

SANCTUARY.

1714. December 15.

GILBERT M'KAY, one of the Depute-Clerks of the Bills, *against* CAMPBELL of Burnbank, Store-master to the Castle of Edinburgh, and COLONEL STEUART, Deputy-Governor thereof.

BURNBANK being under caption at the instance of Gilbert M'Kay, a messenger apprehends him in Edinburgh Castle; but the governor having ordered the gates to be shut till the prisoner should be dismissed, the execution of the letters was stopped. Whereupon M'Kay gives in a complaint to the Lords; which having occasioned answers, the case under debate was, Whether the Castle of Edinburgh was a sanctuary, and had *jus asyli*?

And it was alleged, for the governor and his Majesty's advocate, That it was a sanctuary, as well as the Abbay, because of the statute of King William, Cap. 4, 5, where it is said, "That he who unjustly withdraws himself from the attachment, the officer shall raise the King's horn upon him for that deforcement, until the King's castle;" whereby such diligence is bounded, "until the King's house." And Cap. 5: "If any man strike or beat another within sanotuary, he shall pay a fine to the King:" therefore the King's house is a sanctuary, otherwise the fine should have been paid, to the church. And this conform also to the civil law, where the Emperors' palaces are called "*Aedes nobis consecratae*:" And to the law of nations, all princes' palaces in Europe, nay, ambassadors' houses, being so privileged. *2do*, This was never disputed; and *magna auctoritatis habetur, quod in tantum-probatum est ut non fuerit necesse scripto id comprehendere*, this being the greatest evidence of the *consensus utentium*; nor is there any other authority for the common law of England, and customary laws of France. *3tio*, As sanctuaries were not rejected by the Mosaical law, so the objections of late raised against them do cease in the present case, viz. the insolencies with which the Romish clergy supported the privileges of these places, and their making them sanctuaries for criminals. But sanctuaries for private debts, such as the precincts of Whitehall, the Savoy, the Mint, &c. have still been reckoned *inter levamina inopum debitorum*.

Answered for the complainen, to the first, That by the act 173. Parl. 13. Ja. VI. those statutes of King William are expressly restricted to the King's palaces where

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No. 1. he actually had his residence for the time. And as the civil law, the very law here insisted on, says, that “*incluta palatia ab omni privatorum usu et communi habitatione excipimus*. Nor by that law were the persons of such as were in the prince’s service, or inhabited his patrimony, exempted from diligence, as is expressly declared in *L. 2. C. De Conduct. Dom. August. ut pari Disceptationis eventu in omnibus Causis Legibus serviant*. Neither is there any such privilege mentioned to the princes’ palaces in all the titles, *De his qui Confug. ad Eccl.* and *De his qui Confug. ad Stat. Princ.* And Osiander, Jacob. Gotofred. and others, who have writ expressly *De asylis*, take no notice of any *jus asyli* belonging to them. And as to ambassadors’ houses, if any country indulge it to them, it depends entirely upon the good-will of the prince with whom they reside; but is nowise founded on the law of nature or nations; as says Grot. *De jure Belli et Pac. L. 2. Cap. 18. No. 2.* And it was strictly refused to the French ambassador by Pope Innocent II. because he could give no reason for it. And this also proves, that it cannot be here without an act of Parliament, or the like. To the *second*, answered, That custom cannot be obtruded as law, merely *ex opinione vulgi*, unless it had been the opinion of lawyers, or the Lords had so decided. Nay, as to the former of these, Sir George Mackenzie, in his Observations upon act 35. Parl. 5. Ja. III. says expressly the contrary. So that though no caption had ever been executed there, yet this can never give privilege by prescription, unless, by contrary acts, they had asserted their privilege all the years of a legal prescription. To the *third*, That there is no proof offered that any such privilege belongs to the abovementioned places in and about London; and though it were so, yet they may have it either by express concession, or clear prescription; and then their authority can have no weight in the present case.

It was further alleged for the complainer, That the Castle being now converted to another use, and become a garrison, that relative sanctity (if ever any there was) can now take no place; and though some of our Kings have resided there, yet it seems to have been principally designed for a fort, rather than a palace. *2do*, That no argument can be drawn from the palace of Holyrood-house, since its being a sanctuary is only the remains of the privileges belonging to religious houses; which privileges are continued to such places even in reformed countries beyond seas; as appears from Simon Van Lewen in his *Censur. For. Par. 2. Lib. 1. Cap. 1.* *3tio*, If these reasons prevail, the like may be said of Falkland, Linlithgow, &c.

Answered for the Lord Advocate, to the *first*, That when any place is vested with a privilege, it continues in that case till it be disfranchised. And therefore the Castle’s becoming a fort will not disfranchise it, since it does not cease to be the King’s house, nor come into any private use. To the *second*, it was answered, That the pretence is precarious; and even these religious places abroad derived their privileges from grants of the respective princes, which was only to communicate to them the privileges of the princes’ own palaces. Nay, the Castle of Edinburgh, having anciently been *castrum puellarum*, it was originally a religious

house, as well as the Abbay. To the *third*, it was answered, *1mo*, There has been no common or settled belief that these above-named palaces were sanctuaries; *2do*, They are not constabularies nor garrisons; *3tio*, They are now private dwellings.

“ The Lords found, The Castle of Edinburgh hath no privilege of sanctuary to hinder the execution of the King’s letters.”

It was separately alleged for Colonel Steuart, *1mo*, That the Castle, as being a constabulary and fort, has its constables, governors, deputies, &c. who cannot, without betraying trust, admit persons within the garrison to be carried off; specially such as, by the nature of their trust, must necessarily reside upon the place. Since, at that rate, the whole garrison might possibly be carried off by captions. *2do*, These being military trusts, they cannot be directed in shutting or opening of their gates, but in the military way.

Answered for the complainer, to the *first*, That as the store-master can claim no greater privilege than any soldier within the garrison, so why any of them should be more privileged than any other troops under his Majesty’s pay, can scarce be accounted for. And the argument drawn from the inconveniencies is of no force, unless we suppose his Majesty is not to be served but by dyvours and bankrupts. To the *second*, answered, That a sentence prohibiting the governor to hinder the laws to take place, is not contrary to the trust reposed in him; and undoubtedly the authority of our sovereign Courts reaches as well within garrisons as elsewhere. And it is plainly for the credit and honour of the Government, that such people be expelled, when there is no difficulty of having their places supplied, and that it is possible to find another in every respect as fit for the charge.

“ The Lords assoilzied Colonel Steuart from the complaint; yet ordained him to deliver Burnbank to a messenger, having the caption, and demanding him, in case only of the said Burnbank his returning to the Castle, and his being there the time of demanding.

Act. Charles Erskine.

Alt. Lord Advocate.

Clerk, Mackenzie.

Fol. Dic. v. 2. p. 361. Bruce, v. 1. No. 19. § 20. p. 25.

See ABBAY of HOLYROOD-HOUSE.

See MEDITATIONE FUGÆ.

See PRISONER.

See APPENDIX.