who can show that they have been wronged. I have said that if Mr Dunn's case were that property had been thrown on his hands, or voluntarily taken back by him, this would be injury, because he is entitled to be relieved of property which he has been induced by fraud to purchase presumably at a price exceeding its true value.

But Mr Dunn has re-sold the property on terms very advantageous to himself. He does not say that he would have got a better price for the property if its true value as appearing from the business books had been disclosed to him; such a statement would be absurd on the face of it. The truth is that the fraud did not touch him at all, but only hit the ultimate purchaser, the United Breweries Company, and Mr Dunn is not an injured person, but a party taking benefit by the fraud, and suing for restitution against another party who has also involuntarily benefited by it.

Now, the remedy of restitution against a contract obtained by fraud is an equitable remedy and is carefully guarded by restrictions which are intended to prevent its abuse, and which may sometimes lead unavoidably to incomplete justice being done in individual cases. It is not a universal or a perfect remedy. But I think we do no injustice to anyone in maintaining unimpaired the principle, that no person can claim the equitable remedy of rescission who is not prepared to do equity, and in particular, that the right of relief against fraud is denied to him who is seeking to retain a benefit procured by fraud. It is not necessary to refer to authorities on this elementary doctrine. There is really no question as to the legal principles which regulate the right of restitution. The circumstances under which we are called to apply them are peculiar, and I do not know that much aid is to be got from the study of particular cases. But I think it clear that if Dunn were suing by himself alone it would be a conclusive answer to his claim that he had sold the subjects at a price calculated on the erroneous value attributed to the subjects, that he had not repaid the price to his sub-vendee, and that he had therefore made a profit out of the fraud. The circumstance that he had bought back the property and was thus enabled to offer restitution would not in my judgment improve his position.

Now, plainly Dunn can communicate no higher right to the United Breweries than he himself possesses. The United Breweries have no direct claim of any kind either against Molleson or against Dunn. Whatever right of action they may acquire through Dunn by being joined with him as pursuers must be measured by his right. In relation to him they are gratuitous alienees of his right of rescission such as it is, and as, in my opinion, Dunn is not in a position to claim restitution, it follows that the action considered as an action at the instance of the United Breweries must also fail.

The LORD PRESIDENT, LORD ADAM, and LORD KINNEAR concurred.

The Court adhered.

Counsel for Pursuers and Reclaimers—Sol.-Gen. Asher, Q.C.—Shaw—Greenlees. Agents—Philip, Laing, & Company, S.S.C.

Counsel for Defenders and Respondents—Lord Advocate Balfour, Q.C.—Ure. Agents—Davidson & Syme, W.S.

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*Thursday, July* 7, 1892.

## OUTER HOUSE.

[Lord Wellwood.

## NATIONAL BANK OF SCOTLAND *v.* LORD ADVOCATE.

*Revenue—Stamp-Duty—Banker's Licence—Payment in Error—Condictio indebiti—Stamp-Duties Management Act* 1870 (33 *and* 34 *Vict. c.* 98), *sec.* 14.

By the provisions of the Act 55 Geo. III. c. 184, sec. 24, the Act 7 Geo. IV. c. 67, sec. 13, and the Act 7 and 8 Vict. c. 32, sec. 22, a banker is bound to take out the following licences for the issue of promissory-notes for money payable to the bearer on demand, viz., a district licence for every town or place at which he shall by himself or his agent issue such notes or bills, with this exception, that no banker who on or before 6th May 1844 had taken out four such licences which were at that date in force for the issuing of notes at more than four separate towns or places (the law at that date not demanding in any case more than four licences, and including in the fourth licence all towns or places of issue above three), should be required to take out more than four licences for the towns or places specified in such licences in force on 6th May 1844.

The National Bank had on 6th May 1844 four licences in force, one of the places to which these were applicable being the town of G. In 1871 the bank opened a branch at S., and took out a separate licence. By an Act passed in 1872, S. was included in the municipal boundary of G., but the bank by inadvertence continued to take out a licence and pay duty in respect of S. till 1890. In that year they claimed repayment of the duties so paid, in respect that S. having been since 1872 included in G., such licence was unnecessary, and the duty had been paid in error.

*Held* that the licence-duty being a stamp-duty, could not, under the provisions of the Stamp-Duties Management Act 1870, sec. 14, be recovered unless the application for relief was made within six months after the date of the licence.

*Opinion* that apart from this provision, the bank having annually applied for a licence, and paid a duty which in ordinary course would be applied to public purposes year by year, while it

might have ascertained that it was unnecessary had any inquiry been made, was barred from recovering.

This was an action at the instance of the National Bank of Scotland, Limited, against the Lord Advocate, as representing the Board of Inland Revenue, concluding for payment of the sum of £739, 10s., the amount of licence-duty alleged to have been overpaid by them for a period of eighteen years, under the following circumstances—By the Act 55 Geo. III. cap. 184, sec. 24, it is enacted, "That from and after the 10th day of October 1815 it shall not be lawful for any banker or bankers, or other person or persons (except the Governor and Company of the Bank of England) to issue any promissory-notes for money payable to the bearer on demand, hereby charged with a duty and allowed to be re-issued as aforesaid, without taking out a licence yearly for that purpose, which licence shall be granted by two or more of the said Commissioners of Stamps for the time being, or by some person authorised on that behalf by the said Commissioners, or the major part of them, on payment of the duty charged thereon in the schedule hereunto annexed; and a separate and distinct licence shall be taken out for or in respect of every town or place where any such promissory-note shall be issued by, or by any agent or agents for or on account of, any banker or bankers, or other person or persons. . . . And every such licence which shall be granted between the 10th day of October and the 11th day of November in any year shall be dated on the 11th day of October, and every such licence which shall be granted at any other time shall be dated on the day on which the same shall be granted; and every such licence respectively shall have effect and continue in force from the day of the date thereof until the 10th day of October following, both inclusive." The schedule annexed to the Stamp Act (55 Geo. III. cap. 184) fixes the duty payable by persons issuing promissory-notes at £30 for each annual licence.

By the Statute 7 Geo. IV. cap. 67, "An Act to regulate the mode in which certain societies or copartnerships for banking in Scotland may sue and be sued," it is provided, section 13, that "No such society or copartnership shall be obliged to take out more than four licences for the issuing of any promissory-notes for money payable to the bearer on demand, allowed by law to be re-issued, in all for any number of towns and places in Scotland; and in case any such society or copartnership shall issue such promissory-notes as aforesaid, by themselves or their agents, at more than four different towns or places in Scotland, then after taking out three distinct licences for three of such towns or places, such society or copartnership shall be entitled to have all the rest of such towns or places included in a fourth licence."

By the Act 7 and 8 Vict. cap. 32, sec. 22, it is enacted that "Every banker who shall be liable by law to take out a licence from the Commissioners of Stamps and Taxes to authorise the issuing of notes or bills shall take out a separate and distinct licence for every town or place at which he shall by himself or his agent issue any notes or bills requiring such licence to authorise the issuing thereof, anything in any former Act contained to the contrary thereof notwithstanding: Provided always, that no banker who on or before the 6th day of May 1844 had taken out four such licences, which on the said last-mentioned day were respectively in force for the issuing of any such notes or bills at more than four separate towns or places, shall at any time hereafter be required to take out or to have in force at one and the same time more than four such licences to authorise the issuing of such notes or bills at all or any of the same towns or places specified in such licences in force on the said 6th day of May 1844, and at which towns or places respectively such banker had on or before the said last-mentioned day issued such notes or bills in pursuance of such licences or any of them respectively."

On the said 6th day of May 1844 the pursuers had taken out four licences in accordance with the provisions of the recited Acts, and these licences were then in force; one of the towns or places to which a licence was then applicable was the town of Glasgow.

The licences in question are granted by the Commissioners of Inland Revenue (who have come in place of the Commissioners of Stamps and Taxes), and they are issued on a requisition made by the banker. With a view to save trouble, alike to the pursuers and to the Board of Inland Revenue, a printed form of requisition was adopted several years ago at the suggestion of the Board. In this form there are specified, first, the offices and branches of the bank covered by the four licences in force at 6th May 1844, and in the second place, the names of the several branches for which additional licences are required.

In November 1871 the pursuers opened a new branch of their bank at Springburn, in the county of Lanark, and a separate licence was taken out for it. The charge therefor, which under the Acts narrated is £30, was paid annually by the pursuers down to October 1890.

By virtue of the Glasgow Municipal Act of 1872 (35 and 36 Vict. cap. 41), the part of Springburn in which the office of the said branch is situated was brought within the municipal boundary of the city of Glasgow, and in consequence it was unnecessary, after the date when that Act came into operation, to obtain a separate licence for that branch.

The pursuers in consequence in November 1890, when, as they alleged, this fact first came to their knowledge, applied to the Board of Inland Revenue for repayment of the duties thus paid in error. The Board, without admitting any liability, offered to refund duty for two years, ending October 1889, but the pursuers being dissatisfied with the offer raised the present action. The parties adjusted and lodged the follow-

ing minute of admissions with reference to the opportunities of knowledge and state of knowledge of the pursuers regarding the inclusion of Springburn within the boundary of the city of Glasgow during the period of the payments sought to be recovered—"(1) That previous to, as after, the passing of the Glasgow Municipal Act of 1872, which for the first time included the Springburn branch office within the municipal boundaries of the city of Glasgow, the city authorities levied the cess or land tax and certain police rates from the pursuers, viz., assessment for police, statute labour, sanitary objects, public parks, galleries of art, court houses, and city improvements, in respect of the said branch office. That previous to the said Act the authorities of the county of Lanark, or the Lower Ward thereof, levied from the pursuers in respect of the said branch office the police rate of the Lower Ward district, the prison rate, the registration of voters rate, and the county general assessment. That after the passing of the said Act the said branch office was not rated by the county authorities for any purpose, and the rates for prisons and registration of voters were from that time included in the city assessments levied from the pursuers. (2) That previous to the passing of the said Act the said branch office was entered in the valuation roll of the county of Lanark. That for the purposes of the County Voters Registration (Scotland) Act 1861, the said branch office continued to be entered in the county valuation roll down to 1877-78, when by the Glasgow Municipal Act of 1878 the burgh valuation roll was made available for the purposes of the county voters roll. That since the passing of the said Act of 1872, and down to the present time, the said branch has also been entered in the burgh valuation roll for Glasgow, and the city assessor has been in the practice of serving the agent in charge of the said branch annually with a copy of the proposed entry in the valuation roll of the city. The said copy was not forwarded, but the receipts for payment of the city rates were forwarded, to the head office of the bank in Edinburgh. (3) That No. 11 of process is the form in which applications were made by the pursuers for banker's licences prior to 1888, and that No. 12 of process is the form adopted since the latter date; and from the time Springburn branch was opened till shortly before 7th November 1890 it was annually inserted in these forms as one of the places for which the officials entrusted with the duty of obtaining the proper licences, believed a separate licence was required. That the said officials, during the whole period from Whitsunday 1873 till shortly before 7th November 1890, were not informed and did not know that the Springburn branch office was within the municipal boundary of the city of Glasgow. At the same time there was no lack of opportunity for their becoming acquainted with the fact. That this fact was all along known to the agent in charge of the Springburn branch. It was not his duty, however, to take out the bank licences, and he was not aware that a separate licence was annually taken out for the said branch during the period in question."

The pursuers pleaded—"The principal sums claimed having been paid in error as to fact, the pursuers are entitled to repayment with interest on each annual payment thereof as concluded for."

The defender pleaded—"(1) The pursuers' statements are not relevant, or sufficient to support the conclusions of the summons. (2) In the circumstances, the duties paid having been levied *bona fide*, and applied to the usual purposes of yearly revenue, the pursuers are barred from seeking repetition; and *separatim*, they are barred from claiming an allowance by the lapse of six months from the dates of the respective licences. (3) The pursuers having paid the duties in the knowledge that their Springburn branch was within the municipal boundaries of Glasgow, were under no mistake in fact, and are therefore not entitled to repetition. (4) The pursuers having had the means of knowing the facts, and any ignorance on their part being attributable to their own fault, the claim for repayment of duties, levied conform to their requisition, is not well-founded. (5) The mistake, if mistake there was, being due to the carelessness and negligence of the pursuers themselves, they have no good claim for principal or interest. (6) In any event, there cannot in the circumstances be a tenable claim for interest during the period prior to a formal demand for repayment of principal."

The statutory enactments upon which the second plea-in-law for the defender is founded are fully recited in the opinion of the Lord Ordinary (WELLWOOD), which was as follows—"It appears that from 1872 to November 1890 the pursuers, the National Bank of Scotland, applied for and took out unnecessarily a banker's licence for their branch at Springburn. The branch was opened in November 1871, at which time a separate licence was required. But by virtue of the Glasgow Municipal Act 1872 the part of Springburn in which the office of the branch is situated was brought within the municipal boundary of the city of Glasgow, and after that date it was unnecessary to take out a separate licence. The bank already had a branch office there for which a licence was annually taken out, and under the statutes only one licence was required for each town or place. The third head of the minute of admissions is as follows—'3. That No. 11 of process is the form in which applications were made by the pursuer for bankers' licences prior to 1888, and that No. 12 of process is the form adopted since the latter date; and from the time the Springburn branch was opened till shortly before 7th November 1890 it was annually inserted in these forms as one of the places for which the officials entrusted with the duty of obtaining the proper licences believed a separate licence was required. That the said officials,

during the whole period from Whitsunday 1873 till shortly before 7th November 1890, were not informed and did not know that the Springburn branch office was within the municipal boundary of the city of Glasgow. At the same time there was no lack of opportunity for their becoming acquainted with the fact. That this fact was all along known to the agent in charge of the Springburn branch. It was not his duty, however, to take out the bank licences and he was not aware that a separate licence was annually taken out for the said branch during the period in question.'

The bank now sue for repayment of the sums so paid in mistake, amounting in all to £739, 10s. The defender denies liability, but the Board of Inland Revenue were and are willing *ex gratia* to refund duty for the two years ending October 1889.

"The first defence is this—(Ans. 7) 'The statutes relating to banker's licences make no provision for the return of duty erroneously paid, and under provision applicable to stamp-duties generally the time for asking an allowance in respect of unused stamps is limited to six months from the date of the instrument.' The defender refers particularly to the Stamp-Duties Management Act of 1870 (33 and 34 Vict. c. 98), section 14.

"Subject to such regulations as the Commissioners may think proper to make, and to the production of such evidence by affidavit or otherwise as the Commissioners may require, allowance is to be made by the Commissioners for stamps spoiled in the cases hereinafter mentioned: (that is to say) . . . (5) The stamps used for any of the following instruments—that is to say, . . . (*b*) An instrument executed by any party thereto, but afterwards found to be absolutely void in law from the beginning; (*c*) an instrument executed by any party thereto, but afterwards found unfit by reason of any error or mistake therein for the purpose originally intended; . . . (*h*) an instrument executed by any party thereto which becomes useless in consequence of the transaction intended to be thereby effected being effected by some other instrument duly stamped; . . . Provided as follows—(1) That in the case of an executed instrument, (*a*) the instrument is given up to be cancelled; (*b*) the application for relief is made within six months after the date of the instrument.' . . .

"By the interpretation clause 'duty' and 'duties' mean the stamp-duty and stamp-duties from time to time chargeable by law. 'Instrument' means and includes every written document. 'Executed,' 'execution' with reference to documents not under seal mean signed, signature. 'Write,' 'written,' and 'writing' include every mode in which words or figures can be expressed upon material.

"Now the duty on bankers' licences is a stamp-duty under the care and management of the Commissioners of Inland Revenue. It is said by the pursuers that the licence is not an 'instrument' in the sense of the statute. I think this is a mistake. It falls under the definitions which I have quoted, and besides, if reference is made to the 2nd section, and the schedule of the Act 55 Geo. III. c. 184, part one, it will be seen that 'banker's licence' is one of the 'instruments' referred to in the Act upon which duty is chargeable.

"By that section it is enacted 'that these shall be raised, levied, and paid into and for the use of His Majesty, his heirs and successors, in and throughout the whole of Great Britain, for and in respect of the several instruments, matters, and things mentioned and described in the schedule hereunto annexed (except those standing under the head of Exemptions), or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, and things or any of them shall be written or printed the several duties or sums of money set down in figures against the same respectively, otherwise specified and set forth in the same schedule.' . . . And the schedule applicable to bankers' licence is as follows—'Licence to be taken out yearly by any banker or bankers, or other person or persons who shall issue any promissory-notes for money payable to the bearer on demand, and allowed to be reissued . . . £30.'

"I am therefore of opinion that no application having been made within the time limited by the statute, this defence is well founded and sufficient for the decision of the case.

"In this view it is not necessary for me to decide the other question raised, but I may state generally what my view at present is. The pursuers maintain that the payments having been made under an error in fact, they are entitled to recover, and I heard a learned argument upon the law of *condictio indebiti*, the pursuers' contention being that to exclude a claim for repetition of money paid under error in fact it is not enough that the party who makes the claim is shown to have had the means of knowledge, "unless" (to quote the rubric in case of *Kelly* v. *Solari*) "he paid it intentionally, not choosing to investigate the fact." The authorities mainly relied on were *Kelly* v. *Solari*, 9 M. & W. 54; *Balfour* v. *Smith & Logan*, 4 R. 457; and *The Dalmellington Iron Company, Limited*, 16 R. 523. *Condictio indebiti* is an equitable plea, and I think that in every case the whole circumstances must be considered. In the cases cited in which effect was given to it the payment was not volunteered by the supposed debtor, but was made in response to a demand by the supposed creditor, who thus innocently or otherwise helped to induce the supposed debtor to waive inquiry. The present case, however, is less favourable to the party who paid in error. The bank were not called upon to take out a licence for the Springburn branch. They had to make up their mind year by year what licences they required, and to apply to the Board of Inland Revenue for them. The Board were not put upon their inquiry in the matter, and granted the licences asked as a matter of course on payment of the duty. It may thus well be held that the bank, who ad-

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.

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*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