

The Evolution of Armorial Law in England and Its Relevance for Canadian Armorial Law Today

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1. The Nature of Canadian Arms: A Form of Honour from the Crown, or a Mere Sign of Identity subject to Self-Assumption?

The status of the Canadian Heraldic Authority arises from Royal Letters Patent of 4 June 1988 (Elizabeth II). The key passage of these letters is succinct; all is conveyed in a single sentence:

Now know ye that We, by and with the advice of Our Privy Council for Canada, do by these Presents authorize and empower Our 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.¹

It is clear that the power to grant armorial bearings in Canada already existed ('lawfully belonging') as an element of the Royal Prerogative, and is now to be exercised in normal circumstances by the Governor General rather than directly by the monarch or any other royal officer. To understand this delegation, it is necessary to examine how the power had been previously used. Recently, Christopher Mackie has investigated the history and legal basis of the Canadian Law of Arms in an extensive and scholarly review. Uncertainties remain, but his general conclusion, at least for most of Canada, is that before 1988 the Royal Prerogative in armorial matters was legally exercised, as it was in England, via the Earl Marshal and the Kings of Arms of the College of Arms in London.

This is strongly suggested by their *de facto* rôle in conferring the armorial bearings used in the Canadian federation throughout that period, including those to be used by successive monarchs in right of her or his Canadian dominions. When the Dominion of Canada was created by what is now called the *Constitution Act, 1867*,² it was an English king of arms who assigned arms to the Crown in the new provinces of Ontario, Quebec,

¹ Elizabeth II R. to Governor General Jeanne Sauvé, Letters Patent, 4 June 1988 (37

² (U.K.), 30 & 31 Vict., c. 3.

Nova Scotia, and New Brunswick.³ Similarly, in 1919, it was with an English King of Arms that a Canadian Government Select Committee was assigned to work on the design of the armorial bearings for the Dominion as a whole that was submitted to the Governor General in Council on 20 April 1921, and proclaimed by King George V on 21 November 1921.⁴ The successors of that English king of arms were to play a similar part in the design and assignment of arms and other armories to all of the other provinces before 1988,⁵ when the right to do so passed to the new Canadian Heraldic Authority.

Even before 1919, however, the right of a particular English king of arms to perform these functions had been enshrined in a binding legal directive. In 1907 and again in 1913, the Law Officers of England, Scotland and Ireland, in a joint opinion, advised that the proper authority for granting arms in the British Crown's overseas territories of all classes was Garter Principal King of Arms. Accordingly, in 1908 and, again in 1914, the Home Secretary issued directions to the Kings of Arms that, for all citizens of the Empire outside the British Isles, the Royal Prerogative for granting arms should be exercised by Garter.⁶ This effectively excluded from any jurisdiction over armorial matters outside their traditional British provinces, not only the other two English kings of arms, but those of Ireland and Scotland as well.

This directive was in fact followed in the great majority of cases, but successive Lyon Kings of Arms of Scotland disputed the right of Garter to regulated armorial bearings of Scottish origin, and persisted both in *matriculating* for the children of personal armigers such arms borne in Canada, and in granting armorial bearings both to individuals and (more dubiously from a legal perspective) institutions and municipalities with some historic tie to Scotland.⁷

In principle, the right of Garter or any other British king of arms to grant armorial bearings in Canada should have been terminated when Canada became an independent kingdom after the adoption of the Statute of Westminster on 11 December 1931, but in practice this change of status was largely ignored in Canada, in this as in many other areas. Garter's rights should certainly have been terminated on 8 September 1947, when Letters Patent of George VI delegated all of his powers and those of his successors as King or Queen of Canada to his deputy the Governor General of Canada. Once again, however — as we shall later find — the

³ The king of arms in question was presumably Sir Charles Young, Garter Principal King of Arms from 1842-69.

⁴ Strome GALLOWAY, *Beddoe's Canadian Heraldry* (Belleville, Ont., 1981), p. 64.

⁵ See Conrad SWAN, York Herald (later Garter), *Canada: Symbols of Sovereignty: An Investigation of the arms and seal borne and used from the earliest times to the present in connection with public authority over Canada ...* (Toronto and Buffalo, 1977)

⁶ Noel COX, 'The Law of Arms in New Zealand', *Heraldry News, The Journal of Heraldry Australia Inc.* 29 (2002), pp. 13-18, esp. p. 14. (an abbreviated version of a paper published in *New Zealand Universities Law Review* 18.2 (1998), pp. 225-256

⁷ On these grants, see GALLOWAY, *Beddoe's Canadian Heraldry*, p. 56

government of Canada (and later the Governor General himself) declined to exercise his constitutional authority to grant, register, or regulate armorial bearings in Canada, preferring to refer such matters in the traditional way to Garter and the other officers of the College of Arms in London — to whom these powers were re-delegated in a manner whose constitutionality was at least questionable. Thus it was only after the second and *explicit* transfer of the right to exercise that authority by the Letters Patent of 4 June 1988 that the then Governor General, Jeanne Sauv , accepted this responsibility of her office, and set up the Canadian Heraldic Authority to administer her duties in this area. The traditional authority of the Earl Marshal in such matters was effectively transferred to the new Herald Chancellor (in practice the Private Secretary to the Governor General), and the traditional authority of the three English kings of arms to the new Chief Herald of Canada: from 1988 to 2007 Robert Watt, and since the latter date Claire Boudreau.

Since its inauguration, the Canadian Heraldic Authority thus established and constituted has been attacked on several grounds, most notably by a citizen of the United States of America resident in Canada (Jonathan Makepeace), who desired the right to possess and use arms in Canada, but either did not understand the constitutional role of the Royal Prerogative, or wished to eliminate it. His arguments and statements, however, do raise questions relevant to any contemporary regulation of armigery — that is, the ownership and use of arms and other armories — and are worthy of some consideration, if only to disprove them as thoroughly as possible. Makepeace made the following claims:

1. (a) That everyone has a right to assume arms; (b) that this is a matter of international, rather than national law; and (c) that all that is required of the Authority is that it register arms to protect their use.
2. That the Canadian Heraldic Authority should be responsible to Parliament, not the Crown as represented by the Governor General.
3. (a) That arms granted by the Authority, despite any claim to the contrary, are not honours; and (b) that were this so, this would be intolerable, since they are hereditary.⁸

It is interesting that his denial that arms are honours is accompanied by a strong desire for governmental registration and legal protection. While this attitude respects both the legal character of arms and their traditional association with personal identity, it neglects almost all other aspects of armigery as practised and regulated since the fifteenth century in England: the jurisdiction whose heraldic ‘laws of arms’ form the basis of those of both the Dominion and Kingdom of Canada and of all but

⁸ Jonathan D. MAKEPEACE, ‘The Canadian Heraldic Authority: An Anachronism Turns Fifteen’, *Heraldry in Canada* 37.2 (2003), pp. 19-25

one of its provinces (as Christopher Mackie has demonstrated beyond a reasonable doubt in this journal and elsewhere⁹). As the traditional heraldic laws of arms of Ireland and Wales are virtually identical to those of England, and those of Scotland place an even greater degree of emphasis on their honourable character, and the right of the Crown to restrict and regulate their use, Makepeace's position involves an effective rejection of most of the armorial traditions of the British Isles as a whole, including those that have come to be legally embodied in a division of the much broader 'Law of Arms', and as such to be subject to the authority of the Crown exercised through administrative and judicial entities devoted primarily to their regulation of their use.

Such a radical attack demands a somewhat detailed examination of the history of the tradition of armigery in the British Isles, and especially England, in order to define its basic constituents. I shall accordingly present just such an examination in the first part of this article, before proceeding to an even more detailed examination of the effects of Canadian heraldic regulations and constitutional law on the Laws of Arms pertaining to armorial emblems, their significance, acquisition, and use, received from the mother country.

It must be admitted that armigery and the set of laws and conventions governing it in every country — what is most distinctively called its 'armorial code' — arose in a pre-industrial society very different from our own, and that not all of the assumptions underlying those rules and conventions as they apply to personal armigers are necessarily relevant today. In addition, there have recently been profound changes in societal attitudes and consequent changes in related laws that challenge some established contemporary armorial practices. Among these are (1) the end of the legal inequality of women; (2) the end of stigmatisation of children born out of wedlock and of the legal liabilities arising therefrom; (3) the association of many more individuals with two or more families due to frequent divorce and re-marriage; (4) a new attitude to homosexual partnerships, and the adoption of children by such partnerships; (5) a new desire to suppress the distinction between natural and adopted children; and, finally (6), the world-wide mobility of individuals, and the consequences of changing citizenships for the bearing and protection of arms.

Nevertheless, national armorial codes have managed to adapt and survive many previous upheavals in society. Mercantilism and industrialisation completely transformed the economy and even the structure of society itself, but armigery retained much of its relevance through these changes, and if its rules are modified in appropriate ways,

⁹ See Christopher S. T. MACKIE, *The Canadian Law of Arms: A Close Examination of its Origin, State, and Administration* (Thesis for the Licentiate of the Royal Heraldry Society of Canada (2007), privately published, View Royal, British Columbia). A revised version of it was later published in two parts in this journal: 'The Canadian Law of Arms. Part I: English Origins', *ASH* 2.1 (2009), pp. 71-85; 'The Canadian Law of Arms. Part II: The Provinces', *ASH* 3 (2010), pp. 55-76.

can remain relevant today. Although the armorial division of the Law of Arms of Canada, administered through the Governor General and the officers of the Canadian Heraldic Authority, is the responsibility of the Crown, it is important that it reflect both the nation's constitution and Canadian mores, including any relevant general laws enacted by Parliament. Each one of the attacks and changes made by Makepeace and others of like mind should be expected to raise questions for the current and future practices of the Authority, and it would be wiser to confront them all now in a proactive manner than to deal with them reactively one by one.

The aim of this article is fourfold: (1) first to explore the history of the division of the armorial code and public Law of Arms concerned with personal armigery in the British (and especially English) traditions relevant to Canada; next, based on this examination, (2) to define clearly its basic principles; (3) third, to delineate carefully what problems are likely to arise in the future, and consider possible solutions to each in the light of the principles so established; and finally, (4) to outline the likely consequences of these proposals. Throughout my discussion I shall deal exclusively with the rules and conventions governing *personal* armigery, ignoring those governing that of impersonal entities like institutions and jurisdictions, because it is only in the personal sphere that the changes in social practice and related public law have made significant changes in fundamental armorial laws either desirable or necessary.

2. The Historical Background

2.1. The Origins of Arms, Armigery, and the Customary Armorial Code, c. 1135 – c. 1485

In the last century scholars have determined that the adoption and display of stable emblems ancestral to heraldic arms began in the years between 1135 and 1155 among the princes and greater barons of the north-western realms of Latin Christendom, including France and England, and that over the next century these practices (along with admission to the status of knight as a mark of majority) gradually became universal among noble men of all ranks from those of emperor and king down to that of the simple knights 'bachelor' who formed most of the rank and file of the heavy cavalry.¹⁰ In France, both armigery and the title of *escuier* or 'squire' (originally restricted to those who assisted knights either as servants or as trainees) also descended in the middle years of the thirteenth century to the sons and grandsons of those simple knights who found that the burdens of

¹⁰ On the early history of arms and armigery, see esp. Anthony Richard WAGNER, Richmond Herald (later Garter), *Heralds and Heraldry in the Middle Ages: An Inquiry into the Growth of the Armorial Functions of the Heralds* (2nd edn., Oxford, 1956, 1960), pp. 12-19; Donald Lindsay GALBREATH and Léon JÉQUIER, *Manuel du blason* (Lausanne, 1977), pp. 17-52; Michel PASTOUREAU, *Traité d'héraldique* (1st edn., Paris, 1979), pp. 26-32

formal knighthood had become too heavy for them, but continued to receive the same training and to fight in a knightly manner, albeit with inferior equipment and supporters, and at half their rate of pay. By 1270 roughly half of the heavy cavalry of France had come to be made up of such permanent squires, and their descendants retained both that social title (set after their names) along with the arms indicative of their knightly ancestry down to the Revolution of 1790.

In England, by contrast, though the same renunciation of knighthood among the descendants of the poorer knights the occurred at about the same time and rate, the status of squire remained a purely military and official rank down to just before the accession of Richard II in 1377, and it was only between about that date and the reign of Henry V (which ended in 1422) that most of the noble squires — including many men who had risen into their ranks through service as officers in the king's service, either military or civil — began to display arms in any of the usual contexts, beginning, at least with their personal seal.¹¹ From an early stage in this process, the arms adopted by squires were commonly accompanied by the new species of sign that had come to be closely associated with them on the seals of knights in the 1330s and '40s: the helm surmounted with a fabric cover in the form of a mantle, which in its turn was surmounted by a crest-base and a crest. Together these signs constituted the basic emblematic form of what would come to be called an 'armorial achievement', whose elements were normally displayed and transmitted together, and were subject to the same laws and legal treatments.

As we shall see, it was only when this process of devolution among the squires of England was virtually complete that the far more numerous minor *noblemen* or *gentlemen* who could not even afford to serve as squires began to set arms on their seals, initiating the process by which armigery came to be the principal mark of gentility, either old or new. It is unlikely that it was a mere coincidence that it was at precisely the same time that the English Crown began to restrict and regulate the right to bear not only *arms* but a *crest*, both in the abstract and in a particular form.

The emblems that came to be called *armes* or 'arms' were from the time of their adoption displayed (in what D'Arcy Boulton has called the 'primary mode'¹²) on the shields and flags borne by noble warriors in battles and knightly sports, and came to be displayed both on their horse-trappers and (after 1330) on their military surcoats, giving rise around 1490 to the designation 'coat of arms'. Long before that, however — indeed, very soon after their initial adoption — these new emblems had come to be

¹¹ On these developments, see Sylvia THRUPP, *The Merchant Class of Medieval England 1300-1500* (Ann Arbor, Mich., 1989), ch. VI, and Peter COSS, *The Knight in Medieval England 1000-1400* (Stroud, Gloucestershire 1993); and *The Origins of the English Gentry* (Cambridge, 2003), ch. 9, pp. 216-238.

¹² On the distinction between primary and secondary modes of display and related terms and concepts, see D'A. J. D. BOULTON, 'Advanced Heraldic Studies: An Introduction. Part I 'A New Conception of an Interdisciplinary Field of Scholarship', in *Alta Studia Heraldica* 2.1 (2009), pp. 1-40, esp. p. 18

represented in a secondary, monochromatic, mode on representations of shields engraved on the seals that noble men and women of princely and baronial rank had already begun to use to authenticate their letters and the legal documents they issued in their capacity as territorial and feudo-seigniorial lords, and which soon spread first to knights and their ladies. For these reasons, the practices of armigery in their formative centuries were heavily influenced by the practices of noble men in their several capacities as members of noble lineages, territorial and feudo-seigniorial lords, and both heavy cavalymen (or 'men-at-arms') and commanders of military forces dominated by other such warriors.

In both northern France and the British kingdoms, the society in which armigery first emerged and began to spread through the ranks of the nobility and knightage was one in which both the patrilineage¹³ — a kindred defined on the basis of descent in the male line from a founding ancestor — and primogeniture were major organizing principles. In order to preserve the wealth and power of noble patrilineages, their estates were kept intact by transmitting at least the part that had already been inherited to the eldest son (Latin *primogenitus*) in each generation. Younger sons were maintained in minor roles (eventually as squires), sought their own fortune in military adventures or through marriage to heiresses, became clerics or, later, entered a profession — usually that of law. In England, when a noble landholder died without sons or patrilineal descendants, his daughters became his co-heiresses, transmitting equal parts of the estate either to their husbands or, if they were widowed, to their eldest sons. This pattern of succession to real property and the rights associated with it soon became the basis for the rules governing the descent of arms when they finally crystallized in the fourteenth century.

Nevertheless, the essentially hereditary nature of arms established itself only slowly over the two centuries following the appearance of painted emblematic shields and personal seals. It is possible that it was the cost of cutting new seals for legal use that prompted the adoption of the same coat of arms by heirs, though the tendency of arms to be identified with the lineage and dominions of their bearers from soon after the time of their adoption, and a natural desire among lords to be associated visually with their ancestors and kinsmen probably played a more important rôle.

In fact, though as late as the 1320s some noblemen chose to abandon their father's arms entirely when they chose their own on their

¹³ On the history of the development of the patrilineage in the nobilities of Latin Europe, see Karl SCHMIDT, 'Zur Problematik von Familie, Sippe, und Geschlecht, Haus, und Dynastie beim Mittelalterlichen Adel. Vorträgen zum Thema "Adel und Herrschaft im Mittelalter"', *Zeitschrift für die Geschichte des Oberrheins* (1957). See also Georges DUBY, 'The nobility in medieval France', in idem, *The Chivalrous Society*, Translated by Cynthia Postan (Berkeley and Los Angeles, 1980), pp. 20-111; P. BONENFANT and G. DESPY, 'La Noblesse en Brabant au XIIe et XIIIe siècles: quelques sondages', *Le Moyen Age* (1958).

admission to knighthood.¹⁴ A few did this at a later date, especially if they inherited from their mother the arms of a lineage much more distinguished than their own, or like Richard II's half-brothers Thomas Holland, first Duke of Surrey, and John Holland, first Duke of Exeter, and his cousin Thomas de Mowbray, first Duke of Norfolk, and Henry VI's half-brothers Jasper and Edmund Tudor, were granted the right to bear a version of the royal arms. Nonetheless, after about 1230 the great majority of new knights of all ranks initially assumed at their majority a duly differenced version their father's arms, and while those who later succeeded their father simply abandoned the difference they had borne to that time (most commonly a label), the others transmitted their differenced arms to their own sons, who added and subtracted additional differences in the same way. Thus, the basic design of the original arms of the lineage was retained by most of its members with suitable modifications, and in something very close to its original form by the first armiger's heir, the 'chief of name and arms' of his lineage. After about 1330 this pattern of transmission was fully normative, and has remained so to the present.

Down to about 1340, English noble armigers who inherited substantial estates from their mother had to choose between retaining a version of their father's coat or adopting in its place the arms of their mother — arms which themselves were normally those of her father. In that year, however, King Edward III visually proclaimed his assumption of the additional title 'King of France' by quartering the arms of the Kings and Kingdom of France with those of England on the same field: a practice initiated in Spain more than a century earlier, but little employed elsewhere before 1340. Edward's adoption of marshalling two distinct coats on a single field in the manner was maintained by all of his royal descendants, and came gradually into use among English peers and knights, to permit them to represent maternal inheritances in growing numbers.

The customary usages related to the inheritance of arms, their modification to indicate juniority, and their combination to indicate maternal inheritances, joined the equally customary usages with regard to the design and formal description of arms that grew up in the same period, to constitute what may be regarded as the earliest form of the armorial code. None of the elements of this proto-code was embodied in any sort of written form before the 1340s, however, and few of them seem to have had what could be called a legal character, enforceable by royal courts or officers.

In fact, the only sign that arms and crests had come to be seen as constituting a form of property over which armigers enjoyed some sort of

¹⁴ On the practices of altering and abandoning inherited arms, see esp. GALBREATH and JÉQUIER, *Manuel du blason*, pp. 235-52, and D' A. J. D. BOULTON, 'Arms and Multiple Identities: Changing Patterns in the Representation of Two or More of the Identities of a Single Armiger in Different Regions, c. 1140-c. 1520', forthcoming in the Proceedings of the XXIXth International Congress of Genealogical and Heraldic Sciences, Stuttgart, Germany, September 2010/22

legal right were (1) the practice that began in Germany in the late thirteenth century and in England in the early fourteenth, whereby armigers alienated part or all of their arms to someone other than their heir; and (2) the related practice whereby great lords, including on occasion the king, granted new arms to persons they wished to honour or elevate in social rank. The idea that arms were the exclusive property of their bearers would lead before the end of the century to the practice of bringing suit in a royal court set up in the same period for other purposes against anyone who was regarded as trespassing that right.

Through these developments, and the contemporary emergence of the genre of textbook best called the 'treatise on armory', the customary armorial proto-code was gradually converted into a legal code, forming part of a more general Law of Arms. It is to these developments, therefore, that I must now turn.

2.2. Early Treatises on the Armorial Code and the Emerging Civil Law of Arms, c. 1340 – c. 1485

The very first treatise on armory to come down to us is the little work in Anglo-Norman called *De heraudie*, which was probably composed between 1341 and 1345.¹⁵ It was concerned exclusively with the compositional and descriptive elements of the armorial proto-code, however, and is therefore of little interest to us here. The first and most influential medieval treatise to deal with the armorial code from a *legal* perspective was *De Insigniis et Armis*,¹⁶ written in 1355 by an Italian lawyer and jurist who taught at the universities of Pisa and Perugia. The jurist in question, Bartolo da Sassoferrato (1314-1357), was the most prominent of a school of commentators on Roman law, which had been codified in Constantinople in 528 after the loss of the Latin West, in the collection called the *Corpus Juris civilis* or 'Body of Civil Law'. This code remained thereafter the basis of the law in the Eastern Roman Empire, but was little known in the West until its study was revived at the University of Bologna around 1100.¹⁷

It was Bartolo's attempt to isolate the general principles of Roman

¹⁵ On this treatise, and on the treatises composed in England and France generally between 1340 and 1560, see above, D'A. J. D. BOULTON, 'Advanced Heraldic Studies. Part II.B. The Third Period, 1335-1560. I. The First Phase of Heraldic Didacticism: Texts and Contexts', *ASH* 4 (2011-12), pp. 1-98, esp. pp. 64-98. On the French didactic tradition, by far the most important work is Claire BOUDREAU, *Les traités de blason en français (XIVe - XVIe s.)*, unpublished doctoral thesis, 3 vols., École des Chartes, 1996; and *L'Héritage symbolique des hérauts d'armes* (3 vols., Paris, 2006)

¹⁶ Bartolo da SASSOFERRATO, *De insigniis et armis*, has most recently been published in *Bartolo da Sassoferrato, De insigniis et armis, il più antico trattato di araldica medievale* (Florence, 1998), pp. 27-43. It was earlier published by Evan John JONES, *Medieval Heraldry: Some Fourteenth Century Heraldic Works* (Cardiff, 1943), preceded by a short biography of the author (pp. 221-252). See DENNYS, *Heraldic Imagination*, p. 213, and BOUDREAU, *Héritage symbolique*, p. 70.

¹⁷ Gerald L. GALL, *The Canadian Legal System* (Toronto, 1977), pp. 38-39

law and apply them to contemporary problems that earned him his fame. He was a founder of international private law, distinguishing those statutes of a state that should apply to foreigners from those that should not.¹⁸ He wrote extensively on civil law, including a renowned commentary on the *Corpus*. As will be discussed later, the armorial code, as well as other matters of law with an international aspect, became part of the practice of civil law lawyers in Britain.

De Insigniis et Armis was published posthumously in 1359 by his son-in-law.¹⁹ Interestingly, Bartolo was himself granted a coat of arms by the Holy Roman Emperor Karl IV, probably for his assistance in formulating the Golden Bull (1356): the instrument that effectively denied the Pope participation in the elections of future emperors.²⁰ In *De Insigniis et Armis*,²¹ Bartolo asserted that arms were granted in recognition either of merit or of the tenure of some office, and they should be borne only by those to whom they were granted. In particular, the distinctive arms of a king or prince (presumably what we would call today 'arms of dominion') must never be borne nor even displayed by others. He also opined that while arms were heritable by all legitimate male descendants of the first armiger, illegitimate offspring were not allowed them by right. In addition he maintained that when and in what manner arms were used should be strictly controlled, at least at the regnal level.²² He did allow that arms might be self-assumed for use on one's own property, and might even resemble the ancient arms of another, unrelated person or lineage, provided that the earlier possessor of the arms was not harmed in any way. Arms granted by a prince, however, were always in Bartolo's view to take priority in any dispute, so that a later grant effectively superseded an earlier act of assumption.

Bartolo also concerned himself with trademarks, and it is useful remember that the society of his time was largely illiterate, so that some sort of distinctive mark, rather than a name, was needed to indicate the ownership of any object. Such marks — which often took the form of a rebus playing on the tradesman's name, or of a linear mark resembling a complex rune — were sharply distinguished from arms,²³ and governed by entirely different laws, administered by different courts. This distinction has continued to be maintained in English (though not in Scottish²⁴) law, so arguments about the right to assume arms based on the laws governing

¹⁸ Melanie PARRY (ed.), *Chambers Biographical Dictionary* (Edinburgh, 1967), p. 144

¹⁹ Evan John JONES, *Medieval Heraldry: Some Fourteenth Century Heraldic Works* (Cardiff, 1943), p. 223

²⁰ *Ibid.*, p. 222)

²¹ JONES, *Medieval Heraldry* pp. 224 – 252; Rodney DENNYS, *The Heraldic Imagination* (London, 1975), pp. 62 – 64

²² JONES, *Medieval Heraldry*, pp. 226 - 239

²³ Stephen FRIAR, *A Dictionary of Heraldry* (New York, 1987), p. 280

²⁴ In Scotland today, there is nothing to prevent the owner of a Scots coat from registering it as a trademark, and whether or not armorial bearings have been depicted is not indicated simply by the presence of an escutcheon. This is a matter of legal fact, to be determined only by the Lord Lyon. (INNES OF LEARNEY 165-66)

trademarks are essentially invalid in a context governed by English law.²⁵

In his treatise, of course, Bartolo was attempting to encapsulate practice in his own time within the Holy Roman Empire: a ramshackle entity made up of the three notional kingdoms of Italy (effectively the northern third of the peninsula), Burgundy (or Arles) in the Rhone Valley (now mainly divided between France and Switzerland), and Germany. Even at the time of his death the kings and princes of Latin Europe had barely begun the practices of granting arms and regulating their use, and he himself was the first known beneficiary of a grant from an Emperor. In fact, direct Imperial grants would always remain exceptional in the Empire, where the same Emperor who granted arms to Bartolo had in 1355 delegated the task of conferring minor honours of all sorts to the holders of the newly-created office of *Hofpfalzgraf*, or 'curial count palatine'.²⁶ As the latter seem to have functioned almost exclusively within the German lands of the Empire, the Italian lands where Bartolo lived would effectively remain without any central source of either grants or regulation of arms before the establishment of the new Kingdom of Italy in 1870.

Italians desirous of arms were therefore obliged to continue the primitive practices of assuming them and recording them privately and locally, rather than in a public register maintained by heralds: a profession that itself does not seem to have been introduced into Italy until much later dates. It is also worth noting (1) that in both Germany and Imperial Italy, primogeniture did not normally govern the succession either to lands or to arms, so that all members of a lineage normally bore the undifferenced arms of its founder; and (2) that in both kingdoms, but especially Italy, the emergence of effectively autonomous cities and towns, and the rise of their ruling burgesses to a level of wealth and power comparable to that of the rural nobility, had encouraged the burgesses to imitate their noble neighbours by assuming arms and employing them in many of the same ways. Essentially the same practice arose in France as well in the same period, which is probably why letters of ennoblement in France only occasionally conferred arms on their beneficiaries, most of whom were burgesses (*bourgeois*) who had already assumed arms or inherited such

²⁵ On the authority of Thynne, Lancaster Herald, in 1605, English merchants were forbidden to use armorial bearings as trademarks, and much more recently Stephen Friar — answering an enquiry on the web-page of the Society of Heraldic Artists — advised as follows: 'If you are designing a logo — you can use heraldic devices (lions, dragons, suns and so on) but they must not be shown on a shield — this would constitute an unauthorised coat of arms and its use would be illegal'. (FRIAR, *Heraldic Law*)

²⁶ On these officers and their duties, see G. BENECKE, 'Ennoblement and Privilege in Early Modern Germany', *History* 56, no. 188 (1971), pp. 360-370. More extensive information can be found in Erwin SCHMIDT, *Die Hofpfalzgrafenwürde an der Hessen-darmstädtischen Universität Marburg/ Gießen* (Gießen, 1973), and Jürgen ARNDT, *Hofpfalzgrafen-Register* (3 vols., Neustadt an der Aisch, 1964-1988).

arms from their ancestors.²⁷ The most prominent burghers of London and a few of the provincial towns of England had also begun to adopt arms in the last years of the thirteenth century, and continued to do so into the sixteenth, but before the latter century their arms were simply ignored by the heralds and the English government, who clearly saw them as either invalid or beneath their notice.²⁸

In any case, in all of these respects the situation in the Empire generally and Italy particularly could hardly have been more different from that of England and the other British realms, even in the 1350s. In all of them, primogeniture and the consequent practice of differencing had always been the norm; personal arms were officially treated as marks of knightly nobility, and as we have seen, had even been restricted to dubbed *knights* until the 1330s, when armigery had begun to spread to noble squires; the king had begun what was to become an active practice of granting arms, and had established a court in which disputes over their use could be heard; and the royal kings of arms had begun to play the active rôle in armorial affairs that would lead to the delegation to them of the right of granting and recording armories in their registers.

Bartolo was clearly unaware of these existing differences, and could not have foreseen the even more divergent paths that the Law of Arms as it pertained to the emblematic type would take over the next century. It therefore makes little sense to assert, as Makepeace has done, that the opinions of Bartolo expressed in his little treatise were universally valid when he wrote it, and even less sense to assert that they were perpetually valid even in the lands in which he lived. Not surprisingly, therefore, Bartolo's view on the legality of self-assumed arms was not universally accepted even in his own lifetime.²⁹ The truth is that the laws and customs *effectively* governing the meaning, acquisition, transmission, and use of emblematic arms have always varied considerably from one country and region to the next, and practically the only rule universally recognized is that they should descend at least to the legitimate patrilineal descendants of the first armiger, with or without differences according to the regnal version of the code.

The remainder of Bartolo's treatise concerns practical matters in the display of armorial emblems, and introduces the groundless theory on the symbolic meaning of tinctures that was to become such an important element of armorial erudition over the next two centuries. And it is these matters, rather than a law of arms, that dominate later medieval works that discuss armory. Of these the next to be composed was the *Arbre des*

²⁷ On this development, see esp. *Les armoiries non nobles en Europe, XIIIe-XVIIIe s.: IIIe Colloque international d'héraldique, Montmorency, 19-23 septembre 1983*, ed. Hervé PINOTEAU, Michel PASTOUREAU (Paris, 1986).

²⁸ On the use of arms by burghers in England, see THRUPP, *Merchant Class*, ch. VI.

²⁹ G[eorge] D[rewry] SQUIBB, *The High Court of Chivalry: A Study of the Civil Law in England* (Oxford, 1959, 1997), p. 178

Batailles of Honoré Bovet, published in 1387.³⁰ He lifted his chapter on armorial matters directly from Bartolo's treatise, without formal acknowledgement, and without significant modification other than translating it from Latin to Middle French. Bovet therefore merely reiterated the position of Bartolo on the right to assume arms, but as this was also the normal practice in his time in France — where conferrals of arms by the king and the territorial princes would always remain exceptional honours — he might well have said this without Bartolo's authority.

2.3. The Earliest English Treatises and their Reflection of the Divergent History of Armigery in England, 1395 – c. 1485

It was only in the third surviving independent treatise in this tradition, composed around 1395, that an attempt was made to set out the distinctive armorial laws and practices of England with which we are here especially concerned. The *Tractatus de Armis*, written by an author who used the Latin name Johannes de Bado Aureo (and who was in all likelihood the Welshman, Siôn Trevor, Bishop of Saint Asaph), drew both upon Bartolo's *De Insigniis et Armis* and another work, the *De Picturis Armorum* of an otherwise unknown 'Franciscus de Foveis', of which no copies survive.³¹ Bado Aureo, however, stated that valid arms were granted only by kings, princes, and kings of arms or heralds,³² and said nothing whatever about the right to assume them without such authority. He thus effectively denied the Bartolan doctrine cited by Makepeace and others who maintain the existence of an international armorial code in which this principle is embodied. As we shall see, Bado Aureo's position on this subject would be echoed by most of his English successors, and by all of them after 1450.

Furthermore, unlike Bartolo, Bado Aureo (or Trevor) — reflecting the practices of England and France in an area in which they already differed profoundly from those of Italy — proclaimed the obligation of junior members of armigerous lineages to add to the chiefly coat marks of marks of difference for cadency or 'cadetship'.³³ Such marks (called

³⁰ On Bovet, see Alfred COLVILLE, *La vie intellectuelle dans les domaines d'Anjou-Provence de 1380 à 1435* (Paris, 1941), ch. VI: 'Honoré Bonet, Prieur de Salon, et ses Oeuvres', pp. 214-278. On the *Arbre de Batailles* and its background, see *ibid.*, pp. 278-287, and G. W. COPLAND, *The Tree of Battles of Honoré Bonet* (Liverpool, 1949), pp. 11-69.

³¹ *Magistri Johannis de Bado Aureo Tractatus de Armis (I) Cum Francisco de Foveis*, ed. JONES, *Medieval Heraldry*, Version I, pp. 95-143; Version II, pp. 144-212. The discussion of differencing in Version I is at pp. 129-30, while that in Version II is at p. 184.

³² SQUIBB, *High Court of Chivalry*, p. 178, quoting JONES, *Medieval Heraldry*, p. 142

³³ On the subject of differencing in general, see esp. Robert GAYRE OF GAYRE AND NIGG, *Heraldic Cadency: The Development of Differencing of Coats of Arms for Kinsmen and Other Purposes* (London, 1961); Cecil R. HUMPHERY-SMITH, 'Thirteenth Century Cadency', in *Recueil du 11e Congrès international des sciences généalogiques et héraldiques, Liège 29 mai -2 juin 1972*, in *Recueils de l'office généalogique et héraldique de*

brisures in French and more recently in English as well) are known to have been used from 1177, when the seal of Guillaume de Guines, a cadet of Count Arnoul of Guines, bore the same arms as his father but with the overall addition of a bendlet.³⁴ Nevertheless, Bado Aureo was the first to write about *brisures*, and the first to propose a system that in principle would make it possible for armigers to apply them in an intelligible way, without recourse to a herald. He stated that the eldest son and heir of any armiger should bear his full arms differenced during his father's lifetime by 'some little cross or small difference', while the second son should bear a label of three points, and the still younger sons should bear labels with four, five, or as many points as their position in the order of birth requires. However, he admitted that no such system was actually in use, for the kings of arms gave differences of arms at will. Both his proposed system and his observation about the rôle of the kings of arms in assigning differences are of considerable interest here, and the latter in particular suggests that by 1395 the royal kings of arms had already begun to play a part in the regulation of armigery in England.

Brisures were and are of considerable importance in English armory — as they have been in that of other countries where primogeniture governed the descent of property — since they permit the maintenance of a distinctive common design for the arms of all members of a patrilineage, while at the same time preserving the principle of 'one man, one coat': that is, that every individual male armiger must have arms that are, in detail at least, peculiar to him in his lifetime.³⁵ This actually applied, and still applies, to the heir apparent in the lifetime of his father, so that strictly speaking *brisures* indicate not *cadetship* (the status of being a younger son) but simply *juniority* (the eldest son being junior to his father). Differences indicating juniority of this sort were well established by the time of the siege of Caerlaverock (1300),³⁶ and are still clearly regarded as an essential element of the English armorial code, as new arms are always granted with an entailment specifying the imposition of '*due and proper differences according to the Law of Arms*'.

A number of treatises on armory produced in England in the fifteenth century also dealt with the question of what *brisures* should be employed in an ideal system of differencing, and several of them introduced new ideas on the subject.³⁷ Three of these were composed in

Belgique xxi (Brussels, 1972), pp. 289-292; and *idem*, 'The Origins of the English System of Cadency', in *Brisures, augmentations et changements d'armoiries: Actes du 5e colloque international d'héraldique, Spolète, 12-16 octobre 1987* (Brussels, 1988), pp. 97-123.

³⁴ Donald Lindsay GALBREATH and Léon JÉQUIER, *Manuel du blason* (Lausanne, 1977), p. 236

³⁵ BROOKE-LITTLE, *Heraldic Alphabet*, p. 57)

³⁶ Pedro DE ALCAZAR, *The Law of Arms in Medieval England* (2004), p. 2, repr. on the Web by Craig Levin at <<http://www.sca.org/heraldry/laurel/lexarm.html>>

³⁷ What is presented as a list of such treatises was published in DENNYS, *Heraldic Imagination*, pp. 212-217, and this was reproduced in a shorter form in FRIAR,

the years around the middle of the fifteenth century, of which the first is also the best known: the *Libellus de Militari Officio*³⁸ ('Little Book on the Knightly Office or Duty') — later renamed *De Studio Militari* ('On the Knightly Occupation') — composed by the lawyer-priest Nicholas Upton for his patron, Humphrey Plantagenet of Lancaster, Duke of Gloucester, shortly before the latter's death in 1446. Upton's scheme of brisures for the first generation was lifted directly from Bado Aureo's, but he went beyond his model by specifying that sons of the second generation should bear in order of birth a *label* and a minor brisure like a *crescent*, *bordures of different tinctures*, and if necessary *bordures bearing minor charges*, while those of the third generation should place *additional charges on their bordures*.

The first author to propose a system employing a particular sequence of minor brisures of the type ultimately adopted in England was the unknown author of the next treatise in historical order, commonly called *John's Treatise*,³⁹ which was apparently composed as a textbook for law students around 1450. 'John' (probably John Dade, a lecturer in law in the Inns of Court in London) declared that a man's sons should bear the same arms as their father with 'divers differences': the eldest with a *label*, the second son with a *crescent*, the third with a *mullet*, the fourth with a *martlet*, the fifth with a *annulet*, the sixth with a *fleur-de-lis*, and any further sons with whatever difference their father chose. *John's Treatise* seems to have been the model for a whole family of treatises composed in England around the middle of the fifteenth century,⁴⁰ and his distinctive doctrine on differencing just summarized was copied almost verbatim in most of the other tracts of the family, including the *Sloan Tract* and Richard Strangways' *Tractatus nobilis de lege et expositione armorum* ('Noble Treatise

Dictionary, pp. 348-350. Friar lists some thirty-four works, some of which are unified texts like the *Tractatus de armis*, but many of which are actually compilations or miscellanies including a number of quite distinct texts on broadly heraldic subjects. A more accurate list is published above in BOULTON, 'Heraldic Didacticism: Texts and Contexts', *loc. cit.*, and pp. 97-98. The most thorough study of the history of doctrines on differencing in early treatises is also by BOULTON: 'Brisures of Cadency: From Personal Distinction to Genealogical Code, 1395-1586', in *The Proceedings of the XXVth Congress of Genealogical and Heraldic Sciences, Dublin, Ireland, 17-24 Sept. 2002, Dublin* (published on CD-ROM, Dublin, 2005)

³⁸ First published by BYSSHE in *Nicolai Vptoni, De Studio Militari, Libri Quattuor, Iohan. de Bado Aureo, Tractatus de Armis ...* (London, 1654); published in part in F. P. BARNARD, *The Essential Portions of Nicholas Upton's De Studio Militari, translated by John Blount* (Oxford, 1931). For a discussion of both the author and the text, see DENNYS, *Heraldic Imagination*, pp. 76-82. A slightly improved version of the text was prepared by someone named Badesworth in 1458, the year after Upton's death, but it differs mainly in omitting a section, and arranging the books in a more logical order. It is discussed both in JONES, *Medieval Heraldry*, pp. xviii-xxiv, and DENNYS, *Heraldic Imagination*, p. 82.

³⁹ *John's Treatise*, preserved in three manuscripts, has been published after the first two manuscripts in JONES, *Medieval Heraldry*, pp. 213-220, where it bears the title *Tretis on Armes*. It is discussed by DENNYS, *Heraldic Imagination*, pp. 82-86.

⁴⁰ On this family of treatises, see DENNYS, *Heraldic Imagination*, pp. 82-86.

on the Law and Display of Arms') of c. 1455.⁴¹ It is almost certain that John's doctrines — deeply flawed as they were — not only affected contemporary practices, but served as the basis for the classic doctrine on differencing that was set out clearly with an engraved illustration in Guillim's *Display of Heraldrie* of 1610-11,⁴² which was to remain the most influential textbook on armory for the next two centuries.

In any case, the doctrines on armigery propounded in most treatises on armory composed in England, and especially those written after 1450, were very different from those set out by Bartolo a century earlier, and for reasons that I shall now explore, the differences in these doctrines represented a real and continuing divergence not only between the customs, but between the public laws governing armigery in England and Italy throughout that period.

2.4. The Growing Role of the English Crown and its Officers in the Conferral of Arms and Registration of Arms, 1335-1530

2.4.1. THE PRACTICE OF GRANTING ARMS IN ENGLAND, 1335-1450

Richard Strangways in his *Tractatus* of c. 1455 declared that '*any mann may take hymm a marke, but no armys without an herowd or Percyvant*'.⁴³ In fact, by the time he was writing, legal armigeration required a grant from the king himself or a royal king of arms, not just any herald, as it is today. This was a very recent state of affairs, however, and it is important here to establish when and why the self-assumption of arms was prohibited in England, and when the granting of arms was reserved as a Royal Prerogative.

We know almost nothing about the primitive practice of assuming arms, but while arms were effectively restricted to knights, it is likely that the assumption normally took place immediately following the dubbing ritual by which knighthood was conferred, and that it often involved consultation with a herald employed by the officiant (who was very often the king). Such assumptions must in most cases have involved nothing more than the adoption of a suitable form of difference to the arms of the new knight's father, and thus constituted a sort of 'matriculation', to use the term used for this process in Scotland. Only in the case of a knight whose ancestors had not been of the knightly order of society would the arms assumed have been entirely new, and even then their design would probably have required at least the informal permission of the officiant, as they had to be sufficiently distinctive both to be effective as emblems and to avoid disputes with other armigers.

It was only when squires who had no expectation of being dubbed to knighthood began to take arms for themselves (probably at about the age when they would have been knighted, and in association with a

⁴¹ On this work, also called *Strangways Book*, see *ibid.*, p. 86. It is preserved as London, British Library, ms. Harley 2259, but has not been edited or published.

⁴² John GUILLIM, *A Display of Heraldrie* (London, 1610-11).

⁴³ SQUIBB, *High Court of Chivalry*, p. 179

comparable act recognizing their majority) that the act of ‘assumption’ was wholly removed from the control of the king or noble men of at least knightly rank. It was this sort of assumption — increasingly common in the fourteenth century, and especially after 1335 — that had eventually to be forbidden by royal decree in the fifteenth. But in the interval, many such men seem to have acquired arms by some form of grant, either from the king or from a nobleman acting in a private capacity: the traditional sources of knighthood itself for centuries.

We know relatively little about the early stages of the practice of granting arms in England, but recent research has suggested that it grew out of the private practice, attested from c. 1300 to after 1600, by which an armiger transferred to another man all or part of his own arms, by alienation or licence, as a form of patronage intended to symbolize either an alliance or relationship of some other sort between the two men.⁴⁴ Both practices were at their height between the 1340s and 1440s, and it was in precisely that period that the practice of *granting* wholly new arms and crests emerged and developed in England among armigers of all ranks, including the king.

At first, private grants seem to have been considerably more common than those made by the king, but only a handful are known either from the original deeds of gift or from copies of them.⁴⁵ On the basis of such documents, however, we know that private grants of arms and crests, like those made by the king, were normally made to reward some service to the grantor, and that when the grantee was not already of knightly stock, the grant was further intended to recognize the gentility or nobility of the grantee through the conferral of the outward signs of that social status — effectively assimilating a grantee who was not simultaneously knighted to the status of squire or ‘esquire’. Grants were also made to senior clerics, whose status in the hierarchy of the First Estate was equivalent in rank to that of knight in the Second.

Rather surprisingly in the light of later doctrines, some of the private grantors were themselves simple knights, but most were peers and princes, who commonly retained their own heralds.⁴⁶ Humphrey, Duke of Gloucester, for example, employed a Gloucester Herald during the reign of Henry VI, who presumably advised him on the designs of arms to be granted.⁴⁷ In a few cases grants seem to have been made on the advice of learned heraldists rather than herald. In his *De Studio Militari* of 1446 (dedicated to Duke Humphrey), Nicholas Upton recorded that in 1424 he — while serving the Earl of Salisbury in some capacity — both designed

⁴⁴ On these acts, see Adrian AILES, *Medieval Grants of Arms, 1300 – 1461*. (Unpublished thesis for the degree of Master of Arts in Archives and Records Management, University College, London, 1997), ch. 2, pp. 18-29

⁴⁵ On private grants of arms in England, see *ibid.*, ch. 3, pp. 30-35

⁴⁶ Patrick MONTAGUE-SMITH (ed.), *Debrett's Peerage and Baronetage* (London, 1980) p. 66

⁴⁷ J. P. BROOKE-LITTLE (ed.), *Fox-Davies' A Complete Guide to Heraldry* (revised London, 1985), p. 27

and granted arms to one of the Earl's personal squires following the Battle of Verneuil. Presumably he did so in the Earl's name rather than his own.

Grants of arms by persons other than the king continued into the 1440s and then ceased rather abruptly — apparently because they had been discouraged by the king, who at the very least had at some time before 1455 imposed an obligation to obtain his licence to do so. We know this because private grant of name and arms made by Lord Hoo at some time before his death in that year was adjudged void by the Crown because of his failure to obtain such a royal licence, which thereafter were regularly sought.⁴⁸ Grants of arms by the king directly — of which the first known was made in 1335 — also fell off sharply after 1449, following a decade in which they had been especially frequent.⁴⁹ Nevertheless, between 1335 and 1449 such grants (effected by letters patent issued by the royal Chancery) had been made only sporadically, and had been common only during the reigns of Richard II and Henry IV between 1385 and 1414, and the decade of the reign of Henry VI just mentioned.

In the latter decade, a new source of grants made a sudden appearance: the royal kings of arms.⁵⁰ Grants of arms from those officers, unknown before 1439, were made to London livery companies from 1439, and to individuals from 1458, became increasingly common after the latter date, and were thereafter the normal and almost exclusive source of new arms in England. It must therefore appear that, in or soon after 1450, not only were direct grants of arms from nobles effectively terminated, but direct grants from the king himself were almost completely abandoned in favour of grants from the royal kings of arms — to whom the right to do so must have been conceded by Henry VI soon after attaining his majority in 1447.

The date of the definitive restriction of the right to confer arms to the royal kings of arms seems to have been reflected in the change in the doctrine on this matter that can be seen between Upton's *De Studio Militari* of 1446 and Strangways *Tractatus* of c. 1455. The former actually stated that arms might still be self-assumed — a somewhat antiquated view at that date — but Strangways (following John Dade, writing about 1450) clearly saw the royal heralds as the sole legitimate source of arms, and that has been the position of heraldists as well as heralds and other royal officers since that time.

2.4.2. THE RESTRICTION OF THE RIGHT TO ASSUME ARMS AND THE ESTABLISHMENT OF THE OBLIGATION TO REGISTER THEM, 1417 – 1530

Two decades before Henry VI thus transferred to his kings of arms the exclusive right to confer new arms in his domain, his father, Henry V, had

⁴⁸ See 'X' [A.C. Fox-Davies], *The Right to Bear Arms* (1900), p. 39, and *IDEM*, *Proceedings of the Society of Antiquaries*, 2nd series, 23 (1911), p. 465

⁴⁹ On direct royal grants of arms in England, see AILES, *Medieval Grants of Arms*, ch. 4, pp. 36-49

⁵⁰ On the letters patent granting arms issued by the royal kings of arms before 1461, see *ibid.*, ch. 5, pp. 50-68

taken the first steps in the direction of establishing what would become a royal monopoly on the recognition of arms already borne. In 1417, shortly after his glorious victory at Agincourt, Henry created the office of Garter Principal King of Arms of the English, giving its holder authority over all of the other kings of arms of his domain in both Britain and France, laying the groundwork for the development of a collegiate royal heraldage under the leadership of the new Principal King of Arms that would permit it to undertake the responsibility of conferring new arms and with them the status of gentleman. In the same year Henry issued a writ to the Sheriffs of Southampton and the counties of Wiltshire, Dorset and Sussex, legally restricting for the first time the right of men-at-arms to bear heraldic arms at the approaching musters for a planned invasion of Normandy. The writ proclaimed that:

... no man of whatsoever estate, degree or condition shall assume arms ... unless he possess or ought to possess the same in right of an ancestor or by gift of one having sufficient power, and that on the day of his muster he shall show clearly to persons ... appointed by the king by whose gift he has the same...⁵¹

The penalties were that unproven arms would be broken, the offender would not be allowed to join the expedition, and he would lose wages. An exception was made for 'the men who with the king bore arms at Agincourt ...'. Perhaps these had already been checked on that earlier expedition, or the king thought it insulting to question the integrity of such acknowledged heroes. The king recognised arms granted by others of 'sufficient power' as being legitimate, but he also clearly forbade self-assumed arms, at least for the duration of that expedition. The document says that 'although the Almighty dispenses His grace as He will upon rich and poor, nevertheless the king's will is that of his lieges every man shall be entreated as his estate demands'.⁵²

There is some controversy as to whether Henry V's writ was intended to become established law or to apply merely to this particular expedition, but at the very least it indicated both a desire on the king's part to restrict the bearing of arms to those who had acquired them either by inheritance or by a grant from a competent authority, and that he was prepared to impose such restrictions by formal decree. By 1450, his son would effectively limit the range of competent authorities recognized by the Crown to the king and his kings of arms, and it is not unlikely that Henry had such a limitation in mind and would have imposed it earlier had he lived. In any case, it is of interest that, two and a half centuries later, the King's Advocate in the Court of Chivalry, Dr. William Oldys, introduced Latin wording identical to that in the writ into the essential portions of the articles of the court.⁵³

⁵¹ 'The Writs of 1417': <http://www.heraldica.org/topics/britain/writ1417.htm>, 1

⁵² *Ibid.*, p. 1.

⁵³ SQUIBB, *High Court of Chivalry*, p. 185

The monopoly upon the recognition of valid arms took longer to establish, but only because practical problems made it more difficult to achieve. From the inception of his office, one of Garter's functions was to record the bearings and pedigrees of existing as well as new armigers, but it was not until a royal warrant of 6 April 1530 that effective authority was finally given to the kings of arms or their deputies to enter dwellings and churches to record any arms they found. Any arms they could not authenticate on the basis of some formal document they were authorized to deface.⁵⁴ Further writs were issued in 1555 and 1558 requiring the county sheriffs to assist the heralds in their task of identifying and registering the legitimate armigers, who alone could claim to true gentlefolk. At these visitations, an alternative claim could be made, namely that the arms had been used by the family 'tyme out of mind'. Theoretically this was from 1066, the date of the Conquest, rather than 1189: the date of the accession of Richard I, and of 'time immemorial' in common law,⁵⁵ though of course. In practice the heralds, certainly in the later visitations (and these did not cease until 1688), liked to have clear evidence of the use of a family's arms before the reign of Queen Elizabeth, or at least for more than sixty years before the then current owner's birth.⁵⁶ The last recorded successful use of the 'tyme out of mind' qualification was in 1633,⁵⁷ and the College of Arms' records of grants are supposed to be complete from 1673.

Thus, since 1530 the English Crown has enjoyed the exclusive right both to grant new arms and to affirm — through formal registration and certification when required — the legal validity of existing arms throughout its domain: a domain that until 1931 certainly included its lands in North America. Arms had become an element of the royal system of honours, and were to be governed by the same laws as pertained to other, comparable honours, as adjudicated by royal judicial courts enjoying jurisdiction over them in one circumstance or another. It is to those judicial courts, therefore, that I must now turn my attention.

2.5. Judicial Courts and Semi-Judicial Bodies with Jurisdiction over the Right to Bear Arms since c. 1348

2.5.1. THE CIVIL LAW COURT OF THE CONSTABLE AND MARSHAL, OR HIGH COURT OF CHIVALRY SINCE C. 1348

In 1348, about a third of the population of England died from the Black Death, and the plague struck again in 1361.⁵⁸ The feudal system of land tenure had already been failing as a basis for securing both military and conciliar service. In 1290, the statute *Quia Emptores* had allowed a sub-

⁵⁴ FRIAR, *Dictionary*, p. 365

⁵⁵ SQUIBB, *High Court of Chivalry*, p. 181

⁵⁶ *Ibid.*, pp. 186 - 187

⁵⁷ *Ibid.*, p. 183

⁵⁸ John CANNON, *The Oxford Companion to English History* (rev. edn. Oxford, 2002), p. 106

tenant to sell his land, provided the purchaser maintained the required feudal service to the overlord.⁵⁹ These changes had great repercussions for raising an army and from 1369 onwards the English army became in substantial part a mercenary army, based on 'indentures of war'.⁶⁰ Contracts to supply troops were made between the Crown and individuals and these were able to largely replenish the dwindling feudal forces.

Problems arising from foreign wars were many; for example, the unjust detention of enemy combatants, the payment of ransoms and the escape of prisoners by breaking their paroles. The King together with his Council usually dealt with such matters or Commissioners were appointed by the King to deal with them. Disputes arising from trade and war could not reasonably be thought subject to English law, but common customs and conventions had grown up that were generally accepted by all merchants, sailors and soldiers.

By this time, the procedures in the courts of the European continent were based on the revived Roman Civil Law. Such law, developed from the *Corpus Juris Civilis*, is based upon a set of principles, set down in a text, which is then applied to individual cases. Decisions of previous courts do not establish precedents for future cases, although of course, similar cases subjected to the same principles would be expected to have the same outcomes. Civil law, broadly of this type, remains the basis of legal systems in continental Europe, in Scotland and, indeed, in Quebec, for matters of private law. Nevertheless, even in Quebec public law matters are governed by the Common Law.⁶¹ And heraldic law clearly falls in the sphere of public law, as it is concerned with emblems and insignia that form part of the public honours system of Canada, and are granted, registered, and regulated by an agency that is part of the Chancery of Honours in the household of the Governor General.

The medieval roots of English Common Law are quite different from those of Civil Law. The early Norman kings travelled the land themselves, receiving complaints and then resolving them on the basis of the common customs of the kingdom. Common law, as this came to be called, involved being bound by the decisions already made in previous cases. Future cases were decided by identifying the current case with a precedent, rather than by principles enshrined in a text. Common law ruled within the king's realm except when there was an international dimension to the problem, as was always the case with matters touching on the universal Church, or when there were disputes involving foreigners. Special courts were set up at different times — though mainly under

⁵⁹ John Philipps KENYON, *Dictionary of British History* (London, 1981, 1988), p. 294

⁶⁰ 'The Writs of 1417', p. 1

⁶¹ See any of the following Supreme Court of Canada cases: *Proulx v. Quebec (Attorney General)*, 2001 SCC 66, [2001] 3 S.C.R. 9; *Canadian Broadcasting Corp. v. Quebec Police Commission*, [1979] 2 S.C.R. 618, at p. 644; *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555, at p. 562; *Attorney General of Quebec v. Labrecque*, [1980] 2 S.C.R. 1057, at p. 1081; 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 81

Edward III between 1340 and 1360 — to deal with ecclesiastical, mercantile, naval, and military matters, and within these courts the *procedures* of civil law prevailed, albeit that the laws were based on generally accepted international practice rather than true Roman Law itself.

Among these Civil-Law Courts was one of special interest here, known successively as the *Court de Chivalrie* or *Curia Militaris* (i.e., the Court of Military Affairs), the Court of the Constable and the Marshal, or the Earl Marshal's Court, and finally, the Court of Chivalry — an English rendering of its early Anglo-Norman name, in which 'chivalry' meant 'military affairs'. G. D. Squibb, its principal historian, makes a good case that this court was established between 28 November 1347 and 23 August 1348.⁶² On the first date, a prisoner who had broken his parole was arrested and brought before the King's Council, while on the second date, constables were appointed to arrest the miscreant in a similar case but to bring him before the King's Constable and Marshal, who jointly judged the case. The Court of Admiralty — an analogous court under the Lord High Admiral that dealt with maritime cases — was also created at some time between 1340 and 1357, and both courts owed their origin to problems arising from contact with foreigners, or from the conduct of the King's subjects outside his realm.

Thus, from its origin, what I shall call for convenience the 'Court of Chivalry', like that of Admiralty, was a Civil Law court, and its jurisdiction arose directly from the King's Council. In fact, appeals could be made from the court to the Crown in Chancery — a more important and stable court whose presiding judge was the Lord High Chancellor of England: the keeper of the Great Seal and the highest-ranking of all the great officers of state. At the time of its constitution as a court of justice c. 1345, this body consisted of the members of the Chancellor's long-established administrative office, the Chancery — which among other things was responsible for the issuance of all acts to which the Great Seal had to be attached, and the preservation of all records of royal actions. It constituted the fourth of the so-called 'prerogative courts' of England, after the Courts of the King's Bench, Common Bench, and Exchequer, and would later be joined by the Courts of Requests and Star Chamber. Like the Court of Exchequer (originally that of the Lord High Treasurer), that of the Chancery was a court of equity, which judged in keeping with principles of natural law, but dealt with different types of matter, but it was always the principal court whose procedures followed those of Civil Law. An Act of 1873 transferred the Civil Courts of Chancery and Admiralty, along with most of the other superior courts, to the newly-constituted High Court of Justice, of which they have since constituted mere divisions. The Court of Chivalry, however — which had not sat since 1737 — was not so transferred, and has thus remained in principle an independent court.⁶³

At its establishment in 1348, the latter Court's main function was to deal with indentures to supply troops and other contracts involving the

⁶² SQUIBB, *High Court of Chivalry*, pp. 14-19

⁶³ For this and what follows, see *ibid.*, pp. 120-122.

army, but armorial matters were also included. Before that time, these matters had been decided by *ad hoc* commissioners appointed by the King. The Lord High Constable of England (at the time Humphrey de Bohun V, seventh Earl of Hereford and sixth of Essex) was another of the great officers of state, like the Chancellor and the Treasurer, but unlike theirs, and like that of his subordinate the Marshal of England, his office was hereditary, and from its creation in 1139 to the attainder of its last holder in 1521, passed to the descendants of its first holder. Since then, apart from temporary appointments for coronations, the office has remained vacant. In the early years the King's Constable was the quartermaster of the army and master of the horse, but by the fourteenth century he was the senior military officer of the Crown — roughly analogous to a modern Commander-in-Chief — and fifth in precedence among the great officers, immediately after the Great Chamberlain.

When the Court of Chivalry was constituted in 1348, the Constable was appointed as joint-president with the Lord Marshal, whose office (next in precedence) had from the time of its creation in 1135 been hereditary in the lineage bearing the occupational name of 'li Mareschal' or 'Marshal', who from 1219 were also Earls of Pembroke. From 1338-1399 the office had been held by Margaret Plantagenet of Norfolk, second Countess of Norfolk and from 1297 first Duchess of Norfolk in her own right (the only woman to hold the post), and the present holder, The Most Noble Edward Fitzalan-Howard, eighteenth Duke of Norfolk since 2002, is her descendant and successor. The Marshal had been from the beginning second only to the Constable in military affairs generally, and both officers answered directly to the king. While both offices existed, the Constable and the Marshal shared jurisdiction both over the Court of Chivalry and over the royal heralds, who were collectively attached to the Constabulary and Marshalcy both before and after their brief incorporation in a College under Richard III, but since the effective suppression of the office of Constable in 1521 both Court and heralds (reconstituted as a College in 1555) have functioned under the supervision of the Marshal alone — who since 1399 has borne the double title of Earl Marshal and Hereditary Marshal of England.

The legality of the Court of Chivalry over which the Marshals came to preside was unquestioned for three centuries. Judge Nedham, a common law lawyer, for example, said in 1459 that 'The law of the Constable and Marshal is the law of the land and the law of our Lord the King. We take notice of it ...'⁶⁴. Early in its history, however, the Court began to infringe on matters of the common law courts, principally by including the non-payment of a debt as a breach of parole — normally a promise made by a captured soldier to pay a ransom to his captor. In 1384 and again in 1389, Parliament expressed its concern and, on the second occasion, set limits to the Court's jurisdiction. It should concern itself with 'contracts touching deeds of arms and of war out of the realm and also things that touch war within the realm, which cannot be determined nor

⁶⁴ *Paston v. Ledham* (1459), Y.B. 37 Hen. VI, Pasch. Pl. 8 cited in *ibid.*, p. 165.

discussed by the common law...'.⁶⁵

A national militia was established soon after Henry VII came to power in 1485, and this ended the indentures, and thus a great deal of the Court's work. Indeed, it was almost inactive by 1496.⁶⁶ But armorial disputes continued and, a century or so later, the rights of the heralds to marshal funerals, and their fees for doing, so became contentious issues. The reputation of the Court fell and, in 1621, the King himself (James I) felt a need to protect it. The Court was of '*so high a nature, so auncient, so immediatlie derived from us, who are the fowntaine of all honor*'.⁶⁷ Between 1622 and 1640, the Court was active, taking action against those claiming arms to which they were not entitled and deciding charges on the use of 'scandalous words' by one gentleman of another in order to prevent private, non-judicial duelling.

There was a much more serious aspect to the Court's work. From its origin it had possessed some criminal jurisdiction for acts perpetrated abroad, especially treason. But, if there could be no evidence of an alleged offence, complainants could petition the King in Council for a resolution of the matter by single combat. The Court of Chivalry then had to determine the admissibility of such challenges, and even organise the judicial duels in those cases where it decided that it was impossible that any evidence could be brought before it. Such duels were not abolished in Britain until 1819, when Parliament also removed the Court's criminal jurisdiction for treason and homicide outside the realm.

By 1640, there was no doubt that the Court had become unpopular, probably because it was seen as restricting free speech by hearing charges of 'scandalous words', but by that time, the king, Charles I, whose authority the Court exercised, was also unpopular. Edward Hyde, a new member in what became known as the Short Parliament, attacked the Court in his maiden speech and, on 1st December 1641, the Court figured in the *Remonstrance of the State of the Kingdom*, presented to the King. The document stated that 'The pretended Court of the Earl Marshal was arbitrary, and illegal, in its being and proceedings'.⁶⁸ During the Civil War the Court of Chivalry was suspended, but in 1646 Parliament passed an *Ordinance to Prevent Abuses in Heraldry* because 'divers Persons have assumed to themselves the Use and Bearing of the Arms of several of the Nobility and Gentry of this Kingdom'.⁶⁹ Parliament appointed commissioners and, in turn, they appointed new officers to the College of Arms. A court very similar to that of the Earl Marshal's was set up, but at the restoration of the monarchy, all legislation that the Parliament had passed after 1640 was declared null and void, since it had not received royal assent.

However, 'Judges of the Court of Honour' were now appointed to

⁶⁵ *Ibid.*, pp. 18–19

⁶⁶ SQUIBB, *High Court of Chivalry*, pp. 29–30

⁶⁷ *Ibid.*, p. 45

⁶⁸ *Ibid.*, p. 67

⁶⁹ *Ibid.*, p. 68

execute the office of the Earl Marshal, and these tried armorial cases. In 1672, Henry, Lord Howard of Castle Rising, was created Earl of Norwich and hereditary Earl Marshal and given powers to act judicially without a Constable. A few months later, however, as a non-member of the Church of England, he was excluded from public office,⁷⁰ and so appointed deputies to act for him, their powers being confirmed by royal declaration and an Order in Council.⁷¹ The official Court of Chivalry was not *formally* re-established until 1687, when new letters patent were issued to Henry, Duke of Norfolk, and Earl Marshal, ordering him to hold a Court of Chivalry from time to time. It remained active for fifty years, resolving disputes regarding heraldic funerals, the unlawful assumption of arms, and the use of arms as business advertisements. The Court last sat on March 4th 1737, however, and was then inactive for over two centuries.

In the meantime, as we have already noted, the Court of Chivalry's sister courts lost their jurisdiction or independence as a result of the judicial reforms that culminated in the *Supreme Court of Judicature Act*⁷² of 1873. In 1857, the *Court of Probate Act*⁷³ set up a new Court of Probate and the *Matrimonial Causes Act*⁷⁴ set up a new Court of Divorce and Matrimonial Causes, and in 1859 non-civil barristers were allowed to practice in the High Court of Admiralty,⁷⁵ and common-law barristers were given the right to practice in ecclesiastical courts.⁷⁶ The Court of Chivalry was ignored in these reforms, and was treated as if it were defunct.

Nevertheless, as Squibb pointed out, giving other examples, 'A court of law does not cease to exist by falling into disuse',⁷⁷ and other legislation provided new matters that might have come under its jurisdiction. The *Trade Marks Act 1905*⁷⁸ provided for restraint of the unauthorised use of the Royal Arms in connection with any trade, business, calling or profession in a manner so as to lead to the belief that this had been authorized, and this sanction was re-affirmed in the *Trade Marks Act 1938*.⁷⁹

The Royal Arms are, of course, arms of dominion, and these acts had an international dimension, confirming international agreements. However, some armigerous bodies, notably the corporations of cities, were to protect the use of their arms in Britain and it seems that they thought that no legal mechanism already existed to enforce this. Thus, in 1952, the

⁷⁰ CANNON, *Oxford Companion*, p. 913

⁷¹ *Ibid.*, p. 79

⁷² (U.K.), 38 & 39 Vict., c. 77.

⁷³ (U.K.), 20 & 21 Vict., c. 77.

⁷⁴ (U.K.), 20 & 21 Vict., c. 85.

⁷⁵ By way of the U.K. Act 22 & 23 Vict., c 6.

⁷⁶ In 1877 by way of the *Solicitors Act, 1877*, (U.K.), 40 & 41 Vict., c. 25.

⁷⁷ *Ibid.*, p. 122

⁷⁸ (U.K.), 7 Edw. VII, c. 15.

⁷⁹ (U.K.), 1 & 2 Geo. VI, c. 22. For these acts see online

<www.legislation.gov.uk/.../trade-marks-registered-under-section-sixty...>

Corporation of the City of Kingston-upon-Hull obtained a local Act⁸⁰ preventing unauthorised use of 'the armorial ensigns of the City'. Huddersfield, Birkenhead, Birmingham, and Coventry followed suit.

The *Coventry Act 1954*⁸¹ and the *Manchester Corporation Act 1954*⁸² both received royal assent on 30th July 1954, but the Manchester Act contained no provision respecting the city's arms, for, on 5 May, the Corporation had already presented a petition to the Earl Marshal.⁸³ The complaint was that the Manchester Palace of Varieties, without authorisation, had not only publicly displayed the City's Arms over their proscenium arch, but had also used these same arms on their common seal. The Earl Marshal determined that the matter was within the jurisdiction of the Court and ordered the defendants to appear before it, appointing by warrant the Lord Chief Justice of England, Lord Goddard, as his surrogate. The arguments hinged on the court's jurisdiction and whether the mere display of another's arms affected the rights of the armiger. The judge asserted the right of the Court to deal with armorial bearings, citing many accepted legal authorities. He held that the use of the City's Arms on the defendants' seal was a legitimate complaint. However, the simple display of another's arms as decoration with no malicious intent might not in all cases constitute a valid complaint.

2.5.2. THE HERALDIC JURISDICTION OF THE HIGH COURT OF PARLIAMENT AND THE COURT OF THE STAR CHAMBER

Two other institutions of the royal government of England with judicial functions similarly acquired the authority to deprive an armiger of his arms. The older of these was **Parliament**, which was itself derived from the omnicompetent *Curia regis* or 'Court of the king' of the twelfth and thirteenth centuries. Despite its later concentration on its legislative functions, it could always choose to sit as a judicial court to judge its own members (especially the peers) and other powerful men, acting as both judge and jury. Acts of attainder were usually brought forward in the House of Lords, although they could be initiated by the Commons.⁸⁴ A guilty verdict in a case that carried the penalty of death — most commonly for behaviour adjudged to be treasonous — could result in an act of attainder against the accused, which literally meant 'corrupting his blood'. An act of this type deprived the accused of all civil rights, including those to bear arms and to transmit them to descendants; it thus disarmigerated the armiger's whole descendance.⁸⁵

The Despensers, favourites of Edward II, were deposed in this way.

⁸⁰ *Kingston-upon-Hull Corporation Act, 1952*, (U.K.) 15 & 16 Geo. VI & 1 Eliz. II, c. xliii.

⁸¹ (U.K.), 2 & 3 Eliz. II, c. liv.

⁸² (U.K.), 2 & 3 Eliz. II, c. xlvi.

⁸³ SQUIBB, *High Court of Chivalry*, pp. 123

⁸⁴ David ROSS, 'The Act of Attainder' (Britain Express, 2001, online: <<http://www.britainexpress.com>>), p. 1

⁸⁵ FRIAR, *Dictionary*, p. 31, ROOM, *Brewer's Dictionary*, p. 128

A number of such acts were passed under Henry IV, and a new series was begun under Henry VI in 1449, when the Duke of York (the future Edward IV) and his sons and allies were all attainted for treason, driving them to undertake the campaign against the king that would lead to his overthrow in 1461. Attainder could even be used posthumously, as it was after the Battle of Towton, to allow Edward IV to acquire the property of his opponents killed while in arms against the Crown. Many acts of attainder were later reversed for the descendants of the offender, however, and their armigerous rights (along with all of the others) were thereby restored.

The last act of attainder was passed in Britain in 1798, and in Canada the whole practice of attainting was abolished by the *Criminal Code* of 1892,⁸⁶ so this is no longer a possible source of disarmament in either country.

The other judicial body that came to play a similarly negative part with respect to the right to bear arms in England was the **Court of the Star Chamber**, which effectively replaced special judicial sessions of the royal Privy Council when it was created as a separate institution by an act of 1487. The new court was composed of a mixture of Privy Councillors and Common-Law judges, and was charged with overseeing the operations of lower courts, and deciding questions of equity that arose from them in a fashion at once expeditious and secret. Among the many other powers the Court assumed in this capacity was that of terminating an existing right of an individual and his descendants to bear arms without otherwise depriving him of his property or life.⁸⁷

Having outlined the history of armorial law in England, it would now seem reasonable to try to derive the principles underlying this law that would apply today in Canada. Mackie makes an excellent case that the English law of arms has been applicable in Canada and could have been enforced at least since Confederation.⁸⁸ However, he envisages that it would have been enforced in Canadian rather than British courts, pointing out that these courts received jurisdiction over *all* causes of action in 1867. Indeed, as early as 1859 — the year the distinction between British civil and common-law barristers was ended — the Supreme Court of British Columbia received 'jurisdiction in all cases, civil as well as criminal'.⁸⁹

3. The Law of (Heraldic) Arms in Canada

3.1. The Hypothetical Situation in Canada, 1907 - 1988

As we have seen, although other civil courts were replaced, and the ecclesiastical courts were transferred to the Church of England, this did not

⁸⁶ MACKIE, *The Canadian Law of Arms*, p. 5

⁸⁷ *Ibid.*, p. 177; and Adrian ROOM (ed.), *Brewer's Dictionary of Phrase and Fable* (London, 1999), p. 1120

⁸⁸ MACKIE, *The Canadian Law of Arms*, pp. 2 – 5

⁸⁹ *Ibid.*, p. 4

happen to the Court of Chivalry. The revival of the Court in 1954 implies that its extinction or any transfer of its powers to other courts, whether in Britain or the Empire, was either never intended, or of no permanent effect.

Before proceeding to a derivation of principles from the precedents, it might be as well to clarify the situation of Canadians before the establishment of the Canadian Heraldic Authority, and also to review the relationship between the heralds, armorial law, the British Parliament, and the Canadian legislatures. All these topics might be expected to offer guidelines for the future.

Following the joint report of the Law Officers of England, Scotland and Ireland submitted in 1907,⁹⁰ a Canadian gentleman desiring arms and other armories would have applied to Garter Principal King of Arms. Garter then would have assessed the application and, if he approved it, have drafted a petition (called a 'memorial') on behalf of the applicant to the Earl Marshal. If the latter had approved the application, he would have issued a warrant to Garter to grant such armorial bearings as he deemed suitable.⁹¹ Alternatively, if our Canadian visited London, he could have initiated his request by calling at the College of Arms and seeing the herald on duty that day. The latter would then have undertaken to design appropriate armories and present them to the kings of arms for approval.

Should an armorial dispute have arisen, then a complainant would have written to Garter. If he could not resolve the matter, Garter would doubtless advise the complainant to petition the Earl Marshal, who would probably again have tried to resolve things amicably between the complainant and the defendant. If this had failed, the Earl Marshal would have had to satisfy himself that the matter complained of was within the jurisdiction of his court and no other. Cases of outright fraud, for example, where the use of the arms had been incidental to a crime, would have been heard in a criminal court.

If the matter concerned a Canadian complainant, the Earl Marshal would have been aware or been advised that, following the passage in the previous century of Judicature Acts in Britain, and by the Parliament and provincial legislative assemblies of Canada, civil law cases in general could now be tried in Canadian courts. Notably, the Supreme Court of Canada, established by the Canadian Parliament in 1875, had been explicitly given such jurisdiction.⁹²

Presumably the same reasoning that rehabilitated the Court of Chivalry in 1954 would still have persuaded the Earl Marshal that no other courts, including these, had jurisdiction, especially if, for example, the complainant were in Canada, and the defendant was resident in England. At least as late as 1931, when the Statute of Westminster established the independence and equality of all of the former dominions, the granting and, presumably, monitoring of arms throughout the Empire had been independent of all authority save that of the monarch, and even after 1931

⁹⁰ COX, 'Law of Arms in New Zealand', p. 14, and p. 2 above

⁹¹ Henry BEDINGFELD and Peter GWYNN-JONES, *Heraldry* (London, 1993), p. 76

⁹² GALL, *The Canadian Legal System*, p. 107

the idea that this act had effectively created as many Crowns and royal households as there were kingdoms was not recognized by any of the newly independent governments. The heralds themselves were not British civil servants, but members of the English royal household — which had long functioned as that of the Empire in most matters of honour, and had as yet no equivalent in any of the formerly subordinate kingdoms. If the Earl Marshal had had any further doubts, he could have contacted the Governor General of Canada, who could in turn have asked the Supreme Court of Canada for an opinion as to the possible jurisdiction in a hypothetical case.⁹³ Before 1949, if there had been any doubt in the minds of the Supreme Court justices, they could have passed the question back to the Judicial Committee of the Privy Council in Britain.

It is likely that the justices of the Supreme Court would have thought similarly to the Earl Marshal. The Court of Chivalry, although a civil law court, was unique in its relationship to the Crown, and thus would be the only court competent to hold jurisdiction in armorial disputes. There may have been more of a doubt about the outcome after 1947 because in that year Letters Patent were issued giving the Governor General plenary executive authority in Canada.⁹⁴ Thus the Governor General *could* have set up an heraldic authority from that time and, the Supreme Court *might* have suggested that it *should* have done so, together with a system for resolving any disputes.

In fact, the Governor General and the government of Canada seem to have deliberately decided against this solution. When the Canadian Parliament desired a national flag, the Prime Minister's Private Secretary approached Garter. It happened that a Canadian, Dr. (later Sir) Conrad Swan was Rouge Dragon Pursuivant, and the 'Canadian pale' resulted as a new term in armory.⁹⁵ A few years later, in 1967, the Prime Minister and the Canadian Cabinet again approached Garter over the creation of the Order of Canada. Finally, a letter from Roland Michener, Governor General, to the Duke of Norfolk in November 1972 makes it quite clear that Canada had no intention of setting up its own authority. The letter is on a personal matter of arms, but the relevant sentences are:

That by Letters patent bearing the date the Eighth day of September 1947, the Governor-General of Canada is authorized to exercise in Canada all powers and authorities lawfully belonging to the Sovereign; ...

That it is the desire of the Governor-General of Canada and of the Government of Canada that the powers of the Royal Prerogative in relation to the granting and exemplification of Arms of persons and families to other persons and families resident in Canada be delegated to the Kings of Arms acting under Your Grace's

⁹³ GALL, *The Canadian Legal System*, pp. 108 – 109

⁹⁴ *Ibid.*, pp. 48 – 49

⁹⁵ Sir Conrad SWAN, 'Guest Editorial', *Heraldry in Canada* 39.3 (2005), pp. 5 – 6

Warrant⁹⁶

This delegation (explicitly so called in the document) was limited to the power to grant a Royal License in relation to the *alienation* of arms, which in England is granted by the Queen.⁹⁷ Nevertheless, it was symptomatic of the general reluctance even of the Governors General best disposed to heraldry to establish a Canadian agency with the authority to exercise the Royal Prerogative over the conferral, registration, and regulation of heraldic emblems within the boundaries of the kingdom.

Returning to our hypothetical Canadian complainant, once the Earl Marshal was satisfied that only he had jurisdiction, he would have required the defendant to appear before the Court of Chivalry and appointed one or more surrogates to try the case. Suppose that the Court now decided against the complainant and he had wished to appeal, it would probably have been, based on the history of the system, to the Judicial Committee of the Privy Council in Britain. This had replaced successively, the 'King in Chancery', and the 'King in Council' for judicial matters.⁹⁸

3.2. The Relationship of Parliament to the Heralds both in Canada and in Britain

Although the *Letters Patent 1988* quoted at the beginning of this article appear restrictive 'in respect of the *granting* of armorial bearings in Canada', they clearly imply that an independent Canadian heraldic authority should be established, and that it should have the right to *regulate* as well as to grant arms. In any case, the Governor General was free to use the plenary powers of the 1947 letters patent in favour of his office to justify creating such an authority with the mandate to do both, and could further argue that all the 1988 letters did was to grant *explicitly* authority that had previously been granted *implicitly*.

Given the position taken by Makepeace and those who agree with him that Parliament rather than the Governor General should have been given the power to establish an heraldic authority, it is also important to emphasize that the Letters Patent of 1988 were issued on the advice of the Privy Council for Canada, and were signed by the then Prime Minister of Canada, Brian Mulroney who by the nature of his office enjoyed the support of a clear majority in the elected house of the Canadian Parliament, and did so, moreover, from 1984 to 1993. In no way, therefore, could it be said that the Letters Patent in question were imposed upon an unwilling government or the Parliament that maintained it in office. Furthermore, the Canadian Parliament, unlike the U. S. Congress, is an almost

⁹⁶ Roland MICHENER, quoted in KENNEDY, 'Canadian Cadency', pp. 7 – 8

⁹⁷ See National Archives of Canada Reference RG#7, Series G-21, File 1070-B, App. 261, Box #114, specifically correspondence between Esmond Butler / Col Cherrier and Garter, March 1966 to September 1966.

⁹⁸ S. M. WADDAMS, *Introduction to the Study of Law* (4th edn., Toronto, 1992), p. 118

exclusively legislative institution, whose membership actually includes not only the monarch but the ministers of his or her government (who must be members of one or the other of its two chambers), but does not usurp or duplicate their essentially executive functions.

Nevertheless, it would seem reasonable to examine briefly here the past exchanges of the English and British Parliaments with the heralds and their armorial jurisdiction, to give some sense of what they might conceivably be in Canada.

The Royal Prerogative that, in England and Wales, passes through the Earl Marshal to the heralds, runs in Scotland through Lord Lyon to the heralds and, in Canada, via the Governor General, through the Herald Chancellor to the Chief Herald of Canada and the other heralds of the Heraldic Authority. Parliament stands completely outside this flow of royal authority, but we have seen how, very early in the history of the Court of Chivalry, Parliament was concerned on two occasions to stop the Court from infringing on Common Law.

Under the republican 'Commonwealth' of the 1650s, 'Parliament' (or rather, its two houses minus the king, who had been an essential element of it) intervened even more radically to reform both the Court and the College of Arms. After the execution of Charles I, one might have thought that all interest in armigery would have ended, but as we have seen, there remained in fact great interest in the subject, because both the noble status and the various grades of nobility that it primarily represented had been unaffected by the Revolution, and every member of the Parliament was a more or less active armiger. Forty-four peers and members of the House of Commons were appointed to the Earl of Northumberland's Committee, and they simply established a simulacrum of the Court of Chivalry, and changed the heralds.⁹⁹ The Commonwealth authority was destined to be short-lived, of course, and immediately following the Restoration of 1660 both the Court and the College were restored to their pre-Revolutionary condition. After 1737, however, only the College continued to function on a regular basis, and became thereby the only effective authority in most matters of honour, including the use of armories of all species.

In the first third of the twentieth century, the College of Arms was itself threatened with reduction to the status of a government department. Towards the end of the previous century, and following an unfortunate period when an ageing Garter (Sir Albert Woods) ran the College of Arms, the Home Office had already begun to wonder whether it should take over the heralds.¹⁰⁰ In 1902 a Treasury Committee was appointed to look into the College of Arms and the Courts of Lord Lyon and Ulster, King of Arms, principally because those recently knighted or ennobled complained

⁹⁹ SQUIBB, *High Court of Chivalry*, p. 69

¹⁰⁰ Sir Anthony WAGNER [Clarenceux, quondam Garter King of Arms], *How Lord Birkenhead saved the Heralds* (London, 1986), p. 5

about the Fees of Honour being collected by the College.¹⁰¹ The report in 1903 considered making the English heralds salaried civil servants, as Lyon and Ulster already were. This was decided against because it was felt that the legislation required would be controversial and embarrassing to the sovereign. The Fees of Honour, somewhat illogically, were not ended, but in 1905 diverted from the College to the Treasury.¹⁰² It is possible that the opinion of the Joint Law Officers in 1908 and 1913 on the role of Garter in grants from the Empire was obtained in order to increase the College's revenue.¹⁰³

In 1927, the Home Secretary returned to the attack. He circulated a memorandum to Cabinet stating that 'the position of the College of Arms is an anomaly'.¹⁰⁴ The heralds 'are not, like civil servants, under the control of a Minister responsible to the Sovereign and Parliament'. This seems to have been the problem: that the Home Office viewed the College as properly a department of government, rather than of the Royal Household. Cabinet set up a secret committee chaired by a previous Lord Chancellor and the current Secretary of State for India, F. E. Smith, Lord Birkenhead. Once again, however, the necessity for embarrassing legislation dissuaded the government from proceeding along the lines indicated, and the heralds were permitted to remain under the control of the Earl Marshal rather than a government Minister. The committee's conclusion was that:

We realise the force of criticisms which have been directed against the present fee basis of remuneration of the Officers of Arms, but we are satisfied that the financial and other objections to placing all or even a few of the Officers on a fixed salary outweigh any advantages which might be expected to result from the change.¹⁰⁵

In consequence, the College was allowed to retain its unique status as a collegiate body forming part of the Royal Household rather than any agency of the government, and placed under the authority of an office that was originally attached to the Household, but later became an office of state. So it remains to this day.

3.3. The Nature and Powers of the Canadian Heraldic Authority

When the Canadian Heraldic Authority was set up in 1988, however, the heralds — though attached to the Household of the Governor General as the nearest equivalent to the Royal Household — were made salaried civil servants like the other members of that Household, and fully assimilated to its established hierarchy of grades. Moreover, they were organized into something much more like a government department than a college, and were not divided into the traditional ranks of king of arms, herald, and

¹⁰¹ *Ibid.*, pp. 5 – 7

¹⁰² *Ibid.*, pp. 12

¹⁰³ See above, and COX, 'Law of Arms in New Zealand', p. 14

¹⁰⁴ WAGNER, *Lord Birkenhead*, p. 10

¹⁰⁵ *Ibid.*, pp. 14 –15)

pursuivant, but between those of Chief Herald and herald (the latter including the herald-painters as well as the heralds proper), with that of Deputy Chief Herald inserted as required between the two. Both titles were borrowed from the heraldic authority of the Irish Republic, and seem to reflect a curious antipathy to English heraldic traditions.

The new Authority was given the right to exercise the heraldic powers of the Canadian Monarch through the Governor General, and would appear to be the sole institution to enjoy any of those powers in Canada as a whole. Its relationship to the provincial governments, however, remains somewhat unclear. Some Canadian Provincial Legislatures have passed statutes enabling a Board of Governors or Municipal Council to issue arms for specific colleges and towns. The legal status of such arms is now a matter of doubt among heraldists, for while the Crowns Provincial certainly have the same authority as the Crown Regnal to confer honours of various other types, none of them has received any specific delegation of the right to confer arms, let alone to delegate that right in a completely unprecedented way to bodies that are not even agencies of the Crown.¹⁰⁶

It has been argued, however, that, although such arms have no status outside the province in question, because a provincial legislature is constitutionally permitted to make any provision suitable for that province, it can legalise institutional arms for use *within that province*.¹⁰⁷ I find this argument weak, as the authority of provincial legislatures is strictly limited in many other ways. It would seem politic, however, for the Canadian Heraldic Authority to approach such institutions and offer to regularise such arms and then remind the legislatures of the correct procedures, now that a truly Canadian system has been established.

The Canadian Heraldic Authority has been given the power to regulate the use of arms within the boundaries of the Canadian kingdom, and this power has already been used to establish a number of new rules and conventions governing armigery generally, as we shall see. What is less clear is whether the Authority has been given the power to enforce those rules, along with the traditional rules inherited from the English armorial code, including the prohibitions on the use of unregistered arms, alienation without warrant, and usurpation by others (practices I shall discuss below in §§ 12 and 13. At the moment the Authority lacks an instrument to exercise any of those powers, however, and should the enforcement of its rules be required, it would have to be achieved by a request to the civil authorities, presumably from the Governor General, to order some offender to conform to whatever rule had been violated. This

¹⁰⁶ The right of the Provincial authorities to confer honours was established by the Privy Council decision in *Attorney General (Canada) v. Attorney General (Ontario)*, [1897] A.C. 247 (P.C.) in relation to Queen's Counsel appointments. The prerogative follows the division of powers in ss. 91 and 92 of the *Constitution Act, 1867* and the aforementioned case shows that the granting of honours is a concurrent federal and provincial jurisdiction.

¹⁰⁷ MACKIE, *The Canadian Law of Arms*, p. 5

might also require the passage of a statute recognizing the validity of the Laws of Arms established by the Heraldic Authority, and establishing a process to be followed for their enforcement through the appropriate court of first instance. It might even require the establishment of a strictly heraldic tribunal comparable to the Court of Chivalry to serve that purpose, under the presidency of an expert in heraldic law who was not a herald (or at least not one currently attached to the Heraldic Authority).

4. The Crown and the Armiger in England and Canada

4.1. The Legal Implications of a Grant or Registration of Arms

It is believed that the earliest coats of arms were self-assumed and functioned primarily as emblems in battles and tournaments, but they soon came to be used to identify their armigers in civil situations and contexts, including their seals, and by the time the first armorials were prepared in the 1240s and '50s they had come to be closely identified with the lordly dignities by whose titles their armigers were generally known. Thus, in *Glover's Roll* of c. 1253-8, the arms of King Henry III (Plantagenet) are identified simply as those of *Le Roy d'Angleterre*, the arms of his brother Richard as those of *Le Comte de Cornewail*, and those of all of the other counts or earls of England in the same manner as *Le Comte de (N)*.¹⁰⁸ Their use on seals and flags would have contributed to this identification with such dignities, as well as promoting a secondary identification with the armiger's estate (for the administration of which the seal was constantly employed and within which his banner would have been flown) and his lordship over the vassals enfeoffed within it, who followed him in battle as members of his host and in tournaments as members of his team.

Bartolo in *De Insigniis et Armis* noted that princes gave arms either as an honour or to those holding some armigerous office. In reality, armigerous offices were always extremely rare, and usually hereditary, so the conferral of arms of office was quite exceptional. By contrast, the conferral of arms was always motivated by a desire to honour the beneficiary — who in many cases was the current or former holder of one or more public offices. Offices, of course, required services from their holders, either directly or indirectly to the monarch, and in the pre-Modern period honours of various types — including lordly dignities, knighthood, and simple nobility — were commonly conferred by kings and princes of all ranks both to reward *past* and to encourage *future* service of some sort, especially by the honouree, but also by his heirs and other descendants.

Like augmentations to arms, arms and armories themselves were certainly granted on occasion as a reward for *particular* services to the monarch as the holder of some *particular* office. Given the fact that the vast

¹⁰⁸ See *Aspilogia II: Rolls of Arms of Henry III: The Matthew Paris Shields (c. 1244 – 59)*, *Glover's Roll (c. 1253-8)* and *Walford's Roll (c. 1273) Additions and Corrections to A Catalogue of English Mediaeval Rolls of Arms*, ed. Thomas Daniel TREMLETT and Hugh Stanford LONDON (London, 1967; repr. Woodbridge, 2009), pp. 115-118

majority of them were clearly made in response to a petition from the beneficiary, however, and had the effect of raising their recipient into the nobility, it is likely that most grants of arms were intended to recognize a more general sort of desert on the part of the grantee, involving both the achievement of a style of life worthy of a gentleman, and the regular performance of the socially useful activities characteristic of gentlemen or noblemen of all ranks — from prince to landless son of a squire.¹⁰⁹ Such activities included military service to the Crown in wartime in the capacity of a heavy-cavalryman or (increasingly) a commissioned officer in the regular army or militia, and civil service in peacetime in such (often unpaid) offices as representative of a county in Parliament, sheriff, commissioner of array, or lord lieutenant of a county, bailiff of a hundred, town, or castle, or justice of the peace within a county. In a more general way, gentlemen were expected to maintain order and promote the policies of the government within their estates, districts, and counties — though they were not legally required to do so, and some in fact did not. Those who did so voluntarily were therefore all the more valued by the Crown, and as they were paid little or nothing for their services, they had to be rewarded and encouraged in other ways: especially through the conferral of honours.

The most fundamental of these honours were the armories conferred by the royal kings of arms through their letters patent. These served first of all to recognize the worthiness of their recipients to be admitted to the nobility of the kingdom at the basic rank of gentleman, and then to admit them and their heirs formally to that hereditary status, and finally to confer upon them the principal signs of that status — hereditary armorial emblems peculiar to himself and his descendants — the use of which emblems constituted the only legal privilege the status entailed beyond the right to use the title ‘gentleman’.

That this is what English grants did is quite clear from the wording of the letters patent by which they were effected, issued by the English kings of arms after this prerogative had been delegated to them by Henry VI soon after attaining his majority in 1437. They normally included clauses of the following form, whose exact words are taken from the letters issued by John Smert, Garter King of Arms, to Edmond Mille, on 12

¹⁰⁹ Although the terms ‘nobleman’ and ‘nobility’ were largely (and misleadingly) restricted in England to *peers* from the eighteenth century, *gentil* and *noble* had been fully synonymous and interchangeable terms in Middle and Early Modern English from their first appearance in 1225 to the 1580s, as had their derivatives *gentrice* (1225), *gentilness* (1300), *gentilete* (1340), *gentry* (1386), and *gentleship* (1568) on the one hand, and *noblesce* (1230), *nobleie* (1300) *noblehede* (1382), *noblete* (1387), *nobility* (1425), and *nobleness* (1425) on the other. The earliest example of a contrast between words of the two families given in the *OED 2* (under ‘nobility’) occurred in a work of 1581, in the pair ‘nobilitie & gentlemen’, but words of both families continued to be used interchangeably for a century or so thereafter, and ‘nobleman’ was used to designate not only peers but the sons of peers at Oxford and Cambridge. A work of 1765 is the first cited that contrasts ‘nobility and gentry’ the more recent fashion.

August 1450:

Wherefore I, Garter King of Arms aforesaid, who, not only of common renown, but also by the report and testimony of others, noble men worthy of faith, am well and truly advertised and informed that Edmond Mille has long pursued feats of arms, and as well in this as in other matters, has carried himself valiantly, and honourably governed himself, so that he has well deserved and is worthy that henceforth for ever **he and his posterity be in all places honourably admitted, received, acknowledged, counted, and renowned among the number, and of the company, of other ancient gentle and noble men.** And for the remembrance of this **his gentility**, I have devised, ordained, and assigned to the said Edmond Mille, for him and his heirs, the blazon, helm, and crest ...¹¹⁰

The motivation for and general intention of such grants is also clearly indicated in the wording of the preamble to this document, equally typical of the letters patent of this period:

Equity requires and reason ordains that men, **virtuous and of noble courage, be for their merits by renown rewarded**, and not only their persons in this mortal life, so brief and transitory, but after them, those issuing from and being begotten by their bodies be in all places of great honour for ever before others **distinguished by certain signs and tokens of honour and gentility**, that is to say, by blazon, helm, and crest, so that **by their example more shall be persuaded to use their days in feats of arms, and other virtuous works, to acquire the renown of ancient gentility in their line and posterity.**¹¹¹

The loyalty and service of ancestors to the Crown might also be mentioned in justifying a grant of armories. In the 1599 drafts of arms and a crest for John Shakespeare (probably prepared under the eyes of the playwright, his son), the fact that ancestors were recorded '*for their valiant and faithful service*' to Henry VII is put forward as a justification for the grant, together with the relationship of Shakespeare's mother to the

¹¹⁰ This, a translation into Modern English of the original letter, was published online in *Fifteenth Century English Patents of Arms*. It is the tenth known grant of its kind, and the third to be included in this collection.

¹¹¹ *Ibid.* Brooke-Little had earlier paraphrased the equivalent clauses of a different but essentially similar letter of this period, which began again by noting that '*equity requires and reason ordains*' that virtue and courage be recognised so that, '*In this way they shall give an example to others to spend their days in feats of arms and virtuous works*'. Then the king of arms stated that he had evidence that the grantee has '*borne himself valiantly and conducted himself honourably so as to deserve well and that he and his posterity may be accounted well worthy to be numbered among the company of the ancient, gentle and noble men*'. (J. P. BROOK-LITTLE, *An Heraldic Alphabet* [rev. ed., London, 1985], p. 29). See also AILES, *Medieval Grants of Arms*.

Ardens, a family of the local gentry. In a footnote to the second draft, John Shakespeare's service as Bailiff of Stratford is also mentioned. Interestingly, the first draft gives a further reason for the hereditary nature of arms, 'for the encouragement of his posterity',¹¹² which was present in the earliest grants fully a century and a half earlier.

Thus, from 1440 at the latest, a grant of arms from one of the kings of arms in the service of the monarch, and acting as his commissioned agents in this area (in the same way as their successors in both England and Canada), constituted an hereditary honour which effectively elevated the beneficiary and his legitimate patrilineal descendants into the nobility, and gave him and them the right not only to display the new emblems as a mark of noble or gentle status, but to set after their surname either the title 'gentleman' or 'gentlewoman', or, increasingly from some time in the reign of Queen Elizabeth I, the title 'armiger',¹¹³ in the new sense of 'bearer of (heraldic) arms'. Such grants were in principle recorded in the registers of the heralds, and were effectively recorded after 1530, in the records of the official Visitations of the counties ordered by King Henry VIII in that year that are still kept in the College of Arms. The main object of the Visitations, however, was to examine the legitimacy of all of the armories that had originated in unilateral assumptions, both before and after the ban on such assumptions imposed by Henry V, and to register all those that had been borne 'from time immemorial'. Once registered (often only on the second or third Visitation), such armories were legally protected from unwarranted use or usurpation by persons not included within their entailment, or by unauthorized bodies of any kind. At the same time, thenceforth no armory that had not been registered was to be protected in this way, or even regarded as legitimately borne, and I have already traced the development of that idea in other legal contexts.

As the sole visible insignia of the honourable status of gentleman, arms also served to mark the boundaries of the dominant order of traditional English society, within which alone the attitude prevailed that actions of all kinds should be governed by considerations of honour, and that honour was in many cases the principal reward for such actions. At its worst, this attitude led men to defend their claim to honour from minor and even imagined slights through illegal duels. At its best it led men who could easily have lived indolent lives on their estates to volunteer for service as military and naval officers, and to serve in all of the traditional offices through which the nobility, both high and low, governed the country in the king's name. Arms were indeed regarded as the very

¹¹² C. W. SCOTT-GILES, *Shakespeare's Heraldry* (London, 1950, New York, 1971), pp. 29 – 30

¹¹³ In Latin, *armiger* had long been used to designate those who in English had borne the title *squier* or 'squire', but John FERNE, in his *Blazon of Gentry* of 1586, observed that some of his contemporaries had begun to claim that the English title 'armiger' belonged by right to every 'gentleman of coat-armour', and since about the time of the accession of Queen Victoria in 1837 the word has been used in that sense by both armorists and armigers.

embodiment of the honour inherent in the status of gentleman, and of the lineages to which gentlemen belonged, and their conferral and recognition by the Crown were important symbolic elements in the implicit contract that had always existed between noble armigers and the Crown: a contract by which loyalty and service were given to the Crown in return for honourable recognition and employment, and the possibility of further advancement for descendants who continued the tradition of loyal service.

Of course, arms assumed at a time when royal grants were neither usual nor required could not be regarded as honours from the Crown, but as long as they were regarded as sufficiently distinct from existing arms, and were publicly recognized both by the Crown and by the community of gentlemen as legitimately indicative of membership in that community, they could in principle serve in much the same way as granted or registered arms as symbols of the implicit contract involved in membership in the noble or gentle estate of society. But some form of recognition by the community of armigers of the worthiness of the adopter to bear arms at all was clearly necessary if their function as the honourable insignia of gentility was to be maintained, and some form of record of existing arms was necessary if duplication was to be avoided, and the disputes that inevitably arose from it.

Both of these desiderata became increasingly difficult to achieve after about 1370, with the gradual extension of armigery beyond the relatively small order of knights (of whom there were never more than about 1200 at any one time after about 1250), first to the slightly more numerous class of squires, and then, in the fifteenth century, to the vastly larger and constantly growing class of simple gentlemen, who possessed little in the way of land, but identified strongly with the social customs and values of their knightly and squirely ancestors. In consequence, the only way that either desideratum could be effectively achieved — formal recognition of worthiness, and distinctiveness of design — was to suppress the traditional right of knights to assume arms on being admitted to their dignity, and to restrict the right to confer new arms to the Crown and its officers — who could not only maintain an official register of armigers, but penalize anyone who failed to adhere to the new law. The utility of this idea was no doubt reinforced by the growing importance of the Crown as the fount of honours, for conferred gentility and the arms that were its principal sign could both be seen as forms of honour broadly analogous to knighthood and peership — the conferral of both of which had long been royal monopolies in England. Finally, the requirement that new arms be acquired by a grant from the Crown reinforced the idea that the armigerate/ nobility existed to support and serve the Crown in honourable offices and duties, and that only persons prepared to do this should be honoured with membership in it. Thus, the gradual conversion of arms into a form of honour, conferred through a legal instrument issued exclusively by royal officers on men they deemed worthy of reception into the noble estate, and then duly recorded in an (ultimately) public register, solved all of the problems raised by the rapid extension of armigery

beyond the knightage.

This — with a certain diminution of their social implications — is what grants of arms in the English and Scottish traditions introduced into Canada remain to this day: acts by royal officers conferring in the monarch's name an honourable legal status (that of armiger rather than gentleperson) on men and women who have shown themselves worthy of it through their virtuous and publicly useful acts, with the expectation that the possession of the status will encourage future acts of the same general kind by the beneficiary and his or her descendants forever. Arms are still recorded officially in public registers of grants and recognitions by the relevant authority, and remain subject to publicly recognized rules as to their use, modification, transmission, and combination with other arms and with other species of armory.

Clearly this is very different from the notion of the nature of arms and the appropriate manner of acquiring them forward by Mr. Makepeace. He has no doubt been influenced by his experience of them in the United States, where the traditional practices related to armigery collapsed completely following the Revolution, and the failure of the new government to establish an heraldic authority. In consequence of this — and of his characteristic prejudices against monarchy and hereditary honours of any kind — he prefers to see arms as being in effect no more than private emblems comparable in their nature to trademarks or logos, which happen to conform in their general design to traditional arms, but are subject to no laws governing their form, use, modification, transmission, or combination with other arms or armories. Such emblems may be assumed at will by anyone, without any implication of worthiness or honour, or any suggestion that they represent a legal status conveying membership in a social order with continuing obligations of service to the Crown, state, or community. What legal standing such emblems might have in the United States could come only from their registration by some sort of government agency, ideally on the federal level but failing that on the state level. Unfortunately, no such agency exists on either level, and self-promoted armigers in the southern Republic there must therefore settle for a strictly private registration with one or more of the bodies that provide such a service, of which the oldest and most prestigious is the Committee on Heraldry of the New England Historic Genealogical Society. All such a registration can do, however, is to certify that the emblem in question meets the minimal requirements for a traditional armal design, and to the best of the knowledge of the members of the registering committee, does not resemble too closely the emblem of any other person or entity registered in the United States.

In practice such bodies also refuse to register for persons with no obvious claim to them the arms of royal, princely, and noble houses who happen to bear a similar name, though their failure to require any form of differencing does lead them to register to cadets of cadets of cadets the arms of the chiefs of many noble families, thus violating the laws of arms of the countries from which the claimants arms derive. Nor can such

bodies impose any sort of regulation on the use of the arms in question, or on their transmission to uterine relatives with no traditional claim to them, or indeed on their usurpation by persons with no conceivable claim to them whatever. In these circumstances, the arms thus registered are reduced to the status of personal logos of no social or legal significance, wholly detached from the armorial tradition that still governs the form and use of arms in countries like England, Scotland, and Canada.

Self-assumed arms may be admired for their beauty, may symbolise a person's achievements and beliefs to him- or herself, and may even be used by his or her descendants, but they must always lack the character of public honours representing a *legal status*, either *conferred* or *recognized* and in both cases *regulated* by the state, and also the *obligations to society* entailed in that hereditary status.

As I have argued, a grant or registration of arms in a monarchical state serves to recognize past and encourage future service by the immediate beneficiary and his or her descendants to the monarch and his or her successors, and thus establishes an implicit personal relationship of mutual benefit between the new armiger and his or her descendants on the one hand, and the monarch, his or her heirs, and the society which the latter embody on the other. In principle a similar practice might be maintained to similar effect in a republic, but with greater difficulty — in large part because of the legal egalitarianism that is characteristic of republics, and their general rejection of hereditary statuses and honours. In the Republic of Ireland, for example, something of the traditional armorial régime has been preserved, but in most republics, active armigery and interest in heraldic matters generally persist only among the descendants of the legal armigers of older régimes, who look back to better times, or as an arcane hobby among amateur enthusiasts, whose use of assumed arms lacks any link to the state or the idea of reward for or expectation of service to the community.

Makepeace claims that everyone has a right to assume arms under some form of international law. From the history I have presented to this point, both of armigery and of the laws and customs governing it in England since the fourteenth century, it can be seen that this claim is without any foundation there or in the lands whose Laws of Arms are derived from it — which include Wales and Ireland as well as Canada, Australia, and the other kingdoms of the Commonwealth. In the English legal tradition, arms have for nearly six centuries been restricted more or less effectively to those who have either received them by royal grant, or received legal recognition from the Crown of their right to bear arms that they or their ancestors assumed to represent their claim to the status of gentleman. The implicit right to assume arms that had certainly existed in England before 1417 had been effectively limited to knights before about 1335 and extended to squires serving in royal armies around that time, was clearly extinguished completely by a series of royal decrees beginning in 1417 and concluding in 1530, when Henry VIII empowered his kings of arms to investigate the claims of all *de facto* armigers in the kingdom to bear

their arms, or any arms at all; to register those they found to be borne licitly; and to cast down the rest.

Thus, since 1530 at the latest, arms and their dependent armories have been officially viewed as the principal signs of membership in the nobility or gentry — an honourable and legally recognized social category comparable to the knightage of which it was in effect an extension — the members of which have traditionally been expected to perform, at their own expense, and often at considerable personal risk, the various types of public service for which their arms were originally granted or confirmed. In return for the honour conveyed by membership in this category, and the implicit expectation of public service it entailed, the Crown has guaranteed that the rights conceded in the grant or registration of the arms that represent it will be protected when infringed in any way. It has at the same time protected its own claim to the loyalty and service of those to whom those rights were conceded, by insisting that the arms descend only to those specified in the grant, and only in keeping with the laws governing the descent of arms.

The terms of grants of arms can be violated by two distinct forms of offense. The first arises when an armiger himself extends the use of his or her arms to persons not directly descended from the original grantee (or in some cases, another specified heir), and therefore have no legal right to them. This type of act, called the **alienation of arms**, can be permitted if permission to do so is obtained from the Crown. The second offence arises when a third party, similarly unentitled to the grantee's arms by descent, appropriates them for his or her own use. This is called the **usurpation of arms**, and it is never legally permissible. In the case of alienation, the armiger offends primarily against the Crown. In the case of usurpation, the miscreant has offended against both the armiger — by pretending to an identity or a relationship which does not exist — and the Crown, because a Royal Prerogative has been infringed.

I shall next examine modern cases of each of these forms of offense in turn, and attempt to determine the effects of the laws prohibiting the acts in question on the practise of armigery in Canada.

4.2. The Alienation of Arms and the Adoption of Heirs

As we have seen, the alienation of arms was commonly practised in England between 1340 and 1450, initially without any special warrant, but as early as 1317, an armiger who wanted to select an heir for his arms knew that royal permission to do so was advisable, and by 1455 essential.¹¹⁴ The transfer of Lord Hoo's arms without King Henry VI's permission shortly before the latter year was found to be invalid.¹¹⁵

A modern example of the denial of the right to alienate has recently come to my attention. In 1869, under pressure from Prince Albert, the

¹¹⁴ ALCAZAR, *The Law of Arms*, p. 2

¹¹⁵ *Ibid.*, citing Anthony WAGNER, *Heralds and Heraldry in the Middle Ages* (London, 1967), p. 20

University of Cambridge admitted students who were not members of any of its constituent colleges, usually because they could not afford the fees.¹¹⁶ In 1887, the Non-Collegiate Students' Board acquired a house for them situated opposite the Fitzwilliam Museum and called it Fitzwilliam Hall. The Earl Fitzwilliam was approached and readily agreed that his arms, *lozengy Argent and Gules*, could be used by the students and they, together with the University's arms placed in chief, were so used for the next sixty years.

In 1947, however, Chester Herald wrote to the Censor of Fitzwilliam House, pointing out that the College of Arms had no record of these arms. The Censor replied that the Fitzwilliam coat was used with the consent of the head of the family and the University's coat by permission of the University. Chester Herald explained that *neither private individuals nor corporations had the power to transfer their arms to others* (my italics).¹¹⁷ The University stalled, pointing out that the students were an 'unincorporated fluctuating body of persons'. Further exchange made it 'clear that the College of Arms was powerless'.

Fitzwilliam House duly obtained its own Royal Charter as a college of Cambridge University in 1966, and in the process acquired a true corporate character. The connection to the Fitzwilliam family was re-established by appointing the current Earl as Patron of the new college and obtaining Letters Patent granting the same arms that had been used for eighty-six years, issued on December 31st 1973.¹¹⁸ It is curious that in this case, the fact that the design of the arms in question incorporated those of the Fitzwilliam and University in a manner that did no more than *suggest* a relationship of some sort to both the lineage and the institution meant that it was an essentially new coat, and did not really involve any sort of alienation. Nevertheless, the contention of the Hall that such alienations had been made to it provoked the statement from Chester Herald that all such alienations were legally invalid as violations of the Law of Arms.

He meant, however, that alienations were invalid unless permission to do so had been both sought and received from the appropriate authorities. Alienation of arms requires a Royal Licence to set aside both the normal laws governing their transmission and the specific terms of the original grant. Applications for such licences are addressed to the Earl Marshal, who transmits them to the Home Secretary. If the latter advises that an application be granted, a document so ordering will be signed by both the Minister and the Sovereign, and then sent back to the College of Arms, where it must be recorded before it can become legally effective.¹¹⁹ The resulting arms are termed 'arms of adoption', and it is only by this procedure that already existing arms may be obtained by one not entitled to them by legitimate descent.

¹¹⁶ W. W. GRAVE, *Fitzwilliam College 1869 - 1969* (Cambridge, 1983), pp. 6 - 7

¹¹⁷ *Ibid.*, p. 481

¹¹⁸ *Ibid.* pp. 482 - 483

¹¹⁹ BROOKE-LITTLE, *Heraldic Alphabet*, p. 179

As this implies, Royal Licences of this sort are required to enable an adoptive father to transmit a version of his personal arms to an adopted son or daughter. The arms in question are then differenced by a charge of two interlaced chain links.¹²⁰ A child born out of wedlock, if paternity is acknowledged or can be proved, may petition for the arms of his father.¹²¹ Here again, a difference is imposed. In English armorial practice since the eighteenth century it has been the bordure wavy; in Scots practice, the bordure compony. In the United Kingdom as a whole, the *Legitimacy Act 1959* provided that illegitimate offspring were legitimated if the parents were subsequently married, but the passage of hereditary honours to such children was specifically excluded. They thus have no right to inherit any form of their father's arms without a Royal Licence — which in effect permits them to be adopted by their natural parents.¹²² For Britain at least, this answers Makepeace's claim that arms do not constitute an honour.

When a testator is the last of his or her line, a clause in the will (termed a 'name and arms clause') may oblige the beneficiary to assume, as a requirement of the inheritance, the name and arms of the testator. This may be either as an *addition* to his existing surname, and as a quartering to his arms or, in some cases, instead of both name and arms.¹²³ Within a year of the death of the testator, the beneficiary has to apply for a Royal Licence to carry out the requirements of the will, acting with the advice of a member of the College of Arms. The herald dealing with the case must acquaint the Home Secretary with the facts and, if he or she agrees, draws up a petition to the Sovereign to permit the alteration to general and the specified rules governing the descent of the arms and other armories in question. In effect, such an action amounts to the adoption of an adult relative or friend with the sole intention of preserving from extinction the name and arms of the adopter, even at the expense of those of the adoptee. As this form of adoption is not normally marked in any way, it actually involves a form of armorial deception, as it implies a type of genealogical relationship that does not, in fact, exist.

The process can also be problematic if the arms to be alienated are not certainly the property of the alienator. A case in which this difficulty appeared occurred in 1886 (*Austen v. Collins*).¹²⁴ Mrs. Austen, a widow who died on 18th June 1885, left an estate to William Chandler Roberts and his successors as long as they used the name of Austen together with that of Roberts and quartered the arms of her deceased husband, a Major Austen, with their patrilineal arms. Ignoring the fact that a widow's right to alienate the arms of her husband was legally dubious at best, Queen Victoria granted the Royal Licence on September 19th 1885, but provided

¹²⁰ FRIAR, *Dictionary*, p. 13; BROOKE-LITTLE, *Heraldic Alphabet*, p. 31

¹²¹ FRIAR, *Dictionary* 48; BROOKE-LITTLE, *Heraldic Alphabet*, p. 46

¹²² J. P. BROOKE-LITTLE (ed.), *Boutell's Heraldry* (rev. ed., London, N.Y., 1983), p.

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¹²³ FRIAR, *Dictionary*, p. 254; BROOKE-LITTLE, *Heraldic Alphabet*, p. 147

¹²⁴ *Austen v. Collins* (1886), 54 L.T. 903 (Ch.D.):

<<http://www.heraldica.org/topics/britain/austenvcollins.htm>>

that the arms should be exemplified according to the law of arms and recorded in the College of Arms, otherwise the Royal Licence would be void.

A problem arose when it was discovered that, while the arms used by the late major had indeed been granted to an Edward Austen in 1603, Major Austen had never established his own right to bear a version of these arms. Accordingly, the kings of arms declined to grant the beneficiary the right to receive the arms as borne by the Major, but did grant to William Roberts a version of those arms, differenced with five fleurs-de-lis added to the chevron. They were, the herald said, as nearly identical to those used by Major Austen as the law of arms permitted. Whether the name and arms clause had been complied with was challenged in court, but the judge decided that it had, and William Roberts received his inheritance.

As can be seen from these examples, the alienation of arms — by which is meant the transmission of an existing coat of arms to someone who is not a descendant of the grantee — is always an exception, requiring a special procedure allowing its validation. Its principal function has been to permit the inheritance by legitimated and adopted children of a suitably differenced version of their natural or adoptive father's arms. In Canada, as we shall see, it is no longer necessary for either purpose.

4.3. The Usurpation of Arms

The expression 'usurpation of arms' means the use of arms by someone other than the armiger for deceptive purposes. There is a problem in determining whether or not someone's arms have been usurped because the offence lies at the level of intent. The mere display of another's arms is not an offence. Individuals have always been free to display the arms of their schools, colleges, universities, and towns as a commemorative as well as a decorative act. Lord Goddard, it will be recalled, in his decision in the Court of Chivalry of 1955, hinted that a theatre might not be committing an offence if it displayed its town's achievement over its proscenium arch. There was an implication, however, that, at least in certain circumstances, the permission of the armiger to *display* the arms was necessary.¹²⁵ This can be seen in the wording of the decision of the Court of Chivalry in its most recent case:

We the said Bernard Marmaduke Duke of Norfolk with the counsel of those skilled in the law whom We have consulted in this behalf pronounce decree and declare that the Plaintiffs Corporation of the City of Manchester lawfully bear the arms crest motto and supporters in this cause libellate and that the defendants

Manchester Palace of Varieties have *displayed* representations of the said arms crest motto and supporters in the manner in this cause libellate and *contrary to the will* of the Plaintiffs and the laws and usages of arms and We inhibit and strictly enjoin the Defendants

¹²⁵ SQUIBB, *High Court of Chivalry*, p. 127

that they do not presume to display the said arms crest motto and supporters or any of them. (My italics)

It seems that a 'display of the arms of another for ornamental purposes did not affect the right of the armiger, because it was not necessarily an assertion of right to the arms'.¹²⁶ The defendants, however, had been using the city's arms on their legal seal as well as displaying it above their stage, and were thus guilty of usurpation.

Thus, to set arms of dominion permanently above an entrance would strongly imply that the premises constituted the office of a consul of that country in a foreign land, or a government office like a court house or post office in the country represented by them, and would clearly be an usurpation of the arms if that were not the case. Indeed, to set the arms or crest of anyone else above one's front door would seem to be a claim to own these armories, unless one had placed them there in a clearly temporary way, as a welcome-home gesture for an armiger returning from abroad. It is the repeated or consistent use of armorial bearings identical to another's, in a manner implying ownership that constitutes usurpation. This includes their display on a seal, a letterhead, a visiting card, a bookplate, crockery, silverware, and other personal items, as well as more obvious contexts like flags and monuments.

Attempting to give one's arms so that they would be used in this sense would constitute alienation and thus be illegal. However, arms are one's property and it seems that they may be given to others to display, perhaps for a financial consideration.¹²⁷ This is certainly true in Scotland, as Lord Lyon Innes of Learney indicated in his authoritative handbook that a Scottish armiger may allow his, her, or its arms to be displayed on blazers by a manufacturer of school clothes, or as the sign of a public house, or as an 'By Appointment' sign on the premises of a supplier that the armiger patronizes for a financial consideration. But Scots law has not been received in Canada, so it is not clear that such licensing would be legal here.¹²⁸

A summary of the position would seem to be that the armiger may use the granted arms in any way as a symbol of identity. One may give another permission to display one's arms in a place and manner one approves. In fact, one may only object to the display of one's arms when one considers such display inappropriate.

Such an understanding would allow the display of armorial collections, the arms of one's friends, one's college, school, church and so on, without fear of infringing anyone's sensitivity. It would allow bucket-shop heraldry, where presumably the seller has ensured that the family owning the arms he sells for each surname has died out or, I suppose, a fee

¹²⁶ Ibid., pp. 125 – 126

¹²⁷ Sir Thomas INNES OF LEARNEY, Lord Lyon King of Arms, *Scots Heraldry* (1st edn., Edinburgh and London, 1934, pp. 168 – 171

¹²⁸ On this see HOGG, *Constitutional Law of Canada*, Chapter 2 ("Reception"). This is the case even in Nova Scotia – see *Uniacke v. Dickson* (1848), 2 N.S.R. 287 (S.C.N.S.)

is being paid to an existing owner of the arms. Although frowned on by many, there is little doubt that bucket-shop heraldry does spark an interest in the subject and this is greatly to be desired. The same is true for the self-assumed arms made by so many children. They may well copy their coats from a book, but it is difficult to see what harm this can do and I suspect that many now distinguished heralds and heraldists started in this way.

Where the usurpation of another's arms is part of an attempted fraud, of course, it would constitute grounds for a case in a Common Law court. The uncertain position is where the only offence has been the illegal use of arms. The protection of royal and state arms against their use as trademarks was established by the *Convention of Paris 1883 (revised 1967)*. The European Community has now extended this protection to badges, emblems or escutcheons of 'particular interest' and to those already protected by national laws. A later directive from the European Council allows national laws that are not directly related to trademark law to be brought under this jurisdiction. This might allow the law of arms to be applied in England by a Common Law court.¹²⁹

The application of the law in Canada is vague, however, as it is unclear to which courts, if any, the jurisdiction of the English High Court of Chivalry has passed. Since the Canadian Heraldic Authority is a federal authority, the Federal Court of Canada would seem the obvious court of the first instance, and it probably would protect the arms of any public authority.¹³⁰ There was a recent case concerning honours in Canada, *Black v. Chretien*,¹³¹ and this was heard in the Superior Court of Ontario, but Black's charge was one of misfeasance in public office and negligence, and did not directly concern honours.

Mackie feels that the Provincial Superior Courts (except perhaps those of Prince Edward Island and Newfoundland and Labrador) could have jurisdiction in cases of the usurpation of arms. It is clear from his arguments, however, that whatever court sat on such a matter would be unlikely to grant monetary damages, and would simply issue an injunction against the offender to desist and formally acknowledge his or her offence.¹³² If this is so, then a letter to the Chief Herald of Canada from the offended armiger, followed by a letter to the perpetrator from the Herald Chancellor or the Governor General explaining the position after the facts were verified, would likely resolve the issue.

The offence must be very rare and, in almost every case, arise from ignorance of the law. In a recent situation in Scotland, for example, Donald Trump simply took down the illegal arms when he was notified of the law. Disappointingly, perhaps, we did not get to see Lord Lyon actually

¹²⁹ Martin SUNNQVIST, *The Law of Families' Heraldic Arms* (An English abstract of his LL.M. thesis on European heraldic law and its relationship to trademark law, pub. at <http://www.geocities.com/Athens/Atrium/8018/lawofarms.html?200820> [acc. 20 March 2008], pp. 2 – 3)

¹³⁰ MACKIE, *The Canadian Law of Arms*, p. ??

¹³¹ (2000), 47 O.R. (3d) 532 (S.C.) aff'd (2001), 54 O.R. (3d) 215 (C.A.).

¹³² MACKIE., p. 27

defacing or removing the offending escutcheons.

If the usurpation of arms became a common offence, then Mackie¹³³ has what might be a useful idea. He suggests that arms could be designated as subject to the *Contraventions Act 1992*.¹³⁴ The Canadian Heraldic Authority would then simply issue tickets fining offenders. On a more serious note, if the matter became pressing, the Governor General could always ask the advice of the Supreme Court. Canadian armorial law on this matter is no more uncertain, I would hazard, than that of England and Wales. In Scotland, where the King of Arms, Lord Lyon, is a judge in his own court, there is quicker and more certain resolution of these matters.

4.4. Women and Arms: Their Rights under Traditional Laws

Medieval knowledge of human reproduction was a shadowy mixture of Biblical and ancient Greek and Roman thought. The second chapter of the Book of Genesis told that man was made from dust and had come to life when God breathed into his nostrils (2, 7). Woman was created only as a partner for man, being made from one of his ribs (2, 21 and 22).

The ideas of Aristotle, the scientific parts of whose works were initially banned by the Council of Paris in 1210,¹³⁵ became acceptable only after the scholastic resolution of science with theology by Thomas Aquinas (1224/5 – 1274). Aristotle held that the male seed contained the ‘form’ of the embryo, whereas the female simply supplied the ‘matter’ from which it was made, as well as the seedbed of the womb.¹³⁶ Although the exact nature of the concepts underlying Aristotle’s views on form, matter, substance and essence remain debatable,¹³⁷ the nearest translation into modern biology would be that the male seed supplied all the information — that is, the forty-six chromosomes of deoxyribonucleic acid — necessary for the production of the individual.

The female generative organs were thought to be imperfectly formed male organs, the vagina, for example, being an inverted penis and the menstrual flow, imperfect seminal fluid.¹³⁸ This was because women lacked the ‘vital heat’ to refine semen. Such views, of course, would have tended to support the existing socio-economic status of men and the descent of the coat of arms only through the male line. However, it is unlikely that many contemporaries, even among the better-educated clerics and academics, would have known much about these doctrines.

Galen (i.e., Aelius or Claudius Galenus of Pergamum, AD 129 - c. 200), a Graeco-Roman biologist, had greater influence in the field of medicine, and he had held that it was a confluence of male and female

¹³³ *Ibid.*, p. 43 n. 230

¹³⁴ S.C. 1992, c. 47.

¹³⁵ Ted HONDERICH (ed.), *The Oxford Companion to Philosophy* (Oxford, 1995), p. 51

¹³⁶ Roy PORTER, *The Greatest Benefit to Mankind: A Medical History of Humanity* (London, 1997), pp. 130 – 131

¹³⁷ HONDERICH (ed.), *Oxford Companion to Philosophy*, p. 56

¹³⁸ PORTER, *Greatest Benefit*, pp. 130 – 131

semen that formed the child (Porter 130 –131). The Romans in general thought that female orgasm was a necessary part of conception.¹³⁹ Given the respectability of Galen's views, and their compatibility with the obvious fact that children often show physical characteristics of either or both parents, the Aristotelian view of the absolute primacy of the male in the generation of offspring was unlikely to have been widely accepted.

An interesting belief existed in the pre-Modern period that it was the place where the *conceptus* settled in the womb that determined the sex of the offspring. Galen had taught that the uterus had two cavities, but, by the twelfth century, credulity had increased this number to seven. Three warmer ones on the right produced males, three cooler ones on the left females, and the one remaining central cavity, hermaphrodites!¹⁴⁰

Since the then current knowledge of biology does not really explain the lower status of women in the formative period of armorial practices, we are thrown back upon socio-economic factors in determining their role. Of course, women did not participate in warfare or tournaments, where armigery originated, but with a few years of the first appearance of arms on the seals of princes in the 1130s, those arms began to appear on the seals of the daughters of some of them, and by the middle of the thirteenth century armigery among noble women was normal. Married women came to bear the arms of their father impaled by that of their husband: a convention still maintained to this day. A woman who was or became the heiress of her father could also transmit the arms he had borne (including quarterings inherited from female ancestors) to her descendants, just as she could transmit her father's estates and dignities, but those arms could only be borne by those descendants quartered with those of her husband, and could not be transmitted to her children if her husband was not armigerous (a very rare situation that could be remedied by his acquiring arms of his own). Furthermore, a woman could not transmit her arms to her children if she was not her father's heiress.

Presumably the restrictions on the transmission of arms through daughters reflected in part the association of those arms with the patrilineage of which the daughter herself was a member, but her children were not, and in part their association with the estate of that patrilineage, which the daughter possessed and transmitted only if she was an heiress. Another factor contributing to these restrictions might have been the legal fiction known as the doctrine of *feme couverte*.¹⁴¹ Blackstone, the principal legal authority of the eighteenth century, noted, that 'the very being or legal existence of a woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover she performs everything'. This remained the

¹³⁹ John SCARBOROUGH, *Roman Medicine* (London, 1969), p. 129

¹⁴⁰ Nancy G. SAISI, *Medieval and Early Modern Medicine: An Introduction to Knowledge and Practice* (Chicago and London, 1990), pp. 91-95)

¹⁴¹ Duane L. C. M. GALLES, 'The Arms of Two Ladies: Recent Grants by Canada Herald the Chief Herald of Ireland', *Heraldry in Canada*, 40.1-4 (2006), pp. 75-93

position in English common law until the *Married Women's Property Act 1882*.¹⁴²

During her spinsterhood, a noble woman in England and in most other countries could display the undifferenced arms of her father, as no seniority was legally recognized among daughters.¹⁴³ As a married woman she would display the arms of her father and her husband combined by impalement, as described above, and as a widow would continue to display her marital arms. Thus, a woman born into the nobility would have had the same right to armigery as her brothers, and would have borne distinctive personal arms from the time of her first marriage.

Whether a woman not born into a noble house could have obtained a grant of arms is unclear, as it would have been a rare woman who would have qualified for such a grant under the usual criteria (which included the performance of 'feats of arms'),¹⁴⁴ and there are no known cases of such a grant in England before their reign of the first regnant queen, Elizabeth I, in 1558. In that very year William Hervey, Clarenceux King of Arms, granted arms to 'Dame Marye Mathew daughter and heyre of Thomas Mathew of Colchester in the counte of Essex esquire'.¹⁴⁵ Clarenceux 'assigned geven and granted unto her *and her posterite* the oulde and auncient armes of her said ancestors'. Thus, it seems that she, presumably an heraldic heiress, was allowed to transmit *her* family arms to her children, 'To use bear and shew for evermore in all places'. What makes this grant even more surprising is that Mary Mathew was 'otherwise called dame Mary Jude wiffe to Sir Andrew Jude Knight late Mayor and Alderman of London'. Thus we have a married woman transmitting her arms to her children, rather than those of her husband (who as a knight was almost certainly armigerous himself).

It was a somewhat similar problem that in 1972 exercised The Rt. Hon. Roland Michener (twentieth Governor General of Canada from 1967 to 1974), and was the subject of his letter to the Earl Marshal that we have already touched upon. He requested, 'Your Grace's Warrant to the Kings of Arms for their (*i.e. his arms*) exemplifying to my grandchildren.' He had three daughters, and they had seven grandchildren between them, six girls (for whom he requests the arms) and a boy (to whom he asks that his crest

¹⁴² (U.K.), 45 & 46 Vict., c. 75.

¹⁴³ FOX-DAVIES, *Complete Guide*, p. 387)

¹⁴⁴ There was one possible case of the armigeration of a women in France: that of Joan 'of Arc' (*i.e. Jehanne Darc*, c. '1412 – 1431). We know that, despite her peasant origins, she led the French army at the relief of Orleans in 1429 clad in white armour and flying her *own* standard. SCOTT-GILES (*Shakespeare's Heraldry*, p. 166) further claims that arms were granted to Joan, but perhaps posthumously. These were, *Azure, between two gold fleurs de lis, a sword erect, point upwards, with a gold pommel and hilt, the blade encircled with a gold crown*. Another account, however, (BROOKE-LITTLE, *Fox-Davies' Complete Guide*, p. 207) states that these particular arms were in fact granted, together with nobility and the additional name Du Lis, not to Joan, who was still alive in December 1429 when the arms were granted, but to her brothers.

¹⁴⁵ BROOKE-LITTLE, *Fox-Davies' Complete Guide*, p. 388

also be transmitted, since crests could not be transmitted even by heraldic heiresses).¹⁴⁶ The grandchildren received their grant on 30th March 1973. A later Garter, asked to explain the situation, replied, 'It really is a question of the Law of Arms being applied as if there had been a transfer of the Arms by Royal Licence'.¹⁴⁷

It seems that other grants of arms to women in their own right have been made since the seventeenth century. This is at least implied by the statement by Fox-Davies at the beginning of the twentieth century that 'For the last two certainly, and probably nearly three centuries, no original grant of personal arms has ever been issued without it containing the grant of a crest except in the case of a grant to a woman, who of course cannot bear or transmit a crest...'.¹⁴⁸ Nevertheless, such grants were apparently exceptional, and continued to be so until the later decades of the twentieth century.

As was true of the traditional laws governing the armorial rights of adopted and illegitimate children, those governing the rights of women underwent radical revisions in the last third of that century. All of these changes were almost certainly the result of a growing interest in human rights and the legal equality of the sexes that had begun in the wake of the of the Second World War and of the genocidal horrors associated with it. In 1948, three years after the end of the War, the United Nations had adopted the Universal Declaration of Human Rights, and its first article had declared the right of equality between men and women. Many similar declarations have followed in different contexts.¹⁴⁹ Although these declarations and conventions were not law, the making of laws has generally followed their guidelines. In Canada, the equality of the sexes was legally embodied in the *Canadian Bill of Rights*¹⁵⁰ in 1960 and the *Canadian Charter of Rights and Freedoms* in 1982. The latter was an amendment to the simultaneously patriated Constitution, which states in section 28 that 'the rights and freedoms referred to in it are guaranteed equally to male and female persons'.¹⁵¹ By that time, of course, women had actually proven their claims to equal treatment in law by overcoming the traditional barriers to admission to universities and the professions they led to, and achieving positions of responsibility in virtually every area of life previously denied to them.

Even before that, when the women of the Baby Boom generation were just beginning to graduate from university, the attitude towards women's rights in the armorial as in other spheres had begun to undergo profound changes. In May 1969 (dating by the author's preface), John

¹⁴⁶ Darrel E. KENNEDY, 'Michener Arms Embrace Grandchildren', *Heraldry in Canada* 39.1 (2005), pp. 7-10, esp. p. 8

¹⁴⁷ *Ibid.*, pp. 9 – 10

¹⁴⁸ BROOKE-LITTLE, *Fox-Davies' Complete Guide*, p. 45

¹⁴⁹ GALLES, 'Arms of Two Ladies', p. 78

¹⁵⁰ S.C. 1960, c. 44.

¹⁵¹ GOVERNMENT OF CANADA, *Your Guide to the Charter of Rights and Freedoms* (Special Edition, Ottawa, 2002)

Brooke-Little, in his then current revision of Fox-Davies' *Complete Guide to Heraldry*,¹⁵² noted that there had been a recent resolution of the question of whether a woman with arms in her own right could transmit them to her children. It was assumed that her husband was himself armigerous, and was decided that in such circumstances, the woman's arms could be passed on to her children, but *only if they were impaled by those of her husband within a bordure of a suitable tincture*, and included as quarters two and three of a quarterly coat.

This can hardly be considered equal treatment of, but it was a small step forward. If Roland Michener's case can be taken as a precedent, the process of elevating the rights of female armigers had moved by 1973 to permitting the transmission to children of the whole arms of a woman inherited from her father even when the husband had no arms of his own.

By 1997, so many changes of policy in the area of female armorial rights had been made by the English kings of arms that a public document of clarification was issued, *The Bearing of Arms by Women decreed by the Kings of Arms in 1997*.¹⁵³ The policies announced in this document may be summarized as follows:

1. Before marriage

Women with armigerous fathers may display their paternal arms, but on a lozenge or oval (not a shield), and without crest, wreath or mantling. [*This was simply a reiteration of traditional practices, and made no concessions to female equality.*]

2. During marriage

a. Whether or not entitled to paternal arms, a married woman may bear her *husband's* arms on a shield, but differenced by a small lozenge of contrasting tincture in the canton, centre chief, or other suitable point. [*This was a completely new practice.*]

b. A married woman entitled to paternal arms whose husband is not armigerous may bear her *paternal* arms on a shield differenced by a small escutcheon of contrasting tincture in the canton, chief centre or other suitable point. [*This was another new practice, analogous to the first.*]

c. A married woman entitled to paternal arms may impale those arms with those of her husband on a shield in the traditional fashion.

d. An heraldic heiress (with no living father, brothers, or nephews) may place her paternal arms on an escutcheon of pretence in the centre of her husband's shield. The children of an heraldic heiress, whether she is living or deceased, may quarter her paternal arms (second and third quarters) if, and only if, they are armigerous (presumably whether by their own paternal inheritance or by their own grants).

¹⁵² BROOKE-LITTLE, *Fox-Davies' Complete Guide*, p. 425

¹⁵³ GARTER KING OF ARMS, CLARENCEUX KING OF ARMS AND NORROY AND ULSTER KING OF ARMS, *The Bearing of Arms by Women Decreed by the Kings of Arms in 1997*, in Cheshire Heraldry, online: <<http://cheshire-heraldry.org.uk/decreed.html>>

3. After divorce

Divorced women entitled to paternal arms revert to using those arms on a lozenge. The previous use of a mascle to indicate that they are divorced is now optional. [*Presumably, women who were not armigerous before the marriage, lose the use of their husbands' arms on divorce.*]

4. In Widowhood

a. A widow may bear her late husband's arms on a lozenge or oval (but not a shield), differenced by a small lozenge, as she had while married.

b. Alternatively, a woman entitled to a paternal coat of arms may revert to that on a lozenge and differenced by a small escutcheon as during marriage or she may continue to bear the impaled marital coat, but on a lozenge.

5. A Woman Grantee in England

a. The woman grantee in England may bear her own arms on a shield, but may not be granted a crest. As recently as 1993, it was said, 'Ladies do not bear crests because they do not wear helmets and are not combatant ... they ... may in the future aspire to a grant of arms with crest, helm and mantling. History will have to relate as to whether the Kings of Arms will accede to this aspiration'.¹⁵⁴

This is of course completely specious reasoning, for in recent decades the vast majority of male armigers have reached retirement age without ever having borne military arms or worn a helmet, while a considerable and growing number of women serving in the armed forces have done both.

b. If an English female grantee marries an armiger, she may now transmit her arms *as quarterings* to her descendants, both during her lifetime and thereafter, *unless the patent specifies otherwise*.

The clumsy practice announced in 1969 of impaling such an armiger's arms with those of her husband and uniting them within a bordure before they could be quartered by her children, seems to have been dropped. The document is silent as to the simple question of whether a woman grantee's children with a non-armigerous husband may inherit her arms, but it must be assumed that this right has not yet been extended to such armigers.

6. A Woman Grantee in Canada

It is refreshing to turn to the simplicity of the Canadian position. Canadian women grantees may have their arms depicted on a shield, a lozenge, or oval, according to their preference, together with a helm, crest and motto. Their armorial ensigns may thus be indistinguishable from those of men, if they choose to use a shield.¹⁵⁵

This is indeed a very great change in armorial practice. The use of helm and crest and the option of bearing the coat of arms on a shield instead of a lozenge or an oval constitute a radical break with the past.

¹⁵⁴ BEDINGFELD and GWYNN-JONES, *Heraldry*, p. 46

¹⁵⁵ GREAVES, *Canadian Heraldic Primer*, p. 37

Historically, the full achievement was confined to the male and originally was linked to military service. The arguments underlying the Canadian Heraldic Authority's position are presumably that it complies with changed mores and concurs with the spirit of recent Canadian law in other matters. The loss of the opportunity to indicate sexual as well as personal identity may, perhaps, be regretted — as for most people their sex is an important element of that identity, and is marked by one or more forenames peculiar to one sex or the other. It will be interesting to see how many future female grantees will opt for the oval or lozenge.

4.5. The Effects of Female Equality on the Relationship between Arms and Surnames

Section 15 of the *Canadian Charter of Rights and Freedoms* states that 'every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.¹⁵⁶ Section 28 emphasises that any rights are 'guaranteed equally to male and female persons'. The Canadian Heraldic Authority has carefully complied with the Charter by allowing equal rights to arms and the descent of such arms to men and women.

Not surprisingly, some relatively radical consequences for armorial practice inevitably follow from this decision, one of which is the erosion of the traditionally close relationship between *arms* and *surnames*. As Kevin Greaves has pointed out in an article in *Heraldry in Canada*,¹⁵⁷ because the descent of arms was normally patrilineal, and surnames were transmitted in exactly the same manner in most European countries, the coat of arms came at an early date to be closely associated with a the surname of the patrilineage of its bearers. In fact, it can be regarded as the principal visual sign of the lineage whose name was its principal aural sign.

Of course, this relationship between arms and names grew up gradually over time, and was far from identical even in the different parts of the island of Great Britain and northern France, from which most of the earliest armigers of England and lowland Scotland derived. In northern France the use of surnames began in the eleventh century in precisely the same class of people who first adopted arms in the twelfth — that of princes and barons — and in the later twelfth and early thirteenth centuries spread, with armigery, to the knights, who in the same period rose socially to form a lower stratum of the nobility. The French princes and barons who accompanied William of Normandy to England on his expedition of conquest in 1066 (many of whom were not Normans, but Bretons, Picards, Flemings, and the like) commonly brought their new surnames with them, often of a toponymic type (like d'Arcy, de Clare, de Fiennes, de Quincy, and de Saint-Liz), but others (like the Breton Lestranges and Fitzalans)

¹⁵⁶ GOVERNMENT OF CANADA, *Guide to the Charter of Rights*

¹⁵⁷ Kevin GREAVES, *A Canadian Heraldic Primer* (Ottawa, 2000), pp. 38 – 39

acquired new ones after their arrival, of the same or different types (the former, 'the foreigner', descriptive, and the latter patronymic). In England (with whose practices we must be particularly concerned) surnames remained somewhat unstable even on those social levels into the fourteenth century (one branch of the Fitzalans having taken the name Stewart from their office, as the Marshals, Butlers, Constables, and For(e)sters had from theirs), but so did the arms associated with them. Among the lesser barons and knights, many took their names from those of their principal seats in England; de Clinton, de Dacre, and de Ufford were typical of these. After about 1250, however, matters stabilized, and the great majority of armigers transmitted both their name and their arms to their children and their patrilineal descendants in much the fashion that they have done in recent centuries. And as there was rarely more than a single lineage bearing any particular surname on the baronial level, and only a handful of lineages, generally based in different counties or regions, on the knightly level, names and arms coincided in the early nobility much more closely than they would in later periods.

Not surprisingly, hereditary surnames were not in common use among the mass of the population of England until the fourteenth century, and came even later to Wales. In England as in most other countries, the same surnames, whether toponymic (Allingham, Atwood, Digby, Kent, Westmorland), patronymic (Collins, Johnson, Molson, Watson, Wilson), occupational (Baker, Brewster, Carpenter, Thatcher, Smith, Wainwright), or descriptive (Long, Short, Black, Brown, Good) were adopted in the fourteenth and fifteenth centuries by many quite unrelated patrilineages descended from individuals given those surnames. Unlike those of the old Anglo-French nobility, therefore, such surnames might or might not indicate any genealogical relationship, and two individuals of the same surname from different villages or towns were more likely to be *unrelated* than *related* to one another, at least in a patrilineal manner.

To further complicate matters of interest to us here, *some* members of *some* of these new patrilineages eventually rose in society to the point where they became armigerous, and founded armigerous branches of their lineage whose relationship to one another might have been obscure or unknown. At the same time, most other branches of their lineage did *not* become armigerous, while other *unrelated* lineages of the same name did not give rise to a single armigerous branch. In these circumstances, neither the right to bear particular arms, nor armigery in the abstract, is implied by any particular surname — though the members of any particular armigerous branch of a lineage will normally bear the same surname, so the normal relationship between name and arms is maintained on that level.

In Wales, by contrast, hereditary surnames were only generalized *after* the adoption of hereditary arms, with the result that many branches of lineages bore the same or similar *arms* but quite different *surnames*.¹⁵⁸ The

¹⁵⁸ FRIAR, *Dictionary*, 367 – 372; Stephen SLATER, *The Complete Book of Heraldry* (London, 2002), pp. 188 – 191

Welsh already have what the Canadian heralds call a 'heraldry of the blood', in which arms represent descent in a manner that is partially independent of particular names. Nevertheless, Welsh arms descend in a strictly patrilineal manner, and each is associated with a fixed *set* of surnames that effectively represent different branches of a single patrilineage — which itself lacks a common name.

In Scotland, yet another pattern of naming emerged because of the persistence of the clan system, in which the chiefship descended in a single noble lineage whose common surname — Campbell, Macdonald, Macleod, Macpherson, or the like — served as that of the clan as a whole, but was also adopted by some lineages of clansmen unrelated either to the chief or to one another. In this situation, the arms alone indicate membership in a particular lineage: members of the chiefly line itself bear differenced versions of the chiefly arms, but other armigerous clansmen, including those who bear the chiefly surname, must use quite different arms.

Thus, a considerable variety of different relationships between names and arms developed even in the British Isles. Nevertheless, in the countries of Latin Europe other than Spain and Portugal — where the transmission both of surnames and of arms came to follow an entirely different and peculiar pattern¹⁵⁹ — both names and arms have normally descended together to the patrilineal descendants of the first armiger, unless they have been preserved as quarterings transmitted through an heiress into another patrilineage.

In consequence, the recent Canadian extension of equal armigeral rights to women is quite revolutionary, and raises all kinds of difficulties related to the future descent of those arms, as we shall see. Unless the descent of surnames is modified in the same way, the right of women to transmit their arms to their descendants in the same manner as men will undermine the traditional relationship between arms and surnames, and if the descent of surnames is itself similarly modified, the traditional relationship between both arms and names on the one hand, and patrilineal descent on the other, will be undermined to the point where neither name nor arms will have any certain genealogical implications.

¹⁵⁹ In Spain, charges from a wife's arms could be placed on a bordure (Thomas WOODCOCK and John Martin ROBINSON, *The Oxford Guide to Heraldry* [Oxford, 1988], p. 24), and in Portugal, 'it was always permissible to bear the arms of female ancestors', and at least portions of the woman's arms could descend through the family. (Jacqueline FEARN, *Discovering Heraldry* [New York, 1980], p. 78) Fearn tells us that 'a son, probably not the eldest, might choose from among his ancestral coats up to four to use, indicating by special marks of cadency and sometimes by initials his relationship to the ancestor'. It must be admitted that these are dubious precedents for Canada, where armorial links have always been primarily to Britain and France, and the relevant parts of the Law of Arms evolved along very different lines.

4.6. The Effects of Female Equality on Differencing for Cadency

This introduction of equal armorial rights for sons and daughters also raises the question of how best to deal with making the distinctions among the individual children of each armigerous household that are required by the traditions of English armorial law, not only in the first, but in each successive generation. In effect, this requires the establishment of a system of brisures that distinguishes female children in the same general way as male children, and also recognizes seniority among them in a manner that conforms to national laws on the equality of women.

Ireland led the way in this area, and its heraldic authority decided to revise its marks of cadency in the simplest possible way, extending the system of brisures previously used exclusively for male children to all siblings, and assigning them solely by order of birth.¹⁶⁰ Like their Irish colleagues, the Canadian heralds — for good or ill — have chosen to retain the traditional English marks for sons (the label, crescent, mullet, martlet, annulet, fleur-de-lis etc.) and, in 1992, introduced a separate set of brisures for daughters (the heart, ermine spot, snowflake, fir twig, chess-rook, escallop, etc.).¹⁶¹

The Canadian Heraldic Authority is nevertheless very committed to the medieval practice of ‘one man one coat’,¹⁶² for which the English system of brisures can be no more than a temporary stopgap, even in lineages whose legal membership is not complicated by changes in the laws related to adoption and illegitimacy I shall examine below. The ideal system of differencing based on this principle is one that will produce and maintain over many generations a set of arms that will have a strong ‘family resemblance’, but will also be clearly distinguishable from one another, and indicate both the distinct identity of every member, and his or her line of descent from the founding armiger. Unfortunately, neither the Stodart system of bordures used in Scotland (which does achieve all of these goals for several generations),¹⁶³ nor the English system of minor brisures (which achieves none of them effectively even in the first generation) can distinguish a very large number of individuals. The Scots system runs out of rules, and the English system leads to an impossible number of identical marks.¹⁶⁴

It should again be emphasised, however, that even the Stodart system of bordures used in Scotland, exemplary as it is, must eventually fail in that, at some time, the finite number of prescribed bordure changes

¹⁶⁰ SLATER, *Complete Book of Heraldry*, p. 195

¹⁶¹ KENNEDY, ‘Canadian Cadency’, p. 20

¹⁶² BROOKE-LITTLE, *Heraldic Alphabet*, p. 57; KENNEDY, ‘Canadian Cadency’, p. 19

¹⁶³ On these, see INNES OF LEARNEY, *Scots Heraldry*, p. 101, and (in a modified form) GAYRE OF GAYRE AND NIGG, *Heraldic Cadency*, p. 290

¹⁶⁴ For a critique of the English system, see D’A. J. D. BOULTON, ‘The Law and Practice of Cadency in Canada: English or European?’, *Heraldry in Canada* 6.1 (March, 1972), pp. 4-17; and 6.2 (June 1972), pp. 12-19

must run out. Most books show the system for only five generations.¹⁶⁵ Lord Lyon Innes of Learney himself admitted that 'it is only possible to show the simplest form of cadency'.¹⁶⁶

There are numerous other varieties of bordure. Normally, each son of the main line gets a simple *bordure* of some different colour, but sometimes a 'maternal difference', a charge taken from his mother's arms, or from his wife's proves more convenient. Younger sons of younger sons, again, get various additional differences, ... or it may be charged with appropriate objects.

It seems clear that, eventually, Innes of Learney and Lyon Kings of Arms have had to make arbitrary decisions on the way to difference the arms. He observed that a marriage to a heraldic heiress is a relief, as 'Sometimes the addition of a quartering is sufficient to difference the arms'.¹⁶⁷

The relief that quartering offers to the proliferation of brisures in the English system was also unrealistically endorsed by Fox-Davies.¹⁶⁸ He anticipated that few armigerous families survive four generations without marrying an heraldic heiress. He had, perhaps, forgotten that there are likely to be many cadet branches by this time. In any case, he opined as follows:

The use of these difference marks is optional (original italics). Neither officially nor unofficially is any attempt made to enforce their use in England they are left to the pleasure and discretion of the bearers, though it is a well-understood and well-accepted position that, unless differenced by quarterings or impalement, it is neither courteous nor proper for a cadet to display the arms of the head of his house: beyond this the matter is usually left to good taste.¹⁶⁹

Other authorities, however — including Boulton, Brooke-Little, and Friar — point out the weaknesses of the English practice based on the repeated imposition of the same brisure by the son of the same birth-status in every generation (every second son of a chief adding a crescent, for example), and the steady accumulation of the same minor brisures by the cadets of cadets (every second son of a second son of a second son adding a third crescent to the inherited two, *ad infinitum*). The 'absurdity of such a system is manifest and consequently it is more honoured in the breach than the observance . . .';¹⁷⁰ 'Such a system is clearly absurd . . .'.¹⁷¹ I shall try and examine this more carefully when I discuss the descent of Canadian arms.

In practice, both because of the inherent weaknesses of the English

¹⁶⁵ INNES OF LEARNEY, *Scots Heraldry*, Plate XXI, opp. p. 79

¹⁶⁶ *Ibid.*, p. 78

¹⁶⁷ *Ibid.*, p. 79

¹⁶⁸ BROOKE-LITTLE, *Fox-Davies' Complete Guide* p. 375

¹⁶⁹ *Ibid.*, p. 376)

¹⁷⁰ BROOKE-LITTLE, *Heraldic Alphabet*, p. 83)

¹⁷¹ FRIAR, *Dictionary*, p. 76)

system of differences, and of the failure of the English heralds to insist even on *their* use, English arms have tended to become, as they have in France (and as they always have been in Germany and the lands of central and eastern Europe), 'family arms': that is, emblems of the lineage as a whole, in which individual identity is normally unmarked in any way. If the traditional French and English principle of 'one *man* one coat' was to be preserved in Canada in its modern form of 'one *person*, one coat', the Canadian heralds had to adopt a more sophisticated approach to differencing, in which brisures were employed in a sufficiently flexible manner to permit an unlimited progression of intelligible differences.

In fact, they did precisely this, permitting all of the earlier practices of differencing to be employed according to the wishes of the armiger. As in the earliest days of armigery, differences may be imposed on the arms of the children of an armiger in a variety of ways, including *ad hoc* changes to (1) the charges; (2) the boundary lines of partitions, ordinaries, and subordinaries; or (3) the tinctures of either the charges or the field, and (or) (4) the use of the traditional masculine or new feminine brisures. To set this practice in motion from the very beginning, Canadian grantees may have such differences for their children exemplified in the original grant.

In principle, at least, these new (or revived) practices could certainly produce the desired results summarized above. But they will only do so if they are actually applied judiciously and consistently over the generations, in the Scottish rather than the English tradition. Consideration should therefore be given to instituting a system of matriculation of arms every two generations or so. This would give the opportunity for the creation of new, but related, coats for cadet branches, and also for the reassignment of brisures of deceased members who have left no descendants.

Even this would not completely resolve the problems presented by the new Canadian rules of descent, however. For example, under its current policies, the Canadian Heraldic Authority, while admitting that all descendants of grantees are armigerous, will not grant cadet arms to those descendants of a grantee who are not themselves Canadian citizens: a common situation in a country of massive immigration. Furthermore, as we shall see, the Authority permits the alienation of arms from the traditional lines of descent in ways that undermine any intelligible approach to brisures.

4.7. The Effects of the Equality of Illegitimate Offspring and Adopted Children on the Descent and Differencing of Arms

Historically, arms could not descend to bastards in most of the countries where armigery was practised — that is, to children born of parents not married to each other. Such children were excluded from all rights to inheritance. This rule was of course, a consequence of the importance of the ownership of land in medieval times, and of its transmission with the arms of the owner. At the time a marriage settlement was drawn up, it was important that the future of any property involved should be determined

to fall only on the joint issue of the marriage. This was even more important should the bride also be an heiress. It must be noted, however, that in great houses, where property was plentiful, and high birth demanded recognition, kings and princes often recognised and even legitimated their bastards, and gave them differenced versions of their own arms.

The unauthorised transmission of arms, not only to unrelated persons (those adopted and those left property under a '**name and arms**' clause), but also to those born outside wedlock, constitutes an infringement both of the laws of arms generally and the terms of both grants and registrations. Such transmissions have traditionally been regarded as constituting alienations of the arms. For either to occur requires a setting aside of armorial law, and in England a Royal Licence (obtained by the process described above in § 9) is still required to do so. Furthermore, whenever such an exception to the armorial code was allowed in the past, a special charge called a 'mark of distinction' was added to the irregularly transmitted arms.¹⁷² For a 'name and arms transmission, this was usually a plain canton (Brooke-Little *Fox-Davies' Complete Guide* 105) on the shield and a cross-crosslet on the crest and for an adopted child, two interlocked chain links.¹⁷³

The **mark for bastardy** has a more complex history. In early times it was the bendlet sinister, but since the late eighteenth century it has been the bordure wavy.¹⁷⁴ The baton sinister has been reserved for illegitimate royal issue.¹⁷⁵

In Scotland, however, no special licensing procedure for illegitimate issue is required:

Even the bastard, perhaps on account of the old Scottish custom of 'handfast marriages', is favourably treated in Scots Heraldic Law. On proof of his paternity, he matriculates exactly like any lawful cadet, and simply obtains some form of the specific 'bordure compony', whose purpose is merely to show that he is not actually in the legal line of succession; but far from being reckoned a *filius nullius*, he is treated as a member of his father's clan, and as having an hereditary right to the ensigns armorial which indicate his actual paternity, and quarterings if any.¹⁷⁶

Ireland today has moved even farther. Illegitimacy no longer has any existence in law, so no heraldic marks of illegitimacy now exist.¹⁷⁷ As we have already noted (see 'Alienation of Arms') Britain in its *Legitimacy Act 1959*¹⁷⁸ specifically excluded the transfer of honours (and thus arms) to

¹⁷² FRIAR, *Dictionary*, p. 128

¹⁷³ BROOKE-LITTLE, *Fox-Davies' Complete Guide*, p. 258)

¹⁷⁴ BROOKE-LITTLE, *Heraldic Alphabet*, p. 46

¹⁷⁵ FRIAR, *Dictionary*, p. 48

¹⁷⁶ INNES OF LEARNEY, *Scots Heraldry*, p. 82

¹⁷⁷ SLATER, *Complete Book of Heraldry*, p. 195

¹⁷⁸ (U.K.), 7 & 8 Eliz. II, c. 73.

those born out of wedlock: presumably because it might cause problems for the inheritance of peerages.

Makepeace, who believes that all should be entitled to arms, makes much of quotations from a pamphlet of the Authority. In this it is stated that 'The Authority gives all Canadians the opportunity to shape new symbols of ourselves, individually and collectively, to bring us closer together',¹⁷⁹ and 'the principal objective of the Canadian Heraldic Authority is to ensure that all Canadians who wish to use heraldry will have access to it'.¹⁸⁰ Makepeace argues that all Canadians have the right to bear their own coat. He conveniently ignores a later passage in the same pamphlet: 'Because arms are defined in law as a grant of honour from the Crown, the eligibility of individuals seeking arms is assessed in relation to their contribution to the country'.¹⁸¹

In some ways, as far as armorial inheritance is concerned, the adopted child might be thought at first to be in much the same position as the illegitimate child.¹⁸² Biologically, of course, the adopted child is probably of no genetic relationship to the armiger whereas the illegitimate child has the identical genetic relationship to the armiger as do the legal issue.

According to one authority,¹⁸³ the marks of distinction for adopted children in English heraldry are the same as those given to individuals inheriting the arms under a 'name and arms' clause a plain canton on the shield and a cross-crosslet on the crest, although others insist that interlaced chain links are correct for adopted children.¹⁸⁴

It is an important question whether, given the changing Canadian mores and the breakdown of traditional marriage, these matters, all linked because they undoubtedly constitute alienation of the arms, should require special administrative procedures to allow transmission of the arms. Another question is whether arms so transmitted need marks of distinction to be placed on the shields. These points will be discussed further in the section dealing with transmission of Canadian arms.

4.8. The Effect on Armigery of the Changing Status of Marriage

Up to the 1960s, the great majority of families in Canada, as in most of North America and western Europe, consisted of a married heterosexual couple and one or more children. Today, according to the Vanier Institute, fewer than half of all Canadian families could be described in those

¹⁷⁹ CANADIAN HERALDIC AUTHORITY, *The Canadian Heraldic Authority* (Ottawa, 1990), p. 5

¹⁸⁰ *Ibid.*, p. 12

¹⁸¹ *Ibid.*, p. 15

¹⁸² Julian FRANKLYN and John TANNER, *An Encyclopaedic Dictionary of Heraldry* (Oxford, 1970), p. 30

¹⁸³ *Ibid.*

¹⁸⁴ FRIAR, *Dictionary*, p. 15; BROOKE-LITTLE, *Heraldic Alphabet*, p. 31

terms.¹⁸⁵ Many households include no children, almost a quarter of families with children are one-parent families, and the increased divorce rate has led to ever more children being in dual custody. In addition, legal recognition has been given to families with homosexual, bisexual, and transgendered persons, who themselves are either single parents, or part of a couple who may or may not be legally married.

In 2000, three groups, one in Ontario, one in British Columbia and one in Quebec, pursued the recognition of such same-sex marriages. The Federal Government of the day strongly opposed these groups, arguing that the word 'marriage' implied a heterosexual union, and that same-sex couples already had equivalent rights. The fact that the same word could not be used for their liaisons was no stigma or offence to their dignity. The British Columbia Court decided that the traditional meaning of 'marriage' was entrenched in the constitution. The equivalent court in Ontario, however, held that the common law definition of marriage *was* discriminatory and unjustified, and that of Quebec declared that the opposite-sex requirement in its Civil Code was constitutionally invalid.

When the British Columbia decision was reversed on appeal, the Federal Government asked the Supreme Court of Canada for guidance. On 9 December 2004, the Supreme Court affirmed that marriage for same-sex couples flowed from the *Charter of Rights and Freedoms*,¹⁸⁶ and that no province had the power to legislate to deny same-sex couples the freedom to marry. Parliament in consequence amended a number of statutes in the *Civil Marriage Act*¹⁸⁷ to recognize these changes. All partners were now to be called 'spouses' and parents, whether natural or adoptive, were to be called 'legal parents'.¹⁸⁸

The elements of the Ontario *Human Rights Code*¹⁸⁹ that deal with the importance of non-discrimination in the family are exemplified in a document created by the Ontario Human Rights Commission and published in March 2007. Basically this declared that status in the family is to be defined by actual day-to-day relationships rather than by either blood or adoptive ties. 'The ground of family status may therefore embrace a range of circumstances where there are no blood or adoptive ties, but relationships of care, responsibility and commitment that resemble a parent-child relationship.' Again, 'The Canadian Human Rights Tribunal found that citizenship rules that distinguished between biological and adoptive children discriminated on the basis of family status'.¹⁹⁰

¹⁸⁵ VANIER INSTITUTE OF THE FAMILY, *Profiling Canada's Families III* (2004, online: www.vifamily.ca)

¹⁸⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11.

¹⁸⁷ S.C. 2005, c. 33.

¹⁸⁸ Malcolm C. KRONBY, *Canadian Family Law* (9th edn., Mississauga, 2006), pp. 9 – 15)

¹⁸⁹ R.S.O. 1990, c. H.19.

¹⁹⁰ ONTARIO HUMAN RIGHTS COMMISSION, *Policy and Guidelines on Discrimination because of Family Status* (Toronto, 2007), online: <http://www.ohrc.on.ca>, p. 10

It is clear that maintaining a significantly different *procedure* (that is, something like the Royal Licence) in transmitting arms for adopted and other individuals unrelated in blood, and also for those born outside marriage, could be challenged as being discriminatory under these laws. The Ontario *Human Rights Code* 'provides that every person has the right to be *treated* equally without discrimination because of family status'.¹⁹¹

However, it is possible to *distinguish* between family members as long as this may not be considered discriminatory. Discrimination is conduct that imposes burdens on someone or limits his or her opportunities or benefits.¹⁹² Descent of Canadian arms is 'by his (or her) descendants with such due and proper differences as may be provided, all according to the Law of Arms of Canada'.¹⁹³ The crucial family relationship that must not discriminate is that of 'descent' and the 'proper differences' are marks that must be clearly seen to be of distinction, not discrimination. When determining questions of descent, it is the relationship of the armiger and the putative offspring, whether of blood, adoption, or merely of choice that must be considered. The question of marriage has been made irrelevant.

Nevertheless, the idea that 'descent' could involve even legal adoption, let alone extra-legal 'choice', seems highly problematic. Illegitimate children are beyond question 'descendants' of their parents, in the normal sense of the words of the family derived from the verb 'to descend', but adoptees of either sort are clearly not 'descendants', but at best 'designated heirs' or 'assigns'.

4.9. The Acquisition and Registration of Alien Arms

Canada attracts immigrants from all the countries of the world, and a small proportion of those arriving from the countries of Europe have been armigers in their ancestral country. As the work of Hans Birk and his Armorial Heritage Foundation have established beyond any doubt,¹⁹⁴ a considerable number of these armigerous immigrants to Canada have come from the lands of central Europe — now included in the modern states of Switzerland, Germany, Austria, Hungary, Poland, the Czech and Slovak republics, Slovenia, Croatia, and other parts of the former Yugoslavia — and there can be no doubt that at least a few armigerous immigrants have arrived from every other country in which armigery was practised and supported before 1918. Nevertheless, for historical reasons, most of the armigers who settled in what was to become Canada before 1918 had received their arms from one of the three heraldic authorities of the British Isles — those of Ireland, Scotland, and England — and because

¹⁹¹ *Ibid.*, 16 (my italics)

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ See Hans Dietrich BIRK, FHSC, AIH, *Armorial Heritage in Canada of Continental European Families* (Toronto, 1984), and *Idem* and Peter Béla MÉREY, *Heraldic/ Genealogical Almanac* (1988), (Toronto, 1988)

of the close political relationship that has always existed between these countries and Canada (which still shares a monarch with part of the first and all of the last two), those authorities long continued to serve as sources of new arms, and for the registration and matriculation of existing arms, for persons already settled in Canada.

From 1552 until 1943, Irish arms were granted and recorded by Ulster King of Arms, a herald resident in Dublin Castle with close ties to the College of Arms, but in the latter year the office was permanently annexed to that of Norroy in England, and its jurisdiction was restricted to Northern Ireland. A new Chief Herald of Ireland was immediately appointed under the laws of the emerging Irish Republic,¹⁹⁵ and empowered to grant letters patent and record pedigrees (1) for all citizens of that state (which became a full republic and left the Commonwealth in 1949), (2) for all others normally resident anywhere in Ireland as a whole (an irredentist policy that trespassed on the rights of Norroy and Ulster), and (3) for those living in other countries who have strong Irish links — usually those able to claim Irish ancestry. Relatively few Irish Canadians used the services of the Chief Herald (whose grants to British or Canadian subjects would not have been regarded as valid in Canada at any time), but for obvious reasons a substantial number of citizens of the United States of Irish ancestry did so, and it is likely that their arms would be regarded as valid were they to emigrate to Canada.

Scots armorial law is quite distinct from that of England and Wales and, as we have seen, has very definite rules governing differencing for cadency, and strong legal prohibitions on the usurpation or illegal use of arms. The necessity for all but the head of a house to register or 'matriculate' their individual arms ensures that the medieval ideal of 'one man, one coat' prevails. People of Scottish descent who live outside Scotland can apply to Lord Lyon for a grant of arms. It is descent, not citizenship or nationality, that determines whether petitioners fall within Lyon's legal jurisdiction from the Scottish perspective,¹⁹⁶ but this does not guarantee that a Scottish grant will be regarded as legally valid in the country of which the petitioner is a citizen. In Canada in particular the right of Lyon to grant arms to either individuals or corporate bodies was disputed by Garter, but in practice grants from the former were treated as equally valid before the establishment of the Canadian Heraldic Authority removed the jurisdiction of all other authorities.

We noted that Garter Principal King of Arms was authorized to grant arms to individuals normally resident anywhere in the British Empire, and after 1931 this privilege was effectively preserved in the various independent kingdoms of the Commonwealth, including Canada to 1988. The link between the College and North America, particularly the United States, goes back to the seventeenth century,¹⁹⁷ and even today

¹⁹⁵ SLATER, *Complete Book of Heraldry*, pp. 193 - 194

¹⁹⁶ L. G. PINE, *International Heraldry* (Newton Abbot, 1970), p. 92

¹⁹⁷ Henry BEDINGFELD, 'English Grants of Arms in North America', *Heraldry in Canada* 39.3 (2005), p. 11

citizens of the United States may be granted 'honorary' arms by Garter if they can show descent from a British subject, or are appointed to honorary membership in a British order of knighthood.¹⁹⁸

Even if they had been so inclined, the immigrants to Canada would have been hard pressed to find sources for armorial grants and registrations other than these three in the years before 1988. The wars and turmoil of the last two centuries or so have seriously disrupted armorial regulation in continental Europe, beginning with France — where armorial emblems and everything related to them were legally abolished in 1790. This meant that in Quebec, of course, any valid grants of arms from France must have been made before that date, and probably before the Treaty of Paris of 1763 by which France surrendered all jurisdiction over Canadian territory. It must also be admitted, however, that grants of arms were in fact quite rare in pre-revolutionary France, and that most French arms and armories were both self-assumed and little regulated. A short-lived official system was introduced by Napoleon, and the old system was revived by the Bourbons at the restoration of the monarchy in 1815. But grants even to resident French subjects remained rare after that, and there has certainly been no body with the authority to grant them since the fall of the Second Empire in 1870.

As far as private individuals who have not been ennobled are concerned, this is also true of every continental European country except Spain.¹⁹⁹ The Citizens of those countries who wish to acquire or use arms without implications of nobility (assuming that this was historically permissible) must seek the services of a private society that pretends to grant arms and (or) to register their arms as something akin to trademarks. Apart from those with English, Welsh, Scottish, Irish, or Spanish ancestry, therefore, the position of would-be armigers is similar in the United States.

In Spain, the Corps of *Cronistas Reyes de Armas* or 'Chronicler Kings of Arms', created in succession to the older body of heralds in the sixteenth century, was abolished at the foundation of the erstwhile Republic in 1931, but was re-established under the Franco regency in 1947,²⁰⁰ and continued to function until 2005, when the last member of the corps died and was not replaced. Before 1931 and between 1947 and 2005, citizens of the Central and South American Republics, and of other countries that were formerly part of the Spanish Empire, could apply to a *cronista* for new arms.²⁰¹ This practice has a long history and in the eighteenth century Spanish kings of arms certified citizens of France, Ireland and England, and, by the nineteenth century, those from North America. The effective termination of the Corps by the Spanish Ministry of Justice (to which it was formerly attached) might have deprived the Hispanic world of a source of new arms

¹⁹⁸ *Ibid.*, p. 13

¹⁹⁹ PINE, *International Heraldry*, p. 192; SLATER, *Complete Book of Heraldry*, pp. 211, 203, 226, et passim

²⁰⁰ SLATER, *Complete Book of Heraldry*, p. 223

²⁰¹ *Ibid.*, pp. 205 – 206

and armories, but the gap was immediately filled by the *Cronista Rey de Armas* appointed in 1991 to a new office created by the government of the Autonomous Community of Castile and Leon (an entity comparable to a Canadian province). The incumbent of this office, Don Alfonso Ceballos-Escalera y Gil, Marquis of La Floresta, also serves as the principal herald of the King of Spain, and has assumed all of the functions of the former regnal officer.²⁰²

Thus, the only European heraldic authorities that could claim the right to grant arms to North Americans today are those of England, Scotland, Ireland, and Castile-Leon, and although all of them continue to enjoy an honorary sort of jurisdiction over the granting and registration of arms within their ethnic communities in the United States, since 1988 none of them has had any legal jurisdiction whatever in Canada. Regardless of their ethnic ancestry, Canadian citizens who wish to bear arms legally in Canada must either register their ancestral arms with the Canadian Heraldic Authority, or seek a grant of new arms from the Chief Herald of Canada in accordance with the terms of the Chief Herald's commission of office through the royal prerogative power to grant armorial bearings as exercised by the Governor General.

Conversely, the Chief Herald of Canada will only perform these services for citizens of Canada, who alone are subjects of its Monarch as such. In the face of the expanded domains of English, Scots, Irish and Spanish armorial jurisdiction before 1988, this self-imposed limitation of jurisdiction might seem surprising, especially when it is applied to the siblings and children of citizens who are not citizens themselves. Nevertheless, the policy reflects the traditional doctrine that a grant of arms confers a distinct and honourable status in the context of the national society, intended both to reward past and to encourage future service to the Monarch as the embodiment of both state and nation, through activities of some sort that have been or would be deemed beneficial to the Canadian people. As grants are open to all citizens who meet the criteria of service, regardless of their sex, race, ethnicity, religion, or class origins, they serve to bind to the country and its traditions citizens of the most diverse origins living everywhere within its borders (and even outside them), to encourage among them both loyalty and public service, and furthermore to promote rather than weaken vertical social mobility, as Makepeace has claimed.²⁰³ Legal armigery under modern Canadian laws constitutes a distinctively Canadian version of a general European tradition, and is one of the few institutions of Canadian society that can not only unite individual citizens across ethnic and geographical boundaries, but distinguish them collectively from their neighbours to the south.

²⁰² Don Alfonso CEBALLOS-ESCALERA Y GIL, Marqués de La Floresta, *Heraldos y Reyes de Armas en la Corte de España* (Madrid, 1993), p. 219. This work includes a detailed history not only of the heraldages of the Spanish kingdoms, but of those of most other countries where heralds were maintained.

²⁰³ MAKEPEACE, 'Canadian Heraldic Authority', p. 2

Armorial bearings that have been granted by recognised heraldic authorities of other sovereign countries may also be registered in the Canadian Heraldic Authority by immigrants who have become citizens, and wish in effect to naturalize their arms and their status as armigers. The process is so similar to that of a grant from the Chief Herald that the arms retain their meaning. The armiger must provide a copy of the entire text of the grant and a depiction of the bearings, a biographical sketch including details of education, employment and community service and, if the arms are inherited, proof of descent from the original grantee.²⁰⁴ The Authority, if satisfied with the proofs, records the arms in the *Public Register of Arms, Flags and Badges* as for a Canadian grant, and also issues letters patent of registration to the armiger.

Curiously, however, the policy of the Authority with respect to the future descent of the arms and other armories thus registered is that it conform to the terms of the original grant, rather than being assimilated to the Canadian armorial code. In effect, this policy — which seems to apply to differencing and marshalling as well as simple transmission — leaves the arms of alien origin in a state of imperfect naturalization in Canada, as if registration involved nothing more than approving their use according to an alien armorial code, rather than incorporating them fully into the corpus of Canadian arms.

Nevertheless, this provision of registration for such arms is an important step in the right direction, since new Canadians can feel that their ethnic and lineal history is respected at the same time as they commit themselves formally to membership in their new nation.

Those who have received either grants or registrations of arms in Canada will rarely find comparable opportunities to obtain recognition of those arms should they or their children emigrate to another country, and they will be challenged even to retain their armigerous rights in Canada. While native citizens of Canada are less likely to emigrate than the citizens of other countries, a not insignificant number of them do, and they or their children have become citizens of Australia, the United States, the United Kingdom, or other countries of the European Union. At least some of these emigrants will surely be armigers. They will of course retain their legal claim to their Canadian arms for as long as they retain their Canadian citizenship, whatever other citizenship they acquire in addition. If they surrender their Canadian citizenship, however, their right to legally-protected armigery in Canada will presumably lapse, and no such right will be transmitted to their children or later descendants unless they re-establish Canadian citizenship. In the meantime, they will be subject to the laws governing armigery in their country of immigration — if any such laws exist.

If such armigerous Canadians have emigrated to the British Isles or South Africa, of course, they will be able to register their arms with the

²⁰⁴ GOVERNOR GENERAL OF CANADA, *Granting and Registering Armorial Bearings in Canada*, online: <http://www.gg.ca/heraldry/pg/index_e.asp>, p. 5

appropriate authority, and convert them into English, Scottish, Irish, or South African arms. This might also be possible in Spain or even the Netherlands (as Canadian arms are marks of nobility in the sense of that term used in most of Europe). If armigerous Canadians have emigrated to any other country, however, their arms will have in their new country the same lack of legal standing as those borne by native armigers, and the best such Canadian emigrants will be able to do will be to register them privately with one of the national or regional societies that performs that function. They will of course be free to difference and marshal their arms in any way they please, or to conform either to Canadian or local conventions, but no public authority will either record or protect them, and they will be treated as being devoid of legal significance.

4.10. The Descent of Arms Granted by the Chief Herald of Canada: Problems Raised by Changes in Laws Related to Relationships

Darrel Kennedy, Assiniboine Herald, has given a succinct definition of the Canadian Law of Arms. It is that 'set of decisions flowing from Royal Letters Patent *and Statutes* affecting the use of armorial bearings, supplemented by policies, principles, procedures and conventions, all being subject to evolution from time to time'²⁰⁵ (my italics).

Developments stemming from the *Charter of Rights and Freedoms* and federal and provincial legislation emphasise the equality of all citizens, and there has been a recent change in meaning of family relationships, with more emphasis being placed on roles in the family and less emphasis on blood ties. There is no one document that encapsulates the Canadian Law of Arms, which, as Kennedy points out, is continually evolving. In this respect, it is like all law. The Canadian Heralds meet regularly to discuss and resolve issues as they arise in individual cases and, from time to time, their resolves are made public in articles or talks that they may produce. This structure, not surprisingly considering the history, is similar to that at the College of Arms in London.

What results in Canada is that the armorial status of any individual is determined by the status of both the father and the mother. If only the father or only the mother is armigerous, the individual is entitled to those arms (suitably differenced) with the accompanying crest and motto, since this last is part of the grant in Canada.

4.10.1. PROBLEMS ARISING FROM THE NEW LAWS ON ADOPTION

The heralds, of course, rely on legal documents in determining armorial status. Unfortunately, in Canada, 'all provinces have procedures for amending the child's original birth certificate after adoption so that the birth records show the adopting parents as if they were the natural parents, without any reference to the child's pre-adoptive name'.²⁰⁶ There are also

²⁰⁵ Darrel E. KENNEDY, 'Canadian Cadency', *Heraldry in Canada* 39.4 (2005), pp. 18-24, esp. p. 18.

²⁰⁶ KRONBY, *Canadian Family Law*, p. 80

cases where the gender designation has been changed on birth certificates.²⁰⁷ It is clear therefore, as was the intent of the legislation, that in all things, including inheritance, Canada should treat an adopted child exactly as a biological child of those parents. Such policies have elevated what the authorities see as a form of social justice so far over biological and historical truth that the latter are entirely concealed, and will make it difficult if not impossible for genealogists and historians — including family historians — to reconstruct true genealogical relationships among individuals nominally descended from or collaterally related to an adoptive parent. This situation might also be exacerbated by additional adoptions in the first generation and further adoptions in later generations, which together could make true blood-relationships within a nominal lineage the exception rather than the rule.

These facts will make it very difficult for the Canadian Heraldic Authority to retain its ambition of a ‘heraldry of the blood’. When an adopted child inherits the arms, any link with true blood-lineage is broken. Thus two disparate sets of people, only one of which is related in blood to the adopting armiger, could result in the future. This might be particularly upsetting to the heir-in-blood should, because of age, the adopted child inherit the undifferenced arms. Of course, the Authority could require that some mark of distinction indicating an adoption be placed on the shield, but it would have to be very clear that such a mark was solely for distinction and not discrimination in any form.

A better solution, especially for subsequent generations, might be for the Authority to demand that it design separate and distinct ‘cadet’ arms for the adopted child. This could contain enough elements from the coat of the adoptive father to exemplify and commemorate the relationship, yet be sufficiently distinctive (and perhaps include a specific brisure, like the two interlinked links) to avoid future confusion of the descendants.

4.10.2. PROBLEMS ARISING FROM THE SUPPRESSION OF ILLEGITIMACY

The question now arises as to whether the arms of children born outside marriage should be differenced from those of other children. The whole concept of **illegitimacy** was banished from Ontario law in 1978,²⁰⁸ and other provinces have followed. Thus, whatever the armorial code has traditionally prescribed, once it has been determined that an individual is the child of an armiger, he or she might expect in Canada to inherit the arms in the same way as his or her half-siblings who are the offspring of a traditional marriage. Again, as long as it is clear that they are for distinction, not discrimination, it may be reasonable for the Authority to retain some mark to be used for those born outside marriage.

²⁰⁷ *Ibid.*, p. 8

²⁰⁸ By *The Children’s Law Reform Act*, S.O. 1977, c. 41. See ATTORNEY GENERAL OF ONTARIO, *Dispute Regulation in Family Law: Protecting Choice, Promoting Inclusion* (Government of Ontario, Toronto, 2004), p. 24. Online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/section3>

This would particularly be required should a natural offspring be later discovered who was older than all the children of the marriage. The danger of the spirit of recent legislation would be that it suggests that the new arrival should inherit the undifferenced arms and so require that the label be removed from the child previously considered the eldest. To avoid the possibility of such disputes, it would seem to me that, once a brisure has been taken up, the Authority should state that it cannot be changed. This would include the label and the determination of inheritance of the undifferenced arms. This ruling, together with the Authority's ability to design a cadet shield if necessary, would, I believe, mitigate any hurt feelings.

4.10.3. PROBLEMS ARISING FROM THE SUPPRESSION OF MASCULINE PRIMOGENITURE, AND THE INSTITUTION OF DESIGNATED HEIRS

Kennedy points out that 'it is now the Authority's policy and expectation that the eldest child will be the heir-designate, and is thus entitled to use the three-point label'.²⁰⁹ Thus, if the eldest child is a daughter, she would use the label. But then, what mark of cadency, in these circumstances, would the eldest son show? The simplest solution, as we have seen, was that chosen by Ireland: that is, to use the male brisures in order for all children irrespective of sex. Canada chose to introduce a second set of brisures for daughters. This could also have worked if the label were then used as a small charge (as it is in subsequent generations for cadet lines) for an eldest son who is not the heir.

Unfortunately, as Kennedy stated above, the Canadian Authority wants an eldest daughter who is the heir to use the full-size label — perhaps the most masculine of all armorial symbols. The eldest daughter, although eventually to inherit the undifferenced arms, might well prefer to use the heart brisure during her parent's lifetime. But, in any case, there is still a need for a new brisure for an eldest son who is not the heir. Ralph Brocklebank, FRHSC, has said that a bezant has been suggested.²¹⁰ In fact, Brocklebank devised a neat general solution, allowing one to determine both the sex and the birth order of the children from a set of brisures by placing the approved marks on other marks that indicate birth-order.

A unique privilege is extended to Canadian grantees. They may designate a different person, other than their eldest child, to be the heir to their undifferenced arms. 'If the grantee exercises a right to designate a different person, then that person, not being the eldest child, will not show the label, but will have some other temporary difference. The eldest child is then entitled to have the label as a permanent charge, or to choose something else'.²¹¹ Clearly, this ruling departs from the Authority's aim of a 'heraldry of the blood' and, I feel, should be carefully reviewed.

²⁰⁹ KENNEDY, 'Canadian Cadency', p. 20

²¹⁰ For this and what follows, see Ralph BROCKLEBANK, 'Cadency and Equality', *Heraldry in Canada* 39.1 (2005), pp. 14-15

²¹¹ KENNEDY, 'Canadian Cadency', pp. 20-21

Presumably, this right is only allowed to the grantee and not to future inheritors of the arms. While the right may encourage someone without offspring to bequeath arms to a friend or distant relation, the ability of a grantee to choose a successor comes dangerously near to alienation of the arms. It is, in effect, equivalent to an immediate 'name and arms' clause in a will. The Authority should make it clear that this is an exception allowed only to the grantee and that subsequent descent will be by the Law of Arms of Canada, which, as we have seen, is to the eldest child irrespective of sex. It would be invidious were a grantee able to entail subsequent transmission of his arms by either the male or female line. Even as it stands, grantees could cause considerable upset to any children they may have by designating an unrelated friend.

The gift of arms outside the family in subsequent generations should be allowed only if none of the descendants of the original grantee have had children. When a family would otherwise die out, and only then, the last survivor should be able, by means of a 'name and arms' clause in a will or by a letter to the Authority, be able to nominate a named non-relative to petition the Chief Herald for the arms.

4.10.4. PROBLEMS RELATED TO THE REGISTRATION OF ARMORIES

Despite or perhaps because of the recent statutory changes in federal and provincial laws, it becomes comparatively easy to determine claims to Canadian arms. Marriage can simply be ignored. All that is required is that approved legal documents registering birth or adoption be presented. Suitable documents would be, for example, a birth certificate showing the name of the armiger and parent, a certificate of adoption, or a legal judgement of paternity. This would remove from the Authority and leave to the common law any disputes as to paternity and any difficulties that may arise in the future should manipulation to any degree of deoxyribonucleic acid, the genetic material, become legally acceptable.

The only legal difficulties that could then arise would be would be if the Authority were later to discover either that documents had been forged, or that a subsequent deoxyribonucleic acid analysis, made for some other purpose, disproved an accepted paternity. In the first situation, the right to the arms was never properly established and should therefore be lost. In the second situation, since the right was established in good faith and the false descent discovered by chance, the right to the arms should be retained. The situation would be historically analogous to that of children born within marriage but where a man other than the husband became known to have been the father.

An individual descendant should, of course, be able to renounce an inherited coat for himself or herself, but not for his or her descendants unless a new grant has been obtained. It is important to the integrity of Canadian arms that every armiger should be able to demonstrate his or her entitlement. For this to be true, all descendants of the grantee should have their births recorded by the Authority. Fortunately:

A separate record series has been created to hold genealogical

registrations filed in support of claims to bear arms by lawful descent from the original recipient; in matters of personal heraldry, the Authority adheres to the principle of one person, one coat of arms. This requires creation of separate versions of an original grant or registration to distinguish different members of a family within one generation and in successive generations.²¹²

Thus, if the family have kept their registration up to date, all that should be required of a new descendant is a birth certificate. The descent of arms registered at the Canadian Authority but granted by other authorities would be according to the Law of Arms of the granting authority, and the claimant should obtain confirmation from this authority before registering the new claim with the Canadian Authority.

4.10.5. PROBLEMS RELATED TO THE MARSHALLING OF INHERITED ARMS

Because both male and female parents may bear arms by descent in Canada, unions between armigers might be expected eventually to become more frequent. But assume that the ratio of male armigers to female armigers was five to one and that there were thirty thousand armigers in Canada out of a population of thirty million. Then the chances of two armigers forming a union that could produce offspring, assuming a random selection of mates, would be $25,000 / 15,000,000 \times 5,000 / 15,000 = 0.0000005$ or one in fifty million unions. Obviously these assumptions are not strictly correct. The probability of two armigers forming a union is probably higher than chance, but the number of armigers has probably been overestimated. The point is that this event is probably less likely than that of a British armiger marrying an heraldic heiress. It would seem reasonable therefore to prescribe quartering of the arms by the descendants of such a union. There seems no particular reason to depart from the tradition that quarters one and four are for the *paternal* arms and quarters two and three for the *maternal*, unless both armigers wished to reverse this.

A further problem now arises, however since both the partners have crests and mottoes. Although a few English coats are associated with two, or (extremely rarely) three crests, multiple crests are quite common in German achievements, where they traditionally represented different estates that a family has inherited and owns. It would seem best to avoid a multiplicity of crests, since, in general, modern armory has moved away from the attachment of arms to land.

Kevin Greaves made a suggestion to avoid quartering of the arms when two independent armigers produce children.²¹³ This was that female offspring should bear the mother's shield and male offspring the father's. Should quartering of the arms, which I believe would be preferred by most armigers, be adopted, then Dr. Greaves' suggestion would seem an ideal solution to the problem of the crest and the motto. Descendants of both sexes would quarter their arms but the males would adopt the paternal

²¹² CHA, *Canadian Heraldic Authority*, p. 16

²¹³ Greaves, personal communication

crest and motto and the females, the maternal crest and motto. As a form of temporary marshalling, armigers in legally recognised marriages would be allowed to impale their arms during the period of the marriage, while retaining their own motto and crest.

When considering such drastic changes in what has been a conservative subject, it may be of some consolation to know that, in Canada, the strongest link has already been broken that between arms and the surname. Because of the surname's descent through the male line, it could link to the arms, theoretically, forever. The link to 'blood', in a genetic sense, is much weaker. If it is assumed that there are three generations per century, then in just over three centuries, because the number of ancestors grows exponentially, any descendant will have less than a thousandth of the genetic deoxyribonucleic acid of an original grantee (though a patrilineal descendant will have the same Y chromosome as his ancestor and patrilineal kinsmen). The idea of 'family' is captured more by historical and cultural links than by any physical entity.

5. The Current State of the Laws of Arms in Canada

We have attempted to trace the mandate of the Canadian Heraldic Authority back through the history of armorial law in Britain to its roots in medieval society. Very early in that history, princes and kings began to grant coats of arms in return for the service of the armiger. Although much altered in many ways, it is, indeed, that same contract of loyalty on the one part and respect on the other, that today's petitioners seek with their society through the Crown.

They present what they have done in their lives and hope they may do further. The Crown, in turn, recognizes this service and the implied promise for the future service of their descendants and grants arms as a token, not only for them, but as an encouragement to their offspring. It is this commitment that justifies the status of arms as a minor honour.

There is clearly no right to assume arms for oneself in Canada, despite Makepeace's wish that it might be so. Of course, anyone can paint him- or herself a coat of arms and display it privately in a limited way. Indeed, one hopes that children do this continually. But to use it regularly and in a public fashion — for example, on correspondence, or above the door of one's house — implies that the arms are registered with the Canadian Heraldic Authority, and would be illegal if they were not. Since the fraud is unlikely to be discovered, there is likely to be little in the way of punishment. Chance discovery itself, however, together with any consequent public exposure, would probably constitute retribution enough, especially if the Authority made it known that those who have used self-assumed arms would be unlikely to later receive a proper Canadian grant.

Self-assumed arms have no meaning because meaning is only acquired by public acknowledgement and, in the case of arms in Canada, such acknowledgement can come only from the Canadian Heraldic Authority. There is no point in registering arms unless they have value,

and self-assumed arms are wheels spinning without any traction resulting. A coat of arms has no intrinsic value; that value must be conferred on it by the Crown.

English summary:

Dr. James presents in this article a broad survey of the history of the practices and principles underlying the powers and functions of the Canadian Heraldic Authority, and refutes the position taken by certain of its critics that arms are mere emblems that under international Civil Law may be assumed at will by anyone who wishes to possess them, so that the only proper function of the Authority should be that of registering the arms thus assumed and guaranteeing their protection from usurpation or misuse, on the analogy of the protection of trademarks. James shows that on the contrary, in the context of English society and law from which those of Canada derive, the right to assume and bear arms was initially restricted to knights, and later extended to squires fighting in a similar capacity, and that as soon as men of less than squirely rank began to assume arms in some numbers early in the fifteenth century, the Kings of England began to prohibit such unilateral acts, and to regulate the use of arms in other ways: changes reflected in the doctrines of contemporary treatises on armory. He traces the development of the practice of granting arms to the achievement of its current condition as a royal monopoly around 1450, exercised since about 1440 almost exclusively through the royal kings of arms, and the completion of the process of prohibiting new assumptions through the instrument of the heraldic Visitations of the houses and establishments of all de facto armigers, personal and corporate, established in 1530. He shows how arms, in the eyes of the king and the heralds always a sign of membership in the knightly or noble Estate of society, were converted into a form of conferrable honour at the unique disposal of the monarch, who granted them only to those who were deemed worthy, on the basis of their notable acts in the service of king and kingdom, of admission to the ranks of gentlemen. He then examines the various institutions that at different times served to grant, register, regulate, and adjudicate competing claims to arms, especially the College of Arms and the High Court of Chivalry, the legal instruments through which they performed these functions, and the various types of infraction they had to deal with and in some cases punish. In the latter part of the article, Dr. James examines first, in more detail, the traditional and current English positions on such matters as the granting of arms to women and the transmission of arms to and through younger sons, daughters, illegitimate children, and adopted heirs, and then proceeds to examine the positions and rules established to govern these matters by the Canadian heralds, often in response to recent radical changes in public law governing the rights of women, children born out of wedlock, and adopted children. In many of these discussions he suggests some of the unforeseen and often unfortunate consequences or potential consequences of these new policies, and suggests ways of mitigating them. In sum, he demonstrates that arms in Canada retain their traditional English character as marks of an honourable legal status recognizing and encouraging public service, and both conferred and regulated by the Crown in keeping with current laws governing inheritance, but that at the same time their implications and the rules governing their use and transmission have become distinctively Canadian.

Sommaire français:

Le Dr James nous offre dans cet article un vaste survol de l'histoire des principes et des pratiques qui sont à la base des pouvoirs et fonctions de l'Autorité héraldique du Canada. Il réfute ainsi la position prise par certains de ses détracteurs que les armes ne sont que de simples emblèmes qui, dans le cadre du droit civil international, peuvent être assumés par la personne qui souhaite les posséder, de sorte que la seule fonction propre de l'Autorité serait celle de les enregistrer et de garantir leur protection contre l'usage inapproprié ou la mauvaise utilisation, prenant ainsi comme analogie la protection des marques de commerce. James montre qu'au contraire, dans le contexte de la loi et de la société anglaise, des principes qui sont à la base des lois du Canada, le droit d'assumer et de porter les armes étaient initialement limité aux chevaliers, et plus tard étendu aux écuyers qui combattaient dans les mêmes conditions. Dès que les hommes de rang en dessous de celui d'écuyer aient commencé, au début du XVe siècle, à porter des armes en quantités bien que limitées, les rois d'Angleterre ont interdit de tels actes unilatéraux. Les rois ont aussi réglementé l'usage des armes par d'autres moyens, et ces changements ont été reflétés dans les traités de l'époque sur les doctrines sur les armoiries. Il retrace l'évolution de la pratique de l'octroi des armes pour devenir un monopole royal autour de 1450, exercé depuis environ 1440 presque exclusivement par les hérauts d'armes royaux, et finissant ce processus par l'interdiction de l'adoption de nouvelles armes par des visites d'hérauts aux maisons et établissements de tout porteur d'armes, qu'ils soient des particuliers ou des sociétés, pratique établie en 1530. Il montre comment des armes, toujours un signe d'appartenance à la classe chevaleresque ou noble de la société, ont été converties en une forme d'honneur à la disposition exclusive du monarque, qui les a accordé seulement à ceux qui ont été jugés dignes, sur la base de leurs actes dignes de reconnaissance au service du roi et du royaume, d'être admis au rangs des gentilshommes. Il examine ensuite les différentes institutions qui ont servi à des moments différents à accorder, inscrire, réglementer et juger les demandes contradictoires d'armes, notamment le Collège des armes et la Haute Cour de chevalerie qui sont les instruments légaux par lesquels sont interprété ces fonctions, et les divers types d'infraction qu'ils avaient à traiter et, le cas échéant, punir. Dans la dernière partie de l'article, le Dr James examine plus en détail d'abord les positions anglaises traditionnelles et courantes sur des questions telles que l'octroi des armes aux femmes, et la transmission des armes vers et à travers les plus jeunes fils, filles, enfants illégitimes, et héritiers adoptés, et ensuite à examiner les positions et les règles établies pour régir ces mêmes questions par les hérauts canadiens, souvent en réponse aux récents changements radicaux dans le droit public régissant les droits des femmes, des enfants nés hors mariage, et les enfants adoptés. Dans beaucoup de ces discussions, il expose quelques-unes des conséquences imprévues (et souvent malheureuses) ou les conséquences potentielles de ces nouvelles politiques, et suggère des moyens de les atténuer. En somme, il démontre que les armes au Canada conservent leur caractère traditionnel anglais en tant que marques d'un statut juridique honorable reconnaissant et encourageant le service public, et qui sont conféré et réglementée à la fois par la Couronne en conformité avec les lois courants régissant l'héritage, mais en même temps leur implications particulières et les règles qui régissent leur utilisation et transmission sont devenus typiquement canadienne.