Irish heraldic law – problems of autochthony in a successor state

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Heraldry is found in many civilisations and in many eras, but the modern form of western heraldry may be said to be primarily of European origin. This has been traced to the Crusades and earlier, but it can be said, with some degree of accuracy, that its true origins are shrouded in the mists of time. Ancient Irish heraldry exhibited many of the attributes of "mainstream" western heraldry, but also unique distinctions (indeed we may say that there were three strands to Irish heraldry, Norman, Gaelic and Anglo-Irish). Modern Irish heraldry may be said to date from the extension of English influence, and later government, over the island. This means that Irish heraldry is presented with a particular problem. In the achievement of independence in the twentieth century little thought was given to heraldry – at least not private heraldry (personal and corporate coats of arms), as distinct from government heraldry. The nature of heraldry in a republic is not necessarily radically different to that in a monarchy, but the role heraldry and related "honorary" distinctions play may well be subtly different in such a regime. At the very least the legal basis of grants may be different.

Prior to 1922 armorial bearings granted by Ulster King of Arms (hereinafter "Ulster") were governed by the Irish Law of Arms,[2] which is fundamentally the same as the law of Arms in England. While the exact nature of that law may now be uncertain, at that time (1922) the authority of Ulster to make grants was generally unquestioned and legally unexceptional. This was derived from the delegation to Ulster of the royal prerogative of the Crown of the United Kingdom of Great Britain and Ireland. It is also important to recall that Ulster King of Arms was not a member of the College of Arms in London, but was an independent Irish officer, responsible to the King of Ireland (in his various guises), from 1552 to 1943.[3]

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[2] Sir Crispin Agnew of Lochnaw, Bt, "The Conflict of heraldic laws" (1988) Juridical Review 61, 62.

[3] King of Ireland 1552-1801, King of the United Kingdom of Great Britain and Ireland 1801-1927, King of Ireland 1927-1936 and 1936-43, Ulster acted in a private capacity or as agent of the King of Great Britain and Northern Ireland.

However, the status of grants made by Ulster to recipients in the Irish Free State between 1936 and the creation of a de facto Irish republic in 1937 and the establishment of the Genealogical Office in 1943, is less certain. Ulster remained a residual part of the British official establishment in Ireland, though that is not necessarily determinative of the status of arms granted by him. The source of Ulster King of Arms' income, and indeed the identity of the recipients of his grants, did not necessarily have any bearing on the legal basis of his power to grant arms, nor indeed on the status of those grants. Equally whatever may have been understood and agreed in relation to heraldry in the 1921 Treaty negotiations which led to the establishment of the Irish Free State had no direct application, as they were not subsequently expressly enacted. Neither did the Government of Ireland Act 1920,[4] which led to the creation of Northern Ireland affect the situation in the Irish Free State.

It is important to recall that the royal prerogative of arms in England and Wales, (and Northern Ireland also) was and is exercised by the Kings of Arms, and also by the Lord Lyon in Scotland – and now also the Chief Herald of Canada – effectively without recourse to any other authority, though subject to direction by the Sovereign. It is a ministerial or executive function, based on a broad delegation of the royal prerogative, and is not a legislative or judicial function, though Lyon has a separate judicial function. But nor is it directly analogous to the exercise any other prerogative power,[5] since there is, in effect, a standing delegation of it to permanent non-political servants of the Crown. The situation in Ireland was also complicated at this time (1936) by the sensitive position of the elderly Ulster, Sir Nevile Wilkinson, who had held office since 1908. In 1943 there seems to have been a general assumption that the Genealogical Office simply assumed the "functions and powers" of Ulster King of Arms.[6] This may well be so, because there doesn't appear to have been an intention to change the nature of arms – which were a monopoly of the Crown. It was in the interest of both the British Government and the Irish Government to preserve state control over arms.

[4] 10 & 11 Geo. V c. 67 (U.K.).
[5] For which see Noel Cox, "The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity" (1998-99) 14 Australian Journal of Law and Society 15-42; and Noel Cox, "The royal prerogative in the realms" (2007) 33(4) Commonwealth Law Bulletin 611-638.
[6] These words are used by the Office of the Chief Herald, on their website, at <http://www.nli.ie/en/history-of-the-office-of-the-chief-herald.aspx> (accessed 29th July 2008).

Mediæval writers generally believed that, in some circumstances at least, one could assume arms.[7] In the fourteenth century, the Italian civilian Bartolus De Sassoferrato, father of international law, wrote that arms, like names, could be assumed as one pleased, provided that they were not borne by another before.[8] This principle was adopted by Nicholas Upton, in his *De Studio Militari*.[9] According to Upton, arms were assumed in England as late as the fifteenth century.[10] This belief passed into wide circulation by the publication of the *Boke of St Alban*.[11]

However, Bartolus De Sassoferrato's view was not universally held, even on the Continent, and a rival school of civilian writers maintained that authority was needed for the adoption of arms.[12] Johannes De Bado Aureo[13] wrote in his *Tractatus de Armis*[14] (1360) that arms could be granted by other people than sovereigns, and, indeed, in the fourteenth century arms were frequently granted by a lord to his followers.[15] Private heralds, men learned in the art and science of heraldry, occasionally, though not universally, also included the granting of arms among their responsibilities.[16]

Upton's assertion that arms could be assumed at will was directly contradicted by John Ferne in 1586.[17] It is now accepted that it is illegal to assume arms,[18] and this was the accepted wisdom in 1943 and probably in 1552 also. The mere assumption of arms cannot itself

[7] The practice of assuming armorial bearings has continued, at least as regards burger arms, in a number of countries, such as Switzerland.
[8] "De Insigniis et Armis", printed in E. Jones (ed), *Mediæval Heraldry; Some fourteenth century heraldic works* (1979) 224-52; *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric. II, vol. 3, 586.
[9] F.P. Barnard (ed.), *The Essential Portions of Nicholas Upton's De Studio Militari before 1446* (1931) (trans. J. Blount) 48.
[10] Ibid.
[11] Wynkyn de Worde (ed.), d, VII-VIII, reprinted in J. Dallaway, *Inquiries with the Origin and Progress of the Science of Heraldry in England. With explanatory observations on armorial ensigns* (1793), App. V, cxii.
[12] See Sir George Mackenzie of Roxhaugh, Lord Advocate of Scotland, *The Science of Heraldry, Treated As A Part of The Civil Law, and The Law of Nations* (1680) 11, and the authorities there cited.
[13] He has been identified as John Trevor, Bishop of St Asaph; G.D. Squibb, *The High Court of Chivalry* (1959) 178-179.
[14] Printed in E. Jones (ed), *Mediæval Heraldry; Some fourteenth century heraldic works* (1979).
[15] The earliest princely grant seems to be of the Emperor Lewis of Bavaria in 1338, although they were common by the end of that century; Sir Anthony Wagner, *Heralds and heraldry in the Middle Ages* (1956) 65, 122.
[16] Richard Strangways' unpublished *Tractatus nobilis de lege et exposicione armorum*, written in the 1450s, argued that arms might be granted by a herald or pursuivant: B.M. Harl. ms. 2259 f. 109b, cited in G.D. Squibb, *The High Court of Chivalry* (1959) 179 n. 3.
[17] *Blazon of Gentrie* (1586) 224; see also Sir Harris Nicolas, *The Controversy between Sir Richard Scrope and Sir Robert Grosvenor in the Court of Chivalry, AD 1385-1390* (1832) i, 1-357.
[18] *Austen v Collins* (1886) 5 L.T. 903.

establish a legally defensible title according to the laws of England[19] – or of Ireland. Arms could only be validly borne if acquired by right of birth (from a grant, or user from before the time of legal memory[20]), or grant from the Crown.[21] In England (and Scotland) the Crown's exclusive prerogative prevailed, as it did in many, though not all, European countries.[22] This prerogative is exercised on the Queen's behalf by her heralds, members of the College of Arms. The thirteen members of the Royal Household are appointed by the Sovereign to be her Officers of Arms-in-Ordinary with special responsibility for armorial, genealogical, ceremonial and other similar matters.[23] By extension the position of the Chief Herald of Ireland was apparently the same, if he were indeed the successor to the functions and powers of Ulster King of Arms, as claimed. This, however, was legally uncertain, due to the lack of a transfer of the royal prerogative to the new Irish state.

Although the King had ceased from 12th December 1936 to be such for all purposes except signing treaties and accrediting envoys,[24] this did not mean that Ulster lost his authority to grant arms, especially since the prerogative was already effectively delegated. The grants made by Ulster were now probably on behalf of the King of the United Kingdom, rather than of the King of Great Britain, Ireland and the British Dominions (as he was styled in the Royal Titles Act 1927[25]) empowered by the Executive Authority (External Relations) Act 1936 solely to sign treaties and accredit envoys. Crucially, these grants were now being made by Ulster in what can be seen as a private capacity, as servant of the Crown of the United Kingdom, and not of the Crown or Government of Ireland. Since he was not exercising a

[19] User since time immemorial also gives a good title, under civil law as under the common law. It has been suggested that it follows that prescription gives a right to arms: W. Paley Baildon, "Herald' College and Prescription" (1904) 8 The Ancestor 113; Anon, "The Prescriptive Usage of Arms" (1902) 2 The Ancestor 40, 47. Squibb has pointed to the flaws in these views. Use of arms never gave right, and was only ever evidence of immemorial use: G.D. Squibb, *The High Court of Chivalry* (1959) 179-185.

[20] For the Law of Arms this was from 1066, rather than 1189, as for the common law, see Squibb, ibid, 180-181 n 3. The Court was prepared however to accept that evidence of user from before the time of living memory raised a presumption that the user had continued for the necessary period: Squibb, ibid, 183; cf *Angus v Dalton* (1877) 3 Q.B.D. 85, 89-90 per Lusk J.

[21] It has always been assumed that this is the prerogative of the English Crown: *Strathmore Peerage Case* (1821) 6 Pat. 645, 655 (H.L.). This was argued by Dr William Oldys, King's Advocate, in pleadings before the Court of Chivalry from 1687: G.D. Squibb, *The High Court of Chivalry* (1959) 183-184.

[22] The jurisdiction of the pre-heraldic Court of Chivalry to decide dispute to arms was based on the Law of Arms, not the royal prerogative. This was reinforced by the exclusive jurisdiction of the Court of Chivalry to determine the right to arms: *Scroop v Grosvenor* (1389) Calendar of Close Rolls, Ric. II, vol. 3, 586.

[23] *Scroop v Grosvenor*, ibid, established that the Crown had supreme control and jurisdiction over armorial bearings, and could and did grant arms. From 1467 the right of the Crown to issue patents of arms was explicitly asserted. However, until late in the fourteenth century at least, the English royal heralds themselves had no control over the design of arms, or who bore them, being responsible only for recording and identifying the various coats of arms.

[24] Executive Authority (External Relations) Act 1936.

[25] 17 Geo V c. 4 (U.K.).

function of Irish law, his actions were not inconsistent with the Statute of Westminster 1931, or of Irish law. Ulster King of Arms may no longer have been acting on behalf of the King of Ireland, but his status as a corporation sole survived the constitutional changes, in accordance with general principles of official succession.

Though probably irregular, the grants after 1936 were probably valid. This is because citizens of Ireland continued to be treated, in British law,[26] and also in Irish law,[27] as if they were subjects of the Crown. This remained true at least until 1949,[28] in British law, and at least until 1943 in Irish law, and possibly as late as 1949.[29] Given that Ulster King of Arms was acting in a "private capacity" following the enactment of the 1936 Act, it might be thought that the basis for his operation (his Letters Patent of appointment) require some recognition by the government of the Irish Free State, in accordance with s. 1(1) of the Adaptation of Charters Act 1926, in order that his actions would have the full force of law in the State. However, as he remained an officer of the King of the United Kingdom, his actions were valid in accordance with the rules of conflict of laws, as a "foreign" executive act. The common law of Ireland did not, in any event, apply the Law of Arms,[30] though the Courts would take judicial notice of the Law of Arms as part of the law of the land, though not of the common law.[31]

This means that Irish domiciled men and women had the rights of British subjects, which included the right to a grant of arms. Ulster King of Arms – and from the death of Wilkinson in 1940, Deputy Ulster – was therefore quite within his authority to confer arms upon Irish citizens at this time. The royal prerogative was not transferred or assigned to the Irish government in 1936 or 1937, but continued to be lawfully exercised by the King of Arms, as agent of the King of the United Kingdom. Grants made by Ulster King of Arms from 1937 to 1943 were therefore lawful, if constitutionally unusual or irregular.

Exercising the Royal Prerogative in the Irish Free State without the expressed authority of the government of the Irish Free State would appear to have been contrary to the spirit, if not the

[26] See *Murray v Parkes* [1942] All E.R. 123 (H.L.).
[27] *The State (Burke) v Lennon* [1940] I.R. 136; *McGimpsey v Ireland* [1990] I.R. 110.
[28] British Nationality Act 1948 (11 & 12 Geo. VI c 56 (U.K.).
[29] Republic of Ireland Act 1948 (U.K.).
[30] *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133 per Lord Goddard.
[31] *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

letter, of the Statute of Westminster Act 1931 and the Irish Acts of 1936, inasmuch as the King had no domestic function save on the advice and authority of the government of the Irish Free State. This would also appear to be the case irrespective of the British view that the Irish were still "subjects of the Crown", even after the enactment of the Irish Nationality and Citizenship Act 1935. However, the position of both governments appears to have been to allow Sir Nevile Wilkinson to continue to operate, without being overly concerned about the basis of his authority to act. There was at least a de facto recognition by the Irish Government of Ulster's role.

While this was somewhat anomalous, it was probably inevitable in the circumstances. Unfortunately, any official recognition of the irregularity of the situation in 1936 did not result in any more satisfactory arrangement being made in 1943. Indeed, the establishment of the Genealogical Office was to compound the difficulties, since there no longer remained the arguable authority which the royal prerogative provided at least until 1936 and probably until 1943. In a new de jure republic the basis of the law of arms ought probably to have been enshrined in statute, or at least made explicit in regulations. Unfortunately more immediate political and other concerns allowed this to occur. The Genealogical Office cannot have continued to operate under the same legal authority as Ulster King of Arms did 1936-43, since the royal prerogative no longer applied, nor was the Genealogical Office an office of the King – who remained an official of the Irish State, for certain purposes, until 1948.

From 1936 to 1997 there were no substantive changes in legal arrangements, other than the creation of the Genealogical Office, ostensibly to replace Ulster Office. The National Cultural Institutions Act 1997 made specific provision for the granting of arms. While the authority based on this has been doubted, the Attorney-General expressed his opinion that the National Cultural Institutions Act 1997 did provide sufficient authority for the granting of arms by the Board of the National Library of Ireland. The purpose of the Act was undoubtedly to bring the powers and functions of the Genealogical Office into the National Library of Ireland ("for the avoidance of doubt", since this had already been done by the Allocation of Administration (Genealogical Office) Order 1943). But since the powers to grant arms did not exist from 1943 to 2005 (when section 13 was brought into effect, and as the Attorney-General conceded), the implementation of the new Act could not create such a power, unless clearly and expressly stated.

It is now widely recognised that the power to grant arms prior to the implementation of the 1997 Act in May 2005 was absent, but the Government continues to claim that the 1997 Act provided sufficient authority post-2005. But it must be questioned whether this can be so. The granting of arms was suspended from February 2007 to October 2007,[32] due to these doubts, but uncertainty must remain as to the status of all grants made since 1943, if not indeed before then.

Subsection 2 of section 13 of the National Cultural Institutions Act 1997 is crucial. It states that:

> —(2) The Board shall, from time to time as occasion requires, designate a member of its staff to perform the duty of researching, granting and confirming coats of arms and such member shall use the appellation Chief Herald of Ireland or, in the Irish language, Príomh-Aralt na hÉireann while performing such duties.

This appears to confer an express authority to grant arms, and this would seem to be the interpretation adopted by the Attorney-General. However, the "duty" of "researching, granting and confirming coats of arms" is assigned, but no express authority is stated for the power to grant or confirm arms. This is perhaps a slight distinction, but is nonetheless legally significant – especially so in light of the prior confusion over heraldic authority, and its probable absence prior to 2005.

The original wording of section 13, when a Bill, not merely dis-established and restored the Genealogical Office as a new institution within the National Library, but also provided (in s 13(2)) that "the Board of the Library shall, in relation to the functions assigned to it by section 12, perform the functions heretofore performed by the Genealogical Office including the duty of granting and confirming coats of arms under the style of heraldry." This clearly indicates that the source of the granting and confirming authority lay, not in section 13, but in section 12.

[32] Minister's Statement to Dáil Éireann 25th October 2007.

The limitation in the wording in s 13(2) is echoed in s 12, which describes the functions of the Board of the National Library of Ireland. This provides, inter alia, that:

> (2) The Board shall have all such powers as it considers necessary or expedient for the performance of its functions under this Act including, but without prejudice to the generality of the foregoing, the following powers:
>
> > (*c*) to facilitate, encourage, assist and promote the granting and confirming of coats of arms,

This could be the requisite source for authority to grant or confirm arms – and should be, were the section drafted more carefully and with greater awareness of the preceding controversy over heraldic powers. However, it does not expressly authorise the granting of arms. The provision "such powers as it considers necessary or expedient for the performance of its functions" is insufficiently precise, being too broad. Indeed section 12 seems to suggest that the ultimate authority for grants lies elsewhere than in the hands of the Board of the National Library of Ireland. The expression "facilitate, encourage, assist and promote" could describe the role of an independent heraldic agent, and is insufficiently clear as a source of authority to grant arms. The section as originally drafted did not even mention heraldry or coats of arms, which was ever more unsatisfactory.

As suggested in my paper, "The Law of Arms of Ireland – a lingering question of authority" (2006) 7(2) Journal of the Genealogical Society of Ireland 75-103,[33] s 12(2) could be amended as follows (new text in italics):

[33] See also "The Office of the Chief Herald of Ireland and continuity of legal authority" (2007) 29 Dublin University Law Journal 84-110; "Commonwealth Heraldic Jurisdiction: with specific emphasis on the Law of Arms in New Zealand" (2005) 1(210) The Coat of Arms (3rd series) 145-162; "The Law of Arms in New Zealand" (1998) 18(2) New Zealand Universities Law Review 225-256; "The legal status of grants of arms by Ulster King of Arms 1936-43" (2007) 2(12) Ireland's Genealogical Gazette 4 [reprinted in (2007) 8 Journal of the Genealogical Society of Ireland 71-73]; "The Continuing Saga of Sections 13 and 13 of the National Cultural Institutions Act 1997" (2007) 2(11) Ireland's Genealogical Gazette 4 [reprinted in (2007) 8 Journal of the Genealogical Society of Ireland 74-76].

(2) The Board shall have all such powers as it considers necessary or expedient for the performance of its functions under this Act including, but without prejudice to the generality of the foregoing, the following powers:

> … (*c*) *to grant and confirm coats of arms in accordance with the Law of Arms of Ireland*, …

The expression "the Law of Arms of Ireland" is preferable to, for instance, "the customs and practices of heraldry" because it is referring not merely to the rules which apply to the design and use of heraldry, but also to the authority under which the arms are to be granted.

Section 13 could become

> **13.**—(1) For the avoidance of doubt, it is hereby declared that the Genealogical Office is a branch of the Library*, and is the successor in law to all the rights, privileges, powers and immunities of the Office of Ulster King of Arms as existed prior to 1st April 1943, and for the further avoidance of doubt the Genealogical Office shall be deemed to have existed since 1st April 1943 and to have enjoyed the said rights, privileges, powers and immunities without interruption since that date*.

Although the office came into existence in 1943, there is an additional possible difficulty inherent in the wording of s 13 proposed earlier. The date 1st April 1943 is of course after the advent of the constitutional changes in Ireland. An additional clause would therefore be desirable, since Ulster King of Arms was acting in a quasi-private capacity between 1936 and 1943 – or at the very least was responsible to the King of the United Kingdom rather than to the King of Ireland. Strictly speaking this isn't legally necessary, but given the problems which surround Irish heraldic law, greater clarity is certainly desirable. It is desirable to also revise the wording of clause (1) to address the issue of Norroy and Ulster also being the successor to Ulster. Section 12(2) would contain the basis of authority for modern grants, so arguably the "inherited authority" problem is avoided – while at the same time validating (if this is necessary) all prior grants.

13.—(1) For the avoidance of doubt, it is hereby declared that the Genealogical Office is a branch of the Library*, and is the successor in law to all the rights, privileges, powers and immunities of the Office of Ulster King of Arms as existed prior to 31st December 1936* ***in right of Ireland****, and for the further avoidance of doubt the Genealogical Office shall be deemed to have existed since 1st April 1943 and to have enjoyed the said rights, privileges, powers and immunities without interruption since that date*.

(1A) For the further avoidance of doubt, it is hereby enacted that any grants or confirmation of arms or other acts by Ulster King of Arms from 12th December 1936 to 1st April 1943 shall be deemed to be valid for all purposes in the Law of Arms of Ireland.

This provision would ensure that the grants of arms made prior to 2005 would be valid. The establishment of the Genealogical Office in 1943 was without legislative authority – and it seems without regulations either. The Allocation of Administration (Genealogical Office) Order 1943,[34] under the Ministers and Secretaries Act 1924 (and the later Ministers and Secretaries (Amendment) Act 1939), simply stated that "The administration and business of the Genealogical Office are hereby allocated to the Department of Education". The Office was certainly an office of state, both before and after 1943, but the source of its authority was uncertain.

Problems of national identity remain. There is an apparent element of continuity even where no legal continuity may have in fact existed. There is a curious custom in legislative drafting to state that an institution is completely new, but inherits the powers, authority etc of a previous body – even in cases where the successor body is really the same one, rejuvenated. In 1943 Ulster, an imperial officer, was replaced. The Genealogical Office was not a "republican" office, but really an administrative replacement for Ulster Office. The Office was not created by the Allocation of Administration (Genealogical Office) Order 1943,[35] but the absence of a foundation document did not mean that it lacked authority – if it inherited the powers and functions of Ulster King of Arms.

[34] S.O. 267/1943.
[35] S.O. 267/1943.

Norroy and Ulster may be, in English law, the successor to Ulster, but that doesn't necessarily mean that the Irish heraldic authority cannot also be the successor. This is mirrored in the rule of state succession, which recognises, for instance, that obligations assumed by one country under treaty becomes the responsibility of a new state subsequently created (as by independence being granted to a colony, or by secession). This succession extends to individual offices of state. There are advantages, from a nationalist perspective, of claiming to be the successor of Ulster King of Arms, despite Norroy and Ulster being also regarded as this.

If the legal continuity is emphasised then there is less likelihood of doubts being raised about the legality of previous grants of arms. If continuity is not emphasised then the best option would be to make a clear statement that grants by Ulster prior to 1943 were and remain valid, and those since 1943 by the Genealogical Office are equally valid. There is nothing unusual in legislation asserting that the 1936-43 grants were lawful, even though it is doubtful that they were in fact lawful – which is why legislative intervention would be required.

From 1552 to 1943 Ulster King of Arms granted arms in Ireland, but the basis of his authority changed over time, as did that of the Genealogical Office, in 1552-1801, 1801-1922, 1922-36, 1936-37, 1937-43, 1943-49, 1949-2005, and since 2005. Because of this it is inevitable that some uncertainty exists.

The legal basis of authority to grant arms can be clarified readily enough, but questions remain. What was acceptable in 1943 was not necessarily politically acceptable in later years. Part of this is related to the question of the nature of arms – as honours or dignities, or otherwise. Article 40.2.1 of the Constitution of the Republic of Ireland prohibits the conferral of titles of nobility by the State, and Article 40.2.2 prohibits acceptance by any citizen of any title of nobility or of honour, without the prior approval of the government. The Constitution does not prohibit the granting of honours, other than nobility, by the State. Arms are not, however, nobility – at least not in the Law of Ireland. The place of the Genealogical Office previously recognizing chiefs is a different and highly contentious matter.

In England, and by extension Ireland, a grant of arms does not ennoble a grantee in any sense, except that an armiger (one who has the right to bear arms) is deemed to be of the status of a

gentleman.[36] He may of course be of higher rank, as esquire, knight, peer, or prince, but the grant of arms does not, in Ireland or England, confer social rank.[37] In Scotland (at least until now) a coat of arms is a fief annoblissant, similar to a Scottish territorial peerage or barony,[38] the grant of which provides, as every Scottish patent of arms states, that the grantee is a "noble of the noblesse of Scotland".[39] But the Irish law of arms, like the English, didn't see arms as noble per se, and certainly not as titles of nobility (and thus contrary to the 1937 Constitution).

Grants prior to 1943 (or 1936) were from the Crown, but only because the Crown had a monopoly. This wasn't necessarily incompatible with a "republican" regime, where the Chief Herald of Ireland assumes the role of King of Arms, on behalf of the State (in place of the Crown). This may have been legally questionable – in the absence of a delegation of the royal prerogative, or of legislative or other act. However, the state can, in some situations, assume powers without legislative or apparent constitutional base. There is in fact a third source of authority.[40] The Crown – or in this case, the Chief Herald of Ireland, acting as an organ of the government of Ireland (after 1949, of the Irish Republic) – has the same powers of a natural person to assign property, or create legal rights. It is likely, in fact, that the government believed that a proper delegation or assignment of the powers and functions of Ulster King of Arms had in fact occurred – and it was merely misfortune that this was not the situation.

The key is that the sovereign authority regulates grants. This should continue to be the case. While there is a tradition, in some countries, of assuming arms, the disordered state of Irish heraldry renders it inappropriate to adopt this innovation at this time.

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[36] See, for example, A.C. Fox-Davies, *A Complete Guide to Heraldry* (1985) ch. 2. This has not however always been the case. As the phraseology used in early English grants show, they were in effect ennoblement, the insular equivalent of the grants of nobility by letters patent which were common on the continent, particularly in France: Robert H. Lucas, "Ennoblement in late mediæval France" (1977) 39 Mediæval Studies 239-60.

[37] Gayre mistakenly believed that Lord Goddard's acceptance that coats of arms were a dignity must mean that they are a nobiliary rank: Robert Gayre of Gayre and Nigg, *The Nature of Arms* (1961) 58-59. The possession of armorial bearings is intended more as a recognition of an established status, rather than a means of improving social status. Although the right to bear arms must be regarded as a dignity since it depends upon the exercise of the royal prerogative, it would be a mistake to assume that this in any way makes it an honour.

[38] *Maclean of Ardgour v Maclean* 1941 S.C. 683, line 35, reaffirming *M'Donnell v M'Donald* (1826) 4 Shaw 371. Since Lyon King of Arms Act 1672 (24 Chas. II c. 47) (Sc) all arms in Scotland are regarded as incorporeal heritage: Sir Thomas Innes of Learney, *Scots Heraldry* (1978) 13. Ownership of heritage makes the owner a feudal vassal of the Crown: *Haldane v York Building Co* (1725) Rob. 521.

[39] The wording used in the letters patent of Lord Lyon granting armorial bearings are "by demonstration of which Ensigns Armorial he and his successors in the same are, amongst all Nobles and in all Places of Honour, to be taken, numbered, accounted and received as Nobles in the Noblesse of Scotland".

[40] Bruce Harris, "The 'Third Source' of Authority for Government Action" (1992) 109 Law Quarterly Review 626.

Proper reform would have to be enacted by parliamentary legislation. It would be possible to register all grants by the Genealogical Office and Ulster King of Arms for any period, and have them deemed to be valid. But a clear statement that grants are valid would be preferable. Unless it is stated that the Genealogical Office has authority to grant arms, it must be assumed that its authority is inherited – and it is thus derived from Ulster's inherent or delegated authority, with the implication of inheritance from the Anglo-Irish establishment which that implies. Since Ulster King of Arms authority did not survive after 1936, it cannot have passed to the Genealogical Office in 1943 – though the outward symbolism of the office could, and did. The nature of arms need not – indeed should not – change, but the authority of the State to maintain a monopoly on the granting of arms ought to be clarified.

Pre-May 2005 grantees face the difficult prospect that their arms may remain in legal limbo indefinitely. Only legislative action can satisfactorily resolve this difficulty. It is possible that a cause of action could be mounted for breach of contract. This would be on the grounds that the Chief Herald failed to provide the goods or services for which the applicant paid. It is arguable that a grant is arms is just that, a grant, and not subject to contract law. The courts may also argue that although arms have legal standing,[41] and are a form of property, as incorporeal and impartible hereditaments,[42] inalienable, and descendible according to the Law of Arms,[43] they nevertheless do not have the jurisdiction to hear a claim. An action in negligence, or even misfeasance in public office, is also possible, but not promising.[44] In any event, the cost of a grant is insufficiently great to justify the high cost of court action against the National Library of Ireland, as the agency responsible for the Genealogical Office and the Chief Herald of Ireland since 1943. Nor can the Board of the National Library deny liability on the basis of being a newly constituted body, as the statutory arrangements clearly were

[41] *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133 per Lord Goddard. As early as *Scroop v Grosvenor* (1389) Calendar of Close Rolls, 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.

[42] For a discussion of corporeal and incorporeal property, see Noel Cox, "The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand" (1997) 17 New Zealand Universities Law Review 379.

[43] Arms descend, with due and proper differencing, in the first instance to male descendants of the grantee, and then through females as heraldic heiresses in the event of the failure of the male line, as quarterings: *Wiltes Peerage Case* (1869) LR 4 HL, 126, 153 per Lord Chelmsford.

[44] "*Black v Chrétien*: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence" (September 2002) 9(3) E-Law, Murdoch University Electronic Journal of Law available at <http://www.murdoch.edu.au/elaw/issues/v9n3/cox93.html>; "*Three Rivers District Council v The Bank of England*: The collapse of BCCI and misfeasance in public office" (Academy of Legal Studies in Business 2001 Annual Conference, Albuquerque, New Mexico, USA, 7th-11th August 2001).

intended to maintain an element of legal continuity, of the sort described earlier. Political pressure, aimed at achieving a statutory solution, is however vital.