

## **The Irish Law of Arms – a lingering question of authority**

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### **Abstract**

In 2006 a Private Member's Bill to establish clear legal authority for the Genealogical Office and the granting of armorial bearings by the Chief Herald of Ireland was withdrawn from the Seanad Éireann, after the Minister responsible for the National Library of Ireland, in which the Genealogical Office is located, indicated that he would not support it. The rationale for the Genealogy and Heraldry Bill 2006 was the continued uncertainty, at least in some quarters, over the legal authority for grants of arms. This derived from the means by which the Genealogical Office inherited the role and responsibilities of Ulster King of Arms in 1943. This had ostensibly been based in the royal prerogative, which was not inherited by the Irish State in 1922, nor when it became a de facto republic in 1937, or a de jure republic in 1949. This uncertainty was resolved, or so it was believed, by section 13 of the National Cultural Institutions Act 1997, which came into force in 2005. However, as shall be seen, although this provision has gone some way to resolving this long-standing and unsatisfactory situation, it has not brought an end to the doubt and uncertainty that surrounds the Genealogical Office, and by association, Irish genealogy and heraldry in general.

### **Introduction**

On several recent occasions it has been suggested that the Kings of Arms and Heralds of the College of Arms had declined to record or otherwise recognise grants of armorial bearings<sup>2</sup> made by the Chief Herald of Ireland. This had allegedly been because the College was unsure of the legal basis upon which Irish grants were made, and because of a changed policy with respect to the registration of overseas grants. It may indeed matter little whether the heraldic authority of another country approves or disapproves of the status of one's own heraldic authority, except for two considerations. The first is that the College of Arms is the foremost surviving heraldic authority, whose views must be given due weight. Secondly, the College was not

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<sup>2</sup> These are variously styled coat armour, armorial bearings, arms, or coats of arms, and in some countries, though not all, are 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, or the tradition of the country concerned. Generally, see Noel Cox, "The Law of Arms in New Zealand" (1998) 18(2) New Zealand Universities Law Review 225-256.

alone in expressing concerns about the status of Irish grants; indeed, there had been many voices heard, in the Irish Republic and elsewhere, much louder than the College of Arms.

There are two important questions raised by this reported action of the College of Arms, and by the broader issues that it highlighted. One is the question of the authority for the granting of arms by the Chief Herald of Ireland.<sup>3</sup> The second distinct, though related question, is that of the recognition of Irish grants by the College of Arms.

The Genealogy and Heraldry Bill 2006, published 11<sup>th</sup> May 2006<sup>4</sup> and sponsored by the Genealogical Society of Ireland, was intended to rectify the situation, at least with respect to the first question. It was hoped that it would place the Office of the Chief Herald of Ireland on a sound legal footing and lay to rest any concerns that might exist – at least with respect to the question of the validity of the granting authority. Whether this would lead to the College of Arms registering Irish grants – as distinct from recognising them – would remain a secondary issue, and not one necessarily resolved or resolvable by legislation in the Irish republic. The Bill was not, in the event, passed, but was withdrawn by leave after its Second Reading in the Seanad Éireann, on 12<sup>th</sup> December 2006.

The argument, which was accepted by the Seanad Éireann, was that there was sufficient legal authority for the Genealogical Office in the National Cultural Institutions Act 1997, and that therefore additional legislation was not required – though the issues that the Bill raised would, it was said, be considered. The justification for this confidence remains uncertain, however, as shall be discussed.

The Chief Herald of Ireland was said to be “unaware of any notion that the College of Arms does not recognise the validity of Irish grants”.<sup>5</sup> However, Michael Merrigan, Honorary Secretary of the Genealogical Society of Ireland, and other proponents of the 2006 Bill, believed that the College of Arms was correct in its assessment of the legal position of the Chief Herald of Ireland and therefore in its refusal to accept the validity of Irish grants.<sup>6</sup> This was rooted in the history of the Genealogical Office,<sup>7</sup> which arose during the transitional period when Ireland was a republic in almost all respects except in name (1937-43), and when the existence of Kings of Arms or heraldic and genealogical offices was probably not the most pressing concern of the Irish Government – or indeed of the United Kingdom Government.

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<sup>3</sup> Or, indeed, the Genealogical Office, as the distinction between the Office and the Herald is unclear. The National Cultural Institutions Act 1997 appears to indicate that grants are actually made by the Board of the National Library of Ireland, through its department known as the Genealogical Office, rather than by the Chief Herald of Ireland, as a corporation sole.

<sup>4</sup> Second Reading in the Seanad Éireann 12<sup>th</sup> December 2006.

<sup>5</sup> Fergus Gillespie, Chief Herald of Ireland to Michael Merrigan, Honorary Secretary of the Genealogical Society of Ireland, 6<sup>th</sup> September 2006.

<sup>6</sup> Michael Merrigan to the Author, 31<sup>st</sup> July 2006.

<sup>7</sup> For a history of the Office see Susan Hood. *Royal Roots Republican Inheritance: The Survival of the Office of Arms*. (The Woodfield Press, Dublin, 2002).

To some extent the questions surrounding the authority of the Genealogical Office are a consequence of the process, sometimes radical or even revolutionary, sometimes measured and legalistic, by which the major part of the island of Ireland was converted from being a part of the United Kingdom of Great Britain and Ireland, to being the Republic of Ireland.

It is also possible that there may be a grain of truth in the assertion contained in a 1945 minute of the Dominions Office, that “excursions of kings of arms into the field of constitutional theory generally produce surprising results”.<sup>8</sup> It is also unfortunate that these developments took place at a time when the modern concept of the division or separation of the Crown was in its early stages,<sup>9</sup> leading to some conceptual uncertainty, and – what now appears as – ambiguous or even inconsistent actions.

The essence of the concerns was that it was not clear that the office was authorised, when it was established in 1943, to grants armorial bearings. It is not possible to simply assume that this right exists. Despite these doubts, it has been said<sup>10</sup> that common attitudes in Ireland to this concern included the following rejoinders:

1. The office is legal because of the State’s inheritance of the royal prerogative;
2. The office is legal because of the Ministers and Secretaries Act 1924;
3. The office is legal due to the transitional provisions of the 1937 Constitution;
4. The office is legal because of the National Cultural Institutions Act 1997, s 13
5. The office is legal because it has existed for sixty-three years (as of 2006);

Although it was the fourth argument that prevailed in the Seanad Éireann, all of these are possible explanations. It will be seen, however, whether they, or any of them, can withstand close scrutiny. It is important to understand the nature of grants from 1943, because without doing so we fail to appreciate a large element of the nature of the Law of Arms of Ireland, and even of the nature of the establishment of the Irish Republic. Continued uncertainty can do little to raise the reputation of heraldry and genealogy in Ireland, suffering as it is in the aftermath of a serious scandal, and subject to continued legal doubts – notwithstanding the views of the members of the Seanad Éireann.

In the meantime, it is unfortunate that such uncertainty should have surrounded the status of Irish grants, particularly at a time when the prestige of the Genealogical Office has suffered from the repercussions of the MacCarthy Mór chiefly titles scandal. This arose when the Chief Herald recognised Terence MacCarthy as The MacCarthy Mór, although his pedigree was later shown to be unreliable.<sup>11</sup> The legal authority for the Genealogical Office to recognise Gaelic chiefly titles was also challenged,<sup>12</sup> and the practice of going so has now ended, hopefully only temporarily.

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<sup>8</sup> 16<sup>th</sup> February 1945, Dominions Office, DO35/113.

<sup>9</sup> See Noel Cox, “The control of advice to the Crown and the development of executive independence in New Zealand” (2001) 13(1) Bond Law Review 166-189.

<sup>10</sup> Michael Merrigan to the Author, 31<sup>st</sup> July 2006.

<sup>11</sup> Sean J. Murphy, *Twilight of the Chiefs: The MacCarthy Mór Hoax* (Academica Press, Bethesda, 2004).

<sup>12</sup> Attorney-General’s advice to the Minister of Arts, Sport and Tourism in June 2002.

This paper will address the question of the legal basis for Irish grants of armorial bearings. It may be, as has been suggested by Merrigan, that there are now several categories of arms in the Republic of Ireland. His suggested categories were as follows:

- Grants made by the Ulster King of Arms between 1552 and 31<sup>st</sup> March 1943;
- Grants made by the Chief Herald of Ireland between 1<sup>st</sup> April 1943 and 19<sup>th</sup> March 1997;
- Grants made between the date of enactment and the date of implementation of s 13 of the National Cultural Institutions Act 1997 in 2005;
- Grants made since the implementation of s 13.<sup>13</sup>

It is the purpose of this paper to attempt to untangle the situation as of 2006, and identify the legal basis – if any – for the granting of arms in the Republic of Ireland. These categories, or rather the events which punctuate the periods that mark the categories, are the structure upon which the paper is constructed.

The related question of the recognition of Irish arms by the College of Arms (and by other non-Irish bodies) will then be addressed.

### **Nature of Law of Arms**

In most respects the legal system of the Republic of Ireland is derived from that of that part of Ireland that formerly constituted a part of the United Kingdom. Put simply, most Irish laws were similar to, or indeed identical with, the laws of England<sup>14</sup> – for most civil and criminal matters – and of the United Kingdom for constitutional matters, subject to the usual changes to suit local circumstances. The Law of Arms in Ireland was in the same position. In the absence of an imperial Law of Arms (that is, one common to all the realms of the King, irrespective of otherwise differing legal systems) England and Wales, Scotland, and Ireland (and now also Northern Ireland)<sup>15</sup> enjoyed their own Law of Arms. Those of Ireland were, however, essentially the same in most respects to those in England.

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 Crown.<sup>16</sup> Ireland shared with the rest of the United Kingdom the principle that armorial bearings are within the exclusive control of the Crown. The power to grant and confirm coats of arms is part of the royal prerogative.

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<sup>13</sup> Michael Merrigan to the Author, 31<sup>st</sup> July 2006.

<sup>14</sup> *Harris v Saunders* (1825) 4 Bl. & C. 411; 3 L.J. (o.s.) K.B. 239.

<sup>15</sup> Prior to 1922, arms granted by Ulster King of Arms were undoubtedly governed by the Irish law; Sir Crispin Agnew of Lochnaw, Bt, “The Conflict of heraldic laws” (1988) *Juridical Review* 61, 62.

<sup>16</sup> As in *Halsbury’s Laws of England* (3<sup>rd</sup> ed, 1960) vol. 29, 239-270.

The power to grant armorial bearings was and is currently delegated by the Crown to the kings of arms.<sup>17</sup> In a republican regime the *fons honorum* (or font of honour) would become the President, State or some other organ of government, but the principle of state control would remain the same, unless armorial bearings were entirely deregulated, or the Law of Arms were specifically and explicitly altered by competent legal process.

The applicable Law of Arms in Ireland prior to the early to mid twentieth century was in most particulars identical with that in England, just as the common law in Ireland was very close to that in England. But they were separate and distinct laws, although in both countries grants depended on the royal prerogative for their legal authority. From 1382, and the appointment of a dedicated King of Arms for the Kingdom of Ireland – Ireland King of Arms – the laws of heraldry in Ireland were administered in a manner similar to that in England (where the College of Arms had not yet been created<sup>18</sup>).

The office of Ireland King of Arms lapsed with the fall of King Richard III in 1485, and indeed the extent to which Ireland King of Arms was ever an effective heraldic authority is uncertain. But in 1552 Ulster King of Arms was appointed. This post remained in use throughout the whole of the period with which we are concerned, and undoubtedly operated in much the same manner as the Kings of Arms in England and Wales, and Scotland, in granting and confirming armorial bearings.

### **Grants made by the Ulster King of Arms between 1552 and 31<sup>st</sup> March 1943**

From the extension of the Crown's authority to Ireland until the relinquishing of that authority in the course of the twentieth century the legal authority of the Crown to confer armorial bearings on its Irish subjects was legally-speaking, unimpeachable.<sup>19</sup>

Ignoring, for the purposes of this exercise, grants made prior to 1552, it can scarcely be doubted that within the Kingdom of Ireland,<sup>20</sup> the authority to grant armorial bearings lay with Ulster King of Arms, as the King's authorised deputy. The

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<sup>17</sup> The Crown's prerogative as fount of honour remains exercisable personally by the Sovereign.

<sup>18</sup> The kings of arms and heralds were incorporated by letters patent in 1484, as the Corporation of the Kings, Heralds and Pursuivants of Arms. On 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, which was and remains based upon their own individual letters patent of appointment, and subject to the authority of the Earl Marshal, who authorises each individual grant, by warrant.

<sup>19</sup> Heraldry in Ireland before the Anglo-Norman kingdom is another matter, but, suffice to say, the long era of Anglo-Irish law either extinguished or more likely subsumed any surviving earlier heraldry.

<sup>20</sup> The Kingdom of Ireland was constituted 1541, and the revival of an Irish King of Arms can be seen as consistent with the policy of Henry VIII's government of regularizing the position of Ireland within the King's domains.

applicability of the royal prerogative everywhere in the empire, whether settled, ceded or conquered, was never doubted.<sup>21</sup> This is regardless of the fact that the Law of Arms is not part of the common law<sup>22</sup> and the common law Courts have no jurisdiction over matters of dignities and honours,<sup>23</sup> such as armorial bearings.<sup>24</sup> The Law of Arms is regarded as a part of the laws of Ireland (or of England, as the case may be), and the common law Courts will take judicial notice of it as such.<sup>25</sup>

The Crown in right of the United Kingdom had executive authority over British subjects wherever domiciled.<sup>26</sup> The imperial jurisdiction of the King – primarily through the Earl Marshal – was held to extend to the arms of at least some of the former Indian princes.<sup>27</sup> Subjects of the King of Ireland were unquestionably entitled to seek grants of arms from the King's authorised minister – Ulster King of Arms – and the authority for any subsequent grant lay in the royal prerogative.

Prior to 1922, arms granted by Ulster King of Arms, who since 1943 has been an officer of the College of Arms and an “English” herald (though his responsibilities extend to Northern Ireland), were undoubtedly governed by the Irish Law of Arms,<sup>28</sup> which conferred the same type of territorial monopoly upon Ulster King of Arms as was conferred upon Garter, Clarenceaux and Norroy Kings of Arms in England and Wales, and Lord Lyon King of Arms in Scotland.<sup>29</sup>

From 1922 the situation became more complicated, with the constitution of the Irish Free State remaining silent on the question of the royal prerogative – which was clearly not then transferred to the government of the State, but which probably preserved the royal prerogative in the hands of the King. It seems that the royal prerogative of arms, and the authority of the Ulster King of Arms to confer arms, was unaffected by the advent of the Irish Free State – at least until 1937 (or rather 1936, as shall be seen), and the effective creation of an Irish republic. The 1943 merger of the

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<sup>21</sup> The Crown could rely on the royal prerogative to govern colonies: *Kielley v Carson* (1824) 4 Moo PCC 63; 13 ER 225; *Phillips v Eyre* (1870) LR 6 QB 1; *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273; [1964] 3 All ER 377 (CA); *Gilbertson v State of South Australia* [1978] AC 772, 782 (PC). Once a representative assembly was created, as in Ireland in 1541, then Acts of Parliament were the primary means of legislation.

<sup>22</sup> *R v Parker* (1668) 1 Sid 352; 82 ER 1151 per Keeling CJ.

<sup>23</sup> *Manchester Corp v Manchester Palace of Varieties Ltd* [1955] 2 WLR 440; [1955] 1 All ER 387; [1955] P 133 per Lord Goddard.

<sup>24</sup> *Duke of Buckingham's Case* (1514) Keil 170; 72 ER 346.

<sup>25</sup> *Paston v Ledham* (1459) YB 37 Hen VI, Pasch 18 per Nedham J.

<sup>26</sup> Sir Francis Grant, *A Manual of Heraldry* (Edinburgh, 1924) 9.

<sup>27</sup> In the opinion of the law officers of the Crown, quoted by L.G. Pine, *International Heraldry* (Tuttle, Rutland, 1970) 214.

<sup>28</sup> Sir Crispin Agnew of Lochnaw, Bt, “The Conflict of heraldic laws” (1988) Juridical Review 61, 62.

<sup>29</sup> The position of Ulster grants is considered in Sir Christopher Lynch-Robinson, Bt and Adrian Lynch-Robinson, *Intelligible Heraldry. The application of a Mediæval System of Record and Identification to Modern Needs* (Macdonald & Co, London, 1948) 112-113. They also concur that Ulster King of Arms enjoyed a monopoly of authority – subject of course to certain peculiarities of the Irish Law of Arms.

offices of Ulster King of Arms and Norroy King of Arms, and establishment of an Irish Genealogical Office, were possibly a different matter. But we may fairly conclude that grants of arms by Ulster King of Arms prior to 1936 were as valid as any.

One might speculate as to the status of grants made by Ulster King of Arms between 1936 and 1943, given the creation of a de facto if not de jure republic. But most likely however these grants were entirely lawful, since the citizens of Ireland remained as if they were subjects of the Crown,<sup>30</sup> at least until 1949.<sup>31</sup> Ulster King of Arms – and later Deputy Ulster – was therefore quite within his authority to confer arms upon Irish citizens at this time. The royal prerogative was not transferred or assigned to the Irish government in 1936 or 1937, but continued to be lawfully exercised by the King of Arms.

This was so despite the fact that from 12<sup>th</sup> December 1936 the King ceased to be such for all purposes except signing treaties and accrediting envoys, since Irish citizens remained subjects of the Crown. It meant, however, that the legal status of grants from 1936 to 1943 is subtly different to earlier grants, since Ulster King of Arms was acting as delegate of the King of the United Kingdom, rather than as King of Ireland. This doesn't invalidate them, however (and we must remember that the notion of the separation of the Crowns was not fully developed at this time<sup>32</sup>), but it does show that the transitional period was one in which clear and simple solutions were not always to be obtained.

#### **Grants made by the Chief Herald of Ireland between 1<sup>st</sup> April 1943 and 19<sup>th</sup> March 1997**

With the steady progress of the Irish Government's policy of cutting links with the Crown, the Genealogical Office, later to be also known as the Office of Chief Herald of Ireland, was established 1<sup>st</sup> April 1943. The last Ulster King of Arms, Major Sir Neville Wilkinson, had actually died in 1940, but had not been replaced, and his responsibilities being undertaken by his deputy, Thomas Sadlier. The office of Ulster King of Arms was merged with that of Norroy King of Arms in 1943, as a member of the College of Arms with ongoing responsibility for that part of the island of Ireland which still remained part of the United Kingdom. Ironically, for the first time since the office was created the title of "Ulster" King of Arms now reflected to a much greater degree the actual extent of his territorial jurisdiction. The subsequent history of Ulster King of Arms need not concern us here, and our focus now turns to the new Office of Chief Herald of Ireland.

The establishment of the Genealogical Office in 1943 was without legislative authority – and it seems without regulations either. Legislative authority would not however have been necessary if the powers of the office were purely within the scope

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<sup>30</sup> *Murray v Parkes* [1942] All ER 123.

<sup>31</sup> British Nationality Act 1948 (11 & 12 Geo VI c 56 (UK).

<sup>32</sup> Generally, see Noel Cox, "The control of advice to the Crown and the development of executive independence in New Zealand" (2001) 13(1) Bond Law Review 166-189.

of the royal prerogative, or entirely ministerial or executive rather than judicial. We will consider each of these possibilities in turn.

The granting of coats of arms is usually regarded as being part of the royal prerogative. These dignities, as they are called, have legal standing<sup>33</sup> Arms are a form of property, as incorporeal and impartible hereditaments,<sup>34</sup> inalienable, and descendable according to the Law of Arms.<sup>35</sup> The ownership of arms may survive the cessation of new grants, for example due to government policy, or legal impasse. While armorial bearings are a form of property, the power of conferring of them is generally regarded as an exercise of the royal prerogative – something made explicit in the delegation of the royal prerogative to the Canadian Heraldic Authority in 1988.<sup>36</sup> It is the exercise of a royal prerogative, not a merely administrative act.

The question now becomes, what happened to the royal prerogative in Ireland after 1943 (or rather, 1937, which was the year the Constitution of Ireland came into force,<sup>37</sup> or 1936, when the Executive Authority (External Relations) Act 1936 replaced the King as Sovereign, and retaining the King – as an organ – only for certain limited external purposes)?

It has been claimed that the authority to grant arms survived the effective declaration of a republic in 1937, because of the State's inheritance of the royal prerogative. Unfortunately this does not seem to be correct. In the case of *Byrne v Ireland*<sup>38</sup> the Supreme Court of Ireland categorically established that the Irish Republic did not inherit the royal prerogative.<sup>39</sup> It was apparently excluded – indeed this occurred in 1922,<sup>40</sup> rather than in 1937, or in 1949, when Ireland became officially as well as effectively a republic.

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<sup>33</sup> *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.

<sup>34</sup> For a discussion of corporeal and incorporeal property, see Noel Cox, "The British Peerage: The Legal Standing of the Peerage and Baronetage in the Overseas Realms of the Crown with Particular Reference to New Zealand" (1997) 17 New Zealand Universities Law Review 379.

<sup>35</sup> Arms descend, with due and proper differencing, in the first instance to male descendants of the grantee, and then through females as heraldic heiresses in the event of the failure of the male line, as quarterings: *Wilts Peerage Case* (1869) LR 4 HL, 126, 153 per Lord Chelmsford.

<sup>36</sup> Letters Patent authorising the granting of armorial bearings in Canada, dated 4<sup>th</sup> June 1988. This was sealed with the Great Seal of Canada, on the advice of the Privy Council of Canada.

<sup>37</sup> Constitution (Amendment No 27) Act 1936.

<sup>38</sup> [1972] I.R. 241 (Sup Ct (Irl)).

<sup>39</sup> Supported by *Webb v Ireland* [1988] I.R. 353 and *Geoghegan v Institute of Chartered Accountants* [1995] 3 I.R. 86. See also Garter King of Arms to Secretary-General of the Most Venerable Order of St John of Jerusalem (Rear-Admiral Andrew Gough, CB), 19<sup>th</sup> October 2006.

<sup>40</sup> The Constitution of Saorstát Éireann 1922.

Had the royal prerogative been included in the 1922 constitution, or subsequently assigned to the Irish State, it would have transferred to the new one in 1937; however it is not clear that it was included. No express provision was made for royal prerogatives in the 1922 Constitution.<sup>41</sup> Certain royal prerogatives continued to be exercised by the King until 1936 – and Ulster King of Arms continued to confer armorial bearings on the direct delegation he had from the Crown. The royal prerogatives were left with the King after 1922, and not incorporated into the Constitution.

The Executive Authority (External Relations) Act 1936 restricted the powers of the Crown to signature of treaties and accreditation of envoys; no express provision was made for the powers of Ulster King of Arms to be transferred to the Irish State at this or any subsequent time. The Act itself did more than restrict the powers of the Crown. In an adroitly worded section,<sup>42</sup> it was provided that, from the passage of the Act (12<sup>th</sup> December 1936), the King “cease[d] to be King” for “all other (if any) purposes”, except for those of s 3(1). The King for the purposes of s 3(1) would be the person who would be his successor under the law of the Irish State – the Act provided for the abdication of King Edward VIII. Section 3(1) does not make the “King” King of Ireland, but rather provides that the King of Australia, Canada, Great Britain, New Zealand, and South Africa, had certain limited and defined responsibilities with respect to Irish foreign relations.

This affected the status of Ulster King of Arms as outlined above, since he could no longer be seen as exercising his responsibilities as a delegate of the King of Ireland – even if that legal entity had survived the 1922 Constitution. The royal prerogative however enjoys an imperial unity all of its own. It is clear that the major royal prerogatives apply throughout the Commonwealth (and for this purpose including Ireland). They are applied as a pure question of law,<sup>43</sup> even in a country, such as Malta, where the common law is not otherwise in force.<sup>44</sup> Minor royal prerogatives apply in all common law countries, except that they may be excluded or modified by local circumstances. Given the general circumstances of Ireland, it might be supposed that the whole of the royal prerogative – except for the ecclesiastical prerogatives – extended to the country. From 1936 however, there was no longer a King, except for certain limited external purposes, and therefore Ulster King of Arms must be seen to have been acting as a British King of Arms, rather than an Irish one.

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<sup>41</sup> Kevin Costello, “The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remedyng the Loss of the Royal Prerogatives” (1997) 32 Irish Jurist 145-194, 164.

<sup>42</sup> Executive Authority (External Relations) Act 1936, s 3(2).

<sup>43</sup> Noel Cox, “The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity” (1998-99) 14 Australian Journal of Law and Society 15, 19; *Black v Chretien* (2001) 199 DLR (4<sup>th</sup>) 228, paras 26 per Laskin JA (Court of Appeal of Ontario).

<sup>44</sup> *Sammut v Strickland* [1938] AC 678 (PC). See also *Sabally and N'Jie v Attorney-General* [1965] 1 QB 273, 293; [1964] 3 All ER 377, 380, 381 (CA). The prerogative cannot however operate against an alien in an alien land; *Attorney-General v Nissan* [1970] AC 179, 229; [1969] 1 All ER 629, 654 per Lord Pearson.

These grants would have been valid, despite the absence of a King from the Irish Constitution. In 1935 the Irish Free State was the first dominion to introduce its own citizenship status. But Irish citizens were still treated as subjects of the Crown.<sup>45</sup> The Kings of Arms may, and do, grant armorial bearings to subjects of the Queen in Australia, New Zealand, Canada, and her other realms and territories.<sup>46</sup> Foreign citizens and foreign-domiciled corporations may only receive honorary grants, which have limited legal effect as they are issued by the kings of arms in their private capacities. From 1949 citizens of Ireland have been deemed to not be aliens.<sup>47</sup> But they do not owe allegiance to the Crown, and are therefore disbarred from receiving a grant of arms. From 1922 to 1949 (rather than 1937) they remained subjects of the Crown, and were thus entitled to apply for grants of arms. Ulster King of Arms' own letters patent of appointment dated from 1908, and thus predated the 1922, 1936 and 1937 constitutional changes.

But from 12<sup>th</sup> December 1936 grants of arms were arguably completely divorced from the Irish state, and the question as to whether they were and remain governed by the Law of Arms of Ireland, or of England, is an interesting one. Sensibly, the Law of Arms of Ireland should be the applicable law, however, since Ulster King of Arms was appointed to grant arms in accordance with that law.

On 29<sup>th</sup> December 1937 a new Constitution was adopted which was republican in form, if not in name. It made no mention of the Sovereign, who had effectively been removed as of the previous December by the Executive Authority (External Relations) Act 1936. This Act continued in force. The Sovereign was no longer the head of the Irish executive, but merely an organ or instrument, authorised by the Government of Ireland, to play a specific role in external affairs.

If the transitional provisions of the 1937 Constitution preserved the royal prerogative,<sup>48</sup> then the Genealogical Office may have inherited the requisite authority through the transitional provisions of the Irish Constitution 1937. Article 49 of the new Constitution provided for the transmission of the powers, functions, rights and prerogatives held by the Irish State before 11<sup>th</sup> December 1936,<sup>49</sup> to the Oireachtas.

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<sup>45</sup> *Murray v Parkes* [1942] All ER 123.

<sup>46</sup> See Sir Crispin Agnew of Lochnaw, Bt, "The Conflict of heraldic laws" (1988) *Juridical Review* 61; George Squibb, "Heraldic Authority in the British Commonwealth" (1968) 10 *Coat of Arms* (no 76) 125.

<sup>47</sup> A principle established in 1948 (British Nationality Act 1948 (11 & 12 Geo VI c 56 (UK)). However, Irish citizens were still treated as subjects of the Crown, and they are still not regarded as foreign, even though Ireland is not a member of the Commonwealth. See now the British Nationality Act 1981 (UK), ss 37 (1) (a), (b) and 50 (1).

<sup>48</sup> Generally, see Kevin Costello, "The Expulsion of Prerogative Doctrine from Irish Law: Quantifying and Remedyng the Loss of the Royal Prerogatives" (1997) 32 *Irish Jurist* 145-194 (for the argument that no elements of the royal prerogative were transferred to the Irish State in 1922).

<sup>49</sup> The Executive Authority (External Relations) Act 1936 provided that Edward VIII remained king in the Irish Free State till 12<sup>th</sup> December 1936. The effect of Article 49(1) was that none of the royal prerogatives held by King George VI were transferred.

The crucial elements are that the powers that were transferred under Article 49 were those held by the State at that time, and that these powers were transferred to the legislature, not the executive.

Although the Executive Authority (External Relations) Act 1936 had effectively excised the King as of the 12<sup>th</sup> December 1936, the new Constitution preserved all “prerogatives” held by the Irish State as of the previous day. The question then becomes this: were the royal prerogatives of the King held by the Irish State on 10<sup>th</sup> December 1936? If they were, then they were inherited, under the 1937 Constitution, by the Oireachtas. If they were held by the King, as distinct from the State – if that distinction could be made – then they were not inherited.

It would be usual to assume that the powers of the King would be counted among the powers of the state. In the 1922 Constitution the King was envisaged as being part of the state.<sup>50</sup> Article 2 stated that “All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution”. Article 51 provided that “The Executive Authority of the Irish Free State (Saorstát Eireann) is hereby declared to be vested in the King, and shall be exercisable, in accordance with the law, practice and constitutional usage governing the exercise of the Executive Authority in the case of the Dominion of Canada, by the Representative of the Crown.” Together these would appear to suggest that the royal prerogative – which is probably not mentioned in the Constitution because it is regarded as being a distinct type of law – would be a “prerogative of the state”.

The 1937 Constitution stated that “the powers, functions, rights and prerogatives held by the Irish State” before 11<sup>th</sup> December 1936 were inherited by the new Constitution. Articles 12 and 51 of the 1922 Constitution could be interpreted as embracing the royal prerogative as part of the powers, not of the Constitution per se, but of the King as the person in whom was vested the Executive Authority of the Irish Free State. However, in 1922 the concept of the division of the Crown was not well developed, and it is likely that the royal prerogative was not intended to be patriated in this manner. Indeed, it would seem that the British Government was opposed to a transfer of the office to the control of the Irish Free State because of the concern that this would harm the unity of the Crown and the royal prerogative. This attitude could only be maintained if the royal prerogative is seen as being distinct from the “executive authority” of the 1922 Constitution.

Thus it is not clear whether the royal prerogative was a “prerogative held by the Irish State”, and therefore inherited by that State in 1937. Although it might be a conceptually stronger argument to assert that the royal prerogative was included in the 1922 Constitution, we are bound by the decisions in *Byrne v Ireland*,<sup>51</sup> and subsequent

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<sup>50</sup> Though he was, in the 1922 Constitution, part of Parliament: “All powers of government and all authority, legislative, executive, and judicial, in Ireland are derived from the people of Ireland, and the same shall be exercised in the Irish Free State (Saorstát Eireann) through the organisations established by or under, and in accord with, this Constitution” (Article 12).

<sup>51</sup> [1972] I.R. 241 (Sup Ct (Irl)).

cases, that the royal prerogative was not transferred to the Irish State. It would be unwise to assert that an office (namely the Genealogical Office) had authority to act simply on the basis of a legal argument that directly contradicted a series of Supreme Court decisions, however appealing the above argument may appear. Unfortunately, the Genealogical Office has suffered more than enough from assumptions, and complacency with respect to its legal powers.

The safest conclusion is that the royal prerogative was not transferred to the Irish Government in 1922, or subsequently prior to 11<sup>th</sup> December 1936, and that Ulster King of Arms continued to exercise the non-delegated royal prerogative until 1943. Practice in Canada and elsewhere in the realms of the Queen has shown that the royal prerogative to grant arms can only be delegated by express grant of the Crown, and this was not done at any stage before or after 1922.

If all the royal prerogatives were inherited by the Irish Government after 1922 the Genealogical Office might have authority to grant arms. But the decision of the Irish Government to allow Ulster to remain in office until his death, and the reluctance of the British Government to transfer the office, suggests that the Irish Government had no reason to believe that they now possessed control of the royal prerogative of arms, or indeed had any wish to acquire it. It remained an imperial prerogative, and was expected to die with the last exerciser of that royal prerogative. Surprisingly perhaps, it lingered from Sir Nevile Wilkinson's death in 1940, until 1943, when the Genealogical Office was established, and, perhaps surprisingly, the granting of arms was deemed to be one of its functions.

It remains unclear why the Genealogical Office did not receive an express grant of authority in 1943, unless it was due to mistaken understanding of the nature of the office of Ulster King of Arms, and of the source of his authority. The interval between 1936 and 1943, and the death of the last Ulster, might have contributed to the situation developing as it did.

Ironically, if Ulster King of Arms – or Deputy Ulster – had continued to reside in Dublin Castle after 1943, it would seem that he would have retained the right to confer arms, according to the Irish Law of Arms, for so long as Irish citizens remained subjects of the Crown, which they did until 1949.<sup>52</sup>

The authority for deputy Ulster to confer arms from 1922 to 1943 derived exclusively from the royal prerogative, and was independent of the Irish government or state – it was not extinguished, merely not delegated. The Irish Free State might have sought to obtain control over the office between 1922 and 1937, but this was not done. From 1936 the royal prerogative was apparently that of the United Kingdom, but at the time the distinction between the prerogative of one realm and other was not firmly established, and probably had little practical effect.

From 1943 the Genealogical Office assumed that it succeeded to the powers and functions of Ulster King of Arms, but it would seem that it cannot have done so since the royal prerogative was not preserved in Ireland. So much then for the possibility of

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<sup>52</sup> British Nationality Act 1948 (11 & 12 Geo VI c 56 (UK).

the royal prerogative as the basis for the authority for the Chief Herald of Ireland to grant arms after 1943.

So far we have considered the possibility that the Genealogical Office could exercise the royal prerogative after 1943 – and rejected this option, as contrary to Supreme Court precedents that confirm that the royal prerogative was extinguished.

What about ministerial or executive authority? If the granting of arms were a purely administrative function it would require neither the exercise of the royal prerogative nor legislation. While there is a common perception that executive governmental powers must be derived from either the royal prerogative or statute, there is in fact a third source.<sup>53</sup> The Crown – or in this case, the Chief Herald of Ireland, acting as an organ of the government of Ireland (after 1949 of the Irish Republic) – has the same powers of a natural person to assign property, or create legal rights.

Unfortunately, although this would mean that the Chief Herald might have the right to seek copyright protection for coats of arms,<sup>54</sup> or otherwise exercise the rights and privileges of any natural or artificial person, the Law of Arms is different. If we are concerned here with the granting of armorial bearings of the same essential nature as those granted before 1943, then they must be seen as being granted in accordance with the Law of Arms. This is *sui generis*, and is a right confined – in the Irish Law of Arms as in that of England – in the Sovereign, or *fons honorum* – after 1937, or at least 1949, presumably the President or his lawfully deputised representative. The Office might grant arms that did not have a basis in the royal prerogative, if there was specific legislative authority for this, but none existed, doubtless because it was thought – mistakenly it would appear – that the Office could simply “inherit” the royal prerogative hitherto exercised by Ulster King of Arms.

The Chief Herald of Ireland also believed that from 1943 until 2005 the Genealogical Office operated under an Order made under the Ministers and Secretaries Act 1924 (and the later Ministers and Secretaries (Amendment) Act 1939), and that no specific legislation was required.<sup>55</sup> The use of regulations under an Act is of course an option. However, since the Act would appear to be intended solely to assign governmental functions between departments, would appear *prima facie* to be ineffective as the legal basis for conferring arms.<sup>56</sup>

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<sup>53</sup> Bruce Harris, “The ‘Third Source’ of Authority for Government Action” (1992) 109 Law Quarterly Review 626.

<sup>54</sup> In the National Cultural Institutions Act 1997 it is indeed provided that any copyright subsisting in armorial bearings would be vested in the Board of the National Library of Ireland; s 13(3). The wording suggests that there may have been some doubt as to whether copyright did subsist in armorial bearings, for which question see Noel Cox, “The intellectual property laws and the protection of armorial bearings” (2001) 12(1) Australian Intellectual Property Journal 143-152.

<sup>55</sup> Fergus Gillespie, Chief Herald of Ireland to Michael Merrigan, Honorary Secretary of the Genealogical Society of Ireland, 6<sup>th</sup> September 2006.

<sup>56</sup> This was certainly the view of the College of Arms; Garter King of Arms to Secretary-General of the Most Venerable Order of St John of Jerusalem (Rear-Admiral Andrew Gough, CB), 19<sup>th</sup> October 2006.

The Adoption of Charters Act 1926 deemed bodies established by royal charter or letters patent to be statutory bodies for the purposes of the Ministers and Secretaries Act 1924, and it may also be questioned whether Ulster King of Arms was such a body, although he did have seal and was a corporation sole.

Even if the Office of Ulster King of Arms were a body corporate established by letters patent, and therefore a “statutory body” for the purposes of the 1924 Act, it is necessary to examine the relevant Order, the Allocation of Administration (Genealogical Office) Order 1943, to see whether it was, in fact, ineffective, for the reason cited above, namely that the Act was designed to facilitate the assignment of departments, and did not authorise the granting of legal rights.

The Order is very brief. The single substantive clause states simply “The administration and business of the Genealogical Office are hereby allocated to the Department of Education”. This would not have the effect of creating any additional powers or authority; it does not even formally establish the Genealogical Office, an action which, of itself, may be achieved by administrative act alone. The Attorney-General gave advice to the Minister in June 2002 to this effect. Nor is there a clear statement (or even an unclear one) that the Genealogical Office is the successor to the Office of Ulster King of Arms.

#### **Grants made between the date of enactment and the date of implementation of s 13 of the National Cultural Institutions Act 1997 in 2005**

From 1943 the Genealogical Office seems to have operated under the dubious authority of the Allocation of Administration (Genealogical Office) Order 1943 – which was scarcely authority for anything – and a belief that the office had “succeeded to the powers and functions” of Ulster King of Arms (as stated on the Genealogical Office’s website). There was an interval of more than fifty years before the next legislative or regulatory measure affecting the Office was enacted, though doubts had arisen from time-to-time before then.

On 27<sup>th</sup> November 1996 the National Cultural Institutions Act 1997 was passed by the Seanad Éireann. On 19<sup>th</sup> March 1997 the Dáil Éireann passed the Act. The Act endeavoured to regularise matters by declaring that the non-statutory Genealogical Office was a branch of the National Library of Ireland – but it did not establish the office nor specify its functions or powers. In part the former may have been due to a desire to emphasise the continuity of the office, not merely with the Genealogical Office of 1943, but also the Ulster King of Arms of 1552.<sup>57</sup> Despite the sections – the key ones being 12 and 13 – it is not clear that the situation has been clarified or improved.

The Chief Herald of Ireland believed that the Act did quite clearly provide specific legislative authority.<sup>58</sup> The key provision is s 13,<sup>59</sup> which only came into effect in

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<sup>57</sup> Consistent with this is the preservation of a continuous series of Arms Registers, pre-dating the establishment of the Genealogical Office, until today.

<sup>58</sup> Fergus Gillespie, Chief Herald of Ireland to Michael Merrigan, Honorary Secretary of the Genealogical Society of Ireland, 6<sup>th</sup> September 2006.

2005. Thus from 1997 to 2005 the legal position of the Genealogical Office was unchanged from what it was in 1943.

The Attorney-General's advice to the Minister in June 2002 that there was no legislative basis for the granting of arms by the Chief Herald on behalf of the State was provided before s 13 was brought into effect, but took that section into account. However, as shall be seen, s 13 did little to help matters.

### **Grants made since the implementation of s 13**

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<sup>59</sup> The complete section is as follows:

**13.—(1)** For the avoidance of doubt, it is hereby declared that the Genealogical Office is a branch of the Library.

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

(3) The Board shall be entitled to any copyright subsisting in coats of arms granted or confirmed under this section.

(4) (a) The Board of the Library shall as soon as may be after the Library establishment day appoint a committee to be known as the Committee on Genealogy and Heraldry (referred to subsequently in this subsection as “the Committee”) to perform such of the functions of the Board, as in the opinion of the Board, may be better or more conveniently performed by it and are assigned to it by the Board.

(b) There may be included in the membership of the Committee such number (not being more than half of the membership of the Committee who are entitled to vote) of persons who are not members of the Board.

(c) The appointment of a person to act as a member of the Committee shall be subject to such conditions as the Board may think fit to impose when making the appointment.

(d) A member of the Committee may be removed from office at any time by the Board.

(e) The acts of the Committee shall be subject to the approval of the Board.

(f) The Director of the National Library and the Chief Herald of Ireland shall be included in the membership of the Committee but shall not be entitled to vote.

(g) The Board may regulate the procedures of the Committee but, subject to any such regulation, the Committee may regulate its own procedure.

Section 13 was brought into force in 2005.<sup>60</sup> Section 13(1) does not create the Genealogical Office, but rather states that:

**13.—(1) For the avoidance of doubt, it is hereby declared that the Genealogical Office is a branch of the Library.**

This does not assign any specific powers, and achieves no more than the 1943 Order did. Subsection 2, however, is crucial. It states that:

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

This appears to finally confer an express authority – statutory rather than prerogative – to grant arms. The words “to perform the duty of researching, granting and confirming coats of arms” are important. Does this amount to the delegation of authority – presumably inherent in the powers of the Irish legislature – to grant arms? By way of comparison let us look at the wording used in the 1988 letters patent establishing the Canadian Heraldic Authority. This states that it authorises:

the Governor General of Canada to exercise or provide for the exercise of all powers and authorities lawfully belonging to Us as Queen of Canada in respect of the granting of armorial bearings in Canada.<sup>61</sup>

This is much more explicit than the formula in s 13 of the National Cultural Institutions Act 1997. The usual wording of letters patent appointing a King of Arms states that “We do give and by virtue of these Presents grant into the said [ ... ] Authority Power and Licence with the consent of the Earl Marshal of England or his Deputy for the time being in writing under their hands and seals from time to time first given or signified of granting and appointing to eminent men Letters Patent of Arms and Crests ... ”<sup>62</sup> This is quite explicit, and in marked contrast to the wording of ss 12 and 13.

The greatest difficulty with the wording of s 13 is that it is effectively repeating the error of the 1943 Order, it is stating that the function of granting arms is to be carried out by a certain officer, but does not actually confer the authority to make grants. This may seem a very nice distinction to make, but legally it is significant. Section 13 provides a clearer view of what was intended (than does the Order), and comes closer to achieving that, but alas it also falls short of resolving all uncertainty.

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<sup>60</sup> National Cultural Institutions Act, 1997 (Commencement) Order 2005.

<sup>61</sup> 4<sup>th</sup> June 1988.

<sup>62</sup> From the Letters Patent appointing John Philip Brooke Brooke-Little Norroy and Ulster King of Arms and Principal Herald of the North Part of England and of Northern Ireland, 7<sup>th</sup> July 1980.

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

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

(c) to facilitate, encourage, assist and promote the granting and confirming of coats of arms,

This clearly does not expressly authorise the granting of arms, indeed it seems to presuppose that the ultimate authority for grants lies elsewhere – perhaps in the inherited royal prerogative, which, as we have seen, is an inadequate basis for authority.

Section 13(1) continues the practice of emphasising the continuity of the Genealogical Office. This would not necessarily present a difficulty, even though the office was apparently never formally established. The key point is that the office exists now as a department of the National Library, and that one of the officers of the library is authorised to perform the duties of “granting and confirming coats of arms”, subject of course to the authority of the Board, which is empowered to “to facilitate, encourage, assist and promote the granting and confirming of coats of arms”. This is a wholly inadequate basis for the granting of armorial bearings, and reliance upon ss 12 and 13 will do little to raise the reputation of the Genealogical Office.

Perhaps equally seriously, s 13 fails to address the status of pre-2005 grants of arms, the legal status of which is subject to serious question.

The primary concern remains whether the imprecise wording that was used in ss 12 and 13 of the National Cultural Institutions Act 1997 can confer the right to grant arms. This is a particular problem because we are not here concerned with the known and familiar royal prerogative grants, where, as above, the Queen of Canada can easily provide for the Governor-General of Canada to “exercise or provide for the exercise of all powers and authorities lawfully belonging to Us”. In Ireland we see a non-prerogative authorisation, apparently (but not unambiguously) legislative. Are these “coats of arms” legally the same as pre-1943 coats of arms; does the Irish Law of Arms apply to them, or are they a new form of grant?<sup>63</sup> These are unanswered, and as the legislation currently stands, unanswerable questions.

On the question of the lack of express creation of the Genealogical Office, that may not necessarily matter. The power to grant arms – note, not to recognise chiefly titles – is conferred upon the Chief Herald, not the Genealogical Office, but only as an officer of the National Library of Ireland. Continuity is primarily a concern because there was arguably no legal authority for the granting of arms from 1943 to 2005 (and possibly even after that).

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<sup>63</sup> The grants themselves specifically refer to the Law of Arms, see, for instance the Grant of Arms to Stephen Patrick Cracroft-Brennan, 11<sup>th</sup> February 1986 (Vol. W, fol.43, per Donal Begley, Chief Herald of Ireland).

Additional difficulties and uncertainties may have been created. The National Cultural Institutions Act 1997 appears to indicate that grants are actually made by the Board of the National Library of Ireland, through its department known as the Genealogical Office, rather than by the Chief Herald of Ireland, as a corporation sole. Irish grants of arms themselves do not accurately reflect this legal arrangement. They are in the name of the Chief Herald of Ireland, and include the key phrase that “by virtue of the authority vested in me in that behalf do by these Presents grant and assign unto the said … the Arms following … to have and to hold the said Arms … according to the Laws of Arms and the practice of this Office”.<sup>64</sup> Unfortunately it is not clear that the Chief Herald of Ireland is authorized to grant arms, though it could be argued that s 13 can be read to mean that the Chief Herald for the time being has this authority vested in him. It would perhaps be more accurate to say that the authority is vested in the Board of the National Library of Ireland, and is being exercised on its behalf by the Chief Herald of Ireland.<sup>65</sup>

The 2006 Bill would have repealed what has been described as the fundamentally flawed s 13 of the National Cultural Institutions Act 1997. Section 13 does apparently give some form of authority to the Chief Herald of Ireland to grant arms. But it is not explicit, especially when read in conjunction with s 12. Given that doubts have lingered for sixty years it is unfortunate that a more precise provision were not provided – especially as the draftsmen were alerted by many interested parties, to the deficiencies of the proposed section.

As a final point on the legal authority for the granting of arms in the Irish Republic, there has been an argument that the Genealogical Office is legal because it has existed for sixty-three years. Unfortunately prescription – which may operate in some areas of

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<sup>64</sup> Wording from May 2005. Letters Patent of Grant of Arms to the Association of Professional Genealogists of Ireland, 7<sup>th</sup> July 2006 (Vol. Z, fol.75, per Fergus Gillespie, Chief Herald of Ireland).

It may also be noted that this grant was to a corporate body that was registered as a company on 17<sup>th</sup> August 2006 in the Companies Registration Office, Dublin (number 425002). The letters patent purport to make the grant to the Association, although at the date of the grant the Association, which was founded in 1986, may have been unincorporated. The letters patent also make the grant to the Association of Professional Genealogists of Ireland, although the correct title of the organisation is now (from incorporation as a company) the Association of Professional Genealogists *in* Ireland Limited. There would not appear to be any legal authority for the grant of arms to an unincorporated body, and it must be doubted whether a retrospective grant would be effective; the Association may, however, have been incorporated in some other manner prior to 2006, but this is not evident from the letters patent themselves.

<sup>65</sup> Until 2003 the wording was “by these Presents, acting on behalf of and by the authority of the Government of Ireland, [do] grant and assign unto the said … the arms following … according to the Laws of Arms”. Letters Patent of Grant of Arms to Stephen Patrick Cracroft-Brennan, 11<sup>th</sup> February 1986 (Vol. W, fol.43, per Donal Begley, Chief Herald of Ireland). This wording is also unsatisfactory, for the same reasons, though it could be argued that the Chief Herald was acting by the authority of the Government of Ireland in a loose sense, assuming of course that the Government itself had the authority to grant arms.

private law – does not provide authority for the granting of armorial bearings. The Genealogical Office exists as an institution of government by administrative action. But it needs clear authority to grant arms, or the arms it purports to grant have no legal standing in the Irish Law of Arms. This is a matter of embarrassment to the state, and of real concern to grantees, who have paid for the privilege of having Irish armorial bearings, and might reasonably expect to get a valid grant.<sup>66</sup>

This situation would be amusing if it were not deplorable. The difficulty could have been avoided by a relatively simple amendment to the 1997 Act. The 2006 Bill met some opposition due to its comprehensiveness, particularly in light of the short passage of time since the implementation of s 13. The easiest solution, in terms of short-term correction of the uncertainty, is an amendment to ss 12 and 13 of the National Cultural Institutions Act 1997. The Genealogy and Heraldry Bill 2006 should however form the basis for a more comprehensive reform of Irish genealogy and heraldry. Few would deny that events surrounding the Genealogical Office in recent years do suggest that there is a need for some fairly radical (but carefully reasoned) reforms.

By way of suggestion, s 12(2) could be amended as follows (new text in italics):

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

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

Section 13 could become

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

Doubtless more detailed drafting could create a more robust provision, but it is essential that the continued doubts be speedily put to rest. Ideally the Genealogical Office should be a stand-alone entity (though this would require a more complex

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<sup>66</sup> According to the Genealogical Office website, “The fee for a personal grant of arms is €3,300. The sum of €300 is payable when lodging the application, a further €1,500 is payable when work on the design begins and the balance of €1,500 must be paid before work on the actual grant of arms is put in hand by the herald painter. For a grant of arms to a local authority, or a school, club etc, the fee is €5,000. For a grant of arms to other corporate bodies and organisations, the fee is €10,000”. ([http://www.nli.ie/fr\\_offi.htm](http://www.nli.ie/fr_offi.htm)) as at 14<sup>th</sup> December 2006.

amendment to the Act, or a new Act such as the proposed Genealogy and Heraldry Bill), and the Chief Herald – perhaps even renamed Ireland King of Arms – made its executive head, with specific authority to confer arms, and to recognise chiefly titles.

### **The recognition on Irish grants**

The doubts surrounding the legal status of Irish grants of arms must be said to remain, despite (or perhaps even because of) the enactment of s 13 of the National Cultural Institutions Act 1997. This can do little to persuade heraldic authorities abroad, and least of all the College of Arms, which had already expressed its disquiet, that all was not well in Irish heraldry and genealogy.

One illustration of the consequences of this unsatisfactory situation is in the refusal of the College of Arms to register Irish grants of arms. The following is the account of one instance. In 1974, John E. Flynn, then of Ireland, later Scotland, and now living in England, obtained a Confirmation of Arms from the Chief Herald of Ireland.<sup>67</sup> In 1975 he was advised by Lancaster Herald that these arms could be registered in the College of Arms, provided they were first registered in Scotland (since he was then domiciled in Scotland).<sup>68</sup> The arms were matriculated at the Court of the Lord Lyon of Scotland in the same year. Mr Flynn however took no action at that time to register his Irish arms in the College of Arms.

Some years later, in 2002, he sought to have his arms registered in London. This time he was advised, by Clarenceaux King of Arms, that the College of Arms was not now registering arms originating from the Chief Herald of Ireland.<sup>69</sup> Further advice, in 2004, from Norroy and Ulster King of Arms, was that arms granted by the Chief Herald of Ireland were treated in the same way as all foreign grants of arms. Since 1999 the entering of any foreign arms in the Foreign Arms Register at the College of Arms had been discontinued, with the sole exception of grantees who were British subjects who had previously borne the same arms under another jurisdiction. Only grants and matriculations of the Lord Lyon King of Arms were now entered in the records of the College of Arms.<sup>70</sup> Canadian grants since 1988 could however also be recorded, an example being the grant to Graeme John Leonard Hall, of arms, crest and motto, 10<sup>th</sup> January 1995, recorded in August 2004.<sup>71</sup>

This refusal to register Irish grants was not grounded on any concern as to the legal standing of the Genealogical Office, or doubts as to the legal basis for the Chief Herald of Ireland's powers to grant arms – at least none that were expressed. It was based instead on a policy decision, justified by doubts as to the College of Arms own legal powers in this respect, to only register grants of arms made by Officers of Arms of the Crown.

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<sup>67</sup> Volume U, folio 19.

<sup>68</sup> Sedley Andrus, Lancaster Herald, to J. E. Flynn, 1<sup>st</sup> October 1975.

<sup>69</sup> Hubert Chesshyre, Clarenceaux King of Arms, to J. E. Flynn, 16<sup>th</sup> July 2002.

<sup>70</sup> Thomas Woodcock, Norroy and Ulster King of Arms, to Vernon Coaker, MP, 1<sup>st</sup> October 2004.

<sup>71</sup> With the reference Canada 1/12; The College of Arms Newsletter, November 2004, no 3, p 3.

This was made clear in a letter from Garter King of Arms in 2004, that grants by Lord Lyon or by the Chief Herald of Canada may sometimes be noted in the appropriate book of records at the College of Arms; “This does not apply to others who are not subjects of the Crown”. “In the past there were occasional efforts to note certain Arms granted by other authorities. Unfortunately, this caused a number of problems concerning such matters as the eligibility of grantees and the eligibility of the granting authority. Our own authority to embark on this remained doubtful; and the correct procedure was deemed to be to restrict our activities to the terms of our respective appointments, and what was known to be correct”.<sup>72</sup>

In 2006 Garter King of Arms clarified that the College of Arms were not prepared to accept the 1975 Scottish matriculation for registration, as it was not a grant as such: “Essentially it is the recognition of an Irish grant and not an original grant made in Scotland”.<sup>73</sup> In other words, in accordance with the policy stated in 2004, only grants made to “subjects of the Crown”<sup>74</sup> would be recorded. It would seem that the grants also had to be made by the Crown to qualify for inclusion, since only grants by Lord Lyon and the Chief Herald of Ireland were being registered. Though it is possible that the College had not been asked to register arms conferred on a subject by a foreign authority, this is unlikely.

In the light of recent publicity regarding the disputed status of Irish grants, the College now also expressed its own concerns,<sup>75</sup> but this would not have had any effect upon the decision to not register Irish grants. This was based on the status of the recipient as much as the authority of the granting authority.

The College of Arms, or rather the Kings of Arms who work there, are authorised to grant coats of arms to subjects of the Crown – and may make honorary grants to foreigners and others who are not subjects of the Crown. As noted earlier, honorary grants are issued by the kings of arms in their private capacities, and it may indeed be questioned whether these have legal standing.

The existence of mechanisms in the United Kingdom and the Irish Republic for the mutual recognition of the institutions of each state in relation to Northern Ireland has little bearing upon the question of the registration of Irish grants. The Chief Herald of Ireland believed that the Belfast Agreement<sup>76</sup> was not relevant as the College of Arms is “not a department of Government but a private corporation”.<sup>77</sup> This is incorrect. The corporation may be private – though that is doubtful since all members are

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<sup>72</sup> Peter Gwynn-Jones, Garter Principal King of Arms, to Vernon Coaker, MP, 8<sup>th</sup> December 2004.

<sup>73</sup> Peter Gwynn-Jones, Garter Principal King of Arms, to John E. Flynn, 7<sup>th</sup> July 2006.

<sup>74</sup> Peter Gwynn-Jones, Garter Principal King of Arms, to Vernon Coaker, MP, 8<sup>th</sup> December 2004.

<sup>75</sup> Peter Gwynn-Jones, Garter King of Arms to Secretary-General of the Most Venerable Order of St John of Jerusalem (Rear-Admiral Andrew Gough, CB), 19<sup>th</sup> October 2006.

<sup>76</sup> 10<sup>th</sup> April 1998.

<sup>77</sup> Fergus Gillespie, Chief Herald of Ireland to Michael Merrigan, Honorary Secretary of the Genealogical Society of Ireland, 6<sup>th</sup> September 2006.

appointed by the Crown, and the Earl Marshal is Visitor of the College, but it also indicates that there may have been a misconception as to the nature of grants in England and Wales. Grants of arms are not made by the College of Arms, even though that is a corporate body, but rather by the Kings of Arms, pursuant in each instance to a warrant from the Earl Marshal.

The Belfast Agreement, and other treaties and conventions between the United Kingdom and the Republic of Ireland, allow for the reciprocal recognition of certain processes, and for co-operation and consultation. But although the Belfast Agreement in particular enjoins the state parties to work together, it does not mean that Irish grants would necessarily be treated in a manner different to those of other states. The key issue here is that only grants to subjects of the Crown are recognised (and apparently only when receiving grants from the Crown, though this is less clear).

It has long been the position that those domiciled in the realms of the Crown should only use arms granted by the Crown.<sup>78</sup> It would follow that those domiciled within the realms of the Crown should not obtain grants from foreign heraldic authorities, but that if they do they should seek registration in the College of Arms, Lord Lyon, or the Chief Herald of Canada, as applicable. Whatever the law and practice may be in Scotland and Canada, in England and Wales – and indeed Northern Ireland – the College of Arms appears to hold the view that only Scottish and Canadian grants (not confirmations) can be recognised.

It may well be that this is the correct position to maintain, and it is certainly within the discretion of the College of Arms to register whatever arms it sees fit to register, because of the overarching principle that those domiciled in the realms of the Crown should only use arms granted by the Crown.

It might be observed that the question of whether a recipient of arms is a subject or not is less important than their domicile. An Irishman, or person of Irish descent, who has obtained a grant of arms from the Chief Herald of Ireland, and who is domiciled in England, Wales, or Northern Ireland, would not have a right to have his arms registered in the College of Arms. Firstly, they should only use arms granted by the Crown, and the registration of foreign arms has always been discretionary.

Secondly, and perhaps most importantly from the perspective of the special position of Irish grants, especially since the Belfast Agreement, the College of Arms is probably correct in only registering arms granted by other heraldic authorities of the Crown (setting aside the vexed question of whether the Canadian Crown is the same

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<sup>78</sup> In much the same way foreign honours and titles held by subjects of the Crown are not officially recognised, though their social use is common. As Queen Elizabeth I said, “there was a close tie of affection between the Prince and subject, and that as chaste wives should have no glances but for their own spouses, so should faithful subjects keep their eyes at home and not gaze upon foreign crowns; that we for our part do not care that our sheep should wear a stranger’s marks, nor dance after the whistle of every foreigner.” Foreign knighthoods have not been recognised since the early nineteenth century, and in 1932 King George V revoked all remaining royal warrants authorising the use of foreign titles of nobility by British subjects, saving the current holders and their immediate heirs where named in the warrants.

as the United Kingdom Crown<sup>79</sup>). Its function is to grant armorial bearings, and confirm others borne by virtue of ancestral right.<sup>80</sup> Just as there is no right to a grant – one must convince an Officer of Arms, then the Chapter of the College of Arms, and finally the Earl Marshal, that one is worthy of a grant of arms – so there is no right to have foreign arms registered.

This general principle of state exclusivity can be applied elsewhere also. Each state may decide for itself whether heraldry will be regulated, and if it is, what form that regulation will take. They may choose to allow the use only of duly registered arms – and may or may not recognise and register foreign arms.<sup>81</sup> As with any aspect of dignitary law, the state is the final arbiter. However close the social, political and historical links between countries, it is not generally the case that one can insist upon the mutual recognition of one's title in another country, and this applies to armorial bearings also.<sup>82</sup>

There is of course nothing preventing an agreement being entered into that would allow the College of Arms to routinely register grants made by the Chief Herald of Ireland to men and women domiciled in England, Wales or Northern Ireland (or possibly just those domiciled in Northern Ireland, which would make more sense in principle). Because this would amount to a departure from the standard policy, because these grants are not made on behalf of the Sovereign, and in light of doubts as to its legality, specific authority would have to be sought from the Queen.

There is no reason to believe that such authority would not eventually be forthcoming. However, it would be a matter for Her Majesty, doubtless as advised by her British Ministers and taking into account the political circumstances of the situation, to decide. Hopefully Her Majesty would be allowed to express her own view, and not be treated as simply a pawn in a larger political game. Undoubtedly the present unsatisfactory state of the heraldic laws in Ireland would rightly prove a barrier to any such arrangement being entered into in the short or medium term.<sup>83</sup>

## Conclusion

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<sup>79</sup> For a case that suggests it is, see *R v Secretary of State Foreign and Commonwealth Office, Ex parte Indian Association of Alberta* [1982] QB 892 (CA); cf. *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (HC and CA).

<sup>80</sup> As in *Halsbury's Laws of England* (3<sup>rd</sup> ed, 1960) vol. 29, 239-270.

<sup>81</sup> Internationally, providing full legal protection for even domestic coats of arms is the exception rather than the rule.

<sup>82</sup> An analogous situation is seen with honours. Honours and awards conferred by the Queen in one or other of her capacities are generally recognised in other realms. But awards conferred by foreign heads of state, or even by the heads of state of republics within the Commonwealth (or even indigenous monarchies), are not.

<sup>83</sup> It is the writer's personal view, for what it is worth, that such an arrangement would not be appropriate. Only grants made by the Crown should be registered by the College of Arms. To include any others would conflict with the principle of exclusivity. It could also, potentially, open the prospect for other claims of special circumstances, for instance, to also register South African or Zimbabwean grants.

Irish grants of arms by the Chief Herald of Ireland are now made under the less than satisfactory authority of ss 12 and 13 of the National Cultural Institutions Act 1997. It is fairly clear that this authority is not derived from the royal prerogative, and it must therefore be of legislative or administrative origins. The latter is improbably, the former possible, but unlikely, due to the wording of the sections.

Unfortunately the uncertainty which has lingered since 1943 has not been removed by the enactment of these sections, nor was the position of pre-2005 grants clarified when the sections came into force in 2005.

The Genealogy and Heraldry Bill 2006 did offer an opportunity to correct these uncertainties. Unfortunately this opportunity was not taken, and the status of Irish grants of arms remains uncertain. It is to be hoped that speedy action can and will be taken to correct this lamentable situation.