GAGE v. JUDSON.

(District Court, D. Connecticut. March 13, 1899.)

No. 1,159.

JUDGMENT—WHAT CONSTITUTES—RECORD ENTRY.

A memorandum on the minute book of the judge to the effect that an award of arbitrators in a certain sum is approved and accepted does not constitute a judgment.

C. W. Comstock and A. W. Page, for petitioner.
De Forest & Klein and Canfield & Judson, for respondent.

TOWNSEND, District Judge. This is a hearing on a motion to deny, for want of jurisdiction, a motion to open a judgment entered on January 3d, approving and accepting an award of arbitrators. The original motion to open said judgment was filed during the term in which said judgment was entered. Counsel for defendant contend that this court has no jurisdiction, because the award was presented to the court during the preceding term, and they claim judgment was then rendered thereon. In support thereof, they rely upon the following entries in the minute book of the judge:

"Oct. 5, 517. Gage, Secy. Treasury, vs. Judson. Award of $32,000 in favor of Judson, and U. S. is satisfied with award, and asks report be accepted and discontinue as to others. Order discontinuance granted. Balance continued.

"Oct. 7. U. S. Gage vs. Judson. Award approved and accepted, $32,000."

These minutes are not, in any sense, the entries of a judgment. They are the mere memoranda of the judge as to the proceedings in court, and as to the course to be pursued when the judgment file shall be presented. The motion to deny for want of jurisdiction is refused. Counsel may have 10 days in which to file briefs, on the further claim that the court has no jurisdiction to accept and approve said award.

KEELER v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 1,070.

1. RAILROADS—LIABILITY OF RECEIVERS ON CONTRACTS OF EMPLOYMENT OF COMPANY.

In the absence of an order of court, a contract of employment of a railroad company is not binding on receivers afterwards appointed for it, within a clause of a subsequent deed of the railroad providing that the conveyance is made subject to "any and all indebtedness, obligations, or liabilities which shall have been legally contracted or incurred by the receivers."

2. SAME—FORECLOSURE—REORGANIZATION—LIABILITY OF NEW COMPANY.

Under Sess. Laws Kan. 1876, c. 110, § 1, providing that purchasers of a railroad at foreclosure sale may organize a new company, etc., but "that such organization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company," a contract of employment of the old company, existing when the new company is formed, does not become a liability of the latter.

3. SAME—PLEADING.
Even if it were otherwise, a complaint against a new company on a contract of an old organization should show that the new company was formed under said statute.

In Error to the Circuit Court of the United States for the District of Colorado.

This is an action by F. L. Keeler against the Atchison, Topeka & Santa Fé Railway Company for breach of a contract of employment. A demurrer to the complaint was sustained, and a final judgment was entered in favor of defendant, and plaintiff brings error.

A. J. Abbott (E. C. Abbott, J. S. Jaffa, and J. J. McFeely, on the brief), for plaintiff in error.

Charles E. Gast, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was disposed of in the lower court on a demurrer to the complaint, which was sustained, and a final judgment was thereupon entered in favor of the Atchison, Topeka & Santa Fé Railway Company, the defendant below and the defendant in error here. The case made by the complaint, which was adjudged insufficient, was as follows: Prior to September 24, 1878, F. L. Keeler, the plaintiff in error, had been in the employ of the Atchison, Topeka & Santa Fé Railroad Company, the predecessor of the defendant, as a railroad engineer, and had sustained certain personal injuries. By way of settlement and compromise of a claim made against it by the plaintiff on account of said injuries, the Atchison, Topeka & Santa Fé Railroad Company on the day last mentioned entered into a contract with the plaintiff, whereby it paid him $1,720 in money, and agreed "to employ the said Keeler to work for said company in such capacity as he is capable of filling, so soon as he is able to perform the duties thereof, and to pay him the same wages for such services as the said railroad company from time to time may pay others for like services; and so long as the said Keeler shall remain and be able to perform the duties and services from time to time given him to do, and he shall remain faithful, honest, competent, and obedient, to continue him in its employ, and to treat him in all respects, as to promotion, as other employés of said company are treated." From that time forward until December 23, 1893, when receivers were appointed for said railroad company in a suit to foreclose a mortgage on its road, the plaintiff continued in its service as a locomotive engineer. He was also employed by the receivers after their appointment until about June 20, 1894, when he left their service temporarily on account of sickness. On August 15th of the same year he applied to the receivers for reinstatement in their service, but they declined to further employ him. All the property and franchises of the Atchison, Topeka & Santa Fé Railroad Company were sold on December 10, 1895, under a decree of foreclosure which was entered in the aforesaid foreclosure suit, at which sale its property and franchises were purchased by Edward King, Victor Morawetz, and Charles C. Beaman, who subsequently conveyed the same property and franchises to the defendant, the Atchison, Topeka &

Santa Fé Railway Company, which latter company was organized on December 12, 1895, under the laws of the state of Kansas. The deed by which the property was thus conveyed to the defendant company was made subject to "any and all indebtedness, obligations, or liabilities which shall have been legally contracted or incurred by the receivers * * * before delivery of possession of the property sold, and also any indebtedness and liabilities contracted or incurred by said Atchison, Topeka & Santa Fé Railroad Company in the operation of its railroads prior to the appointment of said receivers, which are prior in lien to said general mortgage, and payment whereof was provided for by the order of said court dated January 10, 1894, and filed January 16, 1894, and which shall not be paid or satisfied out of the income of the property in the hands of said receivers, upon the court adjudging the same to be prior in lien to the said general mortgage, and directing payment thereof." The complaint also pleaded the provisions of section 1, c. 110, Sess. Laws Kan. 1876, which was then in force and unrepealed. This section provides, in substance, that, when a railroad is sold in pursuance of a judgment foreclosing a mortgage or deed of trust thereon, the person or persons acquiring title under the sale, and their successors or assigns, may thereafter exercise all the rights, privileges, and franchises which belonged to the company making the mortgage, so far as they pertain to the portion of the road sold, and that they may organize a new company, elect directors, and dispose of stock in the same name as the old company, or may adopt another name, and may conduct their business generally as provided in the charter of the original company: provided, however, that the new company shall exercise no greater powers than were exercised by the old company: and provided that the new company shall file in the office of the secretary of state a certificate setting forth the facts required to be set forth on the organization of a new company: and provided, further, that the new company shall be subject to the same obligations to the state or the public as the original corporation, and "that such reorganization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company." Such, in legal effect, were the allegations of the complaint upon which the plaintiff relied for a recovery.

We agree with the circuit court that the complaint stated no cause of action, and that the demurrer thereto was well taken. The complaint did not set out any of the provisions of the order under and by virtue of which the receivers originally took possession of the property of the Atchison, Topeka & Santa Fé Railroad Company, or the provisions of any order subsequently made which required the receivers to adopt and continue in force such contracts of employment as at the time of their appointment were in existence between the old company and its employés. Neither did the complaint count upon any provision of the deed whereby the mortgaged property was conveyed by the master who conducted the foreclosure sale to the purchasers at that sale, nor the provisions of the decree of foreclosure, nor the terms of any order whereby the possession of the mortgaged property was relinquished by the receivers to the purchasers thereof,

or to the defendant company. In other words, the complaint fails to show that by any order of court made in the course of the foreclosure proceedings the contract existing between the plaintiff and the old company, for a breach of which by the receivers the present action is brought, ever became obligatory upon the receivers; and, in the absence of such a showing, it is obvious that they did not incur a liability by refusing to employ the plaintiff on August 15, 1894, which was cast upon the defendant company by virtue of the clause of the deed, heretofore quoted, under which the defendant acquired title. To make out a case against the defendant company under the assumption clause contained in the deed by which it acquired title, it was necessary for the plaintiff to have shown that his contract with the old company became binding upon the receivers; and this essential fact his complaint failed to disclose.

Besides the contention that the receivers incurred a liability by refusing to employ the plaintiff on August 15, 1894, it seems to be claimed in his behalf that his contract with the old company became a liability of the defendant company by virtue of the provision of the Kansas statute heretofore quoted (section 1, c. 110, Sess. Laws Kan. 1876), without reference to any orders made in the foreclosure suit. It is observable, however, that the statute in question does not say that, when a reorganization takes place after a sale under a decree of foreclosure, the liabilities of the old corporation existing at the time the new company is formed shall become liabilities of the new company; and such could not have been the legislative intent, as a law of that character would render foreclosure proceedings wholly meaningless and futile. The clause of the statute in question merely provides "that such reorganization shall in no wise affect any liability against the old corporation existing at the time of the organization of said new company"; and it was probably inserted, through abundant caution, to avoid a possible inference that the organization of a new corporation in the mode provided by the act worked a dissolution of the old corporation, and thereby extinguished its debts. Moreover, the complaint in the present case does not show by proper averments that the defendant company was organized as a corporation under authority conferred by section 1, c. 110, Sess. Laws Kan. 1876, as it should have shown, if it was intended to claim that by virtue of the provisions of that act the defendant company is liable to discharge all contracts, of whatsoever nature, that may have been made by the former company. We think, therefore, that no ground of recovery was disclosed by the complaint, and the judgment is hereby affirmed.

UNITED STATES, to Use of ANNISTON PIPE & FOUNDRY CO., v. NATIONAL SURETY CO.

(Circuit Court of Appeals, Eighth Circuit. February 27, 1899.)

No. 1,079.

PRINCIPAL AND SURETY—RELEASE OF SURETY BY CHANGE IN CONTRACT—BOND FROM CONTRACTOR FOR PUBLIC WORK.

The bond from a contractor for public work, provided for by 28 Stat. 278, c. 280, is intended to perform a double function: First, to secure to the government the faithful performance of the contract; and, second, to protect third persons from whom the contractor may obtain labor or materials in the prosecution of the work. In its second aspect, the bond, by virtue of the statute, contains a separate and distinct agreement between the obligors and such third persons, as to which the agency of the government ceases when the bond is given and approved, and subsequent changes in the contract or specifications agreed upon between the government and the contractor, though without the knowledge or consent of a surety, where the general nature of the work and materials remains the same, will not release the surety from liability to persons who supply labor or materials thereunder.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This suit was brought by the Anniston Pipe & Foundry Company, the plaintiff in error, in the name of the United States, against the National Surety Company, the defendant in error, on a bond executed by the defendant on July 15, 1895, as surety for T. J. Prosser, the bond having been executed pursuant to the provisions of an act of congress approved August 13, 1894 (28 Stat. 278, c. 280), which is as follows:

"An act for the protection of persons furnishing materials and labor for the construction of public works.

"Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution: provided, that such action and its prosecution shall involve the United States in no expense."

T. J. Prosser, the principal in the bond, had entered into a contract with Charles B. Thompson, assistant quartermaster of the United States army, who acted for and in behalf of the United States of America, for the construction of a boiler and pump house, pumping machinery, and connections, water mains, steel trestle, and water tank, etc., for the water-supply system for the new military post near Little Rock, Ark.; and the bond contained a condition, in substance, that if said Prosser, his heirs, executors, and administrators, should in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by said contract agreed to be observed and performed by said Prosser, according to the true intent and meaning of said contract, as well during any period of extension of said contract as

during the original term, and should make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the obligation should become void, but otherwise remain in full force and virtue. The plaintiff company sued to recover of the defendant, as surety in said bond, the sum of $842.98, with interest and costs, being the value of certain water pipe which it had supplied to Prosser, subsequent to the execution of the aforesaid bond and contract, to enable him to execute his agreement with the government, and which pipe so supplied he had actually used for that purpose, but had not paid for. For a defense to the action the defendant pleaded, and the trial court so found, that subsequent to the execution of the aforesaid bond, and the contract which it was given to secure, the government had entered into a further agreement with Prosser, modifying the terms of the original contract, or, more accurately, the specifications thereto attached, in such a manner that Prosser was required to lay only 1,866 linear feet of six-inch water pipe in place of 3,850 feet, as specified in the original contract, and that this change in the terms of the original contract, or rather in the plans for its execution, was made without the knowledge or consent of the surety company. In view of the change in the plans for the execution of the contract which lessened the amount of water pipe necessary to be supplied and used, the trial court ruled that the plaintiff could not recover. It accordingly rendered a judgment in favor of the defendant, to reverse which the record has been removed to this court by a writ of error.

Truman A. Post, for plaintiff in error.

J. E. McKeighan (Shepard Barclay, M. F. Watts, and G. A. Vandeveer, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is a familiar rule of law that the contract of a surety must be strictly construed, and that it cannot be enlarged by construction, and that when a bond, with sureties, has been given to secure the performance of a contract, and the principal in the bond and the person for whose benefit it was given make a material change in the contract without the consent of the surety, the latter is thereby discharged. For present purposes, it may be conceded that the finding of the lower court in the case at bar discloses such a modification of the original contract between Prosser and the United States as would fall within the rule last stated, and release the defendant company from its liability, if the United States was suing for its own benefit for a breach of some provision of the contract, the due performance of which the bond was intended to secure. Such, however, is not the case. The suit is not brought by the United States to recover any damage which it has sustained; neither is it brought to enforce any provision of the contract which was entered into between the United States and the principal in the bond. On the contrary, the action is one to enforce a stipulation found in the bond, and only in the bond, which was intended solely for the protection of laborers and material men who might furnish labor and materials while the contract was being executed by Prosser. The United States is merely a nominal plaintiff, and as such, under the provisions of the act of congress, it cannot be held liable even for costs. The real plaintiff is the corporation for whose use the suit was brought, and it sues to enforce an obligation which congress required to be inserted in the bond for its protec-

tion and for the protection of others who might furnish labor or materials while the work was in progress.

The real question to be considered, therefore, is whether the act of congress under which the bond in suit was taken constituted the United States the agent or representative of the persons who supplied labor and materials after the contract and bond were executed, in such a sense that its action in consenting to a modification of the contract with Prosser must be imputed to the laborers and material men, and held to deprive them, as well as the government, of all recourse against the surety.

The act of congress of August 13, 1894, does not authorize the United States to bring suits of its own motion against the obligors in such bonds as are therein provided for, to recover what is due to laborers and material men. It is not empowered to act in their behalf in that respect, but such actions can only be brought at the instance of persons who furnish labor and materials, who are authorized, without previous leave being obtained from any executive department, to sue in the name of the United States, and control the litigation precisely as they might control it if the suits were brought in their own name. It is also noticeable that in its title the act professes to be one for the benefit "of persons furnishing materials and labor," and that in the body of the act the form of the condition to be inserted in the bond for the benefit of the United States is not in terms prescribed, the only provision in that regard being that the bond shall be "the usual penal bond"; meaning, evidently, such an obligation for the government's own protection as it had long been in the habit of exacting from those with whom contracts were made for the doing of public work. On the other hand, the condition for the benefit of persons who might furnish materials or labor is carefully prescribed. Obviously, therefore, congress intended to afford full protection to all persons who supplied materials or labor in the construction of public buildings or other public works, inasmuch as such persons could claim no lien thereon, whatever the local law might be, for the labor and materials so supplied. There was no occasion for legislation on the subject to which the act relates, except for the protection of those who might furnish materials or labor to persons having contracts with the government. The bond which is provided for by the act was intended to perform a double function,—in the first place, to secure to the government, as before, the faithful performance of all obligations which a contractor might assume towards it; and, in the second place, to protect third persons from whom the contractor obtained materials or labor. Viewed in its latter aspect, the bond, by virtue of the operation of the statute, contains an agreement between the obligors therein and such third parties that they shall be paid for whatever labor or materials they may supply to enable the principal in the bond to execute his contract with the United States. The two agreements which the bond contains, the one for the benefit of the government, and the one for the benefit of third persons, are as distinct as if they were contained in separate instruments, the government's name being used as obligee in the latter agreement merely as a matter of convenience.

In view of these considerations, we are of opinion that the sureties in a bond, executed under the act now in question, cannot claim exemption from liability to persons who have supplied labor or material to their principal to enable him to execute his contract with the United States, simply because the government and the contractor, without the surety's knowledge, have made some changes in the contract, subsequent to the execution of the bond given to secure its performance, which do not alter the general character of the work contemplated by the contract or the general character of the materials which are necessary for its execution. When the government has executed the contract and taken and approved the bond, it ceases to be the agent of third parties whom the contractor employs in the execution of the work or from whom he obtains materials, and the rights of such persons under the bond are unaffected by subsequent transactions between the government and the contractor. If such were not the case, it would be possible for the contractor and some officer of the United States, by making some change in the contract or specifications, to deprive laborers and material men of all recourse against the sureties in the bond after they had supplied materials and labor of great value in reliance upon its provisions. It is not probable that such a result was contemplated by the lawmaker. On the contrary, the act bears every evidence that it was intended to provide a security for laborers and material men on which they could rely confidently for protection, unless they saw fit, by their own dealings with the contractor, to relinquish the benefit of the security. We are confirmed in these views by the following authorities: Dewey v. State, 91 Ind. 173; Conn v. State, 125 Ind. 514, 25 N. E. 443; Doll v. Crume, 41 Neb. 655, 59 N. W. 806; Kaufmann v. Cooper, 46 Neb. 644, 65 N. W. 796; Steffes v. Lemke, 40 Minn. 27, 41 N. W. 302. The first two of these cases are very much in point. Bonds were given to the state of Indiana as obligee for the doing of public work, in pursuance of a statute of that state, which bonds contained conditions requiring—First, the faithful performance and execution of the work undertaken by the contractor; and, second, the prompt payment by the contractor of all debts incurred by him in the prosecution of the work for labor and materials supplied by third parties. It was held, in substance, that for any breach of the second condition of the bond by the contractor the right of action was in the laborer or the material man, and that such right of action could not be defeated or prejudiced by any act done by the obligee in the bond after the bond had been taken and approved. It was accordingly ruled that changes made in the contract by the parties thereto, to wit, the contractor and the public authorities, after the bonds had been executed and accepted, would not deprive material men of their right to recover against the sureties in the bond. It results from what has been said that the judgment of the circuit court was erroneous upon the facts found by that court, and should be reversed. It is so ordered, and that the case be remanded for a new trial.

TEXAS & P. RY. CO. v. EASON.

(Circuit Court of Appeals, Fifth Circuit. February 28, 1899.)

No. 780.

1. RAILROADS—INJURY TO PERSON ON TRACK—FAILURE TO GIVE SIGNALS.
The purpose of train signals, by bell or whistle, is to warn persons of the approach of the train, and the purpose of stopping a hand car proceeding on the track to look and listen, or of sending a flagman forward, is the same, and a failure to observe either of such precautions cannot be held the cause of an injury by a train to one who knew of its approach in time to have avoided the injury.

2. MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.
A railroad company cannot be held liable for an injury to a section man, who, with others, was trying to lift a hand car from the track in front of an approaching train, and was struck by the train, merely because the foreman did not expressly direct him to let go of the hand car and save himself, when it does not appear that the men were acting by order of the foreman in attempting to remove the hand car.

3. TRIAL—DIRECTION OF VERDICT.
When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, it is the duty of the court to direct a verdict for the defendant.

4. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.
While the direction of a verdict is a matter resting in the legal discretion of the trial court, its action in refusing to direct a verdict is subject to review, where the evidence is before the appellate court.

In Error to the Circuit Court of the United States for the Northern District of Texas.

T. J. Freeman, for plaintiff in error.

Thos. D. Ross and H. M. Chapman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

McCORMICK, Circuit Judge. J. D. Eason, the defendant in error, sued the Texas & Pacific Railway Company, the plaintiff in error, to recover damages for injuries alleged to have been inflicted on him by the railway company through the negligence of its employés. He alleged that on the 30th of September, 1896, he, with others, was engaged as a section hand in repairing the defendant's track from Brazos station eastward a distance of several miles, and in the work he was under the direction and control of the defendant's foreman, William Wooten; that the foreman commanded him and the other section hands to board a hand car for the purpose of conveying them to the place of work, and that the foreman carelessly, recklessly, and with gross negligence caused the hand car to be propelled along the defendant's track, and around the sharp curves thereon, at a rapid rate of speed; that at a point about two miles east from Brazos station, and when the car was rounding a sharp curve on the track, the foreman sighted the defendant's west-bound train, which was approaching the car at a rapid rate of speed, and he commanded the plaintiff to stop the hand car; that, when the hand car was stopped, the foreman jumped off, and carelessly, recklessly, and without regard for the safety of the