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Tenancies-in-chief in right of the Crown were England's most honorable lordships and closest in relationship to the Crown; but at the same time they were subject to more burdensome feudal duties and services than were mesne or lesser lords. Among Parliament's first business following the Interregnum and restoration of England's monarchy in 1660, was the Abo-lition of Tenures Act, 12 Car. II cap 24; it abolished all military and chivalrous tenures and the burdensome feudal services which accompanied them. Magna Carta, 1215, cut away the luxuriances that had grown out of England's military tenures while preserving the ancient system's vigour; the Abolition of Tenures Act was supposed to have demolished the whole of it.

Yet, a century later, King George II's historiographer, Thomas Madox, disagreed the Act abolished tenures-in-chief:

> To enact that there shall be no Tenure in Capite is, in my humble apprehension, an Incongruity: And even a Statute cannot make an Incongruit congruous... If therefore the words Tenure in Capite had been wholly left out of the Statute, and not at all mentioned therein, all the ends of the Statute would have been fully answered, and the Statute it self would have been plain and consistent... But the truth of the matter is this. *Tenure in Capite* cannot be taken-away, without taking-away not only Knight-service but all other Tenures too... I suppose nobody will oppose me, by saying, that the phrase Tenure in Capite is abolished by this Statute... For I am not reasoning about Words but things.

His antiquarian colleagues held Madox in high esteem. All of his work was based upon original authorities and he sought the strictest accuracy. He was historiographer to the King from 1714 until his death. His six great works, *Formulare Anglicanum,* History and Antiquities of the Exchequer, *Dialogus de Scaccario, Firma Burgi,* and the *Baronia Anglica,* have proved to be of lasting value and importance, not least for England's legal history.

The abolition of (military) tenures was, in fact, actually desired half a century earlier, in 1610, during the reign of Charles II's grandfather, James I. A deputation from a committee of the Commons delivered a "Memorial concerning the Great Contract with his Majesty touching Tenures, with the dependants, purveyance & etc" to the Lords. The Lords' Journals recorded that "for the reforms sought [abolition of knight-service etc], the Commons offer to the King £100,000 yearly, a figure afterwards increased to £200,000." The Memorial also contained an assurance "the tenure *per baroniam,* as it may concern bishops or barons or men in Parliament [would] be considered," and its wording followed *exactly* the principles of England's feudal law laid down by the consilium convened at Clarendon in 1164: "*all* persons of the realm [emphasis added] who hold of the king in chief have their possessions *sicut baroniam."* Frederic W Maitland, The Constitutional History of England, notes, "that at this time the title baron covered all the military tenants in chief of the crown."

The seventeenth century Memorial's substitution of the Latin word *per* for the twelfth century Constitutions' *sicut* may be seen, simply, as the difference in Latin language precision between twelfth century Angevin clerics and seventeenth century parliamentary scriveners. England never had any feudal tenure by barony. The whole of its feudal tenures were the two lay tenures, frank tenement or freehold (of which knight-service, grand serjeanty, and cornage were chivalrous tenures), free socage (of which petit serjeanty, burgage and gavelkind were base tenures), *villeinage* (pure or privileged), and the two spiritual tenures, frankalmoign or divine service. Some lay and spiritual tenure created before 1164 might also have been tenures in capite *ut de corona* and (sicut or per) baroniam. The language of the 1610 Memorial intended to differentiate between tenures which "more properly concern the person [than] the possession" (baronial titles of honor and grand serjeanty) was changed in the Abolition of Tenures Act, but its effect was the same: section eleven of the Act specifically exempted grand serjeanty tenures and preserved "any Title of Honour, Feodal or other."

The Abolition of Tenures Act canceled the burden of required attendance at Parliament together with all of the other burdensome feudal obligations of chivalrous tenures, and converted them to common socage. However, tenures held by grand serjeanty, and "Any Title of Honour, Feodal or other," was preserved intact. The Act was not intended to destroy ancient dignities annexed to land or extinguish the feudal peerage of manor lords whose status of tenants-in-chief in right of the crown created a special honorable relationship with the Crown.

The purpose of the Abolition of Tenures Act was to do away with the burdens of that feudal relationship which had by then become an irritation to the barons, and a source of friction between them and the Crown.

The vague language of the Abolition of Tenures Act, 1660, which reserved "Titles of Honour, Feodal [barony or earldom] or other, by which any Person hath or may have Right to sit in the Lords house of Parliament" is consistent with the language of the Constitutions of Clarendon's article eleven which affirmed England's feudal law to be that baronies subsisted in those who held of the Crown in chief. In later times, antiquarian and constitutional lawyers held that all subjects who possessed tenures as tenants-in-chief in right of the crown were barons by tenure, a view was accepted as late as 1799 by the doctrine that:

> A proprietor holding immediately of the Crown, and having his land either erected or confirmed by the king into a free barony is the only person, in strict law, denominated a baron... The baron is such a free lord as hath a lordship or baronie, whereof he beareth his name.

It was Blackstone's view, too:

> A baron's is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles when an ancient baron hath been raised to a new degree of peerage... the original and antiquity of baronies has occasioned great enquiries among English antiquarians. The most probable opinion seems to be that they were the same with our present lords of manors; to which the name Court Baron, (which is the lord's court, and

incident to every manor) gives some countenance. All lords of manors, or barons, that held of the king *in capite,* had seats in the great council.

And it is consistent with Selden's observation that:

> As the use of the word Baron, is to this day such that it denotes, in the most honourable sense, only the Barons of Parliament, and yet it is variously communicated to some Officers of Courts of ordinary justice, to those of the Cinque Ports, and to the Lords of Manors... But in the most honourable sense, it denoted the King's *thanes* or Tenants by grand Serjeanty, or knights service in Chief: who were joyned with Earls in those times as afterwards Barons were.

None of the Magna Cartas (1215, 1216 and 1217) or any statute from the Magna Carta of the year AD 1225, England's first statute, or any thereafter, take from feudal peers their ancient right to the dignity and style of baron or their place in England's peerage. In fact, article thirty-nine of Magna Carta, 1215, upon which version of barony and peerage by summons rests, declares that "No free man shall be deprived of his standing except by the law of the land." The royal prerogative exercised to create honorial parliamentary barons and other peers is *not* the law of the land: the Common Law and statutes enacted by the Crown, *in Parliament,* is the law of the land.

The Act for the Placement of Lords, 1539, refers to "Barons of the Parliament" in several of its sections. If the lawyers who drafted it thought it necessary specifically to identify "Barons of Parliament," they must have known of barons who were *not* summoned by name to Parliament: the feudal barons who did not receive the individual summons of Magna Carta, 1215.

In *Metropolitan Asylum District v Hill,* 6 App Case 193, House of Lords, 1881, Lord Blackburn affirmed that:

> It is clear that the burden is on those who seek to establish that the legislature intended to take away the private rights of individuals to show that by express words or by necessary implication such an intention appears.

Lord Blackburn's statement of the law was strengthened in *Central Control Board (Liquor Traffic) v Cannon Brewery Co*

Ltd, App Case 744, House of Lords, 1919, in which it was the Lords' opinion that:

> The rule [as to Parliament's] intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms. Apart from the force of public opinion, one of the protections of subjects' liberties is the rule of construction that statutes and other legislative acts are, so far as it is possible, to be interpreted so as not to cause any interference with his vested constitutional rights.

Maurice Powicke, *The Thirteenth Century, 1216–1307,* concurred:

> "The idea that statute law was a separate body of written law, not customary... has never implied a superiority which requires no accommodation to the common law."

No statute of England, Great Britain, or the United Kingdom extinguished the feudal baronage and peerage; and none bars the use, enjoyment, or any right to the use and enjoyment of any "Title of Honour, Feodal or other" formerly used, enjoyed, or claimed by ancient constitutional declaration or prescription. To the contrary, The Abolition of Tenures Act, still in force, specifically preserves them; and that part of the Law of Property Acts, still in force, preserves the existence of manors, lords, and rights of lordship. England's Constitution and the whole of its public law rests squarely upon immutable principles of feudal custom and the Common Law. Except as to *statutory* rights of political representation, the re-creation of *some* feudal barons as honorial parliamentary barons by writ, and the creation of new honorial parliamentary barons by letters patent, does not change these immutable principles, feudal custom, or the Common Law. *Halsbury's Laws of England* notes that the dignity of peerage "can only be lost by attainder or an Act of Parliament." The Forfeiture Act, 1870, abolished attainder and Parliament has extinguished peerages in only two instances. In the fifteenth century, Parliament degraded George Neville, Duke of Bedford, on account of his poverty (which rendered him unable to support the dignity of peerage). In this century, the Titles Deprivation Act, 1917, deprived

three dukes and a viscount of their peerages for bearing arms against the Crown or adhering to its enemy.

It is a characteristic feature of English law from earliest times, that the right of property has been particularly jealous of any attempt to limit it or encroach upon it; and it was Charles I's attacks on the rights of property owners that evoked their bitter resistance ending in his the execution. The hapless king's efforts to exercise to the fullest his rights under feudal law (although, perhaps, *legally* defensible) resulted in much indignation, and brought about the abolition of military and other chivalrous feudal tenures following the monarchy's restoration.

In 29 State Tr 1, *Rex v Cobbet,* 1804, Lord Ellenborough declared, "The law of England is a law of liberty." Although the liberties of English subjects, and aliens under protection of the Crown, are not expressly defined in any statute, they are implications drawn from two well-accepted constitutional principles:

> Subjects, and aliens under protection of the Crown, may say or do what they please provided they do not transgress the substantive law or infringe the legal rights of others; and the Crown may do nothing but what it is authorized to do by some rule of the Common Law or statute.

It is true that the sovereign can do no wrong in the eyes of the law; but it is not true that the sovereign can act wrong or sanction the wrong acts of others contrary to the Common Law or statute. If the royal prerogative exercised to create titles, rank, places, preeminence, and precedence in one class of persons effects an intended or unintended abrogation of the rights of another class of persons without authority of Common Law or an Act of Parliament, such exercise of the royal prerogative is bad law. Magna Carta forbids the sovereign to make any grant or charter, which derogates the public or private rights of subjects. The Crown's Estate Act, 1322, specifies that:

> The matters to be established for the estate of the king and his heirs, and for the estate of the realm and of the people, should be

treated, accorded, and established in Parliament, by the king, and by the assent of the prelates, earls, and barons, and the commonality of the realm, according as had been before accustomed.

The Bill of Rights Act restrains the sovereign from making any grant or charter in derogation of the Common Law or any statute law; and Hallam noted:

> There is not a single instance from the first dawn of our constitutional history, where a proclamation or order of council, has dictated any change, however trifling, in the code of private rights.

Many feudal barons no longer styled as such were greater landowners than any now to be found in the roll of the honorial peerage (Broderick 1881). Why and how and by what theory of law did England's feudal barons lose their title, rank, place, preeminence, and precedence in England's peerage? No Act of Parliament has extinguished feudal titles of honor: the Abolition of Tenures Act, *inter alia,* expressly preserves them. Nine years later, however, Charles II's Privy Council overreached its constitutional authority and "discontinued" barony by tenure. At Common Law English monarchs had power to legislate by an Order in Council (a relic of the time when legislation was part of the royal prerogative); but, by the seventeenth century, the exercise of that power was limited to legislating for newly ceded or conquered territories. Moreover, the Habeas Corpus Act, 1640, made it law "That neither His Majesty, nor his Privy Council, have or ought to have any Jurisdiction, Power or Authority...to examine or draw into Question, determine or dispose of the lands, tenements, Hereditaments...of any the Subjects of this Kingdom." Now, it is now well-settled law that a sovereign's proclamation may not enact any new law, or contradict any old law, or extinguish or restrict a subject's rights in matters about which the law is otherwise silent. With few exceptions, Titles of Honor are not a matter of statutes: mostly, they have their origin in the royal prerogative or in ancient constitutional declarations and prescriptive usages with which the Crown may not interfere.

When a certain territory was recognized as an honor and barony it retained such identity through all its fortunes. When a

tenant-in-chief in right of the crown's land-barony fell into the king's hands through wardship or forfeiture because of attainder for treason, the estate continued as an honor or barony. Important legal meaning attached to a manor that was named an honor and barony; they owed exceptional feudal duties and burdens. Madox explained the differences among them:

> Tenure of the King *in Capite ut de Corona,* as of his Crown; and Tenure of the King in Capite ut de Honore, Baronia, Castro, as of an Honor, Barony, Castle, being in the Kings hands.

When a tenant-in-chief in right of the Crown's Estate came into the king's hands did his mesne lord tenant became the king's tenant-in-chief? Was his mesne lord now subject to the duties and burdens incident to chief lordship? No, that would have been unfair and it would have changed the terms of the mesne lord's tenure. So it became necessary to distinguish between those tenants-in-chief who always held immediately of the king *ut de corona* and those who came to hold of the king by reason of their former lord's forfeiture to the king by escheat or wardship. These tenants were considered to hold of the king *ut de escaeta, ut de honore,* where the tenant held lands of an honor, which came into the Crown by escheat or wardship, and *ut de persona,* where the tenant held lands of a lord whose lordship escheated to the Crown.