House of Lords before the Lord Chancellor, Lord Wright, Lord Romer; Lord Porter. 4th March 1942

The Lord Chancellor; MY LORDS,

1. In this Appeal I should be well content to adopt the unanimous judgments delivered in the Court of Appeal in Northern Ireland, which appear to me to provide a conclusive answer to the argument for the Appellants. The material facts giving rise to the litigation are conveniently set out in the judgment of Lord Chief Justice Andrews. They may be summarised as follows: -

2. The Respondents were insured by the Appellant Company against liability to third parties arising from damage to property caused by the use by them of a petrol tanker belonging to the Respondents. On August 2nd, 1937, this tanker, which was being driven by their employee, one Davison, had taken on board a consignment of 300 gallons of petrol at the Larne Depot of Holmes, Mullin and Dunn, Ltd., for delivery into the storage tank of one Catherwood, a garage proprietor, of Belfast. Davison drove the tanker to Belfast, backed it into Catherwood's garage, inserted the nozzle of the delivery hosepipe into the manhole of Catherwood's tank and turned on the stopcock at the side of the tanker. While the petrol was flowing from the tanker into the tank, Davison lighted a cigarette and threw away the lighted match. The match ignited some material on the floor of the garage and a fire was caused forthwith where the nozzle of the delivery hose was discharging into the tank. Catherwood seized a fire extinguisher and started to play it on the fire which appeared at the manhole, at the same time shouting to Davison to turn off the stopcock. Davison did not do so, or attempt to do so, but started up the tanker and drove it out of the garage until the fore wheels had about reached the water channel in the street. Davison then stopped the tanker and jumped down to the ground. The fire, although extinguished at the manhole by Catherwood, pursued the trailing hose and the escaping petrol, and Davison had barely reached the ground when a very violent explosion occurred. The explosion destroyed the tanker, the motor car of Catherwood which was parked in the street, and also damaged several houses which were the property of other parties. The claims in respect of the motor and houses were settled for £1,001 16s. 7d., which was paid by the Appellants without prejudice to their ultimate rights.

3. One of the grounds on which the Appellants resisted the claim of the Respondents under the policy was that, in view of the terms of an Agreement of October nth, 1934, between the Respondents or their predecessors and Messrs. Holmes, Mullin and Dunn, Ltd., the liability for the damage did not rest upon the Respondents at all. By Clause I of this Agreement the Respondents, when requested to do so by Holmes and Co., were bound to deliver petroleum spirit which Holmes and Co. had for disposal to any destination within Northern Ireland. The delivery was to be by tank lorries at an agreed scale of freights. The lorries were to be loaded at the installation of Holmes and Co. at Larne, and the Respondents were to keep sufficient tank lorries at Larne to transport all the spirit which might be given to them for delivery. The Respondents were to keep the spirit, while in transit, insured against fire and spillage and were to dress all their employees engaged in such delivery in such uniforms as Holmes and Co. might direct. The Respondents undertook to effect all necessary insurances under the Workmen's Compensation Acts and to be accountable to Holmes and Co. for the product entrusted to them for delivery. The Clause of the Agreement mainly relied upon by the Appellants as establishing that, at the time of the accident, Davison was the servant, not of the Respondents, but of Holmes and Co., is Clause 9. It provided that all the employees of the Respondents engaged in or about such delivery should accept and obey the orders of Holmes and Co. regarding such delivery, the payments of accounts and all matters incidental thereto, and that the Respondents should dismiss any employee disregarding or failing to obey such orders. There followed the proviso that nothing contained in the Clause should be taken as implying that such employees were in any way the employees of Holmes and Co.

4. The dispute as to whether, in these circumstances, the Appellants were liable under the policy was referred to the arbitration of Mr. Lowry, K.C., and the learned arbitrator stated his award in the form of a Special Case. Of the questions formulated in the Special Case, only two are now in issue, viz.:

    1 Was Davison at the time of the accident acting as the servant of the Respondents or of Holmes and Co. ?

    2 Was the admittedly careless act of Davison in lighting a cigarette and throwing the match on the floor of the garage an act done in the course of his employment as such servant, for the consequences of which his master was responsible ?

5. The learned arbitrator himself, subject to the Special Case, answered the first question by saying that Davison was at the time of the accident acting as the servant of the Respondents and the second question in the affirmative. Mr. Justice Brown, before whom the Special Case came, was of a different opinion as regards the first question, and held that Davison was at the relevant moment the servant of Holmes and Co. He agreed with the arbitrator as to the answer to the second question. The Court of Appeal in Northern Ireland (Andrews L.C.J., Babington L.J., and Murphy L.J.) unanimously reversed Brown J. on the first question and affirmed the answers arrived at by the arbitrator. As I have already indicated, I think that the conclusion reached by the Court of Appeal was right. In view of the full and careful argument presented to this House by Mr. Macaskie, I add the following observations.

6. Before this House, the Appellants limited themselves to arguing the two questions set out above.

7. As to the first question, no one disputes the proposition that a man may be in the general employment of X. and yet at the relevant moment, as the result of arrangements made between X. and a third party, may be the servant of the third party so as to make the third party and not X. responsible for his negligence. And I agree

that the test to be applied is the test formulated by Bowen L.J. in ***Donovan v. Laing, etc., Syndicate*** [1893] 1 Q.B. 629, at p. 633, viz., *" in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act."* If it were true that the effect of the written agreement under which the Board's petrol tanker was to carry and deliver Holmes & Co.'s petroleum spirit to its destination was to lend the vehicle and its driver to Holmes & Co., it might well be that while making delivery at the garage Davison was not acting as the servant of the Respondents but as the servant of Holmes & Co. Bowen L.J., in ***Moore v. Palmer***, 2 T.L.R. 781, at p. 782, emphasised that "*the great test was this, whether the servant was transferred, or only the use and benefit of his work.*" But, as Lord Chief Justice Andrews observes, the provisions of the agreement point irresistibly to the conclusion that the Agreement was one of carriage and delivery to be performed by the predecessors of the Respondents with their own servants: it was not a contract for the hiring out of lorries and men, or of lending them to Holmes & Co. to enable them to effect delivery. Clause 9 of the Agreement does not, in my opinion, run counter to this view. The provision that the Transport Co.'s employees shall accept and obey the orders of Holmes & Co. regarding delivery means that they shall carry out delivery orders, not that at some moment of the transit and delivery (Mr. Macaskie prefers to fix the moment no later than the time when they take on their load of spirit at Lame) they became servants of Holmes & Co. In truth, the position of the Respondents under the contract is not that of people who lend vehicles and drivers for the hirers to direct, but of independent contractors who undertake by the use of their own vehicles and by the activities of their own servants to produce the results, i.e., the deliveries, as ordered by Holmes & Co. The decision of the Court of Appeal, overruling Brown J. on this matter, cannot be successfully impeached.

8. On the second question, every judge who has had to consider the matter in Northern Ireland agrees with the learned Arbitrator in holding that Davison's careless act which caused the conflagration and explosion was an act done in the course of his employment. Admittedly he was serving his master when he put the nozzle into the tank and turned on the tap. Admittedly he would be serving his master when he turned off the tap and withdrew the nozzle from the tank. In the interval, spirit was flowing from the tanker to the tank, and this was the very delivery which the Respondents were required under their contract to effect. Davison's duty was to watch over the delivery of the spirit into the tank, to see that it did not overflow, and to turn off the tap when the proper quantity had passed from the tanker. In circumstances like these, *"they also serve who only stand and wait."* He was presumably close to the apparatus, and his negligence in starting smoking and in throwing away a lighted match at that moment is plainly negligence in the discharge of the duties upon which he was employed by the Respondents. This conclusion is reached on principle and on the evidence, and does not depend upon finding a decided case which closely resembles the present facts. But the decision of the English Court of Appeal twenty years ago in ***Jefferson v. Derbyshire Farmers, Ltd.*** [1921] 2 K.B. 281, provides a very close parallel. As for the majority decision, nearly 60 years before that, of the Exchequer Chamber in ***Williams v. Jones***, 3 H. & C. 602, it may be possible to draw distinctions, as the court in *Jefferson's* case sought to do. But this House is free to review the earlier decision, and for my part I prefer the view expressed in that case by the minority, which consisted of Blackburn J. and Mellor J. The second question must also be answered adversely to the Appellants.

9. I move that the Appeal be dismissed with costs.

The Lord Chancellor **:**

10. My Lords, I am authorised by my noble and learned friend Lord Romer, who is not able to be present this morning, to say that he concurs in this Opinion.

Lord Wright: MY LORDS,

11. The main issue in this case is whether the Respondents were liable for the rash and careless act of their lorry driver Davison in striking a match to light his cigarette, and throwing it on the floor of the garage, while he was engaged in the process of transferring from the tank lorry a consignment of petrol into the underground tank at Catherwood's garage at Belfast. The Respondents' case is that they were liable, and on this they based their claim to recover under the policy of insurance issued to them by the Appellants, Section II of which deals with Liability to Third Parties. There was a separate claim not here material by the Respondents for the destruction of their lorry. The questions in debate in regard to the third party liability were (1) whether at the material time Davison was the servant of the Respondents or of Holmes Mullin and Dunn, Ltd., with whom the Respondents had a running contract for the carriage and delivery of petrol in their tank lorries; (2) whether, if Davison was the servant of the Respondents, his act in lighting his cigarette was in the circumstances an act of negligence in the course of his employment in the Respondents' service, involving the liability of the Respondents to compensate the various parties whose property was injured by the explosion which resulted from Davison's rash act, including Catherwood, whose garage was damaged and whose car was destroyed, and the owners of adjoining premises affected by the accident. I am only referring to the claims under Section II of the policy.

12. The dispute came in the first instance before a learned Arbitrator, who stated his award in the form of a Special Case for the opinion of the Court. His own decision on both points was in favour of the Respondents. The question thus is whether the arbitrator was, on the facts stated in the award, wrong in law in so deciding. His award was set aside by Brown J. on the ground that Davison was the servant of Holmes Mullin and Dunn, Ltd., at the material time, so that the Respondents were not liable for his act. The Judge agreed that, if he was then the servant of the Respondents, his act in lighting his cigarette was in the circumstances an act done in the course of his employment. The judgment of Brown J. was unanimously reversed by the Court of Appeal, who upheld the arbitrator's award. The Appellant company appeals.

13. My noble and learned friend the Lord Chancellor has stated the facts. I agree with his reasoning and conclusions, and I may add with the judgments of the Lord Chief Justice and the Lords Justices. I should be content simply to express my concurrence with the Lord Chief Justice's convincing judgment. I add a few words merely on the two questions of law.

14. First of all comes the question in whose employment Davison was. This problem and its decision have produced a good many reported cases in the books. In ***McCartan v. Belfast Harbour Commissioners***, 1911, 2 I.R. 143, this House emphatically stated that it is a question of fact how the maxim *respondent superior* is to be applied in any particular case of this character. The problem is to determine who is the "superior" in the particular instance. Lord Dunedin said categorically that the facts of one case can never rule another case and are only useful so far as similarity of facts (for identity, the word so often used, is really a convenient misnomer) are a help and guide to decision. But all the same, it has been sought to find some general idea, or perhaps mere catchword, which may serve as a clue to solve the problem, and for this purpose the idea or the word "control" has been introduced. Thus Lord Dunedin in ***Bain v. Central Vermont Railway Co.***, 1921, 2 A.C. 412 at p. 416 quotes the following language of Bowen L.J. in *Donovan* v. *Laing Syndicate*, 1893, 1 Q.B. 629, at p. 639. *" We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act"*. If that were a complete statement of what Bowen L.J. said, I should be driven to question whether it was not too vague and indeterminate to afford any useful guidance. But Bowen L.J. did not stop there. Indeed Lord Dunedin merely gives the quotation as the first sentence of what Bowen L.J. said. The Lord Chief Justice in the present case quotes the remainder of the passage and this indicates that the word "control" needs explanation and gives some notion of what is necessary before one man's servant becomes *pro hac vice* the servant of another man. It seems to be assumed in all these cases, no doubt rightly, that the man acquiesces in the temporary change of master, though that may have consequences to him in regard to wages, workmen's compensation, common employment and the like. Bowen L.J. completes his statement thus: *"There are two ways in which a contractor may employ his men and his machines. He may contract to do the work and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another - that is, he may lend them - and in that case he does not retain control over the work"*. It was held on the facts of that case, that the latter description applied. In his judgment in ***Moore v. Palmer***, 2 T.L.R. 781, Bowen L.J. states a more concise criterion: *"The test is this, whether the servant was transferred or only the use and benefit of his work"*. Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions. Such was the case of ***Quarman v. Burnett***, 6 M. & W. 499. Its authority has never been questioned. The Defendants there were sued for the negligent driving of a coachman employed by a jobmaster, who had contracted with the Defendants, who were two ladies, to send horses and a driver for their coach. It is clear that the ladies were intended to direct the times when and the places to and from which they took their drives. That was certainly a measure of control, but what, it was held, was there transferred was the use and benefit of the coachman's work. The coachman did not become the servant of the Defendants. Instances of this sort are common. In ***McCartan***'s case *(supra)* the use and benefit of the Harbour Company's crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment. Another illustration is afforded by ***Cameron v. Nystrom***, 1893 A.C. 308. The question there was whether stevedores could plead the defence of common employment against a servant of the shipowner whose vessel they were discharging. The Plaintiff had been injured by the negligence of one of the shipowner's servants. It was held that there was no common employment because the negligent employee had not become the shipowner's servant. No doubt he had in many respects to obey the directions of the shipowners. Lord Herschell, however, thus summed up the position: *'There was no express agreement with regard to the extent to which the master and mate should have control over them [sc. the stevedore's servants]. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to shipowner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedores so completely under the control and at the disposition of the master as to make them the servants of the shipowner, who neither pays them, nor selects them, nor could discharge them, nor stand in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work "*. Lord Herschell there emphasises that it is the extent of control which is material to be considered. But he also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer. It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer. Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed, being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party, and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work. That I think is the position here. The contract is of a character very common between

the owner of lorries or other vehicles and one who wants to hire them for the conveyance of his goods. In principle the facts here are indistinguishable from those in ***Quarman v. Burnett*** *(supra)*. Davison was subject to the control of Holmes Mullin and Dunn, Ltd., only so far as was necessary to enable the Respondents to carry out their contract. In doing so he remained the Respondents' servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes Mullin and Dunn, Ltd., he was bound to have regard to paramount directions given by the Respondents and was to safeguard their paramount interests. This appears from the course of business followed, and is confirmed by the agreement dated the 11th October, 1934, made between Holmes Mullin and Dunn, Ltd., and the Respondents' predecessor in title, in whose shoes it is admitted that the Respondents stand. It is a contract which was intended to remain in force and has remained in force over a period of years, and provided for the carriage of petrol or like products to any destination within Northern Ireland at the request of Holmes Mullin and Dunn, Ltd. Clause 9 provides that the employees of the Respondents or their predecessors engaged in the delivery should accept the orders of Holmes Mullin and Dunn, Ltd., *"regarding such delivery, the payment of accounts and all matters incidental thereto "*. These are just the matters in respect of which, for the convenient performance of the contract, the lorrymen employed would naturally be required to obey the wishes of those for whom the petrol was being carried.

15. I do not find anything in the rest of the agreement to lead to any other conclusion. It is not, however, necessary to make any nice examination of its terms. A question of this sort must be decided on the broad effect of the contract. I do not attach any decisive effect to the proviso to Clause 9 that nothing in the agreement is to be construed to mean that the Respondents' employees are to be taken as employees of Holmes Mullin and Dunn, Ltd., because it could not bind third parties. I think on the whole the agreement goes to support the view that the parties did not contemplate that what the agreement stipulated should involve any transference of servants, as contrasted with transference of service.

16. Each case of this character must be decided on its particular facts.

17. I therefore do not think it necessary to refer to any other of the cases which have been cited. In the great majority the conclusion has been against the servants being transferred from the general employer. Nor do I consider the cases where a man has been held to have become the servant of someone who was not otherwise his employer, by voluntarily doing work for him.

18. On the other question, namely, whether Davison's negligence was in the course of his employment, all the decisions below have been against the Appellants. I agree with them and need add little.

19. The act of a workman in lighting his pipe or cigarette is an act done for his own comfort and convenience and, at least generally speaking, not for his employer's benefit. But that last condition is no longer essential to fix liability on the employer (***Lloyd v. Grace Smith and Co.***, 1912 A.C. 716). Nor is such an act *prima facie* negligent. It is in itself both innocent and harmless. The negligence is to be found by considering the time when and the circumstances under which the match is struck and thrown down. The duty of the workman to his employer is so to conduct himself in doing his work as not negligently to cause damage either to the employer himself or his property or to third persons or their property, and thus to impose the same liability on the employer as if he had been doing the work himself and committed the negligent act. This may seem too obvious as a matter of common sense to require either argument or authority. I think what plausibility the contrary argument might seem to possess results from treating the act of lighting the cigarette, in abstraction from the circumstances, as a separate act. This was the line taken by the majority judgment in ***Williams v. Jones***, 3 H. & C. 602. But Mellor and Blackburn JJ. dissented, rightly as I think. I agree also with the decision of the Court of Appeal in ***Jefferson v. Derbyshire Farmers, Ltd,*** 1921, 2 K.B. 281, which is in substance on the facts indistinguishable from the present case.

20. In my judgment the appeal should be dismissed.

Lord Porter : My Lords,

21. I agree with the speeches just delivered by the noble and learned Lords who have preceded me, and would dismiss the appeal.