

drawn in one form, as well as the other, if the other requisite jurisdictional facts appear.

Another assignment which is argued at some length by the county is to the effect that the circuit court erred in holding that a suit could be maintained on these warrants in the United States circuit court, notwithstanding the provision of a statute of Arkansas approved on February 27, 1879, which repealed all previous acts authorizing counties of the state to be sued, and required all persons having demands against a county to present them for allowance to the county court. Mansf. Dig. p. 350, and notes. This proposition is met and overcome by a recent decision of the supreme court of the United States in *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695, wherein it is held that the statute in question is not adequate to deprive nonresident creditors of a county of their right to sue the county in the national courts, when the amount is sufficient to invoke their jurisdiction.

We have thus reviewed all of the important errors assigned by the county, and find them to be without merit, wherefore the action of the circuit court must be affirmed, with respect to all of those rulings as to which the county has excepted; but for errors prejudicial to the plaintiff, as heretofore indicated, the judgment of the circuit court is reversed, and the cause is remanded, with directions to grant a new trial.

NORTHERN PAC. R. CO. v. BEHLING.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 276.

1. MASTER AND SERVANT—NEGLIGENCE OF COEMPLOYEE—STATUTORY LIABILITY OF RAILROAD COMPANIES.

Under Gen. Laws Minn. 1887, c. 13, a railroad company is liable for injuries to an employe caused by negligence of a coemploye.

2. SAME—NEGLIGENCE—QUESTION FOR JURY.

A section foreman in charge of a hand car was informed by the crew that a train was approaching from behind, but he ordered the men to go on "pumping" until he told them to stop. He delayed giving the order until the train was so close that the car could not be removed from the track in the accustomed deliberate and safe manner, and in the haste and excitement of getting it out of the way one of the crew stumbled and lost his hold, by which the car was precipitated upon another of the crew. *Held*, in an action by the latter against the railroad company, that the question whether the injury was due to negligence of the foreman was for the jury, and the court properly refused to direct a verdict for defendant. *Coyne v. Railway Co.*, 10 Sup. Ct. Rep. 382, 133 U. S. 370, distinguished.

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

At Law. Action by Henry Behling against the Northern Pacific Railroad Company for damages for personal injury. Verdict and judgment for plaintiff. Defendant brings error. Affirmed.

John H. Mitchell, Jr., and Tilden R. Selmes, for plaintiff in error.
F. D. Larrabee, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. The defendant in error was a section hand in the employ of the plaintiff in error, the crew consisting of four men and a foreman. On the 27th of September, 1889, while the crew, under the direction of the foreman, was operating a hand car on the track going to their place of work, a freight train was seen approaching from the rear, and rapidly gaining on the hand car. The attention of the foreman was called to this fact, and the suggestion made that the hand car be stopped and removed from the track, to which he replied: "Never mind. You keep on pumping until I tell you to stop." He delayed giving the order to stop until the train was dangerously near the hand car, when he ordered the men to stop pumping, applied the brakes, and said, "Now get her off the track as quick as the devil will let you." When this order was given, the train was so close to the hand car that there was not time to remove the latter from the track in the accustomed orderly, deliberate, and safe manner, and in the extraordinary haste, exertion, and excitement incident to its removal from the track in time to prevent a collision one of the crew stumbled, and lost his hold upon the hand car, by which it was precipitated upon and injured the defendant in error.

No exceptions are taken to the charge of the court. It is assigned for error that the negligence complained of is the negligence of a fellow servant; but, under the provisions of the Minnesota statute, that fact constitutes no defense. Gen. Laws 1887, c. 13; *Slette v. Railway Co.*, (Minn.) 55 N. W. Rep. 137; *Steffenson v. Railway Co.*, 45 Minn. 355, 47 N. W. Rep. 1068.

The only other error relied upon in argument is that the court erred in refusing to give a peremptory instruction to the jury to find a verdict for the defendant. Whether the facts proved constituted negligence, and, if so, whether the defendant in error was injured as a result of such negligence, were questions of fact for the jury to decide. The plaintiff's testimony tended to support his contention on both of these issues. As we said in the case of *Railroad Co. v. Conger*, 5 C. C. A. 410, 56 Fed. Rep. 20:

"It was for the jury to say whether and how far the evidence was to be believed. If by giving credit to the plaintiff's evidence, and discrediting the counter evidence, the plaintiff's case was made out, the court should not have withdrawn the case from the jury."

The case of *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. Rep. 382, is relied upon by the plaintiff in error, but is not in point. In that case the court say that "the injury to the plaintiff was not caused by any negligence on the part of McCormick," the foreman. In this case the jury found the foreman was guilty of negligence in not giving a timely order for the removal of the hand

car from the track, and that the injury to the plaintiff resulted from that act of negligence. In the Coyne Case the court said, "It does not appear that the approaching freight train was so near as to render it unsafe for McCormick to start the construction train," and it was, therefore, held that an order to hasten the loading of the car was not a negligent act; but in the case at bar the jury found that the foreman was guilty of negligence, not in giving, but in delaying to give, the order for the removal of the hand car from the track until there was imminent danger that it would be run into by the train before it could be removed. The serious consequences of such a collision were barely averted by unusual and extraordinary exertion on the part of the crew. The jury have found that this dangerous situation was brought about by the negligence of the foreman, and that as a result of such negligence the plaintiff sustained the injury complained of.

The judgment of the court below is affirmed.

BUCHANAN et al. v. GOODWIN et al.

(Circuit Court, D. Indiana. September 22, 1893.)

No. 8,774.

PATENTS FOR INVENTIONS—CONSTRUCTION OF CLAIMS—STRAW STACKER.

Letters patent No. 467,476, issued January 19, 1892, for the combination with a threshing machine of a pneumatic straw elevator and stacker, consisting of a fan, a trunk through which the straw is discharged, and various devices by which these parts are adapted to perform their work, cover a useful and valuable invention, and are entitled to a liberal construction.

In Equity. Suit by James Buchanan and the Indiana Manufacturing Company against Thomas L. Goodwin and Andrew J. Hoffman for infringement of a patent. Decree for complainants.

Chester Bradford, for complainants.

A. L. Mason, for defendants.

BAKER, District Judge. This is a bill in equity asking for an injunction and accounting on account of the alleged infringement of letters patent of the United States No. 467,476, issued to James Buchanan, January 19, 1892, on pneumatic straw elevators and stackers. The defendants have admitted the character in which the complainants sue, and their title to the letters patent in suit, to be as stated in their bill of complaint. Evidence showing infringement and the character and value of the invention has been taken by the complainants, but no evidence was taken on behalf of the defendants. The cause was heard on the evidence taken on behalf of complainants, and was argued by their counsel, no evidence or argument having been submitted on behalf of the defendants. The character of the invention is well stated in the testimony of Mr. Oscar W. Bond, complainants' expert. It consists, speaking in general terms, in the combination, with a threshing machine, of a pneumatic straw elevator, consisting

of a fan, a trunk through which the straw is discharged, and various devices by which these parts are adapted to properly perform the work of taking the straw from the threshing machine, and conveying the same to, and depositing it upon, a stack. So far as shown, the complainant Buchanan is the first inventor of a machine by means of which straw can be successfully taken from a threshing machine, and conveyed to, and deposited upon, a stack. Under a familiar rule he is entitled to a liberal construction of his patent. *Parker v. Hulme*, 1 Fish. Pat. Cas. 44; *Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. Rep. 299; *Drill Co. v. Simpson*, 29 Fed. Rep. 292; *Parker v. Haworth*, 4 McLean, 370; *Sloat v. Patton*, 1 Fish. Pat. Cas. 154. The evidence on behalf of the complainants is clear and satisfactory touching the utility and value of the apparatus, and the infringement of the 1st, 6th, 7th, and 9th claims of complainants' patent by the defendants is shown. The remaining claims of the patent are not in issue. It follows that complainants are entitled to the usual decree for an accounting and an injunction, and it is so ordered.

[END OF CASES IN VOL. 57.]