

cannot be considered, not only because in a law case this court does not review the evidence, but in this instance could not, because the bill of exceptions does not purport to contain all the evidence. The fifth specification is that the court erred in awarding the issuance of an ordinary execution upon the judgment. If there was error in this respect, it was purely formal; and if, in any possible way, harmful, the way has not been suggested, and is not perceived. Besides, the objection was not made in the court below, and therefore is not available here. Questions outside of the assignment of errors, of course will not be considered. The judgment below is affirmed.

RUSSELL v. BOHN MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1898.)

No. 408.

1. ASSIGNMENT OF ERROR—DIRECTING VERDICT.

On error to a circuit court from a ruling directing a verdict for the defendant, the assignment of errors should contain a separate specification for each count of the declaration upon which the right to go to the jury is asserted.

2. SAME—REVERSAL—NEW TRIAL.

A specification that "the court erred in taking the case from the jury, and directing a verdict for the defendant," is sufficient, under rule 11, providing that the court may, at its option, notice a plain error not assigned, and the proceedings will be reversed when, from the record, there appears nothing to bar a recovery on one cause of action set forth in the declaration, but the new trial in such case will involve only questions affecting such cause.

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

This was an action by Albert Russell against Bohn Manufacturing Company to recover in assumpsit for money had and received. The circuit court directed a verdict for the defendant, and the plaintiff brings error.

Julius H. Johnson and A. B. Melville, for plaintiff in error.

George A. Carpenter, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. In this case the court directed a verdict for the defendant, and the plaintiff prosecutes the writ of error. Besides a number of special counts, based on alleged breaches of contracts for the sale of lumber, the declaration contains the common counts in assumpsit. The ruling of the court in taking the case from the jury involves, therefore, as many separate questions as there are distinct counts, and by a strict construction of rule 11 of this court (21 C. C. A. cxii.) the assignment of errors should have contained a separate specification for each count on which the right to go to the jury is asserted, but, instead, it is alleged in a single specification that the court erred in taking the case from the jury and in directing a verdict for the defendant, and on that we are asked to determine

whether, upon the entire declaration, and especially whether, upon the common count for money had and received, the case should have been submitted to the jury. Under the last clause of the rule "the court, at its option, may notice a plain error not assigned," or, of course, one of that character which is imperfectly assigned. We are of opinion that such an error is apparent in the record. The plaintiff testified distinctly that at the contract prices the lumber received by him amounted to a sum named, and that the payments made exceeded that amount by \$1,207.70, and, if that be true, there is nothing in the record to bar a recovery of the excess. Settlements of differences growing out of their contracts were made by the parties on August 23 and December 12, 1893, but payments were made by the plaintiff after the latter date, and the question of overpayment therefore could not have been included in either settlement. In other respects no error is perceived in any of the rulings of the court, and the new trial which is ordered will be only upon the question whether the plaintiff in error is entitled to recover for an excess of payments over the aggregate prices of the lumber received of the defendant. The judgment below is reversed, at the cost of the defendant in error, with direction to grant a new trial.

THE TRAVELLERS INS. CO. v. THE WILD RIVER LUMBER CO.

(Circuit Court of Appeals, First Circuit. November 5, 1897.)

No. 218.

INDEMNITY INSURANCE—CONSTRUCTION OF POLICY.

A lumber company procured a policy insuring it against loss from liability to any persons who should "sustain accidental bodily injuries under circumstances which shall impose upon the insured a common-law or statutory liability therefor." The application contained the following: "It is understood that, in the conduct of a portion of their business, the assured employ a railroad owned by themselves, and used only for their own lumbering purposes." The company's lumbering operations were carried on on its own land, remote from other settlements; and it had mills, dwellings, and a store for supplying its workmen and agents. It owned a railroad, some 3½ miles long, for the transportation of its lumber supplies, workmen, and such persons as had business at its mills or store. Two commercial travelers, who had come to its premises to take orders for supplying its store, were, by a special arrangement with its superintendent, to be taken back over its road on a locomotive, paying fare therefor. On the way, the locomotive was overturned, and they were injured, under circumstances subjecting the lumber company to a liability, which it paid. *Held*, that the injuries occurred within the scope of the company's "own lumbering purposes," within the meaning of the application, so as to make the insurer liable, and that, under the peculiar circumstances, the undertaking to carry the travelers on a locomotive was not a fraud on the insurer, so as to preclude a recovery.

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

This was an action at law by the Wild River Lumber Company against the Travelers Insurance Company to recover upon a policy of indemnity insurance. The action was brought in the supreme judicial court of the state of Maine, and thence removed into the circuit court by the defendant. The case was tried