NEW YORK & N. E. R. CO. v. HYDE.

(Circuit Court of Appeals, First Circuit. June 14, 1893.)

No. 50.

1. BILL OF EXCEPTIONS — TIME FOR PRESENTATION AND ALLOWANCE — CIRCUIT COURT OF APPEALS.
A verdict was rendered May 27th, at the term which commenced May 15th and ended October 14th. There was no rule of court fixing the time within which a bill of exceptions should be filed, presented for allowance, or allowed; and no order relating thereto was made in the case. The bill of exceptions was filed August 25th, but was not presented to the judge until October 4th, when it was allowed, over the objection that the delay was unreasonable and unwarrantable. *Held* that, as the allowance was at the trial term, the jurisdiction of the circuit court of appeals was not affected by the delay.

2. SAME—STATE PRACTICE.
The practice in the federal courts touching the filing, presenting, or allowance of bills of exceptions, is in no wise affected by the state practice.

3. SAME—FEDERAL PRACTICE.
In the circuit court of appeals no exceptions to rulings at a trial can be considered unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed and filed with the clerk during the same term. After the term has expired without the court's control over the case being reserved by standing rule or special order, all authority to allow a bill of exceptions then first presented, or to alter or amend a bill already allowed and filed, is at an end. Bank v. Eldred, 12 Sup. Ct. Rep. 450, 143 U. S. 293, followed.

4. FEDERAL COURTS—JURISDICTION—AVERMENTS OF CITIZENSHIP.
An averment that defendant is a corporation "duly established by law, and having its principal place of business in Boston, in the state of Massachusetts," is not a sufficient statement of its citizenship to show federal jurisdiction.

5. MASTER AND SERVANT — NEGLIGENCE — FELLOW SERVANTS — RAILROAD EMPLOYES.
A yard clerk or car clerk in a railroad freight station, whose duty required him to go into the yard for the purpose of getting a record of the seals of the cars which each train left or was to take away, was injured by the backing down upon him of part of a freight train in control of the engineer and train hands. *Held*, that the injury was caused by fellow servants, and the company was not liable. Railroad Co. v. Baugh, 13 Sup. Ct. Rep. 914, applied. Railway Co. v. Ross, 5 Sup. Ct. Rep. 184, 112 U. S. 377, distinguished.

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

Action by Lavius H. Hyde against the New York & New England Railroad Company to recover damages for personal injuries received while in its employ. There was a verdict for plaintiff, and from the judgment thereon defendant brings error. Reversed.

Frank A. Farnham, (Charles A. Prince, on the brief,) for plaintiff in error.

T. Henry Pearse and Alfred Hemenway, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The verdict in this cause was rendered May 27, 1892, at the term of the circuit court which commenced May 15, 1892, and ended October 14th of the same year. No order was made fixing or limiting the time within which the bill of exceptions should be presented. August 25th of the same year the bill was filed in the clerk's office, but the same was not presented to the judge who tried the cause until October 4th. At that time the plaintiff below objected to its allowance, for the cause that the delay was unwarrantable, and not reasonable, within section 953, Rev. St. The exceptions, however, were allowed. The section of the Revised Statutes referred to neither in terms nor by implication limits the time within which exceptions shall be filed or allowed, and does not aid the court in determining this question; and the decisions touching the subject-matter of that statute do not sustain the plaintiff below in claiming that the ordinary rule that what is to be done within a time not named is to be done within a reasonable time has any application to it.

There is no rule of the circuit court for the district of Massachusetts fixing the time within which a bill of exceptions shall be filed, presented for allowance, or allowed. While this court is cognizant of the hazard and great liability to doing injustice which come from allowing the incidents of a trial to remain long unfixed by formal methods, and recommends as the better practice that the trial court should protect both itself and the parties by naming by special order some reasonable time within which proceedings of this character shall be taken, yet the law is clear that our jurisdiction is not affected by the delay which occurred in the case at bar.

In Preble v. Bates, 40 Fed. Rep. 745, decided in the circuit court for the Massachusetts district, December 10, 1889, the bill of exceptions was filed within a few days of the trial, and during the same term. As there was a motion for a new trial pending, the bill was not presented for allowance until after the motion was disposed of at a subsequent term, when it was allowed. As the bill was seasonably filed, and its consideration was postponed to a subsequent term for plain reasons of convenience, it will be found from an examination of the cases hereinafter referred to that it was properly allowed.

It is deemed proper at this point to make some references to the decisions of the supreme court on this topic. First of all, as we have already stated elsewhere, counsel must not be misled by the practice in the state courts, as no portion of the proceedings touching the removal of causes in the federal courts on error or appeal, from the noting the exceptions to the close, is governed by the local rules. Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 544, 553, 555, 9 Sup. Ct. Rep. 150. This has been particularly so held, with reference to settling bills of exceptions in

the case last cited, in U. S. v. Breitling, 20 How. 252, and last of all in Van Stone v. Manufacturing Co., 142 U. S. 128, 12 Sup. Ct. Rep. 181. On the other hand, the rules applicable are derived from the common law and ancient English statutes, except so far as the acts of congress control. Chateaugay Ore & Iron Co., Petitioner, 128 U. S. 555, 9 Sup. Ct. Rep. 153.

We do not need, for present purposes, to investigate these original sources, nor even to revert to the earlier decisions of the supreme court; because all that is required for the general guidance of the court and the profession will be found in the opinions of that court given this side of the year 1856. Important rules are stated in the opinion in Stanton v. Embrey, 93 U. S. 548, 554, 555; especially that, while anciently the bill should be sealed, it is now held sufficient if it be signed by the judge, and that, while the exceptions must be taken and reserved at the trial, the bill may be drawn out in form, and signed at a later period. The practice of signing without sealing was confirmed by the act of June 1, 1872, now Rev. St. § 953. This statute also provides that when more than one judge sits at the trial the presiding judge may authenticate the bill of exceptions. In U. S. v. Breitling, ubi supra, it was said that the time within which a bill may be drawn out and presented to the court "must depend on its rules and practice, and on its own judicial discretion;" and, in reply to a claim that there was in that case a rule limiting the time of filing and of allowance, it was added:

"It is always in the power of the court to suspend its own rule, or to except a particular case from its operation, whenever the purposes of justice require it."

In this case it further appeared that the bill was presented by the excepting party during the term at which the trial took place, but that the proceedings concerning it at that time were informal; and nothing further was heard by the court in reference to it until after the adjournment of the term, and after the judgment was rendered. The bill being then allowed, its allowance was sustained by the supreme court, as the circumstances were regarded as special, and within the well-settled rules explained by the same court in subsequent decisions, which will be hereafter referred to. The determination that a rule limiting the time is for the protection of the court, and may be waived by it when justice requires, was reaffirmed in Hunnicutt v. Peyton, 102 U. S. 333, 353, and must be regarded as fully settled.

In Muller v. Ehlers, 91 U. S. 249, it was held that a bill of exceptions could not be allowed after the adjournment of the term at which the judgment was rendered, unless under special circumstances, which need not be referred to here, as they will be stated later. In Hunnicutt v. Peyton it was said (page 354):

"The time within which the signature of the judge must be applied for, if within the term, is left to the discretion of the judge who noted the exception when it was made."

In Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. Rep. 1102, the exceptions were permitted to stand, although allowed subsequently