

1952

# Russell S. Stickle v. Union Pacific Railroad Co. : Brief of Appellant

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Richard C. Dibble; Counsel for Appellant;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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RUSSELL S. STICKLE,  
*Plaintiff and Appellant,*

— vs. —

UNION PACIFIC RAILROAD COM-  
PANY, a corporation,  
*Defendant and Respondent.*

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**BRIEF OF APPELLANT**

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**FILED** RAWLINGS, WALLACE, ROBERTS  
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# IN THE SUPREME COURT of the STATE OF UTAH

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RUSSELL S. STICKLE,  
*Plaintiff and Appellant,*

vs.

UNION PACIFIC RAILROAD COM-  
PANY, a corporation,  
*Defendant and Respondent.*

Case No. 7831

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

(Numbers in parentheses refer to pages of the record.)

The trial court directed a verdict for the defendant (109-112) and from the judgment entered thereon plaintiff prosecutes this appeal.

This is an action brought by plaintiff, an employee of Rademann Guisto Co., building contractors, against the Union Pacific Railroad Company for injuries received by him in unloading a car delivered to his employer by the said railroad company. Workmen's compensation was ob-

tained by plaintiff from the insurance carrier of his employer. The insurance carrier signed a Waiver (Exhibit "J"), wherein the carrier waived its right of subrogation and consented that plaintiff herein could commence and maintain the action in his own name against the Union Pacific Railroad Company.

The trial court in granting defendant's motion for a directed verdict held that the evidence would support a finding that the defendant company was negligent in sending a car to be unloaded which it knew had a defective metal strap and which strap was usually and customarily used to unload cars loaded as was the flatcar here (110).

The trial court based his ruling on the proposition that he believed plaintiff was guilty of contributory negligence as a matter of law and that if the railroad company could see and discover upon reasonable inspection the defective strap, then the plaintiff also could have seen this condition and his failure to see constituted contributory negligence on his part (110). Thus the court failed to make a distinction between the fact that it was the duty of the railroad company to inspect and that it was not the duty of plaintiff to make an inspection. He did, in fact, make a test of the strap involved by placing his weight upon it before mounting to the top of the tank involved (16).

The injury occurred on the 7th day of December, 1949, at approximately 1:30 p.m., in the yards of the Pacific Fruit Express at Pocatello, Idaho (12). The plaintiff was a steel worker employed by Rademann-

Guisto Construction Company and engaged in the erection of buildings for the Pacific Fruit Express. On the date above mentioned, the plaintiff and others were assigned the task of unloading two large steel storage tanks (12). These tanks were loaded on a flatcar which had been delivered by the defendant to the yards in which plaintiff was working (12).

These two tanks were the same size and were loaded on the one flatcar. Each tank was cylindrical in shape, approximately 10 to 12 feet in diameter, 20 feet in length and weighed 27,000 and 30,000 pounds respectively (13 and Exhibit 4).

The tanks were placed on the flatcar end to end. These tanks rested on cribbing on top of the flatcar and each tank was held down by two metal straps which were attached to the sides of the flatcar and extended over the top of the tanks. These metal straps were 3 to 4 inches in width and approximately an eighth of an inch thick, there being testimony that this band was similar to defendant's Exhibit 5. The straps were attached to each side of the boxcar by being looped over a metal band which went around the side of the flatcar. The end of the strap was clamped to the other portion of the strap, thereby forming a loop encircling the metal band on the flatcar (15).

This flatcar was spotted by the defendant in the yards where plaintiff was working. The car had to be towed by truck down to the place where it was to be unloaded (12-13).

Prior to the spotting of this car it had been inspected

by the defendant company (80). The defendant called the witness George H. Cutler, who was the person in charge of the inspection. Cutler identified defendant's Exhibit 1 as indicating that the inspection on this particular car had disclosed there was a broken tie band (81). The witness testified that he had no recollection of this car being bad ordered independent of Exhibit 1 (82). He stated that it was the customary practice to place on every car that is bad ordered a bad order card similar to defendant's Exhibit 2. This would be attached to the car with a stapling machine and where there was a defect such as discovered in this case, they would place the bad order card so that the side specifying light repairs would be facing out (82). This witness also testified that a car like this flatcar, having a broken tie band, was supposed to be sent to the rip track to be repaired (87). This witness did not know whether the car was taken to the rip track or not. He also testified:

"Q. Well, I am saying ordinarily if there is a broken tie band on it they would take it in and repair it, wouldn't they?

"A. Well, ordinarily.

"Q. Because one of those tie bands can be used for one of two things, either for unloading or to hold the storage tank in place, isn't that right?

"A. Yes, sir.

"Q. Isn't that right?

"A. Yes, sir.

"Q. Now you say the cards are finally taken off when they get to the rip track?

"A. The repair track, yes, sir.



“Q. Or the repair track, yes, and until that time they remain on, I take it?

“A. Yes, sir.

“Q. And, of course your only job is just to bad order the car and put that on and you leave it up to the other people what should be done with it?

“A. Yes, sir.”

The witness testified that as a rule these cards are put on the decking of a flatcar. By this he apparently meant on the side of the car (90). Through leading questions defendant's counsel got the witness to testify that a broken tie band would not render travel unsafe to the point where the car would be unloaded and that it would be safe to move from the point of inspection to the customer (90-91). He conceded, however, that if he figured these straps would be used in unloading the car, he would see to it that they were fixed before the car was sent to the customer (92).

When the car was finally spotted for loading, it was on a track running in a north and south direction. Cribbing had been placed in position on the ground upon which the tank was to be placed. The first strap to be used was that on the south end of the car. The plaintiff used a blowtorch in cutting the strap on the east side. The usual and customary method of unloading a tank such as this from a flatcar, was to place cables underneath the tank and to attach the ends of the cable to a crane, then to hoist the tank from the flatcar and finally lower it onto the cribbing prepared for it. This necessitated the presence of a man on top of the tank in order to connect the cables to

the crane. One of the usual and customary ways for the man to place himself on top of the tank was to climb up the side of the tank, using the strap to pull himself on top (16). Before the plaintiff ascended the strap, he placed his weight on it to see if it would hold him (16). It did and seemed solid and secure (36) and he then commenced to ascend. When he was almost on top, the strap broke on the other or west side and he fell to the ground on his feet and suffered severe fractures in his ankles and legs (16, 18).

As plaintiff fell, he carried with him the strap, pulling it down onto the east side of the car (17). After he was made as comfortable as possible, examination was made of the strap where it had broken. It appeared that a quarter of an inch or less showed a bright clean break and the rest of the break showed that it was corroded and rusted, thereby indicating that it had been broken for some period of time (17, 55).

Neither the plaintiff (47, 106) nor the foreman (56, 105) saw any bad order card on the car and they were not informed of the fact that anything was wrong or defective about the metal strap which had been broken. They made no inspection of the band because they knew that the railroad company made inspection before the cars were unloaded by the consignee (48) and relied upon that inspection and upon the assumption that the bands or straps were in first class shape (43). In further discussing this break the plaintiff's witnesses stated that they would not notice this break unless they were looking for it (55-56) and examined it for that purpose (17, 44).

The foregoing evidence is substantially all that relates to the question of liability in this case. We will not detail the medical evidence because it is not of importance on the question before the court. All that need be said is that the plaintiff was seriously injured, remained in the hospital from four to five months, was unable to work for a period of a year and the injuries have caused permanent disability.

## STATEMENT OF POINTS

### POINT I.

PLAINTIFF WAS DENIED HIS RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

### POINT II.

THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

### POINT III.

THERE WAS SUBSTANTIAL EVIDENCE INTRODUCED THAT THE DEFENDANT WAS NEGLIGENT IN THAT IT FAILED TO REPAIR OR TO GIVE WARNING OF THE BROKEN TIE BAND TO PERSONS WHO WOULD UNLOAD THE TANKS FROM THE FLATCAR.

## ARGUMENT

### POINT I.

PLAINTIFF WAS DENIED HIS RIGHT TO A JURY TRIAL IN VIOLATION OF THE CONSTITUTION AND APPLICABLE AUTHORITIES.

We strenuously assert that the ruling of the court in directing a verdict and refusing to permit the jury to determine the facts has resulted in a denial to plaintiff of his right to a trial by jury.

When a tribunal has been selected to determine conflicting and disputed issues of fact, the right of that tribunal to make the determination should remain inviolate.

Where reasonable minds may differ upon the finding of a factual proposition, then the jury should be permitted to make the determination and the court should not usurp its function. We respectfully submit that the trial judge usurped the function of the jury in this case.

This court in the case of *Shortino v. Salt Lake & U. R. Co.*, 52 Utah 476, 174 P. 860, at page 866 set forth the rule to be followed by trial courts in determining whether or not a case should be submitted to the jury. This court stated:

“That the question of contributory negligence on the part of the plaintiff, like that of the negligence of the defendant, is for the jury, where the evidence and the inferences to be deduced therefrom are such that reasonable men may arrive at different conclusions, has so often been decided by this court that the proposition has, in effect, become elementary.

“In other words, if there is any substantial doubt whether a plaintiff was or was not guilty of contributory negligence, or whether, if negligent, such negligence was the proximate cause of the injury, the court cannot determine the right to recover as a matter of law, but must submit the

question of contributory negligence or of proximate cause, or both, to the jury as questions of fact.”

Again this court stated in *Newton v. Oregon Short Line R. Co.*, 43 Utah 219, 134 P. 567, 570:

“Where, therefore, the circumstances are such that it may reasonably be said that different minds, in viewing and considering the evidence, might arrive at different conclusions with respect to whether or not the injured person exercised ordinary care, the question of negligence must of necessity be determined as one of fact and not of law. While the substance of the foregoing statement is often found in the books and may be said to be a correct statement of the doctrine, yet such statements often leave the reader in doubt whether a given case falls within or without the doctrine. But, notwithstanding this, it is impossible to formulate a rule by which all cases can be determined.

“All that can be said is that, unless the question of negligence is free from doubt, the court cannot pass upon it as a question of law; that is, if after considering all the evidence and the inferences that may be deduced therefrom the court is in doubt whether reasonable men, in viewing and considering all the evidence, might arrive at different conclusions, then this very doubt determines the question to be one of fact for the jury and not one of law for the court. The court can pass upon the question of negligence only in clear cases. All others should be submitted to the jury. The reason of this is apparent from the fact that in this state all questions of fact are for the jury; and therefore, unless it is clear that in viewing and considering the evidence reasonable minds

might not arrive at different conclusions, the case should go to the jury."

To the same effect see *Malizia v. Oregon Short Line R. Co.*, 53 Utah 122, 178 P. 756 and *Steed v. Rio Grande W. Ry. Co.*, 29 Utah 448, 82 P. 476.

We submit that under the foregoing rules the refusal of the trial court to permit determination of this case by a jury constituted a violation of plaintiff's right to a trial by jury, the tribunal selected to hear and determine issues of fact.

## POINT II.

THE TRIAL COURT ERRED IN HOLDING THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS MATTER OF LAW.

This court has given recognition to the authorities heretofore cited in *Moore v. Miles*, 108 Utah 167, 170, 158 P. 2d 676, wherein the court stated:

"\* \* \* In this jurisdiction we are committed to the doctrine that the question of contributory negligence is one for the jury, where as said in *Carpenter v. Syrett*, 99 Utah 208, 104 P. 2d 617, 619, 'different conclusions may be reasonably drawn by different minds from the same evidence  
\* \* \* ,'"

We submit that reasonable minds could reach different conclusions on the proposition of whether or not the plaintiff in this case was guilty of contributory negligence.

At the very beginning the court was following an

entirely erroneous concept concerning contributory negligence. He took the utterly defenseless position that the burden of proof was upon the plaintiff to free himself from contributory negligence. The court stated (111):

“\* \* \* but the fact that somebody is hurt doesn't entitle him to take money away from somebody else who isn't responsible for his injuries and, of course, he must overcome and must show that he, himself, is not guilty of any fault that contributed to his injury, because if he doesn't show that under the law he is not entitled to recover.”

Apparently the trial judge had the idea that it was incumbent upon plaintiff to establish by a preponderance of the evidence that he was not guilty of contributory negligence. To establish that such statement is erroneous certainly needs no citation of authority.

There can be little wonder that the trial court reached the erroneous result that defendant was entitled to a directed verdict when it started out with the proposition that the burden was upon plaintiff to prove his freedom from contributory negligence. Consideration of the evidence in this case will clearly establish that the question of contributory negligence was for the jury in this case.

The plaintiff and his foreman had the task of unloading the tanks from the flatcar. Theirs was not a duty to inspect. Precautions might be expected from them as reasonably prudent persons in the performance of their job. As matter of fact, the plaintiff tested the strap to see whether or not it would bear his weight when he



grabbed hold of it and caused his weight to be exerted against the strap. The strap held his weight. A reasonable man could well find that this test so made by plaintiff was all that needed to be done in the exercise of reasonable care, and that a reasonably prudent person would have done no more to protect himself.

In making a determination of whether plaintiff acted with reasonable care, we must take into consideration all of the surrounding circumstances. One of those circumstances was his knowledge that the railroad company made inspection of the cars before they were unloaded. The foreman stated that he knew of this custom and that in the unloading of cars, such custom was relied upon by him in unloading cars. With these men knowing and relying upon the inspection of the railroad, certainly we cannot say that all reasonable minds would necessarily conclude that a person employed to unload the tanks would make minute inspection of the load and cars to determine whether or not they could be unloaded with absolute safety to himself. As indicated, the plaintiff did make a test and we submit that this test should have been enough to make a jury question of the proposition of whether or not he was in the exercise of reasonable care in climbing to the top of the tank after making the test stated.

The courts have recognized that the railroad in effect represents to a consignee and his employee that a car is in a reasonably safe condition to be unloaded and certainly an employee should be entitled to rely upon that representation.



In *Folsom v. Lowden*, 157 Kan. 328, 139 P. 2d 822, 826, the court stated:

“Appellee is the delivering carrier. The general rule is that a railway company, when it delivers a car of freight to a consignee to be unloaded, in the absence of notice to the consignee to the contrary, represents to the consignee, or his employee, that the car is in reasonably safe condition to be unloaded.”

The court in *Paul v. Georgia Railway & Banking Co.*, 60 Ga. App. 461, 4 S. E. (2d) 99, found that a jury question on contributory negligence was presented in the case. In doing so it determined that the plaintiff could rely upon an assumption that the defendant had discharged its duty toward plaintiff. In that case the plaintiff and others were unloading cars and as they moved the next-to-the-last car, the last car also moved and plaintiff was injured because of this movement. The defendant railroad company had spotted the car and plaintiff was permitted to rely upon the discharge by the defendant of its duty to adequately set the brakes on this car. The court stated:

“\* \* \* The petition alleged that the plaintiff had the right to expect that the defendant had exercised ordinary care in placing said car and in applying the brakes so that it would not move when the car in front of it was moved. It alleged that after the front car had been moved a short distance he discovered that the last car was rolling toward him about to catch him between the cars and that when he discovered this it was too late to get out of the way, although he did everything

possible. This allegation makes a jury question and it was error to sustain the general demurrer."

The trial court in giving his reasons for directing a verdict stated (110-111):

"Now in this case he is charging the railroad with having been negligent in that they failed to exercise reasonable care for his safety and the law says, by the same token, that the plaintiff must exercise reasonable care for his safety and the evidence in this case shows, by the plaintiff himself, that had he walked around and looked at this strap that he was about to use as a ladder to climb up this side of this tank that he would have seen that the strap was torn and that it probably was not safe.

"Now the railroad, he says, should have done that and should have warned him. In other words, he is charging the railroad with the same thing that the evidence shows he failed to do for his own safety and the doctrine and well settled law is that if a person is himself guilty of negligence which contributes to his own injury that that is fatal to his right to recover against somebody else, and it is on that basis that I have determined as a matter of law, and without any question of fact, that the plaintiff ought not to be permitted to recover against the railroad in this instance."

We respectfully submit that the trial court erroneously placed a duty of inspection on the plaintiff and classified that duty as being the same as the duty of the defendant, to make inspection of the car and its load.

He held as matter of law that it was incumbent upon the plaintiff to make careful inspection of the strap. He required that this inspection be made by a visual examination of all parts of the strap and we assume that he would be required under this ruling of the court to inspect all parts of the car. We have found no case which imposes any such duty upon the plaintiff. He did make a test of the strap, which we believe a jury could find constituted an exercise of reasonable care in that regard.

Because the defect in the strap could be found by looking for it, does not mean that plaintiff was guilty of negligence because he did not see it. He had no duty to inspect, that was the duty of the defendant. If a person has no required duty to look, certainly the fact that he does not see because he did not look cannot establish negligence on his part as matter of law. If the defect could not have been seen by looking, then it would have been a latent defect and there would have been no liability on defendant. This latent defect rule seems well established. See *Erie R. Co. v. Murphy*, 108 F. 2d 817; *Mickelson v. Erie R. Co.*, 106 N.J.L. 147, 147 A. 535. There was no duty to inspect so far as the consignee, Rademann-Guisto Co. was concerned. *Pennsylvania R. Co. v. Hummel*, 167 F. 89. If there was no duty on the part of plaintiff's employer to inspect, then certainly there was no duty on the part of plaintiff to make inspection. Plaintiff's task was to use the strap, not to inspect it, and the jury could have found that since he was going to use it, the test he applied, of his own weight, would constitute

an exercise of reasonable care for his own safety and hence would have made it a jury question.

In the case of *Maher v. Chicago, M. & St. P. Ry. Co.*, 278 F. 431, 434, the defendant delivered a car loaded with ice to plaintiff's employer. Plaintiff had removed some of the ice and delivered it to several customers. Between deliveries he closed the door. He noticed certain defects in the door, but irrespective of these defects he continued to use such door and the next morning while he was endeavoring to close the door, it came off the rail on which it was hung and injured him. The trial court ruled as matter of law that plaintiff was guilty of contributory negligence. The appellate court reversed. In discussing contributory negligence the court stated:

“Under federal law this is a defense which must be affirmatively established by defendant. To warrant a directed verdict it must be established conclusively. This defense may be drawn from the plaintiff's evidence; and in the present case the only evidence bearing on the subject came from plaintiff himself. He testified that before the injury he had observed the general ramshackle condition of the door and its fan-like or scissors-like action; but not until after the injury had he observed the sag in the rail, the arch in the canopy, and the worn-down condition of the hanger. These latter things he undoubtedly could have discovered by inspection. They were the things which, in the rickety condition of the door, permitted the hanger to jump off of the rail. He did not discover them. He was a merchant, not a car inspector. Was it negligence for him not to have discovered them and thereupon to have suspended delivery of ice

to his customers (in midsummer) until on his complaint defendant had repaired the door? During all of the necessary occasions on the 12th he opened and closed the door without injury. 'It worked hard,' but it worked. And even if his retina had registered a photograph of the rail, the canopy, and the hanger, that would not be enough. For him to have apprehended the danger it would have been necessary for him mentally to have followed the application of force on the edge of the door, to and through the boards held together only at the top, to and through the hanger in its relation to rail and canopy, and to have realized the likelihood or possibility of the hanger's being forced from the rail as it came to the enlarged space between the rail and canopy. Compare *Hawley v. C. B. & Q. Rld. Co.*, 133 Fed. 150, 152, 153, 66 C.C.A. 216. Would a reasonably prudent man under the circumstances have realized that he must quit using the door for its intended use or take upon himself the consequences of its further use? In our opinion reasonable and fair-minded men might differ in their answers, and the question should therefore have been submitted to the jury."

The above case is stronger for defendant than the case at bar, because here plaintiff was not aware of any dangerous conditions and relied upon the straps being in first class condition (43).

In *Louisville & N. R. Co. v. Freppon*, 134 Ky. 650, 121 S.W. 454, the plaintiff, an employee of a consignee, was injured when he attempted to open the door of the car. Defendant contended that he was guilty of contribu-

tory negligence as matter of law, but this contention was held erroneous and the court stated:

“\* \* \* The point is further made that Freppon was guilty of contributory negligence sufficient to defeat a recovery. But the facts do not authorize this assumption. There is no evidence that he knew or had reasonable grounds to believe that the car door would fall if he knocked the pin out, or that he failed to exercise ordinary care for his own safety. The question of whether or not he was guilty of contributory negligence was fairly submitted to the jury in an instruction telling them, in substance, that if they believed from the evidence that the plaintiff failed to use ordinary care in unloading the car, and was careless and negligent in so unloading the same, and that but for his own carelessness and negligence the accident and injury would not have occurred, they should find for the defendant.”

In *Oklahoma City-Ada-Atoka Ry. Co. v. Riddle*, 182 Okl. 318, 82 P. 2d 304, the defendant contended that plaintiff was guilty of contributory negligence as matter of law. Plaintiff had been injured when he was struck by a falling door from a boxcar. This door had been cleated up to hold it in place. The plaintiff and his fellow workers plied these cleats from the door in attempting to open it and then when they tried to slide the door, it fell, causing the injuries indicated. Defendant's evidence was directed toward showing that there was a written warning “Do Not Open” upon the door and that it was a warning of a dangerous condition. Defendant contended that in violating this warning, plaintiff was guilty of contributory

negligence as matter of law. The court held that the question was one for the jury and that a jury could find that plaintiff was exercising ordinary care for his own safety. In the case at bar there was evidence upon which a jury could find that no warning of any kind was given to the plaintiff. His use of the strap under those conditions would not be negligence as matter of law, if it was not negligence to attempt to use the door which had a sign prohibiting its use.

Another case helpful to plaintiff is that of *Lewis v. Southern Pac. Co.* (Cal. App.), 220 P. 2d 431. Plaintiff was an employee of a shipper to whose yards the defendant delivered a car for loading. After the car was loaded, plaintiff attempted to close the door. It would not move and a fellow employee took a pinch bar and was applying pressure on the door while plaintiff was attempting to pull it. The door fell outward from the top upon plaintiff causing his injuries. A verdict was rendered for plaintiff and on appeal the main contention by defendant was that plaintiff was guilty of negligence in attempting to close the door, and among other things that he should have observed the guides on the door. The court refused to follow this argument and stated, (p. 433) :

“\* \* \* Whether they should, acting as persons of ordinary care and prudence, have observed the defective guides and whether if they had they should with their knowledge have realized the danger were properly questions for the jury. ‘Contributory negligence is a question of law only when the court is impelled to say that from the facts



reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury.' Dwelly v. McReynolds, 6 Cal. 2d 128, 133, 56 P. 2d 1232, 1235."

In *Stoutimore v. Atchison, T. & S. F. Ry Co.*, 338 Mo. 463, 92 S. W. 2d 658, plaintiff was loading cattle for shipment over defendant's railroad. One of the cars delivered by defendant had a defective brake and because of this plaintiff was caused to fall from the top of the cattle car. Judgment for plaintiff was affirmed and the rule regarding contributory negligence was stated as follows:

"\* \* \* Neither can we sustain defendant's contention that plaintiff was guilty of contributory negligence as a matter of law. Plaintiff was not an experienced railroad man. He was working in the dark with the instrumentalities furnished to him by defendant. Under such circumstances, he could only be held guilty of contributory negligence as a matter of law if the danger of doing so is so obvious and glaring that no reasonably prudent person in the exercise of ordinary care would undertake to do so. We, therefore, hold that contributory negligence of plaintiff was a jury question, and that the court did not err in overruling defendant's demurrer to the evidence."

It will be observed that in the case at bar the plaintiff did take some precaution in testing the strap.

In *Waldron v. Director General of Railroads*, 266 Fed. 196, the plaintiff there took some precautions for



his own safety, but there were others he could have taken. It was held a jury question was made. Plaintiff was engaged in loading a car with coal. He was told that the car brake was weak; that it was necessary to keep the coal car in control inasmuch as there was a car below on the same track, from which other employees were unloading furniture. Plaintiff proceeded to place a scotch on the track about a car-length below, in order to stop the car in case the brakes should not hold. The brakes were then released and when plaintiff saw that they would not hold, and that the scotch did not work and that the car would collide with the furniture car, he placed another piece of timber before one of the rear wheels of the truck. In doing so his hand was caught by the wheel and his arm cut off. The trial judge directed a verdict for defendant. This was reversed on appeal and the court stated (p. 199):

“There was evidence that the railroad company furnished a car with a seriously defective brake, knowing that the brake would be depended on to hold the car loaded with coal on a steep grade, and that the defect in the brake was the proximate cause of the accident. If nothing else appeared, the liability of the railroad company would result.

“The question of assumption of risk was for the jury. . . . It is true that, after the loading was half completed, the plaintiff had notice of his coworker’s opinion that the brake was weak. But it had held in process of loading, and there is no evidence that plaintiff or his coworker, Clifton, knew there was any specific defect; and the defendant could not put upon the plaintiff or his

employer the duty of diligence in discovering the defect. It follows that the question whether mere notice of weakness was under the circumstances sufficient to charge the plaintiff with notice of both the defect and the danger was for the jury. Nor does the evidence necessarily require the inference of contributory negligence. The plaintiff and his coworker, Clifton, expected the scotch to so retard the car that the brake would hold it. Upon the jury's view of the reasonableness of this precaution and expectation will depend their decision of that issue. When the plaintiff discovered that the brake and the scotch first provided failed to hold the car in control, it was not negligence in the emergency to try to stop the car, to save the life or property of others, by placing another scotch under the wheels, unless the action taken was heedless or reckless, or the emergency was brought about by plaintiff's own fault. The evidence did not warrant the withdrawal of that question from the jury."

It will be noted in the foregoing case that the defendant had specific knowledge of the defective brake, yet the question of contributory negligence was left to the jury.

Even though a person might have seen a dangerous condition if he had looked for it, does not mean that he is guilty of contributory negligence for not having made visual examination when there was no reason to anticipate the presence of such a dangerous condition.

We have been unable to find any cases involving unloading of cars on this particular proposition, but in the case of *Van Horn v. Wyoming Game & Fish Com.*, 54

Wyo. 346, 92 P. 2d 560, 562, the rules have been well stated as follows:

“\* \* \* Here, we think the more pertinent principle applicable is as held in *Chicago Telephone Company v. Commercial Union Assurance Co., Ltd.*, of London, 131 Ill. App. 248, that the doctrine of contributory negligence does not apply where it appears that the omission or conduct alleged to constitute contributory negligence was in the doing or the not doing of some act or acts in relation to a danger not reasonably to have been apprehended. In the opinion in that case the decision in *Engel v. Smith*, 82 Mich. 1, 7, 46 N.W. 21, 21 Am. St. Rep. 549, was quoted to this effect: ‘It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any. *Beach, Contrib. Neg.*, 41.’

“In *Foreman v. Western Union Telegraph Co.*, 228 Ky. 300, 14 S.W. 2d 1079, 1081, the court declared: ‘Contributory negligence is not imputable to any one for failing to look out for danger which he has no reasonable cause to apprehend.’ *Shearman and Redfield*, Sec. 90, 653, 654.’

“Said the Supreme Judicial Court of Massachusetts in *Wall v. King*, 280 Mass. 577, 182 N. E. 855, 856: ‘One is bound to anticipate and provide against what usually happens and what is likely to happen, but is not bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable.’ *Falk v. Finkelman*, 268 Mass. 524, 527, 168 N. E. 89, 90.”

This rule is similarly stated in *Locke v. Red River Lumber Co.*, 65 Cal. App. 2d 322, 150 P. 2d 506, 509.

The plaintiff was injured as a result of stepping into an open crack in the concrete floor of the defendant's store. Defendant contended that she was guilty of contributory negligence as a matter of law. The court held that this was a question for the jury and stated:

“We may not hold as a matter of law that the plaintiff in this case was guilty of contributory negligence in failing to see the hole in the concrete floor of the aisle. We cannot say she did not use that degree of care which should have been exercised by a reasonably prudent person under such circumstances. That being true, we may not interfere with the finding of the court in that regard. The plaintiff had no previous knowledge of the defect in the floor. She had no reason to anticipate that the main aisle to the front entrance in that general mercantile establishment would be in a dangerous condition for customers to use. She had a right to assume the proprietor of the store would provide his invited customers with safe aisles in which to walk.”

In the case at bar there was no reason for the plaintiff to anticipate any defect in the strap over the tank, particularly in view of the fact that he knew that the railroad company was supposed to make an inspection.

We submit that the trial court erred in holding that the burden of proof was upon the plaintiff to establish his freedom from contributory negligence and then superimposing upon this erroneous rule a finding that as a matter of law the plaintiff was guilty of contributory negligence.

## POINT III.

THERE WAS SUBSTANTIAL EVIDENCE INTRODUCED THAT THE DEFENDANT WAS NEGLIGENT IN THAT IT FAILED TO REPAIR OR TO GIVE WARNING OF THE BROKEN TIE BAND TO PERSONS WHO WOULD UNLOAD THE TANKS FROM THE FLATCAR.

The trial court ruled that a jury question had been made on the proposition of defendant's negligence. In that regard the court stated (110):

"Now of course the railroad, they can't anticipate every use that a person will make of their facilities, such as a strap. That is the purpose of the strap to hold down the load, and they can't be charged with knowledge that somebody may use it as a trapeze or a swing or as a ladder to climb up the tank.

"Now the plaintiff seeks to overcome that by showing that the usual custom and practice in unloading cars was for men to do that and therefore the railroad was charged with the knowledge that that might be done, but from that standpoint the case might be submitted to a jury and they might conclude that the railroad didn't exercise all of the care that was necessary to protect the plaintiff in that regard. But the hurdle that I believe the plaintiff cannot overcome is the doctrine in law that we call contributory negligence."

In this ruling we believe that the trial court was correct. However, we do not know whether defendant contends or will contend that the proof also failed to make a jury question of defendant's negligence and proximate causation.

In *Raymond v. Union Pac. R. Co.*, 113 Utah 26, 191 P. 2d 137, 139, the plaintiff was an employee of a consignee of a car and load delivered by the Union Pacific Railroad Company. That same company is the defendant in the case at bar. With respect to the contentions there made, the court stated:

“Plaintiff asserts and defendant admits that a railroad company will be held liable to a consignee or such consignee’s employee if the railroad company delivers a defective car or a car with a defective load and such consignee or its employees are injured thereby.”

We believe that such rule is well established by the authorities.

In the case at bar, the defendant by its inspection discovered the defective strap which held the tanks in place. Evidence was introduced that the usual and customary way to unload tanks from a flatcar was for a person to get on top of the tank to make the necessary attachment of the cables and tank to the crane. Evidence was also introduced showing that the usual and customary way of ascending the tank was to use the strap. Under this state of facts, the defendant should either have repaired the defective strap or should have given adequate warning of the condition of the strap to the consignee or its employees.

One of the witnesses for the defendant company testified that bad ordered cars should go to the repair track and a car with a broken tie band, such as the car in



question, should have been sent to the rip track to be repaired (87). The evidence establishes the fact that this tie band was never repaired and apparently the car was not sent to the rip track. Based upon the failure of the railroad to make the necessary repairs on this tie band, the jury could find that it failed to use reasonable care in protecting the consignee and its employees from the defective condition so found, and that in placing the car in the yards for unloading purposes, it was guilty of negligence. See *Ladd v. New York, N. H. & H. R. Co.*, 193 Mass. 359, 79 N. E. 742, where defendant failed to make repairs after knowledge of a defective door.

Contention was made by the defendant that adequate notice had been given by placing the bad order card on the car. The jury could have found that this bad order card was never placed upon the car, for the reason that the evidence on this issue was conflicting. Defendant's witnesses testified that they had no independent recollection of the inspection of the car in question. The records of the company disclosed that employees of the defendant had discovered the broken tie band. Testimony was also introduced that the usual and customary practice was to place a card on the car, indicating it was bad ordered and also indicating what was wrong with the car or its contents. Plaintiff and his foreman testified that they did not see a card on the car. Hence, there being a conflict in the evidence, the jury could determine that no card was placed upon the car in question. The jury could find that the defendant had found the defective tie band and had given no notice to the consignee or its employees

and had negligently placed the same in the yards of the Pacific Fruit Express for the purpose of unloading.

Also, the jury could find that merely to place a bad order card on a car in a place where it was not seen and that defendant did nothing further to call the attention of the consignee or its employees to the defective tie band, constituted negligence on its part in failing to give reasonably adequate warning of a known defect.

Many cases could be cited to support the proposition that the defendant owed a duty to Rademann-Guisto Company and its employees, including plaintiff, to make a reasonable inspection to determine whether the car could be safely unloaded and give special warning of any defect so found. We do not anticipate that there will be any dispute concerning this principle of law. See *St. Louis-San Francisco Ry. Co. v. Ewan*, 26 F. 2d 619; *Erie R. Co. v. Murphy*, 108 F. 2d 817; *Hanson v. Ponder*, 300 S. W. 35; *Heaven v. Pender*, (1883) L. R. 11 Q. B. Div. 503. This latter case is a much cited English case and is discussed at 41 A.L.R. 58.

When defendant's witnesses testified that their concern was whether the car could be safely transported, they were not discharging the duty imposed upon defendant. The car was delivered by defendant to be unloaded and hence its duty extended not only to safe transportation but safe unloading. In *Erie R. Co. v. Murphy*, supra, the court set forth the contention of the railroad as follows, (p. 818):

“Appellant's first contention is that, as delivering carrier, it was under no duty so to in-



spect a sealed car received from another carrier as to ascertain whether it was safe for unloading, but that only such inspection was required as would reveal whether the car was reasonably fit for transportation."

It then answered the contention as follows:

"Appellant's first contention is contrary to the great weight of authority. When injury in unloading a car is the proximate result of the car's unsafe condition, the delivering carrier is almost invariably held liable, if a reasonable inspection would have revealed the defect and the carrier gave no notice thereof. *St. Louis-San Francisco Ry. Co. v. Ewan*, 8 Cir., 26 F. 2d 619; *Copeland et al. v. Chicago, B. & Q. R. Co.*, 8 Cir., 293 F. 12; *Missouri Pac. R. Co. v. Sellers*, 188 Ark. 218, 65 S. W. 2d 14; *Doering v. St. Louis & O'Fallon Ry. Co., et al.*, Mo. App. 63 S. W. 2d 450; *Griffin v. Payne, Director General of Railroads*, 95 N.J.L. 490, 113 A. 247; *Roy v. Georgia R. & Banking Co., et al.*, 17 Ga. App. 34, 86 S. E. 328; *Corbett v. New York C. & H. R. R. Co.*, 215 Mass. 435, 102 N. E. 648. Cf. *Wheeling & L. E. Ry. Co. v. Rupp*, 27 Ohio Cir. Ct. R. 212.

"Since appellant was under a duty to appellee to exercise reasonable care to discover and give timely notice of defects that might imperil appellee's safety, the only remaining question is whether there was substantial evidence that appellant failed to perform that duty."

In this latter case the wheel of a hand truck being used by plaintiff fell through a hole in the floor of the

car causing plaintiff's foot to be caught between the floor and the loaded truck. The court concluded:

“\* \* \* Though the evidence was conflicting as to whether an inspector should have carded a car as unsafe or defective under the circumstances here presented, there was substantial evidence from which a jury could reasonably infer that an ordinary inspection would have revealed the hole in the car floor and that, it having been discovered, reasonable care required that notice be given that the condition of the floor might make unloading perilous.”

We respectfully submit that the court correctly ruled that a question of fact for the jury was presented by the evidence on the proposition of defendant's negligence proximately causing the injuries to plaintiff.

### CONCLUSION

Under the foregoing authorities it is apparent that the trial court erroneously denied to plaintiff his right to a jury trial when it directed a verdict in favor of the defendant. For such reason we submit that this Honorable Court should reverse the case and send it back to the trial court to be tried and the questions of fact determined by a tribunal selected to try cases involving conflicting issues of fact.

Respectfully submitted,

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Received ..... copies of the within Brief of Appellant this 1st day of August, 1952.

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