NOTE

This is a Petition of date 10th February 2006 brought by Willi Ernst Sturzenegger of Arran, designing himself as "Feudal Earl of Arran", in which he seeks official recognition "in the name, style and dignity of Willi Ernst Sturzenegger of Arran, Feudal Earl of Arran" with appropriate heraldic additaments. On the face of it this is a surprising proposition. The style has the appearance of a peerage title, yet the style being sought is not the recognised peerage title of Earl of Arran which is currently held, as a subsidiary title, by the Duke of Hamilton. It also has the appearance of being a feudal title, yet the last remnants of feudal tenure in Scotland were brought to an end by the Abolition of Feudal Tenure Act 2000 which came into force on 28th November 2004, the first section of which reads as follows:

"The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished."

There are, however, some precedents. The root of the Petitioner's claim to the style of Earl lies in a conveyance to him of All and Whole the Earldom of Arran including the *caput* thereof which grant can be traced back to an erection by the Crown of lands *in unum comitatum* ("into one earldom" or, more loosely, "into a free earldom"). In 2006 Lord Lyon Blair recognised three Petitioners who had similarly been granted lands traceable back to a royal erection *in unum comitatum* as "Feudal Countess of Crawfurd-Lindsay", "Feudal Earl of Breadalbane" and "Feudal Earl of Rothes" respectively. I shall consider these Petitions in more detail shortly.

The present Petitioner petitioned the Lord Lyon King of Arms previously in 1997 to be recognised officially "in the name, style and dignity of Willi Ernst Sturzenegger of Arran, Earl of Arran in the territorial baronage of Scotland", and for a Grant of Arms with additaments appropriate to him as "Earl of Arran in the territorial baronage of Scotland", on the basis that he had been infeft in 1995 in "ALL and WHOLE the Lands and Earldom of Arran in the County of Bute including *inter alia* the Castle of Lochranza the *caput* thereof …." Lord Lyon Innes of Edingight ordered service of that Petition on the Lord Advocate in the public interest. The Lord Advocate craved that the Petition be served also on the Duke of Hamilton as Earl of Arran in the peerage of Scotland, and on the Earl of Arran in the peerage of Ireland, for any interest that they might have. It was held by Lyon Innes of Edingight that the Petition should be served on the Duke of Hamilton for any interest he might have in relation to the name, style and dignity specified in the prayer, but not on the Earl of Arran in the Irish peerage (*Sturzenegger, Petitioner* 2000 SLT (Lyon Court) 1). The Petitioner had also argued that it was recognised that the Crown could grant the same title of nobility to different individuals, citing the case of the Earldom of Annandale and Hartfell (which is discussed later in this Note). Lyon Innes of Edingight observed that the Petition did not relate to a peerage dignity but to an interest in land. The Duke of Hamilton indicated that he wished to enter appearance but in the event did not proceed.

As a consequence of the *Scotland Act* 1998, the Lord Advocate's interest in the Petition was inherited by the newly appointed Advocate General. On 13th November 2000 Rothesay Herald lodged a Note for the Petitioner indicating that he would seek recognition "in a name, style and dignity such as:

(1) WILLI ERNST STURZENEGGER OF ARRAN, territorial EARL OF ARRAN; or

(2) WILLI ERNST STURZENEGGER OF ARRAN, feudal EARL OF ARRAN; or
(3) WILLI ERNST STURZENEGGER OF ARRAN, earl of the territorial EARLDOM OF ARRAN
or such similar designation as to your Lordship might be acceptable."

He stated that he Petitioner's preferred style would be No. 1 or No. 2.

On 15th November 2000, on the unopposed Motion of the Respondent (the Advocate General), Lord Lyon Innes of Edingight allowed the Answers lodged on 2nd February 1998 by the Lord Advocate to be withdrawn "in respect that the Petitioner has indicated to the Respondent's agents that he will now seek recognition in a style to which the Respondent has no objection", or, in the words of Rothesay Herald's submission in this case, "in respect of a compromise reached with the Advocate General for Scotland where this original petition had been opposed by the Lord Advocate".

On 4th December 2000 there was a short Hearing in the Court of the Lord Lyon. I have no record of what took place at that Hearing. On 6th December 2000 Rothesay Herald craved leave to amend the Petition, inter alia, by deleting "EARL OF ARRAN in the territorial baronage of Scotland" from the instance, by deleting "style and dignity" and "Earl of Arran in the territorial baronage of Scotland" in statement 4, and by deleting "style and dignity" and "EARL OF ARRAN in the territorial baronage of Scotland" from the Prayer. He lodged an amended Petition in which the Petitioner was described as WILLI ERNST STURZENEGGER OF ARRAN, and was desirous of being officially recognised in that name. On 7th December 2000 Lyon Clerk wrote to Rothesay Herald confirming that the Lord Lyon would not issue any decision in relation to the matters canvassed at the Hearing on 4th December, but was "quite ready

to proceed with granting Armorial bearings to the petitioner with no reference to the feudal or territorial titles."

In the event, Lord Lyon Innes of Edingight granted Arms to the Petitioner by Warrant dated 15th March 2001, designing him as "Holder of the territorial Earldom of Arran". The Letters Patent following design the Petitioner as "Willi Ernst Sturzenegger of Arran, Holder of the territorial earldom of Arran". No Note accompanied Lyon Innes's Warrant and the case was not further reported in the *Scots Law Times*.

It might also be mentioned that a Petition had previously been lodged on 27th May 1992 by Dennistoun Gordon Teall of Teallach narrating that he had "acquired right and title to the feudal Marquisate, Earldom and Lordship of Huntly" by disposition granted by Brian Gregory Hamilton dated 22nd November 1991, recorded 3rd January 1992; and seeking a matriculation of new in his own name, "with appropriate additaments in respect of his foresaid feudal barony". Lyon Innes of Edingight duly granted Warrant on 30th June 1993, wherein the Petitioner is designed "Baron of Huntly", granting additaments in respect of the Petitioner's feudal barony of Huntly.

In 2006, as already noted, Lyon Blair recognised the styles of "Feudal Earl" and "Feudal Countess" in three Petitions, those of Ronald Busch Reisinger for his daughter Abigail Busch Reisinger, of John Sullivan and of Sir Philip Christopher Ondaatje. Abigail Busch Reisinger was infeft by her father Ronald Busch Reisinger of Inneryne, styling himself "feudal earl of Crawfurd-Lindsay", by disposition dated 23rd February, recorded 2nd March 2004, in "All and Whole the Earldom, Lordship and Barony of Crawfurd-Lindsay and in the barony of Auchterutherstruther". The land actually conveyed, an exception from exceptions, was the area of ground known as "The Moor Wood" in the

parish of Springfield and County of Fife extending to 12.94 hectares and designed as the "Court Park of the Earldom, Lordship and Barony of Crawfurd-Lindsay". It appears that Lyon Blair was at first minded to recognise Abigail only as Baroness of Crawfurd-Lindsay. He was later minded to recognise her as "Holder of the territorial Earldom of Crawfurd-Lindsay", here following the designation of the Petitioner in the earlier *Sturzenegger* Petition. However, after hearing submissions from Rothesay Herald, Lyon Blair by Warrant dated 9th February 2006 (amended from 8th November 2004) recognised the Petitioner as "Feudal Countess of Crawfurd-Lindsay and Baroness of Auchteruthers truther". The Petition was not served on any potentially interested parties. No Note accompanied the Warrant and the case was never reported.

John Sullivan was infeft as at 23rd November 2004 in "the feudal earldom of Breadalbane in the county of Perth and the feudal lordship of Kildrummie and the feudal lordship of Braemar in the County of Aberdeen". He was recognised by Lyon Blair by Warrant dated 12th April 2006 (amended from 2nd August 2005) as "Feudal Earl of Breadalbane, Feudal Lord of Kildrummie and Feudal Lord of Braemar". Sir Philip Christopher Ondaatje was infeft as at 26th November 2004 in "All and Whole the lands and other heritages forming the barony and territorial lordship of Leslie and the territorial earldom of Rothes together with the territorial office of Sheriff of Fife", and was designed by Lyon Blair by Warrant dated 5th September 2006 (amended from 6th December 2005) as "Feudal Earl of Rothes and Baron and Feudal Lord of Leslie and holder of the territorial office of Sheriff of Fife". In neither of these Petitions (*Sullivan* and *Ondaatje*) was service ordered on any potentially interested parties. No explanatory Notes accompanied the Warrants and neither case was reported.

As noted above, the present Petitioner Willi Ernst Sturzenegger of Arran seeks to be recognised as Feudal Earl of Arran with appropriate additaments. I caused the Petition to be served on the Advocate General for the public interest and on the Duke of Hamilton as Earl of Arran in the Scottish peerage. Neither chose to enter appearance.

Rothesay Herald narrates in his Submissions that the current Petition was lodged after the decisions in *Reisinger* and *Ondaatje* had become known to the Petitioner who wished to be recognised in a similar style as "Feudal Earl of Arran". While accepting that one Lyon is not bound by a previous Lyon's decisions, Rothesay argues that generally Lyon should not depart from an earlier decision unless there is good reason for doing so, and submits that the decisions in *Reisinger* and *Ondaatje* should be treated as persuasive. I agree with the proposition that as a general rule Lyon should follow previous decisions. However, I cannot agree that the decisions in *Reisinger* and *Ondaatje* (to which may be added the decision in *Sullivan*) can be regarded as persuasive, given that the arguments put forward in these Petitions do not appear to have been fully tested, and that in none of these cases was the Warrant accompanied by a Note setting out Lyon's reasoning. There is also the point that a designation such as the Petitioner now seeks would appear to have been considered but deemed not to be appropriate in the Petitioner's previous Petition.

It may be useful to say something at this point about the history of non-peerage barony titles in Scots law. "Feudal" baronies, as they are frequently described, have a long and continuous history in Scots law, stretching back at least as far as the thirteenth century. The standard scholarly work on the history of these feudal baronies is Professor William Croft Dickinson's introduction to his edition of *The Court Book of the Barony of Carnwath 1523-1542*, published by

the Scottish History Society in 1937. Typically the feudal baron derived his status from a grant of land *in liberam baroniam* direct from the Crown. This conferred certain rights of jurisdiction which at one time included the power of life or death (a grant *cum furca et fossa* – described by Cosmo Innes as, "the right of pit and gallows, the true mark of a true baron in the ancient time" (*Scotch Legal Antiquities*, p. 54) for certain categories of crime. Even greater rights of jurisdiction were granted by the Crown to lords who held their lands "in regality", although the barony still remained at the heart of the regality: Croft Dickinson writes, "The regality was still a barony, but a barony with fuller jurisdictional and administrative rights." (*Carnwath*, introduction, xl)

The Heritable Jurisdictions Act of 1746, passed in the wake of the 1745 Jacobite Rising, put an end to the rights of lords of regality and various other heritable office holders, all of whom were entitled by that Act to seek compensation for their loss. Baron courts, however, were not abolished by the Heritable Jurisdictions Act, although their jurisdiction, both civil and criminal, was greatly reduced. Barony jurisdiction continued, as formerly, "to run with the lands", that is, it passed with the ownership of the lands of the barony. The style of "Baron", although not incorrect, gradually fell into desuetude. In his celebrated novel *Waverley*, set in 18th century Scotland, Sir Walter Scott poked gentle fun at the pretensions of Cosmo Comyne Bradwardine, "Baron of Bradwardine". Barony jurisdiction, however, continued to be exercised in some minor matters, and barony courts to be held in some parts of the country into the nineteenth century, although with decreasing frequency. The abolition of barony jurisdiction was mooted from time to time, but in the event nothing was done. Even in the twentieth century baron courts were occasionally held, sometimes for purposes far removed from their original function. For instance, the Baron Court of Corstorphine was revived as a vehicle for the Forrester

family association (see Colin Forrester, *The Forresters: A Lowland Clan and its Lands* (1988) pp. 110-14).

John Horne Stevenson, Marchmont Herald, and author of the authoritative two volume *Heraldry in Scotland* (1914), contributed the titles "Barony" and "Barony Title" to the "Dunedin" edition of the *Encyclopaedia of the Laws of Scotland* (vol. 2, 1927). He noted that barony holding was "the highest and most privileged tenure of land" known to the Scottish feudal system [310], but considered that the term "baron" had "ceased to apply to many who were in earlier days known as barons …." [305]; also that "in ordinary usage the term 'baron' meant a member of the peerage." [304] He also noted that "A barony title did not itself confer any dignity upon the vassal." [309] This was in line with Stevenson's earlier opinion in his contribution on "Baron" to the first edition of Green's *Encyclopaedia of the Law of Scotland*, that "the mere territorial baron has no title of dignity appropriated to him" (vol. 2, 1896, p.33). He also wrote, under "Dignities" (vol. 4, 1897, p. 226-7), that "All dignities [by which he meant peerage dignities], from that of duke downwards, are now strictly personal, whether hereditary or for life." The barony of Torphichen, he noted, here following John Riddell, *Inquiry into the Law and Practice of Scottish Peerages, 2 vols. (Edinburgh, 1842)*, p. 87, was a possible exception. Stevenson continued, "A Dignity … is not now capable of transference … Lands of the holder of a dignity may be alienated, though the title of the dignity, which cannot be alienated, is derived from them." Various privileges attaching to barony title continued to be recognised by Scots law until 2004, and expounded by conveyancers, for example, in relation to bounding descriptions and fishing rights.

In the second half of the 20th century there was a revival of interest in feudal baronies, not unconnected with the desire of Lyon Sir Thomas Innes of Learney to breath new life into the old institution. As Carrick Pursuivant, Innes of Learney had contributed the title "Peerage and other Dignities" to the "Dunedin" *Encyclopaedia of the Laws of Scotland* in 1931, where he followed previous commentators such as Stevenson, and earlier Riddell, in stating that all dignities from that of Duke downwards were now strictly personal, with the possible exception of the Lordship of Torphichen (vol. 11, [382]). In this article Innes of Learney also traced the history of the "feudal" or "territorial" baronage. He was in close touch with Professor Croft Dickinson and is, indeed, thanked for his assistance in Dickinson's introduction to the *Court Book of the Barony of Carnwath*. It is interesting to note that neither Stevenson nor Innes of Learney in the contributions referred to mention the existence of "feudal" Earls or "territorial" Earls in the sense now argued for. Indeed Innes of Learney states that, "The rank and title of Earl is now dissociated from all territorial or official character" (vol. 11, [408]).

In the second half of the twentieth century barony titles, still running with the lands, or at least with the *caput* or chief place, of the barony, came to change hands for increasingly large sums of money. It came to be considered that it was not necessary to own all the lands of the original barony, or even half of them, so long as ownership of the *caput*, or chief place of the barony, could be shown. It even became possible to transfer the *caput* from its original position to some other, less prominent, part of the barony by nomination. The Scottish Law Commission in its *Report on the Abolition of the Feudal System* (1999, SCOT LAW COM No 168) discussed this at 2.31, and noted that "the seller of the Barony of Houston was reported as saying that the land which went with the barony was 'too small for a house, but the new baron will be welcome to put up a tent.'" The *Abolition of Feudal Tenure etc (Scotland) Act* 2000 (asp 5) which

followed on the Scottish Law Commission Report, finally ended the connection between the former feudal baron and the ownership of land, and brought his vestigial jurisdiction to an end. However, partly with an eye to possible claims for compensation under the European Convention of Human Rights, the "dignity" of baron was specifically preserved by section 63 of the Act which reads as follows:

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

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

Subsection (4) of section 63 defines "dignity" as "including any quality or precedence associated with, and any heraldic privilege incidental to, a dignity;"

It will be noticed that while neither J H Stevenson, nor Innes of Learney, writing in Green's *Encyclopaedia*, considered a feudal barony to be a "dignity", by 2000 usage had changed. There is no mention in the 2000 Act, nor in the Scottish Law Commission Report which preceded it, of feudal or territorial earls, or indeed of territorial earldoms.

The history of barony jurisdiction has been rehearsed here at some length as being relevant to the present Petition, because comparisons have been made, as will appear, between feudal baronies and so called "feudal" or "territorial" earldoms. Anachronistic and anomalous the position of the former feudal baron

may be, but there can be no doubt about the thread of continuity from the earliest days of feudalism in Scotland until the present day. It is understood that, even after the coming into force of the *Abolition of Feudal Tenure (Scotland) Act* on "the appointed day" of 28th November 2004, there is still a lively market in barony titles – that is to say, in the "dignity" of a barony, now incorporeal heritable property separated from both land and jurisdiction.

The decisions in *Reisinger, Sullivan* and *Ondaatje* notwithstanding, it seemed incumbent on me to test the Petitioner's case. With that in mind I framed four questions which I asked counsel for the Petitioner to address in the hope that this would lead to a fuller ventilation of the various arguments and issues. The questions were:

1. How does a "feudal" earldom differ from a "territorial" earldom?

2. How do feudal and territorial earldoms differ from standard peerage earldoms?

3. Leaving to one side some recent decisions of the Court of the Lord Lyon, what is the evidence for the continuing existence of feudal or territorial earldoms? It would be helpful if the answer to this question could refer to recognised peerage authorities such as John Riddell in the 19th century and Lord Hailes in the 18th; and also to modern historical research, such as that of Alexander Grant ("The development of the Scottish peerage" (1978) 57 *Scottish Historical Review* 1-27.).

4. Supposing feudal and territorial earldoms still to exist, might they not be subject to the Honours (Prevention of Abuses) Act 1925 which prohibits the procuring of the grant of dignities or titles of honours in return for a gift, money or valuable consideration?

It is convenient to consider the first three questions together. It soon became apparent that the term "territorial earldom" has been used in different senses and can give rise to confusion. This is equally true of the term "feudal earldom". The term "territorial earldom" is used in one sense to describe an early stage in the evolution of the peerage when the dignity of earl was intimately associated with the ownership of land held feudally of the Crown. It was the tenure of this land which gave the earl his style and his status. Such earldoms are often referred to by historians as "feudal" or "territorial" earldoms, and precede chronologically the creation a "personal" peerage by the Crown; described as "personal" because it looked to the person of the peer rather than to the territory which he possessed. In Scotland personal peerages began to be created in the mid-15th century, although it took some time for territorial peerages to disappear. The rise of the new personal peerage and the decline of the older territorial peerage have been well charted by the historian Alexander Grant in his article "The development of the Scottish peerage" published in the *Scottish Historical Review* in 1978. Different dates have been suggested for the end of the territorial peerage in Scotland. In the famous *Sutherland* peerage case in the later 18th century Lord Mansfield suggested that territorial peerages had already come to an end by 1214, but this was heavily criticised, not least by John Riddell, and is now universally believed to be much too early. However, there is general agreement that territorial peerages were all but obsolescent by the beginning of the 17th century. As already noted, Riddell suggested that they had all disappeared by that time with the possible exception of the Lordship of Torphichen, and was followed in this by J H Stevenson and Sir Thomas Innes of Learney.

The second sense in which the phrase "territorial earldom" has been used is to describe the erection of lands belonging to an earl *in unum comitatum*, that is,

"into one earldom" or "into a free earldom". Such an erection brought many advantages: for example, it meant that the lands of the earldom could by conveyed as a unit, as a *unum quid*, by a single sasine rather than piece by piece. The erection of lands into a free earldom was in fashion in the 1660s, although the practice of describing such an erection as a "territorial earldom" does not seem to be found before the 19th century. John Riddell, writing towards the middle of the 19th century, who was certainly familiar with the erection of lands *in unum comitatum*, seems not to have used the phrase "territorial earldom". Nor does the phrase appear to have been used in this sense by another celebrated and well-informed peerage writer, the Court of Session Judge Lord Hailes, in the 18th century. It may be noted also that lands might be erected into a free marquisate or a free dukedom. Thus in 1661 the lands of Anne, Duchess of Hamilton in her own right were erected "into one free dukedom, to be called in all time the dukedom of Hamilton, with the place of Hamilton as its principal messuage"(*RMS* xi, no. 62, p. 32, col.a); and in 1662 the lands of George, Marquis of Huntly were incorporated into "the Marquisate, Earldom, lordship and barony of Huntlie" (*RMS* xi, no. 232, p.115, col.b).

With that clarification as to the potential confusion inherent in the phrase "territorial earldom", I now turn now to the Submissions for the Petitioner.

In regard to the adoption of a name, Rothesay Herald submitted, citing the English case of *Earl Cowley v Countess Cowley* [1901] AC 450, that at common law a person could take what name they chose, including a "title" as a name. I am not persuaded that the authority of *Cowley* extends so far at common law, even in the law of England, as is sought in this case, although I do not doubt that a person may choose to take "Earl" or "Duke" as a forename. However, what I am asked to do here as Lyon King of Arms is to recognise the

Petitioner officially in the name style and dignity of Feudal Earl of Arran and for confirmation of his Arms with appropriate additaments. In *Kerr of Ardgowan and others v Lord Lyon* 2009 SLT 759 (Ex Div), a case which concerned territorial designations, it was accepted that the Lord Lyon has a wide discretion as regards the official recognition of names. Lord Marnoch, giving the Opinion of the Court, referred first to an article contributed by Sir Thomas Innes of Learney to the "Dunedin" *Encyclopaedia*, and to the same author's *Scots Heraldry*, and then continued (at p. 761 [10]), "It is, we think inconceivable that the learned author should have thought that the choice of such name, dignity or title was a matter solely for the applicant; and for these and other reasons given above we are left in no doubt that Lyon does indeed enjoy a wide discretion in deciding whether or not to accept a change of name for entry in the Public Register in question."

Rothesay made a number of written submissions in relation to the designation "Feudal Earl of Arran". He noted that I had asked how a "feudal" earldom differed from a "territorial" earldom. So far as this Petition was concerned, he submitted that the "title" should be preceded by the adjective "territorial" or "feudal" in order to differentiate between territorial dignities and personal peerages. He accepted that the Petitioner did not claim a personal peerage, but rather what he termed a "lesser dignity". He further submitted that whereas the adjective "territorial" might have been considered more appropriate prior to the "appointed day" because the dignity was linked to the land, after the appointed day there was no territorial link and so the adjective "feudal" appeared more appropriate. He continued that under s. 63 of the Abolition of Tenure Act "the dignity of baron became 'incorporeal heritable property' and heritable property is really 'feudal' in the sense that it is held of the crown." I do not follow this reasoning which does not seem to sit well with the first section of the Act. In any event, in his oral presentation Rothesay agreed that in the context of this

Petition the adjectives "territorial" and "feudal" had substantially the same import.

Rothesay Herald also submitted that "As a barony 'confers' the name and style 'baron' on the proprietor, then logically a territorial earldom, which is recognised as a barony, but of a higher designation, should confer the name and style of 'Earl' on the infeft proprietor." In support of this proposition he referred me to a passage from Lord Clyde's opinion in *Spencer-Thomas of Buquhollie v Newell* (1992 SLT 973 @ 976), and also cited several Institutional Writers. I give the passage from Lord Clyde's opinion in full:

"Before going further I should say something about the nature of a barony in Scots law. A barony is an estate of land created by a direct grant from the Crown. The original grant is said to have erected the lands into a libera baronia, a freehold barony (Bell's Principles, s.750). The right can be conferred only by the Crown and cannot be transmitted by the baron to be held base of himself (Bell's Dictionary (7th ed.), p. 99; Bankton's Institute, II.iii.83). In feudal classification a barony falls into the class of noble as opposed to ignoble feus. That classification is discussed by Craig (Jus Feudale, I.x.16) and Bankton (II.iii.83). In Scotland the distinction was recognised between the greater barons and the lesser barons, the former acquiring such titles as Duke or Earl. It was at the earliest a territorial dignity as distinct from the later personal peerage. Thus when one was divested of an estate the title of honour ceased (Bankton, II.iii.84). In the feudal system, however, whether the dignity is that of a baron or of the greater dignity of an earldom, the feudal effects were the same (Erskine's Institute, II.iii.46). As Stair puts it (Institutions, II.iii.45): 'Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordship, earldom, etc. all which are more noble titles of barony, having the like feudal effects'. The grant of barony

carried with it the right to sit in Parliament, but as the number of lesser barons increased, steps were taken from 1427 onwards to restrict attendance to a selected number of them (Erskine's Institute, I.iii.3). The grant in liberam baroniam also carried a civil and criminal jurisdiction (Erskine's Institute, I.iv.25). But Erskine also states that while such an erection or confirmation was necessary to constitute a baron 'in the strict law sense of the word', all who hold lands immediately of the Crown to a certain yearly extent are barons in respect of the title to elect or be elected into Parliament (Institute, I.iv.25)." (Rothesay's underlinings)

The definition of a barony in this passage is in line with Dickinson's treatment in the introduction to the *Barony Court Book of Carnwath* referred to above, save that Dickinson puts more emphasis on the grant of jurisdiction referred to by Lord Clyde later in the passage. Lord Clyde states that, "In feudal classification a barony falls into the class of noble as opposed to ignoble feus", citing Craig and Bankton. It is worth following this a little further. Craig discusses the classification of feus in title ten of the first book of his *Jus Feudale* where he comments first on the classification favoured in the general Feudal Law, and then comments on the position in the law of Scotland. The "Feudal Law" refers to the *Libri Feudorum* of the Lombard jurist Obertus de Orto, written in the second half of the 12th century, and the various commentators thereon. Craig notes that in the general Feudal Law feus may be classified in many different ways, for example, as proper or improper, as frank or not frank, as real or personal, as lay feus and church feus, and so on. He discusses the classification into noble and ignoble feus in the Feudal Law at some length, at chapters 16-18, citing many commentators. He concludes that, "The division between noble feus and ignoble feus is supported by Alvarottus, Rebuffi, and the rest of the commentators, and is not inconsistent with the law of Scotland." (In citing Craig, I have, like counsel and Lord Clyde in *Spencer*-

Thomas, used the 1934 English translation of the *Jus Feudale*, rather than the original Latin.)

The citation from Erskine to the effect that in the feudal system, whether the dignity was that of a baron or of the greater dignity of an earldom (or, one might add, a dukedom) the feudal effects were the same, makes the well accepted point that tenure *in liberam baroniam* was the highest form of tenure known to Scots feudal law. The same point is made by J H Stevenson in his article on "Barony" in the "Dunedin" edition of the *Encyclopaedia* where he states that a grant *in liberam baroniam* was "the highest and most privileged tenure of land" known to the Scottish feudal system (vol.4 [310]), and by Sir Thomas Innes of Learney when he wrote that, "These according to Feudal theory, belonged to the same order as the Earls." [391]

This, surely, is what Stair is referring to when he states that "Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordship, earldoms etc. all which are but more noble titles of a barony, having the like feudal effects" in the passage cited by Lord Clyde (Stair, II.iii.45). Stair's main purpose in this passage, however, is to clarify further what is meant by erection, which he has discussed in the previous chapter, there explaining that the privilege of having one's lands erected into a *unum quid*, which can then be conveyed under the appropriate all-encompassing name, can only be granted by the Crown.

The final two sentences in the quotation from *Spencer-Thomas* where Erskine contrasts barons "in the strict law sense of the word" on the one side, with all feudal vassals holding direct of the Crown who are accounted, writes Erskine, as "barons in respect of the title to elect or be elected into Parliament", are a reminder that the word or style of "baron" had various meanings at different

times in history, not all of which related to a holding *in liberam baroniam*. These are fully discussed by Croft Dickinson in his introduction to the *Barony Court Book of Carnwath*. Here Erskine is referring to the qualification to vote in Parliamentary elections. I am not satisfied, therefore, that the passage from *Spencer-Thomas v Newell* supports Rothesay's proposition.

Rothesay cites a number of other passages from the Institutional and other writers which he contends support the proposition that "The Institutional and other writers recognised that a territorial Earldom is a higher territorial dignity, than that of a baron, but of like effect." This raises again the potential ambiguity inherent in the phrase "territorial earldom". It is not clear in any case whether any of the Institutional writers cited - Craig, Stair, Erskine and Bell – used the phrase "territorial earldom": as already noted this phrase seems to have come into use in the 19th century. Craig is cited as writing (I.12.15), "Dukes, marquesses and earls are all comprehended among the barons, and originally were all known under the latter description; but as the number of barons increased and the distinction attached to the title was correspondingly diminished the newer style of dignity grew into request." This is clearly an historical passage explaining the gradual evolution of peerage titles over many centuries. It refers implicitly to the fact, already discussed, that tenure *in liberam baroniam* was the highest form of feudal tenure known to Scots law. The dukes, marquesses and earls here referred to would in Scotland all have been recognised in these peerage titles by the Crown. In a later passage cited by Rothesay (I.1.23) Craig makes it clear that he is referring to "feudal nobility alone", and not to "nobility of blood", that is to personal peerage creations.

The passage from Stair II.3.45 referred to in *Spencer-Thomas* is also cited separately by Rothesay, as is the passage from Erskine (I.iii.46) to much the same effect. I do not agree that it is possible to extrapolate from these passages

the proposition that a person who owns lands which have at some time been erected into an earldom should be styled an earl. On the contrary, it suggests to me that in terms of the feudal grant the owner has no claim to a style greater than that of baron. This is confirmed by the next Institutional Writer cited by Rothesay, George Joseph Bell, who writes (*Principles*, 10th ed., para.750) that "'Barony' is truly only a feudal dignity conferred on territorial proprietors; lordships, earldoms etc being only nobler titles for a barony, as connected with personal dignities." Here Bell connects the appearance of the terms "lordship, earldom etc" in feudal grants with "personal dignities", that is with personal peerage titles. It is worth repeating that by the time of Stair, Erskine and Bell peerage creations had long since ceased to have a connection with the ownership of land. Rothesay also referred me to passages in Wallace on *Ancient Peerages* (2nd ed., 1785, pages 127 and 217), and to the decision of the Committee for Privileges in the *Kilwinning* Peerage Claim (21st June 1868), but I do not find that these advance the matter any further.

Rothesay also referred me to Craig I.12.25, and to the case of the earldom of Wigton in the 14th century as an example of a "territorial peer" deriving his title from the land and being recognised in that title so long as he was infeft, but losing the title when the land was sold. Such examples refer to a time which predates the introduction of a personal peerage and are, in my view, irrelevant to the present Petition.

Rothesay also referred me to the *Annandale Peerage Case* (1986 SLT (HL) 18). As a prelude to the case Percy Wentworth Hope Johnstone of Annandale and that Ilk matriculated Arms with the Lyon Court in 1983. Letters Patent dated 4th February 1983, following on a Warrant from Lord Lyon Innes of Edingight, design him *inter alia* as "Baron of the Barony of the lands of the Earldom of Annandale and Hartfell", and recognise him as Chief of Clan Johnstone, and as

being entitled as Representer of the Family to the Arms of Johnstone of Annandale and that Ilk without brisure or mark of cadency. He died that same year, but his son Patrick Andrew Wentworth Hope Johnstone of Annandale and that Ilk was recognised as 11th Earl of Annandale and Hartfell on 23rd July 1985 following a hearing before the Committee for Privileges of the House of Lords.

The case concerned the interpretation of two Crown grants of the earldom of Annandale and Hartfell in 1661 and 1662 respectively. In 1661 James, Earl of Hartfell was created also Earl of Annandale by Letters Patent of King Charles II with precedence according to the date of the Letters Patent which had created his father Earl of Hartfell in 1643. In 1662 a Charter of Novodamus under the great seal following on a Signature erected specified lands *in unum comitatum* followed by the words *cum titulo, stylo et dignitate comitis* ("with the title style and dignity of an earl"). The destination in 1662 differed from that in the Letters Patent of 1661. The question at issue was whether the 1662 grant did more than erect the lands into a free earldom, and amounted also to a peerage creation separate from and in addition to the creation of 1661. Much turned on the interpretation of the words *cum titulo, stylo et dignitate comitis*. In the event the Committee held that a separate peerage earldom of Annandale and Hartfell had indeed been created in 1662, that is, separate from the peerage earldom of the same name created in 1661. This meant that there had been two separate peerage earldoms of Annandale and Hartfell in existence at the same time, one of 1661 and the other of 1662. Such a situation was not, however, without precedent, there being, for example, two peerage earldoms of Mar. Lord Keith in his speech used the phrase "territorial earldom" referring to the erection of lands *in unum comitatum*, and distinguishing that from the peerage creation. He said, "I have come to be of the clear opinion, after some initial doubts, that the King, by the charter of 1662, intended to and did create, not only the territorial

earldom of Annandale and Hartfell, but also the new title, style and dignity of earl of Annandale to go with it upon the same destination."

I asked Rothesay if it was his submission that that not two but three earldoms of Annandale and Hartfell had been created by the Letters Patent of 1661 and the Charter of 1662. He answered in the affirmative, submitting that the Charter of 1662 had created two earldoms of Annandale and Hartfell, the one a peerage earldom giving rise to the style "Earl of Annandale and Hartfell" in the peerage of Scotland, the other a "territorial earldom", which also gave rise to the style "Earl of Annandale and Hartfell", but as a lesser dignity and not as a peerage earl. I have difficulty in construing the Charter of 1662 in this fashion. Lord Keith did indeed refer to a "territorial earldom" to describe the erection of lands *in unum comitatum*, but there is nothing to indicate that he believed that this in itself gave rise to the title of "Earl", far less to a title which would, like barony title, run with the lands. The title of "Earl" was not attached by the Committee to the erection of the lands into a "territorial" earldom, but to the words following, that is *cum titulo, stylo et dignitate comitis*, which allowed the Committee to infer the creation of a peerage earldom.

Rothesay Herald also directed me to the use of the phrase "territorial earl" in an Extract of Matriculation issuing from Lyon Office in 1985 after the resolution of the *Annandale Peerage Case*. The circumstances are not straightforward. In 1985, after his successful peerage claim, the 11th Earl petitioned the Lord Lyon King of Arms to recognise his eldest son as "Master of Annandale and Hartfell commonly known as Lord Johnstone", and for a rematriculation of his Arms with the additaments appropriate to him as holder of an earldom in the Peerage of Scotland. By Interlocutor dated 23rd September 1985 Lyon Innes of Edingight granted this Petition, designing the Petitioner as "EARL OF ANNANDALE AND HARTFELL in the Peerage of Scotland". The draft text

of Letters Patent following on Lyon's Interlocutor, designing the Petitioner as "11th EARL OF ANNANDALE AND HARTFELL in the Peerage of Scotland", was sent to the Petitioner's counsel, Sir Crispin Agnew of Lochnaw, then Unicorn Pursuivant. By letter dated 31st October he approved the draft text "subject to two minor additions marked in red". The Lyon Clerk, Don Pottinger, accepted these amendments, the first of which, it would appear, was the addition of the words "Earl of the Territorial Earldom of Annandale and Hartfell and Lordship of Johnstone", immediately after "11th EARL OF ANNANDALE AND HARTFELL in the Peerage of Scotland". These words, it may be thought, were hardly a "minor addition". The original Petition to the Lord Lyon had indeed described the Petitioner not only as 11th Earl of Annandale and Hartfell in the Peerage of Scotland, but also as "Earl of the Territorial Earldom of Annandale and Hartfell". However, the words "Earl of the Territorial Earldom of Annandale and Hartfell do not appear in Lyon's Interlocutor and do not appear to have been discussed or to have been the subject of a judicial determination by the Lord Lyon.

As mentioned already, the continuity as regards barony titles from early feudal grants of land *in liberam baroniam* to be held direct of the Crown to the current position where the dignity of baron has been preserved by the *Abolition of Feudal Tenure Act* of 2000 is undoubted. I do not think that this can be said of "territorial" or "feudal earldoms". On the contrary there is a clear break between the type of territorial earldoms which existed before the evolution of a personal peerage, and the later erection of lands into what has been termed a "territorial earldom". I therefore do not accept that it follows from the recognition of a feudal baron, or one possessed of the dignity of a former feudal barony, as "Baron of X", that the person in possession of a "territorial earldom" stemming from the erection by the Crown of lands into a free earldom, should be recognised as an "Earl" or "Countess", "feudal" or otherwise.

I asked Rothesay if he could point to the use of the style "feudal Earl" or "territorial Earl", or indeed simply "Earl", being used or recognised in respect of an erection of lands into an earldom by the great peerage writers of the 18th and 19th centuries, Lord Hailes and John Riddell, but he was unable to do so. When I asked if he could point me to any example of the recognition of the style of "feudal Earl" or "territorial Earl" in that context before 2006 he was again unable to do so, save for the questionable example of the earldom of Annandale and Hartfell considered above. When I asked how he accounted for this, he suggested that the question had not arisen until recent times, after the Second World War, when many old estates began to be broken up and sold. I do not find this a convincing explanation. It seems to me that for many centuries now titles such as "Duke", "Marquis" and "Earl" have followed on a personal grant from the Crown.

Before concluding I need to consider the fourth question which I asked Rothesay to address:

"Supposing feudal and territorial earldoms still to exist, might they be not be subject to the *Honours (Prevention of Abuses) Act* 1925 which prohibits the procuring of the grant of dignities or titles of honours in return for a gift, money or valuable consideration?"

In reply to this question Rothesay Herald submitted that the *Honours (Prevention of Abuses) Act* did not apply in the present case, and suggested that if it did, it would apply equally to the sale of baronies, as a barony is now recognised as a "dignity". He referred to Stair and Erskine and section 63 of the *Abolition of Feudal Tenure etc (Scotland) Act* 2000, and submitted that a feudal earldom was exactly the same type of "dignity" as a barony. However, the 1925

Act did not apply because the barony or the feudal earldom which was the subject of sale had already been granted to the first recipient. The 1925 Act only related to actions that led to … "the grant of a dignity or title of honour to any person." Baronies and feudal earldoms had already been granted or erected by Crown Charter or Letters Patent, and later transactions relating to them were transfers of corporeal heritable property by charter or disposition or, following the appointed day, transfers of incorporeal heritable property. Transfer of an existing dignity, even for payment, was not the same as "the grant of a dignity" in the words of the 1925 Act. The wording of a statute which creates a criminal offence was to be construed narrowly.

I accept these submissions in so far as they relate to the 1925 Act, although as explained above I do not accept the analogy made between a "feudal earldom" or a "territorial earldom" in the sense argued for and a "feudal" barony.

Taking everything into account, I have not been satisfied that I should grant the Prayer of this Petition. In reaching this decision I have also taken note of the argument put forward by Counsel based on the European Convention on Human Rights and am satisfied that this decision is not in breach of the terms of the Convention.

There is one final point. Rothesay Herald, at the start of his submissions, characterised this Petition as coming under my administrative jurisdiction and, therefore, as being to some extent a matter of discretion. It seems to me, however, that this Petition raises a question or questions of law, which may be subject to appeal.