

the alleged defect in the frog was due to its original construction, and was not occasioned by long-continued use, or by an accidental removal of the blocking. At all events, if the plaintiff in error desired a more specific instruction, to the effect that the jury must be satisfied, not only that the frog was not blocked on the night of the accident, but that it never had been blocked or filled prior thereto, then it was its duty to have asked for such an instruction, which it failed to do. On the contrary, its insistence at the trial seems to have been that, even though the frog was not blocked, and never had been, it was not liable for the injury complained of, unless it had actual or constructive notice of the defect, and that the onus was on the plaintiff to show such notice. As we have already held, this view of the law was and is erroneous.

It is further contended that the court erred in assuming that an unblocked switch angle or frog is a dangerous and unsafe appliance. With reference to this contention, it is only necessary to say that, as no exception was taken to the action of the trial court in charging the jury that an unfilled switch angle was a dangerous contrivance, we cannot notice the alleged error. The plaintiff offered some testimony tending to show that without being blocked switch frogs are unsafe, and are liable to occasion injuries. We think that it might properly have been left to the jury to determine whether the maintenance of an unblocked frog at the time and place of the accident was an act of culpable negligence, but as the court was not requested to submit that issue to the jury, and as no exception was taken to the action of the court in deciding that the maintenance of such a switch was per se a negligent act, no error was committed which can be noticed by this court. It follows that, as none of the assignments of error appear to be tenable, the judgment of the circuit court must be affirmed.

WALTON v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 244.

1. APPEAL—REVIEW—MOTION FOR NEW TRIAL.

AN appellate court will not reverse a judgment rendered for defendant on his motion to vacate a verdict and grant a new trial where it appears that the plaintiff's counsel, on the hearing of said motion, stated to the trial judge that the cause "might as well be determined finally and at once; that a new trial, at most, would result in cumulative testimony; that if the plaintiff had not introduced testimony sufficient to sustain a verdict * * * he wanted to know it without the * * * expense of another trial,"—and where it appears that in entering judgment in favor of the defendant the trial court pursued the only possible course that could have been pursued to determine the case finally and at once, as plaintiff had requested it to do.

2. SAME—WAIVER OF ERRORS.

A party will not be heard to complain of errors which he himself has induced the trial court to commit.

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

At Law. Action by William Walton against the Chicago, St. Paul, Minneapolis & Omaha Railway Company for personal injuries received by plaintiff while in the service of defendant. Verdict was given for plaintiff. On defendant's motion to vacate the verdict and grant a new trial, judgment was given for defendant. Plaintiff brings error. Affirmed.

F. D. Larrabee, for plaintiff in error.

Thomas Wilson, (S. L. Perrin, on the brief,) for defendant in error.

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

THAYER, District Judge. This is a writ of error which is brought to reverse a judgment that was rendered under the following circumstances:

The plaintiff in error sued the defendant in error for personal injuries sustained while in its employ as a brakeman and switchman. There was a trial in the circuit court for the district of Minnesota, and at the conclusion of all of the testimony the defendant moved the court to instruct the jury to return a verdict in its favor. This request was denied, and a verdict was thereafter returned in favor of the plaintiff in error. In due time a motion was filed by the defendant company to set aside the verdict, to vacate the judgment entered thereon, and to grant a new trial, which motion was duly argued and submitted, and afterwards sustained. It was thereupon ordered that the judgment and verdict theretofore rendered be vacated and set aside, that a judgment be entered in favor of the defendant, and that it go hence discharged without day, and recover its costs. After the entry of the last-mentioned order, no motion was made, either to set the same aside, or to modify it, or to expunge any portion of the order.

In explanation of the action taken by the circuit court on the motion for a new trial, it is stated in the brief of counsel for the plaintiff in error, and was orally admitted in argument, that on the hearing of said motion "the argument before the circuit court took the form of an argument upon the facts in the case," the question discussed being "whether or not there was sufficient evidence to sustain the verdict." It is also conceded by counsel, both in his brief and orally, that, during the argument of such motion, plaintiff's attorney stated to the trial judge that the case "might as well be determined finally and at once; that a new trial, at most, would only result in cumulative testimony; and that, if the plaintiff had not introduced testimony sufficient to sustain a verdict, if there was missing * * * an integral factor necessary to produce a cause of action, he wanted to know it without the additional expense of another trial."

In view of the admissions made by counsel for the plaintiff in error, it appears, we think, that the error complained of was an invited error,—one which the trial judge committed at the request of

the plaintiff in error. The trial court had the right to grant the motion for a new trial, and its action in that respect, being purely discretionary, cannot be reviewed by this court, as has many times been held. *Henderson v. Moore*, 5 Cranch, 11; *Pomeroy's Lessee v. State Bank of Indiana*, 1 Wall. 592, 597; *Railway Co. v. Heck*, 102 U. S. 120. The further action of the trial court, in rendering a final judgment in favor of the defendant, was no doubt induced by the statement of counsel, that, if the verdict was set aside on the ground of insufficient evidence, the plaintiff did not in that event desire a retrial, as it would only lead to increased trouble and expense. It is not denied that this is the plain import of the language employed, and that the trial court pursued the only possible course that could, under the circumstances, have been pursued, to determine the case "finally and at once," as it was requested to do, if it granted defendant's motion, on the ground that the facts proven did not constitute a cause of action.

If we assume that the plaintiff in error did not really intend to request the circuit court to enter a judgment in favor of the defendant in error if it was of the opinion that, upon the facts proven, no case had been made out,—that is to say, if we indulge in the liberal presumption that the plaintiff desired some other course to be pursued, which would obviate a retrial, and yet preserve his right to have the case reviewed,—then we think that he should have applied to the trial court, by motion or otherwise, to vacate or modify the erroneous judgment, before suing out the present writ of error. If such a course had been pursued, we must presume that the error complained of would have been corrected, if the plaintiff's attorney had succeeded in satisfying the trial judge that the request made on the hearing of the motion for a new trial had been in any respect misunderstood. As the case stands upon the present record, and the admissions of counsel, we are called upon to review an order that was evidently made at the request of the complaining party. This we must decline to do. It is a well-established doctrine that the parties to a suit must act consistently, and that they will not be heard to complain of errors which they have themselves committed, or have induced a trial court to commit. *Long v. Fox*, 100 Ill. 43, 50; *Nitche v. Earle*, 117 Ind. 270, 275, 19 N. E. Rep. 749; *Dunning v. West*, 66 Ill. 366, 367; *Noble v. Blount*, 77 Mo. 235; *Holmes v. Braidwood*, 82 Mo. 610, 617; *Price v. Town of Breckenridge*, 92 Mo. 378, 387, 5 S. W. Rep. 20; *Fairbanks v. Long*, 91 Mo. 628, 633, 4 S. W. Rep. 499.

Acting in conformity with these views, the judgment of the circuit court is affirmed.

LITTLE ROCK & M. R. CO. v. MOSELEY.

(Circuit Court of Appeals, Eighth Circuit. July 10, 1893.)

No. 232.

1. APPEAL—REVIEW—WAIVER OF ERRORS.

A party who has requested an instruction which assumes that there is some evidence as to a certain matter cannot allege error in the giving of another instruction, relating to the same matter, on the ground that there was no evidence in relation thereto.

2. MASTER AND SERVANT—RISKS OF EMPLOYMENT — SWITCHMAN NOT CHARGED WITH KNOWLEDGE OF DEFECTIVE TRACKS.

In an action for personal injuries suffered by plaintiff, a switchman, while coupling cars, the failure of defendant to keep the spaces between the ends of the ties properly filled was alleged as a cause of the injury. Plaintiff had been working five nights before the accident as night switchman in the yard where it occurred, which was a mile long and half a mile wide, and he testified that he did not know the condition of the track at the place of the accident. *Held*, that an instruction that plaintiff could not recover if he began or continued work with knowledge of the defect, and that he was bound to take notice of apparent defects, was sufficient, without a further charge that before taking service in the yard he was bound to inform himself of the condition of all the tracks. Plaintiff was not bound to examine all the tracks to see whether he could safely walk on them.

3. SAME — SAFE APPLIANCES — RAILWAY COMPANY RESPONSIBLE FOR NEGLECT OF CAR INSPECTORS.

A railway company is responsible to a switchman in its service, who is injured by the breaking of a defective coupling link, for the negligence of its car inspectors, in failing to discover and remedy the defect in the link. *Railroad Co. v. Herbert*, 6 Sup. Ct. Rep. 590, 116 U. S. 642, 652, and *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, 149 U. S. 368, followed.

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

At Law. Action by H. W. Moseley against the Little Rock & Memphis Railroad Company for personal injuries suffered by plaintiff while in defendant's service. Judgment was given for plaintiff. Defendant brings error. Affirmed.

U. M. Rose, (W. E. Hemingway and G. B. Rose, on the brief,) for plaintiff in error.

Geo. H. Sanders and Sterling R. Cockrill, for defendant in error.

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

THAYER, District Judge. This is a suit for personal injuries which were sustained by the defendant in error while attempting to couple cars at Hopefield, Ark., on the line of the Little Rock & Memphis Railroad Company. The defendant in error was a switchman in the employ of the last-mentioned company. The accident occurred on October 18, 1891, before daylight, in the switch yards at Hopefield, while the defendant in error was helping to make up a freight train that was about to leave that station. Among other things, the complaint alleged, in substance, that the injury complained of was due to the fact that the railway company failed