said county do certify that the foregoing is a true transcript of the Record and proceedings had in the case of John Weaver against Caleb Storm as manifestly appears on the Records in my office

In Testimony whereof I have hereunto set my hand and seal of said Court at office in the City of Springfield this 31st day of Oct 1853

A G McCracken Clerk
By W D L H Mack D C

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Entry at August Term 1853 & 2d Entry do	8 & 9
Entry at Jany Term 1854 & Motion	9 & 10
Second Entry at Jany. "	10
Second affidavit & Bond	11 & 12
3d Entry at Jany Term 1854 & Instructions	13 & 14
affidavit of Plff & Entry	15 & 16
Copy of Demurrer & Entry	16 & 17
Issues Joined & Instructions given	18
Entry at July Term 1854	19
Entry at March Term 1855	19 & 20
2d Entry at March " " & Motion	21
Entry at Sept 1855	22
Bill of Exceptions	22 to 32

45 ~~55~~

Jno. R Weaver

Exr. of Jno. Weaver, dead

v

Wm R Horn

admr. of Caleb. Horn, dead

filed Nov. 3 1855

Wm E Duncomb

Clerk

Greene

[40]

J. Weaver Executor of
John Weaver decd.
vs
Wm. Horn Admr
of the estate of C. Horn decd.

civil action in
the Greene cir-
cuit court

The Deft. & his atty will
please take notice that the Plaintiff
has sued out of the Supreme Court
a writ of Error in this case return-
able to the next Jan. Term
thereof
Nov. 18th. 1855.

L. Hendricks atty
for Pltff.

Original

Weaver Ex

my notice

Horn's Ad.

This notice was served in due time Wm C. Price atty for Horn

filed Jan. 24 '56

Wm E Dunscomb

Clerk

In the supreme court
John R Weaver ex^r Jammes Term 1855
of John Weaver dec^d
vs } Error to Green
W^m R Horn Ad^r of
Caleb Horn dec^d

This was an attachment originally brought John Weaver vs Caleb Horn — During the progress of the trial they both died & the above parties have been substituted Caleb Horn before his death put in a plea in the nature of a plea in abatement pulling in issue the truth of the affidavit — upon the courts giving certain instructions for defendant upon the trial of the plea in abatement plaintiff voluntarily to a nonsuit & upon the courts refusing to set it aside he appeals to this court — This was done at the March Term 1855 — There is no record of the filing of any bill of exceptions at that Term — but at the next Sept Term there is the following entry —

"Now at this day comes plaintiff by his attorney and moves the court that the bill of exceptions filed in

cause at the last term of this court be entered of record nunc pro tunc" — but no action of the court appears to have been taken upon the motion —

The ground of attachment was that defendant was a non resident of the state —

The suit was instituted in Dec 1852. returnable on the 5 Mondays after 4th Monday in April 1853 —

The evidence introduced on the trial of the plea in abatement tended to prove that Defendant ~~[illegible]~~ resided on his farm in Green County in this state. That he was in bad health & concluded to spend the winter in Texas He employed a man by name of Brown to gather his corn fatten & kill his hogs make & cure bacon — to take care of his cattle & household furniture and to deliver up his house to him as he returned in the spring — He stated he would return in the spring of life lasted —

He & his family went to Texas but returned in the spring, and in time to have had personal service on him before the return day of the writ

and declaration should have been left at his usual place of abode with some white person of the family over the age of fifteen years — that said service could be made by some sheriff of the state of Missouri only —

These instructions were refused & plaintiff excepted —

The court the instructs the jury on the part of defendant —

1st The court instructs the jury that in order to change a married mans residence he must not only leave his residence with intention never again to return to it, but he must actually have acquired another residence — & though he may have left ~~the~~ his former residence, with an intention never to return yet if he has not actually acquired an other, his old residence continues to be his residence in contemplation of law —

2d That the declarations & acts of defendant at the time he left home & in his preparation to leave, and on his way to Texas after he left home as well as

the circumstances of his leaving his property at home are the facts from which the jury are to gather defendants having or not, abandoned his home with an intention to acquire a new and different one, and although the jury might find that defendant left home with the intention never to return, yet if they further find defendant did not acquire a new home out of this state & settle himself on it they must find first issue for Deft.

3d That if the jury find that defendant returned with his family to his home in this County in 1853, in April that they must find the second issue for defendant

These instructions were given & plaintiff then took a nonsuit

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It is stated by the clerk that after the testimony was concluded plaintiff took a nonsuit, but as to his taking the nonsuit, is not stated in the bill of exceptions, further that it states that plaintiff filed a motion to set aside the nonsuit which was over ruled — the motion is not cofedente

return to this State but remain in Texas that is conclusive evidence against the defendant — that he was not then nor afterwards till his return a resident of nor residing in this State —

3d That if defendant told some persons he was coming back & others that he was not coming back, his contradictory statements are to be taken strongly against himself, and the jury are warranted in coming to the conclusion that he did not intend to return —

4th That unless the jury believe from the evidence that Hom was to return from Texas & did return fifteen days before the return day of the writ in this court so that the ordinary process of law could be served on him they will find for the plaintiff

5th That it was necessary in order to constitute service of the ordinary process of law that the writ & declaration should be read to the defendant or a copy of the writ

the general statements were that he intended to return in the spring & such was the general tendency of the evidence,

Plaintiff however proved by one witness that he applied to Horn to go with him & furnish part of the out fit, but Horn informed him he did not intend to return —

Plaintiff asked the following instructions

1st The court instruct the jury that if they believe from the evidence that the defendant left home in Sept 1852 & said he was going to the state of Texas, and did absolutely go off and not return till the spring following that is ~~shown~~ evidence of his absence out of the State, and if he said that he expected or intended never to return that is evidence that he did not after that reside in, nor was a resident of the state ~~of Alabama~~ until his return —

2d That although defendant may have told some persons as he was starting that he intended to return, yet if after that he told John A Rush & Mr Smart that he intended or expected never to

the bill of exceptions -

Points & authorities

1st The court will not regard the bill of exceptions as forming a part of the record as there is no sufficient evidence of that fact - There is no evidence from the record that it was filed at the time the trial was had — Rubb vs Thomasson 20 Mo 263 Elliot vs Pogue 20 Mo. 263 -

2d -

A voluntary non suit, taken upon the trial of a preliminary issue not involving the merits of the action should not be set aside - Dumas vs Schaeffler 20 Mo 323 - Louisiana & Middleton Plank Road Co v Mitchell 20 Mo. 432 -

3 There was no error in refusing the instructions asked by plaintiff -
Defendants instructions contained the law. Story on the conflict of laws - S 43. 44. 45. 46. 47 — — Elingler vs More 17 Mo 424.

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Weaver Ax^r v
Weaver.

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Horn Adm^r v
Horn

Defts Brief

filed Jan^r 24 '56
Wm E Dunscomb
Clerk

F P Wright

Wm R Horn, admr. of
Caleb Horn, decd.
vs
Jno. R Weaver Exr. of
John Weaver, decd.

In the Supreme Court, in error to the Greene Circuit Court

Fee bill of costs in the Supreme Court to be paid by John R Weaver Executor as aforesaid

William E Dunscomb's costs as Clerk of said Supreme Court

writ of error 1.50 docketting case ,50	2.00
appearance 20 errors 45 argt. & sub. ,50	1.15
trial & judgment 1.00 order ,25	1.25
filing papers 20 certified judgment ,75	,95
copy of judgment ,75 this fee bill 75	1.50
	$6.85
Mc D Doniss Marshal	30
Total	$7.15

Attest

Wm E Dunscomb.

Clk Sup. Court of Mo.

To the Sheriff

of Greene County, Mo.

The within fee Bill satisfied in full
this 25th Decr 1856
Peter C Kingshoff

Wm R Storm, admr
of Caleb Storm decd
vs } Fee bill
Chas R Weaver Exr
of Chas Weaver decd

Costs

Mr D Davies	30
Wm E Davis, comb	6.85
	$ 7.15

Satisfied

Greene

please collect & bring the money
with you next unite
1828
the certified judgment is for the admr of
Weaver