

[HOUSE OF LORDS.]

[COMMITTEE FOR PRIVILEGES.]

EARLDOM OF NORFOLK PEERAGE CLAIM.

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Peerage—Surrender of Peerage to Sovereign—Grant by Sovereign of surrendered Peerage—Honour—Dignity.

A peer cannot surrender his peerage to the Sovereign in any manner; and this law must be applied to a surrender made in 1302.

In 1302 Roger le Bygod, Earl of Norfolk, surrendered the earldom to Edward I. In 1312 Edward II. granted to Thomas de Brotherton and to the heirs of his body the earldom so surrendered. Thomas de Brotherton was frequently summoned by writ to Parliament and sat there. Lord Mowbray, having proved his pedigree as senior co-heir of Thomas de Brotherton, alleged that the earldom had fallen into abeyance, and claimed that the abeyance should be determined in his favour as senior co-heir:—

Held, that the surrender by Roger le Bygod was invalid; that the charter of 1312 was consequently invalid; that the sitting in Parliament under the King's writ could not create an earldom; and that Lord Mowbray had not made out his claim.

LORD MOWBRAY, who was also Lord Segrave and Lord Stourton of Stourton, claimed to be Earl of Norfolk in the Peerage of England, as senior co-heir under a charter granted by Edward II. in 1312. By that charter, the material part of which is set out in Lord Ashbourne's speech, Edward II. granted to Thomas de Brotherton and the heirs of his body lawfully begotten the earldom which Roger le Bygod, Earl of Norfolk, had surrendered to Edward I. in 1302. Lord Mowbray alleged that that earldom went into abeyance in 1478, and prayed that the abeyance might be determined in his favour as senior co-heir of Thomas de Brotherton.

This claim was opposed by the Duke of Norfolk, who held among his other titles that of Earl of Norfolk under a charter granted by Charles I. in 1644 to Thomas Howard, whose heir the Duke was.

A great part of the argument addressed to the Committee dealt with the question whether the principle of abeyance which prevails in baronies is applicable to earldoms, the learned

counsel for Lord Mowbray contending that it is, and the learned counsel for the Duke contending that it is not. Upon this question the Committee expressed no opinion.

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July 2, 5, 6, 9, 12. *Sir Robert Finlay, K.C.*, and *G. D. Burtchaell (A. C. Fox-Davies with them)*, for Lord Mowbray, rested their case upon the charter of 1312, and upon the fact that Thomas de Brotherton was frequently summoned by the King's writ to Parliament and sat accordingly.

Warmington, K.C., and *Lord Robert Cecil, K.C. (Stuart Moore with them)*, for the Duke of Norfolk, pointed out that the surrender by Roger le Bygod of the Earldom of Norfolk, though no doubt believed at that time to be valid, was really invalid, and they cited Collins (*Proceedings and Precedents*) and the other authorities referred to in their Lordships' speeches as conclusive on this point. They also urged that, the surrender being invalid, the charter of 1312 was equally invalid, being based entirely upon the surrender; and that the fact that Thomas de Brotherton had frequently sat in Parliament under the King's writ of summons in no way entitled him to the earldom claimed under the charter of 1312.

Sir Robert Finlay, K.C., in reply, contested these propositions, and argued that the authorities referred to, being centuries later than the surrender, ought not to be read retrospectively.

Sir John Lawson Walton, A.-G. (G. R. Askwith and Geoffrey Ellis with him), for the Crown.

The Committee took time for consideration.

NOV. 27. EARL OF HALSBURY. My Lords, in this case the claimant seeks to establish his right to the Earldom of Norfolk, an earldom created in the person of Hugh le Bygod in 1135. It may be assumed that he has satisfactorily established his pedigree, but in the course of it he is compelled to admit that he is not heir to the earldom so created, but has to rely on a surrender of the earldom to the King in 1302 and a grant in 1312 to Thomas de Brotherton of the earldom so surrendered. Now the claimant has undoubtedly proved his descent from Thomas de Brotherton,

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but the fatal blot in his case is that the surrender upon which he relies is invalid in law. It is settled law "that no peer of this realm can drown or extinguish his honour (but that it descend to his descendants) neither by surrender, grant, fine, nor any other conveyance to the King." This has been repeatedly held to be the law for some centuries, and finally in the Report on the Dignity of a Peer it is stated that such must now be held to be the law: vol. 2 of the Third Report on the Dignity of a Peer, pp. 25, 46.

This is binding on your Lordships. Something was suggested by the learned counsel as to what law or what understanding of the law your Lordships ought to apply. I know of no such jurisdiction as applicable to the law of England. Our duty is to the best of our ability to ascertain what the law is, and, having ascertained it, to give effect to it; to alter it or even modify it is the function of the Legislature, and not of your Lordships' House. No stronger illustration of this principle can be given than when, so lately as 1818, the Court of King's Bench, with Lord Ellenborough presiding, felt itself compelled to allow a claim to wager of battle in an appeal of murder (1), and but for the intervention of an Act of Parliament, 59 Geo. 3, c. 46, some of His Majesty's judges might have had to preside over a single combat between the appellant and his antagonist.

I think Sir Robert Finlay was correct in saying that the King's writ, followed by a sitting in Parliament, of itself created a peerage, but assuming it did, it would not of itself create an earldom. An earldom was an office as well as a dignity, and the office was full of the heir of the Bygods; and the rank of an earl could not be conferred merely by the Sovereign addressing the peer by that title even if it had been possible to create two earldoms for the same county. The somewhat archaic form which up to the present day accompanies the creation of an earldom shews the manner in which such a dignity can be created.

I move your Lordships that we report to the House that the claimant has not established his claim to the dignity in question.

(1) See *Ashford v. Thornton*, 1 B. & Ald. 405, in which case the appellant declined to proceed further after the decision of the Court on the main point, see at p. 460.

LORD ASHBOURNE. My Lords, Lord Mowbray claims that he is entitled to the Earldom of Norfolk, created by the charter of December 16, 6 Edw. 2, 1312. That charter opens with the following words: "The King to Archbishops &c. greeting, Know ye that we have given, granted, and by this our charter confirmed to Thomas de Brotherton, our very dear brother, all the right and honour and Lordship, which Roger le Bygod formerly Earl of Norfolk, and Marshal of England, had by the name of Earl in the county of Norfolk, and which came to the hands of the Lord Edward, (the first) of famous memory, formerly King of England, our father, by the grant, surrender, remise and quitclaim of the same Earl, and are in our hand, to have and to hold to the same Thomas and his heirs of his body lawfully begotten of us and our heirs, with all and singular things thereto belonging by whatsoever name they may be called as entirely as the aforesaid Earl had and held them on the day of the grant, surrender, remise and quitclaim aforesaid for ever."

The earldom that was granted to Thomas de Brotherton in 1312 was the earldom that had been held by Roger le Bygod and had been surrendered by him to King Edward I. in 1302. The suggestion made—not very strenuously—in argument that the charter might be regarded as conferring a new and independent Earldom of Norfolk on Thomas de Brotherton, apart from the Bygod earldom, cannot, I think, be maintained on any fair construction of that document. The fact that Thomas de Brotherton was repeatedly summoned to and sat in Parliament under the grant of 1312 cannot be considered as conferring any right to the earldom apart from the charter. No such case is advanced in his documents by the claimant, who was probably advised that a writ of summons and subsequent sitting in Parliament may ennoble the blood and confer right of peerage, but would hardly be accepted as sufficing, of itself, to confer an earldom. The matter is fully discussed in the Third Report on the Dignity of a Peer, vol. 2, pp. 116, 120, and Cruise on Dignities, p. 228.

Therefore a decision is primarily required on the legal construction and effect of the charter of 1312. Assuming the pedigree of the claimant to be established (and it is not

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disputed), and that there is no constitutional or legal difficulty in applying the practice of calling out of abeyance to earldoms as well as to baronies (which it is not now necessary to discuss), has Lord Mowbray made out his claim to the Earldom of Norfolk granted to Thomas de Brotherton in 1312?

That earldom was the earldom of Roger le Bygod, as held by him at the date of its surrender to King Edward I. in 1302. If that surrender was legal according to peerage law, then the earldom of Roger le Bygod was vested in the Crown, and could be regranted in any subsequent year to any other subject. But was it legally competent for an earl or any other peer to surrender or destroy his earldom or peerage? Can any peer, by his mere personal act, oust and kill the rights of those entitled in remainder—it might be his children, brothers, or near kinsmen? Roger le Bygod had a brother living in 1302, and other kinsmen are stated to have been subsequently in existence. Supposing a claimant should now appear, proving a clear descent from a Bygod entitled to the old earldom, what answer could be made?

This case was not put forward until his supplemental case by the Duke of Norfolk, but it was fully argued before your Lordships. It is manifest that Lord Mowbray never anticipated how this argument would be pressed against his claim, for in his supplemental case it is stated. "a peerage of England is inalienable and cannot be sold, resigned or relinquished."

The question really is narrowed to this, Had Roger le Bygod the legal right to make a valid surrender of the Earldom of Norfolk in 1302? The law on the subject does not now appear open to any doubt, and whenever the question came before your Lordships' House the opinions expressed gave no sanction to any contrary intention. In 1626 Doddridge J., in the Earl of Oxford's case advised the House: "If a man be created earl to him and to his heirs, all men do know that although he have a fee simple yet he cannot alien or give away this inheritance, because it is a personal dignity annexed to the posterity and fixed in the blood": Collins, p. 190.

In the Grey de Ruthyn case, in 1640, a resolution of this House put the proposition with absolute clearness. It is

printed in the Third Report on the Dignity of a Peer, p. 25, vol. 2: "That no peer of this realm can drown or extinguish his honour (but that it descends unto his descendants), neither by surrender, grant, fine, nor any other conveyance to the King."

In 1678 the net question presented itself for decision in the Purbeck case, and the resolution of the House was distinct and unqualified: Collins, p. 306. "No fine now levied nor at any time hereafter to be levied to the King can bar such title of honour or the right of any person claiming such title under him that levied or shall levy such fine." The House proceeded as if it were declaring clear law, and not as if they were laying down any novel proposition. The precedents of surrenders that had been cited were brushed aside, as having passed sub silentio, and without contest. No case was then cited, and none was cited before us, where this House gave any countenance to the contrary proposition.

It is not denied that the law is now clear, but it is urged that it is hard and unreasonable to apply it to such an early date as 1302, that it was not then known or declared. On the subject of hardness and unreasonableness, it is not unworthy of note that this is not a case of disturbing and upsetting a long possession. On the contrary, it is a claim to call a title out of abeyance, after over four centuries.

If the law is clear, how can we avoid applying it? The law did not begin in 1626, or 1640, or 1678. It was suggested that although no date could be arbitrarily fixed for its starting point, may be it would be reasonable to say that it should not be applied until our parliamentary system was established. But even if that canon was laid down I do not think it would help Lord Mowbray, for it could not be urged that the condition suggested was not satisfied before 1302, the date of the surrender. What has been called "the model Parliament" met in 1295, and it is manifest that from that date, at all events, our parliamentary system must be regarded as established: see Stubbs' Constitutional History of England, ch. 15, and the recent Political History of England, vol. 3, ch. 10.

In my opinion the claimant has failed to make out his case, and I concur in the resolution moved by my noble and learned friend,

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H. L. (E.) LORD DAVEY. My Lords, I had prepared some notes as material for a judgment in this case, which have been read, and I believe approved, by some of your Lordships; but I do not propose to trouble you at any length, because I should only be repeating what has already been said by my noble and learned friends. As they have truly said, the real question is whether the claimant has made out a title in his ancestor to the Earldom of Norfolk which he claims.

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Now, my Lords, there cannot, I think, be any doubt about the construction of the charter of Edward II. in 1312. The terms of that charter, which have been read by my noble and learned friend beside me (Lord Ashbourne), are plain and unambiguous. It is therefore Bygod's earldom which Bygod had purported to surrender into the King's hands that the King purports to grant to Thomas de Brotherton. It was not, and did not, operate as a new creation of a new earldom. Indeed, it may be doubted whether, having regard to the original conception of an earldom as an office, the lawyers of that day would have admitted the possibility of there being two earls of the same county.

Now, my Lords, there is no doubt that a man cannot alien a title of honour either by surrender to the Crown or by grant to a subject. This is now settled law, and the reason is this, that it is a personal dignity which descends to his posterity and is fixed in the blood. In other words, he cannot by his own act alter or affect the status of his descendants or the other persons in the succession. But it has been suggested rather than argued that, although this is now recognized to be the law, it was not accepted or treated as law in the reign of Edward II., and that the grant of 1312 ought to be treated as valid and effect given to it in accordance with the ideas of the fourteenth century, and not according to those which now prevail. This contention appears to me to be based on a fallacy, and to involve a misapprehension of the nature of the jurisdiction exercised by your Lordships in peerage cases. Whenever a Court or this House, acting judicially, declares the law, it is presumed to lay down what the law is and was, although it may have been misunderstood in former days, and this House is bound by its own declarations of the law in all matters within its jurisdiction. In fact, this House,

exercising its judicial functions, has no jurisdiction or power to alter the law when once ascertained in a binding way.

My noble and learned friend who preceded me referred your Lordships to the opinion expressed by Doddridge J. when advising this House in the Earl of Oxford's case in 1626, the resolution in the Grey de Ruthyn case in 1640 and that in the Viscount Purbeck's case in 1678. My Lords, I venture to say that no lawyer can doubt that according to the true construction of these resolutions they are, and are intended to be, retrospective. And this point is brought out clearly, in the opinion of Lord Shaftesbury, in the Purbeck case, which I think the ruling one. A number of precedents to the contrary effect had been cited by the Attorney-General in argument (as they have been to your Lordships), including that of the surrender of the Earldom of Norfolk now in question. Lord Shaftesbury's comment (reported in Collins, p. 305) was: "So that all his precedents passed sub silentio and never contested. If any of these surrenders had upon a dispute been adjudged good, Mr. Attorney had offered your Lordships something." On that ground he disregarded the ancient precedents. I think it impossible to treat these resolutions as laying down a new rule for the future only or meaning no more than "*fieri non debuit factum valet*." That would be the office of legislation, not of judicial decision.

Another argument has been used which appears to me to involve a confusion between a right of peerage and a title of honour conferring a particular rank in the peerage, which is a matter merely collateral. The argument to which I refer is that even if the surrender by Bygod was invalid, yet the grant to Thomas de Brotherton, followed by his sitting in Parliament as Earl of Norfolk, would confer the dignity of an earl upon him and give him the status of an earl.

I pass by the objection that this title by sitting in Parliament is not claimed in the claimant's petition and consider the argument on its merits. Historically, a right of peerage is a right to be specially summoned by name to Parliament, and when so summoned to sit amongst the *Majores Barones*. According to law as we now understand it, the heirs of a person so summoned

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For these reasons I concur in the resolution proposed by the noble and learned Earl.

LORD JAMES OF HEREFORD. My Lords, I wish only to express my concurrence in the opinions which have already been presented to your Lordships' House.

VISCOUNT KNUVSFORD. My Lords, I only desire to say that I concur in the view that the claimant has failed to make out his case; and for the grounds on which that decision has been arrived at I would refer to the statements which have been so fully made by the noble and learned Lords opposite (Lord Ashbourne and Lord Davey).

Resolved, that the Committee do report to the House that the petitioner has not established his claim to the dignity in question.

Lords' Journals, November 27, 1906.

Solicitors: *Upton & Britton; Few & Co.; Wilsons, Bristowe & Carpmael.*