NY CLS CPLR § 4017

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Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 40 Trial Generally (§§ 4001 — 4019)

§ 4017. Objections

Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501.

History

Add, L 1962, ch 308; amd, L 1973, ch 233, eff Sept 1, 1973.

Annotations

Notes

Prior Law:

Earlier statutes: CPA §§ 445, 446; CCP § 994; Code Proc §§ 268, 272.

Advisory Committee Notes:

This section is based on part of Federal rule 46. The last phrase of the Federal rule is covered in CPLR § 5501(a)(3) and (4).

Under former law, exceptions to rulings were “deemed made” under CPA § 445, while exceptions concerning charges given to the jury were required by § 446. This section sets forth the underlying theory—that a party’s grievance be made known; there is no difference between an “exception,” an “objection” and a refusal of a party’s request for a ruling in this respect. Objections to a refusal or failure to charge are required by this section, since a mere request to charge may not represent a grievance against a different charge given and the court must be given an opportunity to correct a defective charge. This was the reason for the difference between former §§ 445 and 446 and accords with their provisions. The provision relating to objection to charge to jury requires such objection to be taken before the jury retires, rather than before it reaches a verdict, since the court at such earlier time will have an opportunity to correct the change and possibly avoid reversible error. The last sentence of the section alerts attorneys to the consequences of failure to make objections known with regard to review on appeal.

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I. Under CPLR

1. Generally

Where automobile mechanic testified in products liability case concerning his regular practice in using refrigerant can and testified that he never used immersion coil in heating refrigerant cans and where chemical company offered testimony to prove mechanic's regular usage of immersion coil and, in response to mechanic's objection that matter was collateral, chemical company responded that, evidence was admissible on mechanic's credibility, chemical company's objection to court's ruling excluding its proffered evidence adequately preserved issue for review. Halloran v Virginia Chemicals, Inc., 41 N.Y.2d 386, 393 N.Y.S.2d 341, 361 N.E.2d 991, 1977 N.Y. LEXIS 1850 (N.Y. 1977).

Trial court's refusal to permit defense counsel to take an exception, going so far as to threaten defense counsel with contempt if he should do so and stating that he would not stand for any lawyer in his courtroom saying "I except" to let the jury know he didn't agree with the court's rulings was improper, despite fact that formal exceptions to rulings are no longer required. Roma v Blaustein, 44 A.D.2d 576, 353 N.Y.S.2d 44, 1974 N.Y. App. Div. LEXIS 5541 (N.Y. App. Div. 2d Dep't 1974).

Objection to permitting attorney to testify without oath was properly made in motion for mistrial or to strike before close of case and while witness was available. O'Hearn v O'Hearn, 55 A.D.2d 766, 389 N.Y.S.2d 651, 1976 N.Y. App. Div. LEXIS 15552 (N.Y. App. Div. 3d Dep't 1976).

Failure to record exceptions during summation could not afford basis for reversible error, where both attorneys had waived their right to have summations recorded and plaintiff's attorney did not request that the allegedly objectionable statements and the court's ruling thereon be recorded. Snell v Motor Vehicle Acci. Indemnification Corp., 57 A.D.2d 688, 393 N.Y.S.2d 829, 1977 N.Y. App. Div. LEXIS 11722 (N.Y. App. Div. 3d Dep't 1977).

Defendant was not deprived of fair trial by prosecutor's conduct during cross-examination where, after defense counsel objected to prosecutor's choice of words in forming question, prosecutor rephrased question, defense counsel said "That's fine," and prosecutor then utilized

rephrased question without objection. People v Singleton, 121 A.D.2d 752, 504 N.Y.S.2d 167, 1986 N.Y. App. Div. LEXIS 58734 (N.Y. App. Div. 2d Dep't), app. denied, 68 N.Y.2d 918, 508 N.Y.S.2d 1039, 501 N.E.2d 612, 1986 N.Y. LEXIS 20814 (N.Y. 1986).

In homeowner's action for breach of repair contract, contractor failed to preserve for appeal Trial Term's decision to credit and rely on consultant's pricing report for assistance in resolving questions of fact as they related to type and cost of repairs, even though it was homeowner who had engaged consultant for opinion as to sufficiency of contractor's work, where contractor himself had introduced report into evidence and thus could not impeach credibility of either report or consultant. Dean v Long, 127 A.D.2d 899, 511 N.Y.S.2d 973, 1987 N.Y. App. Div. LEXIS 43401 (N.Y. App. Div. 3d Dep't 1987).

Where there is bona fide objection to offer of certain evidence, proponent of such evidence must take advantage of opportunity to make offer of proof in order to demonstrate relevance of disputed evidence. People v Billups, 132 A.D.2d 612, 518 N.Y.S.2d 9, 1987 N.Y. App. Div. LEXIS 49151 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 873, 523 N.Y.S.2d 500, 518 N.E.2d 11, 1987 N.Y. LEXIS 19105 (N.Y. 1987), app. denied, 70 N.Y.2d 1004, 526 N.Y.S.2d 939, 521 N.E.2d 1082, 1988 N.Y. LEXIS 781 (N.Y. 1988).

In action for negligence in allowing horses to escape from paddock, plaintiffs failed to preserve for appellate review issue of propriety of permitting witness to testify as to fencing material used on defendant farm where there was no objection to such testimony until after witness had described industry standard, and plaintiffs did not challenge witness' credentials to testify as expert. Osborne v Schoenborn, 216 A.D.2d 810, 628 N.Y.S.2d 886, 1995 N.Y. App. Div. LEXIS 7468 (N.Y. App. Div. 3d Dep't 1995).

In light of the employee's argument that the employee was not required to formally serve a N.Y. C.P.L.R. 3101(d) notice because the employer had notice of the expert's testimony through a prior affidavit submitted in opposition to the employer's motion for summary judgment, the employee preserved for appellate review under N.Y. C.P.L.R. 4017 a challenge to the trial

court’s preclusion ruling. Saldivar v I.J. White Corp., 46 A.D.3d 660, 847 N.Y.S.2d 224, 2007 N.Y. App. Div. LEXIS 12609 (N.Y. App. Div. 2d Dep't 2007).

2. Failure to object, generally

When a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived, CPLR 4017. Horton v Smith, 51 N.Y.2d 798, 433 N.Y.S.2d 92, 412 N.E.2d 1318, 1980 N.Y. LEXIS 2658 (N.Y. 1980).

In a mother’s appeal from an order terminating her parental rights to her child based on permanent neglect, the mother would not be permitted to raise the issue of the sufficiency of the evidence of commitment where the petition had identified the commitment and alleged that the mother had executed it more than one year before the proceeding, the petitioning agency’s social worker had testified to the execution of the commitment document without objection, and the mother’s attorney had not challenged the sufficiency of the evidence at the hearing. In re Guardianship of Star Leslie W., 63 N.Y.2d 136, 481 N.Y.S.2d 26, 470 N.E.2d 824, 1984 N.Y. LEXIS 4607 (N.Y. 1984).

Absent proper request for special interrogatory, omission of which is now claimed to be error, no question of law is presented for review by Court of Appeals. Suria v Shiffman, 67 N.Y.2d 87, 499 N.Y.S.2d 913, 490 N.E.2d 832, 1986 N.Y. LEXIS 16607 (N.Y. 1986).

A party’s failure to object to the trial court’s charge makes the charge the law of the case and precludes its being attacked on appeal. Chapman v Thirty-Ninth St. Realty Corp., 26 A.D.2d 806, 274 N.Y.S.2d 172, 1966 N.Y. App. Div. LEXIS 3316 (N.Y. App. Div. 1st Dep't 1966).

In the absence of objection by defendants’ experienced trial counsel, allegation that speculative evidence was received in death action upon the issue of future earning power of deceased would be ignored. Ryan v Samarco, 30 A.D.2d 767, 292 N.Y.S.2d 319, 1968 N.Y. App. Div. LEXIS 3615 (N.Y. App. Div. 4th Dep't 1968).

In an action brought by a New York resident against the resident of a foreign state based on an automobile accident in the foreign state, defendant would not be permitted to amend his answer for the purpose of controverting the jurisdictional issue where his automobile insurance policy had been attached as a basis for obtaining quasi in rem jurisdiction, and where defendant had waived any objection to the issue of quasi in rem jurisdiction by failing to object in the course of the pending actions, despite the fact that defendant's insurer had opposed the application for an order of attachment, and that the United States Supreme Court had declared unconstitutional the attachment of an automobile insurance policy as a predicate for quasi-in-rem jurisdiction. Micha v Hnasko, 87 A.D.2d 920, 449 N.Y.S.2d 93, 1982 N.Y. App. Div. LEXIS 16440 (N.Y. App. Div. 3d Dep't), app. dismissed, 57 N.Y.2d 774, 1982 N.Y. LEXIS 4341 (N.Y. 1982).

In abuse and neglect proceeding, parents' contention that they were denied their statutory and constitutional rights to be present and to confront witnesses at in-camera interview Family Court held with child in presence of only her law guardian was not preserved for appellate review where no proper objection was made in Family Court, even though asserted rights had constitutional basis. In re Karen "BB", 216 A.D.2d 754, 628 N.Y.S.2d 431, 1995 N.Y. App. Div. LEXIS 6602 (N.Y. App. Div. 3d Dep't 1995).

It was error for court to dismiss medical malpractice action at close of plaintiffs' case on ground that testimony of plaintiffs' expert could not be considered by jury, where defendant did not object to admissibility of expert's testimony until after that testimony was completed and plaintiffs had rested; since objection was untimely, expert's testimony was presumed to have been unobjectionable, and alleged error was waived. Koplick v Lieberman, 270 A.D.2d 460, 704 N.Y.S.2d 657, 2000 N.Y. App. Div. LEXIS 3197 (N.Y. App. Div. 2d Dep't 2000).

Defendant's claim that a statute establishing defendant's status as a sex offender for committing attempted kidnapping against a child was unconstitutional as applied to defendant was waived; in violation of N.Y. C.P.L.R. 4017, 5501(a)(3), applicable to such appeals under N.Y. Correct. Law § 168-n(3), defendant raised the claim for the first time on appeal. People v Cassano, 34 A.D.3d 239, 823 N.Y.S.2d 395, 2006 N.Y. App. Div. LEXIS 13225 (N.Y. App. Div. 1st Dep't

2006), app. denied, 8 N.Y.3d 804, 830 N.Y.S.2d 700, 862 N.E.2d 792, 2007 N.Y. LEXIS 253 (N.Y. 2007).

While the owners' counsel declined to object when a photograph was first offered in an adverse possession claim, he did argue, in the colloquy that followed, that the photograph did not constitute a business record; it could not have been said, therefore, that the owners failed to alert the trial court to their concerns with respect to the admissibility of the photograph and its enlargements, as it must have before their argument would have been considered to be unpreserved for appeal. Corsi v Town of Bedford, 58 A.D.3d 225, 868 N.Y.S.2d 258, 2008 N.Y. App. Div. LEXIS 9010 (N.Y. App. Div. 2d Dep't 2008), app. denied, 12 N.Y.3d 714, 883 N.Y.S.2d 797, 911 N.E.2d 860, 2009 N.Y. LEXIS 2486 (N.Y. 2009).

Trial court erred in applying compound interest to the unpaid no-fault benefits because, while the issue was not properly preserved, the pertinent New York insurance regulations provided for the accrual of simple interest on improperly withheld no-fault benefits at a rate of 2% per month. Carlin v Hereford Ins. Co., 125 A.D.3d 917, 5 N.Y.S.3d 171, 2015 N.Y. App. Div. LEXIS 1589 (N.Y. App. Div. 2d Dep't 2015).

3. —Particular applications of rule; jury instructions

Where no exception was taken nor was a requested charge made, the issue with respect to the accuracy of the trial court's charge was not preserved for review. Miles v R & M Appliance Sales, Inc., 26 N.Y.2d 451, 311 N.Y.S.2d 491, 259 N.E.2d 913, 1970 N.Y. LEXIS 1282 (N.Y. 1970).

Even though the defendant did not object to the failure to charge as requested until after the jury had retired, the issue of the charge was adequately preserved for appellate review where the trial court had indicated to counsel that it did not desire to have the exceptions and request to charge heard before the jury and instructed counsel that such be brought up in chambers and the objections were raised in chambers immediately following submission of the case to the jury.

Meagher v Long I. R. R. Co., 27 N.Y.2d 39, 313 N.Y.S.2d 378, 261 N.E.2d 384, 1970 N.Y. LEXIS 1155 (N.Y. 1970).

In a personal injury action in which defense counsels objected generally and without requesting any additional or clarifying instructions after the court gave the jury supplemental instructions to cure a defect in the original verdict which defendants contended was inconsistent and excessive, rather than giving a complete recharge, the court's supplemental instructions were properly affirmed, since no legal error was presented in light of counsels' failure to preserve their objections to the procedure adopted by the court. Beltz v Buffalo, 61 N.Y.2d 698, 472 N.Y.S.2d 604, 460 N.E.2d 1089, 1984 N.Y. LEXIS 4008 (N.Y. 1984).

Court's alleged error, in refusing to instruct jury that exculpatory clause of parties' contract was inapplicable to case, was effectively waived where plaintiff placed entire contract into evidence without any exclusion of, or objection to, provision in question. Plantation House & Garden Prods. v R-Three Investors, 285 A.D.2d 539, 728 N.Y.S.2d 181, 2001 N.Y. App. Div. LEXIS 7444 (N.Y. App. Div. 2d Dep't 2001).

Pursuant to N.Y. C.P.L.R. 4017, 5501(a)(3), a driver failed to preserve for appellate review his contention that the trial court erred in allowing a motorist to present expert testimony in a traffic accident case because the driver did not object to the admissibility of the testimony of the expert until after that testimony was completed and the motorist had rested. Wall v Shepard, 53 A.D.3d 1050, 860 N.Y.S.2d 375, 2008 N.Y. App. Div. LEXIS 5867 (N.Y. App. Div. 4th Dep't 2008).

On exception duly taken, a verdict must not stand that is based on a charge which permits the jury to say that the plaintiff's resolution revoking authority of a bank to honor checks applied to checks given theretofore. K. & K. Silk Trimming Co. v Garfield Nat'l Bank, 215 N.Y.S. 269, 127 Misc. 27, 1926 N.Y. Misc. LEXIS 914 (N.Y. App. Term 1926).

Given the lengthy colloquy on the subject, the court obviously was aware of the nature of the objection and, more importantly, it recognized that the issue would be subject to appellate review; thus, while defense counsel's objection could have been more forceful, the fact

remained that he did raise the objection and he never expressly consented to any juror substitution during deliberations. Therefore, there was fundamental error which was subject to appellate review. Gallegos v Elite Model Mgmt. Corp., 28 A.D.3d 50, 807 N.Y.S.2d 44, 2005 N.Y. App. Div. LEXIS 14831 (N.Y. App. Div. 1st Dep't 2005).

Where plaintiff lodged a general objection based on hearsay before a witness testified but did not object to the specific testimony that constituted the hearsay, as the general objection to both the testimony and the business record apprised the hearing officer that plaintiff objected on the grounds of hearsay, plaintiff preserved the issue for appellate review under N.Y. C.P.L.R. 4017. Hochhauser v Elec. Ins. Co., 46 A.D.3d 174, 844 N.Y.S.2d 374, 2007 N.Y. App. Div. LEXIS 11270 (N.Y. App. Div. 2d Dep't 2007).

4. — —Instructions as to negligence and contributory negligence

Absent an exception or request for clarification, the court’s charge relating to contributory negligence on the part of the infant plaintiff was not error. Hermance v Slopey, 32 A.D.2d 573, 299 N.Y.S.2d 38, 1969 N.Y. App. Div. LEXIS 4194 (N.Y. App. Div. 3d Dep't 1969).

In personal injury action by motorcycle passenger against motorcyclist who, by reason of his own injuries, had lost all recollection of accident in which cycle failed to negotiate a curve and struck road sign, it was fundamental error, requiring reversal in the interests of justice even if plaintiff had failed to request charge pursuant to CPLR 4017, to refuse jury instruction that if jury found that vehicle was in defendant’s control and that circumstances were such that accident would not have occurred in the ordinary course of events if defendant had used reasonable care under the circumstances then jury would be permitted, but not required, to infer negligence from happening of accident. Simmons v Stiles, 43 A.D.2d 417, 353 N.Y.S.2d 257, 1974 N.Y. App. Div. LEXIS 5666 (N.Y. App. Div. 3d Dep't 1974).

In view of critical significance of contributory fault issue in dog bite case, trial court’s error in giving contributory negligence instructions which put burden on injured plaintiff rather than on animal’s owner was fundamental and required a new trial in interest of justice and the exercise

of discretion. Di Grazia v Castronova, 48 A.D.2d 249, 368 N.Y.S.2d 898, 1975 N.Y. App. Div. LEXIS 9868 (N.Y. App. Div. 4th Dep't 1975).

Plaintiff was precluded on appeal from attacking trial court's failure to give a charge instructing jury to consider decedent a "disabled person" in passing upon issue of his contributory negligence where plaintiff, though urging a broader definition of disability based on decedent's lack of sufficient knowledge, made no mention of such a novel and expanded concept of "disability" in trial court. Markman v Kotler, 52 A.D.2d 579, 382 N.Y.S.2d 522, 1976 N.Y. App. Div. LEXIS 12156 (N.Y. App. Div. 2d Dep't 1976).

In action for personal injuries sustained when plaintiffs' vehicle struck city's department of sanitation's foreman's departmental car from rear after he stopped car partially off expressway and proceeded to give instructions to driver of snowplow, mere objection to "charging the Traffic Regulations and the Vehicle and Traffic Code, and particularly the Vehicle and Traffic Code as constituting negligence merely if there is a violation" was insufficient to preserve for review the contention that giving charge on statute prohibiting stopping or parking vehicle on expressway except in emergency was error on ground that foreman was exempt from operation of statute. Petosa v New York, 52 A.D.2d 919, 383 N.Y.S.2d 397, 1976 N.Y. App. Div. LEXIS 12763 (N.Y. App. Div. 2d Dep't 1976).

It was error for trial court, in administratrix' action against motorist to recover for injuries sustained by decedent passenger when motorist struck stopped automobile, to instruct jury on duty of care required of mental incompetents and intoxicated persons charged with contributory negligence, where there was no evidence that passenger was contributorily negligent or had failed to exercise reasonable care for his own safety at time of automobile accident, and charges of intoxication and incompetence of passenger were entirely irrelevant to issue of motorist's negligence. Seneca v Mohawk, 52 A.D.2d 1053, 384 N.Y.S.2d 564, 1976 N.Y. App. Div. LEXIS 12967 (N.Y. App. Div. 4th Dep't 1976).

II. Under Former Civil Practice Laws

A. In general

5. Generally

CPA § 455 had relation to a reference for the trial of an issue of fact arising on the pleadings, and was inapplicable to a reference to take account and report. Pierce v Fenno, 224 A.D. 164, 230 N.Y.S. 39, 1928 N.Y. App. Div. LEXIS 9955 (N.Y. App. Div. 1928).

By excepting to motion denial of motion to dismiss at close of plaintiff's case, defendant's failure to except to denial of motion to dismiss at close of entire case, did not bar review. Fillis v Wahlig, 267 A.D. 781, 45 N.Y.S.2d 609, 1943 N.Y. App. Div. LEXIS 6229 (N.Y. App. Div. 2d Dep't 1943), reh'g denied, 267 A.D. 826, 47 N.Y.S.2d 129, 1944 N.Y. App. Div. LEXIS 4985 (N.Y. App. Div. 1944), aff'd, 293 N.Y. 710, 56 N.E.2d 729, 293 N.Y. (N.Y.S.) 710, 1944 N.Y. LEXIS 2133 (N.Y. 1944).

B. Exception deemed taken

6. Generally

Although exceptions to facts do not lie, and all that is necessary is an exception to conclusions of law (Metropolitan Gaslight Co. v New York (1877, NY) 9 Hun 706; Roe v Roe (1878, NY) 14 Hun 612) if the court finds a fact without evidence it is a ruling upon the question of law and an exception is necessary. Brush v Lee, 36 N.Y. 49, 36 N.Y. (N.Y.S.) 49, 34 How. Pr. 283, 1867 N.Y. LEXIS 7, 1867 N.Y. Misc. LEXIS 244 (N.Y. 1867).; Mead v Smith, 28 Hun 639 (N.Y.).

Where a plaintiff neither objected nor excepted to the submission of three specific questions to a jury he is deemed to have acquiesced in that mode of disposing of the case so far as the jury were concerned. Cooper v New York, O. & W. R. Co., 180 N.Y. 12, 72 N.E. 518, 180 N.Y. (N.Y.S.) 12, 1904 N.Y. LEXIS 1287 (N.Y. 1904).

Where nonsuit is granted no findings are necessary, but an exception must be taken in order to review the judgment, though lack of exception may be waived. People v Journal Co., 213 N.Y. 1, 106 N.E. 759, 213 N.Y. (N.Y.S.) 1, 1914 N.Y. LEXIS 721 (N.Y. 1914).

In the absence of exception as provided for by CPA § 445, a question of law was not reviewable by the Court of Appeals. People v Nixon, 248 N.Y. 182, 161 N.E. 463, 248 N.Y. (N.Y.S.) 182, 1928 N.Y. LEXIS 1244 (N.Y. 1928), overruled, People v Santos, 86 N.Y.2d 869, 635 N.Y.S.2d 168, 658 N.E.2d 1041, 1995 N.Y. LEXIS 3567 (N.Y. 1995).

In view of CPA §§ 445, 446, and surrogate's court act, §§ 71, 72, no exception to the surrogate's decision on the merits was necessary, unless he made separate findings of fact and conclusions of law, upon which the decree was entered. In re Findlay, 253 N.Y. 1, 170 N.E. 471, 253 N.Y. (N.Y.S.) 1, 1930 N.Y. LEXIS 793 (N.Y. 1930).

By failure to file exceptions, as provided by CPA § 445 and by omitting the statement that the case contained all the evidence, the appellant did not call upon the court to review either the facts or the law. Frederick v Johnstown, 47 A.D. 221, 62 N.Y.S. 66, 1900 N.Y. App. Div. LEXIS 80 (N.Y. App. Div. 1900).

Exception to a short decision is not necessary to a review of the exceptions taken on the trial; its function under Judiciary Law, § 551, is the general function of an exception, which is to protect against the decision of the court. Piltz v Yonkers R. Co., 83 A.D. 29, 82 N.Y.S. 220, 1903 N.Y. App. Div. LEXIS 1418 (N.Y. App. Div. 1903).

No exception to the report of a referee or the decision of the court rendered after the trial is necessary to enable the appellate division to review the facts; if necessary an exception "to each and every finding of fact and conclusion of law" and "to each and every refusal of the said referee to find as requested" is open to the criticism that it is too general. In re Mosher's Estate, 103 A.D. 459, 93 N.Y.S. 123, 1905 N.Y. App. Div. LEXIS 1097 (N.Y. App. Div. 1905), aff'd, 185 N.Y. 556, 77 N.E. 1186, 185 N.Y. (N.Y.S.) 556, 1906 N.Y. LEXIS 972 (N.Y. 1906).

Where, at the close of a trial the jury were discharged by consent of both parties and the issues submitted to the trial justice, the defendant, who failed to file any exceptions to the findings, cannot on appeal raise the point that upon the undisputed facts and findings the decision should have been in its favor. Dearing v Independent Union Tel. Co., 145 A.D. 152, 129 N.Y.S. 13, 1911 N.Y. App. Div. LEXIS 1754 (N.Y. App. Div. 1911).

CPA § 445 applied only to cases in which appellant confined himself to exceptions to conclusions of law found by the trial court. Savage v Potter, 159 A.D. 729, 145 N.Y.S. 78, 1913 N.Y. App. Div. LEXIS 8902 (N.Y. App. Div. 1913).

Failure to file formal exception of nonsuit was not jurisdictional, and appellate division could permit an exception to be filed. Termini v Huth, 191 A.D. 218, 181 N.Y.S. 224, 1920 N.Y. App. Div. LEXIS 4689 (N.Y. App. Div. 1920).

Where defendant made specific objections to incompetent evidence, but took no exception, yet appellate court may reverse. Steen v Burleson, 268 A.D. 815, 49 N.Y.S.2d 210, 1944 N.Y. App. Div. LEXIS 3593 (N.Y. App. Div. 1944).

Where a referee reports separately his findings of fact and conclusions of law, and an objecting defendant neither makes request to find nor takes exceptions to the report, a motion to send back the report for further findings will be denied. Surpless v Surpless, 124 N.Y.S. 809, 67 Misc. 586, 1910 N.Y. Misc. LEXIS 317 (N.Y. Sup. Ct. 1910).

Determination of surrogate making allowance of compensation to special guardian after a reference in which the question of compensation was not in issue presented solely a question of law to which an exception could be interposed. In re Dunham's Estate, 160 N.Y.S. 217, 94 Misc. 550, 1916 N.Y. Misc. LEXIS 1205 (N.Y. Sur. Ct. 1916).

On appeal from a judgment entered on report of a referee where no exceptions were filed to the report as provided by CPA § 445, only exceptions taken at the trial can be reviewed. Rosenstock v Hoggarty, 13 N.Y.S. 228, 1891 N.Y. Misc. LEXIS 1048 (N.Y. City Ct. 1891), aff'd, 131 N.Y. 647, 30 N.E. 867, 131 N.Y. (N.Y.S.) 647, 1892 N.Y. LEXIS 1130 (N.Y. 1892).

Where an issue of fact is tried by a referee or by the court with a jury, an exception to a ruling on a question of law made after the cause is finally submitted must be taken by filing a notice of the exception, etc. FIFTH AVE. BANK v WEBBER, 15 N.Y.S. 734, 27 Abb. N. Cas. 1, 1891 N.Y. Misc. LEXIS 3356 (N.Y. Super. Ct. 1891).

Exceptions to the decision of the court on the trial of an issue of law are not necessary in order to raise the question of the correctness of the decision on appeal. Cass v Shewman, 16 N.Y.S. 236, 61 Hun 472, 1891 N.Y. Misc. LEXIS 400 (N.Y. Sup. Ct. 1891).

Where a finding of fact is made by the court without evidence to support the finding, an exception is necessary to bring the case up for review, as the question whether there was evidence to support the finding is one of law, and if in such case no exception is taken to the rulings of the trial court and filed as required by this section, and no exception is taken to the conclusion of law that the complaint be dismissed, the judgment will be affirmed on appeal. Smith v Moulson, 34 N.Y.S. 607, 88 Hun 147 (1895).

7. Ruling as necessary basis of exception

Where the court presiding at a jury trial reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any question of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists authorizing the court to file a decision and the defendant to file an exception to such decision. Murray v New York, 60 A.D. 541, 69 N.Y.S. 959, 1901 N.Y. App. Div. LEXIS 741 (N.Y. App. Div. 1901).

There must be a finding or a refusal to find upon the question sought to be reviewed to make a basis of an exception. Forsyth v Rickenbrode, 22 NY Week Dig 470.

8. Time for taking exception

Under CPA § 268 and under CPA § 445 the time to make a case, in an action tried by a referee, did not begin to run till entry of judgment and notice thereof; and the provision of rule 32 of 1877, requiring a case to be made in ten days after service of the report, was in conflict with the statute and inoperative. Under CPA § 445, exception taken after trial might be taken at any time before the party was required to serve the case. French v Powers, 80 N.Y. 146, 80 N.Y. (N.Y.S.) 146, 1880 N.Y. LEXIS 76 (N.Y. 1880).

The time during which exceptions may be filed does not begin to run until after service of the decision of the court, and service of copies of the order dismissing the complaint and of the judgment is not sufficient. Schwartz v Weber, 103 N.Y. 658, 8 N.E. 728, 103 N.Y. (N.Y.S.) 658, 3 N.Y. St. 611, 1886 N.Y. LEXIS 1146 (N.Y. 1886).

In a case tried before a jury an exception under CPA § 445 had to be taken on the trial before the jury had rendered a verdict. Voisin v Commercial Mut. Ins. Co., 123 N.Y. 120, 25 N.E. 325, 123 N.Y. (N.Y.S.) 120, 1890 N.Y. LEXIS 1715 (N.Y. 1890).

9. —Filing nunc pro tunc

After verdict for plaintiff, court cannot allow defendant to file exception nunc pro tunc to rulings on evidence. Mortimer v Bristol, 190 A.D. 452, 180 N.Y.S. 55, 1920 N.Y. App. Div. LEXIS 4177 (N.Y. App. Div. 1920).

A motion for an order to show cause, returnable at Special Term, to permit the filing of exceptions nunc pro tunc, having been submitted to the Appellate Division by stipulation, is granted. Hammond v New York Casualty Co., 239 A.D. 627, 269 N.Y.S. 290, 1934 N.Y. App. Div. LEXIS 10905 (N.Y. App. Div. 1934).

But it is within the legal discretion of the court to allow such exceptions to be filed nunc pro tunc after the time allowed has elapsed. Spitz v Tousey, 14 NYSR 871.; Coe v Coe, 14 Abb Pr 86.; Bortle v Mellen, 14 Abb Pr 228.; Sheldon v Wood, 13 Super Ct (6 Duer) 679.

10. Form and sufficiency of exceptions

A general exception to the finding or to each and every one of the findings, rulings or conclusions, is insufficient. Newell v Doty, 33 N.Y. 83, 33 N.Y. (N.Y.S.) 83, 1865 N.Y. LEXIS 84 (N.Y. 1865); Wheeler v Billings, 38 N.Y. 263, 38 N.Y. (N.Y.S.) 263, 1868 N.Y. LEXIS 88 (N.Y. 1868); Ledoux v Grand T. R. Co., 61 N.Y. 613, 1874 N.Y. LEXIS 650 (N.Y. 1874).; Ward v Craig, 87 N.Y. 550, 87 N.Y. (N.Y.S.) 550, 1882 N.Y. LEXIS 39 (N.Y. 1882); Moyer v New York C. & H. R. R. Co., 88 N.Y. 351, 88 N.Y. (N.Y.S.) 351, 1882 N.Y. LEXIS 111 (N.Y. 1882); Hepburn v Montgomery, 97 N.Y. 617, 97 N.Y. (N.Y.S.) 617, 1884 N.Y. LEXIS 201 (N.Y. 1884); but see Hatch v Fogerty, 30 Super Ct (7 Robt) 488.

The exceptions must be so specific as to point out the error complained of. Wheeler v Billings, 38 N.Y. 263, 38 N.Y. (N.Y.S.) 263, 1868 N.Y. LEXIS 88 (N.Y. 1868).; Jagger v Littlefield, 81 N.Y. 626, 81 N.Y. (N.Y.S.) 626, 1880 N.Y. LEXIS 288 (N.Y. 1880).; Loomis v Loomis, 51 Barb. 257, 1868 N.Y. App. Div. LEXIS 37 (N.Y. Sup. Ct. July 21, 1868).See also, Jones v Osgood, 6 N.Y. 233, 6 N.Y. (N.Y.S.) 233, 1852 N.Y. LEXIS 59 (N.Y. 1852).; Caldwell v Murphy, 11 N.Y. 416, 11 N.Y. (N.Y.S.) 416, 1854 N.Y. LEXIS 86 (N.Y. 1854).; Ingersoll v Bostwick, 22 N.Y. 425, 22 N.Y. (N.Y.S.) 425, 1860 N.Y. LEXIS 42 (N.Y. 1860).; Newell v Doty, 33 N.Y. 83, 33 N.Y. (N.Y.S.) 83, 1865 N.Y. LEXIS 84 (N.Y. 1865).; Tyler v Willis, 33 Barb. 327, 1861 N.Y. App. Div. LEXIS 10 (N.Y. Sup. Ct. Feb. 4, 1861).

A general exception to a whole finding or refusal to find is not sufficient if the finding or refusal is good in any part. Newlin v Lyon, 49 N.Y. 661, 49 N.Y. (N.Y.S.) 661, 1872 N.Y. LEXIS 234 (N.Y. 1872).; Crawford v Everson, 68 N.Y. 624, 1877 N.Y. LEXIS 783 (N.Y. 1877).; Simms v Voght, 94 N.Y. 654, 94 N.Y. (N.Y.S.) 654, 1884 N.Y. LEXIS 332 (N.Y. 1884).; Heilbrun v Hammond, 13 Hun 474 (N.Y.).; Riley v Sexton, 32 Hun 245 (N.Y.).

It has been said that a party excepting to the conclusions of law of a court or referee are not held to the same strict rule as in excepting to a charge. Newlin v Lyon, 49 N.Y. 661, 49 N.Y. (N.Y.S.) 661, 1872 N.Y. LEXIS 234 (N.Y. 1872).

So a general exception to a refusal to correct findings and make them conform to the proved facts is too vague. Krekeler v Thaule, 73 N.Y. 608, 73 N.Y. (N.Y.S.) 608, 1878 N.Y. LEXIS 679 (N.Y. 1878).

But an exception to the conclusion of law of a certain finding which contained findings both of law and fact is too general. Murray v Berdell, 97 N.Y. 617, 97 N.Y. (N.Y.S.) 617, 1884 N.Y. LEXIS 200 (N.Y. 1884).

An exception to a finding specifying each of the separate facts so found substantially in the words of the finding, is sufficient though only one of the facts was open to exception. Todd v Nelson, 109 N.Y. 316, 16 N.E. 360, 109 N.Y. (N.Y.S.) 316, 15 N.Y. St. 270, 1888 N.Y. LEXIS 732 (N.Y. 1888).

A general exception to the conclusions of law tried by a court or referee without a jury, is insufficient to raise any question for review by the court of appeals; there should be a specific exception to the ruling. Drake v New York Iron Mine, 156 N.Y. 90, 50 N.E. 785, 156 N.Y. (N.Y.S.) 90, 1898 N.Y. LEXIS 682 (N.Y. 1898).

A general exception to a referee's report upon general average is insufficient to bring up the various items for review. Jones v Bridge, 32 Super Ct (2 Sweeny) 431.

11. Questions raised by exceptions taken

An exception taken to a refusal to find facts on the ground of their immateriality, raises the question whether they were material or not. Fox v Moyer, 54 N.Y. 125, 54 N.Y. (N.Y.S.) 125, 1873 N.Y. LEXIS 17 (N.Y. 1873).

Upon a finding that a party is entitled to recover a specified sum, an exception raises the question whether the entire sum is due. Briggs v Boyd, 56 N.Y. 289, 56 N.Y. (N.Y.S.) 289, 1874 N.Y. LEXIS 118 (N.Y. 1874).

A general exception to the finding of a referee for the gross value of a trunk containing personal effects does not bring up the question that some of the articles in the trunk were not baggage. Ledoux v Grand T. R. Co., 61 N.Y. 613, 1874 N.Y. LEXIS 650 (N.Y. 1874).

A specific exception is necessary to bring up the objection that false representations not charged in the complaint were proved and the finding based thereon. Oliver v Bennett, 65 N.Y. 559, 65 N.Y. (N.Y.S.) 559, 1875 N.Y. LEXIS 380 (N.Y. 1875).

Where the referee makes findings of law and fact and the former only are excepted to, the correctness of the rulings of fact will be reviewed. Schwinger v Raymond, 83 N.Y. 192, 83 N.Y. (N.Y.S.) 192, 1880 N.Y. LEXIS 471 (N.Y. 1880).

12. Settlement of case

Exceptions duly taken in the manner prescribed by CPA § 445 had to be inserted in the case on settlement. Young v Young, 133 N.Y. 626, 30 N.E. 1012, 133 N.Y. (N.Y.S.) 626, 1892 N.Y. LEXIS 1411 (N.Y. 1892).

The case or exceptions will not usually be resettled so as to allow exceptions to be inserted which were not taken within the time limited, and especially not if an argument on the case or exceptions has been had. Beach v Raymond, 3 Abb. Pr. 78.

It is proper for the clerk to whom written exceptions to the findings and refusals to find of the court in an equity case are presented, after the filing of the judgment roll within the time specified for that purpose, to file the same and annex them to the judgment roll as part of his return on appeal; and it is not necessary that such written exceptions should be made part of the case to be passed upon on the settlement by the trial judge. Pettit v Pettit, 20 NY Week Dig 154.

13. Right to have case include exceptions and rulings

A party is entitled to have his exceptions included in his case on appeal; and if the case does not include them, he may have the case resettled. Allen v Ryan, 218 A.D. 201, 218 N.Y.S. 171, 1926 N.Y. App. Div. LEXIS 5891 (N.Y. App. Div. 1926).

14. Duty of successful party

It is necessary for a party who succeeds to serve on the other party a copy of the report of the referee and a written notice of the entry of judgment upon it or the copy of a judgment and a written notice of its entry as provided by former CPA §§ 612 (§ 5513(a) herein), 614. Sommers v Ditmar, 46 N.Y.S. 667, 20 Misc. 511, 1897 N.Y. Misc. LEXIS 370 (N.Y. Sup. Ct. 1897).

15. Who may avail himself of exceptions taken

An exception by one party is not available to his opponent on the appeal. NOYES v PHILLIPS, 16 Abb. Pr. (n.s.) 400, 1875 N.Y. Misc. LEXIS 5 (N.Y. 1875).

16. Appeal by municipality from surrogate’s decree

CPA § 445 was not appropriate to an appeal by a municipality from a surrogate’s decree which made no provision for the payment of taxes assessed against the administrator. In re Sullivan, 84 A.D. 51, 82 N.Y.S. 32, 1903 N.Y. App. Div. LEXIS 1703 (N.Y. App. Div. 1903).

17. Appeal from ruling on requests

An appeal to general term cannot be taken directly from the refusal of the court to find certain requests, as such refusal to find is reviewable only on appeal from the final judgment, and the notice of appeal must so state. Gilmore v Ham, 15 N.Y.S. 391, 61 Hun 1, 1891 N.Y. Misc. LEXIS 3238 (N.Y. Sup. Ct. 1891), aff'd, 133 N.Y. 664, 31 N.E. 624, 133 N.Y. (N.Y.S.) 664, 1892 N.Y. LEXIS 1425 (N.Y. 1892).

C. Exceptions that must be taken

18. Generally

Where the president of a corporation is made a co-defendant with the corporation in an action and duly excepts to the denial of his motion, made at the end of plaintiff's case and renewed at the end of the case, to dismiss as to him individually, it is not necessary for him to except to the judge's charge submitting the issue of his liability to the jury in order to preserve the force and effect of his exceptions. Elenkrieg v Siebrecht, 238 N.Y. 254, 144 N.E. 519, 238 N.Y. (N.Y.S.) 254, 1924 N.Y. LEXIS 675 (N.Y. 1924).

Correctness of instructions not reviewable unless excepted to. Dudar v Milef Realty Corp., 258 N.Y. 415, 180 N.E. 102, 258 N.Y. (N.Y.S.) 415, 1932 N.Y. LEXIS 1199 (N.Y. 1932).

Act of Judge in erroneously charging jury upon "law of case," although it necessarily results in verdict not authorized by law, it is not error for which jury is responsible, but is error of Judge, to be pointed out by exception, and if party fails to take exception he cannot raise question upon motion for new trial. Brown v Du Frey, 1 N.Y.2d 190, 151 N.Y.S.2d 649, 134 N.E.2d 469, 1956 N.Y. LEXIS 920 (N.Y. 1956).

Limited exception: where in action for testamentary libel defendant limited case to single issue whether testamentary provision was libelous not only by his restricted motions to dismiss complaint but more emphatically by taking single exception to charge that "words written by testatrix are libelous because they impute to defendant bad actions," sole issue presented by appeal is whether trial court erred in ruling, as matter of law, that testamentary provision in question was libelous. Brown v Du Frey, 1 N.Y.2d 190, 151 N.Y.S.2d 649, 134 N.E.2d 469, 1956 N.Y. LEXIS 920 (N.Y. 1956).

Absent a timely and proper exception, instructions to jury, even if erroneous, become the law of the case. Kluttz v Citron, 2 N.Y.2d 379, 161 N.Y.S.2d 26, 141 N.E.2d 547, 1957 N.Y. LEXIS 1149 (N.Y.), reh'g denied, 3 N.Y.2d 755, 1957 N.Y. LEXIS 1489 (N.Y. 1957).

In absence of exception, Appellate Division has no power, even assuming the charge was erroneous, to reverse on the law because of defects in charge. People v Cohen, 5 N.Y.2d 282, 184 N.Y.S.2d 340, 157 N.E.2d 499, 1959 N.Y. LEXIS 1525 (N.Y. 1959).

When a request is made to go to the jury upon a question of fact, and it is denied and an exception taken it is unnecessary to go through the idle ceremony of excepting to the direction of a verdict under penalty of being deprived of the exception to the erroneous ruling. Benedict v Pincus, 109 A.D. 20, 95 N.Y.S. 1042, 1905 N.Y. App. Div. LEXIS 3479 (N.Y. App. Div. 1905).

Where, after the amendment of a complaint allowing proof of substantial instead of complete performance of a building contract, the defendant has consented to submit the case upon the evidence erroneously admitted under the former pleading without objections or exceptions to such evidence under the amended pleading, and such evidence shows substantial performance, the defendant cannot question a judgment for the plaintiff. Rowe v Gerry, 109 A.D. 153, 95 N.Y.S. 857, 1905 N.Y. App. Div. LEXIS 3513 (N.Y. App. Div. 1905).

When the court, in answer to questions of counsel, states that it will exclude certain named items of expense and an exception is taken thereto, the error is available on appeal and it is not necessary that the question of the admissibility of the items excluded be raised by exceptions to rulings on express questions put. Corrigan v Funk, 109 A.D. 846, 96 N.Y.S. 910, 1905 N.Y. App. Div. LEXIS 3672 (N.Y. App. Div. 1905).

When a defendant has taken exception to a charge. and after argument the court reiterates the rule. an error in the second ruling is available on appeal. although there was no express exception thereto. Dubnow v New York C. R. Co., 122 A.D. 723, 107 N.Y.S. 729, 1907 N.Y. App. Div. LEXIS 2540 (N.Y. App. Div. 1907).

No exception having been made to a charge to the jury that if the boat plaintiff had bought did not conform to the kind of boat defendant had promised plaintiff should recover, the defendant cannot object to verdict that plaintiff did not get what he bought, on the ground that prior

negotiations were wrongly admitted. Jardella v Welin Davit & Boat Corp., 219 A.D. 353, 220 N.Y.S. 115, 1927 N.Y. App. Div. LEXIS 10915 (N.Y. App. Div. 1927).

Alleged erroneous instruction must be timely excepted to. Saulsbury v Braun, 223 A.D. 555, 229 N.Y.S. 70, 1928 N.Y. App. Div. LEXIS 6265 (N.Y. App. Div.), aff'd, 249 N.Y. 618, 164 N.E. 606, 249 N.Y. (N.Y.S.) 618, 1928 N.Y. LEXIS 980 (N.Y. 1928).

Acquiescence in court’s charge in action for assault and battery held refuted by record and request to charge. Van Vooren v Cook, 273 A.D. 88, 75 N.Y.S.2d 362, 1947 N.Y. App. Div. LEXIS 2935 (N.Y. App. Div. 1947), reh'g denied, 273 A.D. 941, 78 N.Y.S.2d 558, 1948 N.Y. App. Div. LEXIS 5369 (N.Y. App. Div. 1948).

Where appellant failed to take the necessary exceptions and to make appropriate request to the court’s charge, he was barred from thereafter raising questions with respect to alleged errors. The submission of requests to find in advance of the charge did not obviate the necessity for making specific exceptions and requests. Brenan v Moore-McCormack Lines, Inc., 3 A.D.2d 1006, 163 N.Y.S.2d 889, 1957 N.Y. App. Div. LEXIS 4917 (N.Y. App. Div. 1st Dep't 1957).

No objection having been made thereto, the charge: became the law of the case. Zelasko v Buffalo Transit Co., 10 A.D.2d 898, 199 N.Y.S.2d 685, 1960 N.Y. App. Div. LEXIS 10777 (N.Y. App. Div. 4th Dep't 1960).

Quaere where the jury’s allowance of part of plaintiff’s claim could be objected to in absence of objection to the instruction that the jury might award part of plaintiff’s claim. Croker Nat'l Fire Prevention Engineering Co. v Success Theatre Corp., 215 N.Y.S. 213, 127 Misc. 44, 1926 N.Y. Misc. LEXIS 899 (N.Y. App. Term 1926).

Failure to object to charge as provided in this section makes the law as expounded by the Court to the jury the law of the case. Ming Hin Chin v Fletcher, 21 Misc. 2d 421, 191 N.Y.S.2d 601, 1959 N.Y. Misc. LEXIS 3051 (N.Y. Sup. Ct. 1959).

Failure to take exceptions before jury renders its verdict is not excused by fact that requests to find were submitted in advance of judge's charge. Ming Hin Chin v Fletcher, 21 Misc. 2d 421, 191 N.Y.S.2d 601, 1959 N.Y. Misc. LEXIS 3051 (N.Y. Sup. Ct. 1959).

Where in action for personal injuries case was presented on theory of inherently dangerous condition of stairway due to defective construction rather than maintenance, and jury was instructed accordingly, and where no exceptions were taken to court's charge and no requests to charge were made, law of case was established. Jameson v Bloomingdale Bros., Inc., 132 N.Y.S.2d 682, 1954 N.Y. Misc. LEXIS 2669 (N.Y. Sup. Ct. 1954).

19. Exceptions through failure or refusal to charge, necessity for

Refusal of judge to charge in action for alienation of husband's affections that if, at the time of the abandonment, the plaintiff's husband had no affection for her or that if it had been previously alienated by other causes she could not recover, is reversible error. Servis v Servis, 172 N.Y. 438, 65 N.E. 270, 172 N.Y. (N.Y.S.) 438, 1902 N.Y. LEXIS 685 (N.Y. 1902).

A refusal to charge is not error where the subject has been sufficiently covered by the charge already given. Continental Nat'l Bank v Tradesmen's Nat'l Bank, 173 N.Y. 272, 65 N.E. 1108, 173 N.Y. (N.Y.S.) 272, 1903 N.Y. LEXIS 1147 (N.Y. 1903).

Failure to charge correct formula for measuring damages constituted reversible error where defendant's request to charge was sufficient to alert court to the need therefor even though defendant did not except to portion of charge stating incorrect formula. Leone v Rose, 10 A.D.2d 412, 199 N.Y.S.2d 946, 1960 N.Y. App. Div. LEXIS 10170 (N.Y. App. Div. 4th Dep't 1960) (action for fraudulent misrepresentation).

Plaintiff, who failed to except to charge or to granting of defendant's request to charge, could not assert on appeal that verdict for defendant was the result of confusion engendered by those requests. Schmalz v Abarno, 10 A.D.2d 1007, 204 N.Y.S.2d 856, 1960 N.Y. App. Div. LEXIS 9577 (N.Y. App. Div. 2d Dep't 1960).

Party who expressly replied in negative when asked by court, immediately after charge had been given, whether he wanted an exception thereto, could not question propriety of charge on appeal. Regan v Bellows, 11 A.D.2d 586, 200 N.Y.S.2d 575, 1960 N.Y. App. Div. LEXIS 9941 (N.Y. App. Div. 3d Dep't 1960).

In action for damages for conspiracy to take away plaintiff's customers, which had been committed maliciously, the submission of punitive damages to jury without exception, precluded questioning such submission on appeal. Kathleen Foley, Inc. v Gulf Oil Corp., 12 A.D.2d 644, 208 N.Y.S.2d 781, 1960 N.Y. App. Div. LEXIS 6508 (N.Y. App. Div. 2d Dep't 1960), aff'd, 10 N.Y.2d 859, 222 N.Y.S.2d 691, 178 N.E.2d 913, 1961 N.Y. LEXIS 995 (N.Y. 1961).

Erroneous charge to which no exception is taken became law of the case. Lankes v Loyal Order of Moose, 12 A.D.2d 1001, 212 N.Y.S.2d 653, 1961 N.Y. App. Div. LEXIS 12491 (N.Y. App. Div. 4th Dep't), aff'd, 10 N.Y.2d 947, 224 N.Y.S.2d 24, 179 N.E.2d 864, 1961 N.Y. LEXIS 898 (N.Y. 1961).

When the jury is not charged at all upon the law of the case, the judgment should be reversed. Winter v Interurban S. R. Co., 96 N.Y.S. 1009, 49 Misc. 131, 1905 N.Y. Misc. LEXIS 566 (N.Y. App. Term 1905).

20. Time of taking exceptions

An exception taken only on the return to the jury, and after an apparent acquiescence in the charge of the court, should receive a strict construction. Twaddell v Weidler, 109 A.D. 444, 96 N.Y.S. 90, 1905 N.Y. App. Div. LEXIS 3575 (N.Y. App. Div. 1905), aff'd, 186 N.Y. 601, 79 N.E. 1117, 186 N.Y. (N.Y.S.) 601, 1906 N.Y. LEXIS 1304 (N.Y. 1906).

Counsel was within his rights in taking exception to comments of court in his charge after retirement of jury but before it rendered its verdict. Hunt v Becker, 173 A.D. 9, 160 N.Y.S. 45, 1916 N.Y. App. Div. LEXIS 10380 (N.Y. App. Div. 1916).

Where attorney for defendant moved after verdict of jury to set aside the verdict on ground that charge to jury was wrong in certain particulars, his exception was not timely. Thomas v First Nat'l Bank, 263 A.D. 476, 33 N.Y.S.2d 500, 1942 N.Y. App. Div. LEXIS 6920 (N.Y. App. Div. 1942).

If instructions are given the jury in absence of the litigants, the plaintiff's objection thereto before the reading of the verdict requires the verdict be set aside. Boerum v Seymour Realty Co., 217 N.Y.S. 484, 127 Misc. 577, 1926 N.Y. Misc. LEXIS 675 (N.Y. County Ct. 1926).

Requests to the court to charge, and exceptions to refusals to charge, must be made before the jury retires or the exceptions cannot be heard on appeal; but an exception to the charge can be made at any time before the jury has rendered a verdict. Walker v Second A. R. Co., 6 N.Y.S. 536, 57 N.Y. Super. Ct. 141, 1889 N.Y. Misc. LEXIS 672 (N.Y. Super. Ct. 1889), aff'd, 126 N.Y. 668, 27 N.E. 854, 126 N.Y. (N.Y.S.) 668, 1891 N.Y. LEXIS 1727 (N.Y. 1891).

An exception to instructions given to the jury after its retirement, in the absence of counsel, cannot be incorporated in the case, if it was not taken at the time and before the rendition of the verdict. Cornish v Graff, 36 Hun 160 (N.Y.).

And an exception may be taken after the bringing in of a sealed verdict, the jury having been allowed to separate. Panama R. Co. v Johnson, 12 N.Y.S. 499, 58 Hun 557, 1890 N.Y. Misc. LEXIS 2597 (N.Y. App. Term 1890).

21. Sufficiency and merit

An exception that counsel "wished to except to the modification of the charge and to the charging of the request made by" the plaintiff's counsel, is not sufficiently specific. Clark v New York C. & H. R. R. Co., 191 N.Y. 416, 84 N.E. 397, 191 N.Y. (N.Y.S.) 416, 1908 N.Y. LEXIS 1075 (N.Y. 1908).

A party excepting to a charge to a jury must by some exception point to the specific proposition which the court has charged or refused to charge or to the specific ruling on the refusal to

charge to which counsel supposed himself entitled; where several requests are made, some of which are charged and some refused, the attention of the court must be called to the ruling refusing a specific request by an exception taken to that ruling; an exception generally to the refusal of the court to charge as requested is not sufficiently specific. Connor v Metropolitan S. R. Co., 77 A.D. 384, 79 N.Y.S. 294, 1902 N.Y. App. Div. LEXIS 2868 (N.Y. App. Div. 1902).

Where a charge, as to the obligation of a defendant to promulgate rules, is so general that it may have related to a warning, which should have been given to employees, an exception to the charge should specifically call the attention of the court to the defect claimed. Chinn v Ferro-Concrete Const. Co., 148 A.D. 368, 132 N.Y.S. 850, 1911 N.Y. App. Div. LEXIS 212 (N.Y. App. Div. 1911), aff'd, 210 N.Y. 634, 105 N.E. 1097, 210 N.Y. (N.Y.S.) 634, 1914 N.Y. LEXIS 1410 (N.Y. 1914).

No reversal will be given for a charge to which the exception made did not point out clearly to the court the exact error; nor did the fact that defendant failed to deny certain of plaintiff’s statements make conclusive presumption of their truth requiring a charge to that effect. Rhinelander v Rhinelander, 219 A.D. 189, 219 N.Y.S. 548, 1927 N.Y. App. Div. LEXIS 10871 (N.Y. App. Div.), aff'd, 245 N.Y. 510, 157 N.E. 838, 245 N.Y. (N.Y.S.) 510, 1927 N.Y. LEXIS 659 (N.Y. 1927).

A general exception to an instruction is sufficient when but a single proposition is involved. Bulson v Lear, 222 A.D. 413, 226 N.Y.S. 479, 1928 N.Y. App. Div. LEXIS 8078 (N.Y. App. Div. 1928).

Although defendant did not except to erroneous charge which failed to inform jury of requirement of notice, where on his motion to dismiss complaint at close of plaintiff’s case he specifically argued this point and the court allowed an exception to its denial of the motion this was deemed sufficient to preserve his right to raise this question on appeal. Zaulich v Thompkins Square Holding Co., 10 A.D.2d 492, 200 N.Y.S.2d 550, 1960 N.Y. App. Div. LEXIS 10097 (N.Y. App. Div. 1st Dep't 1960).

“Whispered” exceptions are not encouraged and the record will not be altered to show an attorney took exception to a charge to the jury if opposing counsel’s affidavits claim he did not and the court and stenographer cannot recollect it. Utica Nat'l Bank & Trust Co. v Nickel, 219 N.Y.S. 556, 128 Misc. 614, 1926 N.Y. Misc. LEXIS 848 (N.Y. Sup. Ct. 1926).

22. —Particular charges

An objectionable statement in a charge of the trial judge should be considered in connection with the entire charge, and it is only possible to predicate error where it is clear that the jury was misled in their consideration of the facts. Continental Nat'l Bank v Tradesmen's Nat'l Bank, 173 N.Y. 272, 65 N.E. 1108, 173 N.Y. (N.Y.S.) 272, 1903 N.Y. LEXIS 1147 (N.Y. 1903).

The failure to object and except to the submission to the jury of specific questions requiring a special verdict, as to plaintiff’s intestate’s freedom from negligence, as to the defendant’s negligence, and as to the damages, is not cured by an exception to the direction of a general verdict based thereon, and in the absence of any other exception, a judgment entered upon a verdict adverse to plaintiff must be affirmed. Cooper v New York, O. & W. R. Co., 180 N.Y. 12, 72 N.E. 518, 180 N.Y. (N.Y.S.) 12, 1904 N.Y. LEXIS 1287 (N.Y. 1904).

Erroneous charge in regard to sudden starting of street car which is claimed was cause of injury to passenger. Dambmann v Metropolitan S. R. Co., 180 N.Y. 384, 73 N.E. 59, 180 N.Y. (N.Y.S.) 384, 1905 N.Y. LEXIS 1094 (N.Y.), reh'g denied, 181 N.Y. 504, 73 N.E. 1123, 181 N.Y. (N.Y.S.) 504, 1905 N.Y. LEXIS 763 (N.Y. 1905).

An instruction that the plaintiff must satisfy the jury by “clear, convincing and conclusive” evidence of the justice of his claim, while technically erroneous, as violating the rule that in such a case the jury must be satisfied by a fair preponderance of the evidence only, does not constitute reversible error, where the charge, considered as a whole, fairly and correctly stated such rule and required the jury to base its verdict upon the preponderance of evidence. Roberge v Bonner, 185 N.Y. 265, 77 N.E. 1023, 185 N.Y. (N.Y.S.) 265, 1906 N.Y. LEXIS 896 (N.Y. 1906).

Exception to a charge to the jury that one killed by a taxicab falling with him into river was a passenger therein, was good, it being the province of the jury and not of the court, to say whether he was a passenger. Salomone v Yellow Taxi Corp., 242 N.Y. 251, 151 N.E. 442, 242 N.Y. (N.Y.S.) 251, 1926 N.Y. LEXIS 983 (N.Y.), reh'g denied, 242 N.Y. 602, 152 N.E. 445, 242 N.Y. (N.Y.S.) 602, 1926 N.Y. LEXIS 1149 (N.Y. 1926).

Plaintiff's employee acted for him in adjustment of a claim and corruptly induced him to pay a large excess which the employee received as a bribe, in action to recover same, erroneous instruction as to damages was ground for reversal. Donemar, Inc. v Molloy, 252 N.Y. 360, 169 N.E. 610, 252 N.Y. (N.Y.S.) 360, 1930 N.Y. LEXIS 632 (N.Y. 1930).

When, in an action to recover certain shares of stock at the value thereof, the court charges that the defendant must return the stock or pay the value thereof, "which on the evidence, I charge you is $1,740," the defendant cannot, on appeal, raise the point that the value was not the proven value at the time of trial, when he has taken no exception to such charge. MacDonald v MacDonald, 112 A.D. 330, 98 N.Y.S. 581, 1906 N.Y. App. Div. LEXIS 666 (N.Y. App. Div. 1906).

In an action to recover damages for breach of an executory contract of sale, instruction that the measure of damages was the difference between the sale price and.the actual value of the property at the time, was correct. Roussos v Christoff, 224 A.D. 276, 230 N.Y.S. 185, 1928 N.Y. App. Div. LEXIS 9980 (N.Y. App. Div. 1928).

Failure to charge correct formula for measuring damages constituted reversible error where defendant's request to charge was sufficient to alert court to the need therefor even though defendant did not except to portion of charge stating incorrect formula. Leone v Rose, 10 A.D.2d 412, 199 N.Y.S.2d 946, 1960 N.Y. App. Div. LEXIS 10170 (N.Y. App. Div. 4th Dep't 1960) (action for fraudulent misrepresentation).

In rear-end collision case, charge which left jury with impression that if plaintiff had stopped on paved portion of highway for a period of five minutes for any purpose, absent a showing of emergency, she was guilty of violating traffic statute, was fundamentally erroneous and grounds

for reversal even though no exception had been taken thereto. De Joseph v Gutekunst, 13 A.D.2d 223, 215 N.Y.S.2d 208, 1961 N.Y. App. Div. LEXIS 10767 (N.Y. App. Div. 4th Dep't 1961).

In submitting collision case to jury, failure to distinguish between husband's derivative cause of action for injuries wife sustained while passenger in his automobile driven by their daughter, and his independent cause of action as owner for damage to automobile, was fundamental error and, though not excepted to, would be taken cognizance of by Appellate Division in interests of justice. Siekierski v Derleth, 13 A.D.2d 715, 213 N.Y.S.2d 941, 1961 N.Y. App. Div. LEXIS 11577 (N.Y. App. Div. 4th Dep't 1961).

In passenger's injury action against coemployee-driver wherein defendant pleaded coverage under Workmen's Compensation Law, plaintiff was entitled to instruction that Workmen's Compensation was applicable only if accident arose within sphere and scope of the employment and was also one of the risks of the employment, flowing therefrom as a natural consequence, and court's charge emphasizing only one of the two coordinate tests, was reversible error. Hendrix v Bennett, 14 A.D.2d 944, 221 N.Y.S.2d 372, 1961 N.Y. App. Div. LEXIS 7883 (N.Y. App. Div. 3d Dep't 1961).

In wife's action for personal injuries sustained in collision between defendant's car and the car she owned jointly with her husband, charge that driver-husband's negligence was imputable to her was erroneous, and so vitally affected issue of plaintiff's contributory negligence as to warrant a new trial, even in the absence of exception. Winser v Trombley, 14 A.D.2d 963, 221 N.Y.S.2d 49, 1961 N.Y. App. Div. LEXIS 7910 (N.Y. App. Div. 3d Dep't 1961).

General instruction that a plea admitting a debt but alleging payment put the burden of proof upon defendant, was offset and made confusing to the jury by the further instruction that false testimony on both sides, evenly balanced, warranted a verdict for defendant. Macchia v Marsigliano, 215 N.Y.S. 170, 126 Misc. 342, 1926 N.Y. Misc. LEXIS 891 (N.Y. App. Term 1926).

An instruction that the testimony of a witness who testified falsely and wilfully, should be entirely disregarded, is wrong and warrants reversal. Macchia v Marsigliano, 215 N.Y.S. 170, 126 Misc. 342, 1926 N.Y. Misc. LEXIS 891 (N.Y. App. Term 1926).

A charge by the trial court to the jury showing antagonism to plaintiff's action, that "photographs cannot lie" as to distances and if so plaintiff must have been guilty of contributory negligence, amount to an instruction for defendant and warrant reversal. Puleo v Stanislaw Holding Corp., 213 N.Y.S. 601, 126 Misc. 372, 1926 N.Y. Misc. LEXIS 576 (N.Y. App. Term 1926).

On exception duly taken, a verdict must not stand that is based on a charge which permits the jury to say that the plaintiff's resolution revoking authority of a bank to honor checks applied to checks given theretofore. K. & K. Silk Trimming Co. v Garfield Nat'l Bank, 215 N.Y.S. 269, 127 Misc. 27, 1926 N.Y. Misc. LEXIS 914 (N.Y. App. Term 1926).

23. Exceptions considered on motion for new trial

Only exceptions taken during the trial can be considered on motion for new trial on the minutes. Polo v D'Achille, 157 A.D. 294, 142 N.Y.S. 506, 1913 N.Y. App. Div. LEXIS 6583 (N.Y. App. Div. 1913).

Research References & Practice Aids

Federal Aspects:

Exceptions unnecessary in United States District Courts, USCS Court Rules, Federal Rules of Civil Procedure, Rule 46.

Jurisprudences:

58A NY Jur 2d Evidence and Witnesses § 921. .

105 NY Jur 2d Trial §§ 358., 441., 442., 446. .

59 Am Jur 2d, Parties §§ 375., 377., 396., 397.

61A Am Jur 2d, Pleading §§ 429 et seq.

75A Am Jur 2d, Trial §§ 395.– 489.

23B Am Jur Pl & Pr Forms (Rev), Trial, Forms 106.– 111., 113.

6 Am Jur Trials 605., Making and Preserving the Record-Objections.

Law Reviews:

The CPLR and the trial lawyer. 9 N.Y.L. Sch. L. Rev. 269.

Treatises

Matthew Bender's New York Civil Practice:

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4017, Objections.

2 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶501.02; 5 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶2701.10.

Matthew Bender's New York CPLR Manual:

CPLR Manual § 23.02. Trials; general rules.

CPLR Manual § 26.05. Scope of review on appeal from final judgment.

Matthew Bender's New York Practice Guides:

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.11. CHECKLIST: Admitting ESI.

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.15. Objecting to Admission of Evidence.

Matthew Bender's New York AnswerGuides:

LexisNexis AnswerGuide New York Civil Litigation § 9.15. Objecting to Court Orders.

Matthew Bender's New York Evidence:

1 Bender's New York Evidence § 107.01. General Principles of Objections and Preservation.

1 Bender's New York Evidence § 107.02. Objections.

1 Bender's New York Evidence § 107.04. Preservation.

1 Bender's New York Evidence § 109.05. Limiting Instructions and Jury Charge.

Annotations:

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection. 62 ALR2d 937.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written. 10 ALR3d 501.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR4th 840.

Modern status of rule regarding necessity of instruction on circumstantial evidence in criminal trial—state cases. 36 ALR4th 1046.

Construction and effect of provision of Rule 51 of the Federal Rules of Civil Procedure, and similar state rules, that counsel be given opportunity to make objections to instructions out of the hearing of jury. 1 ALR Fed 310.

Matthew Bender's New York Checklists:

Checklist for Conducting Jury Trial LexisNexis AnswerGuide New York Civil Litigation § 9.09.

Forms:

2 Medina's Bostwick Practice Manual (Matthew Bender), Forms 18:101 et seq .(trial generally).

Texts:

2 New York Trial Guide (Matthew Bender) §§ 11.02, 11.03, 21.01, 21.03; 4 New York Trial Guide (Matthew Bender) § 90.10.

Hierarchy Notes:

NY CLS CPLR, Art. 40

Forms

Forms

Form 1

Request to Charge

Request to charge

[Title of court and cause] Index No. _____

The following are the plaintiff's requests to charge:

1 It is no defense to an action by a broker, employed to effect an exchange of real estate, to recover commissions, that the title of the other party to the contract to the real estate agreed to be exchanged by him is defective, and so that he is unable to perform his contract.

[Number, state, and enumerate any other charge requested.]

_____

[Signature with name

printed underneath]

Office, P. O. Address,

and Telephone No.

Form 2

Exception to Charge

I except to Your Honor's statement that the admissions of the infant plaintiff were not entitled to be received as having much probative value.

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