1942 *Present :* **Howard C.J. and Soertsz J.**

RODRIGO *v.* PERERA.

66—D. C. Chilaw, 11,554.

Master and Servant—Action for damages for injuries caused in a bus—Negligence of incompetent driver—Driving handed over by driver to conductor—Benefit of master—Scope of employment.

Where the driver of an omnibus negligently entrusted the driving of the bus to the conductor, through whose incompetence injuries were caused to the plaintiff, a passenger in the bus,—

***Held,* that the driver was acting in the course and within the scope of his employment if the act of handing over the bus to the conductor was done in the interest and for the benefit of the owner, even though the driver had express instructions not to hand over the bus to an unauthorized person.**

THE plaintiff sued the defendant to recover damages for injuries sustained by himself, his wife and son in consequence of an accident to an omnibus in which they were passengers and which was negligently and rashly driven by the conductor to whom the driving had been entrusted by the driver. The defendant while admitting the ownership of the bus pleaded that the driver was casually employed by him in the absence of the regular driver and that the conductor had no authority to drive the bus. He further pleaded that the driver had express instructions not to entrust the driving to any other person and that he was not liable for the negligent act of the driver in doing so.

The learned District Judge held that it had not been established that the driver had acted within the course of his employment in handing over the bus to the conductor and that therefore the defendant was not liable.

L. A. Rajapakse (with him *D. Abeywickrema* and *Ratnam*) for plaintiff, appellant.—The defendant's driver, Mathias, permitted the bus to be driven by the conductor who was an incompetent driver. That was a negligent act by the driver, acting in the course and within the scope of his employment. The owner is therefore liable for the driver's neglect of his duty. The *effective* cause of the damage, as distinct from the *proximate* cause, is the negligence of the driver in giving over the wheel to an incompetent driver—*Engelhart v. Farrant*[1]; *Ricketts v. Tilling*[2]; *Priestly v. Dumeyer*[3]. The learned District Judge purported to follow *Beard v. London General Omnibus Company*[4]. That case is distinguishable. There the conductor drove in the absence of the driver and without his authority, after the journey had come to an end. *Gwilliam v. Twist*[5] is also inapplicable, because that was a case of delegation of duty. The fact that the servant did the act in disregard of express instructions does not exculpate the master as long as the act is done in the course of his employment—*Estate Vander Byl v. Swanpoel*[6]; *Mckerron*

[1] *(1897) 1 Q. B. 240.*
[2] *(1915) 1 K. B. 644.*
[3] *15 S. C. 393.*
[4] *(1900) 2 Q. B. 530.*
[5] *(1895) 2 Q. B. 84.*
[6] *(1927) S.A.L.R.A.D. 141.*

on Torts, pp. 62-66. The master's liability for unauthorised torts of his servant applies to unauthorised modes of doing authorised acts—*Clerk and Lindsell on Torts (8th ed.) p. 68.*

H. V. Perera, K.C. (with him *Herat*), for defendant, respondent.—Mathias was not employed to drive this particular bus. If he was employed to drive one bus but drives another he would be doing a wholly unauthorised act. He would not be acting within the scope and in the course of his employment. In the absence of proof that Mathias had authority to drive this particular bus the cases cited by the other side do not apply and plaintiff cannot succeed.

L. A. Rajapakse, in reply.—Mathias was not a temporary but a permanent driver. The driver's licence is to drive any bus, not a particular bus. The *onus* is not on plaintiff to prove that the driver had authority to drive a particular bus. There is a presumption that if A drives B's car A is B's authorised servant—*(1938) 55 S.A.L.J. 33, footnote 43.* In any case Mathias had implied authority to drive this bus—*Halsbury (Hailsham) Vol. 22, p. 228, sec. 408.*

Cur. adv. vult.

March 25, 1942. SOERTSZ J.—

In this case, the plaintiff who was very severely injured and lost his left hand and left leg when an omnibus belonging to the defendant capsized, sued the defendant to recover a sum of Rs. 3,000 on account of the injuries sustained by him and the consequent impairment of his earning capacity, as well as on account of the expenses incurred by him in obtaining treatment for himself and for his wife and son, who were also injured in that transaction.

The plaintiff alleged that the omnibus capsized in consequence of the defendant's driver, Mathias, having "negligently and rashly entrusted the said bus to be driven by . . . . Gabriel Costa *alias* John who, though employed by the defendant to work on the defendant's buses, had no certificate of competence to drive a bus and was also incompetent to drive a bus".

The defendant filed answer admitting the ownership of the omnibus, admitting that "the plaintiff sustained some injuries of a somewhat, severe nature and that his wife and son sustained some slight injuries", but putting the plaintiff "to the proof of the allegation that omnibus No. X 8537 capsized owing to the negligence of Gabriel Costa". He also pleaded that the capsizing of the omnibus was not "owing to the negligence or rashness on the part of . . . . Mathias or incompetence or inefficiency of Gabriel Costs" and he went on to say that Mathias "was casually employed by the defendant on April 27, 1939, to drive omnibus No. Z 507 during the temporary absence of the regular driver . . . . and that the said Mathias had no authority whatever from the defendant to drive omnibus No. X 8537 . . . . and that the said Gabriel Costa was employed by the defendant to do the work of conductor only and that he had no authority from the defendant to drive omnibus No. X 8537 . . . . and that Mathias

had been strictly instructed by the defendant not to allow any person to drive the omnibus entrusted to him, and that the defendant is not liable for any act or thing done by the said Mathias".

The case went to trial on the following issues :—

(1) Was plaintiff injured by the negligent act of defendant's servant, Mathias, in handing over the bus to be driven by Gabriel Costa ?
(2) Was plaintiff injured by the negligent act (sic) of Gabriel in driving the bus in question ?
(3) In either case, is plaintiff entitled to damages ?
(4) What damages ?
(5) Did the two servants, Mathias and Gabriel, act in the common (sic) and within the scope of the employment ?
(5A) If not, can plaintiff claim damages from defendant ?
(6) Was Mathias's act in handing over the bus to Gabriel in disregard to express order given to him ?
(6A) If so, can plaintiff claim damages ?

After trial, the trial Judge answered these issues as follows :—

(1) Yes.
(2) Yes.
(3) No, for reasons stated in my judgment.
(4) Not necessary to answer in view of my other findings.
(5) Gabriel Costa definitely did not. It has not been established that Mathias acted in the course of his employment in *handing over the bus to Costa.*
(5A) No.
(6) Yes.
(6A) Plaintiff can.

He went on to say " in the result although the damages (sic) were caused by the neligence of Mathias in handing over the bus to Gabriel Costa it has not been established that *in so handing over the bus Mathias acted in the course of and within the scope of his employment* ".

The words I have underlined make it quite clear that the trial Judge dismissed the plaintiff's action on the ground that Mathias was not acting in the course of and within the scope of his employment in handing over the bus to Gabriel Costa to drive.

There appears to have been an alternative defence adumbrated in the course of the trial in the Court below, but vigorously pressed on appeal as the main defence, namely, that Mathias was not acting in the course and within the scope of his employment in being at the wheel of this bus at all. As I pointed out in the course of this appeal, that defence was an afterthought. It is not expressly taken in the answer nor can it reasonably be said to be implied in it. It appears to have been so vaguely put before the trial Court in the course of the evidence being led that the Judge does not deal with it for, as the words I have underlined show, the Judge found that Mathias was not acting in the course and within the scope of his employment *in handing over the bus,* not in driving it.

But against the possibility of that being an oversight on the part of the trial Judge, I have myself examined the evidence with great care, and have formed a very clear opinion that Mathias was acting in the course and within the scope of his employment in driving this bus on that day. There is ample evidence to support that view but, *exempli gratia,* I would quote a short passage from the defendant's own evidence:—"Mathias had no authority from me for driving Stephen's bus (*i.e.*, the bus in question). If he had done it safely I could not have found fault with him. In the circumstances of this case, if Stephen stopped to attend to repair bus Z 507 (as in fact, he did) and asked Mathias to drive his bus, I could not have found fault with him". To say the least, this can only mean that Stephen who is the defendant's brother-in-law had implied authority to give orders to Mathias in such circumstances as arose in this case and that Mathias had implied authority to act on those orders. It must, therefore, be held upon the evidence that Mathias was in the course and within the scope of his employment in driving the bus and by implication of the answer given by the trial Judge to issue 5 that appears to have been his view too.

Once that position is reached the other questions are easily disposed of. It is so clearly established that a servant who in the course and within the scope of his employment disregards express orders by his employer does not *ipso facto* exempt his employer from liability that citation of cases would be pedantic.

The only question left, then, is whether Mathias, while driving this bus in the course and within the scope of his employment, was within those limits *when he handed* the bus to Gabriel Costa and asked him to drive it. There can only be one answer to that question on the facts of this case, and that is an answer in the affirmative, for, to apply the principle quoted by the trial Judge from *Clerk and Lindsell (1921) p. 74* if the act complained of was an intentional act—and there can be no doubt that Mathias intentionally gave over the wheel to Gabriel—the question is whether that intentional act was done in the interest and for the benefit of the master. That, of course, does not mean "interest" and "benefit" from the point of view of the manner in which the transaction came to an end, but from the point of view of what was intended when the transaction was set on foot—and this transaction was set on foot to enable the defendant's bus to continue its journey to carry passengers who had embarked on it to be carried to their destinations in return for the fares they paid, those fares going to enrich no other person than the defendant.

For these reasons, I have no hesitation whatever in reversing the answer given by the trial Judge to issue 5 and, in view of his answers to the other issues, in holding that the plaintiff is entitled to damages.

In regard to the amount of damages, this Judgment was deferred in the hope that parties would be able to reach some agreement, but I am informed that this has not been found possible, and Counsel desire that I should assess the damages or send the case back for the trial Judge to assess them. I do not think it necessary to send the case back for

that purpose because there is on record all the necessary material for me to deal with that question and my doing so will save time and expense.

In regard to damages, if the liberal measure adopted in English cases be taken into consideration, the amount claimed by the plaintiff appears to be extremely modest. The plaintiff is 45 years of age and prior to the injuries he sustained was a cultivator, and was also engaged in the tobacco trade. He has had one leg and one arm amputated owing to the injuries he sustained on that day. He has thus, in the prime of life, been, to a great extent, deprived of the pleasures of life, and almost totally deprived of his earning capacity. The medical and nursing expenses incurred by him for himself and his wife and son must be considerable, and I think it would be extremely arbitrary to reduce the amount claimed by him. In my opinion, that can only be done in the cynical view that a man always overestimates his damages. I am not prepared to take such a view. Indeed, it seems to me that the plaintiff has made a modest claim.

I would, therefore, set aside the judgment of the trial Judge and enter judgment for the plaintiff as prayed for in the plaint with costs in both Courts.

HOWARD C.J.—I agree.

Appeal allowed.