

SEYMOUR v. WHITE COUNTY.

(Circuit Court of Appeals, Seventh Circuit. February 13, 1899.)

BILL OF REVIEW—PETITION FOR LEAVE TO FILE—PRACTICE IN CIRCUIT COURT OF APPEALS.

On a petition to the circuit court of appeals, after a decision of that court affirming a judgment of the circuit court, for leave to file in the lower court a bill in the nature of a bill of review, it is deemed the better practice to grant such leave as a matter of course, unless there are special reasons to the contrary, without considering the merits of the proposed bill.

On Petition for Leave to File a Bill in the Nature of a Bill of Review.

Wm. E. Church and Geo. A. Sanders, for petitioner.

J. M. Hamill and J. R. Williams, opposed.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. This is a petition to this court for leave to file in the circuit court of the United States for the Southern district of Illinois a bill, in the nature of a bill of review, to obtain a new trial or reconsideration of the case of the petitioner against the county of White, in the state of Illinois, wherein the judgment rendered in favor of defendant was affirmed by this court, as shown by our opinion in *Seymour v. White Co.*, 34 U. S. App. 658, 20 C. C. A. 402, and 74 Fed. 207. For the necessity of obtaining such leave reference is made to *Bank v. Taylor*, 9 U. S. App. 406, 4 C. C. A. 55, and 53 Fed. 854, in which *Southard v. Russell*, 16 How. 547, 570, and *Kingsbury v. Buckner*, 134 U. S. 650, 671, 10 Sup. Ct. 638, and other cases, are cited. A copy of the bill which it is proposed to file accompanies the petition, but, without consideration of its merits, it is deemed the better practice, unless for special reason to the contrary, to grant the petition as of course. To the extent, therefore, that the leave of this court is necessary and may be granted, it is ordered that the petitioner have leave to file in the court below the bill proffered, or such other or amended bill or petition as he may be advised, and that the costs of this proceeding be taxed against the petitioner.

POWELL et al. v. LEICESTER MILLS et al.

(Circuit Court, E. D. Pennsylvania. February 23, 1899.)

PARTIES—EFFECT OF INTERVENTION—PLEADING.

An intervener cannot enlarge the scope of a suit by setting up a defense not open to the defendant, on the ground that, if he had been sued, such defense would have been available to him.

On Motion for Leave to Amend Answer.

Howson & Howson, for complainants.

H. T. Fenton, for respondents.

DALLAS, Circuit Judge. The leave asked by the intervening defendants to amend their answer heretofore filed by adding five new

paragraphs is, as to the first four of said paragraphs, granted. The proposed fifth new paragraph, as I understand it, sets up a defense which might be available to the intervening defendants in a suit against them, but which is not pertinent to the present one. The intervention of the Macon Knitting Company and Joseph Bennor has not enlarged the scope or varied the nature of this litigation. The interveners may make any defense which the original defendants could make, but they cannot strengthen that defense by showing that, if they had themselves been sued, their position would have been stronger. *Platt v. Railroad Co.*, 65 Fed. 664. Therefore the leave asked is, as to the proposed fifth new paragraph, denied.

All questions respecting costs are reserved, and the suggestion made upon the argument that the intervening defendants should be required to enter security for costs will not now be considered, but may, if desired, be separately presented by motion in writing.

KENNEDY v. GRACE & HYDE CO.

(Circuit Court, S. D. New York. February 27, 1899.)

1. MASTER AND SERVANT—INJURY TO SERVANT—SAFE PLACE TO WORK.

A master is charged with the duty of providing for the safety of the place where his servant is required to work, except as it may be changed by the progress of the work itself.

2. SAME—CONCURRENT NEGLIGENCE OF FELLOW SERVANT.

Plaintiff was working, in the night, on tall timbers provided by his employer, the defendant, and supported by guys in the street. The guys were not guarded nor lighted, as was customary and necessary for their safety, and a passing wagon struck one, throwing plaintiff from the timbers, and causing his injury. *Held*, that the fact that the guys were placed by fellow workmen, and that their negligence, as well as that of the driver of the wagon, may have contributed to the injury, did not relieve defendant from liability.¹

On Motion for New Trial.

Gilbert D. Lamb, for plaintiff.

Charles C. Nadal, for defendant.

WHEELER, District Judge. The plaintiff is a carpenter, and was at work for the defendant, at night, on tall timbers above the sidewalk on Vanderbilt avenue, steadied by guys across the avenue. In the early morning a mail wagon going along the avenue hit one of the guys, and thereby the plaintiff was thrown from the timber where he was at work to the sidewalk, and seriously injured. This suit is brought for that injury, and now, after verdict for the plaintiff for not properly guarding the street for the protection of the work, has been heard on a motion for a new trial.

The guys were moved from place to place along the avenue by the fellow workmen of the plaintiff, as the work progressed. This guy had been moved but a short time before, and so placed that it might

¹ As to fellow servants generally, see note to *Railroad Co. v. Smith*, 8 C. C. A. 668, and, supplementary thereto, note to *Flippin v. Kimball*, 31 C. C. A. 286.

be hit by high wagons passing along the avenue. The principal ground urged in support of the motion is that the injury was caused by the negligence of fellow servants, of which the plaintiff took the risk, and not by anything for which the defendant was responsible.

The employer provides the place. That this imposes the duty of providing for the safety of the place, except as it may be changed by the progress of the work itself, seems to now be well settled. The cases cited for upholding the exception prove the rule. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433; *Finalyson v. Milling Co.*, 14 C. C. A. 492, 67 Fed. 507; *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 527, and others. This place was a public street, where teams and high vehicles were likely to pass at all hours. There was evidence that watchmen, or red lights, are usually and necessarily stationed about the places of such work to warn drivers, for safety; and that there were none about this work at this time. The progress of the work did not displace these safeguards. The lack of them was negligence of the defendant, which the jury found to be unreasonable, and to have caused the injury to the plaintiff, without fault of him. In all the cases, enforcing the exception, noticed, the progress of the work affected the place itself as to safety. As in *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, the place complained of was a building in process of construction. In *Finalyson v. Milling Co.* it was a mine being worked; and in *City of Minneapolis v. Lundin* it was a sewer being constructed, and in each the work being done caused the danger resulting in the injury. In the latter case the court said the street furnished by the city was safe, and the negligence was that of those at work upon the sewer. Here the street was made unsafe for the work by the lack of warning, with which the work in which the plaintiff was engaged had nothing to do. Carelessness in placing the guy or in driving the mail wagon may have concurred, but that would not relieve the defendant from liability for what its own negligence also concurred in. Motion denied.

BAKER v. BARBER ASPHALT PAV. CO.

(Circuit Court, W. D. Missouri, W. D. January 16, 1899.)

No. 2,291.

1. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—ISSUES AND PROOF.

In an action to recover for the death of a servant, alleged to have been due to the failure of the master to provide him with a safe place to work, that the defect complained of was obvious and well known to the servant, so that the risk incident thereto was assumed by him, need not be specially pleaded as a defense, to render evidence on the subject admissible, but such facts go to the question of whether a right of action ever existed in the plaintiff, and are provable under a general denial.

2. PLEADING—AMENDMENT AFTER VERDICT.

A court may permit an amendment after a verdict rendered by its direction to conform a pleading to the proof and the issues actually tried.