

## Property law and Imperial and British titles: the Dukes of Marlborough and the Principality of Mindelheim

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### Summary

The title of prince of the Holy Roman Empire was conferred in 1704 upon all the children heirs and lawful descendants, male and female, of John Churchill, the first duke of Marlborough. The title of prince of Mindelheim was granted in 1705 to all male descendants and daughters of the first duke. But following the Treaty of Utrecht in 1713 and the Treaty of Rastatt in 1714 the principality passed to Bavaria. The right of the dukes of Marlborough to use the style and title was thus lost, and any residual rights would have expired in 1722 on the death of the duke, as they could not pass to a daughter (unlike his British titles). Despite this it is still common practice to describe the Duke of Marlborough as a Prince of the Holy Roman Empire and Prince of Mindelheim. This paper considers the differences in the treatment of the descent of the British and imperial titles.

### Keywords

Duke of Marlborough; John Churchill; Principality of Mindelheim; Principality of Mellenburg; prince of the Holy Roman Empire; peerage; statutory entail; alienation.

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### Introduction

Field Marshal Sir John Churchill, first duke of Marlborough, was one of the greatest military commanders in history. He held the office of Captain-General of the English and then British army (the late seventeenth and early eighteenth century equivalent of Commander-in-Chief of the Forces), in 1690–1691 and 1702–1711. During the War of the Spanish Succession he was commander-in-chief of the combined armies of Great Britain and the

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Netherlands, and his greatest victories over the French were at Ramillies (1706), and Oudenarde (1708)<sup>1</sup>.

But it is for the Battle of Blenheim (1704), in which Anglo-Austrian forces, led by Churchill and the Austrian general, Prince Eugene of Savoy<sup>2</sup>, defeated the French and Bavarians under the French marshal Camille, Duc de Tallard<sup>3</sup>, and the Elector Maximilian II Emanuel of Bavaria, that Churchill is best remembered. It was also this victory, above all others, which cemented his European reputation, and which led to him being given the titles which he, and his wife Sarah, had sought.

Churchill's military achievements were matched by his (and his wife's) political and social ambitions. He was always ready to accept, and often actively sought, what he saw as appropriate recognition for his undoubted talents. It was a sign of his eminence as a general – and of the relatively permissive nature of English society – that he rose so high in the army and then the political elite, given his own modest and relatively humble origins. Indeed the dukedom of Marlborough is the only British dukedom still in existence to have been conferred on a man who was born the son of a commoner, and with no prospect of inheriting either a title or large estates<sup>4</sup>. Churchill was a self-made man, unusual at this time in England, but even more so in Germany. As shall be shown, this difference was to have important consequences for Churchill, and his family.

Another distinction which Churchill eagerly accepted – though his influential wife, Sarah, was opposed<sup>5</sup> – was the rank and title of a prince of the Holy Roman Empire. This was conferred upon the duke by a grateful Emperor Leopold I, after the victory at Blenheim. The substantive principality of Mindelheim followed in 1705; thus making John Churchill Fürst von Mindelheim<sup>6</sup>. No British subject before or since ever received a territorial principality of the Holy Roman Empire, though many have received foreign titles<sup>7</sup>, some of them imperial; and one, Richard of Cornwall, Earl of Cornwall

<sup>1</sup> See, for instance, J.R. Jones, *Marlborough*, Cambridge 1993.

<sup>2</sup> François-Eugène, Prince of Savoy-Carignan.

<sup>3</sup> Camille d'Hostun de la Baume, Duc de Tallard.

<sup>4</sup> All others have been conferred on someone already holding a lesser title.

<sup>5</sup> Sir W. Spencer Churchill, *Marlborough: his life and times*, London 1936, III, p. 47.

<sup>6</sup> Mindelheim was a minor state of Unterallgäu in Bavaria, Germany. Mindelheim was part of the territory of Rechberg until 1467 when it was made a Lordship for the House of Frundsberg. It was raised to a Barony in 1569, was annexed by Maxelrain in 1586, then by Leuchtenberg in 1618, and created a Principality in 1705.

<sup>7</sup> The Field Marshal the Duke of Wellington was prince of Waterloo (Belgium Netherlands, 1815); duke de Vittoria (literally 'of the Victory'; Portugal, 1812), marquis de Torres Vedras (Portugal, 1812), and count de Vimeira (Portugal, 1811); grandee 1<sup>st</sup> class (Spain, 1812), and duque de Ciudad Rodrigo (Spain, 1812). In contrast, Vice Admiral Viscount Nelson received only the Sicilian dukedom of Bronte (1799), though doubtless he would have received other honours had he survived the Battle of Trafalgar (1805).

and Count of Poitou, was even briefly King of Germany (formerly 'King of the Romans', heir to the imperial crown)<sup>8</sup>.

But the duke's humble origins were to present a particular challenge to the imperial authorities, for many of the existing imperial princes were opposed to Churchill being honoured in this way, though they may have owed their own thrones to Churchill's abilities as a general. The Churchills were a long-established West Country family of minor gentry, armigerous, and claiming descent from Roger de Courcil, alleged companion-in-arms to William the Conqueror. But they were commoners, and not regarded as at all equal in blood to the other princes of the Empire. Indeed, in accordance with established English law, Churchill's immediate and more distant family, even his son, known by the courtesy title of Marquess of Blandford, remained commoners even after his own ennoblement.

The great duke's only son, John Churchill, Marquess of Blandford, had died of small-pox at Cambridge in February 1703, only two months after his father had been created duke of Marlborough and marquess of Blandford<sup>9</sup>. These titles had been created with the usual remainder to his heir male. To prevent their extinction with the death of the first duke, his English titles were settled on his heirs female by the Duke of Marlborough Annuity Act 1706<sup>10</sup>. The manor of Woodstock, which was granted 28th January 1705<sup>11</sup> with an estate of 9,000 hectares (22,000 acres) in Oxfordshire, Blenheim Palace (built on the manor)<sup>12</sup>, and a pension of £5,000 a year on the Post Office, were similarly treated. A statutory entail was relatively uncommon, but the alteration of the peerage grant was especially unusual.

In the event, the duke was to have no further sons, and John Churchill was succeeded on his death in 1722 by his eldest daughter, Henrietta, as duchess of Marlborough in her own right. Her own son, William Godolphin, Marquess of Blandford, died in 1731, and on her death she was succeeded as third duke by Sir Charles Spencer, his son, who was also her nephew, as

<sup>8</sup> The second son of King John, Richard was nominally German King 1257–72.

<sup>9</sup> Churchill (*supra*, n. 5), I, p. 631; G.E. Cokayne ('G.E.C.') (ed.), *The complete peerage: the complete peerage of England, Scotland, Ireland, Great Britain, and the United Kingdom extant, extinct, or dormant*, London 1887–1898, 'Marlborough'.

<sup>10</sup> 6 Anne c. 4 or 7, not 6 (England). In July 1993 action taken by duke to end statutory entail to allow his younger son to inherit the entailed estate, due the perceived unfitness of the eldest, the heir to the dukedom, to manage the estate.

<sup>11</sup> Letters patent 5th May 1705, in fee simple; *Hambro v. Duke of Marlborough* [1994] Ch. 158, 159.

<sup>12</sup> Some £300,000 was spent on the palace, the majority from the civil list, and £60,000 by the duke himself. It is very difficult to give an accurate assessment of the present day value of money. 'Measuring Worth, Purchasing power of British pound calculator' (<http://www.measuringworth.com/calculators/ppoweruk/>) is one of many attempts to produce a tool capable of calculating approximate values. Using this, £300,000 in 1706 was estimated to be worth £40m in 2005; L.H. Officer, *Purchasing power of British pounds from 1264 to 2005*. MeasuringWorth.com, 2007.

Henrietta's sister Lady Anne Churchill had married Charles Spencer, third earl of Sunderland. Sir Charles Spencer's younger brother, the Honourable John Spencer, of Althorp, Northamptonshire, was the ancestor of the earls Spencer<sup>13</sup>. The fifth duke took the surname Spencer-Churchill in 1817, but the dukes are in fact direct male line descendants of John Churchill, first duke of Marlborough, through his second daughter.

The present duke is John George Vanderbilt Henry Spencer-Churchill (the 11th duke). His British titles are duke of Marlborough (England 1702), marquess of Blandford (England 1702), earl of Sunderland (England 1643), earl of Marlborough (England 1689), baron Spencer (of Eyemouth, England 1603), and baron Churchill (of Sandridge, England 1685). The Spencer connection brought the titles of earl of Sunderland and baron Spencer, and John Churchill had himself been given the other titles.

The Duke of Marlborough Annuity Act 1706<sup>14</sup> did not affect the imperial titles, which accordingly became extinct upon the death of the first duke of Marlborough, in 1722 (though his daughters remained princesses of the Holy Roman Empire until their own deaths). Therefore Henrietta, duchess of Marlborough (in her own right, in accordance with the special remainder of the Duke of Marlborough Annuity Act 1706)<sup>15</sup>, the second of the line, was also the last of the family to enjoy imperial honours. She could not pass the imperial title to her son, nor could she pass it to Charles Spencer, third duke of Marlborough.

Neither could Henrietta, duchess of Marlborough and Charles, duke of Marlborough, be princess or prince respectively of Mindelheim, though, in part, for different reasons. This paper considers the reasons why the title of Prince of the Holy Roman Empire, and the Principality of Mindelheim, could not be held by the dukes of Marlborough after the death of the first duke, despite common repute to the contrary.

### **Imperial titles for Churchill**

Most standard reference books describe the current duke of Marlborough as a prince of the Holy Roman Empire (1704), and as the prince of Mindelheim (1705)<sup>16</sup>. This would appear to be legally incorrect, at least in part, if not wholly so, for the reasons given above. We may ask how this confusion might

<sup>13</sup> Contrary to idle speculation, Diana Princess of Wales was not a princess of the Holy Roman Empire, as her family were descended in the male line from the Spencers, not the Churchills.

<sup>14</sup> 6 Anne c. 4 or 7 (England).

<sup>15</sup> *Ibid.*

<sup>16</sup> See, for instance, *Burke's Peerage*, and *Debretts Peerage*.

have arisen. To answer that we must look at the circumstances of the creation, and the nature of the titles bestowed.

Count Johann Wenzel Wratislaw, envoy of Emperor Leopold I, had conveyed to the duke a proposal to create him a prince of the Holy Roman Empire, with territory and a seat in the imperial Diet<sup>17</sup>. This was not to be merely a titular honour, like his English dukedom and lesser titles, but a substantive territorial principality. The empire was a form of federation, with member states enjoying varying degrees of independence. Since the Peace of Westphalia in 1648 the tenants-in-chief of the emperor were deemed to be sovereign princes, however miniscule their territories might actually be<sup>18</sup>. This meant that Churchill would possess not merely an honorific imperial title, but also his own independent territory.

The duke wrote to his wife Sarah, on 4<sup>th</sup> June 1704, that Count Wratislaw had told him that the Emperor wanted to make him a sovereign prince of the empire<sup>19</sup>. The duchess was not eager, but did not actively oppose the plan. The emperor sought the formal approval of the Queen, Anne<sup>20</sup>. This was duly given – something which Queen Elizabeth I would never have done<sup>21</sup>, nor, probably, later Sovereigns.

But Leopold had acted precipitously, and difficulties were now encountered. There were no imperial lands then available, which necessitated a delay. But, more importantly, reservations were expressed by some existing imperial princes. Churchill was a new man, only a small country gentleman, from a country at the very edge of Europe, indeed one that was outside the boundaries of the empire<sup>22</sup>. But, though faced with opposition from some the largely German imperial nobility, the emperor felt personally committed to grant Churchill at least an honorific title<sup>23</sup> – the princely title, but without sovereignty or a seat in the imperial parliament, the Diet. This initially was what Churchill received, though this itself was to cause its own problems.

Like peerages, imperial titles descended (and indeed still descend, where the families survive) in accordance with the conditions of the original grant.

<sup>17</sup> *The Marlborough–Godolphin Correspondence*, ed. H. Snyder, Oxford 1975, p. 318–320; Blenheim MSS. E2; printed Ven. W.C. Coxe, *Memoirs of the Duke of Marlborough*, London 1820, I, p. 252–253.

<sup>18</sup> See B. Teschke, *The myth of 1648: class, geopolitics, and the making of modern international relations*, New York 2003.

<sup>19</sup> 15th June 1704; Sir W. Spencer Churchill, *Marlborough: his Life and times*, London 1934, II, p. 485–486.

<sup>20</sup> 20th June 1704 rescript to Count Wratislaw; Churchill, (*supra*, n. 19), II, p. 486.

<sup>21</sup> Wratislaw to Emperor, 22nd August 1704; Churchill (*supra*, n. 19), II, p. 487; *Feldzüge*, VI, p. 866.

<sup>22</sup> This was not necessarily a bar to the granting of a title to Churchill. There were, as will be seen, a number of titles held by princes outside the confines of the empire.

<sup>23</sup> Emperor Leopold I to duke, 17th August 1704; printed Coxe (*supra*, n. 17), I, p. 325–326.

Most of these were to all male descendants of the grantee and their daughters. Thus the sons of a prince would be princes<sup>24</sup>, and each would pass the title to their sons, and so on *ad infinitum*. But, in the case of a sovereign territory, only the eldest son would actually be the ruler (on the basis of the principle of masculine primogeniture), though all male members of the family would enjoy the title. Although daughters would have the style of princess, they would not pass this to their own sons or daughters.

The title of prince of the Holy Roman Empire was granted to Churchill, all his children, heirs and lawful descendants, male and female. But did this mean male descendants, his daughters and their descendants? Churchill may have assumed that it did, when he wrote: 'What is offered will in historie for ever remaine an honour to [our] family'.<sup>25</sup> He was either assuming that the title was subject to a special remainder, so that it would pass through a daughter (as his English titles were later to do), or that he would have a son to succeed him. The former is most likely, though the Duke of Marlborough Annuity Act 1706<sup>26</sup> was yet to be passed<sup>27</sup>. Yet the evidence indicates that this interpretation was not shared by the German princes, who were opposed to the notion of female succession, or succession through the female line<sup>28</sup>. In no case was an imperial title, titular or substantive, inherited by all heirs, male and female. In any case, as the duke was 54 years old, the birth of a son was not altogether out of the question, though Sarah duchess of Marlborough was by then too old to bear a child herself. Remarriage in the event of Sarah's death, and the subsequent birth of a son and heir, were remote possibilities at best.

The emperor had promised Churchill not merely a title, but also a seat in the Diet and a sovereign territory of his own. He was now in a difficult position. He could at least give him a title – and leave the question of territory, and succession, for later and more settled times. Emperor Leopold informed Churchill on the 28th August 1704 that he had created him a Prince of the Empire, with the rank of Highness, and addressed him as 'Most Illustrious Cousin and most dear Prince'<sup>29</sup>. This title was to be for himself and his heirs male and female.

<sup>24</sup> There were some variations. For instance, cadets of ducal families are called prince.

<sup>25</sup> Duke to duchess, 4th June 1704; Snyder (*supra*, n. 17), p. 319; Blenheim MSS. E2; printed Coxe (*supra*, n. 17), I, p. 252–253.

<sup>26</sup> 6 Anne c. 4 or 7 (England).

<sup>27</sup> *Burke's Peerage*, and other secondary sources, seem to believe this also. The former says 'with all his descendants, of either sex, to be princes ... also'.

<sup>28</sup> Salic or Salique Law, an ancient law of Pharamond, King of the Franks, which excluded female rulers, was long thought fundamental to Western laws of succession.

<sup>29</sup> Emperor Leopold I to duke, 28th August 1704; Thomas Lediard, *Life of John Duke of Marlborough*, 1736, I, p. 419.

But Churchill had wanted an effective principality, not an empty title<sup>30</sup>. This was known in Germany. Wratislaw told the emperor that a principality would be necessary to avoid offending a man on whom the empire, then in the last century of its long life, still depended<sup>31</sup>. Leopold was caught in an awkward position, since he could not afford to offend the German princes of an empire which had possessed more appearance than substance for centuries.

A territorial principality was however eventually granted, and Churchill was created prince of Mindelheim, in Suabia, on 18th November 1705, ironically not by Leopold, but by his son, Emperor Joseph. Churchill was invested with the principality at an imperial Diet at Innsbrück on the 24th May 1706. Thus Churchill was finally to have a seat in the imperial Diet, and a sovereign principality, as he had desired.

But what was the nature of these titles? There were two forms, titular and substantive. But the distinctions were not clear-cut. The honorary status of prince of the Holy Roman Empire might be granted to certain individuals, and might become effective as a sovereign principality in time, if certain conditions were met. The individuals who received princely titles included:

- (i) Independent sovereigns outside the Empire (such as the Grand Master of the Sovereign Military Order of Malta)<sup>32</sup>;
- (ii) Sovereigns who were vassals of the Empire, but outside its territory (such as the Prince of Piombino)<sup>33</sup>;
- (iii) Members of the Empire, like the Princes Kinsky<sup>34</sup> or Paar, and those who never had a vote or seat, but held a seat as count in one or several of the

<sup>30</sup> Duke to Sidney Earl of Godolphin, 11th September 1704; Snyder (*supra*, n. 17), p. 370–371; Blenheim MSS. A1-14; printed Coxe (*supra*, n. 17), I, p. 327. Duke to Sidney Earl of Godolphin, 22nd September 1704; Ven. W.C. Coxe, *Memoirs of the Duke of Marlborough* (*supra*, n. 17), II, p. 23.

<sup>31</sup> Churchill (*supra*, n. 19), II, p. 488–489.

<sup>32</sup> Prince of the Holy Roman Empire (Reichsfürst) 1607, cf. in 1620, Austrian prince (HSH) 27th December 1880, cf. 1889 and 1905. They were styled Most Eminent Highness by Italian royal decree 1927 (though for much longer by usage). The Papal rank of Cardinal dated from 1630.

<sup>33</sup> In Tuscany, Italy. In 1594 the Principality of Piombino was created by Emperor Rudolf II of Habsburg. In 1634 the title was acquired by the Ludovisi family, and, in 1708, by the Boncompagni. In 1805 Napoleon assigned it, together with Lucca (Principality of Lucca and Piombino). After Napoleon's final defeat and the congress of Vienna, the state of Piombino was annexed to the Grand Duchy of Tuscany. It became part of the unified Kingdom of Italy in 1860.

<sup>34</sup> The Counts and later Princes Kinsky (formerly Wchinsky or Tynsky, in Czech *Kinský*, plural *Kinští*, old name *Vchynské*) were one of the oldest and most illustrious families originating from the Kingdom of Bohemia, now the Czech Republic.

four comital councils, or who had neither a vote nor a seat in the imperial Diet (as Salm-Reifferscheidt-Raitz)<sup>35</sup>; and  
 (iv) Foreigners of note<sup>36</sup>, like the Princes Belmonte<sup>37</sup>, Chigi<sup>38</sup>, Orsini<sup>39</sup>, Orloff<sup>40</sup>, Potemkin<sup>41</sup>, Lubomirski<sup>42</sup>, and Radziwill<sup>43</sup>.

The effective co-states of the Holy Roman Empire, or Reichsstand, had to meet three conditions or requirements post-1648 to be sovereign rather than merely titular:

- (i) holding of an immediate fief of the Empire;
- (ii) a vote (*votum virile*) and a seat in the imperial Diet; and
- (iii) direct participation in the expenses of the empire.

Not all princes met all three requirements, so one may distinguish between effective and honorary princes of the Holy Roman Empire<sup>44</sup>. Churchill wished

<sup>35</sup> The Salm-Reifferscheidt-Raitz family were made princes and altgraves in 1790. Members of the family are called Altgrave / Altgravine (with the style 'His / Her Serene Highness').

<sup>36</sup> Fra C. Toumanoff, *Genealogical Imperialism*, (1985) 6(134) (N.S.) Coat of Arms 145, 151 n7.

<sup>37</sup> Prince Belmonte (Principe o Principessa di Belmonte) is a title created in 1619 by the Spanish crown for the dynasty founded by the Barons of Badolato and Belmonte, direct descendants of the papal family of the Counts of Lavagna who were ennobled in the eleventh century. The first holder of the title 'Prince of Belmonte' was Grand Seneschal of the Kingdom of Naples, one of the seven Great Offices of State. During the eighteenth century the Belmonte Princes were created Princes of the Holy Roman Empire.

<sup>38</sup> The Chigi-Albani are a Roman princely family of Sienese extraction, descended from the counts of Ardenghesca.

<sup>39</sup> Orsini was one of the most celebrated princely families in mediæval Italy and renaissance Rome, and which, in former times, had large possessions in Hungary. Members of the Orsini family include popes Celestine III (1191–1198), Nicholas III (1277–1280), and Benedict XIII (1724–1730). The princes Orsini und Rosenberg were members of the comital council (*personaliter*) 1683, and the head of the family was made a prince 1724, confirmed 1790. Succession was to all male descendants and their daughters from 1629. They held the title of His Serene Highness and Prince Assistant to the Papal Throne 1735–1958.

<sup>40</sup> Orlov (Орлов) is the name of a Russian noble family which produced several distinguished statesmen, diplomatists and soldiers. The family first gained distinction in the person of four Orlov brothers, of whom the senior was Catherine the Great's lover, and the two junior were notable military commanders. As none of the brothers left a legitimate male issue the title and arms of Counts Orlov passed in 1856 to the related Davydov family.

<sup>41</sup> Created in 1776 for Prince Grigori Alexandrovich Potemkin (Григорий Александрович Потёмкин), Russian General Field Marshal, statesman, and favourite of Catherine II the Great. He is primarily remembered for his efforts to colonize the sparsely populated wild steppes of the southern Ukraine, which passed to Russia under the Treaty of Kuchuk-Kainarji in 1774.

<sup>42</sup> A Polish *szlachta* (noble) family. In 1595, Emperor Rudolph II gave a member of the family the title of Count of Wiśnicz. Later the title of Prince and Count of Wiśnicz and Jaroslaw was conferred the recipient and his sons was granted by Emperor Ferdinand II.

<sup>43</sup> Radziwiłł is a family which has been of considerable importance for centuries, first in the Grand Duchy of Lithuania and later in the Polish-Lithuanian Commonwealth.

<sup>44</sup> Toumanoff (*supra*, n. 36), p. 147. Duke and Prince Jean Engelbert d'Arenberg, *The Lesser Princes of the Holy Roman Empire in the Napoleonic Era*, dissertation, Washington, DC, 1950,

for, and received, the former (effective – a sovereign principality), having first been made one of the latter (an honorary principality). But these two principalities remained distinct, with Churchill being both a Prince of the Holy Roman Empire, and the Prince of Mindelheim.

Despite opposition from many princes, the imperial authorities sought a principality for Churchill, to give him an immediate fief of the Empire. The king of Prussia proposed a grant of the principality of Donauwörth. This did not, however, proceed. Instead, Churchill received the principality of Mindelheim, which had been bought by an elector of Bavaria in the sixteenth century. This had been confiscated from the Elector Max Emmanuel in 1704 for his treachery, and was effectively occupied by imperial forces after the battle of Blenheim. It was therefore available to be given to a new prince. What better man to be the new prince of Mindelheim than the victor of Blenheim, saviour of the empire?

The principality of Mindelheim was situated south of the Danube, 45 kilometres (28 miles) south-west of Augsburg, and 77 kilometres (48 miles) west of München. It covered an area of 39 square kilometres (15 square miles)<sup>45</sup>, and had a nominal income at this time of £1,500<sup>46</sup>. Churchill had to meet the cost of the imperial investiture, which was reduced to £4,500<sup>47</sup> from the usual £12–15,000<sup>48</sup>, as a special favour by the emperor. He also avoided a wartime imperial tax of £6,000<sup>49</sup>.

Churchill now held an immediate fief of the Empire, had a vote and a seat in the imperial Diet, and (perhaps less welcome) direct participation in the expenses of the empire. His principality was effective and substantive, and not merely honorary. The king of Prussia, an ally of Churchill, through his representative the prince of Anhalt-Dassau, moved that the title should descend successively to all the heirs of Churchill's body. But many of the princes were opposed to this. The lack of a male heir would prevent the Churchills becoming hereditary princes of the empire, and this fact was essential to the eventual agreement of the princes. Thus no special remainder was provided<sup>50</sup> – thus rendering Churchill's notion of 'an honour to [our]

published as *Les Princes du St-Empire à l'époque napoléonienne*, Louvain 1951, p. 15ff, quoted in *Almanach de Gotha*, London 1998, p. 275–286.

<sup>45</sup> Churchill (*supra*, n. 19), II, p. 489.

<sup>46</sup> Using 'Measuring Worth' (*supra*, n. 12), £1,500 in 1706 was estimated to be worth £200,000 in 2005; L.H. Officer, *Purchasing power* (*supra*, n. 12).

<sup>47</sup> Again using 'Measuring Worth, – Purchasing Power of British Pound Calculator' (<http://www.measuringworth.com/calculators/ppoweruk/>), £4,500 in 1706 was estimated to be worth £600,000 in 2005.

<sup>48</sup> *Ibid*, £1.6m-£2m in 2005.

<sup>49</sup> *Ibid*, £800,000 in 2005.

<sup>50</sup> The proceedings of the grant of the imperial titles are printed in full in *Erhöhung in Reichs-Fürst Stand ... des ... Herzogs zu Marleborough*, 1707, including:

(a) the emperor's diploma, creating Churchill and all his children heirs and lawful descendants,

family<sup>51</sup> rather nugatory. Perhaps he thought that the Duke of Marlborough Annuity Act 1706<sup>52</sup> applied to the principality, but at least he now had an effective personal principality. The ‘honorary’ prince of the Empire (1704) was a different matter, since this did not bring with it a seat in the Diet, nor the control of any territory.

Churchill visited Mindelheim in late May 1713 (just after the Treaty of Utrecht was signed), receiving royal honours from his subjects<sup>53</sup>. But the fate of the principality, and of Churchill’s effective sovereignty, depended upon the details of the peace treaty which would bring the war to an end. Since the threat of France was ended Churchill was no longer needed by the empire, and he was to pay price. The Principality of Mindelheim was lost in 1714 to the elector of Bavaria, without any compensation being paid to the duke<sup>54</sup>.

Churchill retained the rank and title of (titular or honorary) prince, under the 1704 grant. He died without male heir 1722, and was succeeded by his daughter in his British titles<sup>55</sup>. The duchess was succeeded by the third duke (her grandson) in 1733, and the present duke is descended in the male line from that duke. But Churchill ceased to be de facto and de jure Prince of Mindelheim in 1714, and the family lost any possible claim to the Principality in 1722, as no succession by females or through the female line was tolerated in the empire.

It has been suggested that, after Treaty of Utrecht in 1713 (and the Treaty of Rastatt in 1714, between France and the Holy Roman Empire), Mindelheim was exchanged for the county of Mellenburg, Upper Austria, which was then elevated into a principality by Emperor Charles VI<sup>56</sup>. But other sources state simply that Emperor Charles VI wrote apologetic letters to Churchill<sup>57</sup>, and

male and female, princes of the Holy Roman Empire, and granting him, as an augmentation of honour to his arms, the imperial eagle, on the breast of which arms should be displayed. A St. George’s cross in a canton was granted to his father, Sir W. Churchill, as an honourable augmentation by King Charles II, for impoverishing himself in the cause of St. Charles King and Martyr in the Civil Wars.

(b) A later diploma, erecting the lordship of Mindelheim in Suabia, which it granted to him, into a principality held immediately of the Emperor.

(c) An account of the consequent proceedings of the Electoral College and of the duke’s introduction 22nd November 1706.

<sup>51</sup> Duke to duchess, 4th June 1704; Snyder (*supra*, n. 17), p. 319; Blenheim MSS. E2; printed Coxe (*supra*, n. 17), I, p. 252–253.

<sup>52</sup> 6 Anne c. 4 or 7 (England).

<sup>53</sup> Sarah to James Craggs, 7th June 1713; B.M. Stowe 751, fol. 61.

<sup>54</sup> Sersanders, Churchill’s secret agent (or rather confidential agent, as we would probably term him today) to the Elector of Bavaria, was authorised to include it in the peace treaty negotiations; Sir W. Spencer Churchill, *Marlborough* (*supra*, n. 5), III, p. 47.

<sup>55</sup> By the statute 6 Anne c. 4 or 7 (England).

<sup>56</sup> H. Montgomery-Massingberd, *Blenheim revisited: the Spencer-Churchills and their palace*, London 1985, p. 39.

<sup>57</sup> Churchill (*supra*, n. 5), III, p. 50.

that he did not replace Mindelheim. The immediate sense of obligation in 1704–1706, which had led the imperial authorities to grant Churchill an effective principality, no longer existed, and a merely titular principality was deemed sufficient for the English general.

Ultimately, as will be seen, it is probably of only academic interest whether Mellenburg was indeed conferred upon Churchill, since neither principality could have remained in the possession of the family after the death of the duke in 1722.

Churchill lost his seat and vote in the imperial Diet, a price he perhaps thought worth paying in the cause of peace. His descendants might have become one of the ‘mediatised’ houses of the empire had they retained their principality until the end of the empire, but they did not do so. Mediatised houses are those families that occupied sovereign territories within the Holy Roman Empire and its successor states in what is now modern Germany and Austria<sup>58</sup>. But not every intermediate state enjoyed the same status. Some princes were mediatised, though they were never independent, such as those members of the Diet *ad personam* (*personaliter*). Mediatised duchies, principalities and counties of the Empire also included princes entitled to a collective vote as members of one of four comital councils. Mediatised ducal, princely and county families (the ‘Standesherrn’) were concentrated in Suabia, Franconia, and the Wetterau in north-west Germany, where indeed Mindelheim was located.

But mediatised princes, who continued to enjoy recognition as quasi-sovereign although they lacked territory, were a creation of the last years of the eighteenth century and the early part of the nineteenth, by which time the German-dominated princes had largely forgotten the man whom many had dismissed as the ‘upstart Englishman’. More importantly, no special provision had been made for his imperial titles to pass to the issue of his daughters (or indeed to his daughters). The imperial honorary titles must thus have expired with the death of his younger daughter, Lady Mary Churchill (duchess of Montagu), in 1751, and the effective principality was lost much earlier.

Whatever the situation regarding his imperial lands and titles, Churchill’s British titles, and his estate at Woodstock, were profoundly different, and were subject to special statutory provisions, and did pass to the heirs of his daughters.

<sup>58</sup> In modern (post-1919) Germany nobility was abolished and the former noble title became a family name; it is unlawful to assume a title, which is part of a family name (§ 132a StGB: Mißbrauch von Titeln, Berufsbezeichnungen und Abzeichen). In Austria nobility and titles were formally abolished in 1919. Even if the Dukes of Marlborough were entitled to be styled Princes of Mindelheim, or Princes of the Holy Roman Empire, their titles could only be one of courtesy according to German and Austrian law.

### **Alienation and statutory entails**

The rewards Churchill received from Queen Anne (and earlier King William III) included titles and land. Statutory restrictions on the disposal of Crown lands necessitated the passage of the statute 3 & 4 Anne c 6 (1704). Due to the death of the first duke's son, the marquess of Blandford, and the increasingly unlikely prospects of a son and heir being born to the duke, as noted above, a special remainder to the titles was provided by the statute 6 Anne c. 4 or 7 (1706). A special remainder serves to alter the rules of succession which would otherwise apply to a peerage. In the event of failure of his male issue, the British titles, and Blenheim Palace and its estates, were to pass to Churchill's daughters and their male issue in tail male severally in succession with remainders over<sup>59</sup>.

This was in accordance with the normal rules for the descent of peerages, subject only to the statutory special remainder. As Lord Wrenbury observed in the *Rhondda Case* in the House of Lords:

A peerage is an inalienable incorporeal hereditament created by the act of the Sovereign in which, if and when he creates it, carries with it certain attributes which attach to it not by reason of any grant of those attributes by the Crown, but as essentially existing at common law by reason of the ennoblement created by grant of the peerage<sup>60</sup>.

The key difference from the position of the principality of Mindelheim is that here (with the British titles) we are concerned with a titular honour – though one which gave membership of the House of Lords until 1999. It was not one which enjoyed territorial sovereignty, or indeed had any lands inherently associated with it<sup>61</sup> – although the manor of Woodstock, in Oxfordshire, which had an estate of 9,000 hectares (22,000 acres), was associated with the title. Unlike the imperial fiefdoms, possession of which were jealously guarded by the imperial Diet and the wider body of princes, membership of the House of Lords was relatively freely granted – and thus the presumption was that Churchill's titles would be hereditary, as a family honour.

The first element of a British peerage is that it is a title or dignity created by the Crown<sup>62</sup>. But it is also in the form of inalienable (or at least normally

<sup>59</sup> *Hambro v. Duke of Marlborough* [1994] Ch. 158, 159.

<sup>60</sup> *Viscountess Rhondda's Claim* [1922] 2 A.C. 339.

<sup>61</sup> *R. v. Knollys* (1694) 1 Ld. Raym. 10; 91 E.R. 904; *Re Rivett-Carnac's Will*, (1885) 30 Ch.D. 136, 136.

<sup>62</sup> The Sovereign cannot herself hold a dignity: *Buckhurst Peerage Case* (1876) 2 Ap. Cas. 1, per Lord Cairns, L.C.; considered by *Viscountess Rhondda's Claim* [1922] 2 A.C. 339. The Sovereign has traditionally claimed the title of Duke of Lancaster, somewhat oddly, even when a Queen Regnant. This title, dating from a grant to Prince John of Gaunt in 1362, merged with the crown with the accession of King Henry VI. The title, being a peerage governed by

inalienable) property. English law – and the law in Scotland in relation to peerages differs from that in England and Wales in some respects – recognises a peerage as an incorporeal and impartible hereditament, inalienable and descendable according to the words of limitation in the grant, if any<sup>63</sup>. As a descendable dignity, peerages were covered by the Statute of Westminster the Second 1285 (*De Donis Conditionalibus*)<sup>64</sup>. A peerage is descendable as an estate in fee tail, rather than as a fee simple conditional<sup>65</sup>, whether it is conferred with any territorial qualification or not<sup>66</sup>. A peerage does not have any connection with the tenure of land<sup>67</sup>, but it is customary for viscounts and barons at least to have a territorial designation ('Baron [ ... ] of [ ... ] in Our County of [ ... ]')<sup>68</sup>. The naming of a place is not, however, essential to the creation of a peerage<sup>69</sup>.

The estate in fee tail of the peerage, also called an estate tail, is limited to a person and the heirs of his body, or to a person and the particular heirs of his body. Each successive heir to a peerage succeeds to the peerage in the terms of the original grant<sup>70</sup>. A limitation to 'his heirs' will not carry the peerage to collateral heirs<sup>71</sup> though a grant to the grantee and his heirs male

the ordinary rules of descent, could not have been inherited by Queen Elizabeth I, nor have descended to the present Queen. As the Sovereign is font of honour, they can use whatever title they wish, provided it does not conflict with the royal style and title established by law: *Norfolk Earldom Case* [1907] A.C. 10, 17 (H.L.) per Lord Davey.

<sup>63</sup> *Nevil's Case* (1604) 7 Co. Rep. 33a; 77 E.R. 460; *R. v. Viscount Purbeck* (1678) Show. Parl. Cas. 1, 5; 1 E.R. 1; *Norfolk Earldom Case* [1907] A.C. 10; *Viscountess Rhondda's Claim* [1922] 2 A.C. 339. If the peerage is a barony by writ, there will, of course, be no words of limitation. In English law, letters patent purporting to create a peerage without including words of limitation will be held to be bad. In Scotland a grant in fee would be presumed – *Perth Earldom Case* (1848) 2 H.L. Cas. 865; 9 E.R. 1322; *Herries Peerage Case* (1858) L.R. 2 Sc. & Div. 258; *Mar Peerage Case* (1875) 1 App. Cas. 1, 24, 36. This presumption is, however, rebuttable – *Herries Peerage Case*, *ibid*; *Mar Peerage Case*, *ibid*.

<sup>64</sup> 13 Edw. I c. 1 (England).

<sup>65</sup> *Re Rivett-Carnac's Will* (1885) 30 Ch.D. 136.

<sup>66</sup> *Earl Ferrers' Case* (1760) 2 Eden. 373; 28 E.R. 942.

<sup>67</sup> This was not always so, however. From the time of Henry VI until 1861 it was believed that peerages by tenure were possible; *Arundel Case* (1433) 4 Rot. Parl. 441; *Berkeley Peerage Case* (1861) 8 H.L.C 21; 11 E.R. 333.

<sup>68</sup> See the Crown Office (Forms and Proclamations Rules) Order 1992, S.I. 1992/1730, art. 2, Schedule, Part III, Forms D-G.

<sup>69</sup> *R. v. Knollys* (1694) 1 Ld. Raym. 10; 91 E.R. 904; *Re Rivett-Carnac's Will* (1885) 30 Ch.D. 136, 136; indeed, with a peerage created by writ of summons this would not be possible.

<sup>70</sup> A declaration of legitimacy obtained pursuant to the provisions of the Legitimacy Declaration Act 1858 (21 & 22 Vict. c. 93) (United Kingdom) is good for peerages and other dignities: *Amphill Peerage Case* [1977] A.C. 547. While the laws governing legitimacy have become more liberal since the nineteenth century, they do not in general allow the inheritance of dignities by illegitimate issue.

<sup>71</sup> *Wilkes Peerage Case* (1869) L.R. 4 H.L. 26, not following *Devon Peerage Case* (1831) 2 Dow. & Cl. 200; 5 E.R. 293.

will<sup>72</sup>. A peerage cannot be created with a limitation of descent which is unknown to the law of real property<sup>73</sup>. Nor can a peerage be the subject of a trust, nor pass to a trustee in bankruptcy<sup>74</sup>.

There are other aspects in which a peerage is quite dissimilar to real or personal property. Just as a peerage is a special type of property that is also a dignity or honour<sup>75</sup>, so the method of creation for a peerage differs from that required for ordinary property<sup>76</sup>. An hereditary peerage could be created either by the issue of a writ of summons to the House of Lords<sup>77</sup>, followed by the taking of his seat by the recipient of the writ<sup>78</sup> or by letters patent, the latter method having being invariably adopted since very early times<sup>79</sup>. The ending of the right of hereditary peers to a writ of summons – unless otherwise qualified (by office or election) – by the House of Lords Act 1999, would appear to render the first method of creation obsolete as well as obsolescent. The dukedom of Marlborough was of the former type.

<sup>72</sup> But not to his heirs general, as would a grant of land to the grantee and his heirs male: *Wiltes Peerage Case* (1869) L.R. 4 H.L. 26.

<sup>73</sup> *Wiltes Peerage Case* (1869) L.R. 4 H.L. 26; *Cope v. Earl De La Warr* (1873) 8 Ch. App. 982; *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, 20, per Lord Cairns, L.C.

<sup>74</sup> *Buckhurst Peerage Case* (1876) 2 App. Cas. 1, *Re Earl of Aylesford's Settled Estates* (1886) 32 Ch.D. 162. Members of the House of Commons are disqualified from sitting or voting if bankrupt; Insolvency Act 1986 (United Kingdom), s. 427.

<sup>75</sup> *Norfolk Earldom Case* [1907] A.C. 10, 17 (H.L.) per Lord Davey.

<sup>76</sup> For the creation of new types of dignities, see the Parliamentary *Report as to the dignity of a peer of the realm*, London 1829, first published 25th May 1820, 2, p. 37.

<sup>77</sup> Early Irish baronies were prescriptive, and descent was always to the heirs male of the body of the presumed grantee: *R. v. Levett* (1612) 1 Bulst. 194; 80 E.R. 882. There is, however, only one Irish barony by writ in existence, that of Le Poer (now held by the Marquess of Waterford), whose ancestor was called to the Irish House of Lords in 1375: *Le Power and Coroghmore Barony Case* (1921) Report of the Attorney-General 5, 6.

<sup>78</sup> *Lord Abergavenny's Case* (1610) 12 Co. Rep. 70; 77 E.R. 1348; *Verney's Case* (1695) Skin. 432; 90 E.R. 191. The actual taking of the seat must be proven: *De Wahull Peerage Case* (1892) cited in *St John Peerage Case* [1915] A.C. 282, 291. The existence of the writ may be presumed: *Braye Peerage Case* (1839) 6 Cl. & Fin. 757; 7 E.R. 882. Where a writ alone is used, a barony by writ, or barony in fee is created. A writ alone was usual till the middle of the reign of King Henry VII. Somewhat different rules apply to Irish and Scottish peerages, but as the rules for British and United Kingdom peers follows that of the English peerage, and the majority of peers belong to one or both of these, the rules of the English peerage are what principally concern us here.

<sup>79</sup> The first peerage created by letters patent was that for John de Beauchamp, created Lord de Beauchamp and Baron of Kidderminster in 1388. Limitation was to his heirs male of his body. See the *Report as to the dignity of a peer of the realm* (*supra*, n. 76), V, p. 81. Where letters patent were used, the necessity of taking a seat was removed, although formal investiture remained common until the early seventeenth century. The formal investiture of the Prince of Wales and Earl of Chester, revived in 1911, provides a good example of the older form. Some peerages have been created by act of Parliament, or by charter (*De Vere's Case* (1385) 8 State Tr. N.S. 646), and in the early years it was not always clear which method had in fact been used. See *The Prince's Case* (1606) 8 Co. Rep. 1 13b; 77 E.R. 496.

A peerage created by letters patent descends according to the limitation expressed in the letters patent, which is almost always to the heirs male of the body of the grantee<sup>80</sup>, that is to and through the male line in direct lineal descent from the grantee<sup>81</sup>. The patent must specify the patentee, the name of the dignity and its limitation<sup>82</sup>.

Without a special limitation in the letters patent – such limitations were commonly used as a special honour, to for example, some of the military leaders of the Second World War who lacked sons but had daughters<sup>83</sup> – only a peerage created by writ of summons could ever devolve upon a female<sup>84</sup>. Unlike an imperial title, female succession to a British peerage was possible, though rare.

The patent in English peerages in effect provides a limitation and definition of the effect of the issue of a writ of summons. It was because these rules of descent were regarded as essential to the nature of a peerage that statutory authority was needed to create peerages for life<sup>85</sup>. The right to a peerage is distinct from a title of honour conferring a particular rank in the peerage, which is merely a collateral matter<sup>86</sup>.

A peer, once created by the Crown in the exercise of the royal prerogative, is ennobled in blood<sup>87</sup>, so that no one can be deprived of a peerage except by or under the authority of an Act of Parliament<sup>88</sup>. This is true whether or not

<sup>80</sup> A grant of a peerage to the grantee and his heirs male is valid, though a similar grant of land would be void: *Wiltes Peerage Case* (1869) L.R. 4 H.L. 26.

<sup>81</sup> A grant to 'heirs male' rather than 'heirs male of the body' will be void: *Devon Peerage Case* (1831) 2 Dow. & Cl. 200; 5 E.R. 293; *Wiltes Peerage Case* (1869) L.R. 4 H.L. 26.

<sup>82</sup> Modern practice may be seen in Crown Office (Forms and Proclamations Rules) Order 1992, S.I. 1992/1730, art. 2 (1), Schedule, Part III.

<sup>83</sup> Lord Louis Mountbatten was created Earl Mountbatten of Burma, with special remainder to his daughters in order of seniority. These sorts of remainders were used only 13 times between 1643 and 1831, but after 1876 became more common, with seven used 1876–92.

<sup>84</sup> The doctrine that these baronies by writ (also called baronies in fee) were descendable to the heir general is historically unsound, but now well entrenched in law: *Lord Grey's Case* (1640) Cro. Cas. 601; 79 E.R. 1117; *Clifton Barony Case* (1673) in Sir Edward Coke, *Coke upon Littleton* ('*First Institutes*') (New York, reprint 1979 of 19th ed. 1832), 16b; *Vaux Peerage Case* (1837) 5 Cl. & Fin. 526; 7 E.R. 505; *Braye Peerage Case* (1839) 6 Cl. & Fin. 757; 7 E.R. 882; *Hastings Peerage Case* (1841) 8 Cl. & Fin. 144, 157; 8 E.R. 58; *Wharton Peerage Case* (1845) 12 Cl. & Fin. 295; 8 E.R. 1419.

<sup>85</sup> Appellate Jurisdiction Acts 1876–1947 (United Kingdom). Despite the Life Peerages Act 1958 (6 & 7 Eliz. II c. 21) (United Kingdom) the Crown still does not have the power to confer peerages for life. Creations must be in accordance with one or other of the statutory measures: *Wensleydale Peerage Case* (1856) 5 H.L.C. 958; 10 E.R. 1181.

<sup>86</sup> *Norfolk Earldom Case* [1907] A.C. 10, 17, per Lord Davey. Degrees are added by an exercise of the prerogative: *Report as to the dignity of a peer of the realm* (*supra*, n. 76), II, p. 37. Only earls and barons preceded the establishment of Parliament, and a writ of summons does not create any peerage except that of the degree of baron, whatever style is used in the writ: *Norfolk Earldom Case* (*supra*, n. 62).

<sup>87</sup> *Report as to the dignity of a peer of the realm* (*supra*, n. 76), I, p. 393.

<sup>88</sup> *Countess of Shrewsbury's Case* (1612) 12 Co. Rep. 106; 77 E.R. 1369; *R. v. Viscount Purbeck* (1678) Show. Parl. Cas. 1, 5; 1 E.R. 1. Nor, could a peer lose his title by attainder for treason

the peerage confers membership of the House of Lords. But the ennoblement in blood does not make the peerage the same as the nobility of much of Europe, which was – and in some cases remains – a distinct legal caste. Members of the family of a peer, even his heir apparent, are, in law, commoners. Nor, once conferred, may a peerage be renounced (though Scottish peerages might be), although an heir, upon succeeding to a peerage, may renounce the dignity for his lifetime, under the Peerage Act 1963<sup>89</sup>. The peerage is attached to the individual and his or her heirs and successors without regard to their personal opinion. In the case of the dukes of Marlborough this was backed by statutory provisions, but was not otherwise dissimilar to all other peerages. It was, however, radically different to the imperial princely titles, which conveyed nobility upon all members of the family.

The Churchill estates – based on Blenheim Palace, named after the duke's great victory – was also subject to statutory provisions. They were entailed, so that it would remain in the possession of the dukes of Marlborough as a perpetual reminder of the glorious victory. Entailed estates are not, however, exclusively or even predominantly statutory in nature. An estate tail which has been granted by the Crown in consideration of money or services, the reversion remaining in the Crown, cannot be barred, or ended<sup>90</sup>. In certain cases where estates have been granted for eminent services, or where family arrangements are confirmed by Act of Parliament, holders of the estates who are tenants in tail are forbidden by statute to bar the entail<sup>91</sup>, and the Blenheim estates are of this nature.

An entail meant that an estate could not be alienated. This served the purpose of preserving an estate from possible spendthrifts – an important provision, and one of particular relevance where the estate itself was such a singular example of national thanksgiving.

or felony – *Earl Ferrers' Case* (1760) 2 Eden. 373; 28 E.R. 942. Attainder, or corruption of blood, was in any case abolished by s. 1 Forfeiture Act 1870 (33 & 34 Vict. c. 23) (United Kingdom).

<sup>89</sup> Although no one could be deprived of a peerage without Act of Parliament, it was once not unknown for peerages to be surrendered to the Crown, though it is now held that they may not be alienated. Until 1660 there were many instances where surrenders were made, the last being by the Earl of Buckingham, son of Viscountess Purbeck. It was held in the *Purbeck Case* of 1678 that a titular dignity could be surrendered, though not a feudal dignity. A peerage was held to be a feudal dignity rather than a titular dignity, and therefore unalienable.

<sup>90</sup> Feigned Recoveries Act 1542 (34 & 35 Hen. VIII c. 20) (England), s. 1. Though repealed in part by the Statute Law (Repeals) Act 1888 (United Kingdom), and as to the remainder by the Statute Law (Repeals) Act 1969 (United Kingdom), s. 1, Sch. Pt. III, remains effective still (s. 4(4) of the 1969 Act).

<sup>91</sup> *Davis v. Duke of Marlborough* (1818) 1 Swan. 74; 36 E.R. 303; *Osborne v. Duke of Marlborough* (1866) 14 W.R. 886; *Re Duke of Marlborough's Blenheim Estates and Settled Lands Act* (1892) 8 T.L.R. 582.

An estate tail, or an entailed estate, now takes effect as an entailed interest, though commonly still called an estate<sup>92</sup>. The widest estate which is entailed is limited to a man and the heirs of his body without restriction as to the wife of whom the heirs are to be born or of the sex of the heirs<sup>93</sup>. A similar limitation is to a woman and the heirs of her body<sup>94</sup>. These are an 'estate in tail general'. It is also possible to restrict the heirs to heirs male or heirs female, called an 'estate in tail male general'<sup>95</sup>, or 'estate in tail female general'<sup>96</sup>. In a tail male, the son of a daughter cannot inherit<sup>97</sup>. An estate may be limited to a specific couple, making it an 'estate in tail special'<sup>98</sup>. This may also be limited to heirs male or female<sup>99</sup>. A limitation to a man and the heirs of his body other than the eldest son is also good, and will be recognised by the courts<sup>100</sup>.

Before 1926 an entailed estate could be created in England by deed, will or executory instrument<sup>101</sup>. From 1926 to 1996 they could only be created by deed<sup>102</sup>. Since the coming into force on 1st January 1997 of the Trusts of Land and Appointment of Trustees Act 1996 it has not been possible to create any new entailed interests<sup>103</sup>. However, as well as dating from 1705, and thus pre-dating the statutory limitation, the title to the Blenheim estate is backed by express statutory authority.

The current duke of Marlborough is tenant in tail in possession of one of seventeen United Nations Educational Scientific and Cultural Organisation (UNESCO) World Heritage Sites in England, and the only one which is a stately home still lived in by a descendant of its original owner.

Ironically, however, in 1993 a new settlement was proposed, with the current duke as one of three trustees. The trust fund would be held in trust to pay the income to the duke for his life, and subject to protective trusts for the marquess of Blandford for life. This was approved by the Chancery Division of the High Court, in the face of opposition by the present marquess of Blandford<sup>104</sup>. The marquess, a long-time drug addict, was regarded by his father as unfit to manage the estate, and the entail was adjusted to preserve the estate intact for future generations.

<sup>92</sup> Law of Property Act 1925 (15 & 16 Geo. V. c. 19) (United Kingdom), s. 130.

<sup>93</sup> Sir Thomas Littleton, *Treatise on tenures* ('Littleton's Tenures'), London 1593, first published 1481 or 1482, s. 14.

<sup>94</sup> *Littleton's Tenures* (*supra*, n. 93), s. 15.

<sup>95</sup> *Ibid.*, s. 21.

<sup>96</sup> *Ibid.*, s. 22.

<sup>97</sup> *Ibid.*, s. 24; Co. Litt. 25a, 25b.

<sup>98</sup> *Ibid.*, s. 29.

<sup>99</sup> *Ibid.*, s. 25.

<sup>100</sup> *Elliot v. Elliot* [1916] 1 I.R. 30.

<sup>101</sup> *Lord Glenorchy v. Bosville* (1733) Cas. temp. Talb. 3, 9; 2 Eq. Cas. Abr. 718; 22 E.R. 604; *Sackville-West v. Viscount Holmesdale* (1870) L.R. 4 H.L. 543.

<sup>102</sup> Law of Property Act 1925 (15 & 16 Geo. V. c. 19) (United Kingdom), s. 130(1).

<sup>103</sup> ss 2 (6), 27 (2), Sch. 1 para 5(1).

<sup>104</sup> *Hambro v. Duke of Marlborough* [1994] Ch. 158; [1994] 3 All E.R. 332.

Blenheim is only the best known of a number of entailed estates in the United Kingdom. Other settled estates include the Bolton estates<sup>105</sup>, settled in 1535 by Lord Mountjoye<sup>106</sup>, and the Abergavenny estates<sup>107</sup>, settled in 1555<sup>108</sup>, and alienated by the Marquess of Abergavenny's Estate Act 1946<sup>109</sup>.

The Wellington estates were entailed by the Act for an annuity etc. to the Duke of Wellington 1813–14<sup>110</sup>. This was altered by the Wellington Museum Act 1947<sup>111</sup>, and replaced by the Wellington Estates Act 1972<sup>112</sup>.

The (private) Act for an annuity for Lord Nelson 1806<sup>113</sup> established the Trafalgar estates and the Nelson annuity. The annuity was terminated by the

<sup>105</sup> *Re Bolton Estates, Russell v. Meyrick* [1903] 2 Ch. 461 (CA); *Re Bolton Estates Act 1863* [1904] 2 Ch. 289.

<sup>106</sup> Broke Estate Act 1535 (27 Hen. VIII c. 16) (England), a private Act of Parliament.

<sup>107</sup> *Earl of Abergavenny v. Brace* (1872) L.R. 7 Exch. 145. The Most Honourable Christopher George Charles Nevill, is 6th marquess of Abergavenny (1876), earl of Lewes (United Kingdom 1876), and earl of Abergavenny (Great Britain 1784), viscount Nevill (Great Britain 1784), and baron Abergavenny (England 1450).

<sup>108</sup> An Act concerning the restitution of the heirs male of Sir Edward Neville, knight (2 & 3 Ph. & M. c. 23) (England), a private Act of Parliament.

<sup>109</sup> s. 3. The marquess' seat is now Eridge Park, Tunbridge Wells, East Sussex. In 1873 the earl had 11,000 hectares (28,000 acres), in 1967 the head of the family, now a marquess, had 400 hectares (1,000 acres).

<sup>110</sup> 54 Geo. III c. 161 (United Kingdom), s. 28. The present duke is the 8th, Brigadier Arthur Valerian Wellesley, KG LVO OBE MC OStJ DL. His British titles are duke of Wellington (United Kingdom, 1814), marquess of Wellington (United Kingdom, 1812), marquess of Douro (United Kingdom, 1814), earl of Mornington (Ireland, 1790), earl of Wellington (United Kingdom, 1812), viscount Wellington (of Talavera and Wellington, Somersetshire, United Kingdom, 1809), baron Douro (United Kingdom, 1809).

<sup>111</sup> 10 & 11 Geo. VI c. 46 (United Kingdom).

<sup>112</sup> s. 3(1). The duke's seats are Stratfield Saye House, Reading, Berkshire RE7 2BZ, built 1817, and Apsley House, 149 Piccadilly, London W1V 9FA. In 1991 the duke had 2,800 hectares (7,000 acres) in the United Kingdom. Like the Duke of Marlborough, Arthur Wellesley's foreign titles brought him some lands, but unlike Churchill, Wellesley's titles were merely honorary, the land being simply estates and woodlands assigned to the duke to provide him with an income proportionate with his newly acquired dignity. As Prince of Waterloo (1815, Belgium Netherlands), he was one of the greatest landowners in Belgium. The current duke still holds 1,000 hectares (2,600 acres), 10 kilometres (6 miles) south of Brussels, though the ownership has been challenged, and his hereditary pension has ceased. As duke of Ciudad Rodrigo (1812, Spain) he has 1,200 hectares (3,000 acres) at Molino del Rey, near Granada.

<sup>113</sup> 46 Geo. III c. 146 (United Kingdom). This Act also made every successive earl a Nelson, whatever their original surname (almost a statutory opposite to the 'names and arms clause', where a beneficiary must assume another name in order to inherit; cf. Noel Cox, *Names and arms clauses and law of arms in the common law courts*, (Winter 1999) XIII(188) (N.S.) Coat of Arms, p. 167–172.

Trafalgar House, Wiltshire, was built for Sir Peter Vandeput in 1733. It was presented to Earl Nelson (brother of Vice Admiral Viscount Nelson) in 1806, and rebuilt in 1814. The present, 9th, earl is Peter Nelson. His British titles are earl Nelson (of Trafalgar and of Merton, United Kingdom 1805), viscount Merton (United Kingdom, 1805), and baron Nelson (of the Nile and of Hilborough, Norfolk, United Kingdom, 1801).

Trafalgar Estates Act 1947<sup>114</sup>. The Pendrell annuities, which do not include land, date from the time of King Charles II<sup>115</sup>.

The statutory entailing of the Blenheim estates, and perhaps more crucially, the creation of a special remainder for the dukedom of Marlborough, ensured that the titles and estate in England remained extant and intact. This arrangement was completed during the lifetime of the first duke, and by the time of his death some 15 years later the circumstances of the arrangements may have been forgotten. As the English titles passed to the duke's daughter and to subsequent heirs, so the notion seems to have arisen that the imperial titles descended similarly. This was probably aided by lack of familiarity with imperial titles – especially after the dis-establishment of the Holy Roman Empire in the wake of another French onslaught – and an erroneous and ill-founded assumption that the statutory provisions affected all the duke's titles. There seems to have been much more concern with the preservation of the estates than with the titles, unlike in Germany, where the preservation of the princely title was given higher priority.

The reality is that at least four separate sets of legal rules applied. There are the common law rules with respect to entailed land, the common law governing peerages, the statutory provisions with respect to the estate and titles, and the imperial laws governing the princely titles. Given this complexity, confused further by the political permutations over whether Churchill would get an honorific or effective principality, and whether or not there would be a special remainder for his imperial titles, and that he received two titles, superficially similar but with different remainders, it is scarcely to be wondered that a degree of uncertainty arose.

## Conclusion

The present duke of Marlborough enjoys his British titles, not because of any special remainders in the patents of creation, but because of an Act of Parliament. This Act had no bearing upon the imperial titles conferred upon the first duke, which thus descended in accordance with their original instruments of creation.

The title of prince of the Holy Roman Empire, conferred in 1704 upon all his children heirs and lawful descendants, male and female, expired in

<sup>114</sup> 10 & 11 Geo. VI c. 34 (United Kingdom), s. 1. It was sold by the 5th earl Nelson in 1948, and the estate and house were separated in 1958. The house has had various owners, and was bought by the Earl Radnor 1990, along with an estate of 1,200 hectares (3,000 acres). Lord Radnor had lived at Longford Castle, near Salisbury, Wiltshire. The Trafalgar estate was bought in 1995 by Michael Wade to form an opera house, but the house is currently a wedding venue, and used by private tour groups.

<sup>115</sup> *Re Grant of King Charles II, Giffard v. Penderel-Brodhurst* (1936) 80 Sol. J. 92.

1751 with the death of his younger daughter, Lady Mary Churchill, duchess of Montagu (who was also entitled to be known as Princess Mary Churchill). The imperial titular principality was not what would be called in English law an estate in tail general. It is rather a titular honour held by grant which contained a limitation to all male descendants and daughters, or what might be called an estate in tail male general.

Similarly, the title (and principality) of prince of Mindelheim, granted in 1705 to all male descendants and daughters, would have reverted to the emperor in 1722, as it could not pass to a daughter without a special remainder. However the principality had already passed to Bavaria. The right of the duke of Marlborough to use the style and title was thereupon lost. Even the title of prince of Mellenburg would have expired in 1722.

As recipients of unprecedented imperial honours, it is fitting that the greatest monument to the great duke in England, Blenheim Palace, should be entailed to the dukes of Marlborough for all time. But it is a pity that the imperial honours were not subject to special remainders, so that the current duke might enjoy them too. The treatment of his British and imperial honours were different in part because of the different nature of peerages – which were combined real property and political dignity, and imperial titles, which were sovereign (or quasi-sovereign). The relative weakness of the emperor, compared with the English Queen, was also an important element.