

1956

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

Utah Supreme Court

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8208
Case No. 8505

IN THE SUPREME COURT

of the

UNIVERSITY, UTAH

STATE OF UTAH

JAN 28 1957

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ROBERT L. HEYWOOD,

Respondent,

vs.

THE DENVER AND RIO GRANDE

WESTERN RAILROAD COM-

PANY, a corporation,

Appellant.

FILED
DEC 21 1956
Supreme Court, Utah

BRIEF OF RESPONDENT

RAWLINGS, WALLACE,
ROBERTS & BLACK
By WAYNE L. BLACK,
Counsel for Respondent

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IN THE SUPREME COURT
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ROBERT L. HEYWOOD,

Respondent,

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THE DENVER AND RIO GRANDE
WESTERN RAILROAD COM-
PANY, a corporation,

Appellant.

Case No.
8505

BRIEF OF RESPONDENT

STATEMENT OF CASE

A. PRELIMINARY STATEMENT

The parties will be referred to as in the Court below.

All italics are ours.

Defendant's brief contains a Statement of Facts which is neither complete nor in many respects accurate. We, therefore, deem it necessary to restate the facts of the case.

B. THE FACTS

Plaintiff Robert L. Heywood was 63 years of age at the time of trial. He had spent the mature years of his life as a machinist having first hired out for the Southern Pacific Company in the year 1911. He had worked as a machinist for defendant from November 2, 1922 to the date of his injury on November 23, 1953. His work consisted of running machines, assembling machines, engines and parts and machining parts (R. 14). During the month of November, 1953, his particular assignment was that of a general handy man under the supervision of diesel foreman, Paul Schenk.

On the morning of the occurrence Heywood was assigned by Schenk to take up a steam leak on a single arch steam hammer located at the blacksmith shop (R. 16, 59).

A single arch steam hammer is a mechanism whose purpose is the fashioning of large pieces of metal into various sizes and shapes. The steam comes from the power house which is located approximately one block from the blacksmith shop. The pressure at which the steam is usually kept is 250 pounds. Boiler pops are located on the boiler which relieve the pressure if it reaches a higher amount (R. 19, 20). During November of 1953, the pressure maintained on the steam lines in the blacksmith shop was kept at varying amounts. However, the minimum amount observed on the dials by the plaintiff was 200 pounds (R. 21). The steam leak Schenk had assigned Heywood to repair on the morning of November 23, 1953, was in the stuffing box. The stuffing

box is located approximately ten to twelve feet from the ground where the steam pipe comes from the steam line and goes into the stuffing box. A shut-off valve is located approximately two feet from the stuffing box out along the steam line (R. 21). The purpose of the stuffing box is to provide a flexible joint so that the vibration of the hammer will not break the pipe at the threads. On the end of the pipe which goes into the stuffing box is a collar. The pipe is placed inside the box. Several rings of packing are placed in the box around the pipe and against the collar and the gland is then tightened by four nuts, leaving approximately one-half inch of packing between the collar and the gland (R. 22). If a leak develops it can frequently be corrected by simply tightening the gland. Sometimes it is necessary to replace some of the packing. If the packing is soft, generally one ring is replaced. If it is hard it may be necessary to replace more than one ring (R. 25, 26). On the occasion in question when plaintiff approached the stuffing box he observed that steam was leaking from the box and the gland was down tight. He knew he would have to place more packing in the box. He placed a ladder against the single arch hammer in the approximate position shown on Exhibit 2, climbed the ladder and turned off the valve near the stuffing box (R. 49, 50, 54, 55). After he had turned off the valve, he took the gland off the box, slid it back along the pipe and took out one ring of packing. He needed 16-inch packing. Schenk gave him a piece of seven inch square packing and he advised Schenk that this was not the right size. Eventually he

found a proper size of packing at the power house, took it back and put it in the stuffing box around the pipe (R. 27-29). Plaintiff testified that he performed this task in the usual and normal way. He replaced the gland and tightened it to what he thought was the proper tension. He then reached up and opened the valve. At the time he opened the valve, he was on the ladder with his feet approximately six feet off the ground. He testified, "A. Well, I turned the valve, and I hadn't come down one step before the steam pipe blew straight out in my face, and as it came out it hit me on the hand here." (R. 30). He fell from the ladder and landed on the floor in a standing position with his weight on the left leg (R. 30). In order for the pipe to have come out of the gland, it would have been necessary for it to break away from the collar (R. 67-68).

Defense witness James Everett Aberton, Division Locomotive Foreman, arrived shortly after the accident and observed the pipe that had blown loose from the joint. In his opinion, the pipe at the collar had been broken prior to the time it gave way except for about three-eighths of an inch which apparently had given way suddenly when the pipe came out of the stuffing box (R. 136-138).

Crowton, a pipefitter with 37 years of experience who testified for plaintiff, stated that the pipe involved appeared to be single strength. If it had once been double strength, the steam cutting away at the interior had thinned out the pipe until it had the appearance of single

strength (R. 114). He observed the break in the pipe near the collar and testified that the fresh break as distinguished from the older break was approximately five-eighths of an inch in length (R. 111). See also Aberton's testimony at record 146.

There is a distinction between the work of a machinist and a pipefitter. A pipefitter does all work on pipes including removal and repair. A machinist works on machines or mechanisms but not on pipes. The foreman, in this instance Schenk, determines whether the machinist or the pipefitter is to do the work. If Schenk had desired to have the pipe inspected on this occasion he would have had Heywood get the mechanism ready for removal of the pipe and a pipefitter remove the pipe (R. 15, 79, 85, 98). That the foregoing facts were not in dispute is seen from the testimony of Aberton. He stated:

“Q. The job of removing the packing and replacing the packing, is the job of a machinist, such as Mr. Heywood was?

A. To remove the packing?

Q. Yes; and replace it?

A. Yes sir.

Q. But if the pipe has to be removed, the foreman instructs the pipefitter to remove it, doesn't he?

A. Yes.

Q. *And the foreman determines whether the pipe is to be removed, does he not, in the first instance?*

A. *Yes sir.*” (R. 145).

Crowton testified to the same effect (R. 109).

Heywood testified that if an inspection were to be made of the interior of the steam box and the condition of the collar and pipe within the steam box, this would be a matter for the supervisor to determine and not for him (R. 57, 69, 79, 85).

Schenk testified that the reason he went and looked at the machine after being notified of the leak was so that he could determine whether to send a machinist or a pipefitter to repair the leak. He testified:

“Q. Why did you go to look it over and see what was the matter with it?

A. So I could notify the man about going out and making repairs.

Q. *That was so you could determine whether or not to send a pipefitter out, or just a machinist, isn't that right?*

A. *In a way, yes.*

Q. And you determined, at that time, the fellow that should go out should be a machinist?

A. Correct.

Q. You didn't have in mind any pipes would have to be removed, did you?

A. No.

Q. You concluded, from looking at it, that all it needed was that packing put in there?

A. That is right (R. 153, 154).

He further testified that he made no arrangements at any time to shut the steam off the line at the intermediate valve (R. 154.)

Heywood testified that only two things could cause a leak, either the need for new packing, or a broken pipe (R. 45).

Aberton was in complete accord on this proposition (R. 138, 146).

Plaintiff testified that in removing and replacing the packing in the stuffing box, he would not have an opportunity to see the end of the pipe with the collar on it or have determined the condition of the collar. An inspection could not be made without removing the pipe from the stuffing box.

He further testified that one of the reasons he couldn't see in the stuffing box or make an inspection as to the condition of things in the stuffing box was the steam. He stated that the condition of the valves generally in the shop and of this valve in particular, was such that there was always a certain amount of steam escaping even though the valve was shut off as tightly as was possible. The result was that when he was working at the stuffing box some steam was coming out of the box (R. 32, 59, 64).

Aberton also testified that the joint in the stuffing box was concealed and could not have been inspected without opening the box and getting into it (R. 138, 146).

Schenk made an inspection of the leak at the hammer before he assigned Heywood to repair the leak. He is the one who had the responsibility of determining whether to remove and inspect the pipe. He decided against this procedure (R. 151).

Furthermore, Schenk was at the hammer at the time the work by plaintiff was under way when he brought plaintiff the seven-eighths-inch square packing which plaintiff could not use. Plaintiff testified:

“Q. Did he ever tell you to take the piping out at that time?

A. No, sir.

Q. Did he ever tell you to inspect that flange?

A. No, sir.” (R. 79)

Plaintiff had worked many years in and around the blacksmith shop under the supervision of various foremen. He had always used the valve next to the stuffing box on this particular machine and he didn't know of the existence of the so-called intermediate valve in the middle of the blacksmith shop (R. 51, 75, 76).

Griffith on the other hand testified that the so-called intermediate valve in the center of the shop was the usual and customary place where steam was turned off when the hammer was going to be shut down for the type of repair being done by Heywood at the time of his injury. He also testified that turning off the steam is a pipefitters work and that it was usual for a pipefitter to turn

the steam off when work similar to that being done by Heywood was done (R. 93, 98).

Alberton also testified it was the practice and custom to turn off the intermediate valve when repairs were made on the stuffing box (R. 138).

Schenk testified concerning practice and custom (R. 150):

“A. *I notify the machinist to make the repair, and then the practice is, when the machinist goes out there, when he is free to go out there and do the job, he notifies me about it, and I get a pipefitter to prepare the work. We have an intermediate valve which is shut off—necessary to shut this off, so the man can work with security on the job. This is considered a pipefitter’s job, and we—I instruct the pipefitter to shut that valve off.*

Q. You are referring to the intermediate valve?

A. The intermediate valve. That is not the valve at the steam hammer.”

It will be recalled that Schenk inspected the leak at the hammer on the morning of the accident, instructed plaintiff as to his work, and was later at the hammer when plaintiff was seeking the right size of packing. At no time did he request a pipefitter or anyone else to turn off the intermediate valve (R. 28, 59, 151, 154).

Crowton testified that if work was being done on the single arch hammer, the shut off valve which was used by the plaintiff was the one generally used. He stated that the shut-off valve in the middle of the blacksmith shop would be used if there was some leak or defect be-

tween that valve and the valve near the hammer. If some repair had to be made at that hammer or beyond the valve near the hammer, the valve near the hammer would be the one used (R. 106).

Crowton testified that the piping and fittings, with the exception of some pipes which had been broken or worn out and replaced, had been in the blacksmith shop since 1923 or 1924, and that the railroad had no practice of inspecting the fittings or the piping to determine whether any should be renewed (R. 100).

He testified that pipes which have steam pressure in them deteriorate from the inside, making them thinner but there is little, if any, deterioration from the outside. With respect to joints that are threaded, he testified that if a collar is machined rather than threaded on the pipe the area will not be as weak and will not be as likely to give way. The collar on the pipe in this case was threaded rather than machined and the break occurred in the first thread. In his experience this was always the place where pipe would give way first. He further stated that with the passage of time in the blacksmith shop, leaks in the piping had become more and more frequent (R. 101, 102).

Plaintiff testified that the pressure in these steam lines was always too high. On occasions prior to his injury, he had complained about the amount of pressure in the lines to Schenk and Aberton (R. 32). He made these complaints almost every time he was sent to repair steam leaks in the blacksmith shop (R. 32).

Sometime prior to plaintiff's injuries, there had been reducing valves on the steam lines into the black-

smith shop. These reducing valves had either become inoperative or had been removed. Crowton testified that the reducing valves would have kept the pressure down below a certain maximum and would have prevented excess pressure (R. 105).

Plaintiff testified that a pressure of 135 pounds was adequate for operation of the machines in the blacksmith shop. The 200 pound minimum pressure maintained in the blacksmith shop was unnecessary and the reducing or regulating valves would have corrected the excess pressure (R. 38).

Crowton also testified that pipes in the blacksmith shop are old and that there was always danger of pipe blowing up (R. 33). He further testified that there was a type of shut-off valve consisting of a wheel and chain reaching to the floor which could have been used on this particular line and which would have prevented the necessity of getting up on the ladder near the stuffing box in order to turn the valve, and that this type of valve would have been safer because a workman wouldn't have been required to get up near the steam pressure in order to turn the valve off and on (R. 34).

STATEMENT OF POINTS

POINT I

INSTRUCTION NO. 6 IS A CORRECT STATEMENT OF THE LAW AND IS NOT PREJUDICIAL TO DEFENDANT.

POINT II

THE EVIDENCE SUPPORTS SUBMISSION OF INSTRUCTION NO. 7 TO THE JURY.

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POINT III

THE EVIDENCE SUPPORTS SUBMISSION OF INSTRUCTION NO. 8 TO THE JURY.

POINT IV

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NO. 1, 8 AND 11.

POINT V

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6.

POINT VI

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

POINT VII

THE ISSUES OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE WERE FOR THE JURY: THE TRIAL COURT CORRECTLY AND JUSTLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

ARGUMENT

POINT I

INSTRUCTION NO. 6 IS A CORRECT STATEMENT OF THE LAW AND IS NOT PREJUDICIAL TO DEFENDANT.

Analysis of Instruction No. 6 clearly reveals that it is not, as contended by defendant, a mandatory instruction.

At the outset the jury is advised that defendant is liable only for a failure to exercise reasonable care to provide its employees with a reasonably safe place to work. The jury is further advised that this does not require the absolute elimination of all danger, but only those dangers which the exercise of reasonable care would remove or guard against. Applying those general principles to the case, the court instructs the jury that if they find from a preponderance of the evidence that plaintiff at the time of his injury was performing the duties of his employment and that defendant failed to exercise reasonable care to make said place reasonably safe for the performance of such duties, liability would attach. By use of the words "in that" objected to by defendant an added limitation is imposed. The jury is told that said unsafety must be confined to the position of the plaintiff in connection with his duties and the operation of appliances used in the performance of his duties, and further that his position and the operation of the appliances "were such that the plaintiff was not performing his duties in a place of *reasonable* safety." It is difficult for us to imagine an instruction more confining and more limited in its terms. Our position is that said instruction was unduly and unnecessarily favorable to the defendant because it did not allow the jury to consider all surrounding circumstances in determining whether plaintiff's place of work was reasonably safe. For example, the amount of steam pressure in the lines and the general deterioration of the piping in the round house were removed from the

jury's consideration by the overrestrictive language of the instruction. Also removed from the jury's consideration was the conduct of foreman Schenk in not requiring that the pipe be removed and inspected before having plaintiff replace the packing. The jury should have been allowed to consider foreman Schenk's conduct in determining whether defendant had exercised reasonable care in furnishing plaintiff a reasonably safe place in which to work. In *Denny v. Montour R. Co.* (Penn. 1951) 101 F. Supp 735, the court stated:

“The rule which requires the railroad to furnish its employees with a reasonably safe place to work does not have reference only to the physical condition of the place itself but also has reference to the negligent acts of the fellow employees. *Bailey v. Central Vermont Ry. Inc.*, 319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Griswold v. Gardner*, 7 Cir., 155 F. 2d 333.”

However, defendant is in no position to complain about an instruction that imposed on plaintiff as the prevailing party, a greater burden than the law required. See *Drew v. St. Louis-San Francisco Ry. Co.* (Missouri 1927) 293 S.W. 463.

Defendant in its brief at page 16, states:

“This charge places the whole emphasis on whether the place of work was safe, rather than whether defendant failed to exercise reasonable care.”

That such is not the fact can best be determined by reference to the number of occasions in the instruction where the trial court uses the words negligence,

reasonable care, reasonably safe place to work and reasonable safety. It is also significant that the jury is only told that they *may* find defendant negligent, not that they *must* find negligence. In addition, the interpretation of said instruction must be considered in the light of the other instructions given. In this connection we call attention to the statement of Mr. Justice Holmes in *Union Pacific R.R. Co. v. Hadley*, 246 U.S. 330, 332, 38 S. Ct. 318, 319, 62 L. Ed. 751 :

“On the question of its negligence, the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendants’ conduct viewed as a whole warranted a finding of neglect.”

Throughout the instructions are found constant references to the requirement of a finding of negligence before liability will attach. Instruction No. 1 in part reads as follows :

“He specifically alleges that the defendant was negligent in failing to use reasonable care to furnish plaintiff a reasonable safe place to work in that he was directed to repair a steam leak from such a position and in such a proximity to the steam controls, that he was unable to safely perform the duties of his employment;”

Instruction No. 2 in stating the general principles of law governing the case, quotes from the Federal Employers' Liability Act as follows:

“***** shall be liable in damages to any person suffering injury ***** *resulting in whole or in part from the negligence of any of the employees of such carrier.*”

Instruction No. 3 defines negligence and ordinary care.

Instruction No. 5 states that an employer is liable for negligent acts or omissions of an employee.

Instruction No. 11, reads as follows:

“You are instructed that the railroad is not required to keep its shops equipped with new and modern equipment and that the mere fact that equipment may be old and used is not in and of itself sufficient evidence to prove negligence on the part of the defendant railroad.”

Instruction No. 12 advises the jury how to apportion any recovery for the respective negligence of plaintiff and defendant. Instruction No. 13, the damage instruction, also uses the words “as a proximate result of defendant’s negligence.”

It is difficult to conceive how a trial court could devise more ways and means of reiterating that liability will only attach upon a finding of defendant’s failure to exercise ordinary care.

The cases cited by defendant are distinguishable. In *Seaboard Airline Railway v. Horton*, 233 U.S. 492,

34 Sup. Ct. 638, 585 L. Ed. 1062, (1914), the trial court gave a clearly mandatory instruction. A mere recital of the instruction condemned in that case should demonstrate the distinction between said instruction and the one given in the case at bar.

“*** If you further find from the evidence that the guard was a proper safety provision for the use of that guage and that it was unsafe without it, then the defendant did not furnish him a safe place and safe appliance to do his work, and if it remained in that condition, it was continuing negligence.***”

In Instruction No. 6 the jury is told:

“If you . . . find . . . that . . . defendant failed to exercise reasonable care to make said place reasonably safe . . . you *may* find the defendant negligent . . .”

The same mandatory provisions of the Horton case appear in the next case cited by defendant. *Atlantic Coastline Railroad Company v. Dixon* 189 F. 2d 525, (Cert. den. 342 U.S. 830, 72 Sup. Ct. 54, 96 L. Ed. 628). The jury was instructed as a matter of law that if the place of work was unsafe, defendant was liable. Reasonable care and negligence were foreign to the instruction given. In *Missouri Pacific Railroad Co. v. Burks*, 196 Ark. 1104, 121 S.W. 2d 65, the jury was instructed as a matter of law that if the floor of the freight car was unsafe, defendants were negligent. Liability of the defendant was not made contingent on a showing of negligence. In *Stevens v. Mirakian*, 177 Va. 123, 12 S.E. 2d 780, it was held that the jury should

have been instructed that defendant knew or in the exercise of ordinary care should have known of the defective condition of the chair before defendant could be found negligent. This was not a master-servant case and the basis of liability was not failure to exercise ordinary care to furnish a reasonably safe place to work. Likewise it was not a case in which the evidence was undisputed as to the nature and extent of knowledge possessed by defendant as is the case here.

It will be observed that Instruction No. 6 uses the words "reasonable safety." The word reasonable is variously defined as "exercising sound judgment" or sensibly restrained or temperate." Thus it can be seen that the degree of safety required by the instruction is not absolute but qualified by reasonableness, and limited to the exercise of ordinary care on the part of defendant.

In *S. S. Kresge Co. v. McCallion*, (Eighth Circuit, 1932) 58 F. 2d 931, the Court stated:

"It is not difficult to destroy almost any charge by isolating certain limited expressions therein, but the charge must be considered as a whole with the view of determining the impression conveyed thereby to the jury. *We cannot think the jury could have listened to this charge, which again and again spoke of negligence and of care, and therefrom have gotten an impression that negligence was no part of the issue, and that no matter how careful appellant might have been it was liable.*"

In *Schirra v. Delaware L. & W. R. Co.*, (Penn. 1952) 103 F. Supp 812, the court upheld instructions similar

to those given in the case at bar. See also *Glidewell v. Quincy, O. & K. C. R. Co.*, (Mo. 1921) 236 S.W. 677.

Defendant complains that Instruction No. 6 is erroneous because it fails to specifically require the jury to find that defendant railroad company knew or should have known of a condition which exposed plaintiff to an unreasonable risk of harm. Our answer to this claim is two-fold. First the requirement that the jury must find defendant railroad company failed to exercise reasonable care to furnish plaintiff with a reasonably safe place in which to work, incorporates within it by necessary inference, the proposition that the railroad company knew, or should have known of a condition which subjected plaintiff to an unreasonable risk of harm. It is obvious that under the general instruction defining negligence the jury could not have found that defendant failed to do what an ordinary person would have done under the circumstances unless they also found that defendant had knowledge of a condition subjecting its employees to an unreasonable risk of harm. Secondly, under the facts of the case, knowledge on the part of defendant company was not a disputed issue. The defendant company conceded that the break in the pipe was old and consequently discoverable by an inspection consisting of removal of the pipe from the stuffing box.

At page 8 of defendant's brief appears the following statement:

"Mr. Aberton found that there was an old break between the collar and the pipe all the way around the pipe except for approximately $\frac{3}{8}$ '

(Record 37) He was able to determine that the break was old because of discoloration (Record 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 (Record 137, 138)."

Counsel then quotes at page 9 from the testimony of witness Crowton to the same effect. Likewise, it was undisputed that said break could not have been discovered without removing the pipe from the stuffing box. We again quote from page 14 of defendant's brief:

"The break in the pipe was one which could not have been detected without removing the pipe."

Furthermore, it was undisputed that only two things could have caused the leak in the stuffing box, either a break in the pipe within the stuffing box, or loose packing. If it was a break in the pipe, it would be a job for the pipefitter to perform. If it was loose packing, it would be a job for the machinist. It was foreman Schenk's responsibility to determine whether a machinist or a pipefitter should perform the work. He decided to have Heywood, the machinist, replace the packing, and the effect of this decision was that the pipe was not removed from the stuffing box and was not inspected. Defendant's hopeless effort to place responsibility for the decision not to remove the pipe on the shoulders of Heywood is contrary to the undisputed testimony of defendant's own witnesses. Aberton testified:

"Q. And the foreman determines whether the pipe is to be removed does he not in the first instance?

A. Yes, sir," (R. 145).

And Schenk, the foreman, testified:

"Q. That was so you could determine whether or not to send a pipefitter out, or just a machinist, isn't that right?

A. In a way, yes." (R. 153).

And again:

"Q. You concluded, from looking at it, that all it needed was that packing put in there?

A. That is right." (R. 154).

The facts being undisputed, the only question for the jury was whether in view of the undisputed facts, defendant failed to exercise reasonable care to furnish plaintiff with a reasonably safe place in which to work. That issue was properly submitted to the jury by the trial court's instructions.

An analysis of a series of Missouri cases demonstrates the soundness of plaintiff's position:

In *Messing v. Judge & Dolph Drug Company*, 322 Mo. 901, 18 S.W. 2d 408, (1929), the court discussed an instruction similar to Instruction No. 6 and stated:

"The most serious complaint urged by appellant against the instruction is that it fails to require the jury to find that the defendant knew, or by the exercise of ordinary care could have known, of the unsafe condition of plaintiff's place of work. The instruction, however, requires the jury to find, as a necessary prerequisite to a verdict in favor of plaintiff, that 'in thus furn-

ishing and providing said place of work, **** the defendant failed to use ordinary care and was guilty of negligence.' It has been repeatedly and consistently ruled by this court that a finding of negligence imports knowledge (on the part of the party found to have been negligent) of the unsafe condition of the appliance, or of the place of work. An allegation, or a finding, that a defendant negligently caused or permitted an unsafe described condition is equivalent to an allegation, or a finding, that a defendant knew the condition to exist. The reason for the foregoing uniform holding is readily apparent, for it is obvious that the jury could not well have found that the defendant was negligent in furnishing the plaintiff with an unsafe place in which to work without believing (and inferentially finding) that defendant knew, or by the exercise of ordinary care could have known, of the unsafe condition of the place of work."

The Messing case was followed in a number of later Missouri cases. In *Kamer v. Missouri-Kansas-Texas R. Co.* 326 Mo. 792, 32 S.W. 2d 1075 (1930), the court stated:

"The instruction does not, in express words, require a finding that defendant knew or in the exercise of ordinary care could have known that plaintiff was between cars; but, we do not think it must be held erroneous on that account. The finding that defendant under the circumstances was not in the exercise of ordinary care, and was guilty of negligence, is equivalent to a finding that defendant knew or in the exercise of ordinary care could have known plaintiff was between the cars. (Citing cases)."

The Messing case and the Kamer case were upheld in *Perry v. Missouri-Kansas-Texas R. Co.* (Missouri 1937) 104 S.W. 2d 332.

The Supreme Court of Missouri had occasion to elaborate upon the doctrine of the Messing case in *Schonlau v. Terminal R. Ass'n of St. Louis*, 357 Mo. 1108, 212 S.W. 2d 420 (1948). In that case a baggage handler was injured allegedly because of a bumpy condition of a sub-basement floor. The trial court in its instructions did not require a specific finding that the railroad company knew, or should have known, of the condition of the floor, but submitted the case on general instructions pertaining to negligence. Defense counsel urged the appellate court to reappraise and reconsider the doctrine pronounced in the Messing case. The court stated:

“Defendant urges that we should re-examine that doctrine. Perhaps, if the circumstances of this case were otherwise, it would be well to do so, and, in the future, to limit its application only to those instances, in which we are satisfied the jury, in making all the findings required by an instruction in order to reach the requested verdict, could not do so unless it also found defendant had sufficient knowledge of the unsafe condition complained of.

However, in the instant case we are satisfied from the requirements contained in plaintiff's instruction that the jury had to find, inferentially at least, that defendant had sufficient knowledge of the unsafe condition. The instruction required, as we have pointed out, the jury to find that the place of work was unsafe because the flooring was old and rough, and that defendant furnished

the place of work in such a condition, and that by doing so defendant was negligent. Thus the jury had to find defendant knew of such condition for some time before it could return a verdict for plaintiff under the instruction. We find no error in this instruction under the particular circumstances of this case."

One of the cases relied upon by defendant in its brief is *Hatfield v. Thompson*, 252 S.W. 2d 534, (Missouri 1952) where the Supreme Court discussed the *Messing*, *Kamer* and *Schonlau* cases. In the *Hatfield* case the plaintiff, a conductor, while attempting to board a moving train, allegedly slipped in a hole in defendant's right of way. The most hotly disputed issue of the case had to do with whether the railroad company had knowledge of the hole in the right of way. The trial court's instructions allowed the jury to find from the mere existence of the hole that the defendant was negligent without requiring a finding of prior knowledge of the existence of the hole by the railroad company. The Missouri Supreme Court held that this was error and pointed out the distinction between the situation existing in the *Hatfield* case and that in the *Schonlau* case. The court stated:

"It is the law that where the defect is of such a nature that the finding of its existence carries with it the clear inference of knowledge of defendant of its prior existence, an instruction omitting such a finding cannot be said to be prejudicially erroneous. *Schonlau v. Terminal R. Ass'n. of St. Louis*, 357 Mo. 1108, 1116-1118, 212 S.W. 2d 420, 424, 425. But, as stated, no such inference arises in this case. The hole here

involved could easily and quickly be made by any number of agencies other than that of defendant's workmen."

The facts of the case at bar bring it within the Schonlau rather than the Hatfield case. The jury was required to find in the Schonlau case that the flooring was old and rough. In the case at bar the break in the pipe was old and rusted and consequently discoverable by inspection according to the undisputed evidence. On the other hand, in the Hatfield case the length of time the hole in the right of way had existed and whether the defendant could have acquired prior knowledge of its existence were hotly disputed and an instruction on prior knowledge was held by the court to be necessary to prevent misunderstanding by the jury. In the case at bar the facts pertaining to knowledge being undisputed, the only issue was whether the jury should draw an inference of negligence. Inferences from uncontroverted, as well as controverted facts, are questions for the jury. See *Ellis v. Union Pacific R.R. Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572.

Other cases support plaintiff's position. *Blew v. Atchinson T. & S.F. Ry. Co.*, (Mo. 1951) 245 S.W. 2d 31, *Rothwell v. Pennsylvania R. Co.*, 87 F. Supp. 706 (1950). *Williams v. Atlantic Coast Line R. Co.* 190 F. 2d 744. *Pritt v. West Virginia N. R. Co.* (W. Va.) 51 S.E. 2d 105, 6 A. L. R. 2d 562.

POINT II

THE EVIDENCE SUPPORTS SUBMISSION OF INSTRUCTION NO. 7 TO THE JURY.

Instruction No. 7 authorizes the jury to find that it was the custom and practice of defendant company to shut off the steam at the intermediate valve and to further find that failure of defendant to shut off the intermediate valve was negligence which proximately caused injuries to plaintiff. Defendant makes the following statement in his brief at page 23:

“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.”

The foregoing statement is incorrect. Griffiths testified as follows:

“Q. And do you have a custom and rule which requires that steamfitters turn the steam off at a major valve like that prior to the time that they work on a piece of equipment like this where it's going to be shut down for some time?

A. Well, that work of turning the steam in your steamfitting and so on is generally considered pipefitter's work.

Q. And is it usual for the pipefitters to turn the steam off or have it turned off when work like this is done?

A. Yes.” (R. 93)

Aberton testified to the same effect.

“A. The practice is to turn off the intermediate valve before you make any repairs on the stuffing box at these hammers.” (R. 138)

Schenk also testified to the same effect.

“A. I notify the machinist to make a repair, and then the practice is, when the machinist goes out there, when he is free to go out there and do the job, he notifies me about it, *and I get a pipefitter to prepare the work.* We have an intermediate valve which is shut off — necessary to shut this off, so the man can work with security on the job. *That is considered a pipefitter's job, and we — I instruct the pipefitter to shut that valve off.*” (R. 150).

In this connection we again call attention to the fact that Schenk was present when the work commenced and made no effort to have a pipefitter turn off the **intermediate valve**. He should have known the intermediate valve was not turned off because it would only be turned off pursuant to his orders.

Heywood was unaware of the existence of the intermediate valve (R. 51).

It is true Crowton was of the opinion that the valve next to the hammer would be the proper one to shut off in making a repair such as was being made by plaintiff. This did not eliminate the testimony concerning the custom and practice of turning off the intermediate valve when work such as that being done by plaintiff was anticipated.

Plaintiff is not bound by each and every item of testimony by each and every witness called on his behalf.

In *Schlatter v. McCarthy* (1948) 113 Utah 543, 196 P. (2) 968, this court stated:

“But a party is not bound by every statement that his witness makes, and he may, by testimony of other witnesses and in argument to the jury, show that the facts were different from those testified to by the witness. This is permitted, not for the purpose of impeaching the witness (although it may have that incidental effect), but for establishing the true facts. It would be a monstrous rule that would bind a party to every statement of every witness produced by him.”

The cases cited by defendant are not in point in view of the fact plaintiff did not testify that no custom and practice of turning off the intermediate valve existed, but only that he was unaware of the existence of the valve.

POINT III

THE EVIDENCE SUPPORTS SUBMISSION OF INSTRUCTION NO. 8 TO THE JURY.

The evidence supporting submission of Instruction No. 8 is briefly this. A steam leak was discovered on the morning of the occurrence by Griffiths (R. 87). Griffiths promptly notified foreman Schenk of the leak (R. 87). Schenk inspected the single arch hammer so he could “notify the man about going out and making repairs.” He testified:

“Q. That was so you could determine whether or not to send a pipefitter out, or just a machinist, isn’t that right?

A. In a way, yes." (R. 154).

The leak could have been caused either by a crack in the piping itself or by loose packing. The only way to determine which of these causes actually existed was to dismantle the pipe. This was a pipefitter's and not a machinists job. Schenk decided not to have the pipefitter dismantle the pipe, but to take a chance and replace the packing in the hopes that the packing was the cause of the leak. This was Schenk's decision. Even after Heywood had commenced the work of replacing the packing, Schenk returned to the hammer and gave him a piece of packing which turned out to be the wrong type. At that time Schenk did not suggest that the pipe be removed and inspected. He was content to have Heywood go ahead with the replacement of the packing. Under these circumstances, it became a jury question whether the railroad should have made the inspection which would have revealed the cause of the leak. The following authorities support the giving of Instruction No. 7:

Solomon R. Co. v. Jones, 30 Kan. 601, 2 P. 657; *In re California Nav. & Imp. Co.*, 110 Fed. 670; *Port of New York Steredoring Corporation v. Castagna*, 280 Fed. 618; *Allen v. Union Pacific R. Co.*, 7 Utah 239, 26 P. 297; *Brown v. Sharphouse Contracting Co.*, 159 Cal. 89, 112 P. 874; *Corn Products Refining Co. v. King*, 168 Fed. 892; *New Deemer Mfg. Co. v. Wells*, 296 Fed. 687.

It is interesting to note that defendant cites no authorities to support its claim that Instruction No. 8 should not have been submitted to the jury.

POINT IV

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTIONS NO. 1, 8 AND 11.

In Point IV of its brief, defendant expresses dissatisfaction with the court's instructions No. 9 and 10 on the issue of contributory negligence. Defendant is not in a position to complain about these instructions since it requested they be given and took no exception to them.

Defendant claims its requested instructions No. 1, 8 and 11 should have been given. Before considering said requests separately we desire to answer some of the general contentions made by defendant in its hodge podge point.

In criticizing the Court's instructions No. 9 and 10, defendant states at page 37 of its brief:

"Neither of said instructions charges the jury on the theory that plaintiff had a duty to request and arrange for a pipefitter to inspect the pipe and to remove the pipe."

It is our position that plaintiff was under no duty to overrule foreman Schenk's decision not to have a pipefitter remove and inspect the pipe. It is our further position that nevertheless Instruction No. 10 includes the proposition contended for by defendant. Instruction No. 10 reads in part as follows:

"If you find from a preponderance of the evidence that the plaintiff in performing the duties of his employment, and in the exercise of due care for his own safety, *should have dis-*

covered the defect in the steam pipe and failed so to do, then you may find that the plaintiff was negligent, etc."

Plaintiff couldn't remove the pipe because this was not a machinist's job. The only way he could have discovered the defect was to request that a pipefitter remove the pipe for an inspection. The jury was told by Instruction No. 10 that they could find plaintiff guilty of contributory negligence for his failure to make such a request. It is a well known principle of law that if a proposition contained in a requested instruction is adequately instructed upon by the court in another instruction, there is no error in refusal to give such a request. See *Joice v. Missouri-Kansas-Texas R. Co.* (Missouri 1945) 189 S.W. 2d 568, 161 ALR 383.

Defendant's requested Instruction No. 1 requires only a finding that a safe and a dangerous way of performing the work existed and were equally open to the plaintiff and that he selected the unsafe way, as a basis for negligence on his part as a matter of law. Whether plaintiff was aware of the safe way of performing the work becomes immaterial under the instruction. No requirement that plaintiff did not act as a reasonably prudent person under the circumstances is imposed by the instruction. If he selected a dangerous way and a safe way was open to him, then he is negligent. The jury is further authorized to find that such negligence was the sole proximate cause of his injury.

A party may select a dangerous way as distinguished from a safe way of doing work but, neverthe-

less, have acted as a reasonably prudent person under the circumstances. *Kaumans v. White Star Gas & Oil Co.*, 92 Utah 24, 32, 63 P. 2d 231; *Moore v. Miles*, 108 Utah 167, 158 P. 2d 676.

A moment's consideration will reveal that for a workman to choose a less safe course of doing his work cannot be contributory negligence as a matter of law. The fundamental rule of contributory negligence is that a person must use the care that a reasonably prudent person would use in looking out for his own safety. There are, of course, situations in which the conduct of an injured person may be such that all reasonable minds would agree that he did not use such care. In that event, he would be guilty of contributory negligence as a matter of law. However, the choosing of a way less safe than another does not require a finding of contributory negligence for the simple reason that a reasonably prudent person may have chosen a less safe way. This is particularly true under the facts of the case at bar where plaintiff testified that he was unaware of the existence of the intermediate valve. This proposition of law is clearly pointed out in *Bailey v. Prime Western Spelter Co.*, 83 Kan. 230, 109 P. 791 (1910); See also *Brinkmeier v. Missouri Pacific Ry. Co.*, 69 Kan. 738, 77 P. 586.

Futhermore, defendant's requested Instruction No. 1 allowed the jury to find that plaintiff's negligence in failing to select the safe way as distinguished from the dangerous way, was the sole proximate cause of his injury. Under the facts of the case at bar this would

have been error. See *Thomson vs. Boles*, 123 F. (2d) 487, 492 (8 C.C.A. 1941).

The trial court's Instruction No. 9 left it for the jury to consider under general standards of reasonable care whether plaintiff was contributorily negligent in not shutting off the intermediate valve and allowed the jury to determine not only that such was negligence on the part of plaintiff but that it was the sole proximate cause of his injury. This instruction allowed defendant full leeway in arguing contributory negligence to the jury and, in fact submitted correctly the issue undertaken to be submitted by defendant's requested Instruction No. 1. Instruction No. 9 was and is a correct statement of the law and eliminates the erroneous propositions heretofore pointed out that are present in defendant's requested Instruction No. 1.

Likewise defendant's requested Instruction No. 3 is erroneous. In the first paragraph of the instruction it is stated categorically that Heywood had the duty of exercising reasonable care "in arranging for the shut-off of the master steam valve in the shop." Plaintiff testified that he wasn't aware of the existence of such a steam valve in the shop. He was entitled to belief by the jury on this issue. If he didn't know of the existence of the steam valve, certainly he was under no legal duty to arrange to have it shut off. Yet, requested Instruction No. 8 imposed such a duty upon him as a matter of law. Clearly the instruction would have been erroneous if given.

Defendant's requested Instruction No. 11 is likewise erroneous. Said instruction reads in part ". . . if you find by a preponderance of the evidence that the plaintiff negligently failed to detect a rusted and corroded condition in the steam pipe, etc. . . ." Said instruction declares as a matter of law that plaintiff had the duty of endeavoring to detect the rusted and corroded condition of the steam pipe and then goes on to submit to the jury the question of whether plaintiff was negligent in performance of said duty. Under the evidence most favorable to plaintiff, the jury could find that plaintiff had no duty of inspecting the pipe; that instructions concerning dismantling of the pipe would have to come from the foreman, and the work of dismantling the pipe would have to be done by a pipefitter rather than by plaintiff. This instruction would clearly have been error.

As heretofore pointed out the issue was in fact submitted to the jury by Instruction No. 10 which allowed the jury to find that in the exercise of ordinary care plaintiff should have discovered the defect in the pipe.

POINT V

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 6.

The issue of safe place to work was adequately and correctly instructed upon in the court's Instruction No. 6 and the other instructions enumerated and dis-

cussed in this brief under Point I.

It is our position that defendant's requested instruction No. 6 would have contributed nothing substantial to the court's instructions. This can best be pointed out by considering each of the elements required by the request.

The first element requires a finding that defendant knew or should have known of an unsafe condition or defective equipment. As pointed out by us in Point I, the extent and nature of the knowledge possessed by defendant railroad company was not an issue in the case. The railroad company knew of the leak, was aware of the fact that an external inspection would not reveal the cause of the leak and that in order to discover whether loose packing or a break in the pipe was causing the leak, the pipe would have to be dismantled. It is undisputed that removal and inspection of the pipe would have revealed the cause of the leak. The facts being undisputed the question to be resolved by the jury was whether in view of such facts the railroad company by directing plaintiff to remove and replace the packing, exercised ordinary care in furnishing him with a reasonably safe place in which to work. Defendant's requested instruction No. 6 would have submitted to the jury issues that were not in dispute. Consequently, the manner adopted by the trial court in submitting the issue of safe place to work to the jury was less apt to be misunderstood by the jury than would have been defendant's requested instruction No. 6. We have heretofore distinguished the Horton, Dixon, Hatfield, Burks and Stevens cases. Those cases contained mandatory instructions re-

moving from the jury the issue of whether defendant had exercised reasonable care in furnishing a reasonably safe place to work.

The second element in defendant's requested instruction No. 6 that the railroad before being liable should in the exercise of reasonable care have known that the unsafe condition gave rise to an unreasonable risk of harm, is included in instruction No. 6 where the Court requires as a condition to recovery that "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, etc." If the jury found, as it must, in order to allow recovery for plaintiff, that he was not in a position of reasonable safety, then of course, the jury was finding that he was subjected to an unreasonable risk of harm. These are merely two different ways of stating the same thing.

The third sub-section of requested instruction No. 6 requires that the railroad had a "sufficient period of time within which to correct said unsafe condition, etc." Under the undisputed facts of the case the leak was discovered and reported to Schenk. He it was who decided whether to have a machinist replace the packing or a pipefitter remove and inspect the piping. The time element was not an issue. The issue had to do with the decision made by Schenk at the time he inspected the leak. The railroad

had sufficient time to correct the unsafe condition simply by sending a pipefitter to remove the pipe and inspect it. The railroad didn't do this. The length of time had by the railroad within which to correct the unsafe condition was not a disputed issue. Also to permit recovery only in the event defendant did not have time to fix the pipe would eliminate recovery for negligence in permitting plaintiff to work there after defendant had discovered the dangerous condition. It should not only fix the condition but until fixed should take steps to protect persons from the danger.

The fourth requirement of the requested instruction that the unsafe condition was a proximate cause of plaintiff's injuries, of course, was submitted correctly in the court's Instruction No. 6.

The trial court did not commit error in refusing to give said instruction.

POINT VI

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR BY REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

Defendant's requested Instruction No. 2 is set forth as follows for the convenience of the Court:

"You are instructed that a Railroad Company is not required to adopt extraordinary or unreasonable tests or examinations to discover defects in machinery, but fulfills its duty if it adopts such tests and examination procedure as are ordinarily used by prudently conducted Railroads under like circumstances."

Plaintiff made no contention that the railroad company was required to adopt extraordinary or unreasonable tests or examinations to discover defects in machinery. Under *Moore v. Denver & Rio Grande Western Railroad Company*, 4 Utah 2d 255, 292 P. 2d 849 (1956) extraneous issues not raised by the pleadings or by the parties should not be submitted to the jury. See also *Pollard v. Gammon* (Ga. 1940), 63 Ga. App. 852, 12 S.E. 2d 624.

The last portion of requested instruction No. 2, in our opinion is erroneous where it states: "But fulfills its duty if it adopts such tests and examination procedure as are ordinarily used by prudently conducted Railroads under like circumstances." The issue is not what is ordinarily done by prudently conducted railroads, because prudently conducted railroads might ordinarily perform work in a negligent manner under certain circumstances. The test is that of ordinary care under the circumstances and the tribunal to determine this issue is the jury. As was said by Mr. Justice Holmes in *Texas and Pacific Railway Co. v. Behymer*, 189 U.S. 468, 23 S. Ct. 622, 47 L Ed 905:

"What usually is done may be evidence of what ought to be done, but what ought to be done, is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. Ed 605, 2 Supp. Ct. Rep 932."

See 68 ALR 1400, 1445, Annotation entitled "Custom as a Standard of Care," where it is said:

“Where the safety of employees is dependent upon the employer making reasonable tests or inspections of equipment, the quite general rule is that general practice is not a measure of the care required.”

See also *International & G.N.R. Co., v. Hawes* (1899; Tex Civ. App) 54 S.W. 325; *Midland Valley R. Co. v. Bell* (1917) 155 C.C.A. 391, 242 Fed. 803 (Certiorari denied in (1917) 245 U.S. 653, 62 L. Ed. 532, 38 S. Ct. 12).

Another defect in the requested instruction is that no evidence was introduced by defendant as to the tests and procedures ordinarily used by prudently conducted railroads under like circumstances. Therefore it goes without saying that an instruction on the subject would have been error.

POINT VII

THE ISSUES OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE WERE FOR THE JURY: THE TRIAL COURT CORRECTLY AND JUSTLY DENIED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

A brief review of the facts most favorable to plaintiff indicate that this was a case peculiarly for the jury. The evidence revealed that a steam leak had developed in a stuffing box. The leak was caused either by loose packing or by a crack or break in the pipe within the stuffing box. A visual inspection would not reveal which of the two possible causes existed. If the packing within the box was to be replaced a machinist would be assigned to perform the work. If the pipe was to be removed and

inspected, a pipefitter would be given the assignment. Foreman Schenk made a visual inspection and decided that he would take a chance and have Heywood replace the packing. This failure to remove the pipe and make an inspection which would have revealed the exact cause of the leak created the situation out of which liability on the part of defendant arises. Clearly there was an evidentiary basis for a finding that no proper and adequate inspection was made by defendant prior to assigning plaintiff the task of replacing the packing. Likewise, a jury question was presented as to whether the railroad was negligent through its foreman Schenk in not sending a pipefitter to turn off the intermediate valve before requiring plaintiff to replace the packing. Schenk knew when plaintiff was going to perform this work. He was at the steam hammer at the commencement of the work. He knew the situation with respect to the presence or absence of steam in the line, or so a jury could find, and he did not take proper steps to turn the steam out of the line at the intermediate valve. A jury question was likewise presented with respect to whether or not defendant had exercised reasonable care in providing plaintiff with a reasonably safe place to work. Plaintiff was required to mount a ladder approximately ten feet in the air and to work at the stuffing box. The jury could well have found that plaintiff was also required to turn the valve at the stuffing box back on to test the adequacy of the stuffing before moving from the ladder. Not only the physical factors present must be considered in determining

whether a reasonably safe place to work has been provided for plaintiff, but the conduct of his fellow employees and of his supervisors.

Perhaps the leading case under the Federal Employers' Liability Act on the matter of safe place to work is *Bailey v. Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, where Mr. Justice Douglas, speaking for the court stated:

"The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller v. Atlantic Coast Line R. Co.*, supra) as well as issues involving controverted evidence. *Jones v. East Tennessee, V. G. R. Co.*, 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478; *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 235. To withdraw such a question from the jury is to usurp its functions.

See also *Wilkerson v. McCarthy*, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497.

Defendant states at page 44 of its brief :

“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 the steam without having corrected or repaired the defect.”

The issue of plaintiff's contributory negligence in the foregoing regard was properly left to the jury under Instructions No. 9 and 10 and was resolved against defendant. Not content, counsel for defendant now undertakes a reargument of the facts. We detect once again an effort to revive the doctrine of assumption of risk abolished by the 1939 amendment . A late denunciation of this procedure is found in *Thomas v. Union Railway Company*, (6th circuit 1954) 216 F 2d 18.

See also *Atlantic Coast Line R. Co. v. Burkett*, (5th circuit 1951) 192 F 2d 941.

We submit that the issues of negligence and contributory negligence were peculiarly for the jury under the facts of this case and that the trial court correctly and justly denied defendant's motion for a directed verdict.

CONCLUSION

In conclusion we call attention to the following significant statement in *Southern Pacific Company v. Guthrie* (9th circuit 1949) 180 F. 2d 295:

“Perhaps some of the abstract propositions of the defendant's counsel contained in the in-

structions asked for, based on the facts assumed herein, if such facts were conceded, or found in a special verdict, would be technically correct. But a judge is not bound to charge upon assumed facts in the ipsissima verba of counsel, nor to give categorical answers to a juridical catechism based on such assumption. Such a course would often mislead the jury instead of enlightening them, and is calculated rather to involve the case in the meshes of technicality, than to promote the ends of law and justice. It belongs to the judicial office to exercise discretion as to the style and form in which to expound the law and comment upon the facts. If a judge states that law incorrectly, or refuses to state it at all, on a point material to the issue, the party aggrieved will be entitled to a new trial. But when he explains the whole law applicable to the case in hand, as we think was done in this case, he cannot be called upon to express it in the categorical form based upon assumed facts, which counsel choose to present to him."

Plaintiff respectfully submits that the issues were properly and adequately submitted to the jury by the trial court's instructions and that the jury's verdict should be affirmed.

Respectfully submitted,

RAWLINGS, WALLACE,
ROBERTS & BLACK

By WAYNE L. BLACK,
Counsel for Respondent

Received copies of the within Brief
Respondent this day of December, 1956.

Counsel for ~~Plaintiff and Defendant~~
Defendant and Appellant