

taining the animal was in his sole charge, for the purpose of attention to, and the protection of, the mare during the transportation, and that the company assumed no responsibility for her safety while in his charge, whether from theft, heat, jumping from the car, or injury or damage which she might do herself,—we are constrained to hold that the fair interpretation of this agreement is that it was a contract to carry the defendant in error in the stock car occupied by the mare from Joliet to Junction City upon his payment of fare from Rock Island to the latter place. If this was the contract, the defendant in error was guilty of no negligence in occupying that car rather than the caboose, because he had the right to rely upon the presumption that the company would use ordinary care to carry him safely in the car in which the contract permitted him to ride.

The fact that the defendant in error had not paid his fare from Rock Island to Junction City was immaterial, inasmuch as the conductor had not asked for it, and, if the defendant had undertaken to carry him without the payment of fare, it was bound to exercise all due care in the performance of the obligation thus voluntarily assumed. *Bryant v. Railway Co.*, 4 C. C. A. 146, 147, 53 Fed. 997, 998, 12 U. S. App. 115, 123; *Railway Co. v. Derby*, 14 How. 468; *The New World v. King*, 16 How. 469; *Waterbury v. Railway Co.*, 17 Fed. 671, 673.

The stipulation in the contract that the person who receives free transportation under it agrees to assume all risk of personal injury from any cause whatever, except from injuries arising from the gross carelessness of the railroad company, is entitled to no consideration, because the defendant in error was a minor, and because this stipulation was not his contract, but the agreement of his father, A. D. Lee.

As the errors assigned which have not been considered were expressly waived by the counsel for the plaintiff in error, the judgment below must be affirmed; and it is so ordered.

CHICAGO & A. R. CO. V. EHRET.

(Circuit Court of Appeals, Eighth Circuit. February 7, 1899.)

No. 1,068.

REVIEW ON APPEAL—EXCEPTIONS TO INSTRUCTIONS.

An exception to a charge as a whole is unavailing, where any part of the charge is correct.

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

W. H. Morrow (N. W. Morrow, on the brief), for plaintiff in error.

D. V. Herider, E. N. Watson, and E. S. Herider, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. Charles G. Ehret was a locomotive engineer in the employ of the Chicago & Alton Railroad Company,

the plaintiff in error; and on the 27th of February, 1897, while running his engine, which was pulling a train of cars, the engine was derailed, the train wrecked, and Ehret killed, as a result of the derailment of his engine. The defendant in error, Emma J. Ehret, is the widow of the dead engineer, and brought this action to recover damages for his death, which her complaint alleges resulted from the derailment of his engine, caused by the following acts of negligence on the part of the railroad company: (1) That the railroad company used old, worn, and insufficient rails in a curve in its track at the place where the engine was derailed; (2) that it failed to maintain an outer rail on its track in the curve of sufficient height to render the operation of trains over it reasonably safe; (3) that the ties under the rails at the place of derailment were so old, worn, and rotten as to render the use of that part of its track unsafe and dangerous; and (4) that the railroad company failed to put tiling on the outer side of its track in the curve to drain off the water, as a result of which water accumulated in the cut, and rendered the road-bed soft and unsafe.

The company denied the alleged acts of negligence. The issues thus raised were tried to a jury, who returned a verdict in favor of the plaintiff, upon which judgment was rendered, and the defendant sued out this writ of error.

It is assigned for error that the court refused at the close of all the evidence to instruct the jury to return a verdict for the defendant. There was no error in refusing this instruction, because there was abundant evidence to entitle the plaintiff to go to the jury. The rule as to when a court is justified in withdrawing the case from the consideration of the jury by giving a peremptory instruction based on the assumption of the insufficiency of the evidence to support a verdict is too trite to justify its repetition.

The only other error assigned is based on the following exception to the charge of the court:

"At the conclusion of the charge the defendant said it had no specific exceptions to make, but would like to except to the charge as a whole. The court said, 'You may do so, but I fear, under the well-settled practice of the court of appeals, it will do you no good.'"

The defendant's attorney did not heed the admonition of the learned trial judge, and his exception to the "charge as a whole" goes for nothing; for it is clear from an inspection of the charge that it was not all bad law, which would have to be the case to render such an exception of any avail. *New England Furniture & Carpet Co. v. Catholicon Co.*, 49 U. S. App. 78, 24 C. C. A. 595, 79 Fed. 294. The judgment of the circuit court is affirmed.

GRAND ISLAND CANNING CO. v. COUNCIL BLUFFS CANNING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1899.)

No. 1,015.

LANDLORD AND TENANT — ACTION FOR RENT — CONSTRUCTION OF CONTRACT OF LEASE.

Plaintiff and defendant corporations entered into a contract by which plaintiff agreed to furnish \$22,000 for the erection of a canning factory, which defendant agreed to rent, paying as annual rent 10 per cent. on its cost, and also to purchase each year, at par value, not less than 10 per cent. of the capital stock of plaintiff from its stockholders, until it was all absorbed. *Held*, that under such contract the rent was to be computed on \$22,000, the original cost of the factory, without including the cost of additions and improvements made by defendant after it took possession, but that defendant was bound to pay such rental until it had taken up all plaintiff's stock, whether it occupied the factory or not.

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

Warren Switzler (Charles G. Ryan, William A. Prince, Jacob Sims, and George H. Thummel, on the brief), for plaintiff in error.

John N. Baldwin, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an action at law for rent reserved in a contract. The court below tried it without a jury, made a special finding of facts, and rendered a judgment for \$2,200 and interest for the rent for the year 1893, and for \$2,200 and interest for rent for the year 1894, found that the rent for 1895 had not been paid, but held that the plaintiff in error, the Grand Island Canning Company, was not entitled to recover the rent for this year, because neither the Council Bluffs Canning Company, one of the defendants in error, nor its lessees or grantees, who had occupied the leased premises in 1893 and 1894, were in occupancy thereof in 1895. The defendants in error Daniel W. Archer, George A. Keeline, and Samuel Haas were guarantors of the contract of the Council Bluffs Canning Company. The only errors assigned are that the court should have concluded from the facts that the rental under the contract was \$3,810, instead of \$2,200, per annum, and should have concluded that the plaintiff in error was entitled to judgment for rent for the year 1895. The facts found by the court below which are material to the determination of the questions presented by this assignment are these: On March 18, 1887, the Council Bluffs Canning Company made an agreement with the Grand Island Canning Company whereby the latter company promised to furnish \$22,000 for the purpose of purchasing a site and erecting a canning factory at Grand Island, in the state of Nebraska, and the Council Bluffs Company agreed to furnish any additional capital required to complete this factory, and to fulfill the promises contained in the following stipulation of the contract:

"The party of the first part [the Council Bluffs Canning Company] hereby undertakes and agrees to rent said property, from the time of its completion ready for use and occupancy, at an annual rental equal to ten per cent. of