[HIGH COURT OF AUSTRALIA.]

STEWART AND OTHERS . . . . APPELLANTS;
APPLICANTS,

AND

THE METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *Aug.* 8; *Sept.* 1.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Workers' Compensation—Overseer—Supervising work of contractor—Preparations for lunch—Boiling of billy by contractor's employee for other employees of contractor—Explosion of primus stove—Injury sustained by overseer sitting near by—Whether injury arose "out of" the employment—Workers' Compensation Act 1926-1929 (*N.S.W.*) (*No.* 15 *of* 1926—*No.* 36 *of* 1929), *secs.* 6 (1)*, 7*.

The deceased was employed by the respondent as an overseer and inspector to ensure that a contractor to the respondent carried out certain work according to the specifications. The movements of the deceased were not restricted except that he was required to be on the job whilst any work was in progress, subject to which requirement he was free to have his lunch when he liked. At 11.30 a.m. on the day the work commenced, a ganger employed by the contractor directed one of his workmen to boil the billy for lunch. This

* The *Workers' Compensation Act* 1926-1929 (N.S.W.) provides, by sec. 6 (1), that "'Injury' means personal injury arising out of and in the course of the employment. . . ." Sec. 7 provides:—"(1) A worker who has received an injury whether at or away from his place of employment (and in the case of the death of the worker, his dependants) shall receive compensation from his employer in accordance with this Act. (2) For the purposes of this Act, injury resulting in the death or serious and permanent disablement of a worker shall be deemed to arise out of and in the course of his employment notwithstanding that the worker was, at the time when the injury was received . . . acting without instructions from his employer, if such act was done by the worker for the purposes of and in connection with his employer's trade or business."

was done on a primus stove which was also used on the job for heating plumbite. The deceased was at, or had come to, the place where the billy was being boiled—some forty yards away from where work was still in progress—and was seated on his haunches near to the workman whom he was watching. Whilst the workman was endeavouring to remedy a defect the stove exploded, and the deceased sustained injuries which caused his death.

Held, by *Gavan Duffy* C.J., *Rich*, *Starke*, *Evatt* and *McTiernan* JJ. (*Dixon* J. dissenting), that these facts were sufficient to support a finding that the injury arose "out of" as well as "in the course of" the deceased's employment within the meaning of sec. 6 (1) of the *Workers' Compensation Act* 1926-1929 (N.S.W.).

Decision of the Supreme Court of New South Wales (Full Court): *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board*, (1932) 32 S.R. (N.S.W.) 576, reversed.

APPEAL from the Supreme Court of New South Wales.

A claim for compensation was made under the provisions of the *Workers' Compensation Act* 1926-1929 (N.S.W.) against the Metropolitan Water, Sewerage and Drainage Board on behalf of the dependants of Norman Herbert Astill, who died on 6th January 1931 as the result of injuries received by him on the preceding day whilst in the employ of the Board. From the evidence given before the Workers' Compensation Commission it appeared that the deceased was employed by the Board as an overseer and inspector in connection with some work being carried out for the Board at Long Bay Road, Maroubra, by a contractor who there employed a number of men. The work, which involved the digging of trenches, was only commenced on the day of the accident. The deceased was the only one of the Board's workmen there; he was not required to do any laborious work: his duty was simply to inspect the work while it was in progress, and to see that it was carried out according to the specifications of the contract, for which purpose he was, apparently, supplied with a plan; and he was expected to keep a watchful eye over everything on the job while the men were working. There was no restriction on his movements except that he was required to be on the job whilst any work was in progress; so long as he fulfilled this requirement he could have his lunch when he liked, and he was at full liberty during the luncheon interval. At about half-past eleven

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

o'clock a ganger employed by the contractor directed a member of his gang named Lenham, to boil the billy for lunch. This was done on a primus stove, which was also used on the job for heating plumbite. The deceased, who on the day of the accident had no duty associated with the primus stove, was at, or had come to, the place where the billy was being boiled, and was seated on his haunches, about three feet away, watching Lenham. For some reason or other the stove did not function properly, and, whilst Lenham was endeavouring to rectify it, it exploded, and a quantity of burning kerosene was thrown therefrom over the deceased which ignited his clothes and burnt him so severely that he died next day in hospital as a result of burns and shock. The precise distance of the stove from each part of the job was not clearly defined, but the Commission found that at the time of the explosion "there were then four or five workmen about forty yards away; the ganger had not blown his whistle to indicate that it was time for lunch and his gang of men was still in a trench." On this evidence the Commission found that the deceased's death was the result of an injury arising out of and in the course of his employment with the Board on 5th January 1931, and made an award in favour of his dependants.

At the request of the Board a case, in which the facts were found substantially as above set out, was stated for the determination of the Supreme Court, the question of law being as follows:—

> Does the evidence support the finding of the Commission that the injury which the deceased worker received on 5th January 1931, and which resulted in his death on 6th *idem*, arose out of and in the course of his employment with the respondent?

The Full Court of the Supreme Court, by a majority, held that the deceased's injury did not arise out of his employment, and answered the question in the negative: *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board* (1).

From this decision the applicants now appealed to the High Court.

Rainbow (with him *Miller*), for the appellants. It was the duty of the deceased to watch, on behalf of the Board, everything that

(1) (1932) 32 S.R. (N.S.W.) 576.

was being done on the job by all the employees of the contractor including the employee operating the primus stove. Even assuming that the main work was being carried out at some distance from the deceased, he was, nevertheless, on the area, and was able to give effective supervision. The accident occurred at a place on the area where the deceased, in the course of his employment, was entitled to be; therefore the injury sustained by him arose out of his employment (*Thom or Simpson* v. *Sinclair* (1)). Even though not expressly directed to be at the place where, and at the time when, the accident occurred, the performance of his duty brought him into contact with the danger (*Dennis* v. *A. J. White & Co.* (2); *Allcock* v. *Rogers* (3), and *Lawrence* v. *George Matthews* (1924) *Ltd.* (4)): that being so, it is immaterial whether at the time of the accident he was actively engaged on such duty or not; therefore the case of *Board of Water Supply and Sewerage* v. *Dunn* (5) is distinguishable. The matter comes within the test laid down by Lord *Sumner* in *Lancashire and Yorkshire Railway Co.* v. *Highley* (6). The place was made dangerous by the act of another employee (*Clark* v. *Lord Advocate* (7)).

[DIXON J. referred to *Fearnley* v. *Bates & Northcliffe Ltd.* (8).]

Even assuming that at and about the time of the accident the deceased did not actually have the workmen under his observation, it is conceivable that they and the work involved were the subject of his thoughts.

Bradley, for the respondent. The evidence fails to show that at the time of the accident the deceased had any duty in connection with the primus stove, or any duty at the place where the accident occurred; therefore no liability is attachable to the Board (*Marsh* v. *Pope & Pearson Ltd.* (9)).

[EVATT J. referred to *St. Helens Colliery Co.* v. *Hewitson* (10).

[DIXON J. That case is referred to in *Pearson* v. *Fremantle Harbour Trust* (11).]

(1) (1917) A.C. 127.
(2) (1917) A.C. 479.
(3) (1918) 11 B.W.C.C. 149.
(4) (1929) 1 K.B. 1.
(5) (1924) 24 S.R. (N.S.W.) 360.
(6) (1917) A.C. 352, at p. 372.
(7) (1922) 15 B.W.C.C. 320.
(8) (1917) 86 L.J. K.B. 1000, at p. 1003.
(9) (1917) 86 L.J. K.B. 1349; 10 B.W.C.C. 566.
(10) (1924) A.C. 59.
(11) (1929) 42 C.L.R. 320, at pp. 326 *et seqq.*

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

It must be shown that the deceased's duty took him to the place where he sustained the injury (*Rowland* v. *Wright* (1)). The case of *Morris* v. *Mayor &c. of Lambeth* (2) is distinguishable because there the injured workman was in the exercise of his duties at the time of the accident.

[STARKE J. referred to *Charles R. Davidson & Co.* v. *M'Robb or Officer* (3).]

The mere fact that the injured person was entitled to be at the place where the accident occurred is not sufficient: it must be shown that it was his duty to be there (*Board of Water Supply and Sewerage* v. *Dunn* (4)). The test that should be applied is: Was the deceased, at the time of the accident, performing a duty he owed to his employer? (*Thom or Simpson* v. *Sinclair* (5); *Murray* v. *Allan Bros. & Co.* (6); *Morris* v. *Rowbotham* (7).) *Blovelt* v. *Sawyer* (8) is distinguishable. Although the facts of each case may vary, the tests to be applied are the same. Where the injured workman was idling his time, as here, it is an inference of fact that he was there for his own purposes (*Tinker* v. *Hulse & Co.* (9)). The words "arising out of his employment" were considered in *Lancashire and Yorkshire Railway Co.* v. *Highley* (10), *Thom or Simpson* v. *Sinclair* and *Charles R. Davidson & Co.* v. *M'Robb or Officer* (3)). For the meaning of the words "in the course of his employment" see *Charles R. Davidson & Co.* v. *M'Robb or Officer*. The fact that a workman was injured whilst at his place of employment is not, by itself, sufficient to justify an inference that he was injured as a result of an accident arising out of his employment (*Geary* v. *Matthew Brown & Co.* (11)). The circumstances of this case are similar to those present in *Whittingham* v. *Commissioner of Railways* (*W.A.*) (12), where, by a majority, the Court decided that the injury in question did not arise "out of" or "in the course of" the employment.

Rainbow, in reply. The decision in *Morris* v. *Mayor &c. of Lambeth* (2) is still good law; see *Armstrong, Whitworth & Co.* v. *Redford* (13).

Cur. adv. vult.

(1) (1909) 1 K.B. 963.
(2) (1905) 22 T.L.R. 22.
(3) (1918) A.C. 304.
(4) (1924) 24 S.R. (N.S.W.) 360.
(5) (1917) A.C. 127.
(6) (1913) 6 B.W.C.C. 215.
(7) (1915) 8 B.W.C.C. 157.
(8) (1904) 1 K.B. 271.
(9) (1918) 11 B.W.C.C. 28.
(10) (1917) A.C. 352.
(11) (1931) 24 B.W.C.C. 210.
(12) (1931) 46 C.L.R. 22.
(13) (1920) A.C. 757.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. Norman Astill, an employee of the Metropolitan Water Sewerage and Drainage Board, lost his life as a result of burning and shock caused by the explosion of a primus stove. It appears that (1) work was being carried out for the Board by a contractor named Murray at Long Bay Road, Maroubra, near Sydney. (2) Astill was employed by the Board as an "overseer and inspector," and there was no other person representing the Board on the job—his duty was "to watch over everything on the job while the men were working." (3) On the day in question the job, which included trench work, had commenced. (4) An employee of Murray the contractor, named Lenham, was ordered by the ganger to boil the billy for lunch on the primus stove, which was used on the job. Before the billy boiled, Lenham tried to prime the stove, but it exploded against Astill, who was crouched near by. (5) The precise distance of the stove from each part of the job is not clearly defined, but at the time of the explosion there were "four or five workmen about forty yards away; the ganger had not blown his whistle to indicate that it was time for lunch and his gang of men were still in a trench."

The Workers' Compensation Commission, from which no appeal lies except on questions of law, found that Astill's injury arose out of and in the course of his employment, but the majority of the Full Court has held that there was no evidence to support the finding that the accident arose "out of" the employment.

The first question is whether there is evidence to support the finding that the injury arose to Astill "in the course of" the employment.

The Commission found as a fact that the duty of the deceased was to "watch over everything on the job while the men were working." A determination of what a man's employment is, may involve considerations of time, place and function. In point of time, the accident occurred at a moment when Astill was required to be on duty; in point of place it is clear that Astill's employment extended over and about the area covered by the whole job. Its extent was not and could not well be determined by reference to metes and bounds. His employment being that of an overseer,

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Gavan Duffy C.J. Evatt J. McTiernan J.

his duty was to keep an eye over all the operations being performed by Murray's employees in executing his contract.

In *Low or Jackson* v. *General Steam Fishing Co.* (1), speaking of a workman whose duty was that of a "watchman of four trawlers belonging to the appellants, moored to Granton quay," Lord *Atkinson* said:—"His field of operations, so to speak, embraced this quay, the trawlers, and the means of approach to each of them. At the time the accident happened he had a right to be at the place in which he actually was." He added (2):—"The duty of the deceased was to be at this quay and to take care of these boats. In the discharge of that duty he was entitled to pass from quay to trawler, and from trawler to quay, when and as often as he pleased during the twenty-five hours on which he was on the watch."

It is reasonably clear, therefore, that Astill's "field of operations" or "scene of duty" did not exclude the place where he was when the primus exploded.

It appears from the evidence that Astill was watching Lenham's attempt to prime the stove, when the explosion took place. But it is quite erroneous to suppose that an overseer, watchman or inspector ceases to be in the course of his employment merely because for a moment or two his attention becomes diverted, and his eye strays to some incident or some object on or about the job with which he is not immediately concerned. As Lord *Loreburn* L.C. said in *Low's Case* (3):—"Everything, of course, must depend upon the nature of what he has to do, but allowance should be made for the ordinary habits of human nature and the ordinary way in which those employed in such an occupation may be expected to act. A man may be within the course of his employment not merely while he is actually doing the work set before him, but also while he is where he would not be but for his employment, and is doing what a man so employed might do without impropriety."

It follows that the Commission was fully entitled to find that the deceased was "in the course of" his employment when the incident occurred. This seems to have been conceded in the Supreme Court, *Halse Rogers* J. stating in his judgment: "the question debated

(1) (1909) A.C. 523, at p. 538. (2) (1909) A.C., at p. 539.
(3) (1909) A.C., at p. 532.

before us was whether on those facts the Commission was justified in finding that the accident arose out of the employment; it being conceded that it was open to them to find that it arose *in the course* of the employment" (1).

But the Supreme Court held that the accident did not arise "out of" the employment, mainly because Astill's employment laid upon him no duty relating to the stove, the explosion of which caused his death. It was said, "the finding of the Commission that the deceased had on the day of his death no duties associated with the primus stove is in effect a finding that any danger arising from such lamp was not an 'incident' of his employment on that day" (2).

In *Fisher or Simpson* v. *London, Midland and Scottish Railway Co.* (3) Viscount *Dunedin* said: "If the deceased was in the course of his employment, as that was explained in the case of *McNeice* v. *Singer Sewing Machine Co.* (4), which was approved by this house in *Dennis* v. *White* (5) and *Thom or Simpson* v. *Sinclair* (6), if there are facts from which it may be deduced that his employment brought him within, or *allowed him to be* within, *proximity of the peril* to which his death could properly be ascribed, and the arbitrator comes to the conclusion that the accident which causes death arises out of, as well as in the course of, his employment, his judgment should not be disturbed." In the same case Lord *Tomlin* said (7) that "at the time of the accident the deceased was travelling in the railway carriage in the course of his employment subject to the inherent risks, slight though they may ordinarily be, of falling from the carriage through insecurely fastened doors or open windows."

It seems to us that *Simpson's Case* (8) is a strong authority in favour of the appellant. The accident was "unexplained," and yet, as Lord *Tomlin* pointed out (7), "where the evidence establishes that in the course of his employment the workman was properly in a place to which some risk particular thereto attaches and an accident occurs capable of explanation solely by reference to that risk, it is legitimate, notwithstanding the absence of evidence as to

(1) (1932) 32 S.R. (N.S.W.), at p. 586.
(2) (1932) 32 S.R. (N.S.W.), at p. 590.
(3) (1931) A.C. 351, at pp. 365-366.
(4) (1911) S.C. (Ct. of Sess.) 12.
(5) (1917) A.C. 479.
(6) (1917) A.C. 127.
(7) (1931) A.C., at p. 369.
(8) (1931) A.C. 351.

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Gavan Duffy C.J. Evatt J. McTiernan J.

the immediate circumstances of the accident, to attribute the accident to that risk, and to hold that the accident arose out of the employment." This re-statement of the cases shows clearly that if Astill was "in the course of his employment" properly at a place near the stove, his accident also arose "out of" his employment if it arose because of a "risk particular thereto" attached to that place. What is really the same principle is stated by *Russell* L.J. in *Lawrence* v. *George Matthews* (1924) *Ltd.* (1) as follows:—"Sufficient causal relation or causal connection between the accident and the employment is established *if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot.* If such a locality risk is established, then the accident 'arises out of' the employment, even though the risk which caused the accident was neither necessarily incident to the performance of the man's work, nor one to which he was abnormally subjected."

We think that some confusion has been caused by a misunderstanding of Lord Justice *Russell's* phrase "if the man's employment *brought him* to the particular spot." This cannot mean that there has to exist any special duty to be at the particular place of the accident. In *Lawrence* v. *George Matthews* (1924) *Ltd.* (2) the commercial traveller was not bound to be at the spot where the tree fell, any more than the collector in *McNeice's Case* (3) was bound to be at the spot where he was kicked on the knee by a passing horse. The condition is satisfied if the worker, whilst in the course of his employment, may properly come and does come to the point of danger. It is there that his "employment brought him." Lord *Tomlin* in *Fisher or Simpson* v. *London, Midland and Scottish Railway Co.* (4) refers to "a place to which some risk particular thereto attaches," and proof of the character of the place is often afforded by the occurrence of the accident. The place "turns out to be" a place of special danger (per Lord *Shaw* in *Thom or Simpson* v. *Sinclair* (5)).

Does the present evidence support a conclusion that the place of the accident was a "zone of special danger"? In our opinion it

(1) (1929) 1 K.B., at p. 19.
(2) (1929) 1 K.B. 1.
(3) (1911) S.C. (Ct of Sess.) 12.
(4) (1931) A.C., at p. 369.
(5) (1917) A.C., at p. 143.

does. There is a risk of explosion of a kerosene stove in use, and that risk was borne by those who were close to the stove. Lenham was injured by the explosion of it, as well as the deceased. The actual explosion is conclusive evidence that there was a distinct risk attached to that part of the job where the stove was being used. It "turned out to be" a place of special danger. On this question of whether the accident arose "out of" Astill's employment, the Supreme Court laid stress upon the absence of any duties on Astill's part "associated with" the stove. But this is as irrelevant as the absence of any duty of the commercial traveller in relation to the tree which was struck by lightning (*Lawrence's Case* (1)), or of the salesman in relation to the horse which kicked him (*McNeice's Case* (2)), or of the railway guard to the windows or doors of the carriage, out of which he fell whilst "in the course of" his employment, but not in the course of any particular work or duty to the employer (*Simpson's Case* (3)).

The appeal should be allowed, and the decision of the Workers' Compensation Commission restored.

RICH J. The facts in this case have been stated in other judgments and I need not re-state them. They raise the familiar controversy whether the unfortunate accident which befell the deceased arose out of and in the course of his employment. I have no doubt that it arose in the course of his employment and the finding of the Workers' Compensation Commission to that effect is justified by the evidence in the case. In fact the argument before us centred on the question whether the accident arose out of the employment. "The words of the statute have been open to much criticism. Simple as they appear to be, their application to particular incidents" has "been found so difficult that the law reports are full of various decisions, each attempting—and attempting in vain—to provide some fixed canon of interpretation from which a rule can be established for future guidance" (*Innes or Grant* v. *G. & G. Kynoch* (4)).

In the latest case, *Northumbrian Shipping Co.* v. *McCullum* (5), Lord *Macmillan* prefers the criterion "whether the accident was due

(1) (1929) 1 K.B. 1.
(2) (1911) S.C. (Ct. of Sess.) 12.
(3) (1931) A.C. 351.
(4) (1919) A.C. 765, at pp. 773, 774.
(5) (1932) 48 T.L.R. 568, at p. 572.

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Rich J.

to risks to which the public in general are exposed or to risks special to the employment." Analogies are not very helpful. Each case falls to be decided on its own facts. In this case the accident was not due to extraneous forces. It occurred before the men had ceased work. The deceased was on "the field of operations." He was required to do but little on that day but the essence of that duty was to be present, and in being there he was doing something on his master's behalf and doing it in his own way. I am satisfied that these facts afford evidence upon which the Commission were entitled to draw the inference that there was a "causal relation" or "causal connection" between the employment and the accident.

The appeal should be allowed.

STARKE J. This is an appeal from a decision of the Supreme Court of the State of New South Wales, upon a case stated by the Workers' Compensation Commission of that State. The question raised was whether the evidence supported a finding of the Commission that an injury to a deceased worker which resulted in his death arose out of and in the course of his employment. The *Workers' Compensation Act* 1926-1929 of New South Wales provides that a worker who has received an injury, whether at or away from his place of employment—and in case of the death of the worker his dependants—shall receive compensation from his employer in accordance with the Act. Injury, so far as material to this case, means personal injury arising out of and in the course of the employment. It is now well enough settled that arising in the course of employment does not mean during the currency of the engagement, but "in the course of the work which the man is employed to do and what is incident to it, in other words, out of the service." But a workman may be required to be in attendance, and in that respect engaged on his duty, though not actually doing work. Again, an accident only arises out of employment when a causal connection exists between the employment and the accident: "The expression 'arising out of' no doubt imports some kind of causal relation with the employment, but it does not logically necessitate direct or

physical causation." "Was it part of the injured person's employment to hazard, to suffer, or to do, that which caused his injury?" It is not sufficient to show that but for the employment the worker would not have been at the scene of the accident (*Charles R. Davidson & Co* v. *M'Robb or Officer* (1); *Reed* v. *Great Western Railway Co.* (2); *Upton* v. *Great Central Railway Co.* (3); *Lancashire and Yorkshire Railway Co.* v. *Highley* (4); *J. & P. Hutchison* v. *M'Kinnon* (5); *Parker* v. *Owners of Ship Black Rock* (6)). The question stated in this case must be decided on these principles.

The deceased worker was employed by the Metropolitan Water, Sewerage and Drainage Board. His duty was to inspect work being carried out for the Board at Long Bay Road, Maroubra, by a contractor named Murray, who there employed a number of men. The job had practically only started, and the deceased was the only one of the Board's workers there. He was not required to perform any laborious work, his duty being simply to watch over everything on the job while the men were working. About half-past eleven a ganger employed by the contractor directed a member of his gang to boil the billy for lunch. This was done on a primus stove, which was also used on the job for heating plumbite. The deceased worker was at, or had come to, the place where the billy was being boiled, and was sitting on his haunches about three feet away watching the boiling of the billy, but he had nothing to do with the primus stove. The primus stove did not function properly, and, whilst the contractor's man was priming it, exploded, and a quantity of burning kerosene was thrown over the deceased worker, which ignited his clothes and burnt him so severely that he died the next day.

It was admitted during the argument, and I think rightly, that the accident arose in the course of the worker's employment; his attendance on the job was part of his duty, and the fact that he was not actually working or supervising work at the moment of the accident did not break the course of the employment: he was standing by, ready to perform his duties, though as the work had just started there was but little for him to do.

(1) (1918) A.C., at p. 314.
(2) (1909) A.C. 31.
(3) (1924) A.C. 302, at p. 306.
(4) (1917) A.C., at p. 372.
(5) (1916) 1 A.C. 471.
(6) (1915) A.C. 725.

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Starke J.

The critical question is whether the accident arose out of the worker's employment: did it arise from a risk reasonably incident to the work which he was called upon to perform? The inspector or supervisor had to hazard, in the performance of his duties, the acts or omissions of the contractor's men in the performance of their duties in the work on which they were engaged. Thus, if these men had been using the primus stove for heating plumbite for use upon the job when it exploded, then the causal connection between the inspector's employment and the accident would have been clear enough. But in fact the water was being boiled, not for use upon the job, but for the lunch of the contractor's men employed upon the job. The contractor, however, contemplated that his men should have lunch, and his ganger directed one of them to boil the billy. It is a reasonable inference—or at least an inference which the Workers' Compensation Commission was entitled to draw—that boiling the billy for lunch was within the employment and duty of the contractor's man who was directed to do it (*Morris* v. *Mayor &c. of Lambeth* (1); *Smidmore* v. *London and Thames Haven Oil Wharves Ltd.* (2), queried in *Ruegg's Workmen's Compensation*, 9th ed. (1922), p. 95). It was, as it seems to me, part of the inspector's or supervisor's employment to hazard any risk attached to this operation, though he was not supervising, but just idly watching the operation: it was a risk reasonably incident to his work as inspector or supervisor.

The causal connection between the employment and the accident is found here not so much in the risk attaching to a particular locality, but in the risk attached to the operations of the contractor's men within the sphere of their employment on the job, which the inspector was employed to watch or supervise. The risk in each case, however, is one reasonably incident to the work which it was the duty of the workman to perform.

The question stated in the case should be answered in the affirmative and the judgment of the Supreme Court of New South Wales discharged.

(1) (1905) 22 T.L.R. 22.

(2) (1921) 14 B.W.C.C. 114.

Dixon J. In my opinion the evidence does not support the finding of the Workers' Compensation Commission that the injury from which the death of the worker in this case resulted arose out of his employment. He was employed as an overseer by the respondent Board. On 5th January 1931 a contractor for the Board commenced some work at Long Bay Road, Maroubra, involving the digging of trenches. It was the duty of the deceased to inspect the work while it was in progress and to see that it was carried out according to the specifications of the contract. He appears to have been supplied with a plan, and he was expected to keep "a watchful eye over everything on the job while the men were working." There was no restriction on his movements except that his presence was necessary on the job during any work that was in progress. So long as he fulfilled this requirement he could have his lunch when he liked and he was at full liberty during the luncheon interval. It is evident that upon the first day of work under a contract there might be little for an overseer to inspect. The accident occurred at about a quarter to twelve. At about half-past eleven, the contractor's ganger sent a workman down to "boil a billy" for the men's lunch. For the purpose of heating plumbite a primus stove was available. By altering or adjusting the position of some parts of the primus stove so as to make the burner vertical it could be used for boiling a billy. The workman lit the primus stove, and at about a quarter to twelve the billy was nearly boiling. It does not appear where this was done in relation to the place of work except that a witness said that the men were still in the trenches and that four or five men were about forty yards away behind a box; nor does it appear whether the work was being done in a roadway or upon land under the control of the Board. At a quarter to twelve the deceased was sitting on his haunches near the primus stove watching the workman using it. It began to back fire and blow and the workman proceeded to prime it. Then it exploded and discharged its inflammable contents over the deceased. From the burns which he thus received he subsequently died. No evidence was given of the deceased's movements immediately before he took up his position near the primus stove or of the length of time he had occupied this position before the explosion took place. He had taken no part in manipulating the stove. The workman in charge of it had known him for

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Dixon J.

many years, but no evidence was given of any conversation between them. Much is left to conjecture, but it seems probable that the deceased, having no present duties of inspection to perform, was idly waiting at the place where hot water would be obtainable for lunch. At any rate, there is no evidence which suggests any purpose of the Board's which could bring him in proximity to the boiling billy and the primus stove at that time. His duties, as overseer, required his presence in the vicinity of the work, and, therefore, it is no doubt true that but for his employment he would not have been at the place where the accident happened at the time of its occurrence. But it is not enough to satisfy the condition expressed by the words " arising out of the employment " that the fact of employment was one of the conditions of the occurrence of the accident. A closer causal connection is required. " The injury by accident must have occurred as something which would not have occurred but for the circumstance of the employment and *as having been something due to it*, the employment . . . " (*Lancashire and Yorkshire Railway Co.* v. *Highley* (1)).

Many tests have been proposed for determining whether an accident (or injury) is due to the employment so that that it arises out of it. In *Thom or Simpson* v. *Sinclair* (2) Viscount *Haldane* had elaborately expounded the conception of causation which these words import. It is necessary to read his explanation in full to obtain a just understanding of his meaning, but it contains the statement that a condition required is that the injury should have arisen, not merely by reason of presence in a particular spot at a particular time, but because of special circumstances attending the employment there (pp. 134-135). In the same case Lord *Shaw* referred to accidents totally disconnected with the nature of the employment upon which the workman was engaged yet springing from the employment in the sense that it was on account of the obligations or conditions thereof, and on that account alone, that he incurred the danger, and said that the expression " arising out of the employment " " applies to the employment as such—to its nature, its conditions, its obligations, and its incidents. If by

(1) (1917) A.C., at p. 360, per Viscount *Haldane*.
(2) (1917) A.C., at pp. 134-136.

reason of any of these the workman is brought within the zone of special danger and so injured or killed . . . the broad words of the statute 'arising out of the employment' apply" (1).

In *Highley's Case* (2) Lord *Sumner* proposed a test which he considered to be always applicable "because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment. To ask if the cause of the accident was within the sphere of the employment, or was one of the ordinary risks of the employment, or reasonably incidental to the employment, or, conversely, was an added peril and outside the sphere of the employment, are all different ways of asking whether it was a part of his employment that the workman should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury."

But the "endeavour to obtain from decided cases a fixed standard of measurement by which to test the meaning of the words in the statute 'in the course of' and 'arising out of' employment" was condemned by Lord *Buckmaster* in *John Stewart & Son* (1912) *Ltd.* v. *Longhurst* (3) as a mistake. He said:—"Some of the reported cases . . . appear to me to have made the same mistake and to have attempted to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase" (4).

The risk from which the deceased received his injuries arose from an operation conducted for the benefit of the men employed by the contractor, a benefit in which the deceased may or may not have expected to share. In exposing himself to it he was advancing no purpose of his own employer. His employment took him to the spot

(1) (1917) A.C., at p. 142.
(2) (1917) A.C., at p. 372.
(3) (1917) A.C. 249, at p. 258.
(4) (1917) A.C., at pp. 258-259.

H. C. OF A. 1932.

STEWART v. METROPOLITAN WATER, SEWERAGE AND DRAINAGE BOARD.

Dixon J.

only in the sense that it was in the neighbourhood of the works, and that he was required to be somewhere within the undefined area described by that expression. In *Parker* v. *Owners of Ship Black Rock* (1) Lord *Wrenbury* says: "In order to succeed it is not sufficient that he should show that but for his employment he would not have been at the scene of the accident . . . he must show that it was the employment which took him to the place of the accident." In *Lawrence* v. *George Matthews* (1924) *Ltd.* (2), in stating his fourth proposition, *Russell* L.J. (as he then was) said "that sufficient causal relation or causal connection between the accident and the employment is established if the man's employment brought him to the particular spot where the accident occurred, and the spot in fact turns out to be a dangerous spot." In a sense the present case may be said to depend on the meaning intended by Lord *Wrenbury's* expression "the employment took him to the place" (1) and *Russell* L.J.'s "the employment brought him to the particular spot" (2) In a case such as the present, the whole connection between the accident and the employment lies in the reason why the worker was at the point of danger. I can find no reason in the evidence for the deceased's presence at the operation of boiling the billy which concerned his employment. It does not appear to me to be the cause of his presence in any other sense than that if he had not been employed he would probably have been elsewhere.

In my opinion the decision of *Harvey* C.J. in Eq. and *Halse Rogers* J. was right.

Appeal allowed with costs. Order of the Supreme Court discharged and in lieu thereof order that the case be remitted back to the Workers' Compensation Commission with the intimation that the question of law referred for the decision of the Supreme Court is answered in the affirmative. Costs of the appeal to the Supreme Court to be paid by the respondent Board.

Solicitors for the appellants, *Marsland & Co.*
Solicitors for the respondent, *Williams & Hooke.*

J. B.

(1) (1915) A.C., at p. 732. (2) (1929) 1 K.B., at p. 19.