

Time to Abolish the Duchy of Cornwall?

Graham S McBain^{1,2}

¹ Peterhouse, Cambridge, UK

² Harvard Law School, UK

Correspondence: Graham S McBain, 21 Millmead Terrace, Guildford, Surrey, GU2 4AT, UK. E-mail: gsmcbain@aol.com

Received: August 19, 2013 Accepted: September 19, 2013 Online Published: October 11, 2013

doi:10.5539/res.v5n5p40

URL: <http://dx.doi.org/10.5539/res.v5n5p40>

Abstract

The duchy of Cornwall is one of two duchies still extant in the United Kingdom. The other is the duchy of Lancaster, the abolition of which a previous article has considered. The duchy of Cornwall was the first English duchy, created in 1377 by Edward III (1327-77) in favour of his eldest son, nicknamed the Black Prince. The duchy of Cornwall – as well as the title of Duke – is hereditary. It is inherited by the eldest son of the reigning sovereign.

As with the previous article on the duchy of Lancaster, this article considers the legal nature of the duchy of Cornwall and whether many of the Crown prerogatives and other privileges which it has been granted are of worth in the modern society in which we live. This article also considers the abolition of the duchy.

Keywords: Duke of Cornwall, Crown prerogatives, franchises, charters, legal status, other privileges, the case for abolition

A previous article has argued for the abolition of the duchy of Lancaster, which duchy has been held by the sovereign in right of the Crown since 1399.¹ However, prior to the duchy of Lancaster, was the duchy of Cornwall - the first English duchy. It was created in 1377 by Edward III (1327-77) in favour of his eldest son, Edward of Woodstock (1330-76), who was nick-named the Black Prince. The duchy of Cornwall is inherited by the eldest son of the reigning sovereign and the present Duke of Cornwall is Prince Charles. The purpose of this article is to analyse various legal features of the duchy and to question whether they are appropriate, or relevant, in modern British society - one in which most vestiges of medieval feudalism have otherwise long since departed into the mists of time. Also, this article questions whether the prohibition on females inheriting the duchy offends against modern human rights legislation. Finally, this article considers whether it would be a good idea for the duchy of Cornwall to be abolished and for it to become part of the Crown Estate, in order to provide better value for money for the hard pressed British taxpayer.

Perhaps, surprisingly, there have been few legal texts dedicated to the duchy of Cornwall.² Of these, some relate to now obsolete courts,³ land tenure⁴ and the constitution of the duchy.⁵ Others relate to inheritance⁶ and the rights of the duchy to the foreshore.⁷ Both Lord Coke, in his *Institutes of the Laws of England* (published between 1628-41),⁸ and William Blackstone, in his *Commentaries on the Laws of England* (published 1765-8),⁹ had little

¹ GS McBain, *Time to Abolish the Duchy of Lancaster*. Review of European Studies (2013), vol 5, no 4, pp 172-93.

² See texts cited in Sweet & Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (Sweet & Maxwell, 1957, 2 vols). It lists English legal texts up to 1954.

³ GB Rogers, *Practice of Sheriffs Courts of Cornwall* (1824).

⁴ W Brown, *Law of Limitation as to Real Property including that of the Crown and Duke of Cornwall* (J Sweet, London, 1869). Also, J Manning, *Practice of the Court of Exchequer* (an Appendix contains an enquiry into the Tenure of the Conventiary Estates in the Assessionable Manors, parcel of the Duchy of Cornwall) (Butterworths, London, 2nd ed, 1827).

⁵ J Haines, *History of the Constitution of the Duchy of Cornwall and its Tenants* (1834). See also J Haines, *Case between Sir William Clayton, Bart and the Duchy of Cornwall* (J Betts, London, 1834).

⁶ *Treatise concerning the Dignities, Title, Offices, Pre-eminences, and yearly Revenues which have been granted by the several Kings of England, after the conquest, for the maintenance of the princes their eldest sons, with sundry particulars relating thereto* (1737). C Watkins, *An Enquiry into the Title and Powers of his Majesty as Guardian of the Duchy of Cornwall during the late minority of it's Duke* (Butterworth, London, c. 1797).

⁷ JW Pycroft, *Arena Cornubiae* (London, WG Benning, 1856).

⁸ E Coke, *Institutes of the Laws of England* (W Clarke & Sons, London, last ed, 1824).

⁹ W Blackstone, *Commentaries on the Laws of England* (Oxford, Clarendon Press, 1st ed, 1765-9, University of Chicago Press rep 1979).

to say on the duchy of Cornwall or its Duke. Nor is there much caselaw on the duchy save for the oft cited *Prince's Case* (1606).¹⁰ It may be noted that the duchy of Cornwall has its own website.¹¹

1. Duchy of Cornwall and Descent of Title

(a) Descent to the Eldest Son of the Sovereign

The duchy of Cornwall - as well as the title of Duke of Cornwall - are hereditary. They are inherited by the eldest son of the reigning sovereign and he inherits them either at the time of his birth or on his parent's succession to the throne, if later. This has been the position since the duchy was created in 1337. Thus, Halsbury states:¹²

The title of Duke of Cornwall and the inheritance of the duchy were created by Edward III in 1337 and vested in the Black Prince by charter having the authority of Parliament¹³ to hold to the said Duke, and to his first-born son and his heirs, kings of England and Dukes of the said place in the kingdom of England, to succeed by hereditary...¹⁴ The monarch's eldest son, being also heir apparent, succeeds to the title of Duke of Cornwall immediately he is born by right of inheritance without fresh creation.¹⁵

Edward of Woodstock (1330-76) was the eldest son of Edward III (1327-77). He was popularly called the '*Black Prince*'.¹⁶ In 1331, the younger brother of Edward III - who was called John of Eltham (the latter being the place where he was born) - was made Earl of Cornwall.¹⁷ On his death in 1336, Edward of Woodstock was given the revenues of the earldom of Cornwall; these included some valuable manors outside Cornwall. Then, by means of a charter of 17 March 1337,¹⁸ Edward was created Duke of Cornwall (aged 7), being the first created English Duke since the Norman Conquest.¹⁹ This charter of 1337 - one of three in 1337 and 1338 relating to the duchy of Cornwall - was summarized in the case of *Rowe v Brenton* (1828).²⁰ The charter accorded Edward of Woodstock, the name and honour of Duke of Cornwall and it granted to him 17 manors (later called the ancient manors or *antiqua maneria*), viz.

Launceston, Trematon, Tyntagel [Tintagel], Restormel, Clymneslonde[Stoke Climesland], Tybeste [Tybesta], Tewington, Helleston in Kerrier [Helston in Kerrier], Moreste [Moresk], Tewarnayle (Tywarnhale)[Tywarnhaile], Pengkneht [Penkneht], Penlyn [Penlyne], Rellaton [Rillaton], Elleston in Trighshire [Helston in Trigg]; Lyskyret [Liskerde or Liskeard], Calistock [Calstock], Talskyde [Talskedy], and Lostwythiel,²¹ and our prisages and customs of wines, and all profits of our ports in Cornwall, etc; also our stannary in the same country, together with the coinage of the same stannary, and with all issues and profits therefrom arising, and also with all explees, profits, perquisites of [the] Court of

¹⁰ *Prince's Case* (1606) 8 Co Rep 1a (77 ER 481).

¹¹ www.duchyofcornwall.org . See also D Burnett, *A Royal Duchy* (The Dovecote Press Ltd, 1996).

¹² Halsbury, *Laws of England* (4th ed), vol 12(1), para 318.

¹³ Halsbury cites Blackstone, n 9, vol 1, p 218 who stated (in 1765) 'The heir apparent to the Crown is usually made Prince of Wales and Earl of Chester, by special creation, and investiture; but, being the king's eldest son, he is by inheritance Duke of Cornwall, without any new creation.' Blackstone cited the *Prince's Case* (1606)(see n 10) and J Selden, *Titles of Honor* (John Leigh, London, 3rd ed, 1672), part 2, ch 5.

¹⁴ Halsbury continues, n 12, vol 12(1), para 318, 'Being equivalent to an Act of Parliament, this charter has been held to be good, even though it creates a mode of descent unknown to the common law, which it is doubtful whether the monarch's grant can do without parliamentary authority.' Halsbury cites the *Prince's Case* (1606) (see n 10) at 16a, 20a & 28b (words 'by authority of Parliament' in a royal charter are sufficient to make it an Act of Parliament). See also Watkins, n 6, p 15.

¹⁵ Halsbury, n 12, vol 12 (1), para 320 cites the *Prince's Case* (1606) (see n 10); Blackstone (see n 9) and *Rowe v Brenton* (1828) 8 B & C 737 (108 ER 1217). See also *A Report of the Trial of Rowe v Brenton* (London, W Walker, 1830).

¹⁶ Oxford Dictionary of National Biography (ODNB) on Edward of Woodstock. See also L Creighton, *The Life of Edward the Black Prince* (Rivingtons, 1876) and RW Barber, *Edward, Prince of Wales and Aquitaine: A Biography of the Black Prince* (Scribner, 1978). The epithet 'Black' may refer to his complexion or the colour of the armour he wore at Crecy and Poitiers.

¹⁷ See ODNB, n 16, (John of Eltham, 1316-36). He also received the 17 manors referred to in the text to n 21.

¹⁸ See also J Comyns, *Digest of the Laws of England* (A Hammond, last ed, 1822), vol 7 (title *Roy*), p 301.

¹⁹ W Cruise, *An Essay on the Law of Dignities or Titles of Honour* (London, A Strahan, 1804), p 16. In 1343, Edward of Woodstock went on to become Prince of Wales. He is the first Prince of Wales not to have succeeded to the throne, dying a year before his father.

²⁰ *Rowe v Brenton* (see n 15) at p 739 refers to 'Another charter of the same year [ie of 18 March 1337], reciting the former [charter of 1337], and granting, to the Duke of Cornwall the return of writs [and summons of the exchequer] in the places before named. A third charter of the same year [actually one of 1338], reciting both the former, and granting and confirming to the Duke all fees in any way belonging to the said castles, manors etc' For English translations of these 3 charters see J Manning and A Ryland, *Report of Cases argued and determined in the Court of King's Bench during Michaelmas Term 9 George IV*, vol 3 (1830), App D. See also G Concanen, *A Report of the Trial at Bar, Rowe v Brenton* (London, W Walker, 1830), App 9 (charter of 17 March), App 10 (charter of 18 March), App 11 (charter of 11 January). This case dealt with the right of the duchy - or the conventional tenants - to copper ore raised from the East Crinnis mines which were situated in a conventional tenement in the manor of Tewington, Cornwall. See also Jessel, *The Law of the Manor* (2nd ed, 2011), pp 399-400 (conventional tenements were really leaseholds, with a right of renewal on tendering a fixed premium).

²¹ The more modern names have been placed in []. See also Wikipedia (*Antiqua Maneria*) and Concanen, n 20, Intro.

Stannary, and mines in the same county; to have and to hold to him and to the first begotten sons of him and of his heirs kings of England, and Dukes of the same place in the kingdom of England, hereditarily to succeed as is aforesaid.²²

This charter of 1337 had also been referred to in the principal legal case on the duchy, the *Prince's Case* (1606).²³ Reporting, in the form of an abstract of this case,²⁴ Lord Coke quoted the Latin version of the charter:

habendu et tenendum eidem Duci, et ipsius et haeredum suorum regum angliae filiis primogenitis et dicti loci ducibus, in regno angliae haereditarie successuris. So that he who ought to inherit by force of this grant, ought to be the first begotten son and heir apparent of the king of England, and of such king as is heir to prince Edward, and that such first begotten son and heir apparent to the Crown shall inherit the said dukedom in the lifetime of the king his father... in this case the king's eldest son has this dignity by right of inheritance.²⁵

Thus, the duchy and the title of Duke is inherited by the eldest son of the sovereign. When there is no son, the duchy is vested in the Crown.²⁶

(b) Descent to the Second Son

In the case where the eldest son dies without heirs, Halsbury states:

On the death of the heir apparent without leaving issue the next surviving son of the monarch succeeds; but if the heir apparent leaves issue (who would in that case become heir apparent), the duchy of Cornwall does not vest in that issue or in the next surviving son of the monarch, but reverts to the Crown under the general rule by which, in the absence of an eldest son and heir apparent, the duchy vests in the monarch.²⁷

Thus, the second son will succeed to the duchy on the death of the eldest son without heirs. Although this contradicts Lord Coke's report of the decision in the *Prince's Case* (1606)²⁸ it accords with the decision of Lord Hardwicke LC in *Lomax v Holmden* (1749):²⁹

the case of the duchy of Cornwall is direct; that the eldest son of the king of England... takes it as *primogenitus*; although Lord Coke, at the end of the *Prince's Case*... says otherwise. But that was not the point there, being only an observation of his own, and has ever since been held a mistake of that great man.³⁰

²² *Rowe v Brenton* (see n 15) at p 739. See also J Norden, *A Topographical and Historical Description of Cornwall* (London, printed by William Pearson, 1728, written c. 1600), p 13. A tax was paid to the Duke on the tin, one half penny for every pound of tin which should be wrought. *Ibid*, p 15. Burnett, n 11, p 19, there were 8 stannary towns (Launceston, Lostwithiel, Truro, Helston, Launceston, Tavistock, Chagford, Ashburton and Plymton). In 1838, the duchy surrendered its stannary duties on the coinage of tin in return for an annual payment from the Treasury. *Ibid*, p 31.

²³ *Prince's Case* (1606) (see n 10). See also *Case of the Duchy of Cornwall* (1613) and J Davies, *Complete Works* (ed AB Grosart, 1878), vol 2.

²⁴ *Ibid*, at 15a 'The reason why I have made an abstract of the case, so compendious, is because I have added the whole record at length, and if the case should also be put at large, it would extend, as this case is, to an unnecessary prolixity.'

²⁵ *Ibid*, at 16b. See also at 26b. Coke's translation of the charter of 1337 is not very good. A better version is contained in Manning & Ryland, n 20, pp 474-82. For excerpts from the charter see *Vice v Thomas* (1842) Smirkes Rep, App 20, 21 and *Rowe v Brenton* (n 15). See also E Smirke et al, *The Case of Vice against Thomas* (Saunders & Benning, 1843). Various later charters and Acts referred to in the *Prince's Case* endorse the duchy passing to the eldest son. See also J Doddridge, *Historical Account of the Ancient and Modern State of the Principality of Wales, Duchy of Cornwall and Earldom of Chester* (1630, written 1603). In particular, pp 80 & 81. See also Selden Society Reports, vol 109, p 20 (it also refers to the recitation of the charter of 1337 in the Parliament of 9 Hen V, Rot Parl iv, 140b (1422)).

²⁶ *Rowe v Brenton* (see n 15), p 756 per Lord Tenterden CJ 'The estate of the Duke of Cornwall is of a very peculiar nature, and there is nothing else like it known in this country. The property is vested in the Duke of Cornwall whenever there is such a person, and in the Crown when there is not.'

²⁷ Halsbury, n 12, vol 12(1), para 320. The issue of the monarch's eldest son and heir apparent do not succeed during the monarch's life. See also Comyns, n 18 and the *Prince's Case* (1606) (see n 10), at 29b and 30a. See also Halsbury, n 12, vol 12(1), para 30 'Where the heir apparent dies leaving a son, the title and possessions of the duchy do not vest in the son, but revert to the Crown; for although the eldest son of the heir apparent becomes himself heir apparent on the death of his father, yet not being the eldest son of the monarch, he is not within the limitations of the charter.'

²⁸ *Prince's Case* (1606) (see n 10) at 30a. See also Halsbury, n 12, vol 12(1), para 320, n 2.

²⁹ 1 Ves Sen 290 (27 ER 1038). See also Concanen, n 20, p 34 (speech of Attorney-General).

³⁰ At p 295. Lord Hardwicke LC cites Henry VIII (1509-47), Edward VI (1547-53) and Charles I (1625-49) as examples of second sons taking by inheritance in their father's lifetime.

In conclusion, the duchy of Cornwall and its title passes to the eldest son of the sovereign; or to the second son on the death of the eldest without issue. It will not pass to the daughter of the sovereign, eldest or otherwise.³¹ Thus, Elizabeth of York (1466-1503), the eldest daughter of Edward IV (1461-83) did not become duchess of Cornwall.³²

(c) Modernising the Law to enable Females to Inherit

This principle of male precedence in respect of the duchy of Cornwall is not that surprising since it also applied in relation to the British Crown itself. That is, the eldest child succeeded to the Crown - with males having precedence before females. However, as noted in a previous article in respect of the Crown, this restriction on the basis of gender went against prevailing *mores* on sex equality as well as contemporary legislation to that effect.³³ Also, it probably conflicted with the European Convention on Human Rights (**ECHR**) which Convention is part of English law by virtue of the Human Rights Act 1998. Article 14 of the Convention provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.³⁴

In the case of the discrimination against females in respect of the Crown - in the past - many private members bills were (unsuccessfully) introduced into Parliament in order to remedy this.³⁵ More recently, in 2011, at a conference of Commonwealth heads of government meeting (CHOGM) in Perth Australia, the UK – as well as the heads of the 15 Commonwealth countries required to assent to changes to succession pursuant to the Statute of Westminster 1931 - agreed this restriction in respect of female succession to the Crown should be removed. This was achieved in the Succession to the Crown Act 2013, section 1.³⁶ Given this, this discrimination should now also be removed in the case of the duchy of Cornwall.

In conclusion, in modern times, as with succession to the Crown, succession to the duchy of Cornwall should not be affected by gender. Sons and daughters of the sovereign should have an equal right to succeed.

2. Nature of the Duchy³⁷

(a) Land and Property

Presently, the duchy comprises some 53,628 hectares of land in 23 counties. This estate includes farm, residential and commercial property, much of which is not located in Cornwall.³⁸ In 2009, the county government jurisdiction became co-extensive with the geographic borders of Cornwall when the Cornwall council united with 6 borough, and district, councils.³⁹

³¹ Comyns, n 18, vol 7, p 302 summarises the position ‘every first-born son of such a king, as is heir to the Black Prince, immediately upon the advancement of his father to the Crown, shall be Duke of Cornwall in the life of his father (to whom he is heir apparent) without other creation...And shall have a fee simple in such Dukedom, and the possessions of the duchy, though it does not descend according to the rules of the common law...So, if the first born son of the king dies in the life of his father, his first born son shall not be Duke of Cornwall without a special creation though he be heir apparent to the Crown, for he is not the first born son of a king of England.. So, the first born daughter of the king shall not be duchess of Cornwall, though she be heir presumptive to the Crown; for it must be a son. So, if the king’s eldest son dies, his second son, though he be heir apparent, shall not be Duke of Cornwall, without a special creation; for he was not the first born son...The Prince shall be immediately seised of the duchy of Cornwall, and all possessions belonging thereto. But till a prince is born, the king is seised of all the possessions.’

³² *Prince’s Case* (1606)(see n 10), at 30a ‘nor was Elizabeth the eldest daughter of King Edward IV Duchess of Cornwall, for she was the first begotten daughter of the king, and the limitation is to the first begotten son.’ See also ODNB (n 16) (Elizabeth of York) and Halsbury, n 12, vol 12(1), para 320, n 1 ‘A daughter, even though heiress presumptive, does not become Duke of Cornwall.’ See also n 31.

³³ Halsbury, n12, vol 12 (1) para 10. See also G McBain, *The Religion of the Queen – Time for Change*, University of Queensland LJ, vol 30 no 2 (2011), p 336.

³⁴ See also MW Janies *et al*, *European Human Rights Law* (Oxford, 3rd ed, 2008), p 904.

³⁵ McBain, n 33, pp 336-7.

³⁶ See Statute Law Database, www.legislation.gov.uk. The Sovereign Grant Act 2011 (which came into effect in April 2012) did not change the law in relation to female succession *vis-à-vis* the duchy - although it did provide for the revenue of the duchy to pass to the heir, whether male or female. See s 9 (duchy of Cornwall income and grant to the heir to the throne).

³⁷ See also SJ Madge, *The Domesday of Crown Lands* (London, Routledge,1938).

³⁸ Duchy of Cornwall website, n 11, which states ‘There are over 3,500 individual lettings, including 700 agricultural agreements, 700 residential agreements, and 1,100 commercial agreements.’ See also Wikipedia (Duchy of Cornwall).

³⁹ ie. Caradon, Carrick, Kerrier, North Cornwall, Restormel and Penwith.

(b) Early History of the Duchy ⁴⁰

Prior to the Norman Conquest of 1066, Cornwall may have been a separate kingdom or principality. However, the Domesday book (1086) indicates that William the Conqueror (1066-87) held various manors and possessions in Cornwall.⁴¹ It seems that, early on, Cornwall became an earldom,⁴² and that there were nine creations of earls after the Conquest until 1337 (albeit the precise times when certain of the earldoms were created is uncertain), *viz.*

- The first earl of Cornwall after the Conquest is generally accredited as being Robert Mortain (died 1095) Comte de Mortain (Moreton), who was half-brother to William the Conqueror by his mother Herluin.⁴³ His son, William, forfeited his earldom in 1104 for rebelling against Henry I (1100-35);
- It seems that the earldom was granted in 1140 to Reginald de Dunstanville (c.1100-75), said to be an illegitimate son of Henry I (1100-35).⁴⁴ He was deprived of it by king Stephen (1135-54) for rebelling against him and it was granted to Alain de Bretagne, Earl of Richmond (who died in 1146). It was restored to Reginald, however, in 1141 and he died in 1175 without legitimate male issue;
- John Lackland was granted the earldom in 1175 and it merged into the Crown when John (1199-1216) became king in 1199;
- The earldom was later invested in Henry Fitz-Count (c 1175-1222), the illegitimate son of Reginald de Dunstanville. He likely acquired it in 1215-6 and resigned it in 1220. It then seems to have passed to Robert de Cardinan (c 1220)⁴⁵ and William de Putot (c 1220);
- In a charter of 10th August 1231, Henry III (1216-72) granted to his brother Richard, Earl of Pictou (1209-72) and his heirs the whole county of Cornwall, together with the stannary of Cornwall, and all mines and other appurtenances.⁴⁶ The earldom passed to his son, Edmund of Almain (1249-1300) on the former's death in 1272.⁴⁷ The latter dying childless, the earldom escheated to the Crown;
- In 1307, Edward II (1307-27) granted the earldom to Piers Gaveston (1284-1312), his favourite.⁴⁸ On his murder, it seems to have been granted to Thomas le Ercedeckne in c 1312-3, Richard de Polhampton in c 1314-5 and Henry de Wylinton c 1315-6;
- In 1318, the earldom passed to Isabella of France (1295-1358), wife of Edward II.⁴⁹ It then seems to have passed to John de Tregagu in 1325, on her disgrace;
- In 1328, Edward III (1327-77) made his brother, John of Eltham (1316-36), earl of Cornwell.⁵⁰ On the latter dying without issue, the earldom escheated to the Crown;
- It then seems to have passed to William de Botreaux c 1332, John le Petit c 1335 and John Hamely c 1337.

Finally, on 17 March 1337, the duchy (including the 17 duchy manors)⁵¹ was granted to the Black Prince and it has remained in the hands of the eldest son of the sovereign ever since (or the Crown, in the absence of a child)

⁴⁰ For general texts see Norden, n 22, R Carew, *Survey of Cornwall* (1630, written in 1602) and Doddridge, n 25.

⁴¹ Hellestone, Bewingtowe and Pennehyle, being ancient demesne.

⁴² Cf. Doddridge, n 25, p 78 'This territory was anciently reputed a dukedom; but a little before, and also after the Norman Conquest, it was an earldom...' For a list of the Earls of Cornwall, see Manning, n 4, pp 392-4.

⁴³ See ODNB, n 16 (Robert, count of Mortain, d 1095). The Domesday Book records him as holding 248 manors in Cornwall. It is possible that he was preceded by one Brian of Brittany (c 1048-84/5) who resigned the earldom in 1068. Prior to the Conquest, it is possible that Cornwall was an earldom and that the last Anglo-Saxon earl Condor (Cardoc) did homage for it to William the Conqueror (1066-87) (according to William of Winchester (1415- c. 1482) an English chronicler).

⁴⁴ See ODNB, n 16 (Reginald, Earl of Cornwall).

⁴⁵ *Ibid* (Cardinan family). Cardinan may have acquired the earldom in 1215 and then lost it to Reginald. He was re-appointed sheriff of Cornwall in 1220.

⁴⁶ ODNB, n 16 (Richard, Earl of Cornwall) 'on 10 August 1231 he was at last granted royal charters establishing his control over Cornwall...in hereditary fee, rather than as previously during the king's pleasure. 'Richard, Earl of Cornwall and King of Germany (1209-72) was the second son of king John (1199-1216). In 1225, he had received the county of Cornwall to hold during the king's pleasure and on 30 May 1227, he was belted with the earldom during the king's pleasure - effectively the first earl after the death of earl Reginald, an illegitimate son of Henry I (1100-35) in 1175. See also *Rowe v Brenton* (n 15), at p 739, for the text of the charter of 1231, see Concanen, n 20, App 3.

⁴⁷ See ODNB, n 16 (Edmund of Almain, 2nd Earl of Cornwall). 'He possessed the earldom of Cornwall with its mines and its control over eight and one-third of the county's nine hundreds.' See also Norden, n 22, p 8.

⁴⁸ See ODNB, n 16 (Piers Gaveston, d 1312). The ODNB notes 'Although the charter is dated 6 August 1307 at Dumfries, it may have been written some time later.' For the text of the charter, see Concanen, n 20, App 6.

⁴⁹ For the text of the charter of 25 July 1318, see Concanen, App 7.

⁵⁰ See n 17. For the text of a charter of 1332, see Concanen, App 8.

⁵¹ For the text of the charters of 1332, see Concanen, n 20, App 9. See also App 10 (charter of 18 March), App 11 (charter of January 11). Reference may also be made to a charter of 1343 which added to the duchy a number of estates that lay outside Cornwall. See Charter Roll of 9 July 1343 no 4 (by writ of privy seal). For the position of the duchy in 1714, see Doddridge, n 25, pp 83-6.

save that, during the Interregnum (1649-60), Crown lands - including the duchies of Lancaster and Cornwall - came under the control of Parliament.⁵²

(c) **Legal Nature of the Estate**

Carew (writing in 1602) stated:

Cornwall, as an entire state, hath at divers times enjoyed sundry titles: of a kingdom, principality, duchy, and earldom.⁵³

This is correct in that Cornwall may have been a kingdom, principality, duchy or earldom prior to the Norman Conquest of 1066. However, relatively soon after the Conquest, it seems clear that it was an earldom and, in 1377, it was a duchy.⁵⁴ Thus, the correct reference is to the duchy of Cornwall.⁵⁵ As to the legal estate held by the Duke, in the *Prince's Case* (1606), it was resolved that:

the prince hath an estate in fee simple in the said dukedom... that is not an estate-tail, for it is not limited or restrained either by express words... for the gift to the said prince *et ipsius et haered' suorum regnum angliae filii primogenitus*. So that he who ought to inherit ought to be the first begotten son of the heirs of the Black Prince, be he heir lineal or collateral; but such heir ought to be king of England.⁵⁶

In 1483, this was confirmed in Parliament.⁵⁷ The duchy website states:

The Duchy of Cornwall is a private estate which funds the public, charitable and private activities of The Prince of Wales and his family. The duchy estate was created in 1337 by Edward III for his son and heir, Prince Edward, and its primary function was to provide him and future Princes of Wales with an income from its assets. A charter ruled that each future Duke of Cornwall would be the eldest surviving son of the monarch and heir to the throne.⁵⁸

Charles, Prince of Wales has publicly described the duchy as a '*well managed private estate*'⁵⁹ As to this, the word '*estate*' seems unobjectionable since the collection of duchy properties (commercial, residential and agricultural) can be described as an estate - which word does not have a particular legal connotation.⁶⁰ However, the word '*private*' seems less apt, since it implies that the Duke has unfettered right to do with the estate as he wishes. He does not. If the Duke attempted to alienate the entire estate, this would be contrary to the charter 1377 which provides for the duchy to descend, hereditarily, to the eldest son of the sovereign.⁶¹ Further, as will be seen in 6, many sales of ducal properties are subject to the consent of the Treasury.⁶² Thus, the practical - and legal - reality in modern times is that the duchy - a '*shifting and changing possession from the Crown to the Duke and back again*'⁶³ - is not a private estate.⁶⁴ The Duke holds it, effectively in trust, on behalf of the nation for it to descend

⁵² See generally Madge, n 37.

⁵³ Carew, n 40, p 151.

⁵⁴ It was not a principality after 1377, albeit the Duke is invariably also Prince of Wales. A principality is a higher status to a duchy. It may be noted that the Black Prince only became Prince of Wales (in 1343) after he had received the duchy of Cornwall in 1377. See n 19.

⁵⁵ The Royal Commission on the Constitution (Kilbrandon Commission, 1973), para 329 recommended that Cornwall be officially referred to as a duchy on appropriate occasions.

⁵⁶ *Prince's Case* (1606) (see n 10) at 27a.

⁵⁷ At 27b 'In anno 22 Ed 4 ex rot'Parliament [ie. 1483], in the said long exchange between the king and the Earl of Huntingdon, there the prince is adjudged to be seised of the duchy of Cornwall in fee simple; and so it was unanimously resolved by the Lord Chancellor and the said justices, that the prince hath a fee simple by descent, in the honour and possessions of the said duchy.'

⁵⁸ See n 11.

⁵⁹ J Kirkthope, *The Duchy of Cornwall - A very Peculiar 'Private Estate'*. Cornish World (Feb-March, 2009). See also D Gollancz, *Prince Charles's Legislation veto shows the Duchy is no ordinary Private Estate*. Guardian, 30 October 2011.

⁶⁰ For various meanings of '*estate*' see Jessel, *The Law of the Manor* (2nd ed, 2011), p 376.

⁶¹ Charter of 17 March 1337, 'So that from the same duchy they may at no time be in anywise separated, nor in any manner soever given or granted by us, or our heirs, to any other person or persons than to the Dukes of the said place.' Halsbury, n 12, vol 12(1), para 319 'Under the original charter [of 1377] of the duchy of Cornwall the land and possessions of the duchy are inalienable from it, and sales and other dispositions by the duchy of Cornwall or the monarch must therefore be made under the express powers conferred by statute; otherwise they will be invalid against future Dukes of Cornwall'. See also the Duchy of Cornwall Management Act 1863, Preamble ('Whereas by the original constitution of the duchy of Cornwall the possessions thereof were so settled and limited that they should at no time be in anywise separated or alienated therefrom'). See also Brown, n 4, p 255 'the possessions are so annexed to the duchy that they cannot be disannexed, but by act of parliament.' See also Concanen, n 20, pp 34-5 (speech of Attorney-General), 'the Duke cannot alienate as against the Crown, nor can the Crown alienate as against the Duke...the fee is always in the Crown, and when the temporary existence of a Duke of Cornwall takes it out of the Crown, he takes only a freehold interest, and if he dies before his father, his interest ceases, but in the Crown always remains the fee.'

⁶² Halsbury, n 12, vol 12(1), para 320.

⁶³ Brown, n 4, p 253. Also 'The estate of the duchy of Cornwall is of a very peculiar nature; there is nothing like it existing in the country.'

to the eldest son of the sovereign.⁶⁵ Thus, the duchy of Cornwall is, in reality, little - or no - different from the Crown Estate⁶⁶ or the duchy of Lancaster.⁶⁷ All are *sacra patrimonia* or *dominica coronae regis*.⁶⁸ In conclusion, the duchy is not like any other private estate, having certain peculiar features.

(d) Tax Treatment of the Duchy

In the case of its tax treatment, the duchy is treated as a Crown body and, as such, it does not pay corporation tax. The Duke is entitled to the income from the estate. However, he neither owns the estate outright nor is entitled to sell capital assets for his benefit.⁶⁹ The Duke is not a subject of the Queen and, as such, is not required to pay income tax.⁷⁰ However, the Prince paid a voluntary contribution to the Treasury of 50% of his duchy income from the time he became eligible for its full income at the age of 21 in 1969 and he has paid 25% since his first marriage in 1981. The Duke does not pay any capital gains tax or inheritance tax – taxes that would be payable in respect of a normal private estate. Finally, it may be noted that, in *Bruton v ICO* (2011), a first tier tribunal held that the duchy was a public authority for the purposes of the Environmental Information Regulations 2004.⁷¹ The duchy may appeal.

(e) Duchy Officers and Seal

Halsbury notes that the officers usually appointed for the duchy⁷² include the following:

- *Lord Warden of the Stanneries in Cornwall and Devon*. He acts as deputy chairman of the Council of the duchy (the Prince's Council);⁷³

Also, quoting Legge B in *A-G v The Mayor and Commonality of Plymouth* (1754) contained in J Wrightson, *Reports of Cases Argued and Determined in the Court of Exchequer* (J Butterworth, 1819) at p 134, 'The fee...is the most extraordinary fee that ever was created. Though the estate be a fee simple, it is not an absolute unqualified fee either in the Duke or the sovereign, but is in the nature of a base or qualified fee.' See also p 257 'The Crown, or, in other words, the public, has an interest in everything which is done in the duchy...Whatever is done during the existence of a Duke is to be treated in the same manner as if it were done by the Crown.'

⁶⁴ Kirkhope, n 59, 'if it is a private estate it is a private estate with a unique array of rights and privileges not available to other similar private estates.' Gollancz, n 59, 'The duchy exercises a unique range of legal powers, which elsewhere are reserved for the Crown (in other words, the government).' W Hamilton, *My Queen and I* (Quartet Books, London, 1975), p 88 quoting SM Davidson, *The Book of Kings* 'If [the duchies of Lancaster and Cornwall] they ever did belong to the kings of England as individuals – that is to say as private estates – they completely lost that character when James II (1685-8) fled to France. They then reverted to the nation, and parliament, as representing, the nation, used them as it had a mind.'

⁶⁵ Unlike the duchy of Lancaster, it would seem that the title and honour (ie. the dignity) of Duke of Cornwall is attached permanently to the duchy and could not be given to another. That said, generally, the sovereign has unfettered rights to grant titles of honour.

⁶⁶ Halsbury, n 12, vol 12(1), para 278 'The Crown Estate comprises the lands and other rights...which the monarch enjoys in her political capacity in right of the Crown and which are now under the management of the Crown Estate Commissioners.'

⁶⁷ See n 1.

⁶⁸ Brown, n 4, p 240. He also states 'All the property of the Crown is held for public purposes, and is Crown property, except that which the individual sovereign has retained a right to deal with in his private and personal capacity; it is public property which the Crown administers for the maintenance of the state.' See also p 316. See also the affirmations of Lord Brougham, LC in 1837 and Sir Charles Dilke in Parliament on 18 March 1872 that the duchies of Cornwall and Lancaster are public and not private property, quoted in Hamilton, n 64, p 88.

⁶⁹ Duchy website, n 11, 'The Prince of Wales is not entitled to the proceeds or profit on the sale of assets, and only receives the annual income which they generate, which is voluntarily subject to income tax.'

⁷⁰ The National Archives LO 3/467. Duchy of Cornwall – Land Tax and Vaultation 1913. See Hamilton, n 64, p 217 (which contains the text of an opinion of the law officers of 18 August 1913). The sole legal basis is that 'We are of the opinion that the same principles which render the provisions of an Act of Parliament inapplicable to the Crown unless the Crown is expressly named, apply also to the Prince of Wales in his capacity as Duke of Cornwall. This results from the peculiar title of the Prince of Wales to the duchy of Cornwall.' However, one would assert that this statement of opinion (which contains no reference to legislation, caselaw or charters) is manifestly wrong. The 'peculiar title' of the duchy referred to is that, in the absence of a Duke, it is held by the Crown. However, when held by an individual – as opposed to the Crown itself – it is held in a different capacity (ie by an individual as Duke as distinct from the sovereign). To suggest, therefore, that the Duke and the sovereign are one and the same is manifestly incorrect; they are different individuals and different dignities. Further, the charters were long before modern tax statutes and they contain no such exemption. Thus, the charters - which contain the 'peculiar title' - are not relevant to the issue, deciding the matter neither one way or the other. In short, the legal opinion is simply incorrect on its face. Reliance cannot be placed on the peculiar title as such when considering taxation. See also Burnett, n 11, p 40 'In 1921, citing higher repair bills and personal expenses, the Prince [late Edward VIII] persuaded the Treasury to exempt the duchy from income tax, replacing it with a voluntary contribution.'

⁷¹ The case related to a demand for more information about non-native oysters in the Fal and Helford rivers, located in the duchy of Cornwall.

⁷² Obsolete offices which the Duke had power to appoint were noted by Norden, n 22, p 10 'customer, searcher, comptroller, gauger, escheator...clerk of the market' (spelling modernised). Also '[the Duke] hath also marine jurisdiction, and appointeth an admiral for those coasts [of Cornwall].'

- *Attorney-General to the Duke of Cornwall*. He is the principal legal officer in whose name legal proceedings in respect of the duchy are taken and defended. If there is no Duke, he acts as attorney-general to the duchy.⁷⁴ The attorney general is the legal agent of the Prince of Wales,⁷⁵
- *Receiver-General*. He has oversight of the financial affairs of the duchy There is also a deputy receiver who handles daily financial matters on behalf of the receiver general;
- *Keeper of the Public Records*. He also acts as secretary. Thus, he is generally titled the Secretary and Keeper of the Records. The keeper is responsible for the payment of proceeds of sale into the capital account (see 6).⁷⁶ There is also a deputy (or, sometimes, assistant) secretary and keeper of the records who has practical responsibility for delegated legislation. There is also a Records Clerk;
- *Auditor*;
- *Solicitor*. He represents the Duke in the administration of *bona vacantia* (see 3);
- *Property Services Manager*. He was formerly called the clerk surveyor. There is also a Lands Steward who manages the districts in which the duchy lands are administered.⁷⁷

There are some 110 staff in total employed by the Duke in respect of the duchy. The duchy has its own seal⁷⁸ and the Duke his own privy seal.⁷⁹

In conclusion, the duchy of Cornwall is a duchy which is held by, and for, the eldest son of the sovereign. It is not the same as a private estate since it is governed by legislation in respect of various matters, its land and possessions are generally inalienable and it has various peculiar tax features.

3. Privileges of the Duchy – General

Like the duchy of Lancaster, the duchy of Cornwall has various *jura regalia* accorded to it.⁸⁰ These may be enumerated as follows:

- *Royal Fish*. By virtue of the charter of 1337, the Duke has the right to royal fish (whales and sturgeon) in Cornwall.⁸¹ This franchise derives from a Crown prerogative.⁸² However, it is not exercised by the Duke (or the sovereign) today for various reasons. In particular, all types of whales (*cetacea*) and sturgeon (*acpensar sturio*) are European protected species. As such, their capture, killing, disturbance, keeping, transport, sale or exchange is prohibited. It is argued in a previous article that this right, being obsolete, should be abolished;⁸³
- *Treasure Trove*. It is said that the duchy has a franchise of treasure trove. However, since it did not receive this privilege by virtue of an express grant⁸⁴ this is somewhat dubious.⁸⁵ Sometimes, the duchy

⁷³ He acts as Chairman when there is no Duke of full age. For the Council of the duchy, see Halsbury, n 12, vol 12(1), para 321.

⁷⁴ For the management of the duchy by the Council during the minority of the Duke, see Halsbury, n 12, vol 12(1), para 325. For its management during a vacancy, see para 326.

⁷⁵ Halsbury, n 12, vol 8(2), para 530 n 8. Also, Civil Service Year Book 1996, col 17.

⁷⁶ Ibid, vol 12(1), para 322.

⁷⁷ Ibid.

⁷⁸ Ibid, para 327 'In general, instruments relating to the duchy...are required to be passed under the duchy seal... The provisions of the Law of Property (Miscellaneous Provisions) Act 1989 relating to the execution of deeds do not apply to the duchy seal.'

⁷⁹ The Duke...exercises certain functions by privy seal. The privy seal...is used for such matters as the appointment of sheriffs for Cornwall, the exercise of patronage to benefices and the appointment of officers and members of the Council.'

⁸⁰ eg. Carew (writing c 1602), n 40, p 152, 'These earls and Dukes have from the beginning been privledged with royal jurisdiction or crown rights, namely, giving of liberty to send burgesses to the parliaments, return of writs, custom, toll, mines, treasure-trove, wreck etc and (to this end) appointed their special officers.'

⁸¹ See Halsbury, n 12, vol 12(1), paras 229 & 247. The latter, n 1, quotes from the charter of 1337 'the profit of all the ports within the same our county of Cornwall to us belonging together with wreck of the sea as well as of whales and sturgeon and other fish which do belong to us by reason of our prerogative and whatsoever belongs to any wreck of the sea with any appurtenances in our the said county of Cornwall.' (italics supplied). It is debatable whether the Crown (and the duchy) have any right to dolphins and porpoise, see GS McBain, *Modernising the Monarchy in Legal Terms* - Part 3 (2012)KLJ, vol 23, p 24, n 147.

⁸² This right derives from the Crown having such a right pursuant to Prerogativa Regis (c 1324) c 13 (still extant) which provides that 'the king shall have...throughout the realm, whales and great sturgeon taken in the sea or elsewhere within the realm, except in certain places privileged by the king'. See generally, GS McBain, *Modernising the Monarchy in Legal Terms* (2010) 21 King's LJ, pp 548-51.

⁸³ See article in n 81.

⁸⁴ See generally, n 81, pp 1-25. Halsbury, n 12, vol 9(2), para 1077, n 5 'It is as franchisees in right of treasure trove that her Majesty and the Duke of Cornwall are to be treated as having enjoyed the rights to treasure trove which belonged respectively to the Duchy of Lancaster and the Duchy of Cornwall immediately before [24 September 1997].' See also Treasure Act 1996 s 5(2) and the *Prince's Case* (1606) (see n 10).

⁸⁵ It contradicts a general rule of interpretation that a grant of Crown prerogatives must be express and not by implication. See McBain, n 81,

has chosen not to claim treasure trove.⁸⁶ If the duchy were abolished, this privilege would revert to the Crown and an anomaly would be removed (it not being expressly provided for). Further, such would be more administratively convenient, finders of treasure trove then having to deal with the Crown only;

- *Wreck*. By virtue of the charter of 1337, the Duke has the right to all wreck (including flotsam, jetsam and ligan) on all Cornish shores.⁸⁷ However, the value of wreck is of scant worth to the duchy these days and abolition of this franchise would have little effect on it. Abolition of this franchise, however, would make the handling of wreck administratively more convenient, finders of wreck then having to deal with the Crown only;⁸⁸
- *Bona Vacantia and Escheat*. *Bona vacantia* and *escheat* are now seen as two aspects of the vesting in the Crown of property which has no owner.⁸⁹ The term '*bona vacantia*' is applied to: (i) the residuary estate of persons dying wholly, or partially, intestate and without a husband, wife or other relative within the statutory classes; (ii) the property, and rights, of a dissolved company and certain other corporations; (iii) certain other interests, including certain interests in trust property.⁹⁰ Where *bona vacantia* occurs in the duchy his will pass to the duchy.⁹¹ '*Escheat*' is the capacity of the chief lord to resume land granted by him (or a predecessor in title) on determination of the estate granted. It may arise on disclaimer.⁹² Escheated realty (which rarely occurs) in the duchy will pass to the duchy.⁹³ If the duchy were abolished, the Crown would receive *bona vacantia* and *escheat* directly, simplifying things. In any case, the sums secured by the duchy from *bona vacantia* are small and they are used for charitable purposes *via* the Duke of Cornwall Benevolent Fund;⁹⁴
- *Gold and Silver Mines*. The Crown has the right to such mines in England and Wales although this is founded on a rather dubious legal basis.⁹⁵ This prerogative belongs to the duchy in the case of gold and silver mines situated in the duchy.⁹⁶ It is not of great value and a previous article has argued that the prerogative, anyway, should be abolished;⁹⁷
- *High Sheriff*. The first duchy charter of 1337 declares that the shrievalty of Cornwall (ie. the right to appoint the sheriff in Cornwall) is vested in the Duke.⁹⁸ Today, the high sheriff of Cornwall is appointed by the Duke. When there is none, the duchy Council sits under the trusteeship of the sovereign and, as duchy trustee, the sovereign appoints the high sheriff;

p 9. See also Brown, n 4, p 319.

⁸⁶ G Hill, *Treasure Trove in Law and Practice from the Earliest Times to the Present Day* (1936), p 214. For the Rillaton gold cup, discovered on duchy land and used by George V (1910-36) as a stud box for his dressing table, see Burnett, n 11, p 36.

⁸⁷ See n 81, quoting the charter of 1377. Halsbury, n 12, vol 12(1), para 271 'In the county of Cornwall the right of wreck (namely flotsam, jetsam and ligan but not derelict) belongs either to the Duke of Cornwall or to a subject, except where the right may have escheated or become vested in the Crown by purchase.' Also, n 9 'The Earl of Cornwall had the right by charter *per totum comitatum* (ie. throughout the country [sic] except where it had at the time of the charter been granted out.' See also (5th ed), para 1006 and Merchant Shipping Act 1995, s 243(6). See also Hargrave, F. editor of M. Hale, *A Treatise relative to the Maritime Law of England in Three Parts*. (London, 1787, rep Gale EEBO Print eds), p 28 (Earl of Cornwall had *wreccum maris per comitatum Cornubiae*) and p. 41. See generally, GS McBain, *Abolishing Some More Obsolete Crown Prerogatives - Part 2*, Liverpool Law Review, vol 32, issue 3 (2011), pp 275-315 (also online). See also Pycroft, n 7, p xi.

⁸⁸ See McBain, n 86, p 312. NE Palmer, *Interests in Goods* (2nd ed, 1998), p 151 'The system for reporting and disposal [of wreck] has in fact largely fallen into disuse. For example, just 25 items of wreck were reported in 1990, of which 21 had no value and were disposed of immediately by the receiver. The four other cases involved a small pleasure craft broken free from its moorings, a marine engine, a coil of rope and one item from a historic wreck. Although the receiver of wreck service covers modern wreck, in practice, its services are rarely called upon in this respect. Corporate ownership of modern ships, organised salvage facilities and the existence of the coastguard able to coordinate search-and-rescue activities have largely removed the need for receivers of wreck where there are recent casualties.'

⁸⁹ Halsbury, n 12, vol 12 (1), para 231.

⁹⁰ *Ibid*, para 235.

⁹¹ *Ibid*, paras vol 12(1) 231 *et seq*. Also, vol 17(2), paras 174 & 613-4. Agreement is reached with the treasury solicitor to prevent the need for two grants when a resident in the duchy dies intestate leaving land outside it. See vol 17(2), para 174.

⁹² *Ibid*, para 233. See also charter of 18 March, 1337 (reference to escheat)

⁹³ *Ibid*, paras 232-3. Also, vol 17(2), para 656.

⁹⁴ For the year 2007, the sum was £130,000. Hamilton, n 12, p 78 (the sum from *bona vacantia* between 1952 - 62 was £ 43,820).

⁹⁵ See GS McBain, *Modernising the Monarchy in Legal Terms: Part 2*, (2011) 22 King's LJ, pp 100-3. The dubious legal basis is contained in the argument of counsel for the Crown in the *Case of the Mines* (1567) 1 Plowd 310, 316 *et seq* (75 ER 472) *viz* (a) gold and silver are excellent and the sovereign is entitled to excellent things; (b) the sovereign requires gold and silver to fund an army, in order to protect the country; (c) the sovereign requires gold and silver for coinage; (d) if a subject has gold and silver he could surpass the sovereign in wealth. However, it should be noted that the judges in this case did not endorse, as such, any of these propositions.

⁹⁶ See generally, Halsbury, n 12, vol 12(1), para s 66 & 218-20. See also Norden, n 22, p 9.

⁹⁷ See article referred to in n 94.

⁹⁸ Halsbury, n 12, vol 42, para 1105 'The shrievalty of the county of Cornwall is annexed to the duchy of Cornwall and the appointment of a high sheriff is made by the Prince of Wales as Duke of Cornwall or by the monarch in the Duke's name during his minority and is determinable on his attaining the age of 18.' See also Doddridge, n 25, p 90 and Norden, n 22, p 9. Also Manning & Rylands, n 20, p 475.

- Attorney General. The duchy has its own attorney general;⁹⁹
- Duchy Solicitors. The Revenue Solicitor's Act 1828,¹⁰⁰ s 1 contains an exemption for treasury solicitors.¹⁰¹ The reference to 'attornies' is obsolete; such reference is now to a solicitor.¹⁰² This exemption is preserved by the Solicitor's Act 1974, s 88(1).¹⁰³ This exemption would enable a Treasury solicitor to appear before any UK court and argue cases even though he (or she) does not hold a practicing certificate. An amendment to s 88(1) has excluded this in the case of the Crown Prosecution service.¹⁰⁴ In practice, it is highly likely that any Treasury solicitor appearing before the UK courts would be a properly qualified solicitor – not least because of concerns about the level of professional competence. Therefore, it is asserted this anomaly should be repealed. As to duchy solicitors, the Stannaries Act 1855,¹⁰⁵ section 31¹⁰⁶ contains a similar exemption in respect of duchy solicitors which, it is asserted, is also unnecessary and should be repealed for the same reasons;
- Deeds. The provisions of the Law of Property (Miscellaneous Provisions) Act 1989 relating to the execution of deeds do not apply to the duchy seal. The effect of this is minor since sealing and delivery are required in respect of a duchy deed, as with all deeds. However, a duchy deed does not have to declare on its face that it is a deed;¹⁰⁷
- St Mary's Harbour. This is a private harbor, owned and managed by the duchy as part of the archipelago for the Isles of Scilly,¹⁰⁸
- Consent to Bills. In 2005, the Guardian newspaper reported that the Duke of Cornwall had been asked to give his consent to draft Bills on matters ranging from town planning to gambling because it could affect his private interests.¹⁰⁹ Consent is not a legal requirement;
- Church of England. The Duke has the right to present clerical livings (ie. to appoint priests) in the duchy;¹¹⁰
- Power to Tax. Norden, writing c 1600, asserted that the Duke has a general power to tax.¹¹¹ However, this is almost certainly mistaken;

⁹⁹ See n 74.

¹⁰⁰ 9 Geo 4 c 25. It is entitled 'An Act to authorize the appointment of persons to act as solicitors and attornies on behalf of his majesty in any court or jurisdiction in revenue matters.' S 1 bears the headnote 'Persons appointed to be solicitors or attornies on behalf of his Majesty, under the orders of the Treasury or other revenue departments etc may act as such in all courts or jurisdictions in the United Kingdom.' See also Halsbury, *Statutes of England and Wales* (4th ed), n 12, vol 11 (2).

¹⁰¹ 'Whenever any person has been, or is, or shall be appointed to be solicitor or attorney on behalf of his majesty, under the orders and directions of the commissioners of the Treasury, customs, excise, or stamps, or under the orders and directions of any commissioners or other persons or person having the management of any other branch of his majesty's revenue, for the time being, it is and shall and may be lawful for such person to act and practice as such solicitor or attorney under such orders and directions in all and every court and courts, jurisdiction and jurisdictions, place and places, in any and every part of the [UK]; anything in any Act of Parliament, or in any order or rule of any court of justice, or any law, usage, or custom in force in any part of the [UK], relating to solicitors or attornies, or to the admission or practice of such solicitors or attornies, to the contrary in anywise notwithstanding. (italics supplied).

¹⁰² Solicitor's Act 1974, s 89(6). See also Halsbury's Statutes, n 100, vol 11 (2).

¹⁰³ viz 'Nothing in this Act shall prejudice or affect any rights or privileges of the solicitor to the Treasury, any other public department, the Church Commissioners or the Duchy of Cornwall, or require any such officer or any clerk or officer appointed to act for him to be admitted or enrolled or to hold a practicing certificate in any case where it would not have been necessary for him to be admitted or enrolled or to hold such a certificate if this Act had not been made.'

¹⁰⁴ Section 88 (1A) 'The exemption from the requirement to hold a practicing certificate conferred by subsection (1) above shall not apply to solicitors who are Crown Prosecutors.'

¹⁰⁵ It bears the headnote 'Any person appointed to act as solicitor for the Duchy of Cornwall may practice as such in all courts.' See also Halsbury's Statutes, n 100, vol 11 (2).

¹⁰⁶ It provides: 'Whenever any person shall be appointed by his Royal Highness the Prince of Wales, or other personage for the time being entitled to the possessions of the Duchy of Cornwall, to act as attorney or solicitor in the affairs of the said Duchy, it shall be lawful for such person to act and practise as such attorney or solicitor or in such affairs in all and every court, jurisdiction, and place in any and every part of the [UK], any statute, order, rule, usage, or custom relating to attornies or solicitors, or the admission, enrolment, or practice of attornies or solicitors, to the contrary notwithstanding. (italics supplied).

¹⁰⁷ GS McBain, *Abolishing Deeds, Specialties and Seals, Part 1*, Commercial Law Quarterly, vol 20, no 1, March-May 2006, p 17, n 85. See also Law of Property (Miscellaneous Provisions) Act 1989, s 1(9).

¹⁰⁸ See n 81 (reference to ports in the charter of 1377). The duchy owns the freehold of most of the island and nearly a third of the residential buildings on the island. See duchy website, n 11. In former times harbor dues were levied on all ships in need of anchorage in ports controlled by the duchy. Every ship under 20 tons landing on one of those ports was obliged to hand over a cask, or two if the tonnage was greater. And even the smallest harbour was liable for customs dues with one (Portwrinkle) continuing to be charged with all pilchards landed on its quay as late as the 1780s. See Burnett, n 11, pp 18-9

¹⁰⁹ R Booth, *Prince Charles has been offered a Veto over 12 Government Bills since 2005*. The Guardian. 30 October, 2011. See also Gollancz, n 59.

¹¹⁰ Halsbury, n 12, vol 14, paras 784 & 785. Para 784 'Where the... duchy of Cornwall is patron of a benefice, or has a share in the patronage, no pastoral scheme or order may apply to that benefice without the consent of the...Duke.' See also duchy website, n 11 and also charter of 18 March 1337 ('advowsons of churches, abbies, priories, hospitals, chapels.').

- *Obsolete Privileges*. The two charters of 1377, one of 1338 and one of 1333¹¹² granted other privileges to the Duke, which privileges have long been obsolete (it may be noted that the duchy of Lancaster also had many of these privileges). These comprised: (a) prisage (a duty on imported wine) - abolished in 1809;¹¹³ (b) customs of wines and wool brought into the ports of the duchy - now abolished;¹¹⁴ (c) profits of the hundred and county courts in Cornwall - the former no longer operate and the profits of the latter the duchy no longer receives;¹¹⁵ (d) the stannary and coinage in Cornwall and Devon and profits arising therefrom - no coinage in now minted in Cornwall and Devon;¹¹⁶ (e) fairs and markets;¹¹⁷ (f) free warren - now abolished;¹¹⁸ (g) return of writs and summons of the exchequer - abolished in 1535,¹¹⁹ (h) goods and chattels of all felons and fugitives, tenants of the duchy - now abolished;¹²⁰ (i) all judicial fines, forfeitures and amerciements - now obsolete;¹²¹ (j) escuage of all tenants holding by knights service which they were to pay being assessed in Parliament for their failure of service and absence - this became obsolete by the 14th century;¹²² (k) right of wardship - abolished in 1660¹²³ as well as reliefs and services of tenants (free and bondsmen) - now abolished; (l) the power to punish, and pardon, criminal offences within the duchy - now obsolete;¹²⁴ (m) the right to tolls - now effectively obsolete since few common law tolls presently exist, legislation and contract having superceded them.¹²⁵

In conclusion, privileges in relation to royal fish are obsolete and privileges in respect of treasure trove, wreck, bona vacantia, escheat and gold and silver mines are of little benefit to the duchy and would be more efficiently administered, if they revert to the Crown. So too, the right to elect a high sheriff. Exemptions in relation to duchy solicitors and deeds are unnecessary and should be abolished. There is no real need for a separate Attorney-General for the duchy and this could be handled by the Attorney-General (the duchy also has a solicitor).

¹¹¹ Norden, n 22, p 24 'if the cause so require, the Prince for supply of his necessary occasions may (no doubt) raise a reasonable tax upon the people not to be denied.' (spelling modernized).

¹¹² See n 20 and charter of 10 July 1333 referred to by Doddridge, n 25, p 91.

¹¹³ See charter of 17 March, 1337. Prisage was abolished by 49 Geo III c 98, s 35.

¹¹⁴ Doddridge, n 25, p 91, referring to the charter of 1333 and that of 17 March 1337 'The prizes and customs of all wines brought into these ports of the said county of Cornwall, and the profits of the ports and havens thereof; and the customs of all wool, leather and wool fells, shipped to be transported out of the said duchy, to be collected by officers appointed by the said Duke... the prizes and customs of wines of the port of Sutton, which is now called Plymouth, and is partly within the county of Devon.'

¹¹⁵ See charter of 17 March, 1337 ('the profits and emoluments of the county courts...in Cornwall, and of hundreds and courts of the same.'). See also Doddridge, n 25, p 91.

¹¹⁶ Ibid, 'our stannary in the same county of Cornwall, together with the coinage of the same...and all the issues and profits thereof arising, and also the explees, profits, and perquisites of the courts of the stannary and mines in the same county.' See also Doddridge, n 25, p 92. For the profits of the stannaries', including the toll of tin, see pp 111-2.

¹¹⁷ This includes the right to appoint a clerk of the market, see n 72.

¹¹⁸ Ibid, 'free warren in all the demesne lands aforesaid, so only that the same lands be not within the metes of our forest; So that no one shall enter those lands to chase there, or to take anything which to warren pertains, with the licence and will of the same Duke'. Franchises of free warren, forest, free chase and park were abolished by the Wild Creatures and Forest Laws Act 1971, s 1(1)(b).

¹¹⁹ Charter of 18 March, 1337 'return of all the writs of us and our heirs, and of the summonses of the exchequer of us and our heirs, and attachments as of pleas of the Crown as of others whatsoever in all their said lands and tenements in the...county of Cornwall'. This privilege was one often given to counties palatine (it was also given in the case of the duchy of Lancaster, see McBain, n 1). The effect was that the king's ordinary writs for redress of grievances or the punishment of offences between man and man were not available within the county palatine.. However, after 1535, all writs ran in the name of the sovereign. Doddridge, n 25, p 91 'the liberty and returning of all writs and summons directed to the sheriff of the said county, which shall not be returned, but by the officers of the said Duke, for the time being.'

¹²⁰ Ibid, 'chattels of their men and tenants in all the county aforesaid being felons and fugitives.'

¹²¹ Ibid, all fines for trespasses and other crimes whatsoever, and also fines for licence of concord and all amerciements, ransoms, and issues forfeited, and forfeitures, year day and waste and strip, and all things which to us and our heirs might appertain concerning such year day and waste and murders of all the men and tenants of their lands, tenements, and fees aforesaid, in the said county of Cornwall in whatsoever courts of us and our heirs.' See also Norden, n 22, p 24 referring to an Act of Henry 7 (1496) in which the sovereign's right to 'all forfeitures within Cornwall is reserved and secured to the Duke.' Forfeitures for treason and felony were abolished by the Forfeiture Act 1870.

¹²² Doddridge, n 25, p 91. See also Charter of 3 January, 1377. D Walker, *The Oxford Companion to Law* (OUP, 1980)(scutage or escuage). 'Shield-money, in medieval feudal law, a payment in lieu of military service, paid by a tenant-in-chief in respect of the service of knights which he owed to the Crown...Scutage was divided between the king and the tenants-in-chief who gave personal service in the campaign. It became obsolete by the fourteenth century.' Knights service was abolished by the Tenures Abolition Act 1660, s 4. See also Watkins, n 6, p 26 (Act abolishes all tenures by knight's service).

¹²³ Charter of 18 March, 1337. Wardships were abolished by the Tenures Abolition Act 1660, s 4. See also McBain, n 82, p 541.

¹²⁴ Halsbury, n 12, vol 8(2), para 823 'The Crown enjoys the exclusive right of granting pardons, a privilege which cannot be claimed by any other person either by grant or prescription.' See also Coke, n 8, vol 3, p 233-9 and Norden, n 22, p 10 'power to punish and pardon offences committed within the limits of the dukedom.'

¹²⁵ See Charter of 17 March 1337. See also n 1, pp 182-3.

4. Privileges of the Duchy – Mining ¹²⁶

(a) Stannaries Act 1836

Since, at least, 1201 - by means of a charter of 19 October 1202 granted by King John (1199-1216) ¹²⁷- steward's courts existed in the eight mining districts of Devon and Cornwall, each district being known as a stannary. These were courts of common law. There was also a second stannary institution - the equitable jurisdiction of the Vice Warden of the stannaries. ¹²⁸

- By 1809, the steward's courts had become defunct (the Vice Warden's court being less expensive and more expeditious). Further, the jurisdiction of the Vice Warden's court was never satisfactorily defined (in particular whether it was a court of appeal or of first instance, whether it also exercised common law jurisdiction and whether it applied to metals other than tin); ¹²⁹
- The Stannaries Act 1836, ¹³⁰ section 6 amalgamated the four Cornish stannary courts into one court under the Vice Warden. ¹³¹ By sections 4 ¹³² and 7 ¹³³ of Act, the common law and equitable jurisdiction of that court was confirmed and extended not just to tin (as before) but also over all other metal mines in Cornwall;
- The Stannaries Act 1855, ¹³⁴ (still extant) confirmed that black lead (plumbago) was a metallic mineral for the purposes of the jurisdiction of the Vice Warden's court and that such jurisdiction also covered mines where there was an admixture of metallic and non-metallic minerals. ¹³⁵ The Act also amalgamated the four Devon stannary courts into the Vice warden's court.

¹²⁶ See generally, T Pearce, *The Laws and Customs of the Stannaries in the Counties of Devon and Cornwall* (London, 1725), RR Pennington, *Stannary Law* (David & Charles, Newton Abbot, 1973) and GR Lewis, *The Stannaries* (Boston, Houghton and Mifflin, 1924). See also Coke, n 8, vol 4, pp 228-37. See also J Halcomb, *Report of the Trials and Subsequent Proceedings in the Causes of Rowe v Grenfell, Rowe v Brenton and Another and Doe (Dem Carthew) v Brenton (relative to the claims made by the lessees of the Duke of Cornwall to the copper mines within the Duchy lands; and involving also the question of title to the lands and estates of the Tenants)* (London, J Butterworth, 1826). See also Doddridge, n 25, p 92 *et seq.*

¹²⁷ The charter of King John is reproduced in HT De La Beche, *Report on the Geology of Cornwall, Devon and West Somerset* (London, Longman, 1839). See also Charter of Liberties to the Tinnars of Cornwall (1305), Charter of Confirmation to the Tinnars of Cornwall (1402) and Charter of Pardon to the Tinnars of Cornwall (1508). For the texts of these, see *Wikipedia (Royal Charters Applying to Cornwall)*, citing sources. Also, Manning & Ryland, n 20, pp 493-5.

¹²⁸ Pennington, n 126, pp 29-30 (who says it had no foundation in charter or statute). Cf. Charter of 10 April 1305 Edward I (1272-1307), see Pearce, n 126, p 232-3. See also Norden, n 22, p 17.

¹²⁹ *Ibid.*, ch 1. See also Norden, n 22, p 16 (Vice-warden's court handled appeals).

¹³⁰ 6 & 7 Will 4 c 106. It is entitled 'An Act to make provision for the better and more expeditious Administration of Justice in the Stannaries of Cornwall, and for enlarging the jurisdiction and improving the practice and proceedings in the courts of the said stannaries.' See also Halsbury Statutes, n 100, vol 11(2).

¹³¹ S 6 is entitled '*The courts of law of the stannaries shall be one court held before the Vice Warden, who shall have the same common law jurisdiction as the stewards have had.*' It provides 'The courts of law of the respective stannaries heretofore held before the stewards or steward thereof shall be one court for all the stannaries, and shall be held by and before the Vice Warden for the time being, who as judge thereof shall have, exercise, and enjoy the same common law jurisdiction, and the same powers, privileges, and authorities with reference thereto, and shall transact, do, and perform the same duties, matters, and things in relation thereto, as have heretofore been lawfully transacted, done, performed, or to be exercised or enjoyed by the steward for the time being of any of the stannaries.'

¹³² S 4 is entitled '*Original equitable jurisdiction of Vice Warden confirmed, and extended to matters connected with all metals and metallic minerals in Cornwall in the same way as heretofore over tin.*' It provides: 'The original equitable jurisdiction heretofore lawfully exercised by the Vice Warden for the time being shall and may be henceforth exercised by...every...Vice Warden for the time being; and...every...Vice Warden for the time being shall have, exercise, and enjoy the same equitable jurisdiction, and the same power and authority in all matters and things brought before him, so far as relates to the working, managing, conducting, or carrying on any mine worked for any lead, copper, or other metal or metallic mineral within the said county of Cornwall, or to the searching for, working, smelting, or purifying any lead, copper, or other metal or metallic mineral within the said county, in as full and ample a manner as if the same had related to any tin or tin ore, or tin mine, or mine worked for tin, in the said county . . .'

¹³³ S 7 is entitled '*And also similar jurisdiction in matters connected with all metals and metallic minerals in Cornwall.*' It provides: 'Such Vice Warden for the time being shall also have, exercise, and enjoy the same common law jurisdiction and the same power and authority in all matters and things which shall be brought before him in any way connected with the working, managing, conducting, or carrying on any mine worked for lead, copper, or any other metal or metallic mineral within the said county of Cornwall, or in any way relating to lead, copper, or any other metal or metallic mineral, or the searching for, working, smelting, or purifying lead, copper, or any other metal or metallic mineral within the said county, in as full and ample a manner as if the same had been connected with or related to any tin or tin ore, or tin mine, or mine worked for tin, in the said county.'

¹³⁴ 18 & 19 Vict c 32 is entitled '*An Act to amend and extend the jurisdiction of the stannary court.*'

¹³⁵ S 1 is entitled '*Mines worked for non-metallic as well as metallic minerals to be within the cognizance of the Stannaries Court.*' It provides 'Where any mine or sett within the stannaries shall be worked by the same adventurers not only for metallic minerals within the jurisdiction of the court, but also for non-metallic minerals found in the same mine or sett, or intermixed with metallic minerals, the entire mine and works and products thereof shall be taken to be within the cognizance of the vice-warden, as if the same had wholly consisted of metallic minerals, and the process of the court shall extend to and be exercised over the same, and the machinery and minerals thereon, as in the case of mines of metallic minerals; and the mineral called plumbago or black lead is hereby declared to be a metallic mineral.'

Thus, by 1855 (over 150 years ago), the sole stannary court was that of the Vice Warden. However, by 1870 this court was also virtually defunct, having no business.¹³⁶

- The Stannaries Court (Abolition) Act 1896¹³⁷ (still extant) provided for the abolition of the Vice-Warden's court and the transfer of its jurisdiction to the County Courts of Cornwall.¹³⁸ This was effected by the Stannaries Court (Abolition) Act 1896 SR& O 1896/1106 and the powers of the Vice-Warden (as enlarged by the Acts of 1836 and 1855)¹³⁹ were taken over by the county courts of Cornwall, which courts still hold this jurisdiction.¹⁴⁰

Thus, Halsbury states:

The court of the Cornish tin miners, known as the Stannaries Court, had jurisdiction both at common law and in equity. The court has ceased to exist and the jurisdiction is now exercisable by the county courts of Cornwall.¹⁴¹

As a result, it is asserted that the Stannaries Acts 1836 and 1855 are spent – the transfer of the jurisdiction of the vice-warden to the county court having occurred more than 110 years ago.¹⁴² They can be repealed as well as the Act of 1896, including one section in respect of arbitration.¹⁴³ In any case, it would seem better for all matters relating to mining to be handled by the high court in modern times, as opposed to the county court, this being a specialized area of law. The position as to the gradual move of all admiralty matters to the high court indicates the merits of this.¹⁴⁴

In conclusion, legislation governing the stannary courts may be repealed.

(b) Tin Bounding Customs

Halsbury states:

Tin was worked in Cornwall from ancient times. Those engaged in tin mining developed a body of stannary customs which were regulated by their Convocation, and enforced by their own court. There were also statutory provisions relating to the stannaries, but these have largely been repealed as no working tin mines now remain in Cornwall.¹⁴⁵

As to tin bounding, Halsbury states:

¹³⁶ Pennington, n 126, ch 1.

¹³⁷ 59 & 60 Vict c 45 entitled '*An Act for Abolishing the Court of Vice-Warden of the Stannaries*'. See also Halsbury Statutes, n 100, vol 11(2).

¹³⁸ s 1(1) stated: 'The court of the Vice Warden of the Stannaries shall cease to exist...and...all jurisdiction and powers of the said court and its officers shall...be transferred to and vested in such of the country courts as the Lord Chancellor may after consulting the Lord Chief Justice, by order direct, and be exercised subject to and in accordance with rules of court for regulating the procedure in country courts.'

¹³⁹ The Stannaries Court (Abolition) Act 1896 s 3, confirms this. Entitled '*Explanation of references to Stannaries Court*', it provides that 'References in any unrepealed enactment to mines subject to the jurisdiction of the court of the Vice-Warden of the Stannaries, or within the cognizance of the said Vice-Warden, shall be construed as applying to mines, which would have been subject to the jurisdiction of the said court if it had not been abolished.'

¹⁴⁰ See Halsbury Statutes, n 100, vol 11(2). The same SRO provided that the jurisdiction in companies winding up matters and, in cases where the subject matter was not within the limits of the county courts jurisdiction, it should be exercised exclusively by the court having bankruptcy jurisdiction in Cornwall. This was to deal with various winding up petitions outstanding in 1896 and it is now obsolete.

¹⁴¹ Halsbury, n 12, vol 31, para 590.

¹⁴² So too is the Stannaries Court (Abolition) Act 1896 s 1(2). It states 'Provision may be made by order of the Lord Chancellor (a) for determining by, to, or before what officer, or in what office, may be done anything required to be done by, to, or before any officer or in any office of the said court of the Vice Warden;... (c) for determining the place of sitting for the exercise of any jurisdiction transferred by this Act; (d) with respect to the use and disposal of any property which at the commencement of this Act is held for the use of the said court or of any officer of the said court, and of any room or building which at that date is appropriated for the use of the said court or of the vice-warden, officers, and suitors thereof; and (e) with respect to any records which at that date are under the custody of the said court.'

¹⁴³ This is s 4. Entitled '*References of certain disputes to arbitration*.' it provides: '(1) In the event of any dispute arising between (a) any two or more mining companies; or (b) any mining company and His Royal Highness the Prince of Wales and Duke of Cornwall, or any person having any estate or interest in the mine worked by or leased to that mining company; a judge of a county court exercising the jurisdiction of the Stannaries Court may, on the application of any party to the dispute, order that the matter in dispute be referred to arbitration before himself or before an arbitrator agreed on by the parties or an officer of the court. (2) For the purposes of this section the expression '*mining company*' shall mean any person or body engaged in or formed for working mines within the stannaries.' See also Halsbury Statutes, n 100, vol 11(2). Since 1998, there have been no tin or copper mines operating in Cornwall. The great copper mining era originated from 1836 when copper was struck on the flank of Caradon Hill, on the edge of Bodmin Moor. Burnett, n 11, p 33.

¹⁴⁴ Today, admiralty matters are administered by the High Court. The jurisdiction of the county court over admiralty matters was abolished in 1999, see Halsbury, n 12, vol 1(1), para 482.

¹⁴⁵ Halsbury, n 12, vol 31, para 588. The last mine in Cornwall (South Crofty tin mine) closed in 1998 (the last copper mine closed in 1920, being Dolcoath mine).

The ownership of a mine is vested *prima facie* in the owner of the freehold. This right of ownership is, however, modified by the custom of tin bounding. The custom has fallen into disuse, but it has never been abrogated. Under the custom, if a tin mine lay within waste land or certain enclosed land and was not worked by the surface owner, a tinner could claim and, if various conditions were met, be granted tin bounds. The grant carried the exclusive right to search for and work all tin ore within the bounds, subject to payment of the owner of the soil. Laws passed by the Convocation included detailed provisions as to the rights, duties and liabilities of tin bounders.¹⁴⁶

Customs as to tin bounding belongs to another era and they are obsolete today. It is asserted they should be repealed.¹⁴⁷ Traditionally, the Duke has a ceremonial role in summoning the Cornish Stannary parliament (the Convocation). However, this parliament has not sat since 1753¹⁴⁸ and it is obsolete.

(c) Mining Rights in Assessionable Manors¹⁴⁹

Halsbury notes that the Duke has mining rights in various assessionable manors:

There were in Cornwall 17 assessionable manors originally belonging to the duchy of Cornwall. In those manors certain tenements (known as ‘conventional tenements’) were held by way of leases which were perpetually renewable every seven years at the Accession Court,¹⁵⁰ and therefore were in many ways similar to copyhold. Because they were in law leases¹⁵¹ the custom that possession of the minerals was in the tenant did not apply and therefore the Duke...and his licensees were entitled to get the minerals without the consent of the tenant. Six of the manors¹⁵² were sold for the redemption of land tax reserving mines and metallic minerals. The so-called Assessionable Manors Act¹⁵³ was passed to enfranchise the conventional tenements and to lay down a code for the working of minerals.¹⁵⁴ The code provides different rules for the sold manors (mines and metallic minerals) and the unsold ones¹⁵⁵ (mines, minerals, stone and substrata).¹⁵⁶ Commissioners were appointed to make awards under the Act; and their award is a record of title and establishes the extent of the duchy mineral rights within those manors.¹⁵⁷

The right of the Duke to mine is laid down in the Assessionable Manors Act 1844 (also called the Duchy of Cornwall (No 2) Act 1844) s 53 of which provides that:

All mines and metallic minerals in and under all and singular the tenements now or at any time within [100] years before [1st May 1844] held as conventional tenements of the said manors mentioned in [Schedule 1]¹⁵⁸ and all mines, minerals, stone, substrata, and all other profits whatsoever in, upon, under, and of all waste and other demesne lands of the same manors respectively, and all mines, minerals, stone, and substrata in, upon, under, and of all other lands lying within or parcel of the same manors respectively, and which...belong to the Duke of Cornwall, do and shall belong absolutely to the Duke of Cornwall as

¹⁴⁶ Ibid, para 589.

¹⁴⁷ This applies also to mining customs in respect of Devon. Also, customs as to lead mining in Derbyshire and mining and quarrying in Gloucestershire. See Halsbury, n 12, vol 31, para 588 *et seq.*

¹⁴⁸ Ibid, para 588, n 3. See also T Pitt, *A State of the proceedings of the Convocation, or Parliament, for the Stannaries of Cornwall held at Lestwithiel on Tuesday the 28th day of August 1750* (Gale Ecco reprint, 2011). See also Norden, n 22, p 9 ‘a peculiar parliament, for the private government of stannary causes.’

¹⁴⁹ See also Manning, n 4.

¹⁵⁰ *Rowe v Brenton* (1828)(n 15). See also Carew (writing c 1602), n 40, p 122 ‘The customary tenant holdeth at will, either for years or for lives, or to them and their heirs, in divers manners according to the custom of the manor...Among other of this customary land there are seventeen manors appertaining to the duchy of Cornwall who do every seventh year take their holdings (so they term them) of certain commissioners sent for the purpose, and have continued this use for the best part of three hundred years... The ordinary covenants of most conventional tenants are, to pay due capons, do harvest journeys, grind at the mill, sue to the court, discharge the office of reeve and tithingman, dwell upon the tenement, and to set out no part thereof to tillage without the lord’s licence first obtained.’ See also Norden, n 22, p 25 ‘There be 17 manors appertaining to the duchy of Cornwall, whose custom is, that every seven years the tenants take up their land anew of certain commissioners appointed and authorised for that purpose: And this course of taking they prescribe near 300 years; whereby they covet to derive unto themselves an hereditary estate...’

¹⁵¹ *Rowe v Brenton*, see n 20. *Crease v Barrett* (1835) 1 Cr M & R 919 (149 ER 1353) at 922.

¹⁵² Tewington, Tybesta, Moresk, Tywamhail, Helston-in-Kerrier and Calstock.

¹⁵³ Duchy of Cornwall (No 2) Act 1844, see *A-G to Prince of Wales v Collom* [1916] 2 KB 193.

¹⁵⁴ Ibid, Preamble.

¹⁵⁵ Helston-in-Trigg, Penmayne, Tintagel, Restormel, Penlyne, Penkneth, Talskedy, Liskeard, Rillaton, Stoke Clkimsland and Trematon.

¹⁵⁶ Duchy of Cornwall (No 2) Act 1844, ss 53 & 54.

¹⁵⁷ Halsbury, n 12, vol 12(1), para 225.

¹⁵⁸ See n 153.

possessions...but without prejudice to the estates or rights (if any) of any of the present lessees of the Duke of Cornwall therein.¹⁵⁹

Further, the Duke has the right to search for, and work, mines in the assessionable manors:

Subject to certain restrictions as to parks, pleasure grounds and dwelling houses and their curtilages, and to provisions as to compensation, notice, and security for damage, the Duke...and his lessees, and all persons authorised by him, and his or their agents and workmen, may enter on all land comprised in any of the assessionable manors in which any mines, minerals, stone or substrata belong to the Duke, and search, dig for, open and work the mines and get, carry away and dispose of the minerals, stone or substrata, and, in so far as is necessary or convenient for working those mines and getting, washing, dressing, rendering merchantable, carrying away and disposing of the minerals, stone or substrata, may erect buildings, steam and other engines, machinery and things, sink and make pits, shafts, levels, adits, air holes, tram and other roads and other works, take stone, lime and slate for those buildings and works, take, use and divert water, take and use room for ore and rubbish and other things, and do other acts and things upon, under, in and about the land. Although the surface owner is compelled to permit his land to bear these burdens and to be used for these purposes, he is not divested of his title in favour of the Duke.¹⁶⁰

Although the Duke possesses these mining rights, this is anomalous since he does not possess such rights generally. Further, tin and copper mining (as well as for other metals) no longer occurs in respect of these unsold assessionable manors and is very unlikely to occur in the future. It is asserted that such rights should be abolished.¹⁶¹ Finally, it may be noted that the Duke has a right to sell¹⁶² and lease mines.¹⁶³

In respect of the duchy, it is asserted that legislation relating to the stannary courts should be repealed. Also, that stannary customs (being obsolete) as well as mining rights in respect of unsold assessionable manors should be abolished. The general law on mining should prevail.

5. Privileges of the Duchy – Right to the Foreshore ¹⁶⁴

Generally, the Crown is owner of the foreshore.¹⁶⁵ The Duke owns the freehold of about 3/5ths of the Cornish foreshore and ‘fundus’ (bed) of various navigable rivers. Halsbury states:

The Crown’s *prima facie* title no longer holds good in the case of the foreshore on the coast of Cornwall because, by a statute based on a charter of Edward III [charter of 1337], the Crown’s rights to the foreshores in Cornwall were vested in the Duke of Cornwall, except where they belong to a subject.¹⁶⁶ The rights to the foreshore as between the Crown and the duchy of Cornwall are now regulated by statute.¹⁶⁷

The statute in question was the Cornwall Submarine Mines Act 1858.¹⁶⁸

- The charter of 1377 (as interpreted by this Act) was held - in *Penryn Corpn v Holm* (1877)¹⁶⁹ - to have passed the rights of the Crown in all the Cornish foreshore to the duchy although - in fact - at the time of the charter the Crown had already parted with its rights to wreck on parts of this coast;¹⁷⁰

¹⁵⁹ See also Halsbury, n 12, vol 12(1), paras 225 & 226.

¹⁶⁰ *A-G to Prince of Wales v Collom* [1916] 2 KB 193 at 202 per Atkin J

¹⁶¹ See BBC News of 9 February 2012. ‘*Talskiddy people ‘shocked’ by Duchy of Cornwall Mining Rights*’ (registration of rights by the duchy in the Land Registry). The duchy is said to have stated ‘The duchy of Cornwall is having to register its mineral rights with HM Land Registry in order to preserve them for the future. This does not mean that the duchy has any intention at this time to work the minerals.’

¹⁶² Halsbury, n 12, vol 31, para 288 ‘The Duke of Cornwall may, either by way of absolute sale or for a limited period, dispose of any mines, minerals or rights of entry or other rights in respect of mines and minerals forming part of the possessions of the duchy.’

¹⁶³ *Ibid*, para 296 ‘The Duke...may grant a mining lease of duchy land for any term of years.’ See also Duchy of Cornwall Management Act 1863, ss 21 & 37.

¹⁶⁴ For texts, see Pycroft, n 7. Also, S Moore, *A History of the Foreshore* (London, Stevens & Haynes, 1888).

¹⁶⁵ Halsbury, n 12, vol 12(1), para 223 ‘As general owner of the foreshore, except in Cornwall...’.

¹⁶⁶ *R v Keyn* (1876) 2 Ex D 63 at 121, 155, 158, 199 & 202. For foreshore by a subject prior to the duchy, see *Lopes v Andrew* 3 Mann & Ry 329. Also, Moore, n 164, p 459. Halsbury, n12, vol 12(1), para 223 ‘As general owner of the foreshore, except in Cornwall, the Crown enjoys the right to mines under it unless they have been granted away or otherwise alienated.’

¹⁶⁷ Halsbury, n 12, vol 12 (1), para 247.

¹⁶⁸ An award under this Act made in 1869 established the seaward limits of the county of Cornwall as between the Crown and the duchy. See Halsbury, n 12, vol 12(1), para 268. Also, Brown, n 4, pp 329-30.

¹⁶⁹ 2 Ex D 328 (the 1377 charter as interpreted by the Cornwall Submarine Mines Act 1858, conveyed to the Duke all the rights of the

- This proposition is dubious in that the charter of 1377 did not expressly pass the foreshore and, in a previous case, *Dickens v Shaw* (1823)¹⁷¹ it was held that a grant of wreck was insufficient to pass the foreshore.¹⁷²

Be that as it may, as to duchy rights to the foreshore and tidal rivers, Halsbury states:

As between the monarch in right of the Crown and the Duke... in right of the duchy of Cornwall, all mines and minerals lying under the seashore between the high and low water marks within the county of Cornwall and under estuaries and tidal rivers and other places (below high water mark), even below low water mark, being in and part of the county (except mines and minerals in or under land below high water mark which is part and parcel of any manor belonging to the monarch in right of the Crown), were vested in the Duke in right of the duchy by the Cornwall Submarine Mines Act 1858. Under that Act mines and minerals lying below low water mark under the open sea adjacent to, but not being part of, the county of Cornwall remained vested in the monarch in right of the Crown as part of the soil and territorial possessions of the Crown.¹⁷³

The Cornwall Submarine Mines Act 1858 also provides that the sovereign and all persons entitled in right of the Crown (including his or their lessees or tenants) to (or to the management of) any of the mines and minerals lying below low water mark under the open sea adjacent to (but not being part of) the county of Cornwall, may take or use (or pass through) over or under any land of the duchy within the county for certain specified purposes (to sink pits *etc*)¹⁷⁴ on giving notice to the Duke.¹⁷⁵ compensation is payable to the duchy.¹⁷⁶

6. Financial Control of the Duchy

(a) Transactions Relating to Land

The Treasury deals with relations between the duchy and the Government. The sanction and approval of two or more Treasury Commissioners is required before various powers conferred by the Duchy of Cornwall Management Act 1863 can legally be exercised in respect of:

- sales, disposals, charges or arrangements by way of compromise of, upon or concerning duchy possessions;
- re-purchases, or redemptions of an annual sum reserved or made payable on any such sale, disposal or enfranchisement;
- purchases - except where the consideration does not exceed a specified sum;
- the application of capital money for improvements.¹⁷⁷

Any transaction affecting duchy property which would not otherwise be authorized may be entered into if the Treasury has authorized it on application by (or on behalf of) the Duke.¹⁷⁸ The Treasury may so authorize a transaction if satisfied that the transaction will be conducive to the good management of the duchy. Where a

Crown in the foreshore of the county of Cornwall and not merely the foreshore attached to the manors granted by the charter).

¹⁷⁰ Halsbury, n 12, vol 12(1), para 247, n 1.

¹⁷¹ 1 LJOSKB 122.

¹⁷² Halsbury, n 12, vol 12(1), para 247, n 1.

¹⁷³ *Ibid*, para 268.

¹⁷⁴ This is in order to make or sink any pits, shafts, drifts, levels, drains, watercourses, pools or embankments; and to make, lay, place, use and repair any spoil banks, roads, ways, bridges and banks; and to make, erect and repair any lodges, sheds, steam and other engines, buildings, works, and machinery in, under, upon, through, over or along the land; and to do all other acts necessary or convenient for working, searching for, digging, raising or carrying away, dressing or making merchantable the mines and minerals. See Cornwall Submarine Mines Act 1858, s 3. Also, Halsbury, n 12, vol 12(1), para 269.

¹⁷⁵ *Ibid*, para 269. See also s 3 which is entitled '*Her Majesty and Her Lessees to have Liberty to work such Minerals through the Lands of the Duchy*.' It provides that: 'It shall be lawful... for her majesty, her heirs and successors, and all and every persons and person who may for the time being be entitled in right of the Crown to or to the management of any of the said mines and minerals lying below low-water mark under the open sea, adjacent to but not being part of the county of Cornwall aforesaid, and for her and their lessees or tenants, when and so often and so long as may be necessary for the purposes herein-after expressed, to take or use or to pass through, over, or under any lands for the time being parcel of the soil and territorial possessions of the said duchy within the said county, and which lands shall be either in the occupation of tenants under leases or agreements made subsequently to the state of this Act, or in the occupation of the Duke of Cornwall for the time being.'

¹⁷⁶ See s 5.

¹⁷⁷ Para 324. Until 1844, duchy land was inalienable. See Halsbury, n 12, vol 12(1), para 247. The treasury must, for example, approve all property transactions with a value of £500,000 or more, see duchy website, n 11.

¹⁷⁸ Para 324. Duchy of Cornwall Management Act 1982, s 7(1).

transaction affects land belonging to the duchy, the Treasury must also consider the effect it would have on persons living on (or in the vicinity of) the land.¹⁷⁹

- Alienating land. Subject to Treasury consent, the Duke may dispose by way of absolute sale or disposition for a limited period to any person of any part of the possessions of the duchy, subject to any reservations, exceptions and restrictions.¹⁸⁰ Money received in respect of sales and disposals may be laid out in annuities or other authorized investments;¹⁸¹
- Charges. Subject to prior Treasury authorization, duchy property may be charged, in respect of any loan made to the Duke for the purpose of exercising his power to purchase land, or for financing the permanent improvement of the possessions of the duchy,¹⁸² with payment of the following sums: (a) the loan principal; (b) interest; (c) any other money due under it; (d) costs of and incidental to it. Treasury authorization may be given for a particular charge (or for charges of a particular description) with or without any condition or restriction, as it may think fit;¹⁸³
- Leases. The Duke has full powers of leasing providing that the transaction is for full value. Any other transaction (including a lease for a premium) which exceeds the limit set by the Treasury, needs the latter's consent;¹⁸⁴
- Purchase. With the prior consent of two or more Treasury commissioners (or without such consent where the consideration does not exceed a specified sum) the Duke may purchase any manors, lordships, advowsons, messuages, land, mines, minerals, tenements or hereditaments in England in fee simple or for a term of years in any land in England or Wales (including a term in reversion) or any tenements of inheritance or any rents, pensions, annuities, rights of common or mining or other charges or rights. The power to purchase extends to leasehold interests either in possession of the duchy or in other property. The property so purchased must be conveyed, released, or surrendered to the Duke in the form provided (or in any more convenient form) and, where not extinguished by the conveyance, release or surrender, it becomes part and parcel of the possessions of the duchy, and subject to the same limitations, provisions, powers and authorities in every respect;¹⁸⁵
- Grants. Subject to certain restrictions *re* extent and value, the Duke may make grants out of the land and possessions of the duchy for the purpose of buildings suitable for the use as: a church, chapel, school for the education of the poor or a cemetery. Other gifts may be made with Treasury consent;¹⁸⁶
- Exchanges of Land. With regard to any exchange affecting the possessions of the duchy the powers under the Inclosure Acts for effecting exchanges of land are deemed and construed to authorize a dealing, for the purpose of the exchange, with mines and minerals and rights in respect of mines and minerals, either with (or without) any dealing with the ownership of the surface.¹⁸⁷ Such exchanges in modern times would be rare.

Any transaction affecting the duchy property which would not otherwise be authorized may be entered into if the Treasury has authorized it.¹⁸⁸

¹⁷⁹ Ibid, s 7(3). An authorization may be given for a particular transaction (or for transactions of a particular description) and with or without any condition or restriction, as the Treasury may think fit. Ibid, s 7(4).

¹⁸⁰ Para 332. Duchy of Cornwall Management Act 1863, s 3 & 11. No estates, interests or charges in or over duchy land may be conveyed or created except such as are capable of subsisting or of being conveyed and created under the Law of Property Act 1925. For the consideration for any disposition, see Halsbury, n 12, vol 12(1), para 342. The assurances effecting duly authorised sales, enfranchisements or disposals must be by deed, see Ibid, para 343. For the protection of purchasers, see Ibid, para 344.

¹⁸¹ Halsbury, n 12, vol 12 (1), para 350. For the sale of investments, see Ibid, para 351 and for dividends, see para 352.

¹⁸² Sums received from sales or disposals may be applied towards improvements. See Halsbury, n 12, vol 12(1), para 339.

¹⁸³ Halsbury, n 12, vol 12(1), para 333. Duchy of Cornwall Management Act 1982, s 3(3). In particular, authorization may be given for charges in respect of loans for a particular purpose or not exceeding a particular amount. Ibid, s 3(4).

¹⁸⁴ Para 334. Any leasehold or other outstanding interest in any of the possessions of the duchy may be extinguished or surrendered in consideration of an annuity or yearly sum payable during the period for which the estate or interest would otherwise have continued or any other period deemed expedient, and chargeable upon the possessions in which the estate or interest existed. A new lease may be granted in consideration of a surrendered term. Ibid, para 335.

¹⁸⁵ Halsbury, n 12, vol 12(1), para 336. The power to purchase land includes the purchase of leasehold land, the reversion of which is part of the possessions of the duchy. Ibid, para 335.

¹⁸⁶ Ibid, para 337. For the effect of the grant, see para 338.

¹⁸⁷ Ibid, para 353.

¹⁸⁸ Ibid, para 340.

(b) Contracts concerning the Duchy

Contracts or agreements which touch any matter (or thing to be done) under the Duchy of Cornwall Management Acts¹⁸⁹ may be made by persons nominated by the Duke.¹⁹⁰ Claims by persons as against the Duke under any contract or agreement relating to the possessions of the duchy can only be enforced in equity by suit as against the keeper of the records of the duchy and the Duke is not personally liable to any action or other proceeding in consequence of such a contract or agreement, or concerning any other matter or thing done (or purporting to be done) under the authority of the Acts, or for any omission or otherwise.¹⁹¹ The keeper must be indemnified out of the duchy revenues against the costs, expenses and losses attending any suit so brought against him.¹⁹²

7. Modernising the Duchy

Over its long history there have been various attempts to abolish the duchy of Cornwall. In 1780, Edmund Burke campaigned for the abolition of the duchy. His parliamentary bill failed. So too, a private bill in 1975.¹⁹³ In modern times, it seems clear there are certain legal features of the duchy which should be modernized in order to accord with current human rights. Also, to remove unnecessary administration and obsolete material. Thus,

- Inheritance. As with the prospective abolition of the gender requirement in respect of the Crown (ie. males taking precedence over females) it is asserted this should also be abolished in the case of inheritance to the duchy. Further, it should be clarified that the second child of the sovereign shall inherit the duchy in the case where the eldest child dies without heirs;
- Franchises. The franchise accorded to the Duke in respect of *royal fish* is obsolete and should be abolished. Crown prerogatives granted to the duchy in respect of: *treasure trove, wreck, bona vacantia and escheat* should all revert to the Crown, in order to reduce expense and to remove unnecessary administration. They are of little worth to the duchy today. Further, they are not claimed by the duke in person;
- Attorney General and High Sheriff. In modern times there is no need for an Attorney General especially for the duchy since the duchy solicitor can act as the Duke's agent. There is also no need for the duchy to appoint the high sheriff – a role which, a previous article has argued, should, in any case, be replaced by that of the lord lieutenant to reduce costs and administration, as well as prevent the duplication of functions.¹⁹⁴
- Duchy Solicitors and Deeds. The exemption in respect of duchy solicitors not needing a practicing certificate (as contained in the Stannaries Act 1836) is anomalous and unnecessary. It should be repealed. The privilege in respect of deeds is of no consequence and could be removed;
- Duchy Land. Legislative provisions governing the acquisition - and disposal - of duchy land are couched in Victorian terms. They should be modernized and simplified;
- Tax Status. The tax status of the duchy is obscure and anomalous. It should be clarified in legislation;
- Mining Rights. Today, there is little - or no - mining undertaken in the duchy and the antiquated law on this should be dispensed with. This includes: stannary customs, legislation relating to stannary courts and mining rights in respect of assessionable manors. Thus, the duchy, *vis-à-vis* mining, should be placed in no greater - or worse - position than any other landowner in the country. The general law should govern;¹⁹⁵

¹⁸⁹ ie. the Duchy Management Acts 1863-93 and the Duchy of Cornwall Management Act 1982.

¹⁹⁰ Halsbury, n 12, vol 12(1), para 329.

¹⁹¹ Duchy of Cornwall Management Act 1863, s 34. See also Halsbury, n 12, vol 12(1), para 329.

¹⁹² *Ibid*, s 34.

¹⁹³ A Bill to take into Public Ownership with Compensation the two Estates known as the Duchy of Lancaster and the Duchy of Cornwall. House of Commons. London, 1975. S 1 provided 'Notwithstanding any legislation to the contrary, the estates known respectively as the duchy of Lanacaster and the duchy of Cornwall shall be taken into public ownership without compensation'. S 3(1) provided that 'This Act may be cited as the Nationalisation of the duchies of Lancaster and Cornwall Act 1975.'

¹⁹⁴ GSMcBain, *Abolishing Various Obsolete Offices* (2012) Coventry LJ, vol 17, no 2.

¹⁹⁵ It is asserted that all claims in respect of mining generally should be handled by the high court (and not county courts). Further all antiquated mining customs, which are long obsolete, should be abolished.

- *Foreshore*. Rights to the foreshore are generally handled by the Crown Estate. Given the need to have a coherent national policy on the foreshore - as well as reduce costs and administration - duchy rights to the foreshore should pass to the Crown Estate, with the relevant legislation in respect of the former being abolished.

In short, what is needed is an Act of Parliament which deals with all aspects of the duchy of Cornwall. This is long overdue. If the removal of all this dead wood were undertaken, very little remains. As a result, it needs to be considered whether the duchy of Cornwall should be abolished and all its property transferred to the Crown Estate – such as has been proposed in the case of the duchy of Lancaster in a previous article.

8. Abolishing the Duchy of Cornwall

If the various obsolete privileges of the duchy were abolished - as well as the franchises and peculiar mining rights which no longer bring in any money - is it worth retaining the duchy?

- While the title of Duke of Cornwall could be preserved in any case as a courtesy title, the only real point in preserving the duchy would then be as a source of annual income for the heir. However, the present tax position of the duchy gives it an unfair competitive advantage, in that it does not pay the same taxes as other landowners (nor is the Duke subject to inheritance tax etc);
- One would argue that, since the duchy is really a public asset now - just as the duchy of Lancaster is and the Crown Estate - there is merit in abolishing the two duchies and merging their assets into the Crown Estate. This would ensure greater financial accountability and transparency, remove various feudal customs and obligations not imposed on the rest of the population, and cut out many sinecures and redundant posts. After all, the assets of the nation should be administered in a way in which they best serve the public interest, as opposed to that of one individual. The Duke of Cornwall himself could then receive, like the sovereign, payment from the Crown Estate (which payment would be in abeyance when there was no Duke).

In conclusion, there is no legal reason for preserving the duchy of Cornwall nowadays, just as there is none in preserving the duchy of Lancaster. Ultimately, however, the abolition of the same is a political issue - rather than one of modernizing the law and better accounting for public assets.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/3.0/>).