

Third Series Vol. I part 2.

No. 210

Autumn 2005

ISSN 0010-003X

Price £6.00

THE COAT OF ARMS

an heraldic journal published twice yearly by The Heraldry Society



THE COAT OF ARMS

The journal of the Heraldry Society



Third series

Volume I

2005

Part 2

Number 210 in the original series started in 1952

The Coat of Arms is published twice a year by The Heraldry Society, whose registered office is 53 High Street, Burnham, Slough SL1 7JX. The Society was registered in England in 1956 as registered charity no. 241456.

Founding Editor

John Brooke-Little, C.V.O., M.A., F.S.A., F.H.S.

Honorary Editors

C. E. A. Cheesman, M.A., PH.D., Rouge Dragon Pursuivant

M. P. D. O'Donoghue, M.A., Bluemantle Pursuivant

Editorial Committee

Adrian Ailes, B.A., F.S.A., F.H.S.

John Goodall, F.S.A.

Andrew Hanham, B.A., PH.D.

Advertising Manager

John Tunesi of Liongam

The editors wish to thank Robert Yorke, Barrie Cook, Katie Eagleton and John Rogers for assistance in the preparation of this issue.

COMMONWEALTH HERALDIC JURISDICTION: with specific emphasis on the Law of Arms in New Zealand

Noel Cox

1. Introduction

There has been an on-going debate in heraldic circles in the Commonwealth as to the respective jurisdictions of the College of Arms and of Lord Lyon King of Arms. Uncertainty has also been expressed as to the validity of grants of armorial bearings to subjects of the Queen in Australia, New Zealand, Canada,¹ and her other realms and territories.² These debates have however tended not to place proper emphasis upon what the law actually says, and instead rely on administrative practice, or political or historical preference. No correct answer can be given without an analysis of the Law of Arms as a part of the laws of England and of the other countries in which it has, or may have, legal force.³ In particular, this involves an examination of the judicial and executive aspects of the Law of Arms.⁴

The Law of Arms is an area of law which has, for centuries, been largely the preserve of the antiquary. It is part of the law of the realm, though not of the common law. With the settlement of the overseas territories of the Crown, this law was apparently extended to these shores, though its administration abroad appears problematic, for reasons which will be developed.

Coats of arms are conferred by the Crown upon New Zealanders, and upon New Zealand corporations and public authorities. Whilst most of these grants are by Garter King of Arms, the chief English herald, through his New Zealand deputy, some are from Lord Lyon King of Arms, the Scottish chief herald. Whether these latter grants are proper is a matter which deserves some attention.

There was no doubt that there was a law governing such matters, but what then was the nature of this law? This article will concentrate upon the law in New Zealand. However, it also involves a consideration of laws and legal frameworks common to the former 'settled colonies', Australia, Canada and so on. Canada is of course now distinct, with the recent establishment of the Canadian Heraldic Authority, but many of the underlying legal principles remain.

2. The nature of the Law of Arms

According to the usual description of the Law of Arms, coats of arms, armorial badges, flags and standards and other similar emblems of honour may only be borne by virtue of ancestral right, or of a grant made to the user under the authority of the

¹ Since 1988 there has been a separate Canadian Herald Authority with its own Chief Herald.

² See Sir Crispin Agnew of Lochnaw, 'The Conflict of heraldic laws', *Juridical Review* (1988), p. 61; G. D. Squibb, 'Heraldic Authority in the British Commonwealth', *CoA* 10 (1968), no. 76, p. 125.

³ According to the Scottish herald and advocate, Agnew of Lochnaw, the root of this question of jurisdiction is private international law, as well as the exercise of the royal prerogative: *op. cit.* p. 61.

⁴ A fundamental distinction also made by Squibb, 'Heraldic Authority', pp. 127-8.

Crown.⁵ The power to grant armorial bearings is delegated by the Crown to the kings of arms.⁶ However, even within the British Isles there are three or perhaps four distinct types of arms – Scottish, English, Irish and, possibly, Northern Irish.⁷ Each has its own applicable law, but only the laws of England and Scotland will be examined here.

In England, the Law of Arms is regarded as a part of the laws of England, and the common law Courts will take judicial notice of it as such.⁸ These dignities, as they are called, have legal standing.⁹ But the Law of Arms is not part of the common law¹⁰ and the common law Courts have no jurisdiction over matters of dignities and honours,¹¹ such as armorial bearings,¹² or peerages.¹³ In this respect the Law of Arms may be regarded as similar to the ecclesiastical law, which is a part of the laws of England, but not part of the common law.¹⁴

3. The applicability of the Law of Arms in New Zealand

The application of the laws of England to settled colonies is one of the touchstones of the law.¹⁵ The classic distinction, representing the common law doctrine of the seventeenth and eighteenth centuries, though never entirely consonant with the facts and much altered in its application and shorn of its importance by subsequent legislation, is that between settled and conquered or ceded colonies.¹⁶ It differentiates colonies which had been added to the empire by the migration thither of British subjects, who

⁵ As in *Halsbury's Laws of England* (3rd edn., London 1960), vol 29, paras. 239-270.

⁶ The Crown's prerogative as fount of honour remains exercisable personally by the Sovereign.

⁷ The position of Ulster grants is considered in Sir Christopher Lynch-Robinson and Adrian Lynch-Robinson, *Intelligible Heraldry. The application of a Mediæval System of Record and Identification to Modern Needs* (London 1948), pp. 112-3. Prior to 1922, arms granted by Ulster King of Arms, now an officer of the College of Arms and an 'English' herald, were undoubtedly governed by the Irish law: Agnew of Lochnaw, *op.cit.*, pp. 61f.

⁸ *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

⁹ *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] All ER 387; [1955] P 133 per Lord Goddard. As early as *Scroop v Grosvenor* (1389) Calendar of CCIR, Ric II, vol 3, 586, it was established that a man could have obtained at that time a definite right to his arms, and that this right could be enforced against another.

¹⁰ *R v Parker* (1668) 1 Sid 352; 82 ER 1151 per Keeling CJ.

¹¹ *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133 per Lord Goddard.

¹² *Duke of Buckingham's Case* (1514) Keil 170; 72 ER 346.

¹³ *Earl Cowley v Countess Cowley* [1901] AC 450 (HL).

¹⁴ *Bishop of Exeter v Marshall* (1868) LR 3 HL 17.

¹⁵ Sir William Blackstone, *Commentaries on the Laws of England*, book I, para 107.

¹⁶ *Blankard v Gally* (1693) Holt 341; 90 ER 1089 (KB). The doctrine came too late to apply retrospectively to the American colonies, despite the insistence otherwise by colonial constitutionalists; Paul McHugh, *Aboriginal Rights of the New Zealand Maori at common law*, (unpubl. Ph.D. thesis, Cambridge Univ., 1987), pp. 123-32. It was only really clear after *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB). Only cession, and occupation or settlement (and not conquest) are arguably relevant to the Australasian

had entered into occupation of lands previously uninhabited or at least not governed by any civilized power, and therefore not subject to any civilized legal system, and those which had been acquired by conquest or cession from some recognised power hitherto capable of governing and defending it.¹⁷

The legal situation of the inhabitants of a settled colony presents one important initial difference from that of the inhabitants of a conquered colony. The former carried with them the law of England so far as applicable to the conditions of the infant colony, and they continued to enjoy as part of the law of England all their public rights as subjects of the British Crown.¹⁸ The prerogative of the Crown towards them was therefore limited. The corollary of this was that the migration left these subjects still under the protection of the Crown and entitled to all the legal safeguards which secured the liberties of natural-born subjects. Foremost among these was the right to a legislative assembly analogous to the imperial Parliament.¹⁹

For reasons which owed much to the reality of politics and the practical impossibility of an alternative, it was early established as a principle of imperial constitutional law that settled colonies took English law, rather than that of Scotland or Ireland.²⁰ This was so whatever the dominant ethnic composition of the settlers.²¹

The laws of New Zealand are based upon the reception of English laws in the middle of the nineteenth century,²² when it was first settled as a colony.²³ New Zealand was, from the beginning, administered as a Crown colony.²⁴ It was held to be a settled colony, though not without conceptual difficulty.²⁵ From the contemporary British perspective the Treaty of Waitangi was a treaty of cession which allowed for settlement and for the purchase of land.²⁶ However, because the chiefs actually

[note 16 continues]

situation; Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand', in *Studies in the history of the law of nations*, ed. C. H. Alexandrowicz (Grotian Soc. papers 1968: The Hague 1970).

¹⁷ *Memorandum* (1722) 2 Peere Williams 75; 24 ER 464 (PC): 'What if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England.'

¹⁸ *Pictou Municipality v Geldert* [1893] AC 524; *Cooper v Stuart* (1889) 14 App Cas 286.

¹⁹ *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 per Lord Mansfield, CJ (KB).

²⁰ Scots lawyers do not necessarily agree however: Sir Thomas Smith, 'Pretensions of English Law as "Imperial Law"', in *The Laws of Scotland* (Edinburgh 1987), vol. 5, paras 711-9.

²¹ Squibb also considers what he calls the historico-geographical basis of heraldic authority; 'Heraldic Authority', pp. 125, 128-33.

²² English Laws Act 1858 (NZ).

²³ *R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1866) 1 CA 152, 157; *Wi Parata v Wellington (Bishop of)* (1877) 3 NZ Jur (NS) SC 72; *R v Joyce* (1906) 25 NZLR 78, 89, 112 (CA); *Re the Ninety Mile Beach* [1963] NZLR 461, 475-6 (CA).

²⁴ S. L. Cheyne, Search for a constitution (unpubl. Ph.D. thesis, Univ of Otago, 1975).

²⁵ See *Report of the Privy Council on the project of a Bill for the better government of the Australian Colonies*, dated 1 May 1849; *R v Symonds* (1847) NZPCC 387 (SC). See also the English Laws Act 1858 (NZ) and s 5 of the Imperial Laws Application Act 1988 (NZ).

²⁶ Ian Brownlie, *Treaties and Indigenous Peoples: The Robb Lectures 1991*, ed. F. M. Brookfield (Auckland 1992), p. 12.

had little formal law, and because of the direct proclamation of sovereignty over the South Island, New Zealand was treated thereafter as a settled colony.

It has been established beyond reasonable doubt, by both colonial and imperial legislation and judicial decisions that Canada, Australia and New Zealand each acquired English law as it existed at the various times of settlement.²⁷ But it was only those laws which were applicable to their new situation and to the condition of a new colony.²⁸ It is not always easy to apply the test.²⁹ English laws which were to be explained merely by English social or political conditions had no application in a colony, yet the courts have generally applied the land law, which has a feudal origin. Rules as to real property and conveyancing have been held to be generally applicable in colonies, both settled and conquered.³⁰

Blackstone's statement that 'colonists carry with them only so much of the English Law as is applicable to their own situation and the condition of the infant colony'³¹ is, like so many of his generalisations, misleading. It would have been nearer the truth if he had said 'colonists carry with them the mass of English law, both common law and statute, except those parts which are inapplicable to their own situation and the conditions of the infant colony'. What was applicable was far greater in content and importance than what had to be rejected. It is indeed a general rule that common law principles applied to a colony unless shown to be unsuitable,³² though imperial statutes did not apply unless shown to be applicable.³³

²⁷ This has been established beyond reasonable doubt by both colonial and imperial legislation and judicial decisions: J. E. Coté, 'The Reception of English Law', *Alberta Law Review* 15 (1979), p. 29 [Canada]; *Cooper v Stuart* (1889) 14 AC 46 (PC) [Australia]; *R v Symonds* (1847) NZPCC 387 (SC) [New Zealand]. There might however be an underlying stratum of indigenous laws surviving in each case; see for example *In re Southern Rhodesia* [1919] AC 211, 233-234 (PC).

²⁸ *Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273; [1964] 3 All ER 377 (CA). ²⁹ *Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50 per Lord Carnworth.

³⁰ *Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC). In *Highett v McDonald* (1878) 3 NZ Jur (NS) SC 102, Johnston J observed, in finding that the statute 24 Geo II c 40 (GB) (The Tippling Act) was in force in New Zealand, that provisions for the maintenance of public morality and the preservation of the public peace were, in their general nature, applicable to all the colonies.

³¹ Blackstone, *ibid.* Allegedly based on Lord Mansfield's judgement in *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045 (KB).

³² *R v Symonds* (1847) NZ PCC 387; *Veale v Brown* (1866) 1 CA 152, 157; *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72; *R v Joyce* (1906) 25 NZLR 78, 89, 112; *Re the Ninety Mile Beach* [1963] NZLR 461, 475-6; *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (nothing to suggest that the law was not applicable to New Zealand circumstances); *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 (CA).

³³ *Uniacke v Dickinson* (1848) 2 NSR 287 (Nova Scotia); *Wallace v R* (1887) 20 NSR 283 (Nova Scotia); *R v Crown Zellerbach Canada Ltd* (1954) 14 WWR 433 (British Columbia). The issue was never authoritatively resolved in New Zealand (see, for example, *Re Lushington, Manukau County v Wynyard* [1964] NZLR 161), nor elsewhere; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London 1966), pp. 544-7.

COMMONWEALTH HERALDIC JURISDICTION

The English Laws Act 1858 was passed, in the words of the long title, 'to declare the Laws of England, so far as applicable to the circumstances of the Colony, to have been in force on and after the Fourteenth day of January, one thousand eight hundred and forty'.³⁴ The purpose of the statute was to clarify some uncertainty as to whether or not all Imperial acts passed prior to 1840 were in force in New Zealand, if otherwise applicable. The principle of this Act has been followed in all relevant legislation passed by the New Zealand Parliament since then.

Although the uncertainty had been about statutes, the 1858 Act went further than was strictly necessary, and expressly stated, in section 1, that: 'The Laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.'³⁵

For the most part the applicable law was the statute and common law of England, and the royal prerogative. It did not however include the ecclesiastical law, nor any particular local laws (whether statutory, common, or customary law). The ecclesiastical law was inapplicable, largely because:

It cannot be said that any Ecclesiastical tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church, and in the case of a settled colony the Ecclesiastical Law of England cannot, for the same reason be treated as part of the law which the settlers carried with them from the Mother-country.³⁶

An established Church is, by its very essence, of a territorial nature, and requires to be expressly transplanted from its native soil.

The principle of the English Laws Act 1858 has been followed in all relevant legislation passed by the New Zealand Parliament since then. If any laws of arms were inherited by New Zealand, it was the Law of Arms of England, in 1840.

The only imperial law inherited from the United Kingdom now applicable is those enactments and subordinate legislation specified in the schedules to the Imperial Laws Application Act 1988, together with the common law of England in so far as it was already part of the laws of New Zealand.³⁷ While 'the laws of arms is not part of the common law [of England]'³⁸ and is not detailed in any of the scheduled legislation, it does not follow that the Law of Arms is not part of New Zealand law, despite doubts having been raised.³⁹

The Imperial Laws Application Act 1988 covered Imperial enactments, and Imperial subordinate legislation: it does not affect the pre-existing common law, nor the prerogative, nor any special laws such as the Law of Arms.⁴⁰

³⁴ 21 & 22 Vict no 2, considered in *King v Johnston* (1859) 3 NZ Jur (NS) SC 94. ³⁵ s 1.

³⁶ *In re Lord Bishop of Natal* (1864) 3 Moo PCC NS 115, 148, 152; 16 ER 43, 57; approved in *Baldwin v Pascoe* (1889) 7 NZLR 759, 769-70.

³⁷ G. A. Macaulay, 'Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand', *Canterbury Law Review* 5 (1994), pp. 381, 387. ³⁸ *R v Parker* (1668) 1 Sid 352; 82 ER 1151 per Keeling CJ.

³⁹ Macaulay, op. cit., pp. 381, 387.

⁴⁰ Section 5 impliedly preserves the prerogative, and the wording of the Act clearly limits its application to the statutory law.

Canada, Australia and New Zealand each acquired English law as it existed at the various times of settlement. But it was only those laws which were applicable to their new situation and to the condition of a new colony.⁴¹ It might be questioned whether the Law of Arms was included,⁴² and it is not always easy to apply the test.⁴³ English laws which are to be explained merely by English social or political conditions have no application in a colony, yet the Courts have generally applied the land law, which has a feudal origin.

However, armorial bearings are a recognised form of personal property, and it might be expected that a settler took his armorial ensigns with him. Rules as to real property and conveyancing have been held to be generally applicable in colonies, both settled and conquered.⁴⁴

There was nothing in the specific circumstances of New Zealand to render the reception of the Law of Arms less appropriate than elsewhere in the settled colonies. The New Zealand Constitution Act 1852 made no special provision for heraldry, or for titles of honour,⁴⁵ nor did the constitutional arrangements of any other Commonwealth country. This was not however because it was felt that the Law of Arms was inapplicable to the colonial environment, but simply because it was a very minor aspect of the law, about which few cared. As a part of the royal prerogative it would have been unusual had it been included. There are, however, many examples of the actual exercise of the prerogative, from the early-to-mid seventeenth century onwards.⁴⁶

4. The proper authority responsible for grants of arms in New Zealand

There has been significant rivalry between Garter King of Arms and Lord Lyon as regards their proper jurisdiction. In 1907 and 1913, in a joint opinion, the Law Officers of England, Scotland and Ireland advised that Garter King of Arms was the

⁴¹ *Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Lyons Corp v East India Co* (1836) 1 Moo PCC 175; 12 ER 782; *Phillips v Eyre* (1870) LR 6 QB 1; *Sammut v Strickland* [1938] AC 678 (PC); *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273; [1964] 3 All ER 377 (CA).

⁴² The applicability of the Law of Arms has been questioned, see for example, Michael Crawford, 'Some views on English and Scots heraldic authority outside the United Kingdom', *CoA* 2nd ser. 2 (1976-7), no. 102, pp. 157, 158-9. The test of course requires an evaluation of the applicability of laws at the time the colony was settled, and not at the time the Court considers the question. There seems to be no authority on this specific point; Squibb, 'Heraldic Authority', p. 129.

⁴³ *Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50 per Lord Carnworth.

⁴⁴ *Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC). In *Highett v McDonald* (1878) 3 NZ Jur (NS) SC 102, Johnston J observed, in finding that the statute 24 Geo II c 40 (GB) (The Tippling Act) was in force in New Zealand, that provisions for the maintenance of public morality and the preservation of the public peace were, in their general nature, applicable to all the colonies.

⁴⁵ 15 & 16 Vict c 72 (UK).

⁴⁶ January 1637/8 a grant by Garter to Sir John Borrough, of Newfoundland; Squibb, 'Heraldic Authority', p. 128.

proper authority for granting arms overseas,⁴⁷ although neither opinion asserted that this was necessarily an exclusive jurisdiction. In 1908 and 1914 the Home Secretary gave the Kings of Arms directions on the exercise of the royal prerogative, on the basis of these opinions.

However, the directions of the Home Secretary have not been accepted by Scottish heralds, who argue that these directions cannot over-rule the statute law from which Lyon's powers are derived.⁴⁸ This is quite correct, but directions can fetter the exercise, as Lyon is not legally compelled to grant arms overseas. Her Majesty, through her politically-responsible Ministers, can generally instruct her servants how to exercise their powers, unless the exercise is fettered by statute, or they hold judicial office. Lord Lyon does hold judicial office, but his grants are in his ministerial or executive capacity, not his judicial one.

It has been said that the 'constitutional probity of one Minister of the Crown trying to limit the statutorily delegated executive power of another Minister must be open to some doubt'.⁴⁹ However Lord Lyon is not a politically-responsible Minister, so the Secretary of State for the Home Department, who was then responsible for advising the Crown as to the exercise of the royal prerogative in Scotland, was constitutionally responsible. As far as the Secretary of State was concerned, Lord Lyon was exceeding his discretionary authority in granting arms abroad.

Furthermore, the Law Officer's Opinion of 1913 stated that domicile rather than descent should be the deciding factor with respect to jurisdiction. This is consistent with the principles of conflict of laws, and also logical. Although we may inherit arms wherever we may be living as a form of inalienable heritable personalty, the question of the proper authority entitled to confer those arms in the first place is one of territoriality. This is consistent with College of Arms practice, but Lord Lyon adheres to the concept of descent. The inherent conceptual difficulty with this latter approach is that here the emphasis is on the person rather than on the location. If an individual were to marry in Ireland they would need to comply with the laws of Ireland, and obtain the necessary approvals of the Irish authorities, irrespective of their descent. It is true that in a small number of countries, especially in the Near East, personal law survives. But this is exceptional.

5. Authority vested in Garter

The jurisdiction of the Earl Marshal, the inherent right of the kings of arms to regulate arms, and the power expressly delegated by the Sovereign to the kings of arms to grant arms, constitute the authority of the College of Arms.⁵⁰ While the two sub-

⁴⁷ Opinion of the Law Officers of the Crown on Heraldic Jurisdiction, 13 August 1913 cited in Sir Anthony Wagner, *Heralds of England: a history of the Office and College of Arms* (London 1967), p. 530.

⁴⁸ Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61, 71.

⁴⁹ *Ibid.*

⁵⁰ The Crown has supreme control and jurisdiction over arms, and possesses the authority to grant arms: *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric II, vol 3, 586. This right is exercised by the Earl Marshal as the deputy to the Constable, both personally, and through the Court of Chivalry. The Earl Marshal's authority originates in the grant on 28 June 1483:

ordinate English kings of arms (and in Scotland, Lord Lyon King of Arms) exercise a jurisdiction which is territorially limited, Garter King of Arms has for long been held to have an imperial jurisdiction.⁵¹ He has granted arms in the Empire and Commonwealth, and to foreigners of British ancestry, for many centuries.⁵² This imperial jurisdiction derives, at least in part, from the imperial jurisdiction of the Earl Marshal, which, where not assigned elsewhere (for example to the Canadian Heraldic Authority), remains vested in the Earl Marshal.

The Earl Marshal, who was described in 1672 as being 'next and immediate Officer under Us for Determining and Ordering all matters touching Armes, Ensigns of Nobility, Honour, and Chivalry ...'⁵³ possesses both executive and judicial authority over English arms.⁵⁴ As Squibb points out,⁵⁵ the extension of the executive authority of the Earl Marshal over the various colonies in the New World in the seventeenth and early eighteenth centuries was the logical consequence of the colonists' continuance in law as English subjects.⁵⁶

However, the Law of Arms owed more to the royal prerogative than to the common law, and the applicability of the prerogative everywhere in the empire, whether settled, ceded or conquered, was never doubted.⁵⁷ The imperial jurisdiction of the Earl Marshal was held to extend to the arms of at least some of the former Indian princes,⁵⁸ and it must a fortiori extend to those British subjects overseas whose arms

[note 50 continues]

(1483) Calendar of Patent Rolls 358. The kings of arms have inherent authority deriving from their function as servants of the Earl Marshal, and the letters patent appointing individual kings of arms specially authorise them to make grants of arms.

⁵¹ Hans Schell Lanny, 'Heraldic Authority in the Dominion of New Zealand', *New Zealand Armorial* no. 4 (1970), pp. 15, 16-7; Squibb, 'Heraldic Authority', p. 125.

⁵² As officers of the Earl Marshal, the acts of the kings of arms in matters armorial cannot be questioned in any Court of law: *Austen v Collins* (1886) 5 LT 903.

⁵³ Letters patent of Charles II creating the office of Earl Marshal in the family of the Duke of Norfolk, dated 19 October 1672; G. D. Squibb, *The High Court of Chivalry* (London 1959), p. 128.

⁵⁴ See also Squibb, 'Heraldic Authority', pp. 128-129. The exact date by which the Earl Marshal had acquired authority over the heralds is unclear. However, it was well established by the middle of the sixteenth century, and was confirmed in 1673. In 1708 it was declared that the Earl Marshal was entitled to nominate officers of arms.

⁵⁵ Squibb, *High Court of Chivalry*, p. 129.

⁵⁶ Although Crawford argues that it is not entirely clear whether the Law of Arms was really applicable to the settled colonies – an argument which undermines the authority of Lord Lyon as much as that of Garter. See Crawford, 'English and Scots heraldic authority outside the United Kingdom', pp. 157, 158-9.

⁵⁷ The Crown could rely on the royal prerogative to govern colonies: *Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Phillips v Eyre* (1870) LR 6 QB 1; *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273; [1964] 3 All ER 377 (CA); *Gilbertson v State of South Australia* [1978] AC 772, 782 (PC).

⁵⁸ In the opinion of the law officers of the Crown, quoted by L. G. Pine, *International Heraldry* (Newton Abbot 1970), p. 214.

have been granted by the College of Arms. The Sovereign also retains vestigial rights to grant arms personally.⁵⁹

The Crown in right of the United Kingdom undoubtedly has executive authority over British subjects wherever domiciled.⁶⁰ Grants are valid irrespective of the petitioner's place of residence.⁶¹ Although the English heralds claim extends to an exclusive right to grant arms to all Commonwealth citizens, in reality they restrict the claim to the old dominion countries.⁶² Nor are arms generally now granted to subjects of the Queen in the realms except as subjects of the particular realms.

By virtue of the fact that the laws of New Zealand are legally based upon those of England, the only proper authority for the grant of arms in New Zealand is the College of Arms, now exercising the prerogative delegated by the Sovereign in right of New Zealand. Indeed, the New Zealand Government officially recognise the authority of the Earl Marshal and the Kings of Arms of the College of Arms.⁶³

This is made clear by the official recognition accorded the New Zealand deputy to Garter King of Arms, the New Zealand Herald of Arms Extraordinary to Her Majesty The Queen.⁶⁴ A further indication that the authority of the English heralds is officially recognised is that the Statutes of the New Zealand Order of Merit recognise only those arms granted or confirmed by Garter King of Arms.⁶⁵

It has been said that the imperial jurisdiction of the Earl Marshal and Garter King of Arms is difficult to support either from a plain reading of their warrants and commissions of office, or on the basis of the important negative evidence.⁶⁶ But the weight of authority appears to be otherwise.

⁵⁹ Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61, 68.

⁶⁰ Sir Francis Grant, *A Manual of Heraldry* (Edinburgh 1924), p. 9.

⁶¹ Foreign citizens and foreign-domiciled corporations may only receive honorary grants, which have limited legal effect as they are issued by the kings of arms in their private capacities.

⁶² Agnew of Lochnaw, *op. cit.* pp. 61, 64-5.

⁶³ See Secretary of the Cabinet, *Cabinet Office Manual* (Wellington 1988), para P.1.1: 'The granting, confirmation and control of Armorial Bearings (Coats of Arms) and other Heraldic devices (e.g. badges, emblems, flags) falls within the Sovereign's prerogative as the "Fount of all Honour". Her Majesty's Lieutenants, in exercising this prerogative, are the Earl Marshal of England and the Kings of Arms (College of Arms). New Zealand recognises this Royal prerogative and the authority of the Earl Marshal and Kings of Arms. Their representative in this country is the New Zealand Herald of Arms Extraordinary to HM The Queen.'

⁶⁴ *Cabinet Office Manual*, *ibid.*

⁶⁵ Statutes of the New Zealand Order of Merit (SR 1996/205), cl. 50. A similar case was the controversy regarding the Canadian Priory of the Order of St John of Jerusalem. By statute 29(4) armorial members of the Order were entitled to certain privileges. The Genealogist of the Order was an English herald, who refused to recognise any but grants of Garter King of Arms. The Statutes have since been amended to recognise grants approved by the Genealogist, provided he is 'an Officer of Arms in Ordinary to the Sovereign Head of the Order': Order of St John, *Royal Charters, Statutes and Regulations of the Order* (London 1993).

⁶⁶ No Earl Marshal has ever personally acted in New Zealand, though they have exercised their jurisdiction through a deputy in this country. Cf. Macaulay, 'Honours and Arms', pp. 381, 385.

The authority of the Earl Marshal's Court to decide the *Manchester Corporation v Manchester Palace of Varieties Ltd* was clear,⁶⁷ but the existence and exercise of its judicial authority had no bearing of the exercise of the prerogative of granting arms belonging to the Crown. Unfortunately, there has been a tendency in armorial circles to confuse these executive and judicial functions. The *Manchester Corporation Case* was concerned with the judicial authority of the Earl Marshal's Court to regulate the use of arms, and did not specifically consider the executive authority of the kings of arms to grant arms. The imperial heraldic executive jurisdiction was long exercised by Garter King of Arms, both in the United Kingdom, and in the colonies and later the realms.⁶⁸

6. Authority vested in Lord Lyon

It is widely believed that the Court of the Lord Lyon King of Arms has authority to grant arms to New Zealanders and other subjects of Her Majesty abroad, specifically for those who are of Scottish ancestry. But it has been claimed further that 'outside the United Kingdom the executive armorial functions of the Earl Marshal and Lord Lyon are co-extensive rather than exclusive'. Hence ... 'grants of arms to non resident British subjects by the English and Scottish Kings of Arms are entitled to equal recognition in the British Commonwealth countries overseas'.⁶⁹ This however would appear to be incorrect in both Scots and New Zealand law.

The belief in a co-extensive jurisdiction has not gone unanswered. The late George Squibb, QC, has done much to clarify the law.⁷⁰ The most important piece of evidence relied upon by him is the Lord Lyon Act 1867,⁷¹ especially s 1. This shows that, when acting out of his own country, Lyon is subject to the Earl Marshal.⁷² By this Act, the ministerial powers of Lord Lyon in relation to arms are confined to the territorial limits of Scotland.⁷³

In armorial matters the Kings of Arms are the Ministers to whom is delegated the exercise of that part of the Royal Prerogative by which arms are granted.⁷⁴ By Commission the Sovereign grants Lord Lyon 'Our full power liberty licence and authority of giving and granting Armorial Bearings to virtuous and well deserving persons, according to the rules and ordinances already established'.⁷⁵ In this case the ordinance is the Lyon King of Arms Act 1672.⁷⁶

Agnew of Lochnaw believed that this provides no limitation as to nationality, except in so far as this is implied by other laws.⁷⁷ He contended that the armorial

⁶⁷ [1955] P 133; [1955] 2 WLR 440.

⁶⁸ For instance, in connection with the regulation of the royal style and title, and royal heraldry generally; Squibb, 'Heraldic Authority', pp. 130-131.

⁶⁹ Crawford, 'English and Scots heraldic authority outside the United Kingdom', p. 157.

⁷⁰ See, for instance, Squibb, 'Heraldic Authority', p. 125.

⁷¹ 30 & 31 Vict c 17.

⁷² Squibb, *High Court of Chivalry*, p. 131.

⁷³ In the words of Lord Robertson in *M'Donnell v M'Donald* (1826) 4 Shaw 371, 372 (NS 374, 376).

⁷⁴ Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61, 67.

⁷⁵ Commission appointing Sir Malcolm Innes of Edingight Lord Lyon King of Arms, 10 April 1981.

⁷⁶ 24 Chas II c 47.

⁷⁷ *Ibid.*, pp. 61, 69.

Ministers of the Crown have an unfettered discretion to exercise the prerogative and grant arms to whom they please, subject to the Law of Arms of their jurisdiction.⁷⁸ He contended that it is by convention only that Lyon restricts grants of arms to only those of Scottish domicile or those with heritage in Scotland or to Commonwealth citizens of Scots descent. He believed that it is similarly only by convention that English heralds grant arms only to those domiciled in England or the Commonwealth, and that these convention are not binding.⁷⁹

But the Court of the Lord Lyon has, by a statute of the former Scottish Parliament⁸⁰ and more recent British legislation,⁸¹ authority only over the territory of Scotland. Garter King of Arms, exercising the executive authority of the Earl Marshal, is not similarly limited. Lord Lyon may in practice grant arms to those of Scottish ancestry, but it by no means certain that he should do so, nor that this should extend to corporate bodies, such as the University of Otago. It is not, as some have sought to argue, merely a question of preference for Scottish or English arms.

The Lord Lyon is the sole authority for granting arms in Scotland.⁸² He has significant powers to enforce the Scottish Law of Arms through the Courts, for unlike in England, the Law of Arms in Scotland is part of the general law, and justiciable in the ordinary Courts. The powers and jurisdiction of Lord Lyon are partly customary and partly statutory in origin, and were confirmed by Acts in 1672 and 1867.⁸³ Unlike in England, they comprise both executive and judicial aspects in the one officer.⁸⁴

The Lyon King of Arms Act 1672,⁸⁵ the principal statutory source for the authority of Lord Lyon, states that no person or corporate body in Scotland is entitled to bear arms unless these are recorded in the Public Register of All Arms and Bearings in Scotland. The recording may be due to grant, confirmation or matriculation.⁸⁶ A grantee and their descendants are permitted to use the arms on apparenancy for three generations, but thereafter a matriculation is necessary.⁸⁷

Grants of arms have been made solely by Lord Lyon since at least as early as 1542.⁸⁸ The usual procedure was to grant royal warrants ordering Lord Lyon to 'give and grant' arms.⁸⁹ Under the 1672 Act he may grant arms to natural and corporate

⁷⁸ Ibid, p. 68. In *Stewart McKenzie v Fraser McKenzie* 1922 SC (HL) 39, 44, Lord Dunedin approved the dicta of Lord Robertson in *M'Donnell v M'Donald* (1826) 4 S 371 (NS 374) that the Court of Session would never interfere with a coat of arms granted by Lord Lyon in his ministerial capacity. However, the extent of the jurisdiction is still subject to the scrutiny of the ordinary Courts.

⁷⁹ Ibid., pp. 61-8.

⁸⁰ Lord Lyon Act 1672 (24 Chas II cap 47) (Sc). Not the new Parliament established under the Scotland Act 1998 (UK).

⁸¹ Lord Lyon King of Arms Act 1867 (30 & 31 Vict c 17) (UK).

⁸² Lord Lyon Act 1672 (24 Chas II cap 47) (Sc).

⁸³ Lord Lyon King of Arms Act 1867 (30 & 31 Vict c 17) (Sc).

⁸⁴ Squibb, 'Heraldic Authority', p. 130.

⁸⁵ 24 Chas II c 47.

⁸⁶ *The Laws of Scotland*, vol 11, para 1614, 548.

⁸⁷ Sir Thomas Innes of Learney, *Scots Heraldry* (Edinburgh 1978), p. 117.

⁸⁸ No Scottish king subsequently granted arms personally, the invariable practice being a royal warrant ordering the Lyon to grant arms: Innes of Learney, p. 10.

⁸⁹ Or to extend and give out as in the wording of the matriculation of H.R.H. the Duke of Rothesay (Charles, Prince of Wales), recorded 13 November 1974.

persons who are domiciled in Scotland or who own heritage in Scotland.⁹⁰ According to the Scots, Lord Lyon can also make grants to citizens of any country of the Commonwealth of Scots descent, or from aliens who can show that they require to bear arms in Scotland.⁹¹ A grant is usually made to the petitioner and other heirs of his grandfather.⁹²

Crawford argued that the wording of Lord Lyon Act 1867⁹³ did not territorially limit Lord Lyon's jurisdiction, but rather preserved it.⁹⁴ This disregarded the question which should have been asked first, namely, whether the Scottish Law of Arms can have any application in common law countries, when it is expressly said to be a part of Scots law.⁹⁵ It also ignores the fact that the authority of Lord Lyon was already limited under the 1672 Act to persons and corporate bodies in Scotland. Preservation of his authority cannot amount to an extension of it. Section 1 of the 1867 Act provided that:

[T]he Jurisdiction of the Lyon Court in Scotland shall be exercised by the Lyon King of Arms, who shall have the same Rights, Duties, Powers, Privileges, and Dignities as have heretofore belonged to the Lyon King of Arms in Scotland, except in so far as these are hereinafter altered or regulated.⁹⁶

The 1867 Act described Lyon as the 'King of Arms in that part of the United Kingdom called Scotland', a description which Squibb regarded as crucial.⁹⁷ Nor did the Union with Scotland Act 1706⁹⁸ specifically preserve the armorial jurisdiction of the Lyon, as has been suggested.⁹⁹ Article 19 the Treaty of Union clearly preserved the authority of the Court of Session and other Courts, but not necessarily the executive powers as distinct from the judicial jurisdiction of Court of Lord Lyon. Article 24 refers merely to the rank and precedence of Lyon being determined as best suited the Queen, and does nothing to extend his heraldic jurisdiction. Agnew of Lochnaw argues however that the Lord Lyon Act 1867¹⁰⁰ only limits the judicial jurisdiction of Lyon Court,¹⁰¹ not the ministerial powers of Lord Lyon, and that since the grants are of Scottish arms, Lord Lyon is not acting outside Scotland.¹⁰² This is a specious argument.

⁹⁰ Indeed, owners of heritage in Scotland are required, by law, to have armorial bearings: *Acts* vol I 575 February 1400.

⁹¹ It is now said that this jurisdiction does not extend to Canada since they now have their own Heraldic Authority. However, there is no explanation as to why this should be so, since Lord Lyon has always infringed upon the imperial jurisdiction of the Earl Marshal. There is no reason to doubt the authority of Lord Lyon to grant arms to aliens who can show that they require to bear arms in Scotland; *The Laws of Scotland*, vol 11, para 1615, 549.

⁹² *Ibid.*, vol 11, para 1615, 550.

⁹³ 30 & 31 Vict c 17.

⁹⁴ Crawford, 'English and Scots heraldic authority outside the United Kingdom', p. 157.

⁹⁵ *The Laws of Scotland*, vol 11, para 1612, 547. The Laws of Canada, Australia, New Zealand and the other countries of the Commonwealth rely upon legal systems based upon the common law of England, with or without other laws such as the Roman-Dutch or French civil law. Scots law never applied anywhere but in Scotland.

⁹⁶ 30 & 31 Vict c 17. Emphasis added.

⁹⁷ Squibb, 'Heraldic Authority', pp. 130-131.

⁹⁸ 6 Anne c 11.

⁹⁹ Crawford, *ibid.*, pp. 157, 158-9.

¹⁰⁰ 30 & 31 Vict c 17.

¹⁰¹ Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61, 70.

¹⁰² *Ibid.*, pp. 70-1.

Sir Thomas Innes of Learney has maintained that since Scotland is an equal partner in the United Kingdom with England, the legal position regarding any new grant of arms by the Officers of Arms of either country is somewhat analogous to that regarding English and Scottish peerage creations between 1603 and 1707.¹⁰³ This is an interesting suggestion, but unfortunately it does not help his case. Further, it shows an ignorance of *Calvin's Case*.¹⁰⁴

Calvin's Case was approved by the House of Lords in *Lord Advocate v Walker Trustees*.¹⁰⁵ The essence of *Calvin's Case* was that Scottish peers were *not* recognised as peers in England. If the analogy were properly applied, Scottish arms would not be recognised by English law. Indeed, Scottish and Irish peers have only been recognised as entitled to the privileges of peerage in England since the Union with Scotland Act 1706¹⁰⁶ and the Union with Ireland Act 1800,¹⁰⁷ and only then because of express statutory provision.

Both before and after 1867 the letters patent appointing Lord Lyon have included a territorially descriptive title to the office of Lyon, but in each the actual concession of armorial authority by the Sovereign is made without such limitation.¹⁰⁸ Squibb maintains that the form of appointment of Lyon has changed much since the Lyon Court Act 1867, but Crawford disagrees.¹⁰⁹ On 26 May 1796 Letters Patent (which were in Latin) appointed the notoriously incompetent Robert Auriol Hay, ninth Earl of Kinnoull as Lyon. According to Crawford, the wording was no wider than that of the 1890 letters patent.

Crawford maintains that if the phrase 'in that part of Our United Kingdom called Scotland' were intended to be more than merely descriptive, it might be expected that it would be repeated in connection with some limitation of the royal 'power, liberty, licence and authority of giving and granting armorial bearings ...'. However, this view ignore the words 'according to the rules and ordinances already established for

¹⁰³ Innes of Learney, *ibid.*, p. 93 and note.

¹⁰⁴ (1607) 7 Co Rep 156 16a; 77 ER 377, 396. This relied upon *Earl of Richmond's Case* (1338) 11 Ed III Fitz Brief 473; 9 Co 117 b: 'An earl of another nation or kingdom is no earl [to be named in legal proceedings] within this realm'.

¹⁰⁵ [1912] AC 95 (HL) per Lord Atkinson.

¹⁰⁶ 6 Anne c 11.

¹⁰⁷ 39 & 40 Geo III c 67.

¹⁰⁸ The Letters Patent creating Sir James Balfour Paul, Lord Lyon King of Arms read: 'We out of Our gracious pleasure have made nominated and appointed the said James Balfour Paul during the term of his natural life Our Lyon King of Arms in that part of Our United Kingdom called Scotland and also We for Us and Our Royal Successors Give and Grant to the said James Balfour Paul ... Our full power, liberty, licence and authority of giving and granting Armorial Bearings to virtuous and deserving persons according to the rules and ordinances already established for that purpose: to have and to hold the said office of Lyon King of Arms from the day of the death of the said George Burnett who last held the same ... with all rights privileges and immunities belonging to the said office and therewith usually held and enjoyed or which thereto at any time heretofore pertained but subject always to the provisions of an Act passed in the Session of Parliament holden in the 30th and 31st years of Our Reign chapter 17 ...': J. H. Stevenson, *Heraldry in Scotland* (Edinburgh 1914), vol 1, pp. 454-5.

¹⁰⁹ Crawford, *op. cit.* pp. 157-60.

that purpose'. Arms are not granted in isolation, there must be a Law of Arms. There is, but that of Scotland was, and remains, different from that of England. This elementary observation must be made because of the tendency to ignore this point when discussing imperial jurisdiction.

Since 1867, the letters patent creating a new Lyon have described him as 'Lord Lyon King of Arms in that part of Our United Kingdom called Scotland'.¹¹⁰ The Royal Warrant of 9 March 1905 for precedence in Scotland similarly interpolates 'in Scotland'.¹¹¹ Lord Lyon has a legal duty to determine the extent of his executive authority in each case.¹¹² However, this is subject to review by the Court of Session. The jurisdiction of the Court of the Lord Lyon in questions of precedence¹¹³ or clan chiefships¹¹⁴ was rejected by the Court of Session, but Lord Lyon does not regard those decisions as being final,¹¹⁵ and continues to exercise this jurisdiction in defiance of the Court of Sessions.

Lord Lyon may have authority to grant arms overseas which are valid in Scots law,¹¹⁶ but they are not recognised by the Law of Arms of England, nor in any country in the Commonwealth, nor recognised by local laws unless by the rules of private international law.¹¹⁷ Grants of arms had been made to persons not domiciled in Scotland before the passage of the 1867 Act, and nothing had been done to prevent the continuation of this practice.¹¹⁸ The right to grant arms to persons who sought cadet-matriculations of previously extant Scots arms, or who sought arms by virtue of ownership of land in Scotland still falls to the Lyon as a purely Scottish officer, and does not imply an extra-territorial jurisdiction.¹¹⁹

¹¹⁰ See for example, the Letters Patent of 12 March 1890 in favour of James Balfour Paul, reprinted in Stevenson, *Heraldry in Scotland*, vol 1, pp. 454-5.

¹¹¹ Grant, *Manual of Heraldry*, pp. 46-9.

¹¹² *Royal College of Surgeons of Edinburgh v Royal College of Physicians of Edinburgh* 1911 SC 1054, 1911. The grant of arms by letters patent by Lord Lyon is an exercise of the delegated armorial prerogative of the Crown, and is not a judicial act: *Maclean of Ardgour v Maclean* 1941 SC 683, line 35, reaffirming *M'Donnell v M'Donald* (1826) 4 Shaw 371.

¹¹³ *Royal College of Surgeons of Edinburgh v Royal College of Physicians of Edinburgh* 1911 SC 1054, 1911. The Crown has the prerogative to determine precedence: though not in Parliament, where the House of Lords Precedence Act 1539 (31 Hen VIII c 10) (Eng) remains in force.

¹¹⁴ *Maclean of Ardgour v Maclean* 1941 SC 613, SLT 339.

¹¹⁵ *The Laws of Scotland*, vol 11, para 1614, 548.

¹¹⁶ Sir George Mackenzie of Rosehaugh, *Observations upon the Laws and Customs of Nations as to Precedency* (Edinburgh 1680), p. 79, quoted in Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61, 69-70.

¹¹⁷ Agnew of Lochnaw, *ibid.*, p. 70.

¹¹⁸ Compare Innes of Learney, *Scots Heraldry*, pp. 93-4. There were seventeen grants to Scots residing in foreign states prior to 1867, as well as the registration in 1805-10 of grants to Scots made in 1625 in the Province of Nova Scotia, and in 1698 in the Colony of Caledonia. There were eight registrations of arms by Lyon to petitioners resident in Australia between 1837 and 1865, and another sixteen pre-1867 Scots grants to residents of other overseas possessions of the Crown.

¹¹⁹ Innes of Learney, *ibid.*, pp. 91-2, 94, 101, 107-8.

The Law of Arms in Scotland is that administered by the Court of Lord Lyon, and never constituted a part of the laws of England, so cannot have legal force in New Zealand. Laws of Arms of Scotland and England are different.

7. Advent of Dominion status

Whatever their original position, since independence all Commonwealth countries are recognised by international law as sovereign states. However, where the Queen is head of state, it is in a different capacity from that in which she is Queen of the United Kingdom. Garter is appointed by the Sovereign of the United Kingdom, but this does not necessarily invalidate any exercise by him of the royal prerogative in those countries¹²⁰ – nor, however, does it mean that he should exercise this role.

Until an independent New Zealand heraldic authority is created, receiving from the Crown a direct delegation of the royal prerogative to grant arms, the proper and legally correct authorities to grant arms in New Zealand are the kings of arms and heralds the College of Arms. It has been said that because the Crown of New Zealand (or Canada or Australia) is different to that of the United Kingdom, then it is inappropriate for members of the College of Arms¹²¹ to be the heraldic authority for these distinct sovereignties. It may be that it is inappropriate for this to continue, but the kings of arms have clearly not lost the legal right to regulate arms in the Queen's overseas dominions.

In 1975 it was decided to not establish an independent heraldic authority in New Zealand, but to continue to make use of the College of Arms.¹²² This decision was, according to Macaulay constitutionally inappropriate, but was certainly efficient.¹²³

There had previously been proposals for a New Zealand King of Arms, to be under the Earl Marshal and Garter Principal King of Arms, and within the College of Arms, before the 6th February 1978 appointment of Phillip O'Shea¹²⁴ as the New Zealand Herald of Arms Extraordinary to Her Majesty The Queen.¹²⁵ The essential validity of the appointment by royal warrant of the Queen of New Zealand addressed to the Earl Marshal of England, without the Sovereign of the United Kingdom interposing authority to the warrant has been questioned.¹²⁶ But the prerogative of the Sovereign may be delegated to whomsoever she pleases.

¹²⁰ The continued exercise of imperial prerogatives by British officials or administrative machinery is largely confined to the honours prerogative, though the continued operation of the Judicial Committee of the Privy Council is analogous.

¹²¹ Either by virtue of the jurisdiction of the Earl Marshal, the inherent right of the kings of arms to regulate arms, or the power expressly delegated by the Sovereign to grant arms.

¹²² Phillip O'Shea, 'The Office of the New Zealand Herald of Arms', *New Zealand Armorial* 20 (1982), p. 7.

¹²³ Macaulay, 'Honours and Arms' pp. 381-7.

¹²⁴ Cabinet Office Adviser on Honours, and later Director of the Honours Secretariat.

¹²⁵ Neither the warrant of appointment, nor any other mention of the existence of the position was ever been published in the New Zealand Gazette: Macaulay, 'Honours and Arms', pp. 381, 385n.; Sir Malcolm Innes of Edingight, 'New Zealand Herald of Arms Extraordinary', *Commonwealth Heraldry Bulletin* 3 (1979), p. 2.

¹²⁶ Macaulay, op. cit., pp. 381, 385-6; Sir Malcolm Innes of Edingight, 'New Zealand Herald of Arms Extraordinary', *Heraldry in Canada* 13 (1979), pp. 34-6.

This was a simpler arrangement, and one better reflecting the lower profile of heraldry in this country. New Zealand Herald Extraordinary is the representative in New Zealand of the College of Arms. As an extraordinary herald, he is not a member of the College, and has the same (limited) authority as any Herald Extraordinary. However, in practice much of the work in New Zealand of the College of Arms is delegated to him.¹²⁷

Since the appointment of New Zealand Herald, letters patent issued by the College of Arms to New Zealanders have de-emphasised their English origins.¹²⁸ They bear the New Zealand royal style, rather than that of the United Kingdom.¹²⁹ It is not clear whether grants are under the royal prerogative of the Queen of the United Kingdom, or of New Zealand,¹³⁰ but this makes little difference in practice, as the Laws of Arms are the same in each jurisdiction.

One recent change, and one which has not pleased some,¹³¹ is that the Statutes of the new New Zealand Order of Merit provide recognition only for those with armorial bearings granted or confirmed by Garter King of Arms.¹³² There is also a Herald for the Order.¹³³ Although not a member of the College of Arms, and not entitled to grant arms in his own right, his duties include preparing certificates for the Garter for the grant of supporters for Knights and Dames Grand Companions.¹³⁴ He is akin to the private heralds of the British Orders.¹³⁵

8. The Australian situation

The Law of Arms is as applicable in Australia as elsewhere in the Queen's realms. The laws of Australia are based upon the reception of English laws at various dates from the end of the eighteenth century, when parts of the continent were first settled as a colony. The states each have their equivalent of the New Zealand English Laws

¹²⁷ Mr O'Shea was appointed by letters patent, rather than by the warrant normally used for extraordinary heralds. Grants of Arms continue to be made by the kings of arms (Garter alone for personal grants, all three for corporate arms), under the authority of a warrant of the Earl Marshal. The Queen's royal style in New Zealand is now used in grants to New Zealanders obtained through the agency of New Zealand Herald Extraordinary.

¹²⁸ The Earl Marshal is simply 'Earl Marshal' rather than 'Earl Marshal and Hereditary Marshal of England', and the Sovereign's titles for New Zealand are used.

¹²⁹ O'Shea has said that the letters patent recite the style conferred upon Her Majesty by proclamation under the Royal Titles Act 1953 (NZ). If this is so, it is incorrect, as this style was replaced by that given in the Royal Titles Act 1974 (NZ). But even if the style is incorrect, this does not mean, as Agnew of Lochnaw believed, that the grants are of doubtful essential validity as made 'in the name of a legally non-existent Sovereign': A message from New Zealand Herald of Arms to 1979 Heraldry Seminar, University of Auckland, 26 August 1979; Agnew of Lochnaw, 'Conflict of heraldic laws', pp. 61-6.

¹³⁰ Macaulay, 'Honours and Arms', pp. 381, 386.

¹³¹ This has been criticised by Macaulay, who continues to argue that Garter is unknown to New Zealand law: G. A. Macaulay, 'The NZ Order of Merit', *New Zealand Law Journal* (1996), p. 457.

¹³² Clause 50.

¹³³ Clauses 51, 53, 54, 55, 57.

¹³⁴ Clause 57 (b).

¹³⁵ Such as in the Order of St Michael and St George.

Act 1858, which provide that the laws of England as existing on a certain precise date are deemed to be in force in the state. As in New Zealand, in Australia the Law of Arms of England has been incorporated into domestic law, though not the law administered by the common law Courts.

A significant distinction which must however be drawn between the situation in New Zealand and Australia is that whereas New Zealand is a unitary state, with one set of laws for the whole country, Australia has a federal system of government, with a division of powers and responsibilities.

The authority to grant armorial bearings is a part of the royal prerogative. Like the Law of Arms itself, the royal prerogative is generally non-justiciable (or non-reviewable by the Courts), though their extent is. It is a judicial rule that the royal prerogative is as extensive overseas as it is in the United Kingdom. It is clear that the major prerogatives apply throughout the Commonwealth. These are applied as a 'pure question of ... common law' even in a country, such as Malta, where the common law is not in force.¹³⁶

No prerogatives are expressly delegated to the federal or state governments. In practice some prerogatives were retained by the Sovereign, others delegated to the Governor-General. Yet others may be exercised by the state Governors, either exclusively, or jointly with the Governor-General.

Coats of arms, armorial badges, flags and standards and other similar emblems of honour may only be borne by virtue of ancestral right, or of a grant made to the user under the authority of the Crown. As such they are akin to honours, though this status should not be exaggerated. Yet, even in Canada, the prerogative to grant arms was not delegated until 1988, it having been regarded as not covered by the 1947 letters patent (though not expressly excluded). Nothing was done before 1988 about the heraldic prerogative, probably because it was either overlooked, or because it was not personally exercised by the Queen in any case.

The situation in Australia now is that armorial bearings remain the only aspect of the royal prerogative not delegated to the Australian Governor-General and state governors. Had the prerogative been exercised by the Queen personally, it is probable that it would have been delegated. In the event it was devolved.

9. Conclusion

The Law of Arms of England has been incorporated into New Zealand law and the laws of the other realms. The use of coats of arms is subject to this special law. However, while there is at present no Court to administer the law, the law itself is clear. Grants of arms are made by the Crown, and in the absence of any special delegation, this prerogative is exercised by the Earl Marshal and his servants in the College of Arms. Thus the absence of a judicial organ in New Zealand does not invalidate the exercise of the executive powers conferred by the royal prerogative.

A partial and non-exclusive delegation of the prerogative of arms has in fact been made, with the appointment in 1978 of a New Zealand Herald of Arms

¹³⁶ *Sammut v Strickland* [1938] AC 678 (PC).

THE COAT OF ARMS

Extraordinary to Her Majesty The Queen, and it is to him that New Zealanders should turn for grants of arms. A full delegation to the Canadian Heraldic Authority occurred in 1988. But elsewhere Garter King of Arms retains full authority to grant arms.¹³⁷

¹³⁷ The author wishes to acknowledge the assistance of the editors of the *Coat of Arms* and of the anonymous referee in the preparation of this article. It reflects the author's private opinion and should not be inferred as suggesting the agreement or otherwise of anyone else or of any organisation of which he is a member.