

A note on the creation of peers

1. It is often stated that the creation of peers is an exercise of the prerogative.¹ However, this note seeks to show that, in the creation of life peers to sit in the House of Lords, the power exercised by the Queen (upon advice) is statutory, not of the prerogative following the Life Peerages Act 1958.
2. Such a conclusion would render ~~stale~~ the reasoning in *Black v Chrétien* (2001)² obsolete, since that case assumed without reference to the 1958 Act that the power in question was the prerogative of bestowing honours.

Life peerages before the Life Peerages Act 1958

- 56, Sir James Parke was appointed (a) - 1n / TT1 12 (k) - appointing a life peer was insufficient to grant an entitlement to sit in Parliament: *Wensleydale Peerage* [1856] 5 HLC 958.
5. Parke was then granted an hereditary peerage (though he had no sons to inherit the title), and the Appellate Jurisdiction Act 1876 granted power to the Crown to create a number of Lords of Appeal in Ordinary, being peers for the duration of their office and entitled to receive a writ of summons to the House of Lords. The Act¹⁸⁷⁶ was amended in 1887 to extend these to peerages for life, even ~~after~~ refusing to be a Lord of Appeal in Ordinary.

¹ Eg AW Bradley, KD Ewing & C J S Knight (2015), *Constitutional and Administrative Law* (16th.003 T2Ad783p c48 ().2200

The Life Peerages Act 1958

6. The Life Peerages Act 1958 states that Her Majesty shall have power by letters patent to confer on any person a peerage for life having the incidents specified in subsection (2) of this section. There are three possible interpretations of this provision.
7. Firstly, it may be that it is merely declaratory of a pre-existing prerogative to appoint life peers to sit in the House of Lords. However, the language of the Act tends away from this interpretation: the use of 'shall have' rather than 'has' signifies that the Act will effect a change of Her Majesty's powers. Further, although several of their Lordships in debate on the Bill considered it a corrective to the Wensleydale case, the Act does not explicitly overturn that decision. Rather, it appears to grant a new power.
8. The second and third interpretations differ on the nature of that power. It may either be (i) a power to create life peers (the new peerage having the incidents set out in subsection (2)) or (ii) a power supplementary to a prerogative power of creation, allowing Her Majesty to grant to new life peers the right to receive writs of summons and thus to attend the House of Lords. It is submitted that the former of these is the correct interpretation.
9. The first point in favour of this interpretation is the plain language of the statute. The power is 'to confer...a peerage for life' not merely 'to confer...the incidents specified in subsection (2)'. Further, subsection (2) uses the language 'peerage conferred under this section' indicating that the creation itself is use of the statutory power.
10. Secondly, it is submitted that the Act clearly envisages the rights set out in subsection (2) as 'Incidents' of the peerage created. That is, the new rights stem from the very nature of the peerage created. To construe the Act as creating a supplementary statutory power to grant those rights is therefore inconsistent with the language of the Act.
11. The language of the 1958 Act may be contrasted with the Peerages Act 1963, s 6: 'woman who is the holder of a hereditary peerage in the peerage of England, Scotland, Great Britain or the United Kingdom shall (whatever the terms of the letters patent or other instrument, if any, creating that peerage) have the same right to receive writs of summons to attend the House of Lords, and to sit and vote in that

House.. as a man holding that peerage. The power to create life peers under the prerogative was not in dispute at the time of the 1958 Act. What was in dispute was the right to attend the House of Lords. Had Parliament wished simply to create that right, it would have done so in the clear language of the 1963 Act.

12. Thirdly, s. 1(3) permits a 'life peerage [to] be conferred under this section to a woman'. This clearly envisages the s. 1 power as one of creating a life peerage (with certain incidents). Life peerages had previously been conferred upon women under the prerogative without the right to sit in Parliament, and so no special power was required to create the peerage itself. The intended effect of s. 1(3) is to clarify that the power granted by s. 1 is a power to confer a life peerage of a new kind carrying a right to attend Parliament and capable of being bestowed on men and women alike and not merely to bestow supplementary rights.
13. It follows that, even if there was a pre-existing prerogative power to create life peers with the right to sit in the House, the 1958 Act has subsumed it. *DC Keyser's Royal Hotel Ltd* [1920] AC 508.

The letters patent

14. It is submitted that an ambiguity surrounding the nature of the power exercised in the creation of life peers was at the forefront of the mind of the draftsman of the pro forma letters patent first issued in the Crown Office Rules Order 1958, now contained in The Crown Office (Forms and Proclamations Rules) Order 1992. The forms for life peerages (both barons and baronesses) are to be found as Forms F and G of Part II of the Schedule to the 1992 Order.
15. The relevant formula is '...Know Ye that We of Our special grace certain knowledge and mere motion in pursuance of the Life Peerages Act 1958 and of all other powers in that behalf Us enabling do by these presents advance create and prefer...'
16. This can be compared with the (now defunct) form for creating Lords of Appeal in Ordinary (Form H): 'Know Ye that We of our especial grace have in pursuance of the Appellate Jurisdiction Act 1876 as amended by subsequent enactments nominated and appointed and by these Presents do nominate and appoint...'

17. It will be noted that Forms F and G include reference to 'all other powers', which must refer to prerogative powers. It is submitted that this element of the formula is legally redundant, but was perhaps included ex abundanti cautela.

Can life peers be appointed under the prerogative?

18. Although the 1958 Act has subsumed any existing prerogative power to create life peers entitled to sit in the House, under the principle in *De Keyser* it is plausible to argue that it has not subsumed any existing prerogative power to create life peerages without that right.

19. The 2017 report of the Lord Speaker's committee on the Size of the House noted this possibility as a way of conferring high ranking honours without precipitating a growth in i(d)1 (e0.24 ()-1 (cCyh)2 (t(.)Tj EMC /Span <</3CID 41 >>BDC 7.98 -0 020 (4 4

accident of history - a prerogative power the control of whose exercise requires so
principled rationale

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