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ASSAULTS BY FELLOW EMPLOYEES UNDER THE FELA AND THE JONES ACT

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INTRODUCTION

THE Supreme Court of the United States has in recent years taken long strides to liberalize the Federal Employers Liability Act[1] in favor of railroad workers[2] and the Jones Act[3] in favor of seamen.[4] This article does not purport to laud or deplore this trend, nor to speculate whether these laws will, or should, be replaced by a compensation statute.[5] However, contrary to this liberal trend, there is still one area within the FELA and the Jones Act where the law is not as favorable to railroad workers and seamen as it is under other laws involving the same or a similar legal question. The situation here contemplated is that of a railroad worker or seaman who is assaulted by a fellow employee.

We shall first discuss briefly the present tendency of the Supreme Court to liberalize the FELA and the Jones Act and then examine the assault decisions under these statutes. Other possible remedies of seamen and railroad workers for assaults by a fellow worker will also

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1. 35 Stat. 65 (1908), as amended, 45 U.S.C. §§ 51-60 (1952).

2. See, e.g., Ferguson v. St. Louis-San Francisco Ry., 356 U.S. 41 (1958); Honeycutt v. Wabash R.R., 355 U.S. 424 (1958); Stinson v. Atlantic C.L.R.R., 355 U.S. 62 (1958); Gibson v. Thompson, 355 U.S. 18 (1957); Ringhiser v. Chesapeake & O. Ry., 354 U.S. 901 (1957); McBride v. Toledo Terminal R.R., 354 U.S. 517 (1957); Thompson v. Texas & Pac. R.R., 353 U.S. 926 (1957); Deen v. Gulf C. & S.F.R.R., 353 U.S. 925 (1957); Futrelle v. Atlantic C.L.R.R., 353 U.S. 920 (1957); Shaw v. Atlantic C.L.R.R., 353 U.S. 920 (1957); Arnold v. Panhandle & S.F.R.R., 353 U.S. 360 (1957); Webb v. Illinois Cent. R.R., 352 U.S. 512 (1957); Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957). Detailed discussion of these decisions can be found in De Parcq, The Supreme Court and the Federal Employers' Liability Act, 1956-57 Term, 36 Texas L. Rev. 145 (1957); De Parcq, The Supreme Court and the Federal Employers' Liability Act, 1957-58 Term, 31 Rocky Mt. L. Rev. 22 (1958).

3. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

4. See, e.g., Kernan v. American Dredging Co., 355 U.S. 426 (1958), noted in 27 Fordham L. Rev. 112 (1958); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957), which specifically states that the standard of liability under the Jones Act is the same as that under the FELA. See also McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), noted in 27 Fordham L. Rev. 416 (1958).

5. This subject has received a great deal of recent attention. See, e.g., Gardner, Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen, 71 Harv. L. Rev. 438 (1958); Griffith, The Vindication of a National Public Policy Under the Federal Employers' Liability Act, 18 Law & Contemp. Prob. 160 (1953); Miller, FELA Revisited, 6 Catholic U.L. Rev. 158 (1957); Pollack, Workmen's Compensation Injuries and Diseases, 36 Cornell L.Q. 236 (1951); Richter and Forer, Federal Employers' Liability Act—A Real Compensatory Law for Railroad Workers, 36 Cornell L.Q. 203 (1951).

be considered. We shall analyze in turn the assault decisions handed down in compensation cases and those decisions which involve assaults by employees upon non-employees.

After rejecting what appears to be the present rule, a rule will be proffered which, it is submitted, should be adopted by the courts for assaults under the Jones Act and FELA in view of the liberal trend revealed by the prior discussion.

I. The Rogers Case and its Implications

Starting with the now famous case of *Rogers v. Missouri Pac. R.R.*,[6] the Supreme Court has evinced a desire to liberalize the Jones Act and the FELA beyond the already liberal limits to which they had been extended.[7] The significance of the *Rogers* decision is that here the Court openly stated that negligence under the FELA is "significantly different from the ordinary common-law negligence action."[8] Mr. Justice Frankfurter, in this and related cases, has argued,[9] however, that the Supreme Court should not concern itself with determining whether in a given case there is sufficient evidence to go to the jury, while Mr. Justice Harlan dissented[10] in *Rogers* on the ground that under the majority view a mere scintilla of evidence as to causation would be sufficient to allow the case to go to the jury.

One writer[11] has suggested that the effect of the *Rogers* decision is "to admit expressly what has been true in fact that the FELA is not just a negligence statute but is in a position between a negligence act and a workmen's compensation act." While the same author suggests that this liberal approach has been limited to the field of causation and is not

6. 352 U.S. 500 (1957).

7. See, e.g., Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1955); Cahill v. New York, N.H. & H.R.R., 350 U.S. 898 (1955); Schultz v. Pennsylvania R.R., 350 U.S. 523 (1955); Cox v. Roth, 348 U.S. 207 (1955); Stone v. New York C. & S. R.R., 344 U.S. 407 (1953); Urie v. Thompson, 337 U.S. 163 (1949); Wilkerson v. McCarthy, 336 U.S. 53 (1948); Lavender v. Kurn, 327 U.S. 645 (1946); Tiller v. Atlantic C.L.R.R., 323 U.S. 574 (1945); Tennant v. Peoria & P.U. Ry., 321 U.S. 29 (1943); Bailey v. Central Vt. R.R., 319 U.S. 350 (1943); Tiller v. Atlantic C.L.R.R., 318 U.S. 54 (1943). See also Alderman, What the New Supreme Court Has Done to the Old Law of Negligence, 18 Law & Contemp. Prob. 110 (1953); De Parcq, A Decade of Progress Under the Federal Employers' Liability Act, 18 Law & Contemp. Prob. 257 (1953).

8. 352 U.S. at 509-10.

9. This argument is actually contained in Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 524 (1957), a Jones Act case involving a similar question. It is clear that his dissenting opinion in the Ferguson case applies also to the Rogers case. For a favorable analysis, see Note, 69 Harv. L. Rev. 1441 (1956).

10. The dissenting opinion is found in Ferguson v. Moore-McCormack Lines, supra note 9, at 559.

11. 56 Mich. L. Rev. 143, 145 (1957).

applicable to the issue of breach of duty,[12] others have reached a different conclusion.[13]

The decision in *Sinkler v. Missouri Pac. R.R.*[14] would seem to indicate that the liberal attitude of the Supreme Court will also pervade the field of duty. Here the question was whether the defendant railroad was liable for the negligence of an independent contractor. Though the Court could have found for the plaintiff under the common law doctrine of nondelegable duty,[15] it appeared to go out of its way in announcing:

> However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute, an avowed departure from the rules of the common law . . . was a response to the special needs of the railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety. The cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier.[16]

The cases previously cited[17] and three more recent cases[18] in the Supreme Court also demonstrate a strong tendency to allow jury verdicts for the plaintiff to stand even though intermediate courts have felt that under common law principles there was not sufficient evidence to sustain the finding of the jury.

The Seventh Circuit[19] has read into these decisions the conclusion that a FELA verdict for the plaintiff "can be permitted to stand even though based solely on speculation." However, recent cases can also be found where a circuit court has held that there was not sufficient evidence to

12. Ibid. The author relies on the case of Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957), where a directed verdict for the defendant was upheld on the ground that there was not sufficient evidence for a jury question.

13. See, e.g., Note, 69 Harv. L. Rev. 1441 (1956).

14. 356 U.S. 326 (1958). Cf. Ward v. Atlantic C.L.R.R., 265 F.2d 75 (5th Cir. 1959); Moss v. United States, 263 F.2d 615 (5th Cir. 1959); Griffith v. Baltimore & O.R.R., 162 F. Supp. 809 (N.D. Ohio 1958).

15. Restatement, Torts § 428 (1939). See in particular the illustration.

16. 356 U.S. at 329.

17. See note 2 supra.

18. Baker v. Texas & Pac. Ry., 358 U.S. 878 (1958); Deen v. Hickman, 358 U.S. 57 (1958); Moore v. Terminal R.R. Ass'n, 358 U.S. 31 (1958).

19. Gibson v. Joliet & E.R.R., 246 F.2d 834, 837 (7th Cir. 1957). Evidence of a liberal judicial trend is also indicated in Fox v. New York Cent. R.R., 267 F.2d 532 (2d Cir. 1959); Zegan v. Central R.R., 266 F.2d 101 (3d Cir. 1959); Atlantic C.L.R.R. v. Massengill, 264 F.2d 726 (4th Cir. 1959); Seabord A.L.R.R. v. Connor, 261 F.2d 656 (4th Cir. 1958); Kooker v. Pittsburgh & L.E.R.R., 258 F.2d 876 (6th Cir. 1958); Atlantic C.L.R.R. v. Boartfield, 253 F.2d 733 (4th Cir. 1958); Golden v. Reading Co., 253 F.2d 567 (3d Cir. 1957). See also Comment, The Jones Act: The Employer as an Insurer; Constitutional Aspects, 34 Wash. L. Rev. 108 (1959).

go to a jury.[20] Cases under the Jones Act are illustrative of both results.[21]

Fortunately, it is not our purpose to reconcile these cases. One heartily concurs with Judge Dimock's statement in *Nicholson v. Erie R.R.*[22] that the courts will have to develop the new FELA rule case by case just as was done at common law. As Judge Dimock concedes, until there are more precedents, "it shall be difficult to formulate such a rule."[23]

Thus, not only is the Supreme Court liberalizing the FELA, but it does so openly. Against this background, let us compare the law of assaults under the FELA and the Jones Act with the trend in other fields.

II. Assaults Under the FELA and Jones Act

Since the Jones Act incorporates by reference the FELA, it is not surprising to find that in this area the same rules apply to railroad workers and seamen.[24] Both the FELA and the Jones Act involve negligence.[25] Clearly then it should be, and is, the law under both acts that the defendant-employer is held liable where the vicious character of the assaulter was known or should have been known.[26] While one has no quarrel with the decisions generally on this phase of the problem, the problem remains as to those cases where this evidence or other evidence[27] of negligence is missing.

In such a case is the employer liable? If so, under what circumstances? The first problem presented is whether an assault can be

20. See, e.g., Burpo v. Chesapeake & O. Ry., 266 F.2d 512 (6th Cir. 1959); Wergin v. Monessen S.W. Ry., 258 F.2d 806 (3d Cir. 1958); Nicholson v. Erie R.R., 253 F.2d 939 (2d Cir. 1958); Dessi v. Pennsylvania R.R., 251 F.2d 149 (3d Cir. 1958); Milom v. New York Cent. R.R., 248 F.2d 52 (7th Cir. 1957).

21. See, e.g., Gorska v. Pennsylvania R.R., 262 F.2d 198 (2d Cir. 1959); Vareltzis v. Luckenbach S.S. Co., 258 F.2d 78 (2d Cir. 1958); Borgen v. Richfield Oil Corp., 257 F.2d 505 (9th Cir. 1958); Inter-Caribbean Shipping Corp. v. Sentilles, 256 F.2d 156 (5th Cir. 1958).

22. 253 F.2d 939 (2d Cir. 1958).

23. Id. at 941.

24. See note 4 supra and note 36 infra.

25. The FELA sounds solely in negligence. However, as far as the Jones Act is concerned, one must advert to the fact that negligence and unseaworthiness are but alternative grounds of recovery for but a single cause of action. See, e.g., Hoff v. United States, 268 F.2d 646 (10th Cir. 1959). Our present discussion is concerned solely with negligence.

26. See, e.g., Koehler v. Presque-Isle Transp. Co., 141 F.2d 490 (2d Cir. 1944), cert. denied, 322 U.S. 764 (1944); Tatham v. Wabash R.R., 412 Ill. 568, 107 N.E.2d 735 (1952); Asadorian v. New York Cent. R.R., 7 App. Div. 2d 789, 181 N.Y.S.2d 63 (3d Dep't 1958).

27. Examples of other evidence of negligence can be found in Stankiewicz v. United Fruit Corp., 123 F. Supp. 714 (S.D.N.Y. 1954), modified, 229 F.2d 580 (2d Cir. 1956).

negligence within the meaning of these statutes[28] so that in a proper case[29] the employer can be held vicariously liable under the doctrine of respondeat superior.[30]

An affirmative answer as to the Jones Act and the FELA was given in two cases decided on the same day.[31] In deciding *Jamison v. Encarnacion*,[32] the Court significantly declared: "While the assault of which the plaintiff complains was in excess of the authority conferred by the employer upon the foreman, it was committed in the course of the discharge of his duties and in furtherance of the work of the employer's business."[33] This language was apparently used to distinguish the *Jamison* case from *Davis v. Green*[34] where an assault by an inferior upon a superior was held not to fall within the doctrine of respondeat superior, although the assault arose in and out of the work.[35]

There is certainly in these earlier cases the suggestion that an employer is liable under the doctrine of respondeat superior only where the assault is committed by a superior upon an inferior, provided the assault was related to the employment. Some later cases have concluded that this is indeed the law,[36] a proposition simply stated in *Lykes Bros. S.S. Co. v. Grubaugh*[37] as follows:

[T]he employer may be liable under the Jones Act only when the assault is com-

28. In other words, is the term "negligence" broad enough to include an assault?

29. These words are utilized to indicate that not all assaults come under the doctrine of respondeat superior.

30. "He (the master) may of course be liable on the basis of any negligence of his own in selecting or dealing with the servant, or for acts which he has authorized or ratified. But his vicarious liability, beyond any conduct of his own, extends to the tortious conduct of the servant within the 'scope of his employment'." Prosser, Torts § 63, at 351-52 (2d ed. 1955). It is the latter type of liability that we are now discussing.

31. Jamison v. Encarnacion, 281 U.S. 635 (1930); Alpha S.S. Corp. v. Cain, 281 U.S. 642 (1930). Though both decisions involved seamen, it is clear that the Court feels that the decisions apply equally well to railroad workers.

32. 281 U.S. 635 (1930).

33. Id. at 641. (Emphasis added.)

34. 260 U.S. 349 (1922).

35. "Whatever may be the law of Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey—in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on." 260 U.S. at 351-52.

36. The cases are collected in Annot., 33 A.L.R.2d 1295 (1954). In addition, see Sheaf v. Minneapolis, St. P. & S.S.M.R.R., 162 F.2d 110 (8th Cir. 1947) (which suggests that a more stringent rule should apply in FELA cases than in Jones Act cases); Ochsrider v. Reading Co., 172 F. Supp. 830 (E.D. Pa. 1959); Lore v. Baltimore & O.R.R., 190 N.Y.S.2d 506 (App. Div. 2d Dep't 1959). Cf. Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954).

37. 128 F.2d 387 (5th Cir. 1942), modified on other grounds, 130 F.2d 25 (5th Cir. 1942).

mitted by one having authority over the person assaulted and then only when it is committed in the course of the conduct of the master's business. In each of these cases the assault was by a superior officer upon a subordinate employee when the assailant had the power and authority to direct, control and discipline. No case has held a steamship company liable for an assault committed by a subordinate employee upon his superior or by the head of one department upon the head or an employee of another department over whom the assailant has no authority of direction or control.[38]

However, there are also decisions to the contrary.[39] One need not here determine which cases do represent the law. But if the law is that enunciated above in the *Lykes* case, then it should be changed, a proposition to be subsequently examined in more detail.[40]

III. Other Possible Remedies Available to Seamen and Railroad Workers

The purpose of entering upon this particular aspect of our discussion at all is to forestall the argument that seamen and railroad workers have presently available adequate remedies for assaults without resorting to the FELA and Jones Act. A brief examination of these remedies will demonstrate, nonetheless, that this possible contention is in fact untenable.

A. *Seamen*

It is elementary learning that in addition to his action under the Jones Act, an injured seaman has possible rights under the maritime doctrines of maintenance and cure and unseaworthiness.[41] These rights are not in fact adequate substitutes for a sound rule of respondeat superior under the statutes in question.[42]

1. Maintenance and Cure

The seaman's right of maintenance and cure is neither contractual or delictual, but arises as an incident of his seaman's status.[43] Under

38. 128 F.2d at 391.

39. See, e.g., Gibson v. Kennedy, 23 N.J. 150, 158, 128 A.2d 480, 485 (1957): "But none of the decisions there assembled suggests that the employer is liable only if the attacker had the right to direct, or that the victim is barred merely because his authority was the greater." Cf. Steeley v. Kurn, 347 Mo. 74, 146 S.W.2d 578 (1940), rev'd, 313 U.S. 545 (1941); Jester v. Southern Ry., 204 S.C. 395, 29 S.E.2d 768, cert. denied, 323 U.S. 716 (1944).

40. See pp. 460-62.

41. "When a seaman is injured he has three means of recovery against his employer: (1) Maintenance and cure, (2) negligence under the Jones Act, and (3) unseaworthiness." McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958). We will not discuss here the seaman's right to wages.

42. A recent treatment of these matters can be found in Stumberg, The Jones Act. Remedies of Seamen, 17 Ohio St. L.J. 484 (1956).

43. Waterman S.S. Co. v. Jones, 318 U.S. 724 (1943).

American admiralty law, any seaman injured or taken ill while in the service of his ship is absolutely entitled to compensation for expenses of maintenance and cure[44] "until the point of maximum cure is attained."[45] The phrase "while in service of his ship" has come to signify little more than while one is employed as a seaman, whether on duty or on shore,[46] or whether the disability is service-connected or not.[47]

As in workmen's compensation, no fault on the part of the employer is required.[48] As has been observed: "Negligence on the seaman's part has no relevance to the collection of maintenance and cure in general, although recovery has occasionally been denied where the seaman was guilty of gross negligence or wilful misconduct, or had wilfully concealed a latent illness or injury."[49] In the case of assaults, it appears that a seaman may recover maintenance and cure if he is not the aggressor.[50] He is probably guilty of misconduct where he is the aggressor.[51]

Moreover, it should be pointed out that the "courts take cognizance of the marine hospital where seamen may be treated at minimum expense, in some cases without expense, and they limit recovery to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service."[52]

It would seem clear therefore that benefits recoverable under main-

44. The statement that a seaman is entitled to maintenance means that an injured seaman is to be maintained during his disability in a manner comparable to that which he receives at sea. The statement that he is entitled to cure means that he is entitled to care including nursing and medical attention. Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938); 2 Norris, The Law of Seamen §§ 539-40 (1952). "The amount allowable for maintenance varies according to circumstances. . . . Probably the average would be five or six dollars a day." Stumberg, supra note 42, at 485 n.18.

45. Stern, Duration of Seamen's Maintenance & Cure Rights, 8 Clev.-Mar. L. Rev. 275, 276 (1959); Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938). See Farrell v. United States, 336 U.S. 511 (1949); Comment, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 Yale L.J. 243, 247 (1947).

46. Warren v. United States, 340 U.S. 523 (1951).

47. Smith v. United States, 167 F.2d 550 (4th Cir. 1948).

48. See, e.g., Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932); Seville v. United States, 163 F.2d 296 (9th Cir. 1947).

49. Comment, 57 Yale L.J. 243, 248-49 (1947). Robinson, Admiralty § 36 (1939), reports that this quantum of fault is seldom found.

50. See Gaynor v. United States, 90 F. Supp. 751 (E.D. Pa. 1950); Nowery v. Smith, 69 F. Supp. 755 (E.D. Pa. 1946), aff'd, 161 F.2d 732 (3d Cir. 1947).

51. "If the libellant-appellant were the aggressor in the fracas he had with Captain Neville, and then if Captain Neville used no more force than was necessary to repel the assault upon him, Watson can recover from the defendant neither damages for his injuries, nor his maintenance and cure, for his injuries were caused by his own misconduct." Watson v. Joshua Hendy Corp., 245 F.2d 463 (2d Cir. 1957), affirming 142 F. Supp. 335 (S.D.N.Y. 1956). Cf. Connolly v. Farrell Lines, Inc., 268 F.2d 653 (1st Cir. 1959).

52. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 531 (1938).

tenance and cure are "at best inadequate"[53] and certainly no substitute for compensatory damages which would be given if a proper rule of respondeat superior were applied to assault cases by means of the statutes under discussion.[54]

2. Unseaworthiness

The common law entitled a seaman to indemnity for injuries suffered as a consequence of the unseaworthiness of the ship.[55] Unseaworthiness may exist even though there is no negligence on the part of the employer.[56]

Until recently, an assaulted seaman was not allowed a recovery under the doctrine of unseaworthiness.[57] However, in *Boudoin v. Lykes Bros. S.S. Co.*,[58] the Supreme Court, resolving a conflict among the federal circuits,[59] held that a seaman assaulted by a co-worker could recover under the doctrine of unseaworthiness where the guilty seaman was not "equal in disposition to the ordinary men of that calling."[60] This ruling is not a panacea for the assaulted seaman, for it does not comprehend all assault cases. That this is so can be seen not only from the *Boudoin* case but from other decisions as well.[61]

This extension of the doctrine of unseaworthiness, uncertain as it is, can hardly be deemed a reason, or even an excuse, for not overturning the assault decisions under the Jones Act previously discussed.

Of course, it could be urged, since the seamen could be protected by a liberalization of the present doctrine of unseaworthiness, the change here

53. Comment, 57 Yale L.J. 243, 251 (1947).

54. See note 66 infra.

55. Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918). For a general discussion of unseaworthiness, see Note, A Decade in the Development of the Warranty of Seaworthiness, 32 N.Y.U.L. Rev. 173 (1957).

56. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922); Mitchell v. Trawler Racer, 265 F.2d 426 (1st Cir. 1959); The H. A. Scandrett, 87 F.2d 708 (2d Cir. 1937). However, as pointed out, note 25 supra, there is authority for the proposition that negligence and unseaworthiness are but alternative grounds of recovery for a single cause of action. See, e.g., Hoff v. United States, 268 F.2d 646 (10th Cir., 1959).

57. 68 Harv. L. Rev. 379 (1954).

58. 348 U.S. 336 (1955).

59. The Supreme Court, in the Boudoin case, supra note 58, reversed the circuit court of appeals decision, 211 F.2d 618 (5th Cir. 1954), and agreed with the second circuit decision in Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952). See also Note, 100 U. Pa. L. Rev. 1045 (1952). Cf. The Rolph, 299 Fed. 52 (9th Cir. 1924).

60. 348 U.S. at 340.

61. See, e.g., Connolly v. Farrell Lines, Inc., 268 F.2d 653 (1st Cir. 1959); Stankiewicz v. United Fruit S.S. Corp., 229 F.2d 580 (2d Cir. 1956), reversing 123 F. Supp. 714 (S.D.N.Y. 1954); Jones v. Lykes Bros. S.S. Co., 204 F.2d 815 (2d Cir.), cert. denied, 346 U.S. 857 (1953); Codrington v. United States Lines Co., 168 F. Supp. 261 (S.D.N.Y. 1958).

advocated is unnecessary. The simple answer is that even if the doctrine of unseaworthiness is vastly expanded, this will not in any way remedy the plight of the railroad worker. In a word, if the rule is changed for the railroad worker, the fact that a seaman has another string to his bow should not rule out a similar change in relation to negligence under the Jones Act.

B. *Railroad Workers*

In addition to actions under the FELA, railroad workers have possible remedies[62] under the Railroad Unemployment Insurance Act[63] and the Safety Appliance Act,[64] neither of which has any real relevancy to the subject under consideration. The first is nothing more than a combination unemployment insurance and disability benefit law, while the Safety Appliance Act provides for liability, without fault, of a carrier to an employee where certain appliances do not function properly.[65] Since this latter statute concerns appliances, it can have no application to an assault.

These remedies, therefore, are inadequate[66] substitutes for the recovery of compensatory damages which a proper rule of respondeat superior would provide to seamen and particularly to railroad workers.

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62. The body of the text does not cover the possibility of a railroad worker being covered under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1952). Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, rehearing denied, 345 U.S. 913 (1953); Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128 (1930). Of course, it is also possible for a railroad worker to be a seaman, in which event the Jones Act will apply to him.

63. 45 U.S.C. §§ 352-67 (1952).

64. 45 U.S.C. §§ 1-16 (1952). In the same category is the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1952).

65. See, e.g., Johnson v. Chicago & G.W. Ry., 242 Minn. 130, 64 N.W.2d 372 (1954). The trend toward liberalization of the FELA is also discernible under the Safety Appliance Act. See, e.g., Baltimore & O.R.R. v. Jackson, 353 U.S. 325 (1957); Affelder v. New York, C. & St. L.R.R., 339 U.S. 96 (1950); Carter v Atlanta & St. A.B.R.R., 338 U.S. 430 (1949); Louiselle & Anderson, The Safety Appliance Act and the FELA: A Plea for Clarification, 18 Law & Contemp. Prob. 281 (1953); McCoid, The Federal Railroad Safety Acts and the FELA: A Comparison, 17 Ohio St. L.J. 494 (1956).

66. It might be argued of course that railroad workers and seamen as a class have greater rights than ordinary employees because the acts under discussion allow them common law damages against their employers in addition to the other remedies indicated. But this is beside the point. Congress in its discretion has seen fit to grant these employees this right. The right, thus having been given, should not be curtailed by decisions not consonant with present day thinking or by the fact that the other remedies referred to above do exist.

IV. Comparison of FELA and Jones Act Assault Decisions with Assault Compensation Cases and Those Involving Assaults by Employees Upon Third Persons

A. *Assaults under the Compensation Law*

The early compensation cases closely parallel the approach of the FELA and Jones Act assault decisions in determining whether an injury caused by the assault of a co-employee was one " 'arising out of' and 'in the course of' the employment."[67] It was the rule that an award would be made only where a superior employee assaulted an inferior worker as a result of carrying out the employer's orders or where the employer had knowingly retained a quarrelsome employee.[68] This result can undoubtedly be traced to the fact that "the early judges trained in the common law . . . found it difficult to cast out much of their common law learning."[69] This "common law learning" undoubtedly included the "fellow servant rule"[70] and the exception in relation to a vice principal.[71]

In time, however, the primary question was whether there was a work-induced assault or a personal assault so that "today, if the assault can reasonably be attributed in whole or in part to the nature, conditions, obligations or incidents of the employment, it is regarded as a work-induced assault, not as a personal matter."[72]

The same pattern can be traced in the compensation cases with relation to the concept of the aggressor. As might be expected, the earlier cases denied the aggressor a recovery partially on the theory that he was not furthering the master's business.[73] Some later cases, however, recognized that aggression of itself should not prevent compensation unless it

67. This is the typical statutory language. See Larson, Workmen's Compensation Law § 6:10, at 41 (1952).

68. See, e.g., Metropolitan Redwood Lumber Co. v. Industrial Acc. Comm'n, 41 Cal. App. 131, 182 Pac. 315 (1919); Ura v. Morris & Co., 107 Neb. 411, 186 N.W. 345 (1922).

69. Horovitz, Assaults and Horseplay Under Workmen's Compensation Laws, 41 Ill. L. Rev. 311 (1946).

70. "The rule that the employer was not liable for injuries caused solely by the negligence of a fellow servant first appeared in England in 1837, and almost immediately afterward in the United States, where it was stated elaborately in a well known opinion of Chief Justice Shaw of Massachusetts in Farwell v. Boston & Worcester Railway." Prosser, op. cit. supra note 30, § 68, at 380.

71. "The most important restriction was that generally accepted in the United States that the fellow servant rule did not apply to the negligence of a vice-principal." Prosser, op. cit. supra note 30, § 68, at 381.

72. Horovitz, supra note 69, at 335.

73. See, e.g., Martin v. Sloss-Sheffield Steel & Iron Co., 216 Ala. 500, 113 So. 578 (1927); Pierce v. Boyer-Van Kuran Lumber & Coal Co., 99 Neb. 321, 156 N.W. 509 (1916).

comes within the purview of the legislative defense of wilful misconduct.[74]

One writer has thus summarized the situation in the following manner:

> It is heartening to find that a number of courageous courts have recently reviewed the reasoning behind some of their old decisions as to 'arising out of the employment' and finding the reasoning faulty, they have openly and unqualifiedly overruled the earlier decisions. . . .[75] But it will take time and courage for the majority of courts who have already fallen into the habit of using the aggressor-theory as the defense to a claim, to reverse themselves and declare that such a defense is a court-made one, and not justified by the specific defenses given employers by the various legislatures. And the aggressor-theory must be destroyed if the broad, modern conception of "arising out of the employment" is to be given its proper scope.[76]

That the trend towards abolishing the aggressor doctrine in compensation cases continues is indicated by the cases cited in Professor Larson's *Workmen's Compensation Law*.[77] There has been a similar liberal trend toward allowing compensation in the case of an assault by a stranger (third party) upon an employee.[78]

B. *Assaults by Employees Upon Third Persons*

An extended discussion of a carrier's[79] liability for the assaults of its employees upon passengers would not be germane to this discussion, because the carrier ordinarily is held liable for such an assault whether or not the employee was acting in the course of his employment.[80] This liability is apparently predicated on the theory that the carrier owes a contractual duty to the passenger which is breached by an assault on the latter by an employee.[81] Where the carrier's employee assaults a

74. See, e.g., Hartford Acc. & Indem. Co. v. Cardillo, 112 F.2d 11 (D.C. Cir.), cert. denied, 310 U.S. 649 (1940); Milton v. T. J. Moss Tie Co., 20 So.2d 570 (La. 1944).

75. Horovitz, supra note 69, at 361.

76. Id. at 364-65.

77. Larson, op. cit. supra note 67, § 11.15(c), at 123. New York has now reached this position with the decision in Commissioner v. Bronx Hosp., 276 App. Div. 703, 97 N.Y.S.2d 120 (3d Dep't 1950).

78. Horovitz, supra note 69, at 327-28; Larson, op. cit. supra note 67, § 11.11, at 110.

79. The subject of assaults by a third party upon an employee of the railroad is not deemed relevant to this discussion, because the question usually involved in these cases is not so much the question of whether the employee was within the scope of his employment but rather whether the employer had actual or constructive notice of the danger of assault by third parties and did nothing about it. The leading case is Lillie v. Thompson, 332 U.S. 459 (1947).

80. Pullman Co. v. Hall, 46 F.2d 399 (4th Cir. 1931).

81. Prosser, op. cit. supra note 30, § 63. Some of the cases are collected in Annots., 60 A.L.R.2d 1101 (1958); 53 A.L.R.2d 720 (1957). Though some of the cases reported there turn on the question of scope of employment the vast majority of decisions are based on the contract of carriage.

non-passenger, the liability of the carrier is the same as that of any other employer for an assault committed by an employee upon a third party.[82]

What is the law relating to the liability of the master for an assault by his employee upon a third person? Here again we can put to one side those cases where the employer is liable for the assaults because of his own wrongdoing, as, for example, where he retains an employee with known vicious propensities.[83] As before, we are concerned with the vicarious liability of the employer, a broad subject[84] about which no detailed coverage is intended or necessary here. However, two observations can be made. One discerns a trend here toward liberality in holding for the plaintiff.[85] The test used to determine liability is in no way dependent upon whether the employee is a supervisory, or an inferior, employee. According to the weight of authority, the test of liability, generally speaking,[86] is whether the employee, when he committed the assault, "was acting in the prosecution of the employer's business, and within the scope of his authority, or had stepped aside from that business and done an individual wrong."[87] Although these are ordinary questions of fact,[88] they may also be questions of law.[89]

V. Reasons for Rejecting the Lykes Rule and the Proposed Substitute

The *Lykes* rule[90] should be rejected because it applies "the fellow

82. The term "third party" is used to indicate that the assault is upon a non-employee. If the assault is made upon an employee, the problem would involve (except in the case of FELA and the Jones Act) compensation.

83. This and other situations where the employer is guilty of wrongdoing on his own part are listed in Annot., 34 A.L.R.2d 376 (1954).

84. For a more detailed coverage, see Comment, 24 Tenn. L. Rev. 241 (1956).

85. See, e.g., 35 Am. Jur. Master and Servant §§ 560, 573 (1941); Note, 4 Wayne L. Rev. 172 (1958).

86. These words are added to show that there are many facets to this problem, for example, whether the assault was closely connected with the duties of employment, whether the employee was acting in furtherance of the master's business, the motivation for the assault, etc. These factors and relevant cases are set forth in Annot., 34 A.L.R.2d 376 (1954).

87. 35 Am. Jur. Master and Servant § 561, at 995 (1941).

88. Ferson, Agency § 32 (1954).

89. See, e.g., Sauter v. New York Tribune, 305 N.Y. 442, 113 N.E.2d 790 (1953). Cf. Sims v. Bergamo, 3 N.Y.2d 531, 169 N.E.2d 449 (1957). "The question whether or not the act done is so different from the act authorized that it is not within the scope of the employment is decided by the court if the answer is clearly indicated; otherwise, it is decided by the jury." Restatement (Second), Agency § 228(d) (1958).

90. The term "Lykes rule" is used here to refer to those decisions which appear to imply that under the Jones Act and the FELA an employee can recover for an assault of a co-employee only if the assault is perpetrated by a superior. It is here assumed that these cases represent the law, rather than those cases cited in note 39 supra.

servant rule"[91] to assault cases when it is otherwise generally recognized that this rule has no application to the acts under discussion.[92] Furthermore, the rule is anachronistic not only in the light of the present liberal trend in assault compensation cases[93] and the law relating to assaults by employees upon third parties,[94] but also because of recent decisions under the FELA and Jones Act discussed earlier[95] and those extending coverage both under the FELA[96] and the Jones Act.[97] Finally, as has been demonstrated, the other remedies available are not adequate substitutes for a sound rule of respondeat superior.[98]

VI. Proposed Rule for Assault Cases Under the FELA and the Jones Act

Having thus concluded that the test presently employed in assault cases under the FELA and the Jones Act is anachronistic, the question remains as to which test should be utilized to determine whether an assault is within the scope of employment. The Supreme Court might rule that it is sufficient that the assault arises out of the work matter.[99] If this test be regarded as more appropriate to a compensation statute, the Court should at least follow those rules which govern assaults by employees upon third parties, and in the ordinary case[100] leave to the jury the question of whether the servant acted "within the scope of his employment and in the execution of his service."[101]

As to which rules should govern the situation where the plaintiff is the

91. "A master who has performed his duty of care in the selection of proper servants . . . is not liable to a servant for an assault by a fellow servant not employed to superintend or to guard; nor for an assault by a superintendent if not committed within the scope of his employment." Restatement, Agency § 487, comment b (1933); Restatement (Second), Agency § 487, comment b (1958).

92. See, e.g., Chesapeake & O. Ry. v. De Atley, 241 U.S. 310 (1916).

93. See pp. 458-59.

94. See pp. 459-60.

95. See pp. 452-54.

96. See, e.g., Reed v. Pennsylvania R.R., 351 U.S. 502 (1956); Southern Pac. Co. v. Gileo, 351 U.S. 493 (1956); Morris v. Pennsylvania R.R., 187 F.2d 837 (2d Cir. 1951); Mostyn v. Delaware L. & W.R.R., 160 F.2d 15 (2d Cir. 1947); Sassaman v. Pennsylvania R.R., 144 F.2d 950 (3rd Cir. 1944).

97. See, e.g., Butler v. Whiteman, 356 U.S. 271 (1958); Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958); Senko v. La Cross Dredging, 352 U.S. 370 (1957); Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952). Cf. Braen v. Pfeifer Oil Transp. Co., 263 F.2d 147 (2d Cir.), cert. granted, 359 U.S. 952 (1959).

98. See pp. 454-57.

99. See Horovitz, supra note 69, at 335.

100. Sometimes this may be a question of law. See note 89 supra.

101. Ferson, op. cit. supra note 88, § 32.

aggressor in a work-induced assault,[102] it seems clear that so long as the plaintiff is the aggressor, and the other employee uses reasonable force to defend himself, the employer has violated no duty owed to the plaintiff.[103] However, where the assaulted employee uses excessive force, or in turn becomes the aggressor, then the plaintiff should be allowed a recovery[104] diminished to the extent that his wrongdoing contributed to his injury.[105]

The Supreme Court should repudiate the anachronistic *Lykes* doctrine and substitute a doctrine more consonant with the prevailing liberal interpretation of the Jones Act and the FELA and other acts involving similar legal problems.

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102. See pp. 458-59 concerning the aggressor doctrine in compensation cases and notes 50-51 supra concerning aggression under maintenance and cure cases.

103. When this happens it would not appear that any duty owing to the plaintiff had been violated. Watson v. Joshua Hendy Corp., 245 F.2d 463 (2d Cir. 1957).

104. See, e.g., Watson v. The Letitia Lykes, 135 F. Supp. 933 (S.D. Cal. 1955); Campbell v. Waterman S.S. Corp., 110 F. Supp. 146 (E.D. Pa. 1952).

105. Both the FELA and the Jones Act employ the doctrine of comparative negligence. 35 Stat. 66 (1908), 45 U.S.C. § 53 (1954); 38 Stat. 1185 (1920), as amended, 46 U.S.C. § 688 (1958).