1729.

ROYAL BANK *v.* BANK OF SCOTLAND.

The GOVERNOR & Co. of the Royal Bank of Scotland, and ANDREW COCHRANE, Merchant in Glasgow, } *Appellants;*

The GOVERNOR & Co. of the Bank of Scotland, - - - - - - } *Respondents.*

9th May, 1729.

BANK.—LEGAL DILIGENCE.—In a case betwixt the two banks, it was found by the Court of Session that neither horning, inhibition, nor arrestment, were competent against the bank of Scotland, upon their notes or tickets, the diligence being done *in emulationem.*

This judgment was reversed.

[Fol. Dict. I. 65. Mor. Dict. p. 875.]

No. 5.
1695.

THE Bank of Scotland was incorporated by act of parliament, a clause of which provides "that summary execution by horning shall proceed upon "bills or tickets drawn upon or granted by, or to "or in favours of the said bank, and the managers "and administrators thereof for the time, and protests thereon, in the same manner as is appointed "to pass upon protests of foreign bills, by the 20th "act of parliament 1681; and that no suspension "pass of any charge for sums lent by the said "bank, or to the same, but only upon discharge "or consignation of the sum charged for."

The bank being obliged to make a temporary stoppage of payment, the appellant Cochrane, who held their notes to the amount of L.900, obtained

cash for them from the Royal Bank, and thereafter (in trust for the Royal Bank) applied for letters of horning against the Bank of Scotland. After various proceedings the court refused to grant warrant. June 25, 1728.

The Royal Bank then raised an action against the Bank of Scotland for L.10,255 due upon their notes, with interest and expenses, and upon the dependance of this action applied for letters of inhibition and arrestment. It appears that the Bank of Scotland produced their books, in order to show that they had funds more than sufficient to answer all demands upon them. The case being reported July 11, 26, 1728. by the Lord Ordinary, the lords refused to pass the bill; and upon an application of the Bank of Scotland, they directed the clerks not to write upon any such bill which might be presented, until the Bank had an opportunity of seeing the same at least twenty-four hours before writing upon it.

The principal sums due were subsequently paid, but received under protest that the expenses incurred should likewise be paid; and conceiving that the proceedings of the Court, in refusing the diligence, had the effect of establishing a privilege in favour of the Bank of Scotland, the Royal Bank presented a petition complaining thereof, which, February 25, 1729. with another afterwards given in, was superseded till the first day of June then next.

The appeal was brought from the interlocutors of Entered March 11, 1729. the 2d, 4th, and 9th of April; 25th and 28th June; 11th and 26th July, 1728; and the 25th and 27th Feb. 1729.

1729.

ROYAL BANK
v.
BANK OF
SCOTLAND.

***Pleaded for the Appellants*:**—1. When the respondents were made a corporation, the legislature, in order to give their notes and bills the greater credit, and to enable them to recover more easily money due to them, thought proper that they should both sue and be sued summarily; and therefore the act enables the Bank to sue summarily, and gives the same remedy to their creditors which the Bank has against their debtors. As the respondents have on all occasions exercised that privilege against their debtors, it would be most inconsistent to deny the same privilege of summary execution against them, and expressly contrary to the words of the Act.

2. It is settled law, that every creditor may, by action, demand payment of the money due to him, and, pending such suit, may inhibit and arrest, and upon the arrestment may, by proper process, make the sums arrested liable to satisfy his demand; and the creditor has the same right to demand from the Court the proper process for recovering his debt, as he has to demand payment from the debtor; for his right of debt would be useless, if the remedy given him by law for recovering that debt were denied, or rendered ineffectual. There is no instance of an arrestment or inhibition being refused under similar circumstances.

The production of their books and accounts did not at all supersede the necessity or expediency of using diligence; as whatever their funds might then be, there was no security that they might not be alienated, or fresh obligations contracted in the mean time. Whatever the circumstances of the

debtor may be, that will not answer the creditor's claim for ready money; and as the law has pointed out a method for recovering his debt, he has a right to avail himself of that proper process; and nothing less than a power to dispense with the laws, can prevent him from the exercise of the legal privilege of suing for his debts. This would be in the nature of granting protections for civil debts, which the Claim of Rights declares "to be directly contrary to the known law, statutes, and freedoms of the realme."

3. It was still more unreasonable for the Court, not only to refuse granting the usual diligences, but to establish in some measure a standing privilege in favour of the respondents, that the diligences and processes, which in all other cases pass of course, should be in their case only stopt from being issued, till they have an opportunity of being apprised thereof, and thereby prevent the issuing of the same.

Pleaded for the Respondents:—1. By the act of king Charles II. (referred to in the clause of the bank act quoted above,) summary horning may pass *only* upon bills of exchange that are protested and registered within six months after the date in case of non-acceptance, or after the falling due thereof in case of non-payment. But the respondents' notes, upon which the appellants demanded that process, bore date, and were due several years before they were protested and registered; so that if they were ever intended by the bank act to be subject to such process, the appellants were out of time to demand it upon these notes. 1681, c. 20.

1729.

ROYAL BANK
v.
BANK OF
SCOTLAND.

By the law and practice of Scotland, a summary horning never was or could be issued upon any bill or contract, but at the risk of the person expressly named therein, or in the endorsement or assignment thereof; therefore if such process could be supposed to have been intended by the bank act to pass upon the respondents' cash notes, payable to A. B. or bearer, it could only be obtained at the instance of A. B. or the person to whom A. B. had specially assigned the same.

But the respondents insist, that their current notes for cash, not lent to them, but deposited with them as a bank for circulation of credit, were not intended by the act of Parliament to be made subject to immediate execution, which would be inconsistent with the nature of a bank. Besides, it was never known to be the practice to protest promissory or cash notes.

2. There is no statute appointing the processes of arrestment and inhibition to pass of course at the suit of any creditor; but they have been introduced by custom and the practice of the Court of Session, and are very often refused when the Court sees cause, especially when it appears that they are demanded, not in reality for security of money due, but for envy or emulation against the debtor; which appeared to be the nature of the appellants' demand, they having industriously possessed themselves of the respondents' notes, in order to make them stop payment, and then distress them with all manner of legal process.

3. As to the order to the clerk of the bills, the appellants are not parties thereto, nor do they pre-

tend in their petitions for recalling it, or in their appeal, that they had applied for any process against the respondents, which was stayed by that order. Besides, the Court has not refused to recall that order, but only deferred the consideration thereof till the next term, which is frequently done at the latter end of a term. There is, therefore, no foundation for an appeal on this head.

It is most equitable that every party should be heard who has any thing to say in his defence, before warrant for diligence be issued against him; and no doubt the Court would have made the same order for any other persons in the same circumstances, and upon the same reasons as appeared in the case of the respondents.

After hearing counsel, "it is ordered and ad- Judgment May 9, 1729.
"judged, &c. that the several interlocutory sen-
"tences complained of be and are hereby reversed;
"and it is hereby further ordered, That the appel-
"lants be at liberty to apply to the said Lords of
"Session, to cause their costs and expenses in the
"proceedings above mentioned to be taxed ac-
"cording to the course of their Court.

For Appellants, *P. Yorke, Dun. Forbes, C. Talbot*, and *Will. Hamilton.*
For Respondents, *J. Willes* and *Will. Grant.*

This reversal is not noticed in the reports of the case.