



Scotland's Lord Lyon Gives Armorial Ruling

A PETITION FOR ARMS WITH BARONIAL ADDITAMENTS

WRITTEN BY BRIAN HAMILTON

This Newsletter is by way of a follow up to the Exclusive Special Edition entitled A Petition for Arms with Baronial Additaments published by the Armorial Register on the 5th May 2006 and should be read in conjunction with it.

What follows is the ruling by The Lord Lyon received by Counsel for the Petitioner on the 15th May 2006:

COURT OF THE LORD LYON

Note by Lord Lyon King of Arms in Petition by Margaret Hamilton of Rockhall



This is a Petition by Mrs Margaret Hamilton for official recognition in the name Margaret Hamilton of Rockhall, Baroness of Lag and for a grant of Arms together with the additaments appropriate to the dignity of Baron in the Baronage of Scotland. It is an application to Lyon in his ministerial or administrative capacity.

This is the first Petition for a grant of Arms by a person claiming ownership of a barony which has come before me since the coming into force on 28th November 2004 of section 63 of the Abolition of Feudal Tenure etc (Scotland) Act 2000.

Section 63 provides:

Any jurisdiction of, and any conveyancing privilege incidental to, a 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).

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 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 respect which a deed can be recorded in the Register of Sasines).

[provisions relating to heritable securities]

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.

28 November 2004 is the “Appointed Day” for the purposes of section 63.

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The Petitioner Margaret Hamilton is the wife of Brian Gregory Hamilton who submitted a Petition on 24 January 2004. In that Petition Mr Hamilton sought recognition as Baron of Lag and a grant of Arms. On 10 November 2004 I granted an Interlocutor in that Petition confirming that I was satisfied that, at 10 November 2004, Mr Hamilton was infeft in the lands and barony of Lag. On 7 December 2004 that Petition was withdrawn. In Mrs Hamilton's Petition it is averred that on 3 December 2004 Mr Hamilton assigned his interest in the said barony to Mrs Hamilton.

The Petitioner is resident in Scotland and I believe that she can be regarded as virtuous and well deserving. I am therefore prepared to make a grant of Arms to her. Since the Petitioner has produced the Land Certificate showing that she and her husband are joint owners of subjects at Rockhall, Dumfriess, I am prepared to recognise the Petitioner with the territorial designation of Rockhall.

In this Petition two issues arise. First whether the Petitioner should be recognised as Baroness of Lag, and secondly what form the Arms should take.

There have been submitted as productions an Assignment by Brian Gregory Hamilton in favour of the Petitioner registered in the Scottish Barony Register on 7 December 2004, an Application Form requesting registration of the Assignment in that Register and a copy of an entry in the Minute Book of that Register stating that the Assignment has been registered.

The terms of the Assignment by Mr Hamilton include the following words:

"And I do solemnly and sincerely swear that, as at 28 November 2004, I held the relevant interest in land on my Barony Title as narrated above and was entitled to the Dignity of the Barony, that the Entitlement to the Dignity of the Barony has not been sold or transferred since that date and that I am not aware of any competing claims to the Entitlement to the Dignity of the Barony."

I examined the title to the Barony of Lag in connection with Mr Hamilton's Petition and was satisfied that the Barony existed and that Mr Hamilton was the person in right of it. Mr and Mrs Hamilton were present at a hearing on 18th April 2006 when Rothesay Herald Sir Crispin Agnew of Lochnaw Bt. appeared on the Petitioner's behalf. At that hearing Mrs Hamilton stated that she was still the owner of the Barony which had been assigned to her and that she had no intention of disposing of it prior to my determination of her Petition. I am prepared to recognise the Petitioner as holder of the Barony of Lag.

While I am satisfied on the evidence submitted in this case that the Petitioner is indeed the owner of the barony in question, it being a barony the existence of which I had already accepted, it was made clear to me that it would be helpful if I were to consider whether the production in future Petitions of documents similar to those produced in this case would be acceptable evidence to vouch the ownership of baronies to which such Petitions might relate. Mr Hamilton has for a number of years been active in the purchase and sale of baronies and is anxious to know what procedure should be followed in future in order to satisfy Lyon as to the ownership of a barony after 28th November 2004.

Rothesay Herald argued that the terms of the section in the Assignment which I have quoted are similar to those in affidavits used in divorce cases and in relation to rights in matrimonial homes when these are sold. If an affidavit were to be submitted as evidence, then I would accept that its terms would need to be along the lines of what is contained in Mr Hamilton's assignment.



The Armorial Bearings of

The Court of the Lord Lyon

While I am satisfied on the evidence submitted in this case that the Petitioner is indeed the owner of the barony in question



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The difficulty which I see in regard to verifying the existence and ownership of a barony since the Appointed Day concerns the lack of an official register in which all transfers of ownership require to be recorded. The Scottish Barony Register was established on 28 November 2004 as a means of recording the transfer of baronies. It has been established as a company limited by guarantee. I understand that the Directors of the company are Mr Hamilton, Ms Adele Nicol and Mr Alistair Rennie who has been appointed as Custodian of the Register.

Rothsay Herald submitted a Report dated 7 April 2006 by Mr Alistair Rennie on the operation of the Register. This Report describes the requirements for registration in the Register. I quote from the Terms and Conditions:

“4. The Company shall appoint such a person as it chooses to act as Custodian of the Register who shall be acting at all times as agent of the Company.

5. The Custodian shall have absolute discretion to accept or refuse any application for registration in the Register without ascribing any reason for his decision.

6. In considering any application for registration in the Register, the Custodian shall in his absolute discretion require the presentation of the following minimum evidential documents in respect of any application: (there then follows a list of documents including documents relating to the creation of the barony, a progress of title, clear searches etc.)

7. The requirements of Condition 6 hereof represent the minimal evidential documentation required by the Custodian. The Custodian does not give nor shall be deemed to give any guarantee of the validity of any Claim to Entitlement by the registration of any Claim to Entitlement in the Register.

8. The Custodian shall have no liability in respect of any actions, claims, costs, demands, expenses, losses or liabilities made against or incurred by any individual including, but not limited to, the applicant arising out of anything contained in or reliance placed upon the Register.

11. As a privately-run register, the Custodian reserves the right to discontinue maintenance of the Register and to refuse to accept further applications for registration without liability to any person and without prior notice.

13. The Custodian and the Company shall be entitled to amend the terms and conditions of the Register in his and their absolute discretion.”

It is clear that the Scottish Barony Register is a private register with no statutory basis. It offers no guarantee of the validity of any claim, and no government indemnity is available to provide protection from error or fraud.

The Report by Mr Rennie indicates that before accepting an Assignation for recording in the Register he will have checked the existence of the barony. Rothsay argues that this is competent evidence which the Lord Lyon is entitled to take into account.

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Rothsay submitted a *curriculum vitae* for Mr Rennie to demonstrate that the Custodian of the Register is a person with relevant experience. The Custodian of the Register is appointed by the Company. While Mr Rennie may be a very suitable person to hold the position of Custodian, it would be perfectly possible for some other less suitable person to be appointed. It is clear from the Terms and Conditions that in operating the Register the Custodian exercises his discretion as to what evidence requires to be provided and that the requirements of the Custodian can be altered. I do not consider that a private Register, managed by a person appointed by a private company with no public scrutiny, and operated under terms which allow complete discretion as to what evidence is to be provided, is an acceptable source of evidence in an application before the Court of the Lord Lyon.

It was suggested to me that, if I were not satisfied that the Scottish Barony Register provided sufficient evidence, then a statutory declaration could be obtained from the assignor of a barony confirming that the barony had not been transferred to any other person. But such a declaration would not provide adequate evidence of the existence of a barony.

Reference was made by Rothsay Herald to the Report of the Scottish Law Commission (Scot Law Com No 168 dated 11 February 1999) which led to the Abolition of Feudal Tenure etc (Scotland) Act 2000. Paragraph 2.40 of that Report states "...If the Lord Lyon were not satisfied, on the evidence produced, that an applicant for a coat of arms with baronial additaments was entitled to a barony, and refused the application in relation to the additaments, then it would be open to the applicant to seek a declarator of entitlement to the barony in the ordinary courts and, if successful, to return to the Lord Lyon with that declarator."

Prior to the Appointed Day Lyon could rely on the Land Register or the Register of Sasines for evidence of the existence and ownership of a barony. Other assets which are recorded in registers include stocks and shares of companies. But the share register of a company, while not run by a public agency, is based on the statutory requirements of the Companies Acts.

I have considered whether there is any other similar privately-run register from which a comparison could be drawn. Tartan is recorded, on a voluntary basis, on a number of unofficial registers. The principal ones are the International Tartans Index run by the Scottish Tartans Authority and the Scottish Tartans World Register. Neither of these is regarded as definitive and I do not consider that, in relation to the question of baronies, I can derive any assistance from the operation of these registers.

I have therefore come to the conclusion that it will not be sufficient to accept an entry in the Scottish Barony Register as evidence of ownership of a barony. It will be open to a person to apply to the Court of Session for a declarator as visualised by the Scottish Law Commission. However I have a concern that, if such a declarator were obtained, it would only provide evidence of ownership at the date of the declarator.

I turn now to the second question raised by this Petition, namely the design of the Arms. Since I accept that the Petitioner is the holder of the Barony of Lag, I have to decide what form of Arms is appropriate to the holder of this barony, she having acquired it after the Appointed Day.

In granting Arms and in determining their design the Lord Lyon acts ministerially and exercises the Royal Prerogative (Stevenson, *Heraldry in Scotland* p 69; Learney, *Scots Heraldry* p 10). It is at Lyon's discretion how he determines the design of Arms.

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In his submissions Rothesay Herald argued that, while Lyon has a discretion whether or not to grant a coat of arms, if that discretion is exercised then the appropriate additaments that go with the grant are a matter of right. He gave as examples the right that every Petitioner has to a helmet befitting his degree, the right of a baronet to a canton of Nova Scotia or Ulster, and the right of a peer to a coronet, standard and supporters, the design of the standard and supporters, however, being matters as to which Lyon has a discretion. (I should mention that the baronets' rights to cantons in fact arise from Royal Warrants.) Rothesay went on to argue that the holder of a barony has a similar right to the additaments of a chapeau, baronial mantle, badge and standard. In support of his argument he cited the Report of the Scottish Law Commission, referred to above. The Report refers to a barony holder having a "right to relevant baronial additaments" (para 2.31), "the right ...to add certain special baronial features to the coat of arms" (para 2.38). In its Recommendations (para 2.45) the Report recommends that barons should "retain any precedence and ceremonial or heraldic privileges deriving from their barony".

The Act itself, in Section 63 (4) defines "dignity" as including any heraldic privilege incidental to a dignity.

I do not consider that the comments in the Scottish Law Commission Report amount to evidence that barons have a legal right to insist on additaments. The statements in the Report simply note what the Commission believed to be the position. The Report could have used the words "retain the precedence and ceremonial or heraldic privileges". My view is that by using the word "any" the Report did not intend to assert whether such privileges exist or not.

On 12 May Lindsays WS, the solicitors for the Petitioner, wrote to me with a further submission referring to the explanatory notes on Section 57 of the draft Bill which formed part of the Report by the Scottish Law Commission dated 11 February 1999, and to the notes accompanying the 2000 Act, in particular to note 200. Note 200 refers to subsection (4) of Section 63 of the 2000 Act and reproduces almost verbatim the note on the equivalent subsection in Section 57 of the draft Bill. The terms of note 200 are "...the reference to "dignity" includes matters of heraldry and precedence incidental to a dignity, such as the addition of certain special baronial features to a coat of arms".

I have considered the submission made by Lindsays. The implication from the wording of the note is that the Act is to be read as meaning that nothing in the Act affects the addition of certain baronial features to a coat of arms. I do not believe that the intention of Section 63 of the Act was either to fetter the operation of the system of heraldry in Scotland or to enshrine into Scottish heraldic law a requirement that baronial features were to be a legal right. If that had been the intention then much more specific wording would have to have been adopted in the 2000 Act than the wording used as part of the definition of "dignity" in subsection (4).

In my view the intention of the Scottish Law Commission proposals, and of the Act as subsequently passed, was not to interfere with current heraldic practice. The Act did not create any heraldic right that did not already exist. I do not accept the submissions that the terms of the Scottish Law Commission Report or the Act imply that a legal right to additaments exists. I accept that there has been over recent years a practice by Lord Lyons of granting additaments and that the Act did not seek to interfere in this practice. But that is very different from the assertion that by virtue of the 2000 Act Lyon is precluded from departing from this practice. In my view it has not been established that the granting of additaments does not continue to be a matter for Lyon's ministerial discretion.

I have looked for any historical assistance on this question. Heraldic textbooks are of limited help on the point. Heraldry in Scotland (J H Stevenson 1914) deals extensively with the position of supporters and the question of the extent to which a person might have a right to supporters. The persons entitled to apply to Lyon for supporters include representatives of those feudal barons who were liable to be summoned to sit in parliaments before the Act of 1587 (page 88). Stevenson also refers to the right of a baronet to a canton denoting his baronetcy. However he makes no mention of any other additaments to which any person has a right.

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Scots Heraldry (Innes of Learney 1934) refers (pages 89 *et seq*) to the right that certain categories of people have to demand supporters. He states (page 24) that the chapeau has been comparatively little used in Scotland and adds "It seems a pity it has not been definitely assigned to the "minor barons" for whom it would have been constitutionally appropriate." He makes no reference to any heraldic right enjoyed by a feudal baron. In the second edition of Scots Heraldry, published in 1956, Innes of Learney states (page 31) "Such a cap is the privilege of the feudal baronage." At page 28 he states "A feudal baron will, if he applies for them, receive chapeau and standard". These statements do not appear in the first edition.

The earliest example in the Public Register of all Arms and Bearings in Scotland of the use of a chapeau specifically as a mark of a barony is in 1836 when George Robert Ainslie of Pilton asked for and was granted a chapeau to denote his ownership of the Barony of Dolphinton (LR Vol 4 p 2). No other case of any heraldic feature denoting a barony seems to have been recorded until Gordon of Hallhead in 1934 in LR Vol 31 page 13. In Chisholm of Chisholm in 1938 in LR Vol 33 p 12 a chapeau Gules doubled Ermines was granted as part of the Petitioner's badge to be shown on his standard. It was not until after Sir Thomas Innes of Learney, who became Lord Lyon in 1945, wrote an article entitled *The Robes of the Feudal Baronage of Scotland* (Proceedings of the Society of Antiquaries of Scotland Vol LXXIX 1945) that the chapeau came to be used generally in the design of Arms for a person who was the owner of a barony. This explains why, in the 1956 edition of Scots Heraldry, he altered what had been written in the 1934 edition and referred to the additaments of chapeau and standard as privileges.

It is interesting to note that during the period from the time when Sir Thomas Innes of Learney became Lyon to the end of 1955 there were a total of 21 cases where a chapeau was granted. Four of these were cases where the applicant was the representer of a family who no longer held the baronial lands; in these four cases a blue chapeau was granted. These cases were

1946	Stevenson of Torrance Rose of Kilravoch	
1947	Campbell of Craignish Murray of Parton Mitchell of Tullieallan Farquharson of Finzean	blue chapeau
1948	Nairne of Dunsinnan	blue chapeau
1949	Ferguson of Dunfallandy Montgomerie of Southannan Stuart of Lochronald Farquharson of Invercauld	blue chapeau
1950	Campbell of Strachur	
1952	Munro of Foulis	
1953	Anstruther of Balcaskie Macdougall of Macdougall Nicol of Ardmarnoch Vickers of Tulloch	
1954	Fraser of Tornaveen Colquhoun of Luss	blue chapeau
1955	Grant of Glenmoriston Crichton Stuart of Falkland	

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It is clear that when he wrote the second edition of Scots Heraldry in 1956, Sir Thomas Innes of Learney had, since he became Lyon, been dealing with barony cases where the barony always involved a substantial landholding. His reference in 1956 to the chapeau and standard as privileges must be read in the light of this. And, of course, the practice of granting these additaments had no historical pedigree.

Accordingly my clear view is that I should reject Rothesay's submissions, as amplified by Lindsays, that baronial additaments are a matter of right and that Lyon no longer has any discretion with regard to the granting of additaments.

In an Article in Scots Law Times 2004 page 179 Rothesay Herald discussed the question of how far additaments which have, in the past, been granted by successive Lord Lyons to owners of feudal baronies should continue to be granted after 28th November 2004. I find that Article persuasive and agree with the points which have been made by Rothesay Herald.

With regard to Supporters, which have, as I have mentioned, in the past been granted as of right to representatives of barons liable to sit in parliament before 1587, Rothesay states "While this might be said to be a heraldic privilege of a baron, the important point to note is that the right arose from the fact that the baron was liable to be summonsed to parliament. It would therefore appear to be a right, not of the baron *per se*, but a right arising from the fact that the baron was liable to be called to sit in parliament. It was a right arising from the duty to attend parliament."

Lyon Court practice has been that a grant of supporters has been made to the owner of a barony which was in existence before 1587 where that person was a descendant of the original owner. The right to supporters is thus subject to the qualification that the barony has been held within the family since before 1587 and the right to supporters would fly off if the barony were conveyed outside the family. It is not the ownership of the barony which gives rise to the right to supporters, but the retention within the family of the ownership of the barony.

Rothesay goes on in his Article to argue that heraldic additaments appear to arise not from the right of barony itself, but from related rights associated with the barony. I agree with that view. I would go further and say that additaments reflect the rights and historical obligations associated with a barony as a significant estate of land.

Dealing first with the chapeau or cap of maintenance. In Scots Heraldry p 31 Innes of Learney writes "Such a cap....seems technically to have indicated ownership of jurisdiction". There is no doubt that section 63 of the 2000 Act abolished the jurisdiction of a baron. Accordingly I consider that it is no longer appropriate to symbolise in the design of Arms ownership of an aspect of a barony which has ceased to exist. I disagree with the contrary view which was expressed by Peter Drummond Murray of Mastrick in his Article in SLT 2005 (News) 161.

With regard to the feudo-baronial mantle formerly assigned to the owners of a barony, I agree with Rothesay's view that robes are always connected to a purpose. Learney's view (The Robes of the Feudal Baronage of Scotland p 129) was that the robes may have had a dual function, partly as parliamentary robes and partly worn by the representer of an organised community namely those within the baron's jurisdiction. Insofar as they were originally worn as parliamentary robes the robes became, after 1587 when barons were no longer obliged to attend parliament, the judicial robes of the baron worn in the baron's court. With the passage of the 2000 Act the judicial function of the baron has disappeared and it will no longer be possible for a baron to convene a court. Nor can a baron any longer be regarded as the representer of an organised community because a barony is now no longer an area of land within which there might be a community. Thus both of the functions identified by Learney have disappeared. Baronial mantles are not referred to in the 1956 edition of Scots Heraldry. They have been granted to barons since 1967. During the period from 1967 until 1990 the mantle was granted in approximately half of the 64 applications submitted in that period. Since 1990 it has been granted in all cases. The practice cannot be said to be of long standing. I do not believe that it is appropriate any longer for a feudo-baronial mantle to be granted as part of the Arms for a person who owns a barony.

Accordingly I consider that it is no longer appropriate to symbolise in the design of Arms ownership of an aspect of a barony which has ceased to exist.



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As regards the baronial standard, Rothesay, in his Article, quotes Gayre of Gayre and Nigg's Heraldic Standards and other Ensigns (page 60) to the effect that a standard signifies that a person has a "following" and uses the standard in connection with the following. There is no automatic right to a standard. It is granted at Lyon's discretion. Standards are generally assigned to peers, clan chiefs and the owners of substantial landed estates. In the past Standards have been assigned by Lyon to feudal barons in respect of the following represented by the community within the baronial land. With the passage of the 2000 Act and the disappearance of baronial land a baron cannot any longer be regarded as having a following. I do not, therefore, consider that it is appropriate any longer for a Standard to be granted to the holder of a barony.

In the past a baron has usually been awarded a badge which can be displayed on the Standard. I agree with Rothesay's view that if there is no Standard, there is no need for a badge. A badge is not granted to individual armigers. Badges have only been granted in particular cases for specific purposes such as for use by Slains Pursuivant to the Earl of Erroll, (LR Vol 64 p77) or to corporate bodies for use by their members.

In his submissions on behalf of the Petitioner, Rothesay indicated that he now disagreed with the contents of his own Article. As I have said I find his Article persuasive and I do not accept the contrary submissions which he made on behalf of the Petitioner.

Apart from the grant of supporters which I accept to be a heraldic privilege of particular holders of certain baronies, the granting of additaments has flowed from the exercise by Lyon of his discretion over the last 60 years or so. In the context of the practice of heraldry in Scotland for at least 600 years, a period of 60 years is not particularly long. During the last 30 years or so a market has developed in the buying and selling of baronies assisted by the practice of confining the barony to a small piece of land, and in many cases to a feudal superiority. I doubt very much that when he started the practice of granting additaments in 1946, Sir Thomas Innes of Learney would have envisaged that baronies would come to have changed hands in the way that they have.

I do not consider additaments, other than supporters, to be heraldic "privileges" as defined in section 63 of the 2000 Act. The Oxford English Dictionary defines "privilege" to mean "a right, advantage or immunity granted to, or enjoyed by, a person or class of persons, beyond the common advantages of others; the special right or immunity attaching to some office, rank or station".

A heraldic privilege in the context of a barony would be a heraldic right which the holder of the barony enjoyed by right, by virtue of being the holder of the barony. It would not be a heraldic feature which might be granted by Lyon to such a holder if he were to apply for it and if Lyon decided to grant it.

I do not believe that it is now appropriate, in the light of the 2000 Act, to grant to the holder of a barony which has no connection with any land, additaments some of which have been granted only over the last 60 years and others for less than that, and which, when first granted, were designed to reflect the attributes of a barony as a major estate of land.

In his submissions to me Rothesay referred to Article 1 of the 1st Protocol of The European Convention on Human Rights. This provides that a person is entitled to the peaceful enjoyment of his possessions and that no one shall be deprived of his possessions except in the public interest. He argued that the 2000 Act must be construed in a manner compatible with the ECHR and that it cannot have been the intention of Parliament to deprive an individual of armorial bearings. In my view, as I have mentioned, there is no "right" to additaments, apart from supporters. Therefore additaments are not possessions which Parliament was precluded from interfering with. Parliament did not preclude the holder of a barony from applying for and enjoying armorial bearings.

I do not
consider
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**THE ARMORIAL REGISTER
NEWSLETTER**

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I have granted a Warrant recognising the Petitioner as holder of the Barony of Lag and authorising Letters Patent to be granted to her. The design of the Arms in the Warrant does not include baronial additaments.

Robin Blair

Lord Lyon King of Arms

15 May 2006

The Rules of the Court of Session require that if an appeal is to be taken, notice of appeal has to be given within twenty one days of the decision being handed down. An appeal will be marked within the next few days.

Senior Counsel has advised that the logical outcome of Lyon's ruling is that all baron's, old or new, will lose their additaments.

Brian and Margaret Hamilton call upon the Baronage of Scotland to support them in their Appeal to the Court of Session. Already a number of commitments have been made to support the legal fighting fund. This is an issue that affects every Scottish Feudal Baron. This is not a time for barons to stand by and wait to see what happens. It is unlikely that there will be another opportunity to test this Judgment. Barons are invited to contact Brian Hamilton at bghrockhall@btinternet.com to discuss their contribution to this legal challenge.

