CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY *v.* GLASCOCK.

4-2998

Opinion delivered May 1, 1933.

1. APPEAL AND ERROR—QUESTION NOT RAISED BELOW.—Where a motion to require a cost bond does not appear in the record, and no exception to the court's ruling therein is shown, and failure to require it is not set out in the motion for new trial, the objection will not be considered on appeal.
2. TRIAL—NECESSITY OF SPECIFIC OBJECTION.—Where two of three paragraphs of an instruction are correct, a defect in the third paragraph should be reached by a specific objection.
3. APPEAL AND ERROR—INVITED ERROR.—Appellant cannot complain of an instruction where he requested a similar instruction.
4. RAILROADS—EJECTION OF TRESPASSER.—An action for damages for ejection of a trespasser from a freight train at a dangerous place, resulting in injury, evidence *held* to sustain a verdict for plaintiff.
5. NEGLIGENCE—WHAT LAW GOVERNS.—Where an injury to a trespasser ejected from a train occurred in another State, its laws govern as to the liability; but the remedy must be pursued according to the laws of this State.
6. RAILROADS—EJECTION OF TRESPASSER.—Under the laws of Oklahoma, if a railroad's agent by threats and show of force impelled a trespasser through fear to jump from a moving train and injury resulted, the railroad was liable.

Appeal from Arkansas Circuit Court, Northern District; *W. J. Waggoner,* Judge; affirmed.

STATEMENT BY THE COURT.

This appeal is from judgments for damages for the ejection of Floyd Glascock, a trespasser on one of appellant's through freight trains, from the train near Haleyville, Oklahoma, causing him to fall through a trestle over which the train was passing at the time and severely injuring him.

Floyd Glascock, 18 years old, in May, 1932, left Arkansas County in company with two other boys, who were older than he, in search of work. They got on a through freight train at Brinkley on the Rock Island, appellant's road, and had arrived at Haleyville, Oklahoma, about sundown Wednesday of the same week without accident, where they remained during the night. On Thursday morning appellee, Floyd Glascock, left the other boys and

went out and found some work. He returned in the evening to the railroad station so he might go on with the other boys. Mitchell, one of them, knew some people at another place and thought they might get some work there. They boarded one of appellant's freight trains about 10 or 11 o'clock on Thursday night when the train was running about 6 to 8 miles per hour, appellee, Floyd Glascock, going first up the ladder, being followed by Butcher. Glascock was near the top of the fourth car from the engine, his head and shoulders being over or above the top of the car. The trestle was about one quarter of a mile from where the boys boarded the train, and there was a curve in the track near the point where the two boys were forced from the train.

The special agent, Fore, had gotten into the engine cab after seeing the boys near the train when it started out. He left the cab and was walking down on the top of the cars and flashed a strong light in Glascock's face and told him to get off the train or he would shoot him off. The Butcher boy jumped from the train, which was going about 10 to 20 miles per hour and was over the trestle, and when Glascock jumped he fell on the hard earth about 10 feet beyond where the Butcher boy struck the mud at the edge of the bayou. The special agent was about six feet, seven inches tall and was wearing a large white hat and had a gun strapped about his waist. When he reached the Mitchell boy, who got the car ahead of the one upon which Glascock and the Butcher boy had boarded, and ordered him off, Mitchell told him they were on the trestle, and he did not require Mitchell to get off. He forced the other boys on the next car to jump off, however, threatening to shoot them. They had not heard the remarks of Mitchell to the special agent and did not know the trestle was there, it being dark and the strong light of the agent's flash being in their faces blinding them.

The special agent admitted that he had been on that route for some time, was familiar with the existence and condition of the trestle, and that it was his business to look over the cars and protect the shipments from being broken into and looted, and to keep trespassers off the train.

The boys had seen the special agent in the yards with a gun buckled on his person in a holster. They did not see the gun at the time they were forced off the train by the agent's threat to shoot them, as it was dark and the gun was on the other side of the agent, to the rear of the light, which was flashed and held in the faces of Glascock and Butcher. The Mitchell boy had gone to the yards where the train was being made up and talked to some of the trainmen, who told him to keep out of the sight of the special agent, and, acting on the information, he took the other two boys some distance away so they could board the train near the main line.

The evidence of the Mitchell boy showed that, immediately after the special agent had forced appellee, Glascock, from the train running over the trestle, he remarked to the special agent, "You probably killed both of the boys," to which the special agent replied: "The damn boys should not have been on the train." The Mitchell boy attempted to get off the train after it had left the trestle to look for the other boys and the special agent forbade him to leave the train. He did leave the train, however, stepping from the lower rung of the car ladder. He returned to the trestle and went down under it and found both the boys near the creek. One of the boys was wholly unconscious and practically lifeless, and the Mitchell boy thought him dead. The other boy was writhing in pain. The railroad company sent an engine and car out to return the boys to Haleyville, where they kept both of them from 11 or 12 o'clock that night until 4 o'clock the next afternoon. The Mitchell boy testified that he repeatedly tried to get the company to give medical aid to the injured boys, and it was also shown that the Butcher boy, although only half conscious, was begging for help. The Mitchell boy thought the delay was due in part to the endeavor of the railroad company to get its claim agent back from Texas to Haleyville. He did not see the telegram, but heard the agent and other employees talking about getting the claim agent and about wiring him.

There is no claim made of the excessiveness of the verdict, and the testimony relating to the injury was not set out in the brief.

The railroad's two employees testified that the special agent got on the train in the cab of the engine with them and sat there, not leaving the cab at all, until they reached the next town, 13 miles beyond Haleyville, as the agent himself also testified. He did testify that he had told the boys to keep off the train when he flashed a light out of the cab on them when the train first started. There was some testimony about statements that one of the boys had made that they were running along to get the train and fell off the trestle, not knowing it was there. It was about 20 feet from the track on the trestle to the ground beneath.

The court instructed the jury, giving appellees' requested instruction No. 1 over objection and exceptions, and refusing to give appellant's requested instruction for a directed verdict, and, from the judgments on the verdicts in appellees' favor, the appeal is prosecuted.

Thos. S. Buzbee and *Geo. B. Pugh,* for appellant.

A. G. Meehan and *John W. Moncrief,* for appellee.

KIRBY, J., (after stating the facts). It is first insisted that the court erred in not requiring appellees to make a cost bond upon its motion made during the trial. The motion for cost bond, however, is not shown in the record, nor that any exception was saved to the ruling of the court thereon, nor was the failure to require the giving of the cost bond set out in the motion for a new trial; and this objection therefore cannot be considered here.

In addition, the plaintiffs alleged in their complaint that they were residents of the State of Arkansas, and there was no denial thereof. The motion was not made until after the trial had been proceeded with, the jury impaneled, and part of the testimony heard; and the testimony on the point cannot be said on the whole to have established nonresidency anyway.

It is next contended that the court erred in giving appellees' requested instruction No. 1, objected to, which was written in three different paragraphs. No specific objection was made to any of them, but only a general objection was made to the instruction as a whole. At least two of the clauses are correct statements of the

law, and conceding, not deciding, the other incorrect, since the instruction was not wholly wrong, the defect should have been reached by a specific objection and not a general one. No error was committed in giving it. *Darden* v. *State,* 73 Ark. 315, 84 S. W. 507; *St. Louis I. M. & So. Ry. Co.* v. *Barnett,* 65 Ark. 255, 45 S. W. 550.

Appellant's requested instruction No. 2 contained the language that "such employee wilfully by threats or violence or by violence caused said Floyd Glascock to get off the train while it was running, etc.," submitted the same question to the jury as was objected to by appellant in appellees' said instruction No. 1; and, having concurred in the error complained of, if it was error, waived it and cannot now complain here. *St. L., S.-F. Ry. Co.* v. *Vaughan,* 88 Ark. 138, 113 S. W. 1035; *Wisconsin-Arkansas Lumber Co.* v. *Ashley,* 158 Ark. 379, 250 S. W. 874.

The undisputed testimony shows that this appellee, Glascock, and his companions were around the station at Haleyville, intending to ride free on the freight train going out of there. They acquired information from the trainmen about the time it would leave. They had seen the special agent, whose duty it was to protect the train from trespassers or persons who might break into the cars, and he had told them not to get on the train. That they had caught the train; and three witnesses testified that the special agent, by intimidation and fear by threatening to shoot them off the train, forced them to leave it at a dangerous place, and, as a result of the fall therefrom, two of the boys were very severely injured. The special agent knew where the trestle was, and the three boys, one of whom was not forced from the train, saying he could not leave it because of the trestle, notwithstanding which the special agent walked a few steps, threw his flashlight into the eyes of the other boys and forced them to jump from the train while it was moving on the trestle, and the agent knew such to be the case.

It is true he denied that he had gone on top of the train at all or made any threats or had anything to do with ejecting the boys from the train, and two other witnesses corroborated him about his having remained in

the cab of the engine all the way from Haleyville to the next station, but the jury believed the testimony of appellees, and it is ample to sustain the verdict, which is not claimed by the appellant to be excessive.

The injury having occurred within the State of Oklahoma, the laws of that State govern as to the liability, if any, but the remedy to recover damages on account of the injury must be pursued according to the law of this State where the suit was brought. *St. L.-S. F. Ry. Co.* v. *Coy,* 113 Ark. 265, 168 S. W. 1106; *St. L., I. M. & S. Ry. Co.* v. *Hesterly,* 98 Ark. 240, 135 S. W. 874.

The Oklahoma courts have held that it is unnecessary to show actual physical violence and assault to sustain an action for wrongful ejection of a trespasser and "that, if by threats and show of force he (the conductor) impels one through fear to jump from the moving train, and injury results, the master will be liable." *Folley* v. *C. R. I. & P. Ry. Co.,* 16 Okla. 32, 84 Pac. 1090; see also 52 C. J. 638-39; *Kansas City F. S. & G. Rd. Co.* v. *Kelley,* 36 Kan. 655, 14 Pac. 173; *Kline* v. *C. P. R. Co.,* 27 Cal. 400, 99 Am. Dec. 282; *Pierce* v. *North Carolina Ry. Co.,* 124 N. C. 83, 32 S. E. 399; *St. Louis-S. W. Ry. Co.* v. *McLaughlin,* 129 Ark. 377, 196 S. W. 460; see also *Missouri Pac. Rd. Co.* v. *Rodden, ante* p. 321.

We find no error in the record, and the judgment is affirmed.