

to, or a series of propositions contained in it are excepted to in gross, and any portion of what is excepted to is sound, the exception cannot be sustained." *McClellan v. Pyeatt*, 1 C. C. A. 613, 50 Fed. 686, 4 U. S. App. 319, 321; *Bracken v. Railway Co.*, 5 C. C. A. 548, 551, 56 Fed. 447, 450, 12 U. S. App. 421, 423; *Beaver v. Taylor*, 93 U. S. 46; *Lincoln v. Clafin*, 7 Wall. 132; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960; *Rogers v. The Marshal*, 1 Wall. 644, 647; *Moulor v. Insurance Co.*, 111 U. S. 335, 337, 4 Sup. Ct. 466; *Block v. Darling*, 140 U. S. 234, 238, 11 Sup. Ct. 832.

The charge of the court was concluded, and the jury retired to consider their verdict, on January 26, 1895. The exceptions now urged to certain specific portions of the charge first appeared in the bill of exceptions, which was presented to and signed by the judge who tried the case on February 23, 1895. These exceptions are utterly futile. As early as November, 1892, the decision of this court apprised counsel of this fact. In *Price v. Pankhurst*, 3 C. C. A. 551, 53 Fed. 312, 10 U. S. App. 497, 499, Judge Caldwell, in delivering the opinion of this court, said:

"It is the duty of the party excepting to call the attention of the court distinctly to the portions of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so. The practice, which, it has been intimated at the bar, sometimes obtains, of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives that the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court."

This rule has been repeatedly affirmed. *Bracken v. Railway Co.*, 5 C. C. A. 548, 56 Fed. 447, 12 U. S. App. 421, 423; *Emanuel v. Gates*, 3 C. C. A. 663, 53 Fed. 772; *Sutherland v. Round*, 6 C. C. A. 428, 57 Fed. 467; *Park v. Bushnell*, 9 C. C. A. 138, 60 Fed. 583.

The last supposed error relied upon is that the verdict is excessive. It is well settled that it is not within the power of this court to consider that question. *Railroad Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356; *Railroad Co. v. Charless*, 2 C. C. A. 380, 398, 51 Fed. 562.

The judgment below is affirmed, with costs.

CHICAGO & N. W. RY. CO. v. OLNEY.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1895.)

No. 563.

REVIEW ON APPEAL—DIRECTION OF VERDICT.

A refusal to direct a verdict for defendant is not ground for reversal when the evidence on all the material issues is conflicting.

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

N. M. Hubbard, Jr., and F. F. Dawley (N. M. Hubbard, with them on the brief), for plaintiff in error.

Lyman A. Ellis (Charles A. Clark and Frank W. Ellis, with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. About 3 o'clock in the morning of December 27, 1891, Denton Olney, the defendant in error, struck his knee against a switch target in the yards of the Chicago & Northwestern Railway Company, the plaintiff in error, at Clinton, in the state of Iowa, and was thereby severely injured. At the time of the accident, he was a fireman in the employment of the railway company, and was running along the yard by the side of his engine to throw a switch in the discharge of his duty. He sued the railway company in this action for damages that resulted from the injury, and alleged that its negligence in leaving a switch target without a light upon it in the night, directly in the path which he was required to follow in the discharge of his duty, caused his injury. The railway company denied that it was negligent, and alleged that the negligence of the defendant in error was the proximate cause of his injuries. At the close of the evidence, the counsel for the company requested the court to direct the jury to return a verdict in its favor. The court declined to do so, and this is the supposed error of which complaint is made in this court.

The testimony was conflicting upon all the material issues in the case. There was testimony that it was customary for the company to maintain a light on the switch target against which the defendant in error ran, but that it was not lighted on the night of the accident, and there was testimony that the defendant in error was injured on a target that was never lighted, and that the target on which he claimed to have been injured was properly lighted at the time of his injury. It was the special province of the jury to consider this conflicting evidence, and to find the ultimate facts. This evidence was by no means so clear and convincing that all reasonable men, in the exercise of a fair and sound judgment, would be compelled to come to the same conclusion. The evidence was submitted to the jury under a careful and exhaustive charge, which clearly and correctly stated the rules of law which should guide them in the decision of this case, and they returned a verdict for the defendant in error. A careful examination of the record has satisfied us that it contains ample evidence to warrant this finding, and the judgment below must accordingly be affirmed, with costs. It is so ordered.

WHITE et al. v. IOWA NAT. BANK OF DES MOINES.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1895.)

No. 533.

WRIT OF ERROR—LIMITATIONS.

Under Act March 3, 1891, § 11, a writ of error must be sued out within six months in order to authorize a review by the circuit court of appeals.

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

Writ of error, sued out by Stephen V. White, Franklin W. Hopkins, and S. V. White & Co., to review a judgment in favor of the Iowa National Bank of Des Moines, Iowa. Writ dismissed.

C. H. Gatch (C. A. Dudley and N. E. Coffin were with him on the brief), for plaintiffs in error.

A. B. Cummins (Carroll Wright was with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This court has no jurisdiction of this case. The writ of error was sued out on July 9, 1894, to review a judgment of dismissal of the action which was rendered on October 18, 1893. No motion for a new trial was made in the court below, and the judgment was final on that day, more than eight months before the writ of error was issued. Section 11 of the act of March 3, 1891, which created this court, and gave it the right to review the judgments of the circuit courts, provides:

"That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed." 26 Stat. 829, c. 517; 1 Supp. Rev. St. p. 904.

The writ must, accordingly, be dismissed, and it is so ordered.

CITY OF ANTHONY v. WOONSOCKET INSTITUTION FOR SAVINGS.

(Circuit Court of Appeals, Eighth Circuit. December 2, 1895.)

No. 534.

APPEAL—HARMLESS ERROR.

In an action against a city on interest coupons, the city cannot complain of error in admitting the coupons, without proof of their execution, if it subsequently itself offered evidence amply sufficient to establish the due execution and delivery of the bonds to which the coupons were attached.

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

Geo. B. Crooker, F. C. Raney, Kos Harris, and R. R. Vermilion, for plaintiff in error.

W. H. Rossington and Charles Blood Smith, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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