

1956

Robert L. Heywood v. The Denver and Rio Grande Western Railroad Co. : Brief of Appellant

Utah Supreme Court

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Van Cott, Bagley, Cornwall & McCarthy; Leonard J. Lewis; Clifford L. Ashton; Counsel for Appellant;

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In the
Supreme Court of the State of Utah
FILED

AUG 10 1956

ROBERT L. HEYWOOD,

Clerk, Supreme Court, Utah

Plaintiff,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Case No.
8508

Defendant.

BRIEF OF APPELLANT

VAN COTT, BAGLEY,
CORNWALL & McCARTHY,
LEONARD J. LEWIS,
CLIFFORD L. ASHTON,

Counsel for Appellant.

ARROW PRESS, SALT LAKE

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In the
Supreme Court of the State of Utah

ROBERT L. HEYWOOD,

Plaintiff,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,

Defendant.

} Case No.
8508

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Plaintiff, Robert L. Heywood, commenced this suit in the District Court of Salt Lake County on December 11, 1954, to recover for injuries sustained in The Denver and Rio Grande Western Railroad Company's blacksmith shop at Salt Lake City, Utah, on November 23, 1953. The complaint alleges a cause of action under the Federal Employers' Liability Act grounded on alleged negligent failure of defendant to furnish plaintiff a reasonably safe place to

work and other specific acts and omissions of negligence. The defendant's answer denies negligence and affirmatively alleges that plaintiff's accident and injuries were caused by his own negligence.

The case came on for trial before the Honorable David T. Lewis on January 23, 1956, sitting with a jury. A jury verdict was returned on January 24, 1956, in favor of plaintiff and against defendant assessing damages in the total amount of \$13,000.00. The trial court denied a motion by defendant for a directed verdict. Judgment was entered on the verdict on January 25, 1956.

Thereafter, defendant made a motion for a new trial on the grounds, among others, of errors in law committed by the court in its instructions to the jury. Said motion was heard and argued on May 13, 1956. The trial court denied said motion.

Whereupon, defendant commenced this appeal assigning as error the following:

1. Denial of defendant's motion for directed verdict.
2. Error in the trial court's instructions to the jury including denial of certain of defendant's requested instructions.

STATEMENT OF FACTS

The plaintiff, Robert L. Heywood, was 63 years of age at the time of trial. His lifetime occupation was that of a railroad machinist (R. 13). He had worked for The Denver and Rio Grande Western Railroad Company as a machinist since November 2, 1922. His duties as a machinist con-

sisted of repair and maintenance of machines and equipment including work in the railroad blacksmith shop. He was generally familiar with the blacksmith shop and had worked in it since 1922 (R. 14). He styled himself a "trouble shooter." He testified that the work of a trouble shooter was to repair any machine used by the railroad whether it be a steam hammer or truck or whatever else it might be (R. 15). Part of his duties consisted of determining the cause of trouble and correcting the same (R. 43, 44). Mr. Heywood was a senior mechanic at the time of his accident (R. 57). He testified that he knew of no one more experienced than himself in working with equipment nor more qualified to inspect the type of equipment involved in his accident (R. 57, 58). He had replaced packing in the stuffing boxes on hammers on numerous occasions (R. 29). He had worked on the stuffing box involved in this accident four or five times before the accident (R. 131).

Plaintiff's accident occurred in defendant's blacksmith shop at the site of what is known as the single arch steam hammer at approximately 11:45 a. m., November 23, 1953 (R. 2, 16). The blacksmith shop is a large, high ceiling building used to house hammers and other blacksmith equipment utilized in maintenance repair work. It is located approximately 750 feet from the railroad boiler room (R. 19, 20).

The single arch hammer involved in the accident is shown in Exhibits 1, 2 and 3. These exhibits were identified by plaintiff (R. 16). The single arch hammer is a large piece of equipment used to fashion large pieces of metal taken from the forges. The hammer is located on a

cement slab in the blacksmith shop. The part of the hammer upon which the metal is placed is known as the die (R. 18). Metal is placed on the die with tongs. Operation of the hammer is controlled by two levers. One lever controls the stroke and the other lever controls the steam. The hammer is powered by steam (R. 18).

Steam is made in the power house located about one block from the blacksmith shop. There are three steam boilers in the power house (R. 19). A main steam line runs from the boilers in the power house to various localities, one of which is the blacksmith shop (R. 19, 20). A system of three-inch standard pipes are used to carry the steam.

A main steam line runs from the power house into the blacksmith shop and along the ceiling of the blacksmith shop to the center thereof. A feeder line extends from the center of the blacksmith shop to the single arch hammer. An intermediate shutoff valve is located at the center of the blacksmith shop and controls the supply of steam to the hammer (R. 93). Another shutoff valve is located about two feet from the hammer (R. 94).

Exhibits 1, 2 and 3 show the end of the steam pipe connecting with the single arch hammer.

The steam pipe (from the point of supply) connects with the single arch hammer at a point approximately 12 feet from the ground (R. 21). The connection is enclosed in a stuffing box. The stuffing box is approximately two feet from the closest shutoff valve (R. 21). The stuffing box is used because of vibration. A rigid connection between the steam line and the machine would be impractic-

able because of vibration. The purpose of the stuffing box is to provide a flexible joint (R. 21). The steam pipe leading into the stuffing box (from the point of supply) has a collar or flange on the end. Asbestos hemp packing is placed upon and around the collar and held tight by a gland to prevent steam leaking (R. 21). Exhibit 4 was identified at the time of trial and admitted in evidence as a model of a stuffing box and the pipe leading into it (R. 24). The gland fits around the pipe and is attached and held in place by four bolts (R. 25). The asbestos hemp packing has to be replaced from time to time as it deteriorates with use (R. 26).

The evidence was uncontradicted that the end of the pipe with the collar leading into the stuffing box could not come out of the attached gland without the collar breaking (R. 30, 32, 68). A break in the collar could not be detected by looking at the pipe from outside of the stuffing box (R. 84, 113). The stuffing box concealed the collar. A break at the joint of the collar could not be detected except by removing the pipe leading into the stuffing box (from the source of supply) (R. 69, 70, 78, 138).

With this setting in mind, we turn to the facts surrounding the accident.

On the morning of the accident, Mr. Lewis Morgan Griffiths, a blacksmith in defendant's shop, had been working on the single arch hammer. He discovered that there was a steam leak in the hammer and reported it to Mr. Paul Schenk, the foreman (R. 87, 150). Mr. Schenk notified the plaintiff to repair the leak (R. 150, 15). According

to plaintiff, Mr. Schenk told him to go out and fix the leak on the hammer (R. 16). Plaintiff commenced work on the hammer at approximately 10:30 a. m. (R. 47). Plaintiff had a helper to assist him in doing whatever was necessary in the course of his work (R. 47, 48). There were other men to help if help was needed (R. 48). There were also four pipe fitters available on the day of the accident to help if needed (R. 109). Plaintiff had a $\frac{7}{8}$ -inch S wrench and a 14-inch Stillson wrench with him. There were ladders, scaffolds and other equipment available in the shop to do the work (R. 49).

When plaintiff approached the stuffing box on the single arch hammer, he observed that it was leaking so badly that new packing would be required (R. 26). Plaintiff turned off the valve closest to the machine (R. 27). He took the gland off the stuffing box and slid it back onto the pipe. He took out one ring of the packing and discovered the size packing required. Mr. Schenk was not in the blacksmith shop at that time (R. 27). After some delay, plaintiff found the packing he needed and returned to the hammer (R. 28). He placed the new packing in the stuffing box, replaced the gland and tightened the gland to what he thought was the proper tension. He was standing on a ladder about six feet from the ground. He then turned on the valve letting steam through the line (R. 29). As he started down the ladder, the steam pipe going into the stuffing box blew out and hit him on the left hand. The pipe came out of the stuffing box. Plaintiff fell and hit the floor. He was standing when he landed with the weight on his left leg (R. 30). Other workmen came to

his assistance. He did not have an opportunity thereafter to examine the stuffing box or the pipe (R. 31).

On cross-examination plaintiff admitted that one of his duties was to inspect the work to see if it was done satisfactorily (R. 43, 44). He admitted that part of his job was to determine the trouble and to correct it (R. 44). He admitted that he made no effort to ascertain if the collar on the pipe was broken (R. 45, 46, 47, 55, 58). He didn't know whether the collar was broken or not (R. 37). He made no examination to see the condition of the collar before he tightened the gland (R. 68).

Plaintiff denied any knowledge of the existence or function of the intermediate valve (R. 50, 51, 52). He admitted that he had tried to tighten the gland and had tightened it all the way without success (R. 54, 55). He admitted that there was no better opportunity to inspect the equipment than when same was dismantled and that he had not made an inspection at that time (R. 56). He admitted that he had not asked any one to make an inspection at the time the stuffing box was dismantled (R. 56). He did not arrange to have a pipe fitter take the pipe off and inspect it (R. 84). He testified that it was not too big a job to dismantle the pipe (R. 84). He admitted that steam fitters were not so far away that one could not be obtained (R. 84). He admitted that if he saw something requiring a steam fitter that he could call his supervisor (R. 85). He admitted that he never went to the supervisor on this occasion to tell him to have a steam fitter examine the pipe, although on other occasions he had done so (R. 85).

There was no evidence offered or received that anyone other than plaintiff ever went up to the stuffing box and examined the condition. Presumably plaintiff was in a better position than anyone else to determine the trouble and decide what work should be done and what assistance obtained.

One of defendant's witnesses, Mr. Paul Schenk, foreman, testified that it was the machinist's job in the first instance to inspect the machine to see what had to be done (R. 151, 157). This testimony was not disputed by plaintiff despite the fact that plaintiff was recalled after Mr. Schenk testified. There was no evidence of any custom or practice for a steam fitter to precede a machinist in an examination of equipment nor for a steam fitter to accompany a machinist to the work.

One of the witnesses called by defendant was James Everett Aberton, Division Locomotive Foreman (R. 135, 136). Mr. Aberton arrived at the scene of the accident shortly thereafter. He examined the pipe and collar involved in the accident. At the trial he identified Exhibit 6 as the pipe and collar involved in the accident (R. 136, 137). Mr. Aberton found that there was an old break between the collar and the pipe all the way around the pipe except for approximately $\frac{3}{8}$ -inch (R. 37). He was able to determine that the break was old because of discoloration (R. 156). He stated that it was his opinion that there was just a thread holding the pipe to the collar at the time Mr. Heywood was performing his work (R. 137, 138). He stated that the break in the collar would account for the steam leak (R. 138, 139). He testified that the stress

exerted by tightening the gland might be sufficient to break the remaining portion of the pipe from the collar (R. 142).

Plaintiff called witness Joseph L. Crowton. Mr. Crowton was an experienced sheet metal worker and pipe fitter (R. 100, 101). Mr. Crowton examined Exhibit 6, the pipe and collar, at the time of trial. He testified that he had seen the pipe on the single arch hammer a good many times (R. 111). He testified that from his experience he could look at the break between the collar and pipe and determine whether it was a fresh or old break because of rust. He testified that the break appeared to him to be of old duration except for a distance of approximately $\frac{5}{8}$ -inch. This was based on the rust which appeared on the break (R. 111). Mr. Crowton testified that little pressure would be required to separate the collar from the pipe with such a large break (R. 113).

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 6 WHICH IMPOSED ABSOLUTE LIABILITY ON DEFENDANT.

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 7 WHICH INSTRUCTED THE JURY ON A THEORY CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 8 WHICH INSTRUCTED THE JURY ON A THEORY NOT SUPPORTED BY THE EVIDENCE.

POINT IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS REFUSAL AND FAILURE TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 1, 8 AND 11 OR SOME INSTRUCTION SETTING FORTH IN FULL THE THEORIES CONTAINED THEREIN.

POINT V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING AND REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6 OR SOME OTHER INSTRUCTION INCORPORATING THE THEORY CONTAINED THEREIN.

POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING AND REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

POINT VII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT; THE EVIDENCE COMPELS THE CONCLUSION THAT PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW AND THAT HIS NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS ACCIDENT AND INJURIES.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 6 WHICH IMPOSED ABSOLUTE LIABILITY ON DEFENDANT.

Instruction Number Six reads as follows:

"It is the duty of the defendant railroad company to exercise reasonable care to provide its employees with a reasonably safe place to work. This duty does not require the absolute elimination of all danger, but it does require the elimination of all dangers which the exercise of reasonable care by the defendant railroad company would remove or guard against.

"In this connection *you are instructed that if you shall find from a preponderance of the evidence that plaintiff at the time of his injury was performing the duties of his employment and that the defendant failed to exercise reasonable care to make said place reasonably safe for the performance of*

such duties *in that* the position of the plaintiff in connection with his duties and the operation of appliances used in the performance of his duties were such that the *plaintiff was not performing his duties in a place of reasonable safety, then you are instructed that you may find the defendant negligent in such regard*; and if you further find from a preponderance of the evidence that such negligence on the part of the defendant, if any, proximately caused in whole or in part injuries to plaintiff, then you should return a verdict in favor of plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth.” (Emphasis Added.)

This instruction must be considered in light of the well-settled principles establishing a railroad’s duty under the Federal Employers’ Liability Act. Liability under the Act is predicated upon common law negligence. As stated by this court in the recent decision, *Clifton M. Bowden v. The Denver & Rio Grande Western Railroad Company*, 3 Utah 2d 444, 286 P. 2d 240:

“* * * We recognized then, and do now, that ‘the Federal Act does not make the railroad an (absolute) insurer * * * the Act imposes liability for negligent injuries. * * *’ The test to be applied in determining negligence is that of reasonable care. * * * We also expressly recognized therein the necessity of actual or constructive knowledge, stating at page 334 of 233 P. 2d that a defendant employer ‘is charged with responsibility for conditions of danger * * * of which it either has actual knowledge or is charged with constructive knowledge. * * *’”

And in *Lasagna v. McCarthy*, 111 Utah 269, 177 P. 2d 734, 741, this court said:

“A recent case in point is that of *McGivern v. Northern Pac. Ry. Co.*, 132 F. 2d 213, at page 217, wherein the 8th Circuit Court of Appeals stated the rule in these words: ‘* * * The duty of providing a reasonably safe place in which to work and reasonably safe appliances with which to work while a continuing one does not obligate the employer to keep the place of work safe at every moment where such safety may depend on the due performance of work by the servant and his fellow workmen. *Kreigh v. Westinghouse C., K. & Co.*, 214 U. S. 249, 29 S. Ct. 619, 53 L. Ed. 984. In fact the rule is held not to be applicable where the workmen in the progress of their work render the place unsafe. *Torgerson v. Minneapolis, St. P. & S. (S.) M. Ry. Co.*, 49 N. D. 1096, 194 N. W. 741; *Cartwright v. Atchison, T. & S. F. Ry. Co.*, 8 Cir., 228 F. 872. Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages * * *.’ For additional authority on this point, see *Morgan Construction Co. v. Frank*, 6 Cir., 158 F. 964; and *Medina Valley Irrigation Co. v. Espino*, 5 Cir., 214 F. 732.

“Negligence of the employer being the basis for recovery under the Federal Employers’ Liability Act, it is well to return to the ordinary definition of the term, which is (the omission to do something which a reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing of something which a prudent person under like circumstances would not do. Viewing the appellants’ conduct in the light of this rule, we are unable to find anything in this

record which in any way indicates that they omitted to do that which they should have done; or that they did that which they ought not to have done."

It is thus settled that to render an employer liable it must be made to appear by the evidence that the employer knew or in the exercise of reasonable care should have known of an unsafe condition and knew or should have known that the condition exposed its employees to an unreasonable risk of harm. It is fundamental to common law negligence, that not every risk of harm gives rise to liability; the risk must be unreasonable when viewed in light of all circumstances.

The material facts which bear upon this point are as follows: Plaintiff was, according to his own testimony, an experienced machinist, having worked in the defendant's machine shop since 1922. He was a "trouble shooter." He knew when sent to perform the tasks out of which his accident arose that there was a leak in the steam pipe which required repairs. The manner of making repairs was left to his discretion. Plaintiff had full discretion to select tools and equipment. Ladders and scaffolds were readily available. Plaintiff's accident and injuries were caused by an old break in the collar of a steam pipe. At all times prior to the accident the said collar on the pipe was concealed by a stuffing box which housed the collar connection. Both plaintiff's witness and defendant's witness testified that the break in the collar appeared of old duration. The break in the pipe was one which could not have been detected without removing the pipe. The break was not known to or detected by plaintiff in the course of

his work. (Statement of Facts.) If there was anything unsafe about plaintiff's place of work it was the condition of said pipe.

It is the defendant's contentions that under these circumstances defendant would not be liable to plaintiff unless defendant knew or in the exercise of reasonable care should have known of the unsafe condition and knew or in the exercise of reasonable care should have known that plaintiff was being exposed to an unreasonable risk of harm. Further, as stated in the *Lasagna* and *McGivern* decisions, *supra*, the defendant would not be liable for temporary conditions created by plaintiff using or failing to use appliances furnished by defendant.

Instruction Number 6 is, considered in its best light, an ambiguous and confusing instruction. The opening paragraph of the instruction states an abstract proposition of law. The second paragraph requires a grammatical diagram to ascertain its meaning. If any sensible meaning can be given said paragraph, it is as follows:

"If plaintiff was performing his duties and defendant failed to exercise reasonable care *in that* the position of plaintiff was such that plaintiff was not in a place of reasonable safety then defendant was negligent."

It is the appellant's contention that the underlined words "*in that*" qualify and restrict the meaning of the preceding parts of the instruction. The same words have been so construed in the following decisions:

Frace v. Long Beach City High School, 58 C. A. 2d 566, 137 P. 2d 60.

Textile Work v. Richards, 245 Ala. 37, 15 S. 2d 578.

As stated by this court in *University of Utah v. Richards*, 20 Utah 457, 59 Pac. 96 in construing a Statute:

“* * * Particular provisions relating to a former subject must govern in relation to that subject, as against general provisions in another part of the law which might otherwise be broad enough to include it. * * *”

This charge places the whole emphasis on whether the place of work was safe rather than whether defendant failed to exercise reasonable care. The charge instructs the jury that defendant might be found negligent if plaintiff was not performing his duties in a place of reasonable safety—irrespective of whether the defendant knew or should have known of the unsafe condition, whether defendant knew or should have known that the condition gave rise to an unreasonable risk and whether defendant had reasonable opportunity to correct said situation and failed to do so. Under this instruction the jury might have found the defendant liable even though it believed that the defendant did not know and would not in the exercise of reasonable care have known of the unsafe condition, did not know and should not have realized an unreasonable risk, and did not have an opportunity to correct the condition. Under this instruction the jury could find the defendant liable even though it believed from the evidence that the defendant exercised reasonable care to correct the only unsafe condition of which it knew by sending plaintiff to perform repairs.

For the reasons stated the said instruction, ambiguous as it is, contains a statement which is contrary to the law. It could tend only to confuse and mislead the jury.

Appellant is fully aware of the rule which requires that instructions be read and considered as a whole. The question is whether the error contained in the second paragraph of Instruction 6 is saved by the first paragraph or by the general definition of negligence contained elsewhere in the instructions. The difficulty with this latter suggestion is that the second paragraph may be construed to qualify and restrict all other parts of the instructions. It would be entirely reasonable for a jury to apply such a construction. It must be assumed that the jury read and considered this instruction; and that the jurors may have believed that if they found that plaintiff was performing the duties of his employment and was not in a place of reasonable safety that they might find defendant negligent.

In final analysis the question is not whether the jury did in fact construe the instructions as aforesaid; the question is whether the jury may have construed the instructions in such manner to the prejudice of defendant. If the jury may have been thus mislead the error is clear and prejudicial.

There are a number of decisions, Federal and State, in which instructions, similar to the instruction in question, have been considered and held prejudicially erroneous.

Seaboard Airline Railway v. Horton, 233 U. S. 492 (1914), 34 Sup. Ct. 365, was a suit under the Federal Employers' Liability Act founded upon failure to provide a safe place to work. Plaintiff alleged that the defendant

was negligent, among other reasons, for failure to provide him with a safe place to work in that the defendant furnished him with a locomotive engine not equipped with a glass plate between the engineer's seat in the engine and the boiler pressure gauge. The evidence was conflicting. The case was submitted to a jury with verdict for plaintiff. Judgment was entered on the verdict. Upon appeal by defendant to the Supreme Court of North Carolina, judgment was affirmed. Appeal was taken to the Supreme Court of the United States. Defendant assigned as error certain instructions given by the trial court and the denial of certain requested instructions. One of the instructions was similar to the instruction given in the instant case:

“* * * It is the duty of the defendant to provide a reasonably safe place for the plaintiff to work and to furnish him with reasonably safe appliances with which to do the work. * * * If you find from the evidence that it (the locomotive engine) was turned over to him without the guard and if you further find from the evidence that the guard was a proper safety provision for the use of that gauge and that it was unsafe without it, then the defendant did not furnish him a safe place and a safe appliance to do his work, and if it remained in that condition it was continuing negligence on the part of the defendant, and if he was injured in consequence thereof, if you so find by the greater weight of the evidence, you should answer the first issue ‘Yes.’”

The Supreme Court of the United States held that the instruction constituted prejudicial error. The court said that the jury was, in effect, erroneously instructed that the absence of the guard glass was conclusive evidence of de-

fendant's negligence. Likewise in this case the instruction charges the jury that if the plaintiff was in an unsafe place, defendant was negligent.

In *Atlantic Coastline Railroad Company v. Dixon*, 189 F. 2d 525 (1951 cert. den. 72 Sup. Ct. 54, 342 U. S. 830), a similar instruction was held erroneous. The instruction read:

“* * * ‘I charge you, Gentlemen of the jury, as a matter of law, if you find that the defendant company required its servant, C. C. Dixon, to work in a place which the railroad or its foreman knew to be unsafe, or which the foreman in the exercise of reasonable prudence ought to have known was unsafe, then the defendant is liable for the injuries to its servant if those injuries resulted from an unsafe and dangerous place to work, as alleged in the plaintiff's petition, and it would be your duty to return a verdict for the plaintiff.’ ”

The court pinpointed the error as follows:

“This charge is faulty in that it presents, as the sole criterion of liability, knowledge of the employer or its representative that the place or tools provided for the employee's use were unsafe, rather than the failure on the part of the employer to exercise reasonable care and prudence to that end, which is the recognized test. It should be modified to correctly state the duty of the employer as hereinabove defined. * * * ”

Another case involving the same question is *Hatfield v. Thompson*, 252 S. W. 2d 534 (Missouri 1952). That was an action brought under the Federal Employers' Liability Act. Plaintiff sustained injuries tripping over a hole in a

path adjoining defendant's railroad tracks. Plaintiff alleged failure to provide a safe place to work. The case was tried to a jury with verdict and judgment for plaintiff. Defendant appealed claiming error in instructions. The court's instruction number 1 permitted the jury to find that defendant was negligent if a hole existed on the right of way. None of the court's instructions required a finding that defendant had actual or constructive knowledge of the defective condition. The Missouri Supreme Court held that the instruction constituted prejudicial error:

"Neither of the instructions submitting plaintiff's case required the jury to find that defendant had actual or constructive knowledge of the existence of the hole under which plaintiff's foot allegedly slid. Such knowledge, actual or constructive, is unquestionably a prerequisite of defendant's liability.
* * *

* * * * *

"In this case we have held that the mere requirement of a finding that the existence of the hole was negligence was not the equivalent of the required finding of knowledge. The instructions omitted such a finding and were therefore prejudicially erroneous. * * *"

Missouri Pacific Railroad Company, et al. v. Burks, 196 Ark. 1104, 121 S. W. 2d 65, was a suit brought by a railroad employee against his employer for damages for personal injuries. Plaintiff claimed defendant negligently failed to provide a safe place to work. Plaintiff's injuries resulted from falling through a faulty and weakened floor in a freight car. Appeal was taken by defendant from a verdict and judgment for plaintiff. Instruction number 4

charged the jury that if it found the floor of the freight car was in an unsafe condition, which was known or by the exercise of ordinary care should have been known by defendant that defendant was negligent.

The Arkansas Supreme Court held that the instruction was erroneous:

“Effect of this instruction was to tell the jury that if the floor of the freight car was in an unsafe or defective condition for loading bricks, there was negligence upon the part of appellants.

“Whether conduct in a given case amounts to negligence is ordinarily a question for the jury. In the controversy at bar, knowledge by appellants that there were holes in the floor of the car, or the act of appellants with or without knowledge that it was in an unsafe condition—if, in fact, it was unsafe—in furnishing such car, would be evidence of negligence. * * * The error is that the instruction invades the province of the jury.”

In *Stevens v. Mirakian*, 177 Va. 123, 12 S. E. 2d 780, a similar instruction was held by the Supreme Court of Appeals of Virginia to constitute prejudicial error. That was a suit by an employee against her employer for injuries sustained during the course of her employment. Although not a Federal Employers' Liability case, plaintiff's recovery was there predicated, as here, upon an employer's common law duty to exercise reasonable care to provide a safe place to work. The plaintiff recovered a verdict. The trial court instructed the jury that if it found that the plaintiff was performing the duties of her employment and was injured due to a defective condition of a chair on

which she was resting then its verdict must be for plaintiff. The Supreme Court of Virginia held that the instruction constituted prejudicial error:

“No instruction was given the jury telling them that it was essential that the evidence show or tend to show that the defendant knew or in the exercise of ordinary care should have known of the defective condition of the chair and thereafter failed to repair or remove it from his place of business.

“In this case, knowledge is an essential element of negligence. * * * We think that an instruction embracing this thought was necessary and should have been given.”

POINT II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 7 WHICH INSTRUCTED THE JURY ON A THEORY CONTRARY TO AND NOT SUPPORTED BY THE EVIDENCE.

Instruction No. 7 reads as follows:

“If you find by a preponderance of the evidence that it was the custom and practice of the defendant company, through its employees other than the plaintiff, to shut off the steam at the intermediate valve, or that in the exercise of reasonable care for plaintiff’s safety under the circumstances of this case it was defendant’s duty so to do, and further find from a preponderance of the evidence that the defendant company failed so to do, then you may find that the defendant company was negligent in this

regard; and if you further find from a preponderance of the evidence that such conduct upon the part of the defendant proximately caused in whole or in part injuries to the plaintiff, then you should return a verdict in favor of plaintiff and against the defendant, and award to plaintiff damages as in those instructions set forth."

This instruction permitted the jury to find that it was the custom and practice or duty of the defendant company, under the circumstances of this case, to shut off the steam at the intermediate valve through employees other than plaintiff. The error is that said theory is not supported by any competent evidence. There was no evidence offered or received at the trial proving or tending to prove that it was the custom and practice or duty of the defendant company, under the circumstances, to shut off the steam at the intermediate valve through an employee other than plaintiff. A review of the testimony compels this conclusion.

Plaintiff was the first witness called in support of his case. Plaintiff expressly denied any knowledge of the existence or function of the intermediate valve. There is nothing in his testimony to establish a custom and practice by defendant or a duty to turn off the intermediate valve under such circumstances. The pertinent parts of plaintiff's testimony are as follows (R. 50, 51, 52, 70, 71, 72, 130, 131) :

(Cross-Examination)

"Q. Now, there is another valve, is there not, Mr. Heywood, which is some distance from this par-

ticular valve, which is along the line, which is customarily turned off when you work on this hammer, is it not?

"A. No, sir.

"Q. Isn't it a fact, Mr. Heywood, that on other occasions when you have worked on this hammer you have had this particular valve, which is some distance back, turned off besides having the valve at the hammer turned off?

"A. No, sir.

"Q. Do you know the valve I am speaking of?

"A. Yes, sir.

"Q. And that is a valve that is some distance away which is called a master valve, I think.

"A. That's right.

"Q. And when you turn that master valve off, why, then you don't have any steam anywhere near the hammer on which you are working, do you?

"A. Nowhere in the blacksmith shop.

"Q. In other words—Well, that particular valve that I am speaking about, that's in the blacksmith shop, comes only to this hammer, does it not?

"A. Which valve are you talking about?

"Q. A valve that is about forty feet to the north—

"A. No.

"Q. —and up to the top.

"A. (Witness shakes head in the negative.)

"Q. You don't know of such a valve, Mr. Heywood?

"A. I do not.

"Q. And it isn't a fact that you, on other occasions, along with your helper, have turned off that valve before you worked on this hammer?

"A. No, sir.

"Q. And you don't know of such a valve at all?

"A. No, sir.

"Q. Isn't there also a valve that comes only to this hammer that's up near the ceiling?

"A. I do not know of one.

"Q. You don't know of that valve?

"A. No, sir.

"Q. (By Mr. Ashton) Then you have no recollection, as I understand it, Mr. Heywood, of a main steam valve, which is up near where this pipe runs along the top of the blacksmith shop, which is about thirty or forty feet to the north of this valve that you operated?

"A. On the same line?

"Q. Yes, sir.

"A. No, sir.

"Q. And you have never worked that particular valve?

"A. No, sir.

"Q. And you have never requested the steam-fitters or pipefitters to work that valve for you when you have worked on this equipment on other occasions?

"A. No, sir; not on this particular equipment.

"Q. That's the equipment I am talking about.

"A. That's right.

"Q. And you say that it is the rule that this other valve be turned off?

"A. No, it isn't the rule.

"Q. I understood you to say that was the rule but not the practice.

"A. No. No, it's—In working a machine, you generally turn off the valve that shuts the steam to the machine which you're working.

"Q. I understand that. And are you not also supposed, according to the rule, to turn off the main valve which leads steam into that machine?

"A. No, sir.

"Q. And you have never done that?

"A. No, sir. The main valve takes the steam out of the shop.

"Q. And you don't know the valve that simply takes the steam away from this particular machine?

"A. Only that one valve.

"Q. Only this one valve?

"A. That's right.

"Q. You know of no other?

"A. No, sir."

(Re-direct Examination)

"Q. Mr. Heywood, before yesterday, during the course of the trial, had you ever had knowledge of another valve, other than the valve that you used on this occasion, between that valve and the main shutoff valve that shuts down the whole shop?

"A. No, sir.

"Q. Had you ever had such a valve pointed out to you?

"A. No, sir.

"Q. The only valve you have ever seen turned off was this one on that particular machine?

"A. When I was working that particular machine, yes.

"Q. Have you ever seen any other valves turned off?

"A. There is valves to each one of those steam hammers, and there is four, and I have had occasion to have them all turned off.

"Q. You have never seen where the intermediate valve turns off?

"A. No.

"Q. You have never seen them since 1922, the years you have been there?

"A. No.

"Q. And you didn't know they existed?

"A. No."

The second witness who testified for plaintiff was Mr. Griffiths, a blacksmith in defendant's shop called by plaintiff. The only inference that can be drawn from Mr. Griffith's testimony is that plaintiff should have arranged himself, under the circumstances, to have the valve shut off. Mr. Griffith's testimony in that connection is as follows (R. 94, 95) :

"Q. Was the main valve turned off in this case, do you know?

"A. No, it wasn't.

"Q. In other words, an improper practice was followed by turning only the valve off by the hammer?

"A. Well, I would say so, yes.

"Q. And who was the person who turned that valve off?

"A. Well, I think the proper procedure would have been for the mechanic working on the job to notify the foreman that the steam should be turned off.

"Q. And you know that the steam was not turned off on this occasion, was it?

"A. No.

"Q. So that in this particular instance, anyway, so far as you are concerned, an improper procedure was followed by not turning off the main valve of the steam?

"A. I would say yes to that.

"Q. Now, who is the person who usually determines whether the steam is to be turned off—the mechanic doing the work?

"A. Well, he would naturally be the individual to determine whether the steam should be turned off.

"Q. And how does he go to the foreman and ask that it be turned off?

"A. If I were in his position, that's exactly what I would do.

"Q. Yes. And that was not done in this case.

"A. Not to my knowledge."

The third witness to testify was Joseph L. Crowton, a pipefitter, called by plaintiff. Mr. Crowton testified that the intermediate valve would not be used under the circumstances involved in this case.

Direct Examination (R. 106) :

"Q. Now, if work is being done on the pipes or the fittings on the single arch steam hammer, what shutoff valve is used, to your knowledge?

"A. The one shown on your photo there, on your picture there.

"Q. Is there another shutoff valve somewhere back along that main line?

"A. Yes, sir; about twelve inches, approximately—that could vary a little—from where the three-inch line takes off of the main six-inch line in the roof of the blacksmith shop.

"Q. Now, what is that shutoff valve used for?

"A. Well, if there's anything needs to be repaired on that line between there and the hammer, and actually you'd have to shut it off up at the main steam line, which this valve is located, to work on the line from there down.

"Q. And from the steam valve that is indicated in the photograph, on down, which valve would be used?

"A. The steam hammer itself, I would say the valve right there in the picture. It's just close to the steam hammer."

Redirect Examination (R. 132) :

"Q. Mr. Crowton, yesterday you were asked some questions by counsel, on cross examination, pertaining to the possibility of a leak in the valve that is next to the stuffing box, and what you would do in case there was such leak. Will you elaborate on that and explain what you meant?

"A. Yes. The valve down by the hammer, the one shown on the picture closest to the hammer, I

said anything that connected directly with the hammer, or smaller pipes, condensate pipes, we call them, that lead from the hammer down, that would be all that would be necessary to shut that valve off.

"If you had a pipe you had to screw out directly, of that valve, it wouldn't be safe to do it, then you would go to the upper valve shutoff.

"If there was leakage between the lower valve and the upper valve, you would shut the upper valve off.

"Quite often the valves leak in the packing glands in the valves itself. You could not repair that packing in that valve safely, without going to the upper valve to turn it off. Other than that I would say ordinary work on the hammer itself would be taken care of by just turning the lower valve off. You wouldn't gain anything by turning the upper valve off, as far as safety, if the valve was off.

"As long as a valve shuts off tight behind your work, so you can work, there is no necessity going along the line shutting all the valves off."

The only other witnesses, except medical, who testified were two employees called as witnesses by the defendant. They were Mr. Aberton and Mr. Schenk. Their testimony does not support the theory contained in said instruction. In view of the foregoing, it is clear that there was no competent evidence to support the theory contained in said instruction.

Even assuming, however, that an inference could be drawn from the testimony to establish the custom and practice referred to in said instruction, the issue should not have been submitted to the jury. The rule has been well

settled and frequently stated by this Court that a party is not entitled to go to the jury on an issue unless that part of his own testimony or the testimony of his witness which is least favorable to his contention, is of such a character as will sustain a verdict in his favor on that issue. *Harley Benson v. The D. & R. G. W. Co.*, 4 Utah 2d 38, 286 P. 2d 790. *Alvarado v. Tucker*, 2 Utah 2d 16, 268 P. 2d 986, *Fowler v. Pleasant Valley Coal Co.*, 16 Utah 348, 52 Pac. 594.

The testimony of the plaintiff and his witness Crowton positively denied that the intermediate valve would be used under the circumstances of this case. In view of that testimony and under the foregoing decisions, plaintiff was not entitled to go to the jury on that issue.

POINT III.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION NO. 8 WHICH INSTRUCTED THE JURY ON A THEORY NOT SUPPORTED BY THE EVIDENCE.

Instruction No. 8 reads as follows:

“You are instructed that an employer has a duty to inspect equipment used by its employees when it knows or in the exercise of reasonable care should have known of an unsafe condition in said equipment.

“If you shall find from a preponderance of the evidence that defendant knew or in the exercise of

reasonable care should have known when it found the steam leak that there might be an unsafe condition existing in the steam pipe in the stuffing box, then you may find that defendant was under a duty in the exercise of reasonable care to make an inspection of said pipe to determine whether an unsafe condition actually existed, and if you further find by a preponderance of the evidence that defendant failed to inspect said pipe and that such failure to inspect proximately caused, in whole or in part, injuries to plaintiff, then you should return a verdict in favor of the plaintiff and against the defendant and award to plaintiff damages as in these instructions set forth."

The theory expressed in this instruction is that the defendant had a duty to inspect the pipe in question after a leak was discovered and that if it failed to exercise reasonable care in said inspection it was negligent. Defendant has no quarrel with the proposition that the defendant had a duty to exercise reasonable care in making an inspection of the pipe in question. It is defendant's contention, however, that it fully discharged the said duty.

The testimony should be reviewed to determine what action the defendant took in discharge of its duty to inspect.

The steam leak in question was discovered on the morning of the accident by Mr. Griffiths, a blacksmith (R. 87). Mr. Griffiths promptly notified the Foreman, Schenk, of the leak (R. 87). Foreman Schenk asked plaintiff to repair the leak. As previously stated, the plaintiff had worked as a machinist in the shops since November 19, 1922 (R. 14). Plaintiff was a trouble shooter (R. 15). The plaintiff had performed the same type of work on numerous occasions

(R. 29). It was the testimony of Foreman Schenk that it was plaintiff's duty in the first instance to determine what had to be done (R. 151).

The following testimony of plaintiff is important on the issue of inspection (R. 43, 44, 45, 46, 47, 85) :

"Q. Well, don't you inspect work that you do, Mr. Heywood, to see if you have completed it satisfactorily?

"A. After the job is completed, I always see that it's okeh.

"Q. In other words, whenever you go to repair something, particularly something that has to be taken apart to repair, one of your duties is to inspect the work you do for the purpose of determining whether or not it has been completed satisfactory, isn't it?

"A. That's right, yes sir.

"Q. In other words, that's one of the things that a mechanic always does when he repairs a broken part, is to inspect a thing that he's trying to correct, and inspect the work he's done, for the purpose of seeing if he has corrected the trouble; that's right, isn't it?

"A. To a certain extent, that's correct.

"Q. Well, now, Mr. Heywood, when you went up to look at this particular pipe, you say that you were engaged as sort of a trouble-shooter, is that right?

"A. That's right.

"Q. In other words, one of the things you were to do when they found some trouble was to go up and find out what the trouble was, was it not?

"A. That's right.

"Q. And then correct the trouble; that's right, isn't it?

"A. That's right.

"Q. And when you saw this particular pipe, you say it had a bad leak in it?

"A. Steam leak.

"Q. And when you saw that it had a bad leak you knew there was something wrong, did you not?

"A. Yes.

"Q. And what are the things that cause pipe to leak, Mr. Heywood?

"A. As your stuffing box packing has come loose.

"Q. And if the flange on the pipe concealed in this stuffing box is also broken, that will cause a leak, will it not?

"A. Yes.

"Q. Well, did you make any attempt to ascertain whether or not the flange on this particular pipe was broken at the time you opened it?

"A. No, sir.

"Q. Well, how would you eliminate the possibility of that flange being broken if you made no attempt to ascertain whether it was broken or not?

"A. Because it just needed new packing.

"Q. Well, then, Mr. Heywood, you say you made no effort when you were up there to inspect this particular flange to see if it was broken.

"A. That's right.

"Q. Well, Mr. Heywood, did you make any inspection to see if that was the condition that was existing in that pipe?

"A. No, sir.

"Q. (By Mr. Ashton) Is there ever a better opportunity to inspect equipment that must be dismantled than when you have it dismantled so that you can look into it?

"A. That is the opportune time, I guess.

"Q. Did you make an inspection at that time?

"A. No, sir.

"Q. Did you ask anybody to make an inspection at that time?

"A. No, sir.

"Q. You just put it back together, Mr. Heywood?

"A. That's right.

"Q. Do you know anybody down at that shop who is more qualified to inspect and look at this equipment for the purpose of determining whether or not there's some trouble there than you?

"A. That's up to the supervisor.

"Q. No, no. I asked if you know anybody who is more qualified than you—

"A. No.

"Q. Did you ever go in to the supervisor on any occasion and tell him that you think the steam-fitter ought to check with you to see if this is okey?

"A. On a lot of jobs, yes, sir.

"Q. Did you ever on this job?

"A. No, sir.

"Q. On no occasion?

"A. No, sir."

The conclusion is inescapable from the foregoing testimony that defendant exercised all care and prudence which

could be required of it under the circumstances. The very purpose for which plaintiff was sent to the single arch hammer was to determine the cause of the steam leak and correct it. No one was in a better position to make an inspection than plaintiff. No other employee possessed the knowledge that plaintiff did regarding the condition of the pipe. It was plaintiff who attempted to tighten the flange; it was plaintiff who replaced the packing. If anyone should have known of the condition, it was plaintiff. Admittedly, the plaintiff failed to make the type of inspection required to determine the trouble. Plaintiff's failure could not furnish the basis for defendant's liability, however.

The novel theory advanced by plaintiff at the time of trial and incorporated in Instruction Number 8 was that the defect in question could not have been discovered except by removing the pipe in question; that the work of removing said pipe was that of a pipe fitter; that an inspection of said pipe should have been made by a pipe fitter. The difficulty with this argument is that it ignores the facts. The evidence is uncontradicted that it was plaintiff's responsibility in the first instance to determine the nature of the trouble. There is no evidence that plaintiff ever requested or suggested that a pipe fitter inspect the pipe. Plaintiff admitted that he had made no request for a pipe fitter. There is no evidence that plaintiff's work had progressed to the point or that the nature of the trouble was such that defendant knew or in the exercise of reasonable care should have known that a pipe fitter was required. Certainly the defendant could not be held negligent for failure to furnish a pipe fitter in the absence of evidence

that defendant knew or should have known that a pipe fitter was required. Defendant had the right to assume that if a pipe fitter was needed, plaintiff would ask for one.

Plaintiff, who had the burden of proof, offered no evidence and none was received that it was the custom and practice to send a pipe fitter in advance of or along with plaintiff under such circumstances.

POINT IV.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS REFUSAL AND FAILURE TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NOS. 1, 8 AND 11 OR SOME INSTRUCTION SETTING FORTH IN FULL THE THEORIES CONTAINED THEREIN.

The only charges given by the Court pertaining to the defense of contributory negligence are contained in the court's instructions Nos. 9 and 10. Those instructions are of limited effect. Instruction No. 9 charges the jury on the duty of turning off the intermediate valve or requesting that such valve be turned off. Instruction No. 10 is restricted to plaintiff's duty to discover the defect in the steam pipe.

Neither of said instructions charges the jury on the theory that plaintiff had a duty to request and arrange for a pipe fitter to inspect the pipe and to remove the pipe. This theory became a very material matter in the trial. It was plaintiff's contention that the defect in the pipe

could not have been discovered except by removing the pipe and that the work of removing the pipe was that of a pipe fitter. Instruction No. 8, discussed hereinabove, expressly charged the jury on the issue of defendant's negligence in failing to inspect the pipe after the steam leak was discovered.

It was the defendant's contention that if a pipe fitter was required to make an inspection or to remove the pipe that a request should have been made by plaintiff for a pipe fitter. There was evidence to support defendant's theory. Defendant's witness, Schenk, testified that between a machinist and pipe fitter, it was the machinist's job, in the first instance, to inspect the machine to determine what had to be done (R. 151, 157). Plaintiff himself testified that on a lot of jobs he had asked the supervisor to have a steam fitter check with him (R. 85). Plaintiff admitted that he had never done so on the occasion in question (R. 85). In view of the foregoing evidence, defendant was entitled to have the theory submitted to the jury that plaintiff was negligent in failing to request or arrange for a steam fitter. The jury might well have found, had the same been submitted, that plaintiff was negligent in failing to request or await the assistance of a steam fitter. The general instructions on contributory negligence requested by defendant would have covered the said theory. The instructions given by the Court failed to present said theory. Defendant submits that it was prejudicial error for the Court to fail and refuse to submit said theory to the jury either in the requested instructions or in some part of the charge.

POINT V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING AND REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6 OR SOME OTHER INSTRUCTION INCORPORATING THE THEORY CONTAINED THEREIN.

Defendant's requested Instruction No. 6 contains a correct statement of the law applicable to the facts of this case. The requested instruction is almost identical with an instruction which was approved by this court in the recent case, *Bowden v. The Denver & Rio Grande Western Railroad Co., supra*. The court stated in that decision its recognition of the necessity of actual or constructive knowledge of an unsafe condition in order to charge the defendant with liability.

It was particularly important to the defendant under the facts of this case that the elements set forth in requested Instruction No. 6 be submitted to the jury. The nature of the equipment and the defects were such that the jury might well have found that the defendant did not know and in the exercise of reasonable care would not have known that an unsafe condition existed. There was abundant evidence from which the jury could have concluded that the defendant did not know and would not, in the exercise of reasonable care, have known of an unsafe condition. Defendant was entitled to have this important requisite submitted to the jury. The Court's charge to the jury, as given, was devoid of any statement requiring that the jury find that

the defendant knew or in the exercise of reasonable care should have known of an unsafe condition. To the further prejudice of defendant, the Court's Instruction No. 6 expressly eliminated the necessity of such knowledge on the part of the defendant.

In addition to the *Bowden* case, the following decisions hold that knowledge of an unsafe condition is an essential element of liability under such circumstances.

Seaboard Airline Railway v. Horton, supra,
Atlantic Coastline Railroad Co. v. Dixon, supra,
Hatfield v. Thompson, supra,
Missouri Pacific Railroad Co. v. Burks, supra,
Stevens v. Mirakian, supra.

In each of the three latter decisions, the Court held that it was prejudicial error not to instruct the jury as to the necessity for finding that the defendant had knowledge of the defective or unsafe condition. The pertinent parts of the said opinions are set out above.

It was equally important that the second element set forth in defendant's requested Instruction No. 6 be given to the jury. It is not every unsafe condition nor every defect in equipment which gives rise to liability on the part of an employer. There are always unsafe conditions existing in industrial shops such as railroad blacksmith shops. Railroading is itself a hazardous business. Many unsafe conditions cannot be eliminated even through the exercise of reasonable care. This is particularly true of a defect in equipment which arises and is discovered during the course

of its operation as in this case. The law seems well settled that in order to render a defendant railroad liable for an unsafe condition, it must be found that the condition gave rise to an unreasonable risk of harm. This element of liability was recognized by the Court in the *Bowden* case. This requirement was not set forth in any of the Court's instructions to the jury. Defendant contends that it was entitled to have this theory submitted to the jury.

There can be little controversy over the proposition that when an unsafe or defective condition not previously known arises in a piece of machinery or equipment that a defendant railroad has a reasonable period of time within which to correct the condition without subjecting itself to liability therefor. This element was also included in the instruction considered by this Court in the *Bowden* case and recognized by the Court as proper. It is particularly applicable to the facts of this case inasmuch as the condition in the single arch hammer arose during its operation and steps were taken by the defendant to correct the condition. The Court's instructions to the jury did not set forth this element.

It is defendant's contention that its requested Instruction No. 6, as a whole, contains a correct statement of the law and was particularly applicable to the evidence in this case. Failure to give said instruction deprived defendant of an important part of its defense. Defendant was denied the right to have its theory of the case presented to the jury. The error in failing to give this instruction was aggravated by the Court's Instruction No. 6 which eliminated

all of the elements set forth in the requested instruction from consideration by the jury and made the sole issue whether or not the place of work was unsafe.

POINT VI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN FAILING AND REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

It was the defendant's theory that the defect which caused plaintiff's accident and injuries was latent; that said defect could not have been discovered by the usual and ordinary examinations employed by railroads in the exercise of reasonable care. This theory was supported by competent evidence. Both the plaintiff and other witnesses testified that the defect could not be discovered except by disconnecting the pipe into the stuffing box and examining the same. The defect was in fact not discovered by plaintiff.

Under these circumstances defendant contended that it was entitled to an instruction charging the jury that it was not required to employ or adopt extraordinary or unreasonable tests or examinations to discover defects, but fulfilled its duty by adopting such tests and examination procedure as ordinarily used by prudently conducted railroads. The purpose of such instruction was to advise the jury that the railroad was not under a duty to periodically dismantle and examine extensive steam lines. This theory was incorporated in defendant's requested Instruction No.

2. There is authority to support the propriety of such an instruction:

Texas and Pacific Railroad Co. v. Barrett, 166
U. S. 617, 17 S. Ct. 707,

Lowden v. Hanson, 134 F. 2d 348 (C. C. A. 8th
1943),

Illinois Central Railroad Co. v. Coughlin, 132
Fed. 801 (C. C. A. 6th 1904).

The trial court's instructions to the jury failed to present this theory. Defendant contends that it was entitled to have the theory presented either in the form submitted or elsewhere in the court's charge.

POINT VII.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A DIRECTED VERDICT; THE EVIDENCE COMPELS THE CONCLUSION THAT PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW AND THAT HIS NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF HIS ACCIDENT AND INJURIES.

No useful purpose would be served by repeating or reiterating the evidence which has been set out above. It is the defendant's contention that the great weight of the evidence compels the conclusion that plaintiff was negligent as a matter of law and that his negligence was the sole proximate cause of his accident and injuries.

It is clear from the evidence that plaintiff's accident and injuries were caused by an old latent defect between the collar and pipe concealed by the single arch hammer stuffing box. Defendant discharged its duty to inspect and correct said condition by sending plaintiff, a trouble shooter, senior machinist and an experienced employee, to correct the condition. The failure to correct the condition was negligence on the part of plaintiff. Plaintiff was in the best possible position to ascertain the trouble and appreciate the danger. Plaintiff took it upon himself to turn in the steam without having corrected or repaired the defect.

Plaintiff attempted to avoid responsibility in this connection by contending that the inspection should have been made by a pipe fitter. This contention is unworthy of consideration. It is beyond all reasonable standards to require a railroad to furnish an inspector for an inspector or to furnish assistance to an experienced employee who has not requested or made it known that he desires assistance. The conclusion is therefore inescapable that plaintiff himself was negligent and that his negligence was the sole proximate cause of his accident and injuries.

In view of the foregoing, the court should have granted defendant's motion for a directed verdict.

CONCLUSION

Defendant submits that the trial court committed prejudicial error in its instructions to the jury and its failure to charge the jury in accordance with defendant's requested instructions; that the court erred in denying defendant's motion for a directed verdict. On the basis of the foregoing, defendant respectfully urges that the judgment below be reversed.

Respectfully submitted,

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