

THE LAW OF ARMS IN NEW ZEALAND

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I. 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 Arms¹. Uncertainty has also been expressed as to the validity of grants of armorial bearings to subjects of the Queen in Australia, New Zealand, Canada, and her other realms and territories². These debates have however tended to not 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 force³. In particular, this involves an examination of the judicial and executive aspects of the Law of Arms.

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.

Bearing and using arms, variously styled coat armour, armorial bearings, arms, or coats of arms, is a legally enforceable right. Although their original function was to enable knights to identify each other on the battlefield, they soon acquired wider, more decorative uses. They are still widely used today by countries, public and private institutions and by individuals. The law which governed their use was called the Law of Arms, or the laws of heraldry. The officials who administer these arcane matters are styled pursuivants, heralds, or kings of arms, depending upon their seniority.

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 herald. Whether these latter grants are proper is a matter which deserves some attention.

In England the regulation of heraldry fell to the Court of Chivalry, the Court of the Lord High Constable and the Earl Marshal of England, as this was the body responsible for the regulation of matters of honour. That these matters now, and for several centuries have been entirely heraldic, is an accident of history⁴. Nor must it be thought that the jurisdiction of the

¹The principal Scottish herald and head of the Court bearing this title.

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

³According 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: Agnew of Lochnaw, *supra* n 2.

⁴G D Squibb, *The High Court of Chivalry* (1959) xxv-xxvi.

Law of Arms has always been concerned, as it is today, only with coats of arms and other heraldic matters⁵.

However, disputes over the use of arms after 1389 took two main forms, those in which the defendant was alleged to have taken the arms of another person⁶, and those in which he was alleged to have used arms wrongfully without infringing the rights of another⁷. Sometimes the fabrication of coats of arms, and sometimes the use of armorial insignia, such as supporters, to which the defendant was not entitled, was the cause of action⁸.

There was no doubt that there was a law governing such matters, but what then was the nature of this law?

II. 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 Crown⁹. The power to grant armorial bearings is delegated by the Crown to the kings of arms¹⁰. However, even within the British Isles there are three or perhaps four distinct types of arms- Scottish, English, Irish and possibly, Northern Irish¹¹. 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 such¹². These dignities, as they are called, have legal standing¹³. But the Law of Arms is not part of the common law¹⁴ and the common law Courts have no jurisdiction over matters of dignities and honours¹⁵, such as armorial bearings¹⁶, or peerages¹⁷. In this respect the Law of Arms may be regarded as

⁵It once covered prisoners of war: *Totesham v Garenses* (1351), cited in Squibb, *ibid*, 166 n 6; and appeals of treason: "solonc la ley & usage d'armes", *Rotuli Parliamentorum* iii 604.

⁶For example, *St George v Tuckfield* (1637) Reports of Heraldic Cases in the Court of Chivalry 24; *Prust v Saltren* (1637) Reports of Heraldic Cases in the Court of Chivalry 25.

⁷Though the only case in which an undoubtedly armigerous defendant was accused of misusing arms was *Oldys v Fielding* (1702) Reports of Heraldic Cases in the Court of Chivalry 102.

⁸Squibb, *supra* n 4, 138.

⁹As in *Halsbury's Laws of England* (3rd ed, 1960) vol 29, 239-270.

¹⁰The Crown's prerogative as fount of honour remains exercisable personally by the Sovereign.

¹¹The position of Ulster grants is considered in Sir Christopher Lynch-Robinson & Adrian Lynch-Robinson, *Intelligible Heraldry. The application of a Mediæval System of Record and Identification to Modern Needs* (1948) 112-113. 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, *supra* n 2, 62.

¹²*Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

¹³*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.

¹⁴*R v Parker* (1668) 1 Sid 352; 82 ER 1151 per Keeling CJ.

¹⁵*Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133 per Lord Goddard.

¹⁶*Duke of Buckingham's Case* (1514) Keil 170; 72 ER 346.

similar to the ecclesiastical law, which is a part of the laws of England, but not part of the common law¹⁸.

The exclusive jurisdiction of deciding rights to arms, and claims of descent, was vested in the Court of Chivalry¹⁹. As the substance of the common law is found in the judgments of the common law Courts, so the substance of the Law of Arms is to be found in the customs and usages of the Court of Chivalry²⁰. The procedure was based on that of the civil law, but the substantive law was recognised to be English, and peculiar to the Court of Chivalry²¹.

However, unlike the ecclesiastical law, which continues to be administered by a range of ecclesiastical Courts²², there is now no regularly constituted Court in which the Law of Arms is administered, the High Court of Chivalry being obsolescent. Because the Court of Chivalry is now inactive, it is in the old decisions of that Court, and in the practices, ancient and modern, of the heralds, that we must look for the substance of the Law of Arms in England.

Although the common law Courts do not regard coats of arms as either property or as being defensible by action, armorial bearings are a form of property nevertheless, generally described as *tesserae gentilitatis* or insignia of gentility. Armorial bearings are incorporeal and impartible hereditaments²³, inalienable, and descendable according to the Law of Arms²⁴. Generally speaking, this means they are inherited by the male issue of the grantee, though they can be inherited by the sons of an heraldic heiress, where there is no surviving male heir.

In England 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 gentleman²⁵. He may of course be of higher rank, as esquire, knight, peer, or prince, but the grant of arms does not, in England, confer social rank²⁶.

¹⁷*Earl Cowley v Countess Cowley* [1901] AC 450 (HL).

¹⁸*Bishop of Exeter v Marshall* (1868) LR 3 HL 17.

¹⁹*Scroop v Grosvenor* (1389), supra n 13. The Court of Chivalry is the subject of a chapter by Sir Edward Coke, *Coke upon Littleton* (1979) vol 4, ch 17.

²⁰*Puryman v Cavendish* (1397) Close Rolls 21 Ric II p 1 m 5. The opinion among lawyers is good evidence of what the law is: *Isherwood v Oldknow* (1815) 3 M & S 382, 396; 105 ER 654 per Lord Ellenborough; applied in *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440, 448 per Lord Goddard.

²¹Cases were tried *secundum legem et consuetudinem curie nostre militaris*: *Puryman v Cavendish* (1397) Close Rolls 21 Ric II p 1 m 5. This was recognised by the common law Courts: *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

²²Now largely governed by the Ecclesiastical Jurisdiction Measure 1963 (UK).

²³For a discussion of corporeal and incorporeal property, see 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 NZULR 379.

²⁴Arms 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.

²⁵See, for example, AC 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: Lucas, "Ennoblement in late mediæval France" (1977) 39 *Mediæval Studies* 239-60.

²⁶Gayre 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*

The Law of Arms as understood in Scotland consists of two principal parts, the *rules* of heraldry (such as blazoning²⁷), and the *law* of heraldry²⁸. In contrast to the position in England, the Law of Arms is a branch of the civil law²⁹. A coat of arms is incorporeal heritable property, governed, subject to certain specialities, by the general law applicable to such property. The possession of armorial bearings is therefore unquestionably a question of property³⁰. The misappropriation of arms is a real injury, actionable under the common law of Scotland³¹.

A coat of arms is a fief annoblissant, similar to a Scottish territorial peerage or barony³², the grant of which provides, as every Scottish patent of arms states, that the grantee is a "noble of the noblesse of Scotland"³³.

While the degree to which the general law recognises arms differs, in both England and Scotland a grant of arms confers certain rights upon the grantee and his (or her) heirs³⁴, even if they may not be easily protected. No person may lawfully have the same coat of arms as another person in the same heraldic jurisdiction³⁵. Arms may not be assumed or changed at will³⁶.

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.

²⁷The technical description of a coat of arms, written in the peculiar patois of the heraldist.

²⁸It is said that Lord Lyon has authority to prescribe new heraldic rules if the Laws of Arms are deficient: Act in favour of the Lyon King of Arms against painters, goldsmiths and others who issue coats of arms to persons not privileged to wear them: Registers of the Privy Council of Scotland, 2nd Series, vol 3,594. It is, however, not clear that this was intended to cover the laws of arms or merely the rules of heraldry. The latter is more likely.

²⁹More correctly, of the old common law of Scotland: *Macrae's Trustees v Lord Lyon King of Arms* [1927] SLT 285.

³⁰*M'Donnell v M'Donald* (1826) 4 Shaw 371, 372 (NS 374, 376) per Lord Robertson.

³¹*Royal Warrant Holders v Alexander & Co* 21 March 1933 Scotsman 22 March (Lyon Court).

³²*Maclean of Ardgour v Maclean* 1941 SC 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.

³³The 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".

³⁴Compare Sir Anthony Wagner, *The Work of the College of Arms, III: Searches for Arms* (undated) 1, and Innes of Learney, *Scots Heraldry* (1956) 95-96, 99.

³⁵In England a person can have only one coat of arms, although this rule does not apply in Scotland: J Dallaway, *Inquiries with the Origin and Progress of the Science of Heraldry in England. With explanatory observations on armorial ensigns* (1793) 368.

³⁶G D Squibb, *The Law of Arms in England* (1967); Innes of Learney, *supra* n 32, 77-79.

The absence of a remedy for the illegal usurpation of arms in the law of England does not mean that there are no rights infringed, merely that it not within the jurisdiction of the common law Courts to act³⁷. But how then do armigers acquire arms in the first place?

III. THE LEGAL PROTECTION FOR COATS OF ARMS

In general, the right to bear coats of arms seems throughout the middle ages to have been analogous to the laws which governed the descent of fiefs, though clear rules only developed late³⁸. The *Boke of St Alban*³⁹ (1486) mentions four grounds on which a man might claim title to arms. These were inheritance, tenure of a particular fee or office, grant by a lord or prince, and capture from an enemy in battle⁴⁰. However, it was a rule of the mediæval civilians that titles and matters of honour and dignity were ordered according to the customs of the every particular country⁴¹. These grounds might therefore not apply in all countries.

Mediæval writers generally believed that, in some circumstances at least, one could assume arms⁴². 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 before⁴³. This principal was adopted by Nicholas Upton, in his *De Studio Militari*⁴⁴. According to Upton, arms were assumed in England as late as the fifteenth century⁴⁵. This belief passed into wide circulation by the publication of the *Boke of St Alban*⁴⁶.

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 arms⁴⁷. Johannes De Bado Aureo⁴⁸ wrote in his *Tractatus de Armis*⁴⁹ (1360) that

³⁷The Oath which Kings of Arms took reflected their role as arbiters of heraldry, even before they acquired exclusive authority to grant arms. This may be seen in *the Statutes and Ordinances to be kept in time of Werre*, purported to date from the 27th day of February of the ninth year of the reign of Richard II, reprinted by Sir Travers Twiss (ed), *The Black Book of the Admiralty* (1965) Rolls Series vol I, 296, from the Lincoln Inn mss, no xlvi (volume named *Liber Niger Admiral. Leg. Exerc. Nobilis*).

³⁸M Keen, *Chivalry* (1984) 129.

³⁹W de Worde (ed), d, VII-VIII.

⁴⁰The latter ground being very rarely found, and all known examples are from a late period, the earliest being by the Black Prince from King John of France, at Poitiers: Keen, *supra* n 38, 129-130.

⁴¹Gayre of Gayre and Nigg, *supra* n 26, 58-59; Squibb, *supra* n 4, 164; A Collins, *Proceedings, Precedents and Arguments on Claims and Controversies Concerning Baronies By Writ* (1734) 63.

⁴²The practice of assuming armorial bearings has continued, at least as regards burger arms, in a number of countries, such as Switzerland.

⁴³"De Insigniis et Armis", printed in Jones (ed), *Mediæval Heraldry; Some fourteenth century heraldic works* (1979) 224-52; *Scroop v Grosvenor* (1389), *supra* n 13.

⁴⁴F P Barnard (ed), *The Essential Portions of Nicholas Upton's De Studio Militari before 1446* (1931) (trans J Blount) 48.

⁴⁵*Ibid.*

⁴⁶Wynkyn de Worde (ed), d, VII-VIII, reprinted in Dallaway, *supra* n 35, App V, cxii.

⁴⁷See 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.

⁴⁸He has been identified as John Trevor, Bishop of St Asaph; Squibb, *supra* n 4, 178-179.

arms could be granted by other people than sovereigns, and, indeed, in the fourteenth century arms were frequently granted by a lord to his followers⁵⁰. Private heralds, men learned in the art and science of heraldry, occasionally, though not universally, also included the granting of arms among their responsibilities⁵¹.

Upton's assertion that arms could be assumed at will was directly contradicted by John Ferne in 1586⁵². It is now accepted that it is illegal to assume arms⁵³. Nor do private individuals grant arms any longer. The mere assumption of arms cannot itself establish a legally defensible title according to the laws of England⁵⁴. Arms could only be validly borne if acquired by right of birth (from a grant, or user from before the time of legal memory⁵⁵), or grant from the Crown⁵⁶.

In England (and Scotland) the Crown's exclusive prerogative prevailed, as it did in many, though not all, European countries⁵⁷. 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 matters⁵⁸.

⁴⁹Printed in E Jones (ed), *supra* n 43.

⁵⁰. 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.

⁵¹Richard Strangways' unpublished *Tractatus nobilis de lege et expositione armorum*, written in the 1450s, argued that arms might be granted by a herald or pursuivant: BM Harl ms 2259 f 109b, cited in Squibb, *supra* n 4, 179 n 3.

⁵²*Blazon of Gentry* (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.

⁵³*Austen v Collins* (1886) 5 LT 903.

⁵⁴User 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: 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: Squibb, *supra* n 4, 179-185.

⁵⁵For 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 QBD 85, 89-90 per Lusk J.

⁵⁶It has always been assumed that this is the prerogative of the English Crown: *Strathmore Peerage Case* (1821) 6 Pat 645, 655 (HL). This was argued by Dr William Oldys, King's Advocate, in pleadings before the Court of Chivalry from 1687: Squibb, *supra* n 4, 183-184.

⁵⁷The 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), *supra* n 13.

⁵⁸*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.

The kings of arms and heralds were incorporated by letters patent in 1484, as the Corporation of the Kings, Herald and Pursuivants of Arms⁵⁹. The College itself has no authority, and the armorial prerogative is exercised by individual kings of arms and heralds, subject to the authority of the Earl Marshal, who authorises each individual grant, by warrant.

The prerogative to grant arms is exercised in New Zealand by the deputy to Garter King of Arms, the New Zealand Herald of Arms Extraordinary to Her Majesty The Queen⁶⁰. These are the ministers of the Crown in relation to the Law of Arms, but what of the Court in which that law is administered?

IV. THE COURT OF CHIVALRY

The High Court of Chivalry, the Court Military of the Earl Marshal⁶¹ and the only surviving civil law Court in England⁶², originally exercised both criminal and civil jurisdiction⁶³. However, the common law was not within the cognisance of the Court of Chivalry, and the law administered by the Court, at least from the time of Edward III⁶⁴, was the Law of Arms, or marshal law, founded on the civil law.

The Court de Chivalrie, or Curia Militaris, should not, however, be confused with the Courts military, although this is the common translation of the name of the Court of Chivalry. Court of Knighthood more accurately reflects its role⁶⁵.

It has generally been assumed that statutes and ordinances of war were enforced in the Court of Chivalry⁶⁶, and that modern Courts martial were instituted on account of the inadequacies of the Court of Chivalry⁶⁷. The Court of Chivalry however was never the Court in which military law was administered, but was a permanent Court, dedicated to deciding matters touching upon honour.

It is in the civil jurisdiction of the Court of Chivalry that the Law of Arms relating to armorial bearings was administered. The Court sat as a Court of honour, and its jurisdiction consisted in redressing injuries of honour and correcting encroachments in matters of coat

⁵⁹On the death of King Richard III his acts were declared void, and the College of Arms received a new charter in 1556. However, the existence or absence of legal authority for the collegiate government of the College did not affect the heraldic jurisdiction of the individual Kings of Arms and heralds.

⁶⁰See *infra* p 240.

⁶¹The Earl Marshal, an office hereditary in the family of the Duke of Norfolk, was deputy to the Constable. The latter office is now dormant except for coronations.

⁶²See Squibb, *supra* n 4. However, the substance of the canon law administered by the ecclesiastical Courts of the Church of England is strongly influenced by the civil law: Statutes, Decrees and Regulations of the University of Oxford (1973) tit. IV s xiii, 4; Rules of the Vice-Chancellor's Court, rule 21.

⁶³The early pleas of arms are few, and the reports scanty, except for the three great cases of the era: *Scroop v Grosvenor* (1389), *supra* n 13; *Lovel v Morley* (1386); and *Grey v Hastings* (1410). The latter two cases are cited by Sir Anthony Wagner, *Heraldry in England* (1946) 14-15.

⁶⁴Keen, "Treason Trials under the Law of Arms" (1962) 12 Transactions of the Royal Historical Society 85.

⁶⁵See Squibb, *supra* n 4, 2-12.

⁶⁶As, for example, in *R v Nelson & Brand* (1867) Special Report (2nd ed) 92 per Cockburn CJ. This belief does not, however, appear to date from before Hale: Sir Matthew Hale, *History of the Common Law* (3rd ed, 1739) 38-39.

⁶⁷Sir William Holdsworth, *A History of the English Law* (1956) vol 1, 576.

armour, precedency, and other distinctions of families. These and kindred matters of honour were not within the jurisdiction of the ordinary Courts of law⁶⁸, but were within the jurisdiction of the Court of Chivalry by prescription⁶⁹. This jurisdiction was limited by two statutes, 8 Ric II c 5 (1384) and 13 Ric II st 1 c 2 (1389), both intended to curb the Constable and Marshal.

After 1485, the Court of Chivalry was inactive, as its jurisdiction over contracts touching deeds of arms and of war out of the realm had been rendered obsolete by the replacement of indentured troops by the national militia as the principal military force of the country. Litigation of war within the realm ended with the end to the civil wars. The only jurisdiction left was the "other usages and customs" as defined by the Act of 1389, and appeals of crimes, other than treasons, arising outside the realm under a statute of 1399⁷⁰.

From 1521 to 1563 the Earl Marshal, and his deputies, and Commissioners appointed to exercise the jurisdiction of the office, appear to have purported to exercise the quasi-judicial jurisdiction over the College of Arms and the heralds, while the Court of Chivalry itself was inactive⁷¹. After the Civil Wars of the next century this quasi-judicial jurisdiction was again revived⁷².

The Court of Chivalry was revived again in 1687⁷³, but soon lost a great deal of business, when the common law Courts deprived the Court of Chivalry of all but a purely armorial jurisdiction⁷⁴.

The jurisdiction formerly also included actions for slander, but *Chambers v Jennings*⁷⁵ established that the Courts will not now permit the Court of Chivalry to entertain an action which is cognisable in the Courts of common law⁷⁶. There is, of course, no such common law jurisdiction over armorial bearings, nor, indeed, honours and precedence⁷⁷. However, this could not offer much help to a plaintiff if the Court of Chivalry were no longer sitting.

⁶⁸*Duke of Buckingham's Case*, supra n 16.

⁶⁹*Sturla v Freccia* (1880) 5 App Cas 623, 628. Pleas of arms were heard by the Court of Chivalry from at least as early as the fourteenth century, the first known case being a dispute between Nicholas Lord Burnell and Robert Lord Morley in 1348. See also *Scroop v Grosvenor* (1389), supra n 13.

⁷⁰1 Hen IV c 14 (Eng). See Squibb, supra n 4, 29-40. The criminal jurisdiction of the Court in appeals of treason and homicide were abolished by 59 Geo III c 46, though long since obsolete.

⁷¹Squibb, supra n 4, 39-40.

⁷²Royal declaration of 16 June 1673, confirmed by Order in Council 22 January 1674; College of Arms mss I 26 ff 55-56, cited in Squibb, supra n 4, 79-80. The Court itself, revived in 1622, had ceased to sit after 1641: Letters patent, 1 August 1622, College of Arms mss, SML 3 f 228, printed in Squibb, supra n 4, appendix III, 248.

⁷³Letters patent 13 August 1687, printed in Squibb, supra n 4, appendix IV, 240.

⁷⁴*Oldis v Dommille* (1696) Show PC 58; 1 ER 40; *Russell's Case (Oldys v Russell)* (1692) 1 Show KB 353; 4 Mod Rep 128; 87 ER 301. *Russell's Case* established that a private person was not punishable for making arms, ordering funerals without authority, or painting arms contrary to heraldry. This was because infringement of the herald's privilege gave rise to an action on the case, which could only be heard in a common law Court.

⁷⁵(1702) 7 Mod Rep 125; 87 ER 1139.

⁷⁶Both on the basis of 8 Ric II c 5 (1384) (Eng), and because of the jealousy of the common law Courts, encouraged by Sir Edward Coke in particular.

⁷⁷The King's Bench had held that the Court of Chivalry had jurisdiction over disputes as to precedence: *Ashton v Jennings* (1675) 2 Lev 133. Squibb could not identify any traces of the exercise of such a jurisdiction in the surviving records of the Court, though instances of such

After 1716 the Court was again in recess, though it enjoyed a brief revival 1732-37⁷⁸. But a Court of law does not cease to exist by falling into disuse⁷⁹.

The High Court of Chivalry has power to protect the lawful use of arms, but has been singularly inactive⁸⁰. Some legislative protection for certain categories of arms is provided however. In New Zealand ss 684 (1) (7) and 696 of the Local Government Act 1974, and the Flags, Emblems, and Names Protection Act 1981 both provide protection to some types of official arms. In the former case, the statute also empowers local councils to define their own coats of arms, an action which is tantamount to assuming legally valid arms. Neither statute has general application however, and there is no generally available legal protection for coats of arms.

The Court of Chivalry indeed awoke briefly from its slumbers in 1954 to decide the case of *Manchester Corporation v Manchester Palace of Varieties Ltd*⁸¹. The decision was not marked by any particular legal significance, but it did confirm the continued existence of the Court in England.

It might perhaps have thought that the New Zealand High Court would have the jurisdiction to enforce the Law of Arms in New Zealand, since it has assumed the full range of the varied jurisdictions of the English Courts. However, for this to be so, the jurisdiction would have had to have specifically bestowed by the Judicature Acts⁸². As will be seen, this was not done.

The jurisdiction of the New Zealand High Court has always been defined in respect of the jurisdiction as previously conferred upon the Court. This was originally defined in terms of the jurisdiction of Her Majesty's Courts at Westminster, Courts which administered the common law and equity, but not the Law of Arms⁸³.

The primary source of the jurisdiction of the High Court is statutory, now found in the Judicature Act 1908, especially s 16. This general jurisdiction can be traced through a series of statutes, from the original conferral of prerogative authority in 1840, and the first statutory authority, in 1841⁸⁴. The present provision is that:

disputes could be found among the disputes determined by Commissioners prior to the revival of the Court in 1622: *Squibb*, supra n 4, 143.

⁷⁸The last case concluded was *Blount's Case* (1737) 1 Atk 295; 26 ER 189.

⁷⁹*R v Mayor & Jurats of Hastings* (1882) Dow & Ry KB 148; *R v Wells Corporation* (1836) 4 Dowl 562.

⁸⁰Lord Goddard suggested that the Court be placed upon a statutory basis before commencing any new period of activity: *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440, 449, 450-1.

⁸¹[1955] P 133; [1955] 2 WLR 440.

⁸²The reorganisation of the judicial system in England, brought about by the Judicature Act 1873 (36 & 37 Vict c 66) (UK), incorporated into the Supreme Court specialised jurisdictions, especially those in the Courts formerly the province of the civilians.

⁸³However, 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: *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

⁸⁴Royal Charter 16 November 1840, "Charter for erecting the Colony of New Zealand, and for creating and establishing a Legislative Council and an Executive Council"; *British Public Papers* (1970) 153-155; Ordinance session 2, no 1, ss 2-7 (1841); Ordinance session 3, no 1, ss 2-3 (1844); Supreme Court Act 1860 ss 4-6; Supreme Court Act 1882 (46 Vict no 29) s 16.

The Court shall continue to have all the jurisdiction which it had on the coming into force of this Act, and all judicial jurisdiction which may be necessary to administer the laws of New Zealand⁸⁵.

This section encompasses two separate elements, the prior jurisdiction of the Court, and the necessary derivative common law jurisdiction. The Supreme Court Act 1882⁸⁶ enacted the almost identical provision that:

The Court shall continue to have all the jurisdiction which it had at the time of the coming into force of this Act, and all judicial jurisdiction which may be necessary to administer the laws of New Zealand⁸⁷.

The original source of this jurisdiction is found in the Supreme Court Act 1860, that:

The Court within the Colony shall have jurisdiction in all cases whatsoever as fully as Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster and each of such Courts have or hath in England at the time of the passage of this Act⁸⁸.

The 1860 Act, which closely followed the wording of the Supreme Court Ordinance 1841⁸⁹ and the Supreme Court Ordinance 1844⁹⁰, went on to describe the equitable and other non-common law jurisdiction of the Supreme Court. Clearly, these enactments did not have the effect of conferring upon the High Court the jurisdiction of the Court of Chivalry, a jurisdiction which was never claimed by any of "Her Majesty's Courts of Queen's Bench, Common Pleas, and Exchequer, at Westminster". Specific words would have been required to confer a jurisdiction in any law but the common law, as was done specially for the laws of equity, testacy, and lunacy⁹¹.

A prerogative act cannot confer upon any body (such as the High Court, the College of Arms, New Zealand Herald Extraordinary or some new quasi-judicial body⁹²) the jurisdiction to administer the Law of Arms, as the Sovereign cannot establish, merely by the exercise of the royal prerogative, a Court to administer any law but the common law⁹³.

Thus, while the Sovereign is the fountain of all honour and dignity⁹⁴, and although the powers of the Crown in this respect are unlimited⁹⁵, the jurisdiction of the Court of Chivalry, which administers the Law of Arms and not the common law, must be exercised by that

⁸⁵Judicature Act 1908 s 16.

⁸⁶46 Vict no 29.

⁸⁷Supreme Court Act 1882 (46 Vict no 29) s 16.

⁸⁸Supreme Court Act 1860 s 4.

⁸⁹Session 2, no II, ss 2-7.

⁹⁰Session 3 no 1, ss 2-3.

⁹¹See for example, the Supreme Court Ordinance 1841 (session 2, no 1), ss 3-5.

⁹²The authority of the Court of Chivalry derives from the authority of the Earl Marshal, not from any jurisdiction which the Kings of Arms might possess. The Court could be held before the Earl Marshal alone: *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133, following *Anon* (1732) 2 Barn KB 169; 94 ER 427.

⁹³*In re the Lord Bishop of Natal* (1864) 3 Moo PCC NS 115; 16 ER 43.

⁹⁴*Norfolk Earldom Case* [1907] AC 10, 17 (HL) per Lord Davey.

⁹⁵As with the creation of new types of dignities, see the *Parliamentary Report as to the Dignity of a Peer of the Realm* (1829) vol 2, 37.

Court or by none, unless Parliament enacts otherwise⁹⁶. A revival of the quasi-judicial work of the Commissioners is unlikely, either in England or in New Zealand.

But are the Law of Arms part of our legal inheritance, and do they actually apply in New Zealand?

V. THE APPLICABILITY OF THE LAW OF ARMS IN NEW ZEALAND

It was early established as a principle of imperial constitutional law that settled colonies took English law⁹⁷. The laws of New Zealand are based upon the reception of English laws in the middle of the last century, when it was first settled as a colony⁹⁸. The English Laws Act 1858⁹⁹ provided that the laws of England as existing on 14 January 1840 were deemed to be in force in New Zealand¹⁰⁰. They were however only to be in force so far as applicable to the circumstances of the colony.

The principle of this Act 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 are 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 Zealand¹⁰¹. While "the laws of arms is not part of the common law

⁹⁶Thus in Canada the legal protection of coats of arms is as weak as it is in England and New Zealand, because the Canadian Heraldic Authority was established by letters patent in an exercise of the royal prerogative.

⁹⁷Scots lawyers do not necessarily agree however: *The Laws of Scotland* (1987) vol 5, paras 711 et seq; Sir Thomas Smith, "Pretensions of English Law as 'Imperial Law'" in *The Laws of Scotland* (1987) vol 5, paras 711-719.

⁹⁸*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). It is a general rule that common law applies to a colony unless it is shown to be unsuitable, but English statutes do not apply unless shown to be applicable: *Uniacke v Dickinson* (1848) 2 NSR 287 (NS); *Wallace v R* (1887) 20 NSR 283 (NS); *R v Crown Zellerbach Canada Ltd* (1954) 14 WWR 433 (BC).

⁹⁹21 & 22 Vict no 2, considered in *King v Johnston* (1859) 3 NZ Jur (NS) SC 94.

¹⁰⁰This Act 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". The purpose of the statute was really to clarify the uncertainty as to whether or not all Imperial acts passed prior to 1840 were in force in New Zealand, if applicable. Although the uncertainty had really been about statutes, the 1858 Act went further and in s 1 expressly stated 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."

¹⁰¹Macaulay, "Honours and Arms: Legal and Constitutional Aspects of Practice concerning Heraldry and Royal Honours in New Zealand" (1994) 5 *Canta LR* 381, 387.

[of England]"¹⁰² 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 raised¹⁰³.

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 Arms¹⁰⁴.

It has been established beyond reasonable doubt that 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 colony¹⁰⁵. It might be questioned whether the Law of Arms was included¹⁰⁶, and it is not always easy to apply the test¹⁰⁷. 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 conquered¹⁰⁸.

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 1852¹⁰⁹ made no special provision for heraldry, or for titles of honour, 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

¹⁰²*R v Parker* (1668) 1 Sid 352; 82 ER 1151 per Keeling CJ.

¹⁰³Macaulay, *supra* n 101, 387.

¹⁰⁴Section 5 impliedly preserves the prerogative, and the wording of the Act clearly limits its application to the statutory law.

¹⁰⁵*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). 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" 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 became applicable was far greater in content and importance than what had to be rejected: Sir William Blackstone, *Commentaries on the Laws of England* (1978) book I, para 107 (ed E Christian).

¹⁰⁶The applicability of the Law of Arms has been questioned, see for example, Crawford, "Some views on English and Scots heraldic authority outside the United Kingdom" (1977) *Coat of Arms* (no 102) 157, 158-159. 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.

¹⁰⁷*Whicker v Hume* (1858) 7 HLC 124, 161; 11 ER 50 per Lord Carnworth.

¹⁰⁸*Lawal v Younan* [1961] All Nigeria LR 245, 254 (Nigeria Federal SC). In *Higgett 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.

¹⁰⁹15 & 16 Vict c 72 (UK).

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.

Nor is there any reason to suppose that coats of arms should be treated as inapplicable just because peerages may be inapplicable¹¹⁰. A coat of arms is much more portable (literally so) than a peerage. Like a peerage, coats of arms are not recognised by the common law Courts. It is submitted that the Law of Arms was applicable in New Zealand in 1840 and remains applicable whether the judicial jurisdiction of the High Court of Chivalry extends overseas or not. This view has not gone unchallenged however, particularly by those who would argue for an equal jurisdiction for Lord Lyon King of Arms.

VI. THE PROPER AUTHORITY RESPONSIBLE FOR THE GRANT 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 proper authority for granting arms overseas¹¹¹. 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 derived¹¹². 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"¹¹³. 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, is constitutionally responsible. As far as the Secretary of State was concerned, Lord Lyon was exceeding his discretionary authority in granting arms abroad.

VII. 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 Arms¹¹⁴. While the two subordinate English kings of

¹¹⁰See Cox, supra n 23.

¹¹¹In 1907 the Law Officers held that Garter had an imperial jurisdiction. However, neither then nor in 1913, was it expressly asserted that there was not an equally wide jurisdiction enjoyed by Lord Lyon: 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* (1967) 530.

¹¹²Agnew of Lochnaw, supra n 2, 71.

¹¹³*Ibid.*

¹¹⁴The Crown has supreme control and jurisdiction over arms, and possesses the authority to grant arms: *Scroop v Grosvenor* (1389), supra n 13. 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: (1483) Calendar 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 jurisdiction¹¹⁵. He has granted arms in the Empire and Commonwealth, and to foreigners of British ancestry, for many centuries¹¹⁶.

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..."¹¹⁷ possesses both executive and judicial authority over English arms¹¹⁸. As Squibb points out¹¹⁹, 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 subjects¹²⁰.

Grants are made by Garter under the 1673 warrant of the Earl Marshal. In his individual commission, Garter is granted "authority power and licence with the consent of the Earl Marshal of England ... of granting and appointing to eminent men Letters Patent of Arms and Crests" jointly with or without Clarenceaux and Norroy and Ulster Kings of Arms "according to the ordinances and statutes from time to time respectively issued [by the Earl Marshal]"¹²¹. All of these regulations have been regarded as being in force in New Zealand, the Earl Marshal retaining a power to regulate the exercise of the royal prerogative in respect of the Law of Arms, by a species of delegated legislation¹²².

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 doubted¹²³. The imperial jurisdiction of the Earl Marshal was held to

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.

¹¹⁵Schell Lannoy, "Heraldic Authority in the Dominion of New Zealand" in (1970) *New Zealand Armorial* (no 4) 15, 16-17.

¹¹⁶As 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.

¹¹⁷Letters patent of Charles II creating the office of Earl Marshal in the family of the Duke of Norfolk, dated 19 October 1672; Squibb, *supra* n 2, 128.

¹¹⁸The 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.

¹¹⁹Squibb, *supra* n 2, 129.

¹²⁰Although 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, *supra* n 106, 158-159.

¹²¹Commission appointing Sir Colin Cole Garter King of Arms, 2 October 1979. The "ordinances and statutes" are a form of legislation, but their jurisdiction of course only covers the Law of Arms, not the common or statute law.

¹²²As is indicated by cl 50 of the Statutes of the New Zealand Order of Merit (SR 1996/205) (recognition of grants of arms by Garter King of Arms), and by the appointment of New Zealand Herald by warrant of the Earl Marshal.

¹²³The 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).

extend to the arms of at least some of the former Indian princes¹²⁴, and it must a fortiori extend to those British subjects overseas whose arms have been granted by the College of Arms. The Sovereign also retains vestigial rights to grant arms personally¹²⁵.

The Crown in right of the United Kingdom undoubtedly has executive authority over British subjects wherever domiciled¹²⁶. Grants are valid irrespective of the petitioner's place of residence¹²⁷. 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 countries¹²⁸.

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 does officially recognise the authority of the Earl Marshal and the Kings of Arms of the College of Arms¹²⁹.

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 Queen¹³⁰. A further indication that the authority of the English heralds is officially recognised is that the Statutes of the New Zealand Order of Merit recognises only those arms granted or confirmed by Garter King of Arms¹³¹.

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 evidence¹³². But the weight of authority appears to be otherwise.

¹²⁴In the opinion of the law officers of the Crown, quoted by LG Pine, *International Heraldry* (1970) 214.

¹²⁵Agnew of Lochnaw, *supra* n 2, 68.

¹²⁶Sir Francis Grant, *A Manual of Heraldry* (1924) 9.

¹²⁷Foreign 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.

¹²⁸Agnew of Lochnaw, *supra* n 2, 64-65.

¹²⁹See Secretary of the Cabinet, *Cabinet Office Manual* (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"

¹³⁰See Secretary of the Cabinet, *Cabinet Office Manual* (1988) para P.1.1.

¹³¹Statutes 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* (1993).

¹³²No Earl Marshal has ever acted in New Zealand, though they have exercised their jurisdiction through a deputy in this country. Cf Macaulay, *supra* n 101, 385.

The authority of the Earl Marshal's Court to decide the *Manchester Corporation v Manchester Palace of Varieties Ltd*¹³³ was clear, but the existence and exercise of its judicial authority had no bearing on 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.

VIII. 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"¹³⁴. This however is 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. The most important piece of evidence relied upon by him is the Lord Lyon Act 1867¹³⁵, especially s 1. This shows that, when acting out of his own country, Lyon is subject to the Earl Marshal¹³⁶. By this Act, the ministerial powers of Lord Lyon in relation to arms are confined to the territorial limits of Scotland¹³⁷.

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 granted¹³⁸. 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"¹³⁹. In this case the ordinance is the Lyon King of Arms Act 1672¹⁴⁰.

Agnew of Lochnaw believed that this provides no limitation as to nationality, except in so far as this is implied by other laws¹⁴¹. He contended that the armorial 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 jurisdiction¹⁴². 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

¹³³[1955] P 133; [1955] 2 WLR 440.

¹³⁴Crawford, supra n 106.

¹³⁵30 & 31 Vict c 17.

¹³⁶Squibb, supra n 2, 131.

¹³⁷In the words of Lord Robertson in *M'Donnell v M'Donald* (1826) 4 Shaw 371, 372 (NS 374, 376).

¹³⁸Agnew of Lochnaw, supra n 2, 67.

¹³⁹Commission appointing Sir Malcolm Innes of Edingight Lord Lyon King of Arms, 10 April 1981.

¹⁴⁰24 Chas II c 47.

¹⁴¹Agnew of Lochnaw, supra n 2, 69.

¹⁴²Agnew of Lochnaw, *ibid*, 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.

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 binding¹⁴³.

But the Court of the Lord Lyon has, by a statute of the former Scottish Parliament¹⁴⁴ and more recent British legislation¹⁴⁵, authority only over the territory of Scotland. Garter King of Arms, exercising the 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 Scotland¹⁴⁶. 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 1867¹⁴⁷.

The Lyon King of Arms Act 1672¹⁴⁸, 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 matriculation¹⁴⁹. A grantee and their descendants are permitted to use the arms on apparenacy for three generations, but thereafter a matriculation is necessary¹⁵⁰.

Grants of arms have been made solely by Lord Lyon since at least as early as 1542¹⁵¹. The usual procedure was to grant royal warrants ordering Lord Lyon to "give and grant" arms¹⁵². Under the 1672 Act he may grant arms to natural and corporate persons who are domiciled in Scotland or who own heritage in Scotland¹⁵³. 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 Scotland¹⁵⁴. A grant is usually made to the petitioner and other heirs of his grandfather¹⁵⁵.

¹⁴³Agnew of Lochnaw, supra n 2, 68.

¹⁴⁴Lord Lyon Act 1672 (24 Chas II cap 47) (Sc).

¹⁴⁵Lord Lyon King of Arms Act 1867 (30 & 31 Vict c 17) (UK).

¹⁴⁶Lord Lyon Act 1672 (24 Chas II cap 47) (Sc).

¹⁴⁷Lord Lyon King of Arms Act 1867 (30 & 31 Vict c 17) (Sc).

¹⁴⁸24 Chas II c 47.

¹⁴⁹*The Laws of Scotland* (1990) vol 11, para 1614, 548.

¹⁵⁰Innes of Learney, supra n 32, 117.

¹⁵¹No Scottish king subsequently granted arms personally, the invariable practice being a royal warrant ordering the Lyon to grant arms: Innes of Learney, *ibid*, 10.

¹⁵²Or to "extend and give out" as in the wording of the matriculation of His Royal Highness the Duke of Rothesay (Charles Prince of Wales), recorded 13 November 1974.

¹⁵³Indeed, owners of heritage in Scotland are required, by law, to have armorial bearings: *Acts* vol I 575 February 1400.

¹⁵⁴It 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* (1990) vol 11, para 1615, 549.

¹⁵⁵*The Laws of Scotland* (1990) vol 11, para 1615, 550.

Crawford argued that the wording of Lord Lyon Act 1867¹⁵⁶ did not territorially limit Lord Lyon's jurisdiction, but rather preserved it¹⁵⁷. 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 law¹⁵⁸. 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 regulated¹⁵⁹.

Nor did the Union with Scotland Act 1706¹⁶⁰ specifically preserve the armorial jurisdiction of the Lyon, as has been suggested¹⁶¹. Article 19 the Treaty of Union clearly preserved the authority of the Court of Session and other Courts, but not necessarily the executive powers rather than 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 overseas. Agnew of Lochnaw argues however that the Lord Lyon Act 1867¹⁶² only limits the judicial jurisdiction of Lyon Court, not the ministerial powers of Lord Lyon¹⁶³, and that since the grants are of Scottish arms, Lord Lyon is not acting outside Scotland¹⁶⁴.

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 1707¹⁶⁵. This is an interesting suggestion, but unfortunately it does not help his case. Further, it shows an ignorance of constitutional law, as it ignores the effect of *Calvin's Case*¹⁶⁶.

Calvin's Case was approved by the House of Lords in *Lord Advocate v Walker Trustees*¹⁶⁷. 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

¹⁵⁶30 & 31 Vict c 17.

¹⁵⁷Crawford, supra n 106.

¹⁵⁸*The Laws of Scotland* (1990) 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.

¹⁵⁹30 & 31 Vict c 17. Emphasis added.

¹⁶⁰6 Anne c 11.

¹⁶¹Crawford, supra n 106, 158-159.

¹⁶²30 & 31 Vict c 17.

¹⁶³Agnew of Lochnaw, supra n 2, 70.

¹⁶⁴*Ibid*, 70-71.

¹⁶⁵Innes of Learney, *ibid*, 93 and note.

¹⁶⁶(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".

¹⁶⁷[1912] AC 95 (HL) per Lord Atkinson.

privileges of peerage in England since the Union with Scotland Act 1706¹⁶⁸ and the Union with Ireland Act 1800¹⁶⁹, 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 limitation¹⁷⁰. Squibb maintains that the form of appointment of Lyon has changed much since the Lyon Court Act 1867, but Crawford disagrees¹⁷¹. On 26 May 1796 Letters Patent (which were in Latin) appointed the notoriously incompetent Robert Auriol Hay, 9th 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 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"¹⁷². The Royal Warrant of 9 March 1905 for precedence in Scotland similarly interpolates "in Scotland"¹⁷³. Lord Lyon has a legal duty to determine the extent of his executive authority in each case¹⁷⁴. However, this is subject to review by the Court of Session. The jurisdiction of the Court of the Lord Lyon in questions of precedence¹⁷⁵ or clan chiefships¹⁷⁶ was rejected by the Court of Session, but Lord Lyon does not regard those decisions as being final¹⁷⁷.

¹⁶⁸6 Anne c 11.

¹⁶⁹39 & 40 Geo III c 67.

¹⁷⁰The 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* (1914) vol 1, 454-455.

¹⁷¹Crawford, *supra* n 106, 160.

¹⁷²See for example, the Letters Patent of 12 March 1890 in favour of James Balfour Paul, reprinted in Stevenson, *supra* n 170, 454-455.

¹⁷³Grant, *supra* n 126, 46-49.

¹⁷⁴*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.

¹⁷⁵*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

Lord Lyon may have authority to grant arms overseas which are valid in Scots law¹⁷⁸, 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 law¹⁷⁹. 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 practice¹⁸⁰. 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 jurisdiction¹⁸¹.

The holder of a foreign coat of arms, or of an English, must matriculate his arms in his own name with such differences as may be necessary to distinguish them from any recorded Scottish coat of arms, if he wishes to bear them in Scotland¹⁸².

Lyon will recognise a substantive grant by a competent authority. However, honorary grants of arms by the English kings of arms are not recognised for the purpose of recording arms in Scotland. Nor will foreign arms be matriculated by Lyon if the petitioner is subject to Lyon's jurisdiction, on the grounds that they should have sought a new grant from Lyon¹⁸³. It has been argued that Scotland and England have a common Crown, and therefore Garter and Lyon should have equal power¹⁸⁴. This of course is incorrect, since the Crown may be one¹⁸⁵, but the officers are separate. Lord Lyon is a Scottish officer, Garter an English and imperial officer.

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.

Parliament, where the House of Lords Precedence Act 1539 (31 Hen VIII c 10) (Eng) remains in force.

¹⁷⁶*Maclean of Ardgor v Maclean* 1941 SC 613, SLT 339.

¹⁷⁷*The Laws of Scotland* (1990) vol 11, para 1614, 548.

¹⁷⁸Sir George Mackenzie of Rosehaugh, *Observations upon the Laws and Customs of Nations as to Precedency* (1680) 79, quoted in Agnew of Lochnaw, supra n 2, 69-70.

¹⁷⁹Agnew of Lochnaw, *ibid*, 70.

¹⁸⁰Compare Innes of Learney, supra n 32, 93-94. 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.

¹⁸¹Innes of Learney, supra n 32, 91-2, 94, 101 and 107-8.

¹⁸²*M'Donnell v M'Donald* (1826) 4 Shaw 371, 372 (NS 374, 376) per Lord Robertson. However, a temporary visitor is allowed to use their coat of arms without matriculation, as a Courtesy: *The Laws of Scotland* (1990) vol 11, para 1614, 549. Those who possess foreign coats of arms must follow a similar procedure if they wish to make use of their arms in England.

¹⁸³*The Laws of Scotland* (1990) vol 11, para 1625, 555; Agnew of Lochnaw, supra n 2.

¹⁸⁴Michael Crawford, "The Control of Heraldry in Australia- Some legal aspects" (1974) Coat of Arms NS vol I (no 89) 28-33.

¹⁸⁵This of course is a moot point, since in light of contemporary developments in thinking about the status of the Crown, the English and Scottish Crowns may still be distinct, and distinguishable from the Crown of the United Kingdom. See for example, *Lord Advocate v Walker Trustees* [1912] AC 95 (HL).

IX. 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 countries¹⁸⁶.

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 Arms¹⁸⁷ 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.

Agnew of Lochnaw asked, if the English claim to an exclusive jurisdiction is correct, are these English arms being granted to a citizen of a different sovereign nation, or are they a new species of national arms? Is a grant by Garter to a Canadian a grant of English or of Canadian arms? He thought that if they are Canadian arms, it is for the law of Canada to determine how the royal prerogative to grant arms is to be exercised, and what their status is to be in Canada. If they are Canadian arms, then their use in England is the use of arms which are foreign¹⁸⁸. If they are English arms, which appears more likely, then Canada will apply her private international law rules to determine what effect in Canada will be given to English grants¹⁸⁹. How does this apply to New Zealand?

X. NEW ZEALAND

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 Arms¹⁹⁰. This decision was, according to Macaulay constitutionally inappropriate, but was certainly efficient¹⁹¹.

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 6 February 1978 appointment of Phillip O'Shea¹⁹² as the New Zealand Herald of Arms Extraordinary to Her Majesty The Queen¹⁹³. The essential validity of the appointment by

¹⁸⁶The 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.

¹⁸⁷Either 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.

¹⁸⁸Agnew of Lochnaw, *supra* n 2, 65.

¹⁸⁹*Ibid*, 65-66.

¹⁹⁰O'Shea, "The Office of the New Zealand Herald of Arms" (1982) 20 *New Zealand Armorer* 7.

¹⁹¹Macaulay, *supra* n 101, 387.

¹⁹²Mr Phillip O'Shea, Cabinet Office Adviser on Honours.

¹⁹³Neither the warrant of appointment, nor any other mention of the existence of the position was ever been published in the *New Zealand Gazette*: Macaulay, *supra* n 101, 385n; Sir Malcolm Innes of Edingight, "New Zealand Herald of Arms Extraordinary" (1979) 3 *Commonwealth Heraldry Bulletin* 2.

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 questioned¹⁹⁴. But the prerogative of the Sovereign may be delegated to whomsoever she pleases.

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 him¹⁹⁵.

Since the appointment of New Zealand Herald, letters patent issued by the College of Arms to New Zealanders have de-emphasised their English origins¹⁹⁶. They bear the New Zealand royal style, rather than that of the United Kingdom¹⁹⁷. It is not clear whether grants are under the royal prerogative of the Queen of the United Kingdom, or of New Zealand¹⁹⁸, but this makes little difference in practice, as the Laws of Arms are the same in each jurisdiction.

Since 1978, the position of armorial bearings in New Zealand has remained largely unchanged. The Flags, Emblems, and Names Protection Act 1981 was intended to protect various emblems, such as the royal crown, from false use. It was recommended at that time that protection ought to be extended to coats of arms, but this was not done¹⁹⁹.

The Act does however provide protection against the unauthorised use for the Royal Arms, Royal crown, Royal coronet or Royal cypher, Royal Standard or Sovereign's personal flag for New Zealand or the Governor-General's Flag²⁰⁰. It is an offence to alter the New

¹⁹⁴Macaulay, supra n 101, 385-386; Sir Malcolm Innes of Edingight, "New Zealand Herald of Arms Extraordinary" (1979) 13 *Heraldry in Canada* 34-36.

¹⁹⁵Mr 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.

¹⁹⁶The 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.

¹⁹⁷O'Shea has said that the letters patent recite the style conferred upon Her Majesty by proclamation under the Royal Titles Act 1953. If this is so, it is incorrect, as this style was replaced by that given in the Royal Titles Act 1974. 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, supra n 2, 66.

¹⁹⁸Macaulay, supra n 2, 386.

¹⁹⁹The draft bill of the Flags, Emblems, and Names Protection Act 1981 did indeed include a clause protecting armorial bearings. Clause 16 was dropped at the select committee stage. The committee considered that there was already adequate protection under misrepresentation or passing off, should a person use the coat of arms granted to another without his authority. They did not accept that there was any justification for protecting private interests with criminal sanctions. The committee were also opposed to what they saw as a monopoly being established for the benefit of New Zealand Herald. See *New Zealand Parliamentary Debates* (1980) vol 440, 2741, vol 441, 3858.

²⁰⁰Section 12(2)(a), (b), (c), and (d) respectively.

Zealand Flag²⁰¹. It is also illegal to use any representation of the coat of arms of New Zealand, the Seal of New Zealand, or any emblem or official stamp of any Government department²⁰².

One recent change, and one which has not pleased some²⁰³, 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 Arms²⁰⁴. There is also a Herald for the Order²⁰⁵. 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 Companions²⁰⁶. He is akin to the private heralds of the British Orders.

XI. THE POSSIBLE INCORPORATION OF THE LAW OF ARMS INTO THE COMMON LAW BY JUDICIAL DECISION

The Law of Arms is in the difficult position of applying in New Zealand, yet having no Court in which it disputes can be decided. One possible solution, apart from legislation, is indicated by the example of the Law Merchant.

Those laws which form part of the laws of England, but not of the common law, include the ecclesiastical law and the Law of Arms. However, the modern commercial law also grew out of the custom and usages of the merchants, known as the Law Merchant. Some of these customs were written down, and became a code of international commercial customs. In the Statute of the Staple 1352-3²⁰⁷ this was recognised as part of the law of England, though it is unclear to what extent it was systematised in England. Gerard de Malynes regarded Law Merchant as customary law approved by the authority of all kingdoms and not as law established by the sovereignty of any prince²⁰⁸.

Like the canon law-based ecclesiastical law, it was the "law of all nations"²⁰⁹. However, the growing power of the royal Courts from the fourteenth century weakened that of the local merchants' Courts²¹⁰. The absence of a reception of Roman civil law, unlike other parts of Europe, the relative geographical isolation, and the commercial weakness of England before the sixteenth century all contributed to the law merchant developing differently in England to on the continent²¹¹.

In Tudor times the High Court of Admiralty became really active, and developed its full mercantile and maritime jurisdiction. However, up to 1606 the mercantile law remained a special law administered by special Courts for a special class of people²¹². In the period 1606

²⁰¹Section 11(1)(a).

²⁰²Section 13(2)(a), (b), and (c) respectively.

²⁰³This has been criticised by Macaulay, who continues to argue that Garter is unknown to New Zealand law: Macaulay, "The NZ Order of Merit" [1996] NZLJ 457.

²⁰⁴Clause 50.

²⁰⁵Clauses 51, 53, 54, 55, and 57.

²⁰⁶Clause 57 (b).

²⁰⁷27 Edw III stat 2.

²⁰⁸*Consuetudo vel Lex Mercatoria, or the Ancient Law Merchant* (1622).

²⁰⁹*Luke v Lyde* (1759) 2 Burr 882; 97 ER 614 per Lord Mansfield, CJ.

²¹⁰This process is examined in T Plucknett, *A Concise History of the Common Law* (1956) 660.

²¹¹L Trakman, *The Law Merchant- The Evolution of Commercial Law* (1983) 23-26

²¹²See, for a general discussion, see Scrutton, "General Survey of the History of the Law Merchant" in *Select Essays in Anglo-American Legal History* (1907-1909) vol 3, 7-8.

to 1756 the special Courts (known as Pie Powder Courts, and comprised of merchants) declined²¹³. This was due in large part to the attacks of the common lawyers.

The elasticity of the action on the case enabled the common law judges in the later part of the sixteenth and seventeenth centuries to absorb the law merchant into their own system, while preserving its peculiar identity. Proceedings were brought on an action on the case on the custom of merchants, the details of the custom being pleaded at first as facts²¹⁴. If the contract had been made abroad, jurisdiction was obtained by the fiction that it had been made at the Royal Exchange or in Cheapside.

The decline of the Staple Courts, where the *lex mercatoria* or Law Merchant was administered, was largely due to Sir Edward Coke, who oversaw the acquisition by the common law Courts of most of the commercial litigation from the early part of the seventeenth century²¹⁵. As early as 1606 Coke was able to assert that the law merchant was part of the law of this realm²¹⁶. He also limited the custom of merchants' cases in the Admiralty Court, the sole surviving Court administering the *lex mercatoria*, to those instances where the contract had actually been entered into on the high seas²¹⁷.

Towards the end of the seventeenth century it became unnecessary to plead that one of the parties to an action were a merchant, and once a considered judgment on a custom had been given, the custom was judicially noticed, and no proof of it were needed in later cases²¹⁸.

Following upon the initial groundwork prepared by Chief Justice Holt, from 1756 Lord Mansfield led the way in the development of the Law Merchant into the commercial law of modern times. Mansfield, and his followers, built up the Law Merchant as an integral part of the common law, relying on the writings of foreign jurists for international custom, and special juries of merchants for current trade customs and findings of fact.

What was once international and customary law has become a national and fixed body of law by the use of case law and precedent. However, the law merchant remains a living body of principles which may be extended by proof of a new custom²¹⁹.

It would not be beyond the realms of possibility for a judge like Lord Mansfield to find that the common law Courts could take cognisance of the Law of Arms, and leave it to others to thereafter gradually incorporate it into the common law. Such an approach would be quite tenable, especially given the absence of a New Zealand Court exercising the jurisdiction of the Court of Chivalry. Unfortunately, judicial activism is not what it once was, and *stare decisis*, together with the constraints imposed by the Judicature Acts, would be likely to

²¹³They had been consolidated by the Statute of the Staple 1352-3 (27 Edw III stat 2 cc 5, 6, 8 and 21) (Eng), and declined for economic reasons, although there are not many reports in the sixteenth century indicating that the common law Courts were administering the law merchant.

²¹⁴*Van Heath v Turner* (1621) Winch 24; 124 ER 20; *Pillans v Van Mierop* (1765) 3 Burr 1663; 97 ER 1035.

²¹⁵Sir William Holdsworth, *A History of the English Law* (1926) vol 8, 99-300.

²¹⁶Sir Edward Coke, *Coke upon Littleton* (1979) 182

²¹⁷This led to the complete separation of that part of the maritime law, such as salvage and collisions at sea, which remained within the jurisdiction of the Court of Admiralty, from the law merchant and those parts of the commercial maritime law, such as freight and marine insurance, which were administered in the common law Courts.

²¹⁸*Bromwich v Lloyd* (1698) 2 Lutwyche 1582; 125 ER 870.

²¹⁹Immemorial user is not necessary: *Edelstein v Schuler* [1902] 2 KB 144. However, a new custom must not be contrary to an established rule of law: *Goodwin v Robarts* (1876) LR 10 Ex 337 per Cockburn CJ.

prove insurmountable barriers to the assimilation of the Law of Arms into the common law of New Zealand²²⁰.

XII. CONCLUSION

The Law of Arms of England has been incorporated into New Zealand law. 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 delegation of the prerogative of arms has in fact been made, with the appointment in 1978 of a New Zealand Herald of Arms Extraordinary to Her Majesty The Queen, and it is to him that New Zealanders should turn for grants of arms.

²²⁰The translation of Lord Cooke of Thorndon from the Court of Appeal to the House of Lords in 1996 raised the possibility of such an innovative judge being available to adapt the Law of Arms in England. However, virtually insurmountable hurdles would still have to be overcome for a case to reach the House.