51021-6 [?1819]

Further Observations on the admissibility of His Royal Highness the Prince Regents Evidence.

On the important Question whether His Royal Highness the Prince Regent can be examined as a Witness in the Cause of Berkeley and Berkeley now depending in the Court of Chancery, We (in concurrence with our much lamented Friends Sir Samuel Romilly and Mr Dauncey) purposely confined ourselves to the General question without reference to the particular Case and in dealing with this General Question We also confined ourselves to a very few points which we deemed sufficient to establish the affirmative proposition.

At present without materially deviating from this course we purpose to shew that the support of the Argument is not only a matter of high Public importance but absolutely necessary to the peculiar Interests of Colˡ Berkeley the Plaintiff in this Suit.

The proposition which we presume to maintain is

> That His Royal Highness the Prince Regent (if willing) is capable of being and ought not to be rejected as a Witness in the Cause of Berkeley and Berkeley now depending

That His Royal Highness is willing to give Evidence We should infer in any Case where such Evidence might be found necessary: the Love of Justice alone would be a sufficient inducement, but in this Case We are not left to inference; We are assured that His Royal Highness is willing and was prepared to give his Evidence when a doubt interposed by one of his highest Legal Advisers prevented the accomplishment of his purpose.

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The anxiety of His Royal Highness to secure to Col. Berkeley every advantage that his Testimony could effect is further evinced by the fact that in the year 1812 a Letter was received by the Countess of Berkeley from William Adam Esqr. then His Royal Highness's Chancellor for the Dutchy of Cornwall informing her that His Royal Highness had been pleased to ratify certain written Statements and Papers and to confirm their accuracy throughout and to approve of their being placed under Seal in the Office of the Dutchy of Cornwall deposited there by him in his Character of Prince of Wales and (Duke of Cornwall) with a Writing stating that he (Mr. Adam) had submitted them to the perusal of the Prince, that His Royal Highness confirmed their accuracy and that they remained there to be used for any purpose for which they could be made useful by her Ladyship or her Family.

These Statements and Papers have been also submitted to our consideration, We find them to contain His Royal Highness's recollection of certain conversations which took place between His Royal Highness and the late Earl of Berkeley on the subject of his Marriage, some previous and some subsequent to his second Marriage and to the discussions which from time to time have been raised upon that head and also His Royal Highness's knowledge of certain facts which have produced upon the mind of His Royal Highness his often declared conviction that a Marriage was solemnized between the late Earl and the Countess of Berkeley in the year 1785 and that Col. Berkeley is the Legitimate Issue of such Marriage, to which conviction and the grounds upon which he has formed it, His Royal Highness is as we are informed fully prepared to depose.

Having therefore shewn that His Royal Highness is willing to give such Testimony and that such Testimony is material to the objects of the depending Suit We trust We shall not be charged with unbecoming pertinacity

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in continuing our Argument in support of the Opinion which We still hold and to which We are the more induced as some points of our former reasoning appear to have been overlooked and others misapprehended by His Majesty's Attorney & Solicitor General in their Reply to our Opinions.

The first division of our Argument was

That the King (if willing) is capable of giving Testimony in a Civil Suit

and two Cases Abignye and Clifton and Lea and Lea are cited where the King actually did give such Evidence.

Chief Justice Rolle is stated to doubt these Authorities but We do not find that his Dictum goes to this extent; We read the Objection as being to the manner of offering not as to the propriety of receiving such Evidence.—

But neither Chief Justice Rolle or any other Authority as we believe has ever explicitly declared that the King cannot be a Witness nor is any instance adduced where the Royal Testimony has been offered and rejected, such proof would We think be necessary to establish an Exception of incapacity against the King excluding him alone from a right which all others not specially incapacitated can and do exercise – such an incapacity we contend cannot be established by inference against any one and least of all against the King to whom or his Actions no Personal disability can be attributed (Hale de Prerogativa Regis) If therefore it should be found that the Law is silent on this Head as an Exception We are bound to conclude that the General Rule must prevail.

This General Rule we take to be

That every Person of sufficient age, sound mind and not declared infamous by conviction, is capable of giving Evidence in any Civil Suit, in the Event of which he has no Interest.

Sir Matthw. Hale in the place before cited, holds that the King may in some Cases give Evidence, that in others (where a known disability, as Interest interposes) he may not, thus placing him in this respect in the Situation

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of all other Persons, and the Opinion of this Learned Judge becomes of greater value when he is considered as a Writer on Prerogative in treating of which he must have given his serious attention to the present Question; more especially when citing the following passage from a Judgment of the King in Council "In Curiâ nostrâ supra nos non fit breve ad nos summonendos nec compellandos nisi de voluntate nostrâ" (Hale de Pregativa Regis Hargrave MSS Brit Museum) here the express words "nisi de voluntate nostrâ" lead directly to the conclusion for which we contend. –

Regularly says Sir Matthew Hale the King neither speaks or takes but by matter of Record, yet some things he may do by parol, as a presentation to a Church, He may retain a Chaplain by parol M. 37/38 Eliz. Whitson and Higford. He may Licence by parol an Officer to be absent from his Office and therefore the forfeiture is excused – 26 Eliz: Whitney & Steward – Sir G. Reynels Case cited 9. Report – What then is the case of the Incumbent, Chaplain or Officer if it should be necessary to prove the parol Presentation Retainer or Licence (given perhaps in private) and if the King (alone capable of speaking to the fact) be excluded from giving Evidence. The Evidence admitted in the Essoin de Servitio does not arise from so high a necessity, many may be capable of proving that the Party is absent on the Kings Service; none but the King can prove his Private Licence to be absent.

Of the Essoin de Servitio His Majestys Attorney and Solicitor General have observed that it is not an instance in which Evidence is given by the King but one in which he issues by His Prerogative (an important word which We must remark does not occur in either of the Regency Acts) a Writ commanding the Judges of His Court to allow an Essoin to a party for a certain Cause recited and asserted to exist in such Writ; Now if such Cause did not exist the Judges by their Oath could not allow the Essoin even though the King himself should command them but they could and would allow the reasonable excuse of a party even though the King did not command if the truth of such excuse were duly attested by credible Witnesses. The

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King therefore in this instance stands as the highest Evidence his assertion of a Fact is the Plea on which a Party is excused his nonappearance and escapes a judgment by default which would otherwise terminate his Cause; if then the King can thus give Evidence in an interlocutory matter why not in any other stage of proceeding

With respect to the two Cases Aubignye & Clifton and Lea and Lea, it does not appear that they passed without discussion; from the Reports the contrary may be inferred In the former Case the whole Question must have turned on the fact certified by the King it was not therefore probable that his Testimony would be tacitly admitted by the opposite party if they could have argued its incompetence And in Lea and Lea it is still less probable that the Court would require time to consider of a Case the most important point of which had passed without discussion Chief Justice Willes in Omichund & Barker does not appear to have been aware of this Case as he confines his Observations to an Old Case in Chancery; and this Oversight we conceive must be held to weaken his authority

By this view of the Question and by the Precedents and authorities on which it is founded (which Precedents and Authorities We do not find opposed by any of contrary practice or principle) We seem to be borne out in the conclusion that as the King so also

The Prince Regent (if willing) is capable of giving Testimony in a Civil Suit

But if it shall be determined that the King is incapable of giving Testimony, then We are prepared to contend that His Royal Highness was not by the Acts of 51st and 52d of His Majesty placed in the Situation of the King in all respects and that he was not deprived of the Right which he before possessed of giving Evidence but that His Royal Highness's competence as a Witness remained untouched by those Statutes.

It remains to take notice of those practical obstacles

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to the reception of His Royal Highness's Testimony — which are supposed to arise from the established Rules of Evidence, Those General Rules, as that the Witness must be sworn, that he must be subject to the Process of the Court, liable to Cross Examination, exposed to contradiction by other Evidences and amenable to punishment for falsehood, however valuable and even necessary where the nature of the Case will admit of their application, are nevertheless all of them in certain instances dispensed with, Even the Rule that a Man shall not be a Witness in his own Cause admits of Exception - Necessity appears to be the leading principle upon which such Relaxations have been introduced. It was once supposed that the Oath must be administered on the Holy Evangelists, but the Case of Omichund & Barker cited by the Attorney and Solicitor General shews how far this most sacred form is ex necessitate dispensed with, Jews Mahomedans, Hindoos and other Infidels to our Religion are allowed to swear according to mutilated forms — supposed to bear some resemblance to their own, the Religious Obligation removed, no Security remains to bind those People frequently of the lowest Class and Character except the fear of temporal punishment, the Lascar well knows that in a few weeks or days he will be beyond the reach of our Courts yet his Evidence is admitted even in Criminal Cases of the highest magnitude. —

Again if the supposed veracity of the People called Quakers be a sufficient reason for substituting their — affirmation in Civil Suits for the Ordinary Oath, would there be much difficulty or inconvenience in supposing that the Honor of the Sovereign might safely be relied on, — dispensation is given in respect of their Dignity to the Lords even in the exercise of their most sacred duty the Judgment of their own Peers - The Juror is on his Oath, the Peer is on his Honor, Rising in the Scale of Dignity, How shall the King be heard?

But on this point We are not reduced to reasoning by Analogy the Prince Regent standing as His Legal Advisers contend in the same Situation as His Majesty in respect of

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giving Evidence has taken the usual Oath as Executor on the Probate of the Duke of Brunswick's Will and in the usual manner this was not an act inadvertently and We cannot think unadvisedly done or admitted, it was done not only with the privity but the concurrence of the first Adviser of the Crown, it was administered by a Privy Counsellor and Judge of long and approved experience We are bound to conclude that those High Authorities would have interposed their advice had the measure been so obviously wrong as the Attorney and Solicitor General have deemed it and certainly We must believe that as soon as this supposed Error was discovered every means would be taken to amend it, The illegal Probate would have been immediately revoked - No such measure has as yet We believe been taken, We must therefore consider the Probate of the Duke of Brunswicks Will as an established Precedent that an Oath may be administered to His Royal Highness the Prince Regent in the ordinary manner, and by the ordinary authorities, And this Oath becomes the more important when its terms are fully considered for not only does His Royal Highness swear to certain facts, as the authenticity of the Instrument and the value of the Property, but the Oath proceeds thus "that you will render a just Account of your Executorship if at any time called upon by Law so to do" So that His Royal Highness has thus upon Oath engaged to take, if required, another Oath, verifying his Accounts.

We have never contended that His Royal Highness can be called upon by Process to become a Witness nor does the present occasion require that We should, His entire willingness to bear Testimony in this Case rendering it wholly unnecessary - It is further rendered unnecessary by the consideration that His Royal Highness's unquestionable exemption from compulsory process is no more an objection to his competence, than the privileges of Ambassadors or the contemplated death

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of Persons examined upon Bills to perpetuate Testimony are Objections to the admissibility of their Evidence. —

When doubts are entertained of the credibility of a Witness, when he is suspected of falsehood error or concealment, his Cross Examination becomes essentially necessary to a due execution of Justice, but where none of those Objections can be imputed it appears extraordinary to reject the Testimony merely because it comes from so high a source that it cannot be dealt with in the ordinary course of Proceeding. Nor is this without Analogy for in the Case of the Attorney General putting in an Answer which he does without Oath, Exceptions cannot be taken to it (Davison v. Attorney General) The Plt must be content with such discovery as the Attorney General may think proper to give, tho' short of what the Plaintiff and the Justice of his Case may require — So also of the Objection that the King or Prince Regent cannot give Evidence, because if such Evidence should be false they could not be indicted for Perjury — If the Royal attribute of perfection precludes the possibility that the wrong can be committed, where is the necessity for a Remedy? The Law does not provide a mode of punishment for a Crime which it presumes to be impossible.

We have already had occasion to observe that a Peer answers in Suits in Equity upon his Honor and not upon his Oath and much doubt whether he could be indicted for a false Affirmation. —

We have also had occasion to observe that a Peer upon the Trial of a Peer gives his Judgment upon Honor and We equally doubt whether he would be liable to an Attaint like an ordinary Juror or to any similar Judicial Proceeding. —

There are also other Persons who from other Causes are equally exempt from this liability but whose Testimony is nevertheless received even in matters of the highest importance We have instanced Persons in articulo mortis, Ambassadors and Persons beyond the Jurisdiction.

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To the Declarations of dying Persons all the material objections cited may occur - they are not on Oath - they cannot be cross Examined by the opposite Party - they are beyond the reach of punishment should their declarations prove false - The solemnity of the occasion is deemed sufficient to counterbalance all those failures in point of form - Is the Situation of the King less solemn, Sworn to administer Justice, he stands forward in the eyes of his People to declare a fact coming within his own knowledge and essential to the rights of one of his Subjects yet he is not to be heard! Judgment is to be given in his own name - the life and property of his Subject is forfeited by his own Mandate and he is charged with executing the Sentence contrary to his own Conviction! and why? Because he cannot be Sworn, who acts at all times under the operation of the most solemn of Oaths - because he cannot be punished to whom the Law imputes no wrong. -

Of Ambassadors We must still retain the Opinion that they are not liable to punishment for false Testimony given in any of our Courts, for as they represent the Persons of their respective Sovereigns who owe no subjection to any Laws but those of their own Country, their Actions are not subject to the Municipal Laws of that State wherein they are appointed to reside, and as the security of Ambassadors is of more importance than the punishment of a particular, Crime and the Statute of Anne has recognized and enforced the Privileges to which they are intitled by the Law of Nations and those privileges are now held to be part of the Law of the Land and are constantly allowed in the Courts of Common Law, We cannot but conclude with great deference to the doubt expressed by His Majesty's Attorney and Solicitor General that an Indictment for perjury could not be sustained against an Ambassador. -

To contend that a Minister so offending may be sent home and his punishment demanded in his own Court, is to contemplate a State of Law as existing in

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some other Country far different from and at direct variance with our own, if we may be allowed to suppose that an English Ambassador should be sent home on such a Charge and his punishment required in this Country for a Crime committed in another, must not His Royal Highness reply, in the words of Queen Anne, that he could inflict no punishment on any, the meanest of his Subjects unless Warranted by the Law of the Land - Is there a Law that would Warrant such a proceeding? we believe not - Could We then, demand of another State a species of reparation, which we in our turn could not grant?

But it is said the Party offending may be disgraced, if indeed the disgrace necessarily attending the Crime of Perjury be a sufficient security against its Commission, and an Ambassador because he is liable to disgrace in his own Court for an act possibly committed at its instance, becomes capable of giving Evidence, Exemption from actual punishmt. ceases to be a reason for the exclusion of a Witness. -

These and many other instances shew that the Law adapting itself to the necessities which from time to time may arise, allows many exceptions to the strict Rules of Evidence and We cannot perceive any reason why these Exceptions, if necessary, should not also be extended to the Case of His Royal Highness the Prince Regent and therefore cannot but express our hope that His Royal Highness's Evidence will not be excluded from the present Suit, to the object and Justice of which it is so essentially necessary as We cannot doubt but that it would extend to the minds of others that complete conviction which we understand it to have impressed on the mind of His Royal Highness, We will not however expatiate on the importance of the Evidence but it may be proper to observe that the Objections which are supposed to attach to its admissibility would have equally applied tho' His Royal Highness had been actually present at the Marriage of the late Earl of Berkeley and the Countess in the year 1785 and tho' His Royal Highness had been the

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only Person living who could depose to the fact of such a Marriage having been had The hardship of such exclusion as it would affect Col. Berkeley would indeed be great but as it seems to us its effect would not be less injurious to His Royal Highness for as it is his duty to keep up the Hereditary Body of the Peerage he might be called upon to Issue his Writ of Summons in favor of one who in His Royal Highness's Opinion had no right, in exclusion of him of whose right His Royal Highness entertains such complete conviction that were he on his death Bed he would as We understand declare his Conviction to be that Colᵒ Berkeley is the eldest and Legitimate Son of the late Earl of Berkeley.

John Fonblanque

C Warren

John S M Fonblanque

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Berkeley Papers

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