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Banknotes and Their Vindication in Eighteenth-Century Scotland

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Abstract

The first banknotes in Scotland were issued in 1695 following the incorporation of the Bank of Scotland. In a country critically short of coin and vulnerable to changes in its value, they were an almost immediate success. A century later no fewer than 21 banks, mainly private, issued notes, and Scotland was awash with paper money. This proliferation of paper would hardly have been possible without a stable legal framework. In 1749 the case of *Crawfurd v The Royal Bank* considered, and settled, one of the key legal issues: whether the holder of a banknote took free from infirmities of title which affected those from whom it had been acquired. In the litigation Mr Crawfurd sought to vindicate a £20 Bank of Scotland note which had gone missing in the post and turned up some time later in the hands of the Royal Bank of Scotland. The printed arguments of counsel which have survived provide a fascinating glimpse into a collision between orthodox property law on the one hand and the needs of commerce and the future of the banking system on the other. According to the former, Mr Crawfurd's victory was assured because no one can acquire title through a thief; according to the latter, the Royal Bank must prevail, for any other result 'would be to render the Notes absolutely useless, and consequently would in a great Measure deprive the Nation of the Benefit of the Banks, which could hardly subsist without the Circulation of their Notes'. In this battle of doctrine against policy, Roman law was used as a proxy, with both sides calling on Digest texts and on the account of vindication in Voet's *Commentarius ad Pandectas*. Victory for the Royal Bank was obtained only by re-characterising a rule of bona fide consumption, by spending, as one of bona fide acquisition; and so with this flimsiest of doctrinal veneers, the free circulation of banknotes was assured.

Keywords

Law, Legal History, Scotland, Eighteenth Century, Banking, Banknotes, Money, Vindication

BANKNOTES AND THEIR VINDICATION IN EIGHTEENTH-CENTURY SCOTLAND

KENNETH G. C. REID*

I. THE RISE OF PAPER MONEY

1. The 'Old' Bank and the 'New'

Money in the form of coin, wrote the Scottish judge and jurist, Viscount Stair, is 'bulkish and heavy, uneasy to be transported'.¹ In Scotland it was also in seriously short supply. At the time of the Union with England in 1707 the quantity in circulation may not have exceeded £1 million sterling in value, much of it in the coinage of other countries,² and a shortage of coins remained a persistent problem throughout the eighteenth century.³ Long before the end of that century, however, the place of coin would largely be taken by paper money, at least in high-denomination transactions.⁴

The origins of paper money in Scotland lie in the establishment of the Bank of Scotland in 1695, a year after its English counterpart.⁵ As with the Bank of England, the founding statute⁶ made no mention of the issuing of banknotes.⁷ The Bank's activities, however, were to comprise 'the Trade of Lending and Borrowing Money upon Interest, and Negotiating Bills of Exchange', and it was in the cause of 'Lending' that banknotes first began to be issued. Unlike, therefore, the banks of Continental Europe, notes were issued by way of loans rather than against deposits; and, partly for that reason, these notes soon much exceeded any metallic money immediately available in Edinburgh. The first banknotes were issued on 1 April 1696, and already by July of that year the Bank had liabilities in notes of five times its holdings in coins.⁸ The results, in the early years, were perhaps unsurprising: notes came to be worth less than their face value and, beginning in 1704–05, there were periods where payment had to be suspended and note-holders offered interest instead of coin.⁹ Nonetheless,

* I am grateful to Professor Niall Whitty for first interesting me in this topic, and for generously sharing with me his knowledge and his insights.

¹ James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (2nd edn, 1693, repr ed D. M. Walker, 1981) 1.14 pr (henceforth Stair, *Institutions*). Stair advocated the use of bills of exchange instead.

² The estimate is by Adam Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations* (1776, repr ed J. B. Wight, 2007) 190 (henceforth Smith, *Wealth of Nations*). See also R. Saville, *Bank of Scotland: A History 1696–1995* (1996), 16 (henceforth Saville, *Bank of Scotland*).

³ S. G. Checkland, *Scottish Banking: A History, 1695–1973* (1975), 75 (henceforth Checkland, *Scottish Banking*).

⁴ For the advantages of notes over coin, see *ibid*, 31.

⁵ See generally C. A. Malcolm, *The Bank of Scotland 1695–1945* (1945), ch II; Saville, *Bank of Scotland*, chs 1–5; A. Cameron, *Bank of Scotland 1695–1995: A Very Singular Institution* (1995) chs 2–4 (henceforth Cameron, *Bank of Scotland*).

⁶ Act 1695 c 88: see T. Thomson and C. Innes (eds), *Acts of the Parliament of Scotland (1814–75)*, vol IX, 494–7. The Act is also reproduced in Saville, *Bank of Scotland*, 819–25 and in Cameron, *Bank of Scotland*, 254–7.

⁷ Although there is a glancing reference to 'Bills or Tickets drawn upon, or granted by, or to, and in favours of this Bank'.

⁸ Saville, *Bank of Scotland*, 28.

⁹ *Ibid*, 31.

by the time that the statutory monopoly given to the Bank of Scotland expired, in 1716,¹⁰ paper money was firmly established within Scotland as an equivalent of coin.

The ending of the monopoly did not lead to an immediate challenge to the position of the Bank of Scotland. But in 1727, and in the teeth of the Bank's opposition, a second public bank, the Royal Bank of Scotland, was established by Royal Charter and began to issue notes. Almost at once the 'New' Bank set out to break the 'Old' by accumulating its notes and making substantial and unpredictable demands for payment.¹¹ Recognizing its vulnerability—for it held only a few thousand pounds in reserve to meet notes in circulation to the value of £80,000—the Old Bank called up as many of its loans as possible. It was to no avail. When, on the day of the Old Bank's annual general meeting, on 27 March 1728, the New Bank presented £900 in notes, payment was suspended and not fully resumed for a year. Litigation between the Banks followed.¹² Yet the Old Bank survived and, as the New Bank issued more notes of its own, it became vulnerable in turn, leading to a suspension of hostilities. Relations, however, were to remain strained for many years until an emerging challenge from private banks in the third quarter of the century made co-operation seem desirable or even essential.

2. Banknotes: form and appearance

At first, only high-denomination notes were issued, but in 1704 the Bank of Scotland introduced £1 notes followed, in 1760, by 10/- notes.¹³ The early notes were simple in design, closer in appearance to a cheque than a modern banknote, and indeed the notes were bound into something resembling cheque books from which they were cut out by knife, leaving a stub behind on which the details of the issue could be inscribed.¹⁴ A paper mill was established near Edinburgh, at Gifford, and the plates from which the notes were printed were engraved in a flowing cursive script, with blanks for the date, the number of the note, and its first bearer. After printing, each note was signed by the Bank's Secretary, Treasurer and Book-keeper. The notes issued by the Royal Bank after its foundation in 1727 were in similar form.¹⁵ The life of a banknote was usually less than a year by which time its condition required it to be replaced.

A typical banknote was in the following terms:

Edinburgh

The Governors and COMPANY of the Bank of SCOTLAND constituted by Act of Parliament do hereby oblige themselves to pay to _____ or the Bearer Twenty Pounds Sterling on Demand.

By order of the Court of Directors.¹⁶

¹⁰ The 1695 Act had provided that 'for the space of twenty one years after the date hereof ... it shall not be Leasom to any other persons to enter into, and set up a distinct Company of Bank within this Kingdom, besides these Persons allanarly, in whose Favours this Act is granted'.

¹¹ On the 'bank wars' see: N. Munro, *The History of the Royal Bank 1727–1927* (1928) 55–61 (henceforth Munro, *Royal Bank*); Checkland, *Scottish Banking*, 60–2; Saville, *Bank of Scotland*, 98 ff. A contemporary account written from the standpoint of the Bank of Scotland is Richard Holland, *An Historical Account of the Establishment, Progress and State of the Bank of Scotland; And of the several Attempts that have been made against it, and the several Interruptions and Inconveniences which the Company has encountered* (1728).

¹² Most notably *Royal Bank v. Bank of Scotland* (1728) Mor 875 rev (1729) 1 Paton App Cas 14.

¹³ Checkland, *Scottish Banking*, 108.

¹⁴ See generally Saville, *Bank of Scotland*, 25–6; Cameron, *Bank of Scotland*, 22.

¹⁵ Munro, *Royal Bank*, 62–4; Checkland, *Scottish Banking*, 67.

¹⁶ See Saville, *Bank of Scotland*, 316 (plate); Cameron, *Bank of Scotland*, 39, 96.

The number would be added by hand to the left of ‘Edinburgh’ and the date to right; the name of the first bearer appeared in the gap in the second line. Finally, the note required to be signed.

3. The assessments of Hume and Smith

The rise of paper money attracted extensive comment from two of the leading thinkers of the Scottish Enlightenment, David Hume and Adam Smith. On the whole, Hume was lukewarm or even hostile to the development, writing in 1752 of ‘those institutions of banks, funds, and paper credit, with which we are in this kingdom infatuated’ and warning of the tendency of paper money to drive out silver and gold.¹⁷ ‘By our wise politics’, he observed sarcastically, ‘we are as careful to stuff the nation with this fine commodity of bank-bills and chequer-notes, as if we were afraid of being over-burthen’d with the precious metals’.¹⁸

Smith’s assessment was altogether more positive. Money, though needed to circulate goods, was ‘a dead stock in itself, supplying no convenience of life’.¹⁹ If paper could be substituted for coin for the purposes of internal circulation, the latter would be liberated to buy goods from abroad, to the overall enrichment of the country. In lectures given at Glasgow University in 1766 he explained the point by an extended example:

It is easy to shew that the erection of banks is of advantage to the commerce of a country. Suppose as above that the whole stock of Scotland amounted to 20 millions, and that 2 millions are employed in the circulation of it, the other 18 are in commodities. If then the banks in Scotland issued out notes to the value of 2 millions, and reserved among them 300,000£ to answer immediate demands, there would be one million seven hundred thousand pounds circulating in cash, and 2 millions of paper money besides. The natural circulation however is 2 million, and the channel will receive no more. What is over will be sent abroad to bring home materials for food, cloaths, and lodging. That this has a tendency to enrich a nation may be seen at first sight, for whatever commodities are imported, just so much is added to the opulence of the country.²⁰

Like Hume, Smith accepted the tendency of paper to drain the country of gold and silver. ‘But’, he continued, ‘if we consider attentively we will find that this is no real hurt to a country. The opulence of a nation does not consist in the quantity of coin but in the abundance of the commodities which are necessary for life, and whatever tends to increase these tends so far to increase the riches of a country’.²¹

4. The position at mid-century

As mid-century approached, therefore, paper money had become established in Scotland in practice as well as broadly accepted in economic theory. It was a familiar and significant means of payment, in many cases replacing coin. Yet the legal status of paper money remained largely undetermined: as so often, practice was running ahead of the law. That, however, was just about to change. For even as Edinburgh was recovering from the indignity of being occupied by the Highland troops of Bonnie Prince Charlie in 1745—an occupation

¹⁷ David Hume, *Political Discourses* (2nd edn, 1752), 89–90.

¹⁸ *Ibid.*, 91. For a discussion of Hume’s views, see A. E. Murphy, *The Genesis of Macroeconomics: New Ideas from Sir William Petty to Henry Thornton* (2009), 108–12 (henceforth Murphy, *Genesis of Macroeconomics*).

¹⁹ Adam Smith, *Lectures on Jurisprudence* (eds R. L. Meek, D. D. Raphael, and P. G. Stein, 1978), 503.

²⁰ *Ibid.*, 503–04. Later, Smith came to qualify this view by distinguishing between productive and unproductive expenditure. Only the former (eg expenditure on machinery and tools, as opposed to luxury goods) was beneficial to the economy. See Murphy, *Genesis of Macroeconomics*, 171–6, esp 175–6.

²¹ *Ibid.*, 504.

which induced both Banks to destroy large quantities of their notes rather than have them fall into the hands of the rebels²²—an opportunity finally arose to test some of the key issues. The resulting litigation, *Crawfurd v. The Royal Bank*,²³ was the most important banking case of the century and a crucial test for the viability of the new form of money.

II. PAPER MONEY AND THE LAW: THE CASE OF THE STOLEN £20 NOTE

1. Mr Crawfurd's claim

On 30 July 1748 Hew Crawfurd, a lawyer in Edinburgh,²⁴ sent two Bank of Scotland £20 notes by post to William Lang, a merchant in Glasgow.²⁵ The letter failed to arrive.²⁶ Crawfurd's missing notes were easily identifiable because, with the prudence characteristic of his profession and nation, he had kept a record of their numbers and signed his name on the back. Crawfurd notified the Bank of Scotland of the missing notes, 'desiring that if any of them appeared for payment the same might be stopped till he should be apprised thereof'.²⁷ He also advertised in various newspapers, describing the sum, the numbers, and other particulars. Of one of the notes nothing further is known. The other, however, turned up a few months later in the office of the Royal Bank.²⁸ Probably it had been stolen and passed through several hands before being presented to the Royal Bank for payment, although the circumstances of its loss and re-discovery were never properly established. At first the Royal Bank was unaware of the note's provenance, but when tellers from the two Banks met for a routine exchange of notes, in December 1748, the note was identified and Crawfurd informed.

Although Crawfurd's signature had been scored through, and a number altered, there could be no doubt that this was one of notes which Crawfurd had entrusted to the post. Who owned the note now, however, was a great deal less clear. When it became apparent that the note would not simply be released to him, Crawfurd asked the Bank of Scotland to raise an action of multiplepinding, the normal procedure, now as then, for adjudicating competing claims to money or other property. And when the Bank refused—because, as the Minutes of

²² Checkland, *Scottish Banking*, 73; Saville, *Bank of Scotland*, 123.

²³ (1749) Mor 875. See II.3 below for an account of the various reports of this case.

²⁴ Crawfurd, described variously as a 'Writer to the Signet' and 'Clerk to the Signet', may be the Hew Crawford of Jordanhill, brief biographical details of whom are given in *Register of the Society of Writers to Her Majesty's Signet* (1983), 72. This Crawford became Sheriff-Depute of Renfrewshire and 'Writer to the Prince of Wales', dying on 21 February 1756. There is a persistent uncertainty in the sources mentioned in nn 54–8 below as to the spelling of Crawfurd's name. Lord Kames, whose client Crawfurd was, gives the name as 'Hew Crawfurd' and this is followed in *Morison's Dictionary*. In *Lord Strichen's Report*, however, he is 'Hugh Crawford' and this usage is followed by Lord Elchies. Finally, Lord Kilkerran gives the name as 'Hew Craufurd'. In this chapter I follow the usage of *Morison's Dictionary*, the standard source today for the case, but without any particular confidence that it is correct.

²⁵ The fullest account of the facts of *Crawfurd v. The Royal Bank* appears in the *Record of the Minutes 1742–62* of the Court of Directors of the Bank of Scotland (Lloyds Banking Group Archives, Edinburgh, GB1830 BOS1/2/1/3), 5 January 1749 (henceforth *BoS Minutes*). I am grateful to Lloyds Banking Group Archives for permission to quote from the *Minutes*.

²⁶ If case law from the period is any guide, this was not an isolated occurrence: see *Elder v. Scott* 21 June 1799 FC; *Swinton v. Beveridge* 21 June 1799, Mor 10, 105. Indeed for a time the Royal Bank sought to minimize the risks inseparable from posting by issuing special 'post' bills of exchanges, payable by endorsement after an interval of six days from the date of issue: see Munro, *Royal Bank*, 119–20.

²⁷ *BoS Minutes*, 5 January 1749.

²⁸ This was banknote number 144/28725.

the Court of Directors recorded, it thought itself bound to pay its notes to the bearer²⁹—Crawfurd raised the action himself in the Court of Session in the name of the Bank.

2. And the Banks' response

Crawfurd's claim was greeted by both Banks with dismay, even alarm. And although relations between them had remained poor since the hostilities of thirty years before,³⁰ the prospect of litigation on so sensitive a subject achieved what even the recent Jacobite Rebellion had failed to manage:³¹ consultation and joint action at Board level.³² The initiative came from the Old Bank. At the first meeting of that Bank's General Court of Directors for 1749,³³ held on 5 January, Crawfurd's claim was the main item of business. The Minutes record the outcome:

The Directors having conversed over and considered the affair are of Opinion that it is no less the interest and concern of this Company than of the Royal Bank that such a Decision may be given by the Lords with regard to these notes as may not injure the credit of either Company or be a barr to the circulation of their notes And that in this question there ought to be a mutual understanding betwext the two Companys And therefore they appointed the Deputy Governor Mr Peter Wedderburn Mr Robert Pringle and Mr John Mackenzie as a Committee with the Secretary to meet with such of the Directors of Royal Bank as their Court shall think proper to name and to commune together and concert what measures may be thought proper to be taken in the above affair and to report the result of the Conference to the next Ordinary Court of Directors for their approbation.³⁴

Thereafter matters proceeded quickly. At a meeting of its Board of Directors held the following day, the New Bank accepted the invitation and appointed its own team of three directors.³⁵ The meeting took place shortly afterwards, and each group of directors was able to report back to its Board on 13 January.³⁶ The result was a commitment to joint action: Crawfurd's claim would be defended by both Banks, the lawyers appointed for each would work together, and the cost would be shared equally. In the meantime, the Old Bank would pay up on the note, but on the basis of the New Bank's Cashier 'giving a receipt of the money upon the back of the note which should oblige the Royal Bank to refund the same in case of a decision in Mr Crawfurds favours'.³⁷

The Banks' concern is easily understood. If holders of banknotes were vulnerable to infirmities of title of which they knew nothing, then this would indeed be 'a barr to the circulation' of notes and hence a threat to the whole idea of paper money. And even if that position could be resisted—even if *bona fide* holders took an unblemished title—there was the further difficulty of assessing the holder's state of knowledge. Crawfurd had marked the banknotes and advertised his loss. Must a holder be taken to know this and to realize its

²⁹ *BoS Minutes*, 5 January 1749.

³⁰ For which see I.1 above.

³¹ For the absence of co-operation even in the perilous conditions of 1745, see Checkland, *Scottish Banking*, 75.

³² A search of the *Index to Minutes 1696–1757* of the Bank of Scotland's Court of Directors (Lloyds Banking Group Archives, Edinburgh, GB1830 BOS1/2/23/1) suggests that there was no contact at board level between the time of the bank wars in 1727–8 (when the possibility of merger was being considered) and the *Crawfurd* litigation in 1749.

³³ Meetings of the Court of Directors could be either 'general' or 'ordinary', the difference being that the Bank's extraordinary directors did not attend the latter.

³⁴ *BoS Minutes*, 5 January 1749.

³⁵ *Board of Directors Minutes of the Royal Bank of Scotland* (The Royal Bank of Scotland Group Archives, Edinburgh, RB/5/12), 6 January 1749 (henceforth *RBS Minutes*). I am grateful to The Royal Bank of Scotland Group Archives for permission to make use of the *Minutes* for the purposes of this chapter.

³⁶ *BoS Minutes*, 13 January 1749; *RBS Minutes*, 13 January 1749.

³⁷ *BoS Minutes*, 13 January 1749.

significance? ‘If’, the Banks reasoned, ‘the writing upon notes and advertising the numbers in the Publick Prints should be found sufficient to interpel people from receiving such notes in payment it would be a mean of putting an intire stop to the circulation of notes and of opening a door for frauds by malicious and designing persons’.³⁸

The Board Minutes give no indication of whether the Banks expected to win the litigation. Possibly they did,³⁹ although the provision made for repayment of the £20 by the Royal Bank in the event of Crawford prevailing shows that that outcome too was within their contemplation. But whatever view the Banks held on the subject, they were at any rate anxious to maximize their chances.

3. Procedure and sources

The oral argument in the case was heard by Lord Strichen, probably early in February of 1749. Both sides were profligate in their use of counsel. Crawford was represented by two future Lords President of the Court of Session, Robert Craigie of Glendoick⁴⁰ and Robert Dundas of Arniston (Dean of the Faculty of Advocates and son of the current Lord President)⁴¹ and, as if that were not enough, by Henry Home—the future Lord Kames, a leading figure of the Scottish Enlightenment and mentor to David Hume and Adam Smith⁴²—and Alexander Lockhart (the future Lord Covington). The Banks in turn retained Peter Wedderburn (the future Lord Chesterhall), Robert Pringle (the future Lord Edgefield), and James Erskine;⁴³ Wedderburn and Pringle were both directors of the Bank of Scotland and had taken part in January’s meeting with the Royal Bank directors.

Glimpses of the participants’ style and reputation are provided by a contemporary observer, John Ramsay of Ochertyre.⁴⁴ Of Craigie it is said that ‘though he dealt little in flowers of rhetoric or in addresses to the passions, his pleading gave equal satisfaction to the Bench and to his employers’.⁴⁵ By contrast, the ‘impassioned strain’ of Dundas’ speeches ‘gave additional force to his arguments’.⁴⁶ Home, ‘if less graceful and pathetic in his pleadings than some of his brethren ... commanded respect and interest by the force and ingenuity of his arguments, which had a cast of originality’. Often he ‘maintained propositions which were at best problematical, as if they had been self-evident axioms’.⁴⁷ Lockhart, the final member of Crawford’s team, ‘not only spoke with more fire than most of his brother advocates, but frequently accompanied his perorations with tears, and that

³⁸ Ibid.

³⁹ One reason for a degree of optimism might have been the close links between the Banks and the Court of Session: see II.6 below.

⁴⁰ Lord President 1754–60; see J. W. Cairns, ‘Craigie, Robert, of Glendoick (bap. 1688, d. 1760)’, *Oxford Dictionary of National Biography* (2004). It is possible, however, that Craigie acted for William Lang, the intended recipient of the banknote and, it seems, one of those claiming from the Bank of Scotland. The brief account of Craigie’s argument given in *Lord Strichen’s Report* to the Full Court (discussed below) is unclear could certainly be read in this way.

⁴¹ Lord President 1760–87; see J. A. Hamilton, ‘Dundas, Robert, of Arniston (1713–1787)’, rev M. Fry, *Oxford Dictionary of National Biography* (2004).

⁴² See eg I. S. Ross, *Lord Kames and the Scotland of his day* (1972); A. J. Durie and S. Handley, ‘Home, Henry, Lord Kames (1696–1782)’, *Oxford Dictionary of National Biography* (2004).

⁴³ Two advocates active at this time by the name of James Erskine are listed in Sir Francis J. Grant, *The Faculty of Advocates 1532–1943* (1944) and it is unclear which acted in *Crawford*. One was admitted as an advocate in 1734 and the other (the future Lord Barjarg) in 1743.

⁴⁴ J. Ramsay, *Scotland and Scotsmen in the Eighteenth Century* (1888 repr 1996), vol I (henceforth Ramsay, *Scotland and Scotsmen*).

⁴⁵ Ibid, 111.

⁴⁶ Ibid, 330.

⁴⁷ Ibid, 183–4.

sometimes in cases where there seemed little room for the pathetic'; 'what he knew was always expressed by him with such felicity, that he was thought to know more than perhaps he really did'.⁴⁸ Of the Banks' counsel, only Wedderburn attracted Ramsay's eye. 'His parts', it is said, 'were rather solid than bright, and his elocution was more correct than animated. His *forte* lay in judgment and penetration, not in flights of fancy or sallies of wit.'⁴⁹

Despite the multiplicity of counsel, and of talent, it was Home who seems to have borne the brunt of the argument for Crawford, and Wedderburn and Erskine for the Banks. In the event, no decision was reached by Lord Strichen; instead, and presumably in deference to the importance of the issues, the case was 'reported' to the judges of the Court of Session for a decision *en banc*.⁵⁰ That decision was given on Friday 24 February, three days after Lord Strichen's written Report.⁵¹

The first published report of the case was the half-page account given by David Falconer, the official reporter for the Faculty of Advocates, in 1753.⁵² A decade or so later, in 1766, Lord Kames, one of Crawford's counsel, published a longer version in his collection of *Remarkable Decisions of the Court of Session*, but only his own arguments are set out in full and the legal (as opposed to policy) argument which prevailed is passed over in silence.⁵³ Both reports were later included in Morison's *Dictionary of Decisions*,⁵⁴ the standard source today for pre-1800 case law. Finally, some brief thoughts on the case by two of the judges, Lords Kilkerran and Elchies, were published, respectively in 1775 and 1813;⁵⁵ at a time when judges gave little in the way of reasons for decisions these are of particular value as showing the views of two prominent members of the Court. For a full understanding of the decision, however, it is necessary to have regard to unpublished material. Lord Strichen's Report to the Full Court runs to eleven printed pages and gives a detailed account of the oral argument.⁵⁶ Presumably this was based on the summary made by a clerk in attendance at the hearing,⁵⁷ which may explain the occasional gaps in logic and exposition. At least six copies are known to exist.⁵⁸ In addition, it was normal for advocates to produce detailed, often prolix, written

⁴⁸ *Ibid*, 132–3

⁴⁹ *Ibid*, 140.

⁵⁰ In 1749 Robert Dundas, Lord Arniston, had recently taken up office as Lord President, and Charles Erskine, Lord Tinwald, as Lord Justice-Clerk. The other judges, in order of seniority, were Lords Dun, Milton, Minto, Drummore, Monzie, Haining, Strichen, Elchies, and Murkle, the Earl of Leven, and Lords Kilkerran and Shewalton. See G. Brunton and D. Haig, *An Historical Account of the Senators of the College of Justice of Scotland from its Institution in 1532* (1849), 485–514. In addition, there were two 'extraordinary' Lords, the Duke of Argyll and the Marquis of Tweeddale. These were non-lawyers, appointed under a procedure which was discontinued in 1723, and who sat only occasionally.

⁵¹ For the procedure of the Court of Session in this period, see D. R. Parratt, *The Development and Use of Written Pleadings in Scots Civil Procedure* (Stair Society vol 48, 2006), ch 1 (henceforth Parratt, *Written Pleadings*). Useful material can also be found in N. Phillipson, *The Scottish Whigs and the Reform of the Court of Session 1785–1830* (Stair Society vol 37, 1990), ch 2.

⁵² D. Falconer, *The Decisions of the Court of Session from 1st November 1748*, vol II (1753), 67.

⁵³ Lord Kames, *Remarkable Decisions of the Court of Session, 1730–1752*, vol II (1766), 200.

⁵⁴ William Maxwell Morison, *The Decisions of the Court of Session from its Institution until the Separation of the Court into two Divisions in the year 1808, digested under proper heads, in the form of a Dictionary* (1801–08), 875–7.

⁵⁵ Sir James Fergusson of Kilkerran, *Decisions of the Court of Session from the year 1738 to the year 1752 collected and digested into the form of a dictionary* (1775), 479–80 (henceforth Kilkerran, *Decisions*); Patrick Grant of Elchies, *Decisions of the Court of Session from the year 1733 to the year 1754, collected and digested in the form of a Dictionary*, vol II (1813), 43–4 (henceforth Elchies, *Decisions*).

⁵⁶ Lord Strichen, Reporter, *Minutes, the Governor and Directors of the Bank of Scotland against the Governors and Directors of the Royal Bank and others* (21 February 1749) (henceforth *Lord Strichen's Report*).

⁵⁷ Parratt, *Written Pleadings*, 19, 26,

⁵⁸ Professor Niall Whitty traced the copies held in the collections of Session Papers by Kames and by Falconer in the Advocates Library in Edinburgh. I have since found further copies in Kilkerran's Session Papers, vol 15, no 50, in Elchies' Session Papers (both in the Advocates Library), at vol 581:2 of the Indexed Session Papers

pleadings, including ‘Informations’ written after the Report in a last-minute attempt to influence the Full Court. If this was done in the present case, however, none has been traced despite an extensive search.⁵⁹ The account which follows, therefore, is based largely on Lord Strichen’s Report.

4. Preliminary matters

In arguing the case, two preliminary points required to be disposed of.⁶⁰ First, were banknotes properly to be treated as corporeal moveable property⁶¹ rather than as an (incorporeal) right to payment from the Bank of Scotland? And if they were then, secondly, were they to be regarded as the equivalent of metallic coin and so subject to the same (special) rules?

On the first point, the difficulty lay in the fusion of debt and entitlement. More than just evidence of the Bank’s obligation to pay, a banknote was the very basis of determining entitlement to payment. A banknote, in other words, invited consideration of two different kinds of right. There was, first of all, the right to be paid by the Bank, but there was also the right to physical note itself; and it was the second right, by and large, which determined entitlement to the first—a fact which distinguished banknotes from other obligations to pay. Since the Banks were keen to avoid the ordinary rules of vindication, so they were keen to show that banknotes could not properly be regarded as corporeal property. For the Royal Bank, James Erskine argued:

That the Note in question be considered not so much as a Piece of Money, but as an Obligation to pay Money. In that Light likewise by the *Roman Law*, it could not have been vindicated or fall under the Doctrine concerning the *vitium reale* which takes Place only as to the *res corporales* to which the *nomina & obligationes* are always opposed, being of a different Nature, and not falling under this Doctrine, and so cannot be claimed as a Horse or a Cow *a quocunque*, and therefore must be regulated by the terms of the Obligation itself, which is payable to the Bearer, and must be accordingly paid when presented, without regard to any Claims that third Parties may have.⁶²

If this argument caused the Court to hesitate, this has not been captured in any of the accounts of the litigation. The case was adjudicated, and largely argued, on the basis that banknotes were *res corporales*.⁶³ And that point having been won, counsel for Crawford, in turn, do not seem to have put up serious resistance to the Royal Bank’s claim that banknotes ‘are in Effect an Addition to the Species or current Money of the Nation’ and are subject to the same rules as coins.⁶⁴ What these rules might be, of course, was another matter.

held in the Signet Library in Edinburgh, and in Lloyds Banking Group Archives, Edinburgh (NRAS945/20/1/1). I am grateful to Rosemary Paterson for her assistance in finding the copies in the Advocates Library. Both Kilkerran’s and Elchies’ copies have handwritten but (to me at least) indecipherable notes on the first page.

⁵⁹ The Court process appears not to be held by the National Records of Scotland. The decree is minuted on p 94 of the *Minute Book of Session commencing 15 January 1749 and ending 10 January 1750* (National Records of Scotland, CS16/1/81) but is not marked as having been extracted. No other written pleadings are included in the sets of Session Papers listed in the preceding note.

⁶⁰ They are not, however, so presented in the arguments as recorded in *Lord Strichen’s Report*. On the contrary, no doubt partly because of the system of pleading then in use, there was a tendency to shift from one point to another and then back again.

⁶¹ Or, in the terminology of English law, chattels.

⁶² *Lord Strichen’s Report*, 4–5.

⁶³ That remains the modern law: see L. D. Crerar, ‘Banking, Money and Commercial Paper’, in *The Laws of Scotland: Stair Memorial Encyclopaedia* (Reissue, 2000), para 143 (henceforth Crerar, ‘Banking’); C. Proctor, *Mann on the Legal Aspect of Money* (7th edn, 2012), paras 1.45 and 1.46.

⁶⁴ *Lord Strichen’s Report*, 10 (Wedderburn). See also 3 (Erskine).

With these points settled, there was a shift of focus in argument. In theory, the litigation was a multiplepounding in which the question to be determined was the ‘incorporeal’ one of to whom should the Bank of Scotland pay—to the Royal Bank, to Crawford, to William Lang (as the intended recipient of the banknote), or to more than one of those?⁶⁵ But on the basis that the person entitled to payment was, and perhaps was only,⁶⁶ the person entitled to the banknote, much more prominence was given to the ‘corporeal’ question of ‘whether the Newbank or Mr. Crawford has the best Right to the Bank-note’.⁶⁷ The case, in short, became one about vindication of money.

5. Vindication of money

Although the fact of theft was not clearly established in *Crawford v The Royal Bank*, the case was argued and decided on the basis that the £20 note had indeed been stolen and was a *res furtiva*.⁶⁸ That being so, the general rule was not in doubt: stolen goods could be vindicated by the person from whom they were taken, for no title could pass even to a *bona fide* acquirer without the owner’s consent. The principle was the familiar one of *nemo plus iuris ad alienum transferre potest, quam ipse habet*.⁶⁹ On behalf of Crawford, Home thus had a straightforward argument to make:

[T]he bare Possession of a Bank-note without the Consent of the Proprietor, will no more transfer the Property than the bare Possession of a Table or a Chair. Possession indeed presumed the Consent of the former Proprietor. But then this, like all other Presumptions, must yield to Matter of Fact; and therefore if the Person who vindicates, proves his Property & *quomodo desit possidere*, so as to take off the Presumption arising from Possession, he must prevail.⁷⁰

It was true, Home conceded, that stolen coin could often not be reclaimed, but this was due to a deficiency of proof and not of law.⁷¹ If all coins looked the same, then victims of theft could not identify what had been taken.⁷² But in the present case the banknote had been numbered, and signed. It was indisputably the same note that Crawford had put into the post. It should be returned to him.

The response for the Banks was necessarily inventive. According to the Royal Bank’s counsel, James Erskine, in a key passage,⁷³ Roman lawyers viewed money:

not as a *corpus*, but a *quantitas quae usu consumebatur*, by which Means they effectually withdrew it from being liable to the *rei vindicatio*, or affectable by the *vitium reale*, which was held to accompany all *res furtivae*; and upon this Principle it was, that *pecunia furtiva mutuo data, pro re vendita numerata, creditori soluta, bona fide accipientis fiebant*,⁷⁴ because in all these Cases, they held them to be consumed ...⁷⁵

⁶⁵ *Ibid*, 1 (Craigie). Thus there were various references in argument to the ‘double distress’ of the Bank having to pay twice, a view advocated by counsel for Crawford (2) but naturally rejected by counsel for the Banks (1).

⁶⁶ But while this issue was argued, it does not seem to have determined.

⁶⁷ *Lord Strichen’s Report*, 7 (Home).

⁶⁸ Kilkerran, *Decisions*, 479–80; Elchies, *Decisions*, 43–4.

⁶⁹ D. 50.17.54.

⁷⁰ *Lord Strichen’s Report*, 8.

⁷¹ *Ibid*: ‘quod non deficit jus sed probatio’.

⁷² In the English law of the time this was being expressed as the idea that money has no earmark. See D. Fox, *Property Rights in Money* (2008), paras 7.17 ff, 8.10 ff (henceforth Fox, *Property Rights in Money*).

⁷³ This follows on immediately from an account, based on D. 18.1 pr (which is quoted), of how in the course of history barter gave way to sale, with one commodity being exchanged, not for some other commodity (*merx*) but for an official medium of exchange (*pretium*) or, in other words, for money.

⁷⁴ [Stolen money given in the context of a mutuum (loan for consumption), counted out [or quantified] [as the price] for the object sold and paid to the creditor, will [have] become [the property] of one who receives it in

The use of Latin suggests an impeccable Roman pedigree, but no Roman source was cited,⁷⁶ and indeed the principal *Digest* text discussed elsewhere in argument (though not by Erskine) is directly opposed.⁷⁷ We must return to this important text, by Iavolenus, in due course.⁷⁸

A more serious criticism is that, Roman law or not, the Bank's argument is lacking in logic and coherence. It comprises the following steps. (1) Money is a fungible which, like other fungibles, is consumed by use. (2) Money is used, and so consumed, by spending. (3) Therefore a *bona fide* recipient acquires ownership even of stolen money.

We may allow the first two steps of this argument without hesitation, at least from what would have been the familiar perspective of loan for consumption (*mutuum*). For when money is lent, the borrower is free to spend it and the lender's entitlement is to repayment of money to the same value and not of the original coins and notes. But two things should be noted at once. First, unlike with other fungibles, the 'consumption' of money is metaphorical and not literal. If corn is eaten, it ceases to exist; if money is spent, there is simply a change in possession and hence no (physical) obstacle to vindication in the hands of the third-party recipient. Secondly, in *mutuum* it is not the consumption which brings about the change of ownership but the earlier delivery (*traditio*) by lender to borrower; far from being the cause of change of ownership, therefore, consumption is its consequence.⁷⁹ Thus a theory which, in the context of stolen money, says that ownership is acquired by consumption has a certain amount of work to do. That, as we will see, was the theory of Johannes Voet.⁸⁰ It might also have been the theory of the Bank but for the existence of step (3).

Step (3) of the Bank's argument is not easy to connect up with the steps which precede it.⁸¹ For if money really is consumed by spending (step (2)), there can be no reason for requiring good faith in the recipient (step (3)). Such a requirement seems to imply that, if the recipient is in *bad* faith, the original owner is free to vindicate. But how can this be so? If spending amounts to consumption, there is nothing (on this theory) left to vindicate. Or if, in a more nuanced version of the argument, spending is taken to destroy, not the thing itself, but the owner's relationship to it, that owner has no basis for recovery of the thing against even a *male fide* recipient. Despite the way in which it is presented, therefore, the legally significant step in the Bank's argument is not the consumption (step (2)) but the acquisition (step (3)). That is why good faith is required of the person acquiring and not⁸² of the person consuming. In other words, this is a rule of *bona fide* acquisition masquerading, perhaps for reasons of Civilian plausibility, as one of consumption by use. We will see another example of this disguise later on.⁸³ The truth is that the first two steps could be left out entirely: all that matters for the Bank is that the recipient is in good faith.⁸⁴

good faith.] I am grateful to my colleague, Dr Paul du Plessis, for this translation of a passage which stretched my schoolboy Latin.

⁷⁵ *Lord Strichen's Report*, 4.

⁷⁶ Or has been traced.

⁷⁷ D. 46.3.78.

⁷⁸ See III.1 below.

⁷⁹ Stair, *Institutions*, 1.11.1, 2; John Erskine, *An Institute of the Law of Scotland* (1773), 3.1.18 (henceforth Erskine, *Institute*).

⁸⁰ Voet's solution was to connect consumption by spending to the 'consumption' which he claimed to take place when money was mixed: see III.1 below.

⁸¹ In fairness to James Erskine, it should be borne in mind that we are reading, not his words, but the argument attributed to him by the clerk and Lord Strichen.

⁸² As it was for Voet.

⁸³ See III.2 below.

⁸⁴ Doubtless it would be possible to devise an argument which found a place for all three steps. Thus for example it might be said that, while consumption prevents a vindicatory claim (because, in a legal sense, the

6. The result, and the reasons

When Henry Home—by now Lord Kames—came to report *Crawfurd v. The Royal Bank*, he gave the result of the case in much the same words as, two decades before and as defeated counsel, he had scrawled on his own copy of Lord Strichen's Report. The Judges, he wrote, were unanimous 'that money is not subject to any *vitium reale*; and that it cannot be vindicated from the *bona fide* possessor, however clear the proof [of] the theft may be'. Accordingly, 'Mr Crawfurd had no claim to the note in question'.⁸⁵ Thus was established the rule of *bona fide* acquisition of money in Scotland. The decision also relieved the Banks of the concern, raised once more during the litigation, that newspaper advertisement might 'amount to a sufficient Interpellation to all the World' as to deprive the recipient of good faith.⁸⁶

In reaching its view the Court must be taken to have followed, at least to some extent, the doctrinal argument presented for the Royal Bank by James Erskine and outlined above.⁸⁷ But it is hard to believe that the real arguments did not lie elsewhere.⁸⁸ Policy issues, as might be expected, were highly prominent in Lord Strichen's Report. Trade, it was argued for the Banks, rested on the free circulation of money, and free circulation rested in turn on the reliability of notes and coins. If Crawfurd was able to vindicate the banknote, no merchant could risk taking money in payment 'without being informed of the whole History of it from the Time that it first issued out of the Bank or the Mint till it came to his Hand, which is so apparently absurd, that it seems hardly to merit a Consideration'.⁸⁹ And as banknotes would thus be rendered 'absolutely useless', this would 'in a great Measure deprive the Nation of the Benefit of the Banks, which could hardly subsist without the Circulation of their Notes'.⁹⁰ It was in vain for Home to object that, just as people continue to buy goods despite the (slight) risk that they might be stolen and subject to vindication, so they would continue to accept money if the risks were the same.⁹¹ If money could be vindicated, counsel for the Bank of Scotland concluded, 'no Man could be sure, that one Shilling in his pocket was his own, and both Banks might shut their doors'.⁹²

Although expressed in an exaggerated and emotive way, these arguments must have seemed of considerable force in a society where paper money had become so prevalent. And certainly, when they came to record the decision, neither Lord Elchies nor Lord Kilkerran had anything to say about its merely doctrinal foundation. '[W]e thought', wrote the former, that 'it would destroy all banking, if the objection *res furtiva* could affect Bank notes', meaning,

thing no longer exists), it does not prevent an enrichment claim, and that only the recipient's good faith excludes the latter. But in its argument the Bank was concerned only with vindication.

⁸⁵ (1749) Mor 875 at 876.

⁸⁶ *Lord Strichen's Report*, 10 (Wedderburn). It might be different, Wedderburn accepted (11), 'if the Note had been presented by a suspicious Person'. See also 6 (Erskine).

⁸⁷ Some traces of that argument indeed survive in Crerar, 'Banking', para 144.

⁸⁸ As Erskine argued for the Royal Bank (*Lord Strichen's Report*, 5), a rule of *bona fide* acquisition 'is agreeable to the Practice of all trading Nations at this Day, who possibly without having much Regard to the Subtilties, have embraced it for this very good Reason, that the contrary would at once put a Stop to all Trade' (my emphasis).

⁸⁹ *Lord Strichen's Report*, 5 (Erskine). This anticipates modern economic analysis based on transaction and information costs, for which see, eg, Fox, *Property Rights in Money*, paras 2.11–2.20.

⁹⁰ *Ibid*, 6 (Erskine).

⁹¹ *Ibid*, 9. One difficulty with this argument, as counsel for the Banks noted, is the probable (and certainly practical) absence of a warranty of title in the case of banknotes: see *Ibid*, 6 (Erskine), 10 (Wedderburn).

⁹² *Ibid*, 11 (Wedderburn).

added the latter, that ‘there could be no such thing as a public bank’.⁹³ To Scottish judges in 1749 such an outcome seemed both credible and unthinkable.⁹⁴

There was also another reason why the Court might have been inclined to decide for the Banks or at any rate be receptive to their plight.⁹⁵ The advocates engaged for the Bank of Scotland (Peter Wedderburn and Robert Pringle) were, as already mentioned, directors of that Bank.⁹⁶ But so also were two members of the Court, Lords Murkle and Shewalton, the former having been present, with the two advocates, at the crucial directors’ meeting on 5 January 1749 when the case was extensively discussed and a decision made to open negotiations with the Royal Bank.⁹⁷ And while it was no longer true, as had at one time been the case, that half the directors of the Royal Bank were Court of Session judges,⁹⁸ one member of the current Court, Lord Milton, had been among the Bank’s founders and remained Deputy Governor⁹⁹ while two of his colleagues, Lord Monzie and the Lord Justice-Clerk, Lord Tinwald, were also directors.¹⁰⁰ All are recorded as sitting as members of the Court on the day¹⁰¹ when the case was decided.¹⁰² Even by the standards of the narrow society, clustered round the Castle Rock, of mid-eighteenth century Edinburgh, this was a remarkable coincidence of interests.

III. DOCTRINAL DEVELOPMENT: IAVOLENUS, VOET, AND STAIR

1. Iavolenus and Voet

Little in the way of authority was cited in *Crawfurd v. The Royal Bank*. The omission, however, is easily explained. With one important exception, discussed below,¹⁰³ there was no relevant Scottish authority, whether in relation to banknotes or to bills of exchange,¹⁰⁴ and

⁹³ Elchies, *Decisions*, vol II, 44; Kilkerran, *Decisions*, 480.

⁹⁴ The modern view is also that the rule is based on policy: see *M & I Instrument Engineers Ltd v. Varsada*, 1991 SLT 106 at 109 (‘It appears that where it has been held that money has not been subject to vindication following receipt bona fide by a third party the justification is that to hold otherwise would be an impediment to commerce’).

⁹⁵ See also Saville, *Bank of Scotland*, 104 for an assessment of the effect of the close connections between the Court of Session and Bank of Scotland on an earlier litigation.

⁹⁶ See II.3 above.

⁹⁷ Directors were appointed on a year-by-year basis. For a list of the directors appointed for 1748/9, see *BoS Minutes*, 25 March 1748. The two advocates were ordinary directors and the two judges extraordinary directors.

⁹⁸ Checkland, *Scottish Banking*, 62.

⁹⁹ See M. Fry, ‘Fletcher, Andrew, Lord Milton (1691/2–1766)’, *Oxford Dictionary of National Biography*.

¹⁰⁰ I am indebted to Sophia Volker of The Royal Bank of Scotland Group Archives for providing me with a list of directors. Both judges were extraordinary directors.

¹⁰¹ Friday 24 February 1749.

¹⁰² *Books of Sederunt* (National Records of Scotland, CS1/13), entry for 24 February 1749. A list of judges of the Court of Session in 1749 was given at n 50 above, and all were recorded as sitting on 24 February other than the Earl of Leven and the two Extraordinary Lords (Duke of Argyll and the Marquis of Tweeddale). The *Minute Book* mentioned in n 59 discloses that there was other Inner House business on that day and in theory it is possible that those judges who were directors recused themselves in respect of the *Crawfurd* case, or that *Crawfurd* was able to decline their jurisdiction. But there is no evidence to support this, and the rule seems to have been that the directorship of a public company was no ground for declination: see *Blair v. Sampson* 26 January 1814 FC (reported, out of sequence, at p 501 of the volume for 1814–15).

¹⁰³ Stair, *Institutions*, 2.1.34, discussed at III.2 below.

¹⁰⁴ The first work on the law of bills of exchange long pre-dated the litigation in *Crawfurd*. This was *A Methodical Treatise concerning Bills of Exchange* (1703, 2nd edn 1718) by William Forbes. But, unlike the position in England (see *Anon* (1699) 3 Salk 71, 91 ER 618), *bona fide* acquirers received no protection, thus allowing Home to argue (*Lord Strichen’s Report*, 8) that banknotes should be treated likewise. For an assessment of Forbes’ work, see James Steven Rogers, *The Early History of the Law of Bills and Notes* (1995), 160–3.

while the position in England was more promising,¹⁰⁵ this was not a period, or especially a topic, in which reference to English law was likely. In the absence of native authority the parties had recourse to Roman law, and to that indispensable stand-by of eighteenth-century pleaders in Scotland, the *Commentarius ad Pandectas* of Johannes Voet.¹⁰⁶

As Home was quick to point out, Roman law seemed firmly on the side of Crawford.¹⁰⁷ That much was plain from the opening of D. 46.3.78, a text of Iavolenus:

Should another's coins be paid, without the knowledge or volition of their owner, they remain the property of him to whom they belonged; should they have been mixed, it is written in the books of Gaius [Cassius Longinus] that should the blending be such that they cannot be identified, they become the property of the recipient so that their [former] owner acquires an action for theft against the man who gave them.¹⁰⁸

Admittedly, the text allowed for an exception where money had been mixed and could no longer be identified. The result was then ownership in the recipient by commixtion—a result, it may be noted, which was contrary both to the Scots law of commixtion (which creates common property)¹⁰⁹ and to the normal rule in Roman law (which, in cases of unintentional mixing, protected the original title and allowed *vindicatio pro parte*).¹¹⁰ But as Crawford's £20 note could be identified, by number and signature, there could be no question of the exception applying.

For the Bank of Scotland, Wedderburn countered with a passage from Voet¹¹¹ which built, not on Iavolenus' opening rule, but on the exception for mixing:

This power of vindicating stolen property from a third party possessing in good faith fails nevertheless when stolen money has been paid by a thief to a creditor of his who receives it in good faith, or has been counted out by way of price for a thing sold, and has been either used up or mixed with other money; for cash is regarded as used up by the latter process: D. 46.3.78; moreover cash of another which has been used up in good faith by a creditor can neither be vindicated nor claimed in a personal action.¹¹²

The underlying argument appears to be the following.¹¹³ (1) According to Iavolenus, stolen money cannot be vindicated when it has been mixed. (2) Mixing is a form of consumption.

¹⁰⁵ As David Fox has shown, protection for *bona fide* recipients of banknotes (or bills of exchange) was being developed for half a century or more prior to the landmark decision in *Miller v. Race* (1758) 1 Burr 452, 97 ER 398. See D. Fox, 'Bona fide purchase and the currency of money' (1996) 55 *Cambridge Law Journal* 547 esp 558 ff.

¹⁰⁶ (1698–1704). Thus Ramsay, *Scotland and Scotsmen*, vol I, 182, wrote of Home (Lord Kames): 'If, in his later years, he spoke with little reverence of the Dutch civilians, whose works were to be found in every lawyer's library, there can be little doubt that at his outset, and in his prime, he was exceedingly indebted to these heavy inelegant writers for hints which stood him in excellent stead.' On this occasion, however, it was not Home but his opponents who had recourse to Voet.

¹⁰⁷ *Lord Strichen's Report*, 8.

¹⁰⁸ [Si alieni nummi inscio vel inuito domino soluti sunt, manent eius cuius fuerunt: si mixti essent, ita ut discerni non possent, eius fieri qui accepit in libris Gaii scriptum est, ita ut actio domino eo, qui dedisset, furti competeret.] The English-language version quoted in the text is from the translation edited by Alan Watson (1985).

¹⁰⁹ See eg D. L. Carey Miller, with D. Irvine, *Corporeal Moveables in Scots Law* (2nd edn, 2005), paras 5.01 ff.

¹¹⁰ J. 2.1.28.

¹¹¹ Voet, *Commentarius ad Pandectas*, 6.1.8.

¹¹² [Fallit tamen haec rerum furtivarum a tertio bonae fidei possessore vindicandarum potestas, quoties pecunia furtiva per furem creditori ejus bona fide accipienti soluta, vel pro re vendita pretii vice numerata fuit, & vel consumpta vel alteri pecuniae mixta; cum ita consumpti videantur nummi. l. si alieni 78. ff de solution [D. 46.3.78]. consumpti autem bona fide per creditorem nummi alieni neque vindicari possint neque condici.] The translation is from P. Gane, *The Selective Voet: being the Commentary on the Pandects* (1955–58).

¹¹³ For the view that this had also been Roman law, see M. Kaser, *Roman Private Law* (transl R. Dannenbring, 1965), 112 and, much more fully, M. Kaser, 'Das Geld im römischen Sachenrecht' (1961) 29 *Tijdschrift voor Rechtsgeschiedenis* 169 at 193 ff. The issues are helpfully discussed in Ph. J. Thomas and A. Borraïne,

(3) Iavolenus' rule is about consumption and not (merely) about mixing. (4) Spending is a form of consumption. (4) Therefore when stolen money is spent it cannot be vindicated.¹¹⁴ The doctrinal key is step (2) in which mixing (*commixtio nummorum*) is classified as a type of consumption (*consumptio nummorum*), an idea which can be traced back at least as far as the Glossators. Once this is accepted—and Iavolenus' rule generalized to include all cases of consumption (step (3))—everything else falls neatly into place. It will be noticed that Voet drops the requirement that the money be unidentifiable; on the other hand, he requires good faith of the person carrying out the act of consumption.

Given the evident usefulness of Voet's text it may seem surprising that the Banks' counsel made so little use of it. Wedderburn mentions it only in passing, while Erskine, in developing his argument about consumption and acquisition, ignores it altogether, citing instead the immediately previous paragraph in respect of a different point.¹¹⁵ The explanation is probably that, from the Banks' perspective at least, Voet put good faith in the wrong place. Voet proposed a rule of *bona fide* consumption, the Banks one of *bona fide* acquisition. The difference was of considerable practical importance. If consumption had to be carried out in good faith, consumption by the thief did not count; and that in turn meant that the person acquiring from the thief in good faith could not acquire a good title without a fresh act of consumption. So if Bill stole Anne's money and used it to pay Carol, who took in good faith, Carol was initially in no better position than the thief, Bill. Unless or until she mixed the money with her own or spent it in turn, she remained vulnerable to a vindication by Anne.¹¹⁶ The first *bona fide* acquirer was thus not protected under Voet's system.¹¹⁷ There was also a second difficulty which, if anything, was more serious. If an acquirer's title depended, not on his own good faith but on the good faith of the person from whom he acquired—of the person who had consumed by spending¹¹⁸—then his title was secure only if he both knew who that person was and knew, and if necessary could prove, that that person was in good faith. This necessitated the type of inquiry into 'the whole History' of the banknote which the Banks were particularly anxious to avoid.¹¹⁹

'Ownership of Money and the *Actio Pauliana*' (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 678 at 680–1.

¹¹⁴ Voet does not go so far as to say that the recipient of the money becomes owner, possibly because the passage occurs in the context of defences to vindication. The doubt on the point has remained in modern South African law, despite the adoption in other respects (see *Woodhead Plant & Co v. Gunn* (1894) 11 SC 4) of a rule of *bona fide* acquisition. See C. G. van der Merwe, 'Things', in W. A. Joubert et al (eds), *The Law of South Africa*, First Reissue, vol 27 (2002) para 395; P. J. Badenhorst, J. M. Pienaar and H. Mostert, *Silberberg and Schoeman's The Law of Property* (5th edn, 2006), 260. For the view that ownership is acquired, see F. R. Malan, 'Share Certificates, Money and Negotiability' (1977) 94 *South African Law Journal* 245 at 249.

¹¹⁵ Voet, *Commentarius ad Pandectas*, 6.1.7, to the effect that a pledge received by a money-lender in good faith is valid even if the goods were not owned by the pledger: see *Lord Strichen's Report*, 5. This was used by Erskine to demonstrate how far 'Foreign Nations, and particularly the *Dutch*, carry the Favour of Commerce'.

¹¹⁶ This is because, according to Voet, a person must *both* receive in good faith *and also* mix or spend. A person who merely receives in good faith does not satisfy the dual requirement. See also, on this point, *Woodhead Plant & Co v Gunn* (1894) 11 SC 4 at 8.

¹¹⁷ A further oddity is that the primary beneficiary of Carol's good faith is not Carol herself but the person to whom she pays the money.

¹¹⁸ Or, if the money had changed hands more than once since the theft, of one at least of those who had spent the money.

¹¹⁹ *Lord Strichen's Report*, 5 (Erskine).

2. Iavolenus and Stair

Counsel would hardly have relied on Voet if a comparable discussion had been found by a Scottish writer. In fact, such a discussion existed, and in the most obvious of places. At the time that *Crawfurd* was pled, in 1749, the only comprehensive account of private law in print was Viscount Stair's *Institutions of the Law of Scotland*,¹²⁰ and Stair, like Voet several decades later,¹²¹ offered his own treatment of Iavolenus' text. It is surprising that none of the seven advocates instructed in the case should have uncovered the relevant passage. In their defence, however, it should be said that Stair's treatment occurs not, as might have been expected, in the context of restitution but rather in his account of original acquisition, where it appears at the end of a lengthy section which begins, unpromisingly, with the topic of accession of fruits. More significantly, the index entry for 'money' does not disclose the passage;¹²² if it had, the course of the litigation in *Crawfurd* might have been rather different.

The passage by Stair is as follows:

[I]n fungibles and all such things as are not discernible from others of that kind, possession is generally esteemed to constitute property, which is most evident in current money, which if it be not sealed, and during its remaining so, is otherwise undiscernible, it doth so far become the property of the possessor, that it passeth to all singular successors without any question of the knowledge, fraud, or other fault of the author; without which commerce could not be secured, if money, which is the common mean of it, did not pass currently without all question, whose it had been, or how it ceased to be his; *l. si alien. 78 ff. de solutionibus* [D. 46.3.78]; and though that law is in the case of commixtion of money with another's money, who was not owner of it, whereby it is esteemed as consumption of money commixed, yet that ground doth necessarily reach all money, as soon as it passeth to any singular successor by commerce, for thereby it is consumed in the same way.¹²³

Although more elaborate than Voet's, Stair's treatment is very much along the same lines, making the same connection between consumption by mixing (the subject of Iavolenus' text) and consumption by spending. Crucially, however, there is no requirement that the person spending be in good faith: on the contrary, the 'author' is envisaged as being quite possibly tainted by 'knowledge, fraud, or other fault'. Whether the person receiving the money must be ignorant of the sins of his author is less clear, although the reference to acquiring 'by commerce' can probably be read in this light. It is the spending, however, and not the recipient's corresponding acquisition, which is singled out as important, although Stair allows the spender a pre-existing right, arising simply from possession, to the extent needed to pass title to the recipient.¹²⁴ As compared with Voet, Stair's rule is an eminently practical one, allowing money to 'pass currently without all question'. That being so, it becomes easier to forgive the doctrinal sleight of hand by which—as with Erskine's argument for the Royal Bank in *Crawfurd*, considered above¹²⁵—a rule of *bona fide* acquisition is presented under cover of a rule of consumption by spending. Unlike with Erskine's later argument, however, the deception is at least justified by its linkage with a *Digest* text.

If Stair's text had been discovered in the *Crawfurd* case it would have saved the Banks' counsel a great deal of trouble. Yet in one respect the text would not have helped. For, like

¹²⁰ No new edition, however, had appeared since Stair's own second edition of 1693.

¹²¹ The passage quoted below appears in the first edition of the *Institutions* (12.34) which, though published in 1681, was largely written in the 1660s. See J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007), 68–73

¹²² Although it discloses three others. The index in question is for the second edition of 1693.

¹²³ Stair, *Institutions*, 2.1.34.

¹²⁴ The nature of this right is not explained. A possible model may have been *mutuum*, where the borrower becomes owner of money *before* spending it; but in Stair's theory the possessor's right was something less than ownership.

¹²⁵ At II.5.

Iavolenus (and unlike Voet), Stair requires that the money be ‘not discernible from others of that kind’; money which can be identified can be vindicated despite the good faith of the acquirer. If Stair’s passage had been found by the counsel in *Crawfurd*, and followed, it would have been *Crawfurd* and not the Royal Bank who would have been entitled to the £20 note. Stair, of course, was writing in the context of metallic money which was indistinguishable unless ‘sealed’, by which Stair seems to mean collected in bags or other sealed containers. It is unknowable whether he would have maintained his position following the introduction, some thirty years later, of (distinguishable) paper money.

IV. AFTERMATH

In his *Institute of the Laws of Scotland*, written shortly after the decision in *Crawfurd*, Andrew McDouall (more usually known by his later judicial title of Lord Bankton)¹²⁶ cited both *Crawfurd* and Voet and, aware of the tension between them, attempted a reconciliation by stating the rule given in *Crawfurd* (of *bona fide* acquisition) but adding, rather unhelpfully, that it applied ‘especially’ where the requirements for Voet’s rule (of *bona fide* consumption) were satisfied:

It is remarkable, that tho’ money given in payment had been stolen, yet the party who receives it, *bona fide*, for valuable consideration, is not liable to restore the same to the owner; especially if it had been consumed by the receiver, or mixed with his other money, so as it could not be known. The case is the same as to bank-notes; this is admitted for the benefit of commerce, which could not be supported without the absolute currency of money and bank-notes; and, as this is the law in other countries, so it is received with us.¹²⁷

If later writers in Scotland were aware of the difficulty they were prepared to overlook it, expressing the rule as one of straightforward *bona fide* acquisition.¹²⁸ By that time, however, the English courts too had adopted a rule of *bona fide* acquisition in *Miller v. Race*,¹²⁹ decided a decade after *Crawfurd* and, as one might expect, without any reference to it. Although the doctrinal route taken by Lord Mansfield in *Miller* was quite different from that in *Crawfurd*— a previously established rule of evidence (that money, having no earmark, is unidentifiable) being replaced by a substantive rule preventing recovery¹³⁰—the policy reasons were the same and, if anything, more prominent. Lord Mansfield knew and claimed to admire Bankton’s *Institute*¹³¹ and it may not be entirely fanciful to hear in his celebrated explanation that ‘the true reason’ that money cannot be followed is ‘upon the currency of it’ an echo of Bankton’s insistence (quoted above) on ‘the absolute currency of money’. By the end of the century *Crawfurd* and *Miller* were being cited side-by-side in Scotland as authorities for a single rule,¹³² and the last surviving difference between the jurisdictions— that in Scotland the recipient was presumed to have given value unless the contrary was

¹²⁶ McDouall was raised to the Bench in 1755.

¹²⁷ Andrew McDouall (Lord Bankton), *An Institute of the Laws of Scotland in Civil Rights* (1751), 1.24.14; compare 1.8.34.

¹²⁸ See eg Erskine, *Institute*, 3.5.6; W. Glen, *A Treatise on the Law of Bills of Exchange, Promissory Notes, and Letters of Credit in Scotland* (1807), 218; J. S. More, *Notes to Stair’s Institutions of the Law of Scotland*, vol I (1832), xlviii–xlix. See also *Swinton v. Beveridge* (1799) Mor 10,105; *Lambton v. Marshall* (1799) Mor App ‘Bills of Exchange’ No 8; *Scott and Company v. The Kilmarnock Banking Company* 27 February 1812 FC.

¹²⁹ (1758) 1 Burr 452, 97 ER 398.

¹³⁰ Fox, *Property Rights in Money*, para 8.18.

¹³¹ A. R. C. Simpson, ‘Learning, Honour and Patronage: The Career of Andrew McDouall, Lord Bankton 1746–60’, in H. L. MacQueen (ed), *Miscellany Six* (Stair Society vol 54, 2009) 121 at 138–9.

¹³² *Swinton v. Beveridge* (1799) Mor 10,105.

shown¹³³—was removed by statute in 1856.¹³⁴ With the passing of the Bills of Exchange Act in 1882 the cases, too, came to be superseded by a single statutory provision applying a rule of *bona fide* acquisition to the whole United Kingdom.¹³⁵

How then are we to assess *Crawfurd v. The Royal Bank*? Looked at from the twenty-first century, the result seems obvious and inevitable. It is unlikely that it seemed so to contemporaries. The alarm of the Banks was real, the legal issues difficult and strongly contested, and the concerns of the Court in relation to commerce palpable. The quarter-century after *Crawfurd* was to see an unprecedented expansion in paper money, with private banks competing with the two public banks, and notes issued in ever-smaller denominations.¹³⁶ Surveying the Scottish economy in *The Wealth of Nations* in 1776, Adam Smith found that ‘the business of the country is almost entirely carried on by means of paper’.¹³⁷ For this the law, and the lawyers, could take at least a small part of the credit.

¹³³ G. Ross, *Leading Cases in the Commercial Law of England and Scotland*, vol 1 (1853), 205, 229. Both *Miller v. Race* and *Crawfurd v. The Royal Bank* are given in full.

¹³⁴ Mercantile Law Amendment (Scotland) Act 1856 (19 & 20 Vict c 60), s 15.

¹³⁵ Bills of Exchange Act 1882 (45 & 46 Vict c 61), s 38(2), applied to promissory notes by s 89(1). ‘Holder in due course’ is defined in s 29.

¹³⁶ Checkland, *Scottish Banking*, 104–06.

¹³⁷ Smith, *Wealth of Nations*, 189-90.