

The Lord Lyon's Reply

COURT OF THE LORD LYON PETITION OF IAIN McMILLAN MacAULAY

This is a Petition by Iain McMillan MacAulay for the grant of the undifferenced Arms of MacAulay and for recognition as chief of Clan MacAulay. Background The last known chief of Clan MacAulay was Aulay MacAulay who sold the MacAulay estate of Ardincaple in the late 18th century. A Clan Association was set up in Australia in 1982 and there are also Associations in USA and Canada. Between 1991 and 1995 Archibald Craig MacAulay attempted to find genealogical proof to show that he was descended from MacAulay of Ardincaple.

He died in 1995.

The search was then continued by Iain McMillan MacAulay, his brother. Meantime Iain Davidson MacAulay had started research to find his own descent. Iain McMillan MacAulay was granted Arms on 5th January 1994. On 5th November 1997 a Commission was granted appointing Iain McMillan MacAulay as interim Commander of Clan MacAulay without limit of time. Iain Davidson MacAulay confirmed that he had no objection to this appointment. The Commander arranged for a Clan Constitution to be drawn up in 1998. In 1999 the Commander planned an ad hoc derbhfine with a view to nominating a person to be appointed as chief Iain Davidson MacAulay objected and the derbhfine did not meet but the Lord Lyon gave Iain Davidson MacAulay until January 2001 to come forward with a claim.

No claim has been put forward by Iain Davidson MacAulay. Two other people have indicated that they might have a claim but neither of these has been pursued. In 2001 an ad hoc derbhfine was convened by Ross Herald and was held in August 2001. No formal advertisement of the convening of the derbhfine was made and nor was this called for by Lyon.

Based on information supplied by the Clan Association and after verifying the armigers from Lyon Office, Ross Herald wrote to 6 armigers and 10 landowners. Five of the landowners proved title by sending their title deeds. Three members could not attend and sent in postal votes. Two armigers, one being Iain Davidson MacAulay, asked for the right to make a statement at the derbhfine meeting. Ross Herald agreed to this but requested a sight of the statements in advance.

The proceedings were conducted by Ross Herald in accordance with procedure agreed in advance with the Clan Association. The decision of the derbhfine was to propose to Lyon that Iain McMillan MacAulay should be appointed as chief.

This Petition has been presented in implementation of the decision taken by the derbhfine. The General Position The Lord Lyon has had a rule of thumb, not applied in all cases, that 20 years should elapse before a Commander could be accepted as chief. The traditional procedure is that, where a clan finds itself with no identifiable chief either by descent or by tanistry, an ad hoc derbhfine convenes and proposes to Lyon that a particular person is accepted as chief. The derbhfine is very much a last resort and should not consider proposing a person for chief unless there is no real hope that a genealogically related descendant could ever be found. Historically the position has been that the derbhfine does not convene specifically for the purpose of selecting a chief It comes together without any preconceived plan in order to decide what to do.

The personal standing of an individual proposed by a derbhfine must be considered. Sir Aeneas Macpherson's "The Loyall Dissuasive" p.35 indicates that a person could not be accepted as a chief unless he came from noble stock. An ignoble community could elect whom it liked, but a clan would need to be led by a person with a genealogy of some length showing that his forebears were people of some standing in their community.

Issues arising in the present case This is the first time that a proposal has come to Lyon from a derbhfine for a person to be appointed as chief where the person proposed has no genealogical link to the last known chief. No such case has come before Lyon so far as I am aware, since the present heraldic registration regime was established in 1672. There have been proposals from derbhfines for individuals with no proven genealogical pedigree to be appointed as Commander, and there have been derbhfine proposals for chief where the individual has a genealogical link to the last known chief but where the main line of descent has failed. In deciding whether to grant the prayer of the present Petition:

I have to consider the following factors:

- (a) Is it appropriate to make the proposed appointment?
- (b) Is the Petitioner the appropriate person to be appointed?
- (c) Is it appropriate that an appointment should be as chief of all the Macaulays?

Whatever is decided in this case will have a bearing on many other clans and families where the search for a genealogically related chief proves inconclusive.

I am aware of a number of clans where such research is being conducted. The decision in this case could open a door towards chiefship for many clans whose chiefship has remained dormant because of the impossibility of identifying a genealogically related chief.

What is Clan MacAulay? During the period prior to the holding of the derbhfine meeting other possible claimants emerged which might have led to the establishment of a genealogical connection back to Aulay MacAulay of Ardincaple.

There are three branches of MacAulay, Ardincaple, Lewis and Ireland. No claimants have come forward from either the Lewis or Ireland branches. While there is a certain amount of historical information about the MacAulays of Ardincaple, there does not seem to be any evidence that they were connected at all with the Lewis MacAulays.

Doubt surrounds the question of when the MacAulays first became associated with Ardincaple. To what extent the MacAulays either descended from the Earls of Lennox or were a cadet of Macgregor of Glenstray is also uncertain, as is the question of whether the MacAulays possessed Ardincaple from the sixteenth century or from considerably earlier.

It is thought that the Irish branch descended from the Ardincaple family but little research has been done on the Irish MacAulays. Whatever their origins, there does not seem to be any firm basis for considering the present Petition other than in the context of the Ardincaple MacAulays alone.

The position of other claimants During the period up to 1999 three other claimants emerged. The most significant claim was from Iain Davidson McAulay. At the meeting of the derbhfine in August 2001 Iain Davidson McAulay registered his opposition to the proposal of Iain McMillan MacAulay as nominee but he withdrew his opposition and the decision of the derbhfine was unanimous.

The other claimants have dropped their claims but a further possible claimant has emerged since the derbhfine was held from a person who was not aware that the derbhfine meeting had taken place. This casts doubt on how widely known it was that the derbhfine was taking place, and whether the possibility of further claims has been exhausted. The position of the Petitioner Here we have the situation where the driving force has been the Petitioner himself.

He applied for his own Arms, he gained support for the holding of a derbhfine and organised the meeting held in 1999. He applied to Lyon and was appointed Commander. He was encouraged by Lyon Innes of Edingight to revive the MacAulays and he has done that. He organised the Clan Association and secured approval for its constitution. It is doubtful if much would have happened without Iain McMillan MacAulay's actions. The position of other clans In other cases there has been a distinction between the members of the clan who have been working towards finding a chief and the person of the proposed chief himself In other meetings of derbhfines for chiefs there has been a candidate who had an imperfect blood link and the derbhfine provided the authority of the clan for that person to be nominated.

Here we have no blood link and merely the derbhfine as authority. There are many clans who have been engaged in research over their chief over lengthy periods. This search is a challenge and one which those engaged in it often find frustrating but which they also relish. I have also to consider the position of other clans where it has been indicated that a 20 year period should elapse before a Commander is considered for chief.

In this case a little over 4 years has elapsed between Iain McMillan MacAulay's appointment as Commander and the convening of the derbhfine. If this Petition is granted it is likely that other clans where a 20 year period is running would seek to have this period disregarded.

A decision in favour of the Petitioner in this case could be interpreted as a signal that any clan who had no identifiable chief could come forward whenever they wanted with a nominee, whereas a clan with a doubtful claimant would have to wait 20 years.

I have concluded that, whatever is decided in this case, it will be helpful to lay down guidelines for the future so that everyone can be clear as to the procedure and timetable which I intend to follow in future.

The position of the MacAulays For the reasons already stated as regards the three branches of the MacAulays, I am not prepared to recognise a chief of all the MacAulays.

I have considered the Petition on the basis that the Petitioner might be recognised as Chief of the Name of MacAulay of Ardincaple. A decision to recognise Iain McMillan MacAulay as chief would, for the Ardincaple MacAulays, mean that the search for a blood link

was considered by Lyon no longer necessary and would discourage any Ardincaple MacAulays so inclined from the challenge of further research

Admittedly there would be a 20 year period during which a challenge to the chief's appointment could be made. Thereafter Lyon's decision in this case would be protected both by the 20 year negative prescription in terms of the Prescription and Limitation (Scotland) Act 1973 and by the 20 year positive prescription provided by Scotland's heraldic law as described by Sir George Mackenzie (Works Vol II pages 5823) and referred to in Angus Charles Macalister of Loup, Petitioner (Lyon Court records 1991, Vol 77/16).

In any such challenge during the period of 20 years the onus would have shifted from a search leading towards the objective of finding a chief, to a challenge to an incumbent, implying an adversarial element which would not otherwise be present. It would also have to be accepted that the chief would in the meantime be busy creating a presence and performing a function.

Any challenge could be seen partly as a criticism of these activities. Mounting a challenge within the 20 year period would be a rather different proposition from researching a possible claim in the first instance. If no appointment is made the reasons would need to be clear so that the clan would know whether an application would be considered at some later date and on what basis it might have some prospect of success.

Another factor to be considered is morale within the clan. The traditional role of the derbhfine was to rally the clan by trying to reach a consensus as to the way forward. If possible decisions should be unanimous at a derbhfine meeting as indeed they were in this case.

Traditionally members of the derbhfine would see themselves as the senior members of the clan with a duty to know the feelings of the rank and file and to reach a decision which they would be satisfied would have the enthusiastic support of the clan generally.

Lyon has to consider whether implementing the nomination of a derbhfine will cement the clan together or split it apart. One of the reasons for a lengthy delay before considering the question of a chief is that the elapse of time may help to bring the clan together or to flush out disagreements. A decision taken too soon might not allow this to become clear.

I have also to consider the longer term future. It is clear that the Petitioner is the driving force which has led to this Petition. He is an energetic and charming person and there is no doubting the sincerity of his desire to make the MacAulays a strong clan. But he is aged over 80. If he were appointed his elder son would, unless some other nomination were made, eventually succeed him as chief. The son is a crofter in Sutherland and the Petitioner has told me that he would carry on the good work. But I cannot be certain that he would do so with the same energy and enthusiasm.

If he failed to do so the clan might feel let down that the decision to appoint his father had been taken too quickly. If Iain McMillan MacAulay died before any chief had been determined it is not certain that his son would necessarily emerge as the person proposed as chief Conclusion This Petition has highlighted the need to clarify how applications of this kind, and there are bound to be others, should be approached.

I have therefore decided to issue guidelines which will operate in future. In particular these are intended to highlight two issues. The first is that I have decided that a 10 year period must elapse between the appointment of a Commander with no proven genealogical link to a past chief and a proposal that a person should be considered for chief. I am laying down this as a minimum period in order to allow sufficient time for a clan Commander to become well known, for efforts to rally a clan either to bear fruit or to fail to do so and for any opposition to the Commander's possible appointment as chief to emerge. The second point is that the guidelines will provide a mechanism to ensure that the views of the members of a clan generally are made known not only to the derbhfine but also to Lyon in considering the derbhfine's proposal. Now that there are more and more clan associations and clan members in many parts of the world, I believe that the traditional mechanisms which have held good hitherto are no longer adequate to reflect the interest and enthusiasm of a worldwide diaspora. It is my hope that these new arrangements will provide a means of helping to harness this interest and enthusiasm for the benefit of Scotland's unique clan heritage. Since I have decided that a 10 year period must elapse after the appointment of a Commander before a proposal for chief is considered, I will refuse this Petition.

Lord Lyon King of Arms 19 February 2002