The *Manchester* Epilogue
The Attempt in the 1960s to Reconstruct the High Court of Chivalry

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The High Court of Chivalry[2] (*Curia Militaris* in Latin, *Cour de Chivalrie* in the French of England) was established by King Edward III in 1347 or '48, under the joint presidency of his chief military officers, the Constable and Marshal of England. Among the disputes that soon came under its jurisdiction were those over the rightful ownership and display of particular coats of arms — originally regarded as essentially *military* emblems — and while it also came to enjoy jurisdiction over such matters

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[2] This court (hereinafter 'the Court') was also known as the 'Court of the Constable and the Marshal' and the 'Earl Marshal's Court'. The Earl Marshal received confirmation of his right to preside solely over the Court during the vacancy of the office of Constable — which has been effectively vacant since 1521 (except at coronations) — by Royal Letters Patent issued by James II in 1687. This did not apply to trials of appeals of treason and murder as the English statute 1 Hen IV c 14 required both the Earl Marshal and Constable to preside. See *infra*, note 6, appendix IV. On the Court and its jurisdiction, see also Keith W. JAMES, 'The Evolution of Armorial Law in England and its Relevance for Canadian Armorial Law Today', *Alta Studia Heraldica* 4, (2011-12), pp. 105-172, esp. pp. 118-124.

as trial by battle, hearing accusations of murder and homicide outside of the realm, and 'scandalous words provocative of a duel', disputes over the right to heraldic emblems remained among its major concerns, and eventually became its only *effective* concerns. [3]

The Court (which after the effective suppression in 1521 of the office of Constable, save for brief periods in which it was required for services at coronations and trials for treason, was under the sole presidency of the officer by then called the 'Earl Marshal and Hereditary Marshal of England') last sat on a regular basis in the early eighteenth century.[4] After an absence from the judicial stage of more than two centuries it was successfully revived in 1954, but there have been no further cases heard in the Court since that time. There were, however, official efforts made in the 1960s to restructure the Court and place its jurisdiction on a statutory basis. This article describes these attempts — which were ultimately unsuccessful.

Students of the heraldic Laws of Arms are familiar with the chequered history of the High Court of Chivalry. This was comprehensively set out by G. D. Squibb[5] in his 1959 landmark work *The High Court of Chivalry: A Study of the Civil Law in England*.[6] The study of the history of this court has been supplemented by several academic works since then, most notably by the UK Arts and Humanities Research Council funded research carried out over a three year period by the academic historians Richard Cust[7] and Andrew Hopper.[8] This project culminated

3 The evolution of the Court's jurisdiction is set out in SQUIBB, *infra* note 6.

4 According to SQUIBB, *infra* note 6, the last session of the court in the 18th century was held on 7 March 1737.

5 George Drewry SQUIBB, L.V.O., Q.C., Norfolk Herald Extraordinary 1959-1994.

6 Oxford, 1959.

7 Professor Richard Cust, Ph.D., Professor of Early Modern History, University of Birmingham.

8 Andrew Hopper, D.Phil., Lecturer in English Local History, University of Leicester.

with the 2006 publication by the Harleian Society of *Cases in the High Court of Chivalry, 1634-1640*.[9]

1. The Revival of the Court in 1954

The most recent case before the High Court of Chivalry was brought in 1954, when the Court was convened over a dispute between the City of Manchester and a local cinema over the latter's alleged unlawful display and use of the city's arms.[10]

Lord Goddard,[11] the Chief Justice of England, was appointed to adjudicate this dispute.[12] Responding to the defendant's challenge to the jurisdiction of the Court, he found that the Court continued to exist despite not having sat for over two centuries:[13] Lord Goddard also held that the defendant had unlawfully used the arms of the City of Manchester:

> In view, however, of the use by the defendant of the arms of the City of Manchester as its common seal, and the contentions which it has set up in this case, I think the court may properly inhibit and enjoin it from any display of the Corporation's arms[.][14]

Unfortunately for anyone who had hoped that the 1954 revival of the Court would lead to it presiding over hearings of heraldic disputes on a regular basis, Lord Goddard made two relevant comments. In the first, he stated:

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9 Richard CUST and Andrew HOPPER (London, 2006). There is also a companion website: http://www.court-of-chivalry.bham.ac.uk/

10 *Manchester Corporation v. Manchester Palace of Varieties Ltd.*, [1955] P 133, [1955] 1 All ER 387 [hereinafter *Manchester*].

11 Rayner Baron Goddard of Albourne, G.C.B., Q.C., Lord Chief Justice of England and Wales 1946-1958.

12 Legally, Lord Goddard was appointed and presided as the Earl Marshal's 'Surrogate', as it is the Earl Marshal who formally presides over this court.

13 *Manchester*, at 393.

14 *Manchester*, at 395.

> If, therefore, it is laid down as a rule of this court, as I would very respectfully suggest to His Grace the Earl Marshal that it should be, that leave must be obtained before any proceedings are instituted, it would, I think, prevent frivolous actions, and if this court is to sit again it should be convened only where there is some really substantial reason for the exercise of its jurisdiction.[15]

While the requirement to seek leave before commencing any proceedings and the requirement to limit proceedings to cases where there is a 'really substantial reason' for the Court to sit might have been manageable, Lord Goddard went on to state:

> Moreover, should there be any indication of a considerable desire to institute proceedings now that this court has been revived, I am firmly of opinion that it should be put on a statutory basis, defining its jurisdiction and the sanctions which it can impose.[16]

Clearly these were statements in *obiter* but they had the effect of stalling any possible momentum which may have been generated by the Chief Justice of England and Wales presiding over the revival of the Court. The Court has not sat since 1955.[17]

2. Efforts at Reconstructing the Court

The story, however, did not end there. In the early part of the 1960s, the Association of Municipal Corporations[18] approached the College of Arms

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15 *Manchester*, at 394.

16 *Ibid*.

17 The *Manchester* case was heard in late 1954, and Lord Goddard delivered his judgment in early 1955. While no further cases were heard before the Court, in 1976 the Earl Marshal did appoint G. D. Squibb as his Surrogate in the Court of Chivalry *vice* Lord Goddard who had died in 1971. Squibb died in 1994 and in a letter to the author the Earl Marshal advised that no new Surrogate has been appointed in his place.

18 Through its Secretary, James Swaffield.

about a concern raised by its members over the judicial protection available to local authorities over their heraldic arms.

As the proper forum in England to resolve judicially disputes over the misuse of heraldic arms lay (and currently lies) solely with the High Court of Chivalry, and not before the common law courts,[19] the stage was set for the Home Office to be pressed for the formal reconstruction of the Court.

2.1. June 1964 – Initial Discussions

Discussions about the reconstruction of the High Court of Chivalry were initiated in a meeting between Anthony Wagner, Garter King of Arms[20] and Charles Cunningham,[21] the Permanent Under-secretary[22] for the Home

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19 The authority generally cited for this is the case *R v Parker* (1668), 1 Sid 352 at 352-353; 82 ER 1151 at 1152 (KB) where, faced with a dispute over Mr. Parker having directed and marshalled a funeral, the court stated (as reported by Thomas Siderfin in 1714): *Pur le matter de ceo nest tiel offence pur que les commissioners super ont poyar p commit' car est suppose dee un offence encounter le ley de honor quel est punishable solement in le Court de honor que est deetenus devant le Snr Constable & Snr Marshal de Angliterre & per nul auters car eearit Court per prescription les Judges de c ne poet ee alter forsque p Parliament. (…) Et touts agree que le Court de Honour devant le constabl' & marshal' ad le absolute determinacon del matters de honor cy absolute que le Snr Treasurer ad del Treasury & lauter del conscience.* [*sic*] This case (cited as '*Parker's Case*') was more coherently reported by Sir Creswell Levinz in 1793 at 1 Lev 230; 83 ER 382 (although the point about the Court's exclusive jurisdiction in matters of honour made in Siderfin's report above is missing): …whereto exceptions were taken, 1st. That no Court could be held before the Earl Marshal, or commissioners to execute his office, but the Court is to be held before [both] the [Lord High] Constable and [the Earl] Marshal: but [the Court of King's Bench held that] it was not allowed[. In] matters touching arms and honour, the Court is held before the Earl Marshal only, but touching matters of ordinary justice, which concern life or member, [the Court is held before both] the Constable and Marshal.

20 Sir Anthony Wagner, K.C.B., K.C.V.O., F.S.A., Garter Principal King of Arms 1961-1978 (hereinafter 'Garter').

21 Sir Charles Craik Cunningham, G.C.B., K.B.E., C.V.O., Permanent Under-secretary of State for the Home Office 1957-1966 (hereinafter 'Cunningham').

22 The most senior civil servant of a government department. Also referred to as 'Permanent Secretary'. The Canadian equivalent would be 'Deputy Minister'.

Office in June 1964.[23] This meeting was recorded in a memorandum from Cunningham to his colleague Ronald Guppy.[24]

Cunningham's memo indicated his initial sympathy towards this idea. As outlined by Cunningham, both he and Garter had reached broad agreement, in principle, on several areas:

1. **The Jurisdiction of the Court**

   It was agreed that the jurisdiction of the Court would be limited by statute to disputes involving the 'use' of armorial bearings, rather than encompassing all questions relating to armorial bearings. Alternatively, the legislation could remain silent regarding the Court's jurisdiction and deal only with procedure and enforcement.

2. **Proceedings before the Court to be subject to obtaining leave**

   It was agreed that any proceeding before the court could only be brought by leave of the Court, and that leave would not be granted in frivolous cases.

3. **Enforcement of the Court's orders**

   It was agreed that the Court's judgements could be enforced by way of an application to 'an ordinary Court' for an injunction, and that failure to comply with such injunction would constitute contempt of court.

4. **Appeal rights**

   It was agreed that a decision of the Court of Chivalry would be subject to a right of appeal.

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[23] Described by Cunningham in the memorandum as 'a long talk'.

[24] Ronald James Guppy, C.B., Assistant Under-secretary of State, Home Office. This and most relevant documents to this matter are set out in UK National Archives File HO 286/73, described by the Archives' catalogue less than helpfully as 'Permission for College of Arms to design appropriate heraldic emblems for local authorities without consulting Home Office; problem of unauthorised commercial use'.

At that time, Cunningham hoped to have a Bill ready for introduction in that Parliamentary session.[25]

2.2. March 1965 – Cunningham's Reply

In March 1965, Cunningham wrote to Garter to provide an update since their discussion in June 1964. He advised that several issues had slowed progress on placing this matter before Parliament. He identified four:

1. The subject-matter at issue was 'recondite';[26]
2. Any Bill on this issue would have to be restricted 'quite narrowly' to procedure and enforcement;
3. Any Bill should not be seen to empower the Court to enter into matters which Lord Goddard had concluded would be better left alone; and
4. While this Bill might be introduced by a Private Member, the preparatory work and drafting should be undertaken by the government.

Cunningham concluded optimistically, stating that 'we shall…take whatever opportunities we can to push ahead with the matter[.]' Garter replied to Cunningham's letter, agreed with the points raised and supported the proposed approach suggested by Cunningham.

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[25] This optimistic outlook is referred to, in the past tense, in Cunningham's letter to Garter of 8 March 1965.

[26] Recondite is defined as difficult or impossible for one of ordinary understanding or knowledge to comprehend; of, relating to, or dealing with something little known or obscure. In an ironically circular fashion, this definition is somewhat illustrated by the use of the word 'recondite'.

2.3. May 1965 - Internal Home Office Research

The 'push ahead' alluded to in Cunningham's letter was reflected in two Home Office internal research notes which addressed the reconstruction of the Court.

The first was dated 20 May 1965 and was authored by 'H. Wollaston'.[27] Wollaston was not as optimistic as Cunningham about the reconstruction of the Court, and set out in some detail the challenges he saw with any attempt to do so. He first described the Court as resembling 'a prehistoric monster disembalmed in modern times', and identified the following difficulties facing its reconstruction:

1. Its jurisdiction is uncertain and, if fully exercised, might lead to public complaint;
2. The uncertainty of the Court's ability to enforce its judgements;
3. As a civil law court, there would be difficulties over the law applied and the procedure followed in the Court;
4. The system where the Earl Marshal is the titular head of the Court while an appointed Surrogate hears and decides cases was 'more appropriate for the 17th century than the 20th century;' and
5. Doubt regarding appeals from a decision of the Court.

These concerns seem to have been misplaced, and they ignored the common ground which Cunningham and Garter had found on many of these issues.

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[27] Presumably Henry Woods Wollaston, who was a legal advisor at the Home Office (called to the English bar in 1941) and youngest son of Sir Gerald Woods Wollaston, K.C.B., K.C.V.O., Garter King of Arms from 1930-1944. In 1954 Sir Gerald was also Secretary to the Earl Marshal. Henry Wollaston had also provided his opinion on various legalities relating to the Court in mid-1954 at the request of the Secretary to the Earl Marshal, prior to the Earl Marshal coming to a decision about whether to convene the Court following his receipt of the City of Manchester's petition (see Wollaston to Simonds (3 June 1954) in LCA 2/4718).

Wollaston's note refers to and appears to have been written in light of an earlier legal note on the subject, dated 12 May 1965 and written by 'P. N. S. Farrell'.[28] In his note, Farrell made the following points:

1. Any uncertainty as to jurisdiction might be addressed by requiring leave to be sought prior to process being issued. Where the power to grant leave should rest (e.g. with the Court itself or with the Attorney-General) would have to be determined.

2. The procedure of the Court would have to be established, as would the source of the Court's rule-making authority.

3. The appointment of a Surrogate should continue, although this could be transferred from the Earl Marshal to the Chief Justice of England.

4. The judgement of the Court would be in the form of an injunction against the defendant regarding the continuing use of the arms. This order could include costs, and would be subject to a right of appeal to the Judicial Committee of the Privy Council.

5. The enforcement of any order issued by the Court of Chivalry would be by way of application to local common law courts.

Wollaston's note of 20 May 1965 suggested that an appropriate way forward might be to allocate the Court of Chivalry's jurisdiction to another court, and suggested the use of the *Trade Marks Act 1938* in the section which protects the use of the Royal Arms for purposes of trade.[29]

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[28] Presumably Peter Nigel Sherburn Farrell, who was also a legal advisor in the Home Office.

[29] Interestingly, following the creation of the Canadian Heraldic Authority in 1988, this was the route taken to protect the use of heraldic arms granted by the Authority, with the addition of s.9(1)(n.1) to the *Trade-marks Act* by the *Intellectual Property Law Improvement Act*, SC 1993, c 15, s 58(3) (Bill S-17), the text of which is set out at p. 202 below. An example of the exercise of this provision can be seen in the *Trade Marks Journal*, Vol. 52, Issue 2637 (11 May 2005).

2.4. April 1966 – Further Home Office thinking

Nearly a year later, another Home Office memorandum authored by K. P. Witney[30] set out the historic foundation of the Court of Chivalry and suggested another difficulty:

> It would appear that any definition of the misuse of arms which would permit proceedings to be brought in the Court of Chivalry would lead to criticism which it would be difficult to rebut.

In arguing against having a 'specially constituted court' to protect armorial bearings, Witney argued that as existing courts deal competently with patent and copyright cases they might also be competent to understand and apply the law of arms. He strongly recommended amending the *Protection of Consumers (Trade Description) Bill* to include a provision which would address the commercial misuse of local authority arms and emblems, rather than reconstituting the High Court of Chivalry.

However, attached to his memorandum in an appendix was a concise and useful analysis of the different elements of the Court of Chivalry which would have to be addressed in order for the Court to start operating on a regular basis. These do not appear to be overly complex and suggests the difficulties which the Home Office was having over the question of re-establishing the Court of Chivalry were not legal in nature.

2.5. May/ June 1966 – Garter's Last Attempts to Reconstruct the Court

In May 1966, Garter wrote to Cunningham to wish him well upon his upcoming retirement as Permanent Under-secretary of the Home Office. Garter took the opportunity to ask Cunningham about the 'machinery of the Court of Chivalry'.

Cunningham responded on 2 June 1966. He explained that upon further analysis, the Home Office had concluded that a simple bill placing

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[30] Only the initials 'KPW' are at the foot of the memo. According to the Civil Service Year Book for 1966, 'KPW' likely belongs to K. P. Witney, then an Assistant Secretary of State in the General Department of the Home Office.

the Court on a statutory basis and providing for the enforcement of its decisions would be unlikely to pass Parliamentary scrutiny. Questions in Parliament would likely arise over the jurisdiction of the Court which would lead to pressure to have this aspect of the Court defined and incorporated into statute. This was identified as a problem because:

> Parliamentary discussions of this scope are unlikely, I think, to be acceptable to the Government; and they might well lead, in any event, to conclusions we do not want.

Cunningham offered Garter an alternative: the widening of the scope of the *Protection of Consumers (Trade Description) Bill*[31] which had at that time been recently introduced into the House of Lords.[32] Cunningham's proposal was by reference to clause 12, which made it an offence to make any 'false indication, direct or indirect' that goods or services provided by a trade or business are of a kind supplied to or approved by Her Majesty.

This provision was in reference to the practice in the United Kingdom where the senior members of the Royal Family issue personal warrants certifying that specific goods or services are provided to them by a particular trade or business. This was (and is) commonly used as a marketing tool by businesses as an indicator of the quality of their wares.

Cunningham proposed that clause 12 of the Bill be expanded to include legal protections for the Royal Arms and local authority arms. He asked Garter to consider this option, but caveated this proposal with a statement to the effect that neither the Board of Trade[33] nor the Home

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31 Referred to by Cunningham as the '*Consumer Protection Bill*'.

32 This bill was eventually enacted as the *Trade Descriptions Act 1968* (UK), 1968, c 29.

33 According to the Department of Business, Innovation and Skills, the 'Board of Trade' was established by James I in 1621 as 'The Committee of Privy Council for Trade and Foreign Plantations' and by the time this body was weighing in on the *Protection of Consumers (Trade Description) Bill* in 1966 it served as a kind of department of trade and industry until it was folded into the newly created Department of Trade and Industry in 1970.

Secretary had given their approval to the widening of the scope of clause 12. He enclosed a copy of Witney's memo of April 1966.

Less than two weeks later, Garter provided a substantive reply. In it he appeared to reject the proposal to broaden clause 12, saying to do so would raise 'difficult questions if it means that part of the jurisdiction of the Court of Chivalry would be taken from it and given to other Courts'. Instead, Garter focused upon the difficulties identified by Cunningham by the prospect of legislation placing the Court of Chivalry on a statutory basis. He quite conclusively rejected all of these.

On the question of legislation, Garter's view was that it should be simple to draft a statutory definition of the Court of Chivalry's jurisdiction, confined to heraldic matters, to the exclusion of 'scandalous words,' peerage claims and baronetcy claims.

Garter also rejected the suggestion that the law of arms, itself, needed to be defined and set out in statute. He pointed to the Scottish heraldic court, the Court of the Lord Lyon, whose statutory foundation fails to define the Scottish law of arms without any impediment upon the working of that court.[34]

Garter's views and approach were summed up as follows:

> It is for those who would transfer [the High Court of Chivalry's] jurisdiction to 'the ordinary courts' to make out a case for it.

Garter concluded his letter by suggesting that he would like to meet with Cunningham to discuss these matters further. No record any such this meeting is in the file.

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[34] The *Lyon King of Arms Act 1867* (UK), 30 & 31 Vict c 17. According to the Scottish Court Service's website (http://www.scotcourts.gov.uk/tribunals/lordlyon.asp), the Court of the Lord Lyon has jurisdiction, subject to appeal to the Court of Session and to the Supreme Court of the United Kingdom, on 'questions of heraldry and the right to bear Arms'.

2.6. August 1966 – Garter writes to the Home Secretary

Only six weeks later, Garter wrote a letter to Roy Jenkins,[35] the Home Secretary, and Cabinet Minister with responsibility for the College of Arms. The contrast in the tone of this letter compared to Garter's letter to Cunningham of June is striking.

In this letter, Garter appears to have abandoned his advocacy for the reconstruction of the High Court of Chivalry. Instead, he proposed

> …to combine simplification and modernisation in the legislation with transference of the powers from the Earl Marshal to a modern court, probably the Probate, Admiralty and Divorce Division of the High Court.
>
> (…) the basis of the proposed action would be that the Earl Marshal himself felt, though not without regret, that the time had come to surrender his ancient but ill defined powers to a modern court which could exercise them within clearly defined limits and to greater practical effect.

Clearly therefore, in the six weeks which passed between these two letters, Garter had come to understand the political realities faced by the Home Office in promoting legislation to place the Court of Chivalry upon a statutory foundation.

There is no record in the file of what response, if any, was made by the Home Secretary to Garter's letter. However, further discussions were arranged, as these are referred to in the next, and final document on the file, dated May 1967.

[35] Roy Baron Jenkins of Hillhead, O.M., P.C., Secretary of State for Home Affairs 1965-1967.

2.7. May 1967 – A Home Office Memorandum

On 11 May 1967, Witney wrote a memo to Sir Philip Allen,[36] who was Cunningham's replacement as Permanent Under-secretary of State in the Home Office. This note indicates how far the Home Office thinking had shifted from the reconstruction of the High Court of Chivalry to realistic means to prevent the misuse of heraldic bearings.

Three options were canvassed in the memo. The first two were dismissed: the 'refurbishing' of the Court of Chivalry, and the transfer of its jurisdiction to the High Court's Probate, Admiralty and Divorce Division. According to Witney, these first two options 'would require legislation of a kind easily exposed to ridicule'.

A third option is therefore revisited: the broadening of clause 12 of the *Protection of Consumers (Trade Description) Bill*. According to Witney, the Home Office and the Board of Trade were agreeable,[37] at this point, to allow an amendment to be proposed in the House of Lords in order to create an offence of 'the misuse of arms' where an individual or body corporate made 'a false indication of approval' by way of the 'single and tangible form of the misuse of arms'.

This proposal is modest, and stands in stark contrast to what Garter and the Association of Municipal Corporations had proposed instead – a comprehensive clause codifying the misuse of heraldry which read as follows:

> **12.** (1) If any person without lawful authority or excuse (the proof thereof shall be on the person accused) uses in connection with any trade, business, calling or profession, any armorial bearings, device or badge in such manner as to lead to the belief that he is duly authorised to use the same as his own, he shall be liable on

[36] Philip Lord Allen of Abbeydale, G.C.B., Permanent Under-secretary of State for the Home Office 1966-1972.

[37] Reluctantly, in the case of the Board of Trade.

> summary conviction to a fine not exceeding £X, or in the case of a second of subsequent offence £X.
>
> Provided that nothing in this section shall be construed as affecting the right (if any) of the proprietor of a trade mark in existence at the date of the commencement of this Act, and containing such armorial bearings, device or badge, to continue to use such trade mark.
>
> (2) For the purpose of any proceedings under this section a certificate purporting to be signed by Garter King of Arms or his Deputy, and certifying that no armorial rights are infringed by such use of any armorial bearings, device or badge, shall be evidence of the matters so certified.

This provision was examined by the Home Office's legal advisors who identified several issues.

First, the reference to a 'device or badge' in clause 12(1) presented a problem, as these terms were not easily defined nor necessarily restricted to heraldic devices or badges.

Second, the offence related to the use of armorial bearings, devices or badges without 'lawful authority or excuse'. While clause 12(2) provides for a certificate issued by Garter, this would not provide evidence that an accused had 'lawful authority or excuse'.

Aside from these legal issues, Witney advised that the Board of Trade would not accept the provision as proposed by Garter. In 'the coming discussion with Garter' Witney recommended that Sir Philip take the position that in order for anything to be accomplished on this question, it would have to be limited to the existing structure of the current wording of clause 12(1).

3. Historical and Legal Conclusions

Here the file ends. Despite the best efforts of the College of Arms and of the Home Office, the High Court of Chivalry was not placed on a statutory foundation, nor was its jurisdiction transferred to the common law courts.

Although discussed at length, the final wording of section 12 of the *Trade Descriptions Act 1968* did not really contain any useful language to assist with the protection of heraldic arms:

> **12.** (1) If any person, in the course of any trade or business, gives, by whatever means, any false indication, direct or indirect, that any goods or services supplied by him or any methods adopted by him are or are of a kind supplied to or approved by Her Majesty or any member of the Royal Family, he shall, subject to the provisions of this Act, be guilty of an offence.
>
> (2) If any person, in the course of any trade or business, uses, without the authority of Her Majesty, any device or emblem signifying the Queen's Award to Industry or anything so nearly resembling such a device or emblem as to be likely to deceive, he shall, subject to the provisions of this Act, be guilty of an offence.

In correspondence with the Law Commission[38] in 1973, Garter briefly described the efforts made during the 1960s to 'modernise and simplify the procedure' of the High Court of Chivalry. He pointed to ss. 1 and 13 of the *Trade Descriptions Act 1968* and s. 15 of the *Theft Act 1968* as providing 'simpler remedies for certain kinds of commercial exploitation of arms'.[39]

Sections 1 and 13 of the *Trade Descriptions Act 1968* read:

> **1.** (1) Any person who, in the course of a trade or business —
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> (a) applies a false trade description to any goods; or
>
> (b) supplies or offers to supply any goods to which a false trade description is applied
>
> shall, subject to the provisions of this Act, be guilty of an offence.
>
> (2) Sections 2 to 6 of this Act shall have effect for the purposes of this section and for the interpretation of expressions used in this section, wherever they occur in this Act. (…)

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[38] Established by the *Law Commission Act 1965* (UK), 1965, c 22, the Law Commission reviews existing law in order to recommend reforms.

[39] Garter to Henry William Walter Huxham, C.B., C.B.E., Solicitor for the Law Commission (12 March 1973), UK National Archives File LCA 2/4718.

> **13.** If any person, in the course of any trade or business, gives, by whatever means, any false indication, direct or indirect, that any goods or services supplied by him are of a kind supplied to any person he shall, subject to the provisions of this Act, be guilty of an offence.

Section 15 of the *Theft Act 1968* read:

> **15.** (1) A person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it, shall on conviction on indictment be liable to imprisonment for a term not exceeding ten years.
>
> (2) For purposes of this section a person is to be treated as obtaining property if he obtains ownership, possession or control of it, and 'obtain' includes obtaining for another or enabling another to obtain or to retain.
>
> (3) Section 6 above shall apply for purposes of this section, with the necessary adaptation of the reference to appropriating, as it applies for purposes of section 1.
>
> (4) For purposes of this section 'deception' means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person.

Despite Garter's assertion, it is difficult to see how these provisions provide much protection for heraldic arms. Furthermore, this author is not aware of any proceedings brought under these statutes in relation to the use or misuse of heraldic arms.

Garter's correspondence with the Law Commission was in the context of its review of 'ancient courts'. The result of the Law Commission's work was the *Administration of Justice Act 1977*,[40] which at s. 23, abolished the jurisdiction of several ancient courts to 'hear and determine legal proceedings,' and curtailed the authority of over fifty other

[40] (UK), 1977, c 38.

ancient courts. But once again the High Court of Chivalry escaped parliamentary reform.[41]

However, this is not to suggest that the Law Commission thought the Court's jurisdiction was obsolete. In its report *Jurisdiction of Certain Ancient Courts,*[42] the Law Commission specifically referred to the High Court of Chivalry, among other courts, when it stated: 'The principle we have endeavoured to follow is that jurisdictions which are not obsolete should be preserved'.[43]

The impediment to placing the jurisdiction of the Court on a statutory foundation was not in fact *legal* in nature, but rather *political*, arising from serious concerns within the civil service as to the likely reaction of government and Parliament to the introduction of legislation giving heraldic arms modern legal protection.

The legal issues could have been resolved comprehensively in the manner proposed by Farrell in his note of 12 May 1965. Alternatively, Parliament could have enacted a provision as simple as that provided in section 1 of the *Lyon King of Arms Act*:

> The jurisdiction of the Lyon Court in Scotland shall be exercised by the Lyon King of Arms, who shall have the same rights, duties, powers, privileges, and dignities as have heretofore belonged to the Lyon King of Arms in Scotland, except in so far as these are herein-after altered or regulated.[44]

This would have placed the onus on the Court and its judicial appellate authority to determine the scope of the Court's jurisdiction and practice. Parliament would have remained able to intervene by statute if the

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41 There was some suggestion by Huxham that the Law Commission's review of ancient courts may have provided an opportunity to simplify and modernise the powers and procedures of the High Court of Chivalry. See Huxham to Garter (12 February 1973) in LCA 2/4718. That file does not indicate any further action was taken to do so. A review by Huxham of the Home Office file on this matter may have discouraged further momentum in that direction.

42 (1976), Cmnd. 6385 (Law Com. No. 72).

43 *Ibid.*, at para 23.

44 (UK), 30 & 31 Vict, c 17.

jurisdiction or practice of the Court became inappropriately exercised. Historically Parliament had already played this role with respect to the jurisdiction of the Court.[45]

Another approach would have been to follow Wollaston's proposal of 20 May 1965 to use trade-mark law to provide legal protection to heraldic arms. Perhaps this could have taken a similar form as that adopted in Canada following the establishment of the Canadian Heraldic Authority, where s. 9(1) of the federal *Trade-marks Act* was amended to read:

> 9. (1) No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for, (…)
>
> > (n.1) any armorial bearings granted, recorded or approved for use by a recipient pursuant to the prerogative powers of Her Majesty as exercised by the Governor General in respect of the granting of armorial bearings, if the Registrar [of Trade-marks] has, at the request of the Governor General, given public notice of the grant, recording or approval[.][46]

The issue was not therefore a legal one. In my view Cunningham succinctly identified the crux of the difficulty and explained the real basis of his reluctance to move forward with this project when — in a letter to Garter in 1966 — he asserted that Parliamentary discussion regarding the jurisdiction of the Court was unlikely to be acceptable to the government. And with the ebb and flow of politics and political parties, it would be difficult to predict a time when such Parliamentary discussion *would* be acceptable.

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[45] By way of the *Jurisdiction of Constable and Marshal Acts* (Eng), 8 Ric II, c 5 and 13 Ric II, st I, c 2.

[46] This amendment was introduced by the *Intellectual Property Law Improvement Act*, SC 1993, c 15, s 58(3).

Nevertheless, although the Court has not sat since 1955, it can be confidently asserted that it continues to exist in law, on the basis of Chief Justice Lord Goddard's authoritative declaration in the *Manchester* case that:

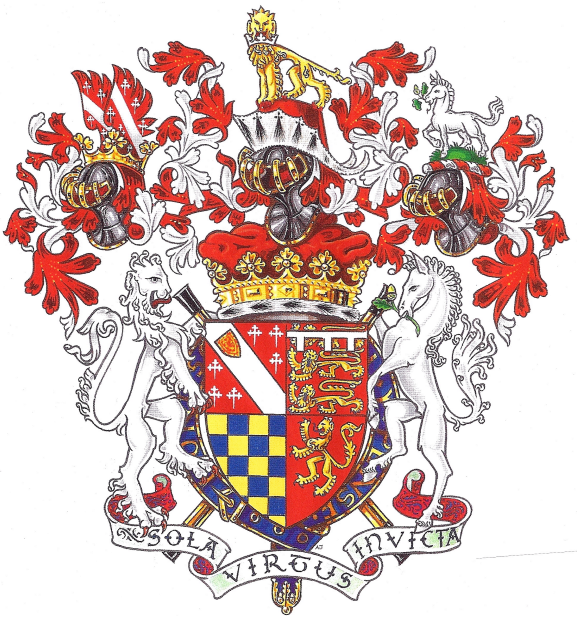
> (…) once it is established that this court exists, whatever interval may have elapsed since its last sitting, there is no way so far as I know of putting an end to it save by an Act of Parliament.[47]

As the High Court of Chivalry still exists in law, an opportunity for the reform of this judicial institution may arise in the future. A review of the attempts to reconstruct the Court in the 1960s, and the difficulties thereto, provide valuable lessons to those who may endeavour in the future to revisit this issue.

English summary: *The author presents in this article a close examination of the public archival record documenting the ultimately unsuccessful efforts made (following the successful revival of the Court of Chivalry in 1954) by Garter King of Arms Sir Anthony Wagner, and a succession of Permanent Undersecretaries of State and subordinate officials of the Home Office, to develop policy supporting parliamentary legislation placing the revived Court on a statutory basis.*

Sommaire français: *L'auteur présente dans cet article un examen attentif des documents archivistiques publiques qui éclaircissent les efforts sérieux, mais vains (suite à la relance du High Court of Chivalry en 1954) de Garter King of Arms Sir Anthony Wagner et plusieurs sous-ministres et fonctionnaires subalternes du Home Office, pour élaborer une politique qui aurait appuiée l'introduction d'un projet de loi pour mettre ce tribunal ranimé sur une base législative.*

[47] *Manchester*, at 393. The Law Reform Commission was also of the view that the Court continues to exist – see note 41, *infra*.



Armorial Achievement of the Duke of Norfolk
Earl Marshal and Hereditary Marshal of England

Armorial Achievement of the Office of
Garter Principal King of Arms of England