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A SOUTHERN CALL TO ARMS: AN ARMORIAL COMPACT

Duane L.C.M. Galles†

Legislation is among the subtlest and most skillful instruments of the law and during this century the interstate compact has evolved to be one of the deftest indigenous species of the genus. So deft is the modern interstate compact that it can accomplish the improbable and attain what until a few decades ago would have seemed merely visionary. By an interstate compact an office in abeyance for nearly three centuries, medieval in origin, and seemingly out of touch with contemporary mores could be revived today in a form in harmony with current legal doctrines and administrative practice. The office is that of Carolina Herald. It was created in 1705 by the Lords Proprietors of the Province of Carolina. It enjoyed jurisdiction in armorial matters over the territory now encompassed by the states of North Carolina, South Carolina, Georgia, (part of) Florida, Alabama, Mississippi, and Tennessee.¹

Actually, the revival of the office is not so improbable as some might think. Heraldry or armory is the art and science dealing with coats of arms and other armorial emblems. Though medieval in origin, heraldry has long been of interest to Americans. An early American student of heraldry was Philadelphian William Barton. He was trained in the art by none other than Sir Isaac Heard, later Garter King of Arms, who was George III’s principal specialist in matters armorial. Barton used his heraldic expertise to good advantage and served as expert consultant to Congress in 1782, aiding Congress in the design of a coat of arms for the new United States. Barton is credited with steering Congress away from the classical emblems suggested by Jefferson and towards the heraldically cor-


¹ Waring, The Carolina Herald, 72 South Carolina Historical Mag. 161 (July 1971).
rect arms actually adopted by Congress. Later in 1788 Barton wrote a treatise on heraldry which received the praise of Washington. Indeed, the Father of Our Country—who himself made use of a coat of arms—wrote Barton that he found in heraldry nothing "unfriendly to the purest spirit of republicanism."

In this century there has been a revival of interest in heraldry. The democratic Swiss are among the most avid contemporary students of heraldry and their journal *Archives suisses héraldiques* is among the leading heraldic publications in the world. The Irish republic in 1943 created its own office of Chief Herald of Ireland who in 1963 made a grant of arms to a well-known American, President John Fitzgerald Kennedy. In 1954 England's ancient heraldic court, which had been in abeyance since 1737, was revived. That year the court of chivalry or the Earl Marshal's court sat with Lord Goddard, Lord Chief Justice of England, sitting as surrogate for the Earl Marshal in a civil case. The Republic of South Africa in 1962 created its own Bureau of Heraldry headed by a State Herald. Recently, on June 4, 1988, the Canadians set up their own Heraldic Authority.

What is distinctive about the office of Carolina Herald is that it would result in an American heraldic authority with origins going back three centuries. Unlike the Irish, Canadian or South African heraldic authorities, the American office would not be a new creation. The successor states to the Lords Proprietors, by means of an interstate compact, would merely revive it or "call it out of abeyance."

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3. Watt, *The Canadian Heraldic Authority*, 22 *Heraldry in Canada* 4, 11 (Sept. 1988). The Canadian Heraldic Authority was constituted within the office of the Governor General, who acts as the Queen's representative. The Governor General's Secretary is the Herald Chancellor and the Assistant Secretary is Deputy Herald Chancellor. Together they provide supervising authority similar to that of the Earl Marshal in England. The professional staff is composed of the Chief Herald of Canada and three junior heralds, each named after one of Canada's great rivers, Saint Laurent, Athabaska, and Fraser. Saint Laurent serves as Registrar and Keeper of the Seal of the Authority and thus functions somewhat like a clerk of court.

In Scotland heraldic matters by statute fall under the jurisdiction of the Court of the Lord Lyon, which is a court of record with both civil and criminal jurisdiction. D. Walker, *The Scottish Legal System* 221 (1976).
The First Carolina Herald

The first Carolina Herald was Lawrence Cromp. In 1705 His Excellency, John, Lord Granville, Palatine of Carolina, along with the Right Honorable Lords Proprietors of Carolina, presented Cromp with a patent creating him for life “President of our Court of Honour and principal Herald of our whole Province of Carolina, by the name of Carolina Herald.” In the language of the Roman law tradition Cromp was given both voluntary and contentious jurisdiction. That is to say he had both executive and judicial power. The patent in fact conveyed three main powers.

Carolina Herald was authorized to “grant and assign . . . such arms and crests as you shall think most fit and proper to all such inhabitants of our said Province” of Carolina and to keep a register of the same. Second, Carolina Herald was authorized to bestow distinctions of honor and to regulate precedence in the province. These were executive powers. Finally, he was authorized to hold a Court of Honour and to cite and cause persons to appear before him to hear and determine controversies regarding coats of arms. This judicial power could be exercised in civil cases where two parties disputed the right of the other to the use of armorial bearings, or it might be exercised in criminal or “office” cases where Carolina Herald initiated enforcement action *sua sponte* against a party for improper use of armorial bearings.4

Lawrence Cromp, the only incumbent appointed to the office of Carolina Herald, was no tyro in matters armorial. He had long been a member of the College of Arms in London, the official English armorial authority incorporated by royal charter in 1484 by Richard III. In 1689 Cromp, as Portcullis Pursuivant, entered the ranks of the College’s officers of arms. Eleven years later he was promoted to the office of York Herald. He had thus been a herald in England for five years before being appointed Carolina Herald as well. He occupied the office of Carolina Herald until his death in 1715.5

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5. M. Noble, *A History of the College of Arms, and the Lives of All the Kings, Herald, and Pursuivants, from the Reign of Richard II, Founder of the College, Until the Present Time* 359 (1804). The English College of Arms consists of three senior armorial officers, known as “Kings of Arms” and bearing the titles of Garter King of Arms, Clarenceux King of Arms, and Norrey King of Arms. There are also six heralds (bearing the names of Chester, Windsor, Richmond, Somerset, York,
His death proved untimely. Matters of the Lords Proprietors of the Province of Carolina were in turmoil. Their domain was in disarray. The political situation was delicate in the province and there was a movement afoot to sever the province in two. Furthermore, the proprietors were tiring of the burdens of governance and were considering the surrender of their charter to the crown, which in fact—thanks to a revolution in 1719—they did. Nor was the economy of the province more encouraging. Beginning in 1712 the Tuscorora and Yamassee Indian wars devastated the province. In short, the times were not auspicious for filling the vacant office of Carolina Herald. 6

REVIVAL BY COMPACT

The enabling instrument for the revival of the office of Carolina Herald was not created until many decades after the death of Lawrence Cromp. Its adaptability to that end did not become clear until the twentieth century. This instrument is the compact clause of the federal Constitution of 1787. During the first century and a half of its existence its potential was under-used. From 1789 to 1900 only twenty-one interstate compacts were entered into. Compacts were used only to settle boundary disputes until 1921. In that year occurred the first significant use of the compact clause to create an interstate public authority. This was the Port of New York Authority Compact. The compact created an interstate agency to develop, construct and operate transportation facilities in the New York port area. The agency proved a signal success and this injected new life into the compact clause. A number of other compacts followed in quick order. The Colorado River Compact, for example, was notable for its geographical reach.


6. R. Weir, Colonial South Carolina: A History 50, 85, 101 (1983). Doubtless the partition of the Province of Carolina had the most deleterious effect on the prospects of the office of Carolina Herald. One need but consider the effect that partition of Ireland in 1922 had on its ancient heraldic officer. Ulster King of Arms enjoyed heraldic jurisdiction throughout the thirty two counties of Ireland. With the advent of the Irish Free State came a partitioning of heraldic jurisdiction by the appointment in 1943 of a new Chief Herald of Ireland. For the six counties of Northern Ireland the office of Ulster King of Arms was continued and united with that of Norroy King of Arms, an officer of the English College of Arms. S. Friar supra note 5, at 202.
Concluded by seven western states, it settled the thorny problem of the allocation of the waters of the Colorado River. Today there are said to be some 176 operative compacts in the United States.7

The compact clause prohibits any state, without the consent of Congress, to "enter into any agreement or compact with another state, or with a foreign power." While expressed as a prohibition, the clause has always been interpreted as an affirmative grant of power to the states with the consent of Congress, to enter into compacts or interstate agreements. Long considered the legislative instrument for the resolution of interstate disputes, Mr. Justice Brandeis declared it "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."9 Recently the United States Supreme Court has determined that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of the agreement is an appropriate subject for congressional legislation," "congressional consent transforms an interstate compact within this [Compact] Clause into a law of the United States . . . ."10 Its construction, therefore, is a federal question. Given their status as federal law, under the supremacy clause, compacts supercede otherwise valid state restrictions, including restrictions part of a state constitution.11

Interstate agreements begin with the states interested in a particular measure. The terms are concluded and stated in the form of an agreement which is then consented to by act or joint resolution of Congress. This act or joint resolution of Congress must be approved by the president. Once the federal consent is given, compacts then acquire the status of federal law.


8. U.S. CONST. art. I, § 10, cl. 3.


THE SHAPE OF THE COMPACT

How ought a compact reviving the office of Carolina Herald be structured? Administrative law, the history of public authorities created by compact, and traditional heraldic law suggest an answer. Using the model of the Port of New York Authority, a public authority could be established. This would enable Carolina Herald to wield both legislative and judicial authority without trenching on the separation of powers doctrine. Public agencies traditionally do both through rulemaking and adjudication of contested cases.\(^{12}\)

The governing body of the public authority could be a commission or council, called the “Carolina Heraldic Authority,” composed of one councillor appointed for a fourteen-year term by the governor of each of the (seven) compacting states. The terms of the initial councillors could be for periods of two, four, six, eight, ten, twelve, and fourteen years, chosen by lot, to provide staggered terms and greater continuity of membership on the council. Like judges in England, a councillor might be removed by the appointing authority upon address by the legislature of the state making the appointment.

The council would have authority to appoint for a fourteen-year term the public authority’s administrator, known as Carolina Herald. To be appointed Carolina Herald one would need to be learned in the law and in matters armorial. Carolina Herald would enjoy basically the same powers granted to the first Carolina Herald, revised, however, to suit contemporary American legal norms as well as the peculiar structure of the agency.

Carolina Herald would have authority to grant to public and private persons coats of arms, badges, and other distinctions of honor. This raises immediately the question of what law would govern such grants. Because Carolina Herald was at the same time an English armorial officer with the title of York Herald, it might be presumed that English heraldic law had been incorporated into the province of Carolina. Yet the patent of 1705 in no way made Carolina Herald subject to the English heraldic establishment. There was no provision, for example, for appeals from the provincial herald to a metropolitan authority. Rather, like Ulster King of Arms in Ireland, Carolina Herald

appears as an autonomous heraldic authority. In fact, the Irish heralds did follow English heraldic law but they felt themselves free to adapt it to Irish circumstances. This seems the appropriate approach for Carolina Herald.

Arguing by analogy with admiralty jurisdiction would produce a similar result. Like the Earl Marshal's court, the court of the admiral formed one of the civil or Roman law branches of English law. It was not a common law court and looked to Roman or civil law for much of its substantive and procedural law. It has been held that by vesting admiralty jurisdiction in the federal courts, the United States Constitution "took over the traditional body of rules, precepts and practices known to lawyers and legislators as the maritime law, so far as the courts invested with admiralty jurisdiction should accept and apply them." Thus, what looks like a mere grant of jurisdiction was in effect an adoption of substantive law. Furthermore, the federal admiralty courts have power, not only to "accept and adapt" maritime law, but also to "continue the development of this law within constitutional limits." By analogy the vesting of armorial jurisdiction in Carolina Herald in 1705 took over the traditional body of armorial law and rules, so far as Carolina Herald and his successors should "accept and adapt" them. Furthermore, Carolina Herald would have authority to continue the development of this law within constitutional limits.

Coats of arms are a species of property akin to an incorporeal hereditament. Traditionally they descend from the grantee upon his death to his eldest son lawfully born of his body. Younger sons and adopted and illegitimate issue can only use the paternal arms if it is "differenced" or distinguished by the addition of a distinctive mark or "charge." If there are no sons, daughters inherit the undifferenced paternal arms.

This bias in favor of the eldest legitimate male heir of the grantee may raise "equal protection" questions. The traditional system favors the eldest son over younger sons, male

13. See the text of the 1705 patent in Waring, supra note 1. For information on Ulster King of Arms see S. Friar, supra note 5, at 202.
issue over female issue, legitimate over illegitimate children and biological over adopted children. In England an adopted child’s coat of arms is differenced by the addition of two interlacing chain links, in Scotland by the addition of a voided canton. Bastardy is generally denoted by a special border about the shield.16

Yet similar preferences are upheld in other areas of law. At common law family burial plots do not pass under the residuary clause of a will but rather, as in intestate succession, to the children of the decedent. In one state—Minnesota—it is even provided by statute that a family burial plot pass to the eldest child of the decedent.17 Similar preferences are found in those states where fee tail persists, for it is often provided that the entail is limited to the grantee and the grantee’s immediate successor.18 In any case it has been proposed that the Canadian Heraldic Authority end the distinctions based on sex, legitimacy, and adopted status. In “adapting” traditional armorial law Carolina Herald might prudently find the Canadian precedent persuasive.

To avoid running afoul of the constitutional clauses proscribing titles of nobility,19 grants of arms might be defined as personal distinctions of honor which confer no special legal status or privileges and are merely the non-assignable, intangible personal property of the grantee for life. The right would be akin to legal rights in trade marks and trade names, except that in the case of armorial ensigns there would be absent the requirement of use in commerce.

Within the territory of the compacting states and to the extent not governed by federal statute, Carolina Herald might also be authorized to regulate precedence.20 To accomplish all these ends Carolina Herald would be authorized to make bylaws and rules, including procedural, interpretative and legislative rules, in the manner of the Federal Administrative

16. Innes, The Role of Heraldry in the Organization of the Family, 21 HERALDRY IN CANADA 40, 44 (Dec. 1987); S. Friar, supra note 5, at 13, 48.
20. Ashton v. Jennings, 3 Keb. 462 (1675) decided that cases of precedence were subject to the Court of Chivalry and not to the common law courts. G. Squibb, PRECEDENCE IN ENGLAND AND WALES (1981).
Besides regulatory powers, Carolina Herald would also enjoy adjudicatory powers. Like the first Carolina Herald, the agency official would be authorized to hear and determine controversies between claimants to armorial bearings. This official's status in such cases would be that of an "article I court," like the martial courts, enjoying subject matter jurisdiction where the controversy arose out of a grant of Carolina Herald or where the defendant to an armorial controversy is an inhabitant of one of the compacting states. Carolina Herald would have power to order persons to cease and desist from the improper use of armorial bearings. Enforcement of these orders could be sought in the federal court of appeals. Appeals from the decisions of Carolina Herald might also lie to the federal court of appeals.

Like the first Carolina Herald, the head of the revived authority would be authorized to initiate enforcement action\textit{sua sponte} and summon or cite persons to attend and defend their actions and mete out punishment to wrongdoers. The grant of subpoena power would be appropriate, too. Punishment would have to be defined with specificity, perhaps incorporating by reference federal statutory penalties or state statutory penalties of one of the compacting states. Appeals in such cases would lie to the federal court of appeals, which could issue injunctions and use its contempt powers to enforce the orders of Carolina Herald. The expertise of Carolina Herald would be entitled to deference by the courts if supported by substantial evidence.

From the administrative point of view, Carolina Herald would be authorized to execute contracts, to hire pursuivants and other assistants, and to provide for the monetary compen-

\footnote{21. 5 U.S.C. §§ 551-559 (1988). In rule-making and in establishing policies, it would be well for Carolina Herald to remember that heraldic law stems in large part from the Roman or civil law tradition. Thus, Carolina Herald's usage and procedure, like that of the admiralty courts, might reflect this distinct tradition. In the Court of Chivalry the sovereign was represented, not by the Attorney General, but by the King's Advocate. Practitioners came not from the common law Inns of Court but from the civil law Doctors' Commons. "Civilians," as the civil law practitioners were styled, bore titles derived from the Romano-canonical tradition. They were not called "barristers" and "attorneys" as in the common law courts, but rather "advocates" and "proctors." The defendant was "cited," not "summoned" and the decision of the court was not a "judgment" but a "sentence." G. Squibb, \textit{The High Court of Chivalry} 132, 133, 136, 199, 211 (1959).}
sation of the authority's officers and staff. Its budget would be presented annually by Carolina Herald to the council of the Carolina Heraldic Authority, which would have authority to approve it and authorize expenditures. Any profits of the authority would be distributed annually to the compacting states on the basis of population, based on the most recent federal decennial census. Should the agency be dissolved, its assets would be liquidated and distributed to the compacting states on the same basis. Carolina Herald would in addition make an annual report to the council of the Carolina Heraldic Authority and copies would be forwarded to the governor of each compacting state.

Carolina Herald would be authorized to sue and be sued, to adopt arms and a seal, to fix a seat and establish an office there, to purchase and hold property, including such books and records as might be reasonably necessary for the execution of the agency's authority. Hopefully, the office of Carolina Herald would be fixed in Charleston, South Carolina, the seat of the proprietary government. But there would be nothing to prevent the establishment of branch offices, each headed by a pursuivant—perhaps in each compacting state.

And so we have limned out a sketch of how the office of Carolina Herald might be revived today by means of a compact or interstate agreement. The Port of New York Authority so far has been the most signally successful use of the compact clause to establish an interstate public authority. That agency's practical success and subsequent federal case law have served to demonstrate the potential of the compact clause and laid a foundation for its use to revive the office of Carolina Herald.

Of course, other regions are free to avail themselves of the compact clause, too. New England, for example, could by use of the compact clause transform into a public authority the presently private Committee on Heraldry of the New England Historic Genealogical Society. The Committee on Heraldry was established in 1864 as a standing committee of the society and reviews and approves claims by Americans to coats of arms based on grants by foreign public authorities and by user. Since 1928 it has periodically published in the New England Historical and Genealogical Register a "roll of arms" approved
by it.\textsuperscript{22}

But only in the South is there an historic opportunity for the legal successors of a once-existing armorial authority to "call it out of abeyance" and restore it as a functioning public authority. Not only would the compact clause permit revival of the office of Carolina Herald, it would also distinguish it from the new heraldic authorities created in recent decades in Ireland, South Africa, and Canada. One hopes that the instrument at hand will be used and used well.

\textsuperscript{22} For a short history of the Committee on Heraldry, see 112 New Eng. Historic and Genealogical Reg. 166 (1958).