

Case No. 5,054.

[6 Blatchf. 426.]¹

FRANKLIN V. HEISER ET AL.

Circuit Court, S. D. New York.

June 2, 1869.

CONTRACTS—CONSTRUCTION—RECOVERY OF STOLEN BONDS—REWARDS.

Where H. made a written agreement with F., that, in case F. could recover certain bonds fraudulently obtained from H, he would pay \$3,000, and the police notified H. that the bonds had been recovered, and were subject to his order, and they did not pass through the hands of F.: *Held*, in a suit brought by F., against H., to recover the \$3,000, that it was incumbent on F., in order to show that he recovered the bonds, within the meaning of the agreement, to show that the police recovered the bonds through information furnished by F., and that it was not enough for F. to show that he sent communications on the subject to the police before the bonds were recovered, it appearing that the police had received other communications on the subject, as well as one from H., before the bonds were recovered.

This was an action of assumpsit tried before the court without a jury. The plaintiff [Benjamin Franklin] was a detective police officer in Philadelphia. The defendants [Henry A. Heiser, Jr., and others] composed the firm of Henry A. Heiser's Sons, of New York. The declaration averred, that \$15,000 worth of United States five-twenty bonds had, prior to the 24th of November, 1868, been feloniously abstracted from the possession of the defendants; that, on that day, the defendants agreed with the plaintiff, in consideration that he should undertake to recover the bonds, that they would, in the

event of the recovery of the same by the plaintiff, pay to him the sum of \$3,000, and that, in the event of the recovery by him of a less amount than the whole of the bonds, they would pay him in the proportion that the amount recovered should bear to the whole sum of \$15,000; and that he did recover all of the bonds for the defendants. The contract between the parties was in writing, as follows: "Philadelphia, Nov. 24, '68. We hereby agree, that, in case B. Franklin, Esq., or assigns, can recover fifteen thousand of 5/20 U. S. 6% bonds, fraudulently obtained from us by J. A. Marsh, we will pay three thousand dollars, and that, in case he returns any amount of the above described bonds, we will pay in the same proportion. Henry A. Heiser's Sons." The bonds were recovered, all of them, at Memphis, Tennessee, where Marsh was arrested. The defendants obtained all of them, but none of them passed into, or out of, the hands of the plaintiff. One of the defendants went to Memphis, from New York, after the arrest of Marsh, and obtained the bonds, after four days' efforts there, from parties who had them in possession, and by the payment of \$4,000. The plaintiff was not at Memphis. He started to go there, and had reached Paris, Tennessee, when he learned that Marsh had been arrested at Memphis, and had been taken to New York by officers from Memphis, and that he, Franklin, had passed them on the way. He retraced his steps, and overtook them in Indiana, and accompanied Marsh to New York, reaching there two days after the defendant who obtained the bonds had reached Memphis. That defendant had left New York for Memphis three days before he reached Memphis, having learned, by a telegraphic despatch to the defendants, from the police of Memphis, that Marsh had been arrested, and that the bonds had been recovered, and were subject to the order of the defendants, less reward and expenses. This despatch reached the defendants, at New York, on the same day that the plaintiff learned, at Paris, of the arrest of Marsh. On the 23d of November, the day before the agreement was made with the plaintiff, the defendants authorized the New York police to offer a reward of \$5,000 for the recovery of the bonds. A telegraphic despatch from the police of New York, to the police of Memphis, giving Marsh's name, and age, and a description of his person, and stating the amount and character of the bonds he had abstracted, and the reward, reached the police in Memphis on the 24th of November, before the agreement with the plaintiff was made. The defendants themselves, on the 25th of November, at half-past 11 o'clock A. M., sent from New York, to the police at Memphis, a telegraphic despatch, as follows: "Marsh left Philadelphia, by evening train, on 23d. He started for house of J. Ferguson, his uncle, in your city. Arrest him, and hold him till arrival of B. Franklin, Philadelphia detective, who leaves to-day." The plaintiff made no communication to the police of Memphis until 7 o'clock P. M., on the 25th of November, when he sent a telegraphic despatch to them from Philadelphia. He left Philadelphia, for Memphis, at 11 o'clock P. M., the same day. In addition to the written agreement, the defendants furnished the plaintiff with \$500, to defray the expenses of himself and

of Marsh's brother, who was to accompany him, to Memphis. This sum, or so much as should not be expended, the plaintiff was to retain in any event

Charles M. Da Costa, for plaintiff.

John E. Burrill, for defendants.

BLATCHFORD, District Judge. On the facts in this case, I think it is incumbent on the plaintiff, in order to show that he recovered the bonds, within the meaning of the written agreement, to show that the police of Memphis, who notified the defendants that the bonds had been recovered and were at Memphis, subject to their order, less reward and expenses, recovered them through information furnished by the plaintiff. It was easy, if the fact was so, for him to have done this, by producing the testimony to that effect of the police officers of Memphis, who arrested Marsh and obtained the bonds. No explanation is furnished on that subject by the plaintiff, except merely to show that he sent the despatch of November 25th, from Philadelphia, and several despatches afterward from various places on his way to Memphis, which gave a description of Marsh, and particulars as to when he left Philadelphia and Cincinnati for Memphis, and as to the number of his ticket, and which were received by the police of Memphis before Marsh's arrest. The case would be different in the absence of the despatch from the police of New York, of November 24th, and of the one from the defendants of November 25th. The action, therefore, so far as it is founded on the special contract, fails.

There are in the declaration counts for work and labor, &c, being the common counts. But, on the evidence, the plaintiff was to be entitled to nothing but the \$500 he received unless he should recover the bonds or some of them. Therefore, he can recover nothing in this suit, on a quantum meruit, for the services he rendered.

I find for the defendants.

¹ [Reported by Hon. Samuel Blatchford. District Judge, and here reprinted by permission.]