

BANK.

1728. July 11.

ROYAL BANK *against* BANK of SCOTLAND.

No 1.

IN a case betwixt the two banks, it was found, that neither horning, inhibition, nor arrestment, were competent against the Bank of Scotland, upon their notes or tickets, the diligence being done *in emulationem*.

Fol. Dic. v. 1. p. 65.

1749. February 24.

Competition HEW CRAWFURD, Clerk to the Signet, with The ROYAL BANK.

No 2.

HEW CRAWFURD clerk to the signet, wanting to transmit L. 20 Sterling to William Lang, merchant in Glasgow, inclosed in a letter an Old Bank note for that sum, which was sent by post; and, for security, Mr Crawford not only took a note of the number, but also wrote his name upon the back thereof. This letter being lost by some accident, an advertisement was forthwith put in the newspapers, that the note was amissing, describing the sum, number, and all other particulars. The note at last appeared in the hands of the New Bank, and Mr Crawford raise a multiplepinding in the name of the Old Bank.—The New Bank admitting, that the note might have been stolen, *insisted* that they were *bona fide* purchasers; and that such is the nature of money and of bank-notes, which serve the purpose of money, that a *bona fide* purchaser, or possessor, is not subjected to a *rei vindicatio*, because such a claim would be an impediment to commerce.

Bank-notes,
like money,
are not liable
to *vitium*
reale.

Answered for Mr Crawford, Bank-notes have no privilege by the law of Scotland above bills of exchange, other than that they are taken payable to the bearer, which makes them pass from hand to hand without the necessity of indorstation; but which, at the same time, gives them no other privilege than what belongs to every sort of moveable. The bare possession of a bank-note, without consent of the proprietor, will no more transfer the property, than the bare possession of a table or of a chair. Possession, indeed, presumes the consent of the former proprietor: But then this, like other presumptions, must yield to positive proof; and therefore, if the person who vindicates, proves his property, *et quomodo desit possidere*, so as to take off the presumption arising from possession, he must prevail. And the present case is precisely similar to that of a blank bond, while that deed was in fashion: Possession of a blank bond presumed property; but no mortal ever doubted that the true creditor had access to vindicate the same, if he could prove *quomodo desit possidere*. Nay further, even current coin has not this privilege: It is true, if a guinea be stolen, the proprietor cannot vindicate the same, unless he be able to prove his property, *et quomodo*

No 2. *desiit possidere*, which can seldom happen ; but here *non deficit jus, sed probatio*. And this matter cannot be better explained than in the words of *Javolenus, l. 78. Solution**: ‘ Si alieni nummi infcio vel invito domino soluti sunt, manent ejus cujus fuerunt. Si mixti essent, ita ut discerni non possent, ejus fieri qui accepit, in libris *Gaii* scriptum est : ita ut actio domino, cum eo qui dedisset, furti com- peteret.’

Replied, If money or bank-notes were, like other moveables, subject to a *rei vindicatio*, the commerce of money or bank-notes would be more dangerous than of other moveables : If a man purchase a horse or a flock of sheep, he has the warrantice of the vender to rely on : But money or bank-notes cannot be traced ; for a man may have plenty of both without being able to say from what hand any one guinea or bank-note came. For this reason, as money and bank-notes are the great vehicles of commerce, it is universally received in practice, that the circulation of money and of bank-notes should be absolutely free, by denying a *rei vindicatio*. So far strict law yields to the favour of commerce ; nor is it attended with great hardship to any person, considering how much easier it is to preserve money and bank-notes from theft, than almost any other sort of moveables.

‘ The Judges were unanimous in two points : That money is not subject to any *vitium reale* ; and that it cannot be vindicated from the *bona fide* possessor, however clear the proof the theft may be. *2do*, That bank-notes serving the purposes of money must be intitled to the same privileges. And therefore that Mr Crawford had no claim to the note in question.

Fol. Dic. v. 3. p. 47. Rem. Dec. v. 2. No 105. p. 200.

* * * D. Falconer reports the same case thus :

A MULTIPLEPOINDING was raised in the name of the Bank of Scotland, by Hew Crawford, clerk to the signet, for determining the property of a note of theirs for L. 20 Sterling, alleged to have been by him inclosed in a post letter, indorsed to William Lang, merchant in Glasgow, to whose hand it never came ; whereupon he had several times advertised the number and marks thereof in the newspapers ; and which was also claimed by the Royal Bank, as possessors of it, for value.

N. B. The marks advertised appeared to have been delete ; but the bank pleaded the general point, without laying stress upon this.

Pleaded for the Royal Bank ; Money is not subject to vindication. By the principles of the Roman law it is not considered as a species, but a quantity, as supposed to be extinguished by use ; and all trading nations have so far followed the Roman law, as not to allow vindication of money stolen, and *bona fide* received by third parties. And the banks being erected by public authority, for circulating notes payable to the bearer, these notes ought to be considered as money ; or considering them as blank obligations, such are not subject to vindication, *Voet, tit. de rei vindicatione*.

* Lib 46. tit. 3. Digest.

Pleaded for Mr Crawford, The note was *res furtiva* which hindered the transmission thereof; and even money when stolen may be vindicated, if it can be discovered, *l. 78. ff. de solutionibus.*

No 2.

Replied, If it were relevant, there is no sufficient evidence that the note was *res furtiva.*

THE LORDS found, That Mr Crawford had no claim to the note, and preferred the Royal Bank.

Adv. R. Craigie, H. Home, Lockhart & R. Dundas. *Adv. Wedderburn, R. Pringle & J. Erskine.*

D. Falconer, v. 2. No 64. p. 67.

1768. February. BORLAND against THISTLE BANK of Glasgow.

No 3.

A BANKING company is not obliged to pay value for forgeries committed against them; and they are entitled, when a forged note is presented, to stop its farther circulation by putting a mark upon it, certifying that it is a forgery.

Fol. Dic. v. 3. p. 47. Tail's MS.

1794. January 16. JOHN M'GILCHRIST against THOMAS ARTHUR.

JAMES FIFE granted to Archibald Macauland the following order:

' Port-Glasgow, 23d February 1793.

' Pay the bearer on demand, or his order, One hundred pounds Sterling, and debit my account with the branch of the Bank of Scotland, Greenock.

' To Messrs Wilson and Arthur their agents.'

This order, Fife afterwards alleged, was granted without value, and on promise of repayment on or before the 26th February 1793.

Macauland stoppt payment on the 5th March following. On the 12th of that month, Fife received a charge of horning upon this draught, at the instance of John Macgilchrist, who had got it as a payment from Macauland on the 24th of February, but had not presented it at the Bank till the 5th of March, when Fife having by that time withdrawn his money out of their hands, payment was refused, and a protest immediately taken.

Fife raised a suspension of this charge, which, upon his bankruptcy, was conducted by Thomas Arthur, the trustee for his creditors. The competency of a summary charge upon such a note having been disputed, the Lord Ordinary turned the charge into a libel, and found the defender liable in the sum contained in the draught, with interest.

In a reclaiming petition, Arthur contended, That if Macauland had immediately, upon receiving the draught, carried it to the Bank, as he ought to have

No 4.

When a person grants a draught on his banker, payable to the bearer, or his order, on demand, he cannot, in a question with an onerous holder of it, plead compensation upon a debt due to him by the person to whom the draught was originally delivered.