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November 1610

B e f o r e :

Between:

Case of PROCLAMATIONS

Memorandum, that upon Thursday, 20 Sept. 8 Regis Jacobi, I was sent to attend the Lord Chancellor, Lord Treasurer, Lord Privy Seal, and the Chancellor of the Duchy; there being present the attorney, the solicitor, and recorder: and two questions were moved to me by the Lord Treasurer; the one if the King by his proclamation may prohibit new buildings in and about London, etc; the other, if the King hath answered, that he will confer with his Privy Council, and his Judges, and then he will do right to them. To which I answered, that these questions were of great importance. 2. That they concerned the answer of the King to the body, viz. to the Commons of the House of Parliament. 3. That I did not hear of these questions until this morning at nine of the clock: for the grievances were preferred, and the answer made when I was in my circuit. And lastly, both the proclamations, which now were shewed, were promulgated, anno 5 Jac. After my time of attorneyship: and for these reasons I did humbly desire them that I might have conference with my brethren the Judges about the answer of the King, and then to make an advised answer according to law and reason. To which the Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: but to apply his medicine according to the quality of the disease: and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.

To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament. But at this time I only desired to have a time of consideration and conference with my brothers, for *deliberandum est diu, quod statuendum est semel*; to which the solicitor said, that divers sentences were given in the Star-Chamber upon the proclamation against building; and that I myself had given sentence in divers cases for the said proclamation: to which I answered, that precedents were to be seen, and consideration to be had of this upon conference with my brethren, for that *melius est recurrere, quam male currere*; and that indictments conclude, *contra leges et statuta*; but I never heard an indictment to conclude, *contra regiam proclamationem*. At last my motion was allowed; and the Lords appointed the two Chief Justices, Chief Baron, and Baron Altham, to have consideration of it.

Note, the King by his proclamation of other ways cannot change any part of the common law, or statute law, or the customs of the realm, 11 Hen. 4. 37. Fortescue De Laudibus Angliae Legum, cap. 9.18 Edw. 5. 35, 36, etc. 31 Hen. 8. cap. 8. *hic infra*: also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not; for ubi non est lex, ibi non est

transgression: ergo, that which cannot be punished without proclamation, cannot be punished with it. *Vide* le stat. 31 Hen. 8. cap. 8.[1] which Act gives more power to the King than he had before, and yet there it is declared that proclamations shall not alter the law, statutes, or customs of the realm, or impeach any in his inheritance, goods, body, life, etc. But if a man shall be indicted for a contempt against a proclamation, he shall be fined and imprisoned, and so impeached in his body and goods. *Vide* Fortescue, cap. 9. 18. 34. 36, 37 etc.

But a thing which is punishable by the law, by fine, and imprisonment, if the King prohibit it by his proclamation, before that he will punish it, and so warn his subjects of the peril of it, there if he permit it after, this as a circumstance aggravates the offence; but he by proclamation cannot make a thing unlawful, which was permitted by the law before: and this was well proved by the ancient and continual forms of indictments; for all indictments conclude *contra legem et consuetudinem Angliai*, or *contra leges et statute*, etc. But never was seen any indictment to conclude *contra regiam proclamationem*.

So in all cases the King out of his province, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed: and as it is a grand prerogative of the King to make proclamation, (for no subject can make it without authority from the Kint, or lawful custom,) upon pain of fine and imprisonment, as it is held in the 22 Hen. 8. Proclamation B. But we do find divers precedents of proclamations which are utterly against law and reason, and for that void; for *qua contra rationem juris introducta sunt non debent trahi in consequentiam*.

An Act was made, by which foreigners were licensed to merchandize within London; Hen. 4. by proclamation prohibited the execution of it; and that it should be in suspence *usque ad proximum Parliament* which was against law. *Vide* dors. Claus. 8 Hen. 4. Proclamation in London. But 9 Hen. 4. an Act of Parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady, upon pain of death, which was absolutely in *terrorem*, and was utterly against the law.

Hollinshed 722. anno Domini 1546. 37. Hen. 8. the whore-houses, called the stews, were suppressed by proclamation and sound of trumpet, etc.

In the same term it was resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference bewixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment; also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them: also *malum aut est malum in se*, *aut prohibitum*, that which is against common law is *malum in se, malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation.

Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.

But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law, etc.

Lastly, if the offence be not punishable in the Star-Chamber, the prohibition of it by proclamation cannot make it punishable there: and after this resolution, no proclamation imposing fine and imprisonment was afterwards made, etc.

Note 1 Repealed by 1 E. 6. c. 12. § 5. [Back]

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