1927.

Present: Maartensz A.J.

LAZARUS *v.* SIMON DE SILVA.

55—C. R. Gampola, 7,586

Master and servant—Act of servant—Scope of employment—Master's liability.

The driver of a motor omnibus belonging to the defendant halted the omnibus in a street behind the plaintiff's omnibus and proceeded to remove a stone, which was placed before the front wheel of the plaintiff's omnibus, at the same time releasing its brakes. The plaintiff's omnibus went down the street and was damaged.

In an action for damages brought by the plaintiff against the defendant,—

Held that the act of the defendant's driver was done for a purpose of his own and that the defendant was not liable.

APPEAL from a judgment of the Commissioner of Requests, Gampola.

Garvin, for plaintiff, appellant.

Navaratnam, for defendant, respondent.

July 11, 1927. MAARTENSZ A.J.—

In this case the plaintiff sued the defendant for the recovery of a sum of Rs. 300 on account of damages to his motor bus resulting from the wrongful and negligent act of the defendant's servant.

The facts are as follows:—On the day in question plaintiff's motor bus No. C 5667 was halted in Kandy street, where there was a downward slope. To prevent the bus from moving and as additional security to the brake, a stone was placed in front of the front wheel. Manuel, who was at the trial was admitted to be the driver of defendant's bus No. D 1114, halted defendant's bus about 5 feet behind plaintiff's bus. Manuel then got down, removed the stone that had been placed in front of plaintiff's bus and released the brakes with the result that plaintiff's bus went down the hill towards Kandy and was damaged.

The learned Commissioner held that the act committed by the defendant's driver did not fall within the scope of his employment and dismissed plaintiff's action.

It was contended in appeal that, although the act of the defendant's driver was not incidental to the driving of the bus, yet it should be deemed within the scope of his employment, as it was done for the benefit of the defendant in that the object of the driver

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was to pass plaintiff's bus and pick up passengers who might otherwise travel by the plaintiff's bus and complete the journey to Kandy as quickly as possible.

No doubt the fact that the act was for the benefit of his employer is one of the tests employed in ascertaining whether the servant was acting within the scope of his employment or not. But the mere fact that the act was for the benefit of the owner does not of itself conclude the question whether the act fell within the scope of the servant's employment.

In the course of the argument I was referred by appellant's counsel to the case of *Smith v. Martin and the Corporation of Kingston-upon-Hull.*[1] In this case a teacher employed by the Corporation asked the plaintiff, a pupil, during school hours to poke the fire in the teachers' common room. While the plaintiff was carrying out the order her pinafore caught fire and she was seriously injured. It was held that the act of the teacher was within the scope of her employment which was not strictly confined to teaching alone and that the Corporation was liable to the plaintiff for the teacher's negligent act. The *ratio decidendi* in this case was that the teacher was put in a position in which it was intended that her commands should be obeyed by the children and the educational authority was responsible for orders given by her in that position. This case is no doubt an authority as to the scope of a school teacher's employment, but I cannot see its applicability to the case under consideration where the act in question was not incidental to the driving of the bus.

Another case referred to was that of *Limpus v. London General Omnibus Co.*[2]. In this case the driver of defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiff and was thereby overturned. The defendants' driver said that he pulled across the rival omnibus to prevent it from passing him. The defendants had given instructions to the driver not to obstruct any bus. The judge directed the jury " that the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants, then the defendants were responsible for the act of their servant; that if the act of the defendant's driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving

[1] *(1911) 2 K. B. 775.*

[2] *(1862) Hurlstone & Coltman 526.*

on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible; that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, were immaterial if the defendants' driver did not pursue them; but that if the true character of the act of the defendants' servant was, that it was an act of his own and in order to effect a purpose of his own, the defendants were not responsible."

It was held that the direction was right.

The last of the directions appear to me to be peculiarly applicable to this case. Assuming that the act was done in the course of the employment, it appears to me that the act of defendant's driver was an act of his own and in order to give effect to a purpose of his own, for according to the evidence the defendant's bus was full and it was therefore not necessary to halt the bus for the purpose of picking up passengers. It is also in evidence that the bus was halted 5 feet behind the plaintiff's bus. This appears to me sufficient space to allow defendant's driver to move his bus past plaintiff's bus. Nor is there any evidence that there was anything behind the defendant's bus to prevent the driver backing his bus if the space was insufficient to enable him to pass the plaintiff's bus.

The facts appear to me to show very clearly that the removal of the stone and the releasing of the brakes were acts of the driver's own and in order to effect a purpose of his own, and the defendant is therefore not liable.

I am also of opinion that the act of the defendant's driver was not an act done in the course of the driver's employment. The driver was employed to drive the bus, and if he caused damage by negligent or reckless driving no doubt the defendant would ordinarily be liable. I cannot conceive how it can be said that the removal of the stone and the releasing of the brakes were acts done in the course of the driver's employment.

I affirm the judgment of the learned Commissioner and dismiss the appeal with costs.

Appeal dismissed.