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Scotland's Lord Lyon Gives Armorial Ruling

A PETITION FOR ARMS WITH BARONIAL ADDITAMENTS

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A Petition for Arms with Baronial Additaments:

Since at least the 1930's Scotland's feudal barons have been granted arms with additaments appropriate to their rank. These additaments are:-

A helmet befitting his degree; Chapeau; Baronial Robes; Standard and Badge

When the Scottish Parliament passed the Abolition of Feudal Tenure etc. (Scotland) Act 2000 one of the provisions was that certain parts of the Act would come into force on the 'appointed day'. Section 63 of the Act concerns baronies.



- (1) Any jurisdiction of, and any conveyancing privilege incidental to, barony shall on the appointed day cease to exist; but nothing in this Act affects the dignity of baron or any other dignity or office (whether or not of feudal origin).
- (2) When, by this Act, an estate held in barony ceases to exist as a feudal estate, the dignity of baron, though retained, shall not attach to the land; and on and after the appointed day any such dignity shall be, and shall be transferable only as, incorporeal heritable property (and shall not be an interest in land for the purposes of the Land Registration (Scotland) Act 1979 (c.33) or a right as respects which a deed can be recorded in the Register of Sasines).
- (3) Where there is registered, before the appointed day, a heritable security over an estate to which is attached the dignity of baron, the security shall on and after that day (until discharge) affect-
 - (a) in the case of an estate of dominium utile, both the dignity of baron and the land; and
 - (b) in any other case, the dignity of baron.
- (4) In this section-

“conveyancing privilege” includes any privilege in relation to prescription;

“dignity” includes any quality or precedence associated with, and any heraldic privilege incidental to, a dignity; and

“registered” has the same meaning as in Part 4 of this Act.

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In 2002 it was announced that the appointed day would be 28th November 2004.

On 17th December 2002 the Lord Lyon issued a set of rules (set out below) which would govern the granting of arms to feudal barons and the matriculation of arms to their heirs.

COURT OF THE LORD LYON ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) ACT

In connection with the Appointed Day under the above Act, which has been announced to be 28 November 2004, the following Rules will apply:

- (1) With effect from the Appointed Day the Lord Lyon will no longer officially recognise a person as a feudal baron, nor make any grant of baronial additaments as part of Armorial Bearings.
- (2) Any Petition for recognition as a baron and/or for baronial additaments must be submitted to the Court of the Lord Lyon not later than 30 April 2004 in order to allow time for it to be processed before the Appointed Day. No such Petition lodged after the 30 April 2004 will be considered.
- (3) After the Appointed Day the Lord Lyon will be prepared to consider allowing a bleu chapeau as part of the Arms matriculated by an heir of a baron who has been recognised by the Lord Lyon prior to the Appointed Day, in a similar manner as bleu chapeaux have in the past been, and will continue to be, allowed to Representers of former owners of baronial lands.
- (4) After the Appointed Day a baron who has a grant of Arms with baronial additaments may continue to use the additaments for his lifetime. Use of the additaments by his heir after the death of the baron will not be permissible and all existing grants will be subject to this Rule.



The Armorial Bearings of

The Court of the Lord Lyon

These 'new rules' caused considerable distress to barons already in receipt of a grant of arms with baronial additaments.

Robin O. Blair

Lord Lyon King of Arms

17 December 2002



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These 'new rules' caused considerable distress to barons already in receipt of a grant of arms with baronial additaments. In future their heirs were to lose the red chapeau to be replaced with a bleu chapeau; they were to be treated the same as former barons who had disposed of their baronies. Furthermore barons were no longer to be recognised in their rank when petitioning for arms and no future baron would be granted the additaments appropriate to their rank.

The Lord Lyon received a number of submissions following his 'new rules' including a lengthy submission from a firm of solicitors representing a group of barons. Lyon refused to meet with Senior Counsel (QC) to discuss their grievances. Senior Counsel was then instructed to prepare a Petition for Judicial Review. This was sent, in draft form, to Lyon in June 2003 asking that he look at it and reply within two weeks. On 3rd July Lyon issued a statement saying that he was treating the rules as suspended and subject to possible modification.

Counsel's advise at the time was to the effect that if there were no 'new rules' then there was nothing to be reviewed by the court. From that point onward Lyon steadfastly refused to make known his policy on baronial petitions and additaments.

A petition was lodged by the writer of this article seeking arms with baronial additaments in respect of his Barony of Lag. After exhaustive investigation Lyon issued an Interlocutor (11th November 2004) saying he would recognise the petitioner as Baron of Lag. Almost simultaneously the petitioner informed Lyon that he would be assigning the barony to his wife and that his petition was therefore withdrawn. The 'appointed day' passed and still no news on Lyon's proposed new policy. Lyon was informed that the Dignity of the Barony of Lag had been assigned to the writer's wife on 5th December. The purpose of this was to set up a test case and force Lyon to come to a decision and make known his policy.

The Baroness of Lag lodged her petition on 20th January 2005; Lyon replied with a note saying "I anticipate that it will be approximately six months before it reaches the point of coming forward for attention, at which point I will decide whether I will give it consideration." Six months came and went and a phone call was answered with "Possibly in November". At this point the writer decided it was time to seek the help of the court.

Again Senior Counsel was instructed and the court was presented with a Petition for Judicial Review. The case was set down for 7th March 2006 in the Court of Session. Just a few days before the Petition for Judicial Review was to be heard the Lord Lyon offered a compromise:-

"I will be prepared to hear submissions on behalf of Mrs. Hamilton and will undertake to make a decision in light of those submissions within 28 days of the submissions as to whether to grant a warrant and, if so, in what terms. At the same time I would issue a Note explaining the reasons for my decision."

The hearing took place on 18th April in the offices of the Lyon Court. It cannot be properly described as a court hearing as the Lord Lyon was hearing the petition in his ministerial capacity. Lyon wears two hats; he is a Minister of the Crown and a Judge. The hearing can be best described as semi-formal; present were the Lord Lyon, Lyon Clerk, Sir Crispin Agnew of Lochnaw Bt. QC Counsel for the Petitioner, Margaret Hamilton of Rockhall, the petitioner, and the petitioner's husband. Occasionally Lyon asked for further explanation of Counsel's submissions but for the most part was content to hear the submissions without comment. **The Hearing lasted an hour and forty five minutes.**

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Counsel in his opening remarks pointed out his difficulty in that it was not known what problem Lyon had in relation to barony titles or what he might be considering as a result arising from the 2000 Act. Comments had been published in the press but no formal statements made.

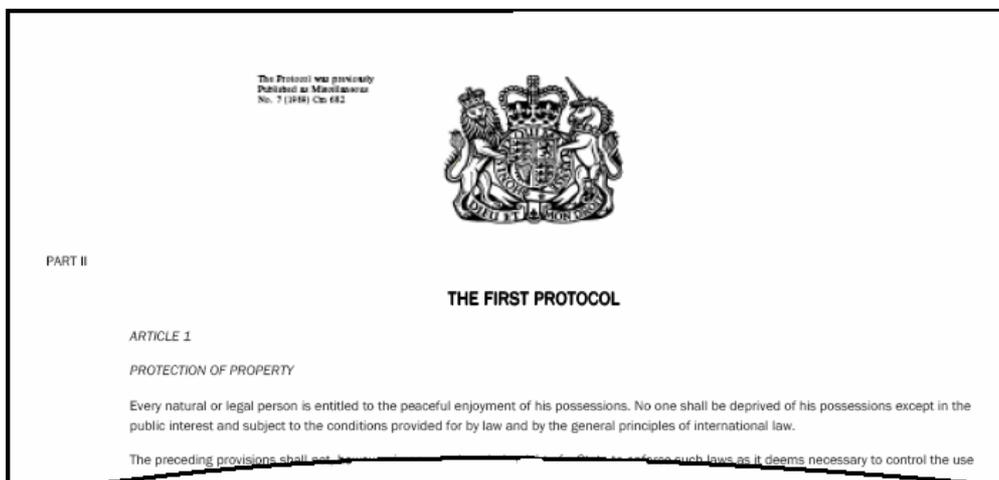
Counsel's first point was that there was a distinction to be made between the Lord Lyon's discretion and a petitioner's entitlement. In brief, if the Lord Lyon exercises his discretion in favour of a petitioner and makes a decision to grant that petitioner arms then certain rights flow from that decision. Those rights are dependent upon the rank of the petitioner - eg. a peer is entitled as of right to a helmet befitting his degree, a coronet, a standard and supporters etc. Following upon that it was accepted that Lyon retains the discretion as to the heraldic design but has no discretion to include those additaments within the grant if requested. It was also submitted that Lyon has no discretion to refuse to recognise a person in their dignity and rank in the Letters Patent granting the coat of arms.

Counsel then went on to review the statutory background noting that there had been no change in the wording of the section of the Act from that originally proposed by the Law Commission. Counsel quoted authority on the competence of referring to parliamentary and other reports in attempting to define the law when there was difficulty in defining an Act. Counsel made specific reference to sections of the Law Commission's Report [Scot Law com No.168, 11February 1999]. Counsel concluded this section by saying that "It is therefore clear that the intention of the Scottish Law Commission in presenting the draft Bill was that there should be no change in the rights of a baron."

Counsel then spoke about the passage of the Bill through it's parliamentary procedure noting that there was no indication from the Scottish Ministers of any intention other than that expressed by the Law Commission. Counsel concluded by saying that Section 63 of the Act achieves the intention of the Scottish Law Commission.

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The next chapter of the argument concerned property rights:-



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Article 1 of 1st Protocol provides:

Protection of property

“Article 1.

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Counsel quoted *Maclean of Ardgour v Maclean* 1941 SC 613, the LJC at 683 “Family arms are admittedly feudal heritage” and *McDonnell v McDonald* (1826) 4 S at p 372, per Lord Robertson, a right to armorial bearings is “a question of property” to establish that a coat of arms and the right to heraldic additaments are undoubted property or “feudal heritage”.

Counsel then referred to the assignation of the barony to Mrs. Hamilton of Rockhall and the sworn statement of Mr. Hamilton that he was entitled to the barony and that he had not sold or transferred the barony and knew of no competing claims. He pointed out to Lyon that this is similar to affidavits regularly used by the courts to prove divorces or in conveyancing relating to houses where there are affidavits that there are no matrimonial rights in the house and these are regularly accepted by solicitors. Counsel provided Lyon with a report on the operation of the Scottish Barony Register and submitted that the Register was evidence that Lyon had to consider. Counsel submitted that Lyon could not have a policy of not recognising baronies because there no longer was a public register available. In the event that Lyon was unable, on the evidence presented to him, to decide the matter of ownership of a barony then it was open to him to require a petitioner to obtain a declarator from the Court of Session. Lyon also had the power to reduce a grant of arms or reduce a grant in so far as it included baronial additaments.

Counsel referred to his own article *Baronial Heraldic Additaments – Unintended consequences of the Abolition of Feudal Tenure etc (Scotland) Act 2000* [2004 SLT (News) 179] and accepted that at the time of writing he had not fully considered the points made in relation to the intention of the legislation and that the views of Slains Pursuivant [Baronial Heraldic Additaments 2005 SLT (News) 161] should be followed in lieu of his tentative opinions in the article.

Counsel
provided Lyon
with a report on
the operation of
the Scottish
Barony Register



<http://armorial-register.com>

**THE ARMORIAL REGISTER
NEWSLETTER**

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On the 2nd May Lyon wrote to Counsel:-

"I have reached a decision in the light of the submissions you made on April 18th.

I am willing to grant arms to your client but these will simply be ordinary arms and will not include additaments. I will allow the territorial designation.

Do you wish to suggest a design for the arms so that I can grant a warrant? I would attach to the warrant a note explaining my decision."

The petitioner, the Baroness of Lag, is taking advice from Counsel and considering her position in relation to an appeal to the Court of Session which would be by way of a Judicial Review of Lyon's decision.

Brian G. Hamilton

5th May 2006