Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 3 | Issue 5 Article 2

2-1928

Assumed Risk Under the Federal Employment Liability Act

John D. Welman

ASSUMED RISK UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT

JOHN D. WELMAN*

Two section men engaged in interstate commerce are carrying a tie and one negligently drops his end and injures the other. Or, two engine wipers are wiping an engine engaged in interstate commerce and one negligently wipes dust into the eye of the other and injures it.

Query 1. Does the Federal Employers' Liability Act create a liability against the railway company for such negligence?

Query 2. If that act creates a liability, does it also create a defense, or permit the defense of assumed risk to remain so as to be a complete bar to the liability or right of action created?

Congress determined to have uniform rights of action for the injury and death of the employees of railroad carriers engaged in interstate commerce, and had exclusive jurisdiction when it concluded to cover that field. The United States had no death statute, nor any common law covering those matters. It had no common law at all. It was therefore necessary to create a right of action for an injury as well as for a death, and this it could do only by a statute. Both rights of action would have to be statutory. This it did and made "negligence the requisite or basis of each action."[1]

See biographical note, p. 379.

[1] Justice Pitney in *Seaboard Co. v. Horton*, 233 U. S. 492, 501, 58 L. ed. 1062 (1913), calls it the *right of action*, and that it is created by the first section of the act.

"By its first section a right of action is conferred (under the conditions specified) for injury or death of the employee resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, etc."

Again he says as to this clause (233 U. S. 492, 501):

"The one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee or plaintiff."

In *Chicago R. Co. v. Ward*, 252 U. S. 18, 22, 64 L. ed. 430 (1919), in speaking of the act (without specific reference to Section 1 creating the liability), Justice Day says:

"The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of the assumption of risk."

As there had been and were certain complete defenses to the common law action for a negligent injury, Congress undertook and did deal with those defenses in Sections 3 and 4. Contributory negligence had been a full defense under the common law. Section 3 provides that it shall not be a full defense or bar a recovery, but only diminish the damages and further that there can be no contributory negligence where the violation of a safety appliance act caused or contributed to the cause of the injury.[2]

The other important defense Congress put in section 4 as follows:

"* * * such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."[3]

Congress thereby eliminated only one item from the common law assumption of risks. The Supreme Court says in the *Seaboard-Horton* case:[4]

"that in all other cases such assumption of risk shall have its former effect as a complete bar to the action."

"Bar to the action"—What action is the Supreme Court talking about? The right of action created by Section 1.[5] The class of risks assumed are not mentioned or distinguished in Section 4, but they are those assumed under the common law. The Su-

---

[2] "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee (35 Stat. 66)." (Act April 22, 1908, c. 149, sec. 3.)

[3] "In an action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee (35 Stat. 66)." (Act April 22, 1908, c. 149, sec. 4.)

[4] 233 U. S. 492, 503 (1913).

preme Court says that it is evident that the legislative intent of Congress was to keep alive or enact all other assumed risks as defenses. One of the other assumed risks thus kept alive, and as a complete bar to the action is, that an employee assumed the risk of the negligence of his fellow-servant (not a vice-principal).

But section 1 creates a liability for the negligence of a fellow-servant "any employee". How, then, can it be that Section 4 can frame a complete defense to that liability? Why create a liability for the negligence of any employee if it is to be offset or nullified by creating a complete defense in a subsequent section of the same act? Is it possible that a complaint, petition or declaration might aver a good cause of action under Section 1 of the Act, and the facts stated be admitted as absolutely true, and yet there can be a complete bar and defense to the action under section 4? Why build the right of action only to be torn down?

Under the commerce clause of the constitution Congress has exclusive jurisdiction over interstate commerce when it enters that field of legislation. Having determined so to do, it had to adopt a statutory right of action and exclude all common law actions as well as statutory actions in the various states. The common law of the various states did not give a right of action for an injury caused by the negligence of a fellow-servant (not vice-principal). That is a general statement. In some states it seems there was an action for negligence of a fellow servant, but that the plaintiff assumed the risk of such negligence was a pure defense. In Indiana plaintiff had to plead, and therefore prove, that he did not assume the risk. That burden was on plaintiff in some other states, while in Federal Courts assumed risk has been regarded as pure defense. A similar situation prevailed as to contributory negligence. It required a statute in Indiana to put the burden of proving contributory negligence upon the defendant. And that burden now upon the

[5] "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for

defendant applies only in personal injury and death. As to property that burden in Indiana is still upon the plaintiff. The Federal Court sitting in Indiana has always regarded contributory negligence and assumed risk as defenses and burdens upon defendant.

The courts of many states called certain fellow servants "vice-principals" and thereby created a liability for his negligence, or at least did not permit the defense of assumed risk until knowledge of the danger. The legislatures of many states passed acts creating a liability for negligence of certain servants for which there was no liability under the common law on account of assumed risk. In many states there were but few fellow servants left. Other state acts destroyed *in toto* contributory negligence or assumed risk, or both as defenses. Most of the states had passed Compensation Acts creating a liability for every injury and without regard to negligence. The doctrine of last clear chance prevailed in most courts and to grant recovery under such doctrine either destroyed or excused contributory negligence. Some states had statutes creating presumptions of negligence when struck by a car or engine.

Out of all of this chaos Congress had to create a *statutory* right of action. Why then should not Congress in the most practical manner create a right of action creating liability for the negligence of any and every employee of the carrier, and then in the same act take care of the former defenses as it saw best to do? Congress had to create a statutory right of action. It therefore had to create a statutory defense. Otherwise there would have been no defense, unless there were no negligence. And where negligence existed, there would be no defense whatever.

Would it be strange to say that there can be no last clear chance under the Federal Act? Under last clear chance contributory negligence of the plaintiff "vanishes", "disappears", or is "excused" before the special duty or last clear chance arises. Under the Federal Act when contributory negligence is present it remains so for the purpose of diminishing damages. Last clear chance and contributory negligence can not exist at the same time.

---

such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment (35 Stat. 65)." (Act April 22, 1908, c. 149, sec. 1.)

Under the Federal Act, does a servant assume the risk of the negligence of his fellow servant? Or is the law on that question the same since the Federal Act was passed as it was before it was passed? By "fellow-servant" is meant those of the same grade as distinguished from a vice-principal or a servant performing some duty of the master, or duty upon the master fixed by law that he could not delegate to a servant. The common law of Indiana is well settled.[6]

In passing upon the Federal Act the Supreme Court says in *Seaboard v. Horton*:[7]

---

[6] "When the contract of service is entered into the master impliedly contracts that he will exercise ordinary care in the selection and retention of employee's co-servants, and such employee impliedly contracts that, this requirement complied with, he will assume the risks of the service, the perils of injury from the negligence of such co-servants." *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 695 (1903).

The common law of the Federal Courts is well put in *Central R. Co. v. Keegan*, 160 U. S. 259, 264, 40 L. ed. 418 (1895).

"It was further declared that 'the danger from the negligence of one specially in charge of the particular work was as obvious and as great as from that of those who were simply co-workers with him in it; each is equally with the other an ordinary risk of the employment, which the employee assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employee with fit and careful co-workers, and the furnishing to such employee of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employee turn rather on the character of the alleged negligent act than on the relations of the employees to each other, so that if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor. * * *

"He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow-servants."

[7] In the lower court the allegation of negligence is "negligence of the defendant company in that the engineman and fireman (the employees of the latter in operating a train which ran down and killed decedent) failed to keep a reasonable lookout for decedent just before he was killed."

The evidence showed that neither the engineer nor fireman was keeping a lookout; that if they had done so the accident could have been averted.

"Some employments are necessarily fraught with danger to the workmen,—danger that must be and is confronted in a line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing wages. And a workman of mature years is taken to assume the risk of this sort, whether he is actually aware of them or not.

"But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or dis-repair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have discovered them and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court."

Is it not clear that all servants assume the risks of the dangers of the "occupation" or "employment"? The risks of the occupation are assumed whether the servant has knowledge of them or not, "But risks of another sort" (not of the occupation and arising from the negligence of the master are not assumed until the servant has actual or constructive knowledge. The same principles are announced in *C. & O. v. DeAtley, supra.*

The Supreme Court of Virginia held that as decedent was given permission to be where he was the company owed him a duty to keep a reasonable lookout, and that the ignorance of the engineer and fireman of decedent's presence was no defense. Decedent was a track inspector using a three-wheel velocipede in his line of duty. Although more than ninety per cent of writs of certiorari are denied, it was granted in this case, and for a particular purpose, perhaps.

Justice Holmes says:

"The deceased was an experienced section foreman upon defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used a three-wheeled velocipede that fitted the rails and was propelled by the feet of the user. He had obtained from his immediate superior, the supervisor of track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at seven in the morning and at half past six on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed. For reasons that the jury found insufficient to excuse the omissions the engineer and fireman of the train were not on the lookout, and the question raised is whether as toward the deceased the defendant owed a duty to keep a lookout or whether on the other hand the deceased took the risk.

"If the accident had happened an hour later when the deceased was inspecting the track, we think there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way."

The assumed risk of the occupation is a complete bar to the right of action. The risks caused by the negligence of the master is a complete bar if they have been discovered and appreciated by the servant.

What is the risk of the "occupation" which is always assumed? Does that include the two servants carrying a tie or wiping an engine? Under the common law the duty of the master was to exercise ordinary care in furnishing a reasonably safe place for work. Even then some employments were necessarily fraught with more danger to workman than other employments. His further duty was to exercise ordinary care in the selection and retention of his servants. The master impliedly contracted with his servant to exercise such care and the servant impliedly contracted to assume the risks of the place, and the risks of the negligence of the co-servants selected by the exercise of ordinary care. A servant did not assume the negligence of another servant not selected by ordinary care, or of an incompetent one until after such incompetency was known. There was always a liability for the failure of the master to exercise ordinary care either in the selection and retention of his co-servants, or in furnishing a reasonably safe place to work. Therefore, the Risk of the Occupation covers only the business and place furnished by the master in the exercise of ordinary care together with the servants selected and retained by such care.

This is a fair statement of the rule, and the Federal Courts, as well as most others, adopted the fellow servant rule of the *Farwell v. Boston case*, 4 Metc. 49, whereby the servant impliedly contracted to assume the risks of the service or employment, including the negligence of his fellow-servant in the same employment. The servants charged with the master's duty were not fellow servants. They were generally known in the law as vice-principals.

Carrying in mind the fact that the risks of the occupation are assumed, whether the servant was aware of them or not, it is plain that there was no liability for the negligence of a servant although the injured servant had no knowledge of such negligence, or no opportunity of knowing of such negligence before the injury.

As against this statement of the law there is apparent conflict. Justice Pitney in *C. & O. v. DeAtley*, in speaking of section 1 says that section

"abrogated the common law rule known as the fellow servant doctrine by placing the negligence of a co-employee upon the same basis as the negligence of the employer. At the same time, in saving the defense of assumption of risk * * * *, the act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employers own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk."[8]

As to the master's negligence assumed risk is not a bar until the servant has actual or constructive notice of such. The facts in that case show that Justice Pitney was dealing with the negligence of an engineer (a vice-principal) who controlled the speed of the train and had authority to order and control DeAtley's movements. Was Justice Pitney dealing only with the facts in that case, or was he intentionally saying in effect that when a section man negligently drops his end of the tie and injures the man carrying the other end, that the dropping of the tie is the negligence of the master? In such instance there could be no knowledge of such negligent dropping until after the happening and therefore no assumption of risk, and therefore no defense. It should be noted, that in our opinion, all of the cases of liability so far decided by the Supreme Court involved the question of a vice-principal, for whose negligence there is a liability under the principles of the commonlaw (used in construing the Federal Act), where assumed risk does not arise until there is knowledge. Was Justice Pitney intentionally destroying the assumption of the risk of a fellow servant's negligence as applied in the risk of "occupation" and broadly saying the negligence of no servant is assumed until there is knowledge? In his opinion in the *Seaboard-Horton* case Justice Pitney recognizes the risks of "employments" and then says,—"But risks of another sort * * * may arise out of the failure of the employer to exercise due care with respect to providing a safe place to work and safe appliances for the work." This division of risks is somewhat strange as the "place" was always included in the risk of the employment, and when the master had exercised due care to furnish the place he was not, and could not, be said to be negligent. After such due care the servant assumed the dangers—the dangers existing after due care had been exercised by the master in furnishing the place.

But it might seem that Justice Pitney's holding is to the effect that the risk of no employee's negligence (a purely fellow servant as well as a vice-principal) is assumed, until and after

[8] 241 U. S. 310, 313. (1915).

there is knowledge of such negligence. This is the phase of the question that gives us most concern. It seems that this question is clarified by the later decision and that a servant assumes the risk of the negligence of his fellow servant (not vice-principal) whether he is aware of such negligence or not.

The later case is that of *C. & O. Ry. Co. v. Nixon.*[9] This case holds that decedent assumed the risk. The last sentence of the opinion repeats it by saying,—

"It seems to us to have been no more than an extension of his ordinary rights and his usual risks."

As to whether the company owed deceased the duty to keep a lookout the opinion makes this brief reference,—

"The duty of the railroad company toward this class of employees was not affected by that which it might owe to others."

This case was reversed on the assumption of risk. In this case the engineer and fireman were not on the lookout although we know section men may be found any place along the track. Their negligence was the "ground" of the action below. Did deceased assume the risk of their negligence? What was the risk assumed that made a complete bar to the action? Suppose they had seen deceased upon the track and negligently (not wilfully) killed him? Would that have been any greater actionable negligence than the failure not to see him at all? If they or the company owed deceased no duty, then no liability could exist except for wilful injury. A railroad company must operate its train with ordinary care knowing that some of its servants will be on or near the track. It must be on the lookout for third persons, or the public, at street crossings, and use due care under the circumstances. Did deceased assume the risk of the occupation in this case? That is the risk that trains would pass at any time. Did that risk of occupation include also the further risk that the engineer would not always be looking? Is the glass in the front of the cab for the only purpose of looking out for the public, or obstructions on the track, or visible signals? This seems to indicate that the deceased assumed the risk of the negligence of the engineer and fireman—the risk of the occupation including the negligence of the men on the engine. It had to be the risk of the occupation of employment, or the risk of the negligence of the engineman, or both. The Virginia courts held the company liable for its negligence through the failure of the servants on the engine to keep a reasonable lookout—primarily the negligence of the servants. To correct this mis-

[9] 271 U. S. 218. (1925).

take *certiorari* was granted and liability was denied because deceased assumed the risk of the act or omission that caused his death. It can not be said that this case went off on the theory that defendant owed deceased no duty. If that were so then there it would have been said that there was no negligence on the part of the company or the engineer for failure to keep a lookout. If there was no such negligence then there would have been no occasion to say that the action was barred because there was no duty, no right of action. Yet when the Company used ordinary care in the operation of its railroad and the same care in the selection and retention of its engineer and fireman, the deceased contracted to assume the risks of the negligence of its servants other than vice-principals. This case was not reviewed for the purpose of holding that no duty was owed Nixon. If there was no duty to keep a lookout plaintiff's cause of action would have failed and there would have been no occasion to speak of assumed risk, and that the cause of his death was assumed.

Extremely interesting along this line is the recent case of *Pachelo v. N. Y., N. Y. & H. R. R. Co.*[10] There plaintiff was engaged, pursuant to orders, in spreading dirt over the roadbed in a railroad yard. He was struck by a cut of cars with engine attached backing down upon him, and which for some time previous had stood about four hundred feet away. Just beyond him the track was crossed by a highway. There was no one on the rear of the cars to warn him. Neither did the switch engine ring the bell before starting, or before crossing the highway. The railroad company had a rule that old engines must ring the bell when "about to move" and also ring "on approaching a highway."

The district court dismissed the case at the close of all the evidence on the ground that the plaintiff had assumed the risk of such an accident.

The Circuit Court of Appeals said:

"Except for the two rules mentioned above, the case would clearly fall within *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758; *Boldt v. Penn. R. R. Co.*, 245 U. S. 441, 62 L. ed. 385, and *C. & O. Ry. Co. v. Nixon, Admx.*, decided May 24, 1926. Apparently among the risks assumed is that of the inattention of other employees, in train movements. *C. & O. Ry. Co. v. Nixon* was decided under the Federal Employers Liability Act and expressly reaffirmed *Aerkfetz v. Humphreys;* it is, of course, controlling." * * *

"A number of decisions in the Circuit Courts of Appeal under the Employers Liability Act have, however, created an exception to the ruling in

[10] 15 Fed. (2nd) 467. (1926)

Aerkfetz v. Humphreys, when the plaintiff's fellow servants have failed to observe a rule or practice established by it for the protection of its employees. *Lehigh Valley R. R. v. Mongan*, 279 F. 85; *Director General v. Templin*, 268 F. 483; *L. V. R. R. v. Doktor*, 290 F. 760; *Toledo R. Co. v. Bartley*, 172 F. 82; *B. & O. R. Co. v. Robertson*, 300 F. 314; *St. L. & S. Ry. v. Jeffries*, 276 F. 73. * * *

"Just what is the ground of the distinction is not altogether apparent, though there would seem to be more warrant for supposing that one's fellow will observe an express rule or practice for specific action in a particular situation than that they will be uniformly attentive. Possibly it has arisen merely from a disposition to relax the severity of the rule."

There we have a judicial estimate of the *C. & O. v. Dixon* case, and the latter holds, "among the risks assumed is that of the inattention of other employees in train movements." What is this inattention other than plain negligence of employees? And the negligence assumed is one of the risks of the employment or occupation.

That the violation of a rule is such negligence as is not assumed may be said to be the negligence of the master; that the employee in ringing the bell is performing a duty of the master, that in failing to ring, the violation is that of the master; that the person so failing is a vice-principal and not a fellow servant.

In the *Nixon* case the Virginia courts held the company owed a duty to keep a reasonable lookout for him and the negligent failure of the enginemen so to do was the negligence of the company, *respondeat superior*. (1) That duty was imposed by law. (2) There was a violation of the duty imposed. (3) An injury proximately caused by such violation of duty. The Supreme Court did not say the major premise of that right of action was false. It may have hinted in that direction, but it defeated that right of action by the defense of assumed risk. Otherwise assumed risk was sheer surplusage in that opinion, and should not have been made predominating.

In the *DeAtley case* Justice Pitney says,—

"At the same time in saving the defense of assumed risk * * * the act placed a co-employee's negligence, where it is the ground of the action, in the same relation as the employer's own negligence would stand to the question whether a plaintiff is to be deemed to have assumed the risk."

It is obvious, then, in an action grounded upon a co-employee's negligence, that in making a defense to such action that plaintiff assumed the risk of the negligence pleaded, such negligence must be treated as or called the negligence of the master. The act

"placed" or made the employee's negligence that of the master "in saving the defense of the assumed risk." Necessity required the creation of this arbitrary right of action. The United States as such had no common law. Congress had to create an entirely new and statutory right of action—an arbitrary one. It wanted to create a liability against interstate carriers. As it had no common law, it had to start by making a liability for the negligence of every and "any" employee of the carrier. It had no *respondeat superior* and therefore it made a liability of the carrier direct for the negligence of any employee. Thus the liability, the right of action, was necessarily an arbitrary one. Section 1 is as broad and arbitrary upon negligence as any Compensation Act without negligence. To create the defense of assumed risk Section 4 was just as necessary, and it kept alive *all* the defenses of assumed risk except the violation of safety appliance acts. Therefore, assumed risk is applied to the negligence of the master arbitrarily instead of to the negligence of the co-employee. Yet practically it amounts to the same thing.

If it be said that the master's negligence is assumed only when known and appreciated, may not that be very true but not exclusively so? Does that necessarily exclude the negligence of a fellow servant assumed in the risk of the employment? As the liability for the negligence of any employee was arbitrarily (or even if otherwise) created as aforesaid why may not the defenses to such negligence remain? The *Nixon case* is the last expression on that question. The evidence in that case and before the Supreme Court showed that neither the engineer nor fireman saw Nixon although there was a long distance of straight track ahead. Neither did Nixon see the train behind him. No one saw Nixon. There was no time for Nixon, under the evidence, to know and appreciate his danger. The master's negligence there was that of the men on the engine. The engineer's negligence that of the master. Nixon was not charged with contributory negligence. Neither is it said that his negligence was the proximate cause of his death. He assumed the risk. View that case from any point, the defense of assumed risk defeated the action—there was no failure of proof. There is no dissenting opinion in that case. He never knew what killed him but he assumed the risk—the inattention or negligence of co-employees in propelling a train. He had engaged in a dangerous employment. The master was presumed to have used due care in the selection and retention of its employees and the same care

furnishing the place and yet it was dangerous on account of the inattention or negligence of co-employees.

Congress made negligence the basis of the action and as a general rule Federal Courts have reserved to themselves the authority and right to determine what is such negligence under the common law rules. Sometimes even our Supreme Court has left that matter to a jury and two state courts to decide, thereby destroying uniformity or making possible different standards of negligence in different jurisdictions under similar circumstances. So also have Federal Courts determined the risks assumed under Section 4, by applying the common law rules.

The Federal cases including those of the Supreme Court would indicate that Sections 1 and 4 of the Federal Employers Liability Act did not change to a great extent the common law upon the questions involved in said sections, that is, the common law as promulgated by Federal Courts previous to its enactment. This is manifest for the reason that Congress had to cover the entire field of negligence and assumed risk by a statutory right of action and a statutory defense. The common law rules of negligence and assumed risk under the statute as now interpreted are practically those formerly existing.

What then will the Supreme Court say when a section man drops his end of the tie, or an engine wiper throws dust into another wiper's eyes? Under the doctrine of the *Nixon case* and the *Pacheco case* will it not say there is no liability, that assumed risk prevents a recovery?

INDIANA LAW JOURNAL

Published Monthly, October to June, inclusive, by The Indiana State Bar Association

EXECUTIVE OFFICE, 106 CITY HALL, INDIANAPOLIS, INDIANA
EDITORIAL OFFICE, BLOOMINGTON, INDIANA

SUBSCRIPTION PRICE $3.00 A YEAR SINGLE COPIES 50 CENTS
Canadian Subscription Price is $3.50; Foreign, $4.00

Subscription price to individuals, not members of the Indiana State Bar Association, $3.00 a year; to those who are members of the association the price is $1.50 and is included in their annual dues, $5.00.

The complete management of the Indiana Law Journal is exercised by The Indiana State Bar Association through its officers. The Editor, Editorial Boards and other officers of The Journal are appointed by the President of The Indiana State Bar Association with the advice and approval of the Board of Managers. The Indiana State Bar Association founded the Indiana Law Journal and retains full responsibility and control in its publication. The participation of Indiana University School of Law is editorial.