

Note issued with Warrant for Letters Patent

from

Lord Lyon King of Arms

in the application of

GEORGE DAVID MENKING

of date 21 August 2014

1. The Petition was lodged on 21st August 2014. The Petitioner seeks to be officially recognised in the name George David Menking, Lord of the Garioch with a grant of Arms suitable and according to the Law of Arms, to himself and his descendants, together with all the additaments appropriate to the dignity of Lord in the Baronage of Scotland.
2. In considering this petition, I had before me the following evidence:-
 - (i) Registration in the Scottish Barony Register dated 11 December 2012, registered 12 December 2012.
 - (ii) Assigantion by Mark David Menking in favour of George David Menking, registered in the Scottish Barony Register 12 December 2012 Volume 2, folio 112.
 - (iii) Correspondence from the Petitioner's agent (Lindsays Edinburgh) dated 21 August 2014, 28 October 2014, email of 9 December 2014.
3. After outlining the questions outstanding for me, I asked for submissions from the agent and a letter of the 28 October 2014, noted above, provided those submissions.
4. The issues in this Petition related to the status of the 'Lordship and Regality of the Garioch' as well as the question of feudal and other dignities in general. The central legal point being whether such ownership of the Lordship and Regality of the Garioch is sufficient to bring the Petitioner within the jurisdiction of the Lord Lyon for the granting to him of Arms.
5. My starting point for considering these matters is the present practice and law. The Scottish Barony Register is the only register for the Lord Lyon to have reference to in these matters, albeit a non-statutory register. The present practice was established by previous Lord Lyons. The practice is that 'a person of skill' who is at present the Custodian of the Register (Mr Alistair Rennie) provides a report based on an examination of a prescriptive progress of title that the owner is entitled to the dignity. This system has in practice operated efficiently and effectively in relation to baronies. I am content to follow this practice as long as the present Custodian is 'a person of skill'. I noted that the Register is a 'Barony Register' and, as such, is protecting the dignity and legal entity of barony in Scots Law. The Abolition of Feudal Tenure etc. (Scotland) Act 2000 ('the 2000 Act') at Section 63 led to the Register being set up.

6. The part of the question before me relates to the extension of the practice to other dignities which may be covered by the words in Section 63 '*or any other dignity or office (whether or not of feudal origin)*'. Section 63 states:-

Baronies and other dignities and offices

(1) Any jurisdiction of, and any conveyancing privilege incidental to, barony shall on the appointed day cease to exist; but nothing in this Act affects the dignity of baron or any other dignity or office (whether or not of feudal origin).

(2) When, by this Act, an estate held in barony ceases to exist as a feudal estate, the dignity of baron, though retained, shall not attach to the land; and on and after the appointed day any such dignity shall be, and shall be transferable only as, incorporeal heritable property (and shall not be an interest in land for the purposes of the Land Registration (Scotland) Act 1979 (c.33) or a right as respects which a deed can be recorded in the Register of Sasines).

(3) Where there is registered, before the appointed day, a heritable security over an estate to which is attached the dignity of baron, the security shall on and after that day (until discharge) affect—

(a) in the case of an estate of *dominium utile*, both the dignity of baron and the land; and

(b) in any other case, the dignity of baron.

(4) In this section—

“conveyancing privilege” includes any privilege in relation to prescription;

“dignity” includes any quality or precedence associated with, and any heraldic privilege incidental to, a dignity; and

“registered” has the same meaning as in Part 4 of this Act.

7. A review of the available correspondence between the Lyon Office and the Scottish Barony Register does not include discussions of Lordships, Territorial Earldoms or other dignities. I have noted that previous Lord Lyons have made grants of Arms on this basis. I am not bound by these previous decisions and, as far as I can see, these were decided on a case by case basis. They are also relatively few in number and spread over a number of years. For the sake of clarity I do not regard these decisions as setting any precedent.

8. I also observe that the 2000 Act is silent on dignities and captures them only using the words towards the end of Section 63 (ii). In the established recent practice the dignity of barony establishes for its owner jurisdiction to petition the Lord Lyon for a grant of Arms. This is the primary function of the Lord Lyon in such matters.

9. I turn now to address the question of the nature of the Lordship and Regality in Scots Law. It is my opinion from the Institutional Writers and textbook writers that Baronies and Regalities are to be considered together. The dignity of a Regality was the highest feudal dignity and included higher jurisdictional rights and privileges as well as all the privileges of barony.

10. The principle source from the Institutional Writers is Bankton (see II. III, 83, 95, 96, 97 and 106).

He writes:

“83 – Baronies and Regalities come next to be considered ... This leads me to the distinction of fees Noble and Ignoble ... Noble fees, are those which conferred nobility to persons vested in them; these were baronies and regalities; and anciently all nobility, in the modern states proceeded from such fees; thus the title of baron included Duke, Marquis and Earl, as well as that of Lord. All barons were equally entitled, as lords of parliament, to sit and vote on it; ... Some persons of greater merit or interest with the Sovereign, were vested with higher privileges than barons by erection of their lands into regalities...

95 – Regality was the highest feudal dignity ... The erection of lands to a Dukedom, Marquisate or Earldom, did not extend the jurisdiction and privileges beyond those of a barony, which is called Feudal Lordship, unless there were likewise erected into a regality ...

96 – Besides the rights and privileges included in a barony, divers other *Regalia*, and valuable Franchises, were implied in a regality ...

97 – ‘Lords of Regality...’ [NB: The style used to describe the person]

106 – ... for Regality, as the greater, implied all the privileges that were included in Barony, which is the lesser dignity ...”

11. This position is further strengthened by the view of Erskine, (see Institutes I. IV. 7 & 10) where he states:

“7 – Regalities were feudal rights of land granted by the king *in liberam regalitatem*; so that regality jurisdictions, while they subsisted, were properly territorial, and attendant on the lands. The grantees, though commoners, were called Lords of Regality, on account of the high and regal jurisdiction implied in these grants ... No lands could fall under this jurisdiction but such as belonged either in property or superiority to the grantee ...

10 – ... for the erection of lands into an earldom or lordship imports no higher jurisdiction than barony, *D Montrose*, 9 July 1713, M. 10, 919 ...”

12. It is my opinion that these passages, especially the Bankton references at paragraphs 96 and 106, help me conclude that a Regality was a higher form of Barony and that it included “the rights and privileges included in a barony”.

13. Green’s Encyclopaedia of the Law of Scotland (Dunedin Edition, Vol 12 p 359 paragraph 398) refers to “the Lordship of Regality” and states “753 – Regality was the highest feudal dignity, and, in addition to all the privileges of barony, included ...”.

14. These sources apply only to a grant of a Regality prior to the Abolition of Heritable Jurisdictions Act, 1747, (‘the 1747 Act’). In summary, prior to 1747 a grant of a Regality was the grant of a heritable right, which included all the rights and privileges of a barony. A Lord of Regality is therefore a feudal baron with higher jurisdictional rights and other privileges.

15. With regard to the effect of the 1747 Act on the Lordship and Regality I am of the opinion on a proper construction of the 1747 Act, that “jurisdiction, powers, authorities and privileges” relating to the Regality were abolished. I am, however, also of the opinion that this did not affect the baronial rights and privileges which were inherent in the Regality. In essence, after the 1747 Act Regality became a barony and, at a more specific level, Lords of Regality became Barons.

16. I should also note that, whilst agreeing that it is arguable that they retained the right to be called 'Lords of Regality' but only with the jurisdiction of a baron, I am not persuaded by that position. I am of the opinion that, while Lords of Regality were abrogated by the 1747 Act, they continue to retain the dignity of baron. They are a genus of barony.

17. I have reached my opinion on this matter, taking into account that the enactments which take away rights are to be strictly limited, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted. This provision of Section 1 of the 1747 Act states:

“That all heritable jurisdictions, and all regalities ... belonging unto, or possessed or claimed by any subject or subjects, and all jurisdictions, powers and privileges thereunto appertinent or annexed or dependent thereupon, shall be, and they are from and after the twenty-fifth of March in the year of our Lord one thousand seven hundred and forty-eight, abrogated, taken away, and totally dissolved and extinguished.”

18. I am of the opinion that the 1747 Act at Section 24 did not intend to deprive a Lord of Regality of his baronial jurisdiction. I refer to Section 24 which states:

“Provided always ... that all and every person and persons who shall appear to have been lawfully possessed ... of any such justiciary, regality, or other jurisdiction hereby abrogated, shall ... retain such jurisdiction of barony, or other lower jurisdiction, as such person or persons would have been entitled to, in case of such jurisdiction, regality or other jurisdiction had never been erected, granted or existed...”

19. In summary on this issue I am of the opinion as a proper construction of the 1747 Act that while jurisdiction, authorities and privileges pertaining to the Regality were abolished, the Act did not affect the baronial rights and privileges. A Lord of Regality in the context of Scots Law today is a baron.

20. On the basis of the established practice in the Lyon Court, I accept jurisdiction on the basis that a Lord of Regality is of the genus of baron and would grant Arms accordingly. The grant would be based on the established present practice with regard to additaments. It is worth noting that the Scottish Barony Register have offered to make such entries in the Register Minute Book and Style of Assignment to include the words 'being of the genus Barony'. This is a pragmatic way forward and if all the proofs are in order allows me to accept jurisdiction and grant Arms to owners of such dignities.

21. With regard to the aspect of the Petition which deals with the 'official recognition of the Petitioner in the name George David Menking, Lord of the Garioch', I have sought a common sense and pragmatic way forward, bearing in mind that in Scotland anyone is at liberty to call themselves what they wish subject to it not being the intention to deceive another person, for example to avoid bankruptcy by becoming someone else. Further, in the context of this petition the recognition of feudal titles such as a 'feudal Lordship' is a matter for the discretion of the Lord Lyon.

22. Let me now turn, for the purpose of completeness, to the subject of 'other feudal titles' in terms of Section 63 of the 2000 Act. These titles include the dignities of feudal lord, feudal earl and feudal marquis where such titles are established on the basis of a Crown Charter.

23. There are a number of decisions where previous Lord Lyons have recognised the existence of such titles. There are only a few such petitions and I have carefully examined those petitions in which these issues were addressed. Bearing in mind that I am not bound by

the decisions of previous Lord Lyons and the petitions on these matters have turned on the facts and circumstances of the petition, I have decided to review the approach of the Lyon Court on these matters.

24. As might be expected, the legal basis for such petitions can be found in the writings of various institutional writers and in the case law.

25. In *'Jus Feudale'* Craig states at 1.12.15:

“Dukes, marquesses, and earls are all comprehended among the barons, and originally they were all known under the latter description; but as the number of barons increased and the distinction attached to the title was correspondingly diminished the newer style of dignity into request.”

Craig states clearly that dukedoms, marquisesates, earldoms and baronies are all of the genus of barony.

26. The case of *Spencer Thomas of Buquhollie v Newell* 1992 SLT 973 provides us with a summary of the institutional writers in the opinion of Lord Clyde. His lordship also gives use a core analysis of the nature of a barony and other dignities.

27. The opinions of Craig, Stair and other leading institutional writers are summarised by Lord Clyde in his seminal decision in *Spencer Thomas of Buquhollie v Newell*, in which he provided a concise analysis of the nature of a Barony and the more noble dignities of Lordship and Earldom:

“Before going further I should say something about the nature of a barony in Scots law. A barony is an estate of land created by a direct grant from the Crown. the original grant is said to have ‘erected’ the lands into a liberia baronia, a free-hold Barony (Bell’s *Principles*, s.750). The right can be conferred only by the Crown and cannot be transmitted by the baron to be held base of himself (Bells’s *Dictionary* (7th ed.), p.99; Bankton’s *Institute*, II.iii.86). In feudal classification a barony falls into the class of noble as opposed to ignoble feus. That classification is discussed by Craig (*Jus Feudale*, I.x.16) and Bankton (II.iii.83). In Scotland the distinction was recognised between the greater barons and the lesser barons, the former acquiring such titles as Duke or Earl. It was at the earliest a territorial dignity as distinct from the later personal peerage. Thus when one was divested of an estate the title of honour ceases (Bankton, II.iii.84). In the feudal system, however, whether the dignity was that of a baron or of the greater dignity of an earldom, the feudal effects were the same (Erskine’s *Institute*, II.iii.46). As Stair put it (*Institutions*, II.iii.45): “Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordship, earldom, & c. all of which are but more noble titles of a barony; having the like feudal effects”. The grant of barony carried with it the right to sit in Parliament, but as the number of lesser barons increased, steps were taken from 1427 onwards to restrict attendance to a selected number of them (Erskine’s *Institute*, I.iii.3). The grant in liberam baroniam also carried a civil and criminal jurisdiction (Erskine’s *Institute*, I.iv.25). But Erskine also states that while such an erection or confirmation is necessary to constitute a baron ‘in the strict law sense of the word’, all who hold lands immediately of the Crown to a certain yearly extent are barons in respect of the title to elect or be elected into Parliament (*Institute*, I.iv.25).”¹

28. Lord Clyde therefore states the legal position in 1992, namely that a barony in a generic sense was a noble feu and that there were distinctions within the barony which are sometimes referred to as higher dignities. In essence the higher dignities are of the genus of barony. If so proved, taking into account section 63 of the 2000 Act, any petitioner with such dignity

¹ 1992 SLT 973 at 976B

would come under the jurisdiction of the Lord Lyon and could be considered for a grant of Arms. It should be noted that the additaments would be as a baron and the wording on the Letters Patent with regard to jurisdiction would be in similar wording to those later in this note. The law establishes that such higher feudal dignities are of the genus of barony.

29. I also note that in the past baronies have been recognised in the Letters Patent under the signature of the Lord Lyon as—

“baron of X for aught yet seen”

30. I have reached the opinion that for this Petition the wording of recognition should be:

‘By Deed of Assignation recorded in the Scottish Barony Register, the Petitioner holds the Lordship and Regality of Garioch being of the genus Barony, which ownership brings the Petitioner within the jurisdiction of the Lord Lyon, King of Arms.’

31. As this recognition gives an appropriate recognition to the dignity and clearly identifies the jurisdictional basis, I can proceed to consider the granting of Arms to the Petitioner. I would propose to adopt this jurisdictional approach with all future petitioners involving feudal and other dignities, as these matters fall to be dealt with under the discretion given to the Lord Lyon. I have also concluded that the approach I am adopting is appropriate to the practice of this area of law in the 21st Century. I note for the sake of completeness that my decision in this Petition will apply to this Petition and to any further petitions involving feudal dignities or any other dignities. I also considered if this change in practice has any implications in terms of the European Convention on Human Rights (1953) and have concluded it does not.

32. The findings in fact in this Petition are as follows:-

- (i) The Petitioner is the owner of the Lordship and Regality of the Garioch being of the genus Barony;
- (ii) The Petitioner has established jurisdiction to be granted Arms by the Lord Lyon;
- (iii) The Petitioner’s grant of Arms will follow the established practice of the Lyon Court after the 2000 Act;
- (iv) The Petitioner’s Arms will reflect the additaments at present in practice for the dignity of a baron;
- (v) The Petitioner’s Letters Patent will recognise the Petitioner as the holder of the Lordship and Regality of the Garioch being of the genus Barony.

33. I have reached the findings in fact for the following reasons:

- (i) The documentary evidence lodged supports the findings;
- (ii) The Law on Lordship and Regality dignities establishes the dignity today as of the genus of barony.

34. I have reached my understanding in this Petition after considering the totality of the evidence before me including that of the Institutional writings and the relevant case law. I also considered the submissions made by the Petitioner’s agent in the correspondence. The burden of proof rests with the Petitioner and he has discharged that burden to the extent that the Petition should be allowed, but only to the extent that—

- (i) the Petitioner be granted Arms to himself and his descendants with the additaments appropriate to a baron; and
- (ii) the Petitioner's Recognition be in the following terms:
'by Deed of Assignation recorded in the Scottish Barony Register, the Petitioner holds the Lordship and Regality of the Garioch being of the genus of barony, which ownership brings the Petitioner within the jurisdiction of the Lord Lyon, King of Arms.'

35. The Petition is therefore allowed in terms of paragraph 23 (i) and (ii).

Joseph John Morrow
Lord Lyon

Dated: 30 April 2015