THE ENGLISH LAW OF SANCTUARY

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Although the protection of churches and holy places was embodied from an early date in Canon law,[1] the law of sanctuary as it applied in England was necessarily part of the secular common law. The Church never had the physical power to resist the secular authorities in the administration of justice, and although those who violated sanctuary were liable to excommunication[2] the Church could not in cases of conflict prevent the removal from sanctuary of someone to whom the privilege was not allowed by the law of the land. The control of the common law judges was, indeed, tighter than in the case of benefit of clergy. The question whether an accused person was or was not a clerk in Holy Orders was ultimately a question for the ordinary, however much pressure might be put upon him by the judges; but the question of sanctuary or no sanctuary was always a question for the royal courts to decide, upon the application of a person who claimed to have been wrongly arrested in a privileged place. The present summary is confined to the position under English law.[3]

As a matter of historical fact, sanctuary or asylum was older than the common law, having been recognised in Anglo-Saxon times. There is no need, therefore, to dwell upon its legal origins: it was always a part of the common law. It is frequently mentioned in legal records,[4] though there are few legal discussions in the earlier law reports. Since sanctuary was not a personal privilege, but a privilege attaching to a sanctified place, it was in theory available to Jews and infidels as well as Christians;[5] but it was not available to the clergy, who (under the provisions of the *Articuli Cleri*) were to be handed over to the ecclesiastical authorities. There was another important contrast with benefit of clergy in that there were no restrictions in respect of the offence alleged:[6] sanctuary was available at one extreme for felons and even traitors, while at the other extreme it was available for minor malefactors and debtors. The privilege was accepted without question by the secular courts, in cases where the claim was made out; if a person could prove that he had been improperly taken from sanctuary, he was invariably restored; and if the facts were in dispute, they were tried by jury. Even an enemy like Perkin Warbeck could not be molested while under the protection of a church.

The law recognised two kinds of sanctuary, which may conveniently be termed 'general' and 'special'. The general privilege belonged to all churches, as

1. The first text on the subject in Gratian is from the Council of Orange (A.D. 441): D.87, c.6.
2. The constitutions of Ottobuono's legatine Council of London (1268) imposed automatic excommunication on violators of sanctuary: F.M. Powicke & C.R. Cheney, *Councils & Synods . . . 1204-1313* (1964), II, 763.
3. For an introduction to the vast literature on *asylum* in Canon law and early legal systems, see Misserey, 'Asile en Occident', cols. 1103-1104; Riggs, *Criminal Asylum in Anglo-Saxon Law*, 21 n.53.
4. Usually in the form of a plea to be restored, but questions could arise indirectly: e.g., *Thorp* v *Lyster* (1386), 100 Selden Soc. 67, no. 6.2, where the defendant cleric in an action for battery pleaded that he was resisting a bailiff trying to take a suspect from his church.
5. This was the teaching of the canonists, and of the 15th-century readers in the Inns of Court, but no case is known. The readers disagreed over heretics, whom the Canon law apparently excluded (Misserey, 'Asile en Occident', col. 1097).
6. The Canon law allowed a few exceptions, such as highway robbery (*Extra* 49, c.6: a decretal of Innocent III), but these were apparently not recognised at common law.

a matter of law, and therefore required no legal proof; but any more extensive privilege had to be supported by royal and papal grant or prescription (immemorial usage). Such special privileges were determined in the same manner as a secular franchise: that is, by investigating title to the liberty claimed. The variations of scope in grants of sanctuary demonstrated that these were not questions about immutable natural or divine law, but about specific rights, and so the question whether a particular church was entitled to a special liberty was no more a matter for the ecclesiastical courts to determine than the question whether it owned a piece of land or a right of way. The liberties of the Church were indeed all guaranteed by Magna Carta and its confirmations; but how far those liberties extended was a question for the king's courts.

GENERAL SANCTUARY, AND ABJURATION

The common law allowed a person to take sanctuary in any church[7] or consecrated cemetery, by placing himself physically within the sanctified place or (if there was no consecrated ground outside) by grasping the door handle or knocker. But this general privilege was subject to the important qualification, mentioned in Bracton (around the time of Henry III), that it lasted only for forty days. At the end of forty days, according to Bracton, the fugitive could not be forcibly removed but was to be starved out. Anyone who gave him food thereafter would be an accessory after the fact to his offence and could be indicted for 'receiving' him. This doctrine, which apparently departed from the Canon law, became the settled law of England.

The fugitive was faced with a choice at the end of the forty-day period of safety. He could surrender to the authorities and stand trial. He could make a run for it, and take a chance of reaching another church: in which case he would have another forty days. (He could alternatively, according to the inexorable but unattractive logic of the law, commit another felony and return to the same church.) Or he could, in case of felony,[8] abjure the realm.

Abjuration is thought to have been an English invention,[9] and it was recognised by the English Church in the thirteenth century to the extent that an abjured person came within the ecclesiastical protection of sanctuary.[10] If he elected to abjure, a felon in sanctuary called for a coroner to come and record his confession in the presence of witnesses. The coroner would then nominate a port from which he was to leave the country, and administer an oath to the felon to proceed to that port and thence by ship to depart the realm, never to return. The felon's property was seized, save for his shirt, breeches, and a coat or gown, he was given a wooden cross to serve as a passport, and he was sent on his way to the port, escorted by a series of constables. The procedure was widely used between the thirteenth and early sixteenth centuries, but it is highly doubtful whether it worked very well in reality. The handing over from one constable to another must often have broken down, and it can hardly be doubted that many criminals took the opportunity to run away from the prescribed route: there are precedents of ingenious pleas by some who were subsequently caught.[11] But the penalty for returning without royal licence, or for absconding en route, was judgment of

7. Including new foundations, so long as they had divine services. Arguably the church had to be in England, because otherwise the claim (if disputed) could not be tried.
8. Unlike sanctuary itself, abjuration was not available in cases of treason or misdemeanour.
9. See A. Réville. 'Abjuratio regni' (1892), 50 *Rev. Historique* 1-42.
10. This was enacted by a council at London in 1257, and by the Lambeth Council of 1261: Powicke & Cheney, *Councils and Synods*, I, 534, 679.
11. The law allowed a minimal departure from the road *ad deponendum pondus naturale*, but not to seek a bed for the night or to beg alms. It was held in 1440 that genuinely losing one's way was a defence, provided all reasonable steps were taken to regain it.

death without trial. This was because the offender had already confessed a felony, whereupon he was as effectively convicted as if he had pleaded Guilty in court, and he had broken the condition of his reprieve; the convict was, indeed, civilly dead from the moment of abjuration, and his 'widow' could remarry. In 1531, Parliament, concerned that able-bodied criminals might be enlisting in foreign armies and navies, abolished abjuration of the realm and introduced inland abjuration to English sanctuaries;[12] a policy which, as we shall see, did not stand for many years.

SPECIAL OR PRIVATE SANCTUARIES

Many religious foundations laid claim to additional rights of sanctuary which could be sweeping: they were usually supported by papal bulls, real or forged, and sometimes reinforced by suitable saintly legends. Such special privileges were usually unlimited in time, and sometimes extended beyond the precincts of the church or monastery. Beverley and Hexham, for instance, claimed a sanctuary extending for one league from the church door. In Salisbury, it was even claimed that felons could be saved from the gallows by sending 'St John's cart' with a banner for the felon to touch. Those religious houses which possessed sanctuary without limit of time entertained communities of resident 'grithmen' or 'sanctuarymen', none of whom - even confessed felons - had any need to abjure. The largest communities were probably those at Glastonbury and Beaulieu in the south, Westminster, Clerkenwell and St Martin's-le-Grand in London, and Beverley and Durham in the north. They were only subject to slight regulation, and although their members sometimes helped with daily chores it seems that little attempt was made to control or reform them. Since the sanctuary-men were not convicts, they could lawfully carry on trades while 'inside'; some simply used the church as a safe base for continuing criminal activities. It is little wonder that the system was a subject of constant complaint.[13] The wonder is rather that the Church took the system so much for granted that little or nothing was done by the ecclesiastical authorities to remedy the obvious abuses.

The common law, too, was powerless to overturn the system of sanctuary; but the judges did the best they could to check its scope by insisting on rigorous proof. A leading case in this regard occurred in 1486, when Humphrey Stafford (accused of treason) took sanctuary in Culham abbey, near Abingdon. The abbot supported the claim, producing a forged charter of King Coenwulf. The case was decided on a point of construction, but the judges expressed the view that a sanctuary could only be established by papal and royal grants made before the time of legal memory (1189), together with allowance in eyre: a very strict test indeed.[14] In 1495 an outlaw in an appeal of murder claimed to have been taken from sanctuary at Winkburn in Nottinghamshire, a Templar foundation which had passed to the Order of St John. Serjeant Kebell argued that asylum was a manifestation of the royal prerogative of mercy, first exercised by Romulus, and that it was allowed by the Old and New Testament.[15] No final judgment was given, but Hussey C. J. said that even prescription would not be allowed in the case of an appeal, since the king could not deprive the appellor of his remedy, and therefore only an act of parliament would suffice.[16] A third blow against sanctuaries

12. 22 Hen. VIII, c. 14.
13. See, e.g. the complaint about St Martin's-le-Grand in 1402: *Rotuli Parliamentorum*, III, 503-504, no. 70.
14. *Ex p. Stafford* (1486), Y.B. Trin. 1 Hen. VII, fo. 25, pl. 1; 64 Selden Soc. 115; Keil. 190; 94 Selden Soc. *341*; 102 Selden Soc. 32.
15. The reports contain no citations, and it is not obvious what New Testament passage he had in mind: unless it is the reference to *colonia* in Acts, 16.12.
16. *Rollesley* v *Toft* (1495), 102 Selden Soc. 31; Y.B. Hil. 9 Hen. VII, fo. 20, pl. 15; Caryll's MS. reports; record in KB 27/936, m. 60 (abstracted in Rastell's *Entrees*, fo. 584v).

came in 1513, when the ruling in Stafford's case was followed. Hugh Boswell, a deacon[17] convicted of stealing two silver chalices, two corporals and a velvet cope from Geddington church, Northamptonshire, claimed to have taken sanctuary in the Cluniac priory of St Andrew, Northampton, and to have been forcibly arrested in the great court there on the sheriff's orders. The claim was based on prescription, and on bulls of Innocent IV and Benedict XII, the last of which contained terrifying curses. The claim was nevertheless disallowed, and Boswell sentenced to death on the advice of all the judges of England, because he had not set out a royal grant or allowance in eyre.[18] Curiously, the exception of sacrilege,[19] which might also have barred the claim, is not mentioned in the reports.

OPPOSITION TO SANCTUARY

The hostile attitude of the royal courts towards special sanctuaries in early Tudor times reflected widespread popular opinion. The dens of criminals in these places were not associated in many people's minds with the liberty of the subject or with reasonable standards of mercy. Indeed, a Venetian visitor to England in the time of Henry VII found it hard to believe that so many villains were permitted to conduct organised criminal activities under the shelter of the Church, while Starkey put into the mouth of Cardinal Pole the question whether it was a good thing for murderers and robbers to be allowed to escape all punishment in sanctuary: 'a plain occasion of all mischief and misery', not to mention murder.[20] Polydore Vergil complained that 'our Christian world today, and especially England, is full of sanctuaries; which admit not only those in fear of attack, but also all manner of criminals, even traitors'[21] Perhaps most telling of all, given the conservative position of its author, is the passage which Thomas More put into the mouth of the duke of Buckingham in his *History of King Richard III*, and which may reasonably be supposed to reflect More's own views at the time of writing (about 1513). The main argument was that, although sanctuary was on no account to be broken, the abuses could be tackled without damaging the institution itself. While it was a 'deed of pity' to afford refuge to those who had taken the wrong side in dynastic disputes for the crown, it was hardly justifiable on the same grounds to give support to professional criminals. In fact very few of those in sanctuary were deserving cases, especially since anyone who offended under extenuating circumstances could seek a pardon. Westminster Abbey and St Martin's had become the homes of 'a rabble of thieves, murderers, and malicious, heinous traitors', living in safety from the proceeds of crime which they took with them.[22] If this was indeed the view of Sir Thomas More, it becomes yet more surprising that the Church took no action. The abuses of sanctuary were in the

17. He first claimed benefit of clergy, and set out that he had taken the orders of benet, acolyte, subdeacon and deacon. The crown demurred, perhaps because a deacon's orders were insufficient for the purpose, perhaps because of the statute 4 Hen. VIII, c. 2, which denied clergy in the case of stealing from a church: 102 Selden Soc. 39.
18. *R.* v *Boswell* (1513), 102 Selden Soc. 37; Keil. 189v; record in KB 27/1008 , Rex m. 12.
19. There was a view that sanctuary was not available in case of sacrilege, and an English decision of 1314 to that effect (taken on the advice of the bishop of London) was still remembered in the 16th century: *R.* v *Bury* (1314) 85 Selden Soc. 73; Fitz. Abr., *Corone*, pl. 420. In 1322 a woman who killed a cleric was denied sanctuary by the bishop of London: G. J. Aungier ed., *Croniques de London* (1844), Camden Soc. vol. 28, 42. The Canon law was less than clear, though Gregory IX had excepted from sanctuary those who committed homicide in a church (*Extra* 49, c.10).
20. *A Relation of the Island of England about the year 1500* (Camden Soc., 1847), 34-35; Thomas Starkey's dialogue between Pole and Lupset, in S. J. Herrtage ed., *England in the Reign of Henry VIII* (1878), 140.
21. Translated from P. Vergil, *De inventoribus rerum* (1528), fo. 55.
22. T. More, *The History of King Richard III* (R.S. Sylvester ed., 1963), 27-33, 115-119. The passage is more accessible in the Folio Society edition: P. Kendall ed., *Richard III: the great debate* (1965), 50-58.

forefront of complaints about the attitudes of the Church around the time of the Reformation Parliament. As with benefit of clergy, the bishops evidently took the view that the right of sanctuary was so absolute that it admitted of no easy qualifications: it was better to tolerate murders and robberies than to chip away at ecclesiastical privilege. This position, dubious in Canon law and politically naive, was abandoned by the Roman Catholic Church in the course of the next century, as increasing *casus excepti* were admitted.[23]

THE ABOLITION OF SANCTUARY

The intransigence of the Church authorities in the face of constant complaint led to a cause célèbre in 1517-19. A justice of the peace, John Pauncefote, had been shot and mutilated on his way to the Gloucester quarter sessions in 1516, and some of the alleged murderers (including Sir John Savage) had fled to sanctuary in St John's priory, Clerkenwell. A plea of sanctuary was made in the King's Bench, but the judges put off a final decision while the dispute raged elsewhere. Such had been the public outcry that the Star Chamber had taken the case under consideration, and ordered the bishop of London and canon lawyers to attend and argue the case. After some preliminary discussions, the case was argued in November 1519 in the personal presence of King Henry VIII. It was agreed that the pope could not create a sanctuary, and therefore a grant by the pope followed by a royal confirmation was void: there had to be a grant by the king, followed by a papal confirmation. One canonist (Dr Vesey) was prepared to accept that a sanctuaryman lost the protection of the church if he committed new offences; but other doctors took the view that this exception was limited to offences of a sacrilegious nature. The king made it clear he wanted action; he referred to the evils of the great sanctuaries, and said he did not believe that the kings and holy fathers who created them ever intended them to be used as they were at present. He ended with the threat, 'I will have that reformed which is usurped by abuse, and have the matter restored to the true intention of the original makers'. Fyneux C. J. added that such abuses were contrary to the intention of grants made *ad laudem et honorem Dei*, and should therefore be considered causes of forefeiture, as in the case of secular franchises which were misused.[24] There was no final judgment, Savage being eventually pardoned, but the fate of sanctuary was probably settled after that episode.

Claims to sanctuary were treated to increasingly hostile scrutiny,[25] but direct reform had to await the fall of Wolsey and the break with Rome. In 1534 sanctuary was abolished for treason.[26] In 1535 sanctuarymen were subjected to more stringent control; they were to wear special badges, and were to lose their privileges if they were caught at night, or with weapons, or if they disobeyed their rules. The dissolution of the monasteries put an end to the monastic sanctuaries, including Glastonbury, Beaulieu and St John's. Then, in 1540, came an even bolder reform. The privilege was no longer to be available for murder, rape, burglary, robbery or arson; all special sanctuaries not expressly named were abolished; and, with limited exceptions, all sanctuaries were reduced to forty days, thereby forcing abjuration.[27] In view of the prior introduction of inland

23. Misserey, 'Asile en Occident', col. 1093.
24. Translated from the law French report by Serjeant Caryll, printed at Keil. 188-191. For further details of the case, see 94 Selden Soc. *342-344*; Ives' article (bibliography, below); *Notebook of Sir John Port*, 102 Selden Soc. xlv, 41.
25. See 94 Selden Soc. *344-345*.
26. 26 Hen. VIII, c. 13. The Roman Church followed suit in the time of Gregory XIV (1590-91). For earlier bulls on the subject, see 94 Selden Soc. *335* n.5.
27. 32 Hen. VIII, c. 12.

abjuration, permanent sanctuary thus came to be confined to a few specified places. This proved not to be a successful policy, in particular because it was so unfair on the inhabitants of the cities chosen as sanctuary centres. After considerable tinkering in the sixteenth century, which made the law very complex, parliament took the unwise step in 1603 of repealing the Henrician statutes and thereby reinstating the common law.[28] This time public opinion would not stand for it. Many continental countries had already taken action, and sanctuary was no longer regarded with favour even in the Roman Catholic Church. In 1624 the whole institution of sanctuary was swept away in England by the simple enactment that 'no sanctuary or privilege of sanctuary be hereafter admitted or allowed in any case'.[29] This time there seems to have been no protest from the Church, and Canon law may be supposed to have accommodated the change without much soul-searching.[30]

28. 1 Jac. I, c. 25, s. 34.
29. 21 Jac. I, c. 28, s. 7. A number of places of refuge from civil arrest remained a little longer (e.g. the Savoy and the Whitefriars in London): 8 & 9 Will. III, c. 27, s. 15. These were not technically sanctuaries, but liberties where the king's writ was supposed not to run.
30. It is interesting to compare the Roman *Codex* of 1918 with the earlier law: under that legislation the privilege of sanctuary has been reduced to a rule that fugitives should not be removed from a church without the permission of the ordinary or rector.

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