MISSOURI PACIFIC RAILROAD COMPANY *v.* YANCEY.

Opinion delivered December 23, 1929.

1. APPEAL AND ERROR—DECISION ON FORMER APPEAL.—A decision on a former appeal in an action for damages for false imprisonment that the testimony was sufficient to warrant a verdict for plaintiff, *held* the law of the case on a subsequent appeal, where the testimony on the second trial was at least as strong for the plaintiff as on the first trial.
2. FALSE IMPRISONMENT—ACT OF AGENT—INSTRUCTION.—An instruction to the effect that if defendant's agents, acting within the scope of their authority arrested plaintiff without a warrant and without probable cause and kept him in prison, the jury should find for plaintiff, and that, even if the agents had probable cause for arresting plaintiff, defendant would be liable if such agents failed to make an investigation which would have dispelled their belief in his guilt and thereafter detained plaintiff in prison, *held* not error under the evidence.
3. FALSE IMPRISONMENT—CONTINUING TORT.—The act of a railroad agent in arresting plaintiff and placing him in jail was a continuing tort, for the consequences of which the railroad company was responsible until plaintiff was released, and the unlawful imprisonment did not end when plaintiff was turned over to the city marshal.
4. FALSE IMPRISONMENT—BURDEN OF PROOF.—In an action for false imprisonment, proof that plaintiff was arrested by defendant's agent places upon defendant the burden of proving that the arrest was by authority of law.
5. FALSE IMPRISONMENT—ELEMENTS OF DAMAGES.—In an action for false imprisonment, plaintiff may show the condition of the jail in which he was confined and the treatment received therein as elements of the damages which he sustained.
6. FALSE IMPRISONMENT—AMOUNT OF DAMAGES.—In an action for damages for false imprisonment, a verdict for $3,000 as damages, *held* not excessive under evidence showing the condition of the jail and the effect of confinement therein.

Appeal from Chicot Circuit Court; *Turner Butler*, Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted to reverse a judgment for damages against a railroad company for false imprisonment. Upon a former appeal of the case the judgment was reversed because the circuit court erred in submitting

the question of punitive damages proved in the case. *Mo. Pac. Rd. Co.* v. *Yancey,* 178 Ark. 147, 10 S. W. (2d) 22.

Upon a retrial of the case, J. E. Yancey was again the principal witness for himself. According to his testimony, he had formerly worked for the Missouri Pacific Railroad Company as a brakeman for about four years, but had not worked for it for about one year before the date of the alleged false imprisonment. On the night of January 16, 1928, in company with Bill Stockton, Yancey went down into the switch yards of the company at McGehee, Arkansas, to see on business one of its employees, who, he thought, was working that night. They were going to see John Pearson, who was a car inspector. It commenced to rain, and Yancey remarked to his companion that they had better trot up to avoid getting wet. As they passed the end of a freight train, R. E. White, who was a special agent for the railroad company, and Ted Brownlaw drew a pistol on them and told them to hold up their hands. Yancey first held his hands up, and, being excited, then put them in his pockets. White said, "Look out, boy. I will shoot your guts out if you don't put your hands up." White then held a flashlight and pistol on Yancey and his companion while Brownlaw searched them. White then marched them with their hands up past the station to the main part of the town and turned them over to the marshal, telling him that he had a couple of boys that he wanted him to lock up for him. The marshal said, "All right," and asked him what they had done. White replied, "I think they are the ones that broke into the box-car Friday night. Anyway, take them around and lock them up." This was about eleven or eleven-thirty at night. A little later in the night White came to the jail and called Yancey out. He told him to hold up his right foot for him to examine. Yancey and his companion were then returned to the jail, and White told them that he would be around between nine and ten o'clock in the morning to question them. Sometime during the next morning White and

Fiveash, another special agent for the railroad company, came to the jail and questioned Yancey, and Fiveash told him that he wanted to look at his foot. Yancey told them that he had a skinned place on his hand that he had skinned with a handsaw. Fiveash turned to White and said, "He probably did that breaking into that box-car." Fiveash then told Yancey that was all he wanted with him. Yancey was put back in jail and kept there until about six o'clock in the evening of January 17, when he was released.

According to the testimony of Walter Haley, city marshal of Dermott, about eleven-thirty o'clock on the morning of January 17 Fiveash called him on the telephone and told him that he had Stockton and Yancey in the jail, that some box-cars had been robbed, and he thought that they did it. He said the boys claimed to have been at a dance on Friday night, the night of the robbery, and asked him to find out if they were. Haley did so, and telephoned him that the boys were at the dance.

R. L. White was a witness for the railroad company. According to his testimony, he was authorized to arrest any one whom he thought was doing anything to railroad property. At the time he arrested Yancey and his companion, he and another special agent for the railroad company were engaged in checking a merchandise train. They arrested Yancey and his companion because they had been requested to do so by the city marshal of McGehee, who thought they had broken into some houses in the town. He did not arrest them on account of anything they had done with regard to robbing the cars of the railroad company. At one place in his testimony he admitted that he had stopped Yancey and his companion to ask them what they were doing there in the railroad yards. He was then asked under what authority, and answered because they were out there in the yards around a merchandise train. We further copy from the cross-examination of White the following:

"Q. Did you stop them? A. I stopped them to ask them what they were doing out there. Q. You arrested them when you stopped them? A. Yes sir. Q. Now, under what authority? A. Because they were out there in those yards around the merchandise train. We told them to stop. There was no fence around the property. When witness got to jail the next morning, Mr. Fiveash was there. Mr. Fiveash called up the city marshal in Dermott in his presence."

Other testimony tended to corroborate the testimony of White to the effect that he had arrested Yancey and his companion at the request of the city marshal of McGehee.

Other facts will be stated under appropriate headings in the opinion.

E. B. Kinsworthy and *R. E. Wiley,* for appellant.

E. P. Toney, N. B. Scott and *Golden & Golden,* for appellee.

HART, C. J., (after stating the facts). The first assignment of error is that the testimony is not legally sufficient to warrant the verdict. A comparison of the testimony abstracted above with that proved upon the former trial will show that the testimony is at least as strong for the plaintiff as it was on the first trial of the case. We there held that the testimony was legally sufficient to warrant the verdict, and this is the law of the case upon this appeal.

The next assignment of error is that the court erred in giving instruction No. 5, which reads as follows:

"The court instructs the jury that if it should find from the evidence that White and Brownlaw, without any warrant, arrested plaintiff, and kept him in prison for any length of time, and that such action was without probable cause, and that said White and Brownlaw at the time of making said arrest were acting for the defendant and within the scope of their authority, then the jury should find for the plaintiff. Even though the jury should believe that defendant's said agents had probable cause

for making the arrest and were acting within the scope of their employment, still it was their duty to use reasonable diligence in making other investigation, and if the jury should believe from the evidence that, after they had obtained the information, or could have reasonably obtained such, which would have dispelled their belief in the probable guilt of plaintiff, they detained such plaintiff in the city prison of McGehee, without cause, then you should find for the plaintiff."

We do not think that the court erred in giving this instruction. According to the testimony for the plaintiff, he was arrested by White, a special agent of the railroad company, because he was suspected of having broken into a merchandise freight car of the company a few nights before. White testified that he had a right to arrest persons under such circumstances. Yancey was arrested by White, and taken to the city marshal to be confined in jail, about eleven-thirty at night. A little while thereafter White returned to the jail and questioned Yancey. The latter was then locked up again, and about the middle of the next morning White and another special agent of the railroad company took Yancey out of jail for the purpose of questioning him. It is also inferable from the plaintiff's testimony that they caused an investigation to be made of his whereabouts on the night of the former robbery, and found out that they were at a dance at the time it occurred. Then they ordered the release of Yancey from jail.

If defendant, by its agent, unlawfully caused Yancey's arrest and incarceration in jail, it was a continuing tort, for the consequences of which the defendant was responsible until, by its agent, Yancey was released about dark on the 17th day of January, 1928. The unlawful imprisonment, if it was such, did not end when Yancey was turned over to the city marshal, but continued during his confinement in jail and up to his release on the

evening of the next day. Hence we do not think that the instruction complained of was erroneous.

It is next insisted that the court erred in placing the burden of proof upon the defendant to show by a preponderance of the evidence that its agents had arrested Yancey at the request of the officers of the city of McGehee, and that any private citizen had a right without a warrant to arrest another when he has probable cause to believe that a felony has been committed by the person to be arrested. The court had already instructed the jury that the burden was upon Yancey to show that White, as special agent for the railroad company, in making the arrest and causing the imprisonment of Yancey was acting within the scope of his authority, real or apparent, as held in *St. Louis I. M. & S. R. Co.* v. *Sims,* 106 Ark. 109, 152 S. W. 985. The undisputed evidence shows that White arrested Yancey. The theory of the railroad company was that White arrested him, not because he was suspected of having broken into one of the box-cars of the railroad company which contained merchandise, but that he arrested him at the request of the town marshal because he was suspected of having broken into some houses in the city of McGehee a short time before.

We do not think the court erred in giving this instruction. The action was one for false imprisonment, and, the arrest having been proved by the undisputed evidence, the burden was upon the defendant to show that it was by authority of law. *McAleer* v. *Good,* 216 Pa. 473, 65 Atl. 934, 10 L. R. A. (N. S.) 303, and cases cited.

Every imprisonment of a man is a trespass; and in an action to recover damages therefor, if the imprisonment is proved or admitted, the burden of justifying it is on the defendant. *Bassett* v. *Porter,* 10 Cush. (Mass.) 418; *Jackson* v. *Knowlton,* 173 Mass. 94, 53 N. E. 134; and *Snead* v. *Bonnoil,* 166 N. Y. 325, 59 N. E. 879.

The last assignment of error is that a verdict of $3,000 is excessive. We cannot agree in this contention, if the facts testified to by the plaintiff were believed by the jury. The plaintiff testified that he was compelled to walk by the station with his hands up, in the presence of a crowd of people, in a community where he was well known, and he was placed in a cold jail, without any fire, while the weather was cold and disagreeable; that he was twice taken out of jail and questioned about a felony which he did not commit; that he was not given anything to eat at all while he was in jail, and that the jail was filthy. Plaintiff further testified that he contracted a bad cold by reason of his imprisonment, and that this finally resulted in him having tuberculosis. The condition of the jail and the allegation that he had contracted tuberculosis by reason of his confinement there were put in issue by an amendment to his complaint before the case proceeded to trial. The plaintiff in an action for false imprisonment may show the condition of the jail in which he was confined and the treatment he received therein as an element of damages he had sustained. *Grimes* v. *Greenplatt,* 47 Col. 495, 19 Ann. Cas. 608, and *Spain* v. *Oregon-Washington Rd. & Navigation Co.,* 78 Ore. 355, 153 Pac. 470, Ann. Cas. 1917E, 1104. Hence we hold that this assignment of error is not well taken.

We find no reversible error in the record, and the judgment will be affirmed.

BUTLER, J., not participating.