[509] PEERS OF THE REALM.

1. REX & REGINA *versus* KNOLLYS.

[Trin. 6 W. & M. B. R. 1 Ld. Raym. 10, S. C.]

[See *In re Rivett-Carnac's Will*, 1885, 30 Ch. D. 141.]

Ante, 47, S. C. *Post*, 512. 3 Salk. 242. Carth. 297. Comb. 273. Skin. 336, 517. Cases B. R. 55. Holt 530. Trem. 11. 8 S. T. 50, 58.

Indictment was found at Hicks's Hall against Charles Knollys, for the murder of

Captain Lawson, which was removed into B. R. The defendant pleaded in abatement, that William Knollys, Viscount Wallingford, by letters patent under the Great Seal of England, which he produced in Court, bearing date August 18, 2 Car. 1, was created Earl of Banbury, to him and the heirs-male of his body: that William had issue Nicholas, who succeeded him in the said title; and that the said honour descended to him the defendant from the said Nicholas, as son and heir: *et hoc paratus est verificare.* It was replied, that 14 Decemb. 4 W. & M., the said defendant petitioned the Lords then assembled in Parliament, to be tried by his Peers, and the Lords disallowed his peerage, and dismissed the petition.

The defendant demurred, and the Attorney-General joined in demurrer.

The first point considered per Holt C.J. was, what an earldom was, and wherein it consisted?

Before the time of Ed. 3, there were but two titles of nobility, viz. earls and barons.

Barons were originally created by tenure, afterwards by writ, and last of all by patent; *scil.* about 11 R. 2.

As to earls, 1st, They were always created by letters-patent. *Vide* Seld. 536.

2dly, An earldom consisted in office for the defence of the kingdom. *Vide* Bract. lib. 1, c. 8. *Comites* had their name, not from counties, but *a comitando regem*, 9 Co. 49. It may be entailed as any other office may, within Westm. 2.

3dly, Earldoms consist of rent and possessions, &c., which were anciently great. *Vide* Mag. Char. The relief of his heir is 100l. This being premised, he went on to consider the objections:

1st, That it is not alleged by the defendant that he is *unus parium regni Anglie*, but only *unus parium regni;* nor is Banbury alleged to be in England, and an Irish peer may be made under the Great Seal of England.

[510] To this he answered, that the Great Seal of England is appropriated to England, and what is done under it has relation to England, and to no other place; and though the King may create an Irish peer under his Great Seal of England, yet that must be by express words, being by Special Act of Prerogative. An Act of Parliament does not extend to Ireland, unless particularly named; and it is a foreign intendment to suppose him an Irish peer, and therefore is to be rejected.

The place from whence an earl takes his title, is not material; it is not necessary there should be such a place in England, or indeed any where. Albemarle is not in England, and there is really no such place as Rivers, though we have an earl of that name.

2dly, It is objected, that the defendant ought to have concluded his plea, with *prout patet per recordum*, and have produced a writ to certify the discents.

As to the writ to certify the discents, that is not of necessity, but used merely for expedition; and if his peerage had been created by writ, then it would have been triable by the record, and this a fatal exception: but letters patent may be pleaded and shewn to the Court, and the adverse party cannot deny them: and as this case is, here being discents, if the defendant had concluded as the King's Counsel say he should, it would have been an impracticable conclusion, and consequently void. And in the precedents cited of the other side, there were no letters patent pleaded; nor could there in this case be any such issue as earl, or not earl; for the letters patent under the Great Seal could not be denied or questioned, but by pleading *non concessit.*

3dly, That the defendant is concluded of his peerage by the order of the House of Lords.

To this Eyre, J. said, The defendant had a title to his honour by legal conveyance, and that it was under the protection of the common law, and could not be taken from him but by legal means. That the House of Lords could no more deprive one of a peerage, than they could confer a peerage. That the defendant's right stood upon the letters patent, and his legitimacy; that the letters patent could not be cancelled without a *scire facias;* and that the defendant could not now be proved a bastard, or illegitimate.

Holt, C.J. gave these reasons: 1st, That this order was not a judgment of Parliament; the Parliament consists of the King, the Lords Spiritual and Temporal, and the Commons. The judicial power is in the Lords only; yet legally and virtually it is the

judgment of the King, if not of the Commons; and writs of error in Parliament are *coram nobis in præsenti Parliamento.* *Vide* Fleta, c. 17. All power of jurisdiction is derived from the King; if that be an author to be credited.

[511] The House of Lords has a double authority, as Parliament and the course of the House, between which we must distinguish by their style. Journals are no records of Parliament, and therefore we cannot take notice of them. Hob. 110, *King and Hunsdown* versus *Arundal and Howard.* Judgments ought to be given in their proper style; and therefore if this Court, which is *coram Rege*, enter judgment *per justiciarios de B. R.* it is void.

The House of Lords has no jurisdiction over an original cause mixed with matter of fact; because, 1st, That Supreme Court is the *dernier resort;* besides that, for the most part, original causes are mixed with matter of fact, and it is below the dignity of so supreme a judicature to try a matter of fact. It is for this reason, error in fact, in the Court of King's Bench, must of necessity be redressed before the Judges of this Court. 2dly, If the Parliament should take cognizance of original causes, the subject would lose his appeal, so much indulged by the common law in all cases. Causes come not thither, till they have tried all other judicatures. For this reason, within these four years, judgment was given against the Earl of Macclesfield in the Exchequer; he brought error in the House of Lords; and the question was, whether by 31 Eliz. 3, the Exchequer-Chamber should not interpose? And the writ was abated; and it was held, that the Exchequer-Chamber should interpose. This dignity is a title by common law; and if a patentee be disturbed of his dignity, the regular course is, to petition the King, who indorses it, and sends it into the Chancery. *Vide* St&undf. Prerog. 72. 22 E. 3, 5. Long 5° E. 4, 117. The King could give precedency by the common law, but is bound by 31 H. 8, c. 10.

If a peer commits treason, he must be tried by his Peers, and they may order a trial; but the King may choose whether he will make a high steward.

2dly, No plea was depending in the House of Lords; for the defendant did not petition to enjoy, but supposed himself in possession.

4thly, Here was no judgment. A Court can give no judgment in a thing not depending, or that does not come in a judicial way before that Court: here the title of the earldom was not before them. If trespass be brought for a trespass done in the ground belonging to a house, and it appears at the trial the plaintiff has no title to the house, yet the Court cannot give judgment to turn him out.

5thly, A judgment ought to be complete and formal. If a *quo warranto* be brought for usurping Royal franchises, and the Court give their opinion that the defendant has no title; yet unless they go on, *et quod ab inde excludatur, &c.* it is nothing. So in the case of *Lovell*, 2 Cro. 284. In debt on an obligation the defendant pleaded a bar by **[512]** verdict and judgment in a former action wherein the entry was, that the defendant should recover costs, *et quod eat inde sine die:* here, because there was no judgment, *quod querens nil capiat per breve*, it was adjudged naught; for dismission is no judgment in a Court of Law.

Objection: It is said that this judgment was given *secundum legem Parliamenti.*

Answ. *Lex Parliamenti* must be looked on as the law of the kingdom; but admitting it were a particular law, yet if a question arises determinable in the King's Bench, the King's Bench must determine it. *Vide* Dy. 60.

14 Car. 2, C. B., *Binion* versus *Eveling.* Filing an original against a Parliament-man was adjudged to be no breach of privilege. If a man be committed by Parliament, and the Parliament is prorogued, this Court will grant a *habeas corpus.* But no precedent hath been shewn to warrant the determining inheritances originally *per legem Parliamenti;* if it be so determinable, it must be by Act of Parliament, but there is no such; or by custom, but there is no such custom. But if inheritances were determinable in Parliament, without their having jurisdiction, they would have uncontrollable power, and *res est misera, ubi jus est vagum.* And he concluded that judgment should be given for the defendant, and accordingly the indictment was abated: so the defendant was not tried for the murder at all.