mittedly had the means of knowledge, and would at once have discovered the mistake if those officials who took out the licences had made any inquiry, waived all inquiry, The case of *Kelly* v. *Solari*, and the cases which have followed upon it, go far to free a person who has made a payment by mistake from the consequences of his own neglect. But the view that in the circumstances above mentioned the bank must be held to have waived all inquiry is much strengthened by the consideration that the bank must be held to have known that the duty so paid would in ordinary course be used year by year for public purposes. The case therefore seems to me to fall within the decision of *Bell* v. *Thomson*, 6 Macph. 64. It is plain that great inconvenience would be caused if such a claim were to be entertained, and it would be strange if it were entertained when regard is had to the limited conditions under which repayment is allowed under the Income-Tax Statutes and the Stamp-Duties Management Act. Indeed, there is more ground for indulgence in the case of an over-payment of income-tax, because when the return is made it is often not easy to make a correct estimate of the income for the year of assessment. I think the fact that in the Income-Tax and Stamp-Duties Management Acts express provision is made for repayment in certain cases goes far to show that where duties are chargeable which are to be applied to public purposes, and no provision is made for repayment in case of payment in error, a person who pays in error has no redress unless the Commissioners *ex gratia* think fit to remit the whole or part of the duty.

"On the whole matter, I think the Commissioners were under no legal obligation to repay the money sued for. I shall therefore assoilzie the defender, with expenses, from which will be deducted the two years' duty with which he is willing to credit the pursuers."

The following was the interlocutor:—

"Assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits the same to the Auditor to tax and to report: And in respect of the offer to allow the pursuers repayment of two years' duty, allows the amount thereof to be set-off against or deducted from the expenses found due."

Counsel for the Pursuers — Rankine. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for the Defender—Young, Agent —David Crole, Solicitor for Inland Revenue.

Tuesday, November 1.

OUTER HOUSE.

[Lord Wellwood.

TYLER *v.* MAXWELL.

Bill of Exchange—Cheque—Holder in Due Course—Gambling Debt—Bills of Exchange Act 1882 (45 *and* 46 *Vict. c.* 61), *sec.* 29 *and* 30.

Circumstances in which it was *held* that the indorsee of a cheque, granted for a gambling debt by a person in a state of intoxication, was not a holder in due course.

This was an action at the instance of John Benjamin Tyler, hotel proprietor, Savernake Forest Hotel, Marlborough, Wiltshire, against George Maxwell, Kenbridge, New Galloway, Kirkcudbrightshire, for payment of a sum of £5000, contained in a cheque dated the 15th February 1892, drawn by the defender on the British Linen Company Bank, Dumfries. The cheque in question was drawn by the defender in favour of the Marquis of Ailesbury, and was by him indorsed to the pursuer. The cheque, with the exception of the signature, was not in the defender's handwriting. The defender alleged in defence that when he granted the cheque he was so much under the influence of drink that he was not capable of understanding, and did not know the meaning or the nature of the obligation he incurred by signing his name, and that the cheque, if granted for any debt or obligation at all, was granted for a gambling debt. He further alleged that these defects in Lord Ailesbury's title were known to the pursuer, and that the pursuer gave no consideration for the cheque.

Authorities cited—Pollock on Contracts, 286; *Pollok* v. *Burns*, March 3, 1875, 2 R. 497; *Coustin* v. *Miller*, February 26, 1862, 24 D. 607.

A proof was led, the result of which appears from the opinion of the Lord Ordinary.

The Lord Ordinary (WELLWOOD) on 1st November 1892 pronounced the following interlocutor:—"Finds that the pursuer is not a holder in due course of the cheque libelled: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses under deduction of the expenses found due to the pursuer by interlocutor of 14th June 1892: Allows an account of defender's expenses to be given in," &c.

"*Opinion.*—The pursuer sues the defender for the sum of £5000, contained in a cheque payable to bearer, dated 15th February 1892, drawn by the defender upon the British Linen Company Bank, Dumfries. The pursuer alleges that he is the holder in due course of that cheque. The defender says that he is not. That is the question which I have to decide.

"It is not disputed that the signature upon the cheque is the defender's signature. But he alleges in defence that it was obtained when he was intoxicated

and not capable of understanding the nature of the obligation he incurred by signing his name. He maintains that the cheque was granted to or obtained by the Marquis of Ailesbury for an illegal consideration and by illegal means, in respect (1) that the cheque was granted for a gambling debt—money lost at cards; and, secondly, that it was improperly and illegally obtained from him when he was in the state of intoxication alleged.

"The defender further alleges that the pursuer when he took the cheque was well aware of the circumstances in which Lord Ailesbury obtained it, and therefore is not a holder in due course.

"It will be convenient in the first place to state the view which I take of the law applicable to the case. The rights and position of a holder in due course of a bill or cheque are thus described in sections 29 and 30 of the Bills of Exchange Act 1882. By section 29 it is enacted—'(1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely—(*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact; (*b*) that he took the bill in good faith, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it. (2) In particular, the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.' And by section 30 it is enacted—'(1) Every person whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. (2) Every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill.'

"From those sections it appears that if it is proved that a bill is affected with illegality, the holder of it, in order to secure the privileges of a holder in due course, must prove that he has given value for it in good faith—that is to say, he must prove both that he has given value, and that he had not notice of the illegality so proved and admitted. If his proof fails in either particular he cannot recover.

"Now, in this case a twofold illegality is alleged. The first is that the cheque was granted for money lost by betting at cards. By the law of Scotland such betting and gambling is illegal at common law and by statute—see opinion of Lord Deas in *O'Connell* v. *Russell*, 3 Macph. 89, 93, and 94; and the opinion of Lord Justice-Clerk Moncreiff in *Calder* v. *Stevens*, 9 Macph. 1074 and 1077.

"It has been doubted whether the Act 8 and 9 Vict. c. 109, applies to Scotland, but if it does the result is the same, as I shall show presently.

"I have no reason to think that the law of England is different as to bills or notes granted for losses at cards. The transaction in question in this case being illegal according to the law of Scotland, the country in which it is sought to be enforced, it probably lay on the pursuer both to aver and prove that it was not illegal by the law of England; but there is no averment or proof of this.

"I have however examined the English decisions and the statutes against gambling, and I am satisfied that as regards gambling at cards and other games or sports (in which horse racing is held to be included) the law of England is the same as that of Scotland.

"In the case of *Don* v. *Richardson*, 16th June 1858, 20 D. 1138, which was not I think referred to in the argument, the bill sought to be suspended was said to have been granted for racing bets. The Lord Ordinary (Lord Neaves) before answer appointed the opinion of English counsel to be taken upon certain points, as the bill was granted in England and was drawn payable there. The counsel selected—Mr Lush, Q.C.—returned the following opinion (p. 1139):—'I am of opinion as follows, viz., 1. That a bill granted without value is not void, but may be recovered by a *bona fide* onerous holder. 2. That such a bill cannot, however, be recovered by one who is not a holder for value. 3. That a bill granted for a gaming debt is not void, but may be recovered by a *bona fide* onerous holder, by which expression I intend a person who has given value for the bill without notice that it was given for a gaming debt. 4. That such a bill cannot be recovered by one who is not an onerous holder, or one who had notice and knowledge of its nature and origin. 5. That a debt arising out of bets on horse races is a gaming debt. 6. That a bill granted for a bet is held as granted for an illegal consideration, and is good in the hands of a *bona fide* indorsee for value.'

"The pursuer's counsel founded upon the case of *Fitch* v. *Jones*, 5 Ellis & Blackburn, 238, decided in 1853, as an authority to the opposite effect. At first sight that case certainly appears to be inconsistent with some of Mr Lush's opinion. It would be strange if it was, because Mr Lush was counsel in the case. But I am satisfied that *Fitch* v. *Jones* is not inconsistent with the opinion given by Mr Lush in *Don's* case, because while the wager in *Don's* case was one struck at by the old Act of 9 Anne, c. 14, the wager in the case of *Fitch* v. *Jones* was a wager concerning the amount of hop-duty in a particular year, the year 1854—a kind of gambling not struck at by the Act of Queen Anne.

"Under the statute of 9 Anne, c. 14, it is enacted that 'all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into, or executed by any person or persons whatsoever, where the

whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person or persons so gaming or betting as aforesaid, or that shall during such play so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes, any statute, law, or usage to the contrary thereof in any wise notwithstanding.'

The enactment in 9 Anne, c. 14, was altered or modified by 5 and 6 Will. IV. c. 41, to this effect, that while the enactment that such instruments and securities should be absolutely null and void was repeated (to prevent the hardships consequent upon that penalty to persons who had acquired them for a valuable consideration without notice of the original consideration for which such securities or instruments were given), it was enacted that nevertheless every such note, bill, &c., should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration.

Now, the Act of 8 and 9 Vict. c. 109, repeated the Act 9 Anne, c. 14, only in so far as it was not altered by 5 and 6 Will. IV. c. 41, and therefore bills or notes granted for money lost at cards, &c., still were held to be granted for an illegal consideration. The result of this is, that where it is proved that the consideration for a bill or note is within the matters struck at by the Act 9 Anne, c. 14, the holder of such a bill or note has to prove that he gave value without notice.

"On the other hand, in the case of wagers which only fall under 8 and 9 Vict. c. 109, an indorsee—at least an indorsee without notice—was not called upon to prove that he had given value even if it was proved or admitted that the bill or note was originally granted for a gambling debt, because, although the note is void, the consideration is held not to be illegal.

"I may refer in support of this statement of my understanding of the law of England to the cases of *Hay* v. *Ayling*, 1851, 16 Q.B. 423, and the argument in the recent case of *Lilly* v. *Rankin*, 1886, 56 L.J., Q.B. 248.

"If I am right in holding that the cheque in this case was granted to Lord Ailesbury for an illegal consideration, the burden is on the pursuer to prove that he had no notice of the defect in Lord Ailesbury's title, and that he gave value in good faith for the cheque. If he has failed to prove that he did not know that the cheque was granted for a gambling debt, he cannot recover, and that alone would be sufficient for the decision of the case.

"There is, however, another averment of illegality made by the defender upon which it is right that I should express an opinion.

"The defender avers that the cheque was obtained from him by Lord Ailesbury while he was incapable from drink of understanding what he was doing or the meaning and effect of the document which he signed. This is not a defence to be received with favour, especially when put forward by the person who signed the document sued on, and in the present case it is impossible to feel the slightest sympathy with the defender, who first stupified himself with drink, and then resisted the efforts of his acquaintance Mr Coleman and his servant Price to dissuade him from going to Lord Ailesbury's rooms. But when I am asked to say whether when he signed the cheque he knew what he was about, I am bound to say, on the evidence before me, that he did not, and further, that his condition must have been apparent to Lord Ailesbury and the other persons in company with him.

"It is said that in order to sustain such a defence the intoxication must be shown to have been total. This is true in a sense, but it is not necessary that the defender should be shown to have been insensible from drink, because if this were so, such cases as the present could not arise. In the present case the defender was not totally disabled by drink. He could stagger unassisted to Lord Ailesbury's room. He could speak, after a fashion; he could sit, and at least go through the form of betting at cards; he was able to sign his name when the paper was put before him; and when he was put to bed by his valet he was able at least to say that he had lost £3 ready money at cards. It is further to be noticed that his intoxication, at the outset at least, was entirely his own doing, and the most that can be said is that it was taken advantage of by those who played with him.

"But when this is said, it is all that can be said in favour of Lord Ailesbury. It is proved to my satisfaction by the evidence of independent witnesses—Mr Coleman and the boots Johnston—that before the defender went to Lord Ailesbury's room at all he was so stupid through drink that he should have been put to bed instead. This must have been apparent to Lord Ailesbury, and yet he invited the defender to his sitting-room at midnight to have more drink and play cards, although he had never played cards with the defender in his life before.

"As to what took place in that room we have only the evidence of Lord Ailesbury; not a single other person who was present was adduced, and in particular Dougall, who wrote out the body of the cheque, and is said to have kept the tally, was not put in the witness-box or, so far as I know, cited by the pursuer. We know so much, that these persons were sober, while the defender was drunk, and that the result of the three hours' play was that the defender left the room after putting his name to a cheque for £5000 which he was said to have lost at baccarat.

"The defender says that when he awoke next morning he had no recollection of

having signed the cheque or lost the money. This is a statement not to be readily accepted, but I am inclined to believe the evidence of Price, an extremely sharp lad, who says that the defender told him he had only lost £3 or £4, and that the first he heard of the cheque was when the cheques subsequently granted by the defender for the hotel and other bills were dishonoured in consequence of the cheque for £5000 having been presented.

"It is not suggested that the defender is a swindler, and I cannot believe that if he had recollected of having signed a cheque for such a large sum when he had not sufficient funds at his credit, he would, without communicating with his bankers, have granted further cheques. And I do not see any evidence such as there was in *Pollok* v. *Burns*, of the defender failing to repudiate the transaction at the first opportunity though aware of what he had done.

"The transaction therefore being in my opinion doubly illegal, the pursuer must show that he took the cheque for value and in ignorance of the illegality.

"It appears from the evidence, though not from the record, that Lord Ailesbury and the pursuer had been for years on terms of the closest intimacy. From 1884 to September 1887 the pursuer acted as Lord Ailesbury's trainer, and that connection was only terminated by their both being warned off the turf by the Jockey Club on the charge of having instructed Lord Ailesbury's jockey Martin to pull a horse. Although their racing connection was thus necessarily terminated in 1887, they have remained intimate down to the present time, Lord Ailesbury frequently residing for long periods at the inn kept by the pursuer. The pursuer was thoroughly aware of Lord Ailesbury's gambling and betting habits, and the two were frequently engaged in betting transactions, Lord Ailesbury making bets for the pursuer though the pursuer was apparently content to remain Lord Ailesbury's creditor for the money so won.

"Now, I am asked to believe that when Lord Ailesbury got the cheque for £5000 he at once freely and voluntarily handed it over to the pursuer without any explanation being given or asked as to the means by which the cheque had been obtained, and that he agreed that the £5000 should be applied in or towards payment of a debt of upwards of £7000 which had been due to the pursuer for years. I do not believe this story.

"Even if it were true that Lord Ailesbury intended that the £5000 should be applied in payment or towards reduction of his debt to the pursuer, I cannot believe that the pursuer was not told and did not presume to inquire or suspect that the cheque had been obtained by gambling.

"But further, I do not believe that Lord Ailesbury ever intended that the £5000 or any substantial part of it should go into the pursuer's pocket. There is nothing in Lord Ailesbury's previous treatment of the pursuer, whom, according to his own statement, he left unpaid for seven or eight years, to countenance such a supposition. Even if Lord Ailesbury's alleged debt to the pursuer were proved to the full extent, it would by no means follow that that was the value given by the pursuer for the cheque.

The explanation suggested on behalf of the defender is much more probable. Lord Ailesbury was well aware that if, as was probable, looking to the circumstances in which the cheque was obtained, payment was refused, he could not himself enforce payment of it; and further, that if his receiver came to hear that he had recovered the proceeds of the cheque he might have to pay it over to the receiver. It was therefore necessary that if he was to obtain any benefit from the cheque, it must be enforced through some other person who could pose as a *bona fide* onerous holder. Now, the pursuer possessed the requisite qualities and qualifications for carrying such a scheme into effect. His discretion could be relied on, and as he was to some extent a creditor of Lord Ailesbury, the debt due to him could be pointed to as good value for the transference of the cheque. Therefore when Lord Ailesbury telegraphed for the pursuer to come to Brighton, it was presumably for the purpose of arranging with him as to the best means of enforcing payment of the defender's cheque.

"It may be and probably was arranged that as a condition of his assisting, some part of the proceeds of the cheque should be retained by the pursuer. But when he asks me to believe that he was given the whole sum unconditionally, and that he was not told and did not know the circumstances in which the cheque was obtained, I must say that I do not believe him.

"As the pursuer in my opinion has failed to discharge the burden which lay upon him, he is not entitled to be considered a holder of the cheque in due course.

"In the view which I take of the case it is not necessary to inquire whether the pursuer has proved the debt alleged to be due by Lord Ailesbury to him. To a large extent the pursuer's claim is inadmissible or doubtful. I refer particularly to the claim for salary which the pursuer failed to earn in consequence of a fraud in which he was a participant, and to the claim for bets won by Lord Ailesbury but not paid over, as to which the proof does not seem satisfactory. These would strip off nearly £4000. As to the rest of the claim—while the inquiry has been made without any proper contradictor, Lord Ailesbury, who has no substantial interest to object, being willing to accept the whole accounts as correct without further investigation—I think that probably a substantial sum is due by Lord Ailesbury to the pursuer. But that, as I have explained in my opinion, does not affect the present case, for the double reason that the pursuer knew of the illegality connected with the obtaining of the cheque and that a discharge of Lord Ailesbury's debt was not given as value for the cheque. I should have said before that no

discharge or receipt of any kind was given by the pursuer to Lord Ailesbury, which confirms this view.

"It is also unnecessary to deal with the question as to the effect by the law of England of a receiving-order having been made and a receiver appointed in connection with Lord Ailesbury's affairs, as to which a good deal of evidence was given on both sides by counsel learned in the law of England. I must say that I have some difficulty in seeing how the receiver could have made use of the cheque if it had been handed to him. He could only sue in the name of Lord Ailesbury and Lord Ailesbury could not have recovered on that cheque.

"But as I have said, it is unnecessary to consider that question. The pursuer has been shown not to be a holder in due course, and therefore the defender must be assoilzied."

Counsel for the Pursuer—A. J. Young—Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Defenders—Sol. Gen. Asher, Q.C.—Dickson—Salvesen. Agents—Webster, Will, & Ritchie, S.S.C.

HOUSE OF LORDS.

Saturday, January 21, 1893.

(Before the Lord Chancellor (Herschell), and Lord Watson, Lord Ashbourne, Lord Macnaghten, and Lord Field.)

THE PORT-GLASGOW AND NEWARK SAILCLOTH COMPANY, LIMITED *v.* THE CALEDONIAN RAILWAY COMPANY.

(*Ante*, vol. xxix., p. 577, and 19 R. 608.)

Reparation — Railway — Fire Caused by Spark from Engine — Damages — Negligence—Onus of Proof.

The owners of a flax store situated near a railway, which had been set on fire by a spark from a passing engine, sued the railway company for damages, alleging that they had omitted to take proper precautions against the emission of sparks in not fitting the engine with a contrivance known as the "spark-arrester." The evidence showed that the engine in question was of a new type, to which the "spark-arrester" was inapplicable, and that it was fitted with the best known means for preventing the emission of sparks available in engines of that class. It was not proved that the risk of communicating fire had been sensibly increased by the new method of construction.

Held (*aff.* the decision of the First Division) that the pursuers had failed to prove that the absence of the spark-arrester made the engine defective, or that the defenders were negligent in using such an engine, and accordingly that the defenders fell to be assoilzied.

This case is reported *ante*, vol. xxix., p. 577, and 19 R. 608.

The pursuers appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an appeal from an interlocutor of the Inner House recalling an interlocutor of the Lord Ordinary, by which he found the defenders, the Caledonian Company, in blame in respect of a fire which had occurred on the pursuers' premises owing to flax stored there being ignited.

My Lords, at the trial it was in contest whether or not this flax had become ignited by means of a spark from one of the defenders' engines. That question was determined against the defenders by the Lord Ordinary, and the Court above saw no reason to differ from that conclusion. It must therefore be taken, for the purpose of discussing this matter in your Lordships' House, that the injury and damage to the pursuers was the result of a spark from one of the defenders' engines. It is now well settled-law that in order to establish a case of liability against a railway company under such circumstances it is essential for the pursuers to establish negligence. The railway company having the statutory power of running along the line with locomotive engines which in the course of their running are apt to discharge sparks, no liability rests upon the company merely because of sparks emitted by an engine having set fire to adjoining property. But the defenders, although possessing this statutory power, are undoubtedly bound to exercise it reasonably and properly, and the test whether they exercise this power reasonably and properly appears to me to be this—They are aware that locomotive engines running along the line are apt to emit sparks. Knowing this, they are bound to use the best practicable means, according to the then state of knowledge, to avoid the emission of sparks which may be dangerous to adjoining property, and if they, knowing that the engines are liable thus to discharge sparks, do not adopt that reasonable precaution, they are guilty of negligence, and cannot defend themselves by relying upon their statutory power. About the law, as I have thus expressed it, I do not think there is any controversy between the parties to this litigation. It was conceded by the learned counsel for the appellants that the law was that which I have submitted to your Lordships. The question therefore resolves itself into one of fact. Have the pursuers, upon whom, in my opinion, the *onus* lay, and always must lie where liability can only be shown by the establishment of negligence on the part of the defenders, made out a case of negligence?

My Lords, at the time when the action was tried the pursuers did not know for certain which of the engines of the defenders' company had caused the damage, assuming it to be certain that it was caused