question was a pure question of fact I mean that it depends on evidence certainly not reconcileable but to a certain extent conflicting, for the female pursuer and her husband are quite distinct in saying that they heard no warning until the female pursuer stepped out of the train, and that it was then at a standstill. On the other hand, the guard says that he stepped out when the train was in motion and at once shouted to the passengers to keep their seats. The carriage in which the pursuers were travelling was immediately adjoining the guard's van, and therefore it might very well be contended that if the guard's evidence was to be relied on, the pursuers must have heard the warning given by the guard before the female pursuer descended from the train. This raises a question of credibility, because there is thus a conflict of evidence. In these circumstances I quite agree with Lord Kyllachy that this is not a case in which we ought to disturb the verdict.

LORD KINNEAR was absent.

The Court discharged the rule.

Counsel for the Pursuers—M'Kechnie—Graham Stewart. Agent—Andrew Wallace, Solicitor.

Counsel for the Defenders—Asher, Q.C.—Ure. Agents—Millar, Robson, & Innes, S.S.C.

Friday, May 22.

SECOND DIVISION.

[Lord Wellwood, Ordinary.

GUTHRIE *v.* IRELAND.

Obligation—Illegal Consideration—Bill—Tippling Act 1751 (*24 Geo. II. cap.* 40), *sec.* 12—*Guest Resident in Hotel.*

A person brought a note of suspension of a charge upon a bill for £50 granted in payment of his expenses while resident in a hotel, on the ground that the bill was null and void under the Tippling Act, on account of some of the expenses being for spirituous liquors supplied in less quantities than 20s. worth at a time. The Court (adhering to the Lord Ordinary) *refused* the note, as the account produced and proved showed no item for spirits, and brought out an indebtedness of more than £50.

Opinion that Lord Abinger's view expressed in *Proctor* v. *Nicholson*, 1835, 7 C. & P. 67, that the Tippling Act "does not apply to cases where spirits are supplied to guests who are lodging in the house," was sound.

Charles Seton Guthrie of Scotscalder, Caithness-shire, upon 10th February 1888 granted a bill at three months for £50 in favour of Alexander Ireland, innkeeper, Georgemas, in payment of an account as the amount of his indebtedness for board, lodging, hires, &c., while resident in the inn from 5th October to 27th December 1887. Having failed to obtain payment of the bill at maturity, the said Alexander Ireland protested the same, and upon 23rd June 1890 charged Mr Guthrie to pay within six days. Thereupon Mr Guthrie brought a note of suspension of said charge against Ireland, on the ground that the said £50 included payment for spirits which were never supplied to the amount of 20s. at one time, that accordingly the bill was, under the Tippling Act of 1751, as construed by the Whole Court in the case of *Maitland* v. *Rattray*, November 14, 1848, 11 D. 71, null and void, and did not authorise the summary diligence which had been done upon it.

The complainer pleaded—"(1) The alleged bill on which the charge sought to be suspended proceeds, having been granted without legal value, and for an unlawful consideration, no action or diligence upon it could competently be raised, and the charge complained of should be suspended, with expenses. (2) The consideration for said alleged bill being illegal in whole or in part, it could not authorise summary diligence, and the complainer is entitled to suspension as craved."

The said Act of 24 Geo. II. cap. 40, by sec. 12 enacts that "No person . . . shall be entitled unto or maintain any cause, action, or suit for or recover either in law or equity any sum or sums of money, debt, or demands whatsoever for or on account of any spirituous liquors unless such debt shall have really been and *bona fide* contracted at one time to the amount of twenty shillings or upwards."

The Lord Ordinary (WELLWOOD) allowed a proof, at which the respondent produced an account recently made up from memory amounting to £73, and none of the items of which bore to be for spirits. It also appeared that complainer was in the habit of giving his friends spirits at the bar, which were not paid for at the time. The other material facts are sufficiently set forth in the opinion of the Lord Ordinary, who upon 4th February 1891 repelled the reasons of suspension and refused the note.

"*Opinion.*—In this process the complainer seeks to suspend a charge on a bill for £50 granted by him to the respondent on 10th February 1888. The ground of suspension is that part of the consideration for the bill consisted of furnishing of spirituous liquors to the complainer in quantities of less than twenty shillings' worth at a time. The complainer contends, on the authority of the case of *Maitland* v. *Rattray*, 11 D. 71, that the bill is wholly null and void, at least as a warrant for summary diligence in respect of the provisions of the Tippling Act (24 Geo. II. c. 40), sec. 12.

"This is no doubt a shabby defence, but if well founded it must receive effect. The first question, however, to be considered is, whether the bill was granted in part for an illegal consideration in the sense of a consideration struck at by the Act. It lies

upon the complainer to prove this conclusively. It is his only ground, as it is not disputed that apart from the terms of the Act at least the sum of £50 is due to the respondent.

"There is this peculiarity in the case, that it is not proved that any account was rendered to the complainer when he granted the bill, and in this respect this case differs from previous cases in which it could be seen on the face of the accounts how much represented legal and how much illegal charges.

"But the complainer contends that, at all events, the bill was granted for his whole hotel bill between 5th October and 27th December 1887, and that it therefore covered all charges for spirits supplied during that period. Take it that this is true in this sense, that the respondent or his wife did supply the complainer and those he treated on credit with both whisky and brandy in small quantities, and that the respondent was willing in 1888 to accept £50 as in full of the complainer's hotel bill, still the bill charged on has not been paid, and as payment is resisted on the ground that it was partly granted for an illegal consideration (an averment which is not instructed by any account produced or founded on by the complainer), I think that the respondent is now entitled if he can to show that when the bill was granted there were legal charges to the amount of £50 due by the complainer, irrespective of the charges for spirits objected to.

"Now, the respondent has produced an account which was made up from memory a short time before the proof. I should attach little importance to this account if its accuracy were not to a material extent borne out by the complainer's own admissions in the box and the undisputed facts of the case. The very first item, 'To board and lodgings for eleven weeks and five days at £3 per week, £35, 3s., if established, accounts for all but £15 of the £50. The complainer does not admit that he agreed to that rate of board, and I should not have been disposed to take Mrs Ireland's unsupported word that such an arrangement was made, but I find that the complainer in his letter dated 15th February 1888 to the respondent names that very sum as what his trustees were then willing to guarantee for his lodging and food for the future. Again, if there was no arrangement I think that reasonable hotel charges would have amounted to more than the sum charged, which is not much more than 8s. a day. Then as to the remaining £15, the complainer admits the keep of a horse from 18th October to 20th December 1887, which at 2s. 6d. a day amounts to £7, 17s. 6d. He also admits that dogs were kept for him at times, the charge for which may be stated roughly at £2 in all. He also admits frequent hires of a horse and conveyance, and the use of the respondent's conveyance after his own horse came. The respondent's charges for this amount to about £8, but £5 may be stated as the minimum of what is due on this head. Then the complainer admits an advance of cash to the amount of at least £2, and it is proved that he got two barrels of beer for which £3, 10s. is charged. If these sums, which do not exhaust the account, are added together it will be seen that they amount to £55, 10s. 6d., being £5, 10s. 6d. more than the sum in the bill. Even if the board and lodging were charged at £2, 10s. a week the unobjectionable charges, which are really almost proved out of the complainer's own mouth, cover the whole sum in the bill. This being so, I see no reason why the respondent, simply because he was willing to accept less than his full account for the sake of a settlement, should not now, when payment is refused, attribute the whole sum in the bill to his charges other than those for spirituous liquors.

"In this view, it is not necessary for me to decide a somewhat difficult question under the Tippling Act, viz., Whether the Act applies to the case of a person lodging in the house who has a running account for his board and lodgings? If the Act applies, then a lodger might refuse payment for every glass of spirits which he or his guests drank during his stay in the hotel or lodgings, unless he bought a pound's worth at a time. In the case of *Proctor* v. *Nicolson*, June 24, 1835, 7 C. & P. 67, Lord Abinger held that the Act did not apply to such a case. He said—'I think that that enactment does not apply to cases where spirits are supplied to guests who are lodging in the house, as it could never be intended by the Legislature that an innkeeper should not be entitled to be paid for spirits supplied to such guests who had taken up their abode in his inn.' On the other hand, in *Hughes* v. *Done*, 1841, 1 A. & E. Q.B. 294, Lord Denham expressed doubts of the decision in the case of *Proctor* v. *Nicolson*, and refers to cases, one of which is *Burnyeat* v. *Hutchinson*, 5 B. & Ald. 241, to the opposite effect. In Wharton on the Law applicable to Innkeepers, 1876, p. 144, the author, on the authority of the case of *Proctor* v. *Nicolson*, states that the Act does not apply to such a case.

"If the Act does not apply to spirits furnished to a lodger in his own room, it is hard to distinguish between such charges and those for spirits supplied at the bar or in the public rooms. But, as I have said, I do not feel called upon to pronounce a positive opinion upon the question, and I prefer to decide in favour of the respondent on the ground first considered."

The complainer reclaimed, and argued—The fact that he was resident in the inn made no difference. The constant tippling at the bar proved here was just what the Act was passed to discourage. The Act was peremptory—Abbott, C.-J., in *Burnyeat* v. *Hutchinson*, *supra*. Lord Abinger's opinion had been seriously doubted in the more recent case of *Hughes* v. *Done*, *supra*.

Counsel for the respondent was not called upon.

At advising—

LORD JUSTICE-CLERK—The Lord Ordinary has disposed of this case on the

ground that the account incurred by Mr Guthrie of Scotscalder, when examined, shows that there is a sufficient amount due by him to this innkeeper, apart from charges for liquor altogether, to cover the amount of the bill which Guthrie has granted.

That is sufficient for the decision of the case, for I agree with the Lord Ordinary in that view, but it seems desirable, since we have had a full argument from the reclaimer on the question raised under the Tippling Act, that I should express my opinion on that matter also.

The object of the Tippling Act is plain enough. It is to prevent persons who have no ready cash from going to bars and drinking small quantities from time to time by getting credit. Such a practice tends to throw those persons into the power of the publican, and gives him an inducement to encourage drinking, and thus bring poor people under oppressive debt while injuring them morally. The Act is directed to the prevention of this public nuisance. But here the customer is a guest in the house and he orders the liquor for himself and his friends, but it is all supplied to him on his order and credit as a resident in the house. Does the Tippling Act apply to that case? I think it does not. I think that Lord Abinger's opinion in the case of *Proctor* referred to by the Lord Ordinary is quite sound. Lord Denham in the case in which he expressed some doubt as to that opinion, seems to have confused two things, viz., the case where liquor is supplied in a place for passing entertainment—a public-house or tavern—and the case of a hotel with guests living in it, it may be for considerable periods. It would be a very strange thing if the Tippling Act must be read so as to require a hotel-keeper to demand payment from a person living in his house for every glass of liquor as he orders it. It would lead to a total subversion of hotel practice, and if it were the law it would be very surprising that in the case of an Act passed so long ago it should only come to be held now that it applied to guests living in a hotel. I am of opinion that it does not apply, and therefore I entirely concur with the decision of Lord Abinger in the case of *Proctor*. I am confirmed in my view by finding that Lord Abinger's opinion is accepted as authoritative, and as the recognised law. Mr Wharton in his treatise in 1876 stated the law in accordance with that case. Mr Watt has, however, insisted upon the particular circumstances of this case. He maintains that this case is taken out of the rule approved by Lord Abinger, because Mr Guthrie got his liquor or gave his friends their liquor at the bar. But I am not dealing with any particular case. The enactment being statutory and prohibitory it must be strictly interpreted, and my reading of the Act is that it is intended to cover the case of liquor served out to persons coming to a licensed house for temporary refreshment, but not to cover the case of guests living in a hotel. I think therefore that the judgment of the Lord Ordinary must be affirmed, both upon the ground on which he has got his judgment and on the ground taken by Lord Abinger.

LORD RUTHERFURD CLARK—I am satisfied with the Lord Ordinary's judgment, and adhere upon the grounds which he has stated. I do not think we should give any judgment upon the Tippling Act, although I agree with the opinions which have been expressed regarding it.

LORD TRAYNER—I agree with Lord Rutherfurd Clark, but without expressing any opinion as to the Tippling Act although I have a strong inclination towards thinking Lord Abinger's view sound.

LORD YOUNG was absent.

The Court adhered.

Counsel for Complainer, and Reclaimer—Asher, Q.C. — Watt. Agent — Thomas Dalgleish, S.S.C.

Counsel for Respondents—D.-F. Balfour, Q.C.—M'Lennan. Agents—Philip, Laing & Company, S.S.C.

Saturday, May 23.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

WRIGHT'S TRUSTEES *v.* M'LAREN AND OTHERS.

Heritable Security—Transmission of Personal Obligation—Conveyancing Act 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 47.

The 47th section of the Conveyancing Act 1874 enacts that "a heritable security for money duly constituted upon an estate in land shall, together with any personal obligation to pay principal, interest, and penalty contained in the deed or instrument whereby the security is constituted, transmit against any person taking such estate . . . . by conveyance when an agreement to that effect appears *in gremio* of the conveyance, and shall be a burden upon his title in the same manner as it was upon that of his . . . . author, without the necessity of a bond of corroboration or other deed or procedure."

William M'Laren sold to Robert M'Laren property burdened with £800, and executed a disposition which contained *in gremio* the following clause—"Which sum of £800 it has been agreed is to remain on the security of the said subjects and others as aforesaid, and the said Robert M'Laren is to take upon himself the obligation to repay the same; and it is further agreed, as the said Robert M'Laren by acceptance hereof declares and agrees, that the personal obligation to pay principal and interest and penalty contained in said bond and disposition in security shall be a burden upon his title in the same manner as it was that of me,