Erskine May, Chapter V, pp. 290-299

Life Peerages—The Wensleydale Case

But all temporal peers,—whether English, Scottish, or Irish, and whether sitting by hereditary right or by election,—have been ennobled in blood, and transmit their dignities to their heirs. Hereditary descent has been the characteristic of the peerage, and—with the exception of the bishops—of the constitution of the House of Lords.

The Law Lords

In 1856, however, Her Majesty was advised to introduce among the hereditary peers of the realm, a new class of peers, created for life only. Well-founded complaints had been made of the manner in which the appelate jurisdiction of the House of Lords had been exercised. The highest court of appeal was often without judges, their place being filled by peers unlearned [291] in the law, who sat as members of the court, without affecting to participate in its judgments. This had been an evil of long standing; though it had not, until lately, aroused the vigilance of suitors and the public. For some years after the Revolution, there had not been a single law-lord in the House, Lord Somers having heard appeals as Lord Keeper. When that distinguished lawyer was at length admitted to a seat in the House of Peers, he was the only law-lord. During the greater part of the reigns of George II. and George III., appeals had been heard by Lord Hardwicke, Lord Mansfield, Lord Thurlow, and Lord Eldon, sitting in judicial solitude,—while two mute, unlearned lords were to be seen in the background, representing the collective wisdom of the court. In later times a more decorous performance of judicial duties had been exacted by public opinion; and frequent changes of administration having multiplied ex-chancellors, the number of law-lords was greater than at former periods. But in an age in which reforms in the administration of justice had become an important department of legislation, and a subject of popular interest, theoretical improvements, at least, were demanded in the constitution of the first court of appeal.

Precedents for Life Peerages

As an expedient for adding to the judicial strength of the House, without a permanent increase of its numbers, it was suggested that the most eminent judges might be admitted to the privilege of sitting there, for life only. The practice of granting peerages for life was not a constitutional [292] novelty, but had long fallen into desuetude. Between the reigns of Richard II. and Henry VI., several precedents were to be found of the creation of life-peerages. Some of these, however, had been made,—like many other peerages of that period,—in full Parliament: some had been granted to peers already entitled to sit in Parliament by hereditary right: some peers so created had never sat in the House of Peers: one had been a foreigner, who could not claim a seat by virtue of his title: and, for upwards of four hundred years, there was no instance on record, in which any man had been admitted to a seat in the House of Lords, as a peer for life. But there were many later instances in which ladies had received life-peerages. Charles II. had created the beautiful Louise de Querouaille, Duchess of Portsmouth for life; James II. had created Catherine Sedley a baroness, by the same tenure; George I. had raised Madame de Schulemberg to the rank of Duchess of Kendal for life, and had conferred a life-peerage upon her niece;(1) and George II. had made Madame Walmoden Countess of Yarmouth for life. Between the reign of James I. and that of George II., peerages for life had been granted to no less than eighteen ladies. But as the fair sex are unable to sit in

Parliament, this class of peerages could not be relied upon, in support of the right of the crown to introduce life-peers into the House of Lords.

There was, however, another class of peerages, [293] whence a strong argument was derived in favour of the royal prerogative. Though peerages in their general character have been hereditary,—descending like estates to the elder son,—yet peerages have been continually granted to persons, with remainder to collateral relatives, or to the elder son of the peer by a second wife, or to the son of a younger brother, or other relative not in the direct line of succession, as heir at law. All grants of this class—being governed, not by the general law of descent, but by the special limitations in the patent—were exceptions from the principle of hereditary succession. The first grantee was, in effect, created a peer for life, though the second grantee became entitled to the peerage, subject to the ordinary rights of succession. But the grant of a peerage of this class was plainly distinguishable from a peerage for life, as it provided—though in an exceptional manner—for the duration of the dignity beyond the life of the first grantee. It was indeed maintained that such peerages afforded further evidence against the legality of life-peerages, as they had been constantly granted, without objection, while none of the latter had been created for centuries.

But if these precedents and analogies were obsolete, or of doubtful application, the legality of life-peerages had been recognised by nearly all constitutional authorities. Lord Coke had repeatedly affirmed the doctrine, that the crown may create peerages 'for life, in tail, or in fee:' the learned Selden had referred to the ancient [294] custom without comment: Chief Baron Comyns and Cruise had accepted the authority of Coke as unquestioned law: the popular Blackstone had repeated and enforced it;(2) and, lastly, Lord Redesdale's committee, 'On the dignity of a Peer,' in 1822, had acknowledged it without reserve. Butler was the only eminent writer who had expressed any doubt upon the subject. The doctrine had also been generally received among statesmen as well as lawyers. Lord Liverpool's administration, impressed with the necessity of improving the appellate jurisdiction of the Lords, had, at one time, unanimously resolved to create life-peers. In 1851, the government of Lord John Russell had offered a life-peerage to Dr. Lushington, the distinguished judge of the Admiralty Court, who, by a late statute, had been denied the privilege of sitting in the House of Commons. In the Devon peerage case, Lord Brougham had stated from the woolsack, as chancellor, that the crown had not only the power of creating a peerage for the life of the grantee himself, but for the life of another person; and upon a more recent occasion, Lord Campbell had laid it down in debate, that the 'crown might create, by its prerogative, a peerage for life, but not a peerage during a man's continuance in office: that would [295] require an enactment of the three branches of the legislature.'

The Wensleydale Patent

Relying upon these precedents and authorities, ministers advised her Majesty, before the meeting of Parliament in 1856, to issue letters patent to Sir James Parke, lately an eminent baron of the Court of Exchequer, creating him Baron Wensleydale for life. The letters patent were issued: but the peers loudly protested against the intrusion of a life-peer to sit amongst the hereditary nobles of the realm. An untimely fit of the gout disabled Lord Wensleydale from presenting himself, with his writ of summons, on the first day of the session; and on the 7th of February, Lord Lyndhurst proposed, in a masterly speech, to refer his exceptional patent to the Committee of Privileges.

Throughout the learned debate which followed, the abstract prerogative of the crown to create a life-peerage was scarcely questioned; but it was denied that such a peerage conferred any right to sit in Parliament. It was treated as a mere title of honour, giving rank and precedence to its possessor, but not a place in an hereditary legislative chamber. The precedents and authorities in support of life-peerages were exposed to a searching criticism, which failed,

however, to shake the position that the crown had, in former times, introduced life-peers to sit in the House of Lords. But it was admitted on all sides, that no such case had occurred for upwards of four [296] hundred years. Hence arose a most difficult question of constitutional law. Had the ancient prerogative of the crown been lost by desuetude; or could it be exercised, if the Queen thought fit to revive it? The ministers, relying upon the maxim, '*nullum tempus occurrit regi*,' argued that there could be no loss of prerogative by lapse of time. But their opponents forcibly contended that the crown could not alter the settled constitution of the realm. In ancient times,—before the institutions of the country had been established by law and usage,—the crown had withheld writs of summons from peers who were unquestionably entitled, by inheritance, to sit in Parliament: the crown had disfranchised ancient boroughs by prerogative; and had enfranchised new boroughs by royal charter. What would now be said of such an exercise of the prerogative? By constitutional usage, having the force of law, the House of Lords had been for centuries a chamber consisting of hereditary councillors of the crown, while the House of Commons had been elected by the suffrages of legally qualified electors. The crown could no more change the constitution of the House of Lords by admitting a life-peer to a seat in Parliament, than it could change the representation of the people, by issuing writs to Birkenhead and Staleybridge, or by lowering the franchise of electors.

Passing beyond the legal rights of the crown, the opponents of life-peerages dilated upon the hazardous consequences of admitting this new class of peers. Was it probable that such peerages would be [297] confined to law-lords? If once recognised, would they not be extended to all persons whom the ministers of the day might think it convenient to obtrude upon the House of Lords? Might not the hereditary peers be suddenly overpowered by creatures of the executive government,—not ennobled on account of their public services, or other claims to the favour of the crown, but appointed as nominees of ministers, and ready to do their bidding? Nay! might not the crown be hereafter advised to discontinue the grant of hereditary peerages altogether, and gradually change the constitution of the House of Lords from an hereditary assembly, to a dependent senate nominated for life only? Nor were there wanting eloquent reflections upon the future degradation of distinguished men, whose services would be rewarded by life-peerages instead of by those cherished honours which other men,—not more worthy than themselves,—had enjoyed the privilege of transmitting to their children. Sitting as an inferior caste, among those whom they could not call their peers, they would have reason to deplore a needless innovation, which had denied them honours to which their merits justly entitled them to aspire.

Decision of the Lords

Such were the arguments by which Lord Wensleydale's patent was assailed. They were ably combated by ministers; and it was even contended that without a reference from the crown, the Lords had no authority to adjudicate upon the right of a peer to sit and vote in their House; but, on a division, the patent was referred to the [298] Committee of Privileges, by a majority of thirty-three.(3) After an inquiry into precedents, and more learned and ingenious debates, the committee reported, and the House agreed, 'that neither the letters patent, nor the letters patent with the usual writ of summons issued in pursuance thereof, can entitle the grantee to sit and vote in Parliament.' Some hereditary peers, who concurred in this conclusion, may have been animated by the same spirit of jealousy which, in 1711, had led their ancestors to deny the right of the crown to admit Scottish peers amongst them, and in 1719 had favoured a more extensive limitation of the royal prerogative: but with the exception of the lord chancellor,—by whose advice the patent had been made out,—all the law-lords of both parties supported the resolution, which has since been generally accepted as a sound exposition of constitutiona1 law. Where institutions are founded upon ancient usage, it is a safe and wholesome doctrine that they shall not he changed, unless by the supreme legislative

authority of Parliament. The crown was forced to submit to the decision of the Lords; and Lord Wensleydale soon afterwards took his seat, under a new patent, as an hereditary peer of the realm.

But the question of life-peerages was not immediately set at rest. A committee of the Lords having been appointed to inquire into the appellate jurisdiction of that House, recommended that her Majesty [299] should be empowered by statute, to confer life-peerages upon two persons who had served for five years as judges, and that they should sit with the lord chancellor as judges of appeal and deputy speakers. A bill, founded upon this recommendation, was passed by the House of Lords; but after much discussion, it miscarried in the House of Commons.

Footnotes.

1. Or reputed daughter, the Countess of Walsingham.
2. 'For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs, as where a peerage is limited to a man and the heirs male of his body, by Elizabeth, his present lady, and not to such heirs by any former or future wife.'—Steph. Blackstone, ii. 589.
3. Content, 138; not content, 105. Hans. Deb., 3rd Ser., cxl. 263.

Next Contents Previous