

CLARA CEREZO, PLAINTIFF AND APPELLANT, VS. THE ATLANTIC, GULF & PACIFIC COMPANY, DEFENDANT AND APPELLANT.*G.R. No. 10107. February 14, 1916*

Ponente: TRENT, J.

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This is an action for damages against the defendant for negligently causing the death of the plaintiff's son, Jorge Ocumen, on the 8th of July, 1913, deceased being plaintiff's only means of support. Judgment was entered in favor of the plaintiff for the sum of P1,260, together with interest and costs. Defendant appealed.

The deceased was an employee of the defendant as a day laborer on the 8th of July, 1913 assisting in laying gas pipes on Calle Herran in the city of Manila. The digging of the trench was completed both ways from the cross-trench in Calle Paz, and the pipes were laid therein up to that point. The men of the deceased's gang were filling the west end, and there was no work in progress at the east end of the trench. Shortly after the deceased entered the trench at the east end to answer a call of nature, the bank caved in, burying him to his neck in dirt, where he died before he could be released. It has not been shown that the deceased had received orders from the defendant to enter the trench at this point; nor that he entered there to perform any duty for the defendant; nor that the trench had been prepared by the defendant as a place to be used as a water-closet; nor that the defendant acquiesced in the using of this place for these purposes. The trench at the place where the accident occurred was between 3 and 4 feet deep. Nothing remained to be done there except to refill the trench as soon as the pipes were connected. The refilling was delayed at that place until the completion of the connection. At the time of the accident the place where the deceased's duty of refilling the trench required him to be was at the west end. There is no contention that there was any danger whatever in the refilling of the trench.

The plaintiff insists that the defendant was negligent in failing to shore or brace the trench at the place where the accident occurred. While, on the other hand, the defendant urges (1) that it was under no obligation, in so far as the deceased was concerned, to brace the trench, in the absence of a showing that the soil was of a loose character or the place itself was dangerous, and (2) that although the relation of master and servant may not, have ceased, for the time being, to exist, the defendant was under no duty to the deceased except to do him no intentional injury, and to furnish him with a reasonably safe place to work.

As the complaint fails to show whether the plaintiff's right to recover is based on the Employers' Liability Act (Act No. 1874) or the Civil Code, it is necessary to determine just what effect the former has had upon the law of industrial accidents in this country.

Act No. 1874 is essentially a copy of the Massachusetts Employers' Liability Act (Rev. Laws. 1902, chap. 106, sees. 71-79), it having been originally enacted in that jurisdiction in 1887. (Stat. 1887, chap. 270.) The Massachusetts statute was "copied verbatim, with some variations of detail, from the English statute (43 & 44 Vict, c. 42). Therefore it is proper, if not necessary, to begin by considering how the English act had been construed before our statute was enacted." (*Ryalls vs. Mechanics' Mills*, 150 Mass., 190: 5 L. R. A., 667.)

The English statute was enacted effective January 1, 1881. The Employers' Liability Act of Alabama, first enacted in 1885 (Civil Code 1907, chap. 80, sec. 3910), "is a substantial, if not an exact, copy of the English act of 1880. This court is not finally concluded by the decision of any other State court or the British court, in their construction of a similar statute, but the opinion of learned courts upon similar questions are entitled to great weight, and this is especially true when the statute, from which ours was copied, had been construed prior to its enactment by our legislature." (*Birmingham Ry. & Electric Co. vs. Allen*, 99 Ala., 359, 371; 20 L. R. A., 457.)

The employers' Liability Act of Colorado (Laws 1893, chap. 77; Mill's Annotated Statutes, Supp. 1891-1896, sec. 1511a) was copied from the Massachusetts Act of 1887 and the Colorado legislature "presumably adopted the act with the construction that had been given it by the courts of that state." (*Colorado Milling & Elevator Co. vs. Mitchell* [1899], 26 Colo., 284). Generally speaking, when a statute has been adopted from another state or country and such statute has previously been construed by the courts of such state or country, the statute is deemed to have been adopted with the construction so given it (2 *Lewis Southern Land on Stat. Const.*, sec. 783). The law being so clearly traced to its source, it is advisable, if not necessary, to ascertain what the law stands for in those jurisdictions where it has been in force for a long time past.

To adequately comprehend the significance of the Act in England and in those States of the United States where it has been adopted, it is necessary to set forth briefly the liability of an employer for personal injuries suffered by his workmen prior to its enactment. At common law masters impliedly agreed to use reasonable care to provide reasonably safe premises and places in and about which the servant was required to work, to furnish reasonably safe and suitable machinery, and a sufficient supply of proper materials, tools, and appliances for the work to be done, and at all times during the continuance of the work to repair and to keep in the same safe and suitable condition the places, machinery, and appliances; to provide competent workmen; and so far as the servant could not be assumed to know the perils of the work itself, or of the particular portion of it in which he was engaged, to instruct him and to warn him of any secret danger of which the master was aware. As to these matters, the master was bound to exercise that measure of care which reasonably prudent men take under similar circumstances. But the master was not an insurer and was not required to provide the safest possible plant or to adopt the latest improvements or to warrant against latent defects which a reasonable inspection did not disclose. It was only necessary that the danger in the work be not enhanced through his fault.

The right of the master to shift responsibility for the performance of all or at least most of these personal duties to the shoulders of a subordinate and thereby escape liability for the injuries suffered by his workmen through his non-performance of these duties, was, in England, definitely settled by the House of Lords in the case of *Wilson vs. Merry* (L. R. 1 H. L. Sc. App. Casv 326; 19 Eng. Rul. Cas., 132). This was just two years before the enactment of the Employers' Liability Act of 1880, and no doubt the full significance of such a doctrine was one of the impelling causes which expedited the passage of the Act, and chiefly accounts for the presence in it of subsection 1 of section 1.

While there were some authorities in the United States prior to 1880 decidedly in favor of the doctrine of *Wilson vs. Merry*, by far the greater weight of authority was that such duties were personal to the master and that he could not by delegating such duties to subordinates escape liability for their negligent performance.

The servant, on his part, by entering the employment, was held to impliedly agree to take upon himself the perils arising from the carelessness and recklessness of those who were in the same employment, without regard to their grade or rank or authority in the service, provided that the act causing the injury was not in the performance of any personal duty of the master intrusted to the negligent servant.

In Street's edition of *Shearman & Redfield on Negligence* (vol. 1, sec. 180), the following statement and history

of the rule is given:

"Under the principles before stated, it must be conceded to be settled at common law that a master is not liable for injuries personally suffered by his servant through the ordinary risks of the business, including the negligence of a fellow servant, acting as such, while engaged in the same common employment, unless the master is chargeable with negligence in the selection of the servant in fault, or in retaining him after actual or constructive notice of his incompetency. This 'bad exception to a bad rule,' as Lord Esher called it, in his testimony before a parliamentary committee, was first suggested in 1837, in an English court, in *Priestly vs. Fowler* (3 M. & W., 1), where the precise point did not arise. That case, however, is always spoken of as the foundation of the rule. The first real decision of the question was made in South Carolina in 1841 (*Murray vs. South Carolina R. Co.*, 1 McMull. Law, 385.) This was cited and approved by Chief Justice Shaw, of Massachusetts, 1342, in the *Farwell* case (*Farwell vs. Boston, etc., R. Co.*, 4 Met., 49), which is the leading case on the question, and contains all the reasoning in favor of the rule which is worth mentioning. His opinion was followed in New York in 1847 (*Coon vs. Syracuse, etc., R. Co.*, 6 Barb., 231, affirmed 1851, 5 N. Y., 492). * * * Since then the rule has been forced upon Scotland, by the votes of English judges, over-ruling the Scotch courts; and it has been accepted by all American courts, both Federal and State, with only some qualifications in Kentucky and some western and southern States; which, however, turn rather upon the interpretation of the rule than upon the rule itself."

As the inadequacy of the doctrine to keep pace with the marvelous industrial development of the last century became apparent, it was sought, in most jurisdictions, to soften its rigors by introducing the fiction of vice-principalship which undertook to increase the number of responsibilities which the master could not escape by delegating them to subordinates. The whole doctrine was, in brief, a denial as to the employee, of the principle of *respondeat superior*. Under the latter, a stranger invited upon the master's premises, either expressly or impliedly, could recover for injuries received through the negligence of the master's employees. It was this right which was denied to the employee.

Another defense to which the master was entitled under the common law was that known as contractual assumption of risks. Practically the same thing is referred to in very many cases as the defense of *volenti non fit injuria*. (That to which a person assents is not deemed in law an injury.) While these two defenses are theoretically distinct, it has been said by one learned writer that it is impossible to treat the two separately in reviewing American decisions (5 Labatt's *Master and Servant*, sec. 1647a). The distinction is usually important only when the master's breach of a statutory duty is concerned. In those jurisdictions holding that the continuance in the service of an employee after he has knowledge of the violation of a statutory duty by the master is not a defense, the holding is usually justified on the ground of an implied contract of the servant to assume the risks of the business; and that, consequently, it would be against public policy to permit the master to contract against the effects of a violation of the statute. It is in those jurisdictions that recognize the same state of facts as a defense available to the master where the maxim *volenti non fit injuria* is relied upon, such courts holding that no contract, express or implied, is involved, and that, consequently, the public policy in question is not involved. Under either name, the defense in question leaves the workman without remedy when his injury results from a risk known or imputable to him before entering the employment or because of his continuance at work after such knowledge came to him, whether such a risk was due to a defect in the ways, works or machinery, or to negligence of the master or other persons in the common employment.

A third defense which a master could interpose in an action against him by an employee for personal injuries received in the course of the employment was that of contributory negligence. It has been frequently remarked that this defense is often confused with that of assumption of risk or *volenti non fit injuria*. The Supreme Court of the United States explained the distinction between the two defenses in the following language in the recent case of *Seaboard Air Line Railway vs. Horton* (233 U. S., 492, 503):

"The distinction, although simple, is sometimes overlooked. Contributory negligence involves the notion of some fault or breach of duty on the part of the employee; and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks 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 of 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 disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

See also *Dowd vs. New York, O. & W. Ry. Co.* (170 N. Y., 459). In *Halsbury's Laws of England* (vol. 20, p. 138), it is said:

"The defense of contributory negligence is always available in actions for compensation for negligence. It is a common law defense available to a master sued by a workman in respect of personal negligence, and, if proved, defeats the action."

Cooley on Torts (2d ed., page 667), says:

"Where the master is sued by his servant for an injury which it is claimed has been occasioned by his negligence, it is very properly and justly held that the plaintiff is not to recover if his own negligence contributed with that of the defendant in producing the injury."

Summing up the defenses available to the master under the common law of England and the United States, it may be said that he could defend against an action by his servant by proving his own freedom from negligence, the plaintiff's contributory negligence, that the injury was caused by the negligence of a fellow servant, or that it happened through one of the ordinary risks of the employment. Any one of these defenses was a sufficient answer to the plaintiff's claim. The first two are defenses which he might urge against the claim of a stranger, but the last two are peculiar to the relationship of master and servant, and are said to arise from the implied contract of service between them.

Let us now see what effect the Employers' Liability Act had upon the common law. In England, as we have stated above, the employer was not liable under the common law for injuries to his employees caused by the negligence of a fellow servant who had been intrusted by the master with the duty of furnishing the employees safe places, machinery, etc., for their work. Under the first subsection of section 1 of the Employers' Liability Act, it is clear that an employer may no longer claim exemption from liability upon this ground. But, as above stated, it was already the majority rule of the common law in the United States that masters could not delegate their responsibilities to provide safe premises and machinery for their employees or subordinates. Hence, we find the Massachusetts court saying in *McCafferty vs. Lewando's F. D. & C. Co.* (194 Mass., 412; 120 Am. St. Rep., 562):

"So far as defects in the ways, works, and machinery are concerned, there is no difference between the liability under the Employers' Liability Act (Rev. Laws, c. 106, sec. 71, cl. 1) and at common law, except in the amount which can be recovered."

In Alabama it was said in *Wilson vs. Louisville, etc., R. Co.*, (85 Ala., 269):

"Under the statute, negligence in causing, or failing to discover or remedy a defect, is essential to liability. It does not undertake to define what shall constitute a defect, or negligence in regard to the condition of the ways, works, machinery or plant. To determine these matters, reference must be made to the principles of the common law. Therefore, whether the plaintiff's right to recover is based on the statutory or common law liability of an employer, the measure of defendant's duty to plaintiff is essentially the same."

In *Colorado Milling & Elevator Co. vs. Mitchell* (26 Colo., 284), it was said:

"Clauses 1 and 2, which are the only provisions that can be said to have any bearing upon the case in hand, are, so far as they go, but a legislative recognition of the principles laid down in the former decisions of this court."

It is, however, observed in *Toomey vs. Donovan* (158 Mass., 232), that section 4 of their Act (sec. 6 of our own) enlarges "the liability of the employer; otherwise, it is meaningless. The inference from the section plainly is that the employer should be liable when a contractor does part of his work and an employee of the contractor is injured by reason of a defect in the condition of the ways, works, machinery, or plant furnished by the employer to the contractor, which has not been discovered or remedied through the negligence of the employer, or of some person intrusted by him with the duty of seeing that they were in proper condition."

In England, the view is entertained that the liability imposed by the Act in extension or derogation of the employer's common law liability arises almost entirely from the partial abrogation of the doctrine of common employment which the Act effects (*Weblin vs. Ballard*, 17 Q. B. D., 122).

The Employers' Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to workmen. The object of the Act was to get rid of the inference arising from the fact of common employment with respect to injuries caused by any persons who are intrusted with the duty of seeing that the ways, works, or machinery are in proper condition, who have duties of superintendence and control. And, in the case of railroads, who have charge or control of engines, switches, signals, or trains. (*Griffiths vs. Earl of Dudley*, 9 Q. B. D., 357, 362.)

In Massachusetts, prior to the enactment in question, it had always been the rule that the common employer was not liable to an employee for injuries sustained through the negligence of a superintendent or superior workman (*Zeigler vs. Day*, 123 Mass., 152; *Kalleck vs. Deering*, 161 Mass., 469; 42 Am. St. Rep., 421). In *Quinlan vs. Lackawanna Steel Co.* (107 App. Div., 176; 94 N. Y. S., 942), it was said that the act was undoubtedly intended to make the employer liable for the acts of a superintendent while engaged in acts of superintendence. In *1 Dresser on Employers' Liability* it is said:

"The effect of the Act is to except from the class of fellow servants, the risk of whose negligence the servant was held to have assumed, such persons as are intrusted by the master with duties of superintendents while in the exercise of them."

In Alabama it has been said that the statute does not make the master liable for the negligence of an employee who is a mere fellow servant and nothing more of the injured employee (*Walton vs. Tennessee Coal, Iron & R. R. Co.*, 166 Ala., 538).

In *5 Labatt's Master & Servant*, p. 5192, it is said that, generally speaking, conditions precedent to recovery are (1) that the servant was a "superintendent" within the meaning of the acts; (2) that the act which was the immediate cause of the injury was negligent; and (3) that the act was done in the exercise of the controlling functions of the superintendent. It has been suggested that, in effect, subsection 2 of section 1 extends to workmen the benefit of the principle of *respondeat superior* so far as negligent acts of "superintendents" are concerned.

The third subsection of section 1 carries the abrogation of the fellow-servant doctrine even farther as respects employees of what is generally known as the operating department of railroads. In this industry an employer is liable not only for negligent acts of those who may be properly said to be within subsection 2, but also, according to subsection 3, to all persons "in charge or control of any signal, switch, locomotive engine or train." Railroad companies have thus special liabilities and railroad employees have special benefits under the Act.

The effect of the Act on the fellow-servant doctrine was not to entirely abolish it but to reduce its scope. As was said in *Henahan vs. Lyons* (1909) (201 Mass., 269), "There can be no recovery for the negligence of an employee where there is no evidence that superintendence was his sole or principal duty."

Now, what effect has the Act had upon the common law defense of assumption of risk, or as it is considered in some jurisdictions, *volenti non fit injuria*? In a recent case decided by the Supreme Court of the United States, in which the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat., 65) was discussed, it was said:

"Upon the merits, we of course sustain the contention that by the Employers' Liability Act the defense of assumption of risk remains as at common law, saving in cases mentioned in section 4, that is to say: '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.' " (*Southern Ry. Co. vs. Crockett*, 234 U. S., 725.)

In England, it was said in the case of *Thomas vs. Quartermaine* (18 Q. B. D., 685) that the Act had not varied the effect of the maxim *volenti non fit injuria* so far as it involves the ordinary risks inherent in his particular employment. To the same effect is *O'Maley vs. South Boston Gas Light Co.* (158 Mas., 135); *Birmingham Ry. & Electric Co. vs. Allen* (99 Ala., 359); *Whitcomb vs. Standard Oil Co.* (153 Ind., 513). But while the Act made no change in the doctrine of assumed risks, there is, nevertheless, a noticeable difference in the application of the doctrine in favor of the workman since the enactment of these Acts. The doctrine is based upon the implied consent of the servant to accept or continue in the employment after becoming aware of the risk which resulted in his injury. It was formerly held that mere acceptance of the employment or continuance in it with knowledge of the risk was conclusive of the workman's consent to accept the risk, and the usual practice was, when evidence of this nature was satisfactory, to direct a verdict or nonsuit in favor of the defendant. The trend of modern public sentiment in favor of compensation for industrial accidents, however, has had the influence of making the assumption of risks almost entirely a question of fact instead of, as under the former practice, practically inferring his consent from the fact of his knowledge of the risk coupled with his continuance in the service. The unwillingness of the employee to sacrifice his employment has been recognized as an inducement for him to run the risk, however unwilling he may be, in fact, to do so. This new theory of the assumption of risk, however, does not abrogate the doctrine at all. It merely requires more convincing evidence of the employee's consent to assume the risk. It is still true that the employee assumes the ordinary risks inherent in the industry in which he is employed. But as to those abnormal risks arising from unusual conditions, the new view of the doctrine requires the question of his consent to undergo such risks to be considered purely as a question of fact and to require cogent and convincing evidence of such consent. Cases in which the whole matter is discussed at length are *Thomas vs. Quartermaine* (18 Q. B. D., 685); *Yarmouth vs. France* (19 Q. B. D., 647; 17 Eng. Rul. Cas., 217); *Smith vs. Baker* (60 L. J., Q. B. D., N. S., 683); *Fitzgerald vs. Connecticut River Paper Co.* (155 Mass., 155; 31 Am. St. Rep., 537); *Mahoney vs. Dore* (155 Mass., 513) ; *Davis vs. Forbes*, 171 Mass., 548); *Simoneau vs. Rice & Hutchins* (202 Mass., 82); and see 3 *Labatt's Master and Servant*, p. 3627, et seq.; 2 *Dresser on Employers' Liability*, p. 326.

"The defense of contributory negligence is always available in actions for compensation for negligence. It is a common law defense available to a master sued by a workman in respect of personal negligence, and, if proved, defeats the action. The act has not deprived the employer of this defense." (20 *Halsbury's Laws of England*, p. 138.)

In Massachusetts it was said that assuming the negligence of a superintendent, the servant could not recover if he were guilty of contributory negligence. (*Regan vs. Lombard*, 192 Mass., 319). This doctrine, however, like that of the assumption of risk, has been more recently partially abrogated by statutes. Under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. 65; U. S. Comp. Stat. Supp., 1911, p. 1322), the defense of contributory negligence "is abrogated in all instances where the employer's violation of a statute enacted for the safety of his employees contributes to the injury." And in several States the doctrine of comparative negligence, as to some industries, has been established by statute. The effect of these statutes is to diminish the damages recoverable in proportion to the negligence of the injured person. (Arkansas, Laws of 1907, p. 162; Colorado, Act of May 27, 1911; *Morrison & De Soto Stat. Ann.*, sees. 2060 and 2063; Florida, Gen. Stat. 1906, sees. 3148 et seq.; Georgia, Code 1911, Acts 1909, p. 160).

Viewing the act as a whole, it was said in *Thomas vs. Quartermaine* (18 Q. B. D., 685), per Bowen, L. J. :

"The true view in my opinion is that the Act, with certain exceptions, has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business. If it has created any further or other duty to be fulfilled by the master I do not know what it is, how it is to be defined, or who is to define it."

In *Mobile etc., Ry. Co. vs. Holborn* (84 Ala., 133), it was said :

"The purpose of the statute is to protect the employee against the special defenses growing out of, and incidental to, the relation of employer and employee; and the result is to take from the employer such special defenses, but to leave him all the defenses which he has by the common law against one of the public, not a trespasser, nor a bare licensee."

In *1 Dresser on Employers' Liability*, sec. 2, it is observed that it is apparent that the Act has not attempted to define generally the rights and duties of masters and servants, and is not a codification of the law. Constant reference must be made to the common law to define who are masters and who are servants, what is the scope of the employment and whether the inquiry was the proximate result of the negligence; and negligence itself is determined by the common law, and not by the Act. The Act, moreover, is silent concerning certain terms of the contract of service. It does not impose any obligation on the master to employ competent servants, nor to instruct or warn his servants about their work or the dangers of it. These obligations were too well settled and important to be taken away by implication merely, and the courts have held that the Act was remedial, and a concurrent, instead of an exclusive, remedy.

It is manifest, therefore, that the purpose of the Employers' Liability Act was, at most, to abolish certain defenses in certain specified cases, but in no manner to prejudice common law rights of employees or to interfere with the enforcement of any right that the Act itself did not create. Such have been the holdings of the courts in England and the United States from the very beginning.

We now come to the consideration of Act No. 1874 for the purpose of determining what effect this Act has had upon the law of damages in personal injury cases in this country, bearing in mind that the Act is, as we have indicated, essentially a copy of the Massachusetts Employers' Liability Act which has "prevailed in the State of Massachusetts some years and upon which interpretations have been made by the Massachusetts courts, defining the exact meaning of the provisions of the law." (Special report of the joint committee of the Philippine Legislature on the Employers' Liability Act, *Commission Journal* 1908, p. 296.) We agree with the Supreme Court of Massachusetts that the Act should be liberally construed in favor of employees. The main purpose of the Act, as its title indicates, was to extend the liability of employers and to render them liable in damages for certain classes of personal injuries for which it was thought they were not liable under the law prior to the passage of the Act.

We do not doubt that it was, prior to the passage of Act No. 1874 and still is, the duty of the employer in this jurisdiction to perform those duties, in reference to providing reasonably safe places, and safe and suitable ways, works, and machinery, etc., in and about which his employees are required to work, which, under the common law of England and America, are termed personal duties, and which in the United States are held to be such that the employer cannot delegate his responsibility and liability to his subordinates.

"This (rule of) contractual obligation, implied from the relation and perhaps so inherent in its nature to be invariable by the parties, binds the employer to provide safe appliances for the use of the employee, thus closely corresponding to the English and American law." (*Rakes vs. Atlantic, Gulf & Pacific Co.*, 7 Phil. Rep., 359, 366.)

So, to this extent, the first subsection of section 1 of the Act is simply declaratory of the law as it stood previous to the enactment. It may be that the employer would not be liable, under the Civil Code, for personal injuries caused to his employees as a result of the negligence of the employer's superintendent or acting superintendent, or that of a person in charge or control of a signal, etc., provided that the employer "employed all the diligence of a good father of a family to avoid the damage." (Art. 1903 of the Civil Code, and *Chaves and Garcia vs. Manila Electric Railroad and Light Co.*, 31 Phil. Rep., 47.) Under the Act the employer would be liable in damages for such negligence of the employees named. If this view be correct, a question which we are not now called upon to definitely determine, then the liability of employers was, in fact, extended and new rights of action were created by the Act. It is these new rights to which the Act refers, wherein it provides that "the employee, or his legal representatives, shall, subject to the provisions of this Act, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer."

Standing in this form, it is quite clear that it was not intended that all rights to compensation and of action against employers by injured employees or their representatives must be brought under and be governed by the Act. The strongest proof of all, showing that the Legislature never intended by the Act to curtail the rights of employees, is that of the defense of contributory negligence which defeats the action under the Act, while under the Civil Code, such complete defense does not exist at all in this country. (*Rakes vs. Atlantic, Gulf & Pacific Co.*, supra; *Eades vs. Atlantic, Gulf & Pacific Co.*, 19 Phil. Rep., 561.) That the defense of contributory negligence, as it is understood in the United States, is recognized in the Act with all its force and effect is clear, because the first section requires as an essential requisite that the employee be "in the exercise of due care" at the time of the injury in order to hold the employer liable for damages. The plaintiff in the case of *Rakes vs. Atlantic, Gulf & Pacific Co.* (supra) could not have recovered under the Act because he was not in the exercise of due care at the time of the injury.

Taking into consideration what we have said above in reference to the origin and history of the Act, its plain purport, and realizing that the legislature was content with the expounded meaning of the words which it adopted, we find no difficulty in reaching the conclusion that in those cases either within or without the words of the Act in which the law, as it stood prior to the passage of the Act, gives an employee a remedy, he still has a right to sue under the same conditions and to recover damages to the same extent as if the Act had not been passed. We are also of the opinion that so far as section 1 of the Act is concerned, the provisions giving the employees the same rights to compensation and to action as if they had not been employees, the requirement of notice as a condition to maintaining the action, that relating to the time within which the action must be brought, and that requiring the employee to give notice to his employer within a reasonable time after he becomes aware of the defect or negligence, only apply to those extremes lying outside of the Civil and allied Codes, but embraced by the Act, unless a case shall arise in which the plaintiff, although he has a remedy under the Civil Code, insists upon relying upon the Act alone. (*Ryalls vs. Mechanics' Mills*, 150 Mass., 190, and cases cited therein.) Act No. 2473 has not

in the least changed these principles.

The net result is that we are required, under the pleadings and record in the case at bar, to determine whether the plaintiff can recover for the death of her son under either Act No. 1874 or the Civil Code.

Assuming that the excavation for the gas pipe is within the category of "ways, works, or machinery connected with or used in the business of the defendant," we are of the opinion that recovery cannot be had under the Act for the reason that, as we have indicated, the deceased was at a place where he had no right to be at the time he met his death. His work did not call him there, nor is it shown that he was permitted there tacitly or otherwise. Under the Anglo-American law the rule applicable to such a set of facts is that the master is not responsible, under the Employers' Liability Act, for accidents to his employees when they are outside the scope of their employment for purposes of their own.

"The obligations of the master * * * continue in force, not only during all the time in which his servants are actually engaged in his service, but also during the time reasonably occupied by them on his premises in going to and returning from their work and in intervals of rest between. * * * But he is under no obligation to keep in safe condition for their use any part of the premises to which their duties do not call them and to which he has not given them permission to go." , (Street's edition of Shearman & Redfield on Negligence [vol. 1], sec. 188.)

To the same effect is 4 Labatt's Master and Servant, p. 4697.

"A master's duty in respect to furnishing his servants a safe place in which to work extends to such parts of his premises only as he has prepared for their occupancy while doing his work, and to such other parts as he knows or ought to know they are accustomed to use while doing it. The application of this principle has frequently prevented recovery in cases where the injury proximately resulted from the fact that the injured servant was occupying the dangerous. position merely for his own convenience and accommodation. Under such circumstances his legal rights are no greater than those of a licensee."

Besides the many cases cited by this author supporting his text, we note *Connell vs. New York C. & H. R. R. Co.* (129 N. Y., Sup. 666); *Louisville & N. R. R. Co. vs. Hocker* (111 Ky., 707); *Gawlack vs. Michigan C. R. Co.* (11 Ohio C. C., 59); *Pfeiffer vs. Ringler* (12 Daly, 437)—in all of which cases the injured persons were attending a call of nature in dangerous circumstances at places not authorized by the employer to be used for that purpose; *Wilson vs. Chesapeake & O. Ry. Co.* (130 Ky., 182), where plaintiff left a roundhouse in which he was working at night and started in the dark through the yards for a restaurant to get something to eat; *Pioneer Mining & Mfg. Co. vs. Talley* (12 L. R. A., N. S., 861), where plaintiff, a miner, left his work and went into another portion of the mine to get his own tools which he had loaned to other workmen; *McCann vs. Atlantic Mills* (20 R. I., 566), where plaintiff went into a dark place to get a drink of water and was injured by falling into a reservoir; and *Adams vs. Iron Cliffs Co.* (78 Mich., 271; 18 Am. St. Rep., 441), where plaintiff left his work during working hours and started to cross some railroad tracks for the purpose of attending to his private business. In all these cases it was held that the injured person was outside the scope of his employment at the time and, hence, had no right of action against his employer.

Article 1105 of the Civil Code provides that:

"No one shall be liable for events which could not be foreseen, or which having been foreseen were inevitable, with the exception of the cases expressly mentioned in the law or those in which the obligation so declares."

The case under consideration does not fall within the exceptions mentioned in the above quoted article. (Manresa, vol. 8, p. 91.) After providing a reasonably safe place in and about which the deceased was required to work, the defendant's liability was then limited to those events which could have been foreseen. Article 1902 provides that a person who, by an act or omission causes damage to another when there is fault or negligence shall be obliged to

repair the damage so done. Article 1903, after providing for the liability of principals for the acts of their employees, agents, or those for whom they are otherwise responsible, provides that such liability shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage. We have then, on the one hand, nonliability of an employer for events which could not be foreseen (article 1105), and where he has exercised the care of a good father of a family (article 1903), and, on the other hand, his liability where fault or negligence may be attributable to him (article 1902).

Gideon, city engineer of Manila and a witness for the plaintiff, testified concerning his experience with trenches in this city. He stated that if the trenches are very dangerous his department uses sheathing piles and braces them firmly. If the trenches are of considerable depth and the ground is not considered safe, they put planks on both sides, supported by braces. If the trenches are not very deep or if the ground is considered safe, they simply make the excavations. The conditions vary and the precautions used depend upon the opinion of an experienced engineer. Seaver, chief of police of the city of Manila and also a witness for the plaintiff, testified that the slide which caused the death of the deceased came principally from the side of the trench farthest from the street-car tracks. Captain Ordax of the police department, another witness for the plaintiff, testified that the earth which covered the deceased's body came from the side opposite the street-car tracks. Another witness testified that the distance from the street-car tracks to the trench was only a few feet, but that the trench had been open for a week. From the testimony of the witnesses it does not appear that there was any water in the bottom of the trench, although some of the witnesses said that it was damp. The trench was only three and one-half to four and one-half feet deep. The cause of Ocumen's death was not the weight of the earth which fell upon him, but was due to suffocation. He was sitting or squatting when the slide gave way. Had he been even half-erect, it is highly probable that he would have escaped suffocation or even serious injury. Hence, the accident was of a most unusual character. Experience and common sense demonstrate that ordinarily no danger to employees is to be anticipated from such a trench as that in question. The fact that the walls had maintained themselves for a week, without indication of their giving way, strongly indicates that the necessity for bracing or shoring the trench was remote. To require the company to guard against such an accident as the one in question would virtually compel it to shore up every foot of the miles of trenches dug by it in the city of Manila for the gas mains. Upon a full consideration of the evidence, we are clearly of the opinion that ordinary care did not require the shoring of the trench walls at the place where the deceased met his death. The event properly comes within the class of those which could not be foreseen; and, therefore, the defendant is not liable under the Civil Code.

Having reached the conclusions above set forth, it is unnecessary to inquire into the right of the plaintiff to bring and maintain this action.

For the foregoing reasons the judgment appealed from is reversed and the complaint dismissed, without costs. So ordered.

Arellano, C. J., Torres, Johnson, and Araullo, JJ., concur.
Carson, J., dissents.

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