HOUSE OF LORDS.

Tuesday, October 25, 1921.

(Before the Lord Chancellor (Birkenhead), Lords Buckmaster, Sumner, Wrenbury, and Carson.)

SUTTERS *v.* BRIGGS.

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

Gaming—Bets Paid by Cheque—Collection by a Bank—"Indorsee or Holder"—Gaming Act 1835 (5 *and* 6 *Will. IV, cap.* 41), *secs.* 1 *and* 2.

The Gaming Act 1835 by section 1 enacted that bills, &c., given in respect of gaming transactions should be deemed to have been given for illegal consideration; by section 2 that "in case any person shall . . . execute any note, bill, or mortgage for any consideration on account of which the same is" (by the Gaming Acts) "declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note" (&c.) "the amount of the debt thereby secured or any part thereof, such money so paid shall be deemed to have been taken to have been paid for and on account of the person to whom such note" (&c.) "was originally given upon such illegal consideration as aforesaid . . . and shall accordingly be recoverable by action at law." B sued S to recover £50 paid by cheque in settlement of a bet. The cheque was crossed "not negotiable" and "account payee only" and was paid by S to his account with his bankers, who as agents for collection presented it to B's bankers and received payment. *Held* that B was entitled to judgment on the grounds (1) that "holder" in section 2 should be given its natural meaning, and (2) that bankers are "holders or indorsees" even when they are mere agents for collection.

Dey v. *Mayo* (1920, 2 K.B. 346) *approved.*

The *facts* appear from their Lordships' considered judgment—

LORD CHANCELLOR (BIRKENHEAD)—This appeal in my opinion fails.

The consequences of this view will, no doubt, be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculations as to the probable intention of the Legislature. Where, as here, the legal issues are not open to serious doubt our duty is to express a decision and leave the remedy (if one be resolved upon) to others.

The facts of the case are not in dispute and have been the subject of admissions between the parties.

On 13th October 1920 the respondent betted the appellant £50 that a horse named "Blue Dun" would win the Cesarewitch Stakes, a race to be run on the same day. Blue Dun did not win, and according to the rules which govern betting transactions the respondent became liable, though not in law, to pay the £50 to the appellant. He did so by giving to the appellant a crossed cheque for £50. This cheque was dated 18th October 1920 and was drawn by the respondent on the Oxford Street branch of the London, County, Westminster, and Parr's Bank in favour of the appellant. The respondent had written on the face of the cheque the words "not negotiable" and "account payee only." The appellant endorsed it in blank and handed it for collection to the Strand branch of Barclay's Bank where he had an account. Barclay's Bank duly presented the cheque, and it was honoured in course out of funds standing to the respondent's credit at his bank. Neither the respondent nor his bankers were aware of the capacity in which Barclay's Bank were acting, but in fact this bank received payment as collecting agents only.

On the 5th November 1920 the respondent issued a writ against the appellant for the recovery of the £50 so paid, basing his claim on section 2 of the Gaming Act 1835. A decision of the Court of Appeal in *Dey* v. *Mayo* (1920, 2 K.B. 346), binding upon both the trial Judge and the Court of Appeal, covered the present case in favour of the respondent. Judgment was therefore entered for him and was in due course affirmed on appeal. The case now comes before your Lordships, who are not bound in the matter by any previous decision of this House. We are therefore to consider whether the judgments in *Dey* v. *Mayo* correctly state the law, and whether there is such a right as the respondent contends in the circumstances stated above.

The Gaming Act 1835 was ostensibly passed with the object of amending existing legislation. It is necessary to advert to the statutes so amended in order to gain a proper appreciation of the earlier law and of the mischief which the Act under consideration was intended to remedy.

The short title of the Act is misleading, but the long title and the preamble make it plain that the effect was by no means confined to gaming transactions. In fact, four classes of statutes were amended and four classes of persons were affected, namely—(1) Persons who held bills, notes, &c., which had been given in respect of gaming transactions, (2) persons who held bills, &c., given in contravention of the usury laws, (3) persons who held bills, &c., given in connection with bankruptcy frauds, and (4) persons who held bills, &c., given in violation of the statute prohibiting the ransoming of ships.

These four classes of statutes had a single and severe feature in common—that the bills, notes, &c., at which they were aimed were declared to be null and void. The result was that however complete the good faith of the holder they were not enforceable, although no circumstance apparent on the face of them could give such a person warning of the vicious origin. The Act of 1835 corrected and alleviated the harshness of these provisions. By section 1 all such bills, notes, &c., were to be deemed to have been given for an illegal consideration—in

other words, they were made enforceable at law in the hands of a third person, who acquired them innocently. Such was the sole amendment of the law in relation to the three classes of statutes other than the Gaming Acts, for section 3 of the Act may for this purpose be dismissed as irrelevant. The last-mentioned Acts were, however, further amended or supplemented by section 2 of the Act of 1835, which is in these wide general terms—"in case any person shall . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts" (*i.e.*, the Acts relating to gaming) . . . "or by any one or more of such Acts, declared to be void, and such person shall actually pay to the indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured or any part thereof, such money so paid shall be deemed to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's Courts of Record."

This exceptional treatment of bills, &c., given in respect of gaming transactions is remarkable. The reason can hardly be founded upon a special reprobation of gaming nascent in the mind of the Legislature. For it cannot be said that the other three classes of transactions were in just appraisement more venial. The experience of the evils attaching to the ransoming of ships was recent, and the practice had been forbidden from motives of high policy in order to preserve the existence of the nation during an unprecedented war. A person who committed a breach of this statute added thereby to the enemy's resources, and was liable to a fine of £500 (45 Geo. III, cap. 72, sec. 18). A man so blinded by private advantage as to contemplate a naked disservice to his country could not claim to be of greater moral standing than a gambler. Nor was the first Reformed Parliament likely to regard a fraudulent bankrupt or one who aided him as a trivial offender. The explanation must be sought elsewhere, and is, perhaps, to be found in the fact that the law relating to gaming as it then existed was, as a mere matter of history, different from the law governing the other prohibited transactions. In 1835 a man who lost and paid a bet of £10 or upwards could recover from the winner the sum so paid. By 9 Anne, cap. 19, sec. 2, a loser who lost at one time or sitting £10, and paid the sum lost or any part of it could recover the amount so paid. This provision was reinforced by the power given to the Courts of Chancery by the Act 18 Geo. II, cap. 34, sec. 3, not merely to grant discovery in aid of an action at law to recover such an amount, but even to decree payment of the same. Moreover, the Act of 9 Anne, cap. 19, sec. 5, made it an indictable offence to win or lose £10 at any one sitting, or £20 within twenty-four hours. These severe provisions remained law for a further ten years until they were repealed by the Gaming Act 1845. It may be inferred that the intention of Parliament, expressed in section 2 of the Act of 1835, was to make it clear that the amendment of the law effected by section 1 was without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto.

I find it necessary to recal the history of the subject partly because so far as I am aware this aspect of the statute has not been touched upon or discussed by any authority other than Atkin, L.J., who in his judgment in *Dey* v. *Mayo* glanced at the matter, and partly because certain judicial dicta have too hastily assumed that the law as it now stands was the law in 1835. Thus Channell, J., in *Nicholls* v. *Evans* (1914, I K.B., at p. 120) said—"If a person makes a bet, and having lost, pays it in cash, he cannot recover it back. That I think is agreed. If that is the case it seems somewhat ridiculous that the fact that the bet is paid, not in cash but by the machinery of a cheque, should make any difference"—and having made that assumption he employs it in such a way as to limit the meaning of the word "holder" used in section 2 to "a holder who derives his title from the person to whom the bill or note was given." Again, in *Dey* v. *Mayo*, Bankes, L.J., said—"It may be safely said that there was no intention to make any alteration in the rule of law which provides that a person who pays money to another with full knowledge of the facts cannot recover it back." A similar observation was made by Scrutton, L.J., in the course of his judgment in the same case. The fact is that in 1835 direct payments were recoverable if the statutory conditions were fulfilled, and the Act, which was only intended to benefit certain third persons who had become holders of void notes, was so drawn as to prevent this strictly limited modification enuring to the benefit of the person to whom the loser gave the note in settlement of his gaming debt. It was not intended to confer any further rights upon him. This general consideration must be given due weight when the construction of the relevant phrases of the section is approached.

It is abundantly plain that a cheque is a "bill" within the meaning of the section (see section 73 of the Bills of Exchange Act 1882, and the judgment of Palles, C.B., in *Lynn*, v. *Bell*, (1876) 10 Ir. R. (C.L.), at 487 *et seq.* In the same sense Lord Blackburn pointed out in *M'Lean* v. *Clydesdale Bank* (9 A.C. at pp. 105 and 106, 21 S.L.R. 140) that the definition of a bill of exchange, in section 3 of that Act, which is in the circumstances evidence of the law before the Act, "completely embraces in it a cheque."

The real issue is as to the meaning of the phrase "indorsee, holder, or assignee," and in holding that the respondent is entitled to judgment I am guided by two broad considerations—(1) That not only is there no reason why the word "holder" used in the section should not be given its natural meaning so as to include the original payee,

but that there are positive reasons why that natural meaning should be given; (2) That bankers are "holders or indorsees" even when, as in this case, they are mere agents for collection.

Taking the first of these considerations in its order, it is important to recal that at the date when the Act was passed a direct payment could under the conditions stated in the Act of Anne be recovered, and that a bill or note was absolutely void. The Act was intended to give relief to *bona fide* holders, but in providing such relief the Legislature may quite easily have been influenced by the consideration stated by Channell, J., that the fact that the bet was paid by the machinery of a cheque and not by cash ought in logic to make no difference. The result, however, would in fact be different, as the law then stood, unless express provision was made that the drawer should have a right of recourse against the original payee—in other words, a lawyer of 1835 applying the reasoning of Channell, J., must have come to an opinion contrary to that of the learned judge. The danger of not examining the state of the law at the date of the statute which falls to be construed is shown by the fact that it was rather as an inference from the law as established by the Act of 1845 than from the law existing in 1835 that the learned Lords Justices in *Dey* v. *Mayo* held (as indeed it was argued before your Lordships), that the word "holder" in the section does not include the original payee. In fact this inference rests upon a somewhat obvious fallacy. For just as the Act of Anne with its amending Act enabled direct cash payments to be recovered by action, so section 2 of the Gaming Act 1835, made recoverable payments by the machinery of a bill or note which had ceased by virtue of section 1 of that Act to be void. This construction may, no doubt, be said to duplicate in some cases the remedy under the earlier Acts, but no such redundancy could justify your Lordships in denying to the word "holder" its ordinary and natural meaning.

And there are in fact positive reasons in favour of adhering to that meaning. The expressions now in use with regard to bills and notes, with the single exception of the term "holder in due course," were well known in 1835—for example, Bayley on Bills of Exchange (1822 edn.), at p. 398, used the expression "*bona fide* holder for value," and the Statute 58 Geo. III, c. 93, passed only seventeen years before 1835, with the design of affording relief to innocent holders of bills, notes, &c., void under the Usury Acts, had used the narrow phrase "an indorsee for valuable consideration." With this knowledge and with such a precedent available, Parliament in framing section 2 chose to use the widest possible term "any indorsee, holder, or assignee." The wide generality of the wording of the section is in marked contrast with the narrow technicality of section 1, which is intended to effect the object of the statute with the least possible alteration of the law as it then existed. A narrow construction, such as the appellant contends for, would open a great field for collusion. As Atkin, L.J., suggestively pointed out in *Dey* v. *Mayo*—"The loser, as before, was not put to inquire and decide whether a bill was presented by a person who was in fact a holder in due course. . . . If it were otherwise it is plain that it admits of collusion between the winner and the third party, who might feign a valuable consideration for the purpose of obtaining payment from the loser, but might be in a different mood when the loser required his evidence to support a claim against the winner."

And it must be borne in mind that it is impossible for the drawer to know whether the person, be he banker or not, who presents the cheque for payment is a holder in his own right or a mere agent for collection. It is a question of fact in each case what is the capacity in which a person holds the bill—*M'Lean* v. *Clydesdale Bank*, 9 App. Ca. at p. 115; and *Capital and Counties Bank* v. *Gordon*, 1903, App. Cas. at p. 244. A drawer could in general only ascertain the facts by fighting an action, but if he were to lose, section 2 of the Gaming Act 1835 gives him no right of action for the costs so incurred; while if he were to pay without a contest the winner would always be entitled to plead that the payment was made to a mere agent for collection.

It may indeed be that the second proposition that bankers are holders or indorsees even when they are merely agents for collection is a necessary inference from the reasons that have influenced me in my view as expressed upon the earlier proposition. But it can in fact be justified upon other and narrower grounds.

It is, as is well known, usual for bankers, in the case of substantial customers at least, to constitute themselves holders in due course, as was the case in *Capital and Counties Bank* v. *Gordon*, the result of which case led to the passing of the Bills of Exchange (Crossed Cheques) Act 1906. At common law, however, the capacity in which a person holds a bill is irrelevant to the question whether he is a holder. The test is possession (*see* the judgment of Martin, B., in *Ancona* v. *Marks*, 31 L.J.Ex. at p. 168). A mere agent may sue (*Law* v. *Parnell*, 29 L.J., 17 C.P., a case which was cited by my noble and learned friend Lord Carson during the argument). The same principles apply to indorsees (*Denton* v. *Peters*, L.R., 5 Q.B. at p. 477).

The definitions cited on behalf of the appellant from early editions of Byles on Bills and from Chalmers are not inconsistent with this principle. The words "entitled at law to recover" mean only "not liable to be defeated in an action on the bill on the ground that the action has been brought against the wrong party." These very text-books actually contemplate a mere agent suing upon a bill (*see, e.g.*, Byles on Bills, 4th ed., 1843, p. 120)—"If the party presenting be the mere agent of another the agent's title is infected with the infirmity of his principal's title although the principal is in the agent's debt, and the agent consequently cannot enforce payment of the maker."

The common law was not altered in this respect by the Bills of Exchange Act 1882. By section 8 (3) "A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank." By section 34 (1) "An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer." Now in the present case Barclay's Bank was in possession of a bill indorsed in blank, and therefore payable to bearer. Therefore the bankers were bearers, and as bearers were also holders. This follows from the definitions in section 2 of the Act. "'Bearer' means the person in possession of a bill or note which is payable to bearer" and "'holder' means the payee or indorsee of a bill or note who is in possession of it or the bearer thereof." It follows from the Act itself that the term "holder" includes an agent for collection. As Bigham, J., said in *Akrokerri (Atlantic) Mines, Limited* v. *Economic Bank* (1904, 2 K.B. at p. 472), "'Holder' does not necessarily mean holder for value. The expression includes every person who is in lawful possession of the instrument, and therefore includes an agent for collection." And the note, with which I agree, at p. 5 of Chalmers' Bills of Exchange, 7th ed., is to the same effect—"A 'holder' includes . . . (*b*) the person to whom a bill is by its terms payable, and who, as against third parties, is entitled to enforce payment thereof, though as between himself and his transferor he is a mere agent or bailee with a defeasible title, *e.g.*, an agent for collection."

I recal only to reject as fallacious the arguments based on section 77 (6) and section 82 of the Bills of Exchange Act 1882. Section 77 (6) is as follows:—"Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

The argument on this point is that as the sub-section gives a banker power to cross a cheque sent to him for collection specially to himself, it necessarily follows that he would not have that power apart from the sub-section and is not a holder. It is implicit in such an argument that although a banker who is acting as an agent for collection has the major right of crossing a cheque specially to himself, he does not possess the minor rights of crossing it generally or specially to another banker or of making it not negotiable. Therefore a country banker to whom a cheque is sent for collection may not cross it specially to the bankers acting as his agents even for the purpose of safeguarding it in transit. A decision involving such a consequence would effect a revolution in banking practice, and would supply at least as great a shock to bankers as *Dey* v. *Mayo* to bookmakers.

This sub-section, which was not in section 5 of the Bills of Exchange Act 1876, was possibly inserted *ex abundanti cautela*, lest it might be argued that the practice was unlawful as constituting a breach of the relation of principal and agent, inasmuch as it recognised only payment made to the agent.

Nor does section 82 afford assistance to the appellant. The words of that section are—"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment." I cannot myself understand how any inference can be drawn from this section that a banker who receives payment as agent for collection is not a "holder." On the contrary, the opposite inference is far more plausible, namely, that the protection became necessary because he is a holder and as such liable to an action for conversion. The appellant's attempt to draw such an inference is further shown to be baseless by the fact that the Bills of Exchange (Crossed Cheques) Act 1906 confers the same protection on bankers who by their action have made themselves not merely "holders," but "holders in due course"—see *Capital and Counties Bank* v. *Gordon* (1903 A.C. 240), and *per* Bowen, L.J., *National Bank* v. *Silke*, 1891, 1 Q.B. 439.

Moreover, if bankers are not holders of cheques for which they are agents for collection only they derive no benefit from section 27 (3), as the sub-section does not apply even where there is a lien to a person who is not a holder.

For these reasons I think that section 2 of the Gaming Act 1835 was designed to preserve the right of the loser of a bet to recover the amount even when it was paid by means of a cheque, thenceforth made enforceable in the hands of a third party under the conditions stated in section 1.

There is indeed no reason for limiting the natural and ordinary meaning of the words used. The term "holders or indorsees," means any holder and any indorsee whether the holder be the original payee or a mere agent for him, and the rights of the drawer must be construed accordingly. The circumstance that the law apart from the section in question was repealed in 1845 without any repeal of the section itself may lead to anomalies, but cannot have weight in construing the section.

I move, your Lordships for these reasons that this appeal be dismissed with costs.

LORD BUCKMASTER and LORD CARSON desire me to state they entirely concur in the judgment I have just delivered.

LORD SUMNER—On the 13th October 1920, Mr Briggs put £50 on Blue Dun for the Cesarewitch and lost. On the Monday following he paid the bookmaker Mr Sutters by a cheque on the London, County, Westminster, and Parr's, crossed "not negotiable, account payee only." Mr Sutters endorsed it generally and paid it into his account with Barclay's Bank for collection, and it was duly cleared and paid. Accordingly, by his bankers on whom the cheque was drawn, the respondent did actually pay to an indorsee of this note or bill the amount of the money thereby secured. Why, then, cannot he recover

the amount of it from the appellant by action at law pursuant to 5 and 6 Will. IV, cap. 41, section 2?

It may be as well to note that the appellant's counsel did not rely on the fact that the money was lost, not at cards, dice, tables, tennis, or bowls, but on a horse race. They accepted that, as Moulton, L.J. observes in *Hyam* v. *Stuart-King* (1908, 2 K.B. at p. 715) a long series of cases has settled that horse racing is within the statutes of Anne and William IV. Their major reason was that Barclay's Bank were not indorsees within the meaning of that section. All the argument on the word "holder" fails unless the word "indorsee" can also be negatived, and the difficulties put in connection with "holder" can only be made relevant by arguing that if "holder" can first be shown to mean holder by an independent title, and particularly holder for value without notice, then the same thing will be true of "indorsee," thanks to the mere collocation of the words. As Barclay's Bank certainly were indorsees within the mere words of the section, the meaning desired must be got from the policy of the Act, and more particularly from the policy as described in or implied from the preamble. There is a minor reason given also, namely, that the Act only deals with instruments which secure a debt, and not with instruments by which a debt is paid. This again must be got from the preamble, for it is no part of the enacting words. The prior legislation clearly avoided all notes and bills in the hands of third parties, whether given to the original taker as a paper payment, conditional on a future cash payment, or as security for future payment, and I see nothing to justify us in excluding from the remedial legislation which replaced it the former class (obviously not the least important), where the document can technically be called a payment, though barren because unenforceable by the payee. Further, the point that Barclay's were collecting the cheque simply for Mr Sutters, who could have sent a clerk to the counter of the London and County Bank but for the crossing, is either irrelevant or begs the question. If section 2 gives a position of unqualified advantage to any indorsee, the point does not arise, and it cannot be made to arise merely by saying that with another instrument in another form a course might have been taken which would possibly have made the point arise.

The ground may be cleared here of another argument equally ingenious but equally groundless. It is said that "shall actually pay to any indorsee" is to be interpreted by referring to the later words, "such money so paid shall be taken to have been so paid for and on account of" Mr Sutters. Now to sue Mr Sutters for money paid to his use to Mr Sutters is going round and round and is ridiculous. You cannot take money to have been paid for account of Mr Sutters unless it has been paid to someone who is not Mr Sutters or his messenger or his mere agent. It follows that payment to a mere collecting bank is not payment to an indorsee within the section. I pass over the point that a banker's lien is not merely over the paper on which the order to pay is written but over the chose in action which that order to pay creates, and that Barclay's had such a potential interest by way of lien on this cheque as would have been made actual at will if they had chosen to credit Mr Sutters with the amount and to notify him of the fact before the cheque was cleared. I think the whole argument on this point fails. If the section means "any indorsee," as it certainly says it, and Barclay's Bank were indorsees, then the Legislature does not care for whom that bank acted, nor does it look behind them. The question again comes round to asking whether any qualification on "any indorsee" is implied? This, after all, is always the question.

The Legislature plainly meant to help persons who had taken, for value and without notice of the consideration for which they had been given, certain instruments and securities, which prior statutes had made void as having been given in consideration of losses at play or for the purpose of receiving a usurious rate of interest or by insolvents in consideration of improper assistance by individual creditors, or by way of ransom of ships and cargoes contrary to law. In pointing this out very eminent judges have in some cases used language, which not only affirmatively states this intention, but negatively avers that both in intention and in effect the Act of 1835 went no further *e.g. Hay* v. *Ayling* (1898, 16 Q.B. 423, per Campbell, C.J.), approved in *Woolf* v. *Hamilton* (1892, 2 Q.B. 337), *Hyam* v. *Stuart-King* (1908 2 K.B. at p 714, per Moulton, L.J.), *Saxby* v. *Fulton* (1909 2 K.B., at p. 229, per Buckley, L.J.). As, however, section 2 of the Act of 1835 and the rights of such a person as the present respondent were not in issue in these cases the opinions so expressed are not decisive. The questions now arise—first, Did the Legislature intend to do this and no more? and second, If so, did the Legislature completely effect its limited purpose by section 1, which replaces the avoidance of such instruments by merely deeming them to have been given for an illegal consideration? This may be so, for there is nothing to show that section 2 is ancillary only and not an independent provision, and if so the preamble does not affect it. Indeed, whatever ground there is for thinking that the holder for value is the subject of the benevolence of the Legislature, is to be found in section 1, for the change which it makes is really beneficial to and is directed to the holders of negotiable instruments, but that exhausts the benefit, and section 2 is enacted for the benefit of the person who pays the holder, whether under compulsion of law or not this section does not say.

The recital of the Acts against gaming, passed under Charles II, William III, and Anne, which dealt with instruments given both as security for and in satisfaction of gaming debts, shows that for the purposes of this enactment "note, bill, or mortgage" in section 2 are words covering both classes of instrument. The recital of the mischief,

that the instruments dealt with are "sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration without notice," followed by the words "for remedy thereof be it enacted," show pointedly that the omission from the enacting sections of any reference to valuable consideration or to notice is deliberate. The preamble rather suggests that the enacting words do not refer only to transferees for value without notice than that they do.

Turning next to the words of section 2, and assuming that the objects recited in the preamble are not exhausted by section 1, the instruments mentioned fall into two classes, namely, negotiable instruments, whether or not their negotiability is restricted, and instruments that cannot be called negotiable instruments at all, but the enactment applies equally and in the same way to both. If the instrument has been given upon a consideration for which any of the recited Acts would have made it void, actual payment to any indorsee of any bill and actual payment to any assignee of any mortgage give the same right of action to the party who pays. Accordingly if words like "for value without notice" are to be imported as an implied qualification upon "indorsee" or "holder," they must be equally capable of being imported to qualify "assignee," and conversely if they cannot be attached by implication to the last word they cannot be attached to the others. Now an indorsee of a bill, taking it for value and without notice, needs no further help than is involved in substituting a presumed illegal consideration for entire avoidance, but an assignee of a mortgage which the mortgagee cannot enforce because it was given for an illegal consideration must stand in his assignor's shoes and can have no better right than he had whatever value he may have given and whatever notice he may have escaped. It follows that as the section treats both categories alike the result of this implication would be that the party paying would get his remedy over in the one case because he could have been made to pay and in the other because he could not—a hopeless inconsistency not to be imputed to the Legislature. The words are "actually pay," not "be compellable to pay and actually pay" or "shall elect to pay and shall actually pay," and they are "any indorsee," not "any indorsee for value without notice." The fact is that the assistance designed cannot be given to assignees of mortgages and to indorsees of bills of exchange in the same sentence and in the same way without disregarding the negotiability of the latter instruments. If the intention of assisting persons who have given value without notice as indicated by the preamble was all that the subsequent sections were meant to give effect to, one would have expected the enactment to be in such cases that these persons should be entitled either to sue on the instrument notwithstanding that it had been made void by the recited Acts, which *Edwards* v. *Dick* (4 B. & Ald. 212) had decided could be done in the case of a drawer and indorser of a bill when sued by the indorser for value, or should recover from their transferors the amount of the value given as money had and received. The fact that neither course is taken shows that whatever object this long preamble is supposed to serve it did not control or qualify the actual enactment. As a matter of fact I think it had very little to do with it.

If, however, the section is read as meaning all that it says—no more and no less—a scheme appears which is at least practical. As early as 1821 the intention of the Act of 9 Anne had been recognised as being to prevent a winner from obtaining money by way of gaming and to disable him from keeping money won at play, even though indirectly obtained. "No person who derives his title through the winner can make the loser pay"—Abbot, C.-J., in *Dick* v. *Edwards*, 4 B. & Ald., at p. 215, and also Holroyd, J., at pp. 216 and 217. The idea of this amending Act seems to be to encourage the unsuccessful gamester to pay third parties by enabling him to pass his payment on to the winner. If he does he has gambled and lost and has not paid anybody. He has merely parted with paper which turns up in third parties' hands. The Legislature imposes the test of liability to be brought into court and put to the possibly unpleasant necessity of pleading this Gaming Act. The section makes it worth his while to pay and save his credit, and gives him the satisfaction of recovering the money from the winner and so getting even with him. Persons whose business it is to oblige backers may not appreciate it, but I do not see why it should not be popular with persons whose business it is to be *bona fide* holders for value. At anyrate this is what the section says, and it is the result of deliberate abstinence from drawing any distinction between those who have given value and those who have not.

I should mention two minor points. By virtue of the Bills of Exchange Act Barclay's were "holders" as well as indorsees, and had such rights as attach to a holder in due course. I do not see why in this case effect should not be given to the Act of 1882 since nothing in the Act of 1835 prevents it. "Holder" as used in 1835 is not shown to be exclusive of or inconsistent with "holder" as used in the code. It is said that, if so, holder in the Act of 1835 includes the payee of the cheque, for he would be a holder under the Bills of Exchange Act. One must note that from 1835 to 1845 the loser of more than £10 at gaming remained entitled by the Act of 9 Anne to recover any cash paid directly to the winner, quite independently of the Act of 1835. It is not, therefore, clear that in 1835 the Legislature was much impressed in this connection by the common law rule which makes a voluntary payment irrecoverable. Still here I think the earlier Act is inconsistent with such an effect, for the result would be that if the respondent had chosen to pay the cheque to the appellant he could have recovered the money from him again, the express provision of the section overriding the general rule that money voluntarily paid is

irrecoverable. This cannot be. To put it decorously, the Act must be interpreted so as to avoid circuity of action; to put it bluntly, such an interpretation would simply make the section silly. As for the point, taken but faintly before your Lordships, that the matter is in some way affected by this cheque being crossed and marked "for account of payee only, not negotiable," I think it does not arise. Section 2 deals with bills and notes generally, as it does with mortgages generally. It draws no distinction between bills which are and bills which are not marked not negotiable, and applies the same consequent right to an actual discharge of all. It is not to be read distributively or as if the words were "negotiable note or bill" or "not negotiable note or bill and mortgage," but the payment is to be to any indorsee of the note or bill which is indorsed. The question is not whether this cheque was marked not negotiable so as to restrict its negotiability in accordance with section 81 of the Act, but whether it is a note or bill. No one has argued that it was not. If Barclay's were within the class of "any indorsees of a note or bill," the addition of the words "not negotiable" to the bill does not take them out of the class again. An argument can only arise upon these words if by some implication there is introduced into the section the test of the ability of the indorsee or holder to sue and recover on the instrument, which is the very point in debate. If this test can be introduced, Barclay's were not indorsees or holders for value, and so the section would not apply. If it cannot, the crossing of the cheque with the addition of these words makes no difference. In any case they are indorsees.

The general policy of the Act of 1835 is finally appealed to. I think if this point is distinguishable from the argument upon the words of the preamble it really involves an inquiry whether this was a sensible piece of legislation or not, which is hardly a judicial question. The earlier Acts adopted a position of compromise. Gamesters were not to be punished, but they were to be impartially inconvenienced. Unfortunately ignoring patent facts does not help one for long, and the existence and accommodating disposition of third parties raised another and a pressing question. The desire to help them involved the Legislature in the necessity of favouring either the winner or loser, for if third parties were to be paid the law could no longer stand indifferent. As luck would have it, when the Legislature interfered again it was the winner who lost, *victa Catoni.* I cannot tell why, it looks like a compromise, and it is little use speculating about the motive for a compromise. The whole policy of the law as to betting is hard to understand by itself; it becomes harder still when the remedial measure includes in one and the same provision not merely betting but lending money at more than 5 or 6 per cent., and frauds on creditors or on the law of ransom. I can only see one common policy applicable to all four, and that is to discourage them all alike by making each of them severally not worth while. If that is all, it does not help the appellant. As far as betting goes the discouragement is not very formidable, for it enlists on the side of payment of debts of honour that large class of persons, among whom of course I do not include Mr Briggs, who find nothing so repugnant to them as the discharge of a sordid legal obligation. The appeal, in my opinion, fails.

LORD WRENBURY—I also am of opinion that this appeal fails.

Many points have been argued before your Lordships, but the appeal fails if, as I think is the case, Barclay's Bank were indorsees or holders of the cheque within section 2 of the Act of 1835. The skeleton frame of that section is as follows:—If the drawer shall actually pay the indorsee, holder, or assignee, the payment shall be deemed to have been made for and on account of the drawee, and shall be a debt owing from the drawee to the drawer, and shall be recoverable. In this language the holder is, I think, any person who so holds the cheque as that in the ordinary case he could sue the drawer upon it. I have had the advantage of considering the opinions just expressed by the Lord Chancellor and Lord Sumner. I agree with their reasoning, and cannot usefully add anything to it. I think the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

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Note.—The Gaming Act 1922 (12 and 13 Geo. V, cap. 19), section 1, enacts—"Section 2 of the Gaming Act 1835 (which makes money paid to the indorsee, holder, or assignee of securities given for consideration arising out of certain gaming transactions recoverable from the person to whom the securities were originally given) is hereby repealed. No trustee, executor, or other person acting in a representative or fiduciary capacity shall be under any obligation to make or enforce any claim under the said section in respect of any transaction completed before the passing of this Act, or be liable for any breach of duty by reason of any failure to do so. No action for the recovery of money under the said section shall be entertained in any court."