

INSIGHT

Scottish Barony Title

A Scottish Barony Title is an officially recognised noble title available to purchase. Barony titles are personal titles separated from the land that they formerly belonged to and are no longer recordable in the public land registers.

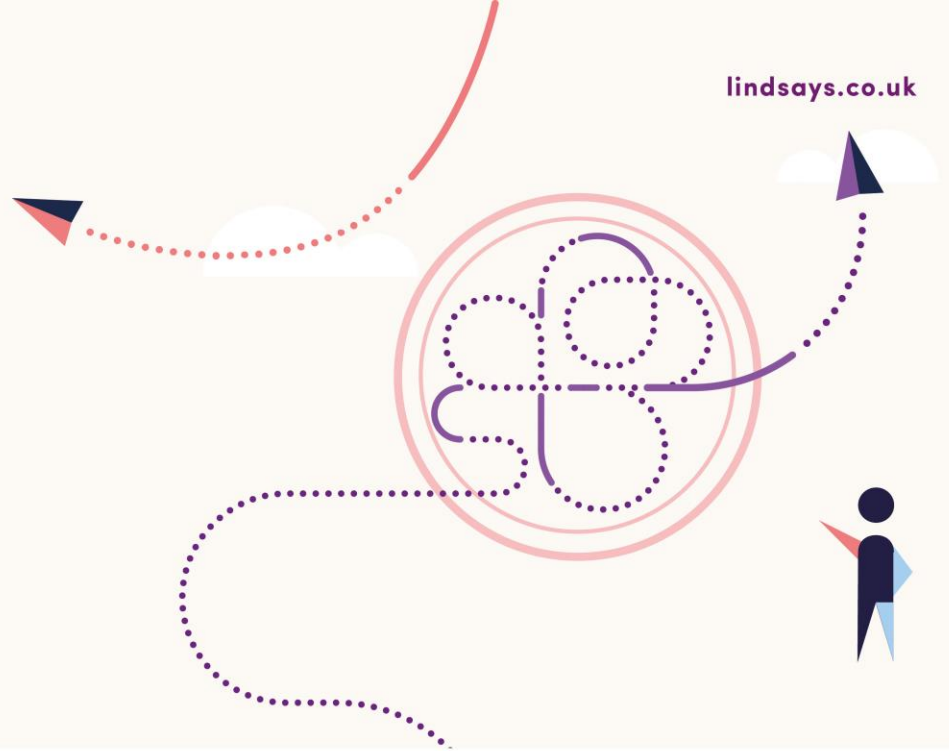
Introduction

The personal dignities of baron, lord, earl and marquis are uniquely Scottish titles which have survived feudal abolition, despite being completely dissociated from the land to which they were originally attached. Although feudalism in England declined from the late Middle Ages onwards it survived in Scotland until 2004. Dignity in this context refers to the title of baron, lord, earl or marquis which the holder is legally entitled to adopt on completion of the appropriate conveyancing formalities. In this paper 'barony' and 'baron' will be used as generic terms and will include the higher dignities.

Historical background

Until feudal abolition on the appointed day (28 November 2004) a barony, and the superior titles of lordship, earldom and marquise were estates of land held directly from the Crown. Historically the erection of land to baronial status secured the allegiance of the vassal to the Crown and was granted in return for military service.

The introduction of standing royal armies was one of the factors in the late medieval decline of feudalism. Although a grant *in liberam baroniam* was essentially a feudal creation, it has been suggested that barons were first created in the Gaelic Kingdom of Dalriada which existed in Scotland from the fifth to ninth centuries. While the notion that baronial grants pre-date the feudal system may be debatable it



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is clear that from the twelfth century onwards, they became more common.

Baronies were constituted by a Crown Charter which was recorded in the Register of the Great Seal of Scotland and until 1874 every new baron was confirmed by the Crown in a Charter of Confirmation. It is worth repeating at length Lord Clyde's seminal analysis of the nature of a barony in Scots law in his 1990 decision in the case of *Spencer-Thomas of Buquhollie v Newell* relating to the Barony of Freswick:

'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.86). In feudal classification a barony falls into the class of noble as opposed to ignoble feus. That classification is discussed by Craig (*Jus Feudale*, I. X. 16) and Bankton (II.iii.83). In Scotland the distinction was recognised between the greater barons and the lesser barons, the former acquiring such titles as Duke or Earl. It was at the earliest a territorial dignity as distinct from the later personal peerage. Thus when one was divested of an estate the title of honour ceased (Bankton, II.iii.84). In the feudal system, however, whether the dignity was that of a baron or of the greater dignity of an earldom, the feudal effects were the same (Erskine's *Institute*, II.iii.46).

As Stair put it (*Institutions* II.iii.45): "Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordship, earldom &c, all of which are

but more noble titles of a barony, having the like feudal effects".

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

A holding "in baroniam" transformed the landed estate into a new and clearly defined legal and administrative unit, described by the former Lord Lyon, Thomas Innes of Learney as "a peaceful self-governing social unit".

As well as significant commercial benefits the Crown grant also conferred important legal privileges, including the right to use the title of "baron" and the right of jurisdiction within the barony. Some barons courts exercised the right of "pit and gallows" and were able to impose the death sentence for cases of theft and manslaughter. Barons were also entitled to sit as Lords Temporal in the Scottish Parliament, though in terms of Acts of 1428 and 1587 they were permitted to absent themselves and appoint representatives in their stead. Sir Robert Douglas of Glenbervie, the genealogist and author of *The Baronage of Scotland*, commented that "there is no nation in Europe where the Gentry, or lesser Barons and Freeholders enjoy so much liberty, or had such extensive privileges as those of Scotland".



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The powers enjoyed by the barons were significantly reduced by the Heritable Jurisdictions (Scotland) Act 1746, though theoretically they retained a right of civil and criminal jurisdiction until it was formally abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000.

Over time baronies lost their economic as well as their legal significance as estates were sold off or broken up, often to pay death duties in the years following the two World Wars. Furthermore, with the termination of entails (a legal device to ensure succession to a designated line of heirs) "conveyancers all too often consigned baronies to history, and neglected to convey them with the land to which they were attached. Thus many have fallen through cracks in the floorboards of lax conveyancing, making proof of good title often torturous and sometimes impossible."

(Hugh Peskett, *Burkes Peerage*, 107th Edition). Stripped of their legal and economic benefits baronies were of little value to their holders.

Dignities and feudal abolition

Interest in baronies was revived by Sir Thomas Innes of Learney, Lord Lyon from 1945 to 1969. As a result of this renewed interest and the development of a small, but active, market in baronies they were accorded special treatment in the 2000 Act. In terms of Section 63(1) of the Act barony titles were converted into personal titles with no powers or responsibilities. In addition feudal abolition has not affected the ability of the holder of a barony to sell, gift or bequeath the title which is preserved as incorporeal property separate from the ownership of land:

'63 Baronies and other dignities and offices

- 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 feudal or origin).
- 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 of which a deed can be recorded in the Register of Sasines).'

As baronies can no longer be registered in the Sasine or Land Registers title is completed by delivery of the Assignation transferring ownership.

In order to preserve the integrity of the barony market, the Scottish Barony Register, a privately run, non-profit company limited by guarantee, has been established. Registration in the Register is for publication only, that is to say it is purely a method of publicising a claim to a barony and confers no additional legal validity. In the words of the current Custodian, Alistair Rennie, a lawyer and a former Deputy Keeper in the Registers of Scotland "even though the Register does not guarantee the validity of a claim it will provide a repository where claims to the Dignity of a barony and the evidence adduced to support them can be identified".

The current Directors of the Register are the



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Custodian, the writer of this article who is a practising solicitor, and Professor Paisley of Aberdeen University, one of the Scottish conveyancing professors and Stewart Brymer, a practising solicitor and an Honorary Professor in law at the University of Dundee.

Modern legal procedures

Prior to feudal abolition the right to adopt the title of baron was attached to the ownership of the caput or head place of the barony. The caput might have been a castle or mansion house, though could be another part of the estate such as a field, wood or standing stones from where justice was administered.

Although the barony has now been separated from the land, a purchaser will generally still need the services of a Scottish solicitor to assist with the examination of the title deeds and the conveyancing formalities. The title will involve a progress of writs from the last Crown Charter which will generally be a Victorian deed granted some time before the Conveyancing (Scotland) Act 1874 which dispensed with the requirement for Crown consent to any change of ownership. Assuming the title is valid the parties will enter into a contract and shortly after conclusion of this contract, and on completion of the remaining due diligence, the barony will be assigned to the new owner.

At the point of delivery of the Assignation to the purchaser title transfers to the new owner. The Assignation is then generally registered in the Scottish Barony Register and while registration is not compulsory, it is recommended to preserve the marketability of the particular dignity and the integrity of the market as a whole. Registration dues are charged by the Register - £700 in the case of a first registration and £350 for subsequent registrations.

Why own a dignity?

The motives for acquiring a dignity are as varied and as interesting as the people who purchase them. For some it is an opportunity to buy a piece of Scottish history, for some it is a way of re-connecting with their Scottish roots, for others it is a way of enhancing their social or professional standing, while for others it is a passport into the world of Scottish heraldry.

Periodically there are protests about the trade in baronies and the alleged squandering of Scotland's heritage. Such protests perhaps display a misunderstanding of the nature of Scottish baronies pre and post-feudal abolition. What distinguished "feudal" barons from other peers was the fact that, while they enjoyed their status as a result of royal patronage, their baronies were essentially commercial holdings which were transferable, albeit with the formality of royal consent. In response to the disapproval of the sale of baronies it has been suggested by an expert in the field that 'an inherited title is clearly no more "earned" than a purchased one'. Such disapproval will no doubt continue to arise periodically, but the benefits to the Scottish economy of the trade in baronies are not insignificant.

Heraldry

The grant of Arms is a matter within the discretion of the Lord Lyon, who is the Crown's representative in all heraldic matters in Scotland. The holder of a Scottish barony can petition the Lord Lyon for a grant of Arms with additaments appropriate to a baron as long as the holder falls within Lord Lyon's jurisdiction and is a virtuous and deserving person. Until recently foreign petitioners, although holders of a Scottish barony, were precluded from petitioning as they fell outwith Lyon's jurisdiction. In 2009 Lyon Sellar confirmed that



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he would officially recognise barons who meet certain conditions.

His Note issued on 1 December 2009 is worth repeating at length:

'The following Note was attached to a Warrant issued by the Lord Lyon King of Arms of date 1 December 2009 granting Armorial Bearings to Mark Paul Lindley-Highfield of Ballumbie Castle, Baron of Carlsburn:-

NOTE:

In his Note dated 15 May 2006 refusing the Petition of Margaret Hamilton of Rockhall, Baroness of Lag, as regards the appropriate form of baronial additaments, Lord Lyon Blair also considered what evidential value might attach to an entry in the private and unofficial "Scottish Barony Register" which had been established as a means of recording the transfer of quondam feudal baronies following the coming into force on 28 November 2004 ("the appointed day") of the Abolition of Feudal Tenure etc (Scotland) Act 2000, Section 63 of that Act dissociates such baronies from both jurisdiction and land. The Act, however, preserves the dignity of baron, but enacts that after the appointed day any such dignity shall be transferable only as incorporeal heritable property. Lyon Blair indicated that he was not disposed to accept an entry in this private register as proof that a Petitioner was entitled to the dignity of baron. He noted the difficulty in regard to verifying both the existence and the ownership of a barony since the appointed day given the lack of an official public register. The Scottish Barony Register was a private register with no statutory basis which offered no guarantee of the validity of any claim and was not covered by any government indemnity providing protection from error or fraud. It had been established as a company limited by guarantee, one of the directors

being Mr Brian Hamilton who was well-known as being active in the purchase and sale of baronies [n.b. - Mr Hamilton is no longer a director]. Lyon Blair was also critical of some of the terms and conditions attached to registration. He concluded, "I do not consider that a private Register, managed by a person appointed by a private company with no public scrutiny, and operated under terms which allow complete discretion as to what evidence is to be provided, is an acceptable source of evidence in an application before the Court of the Lord Lyon."

Lyon Blair's ruling in that Petition was subsequently subject to judicial review. When the review reached court, the parties were able to agree a statement as regards the appropriate form of baronial additaments, to which the Court interposed authority. That agreement, however, did not include consideration of the evidential value of the Scottish Baronial Register. Accordingly Lyon Blair's comments on this still stand. I am persuaded that there is considerable force in Lyon Blair's reasoning and am not prepared to accept an entry in the Scottish Baronial Register as being, in itself, sufficient proof of ownership of the barony in question. I appreciate, however, the unsatisfactory nature of the present position in relation to baronies and the need to explore further options. In the meantime I am persuaded that I can regard the present Custodian of the private register, Mr. Alistair Rennie, as a man of skill, and am prepared to take his approval as Custodian of the registration of the ownership of a particular barony, as evidenced by the company registration stamp, coupled with a confirmatory statement to Lyon Office from Mr. Rennie himself, as being, in principle and for aught yet seen, sufficient proof of the existence and ownership of the barony in question. It is on this basis



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that I have determined that the Petitioner is entitled to the dignity of baron of Cartburn for aught yet seen.

(signed) David Sellar
Lyon

In 2014 Lyon Morrow issued a Note in relation to a petition submitted by the holder of the Regality and Lordship of the Garioch. The Note addresses the issue of whether ownership of a higher dignity is sufficient to bring the petitioner within the jurisdiction of the Lord Lyon for the granting to him of Arms and a copy can be read on the Lyon Court website, www.lyon-court.com. The conclusion reached by Lyon on the case of the Garioch was that the petitioner's ownership was sufficient to found jurisdiction and the terms of the Note now provide the template for petitions by the holders of Lordships and the other higher dignities of Earldom and Marquisate. The main prerequisite is that the Assignation of any higher dignity should narrate the fact that such dignities are "of the genus barony". There are still issues surrounding petitions founded on feudal Earldoms where this is an existing territorial Earldom of the same name. It is worth taking advice before acquiring a Lordship, Earldom or Marquisate if the intention is to petition for Arms.

Assuming petitioners meet the relevant preconditions Lord Lyon will grant Arms with a helm fitting their degree. He will no longer officially recognise the petitioner's dignity, but will simply include words of recognition which acknowledge the fact of ownership. It should be noted however that Lord Lyon has no jurisdiction in relation to the transfer of baronies so while he may decline to grant Arms or certain additaments, his opinion does not affect the validity of the title to the barony. Further guidance on heraldic matters, including recent general guidance by Lord Lyon on Baronial

Additaments and Territorial Designations, can be found on the Lyon Court website.

Lindsays has acted in a significant number of sales and purchases of dignities and represented clients in a number of leading legal cases in the Lyon Court and the Court of Session. This article will be updated on an ongoing basis to reflect developments in the law and practice surrounding dignities.

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