

GENEALOGICA & HERALDICA XXXV

REFORMATION REVOLUTION RESTORATION



CAMBRIDGE
2022

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ISBN 978-0-904858-07-5

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Congress logo by Tania Crossingham

Photographs on the rear cover: Congress banners in Clare College Scholars' Garden by Jack Sain, plaque created for the Congress baton by Paul A. Fox

Printed in Great Britain by 4word Ltd, Bath

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SCOTS HERALDRY AND THE SCOTTISH LEGAL SYSTEM: A PARTNERSHIP OF OVER 400 YEARS

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The Rt. Hon. Lord Lyon King of Arms

The office of Lord Lyon is threaded throughout Scottish history and is said to be linked to the High Sennachie of the Celtic Kings. It emerged in the documentation of Scotland in the early fourteenth century and has been operationalised through successive statutes and legal cases since that period of Scottish history. The office of Lord Lyon and Scots law have developed together since the sixteenth century. It has been a journey that narrates the development of Scotland as a nation. Indeed, Scots heraldry is often described as “the garden of Scottish history” – that history includes not only the history of Scots heraldry but also Scotland’s legal history.

For his office to come into effect, the Lord Lyon has first to be sworn in before the Lord President of the Court of Session. In my case, this took place on 24th February 2014, when I took both the Royal Oath and the judicial oath – “**to act without fear or favour**”. There is a long-established relationship between the Crown and the Lord Lyon. Indeed, at one time, a direct insult to the Lord Lyon was regarded as a direct insult to his Master. In 1515, when Lord Drummond struck the Lord Lyon King of Arms, the case was tried as a capital offence. Drummond was saved only through the personal intercession of the Lord Lyon together with that of some of the more powerful nobles.¹

The *Stair Memorial Encyclopaedia* describes the Lyon Court as an “undoubted court of law”.² This is the key reason why the office of Lord Lyon has survived and remains a part of Scottish life. The Court of the Lord Lyon sits formally to swear in new Officers of Arms or to determine cases relating to rights to arms, to peerages, to baronetcies, and in particular to Scottish Clan or Family Chiefships. Since the Lyon King of Arms Act 1592, the Lord Lyon has had enforcement power where a criminal prosecution is brought before him by the Procurator Fiscal for the Court of the Lord Lyon. Whilst prosecutions in the Lyon Court are rare, the ability to have the means of enforcement serves to stabilise the heraldic system in Scotland. The Procurator Fiscal is appointed by Scottish Ministers and is independent of the Court and, with regard to the separation of powers, the office of Procurator Fiscal is deemed compliant with the Human Rights Act 1998.

Being a court of law, of which the Lord Lyon is the sole Judge, the decisions of the Lord Lyon are subject to appeal. There is, however, no appeal against a decision not to grant arms, as such a decision falls within an administrative (and *not* judicial) function of the Lord Lyon; it is an example of the Lord Lyon’s ministerial function. If, however, it can be demonstrated that the Lord Lyon has acted unreasonably, then a decision can be challenged by way of judicial review.

When the Lord Lyon is acting in a judicial capacity, the Court of Session has confirmed its jurisdiction to review proceedings in the Lyon Court.³ From the Court of Session, an appeal may be taken to the Supreme Court. In *McDonnell v McDonald*⁴ in a decision of 1826, Lord Robertson stated:

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“The power of granting ensigns armorial is part of the royal prerogative, but every thing belonging to that power has been given by sundry statutes to the Lord Lyon’s grant. His power to grant new armorial bearings is merely discretionary and ministerial, and with that this Court cannot interfere.”

The Head of the Lyon Court is a Judge of the Realm and is always the Lord Lyon King of Arms, who must be a qualified lawyer, admitted as a solicitor or advocate in Scotland. The law to be applied in the Court is Scots law. The Court of the Lord Lyon holds a singularly unique position in the legal system of Scotland, as well as within the Scottish cultural system.

After Cromwell’s successful invasion of Scotland in 1650–1652, the writing seemed to be on the wall for the Lyon Court and the office of Lord Lyon. Charles I had appointed Sir James Balfour as Lord Lyon in 1630 and granted him a baronetcy three years later. Balfour had remained consistently loyal to the royalist cause through the period of civil war, and it was Balfour who read the Coronation Oath to Charles II when he was crowned King of Scotland at Scone.⁵ The story of Cromwell’s soldiers burning Lyon Court records in Perth in 1651 while Balfour was attempting to transport them to his castle at Denmilne created the impression that, from the beginning, the Cromwellian regime in Scotland was specifically hostile both to the Lyon Court and to Balfour personally.⁶ It is therefore surprising that it took until 1654 for Balfour to be deprived of his title, despite the official abolition of all independent Scottish judiciaries in 1652 whereby “... *no power, jurisdiction or authority was to be exercised in Scotland which was not derived from the Parliament of England*”.⁷

On 13 May 1658, at Whitehall, Cromwell signed a declaration appointing Sir James Campbell of Lawers as “Lord Lyone King-at-Arms” for life. Commentators remarked on the irony of a regicidal republican government explicitly undertaking to “crown” a King.⁸ The question of why it was deemed appropriate in 1658 to restore the title “Lyon King of Arms” deserves to be taken seriously. The preamble to the 1658 declaration, which observed–

*“it hath ever bein found as necessarie as it is suteable to the dignitie of the state of PRINCES
That...They should have...Fitt and Convenient Officers at Armes alsweill in tymes of peace
as warre”*

seems to suggest a definite shift in the regime’s approach to the Scottish nobility and the role of the state as the protector of hereditary dignities.⁹

It is unclear how the Lyon Court operated between 1658 and the Restoration of 1660. With no primary records available, we cannot currently reconstruct the business which the Lyon Court handled under James Campbell of Lawers. However, we can observe that 1658 was not an auspicious time for such work to begin. Oliver Cromwell himself would be dead within months of the Court’s reinstatement, and the mounting political instability from 1658 onwards caused a rapid haemorrhaging of state authority. In fact, the end of Richard Cromwell’s Protectorate in 1659 officially invalidated every act passed in the previous five years, including the Act of Union itself. Therefore, while the Lyon Court may not have been totally inactive in the two years leading up to the Restoration, it is highly unlikely that it would have achieved its goals. In the chaos of 1660, Campbell of Lawers – possibly wishing to be out of the spotlight when Charles II returned – relinquished his title to Gilbert Stewart. Stewart himself has made no visible impression

on the historical record, and only held the title for a matter of days until he himself was replaced by Charles' appointee, Sir Alexander Durham of Largo.¹⁰ The Restoration of Charles II meant that the republican Lyon Court, along with all other ordinances and establishments of the republican period, had never legally existed. In the Act of Parliament of 1672 which appointed a successor to Alexander Durham of Largo, James Balfour was named as Durham's direct predecessor as Lord Lyon. In other words, James Campbell of Lawers and Gilbert Stewart were written out of history entirely, presumably along with all their heraldic judgements, whatever those may have been.¹¹ More generally, the post-Restoration reaction of most Scottish political and legal commentators to the period of the Lyon Court, like many similar policies for republicanising Scotland in the 1650s, would have proved to be something of a damp squib.

The Lyon King of Arms Acts between 1592 and 1672

During the 80 year period from 1592 to 1672, four acts were passed by the Scottish Parliament concerning the office and jurisdiction of the Lyon King of Arms, culminating in the establishment of the *Public Register of All Arms and Bearings* in 1672.¹² 350 years have now passed since the creation of the *Register*; but this legislation continues to underpin the role and functions of the Lord Lyon and his Court in the present day. The 1672 Act, and its parent legislation – passed in 1592, 1662 and 1669 – are best understood as the outcome of political and financial pressures; intellectual influences, linked to the first enlightenment, were also important.

Although the Lord Lyon King of Arms is known to have had jurisdiction over armorial bearings since before 1503, the first statutory reference to the armorial jurisdiction of the Lyon came in 1592, when the twelfth parliament of James VI passed legislation “Concerning the office of [*Sir David Lindsay of the Mount*], Lyon King of Arms, and his brother heralds”. The 1592 legislation was enacted following Sir David Lindsay of the Mount's investiture as Lyon King of Arms in 1591, whereupon he succeeded his uncle Sir David Lindsay of Rathillet as Lord Lyon, thereby becoming the latest member of the heraldic Lindsay dynasty.

A letter from Rathillet to the Lord Clerk Register in July 1590 suggests that Rathillet was not receiving all of the fees due to him as Lord Lyon. That letter, and the timing of the 1592 legislation – which was enacted immediately following Sir David Lindsay's appointment – would seem to indicate that the statute was introduced under impetus from Sir David Lindsay in order to ensure that the emoluments due to him as Lyon were forthcoming, and that the rights and perquisites of his office were respected. Using legislation was a common means of ensuring that such rights were recognised, and acts in favour of individuals made up a large amount of parliamentary business. Rules, laws and rights had to be continually reiterated and affirmed to ensure that they remained common knowledge, and to prevent them slipping quietly into desuetude. The 1592 Act contained provisions for restraining fraud and increasing security in armorial property. It states:

“...by this present act, gives and grants full power and commission to Lyon King of Arms and his brother heralds to visit the whole arms of noblemen, barons and gentlemen borne and used within this realm, and to distinguish and discern them with congruent differences, and thereafter to matriculate them in their books and registers.”

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The 1592 Act attached a fine of £100 payable to the Lyon in respect of any contravention relating to armorial bearings. The power of prosecution was introduced. The Act also required the Lyon to matriculate and register armorial bearings in the records of the Lyon Office. Nevertheless, the 1592 Act ultimately appears to have had little meaningful long-term effect.

Sir Charles Erskine of Cambo is the Lyon to whom we owe the existence of the current *Public Register of All Arms and Bearings in Scotland*. He was crowned Lyon on 4th June 1663. Bills for the purchase of a new gold chain of office are detailed in the Exchequer records.

The Lyon King of Arms Act 1669 revived provisions in respect of the Lord Lyon made in the statute of 1592. It empowered Erskine to hold two courts a year: on 6th May and on 6th November. It also strengthened the enforcement process, with any offender being declared an outlaw and a fugitive. The 1669 Act concluded by reiterating that all the concessions and privileges accorded to Lyon and his brother heralds by Charles I were to persist. Erskine received the customary pension of £1,200 as paid to his predecessors, and the office of Lord Lyon was to be for the life of the holder. After a document was executed in his favour, Erskine's son Alexander with his father jointly held the office of Lyon for the duration of their natural lives. Following Parliamentary ratification, this document put the office of Lord Lyon on a hereditary basis.

Grants of patronage such as described above were often followed by Acts of Parliament in favour of the new Lord Lyon – an example being the Lyon King of Arms Act 1672, when the privileges of the Lyon passed into law. Although the 1672 legislation is probably best regarded as the ultimate expression of Erskine's personal ambitions – both for his family's social and economic position and for the reinvigoration of the office of the Lord Lyon – the ideas contained within the legislation did not arise in isolation, but rather reflected wider intellectual concerns and developments. The content of the legislation and a renewed interest in recording armorial bearings appear to have been inspired by developments in textual scholarship. This feature of the European Enlightenment placed increasing importance on the use of archival documents and authenticated records in the construction of history. These ideas, in turn, had a great impact on the study and science of genealogy, of which armorial bearings were an important part.¹³ Erskine's register of arms use was ratified: fines, escheat and, failing this, imprisonment. The Act of 1672 concludes with a further general ratification of existing regulations.

It was the Lyon King of Arms Act 1672 that established the *Register of All Arms and Bearings in Scotland*, which celebrates its 350th Anniversary this year. The *Register* has become a rich source of our Scottish heraldic heritage; but it is through the Court of the Lord Lyon being part of the legal system in Scotland that the *Register* is still actively expanding month by month.

The Court of the Lord Lyon regularly hears cases, one illustration that the legal system of heraldry in Scotland is still alive today. The following two cases were heard recently. In the case of the Petition of William St Clair Inglis of Nether Cramond, the Petitioner sought official recognition in the name, style and dignity of Sir William St Clair Inglis of Nether Cramond as heir to the baronetcy of Inglis of Nether Cramond through matriculation in the Register of All Arms and Bearings in Scotland.

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The baronetcy was granted on 22nd March 1687. The Petitioner matriculated his own coat of arms on 27th September 1982. The Petitioner had proved his right to succeed to the baronetcy.

In the Petition by John Michael Baillie-Hamilton Buchanan of that Ilk of Arnprior, the Petitioner sought to be recognised as Chief of the Name and Arms of Buchanan of that Ilk. The evidence, for aught yet seen, proved the Petitioner's descent from the chiefly line – supported in a matriculation of Arms dated 1953 – and that the Petitioner's family line was now the senior line.

My final point relates to the direction in which the law should develop, if legislative time could be found. Firstly, there is a need to remove the criminal sanctions relating to breaches of heraldic law. Secondly, there is a need for modern penalties of enforcement. Thirdly, there is a need to review and revise the law of succession in relation to arms and dignities, which should follow the established law of the country. It is essential for the development and survival of the Court of the Lord Lyon that we remain firmly within the Scottish legal system, with the Lord Lyon as the Heraldic Judge in Scotland.

¹ Sheriff Strathern, 'Origin, Coronation and Jurisdiction of the Lord Lyon King of Arms', *Transactions of the Glasgow Archaeological Society*, vol. 1, no. 1 (1868) p. 218.

² The Laws of Scotland in Stair Memorial Encyclopaedia / Courts and Competency, vol. 6/8, para. 1010.

³ *Dunbar of Kilconzie* 1985 SLT 158.

⁴ *McDonnell v McDonald* (1826) 4S 371, at 312 per Lord Robertson.

⁵ John Nicoll, *A Diary of Public Transactions and Other Occurrences, Chiefly in Scotland, from January 1650 to June 1667* (Edinburgh, 1886), pp. 4346 (Nicoll).

⁶ J. H. Stevenson, *Heraldry in Scotland*, vol. 1, (Glasgow, 1914), p. 116.

⁷ F. D. Dow, *Cromwellian Scotland 1651/1660* (Edinburgh, 1979), p. 36; Nicoll, *op. cit.*, p. 80.

⁸ "Appointment by Oliver Cromwell..." in Francis J Grant (ed.), *Memorial Catalogue: Heraldic Exhibition, Edinburgh 1891* (Edinburgh, 1892), pp. 145; [R.R.], 'Lord Lyon King-of-Arms' in *Notes and Queries*, 2nd Series, vol. vi (1858), p. 96; James Balfour Paul "Heraldry in Relation to Scottish History and Art: being the Rhind lectures on archaeology for 1898" (Edinburgh, 1900), p. 86.

⁹ Charles L. Stainer (ed.), *The Speeches of Oliver Cromwell, 1644/1658* (London, 1901), p. 304.

¹⁰ "Memorial Catalogue: Heraldic Exhibition, Edinburgh 1891", ed. Francis J Grant (Edinburgh 1892), p. 14.

¹¹ J. H. Stevenson, *Heraldry in Scotland*, vol. 1, [Glasgow 1914], pp. 118–119.

¹² Acts in favour of the Lord Lyon Balfour of Kinnaird were also made in 1633 and 1639.

¹³ Kelsey Jackson Williams, *The First Scottish Enlightenment* (Oxford, 2020), p. 231.