

THE LORDS were generally of opinion, it was not necessary to bring a man under the qualifications of the act, that he should be marked in the clerk's book.

No 6.

They found it proven, that James Somervell was notour bankrupt. (See BANKRUPT.)

Reporter, Lord Murkle

Act. H. Homr.

Alt. Lockhart.

Clerk, Justice.

Fol. Dic. v. 4. p. 260. D. Falconer, vol. 2. p. 292.

1779. January 13.

JOHN GRANT, against ROBERT DONALDSON.

JOHN GRANT, writer in Edinburgh, retired to the Abbey of Holyroodhouse, on 21st April 1778, for protection from personal diligence, raised against him at the instance of Robert Donaldson, writer to the signet. Having neglected to enter his name in the Abbey-books, he was apprehended within the sanctuary 7th May thereafter, on Mr Donaldson's caption, and carried instantly to jail, but liberated that day, upon making consignation of the money for which the charge had been given. Mr Grant, after his liberation, presented a complaint to the Court of Session, against Mr Donaldson, and the messenger who executed the caption, praying the Court to find, that their proceedings were illegal and oppressive; to inflict censure on them; and to give the complainer a suitable reparation for the injury.

*Pleaded in defence:* At the time this caption was executed, the complainer was not entitled to be protected against diligence, though within the precincts of the sanctuary, as he had not entered his name in the Abbey-books.—The place itself is, by the custom of the Abbey, a protection for 24 hours to the person retiring within its precincts, that he may have sufficient time to get himself booked; but, in order to continue any longer under the protection of the sanctuary, booking is as necessary as being locally within the bounds of it.

This is established by immemorial usage; and it likewise appears from the regulations of the place. The acts of the bailie-court of the Abbey, in 1686 and 1697, discharge the inhabitants from receiving any person into their houses, until they cause an entry of their names and designations to be made in a book kept by the bailie, under pain of being subjected to certain fines. In 1733, there was an act of the bailie-court, declaring, that the not booking should be a forfeiture of the privilege. This act, with other records of the court for that year, is now lost. But, in the case of Hamilton of Redhouse, 1741, *No 4. B. 1.* it was founded on by both parties as a regulation then subsisting.

The constant usage has been, that all persons retiring to the Abbey for protection, have entered themselves in the books. Seven hundred and sixteen persons have been booked since 1741. In the above case of Hamilton of Redhouse, 12th June 1741, the court expressly found, that booking was a necessary requisite to the privilege of the sanctuary.

*Answered for the complainer:* The privilege of sanctuary within the bounds of

No 7.

It is necessary for a messenger, executing a caption within the precincts of the Abbey, to have the concurrence of the bailie.

In order to have the benefit of the sanctuary, beyond 24 hours, the party's name must be entered in the Abbey-books.

No 7.

the Abbey, which anciently, in this country, extended to felons, still subsists as a protection against personal diligence on civil debt. To this extent the privilege continues annexed to the place; and nothing less than an act of the legislature could authorise the execution of personal diligence within the precincts of the sanctuary.

The bailie of the Abbey has jurisdiction to regulate its internal police; and, on that account, may have powers to make regulations for the purpose of obliging those who live within the precincts to enter their names in his book, and pay his fee, under the penalty of a small fine. The acts of the bailie-court, 1686 and 1697, are of this kind. But a regulation, denying the privilege of the sanctuary itself, as a penalty for not being entered in his books, is certainly beyond his powers. The regulation 1733, therefore, was unwarrantable. It has never been renewed; which shows that the bailies themselves have considered it as illegal.

The usage does not aid the defender's doctrine. The number of persons booked proves only that the bailies have been attentive to exact their fees, and enforce the regulations against the inhabitants. But no instance can be produced, where the diligence has been executed within the Abbey, against persons not booked, except in the case of Hamilton.

Even where the law does not allow the sanctuary to be a protection, no person can be taken out of it without the knowledge and concurrence of the bailie. This is expressly established by the regulation of the Abbey-court, 1757, which bears, 'That, conform to ancient custom, as well as late practice, the constables of the Abbey oppose every officer of the law from taking any person out of the Abbey, for debt, or even for bailable crimes, without a signed order from the bailie.' Some exceptions are mentioned in this act, within which the present case does not fall. The complainer was taken out of the sanctuary without any order or concurrence of the bailie; and, in this respect, his case differs materially from that of Hamilton, in which the judgment expressly mentions that the bailie concurred. The judgment of the Court was,

'Find that, when a messenger executes a caption within the precincts of the Abbey of Holyroodhouse, it is necessary to have the previous concurrence of the bailie of the Abbey to that effect. Further, Find that, in order to entitle a person to the benefit of the sanctuary, it is necessary to be booked in the Abbey-books. And, upon the whole circumstances of this case, and the former practice, find that the respondent, in executing the caption against the complainer, acted *bona fide*; therefore dismiss the complaint;' &c.

Lord Ordinary, *Kennet*.A&C. *Honyman*.Alt. *Elphinston*.Clerk, *Tait*.

*Fol. Dic. v. 4. p. 260. Fac. Col. No 55. p. 98.*