Yale Law Journal

Volume 13
Issue 8 *Yale Law Journal*

Article 4

1904

EDITORIAL

YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 835, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuation of the subscription is desired.

A CRIMINAL PROSECUTION IN THE PHILIPPINES.

A contribution has been received from the Philippine Islands describing a trial that recently took place. It is worthy of attention, as it indicates some of the peculiar conditions and difficulties which our government has had to meet. These problems are further illustrated in Mr. Wilfley's article in the present number on "Trial by Jury and 'Double Jeopardy' in the Philippines." The same author has also shown how well many of these problems have been solved in the *North American Review* for May.* In view of the present interest in the topic, we regret that a lack of space prevents the publication in its entirety of the account of a trial that "graphically unfolds the lights and shadows of Filipino life and character." The following, however, is an abridgement describing the offense and the prisoner,—and that criminal law to be applied —so complicated in its provisions that one is at a loss to tell who receives the punishment after all, the lawyers and the court, or the accused.

The specific charge against the defendants is that on a certain night they entered and robbed a store belonging to a Spanish mestizo, the owner residing in the building. The robbers bound

*"The New Philippine Judiciary," North American Review, Vol. 178: No. 5.

the arms of the proprietor, whom they found within the store-room, and ransacked the building, taking away certain property consisting of cloth and palay. After remaining in the store perhaps half an hour, the idea of the duration of time being exceedingly vague in the ordinary native mind, and evidence as to time being correspondingly uncertain and unsatisfactory, most of the gang left the building and proceeded to the beach. There they had left the boat in which they came to the little pueblo where the crime was committed. Upon their arrival at the sea side the arms of the prisoner were unbound, but he was forced to enter the boat by the two members of the band to whose special custody he was committed, and with prisoner and plunder the boot was rowed out to sea.

There were eight men in the boat, all of whom were armed, beside the captive, who was unarmed and defenceless, which condition is taken into consideration as an especially aggravating circumstance by the Spanish criminal code. After rowing some distance from the shore the malafactors in charge of the prisoner turned upon him and killed him with a blow in the neck from a bolo and a thrust from a spear, a weight was tied to the body, which was cast into the sea, and from henceforth Rafeal Butron was never seen of men. The robbery, following the assault on the house, occurred about seven o'clock, the murder followed probably fully an hour later, which transactions, as provided by the Spanish criminal law, transpired at night time, and by the same law nocturnity is to be considered by the trial judge as an aggravating circumstance in meting out the fitting penalty to the offense proven.

The defendants were originally twelve in number, three have died in prison, and one turned state's evidence. Beside the accused before the court, three of the band, and those among the most culpable from the testimony of their fellows, have never been arrested; probably they are roaming among the mountains of the interior or have escaped to another island.

Vicente, the tagallo, is apparently the chief actor of the band. The other defendants seem to hold him in dread, and, I suspect, withhold whatever they know of his participation in the outrage. He is evidently superior to his fellows in intelligence and force of character. He represents a type of his countrymen who are at the present writing causing infinite trouble to the government and people of the Archipelago. The instigator of crime and sedition finds a wide field of operations in the Philippines. The prime mover of most of the ladrone outrages is the man, or perhaps two or three men, who concoct the enterprise and induce the barefooted man to undertake its execution.

Another interesting character is the witness Pablo, one of the accused testifying in his own defense, and who relates some things that he saw and heard very damaging to defendants who are not present and which do not inculpate himself. Pablo desires the court to realize that he is deeply impressed with the realization that

he is giving his testimony under oath. The poor fellow is shivering with fear, probably of Vicente, who sits behind him, and he realizes that every word he utters is heard by the grim tagallo and will be remembered, perhaps to be revenged when the day of reckoning comes. If left to himself, and the dread presence of Vicente were withdrawn, Pablo would probably tell what part every one of the gang took in the robbery and murder, excepting himself and two members of his family who are among the accused. He tells the facts as far as he dare under existing conditions. He tells who killed the prisoner, how he was killed and what disposition was made of the body. He tells of an unknown man who was walking to and fro in front of the house of the murdered Spaniard, and, as near as he dare, he says the man was Vicente, but in the presence of Vicente dare not acknowledge his recognition of him. That the accused shall be confronted with the witnesses against him is now and has been since the American occupation a principle of the criminal law of the Philippines. We would not venture to maintain that the introduction of this primary rule of the criminal procedure of the United States was an injudicious measure, but it cannot be denied that in this section this rule of common right to the citizen of the States affords a wide avenue of escape to innumerable criminals, permitting the instigator to go free and leaving the victims to punishment.

In this country the circumstances attending the commission of certain offenses are very different from those usually attendant upon the same crime in the United States, as for instance, robbery and homicide. Vicente, a prominent man in the community, has a grievance against the Spaniard, Rafeal Butron. He wishes him out of the way and decides upon his death. He directs his brother-in-law, Alfonso, a chief actor in the tragedy, and one of the two who had custody of the captive and dealt the death blow, to gather a sufficient number of fellows of the baser sort and assault the dwelling of Butron, take him prisoner and kill him. Alfonso confers with Maximo and Roberto, who appear to have been kindred spirits, ready and willing to undertake the commission. Alfonso and his comrades serve the summons of their chief on Pablo, Rufio and the other retainers, who willingly or unwillingly buckle on their bolos, take their spears and set out on the expedition of robbery and murder. All through the proceeding it appears between the lines that though Alfonso, Maximo and Roberto are apparently the chief actors, Vicente's hand is pulling the wires and that he is the actual promoter of the crime.

Vicente does not go with the party to gather the recruits. Vicente does not enter the house. Vicente does not accompany the band with the prisoner to the seashore. Vicente is not present at the deed of death. Vicente, however, is head and front of the offending, the instigator by whose procurement the crime was committed. When the ignorant dupes are called before the court to

answer for the murder, Vicente confronts his puppets, who in his presence are dumb as to giving utterance to testimony that might anger their overlord and bring down upon them his future vengeance.

This semi-savage blood compact entered into against the peace of society, perhaps, more than any other instrumentality, has driven poor and ignorant men into the ranks of the seditious and criminal. The compact once written in blood, the terror is upon him, he dare not withdraw if he would. The Katipunan holds its members with a grip of steel. Its mysterious influence is felt all over the Philippines. The vow once taken, a fear of impending doom holds the votary to his unholy allegiance. He dare not divulge its secrets or break away from the mystic brotherhood. The fear of its vengeance seals his lips and drives him into danger and death at the command of the leaders he has sworn to obey.

The Philippine Criminal Code carefully points out to the trial judge what he shall consider an aggravating and what an extenuating circumstance. If a bully meet a frail consumptive on the street and without provocation knock him down, the law obligingly instructs the judge that the aggressor took advantage of his superior strength, and that in imposing the penalty he must give consideration to this circumstance, and provides a scale of penalties to be fitted to the peculiar conditions of the transaction. The judge is presumed incapable of a fair consideration and comparison of all the evidence in the case. To supply the deficiency in the judicial intellect, a mechanical list of penalties are appended to the code, constituting a sort of Chinese puzzle, from which the court and attorneys figure out the fitting penalty at the close of the trial of a criminal case.

This Spanish-American-Filipino code is a constant irritation to the judge or practitioner from the United States. What any person of sufficient intelligence to keep out of an asylum for the feeble minded would take into consideration as mitigating or aggravating the offense, is minutely designated by the code. The trial judge is unable to exercise a wise discretion, so essential to an impartial and exact administration of justice according to the judicial mind of the United States. Instead of being given latitude in the imposition of penalties he is hampered by the innumerable restrictions of this ridiculous code with its senseless minute classification. Turning to the tabulated list, we find a statement of penalties unknown to the American practitioner and which it is devoutly to be hoped will speedily be swept from the statutes, and among them, thirty-fourth on the list, presidio correccional in its minimum degree, denoting imprisonment from 6 months and 1 day to 2 years and 4 months. The next penalty, thirty-fifth on the table is presidio correccional in its medium degree, or imprisonment for 2 years, 4 months and 1 day to 4 years and 2 months. Then comes presidio correccional in its minimum and medium denoting a term

of from 6 months and 1 day to 4 years and 2 months; presidio correccional in its medium and maximum, 2 years, 4 months and 1 day to 6 years; presidio correccional in its maximum 4 years, 2 months and 1 day to 6 years. Then follows presidio correccional in its minimum, medium and maximum, mixing in with presidio mayor with its minimum, medium and maximum and arrest mayor, cadena perpetua, cadena temporal, reclusion perpetua, reclusion temporal, relegacion perpetua, relegacion temporal, perpetual and temporal expulsion, confiniemento, banishment, public censure, caution, perpetual absolute disqualification, temporary absolute disqualification, perpetual and temporary, special disqualification. After the conclusion of the trial it is customary for the fiscal to ask the imposition of a certain penalty, which the counsel for the accused frequently opposes as too severe; then follows a prolonged search through the labyrinth attached to the criminal code to determine the penalty fitting the transgression, which ought to be decided by the judge from a comparison and consideration of all the circumstances as shown by the evidence, and from a clearly defined scale embracing a certain number of years as provided by the codes of the several States of the Union. *W. F. Norris.*

Ramblon, P. I.

NEGRO PEONAGE AND THE THIRTEENTH AMENDMENT.

No little interest has been aroused by Judge Speer's recent decision in the District Court at Savannah (*United States v. McClellan,* 127 Fed. 971), maintaining the application of the Thirteenth Amendment to uphold the constitutionality of the statutes of 1867 against peonage, and their prohibition of recent attempts to obtain forced labor from negroes to work out debts. This incipient system of compulsory labor, with its partial return to *ante bellum* conditions, would seem to have met with a large measure of approbation among leaders in public affairs in the State. One of the defendants was the sheriff of the county where the negro in question was seized; members of Congress and other prominent men were active in behalf of the defense; the opinion makes allusion to the political aspect of the questions involved. For this reason the case has an interest quite out of proportion to its legal importance, for it is difficult to conceive that it could ever be successfully maintained that involuntary servitude within the literal meaning of the Thirteenth Amendment was not charged by the indictment, on a demurrer to which the case came before the court.

It is a more plausible proposition that the statute of 1867, passed as it was to check the New Mexican system of peonage then in operation, was not intended to have any such result as that sought, but on this point, as on the other, the well-rounded arguments of the court carry conviction. A rigid and impartial interpretation of these provisions, which represent a large part of the tangible results of our Civil war, will, it is to be hoped, check practises which,

however much they may be approved by local opinion, are undoubtedly looked upon throughout the country as a whole as obnoxious to the spirit of our institutions.

In this connection, it may not be out of place to note some of the attempts which have been made to limit or extend the application of this Thirteenth Amendment. It is hardly necessary to allude to the effort made in the *Slaughter House Cases,* 16 Wall. 36, to include within "involuntary servitudes" monopolies created by law in occupations which, in the absence of statute, would be lawful for the public. In *Tyler v. Heidorn,* 46 Barb. 439, an interesting but futile attempt was made to apply the amendment to invalidate an obligation to pay an annual rental in bushels of wheat in accordance with the covenant of the grantee of the land concerned. On the ground that begetting a bastard child had been made a misdemeanor it has been held not unconstitutional to compel the father to work out fines under bastardy proceedings. *Myers v. Stafford,* 114 N. C. 234. And a State constitutional provision substantially similar to the Thirteenth Amendment has been held not to be contravened by a statute providing that a wilful failure by a laborer without just cause to reasonably fulfill his contract should render him liable to fine or imprisonment. *State v. Williams,* 32 S. C. 583. Again, the employment at labor of a person committed to a city prison, crediting him with one dollar a day on the judgment against him is not repugnant to the Amendment. *Topeka v. Boutwell,* 53 Kan. 20. On the other hand, in *Thompson v. Bunton,* 117 Mo. 83, a statute authorizing a vagrant, unconvicted of crime, to be hired for six months to the highest bidder, was declared a contravention. An exceptionally salutary application was made when it was held in *Re Sah Quah,* 31 Fed. 327, that the customs prevalent in Alaska of slaveholding and enforced servitude among the native tribes were not only contrary to the terms of the Amendment, but also subject to its provisions.

As has been intimated, it is its connection with the race question in the South which lends to the recent peonage case its chief importance. As long as the cleft between the races remains so broad, as long as the memories of negro slavery remain so vivid, as long as the negro race itself remains in a condition of such widespread ignorance, courts will undoubtedly have to deal with efforts such as are involved in this case to nullify in part the constitutional requirements on this subject. It will be generally agreed that, aside from the purely legal phase of the question, to permit such practices would have an unhealthy influence, and would tend to the postponement of the solution of one of our most vital as well as most difficult national problems.

ASSUMPTION OF RISK GROWING OUT OF THE NON-PERFORMANCE OF A MASTER'S STATUTORY DUTY.

That the common law places upon the master certain duties for the protection of his servant is fundamental; that these duties cannot

be delegated so as to relieve the master from liability, although deducible from, is equally elemental with the first proposition. One of these common law duties is the furnishing of reasonably safe implements with which to work. The courts have, however, engrafted upon this principle a qualification, in that, although the master has not performed his full duty, thereby creating an additional risk which was both obvious and ordinary, yet the servant by continuing his employment with knowledge of such delict, was conclusively presumed to have accepted the increased hazard arising therefrom. That is the doctrine of "assumption of risk." If an injury accrued to him in such a contingency the servant was deemed to have waived the master's non-performance of duty and no recovery was possible.

Do the same rules of law apply if the master is under a statutory duty to provide protection for his servant? The United States Circuit Court of Appeals has come to the conclusion recently that the doctrine of "assumption of risk" is equally applicable, whether the duty be statutory or of the common law. A statute of Missouri designed for the protection of employees provided that all exposed gearings, etc., should be guarded. An employer complied with the statute, but for a period of six weeks prior to an injury to one of his employees he had allowed some of the guards to fall into disuse so that a pair of rapidly revolving cogwheels were left exposed. A servant, a girl of 20 years of age, was required to work at the machine containing these wheels, about ten or fifteen minutes each day, and in consequence of their unguarded condition was injured. The Circuit Court of Appeals holds that the servant is entitled to no recovery, since by continuing in her employment she had assumed the risk arising from the failure of the master to comply with his statutory duty. In a strong dissenting opinion Judge Thayer takes an opposite view. *St. Louis Cordage Co. v. Miller,* 126 F. 495.

As to whether acquiescence by the servant under the above conditions will be regarded in law as a waiver of compliance by the master of a statutory duty, the courts differ. That there is no waiver and that the servant is entitled to recovery for an injury arising from the breach seems to be the rule in England, Illinois, Indiana, Missouri, Wisconsin and Tennessee. Some of these courts even hold that the servant's contributory negligence will not affect his recovery. On the other hand, the courts of Massachusetts, New York, Michigan, Alabama and Colorado agree that the risk arising from the breach of a statutory duty can be assumed as readily as that resulting from a common law obligation.

The courts sustaining the doctrine of waivers rely in great part on the maxim, *"Volenti non fit injuria,"* and recurrence is made for support to the case of *Thomas v. Quartermaine,* 18 Q. B. D. 685, in which it is said the maxim was first prominently applied to an action for personal injuries. A later case, however, states,

"in *Thomas v. Quartermaine* both the Lord Justices thought the maxim would not apply at all where the injury arose by the direct breach by the defendant of a statutory duty." Per *Wills, J.*, in *Baddeley v. Granville,* 19 Q. B. D. 423. In the latter case a man was required by statute to be kept constantly at the entrance to mines when the men were going up or down the shaft. Plaintiff knew it to be the regular custom not to have a man in attendance at night, and in consequence of such absence an injury resulted. It was held the defense of *volenti non fit injuria* had no application when an injury arose through the breach of a statutory duty by the employer and recovery was allowed. *Vide Smith v. Baker,* 1891 App. Cases 325; also *Yarmouth v. France,* 19 Q. B. D. 647, 653, 657.

So, in *Cutlett v. Young,* 143 Ill., 74, a statute provided that cages used for conveying miners up and down a shaft should be covered. Plaintiff continued working knowing of defendant's neglect to cover the cages, and later was injured through the omision, but was allowed to recover. The court said, "It was intended that in case of injuries occasioned by any violation of the statute or by wilful failure to comply with any of its provisions the right of recovery should not depend upon the exercise of ordinary care in the person injured or be precluded by contributory negligence." To same effect, *Bartlett v. Roach,* 68 Ill., 174; *Litchfield v. Taylor,* 81 Ill., 90.

In *Boyd v. Brazil Coal Co.,* 25 Ind., App. 157, where a statute of the same general import was in force, the decision reads, "A master who, under the revised statutes relating to the safety of miners owes his servant the duty of providing a safe place for him to work, is not relieved from liability for his negligence by the neglect of the servant or the servant's notice of danger or assumption of risk * * * We believe, however, that the maxim *volenti non fit injuria* or doctrine of assumption of risk does not apply to a statutory duty imposed on the master, and the continuing of the servant in the employ of the master with knowledge of such breach of duty will not prevent a recovery for an injury suffered by such breach." To same effect, *Hochstetter v. Coal Co.,* 8 Ind. App. 442.

In Wisconsin a statutory duty was imposed on railway companies to fence their lands. A conductor remained in the employ of the defendant knowing that this duty was not performed, but the court held that this knowledge and acquiesence did not operate as a waiver by him of his rights to recover for injuries sustained through the want of a fence." "The deceased might well act," the court says, "upon the presumption that the defendant would proceed to perform without unnecessary delay the duty which the statute imposed upon it." *Quackenbush v. Ry.,* 62 Wis. 411.

A statute in Tennessee provides that "Every railway company shall keep the engineer or fireman or some other person always upon the lookout ahead." The construction of this statute by the

courts of that State is to the effect that where an accident occurs by reason of the non-compliance on the part of the railway company with the statutory regulation, the right of action in favor of the injured party is absolute, and that his contributory negligence is no bar, though it must be considered in mitigation of damages. *Railroad v. Smith,* 6 Heisk. 174; *Same v. Walker,* 11 Heisk. 383; *Same v. Nowlin,* 1 Lea 523.

The authority for the same rule in Missouri may be found in *Durant v. Lexington,* 97 Mo., 62, where it was said, "Mere knowledge by the plaintiff of the failure of the defendant to have the protection required by law will not defeat an action for recovery of damages accruing from a non-compliance."

On the other hand, the Factory Law of New York makes it obligatory upon employes to guard exposed gearings, and a woman twenty-one years of age was not allowed to recover for an injury sustained in the operation of an ungeared machine. "We are of the opinion," says the court, "that there is no reason, in principle or authority, why an employee should not be allowed to assume the obvious risks of the business as well under the Factory Act as otherwise. There is no rule of public policy which prevents an employe from deciding whether, in view of increased wages, the difficulty of obtaining employment. or other sufficient reasons, it may not be wise and prudent to accept employment subject to the rule of obvious risks. The statute does not deprive them of their free agency and right to manage their own affairs . *Knisley v. Pratt,* 148 N. Y. 372. Upon the same theory the court proceeds in *O'Malley v. South Boston Gas Co.,* 158 Mass. 135, when it says, "It would be an unwarranted construction of the statute, which would tend to defeat its object, to hold that laborers are no longer permitted to contract to take the risk of working where there are peculiar dangers from the arrangement of the place and from the kind and quality of the machinery used." *Vide Grand v. Railroad,* 83 Mich. 564. An inspection of the case of *Victor Coal Co. v. Muir,* 20 Colo. 320, which is cited in support of the theory, shows that the servant himself was a violator of the statute under which he sought protection, so that the case affords a meagre basis for the proposition it is sought to sustain. *Vide Birmingham v. Allen* 99 Ala. 359.

It is submitted, that when a statutory duty is imposed on an employer for the protection of his servants, the better rule is that the servant does not waive compliance by the master, and assume the resulting risk by continuing in the master's service. The proposition is submitted on the following grounds: First, that the master is placed under a positive statutory duty which the servant has a right to presume will be performed. *Quackenbush v. Wisconsin Ry. supra; Railway Co. v. Archibald,* 170 U. S. 665. Any disregard of this duty is not a mere omission, but a tort, as it is a direct violation of a positive law. The master is, therefore, guilty of a wrong before any injury accrues to his servant. It is contrary

to principle to allow the master to take advantage of his own wrong when the injury does acrue, because there may have been a tacit acquiesence in the master's wrong on the part of the servant. The master ought not to be allowed to rely upon his own neglect of duty as a defense against injuries arising from such neglect, especially when the more manifest the neglect, the more certain the defense. Second, any other construction would be against public policy in that it would in effect nullify the statute. *Durant v. Lexington, supra.* The primary object of the statute is to secure proper protection to employes. If we adopt the doctrine of waiver, "the statute would furnish the employe little protection. The mere refusal of the owner to furnish the safeguards provided by the statute would then be sufficient to exonerate him from liability if the employe continued in his employment and sustained injury." *Hochstetter v. Mosley, supra.* As satisfactorily elucidating the theory that the doctrine of assumption of risk, when applied to statutory duties, is contrary to public policy, we can do no better than quote from the opinion which first laid it down that the maxim *volenti non fit injuria* has no application to such duties. "An obligation imposed by statute," says Wills, J., "ought to be capable of enforcement with respect to all future dealings between the parties affected by it As the result of past breaches of the obligation people may come to any agreement they like; but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A and B that B shall be at liberty to break the law which has been passed for the protection of A. Such an agreement might be illegal, although I do not hold this to be so. But it seems to me that if the supposed agreement between the deceased and the defendant, in consequence of which the principle of *volenti non fit injuria* is sought to be applied, comes to this, that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as himself, such an agreement would be in violation of public policy and ought not to be listened to." *Baddeley v. Granville,* 19 Q. B. D. 423; see also *Blamires v. Lancashire Ry.,* L. R. 8 Ex. 283; also *Reno-Employers' Liability Acts,* sec. 74, 178.