KANSAS GULF SHORT LINE RAILROAD COMPANY v. M. C. SCOTT.
Cause Number 2
Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston
From the 7th Judicial District Court, Smith County, Hon. Felix. J. McCord
[1 Tex. Civ. App. 1, 20 S.W. 725]

WILLIAMS, ASSOCIATE JUSTICE.—Appellee brought this suit against appellant to recover damages, claiming that he had been wrongfully ejected from appellant's train. The damages, which he claimed, were the amount of the fare from Wells, the station on appellant's road, at which he was put off, to Tyler, the point of his destination; for violence, insults, and indignities offered to him by the conductor in ejecting him; and the value of a pass, which he held, entitling him to ride over that road until December 31, 1908, and which, he claimed, was repudiated and rendered valueless by the action of appellant's agents. Appellant pleaded a general denial, non est factum, and other facts, which will not be noticed further, as they are not involved in the points raised in this appeal.

Verdict was rendered for appellee for $250 for the ejection, and $1000 for the value of the pass.

During the trial, appellee, Scott, testified, that the road was ninety-eight miles long; that he intended to use the pass traveling over the road, as he passed over it frequently, getting lumber to use in building, in which business he was engaged sometime ago; that he had traveled over the road on the pass without paying; and that it would have been useful to him, if honored, until A. D. 1908.

Appellant resided at Tyler, one terminus of the road, and the fare from there to Lufkin, the other terminus, was $5.90. At this point appellee was asked: "How many trips would you have probably made over defendant's road, per year, had it not revoked the pass?" Appellant objected to this, that it sought for the opinion of the witness, and that the witness should state the facts, and leave the jury to draw the conclusion. The objection being overruled, the witness answered: "I would have probably made ten trips per month."

The court charged the jury, that in estimating the value of the pass, they should, among other things, consider the number of trips plaintiff would probably have made.

This evidence of Scott is all the evidence shown in the record affecting the value of the pass.

The ruling of the court admitting this evidence is the ground of appellant's first assignment of error.

The court, in its charge, instructed the jury, that if the agents of defendant used abusive language or insults to plaintiff, or offered indignities to plaintiff's person or character, he would be entitled to recover damages therefor. Appellant's third assignment complains of this charge, because there was no evidence to warrant it.

Appellee, Scott, testified, that he got on the cars at Lufkin, and between there and Wells presented his pass to the conductor. The latter said that no such pass had ever

been issued. Scott replied: "That cannot be so." The conductor then said that the ticket had been scratched. Scott insisted that the pass had been properly issued from the office; and the conductor again said: "No, that pass is bogus; you will have to get off;" and threatened to put Scott off, unless he would get off voluntarily. Scott said that he would not get off, but would have to be put off, as he was traveling on a good pass. The conductor waited until the train reached Wells, and then said to Scott, that he looked upon him (Scott) as a gentleman, and did not want to put him off. Scott again refused to get off; whereupon the conductor said he would take Scott by the arm and lead him off, which he did.

The conductor advised with two other employes of the railway company as to the validity of the pass, and they agreed with him that it was not good. This is all the evidence there is tending to show any misconduct on the part of the conductor.

We are of the opinion that both of these rulings are erroneous. The question to Scott called for his opinion as to the number of trips he would probably have made in the future, had his pass remained in force, and the proposed evidence is not embraced within any of the exceptions to the rule which excludes mere opinions of witnesses.

No reason is seen why the facts upon which such opinion as the subject inquired about admitted of, could not have been detailed by the witness to the jury; nor why the

jury could not have formed the opinion, after hearing the facts, as well as the witness. When this is the case, opinion is not competent evidence. Clardy v. Callicoate, 24 Texas, 172; 1 Whart. Ev. sec. 513.

This evidence was well calculated to affect the verdict of the jury, inasmuch as the probable number of trips plaintiff would have made was to be considered by them in estimating the value of the pass, and there was little other evidence upon which they could base a verdict on this point.

The evidence as to the conduct of the conductor in putting appellee off the car was not, in our opinion, such as to warrant the charge complained of in the third assignment. While this ejection of appellee may have been wrongful, it is apparent from the record that he used no "abusive language or insults to plaintiff's person or character." His claim that the ticket was "bogus" and had "been scratched," contained no charge against appellant; on the contrary, he seems to have disclaimed any such meaning by stating that he regarded appellant as a gentleman.

The jury probably inferred from the charge quoted that they were at liberty to consider the language and the conduct of the conductor as abusive or insulting.

For these errors the judgment must be reversed.

The second assignment of error, complaining of the exclusion of evidence offered by appellee, and the fourth, fifth, and sixth assignments, attacking passages in

the charge of the court, are not well taken. The exclusion of the proposed evidence was right, and the instructions referred to present correct rules of law for the guidance of the jury.

Several propositions are stated in appellant's brief under his ninth assignment. That assignment of error attacks the verdict of the jury as allowing excessive damages. In view of the fact that the verdict was based, in part, upon improper testimony, and found under an erroneous instruction, no opinion we might express upon it could serve any useful purpose upon another trial. No complaint is made upon the measure of damages given in the charge except that above pointed out.

Appellant, however, contends that inasmuch as the pass for twenty-five years was given appellee for an undivided one-half interest in land conveyed by him to the railway company, valued at the time at $2000, he can not in this suit recover more than the value of his one-half interest in such land after deducting the benefits he has received in the use of the pass for five years.

To this we cannot assent. Whatever may have been the estimate put upon the land, he was entitled to the full value of that which he received in exchange for it, the ticket. If this was greater than the value of the land, he was entitled to the benefit of it. If he was wrongfully deprived by the acts of the appellant of the use of the pass, before it expired, he was entitled to recover the value.

Of course if the pass was never issued for twenty-five years, but for five only, he would be entitled to nothing.

The rules given in the charge for determining the validity and effect of the pass are correct.

This disposes of the questions raised by appellant that are likely to occur on another trial.

Reversed and remanded.

Delivered October 11, 1892.