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

KELAART *v.* PIYADASA

806—Workmen's Compensation C3/59/40.

Workmen's compensation—Scope of employment—Disobedience of orders—Act not done for purposes of, or in connection with, employer's business—Liability of employer—Ordinance No. 19 of 1934 (Cap. 117), s. (3b).

The deceased, A, was employed by the respondent, a contractor, who was engaged in building tanks for the Shell Company. A was employed as a labourer to bring water and supply tools to the workmen. The tank was 25 feet high and the stage was 7 feet high.

A was employed outside and was prohibited from going up to the stage as he was suffering from hernia. Moreover, his duty was to put the tools in the bucket, which was drawn up by a rope.

On the day in question, the deceased went up to the scaffolding to ask another workman for a chew of betel. Whilst on the scaffolding, he cried out in pain, lost his balance, fell down on to an iron sheeting and died as a result.

Held, that A, when he got on to the scaffolding, took himself out of the scope of his employment and as the accident took place before he resumed employment, the act was not done for the purposes of, or in connection with, his employer's business.

APPEAL from an order of the Commissioner of Workmen's Compensation.

G. Thomas, for the applicant, appellant.

S. Alles (with him *J. E. A. Alles*), for the employer, respondent.

Cur. adv. vult.

June 2, 1942. HOWARD C.J.—

This is an appeal against the judgment of the Commissioner of Workmen's Compensation, Colombo, delivered on November 5, 1941, dismissing the applicant's claim for compensation with costs. The applicant claimed compensation on behalf of his brother, Sirisena, a minor, arising out of the death of his father, one J. A. Aron Singho, a workman employed by the respondent. The latter was a contractor and at the time of the accident, which resulted in the death of Aron, was engaged in building tanks at Kolonnawa for the Shell Company. The respondent, in giving evidence, stated he kept a book (R 3) in the course of his business and this book gave the names of his workmen, the dates on which they

worked and the rates of pay. He employed rivetters, blacksmiths, jollymen, coolies and fitters. Aron was styled as a coolie and, according to the respondent, he was employed to bring water and supply tools to the workmen. The tanks are 25 feet high. The stage was 7 feet up. There were two stages inside the tank and two stages outside. On the day of the accident, June 18, 1940, three workmen were working on the inside and two others with the respondent outside. According to the respondent, Aron, who suffered from hernia, had been prohibited by him from going up on to the stage. Moreover, coolies had no business on the stage. Aron's duty was to put the tools in a bucket and the bucket was dragged up by a rope. Aron, according to the evidence of the respondent and another workman called Thomas, came up on to the scaffolding to ask the latter for a chew of betel. According to the respondent and Thomas, whilst on the scaffolding he cried out in pain, seized his testicles with both hands, lost his balance and fell down on to an iron sheeting on the ground. Aron died the same day. An inquest was held on his body and the Coroner found that death was due to concussion of the brain and fracture of the base of the skull, and that this was caused by the fall from the scaffolding. The evidence of the respondent and two workmen, Thomas and Richard, was to the effect that Aron was employed as a coolie on the ground and had no business on the scaffolding, which had been prohibited. On the other hand, two workmen called Dharmadasa and Perera maintained that Aron was a fitter or rivetter and used to work on the scaffolding. Perera also stated that when the accident occurred Aron, in the course of his duty, was on the stage with three others. The stage was lowered and it stopped on a bolt. Aron was asked to clear it and fell down in doing so. It will, therefore, be seen that there was a conflict of evidence as to the nature of Aron's duties and the manner in which he met with the accident. The Commissioner has accepted the evidence of the respondent, that the applicant was merely doing the work of a casual labourer and his duties did not involve mounting the scaffolding. I am not prepared to say that, in coming to this conclusion, the Commissioner was wrong.

The Commissioner then proceeded to hold that in climbing the scaffolding the deceased was undertaking a risk which was not one of the ordinary risks of his employment and he could not, therefore, regard the accident as arising out of the course of his employment. He, therefore, held that the case for the applicant failed.

In holding that the accident did not arise out of the course of the deceased's employment, the Commissioner has been guided by the decision in *The Lancashire and Yorkshire Railway Company v. Highley*[1]. This case, it is interesting to note, was decided before the law was amended by the Act of 1923, to enable the dependents of a workman to obtain compensation in the case of injuries resulting in death, although at the time when the accident happened the workman was acting in contravention of a statutory or other regulation applicable to his employment or of orders given by or on behalf of his employer. A provision on similar lines to this amendment is to be found in section 3 (*b*) of the Workmen's Compensation Ordinance (Cap. 117). There are numerous decisions

[1] *(1917) A. C. 352*

which deal with problems very similar to the one with which I am dealing. It is no easy matter to thread one's way through this jungle of case law. The law received full and comprehensive consideration in the recent case of *Noble v. Southern Railway Company*[1]. In that case, the deceased was killed by an electric train. He was in the employment of the respondents as a fireman and attached to the locomotive depot at Norwood Junction. He was employed in piloting duties, meaning that when a driver did not know the railroad, he had to travel in the engine cab and show it to him. About midnight on August 24, 1938, he reported at the engine shed and was then told to go to East Croyden, travelling as a passenger from Norwood Junction Station by a train due to leave at 12.25 A.M. To catch that train he had to walk to the Junction Station. There is a recognized route to that place, which has been specified as the right way since the locomotive depot was opened in 1925. The distance along this route, which was adequately lighted at night and perfectly safe, was 1,002 yards. There was, however, a short cut along the lines of the railway, the total distance of which was 841 yards. This route was dangerous because of live rails, various obstructions and electric trains. It was not lighted at night and its use by employees of the respondents was strictly prohibited. The deceased took this route and was killed about 12.14 A.M. by an electric train coming up behind him. He was killed when he had departed from the recognized and safe route and was walking along the highly dangerous route in close proximity to the rails used by electric trains. He was in a place where the respondents had expressly forbidden him to go. He was doing a prohibited act, involving an added risk, in a place where he was by the prohibition forbidden to go. In his judgment, Viscount Maugham said that three questions had to be answered as follows :—

> "First, looking at the facts proved as a whole, including any regulations or orders affecting the workman, was the accident one which arose out of, and in the course of, his employment ?
>
> Secondly, if the first question is answered in the negative, is the negative answer due to the fact that when the accident happened the workman was acting in contravention of some regulation or order ?
>
> Thirdly, if the second question is answered in the affirmative, was the act which the workman was engaged in performing done by the workman for the purposes of, and in connection with, his employer's trade or business ?"

Viscount Maugham then went on to say that what has been described as the doctrine of "added peril" was not the *ratio decidendi* in any decision of the House of Lords. Regulations and orders applicable to a man's employment are designed simply to prevent added perils being occasioned to him and his fellow workmen in that employment. It was clear, however, that, if the case came within the amendment to which I have referred, the man will be entitled to compensation, notwithstanding the added risk which the man had run by his disobedience. The

[1] *(1940) A. C. 583.*

"added peril" test was, therefore, quite inapplicable. Viscount Maugham then proceeded to answer the three questions as follows:—

(1) The accident did not arise out of the employment. The man was given a safe route but chose to take one which was prohibited because of its dangers: *Moore (A. G.) & Co. v. Donnelly*[1].

(2) The negative answer to the first question was due to the fact that the accident to the workman occurred on his employer's premises while he was contravening the regulations as to the proper route from the engine house to the station. The answer to the second question was in the affirmative.

(3) This question was also answered in the affirmative. There was no suggestion that the deceased deviated from the safe route to fulfil any purpose of his own. He was walking along the line for no other purpose except to catch the 12.25 A.M. train to East Croyden. He was still on the respondent's premises and was going about his allotted job.

In this case, I think the first two questions must be answered in the same way as in *Nobel v. Southern Railway Co.* (*supra*). With regard to the third question, can it be said that when the deceased got on the scaffolding to get a chew of betel he was engaged in performing an act for the purpose of, and in connection with, his employer's trade or business. In order to come to a decision on this point, I need only refer to two cases. In *Knowles v. Southern Railway Company*[2], the respondent railway company had a rule that "employees must not consume intoxicating liquor while on duty". This rule was well known to the company's employees, including the deceased man, a carter, whose duty it was to drive a pair-horse van. On the day of the accident giving rise to the claim for compensation, while he was taking a load from one depot to another, he stopped his van outside a public-house, descended from the box seat, and having put a chain on the near side wheel and removed a trace he went some distance up a side street to a public house for the purpose of getting a glass of beer and also for the purpose of using the lavatory, but the County Court Judge found as a fact that the man's dominant purpose was to drink the beer. On his return to the van, he removed the chain, replaced the trace, took the reins in his hands, and was in the act of mounting to his seat when, probably owing to the horses starting to move, he slipped and fell under the wheel and sustained injuries which caused his death. On a claim for compensation by his widow, it was held (1) that the accident did not arise in the course of the deceased's employment, seeing that it happened before he had completed the series of acts—unchaining the wheel, refastening the trace, taking possession of the reins—which owing to his breach of duty, had to be performed before he could regain effective control of the horses for the purpose of re-starting them; and (2) that the accident could not be deemed to have arisen out of, and in the course of, the deceased man's employment within the meaning of section 1, sub-section 2, of the Act inasmuch as the act

[1] (1921) 1 A. C. 329. [2] (1937) A. C. 463.

he was doing in contravention of a regulation applicable to his employment was attempting to regain his seat on the van as one part of a composite act of consuming intoxicating liquor while on duty, which act, being expressly forbidden by the terms of the employment, could not be said to be an act "done by the workman for the purposes of, and in connection with, his employer's trade or business" within the meaning of the sub-section. In his judgment, Lord Russell of Killowen says as follows :—

> "I agree with the view expressed by Greene L.J., namely, that where a man leaves his work to break a rule, he necessarily takes himself out of the scope or sphere of his employment and remains outside its limits till the time when he resumes his employment."

Further on, the learned law Lord states :—

> "Taking the view which I take on these two preliminary points, I am of opinion that, from the moment that the workman left the driver's seat, as the first step towards the 'Gladstone', he broke off his employment."

In *Davies v. Gwauncaegurwen Colliery*[1], in contravention of his employer's express orders, a workman unnecessarily went into a prohibited area to hang up his coat, and on turning round to return to his proper working place fell into a hole and was fatally injured. His widow claimed compensation, contending that the workman's acts of hanging up his coat and returning towards his work were acts done "for the purposes of, and in connection with, his employers' trade or business", so that under section 7 of the Workmen's Compensation Act, 1923, the fatal accident was to be "deemed to arise out of, and in the course of his employment, notwithstanding that the workman was . . . . acting in contravention of" his employers' orders. The Deputy County Court Judge held that the acts were done for the workman's own purposes and not for the purposes of, or in connection with, his employers' trade or business, so that section 7 did not apply. On the widow's appeal, it was held that the Deputy Judge's decision was right.

I find it impossible to distinguish the present case from the last two cases I have cited. When Aron left the ground and got on the scaffolding he had, like the carter in *Knowles v. Southern Railway Company* (*supra*), necessarily taken himself out of the scope or sphere of his employment. The accident took place whilst there and before he had resumed his employment. In these circumstances, the act was not for the purposes of, and in connection with, his employer's trade or business.

For the reasons I have given, I have come to the conclusion that the finding of the Commissioner was right and the appeal must be dismissed.

Appeal dismissed.

[1] *(1924) 2 K. B. 651.*