In support of this proposition he cites *Shackell* v. *Rosier* (2 Bing. N. C. 634), *Arnold* v. *Clifford* (2 Sumner's C.C.R. U.S., 238)), *Martyn* v. *Blithman* (Yelv. 197).

In the present case Weld-Blundell did an unlawful act in libelling Lowe and Comins. He cannot by legal process reimburse himself for the consequences and throw the cost upon another.

Further, notwithstanding what was said by Kelly, C.B., in *Riding* v. *Smith* (L.R. 1 Ex. 91), I think *Ward* v. *Weeks* (7 Bing. 211) is good law. "There is ample authority," said Bramwell, L.J., in *Bree* v *Mavescaux* (7 Q.B.D. at p. 437), "to show that a man is not liable for damage occasioned by the repetition of a slander—that is to say, if A said to B that C stole his sheep, though A would be liable to C for such slander, yet if B repeats this slander, A, the original speaker, would not be responsible for this." The proposition thus stated, however, requires, I think, qualification. If, for instance, A expressly authorised B to repeat the slander, or if from the surrounding circumstances it is to be inferred that he anticipated and wished that he should repeat it, the proposition would not, I think, be true—*Speight* v. *Gosnay*, 60 L.J., Q.B. 632; *Ratcliffe* v. *Evans* 1892, 2 Q.B. 530.

The present case is not one of slander but of libel. But not only had Weld-Blundell not authorised Stephens to repeat the libel; he had sent him the letter containing the libel under such circumstances that he (Stephens) owed him the duty not to disclose it. Assuming that it can be said that Stephens made publication to Lowe of the libel on Comins, and made publications to Comins of the libel on Lowe, nothing results from this for (1) Weld-Blundell was not liable in respect of that publication which he had not authorised, and (2) he was made liable not for that publication but for the publication made by Weld-Blundell to Stephens, and the last-mentioned publication had been made and its consequences incurred before the events happened that Swift dropped the letter and Hurst picked it up and wrongfully read it, and as a result Lowe and Comins were informed. Nothing that Stephens did created the liability under which Weld-Blundell lay. I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty. And if it be worth while to pursue it further, that which Stephens did in breach of duty was not that he informed Lowe and Comins, but that he negligently gave Hurst the opportunity to commit another wrongful act, namely that of reading the letter—an opportunity of which he wrongfully availed himself, and then did the act of informing Lowe and Comins.

We have heard little, and I have so far said nothing, as to the question discussed below, and on which the Court of Appeal express an opinion, namely, whether the duty (although the Court of Appeal call it a contract) found by the jury to keep secret the letter of the 4th May was contrary to public policy. All the Lord Justices held that it was not. I fully agree. The contrary proposition would seem to be that public policy requires that a man should spread a malicious libel to the best of his ability, or at least that he should inform the party libelled (if he does not already know it) in order that he may be induced to bring an action. I do not think public policy requires anything of the kind.

In my judgment the order under appeal is right. There was a duty; there was negligence; there was no special damage. The damages are nominal. I think the appeal should be dismissed with costs.

Appeal dismissed with costs.

Counsel for the Appellant — Langdon, K.C.—J.B. Matthews, K.C.—E. F. Lever—L. Albuquerque. Agents—J.S. Blanckensee & Company, Solicitors.

Counsel for the Respondent—Hogg, K.C. —P. Hastings, K.C. Agents — Guedalla, Jacobson, & Spyer, Solicitors.

HOUSE OF LORDS.

Monday, May 17, 1920.

(Before Lords Cave, Dunedin, Atkinson, Shaw, and Sumner.)

BOURTON *v.* BEAUCHAMP & BEAUCHAMP.

(APPEAL UNDER THE WORKMEN'S COMPENSATION ACT 1906.)

Master and Servant—Death of Workman by an Accident — Scope of Workman's Employment — Misconduct of Workman — Breach of Statutory Provision — Explosives in Coal Mines Order, 1st September 1913, Regulations 2 (c) and 3 (c) — Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1.

Contrary to the Coal Mines Order 1st September 1913, a miner proceeded to remove the stemming from an unexploded charge which had missed fire. An explosion took place, as a result of which he died. His widow claimed compensation from the respondents his employers, under the Workmen's Compensation Act 1906. *Held* that the accident did not arise "out of and in the course of" the deceased's employment, since the deceased was engaged in an act expressly excluded from his employment by the provisions of the Coal Mines Order.

The *facts* appear from their Lordships' judgment, which was given without calling upon counsel for the respondents.

LORD CAVE—This appeal has been very well argued, but I understand that your Lordships do not desire to hear counsel on behalf of the respondents.

The appeal is by the widow of Albert Bourton from an order of the Court of Appeal in England allowing an appeal from an award of compensation in respect of the death of her late husband made by His

Honour Judge Gwynne-James under the Workmen's Compensation Act 1906.

The facts are as follows:—The deceased was a collier and certificated shot-firer who was employed by the respondents at the Farrington Collieries to get coal either by a pick or by shot-firing. On the 19th February 1918 a man named West, who was employed at the same mine, charged a hole in the coal face with explosive shot. This he connected with a fuse and stopped the mouth of the hole with stemming. He lighted the fuse but the shot missed fire, leaving the stemming intact and leaving some charred remains of the fuse outside the stemming. West entered in a book containing the record of shots, which was kept in the candle-house, the fact of the shot having missed fire, but did not, as the regulations required, report the fact to the manager or under-manager. On the 21st February the deceased went with other men to get coal at the same place. Before arriving at the spot he was unaware of the existence of the hole and the unexploded shot, but on arrival he must have seen the stemming and burnt fuse, for he proceeded to drill out some of the stemming with a view to laying a fresh shot in the same hole. Unprotected lights are used in this colliery, and the deceased had a lighted candle in his cap. On the stemming being removed an explosion occurred which caused grave injury to the deceased and others, and in the case of the deceased septic pneumonia supervened, and he died on the 15th March. The learned County Court Judge has found that the deceased when he removed the stemming had no reasonable ground for believing that the charge had exploded, but that in fact he did so believe. I agree with the learned Judges in the Court of Appeal in thinking that there was no evidence on which he could come to that conclusion, but in any case it is plain that the deceased saw the hole, the stemming, and the fuse, and knew that the hole had been charged. At the hearing in the County Court it was admitted that the deceased in removing the stemming acted contrary to the regulations contained in the Explosives in Coal Mines Order of the 1st September 1913, which under section 61, sub-section 4, of the Coal Mines Act 1911 have effect as if enacted in the Act. Of these regulations, Regulation 2 (*c*) provides that "No explosive shall be forcibly pressed into a hole, and when a hole has been charged the explosive shall not be unrammed nor shall any part of the stemming be removed nor shall the detonator leads be pulled out." Regulation 3 provides that "If a shot misses fire: . . . (*c*) A second charge shall not be placed in the same hole"; and (*e*) "Except where the missfire is due to a faulty cable or a faulty connection, and the shot is fired as soon as practicable after the defect is remedied, another shot shall be fired in a fresh hole, which shall be drilled not less than twelve inches away from the hole in which the shot has missed fire, and shall, as far as practicable, be parallel with it." The act of the deceased was in violation of all these regulations.

A claim for compensation having been made by the appellant, the learned County Court Judge held that the accident arose out of and in the course of the deceased's employment and awarded compensation. He expressed his opinion that Regulation 2 (*c*) did not limit the deceased's sphere of employment, but gave directions as to working within the sphere of his employment. It appears from a note to the award that his attention was not called to the important Regulation 3 (*c*) until after he had given his award. On appeal Sir C. Swinfen Eady, M.R., Warrington, L.J., and Duke, L.J., unanimously came to the opposite conclusion. They held that the injury did not arise out of the deceased's employment but through an added risk which he was forbidden by the statutory regulations to run, and accordingly allowed the appeal. Thereupon this appeal was brought.

Questions as to the limitation by statutory and other directions of the sphere of a workman's employment have been considered by this House in a number of cases, of which some of the most recent are *Barnes* v. *Nunnery Colliery Company*, 1912 A.C. 44, 49 S.L.R. 688; *Blair & Company* v. *Chilton*, 113 L.T.R. 514; *Plumb* v. *Cobden Flour Mills*, 1914 A.C. 62, 51 S.L.R. 861; *Herbert* v. *Samuel Fox & Company, Limited*, 1916, 1 A.C. 405, 53 S.L.R. 810; *Lancashire and Yorkshire Railway Company* v. *Highley*, 1917 A.C. 352, 55 S.L.R. 509; and *Campbell or Robertson* v. *Woodilee Coal and Coke Company, Limited*, 123 L.T.R. 113, 57 S.L.R. 343. These decisions show that the question to be determined in each case of this character is whether the act which caused the injury arose out of and in the course of the employment, or was one outside the employment altogether. If the former is the case and death or serious and permanent disablement results, then under the Workmen's Compensation Act 1906, section 1, sub-section 2, there is a right to compensation even though the injury was attributable to the serious and wilful misconduct of the worker, but if the act was wholly outside the sphere of employment, then the Act has no application and compensation cannot be awarded. The distinction, as Lord Finlay pointed out in *Highley's* case, may be a fine one, but it is a real distinction. There is a substantial difference between doing carelessly or recklessly a thing which you are employed to do, and doing a thing which you are not employed or entitled to do at all. The former risk is undertaken by the employer in cases falling within the statute; the latter is a peril added by the workman, and not within the contemplation of the parties to the contract of employment.

The test has been put in different ways. In *Barnes'* case Lord Atkinson said—"The unfortunate deceased in this case lost his life through the new and added peril to which by his own conduct he exposed himself, not through any peril which his contract of service directly or indirectly involved or at all obliged him to encounter. It was not, therefore, reasonably incidental to his employment. That is the crucial test." In *Plumb's* case Lord Dunedin, while pointing out out that the question to

be answered is always a question arising upon the very words of the statute—that is, whether the injury arose out of or in course of the man's employment — repeated a phrase which he had used in the case of *Conway* v. *Pumpherston Oil Company* (1911 S.C. 660) in the Court of Session, namely, that "there were two ways of frequent occurence in which a workman might go outside the sphere of his employment—the first, when he did work which he was not engaged to perform, and the second, when he went into a territory with which he had nothing to do," and the noble and learned Lord quoted with approval the sentence which I have cited from Lord Atkinson's judgment in *Barnes*' case. Again, in *Highley's* case, Lord Sumner puts the matter in this way—"I doubt if any universal test can be found. Analogies, not always so close as they seem to be at first sight, are often resorted to but in the last analysis each case is decided on its own facts. There is, however, in my opinion one test which is always at any rate 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."

If these tests or any one of them be applied to the present case the result must be unfavourable to the appellant The deceased was not doing a permitted act carelessly; he was doing an act which he was prohibited from doing by statutory provisions which attached to his employment, and which by those provisions was expressly excluded from his employment. He was neither engaged nor entitled to open up a hole which had been previously charged, and his doing so cannot therefore have been reasonably or at all incidental to his employment. It was no part of his employment to hazard or to do that which caused his injury, and the hazard was an added peril consequent on his own extraneous act. In my opinion, therefore, the injury here in question did not arise out of or in the course of the employment of the deceased within the meaning of the Act, and the claim to compensation fails.

It is impossible not to feel sympathy with the appellant, but as has been said in previous cases an ill-service would be done to the general body of workmen employed in mines if owing to any such feeling a decision were given which would weaken or undermine the regulations which have been imposed for securing so far as possible the safety of those who are engaged in this dangerous employment.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN—I concur. In the matter of authority I do not think that really there is more to be said than is to be found in the cases which have been mentioned by the noble and learned Viscount upon the Woolsack. The application to the particular facts of a case may be difficult and may give rise to difference of opinion between different minds. As regards this case I have not felt any doubt, and I only wish to say further that I desire particularly to associate myself respectfully with the remarks that were made by my noble and learned friends Lord Atkinson and Lord Shaw in the case *Herbert* v. *Samuel Fox & Company, Ltd.* (1916 A.C. 405) as to the disservice which would be done by treating as matters of nonentity these statutory rules.

LORD ATKINSON—In my opinion this is a plain and simple case. It is not at all a case where a workman has done negligently some work which he was employed to do; it is a case where the workman has done a thing that he is by statute—for the regulations have the force of statute—forbidden to do, to effect an object which by the same statute he is forbidden to effect. He is forbidden by statute to withdraw stemming from a hole already charged, he is forbidden also by statute to fire a shot in a hole that has been already charged; and really it passes my comprehension how a certain act can be more effectually put outside the sphere of a workman's employment than by a statutory prohibition which says that he shall not do that work.

I think it is perfectly clear that this thing which this unfortunate man did was outside the sphere of his employment, and I only wish to say, in passing, what it ought to be hardly necessary to say, that wilful misconduct does not bring within the sphere of a workman's employment a work or an act which but for that misconduct would have been outside it. The provision with regard to serious and wilful misconduct has really no application until you first get the serious and wilful misconduct which has been committed inside the sphere of his employment.

LORD SHAW—I agree.

LORD SUMNER—I agree.

Appeal dismissed with costs.

Counsel for the Appellant—H. Morris—H. Slesser. Agents — Church, Adams, Prior, & Balmer, for A. E. Withy, Solicitor, Bath.

Counsel for the Respondents — Inskip, K.C. — Shakespeare. Agents — Calder, Woods, & Pethick, Solicitors, for F. E. Metcalfe, Solicitor, Bristol.