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THE SCOPE OF THE 1939 AMENDMENT TO THE FEDERAL EMPLOYERS' LIABILITY ACT

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TENNYSON majestically said: "The old order changeth, yielding place to the new." This ancient saying has truth even in the law. Law is filling in the interstices of life once virgin to it. It has demonstrated that it has capacity for growth and expansion and ability to adapt itself to change. As proof, consider that law commonly called "the 1939 Amendment" to the Federal Employers' Liability Act.[1] Yet, more important, this amendment marks a real change in the objectives of the law. It illustrates, as perhaps no other single statute, a change in the law's philosophy, and a recommendation that all laws, to be effective, must define rights and liabilities in a practicable manner.

The change in philosophy we speak of is from the court-made doctrine of *Aerkfetz v. Humphreys*,[2] that growing industry, and railroads in particular, should be protected, shielded and insulated against human overhead, even though such might mean protection from the consequences of their own neglect. Then courts viewed actions to recover damages for personal injuries with the avowed purpose of defeating recovery. Out of this common purpose there were generated those court-made defenses of assumption of risk, contributory negligence, and the fellow-servant rule. Indeed, even after the passage of the Federal Employers' Liability Act in 1908, some of these defenses were paraded in opinions of courts of review, fre-

[1] "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." 53 Stat. 1404 (1939), 45 U.S.C.A. §51 (1954).

[2] 145 U.S. 418 (1892).

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quently under aliases. Little wonder, indeed, that railroad companies had no desire for a workmen's compensation act prior to 1939 when Congress skewered these defenses in definite language. Today the law accentuates the rights of the individual. The objective of the specific acts governing railroad workers is vividly described by Mr. Justice Douglas thus:

> The purpose of the act was to change that strict rule of liability, to lift from employees the "prodigious burden" of personal injuries which that system had placed upon them and to relieve men "who by the exigencies and necessities of life are bound to labor" from the risks and hazards that could be avoided or lessened "by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work."[3]

The recognition of the necessity of practicable operation of law is, we said, found in the 1939 Amendment. Consider, if you will, this language:

> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce . . . shall . . . be considered as being employed by such carrier in such commerce. . . .[4]

This is not only clear language, it is language with teeth in it. Note the frequent use of the word "any" in these phrases: "any employee," "any part of whose duties," or "in any way" affect such commerce. These are expressions which in themselves mean a spreading of the base of the Act.

Prior to this Amendment the Federal Employers' Liability Act required that the employee be engaged in interstate commerce at the moment of injury. The test prior to 1939, which was that laid down in the case of *Shanks v. Delaware L. & W. R.R. Co.*,[5] was:

> The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? What his employment was on other occasions is immaterial, for . . . the Act refers to the service being rendered when the injury was suffered.[6]

This criterion was known as the "pin point rule." The appellation was no doubt derived from its deliberate blindness to peripheral conditions. And, as anyone may well have foreseen, such a test resulted in a multitude of injustices. The railroad's employee was

[3] Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949).

[4] 53 Stat. 1404 (1939), 45 U.S.C.A. §51 (1954).

[5] 239 U.S. 556 (1916).

[6] Ibid., at 558.

in theory entitled to the benefits of the Federal Employers' Liability Act. Yet after injury he found himself the subject of a legal tug of war between the Federal Employers' Liability Act and state workmen's compensation laws. In cases where the employee had been injured through the neglect of the company, the employer denied liability on the ground that the injured was not engaged in interstate commerce at the time of his misfortune. Conversely, in cases where the mishap occurred without negligence, the employee's claim before a compensation body (if he was fortunate enough to be in a state where there was a workmen's compensation act) met with resistance on the ground that he was engaged in interstate commerce when injured, and thus no state compensation act was applicable.

Such refinements were made as to produce a welter of conflicting decisions as to what remedy, if any, the injured railroad worker had. Accordingly, the injured railroad worker—and unfortunately, his lawyer as well—lived in somewhat of a "no man's land." Whether the injured's remedy was under the Federal Employers' Liability Act or according to the terms of some compensation act was always a poignant question. Frequently, he brought an action under the Federal Employers' Liability Act and did not find that he was not entitled to the benefits of that Act until some court of last resort had decided "no interstate." And this, notwithstanding that he might have spent ninety-five percent of his working moments in what was undeniably interstate traffic. In the meantime his claim under a workmen's compensation act, if there was an act in the state wherein he was employed, became barred by the statute of limitations. It became a question of pitting workmen's compensation laws against the Federal Employers' Liability Act, depending upon what was most effective to defeat recovery. Thus, in cases of culpability the railroad sought cover on want of interstate commerce. Likewise, in situations where employees proceeded under the Workmen's Compensation Act, the trite position of the railroad was that the Federal Employers' Liability Act governed. Accordingly, the railroad worker was frequently left in a vacuum, notwithstanding that he was entirely innocent of the tort which had been committed.

These situations multiplied themselves. They became so numerous, as the decisions will attest, that it became very questionable whether the Federal Employers' Liability Act could accomplish the purpose for which it had been intended, viz., to give those engaged in this extrahazardous work a particular remedy. Finally, there was

evolved the 1939 Amendment. The Judiciary Committee of the United States Senate cited the *Shanks* case, and appreciated the difficulties encountered in determining the answer to the then controlling question, as to whether the injured at the moment of occurrence was in interstate commerce. After observing that the preponderance of service performed by all railroad men is interstate in character, it then boldly stated that the purpose of the Amendment was to broaden the scope of the Act so as to include within it employees who, while ordinarily engaged in interstate commerce, may at the time of injury be divorced therefrom and in intrastate commerce. It recognized that railroad men shifted from one class of service to another, and that they should all enjoy uniform treatment in case of injury. It stated specifically:

> The adoption of the proposed Amendment will to a very large extent eliminate the necessity of determining whether an employee at the very instant of his injury or death was actually engaged in interstate traffic. If any part of the employee's duties (at the time of his injury or death) directly, closely or substantially affected interstate or foreign commerce, the plaintiff would be considered entitled to the benefits of the Act.[7]

Why do we turn back grandfather's clock in discussing this Amendment? For a full appreciation of this law, the antecedent conditions, and the purposes it was to attain, must be known. Otherwise how shall we know what ills it was to remedy?

Today, the question of interstate commerce is a very simple one. The 1939 Amendment unveiled interstate commerce. It is no longer a mystery or something to be feared in the trial of an employee's case. Familiarity with it belongs to any who will give it some study. It is not, as it had been regarded in the past, some hidden truth the revelation of which only a few enjoyed. Stated as simply as the Act makes it, the test is: Did the employee have any duties which furthered interstate commerce? Did he in any way affect interstate commerce? If but one of these queries is answered "Yes," he comes within the Act although he might have been engaged in work of a purely intrastate character at the time of injury. As Judge Walter Lindley, who spent a lifetime in federal courts, observed:

> Congress' intent to include any employee who performs services which in any way further or affect interstate commerce is clear.[8]

[7] Report of the Judiciary Committee of the United States Senate, 76th Congress, 1st Session (Committee Report No. 1661, upon 1708).

[8] Edwards v. Baltimore & O. R. Co., 131 F. 2d 366, 369 (C.A. 7th, 1942).

Because all of us cling to the past, because all of us to a certain degree dislike change, the courts at first felt it difficult to comprehend the limitless bounds of this Amendment. The avenues of remedy it opened were unknown to the law. However, today the Amendment enjoys matured interpretation.

As is indicated from a consideration of the situations which we shall consider, the Amendment did not bring under the Act employees solely engaged in intrastate commerce. As was pointed out:

> All the Amendment did was to mark the line to which the Federal Act might be extended, as to a matter about which there was much uncertainty and confusion. If the Congress could constitutionally enact the Federal Employers' Liability Act, . . . then, necessarily, it may clarify and make effective the terms and the application thereof. . . .[9]

Thus, view the situations now within the act: The injured employed as a road foreman by a railroad located solely in one county, while returning home in a handcar after working on a switch over which his employer's cars passed in delivering coal from mines to another carrier which took the cargo beyond the state;[10] a section crew member sent on a six-mile trip, in a truck owned by a third party, for the purpose of getting tools;[11] a lumber inspector injured while inspecting ties on a loading dock of a lumber company before purchase by the railroad company which shipped some of the ties inspected by him to other states and used some of them on its main line and as replacements;[12] an all around laborer and cleaner, filling barrels of oil to be used in filling lanterns and oil cans used in oiling railroad engines and machines;[13] a brakeman being transported on a company conveyance after leaving his train, one car of which was in interstate commerce;[14] a signal man repairing lighting fixtures of a railroad station;[15] a maid at a terminal;[16] a laborer loading posts to be used in repairing a roadway;[17] a railroad's emergency

[9] Pritt v. West Virginia N. R. Co., 132 W. Va. 184, 194, 51 S.E. 2d, 105, 114 (1948); certiorari denied, 336 U.S. 961 (1949).

[10] Riley v. West Va. No. Ry. Co., 132 W. Va. 208, 51 S.E. 2d 119 (1948).

[11] Patsaw v. Kansas City So. Ry. Co., 56 F. Supp. 897 (W.D. La., 1944).

[12] Ericksen v. Southern Pacific Co., 39 C. 2d 374, 246 P. 2d 642 (1952).

[13] Harris v. Missouri Pac. R. Co., 158 Kan. 679, 149 P. 2d 342 (1944).

[14] Northwestern Pacific Ry. Co. v. Industrial Accident Comm., 73 C.A. 2d 367, 166 P. 2d 334 (1946).

[15] Scarborough v. Pennsylvania R. Co., 154 Pa. Super. 129, 35 A. 2d 603 (1944).

[16] Albright v. Pennsylvania R. Co., 183 Md. 421, 37 A. 2d 870 (1944).

[17] Rainwater v. Chicago, R.I. & P. Ry. Co., 207 La. 681, 21 S. 2d 872 (1945).

flood control worker whose job was to fill sandbags, place them on a flat car destined to move over the tracks used for movement in interstate commerce, the bags being placed along the tracks to protect them from flood waters;[18] a locomotive fireman on a train engaged in moving empty coal cars which had come from outside the state to coal mines in the state where they were to be loaded and transported to other states.[19]

Contrast is always the effective medium to compare the present with the past. What are the contrasts in this phase of the law? Since we cannot consider all of them, we shall "point to a few lodestars," as Mr. Justice Rutledge would say.

Under the old rule, once an instrumentality was withdrawn from interstate commerce, anyone working about it was not within the Act. But the Missouri Appellate Court, in a case where a boilermaker's helper in the railroad's shop, wherein heavy repairs were being done on an engine removed from service on June 10, 1945, brought into the shop June 25, 1945, and after 24 days returned to interstate service, held this to be within the Act when he sustained injuries while working on the engine in the shop.[20] The court reasoned that since the locomotive was destined to return to interstate service as soon as it had been repaired, the plaintiff was affecting interstate commerce.

Where the plaintiff employed as a repairman at the railroad shops doing what is known as "back shop repairs" with repairing instrumentalities withdrawn from interstate commerce, it was declared within the Act by the New York Court of Appeals, the court reasoning that his duties affected interstate commerce.[21] So also has a blacksmith's helper engaged in making locomotive parts been held to be entitled to the benefits of the Act.[22]

To the extent that the Act brings within it almost all employees, consider that situation where the decedent was employed in a roundhouse as a member of a repair crew and while repairing a stall be-

[18] Skanks v. Union Pacific R. Co., 155 Kan. 584, 127 P. 2d 431 (1942).

[19] Louisville & N. R. Co. v. Stephens, 298 Ky. 328, 182 S.W. 2d 447 (1944).

[20] Wheeler v. Missouri-Kansas-Texas R. Co., 205 S.W. 2d 906 (Mo. App., 1947).

[21] Baird v. New York Central R. Co., 299 N.Y. 213, 86 N.E. 2d 567 (1949). In Shelton v. Thomson, the court said, "A car cannot travel even in interstate commerce without wheels." 148 F. 2d 1, 3 (C.A. 7th, 1945).

[22] Trucco v. Erie R. Co., 353 Pa. 320, 45 A. 2d 20 (1946).

came electrocuted.[23] Parenthetically, it should be noted that this case also holds that a signed stipulation by the widow as well as the hearing held by a state industrial board which entered an order awarding compensation was not an adjudication of the character of decedent's work and that an action could be maintained under the Act.

DIFFERENTIATION BETWEEN CONSTRUCTION AND REPAIR WORK IS NOW NONEXISTENT

The old rule was that when an employee was engaged in construction work he was not in interstate commerce, but while doing repair or maintenance work about an instrumentality used in interstate commerce he was entitled to the benefits of the Act.[24] Apparently, the rationale of this rule was that the object being constructed could not be an instrumentality of interstate commerce until it had been dedicated by actual use. Yet today that old rule has died with the Amendment. Thus, an employee injured on the third day of his employment, while laying rails on a new railroad bed which had not yet been used, came within the Act since during the first two days of his work he had worked on the main line of the railroad which was an instrumentality of interstate commerce.[25]

Also interesting is the case of the trackman who was injured while spreading cinders and ballast in surfacing tracks which had just been laid. However, not until thirty days later were the tracks upon which he was working used in interstate traffic. The court was of the opinion that it was just as necessary to place rails as it was to replace them, and that the work furthered and affected interstate commerce.[26]

But on the other hand the Supreme Court of Idaho, in a three-to-two opinion, held that an employee who sprained his back while working on a new track was entitled to compensation benefits under the state act and did not come within the Federal Employers' Liability Act.[27] The probable reason for the decision is that the court did not want to leave the injured remediless. If it were held that he came within the Federal Employers' Liability Act, he would have

[23] Zimmermann v. Scandrett, 57 F. Supp. 799 (E.D. Wis., 1944).

[24] Chicago, B. & Q. R. Co. v. Harrington, 241 U.S. 177 (1916).

[25] Missouri Pacific R. Co. v. Fisher, 206 Ark. 705, 177 S.W. 2d 725 (1944).

[26] Agostino v. Pennsylvania R. Co., 50 F. Supp. 726 (E.D.N.Y., 1943).

[27] Moser v. Union Pacific R. Co., 65 Idaho 479, 147 P. 2d 336 (1944).

no case. This is an example of the truth of the saying that a "hard case makes bad law."

INJURY ARISING FROM A SERIES OF INJURIES

Most tort lawyers are inclined to feel that the injury resulting from a tort must flow from the particular tort itself or be inherent in its consequences, such as subsequent falls because of a leg injury in a single accident, or mistakes by physicians in diagnosis and treatment. Here, however, the injury need not grow out of a single occurrence. An action may be maintained to recover for a condition of ill being resulting from a series of incidents or a continuous wrong. These decisions have their origin in the language of the Act. But we believe their taproot is in the 1939 Amendment which, together with a fairminded Supreme Court, brought home to the inferior courts not only the purpose of the Act but also the fear that unless it fostered those purposes, certiorari would be granted.

Most interesting, indeed, is the case of a sorefooted switchman. His feet had either become sore or diseased as the result of his alighting upon gravel and rock over a period of ninety days. The defendant urged that the condition came about gradually and not by any specific incident and that there was no "injury" within the meaning of the Act. The Texas court pointed out that there was nothing in the Act requiring an injury to occur on a specific date or to arise from any specific occurrence.[28]

One of the real landmarks in the history of the Federal Employers' Liability Act is the case of *Urie v. Thompson*.[29] There the plaintiff had been exposed to silicosis which had resulted from many years' exposure at the same work. This was an "injury" within the Act, since plaintiff-employee alleged and proved that the defendant-employer failed to properly adjust the sanders on its locomotives. The court stated:

> The question remains whether silicosis is an "injury" within the meaning of that term as used in the Federal Employers' Liability Act. It is a novel one for this Court. But we think silicosis is within the statute's coverage when it results from the employer's negligence.[30]

[28] Kansas C.S. Ry. Co. v. Chandler, 192 S.W. 2d 304 (Tex. Civ. App., 1945).

[29] 337 U.S. 163 (1949). It was contended that the plaintiff must have contracted silicosis as a matter of law more than three years prior to filing suit; to do so would be to make his remedy illusive. This the court would not do. It was also pointed out that, although the inhalations took place over a period of years prior to the 1939 Amendment, there was no assumption of risk.

[30] 337 U.S. 163, 180 (1949).

Considerations arising from the breadth of the statutory language, the Act's humanitarian purposes, its accepted standard of liberal construction to accomplish those objects, the absence of anything in the legislative history indicating a Congressional intent to require a restricted interpretation or expressly to exclude such occupational disease, and the trend of existing authorities dealing with the question, combine to support this conclusion of the soundness of the *Urie* doctrine.

Dermatitis is now a condition for which there may be recovery under the terms of the Federal Employers' Liability Act. This is, of course, the result of the *Urie* decision. Indeed, it would appear that if silicosis is remediable, dermatitis should likewise be recognized as an occupational disease.

The first case was that of a dining car waiter who sustained a contact dermatitis allegedly caused by the use of three well-known products supplied by his employer for cleansing and sterilizing dining car equipment. The trial court set aside a verdict in favor of the plaintiff, but the Court of Appeals, in reversing this judgment, reasoned that the jury might well have found that the use of the three cleaning agents created a risk of injury to the plaintiff which a reasonable person would have guarded against, and that the defendant did not take such measures to guard against that risk as would have been employed by a reasonably prudent man. Recovery was allowed although there was no finding that any other employee of the railroad had even been similarly affected, and there was evidence that the cleansing products in question were widely used for the same purpose for which the railroad employed them.[31]

The significance of this decision is that no notice, constructive or actual, was shown by plaintiff. The court was adopting the thoughts expressed in the *Urie* case, to-wit:

> When the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning.[32]

Likewise, we find that inspectors suffering from dermatitis as a result of coming into contact with diesel fuel oil and lubricating oil in the servicing and inspection of locomotives are allowed to re-

[31] Young v. Pennsylvania R. Co., 197 F. 2d 727 (C.A. 2d, 1952).

[32] 337 U.S. 163, 186 and 187 (1949).

cover. In an Illinois case, recovery was affirmed on the basis that the defendant failed to use reasonable precautions, discoverable by the exercise of ordinary care, to prevent the inspector from the occupational hazard in his work in and about diesel fuel and lubricating oils. Here, however, although the disease was contracted in 1947, there was some evidence of constructive knowledge on the part of the defendant in 1951 as to the dangers inherent in the use of such fuels.[33]

Today, it may be said that the employer is presumed to be familiar with the dangers hidden, as well as open, which ordinarily acccompany the business in which he is engaged. Such was the reasoning when recovery was allowed where the deceased died as a result of poisoning monoxide gas arising from the hot ashes in a pit.[34]

WHEN IS ONE AN EMPLOYEE WITHIN THE ACT?

Although it had been held prior to 1939 that an employee's duties include not only actual service but also those things necessarily incident thereto, such as going to and from the place of employment on the employer's premises,[35] the 1939 Amendment has its effect here, too. Prior to the passage of the Amendment, only those whose work was of an interstate character at the time of injury were afforded this protection. Today, anyone, who if injured while actually working would be held to be within the 1939 Amendment, is entitled to the Act's benefits.

In considering this question as to when a person is employed (the term "scope of employment" is disliked since it is foreign to the Act), the courts have adopted the liberal attitude. Consider the case of the worker who, on a day prior to the day he was injured did not work and about whose subsequent work there was some ques-

[33] Crowley v. Elgin, J. & E. Ry. Co., 1 Ill. App. 2d 481, 117 N.E. 2d 843 (1954).

[34] Baumgartner v. Pennsylvania R. Co., 292 Pa. 106, 108, 140 Atl. 622, 624 (1928). The court there said, ". . . and the master is presumed to know the nature and qualities of the materials he places in the hands of his servants. In other words, he is presumed to have such knowledge of matters pertaining to his business as is possessed by those having special acquaintance with the subjects involved. . . . An employer is presumed to be familiar with the dangers latent, as well as patent, ordinarily accompanying the business in which he is engaged."

[35] Erie R.R. Co. v. Winfield, 244 U.S. 170 (1917); North Carolina R.R. Co. v. Zachary, 232 U.S. 248 (1914).

tion, was injured while sleeping in a place adjacent to the right of way when a switch engine struck him. He had attempted to sleep in a tank car furnished him by the railroad but vermin drove him out. This was held an incident of his employment.

In another situation, where the day's work of the section hand consisted in laboring on a track of the railroad used in interstate commerce and where he lived in a shanty and was subject to call at night, the fact that he was injured by the explosion of an oil lamp in the shanty, while waiting to leave for a week-end at home, gave him a right of action under the Act.[86]

Thus, it is readily appreciated how the 1939 amendment affects the question of recovery for injuries occurring under circumstances incidental to employment. It broadens the interpretation of what is or is not incidental for the reason that the base of the Act itself is broadened so as to bring within its confines those who were beyond the pale prior to 1939.

UNUSUAL INTERPRETATIONS OF THE ACT

Notwithstanding that the Act is couched in the simplest language, notwithstanding that the Supreme Court has repeatedly commented that it is interpreted liberally to achieve its humanitarian purposes, notwithstanding its interpretation is to be determined by federal and not local law, we have some heretical interpretations on the books. Let us examine but a few.

In the *Moser* case, which has already been discussed, where the employee sprained his back when engaged in work on a new track, and the Industrial Commission of Idaho awarded him compensation, the Supreme Court affirmed the award in its three-to-two opinion. This we have pointed out was probably the result of a judicial effort to see that he was not remediless.

In Illinois, the evil began in 1942 with a case wherein the injured sought compensation. There, a railroad patrolman was injured while ejecting trespassers. Although a part of his duty was to inspect interstate cars for broken seals and to observe the conditions of the tracks over which interstate commerce ran, the court, to overrule the railroad's claim, held that the test of the applicability of the 1939 Amendment was whether the activity in which any employee is engaged *at the time of the accident* directly or closely and substantially af-

[86] Atlantic C.L. R.R. v. Meeks, 30 Tenn. App. 520, 208 S.W. 2d 355 (1947).

fects interstate commerce.[37] This ruling, probably engendered by desire to award compensation, does violence to the Amendment itself. It ignores completely the clause, "any part of whose duties" shall affect interstate commerce. It ignores completely the Congressional intendment. As a result of that decision, the same court, eight years later in the case of *Ernhart v. Elgin, J. & E. Ry. Co.*,[38] when confronted with the case of a conductor of a switching crew whose duties were both inter- and intrastate in character, but sustained an injury while engaged in an intrastate movement, adhered to the narrow view. In affirming a recovery by the employee, it held that the intrastate functions of a switching crew affect interstate commerce. This, of course, is a violent process of reasoning and at loggerheads with the federal decisions.

In 1952, the same question came before the Illinois Supreme Court in the case of *Walden v. Chicago & North Western Ry. Co.*[39] There the decedent, a carpenter foreman, was killed when he fell from a highway bridge over which vehicles passed and under which were the yards of the railroad wherein trains moved in interstate commerce. The decedent spent perhaps seventy percent of his working time in what was admittedly interstate work, such as maintenance and repair of interstate instrumentalities. The Appellate Court paid no heed to this, and held simply that he was not in interstate commerce at the time of his injury, relying upon decisions decided before the passage of the very important 1939 Amendment to the effect that one engaged in the maintenance of a railroad bridge was not in interstate commerce.[40]

The Supreme Court adhered to its prior "pin point" interpretation of the Amendment and reversed the Appellate Court, not on the basis of the man's prior activities, but for the reason that the maintenance and repair of a highway bridge over its switch yard was done to facilitate the flow and movement of interstate commerce traffic in the yards below. Although the widow received her award, the court overlooked an opportunity to cut itself free from its two prior interpretations of the Amendment.

[37] Thomson v. Industrial Comm., 308 Ill. 386, 44 N.E. 2d 19 (1942).

[38] 405 Ill. 577, 92 N.E. 2d 96 (1950).

[39] 411 Ill. 378, 104 N.E. 2d 240 (1952).

[40] Hallstein v. Pennsylvania R. Co., 30 F. 2d 594 (C.A. 6th, 1929); Montgomery v. Terminal R.R. Assn., 335 Mo. 348, 73 S.W. 2d 236 (1934), certiorari denied 293 U.S. 602 (1934).

THE DOCTRINE OF ASSUMPTION OF RISK

Prior to the 1939 Amendment, there was a specific provision of the Federal Employers' Liability Act concerning assumption of risks. It read thus:

> In any action brought against a common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or 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 injuries or death of such employee.[41]

However, in August, 1939, this section was amended so that after the words, "of his employment in any case," the following words were added: "where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case."[42]

Indeed, even after the passage of the 1939 Amendment, the courts held that the defense of assumption of risk, as abolished by paragraph 4 of the Act,[43] was applicable only where the negligence of the carrier is in violation of some statute enacted for the safety of employees and that the defense was still available not only as to ordinary risks inherent in the business, but also as to secondary risks arising from abnormal dangers caused by the employer's negligence. Such was the holding of the Court of Appeals on May 19, 1942, in the *Tiller v. Atlantic Coast Line Ry.*[44] case involving an accidental death which occurred in March, 1940. But how the United States Supreme Court destroyed at a single thrust this opinion of the Court of Appeals and the mode of thinking it represented, is now history. Echoes of Justice Black's famous words that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 Amendment"[45] are found in the opinions of other courts.

The late Mr. Justice Rutledge in describing the serpentine force with which the application of this doctrine destroyed the employee's remedy includes many thoughts of Mr. Justice Black, whose concept

[41] 35 Stat. 66 (1908), 45 U.S.C.A. §54 (1954).

[42] 53 Stat. 1404 (1939), 45 U.S.C.A. §54 (1954).

[43] Ibid.

[44] 128 F. 2d 420 (C.A. 4th, 1942). Cause of action March 20, 1940, decision March 3, 1942, reversed in 318 U.S. 54 (1943).

[45] 53 Stat. 1404 (1939), 45 U.S.C.A. §54 (1954).

of the various defenses engrafted by courts onto the Federal Employers' Liability Act is unexcelled. He tells us:

> But under Employers' Liability Act prior to 1939 there was inescapable reason for making accurate differentiation of the three [assumption of risk, contributory negligence, and the fellow-servant rule have each produced its signal]. . . . Assumption of risk remained for defense to liability. Contributory negligence merely reduced the damages. The fellow-servant rule was abolished.
>
> These distinct consequences required distinct treatment of the three conceptions. This meant that so far as assumption of risk, which remained a complete defense, had swallowed up contributory negligence and the fellow-servant rule, the latter, having different effects, should be withdrawn from its enfolding embrace. In that way only could the clear legislative mandate be carried out and the distinct consequences attributed by it to each be attained. To permit assumption of risk still to engulf all the proper territory of contributory negligence and the fellow-servant rule would be only and plainly to nullify Congress' command.[46]

Thus, a fair appraisal of the 1939 Amendment, widening the base of the Act, as it did, destroyed the defense of assumption of risk, by whatever name it may be called, means that the Federal Employers' Liability Act can operate at the human level where accomplishment of its purposes is possible. It stands out today among all other types of legislation as the only law which gives an injured employee a true remedy.

Now we have attained an implement which can be very good. We must keep it. Indeed, if Senator Norris, the great pioneer of the Act, were with us today, he would consider apropos that slogan of a political party employed in the 1952 elections: "Don't let them take it away from you."

The prime objective of all law is to solve problems confronting the everyday life of man. Thus, if any law is to be practicable, it must be realistic; it must be cognizant of the realities of life.

Time moves on and does so with its own pruning knife. Sometimes obstacles are abated and sometimes they are created. The law, it seems, always lags behind.

The 1939 Amendment is a superb effort to make a law practicable. With the steel of reality, it has clipped the wings of mere theory out of the Federal Employers' Liability Act. At last one of the squeakiest wheels in the administration of justice has received some grease.

[46] Owens v. Union Pacific R.R. Co., 319 U.S. 715, 721 (1943).