HOUSE OF LORDS

Thursday, May 13, 1920.

(Before Lords Finlay, Dunedin, Sumner, Parmoor, and Wrenbury.)

WELD-BLUNDELL *v.* STEPHENS.

(ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.)

Principal and Agent—Confidential Instructions—Agent's Negligence—Novus actus interveniens—Measure of Damage—Ex turpi causa non oritur actio.

The appellant in instructing his agent, the respondent, wrote him a letter containing defamatory statements about certain persons into whose hands the letter got through the agent's partner negligently dropping it, when it was picked up by a third party and the contents communicated. The appellant was sued by these persons for defamation and had to pay £1769.

The appellant sued the respondent for damages for breach of his duty to keep his instructions secret. The jury found that there was a breach of duty on the respondent's part and that the actions of damages and consequent loss to the appellant were the natural and probable consequence of the respondent's negligence, and assessed the damages at £650. The presiding judge entered judgment for the respondent on the grounds (*a*) that he had no duty to keep the letter secret, and (*b*) that *ex turpi causa non oritur actio.*

Held that the respondent had a duty to keep the letter secret; that he negligently failed in his duty; that consequently an action lay against him; but that the appellant's loss was not the natural and probable consequence of the respondent's negligence; and that only nominal damages therefore were due.

Scott's Trustees v. *Moss* (17 R. 32) *distinguished.*

M'Naughton v. *Caledonian Railway Company* (21 D. 160) *approved.*

Decision of the Court of Appeal (1919. 1 K.B. 520) *affirmed.*

Appeal from an order of the Court of Appeal setting aside a judgment of DARLING, J., and giving judgment for the appellant for nominal damages.

Their Lordships' judgment was as follows—

LORD FINLAY—The action in this case was brought to recover damages for negligence in the custody of a letter entrusted by the appellant (plaintiff) to the respondent (defendant) as his agent. It is alleged in the statement of claim that by reason of the respondent's breach of duty the letter came to the knowledge of two persons, Comins and Lowe, who brought actions against the appellant and recovered damages in respect of defamatory statements made in it.

The case was tried with a jury before Darling, J. The jury found in favour of the plaintiff with £650 damages, but the learned Judge upon further consideration entered judgment for the defendant. The Court of Appeal entered judgment for the plaintiff for 20s. without costs, and the present appeal to your Lordships' House has been brought asking that judgment should be entered for £650, the amount of the jury's verdict and costs.

The appellant had invested a considerable amount of money in a company called the Float Electric Company, Limited, and was greatly dissatisfied with its management. On receiving a further request for advance of money for the undertaking he determined to employ the respondent, who is a chartered accountant, and who had acted for him before, to investigate the affairs of the company. He wrote to him a letter dated the 4th May 1915, out of which these proceedings have arisen. In that letter he complained of the mismanagement of the company, and made severe reflections upon the conduct of Mr Hurst, the manager, and of Mr Lowe and Mr Comins, who had also taken part in its affairs. The letter requested the respondent to go to the bank and get an inspection of the ledger of the company, and then if necessary to go on and make inquiries of Mr Hurst, the manager of the company's office. The respondent handed the letter to his partner Mr Swift asking him to attend to the business. Mr Swift went to the bank, taking the letter with him, and examined the ledger. He then went on to see Mr Hurst and had some conversation with him. While in the office he unfortunately pulled out of his pocket along with some other papers the appellant's letter to him and left it lying on the floor. On getting back to his own office he realised the loss of the letter and telephoned to Mr Hurst to look for it and return it to him. Mr Hurst found the letter and before returning it to Mr Swift had a copy taken and certified. This copy he showed to Mr Lowe and Mr Comins. Each of these gentlemen brought an action against the appellant. Mr Lowe recovered a verdict for £1000 damages, but by consent this was in the Court of Appeal reduced to £250. Mr Comins recovered a verdict for £500. It was ruled in both cases that the letter was written on a privileged occasion, but the jury in each case found that there was express malice on the part of the present appellant. Judgment was entered for £250 and £500 accordingly with costs, and the appellant had to pay £1769 in respect of these judgments.

The appellant then brought this action against Mr Stephens, the respondent, to recover damages, alleging that these two actions had been brought in consequence of the negligence of Mr Stephens and his partner in the custody of the libellous letter. The statement of claim was delivered on the 20th July 1917 and claimed damages for the defendant's failure to take proper care of the letter. The defendant denied the negligence and counter-claimed for £45 in respect of professional services render to the appellant.

The following are the questions put by the learned Judge to the jury, with their answers:—Darling, J.—"Was it the duty of

the defendant to keep secret the letter of the 4th May written by the plaintiff to the defendant?—(A) Yes. Did the defendant neglect his duty in regard to the said letter so that the contents thereof were disclosed or came to the knowledge of Mr Hurst?—(A) Yes. Were the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them the natural and probable consequence of the proved negligence of the defendant?—(A) Yes." Damages £650. To the jury—"I understand, gentlemen, in not giving the full amount claimed you acted on what I suggested that the conduct of the plaintiff himself was responsible to some extent for the damages which were awarded. The foreman of the jury—Quite so."

On further consideration Darling, J., entered judgment for the defendant on the ground that the liability of the plaintiff in damages was in respect of his own wrongful act in publishing the libel, and he rested his decision on two grounds—(1) He dealt first with the maximum which had been invoked by the defendant *ex turpi causa non oritur actio*, and the contention that the alleged contract of agency related to the custody of a malicious libel by the plaintiff himself. Darling, J., said—"After much consideration I have, however, come to the conclusion that our law does not and cannot imply any such promise or term as that which the plaintiff alleges, and therefore no breach of contract or dereliction of duty was committed by the defendant." (2) The learned Judge went on to say that were the case otherwise there would remain the question whether the plaintiff could recover against the defendant damages consequent on the action for libel against the plaintiff by Lowe and Comins. He said—"The question to be decided may, I think, fairly be put in these words—'Can one recover damages against another because he has had to make reparation for a wrongful act committed by himself?' I think he cannot."

An appeal was brought to the Court of Appeal asking that judgment should be entered for the plaintiff, the present appellant, for £650, the amount given by the jury. The Court of Appeal were divided in opinion. Scrutton, L.J., was in favour of the appellant, but Bankes, L.J., and Warrington, L.J., were of another opinion. They disagreed indeed with Darling's, J., view that the action was not maintainable. Bankes, L.J., said—"Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor contrary to public policy." Warrington, L.J., said—"On the whole I can see no reason, founded on public policy or any other ground, why an agent should be at liberty to disclose evidence of a private wrong committed by his principal, and I come to the conclusion that the implied obligation of the defendant in reference to the plaintiff's documents in general extended to the letter of the 4th May 1915." The decision of the Court of Appeal on this point was obviously right, and no attempt was made on behalf of the respondent to impugn the correctness of this portion of the judgment. Indeed, any decision to the contrary would involve consequences at once extravagant and unreasonable. It would be startling if it were the law that an agent who is negligent in the custody of a letter handed to him in confidence by his principal might plead in defence that the letter was libellous. There may, of course, be cases in which some higher duty is involved. Danger to the State or public duty may supersede the duty of the agent to his principal. But nothing of that nature arises in this case.

The majority of the Court of Appeal then proceeded to consider the question whether, assuming the appellant to have a right of action against the respondent, he was entitled to recover the special damages claimed in respect of the actions by Lowe and Comins for libel. They held that he was not so entitled, as the damages in these actions were given in respect of the plaintiff's own wrongful act in publishing a malicious libel.

This part of the case has been elaborately argued before your Lordships, and there has been urged at the Bar of your Lordships' house a further objection to this head of damage which is not noticed in the judgments of the Court of Appeal, namely, that the actions were not the result of the respondent's negligence, but were caused by a *novus actus interveniens* on the part of Hurst, by whom the existence of the libel was made known to Lowe and Comins. I shall deal with these two grounds in the order in which I have mentioned them.

(1) The majority of the Court of Appeal held that as the plaintiff's letter was a malicious libel, the actions against him with their damages and costs were the result of his own wrong, and that therefore he could not recover from the defendant in respect of them.

In arriving at this conclusion the Lord Justices relied upon the law laid down by Kennedy, J., in *Burrows* v. *Rhodes*, 1899, 1 Q.B. 816. Kennedy, J., in that case said—"It has, I think, long been settled law that if an act is manifestly unlawful or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom." This passage has no application to a case like the present in which a letter written by a principal to his agent on the business of the agency contains reflections upon the character of other persons. It is the duty of the agent to treat such a document as confidential, and to take reasonable care to prevent its falling into the hands of others. The case bears no analogy to the class of authorities cited by Kennedy, J., in which a man about to commit a crime or civil wrong takes an indemnity from another against the consequences. In the case of an agent the fact that a letter contains libellous matter is really an additional reason for care in its custody, and a natural consequence if such documents get abroad would be an action for damages by the

person libelled. In the present case, the agent, knowing what was in the letter, took upon himself the duty of safeguarding it, and he must be liable for any damage which directly and naturally results from his failure to do his duty in this respect.

Reliance was also placed by the Lords Justices on the decision of this House in *Neville* v. *London Express Newspaper, Limited*, 1919 A.C. 368. That was an action for maintenance, and it was decided in this House that an action for damages for maintenance will not lie in the absence of proof of special damage. In that case the action maintained was one to compel the repayment of money which had been obtained by fraud. The London Express Company, Limited, were the maintainers and the special damage alleged in the action against them for maintenance was that the plaintiff had been compelled to refund the money so obtained. It was decided that this was not special damage which would support an action for maintenance. It would be obviously absurd that a debtor who had wrongfully resisted payment until he was compelled to pay by action should be entitled to recover in proceedings for maintenance the amount which he owed and which had been recovered from him in the action. The observations on which the respondents in the present case relied were made with reference to an action to recover damages for maintenance. It cannot be laid down as a general proposition that if a wrongful act is done, the natural consequence of which is that the plaintiff's creditor proceeds to enforce his rights, this may not form a head of damage. This applies with special force with reference to a case in which by the negligence of the agent facts have been divulged which might support claims for damages for tort against his principal.

Reference was made in argument to the leading case of *Merryweather* v. *Nixon* (8 T.R. 186) and the more recent authorities in which the doctrine on that subject has been developed. I cannot think that cases under this head have any relevance to the present. What they decide is that there is no liability to contribution arising out of the mere fact that damages for a tort have been recovered against two persons, and further, that if it appears that there was a combination to do an act manifestly wrongful no express contract by one of the parties to indemnify the other would be enforceable. This rests on broad considerations of policy, as it is obviously inexpedient that the law should encourage any combination to commit a tort. There was nothing of the kind in the present case. The facts which gave rise to the liability of Mr Weld-Blundell to Mr Comins and to Mr Lowe occurred when he wrote and delivered the letter to Mr Stephens, and Mr Stephens was no party to that act. It is no part of the policy of the law that immunity should be extended to breaches of trust committed by an agent in revealing information which has been given to him in confidence as to facts on which possible claims for damages might be preferred against his principal.

It was sought by the respondents to assimilate the case to one of liability for debt, and it was said that under no circumstances can damages be recovered in respect of the fact that the plaintiff has been compelled to pay money which he owes. This doctrine cannot be of universal application. No such general deduction can be drawn from the doctrine laid down in *Neville's* case, where the money had been obtained by fraud, where restitution was a duty and retention was in itself dishonest. Actions for maintenance are of a very special nature, but even in them the doctrine in *Neville's* case is not always applicable. For instance I do not think that *Neville's* case would govern a case in which the defendant in an action of maintenance had incited a lender to call in the loan and had maintained an action for the purpose. Payment might otherwise have been allowed to stand over for a long period, and it would be for a jury to appraise the chances of this. The amount of the debt would not be recoverable, but the wrongful act of the maintainer might occasion inconvenience and damage calling for compensation.

Similar considerations would apply where the defendant has been guilty of any actionable wrong. If in consequence of that wrong a creditor calls in his debt, why should not this form an item of damage in an action against the wrongdoer? The damages would of course not be measured by the whole amount of his debt, but regard might be had to the probability that but for the defendant's wrong the money might have been allowed to remain in the hands of the borrower till a more convenient season.

The consequences might be serious to a mercantile firm even of the highest standing if all those who have legal claims against the firm were set in motion at once to enforce these claims. A third person who by malice or negligence in discharge of his duty to such a firm brings about such pressure by creditors would plead in vain that all that happened was the enforcement of legal debts. The fact that they would have been enforced at some time might prevent liability for the whole amount, but it would be startling if it afforded complete immunity to misconduct by an agent which might entail the ruin of his principal's business.

The extension of the supposed rule as to debts to cases of enforcement of liability for torts which results from the misconduct of an agent would lead to some remarkable results. Take the present case as an illustration. Mr Weld-Blundell had written a confidential letter to his agent on a privileged occasion. That letter contained libellous matter for which Mr Weld-Blundell might be made liable if the jury should find that he had been influenced by express malice. The question of damage in respect of the actions for libel brought in consequence of the defendant's misconduct must be determined on the same principle which would apply if the defendant had maliciously and for the purpose of inducing the persons libelled to bring their actions

against Mr Weld-Blundell communicated to them the fact that the libellous letter had been written. Mr Weld-Blundell was under no sort of obligation to Mr Comins or Mr Lowe to reveal to them the existence of this letter in order that they might have the opportunity of bringing actions against him. He would indeed be bound to endeavour to remove any unfavourable impression which the letter might have created on the mind of his agent with regard to Mr Comins and Mr Lowe, but there is in such a case nothing that corresponds to the duty that is incumbent on a fraudulent person to make restitution, or on a debtor to pay his debts on demand.

Somewhat similar considerations might apply if the agent's breach of confidence had led to an action for penalties. A man may without any moral delinquency have made himself liable to penalties to a considerable amount at the suit of any common informer. It could not be suggested that there would be any obligation upon him to make these facts generally known in order to give an opportunity to any person who might be so minded to play the part of the common informer. Under such circumstances it may well be, as was suggested in *Neville's* case, that any person who maintained an action for such penalties would be liable to substantial damages in respect of the penalties, the payment of which had been compelled by the maintained action. It might be no answer that there was a legal liability to pay the penalties, as that potential legal liability would never have become effective but for the wrongful act of the maintainer. The same observations might apply if the action for penalties was due to the betrayal by an agent of his principal's confidence.

It is not disputed that the defendant was guilty of a breach of duty as agent. A direct consequence of that breach of duty (subject only to the question of the effect of Hurst's intervention, with which I shall deal under another head) was that Mr Comins and Mr Lowe brought the actions for libel which but for the defendant's breach of duty would never have been brought. It must have been in the contemplation of the parties that if the letter were allowed to get abroad actions might very probably be the result, and indeed this probability was the great reason which imposed the duty of precaution in the custody of such a document. The result of the defendant's negligence was that these actions were brought against his principal, Mr Weld-Blundell. There is no legal principle to exclude the damages in such actions from being taken into account in estimating the damages payable by the agent. To hold that no such damages could be recovered would be to give practical immunity in many cases to agents who have allowed the secrets of their principal to become known.

It is not necessary to consider the question on which Rowlatt, J., in *R. Leslie, Limited* v. *Reliable Advertising Agency* (1915, 1 K.B. 652) differed from Lord Coleridge, J., in *Cointat* v. *Myham* (1913, 2 K.B. 220), or the dictum of Lord Lyndhurst in *Colburn* v. *Patmore* (1 Cr. M. & R. 73). The ground on which Rowlatt, J., held that there can be no indemnity in respect of the result of a criminal prosecution is that it is against the policy of the law that the punishment for crime should be mitigated by any contribution in any form from another. No such question arises in the present case where the question relates merely to civil liability.

I cannot agree with the decision of the majority of the Court of Appeal that damages were not recoverable from the agent in respect of actions for libel resulting from his negligence in not taking care of the letter.

(2) But at the hearing in your Lordships House it was further contended that the actions for libel were not the result of the agent's negligence but of the wrongful act of Hurst in making the letter known to Lowe and Comins. This point was not raised before Darling, J. It appears from the transcript that it was raised in the Court of Appeal by the junior counsel for the respondent at the close of his argument. It was not received with favour by the Court, and no notice was taken of it in the judgment. The point is not made in the respondent's case either in the body of the case or in the reasons. It has, however, been argued at the bar of your Lordships' House and must be dealt with.

In answer to the second question put by the learned Judge at the trial the jury found that the actions for libel brought by Lowe and Comins against the plaintiff and the damages recovered by them were the natural and probable consequence of the proved negligence of the defendant. The jury did not give the full sum which the plaintiff had had to pay in these actions, no doubt because they thought that if the plaintiff had acted reasonably the matter might have been settled on more favourable terms. The contention now raised is that in point of law the learned Judge at the trial was bound to withdraw from the jury the consideration of these actions as an element in the damages, as they were really the result of what Hurst did and not of the respondent's negligence. It is urged by the respondent that the act of Hurst in supplying Comins with a copy of the letter was dishonourable, and so it was. By the negligence of the respondent the letter had been left on the floor of Hurst's office. It might have been picked up by any person who had access to the office. If the person who picked it up happened to be a gentlemen no mischief would in all probability have followed, as he would have returned it to the respondent or his partner Mr Swift. But the person who negligently leaves a paper of this description lying on the floor can hardly say that its being picked up by some-one who is not a gentleman is so remote a contingency that it may be disregarded in ascertaining what are the natural consequences of the negligence. It may be picked up by some-one who is not sensible of the obligations of honour in such matters, and the divulgation of its contents

may then follow. The necessity for special care with regard to documents of this kind arises from the very fact that there are a great many people about who are not very scrupulous. Such a letter may be picked up by some-one who reads the letter, and then from a spirit of mischief or by way of amusement talks about it or shows it to some person concerned. Everyone knows that such an occurrence is very possible, nay probable. It appears to me that if this point had been taken before Darling, J., he would have been bound to say that the matter would not be withdrawn from the jury. I feel very little doubt that if this point had been raised by counsel for the defendant in his address to the jury they would have said, and rightly said, among themselves, that you must take human nature as it is, and that it is precisely because there are mischievous and dishonourable people about that it is necessary to be very careful in the custody of such documents.

The fact that the damage was caused by the act of some third person does not prevent its being recoverable if such an act was a natural and probable consequence even though wrongful. I may refer in illustration to some of the cases which have been cited:—*Engelhart* v. *Farrant*, 1897, 1 Q.B. 240; *Clark* v. *Chambers*, 3 Q.B.D. 327; *Burrows* v. *Marsh Gas Company*, L.R., 7 Ex. 96; *Rex* v. *Moore*, 1832, 3 B. & A. 184; *Scott's Trustees* v. *Moss*, 1889, 17 R. 32; and *Bowen* v. *Hall*, 6 Q.B.D. 333, at pp. 337 and 338.

Brett, L.J., with the concurrence of Lord Selborne (then Lord Chancellor) expressed himself as follows:—"The decision of the majority (in *Lumley* v. *Gye*, 2 El. & Bl. 216) will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby* v. *White*, 2 Ld. Raym. 938. If these conditions are satisfied the action does not the less lie because the natural and probable consequences of the act complained of is an act done by a third person, or because such an act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendant's act. In many cases that may be so, but if the law is so to imply in every case it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him or is an act which it is illegal for him to do the law will not recognise that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vickars* v. *Wilcocks* (8 East 1) requires this doctrine for its support it is in our opinion wrong. We are of opinion that the propositions deduced above from *Ashby* v. *White* are correct."

It must be borne in mind that the present is an action for breach of duty by an agent in failing to take proper care of a document entrusted to him. It is admitted that he failed to discharge that duty and the very thing happened which it was his duty to guard against. The precise chain of circumstances which would ensue from negligence could not of course be foreseen. If the letter had been picked up by Lowe or Comins it would hardly be denied that the bringing of the actions would have been a natural and direct consequence. So if it had been picked up by a servant whose gossip about it came to the knowledge of Lowe and Comins I am unable to discover any principle of law which would justify us in holding that this head of damage ought to have been withdrawn from the jury. It was eminently a question for them as to the natural consequence of the defendant's breach of duty. The jury very properly discounted the amount of damages as they appreciated the fact that the appellant's own conduct had probably aggravated his loss.

In my opinion the judgment of the Court of Appeal should be reversed, and judgment should be entered for the appellant for £650, the amount of the verdict, with costs in the Courts below and in this House.

LORD DUNEDIN—The noble and learned Lord on the Woolsack has stated so fully and accurately the facts out of which this case arises that I need say nothing as regards them. I am in accordance with him as to the first point which was raised before Darling, J., and dealt with by the Court of Appeal. There remain two reasons for which it is argued the plaintiff cannot recover the damages he asks as special damage.

My noble and learned friend states one of them as raising the question of whether the damage suffered was the natural consequence of the negligence committed or was the result of a *novus actus interveniens*. Another way of stating what probably is, in the circumstances of this case, the same question is to ask whether the damages alleged are not too remote. A variety of cases have been cited in support of the proposition that the result may be a natural and probable result although it was indirect. That that may be so I do not doubt.

In addition to the authorities already cited I would add the well-known Squib case of *Scott* v. *Shepherd* (2 Wm. Bl. 892), and another case which is probably not known here, decided, and I think rightly decided, in the Court of Session—*Scott's Trustees* v. *Moss*, 17 R. 32. In that case the occupant of a recreation ground in the vicinity of a large town advertised that a descent from a balloon would be made by

parachute within the grounds at a certain time. The descent was made into a field of turnips on a farm adjoining the grounds and a crowd which had assembled outside the grounds rushed in and injured the fences and the turnips. The farmer sued the occupant of the recreation grounds, the Lord Ordinary sustained a plea of irrelevancy and dismissed the action, but the Inner House recalled that judgment and granted the issue to go to a jury, which asked the question whether what had happened was the natural and probable result of what the defendant had done. I have, however, come to the conclusion that there was here no evidence which entitled the jury to give the affirmative answer they did to the question as put to them that the actions for libel and the damages recovered were the natural and probable consequence of the proved negligence of the defendant. I think one may here repeat in terms, with change of names, the words of Tindal, C.-J., in *Ward* v. *Weekes*, 7 Bing, at p. 215—"It was the repetition of the words by Hurst to Lowe and Comins, which was the voluntary act of a free agent over whom the defendant had no control and for whose acts he is not answerable, that was the immediate cause of the plaintiff's damage."

I now pass to the other point, and on this I am again constrained to differ from the opinion expressed by my noble and learned friend. The point as it precisely arises may be a new one—that is to say, we were not informed by counsel of any case which exactly covers the circumstances of this one, nor have I been able to find such a case for myself. This is what makes it possible to distinguish, as my noble and learned friend has done, between this case and such cases as *Burrows* v. *Rhodes* (1899, 1 Q.B. 816) and *Neville* v. *London Express Newspaper Limited*, 1919 A.C. 368. But though the cases are distinguishable upon the ground that the application of the principle is to be found in different circumstances, yet in my opinion the underlying principle is the same. To take first the case of contribution between wrongdoers, which is the first instance given by Kennedy, L.J., in the passage cited, why is there no contribution among wrongdoers? Only, I think, because of the underlying proposition that no man can claim damages when the root of the damage which he claims is his own wrong, for in certain cases there may be contribution. The rule even in England, laid down in *Merryweather* v. *Nixon* (8 T.R. 186), is not a universal rule, but is qualified by the necessity that the doer of the wrong who is suing his joint wrongdoer for contribution "must be presumed to have known that he was doing an unlawful act"—*Adamson* v. *Jarvis* (4 Bing. 66, at p. 73) and Lord Herschel in *Palmer* v. *Wick Steam Shipping Company*, 1894 A.C. 318, at p. 329. In other words, if the underlying proposition is absent the rule does not apply.

Then as regards *Neville's* case, it was found by the majority in this House that the maintenance of the action was a wrong against the plaintiff although the maintained action was successful. Once it was successful the natural and probable consequence was that the plaintiff had as a defendant in action to pay the sums found due. Yet he was not entitled to recover the same as special damages. I confess I can see no ground on which such a result could be reached except the application of the principle for which I am contending. It does not seem to me in the least to explain the matter to say that the action of maintenance is a very peculiar action. I quite agree. If I may put aside for the moment my duty of considering English law alone in this an English case, and may look at it with eyes which are always open to consider the English law as a foreign system, I think it is a cumbersome curiosity of English law. Nevertheless it exists and forms a liability. It appears to me that the liability which arose in *Neville's* case from it being successfully shown that the action was a maintained action, differs once it is established no whit from the liability supposed *ex hypothesi* to be established in this case from negligence, and the result would, in my judgment, have been clear to give as damages the peculiar loss to which the plaintiff was put as the necessary result of the success of the maintained action, were it not for the proposition that a man, as Darling, J., puts it, cannot recover damages because he has had to make reparation for a wrongful act committed by himself.

In the case of *M'Naughton* v. *Caledonian Railway Company* (21 D. 160, at p. 163) the late Lord President Inglis, then Lord Justice-Clerk, said as follows — "Where an event is brought about directly by the *culpa* of two persons, whether joint or several, when the *culpa* of each has contributed to produce the event, and the event would not have been produced but for the *culpa* of both, there can be no claim as between these persons for reparation of injury flowing from the event." I am well aware that this was said in a case of accident where the point in question was what is ordinarily termed "contributory negligence," and it could easily be said that the proposition must be read *secundum subjectam materiem*. None the less it is expressed as a general proposition, and in my humble opinion as a general proposition it is sound. A general proposition is not necessarily vitiated as such because the *subjecta materies* will permit though it does not enjoin a limited application.

For these reasons I am of opinion that the result reached by Darling, J., and the majority of the Court of Appeal was right, and that the appeal should be dismissed with costs, and I move accordingly.

LORD SUMNER—In this case neither the character nor the validity of the contract is now in dispute. The fact and the nature of the respondent's breach of it are accepted, and the only issue is between substantial and nominal damages.

The plaintiff pleaded an employment of the defendant as an accountant, alleging an implied obligation to keep his instructions secret. The case made was not a republica-

tion of the appellant's libel or an intentional or wilful disclosure of his letter, but a want of care in the custody of it whereby its contents became known to the parties whom it defamed. Each member of the Court of Appeal expressly states the obligation which the defendant broke to have been an obligation to use care, and one of the grounds given for the decision against the appellant is that his case is really a claim for indemnity and not for damages due to want of care. As Bankes, L.J., puts it—"If the plaintiff is right, the obligation not to disclose is equivalent to an obligation to indemnify the plaintiff against the liability to pay the amount recovered for damages and costs in an action brought as a consequence of the disclosure." The appellant accepts this decision in the statement which he makes in paragraph 8 of his case—"The present action was then commenced by the appellant against the respondent to recover damages for the respondent's breach of duty (charged as a breach of an implied term of his contract of employment) to use reasonable care to keep secret the contents of his said letter."

This view of the contract and the breach is accordingly the basis of the present debate, for so far there is no appeal from the decision below. That a man may in some cases contract to be indemnified against his own torts is obvious, but that is not the point. If I do not discuss the question whether a man can lawfully contract with another to repay to him what he is compellable to pay to those whom he libels, I do not wish it to be supposed that I affirm that he can. We have nothing to do here with any duty (which could only be contractual) to hold the appellant harmless from liability for what he had written or to save him from himself or to recoup him even for self-inflicted losses, nor with any undertaking to insure against the risk of the contents of the letter becoming known, or absolutely to keep them secret in all events and to guard against the letter's becoming known to anybody, for no such contract is before your Lordships.

Again, this contract of employment contains no special term as to the extent or measure of damages, express or implied. "The damage," says Bowen, L.J., in *Cobb* v. *Great Western Railway* (1893, 1 Q.B. 459) "must be such as would flow from the breach of duty in the ordinary and usual course of things. This is the general rule both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the contract." This special application to contracts of the rule as to remoteness depends like other matters of contract on mutuality and agreement, on some communication between the parties at or before the time when the contract is made, some knowledge and acceptance by the one party of the purpose or intention of the other in entering into the contract. There is no evidence of anything of the kind here. It is true that the respondent said that he realised the letter was dangerous when he got it, but that answer did not purport to refer to actions brought upon it. There are plenty of other ways in which it might make mischief, and indeed when Mr Stephens asked the counsel who was cross-examining him, "Do you mean dangerous in the sense that it was libellous?"—all the answer he got was, "A highly dangerous letter to the interests of Mr Weld-Blundell unless it was kept from the knowledge of those whose names are referred to in it." To that it was that he replied that he realised it was dangerous. As a matter of fact nothing passed between the parties on the subject, and so far was any such special contemplation from the appellant's mind that when Messrs Comins and company's solicitors asked him to apologise for his letter his answer was—"I suppose you will not venture to deny my right, even in this land of fools and rogues, to say or write what I please to my own servants, such as Comins, Hurst, Stephens, &c., more especially when as in this case I limit my remarks to what is and has been a subject of common knowledge to and among all of them, or, as you put it, among the entire gang in my employment."

Clearly Mr Weld-Blundell thought he could write to Mr Stephens what he liked without being under any legal liability, whether the letter became known or not. There is no evidence that any such thing was in the contemplation of either party; certainly it was not in that of both. There is therefore no ground for applying to the defendant's breach of contract in this case any other measure of damages than such as would have applied if it had been a breach of a non-contractual duty. The only damages of which there was any evidence consisted of the damages and costs, both the successful plaintiffs' and his own, which were recovered against the appellant or incurred by him in the libel actions. Obviously there might have been other substantial damages recoverable against Mr Stephens if they could have been proved—for example, the cost of advertising for the lost document and getting it back. But how is the appellant to show that his payment of the above-mentioned damage and costs was the respondent's doing or the respondent's fault?

Either the sums which the appellant had to pay were the direct result of what he did himself and were self-inflicted injuries or they were caused not by Mr Stephens but by Mr Hurst. As to the costs the appellant brought them on himself by electing to defend what in truth were undefendable actions. If it be said that until express malice was found by the jury his liability might only be nominal, that it was reasonable for him to take his chance on this issue, and that he was put in the position of having to elect by the respondent's want of care, the fact still remains that he was in part at least the author of his own wrong by publishing the libel at all. To say that Mr Weld-Blundell gave Mr Stephens the opportunity of making him liable and that Mr Stephens took it and did so is to my mind a

mere quibble. The appellant's liability did not depend on or spring from Mr Stephens, unless a mere occasion is identified in law with cause. The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a nutshell. "True it is," he says, "that I libelled Messrs Comins and Lowe to Mr Stephens, but if Mr Stephens had not lost my letter they would have known nothing about it and I should have escaped the consequences of my own wrongdoing." What is this but saying in plainer language—"My own act was the *causa causans* of the judgments against me and Mr Stephens' omission to be careful was the *causa sine qua non?*" From the moment when the libel was published the appellant was under legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it. If he had been in possession of lost property belonging to Mr Comins and the letter had betrayed to the owner the secret of its whereabouts; if he had encroached on Mr Lowe's land and the letter had apprised that gentleman of the fact just before a title accrued by lapse of time; if he had owned a debt to them and the letter had recalled it to their attention, I can hardly suppose that the several judgments recovered could be alleged to be caused by the respondent, even though it was by his fault that Messrs Comins and Lowe got at the letter. As Lord Justice Bankes says—"The damages and costs in question are payable by reason of the plaintiff's own wrongdoing and were legally recoverable from him independently of the defendant's breach of his obligation."

As to *Neville* v. *London Express Newspaper Limited* (1919 A.C. 368) I confess I should have thought from the report of that case that your Lordships had then laid down a principle which would now be in point, but in deference to the noble Viscount who was a party to that decision and whose opinion is to the contrary, I forbear to express any conclusive judgment upon it. If, however, the damages of which evidence was given were not simply caused by the appellant's publication of the libel, they arose in actions directly and immediately brought about by the intervention of Mr Hurst. In my opinion the evidence on this point was all one way, and there was nothing to the contrary to be left to the jury. The point was taken in the Court of Appeal, and I am unable to understand why your Lordships are not to decide it now. It is a question of law. The responsibility of Mr Stephens ended with Mr Swift, his partner, who was careless but did not drop the letter intentionally. No authority was given by Mr Stephens to Mr Hurst in the matter. It was never intended that he should read or make use of the letter. It was no part of his duty to do so. I may add, though I do not think it makes the respondent's irresponsibility any clearer, that Mr Hurst appears to have involved himself in conversion and detinue of the document, and in sundry original publications of the rather complicated collection of libels which it contained. He was an independent actor and a mischief-maker.

It is important to recall exactly what the evidence is as to Mr Hurst. It is given by Mr Swift, who was not contradicted, nor was his cross-examination directed to shaking his evidence on this point. He received the letter from the respondent for the purpose of making the investigations desired by the appellant. So far there was no breach at all. He dropped it carelessly in Mr Hurst's room. He discovered that he had lost the letter before Mr Hurst found it, and he telephoned to him about it. Mr Hurst looked about the room and replied—"There is a letter under the chair in my office where you were sitting." Mr Swift replied—"Well, it is a private letter; do not read it! Just put it in an envelope and send it along to me," and Mr Hurst said—"I will do that straight away." Next day he said when asked why it had not arrived—"I could not catch the post, because I was detained; but you will get it by the second." This was only a half-truth. What really detained Mr Hurst was that he was getting a certified copy of the letter made, which was ultimately the foundation of the plaintiffs' case in the actions brought against the appellant.

What canon is to be applied to such a case? It is argued that the respondent is liable for any damage which is "a natural consequence," or a natural and necessary consequence, of his breach of duty; that the conduct of Mr Hurst was "under the circumstances probable," and that Mr Stephens was therefore responsible for it; that the respondent's breach of duty was "the effective cause of the litigation," and that Mr Hurst's "intervening negligence does not affect" this result.

What are "natural, probable, and necessary" consequences? Everything that happens happens in the order of nature and is therefore "natural." Nothing that happens by the free choice of a thinking man is "necessary" except in the sense of predestination. To speak of "probable" consequence is to throw everything upon the jury. It is tautologous to speak of "effective" cause, or to say that damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. Still I venture to think that direct cause is the best of expressions. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one operating at the same time and leading to a common result, as in *Burrows* v. *March Gas Company* (L.R., 7 Ex. 96) and *Hill* v. *New River Company*, 9 B. & S. 303.

As, however, these different epithets and formulæ are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question

of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr Hurst between the respondent and Messrs Comins & Company. Want of care has not to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional, or wanton breach. This at once makes it possible to lay aside large classes of authorities. Further, what a defendant ought to have anticipated as a reasonable man may be and is very material when the question is being discussed whether or not he was guilty of negligence — that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation — *Blyth* v. *Birmingham Water-Works*, 11 Ex. 781; *Smith* v. *London and South-Western Railway* (L.R., 6 C.P. 14), *per* Blackburn, J. Again, what ordinarily happens or may reasonably be expected to happen is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell* (L.R., 7 C.P. 253), unless, indeed, it be regarded as a decision on negligence or no negligence. At any rate it is not this case. Again, between the negligence of a defendant and the infliction of hurt or loss on a plaintiff, the action of human beings may intervene in a great variety of ways—the action of children, or other irresponsible creatures, of persons in a state of excusable ignorance acting without any intention to injure others (*Elkin* v. *M'Kean*, 79 Penn. R. 493), of persons in a state of excusable alarm produced by the wrongful acts of the defendant (*Scott* v. *Shepherd*, 2 Wm. Bl. 892; *Jones* v, *Boyce*, 1 Starkie, 493), of persons acting in the exercise or the defence of their rights and without intention to injure others (*Clark* v. *Chambers*, 3 Q.B.D. 327; *The Sisters*, 1 P.D. 117; *Halestrop* v. *Gregory*, 1895, 1 Q.B. 561), of persons acting as the defendant meant them to act or acting as the defendant must have foreseen that they would act in consequence of things done by him for his own purposes or in a state of indifference as to the result to others (*Scott's Trustees* v. *Moss*, 17 R. 32; *Rex* v. *Moore*, 3 B. & A. 184). Mr Hurst's action is none of these. Equally we may lay aside the cases where dangerous things or things capable of being dangerous if left exposed to the interference of others have been treated as imposing special duties of care on those who are responsible for their being left where strangers can make them a source of danger to those brought into contact with them—such cases are *Illidge* v. *Goodwin* (5 Car. & P. 190) and *Lynch* v. *Nurdin* (1 Q.B. 29). Darling, J., thought that this case might be treated as if the letter was an "explosive" dangerous in itself and concealing its real character from ordinary examination. The analogy was a false one. The letter could not "go off" of itself. If let alone it was quite harmless, and Mr Hurst's only motive for meddling with it must have been either its patent utility for mischief-making or his moral disapproval of Mr Weld-Blundell's own wrongdoing. There is a special line of cases relating to things supposed to be dangerous in themselves, horses and guns, lamps and hair washes, railway trucks and railway turntables; but a document has been expressly held not to belong to this category (*Le Lievre* v. *Gould*, 1893, 1 Q.B. 491).

As applied to the present circumstances, what principles and what decisions are in point? The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done, not to inflict punishment for duty disregarded. The trial of an action for damages is not a scientific inquest into a mixed sequence of phenomena or an historical investigation of the chapter of events by which Mr Weld-Blundell, the libeller of Messrs Comins and company, came to be their judgment debtor. It is a practical inquiry the object of which is to settle the question whether the appellant's payment of damages and costs to these gentlemen was Mr Stephens' doing, and whether it was Mr Stephens who made Messrs Comins and company go to law. If Mr Weld-Blundell cannot prove that it was so the loss lies where it fell.

In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A is in fault he is not responsible for injury to C, which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause—(*e.g.*, *Cobb* v. *Great Western Railway* (1893, 1 Q.B. 459); *Attorney-General* v. *Conduit Colliery*, 1895, 1 Q.B. 301. It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A—in a word that he insulates A from C. It is quite plain that when Mr Swift dropped the letter and found out his loss the matter would have ended there but for the idle hands of Mr Hurst. He gave the letter a fresh start and on his original impulse it came to be sued on. Precisely the same result would have happened if the person who dropped the letter in Mr Hurst's office had previously got it by picking Mr Swift's pocket. Again, the matter cannot be worse for Mr Stephens than if he had shown Mr Hurst the letter himself, that is, had published to him Mr Weld-Blundell's original libel. What then? Would the respondent have been liable if Mr Hurst had republished it (as indeed he did) without authority from him and not in accordance with any intention or desire on his part, actual or imputable? *Ward* v. *Weekes* (7 Bing. 211) says no. The case is ninety years old, and I see no reason to doubt it. The repetition, says Tindal, C.-J., was "the voluntary act of a free agent, over whom the defendant had no control, and for whose acts he is not answerable, and this repetition was the

immediate cause of the damage." Yet, taking men as we find them, few things are more certain than the repetition of a calumny confidentially communicated even on an honourable understanding of secrecy.

I gather that the appellant's real argument is this—Why was it the respondent's duty to take care of the letter? Because it contained not only his instruction but several libels. What was the importance of taking care of it as a libel? Because in the hands of others an inconvenient use might be made of it—for example, the person whom the appellant had wronged might be enabled to make him right his wrong. Why should the respondent be concerned with that? Because he might expect that if he lost the letter something of the sort might happen. Why should he expect that such a use might be made of the letter by the finder? Because we must take men as we find them and we find them as often bad as good. Then Mr Hurst's misbehaviour was the natural and probable consequence of Mr Swift's carelessness.

If there is any basis for this argument, I do not see why it stopped where it did. There can be no doubt that if Messrs Comins and company had had the letter sent to them by a person who had stolen it, this action would have failed, even though the respondent by his carelessness enabled the thief to get access to the letter. Why is the line drawn at Mr Hurst's conduct? If an expectation that other people will do wrong when they are given the chance be the foundation of the respondent's responsibility for what Mr Hurst did, it would equally extend to the conduct of a criminal.

The importance of the point is this. It is said that the jury's third finding is conclusive because there was evidence to go to the jury which would support it. This evidence is either the respondent's admission above quoted, that he realised that the letter was dangerous, or it is the general effect of the circumstances of the case as a jury would regard them. I cannot see that there is any evidence in law in either case, because I cannot see that the mere probability that actions might be brought for the libels can turn Mr Hurst's act into the respondent's act. It might be material if the question of want of care were in dispute, but it is not. Remoteness of damage is a question of cause and effect—a different question. That a jury can finally make A liable for B's acts merely because they think it was antecedently probable that B would act as he did apart from A's authority or intention, seems to me to be contrary to principle and unsupported by authority.

I turn to the cases cited by the appellants. They certainly do not determine the present question nor does it seem to me that *Clark* v. *Chambers* at any rate is a decision on the measure of damage or on the casual connection between the wrong act done and the wrong suffered at all. What the defendant Chambers there did was deliberately done for his own purposes in disregard of the rights of others generally, and what the intervening party did was in defence of his rights and not obviously dangerous to others. When the reasoning is summed up at p. 338 stress is laid on the fact that the defendant's act was a deliberate and unlawful obstruction of a right-of-way, and no less than three grounds are stated for the decision (1) that it is covered by *Scott* v. *Shepherd*, a case which has no bearing on the present appeal; (2) that the defendant when he laid this trap must have anticipated that someone entitled to use the road would abate the nuisance he had created, and took the risk of it; and (3) that there was a duty upon him to safeguard others from the effects of anything that might lawfully be done in removing his obstruction. I think many persons have felt difficulty in fitting *Clark* v. *Chambers* into any coherent relation with the rest of the law on this subject. Lindley, L.J., for example, in *The Bernina* (12 P.D. 36) is fain to treat it as a case of joint concurrent negligence of the defendant, who should have provided a light, and of the person who moved the chevaux de frise and left it in the dark. No difficulty need be felt now in saying that the case has no place in the present argument. *Bowen* v. *Hall* (6 Q.B.D. 333) is a case in which the third party's act, rightful or wrongful, was precisely what the defendant intended to bring about. The point argued was that the third party's act was in itself wrongful, and for that reason only was too remote, which is not the point here. *Engelhart* v. *Farrant* (1897, 1 Q.B. 240) should be read with *M'Dowell's* case, for the latter purports to follow the principle, whatever it is, of the former. Both relate to responsibility for the intervention of irresponsible young persons. In the former stress is laid on the zeal of the lad who officiously started the horse, thinking he was doing his master a service, though in defiance of his orders. Even so, the case is said to be on the border line, and Lopes, L.J., says the liability would have been the same if no one had been left with the horse and an entire stranger had started it, which clearly shows that he conceived the case to depend on the special responsibility of those who leave animals unattended in public places. Unless the decision really turns, as argued by counsel and held by Lord Esher, on the continuing negligence of the man who ought to have remained in charge of the horse all the time, and whose omission was an effective cause concurrent with the boy's officious interference with the horse, and so follows *Illidge* v. *Goodwin*, I think the case was insufficiently considered and when necessary should be prepared to review it. In *M'Dowell* v. *Great Western Railway Company* (1903, 2 K.B. 331), on the contrary, the railway company was exonerated from responsibility for what was held to have been due to the intervening action of others, though it had just as much reason to anticipate what had happened as the present respondent had, and perhaps more, for the intervening agents were young boys. *De la Bere* v. *Pearson* (1908, 1 K.B. 280) turns on the implications of the particular contract. It was more than a mere contract to use care, it approximated to a warranty of the fitness of an article supplied. What the

defendant had agreed to do was to recommend an honest inside broker; he recommended an outside broker who was a rogue, and the consequences of his roguery were held to be covered by the contract as construed.

Great stress was laid on Lord Wensleydale's language in *Lynch* v. *Knight* (9 H.L.C. 587)—"To make the words actionable by reason of special damage the consequences must be such as, taking human nature as it is with its infirmities, and having regard to the relationship of the parties concerned, might reasonably and fairly have been anticipated and feared would follow from the speaking of the words." It must be remembered what *Lynch* v. *Knight* was. The defendant had been guilty of making deliberate and continued accusations against his sister to her husband, obviously intending to produce some effect on him adverse to her. Lord Campbell wrote of him—"He having intended the husband to believe that it was true and having intended the husband to act upon it." Thus the first question was whether what the husband did was within the class of action he was intended to take arose from some idiosyncrasy of the particular husband. If it was the former, the defendant's father's argument was that as the husband was not in law bound to put her away in consequence nor was warranted in doing so, this particular consequence was not special damage. One must read Lord Wensleydale's words with reference to this argument. I do not think he would have spoken of "human nature with its infirmities" in connection with Mr Hurst, for that would be stretching charity into condonation, nor is there any evidence of any relationship between Mr Hurst and Messrs Comins and company beyond the fact that he knew who they were. Lord Wensleydale's view was that what Lynch intended Knight to do would extend to what any reasonable man would have feared that he would do, but this was not part of the decision nor is it applicable to this case, for here the respondent had no such intention as Lynch had. Their Lordships all concurred in rejecting the argument that the husband's conduct could not be material unless it was his legal right or duty to act as he did, but they held that the defendant must succeed, because it was not reasonable for the husband to have taken so serious a course on an imputation of mere "levity of manners," requiring only vigilance on his part. The passage in question is therefore no warrant for the proposition which the appellant founds on it. The contention is not raised here that Mr Stephens escapes liability for Mr Hurst's acts merely because they were tortious or that Mr Hurst stood in any special relationship to Messrs Comins and company. The bare unqualified contention is that the defendant is liable, as for the consequences of his partner's carelessness, for anything done by Mr Hurst which, taking men as we find them, a jury might think it natural for Mr Hurst to do. This proposition if right makes a clean sweep of a vast body of decided cases, as mere indications of which I need only mention *Parkins* v. *Scott* (1 H.L.C. 153) and *Bree* v. *Marescaux* (7 Q.B.D. 434), for more than half of human kind are talebearers by nature, and a good many people "naturally" take advantage of any opportunity to be dishonest if they see anything to be got by it.

I think the appeal fails and should be dismissed with costs, and as the point relating to the decision of the Court of Appeal to deprive the appellant of his costs of the action has not been argued I think the judgment of the Court of Appeal should be upheld.

LORD PARMOOR—The appellant on the 4th May 1915 wrote to the respondent a letter instructing him to investigate the affairs of the Float Electric Company. This letter contained libellous statements referring to Lowe, a previous manager of the company, and to Comins the auditor, which on the subsequent trial on a libel action were held to be malicious. The respondent handed the letter to his partner, who dropped or left it in the room of the manager Hurst at the offices of the Float Company. The manager found and read the letter and communicated its contents to Lowe and Comins, who brought actions of libel against the appellant, alleging as the publication the publication to the respondent. The plaintiffs succeeded in both actions, the judge ruling that the occasion was privileged, but the jury finding that the appellant had acted maliciously. The sum paid by the appellant for damages and costs amounted to £1769, 14s. 8d.

The appellant then commenced an action against the respondent, charging him that he had broken an implied term in his contract of employment, to use reasonable care to keep secret the contents of the said letter, and basing his claim for damages on the sums which he had had to pay for damages and costs in the libel actions. The action was tried before Darling, J., and the jury found (1) That it was the duty of the defendant to keep secret the letter of May 4th, written by the plaintiff to the defendant. (2) That the defendant had neglected his duty in regard to the said letter, so that the contents were disclosed or came to the knowledge of Mr Hurst. (3) Damages £650 on the ground that the plaintiff himself was responsible to some extent for the damages awarded in the libel actions.

These findings are not questioned in the appeal, and in my opinion they are not open to discussion in this House. On further consideration Darling, J., held that the injuries sustained by the appellant were traceable to his own unlawful act, and that the maxim *ex turpi causa non oritur actio* applied, and further, that the plaintiff could not recover damages against another because he had had to make reparation for a wrongful act committed by himself. At the same time the learned Judge expressed his agreement with the finding of the jury, that the bringing of the libel actions and the resulting loss to the plaintiff were the natural consequence of the defendant's

negligent disclosures. The Court of Appeal were unanimous in deciding that the appellant had a good cause of action against the respondent, and held by a majority that only nominal damages were recoverable. The only question raised in debate before your Lordships is whether nominal damages are alone recoverable.

The decision of the Court of Appeal affirms the proposition that there is in law no objection to an obligation undertaking not to disclose a libellous document where the libellous document is not criminal in character, and the party who undertakes the obligation is not in the position of a joint tort feasor. In my opinion this carries the appellant a long way, and the question of damages must be carefully dissociated from the question of a right of action. If the respondent had been in the position of a joint tort feasor he would not have been liable in the action, and the question which arises in this appeal, as to whether more than nominal damages are recoverable, would not have arisen. This decision, however, leaves open the question whether an obligation to indemnify a plaintiff against a liability consequent on the disclosure of his own wrong is an obligation which may be enforceable at law. This issue is directly raised where damages are claimed on the basis of the damages and costs incurred in any libel action or actions which have resulted from the disclosure by an agent of libellous documents entrusted to him for safe custody. On this point Scrutton, L.J., formed a different conclusion from Bankes and Warrington, L.JJ., and the case is one of great difficulty.

The first matter for consideration is whether the obligation undertaken by the respondent was intended by the parties themselves to include such a liability for damages in the event of the negligent disclosure of the libellous document. With some hesitation I have formed the opinion that this question should be answered in the affirmative. I agree with Darling, J., that subject to the objection of law, which does not appear to me to have been present to the mind of either party when the contract was made, the damages claimed are as found by the jury to be the natural and probable result of the negligent disclosure. Apart from such damages there was no suggestion during the course of the trial that loss and expense had been incurred by the appellant. I should further be prepared to find, if necessary, that the damages as claimed were within the contemplation of the parties when the contract was made. That there is no general objection to a contract in this form is evidenced by such a case as *Agius* v. *Great Western Colliery Company* (1899, 1 Q.B. 413), where the unsuccessful defendant recovered as damages for breach of contract both the damages awarded against him in an action resulting from that breach and the costs of his unsuccessful defence, the Judge at the trial finding that the course taken by the plaintiff in defending the action against him was reasonable.

The objection, however, taken on behalf of the respondent is that it is not material that the damages awarded have been found to be the natural and probable result of the breach of the contract, or that they were within the contemplation of the parties at the time of entering into the contract, seeing that they are not legally recoverable on the principle stated by Darling, J.—"Can one recover damages against another because he has had to make reparation for the wrongful act committed by himself?" Or, to put the question in a different form, Can damages which would otherwise be recoverable as being the natural result of a breach of contract, or as being within the contemplation of the parties, be incapable of being recovered because they are founded on the costs incurred to make reparation for a wrongful act committed by himself? If this principle is applicable, then it follows that the damages and costs incurred in the libel actions would not be recoverable by the appellant although the contract should contain an express promise of indemnity from the respondent. This position was not contested in the able argument on behalf of the respondents.

I think that the proposition stated in this general language is too wide, and that there are circumstances in which an indemnity can be claimed against a wrongful act of the plaintiff which is not either criminal or wilful in its character. With this limitation in mind I should be content to take the law as laid down by Kennedy, J., in the case of *Burrows* v. *Rhodes* (1899, 1 Q.B. 816)—"It has, I think, been established that if an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either a civil wrong or criminal offence, he cannot maintain an action for contribution or indemnity against the liability which results to him therefrom. An express promise of indemnity to him for the commission of such an act is void. Where the circumstances constituting the unlawfulness of this act are known to the doer of it his inability to claim contribution or indemnity appears to me to be clear." Does the libellous document entrusted to the respondent, which was in itself privileged but which was found to be malicious, come within an act "manifestly unlawful or which the doer of it knows to be unlawful?" There appears to be no direct authority, but Scrutton, L.J., expresses the opinion—"I cannot say that Mr Weld-Blundell must be taken to have known that he was committing an unlawful act so as to lose all protection if the letter was revealed." In other words the learned Lord Justice finds that the wrong was not wilful and comes within the category of cases in which a plaintiff can legally claim indemnity against his own negligent act or the negligent act of those for whom he is responsible. In *Trinder, Anderson, & Company* v. *Thames and Mersey Insurance Company* (1898, 2 Q.B. 114) the negligent navigation was held not to defeat a claim to recover on a marine insurance policy although such negligent act had directly conduced to the collision, but it is indicated that the conclusion would have been different if the negligence had been wilful. The same principle applies in

the case of fire policies with the same distinction between negligence and a wilful act. In *Cointat* v. *Myham* (1913, 2 K.B. 220) a claim for damage was allowed in respect of a fine and costs as well as for a loss of trade. On the other hand, in the case of *R. Leslie Limited* v. *Reliable Advertising Agency* (1915, 1 K.B. 652) it was held that as the plaintiffs had been convicted of sending a money-lending circular without having reasonable grounds for believing the addressee to be of full age, the claim was not maintainable. I desire in the present appeal to express no opinion of what the legal result would be in a case in which damages in the nature of an indemnity for a criminal act are sought to be recovered for a criminal act. In such a case questions of public policy would arise which do not arise in the present appeal. On the whole I agree with the judgment on this point of Scrutton, L.J., and apart from authority I can see no reason why, if the action is maintainable damages in the nature of an indemnity should not be recovered, if such damages can be regarded either as the natural and probable result of the negligence, or as in the contemplation of the parties when they entered into the contract.

It was further contended on behalf of the respondent that the damages were too remote, in that the actions for libel were directly attributable not to the negligence of the respondent but to the action of Hurst in disclosing the libellous document to Lowe and Comins. This point was not raised at the trial before Darling, J., and is not referred to in the judgment of the Court of Appeal, but the intervening negligence of a third party does not necessarily in law render the negligence too remote, and if it had been intended to raise this point it should have been raised at the trial of the action so that the necessary relevant question might have been left to the jury. It is sufficient to refer to the case of *Engelhart* v. *Farrant & Company* (1897, 1 Q.B. 240), in which the defendant was held to be liable where the negligence of his driver in leaving a cart was the effective cause of the damage, although in his absence a lad drove on and came into collision with the plaintiff's carriage. This principle was recognised in the case of *M'Dowell* v. *Great Western Railway Company* (1903, 2 K.B. 331), although it was held in that case that the evidence did not support the finding of the jury, and that the negligence of the defendants was not the effective cause of the accident. I would refer also to the cases of *Clark* v. *Chambers*, 3 Q.B.D. 327; *Bowen* v. *Hall*, 6 Q.B.D. 333; and *Lynch* v. *Knight*, 9 H.L.C. 577.

In my opinion the judgment of the Court of Appeal should be reversed and judgment entered for the appellant for the amount of the verdict.

Lord Wrenbury—By his letter of the 4th May 1915 the plaintiff Weld-Blundell published to the defendant Stephens with express malice a libel upon certain persons including Lowe and Comins. The relevant facts for the moment stop there. Whether Lowe and Comins knew it or not there existed by reason of those facts a cause of action against Weld-Blundell at the suit of each of them. He lay under a legal obligation to pay damages for his wrongful act. They subsequently learned that they had this cause of action. Each of them sued and recovered damages and costs. Those damages were of course the pecuniary equivalent of the wrong done to the parties libelled. Weld-Blundell in those actions suffered no damage at all. He had to pay money, but a defendant is in no sense damaged by being compelled by legal process to satisfy his legal obligation.

In that state of facts Weld-Blundell in the present action seeks to recover from Stephens the money he has had to pay to Lowe and Comins. He is entitled, he says, to recover it because Stephens in breach of duty to him did such acts as made Lowe and Comins become aware that they had the above right of action. If Stephens had not committed that breach of duty Lowe and Comins would not have known that they had, or might not have known that they had and would not have exercised, their right of action, and Weld-Blundell would not have been compelled to pay money. He is damaged, he says, by the amount of money he has had to pay, and Stephens is liable to him in the amount of the damages and costs in the libel actions and damage for Stephens' negligence and breach of duty. There is in my judgment more than one answer to this contention.

The relations between Weld-Blundell and Stephens were such that the latter no doubt owed a duty to the former and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence but from his own wrongful act in indulging in malicious libel. And the amount he has to pay was measured by his own wrongful act. It bore no pecuniary relation to Stephens' wrongful act. Stephens' act was not the cause (whether with or without the word "effective") of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not *causa causans*, but at most *causa sine qua non*.

In discharging his liability to pay damages for malicious libel, Weld-Blundell suffered no damages at all. A man is not damnified by being compelled to satisfy his legal obligation. In *Neville* v. *London Express Newspaper Ltd.* (1919, A.C. 368) the House were unanimous upon this proposition.

Futher, the following passage in the judgment of Kennedy, J., in *Burrows* v. *Rhodes*, (1899, 1 Q.B. at p. 828) correctly, in my judgment, states the law—"It has I think long been settled law that if an act is manifestly unlawful, or the doer of it knows it to be unlawful as constituting either a civil wrong or a criminal offence, he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. An express promise or indemnity to him for the commission of such an act is void."

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.

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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