

question, see *Construction Co. v. Young*, 59 Fed. 721, 8 C. C. A. 231; *Dudley E. Jones Co. v. Munger, etc., Co.*, 2 U. S. App. 188, 1 C. C. A. 668, 50 Fed. 785; *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10; *Pennsylvania Co. v. Jacksonville, etc., Ry. Co.*, 55 Fed. 131, 5 C. C. A. 53; *American Const. Co. v. Pennsylvania Co.*, 148 U. S. 372, 13 Sup. Ct. 758. The appointment in this case was of a receiver of the property of the Oconto Waterworks Company, and of that the appellants cannot complain. The wrong done them was in ordering them to surrender to the receiver the possession of the waterworks plant of which they were in possession, claiming title under the foreclosure sale, in directing the receiver to take possession thereof, and in enjoining them against asserting title or claim to the property. These features of the order are prohibitory or mandatory in character, and subject to review upon appeal. The order whereby certain bonds were required to be delivered to the clerk involves no present harm to either party, and need not be disturbed. The mandate therefore will be that those portions of the order of the circuit court whereby the receiver was directed to take and the appellants to surrender possession of property, excepting the bonds aforesaid, and the appellants enjoined from asserting title, be set aside, and that the possession be restored to the appellants, unless for some cause, not apparent in the record before us, the possession of the receiver should be continued. The petition for a rehearing is overruled.

BAKER, District Judge, who participated in the original decision, concurs.

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ADKINS v. W. & J. SLOANE.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 344.

APPEAL—OBJECTIONS NOT RAISED BELOW—TRIAL BY COURT.

The sufficiency of the evidence to support a general finding by the court on a trial at law without a jury cannot be reviewed on writ of error, where the case was submitted by both parties without a request for a peremptory instruction on the facts, although a general exception was taken to the judgment at the time it was entered.

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

This was an action by attachment brought by W. & J. Sloane, a corporation, against Isaac Wolf, in which James G. Adkins filed an interplea claiming property taken under the attachment. On trial of the issues arising on the interplea before the court, a jury having been waived by stipulation, judgment was rendered for plaintiff. Adkins brought error, upon which the circuit court of appeals rendered an opinion affirming the judgment. 8 C. C. A. 656, 60 Fed. 344. Adkins moved for a rehearing.

Henry Wollman, Clarence S. Palmer, and R. O. Boggess, for plaintiff in error.

Nathan Frank, for defendant in error.

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

**PER CURIAM.** A motion for a rehearing has been filed in this case, which we have duly considered. The point is urged that, even though it be true that the circuit court made a general finding in favor of the defendant in error and against the plaintiff in error, yet there was no testimony whatever to sustain such finding. A general exception was taken to the judgment at the time it was entered, and, in view of that exception, it is now urged that it is the duty of this court to review the testimony on which the verdict was based, and to determine whether there was any evidence to support it. We think, however, that this view is erroneous. The case was submitted to the circuit court, by counsel for both parties, upon the evident assumption that there were certain issues of fact which must be determined by the court. The trial court was not asked to grant a peremptory instruction that, upon the undisputed facts, the intervener was entitled to recover; and, in the absence of such a request, it is well settled that we are not authorized to review the finding of the circuit court, even in the respect above stated. This precise question was decided by the supreme court in the cases of *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Cooper v. Omohundro*, 19 Wall. 65; *Insurance Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. 671; and by this court in *Village of Alexandria v. Stabler*, 1 C. C. A. 616, 50 Fed. 689. It is true that in the two cases last cited the trial was before a jury, but the same rule is applicable when the trial is before the court. To raise the issue in this court, on a writ of error, that there was no evidence to support the verdict of the trial court, it should be made to appear that the same issue was presented to the trial judge by an appropriate instruction. The motion for a rehearing is accordingly denied.

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**DIETZ v. LYMER.**

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 351.

**1. APPEAL—DISCRETION OF TRIAL COURT—NECESSITY OF BILL OF EXCEPTIONS.**

The discretion of the trial court in sustaining motions to make answers more certain, and to strike out parts of answers as indefinite, and imposing costs as a condition of amending an answer, will not be reviewed on writ of error; especially where there is no bill of exceptions to make such motions part of the record.

**2. SAME—OBJECTIONS NOT RAISED BELOW—TRIAL BY REFEREE.**

On writ of error to review a judgment entered on a referee's report in an action at law, where there is no written stipulation waiving a jury, and nothing showing a reference under the state statute, and where there is no bill of exceptions, and no specific exception was taken to the overruling of exceptions to the referee's report or to the judgment thereon at the time it was entered, no question is presented for review. *Investment Co. v. Hughes*, 8 Sup. Ct. 377, 124 U. S. 157, followed.