

*Court of the Lord Lyon*

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*Interlocutor of the*

*Lord Lyon King of Arms*

*in*

*the Petition of*

***SIR JOHN CHRISTOPHER FOGGO MONTGOMERY CUNNINGHAME of  
KILMAURS, Baronet of Corsehill***

*of date*

***23 March 2010***

**Edinburgh**, 18 December 2013; The Lord Lyon King of Arms, having considered the arguments for the Petitioner and the Respondent (Primo) RECOGNISES the Petitioner in the name, style and dignity of SIR JOHN CHRISTOPHER FOGGO MONTGOMERY CUNNINGHAME OF THAT ILK, Baronet of Corsehill, CHIEF OF THE NAME AND ARMS OF CUNNINGHAME for aught yet seen; and (Secundo) GRANTS WARRANT to the Lyon Clerk to matriculate of new in the name of the Petitioner and his heirs bearing the Name of Cunninghame of that Ilk the following Ensigns Armorial, *videlicet*:- Argent, a shake-fork Sable. Above the Shield is placed an Helm befitting his degree with a Mantling Sable doubled Argent, and on a Wreath of the Liveries is set for Crest a unicorn's head couped Argent armed Or, and in an Escrol over the same this Motto "OVER FORK OVER". On a Compartment below the Shield are set for Supporters two cunnings Proper, together with a Standard and Pinsel appropriate to the Chief of the Name and Arms of Cunninghame the blazons of which are yet to be determined.

(Signed) David Sellar  
Lyon

## NOTE:

The *Scots Peerage* and the *Complete Peerage* number the Earls of Glencairn differently. In this Note I have followed the numbering in the latter. I would add that no particular significance should be attached to the different spellings of the name of Cunningham.

The Petitioner The Petitioner seeks (One) to be recognised in the name, style and dignity of Sir John Christopher Foggo Montgomery Cunninghame of Kilmaurs, Baronet of Corsehill, Chief of the Name and Arms of Cunninghame (or in such other name, style and dignity as seems appropriate); and (Two) to have maintained, ratified and confirmed to him and his heirs bearing the name of Cunninghame of Kilmaurs alone (or such other name as may be determined), in the plain, undifferenced Arms of Cunninghame, with Supporters, Standard and Pinsel appropriate to the Chief of the Name and Arms of Cunninghame. He makes this claim as heir-male of the Cunningham Earls of Glencairn.

The Respondent The Respondent is William Robert Bontine Cunninghame Graham of Gartmore who opposes the Petition and seeks to be recognised in the name of Cunningham, sole, and allowed the Ensigns Armorial and all due and proper additaments of Cunningham of Glencairn, Chief of the Name and Arms of Cunningham. He makes this claim as heir of entail (tailzie) of William, 12<sup>th</sup> Earl of Glencairn (d. 1734) through his elder daughter Lady Margaret Cunninghame, whose heir-male he is.

The Peerage Case Following the death of John, 15<sup>th</sup> Earl of Glencairn in 1796 without issue, there were two claimants to the earldom. Sir Adam Fergusson, Bt., claimed as heir-general of Alexander, 10<sup>th</sup> Earl of Glencairn who died in 1670. Earl Alexander left no sons and had been succeeded in the earldom by his younger brother John, 11<sup>th</sup> Earl. Sir Adam was the heir of line of Earl Alexander's only daughter Margaret. The Committee for Privileges of the House of Lords found that Sir Adam had shown himself to be the heir-general of Earl Alexander, but declared that Sir Adam had not made out his right, as such heir-general, to the dignity of Earl of Glencairn. The other claimant was Lady Harriet Don, sister of the 14<sup>th</sup> and 15<sup>th</sup> Earls, although it is not clear what was the basis of her claim. One difficulty which faced their Lordships was the fact that no charter survived if, indeed, one had ever existed, giving the destination of the peerage. The ancestor of the Petitioner, Sir Walter Montgomery Cunninghame of Corsehill, who represented himself to be heir-male to the

earldom, opposed the claim of Sir Adam as heir-general, but apparently did not lodge a formal claim himself. Counsel conjectured that he may not have had the necessary proofs to back his claim to the earldom to hand. The ancestor of the Respondent, Robert Graham of Gartmore, who was, as will be seen, the heir of tailzie (entail) of William, 12<sup>th</sup> Earl, made no claim in 1796. It is suggested by the Respondent that this was because he was gravely ill: certainly, he died in 1797. Surprisingly, it would appear that there was no mention before the Committee for Privileges of the Entail of 1708/9 which figures so prominently in the present case.

The Committee indicated that, unless there was clear evidence to the contrary, a peerage would descend to heirs-male. The Lord Chancellor, Lord Loughborough, said, “My Lords, it has been fixed by repeated determinations of this House ... that where the limitation of a peerage is not be discovered, the presumption is, that it descends to the heirs-male of the body of the original grantee”; and again, “If there be anything certain in the law of peerage, it is this presumption in favour of heirs-male.” (*Earldom of Glencairn Peerage Claim* (1796) 1 MacQueen 444-6; James Maidment, *Peerage Claims 1760-1797* (Edinburgh, 1840) Appendix IV) This view had the support of the great authority of Lord Mansfield but, as is well known, has been severely criticised by John Riddell in the nineteenth century and Sir Iain Moncreiffe of the Ilk in the twentieth. However, it was not an issue in the instant case, although it should be noted that the unopposed succession of the 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Earls, in 1670, 1703, 1734, 1775 and 1791 respectively, each of them succeeding as the heir-male of his predecessor, despite the existence of descendants of Alexander, the 10<sup>th</sup> Earl, in the female line, supports the view that contemporaries understood the Earldom to be destined to heirs-male.

The Entail of 1708/1709 The Respondent relies upon a tailzie (or entail) drawn up for William, 12<sup>th</sup> Earl of Glencairn, dated 15<sup>th</sup> October 1708 and recorded on 9<sup>th</sup> February 1709. The Respondent has lodged a certified copy of the Entail in process together with a typed transcript. The Entail is in favour of Earl William’s eldest son and the heirs-male of his body, whom failing the Earl’s second son and the heirs-male of his body, whom failing the Earl’s elder daughter Margaret and the heirs-male of her body, whom all failing the Entail covers several other contingencies. As already noted, the Respondent claims that, as the heir-male of Margaret, elder daughter of Earl William, and wife of Nicol Graham of Gartmore, and the heir, therefore, of tailzie, he is entitled to be recognised in the name of

Cunningham, sole, and to matriculate the Arms of Cunningham of Glencairn, Chief of the Name and Arms of Cunningham.

The Entail conveys “all and Sundry our Lands, Lordship, Baronies and others after mentioned”, this phrase, or similar, being repeated several times (lines 60, 124, 233, 321). There is also a direction that the heirs of tailzie “not of my own name” succeeding are to take on “the title of honour Coat of arms and surname of my family” (line 225). The Petitioner argues that this latter was an ineffectual direction in relation to the “title of honour”, that is, the peerage, because it contained no resignation of the title of honour, and the Entail was not issued under a royal signature (see *Viscountcy of Oxfuird* (1986 S.L.T. (Lyon Ct.) 8), decided by the Committee for Privileges of the House of Lords, and in particular the speech of Lord Fraser of Tullybelton at pages 15 and 16). As I understand it the Respondent does not challenge this. Both the *Scots Peerage* and the *Complete Peerage* consider the Entail to be invalid and ineffective as regards the conveyance of the peerage. However, various lands, including the lands and estate of Finlayston in Renfrewshire, were conveyed to Robert, the second son and eventual heir-male of Nicol Graham of Gartmore and Lady Margaret Cunninghame, following the death of the 15<sup>th</sup> Earl in 1796; it would seem under the Entail, although I have not seen the terms of the conveyance. For completeness, I note that the phrase “title of honour” also occurs at line 209 of the Entail where it specifies that when the succession opens to females, “That the eldest exclude all other heirs portioner Both as to the title of honour & estate.”

The question then arises, could the Entail validly convey the Name and Arms and Chiefship of Cunninghame? The Petitioner argues that, just as the Entail did not convey the peerage title, it did not convey the right to the Name and Arms and Chiefship, there being merely a direction to take on the Coat of Arms and Surname, but not necessarily as the sole name. The Respondent submits that the Entail was habile to convey the Name and Arms and Chiefship. The Petitioner very fairly drew the Court’s attention to the recent Lyon Court case of *Oliphant of that Ilk, Petitioner* (2004 S.L.T. (Lyon Ct.) 14), as it might be thought to point to a conveyance of the Chiefship. It is worth noting that the author of the entry on the Earldom of Glencairn in the *Complete Peerage* clearly thought that the Entail did not convey the Name and Arms and Chiefship. He wrote that, “By entail, 15 Oct. 1708 (recorded 9 Feb. 1709), he [the Earl of Glencairn] conveyed his ‘title of honour’ created as early as the time of James IV, his ‘arms and surname’ etc. [my italics], in favour of a new set of heirs. This was,

of course, invalid, but was done in the hope of obtaining (as was frequently the case before the Union) a royal confirmation validating the same.” (*Complete Peerage V*, p. 675 n. (b)). In my opinion the Entail did not validly convey the Name and Arms and Chiefship of Cunninghame. The effect of a valid conveyance, given that the conveyance of the peerage title was invalid, as all agree, would have been to separate the Name and Arms and Chiefship of Cunninghame from the Earldom of Glencairn. I cannot think that this was the intention of the entailer who, in the Entail, bracketed together “the title of honour Coat of Arms & surname of my family” as noted above. The case of *Oliphant* is superficially similar in that it concerned a disposition which, while not effective to alter the destination of the peerage title Lord Oliphant, was held to be a special destination effective to convey the dignity of the Chief of the Name and Arms of Oliphant. However, the background to *Oliphant* was very different from that in the Cunninghame Entail, and the case can readily be distinguished on its facts. In any event, I am not bound by the decision in *Oliphant*.

Supposing that I am mistaken on this point, there are further reasons for finding against the Respondent. The Petitioner argued that any claim that there might have been under the Entail had been lost because the conditions attached to the Entail had not been obtempered within a reasonable time. The Entail required the Grahams of Gartmore, as heirs-male of Margaret Cunninghame, daughter of the 12<sup>th</sup> Earl, to adopt the surname of Cunninghame, although it did not specify that the surname should be borne sole. As a result, successive generations of the Grahams of Gartmore added the name “Cunninghame” to their own, before the surname of Graham. The best known of these Cunninghame Grahams was Robert Cunninghame Graham of Gartmore, politician and writer, who died in 1936. The Respondent pointed to the fact that the Cunninghame Grahams did sometimes display the undifferenced Arms of Cunningham alongside those of Graham of Gartmore, for example, on decanters and on a dinner service. However, the Name and Arms of Cunninghame always took second place to the Name and Arms of Graham of Gartmore: the name in use was not Graham Cunninghame, but Cunninghame Graham; and the Arms of Cunninghame were placed in a secondary position, that is on the sinister side, rather than on the dexter. Also, and fatally, no attempt was made by the Grahams of Gartmore for over one hundred and fifty years to matriculate the Arms of Cunninghame in the Public Register of All Arms and Bearings in Scotland. The display of the Cunningham Arms by the Grahams of Gartmore was therefore illegal. I cannot accept that this delay was reasonable. The Grahams of Gartmore were well aware of the difficulties which could arise from Name and Arms clauses,

as is demonstrated by their taking the name of Bontine of Ardoch, and they could not have been unaware that a display of Arms which had not been recorded in the Public Register was illegal. The ingenious arrangement regarding the surname of Bontine of Ardoch, which was subject to a Name and Arms clause, and the surname of Graham of Gartmore, by which the eldest son of Graham of Gartmore assumed the surname of Bontine of Ardoch until he succeeded to that of Graham of Gartmore was the subject of withering criticism from Lyon Sir Thomas Innes of Learney whose outraged comments can be found in the case of *Graham of Gartmore and Ardoch against Walz* (1960 S.L.T. (Lyon Court) 6), discussed further below.

The Matriculation of 1972 Admiral Sir Angus Edward Malise Bontine Cunninghame Graham of Gartmore and Ardoch, the grandfather of the present Respondent, lodged a Petition with Lyon Sir Thomas Innes of Learney on 1<sup>st</sup> March 1957, although the Arms were not matriculated until 17<sup>th</sup> January 1972, seeking (*primo*) to be officially recognised in the surname of Graham of Gartmore and designation “of Ardoch”, and his only son and heir (the father of the present Petitioner) as Robert Cunninghame Graham of Gartmore and Ardoch, younger, and (*secundo*) that the said Arms of Graham of Gartmore might be matriculated of new in his own name without brisure or mark of cadency, but substituting for the third quarter the Arms of Cunningham of Glencairn. Sir Thomas, by Interlocutor dated 11<sup>th</sup> February 1958, found, *inter alia*, that Sir Angus had a right to reinvestiture in the Arms of Nicol Graham of Gartmore matriculated in 1772, and (*primo*) officially recognised Sir Angus and his son Robert “in the surname of GRAHAM OF GARTMORE and designation ‘of Ardoch’, videlicet:- SIR ANGUS EDWARD MALISE BONTINE CUNNINGHAME GRAHAM OF GARTMORE and Ardoch, and ROBERT ELPHINSTONE CUNNINGHAME GRAHAM OF GARTMORE and Ardoch” and (*secundo*) confirmed unto the Petitioner and his heirs of tailzie descending from the marriage of Nicol Graham of Gartmore and Lady Margaret, daughter of William, Earl of Glencairn, the following Ensigns Armorial, videlicet:- Quarterly; 1<sup>st</sup> and 4<sup>th</sup>, Or, a pale Gules charged with a crescent Argent, on a chief Sable three escallops of the First; 2<sup>nd</sup>, Or, a fess chequy Azure and Argent, in chief a chevron Gules; 3<sup>rd</sup>, Argent, a shakefork Sable.” The Arms of Cunningham are here substituted in the third quarter in place of a repeat of the Arms in the second quarter, “Or, a fess chequy Azure and Argent, in chief a chevron Gules” as in Nicol Graham’s matriculation of 1772.

As already noted, this Interlocutor of Lyon Sir Thomas Innes of Learney was only executed on 17<sup>th</sup> January 1972 (*Lyon Register*, vol. 57, fol. 13-14). The cause of this unusual delay in matriculation is set out in a note written at the foot of folio 100 of volume 43 of the Public Register of All Arms and Bearings in Scotland which reads, “Edinburgh 18 October 1966. The Admiral’s Petition of 1<sup>st</sup> March 1957 signed by Mr. Charles E Jauncey, Kintyre Pursuivant ... was opposed by Mrs J B Waltz [who had lodged caveats]. On 11<sup>th</sup> February 1958 Lyon delivered judgment, repelled objections and granted Warrant to reinvest the Admiral in the Arms by matriculation. [Reported as *Graham of Gartmore, Petr. v Waltz* (1960 S.L.T. (Lyon Court) 6] As the Treasury matriculation dues have not yet been lodged: the Petition is passed to my successor Mr Malcolm Innes of Edingight, as Lyon Clerk. [signed] HAB Lawson, Rothesay Herald and Lyon Clerk.”

In *Graham of Gartmore v. Waltz* at page 8, Sir Thomas said, in relation to the inclusion of a subsidiary quartering for Cunninghame in respect of the marriage of Lady Margaret Cunninghame to Nicol Graham of Gartmore, “Since he [the Petitioner] is under no astriction ... to bear the arms of Graham of Gartmore ‘allenary’ [“alone”], I find that there is no reason why he should not include Cunninghame as a subsidiary quarter, but I have been obliged to point out that ‘Cunninghame Graham’ without a hyphen would not constitute the two words a surname, and that a hyphen would difference ‘Graham’, so that he would not be Representor of ‘Graham of Gartmore’”. Sir Thomas had previously observed in narrating the descent of Admiral Sir Angus Cunninghame Graham in his Interlocutor of 11<sup>th</sup> February 1958 (matriculated in 1972), that Robert, the son and heir of Nicol Graham of Gartmore and Lady Margaret Cunninghame, had, “unofficially assumed the name and Arms of ‘Cunninghame’ in addition to those of Graham ...”.

In the present case the Petitioner argued that, even if the entail of 1708/9 was habile to convey the Name and Arms of Cunninghame, and even if the time during which action should have been taken to record the Arms of Cunninghame in the Public Register had not run out, the Petition of Sir Angus Cunninghame Graham of Gartmore, lodged in 1957 and matriculated in 1972, amounted to a waiver and abandonment of any title and interest, and any right to claim the Chiefship of the Name and Arms of Cunningham. I agree. I would add that there are many examples of the stem Arms of a family appearing in the third quarter of Ensigns Armorial where there is no question of their signifying Chiefship of the Name and Arms in question.

The Petitioner's Claim I now turn to consider the Petitioner's claim to be Chief of the Name and Arms of Cunninghame. I do not consider the occasional hyphenation of the names of Montgomery and Cunninghame to be a bar. There seems to have been no consistent usage over the generations, and the name of Cunninghame, is never found in a secondary position. In any case, hyphens can be dropped if there is found to be good reason to do so, as in the case of *Munro-Lucas-Tooth, Petr.* (1965 S.L.T. (Lyon Ct.) 2). Another example of the dropping of hyphens is that of the Duke of Buccleuch who was recognised in 1975 as Chief of the Name and Arms of Scott after dropping the hyphens in the surname Montagu-Douglas-Scott (*Lyon Register*, vol. 60, fol. 7-8).

The Petitioner claims the Name and Arms of Cunninghame as heir-male of the Earls of Glencairn. That he is the heir-male of Alexander Cunningham, created first Baronet of Corsehill in 1672/3 with a destination to the heirs-male of his body is, I believe, uncontentious. Alexander Cunninghame matriculated Arms in the Public Register of All Arms and Bearings in Scotland about the same time, being described there as "descended of a second son of the Familie of Glencairne", and granted a crescent as difference. He is described in the Register as the only son and heir of Alexander Cuninghame the first son and heir apparent of yet another Alexander Cuninghame. The editor of the *Baronetage* notes that this third Alexander was the son of another Alexander, son and heir of Cuthbert, son and heir of Andrew, all of Corsehill, the said Andrew being the second son of William Cuninghame, 4<sup>th</sup> Earl of Glencairn, from whom he received the Corsehill estate [See now R.M.S. III, no. 2418]. The editor of the *Baronetage* notes, "from this descent it would seem that, if no nearer male heir exists, this family has a good claim as heir male to the Earldom of Glencairn." The *Scots Peerage* gives the same descent while noting that the first of the Alexanders had an elder brother Patrick who was killed in a feud with the Montgomeries in 1588. The editor of the article on the Earls of Glencairn in the *Scots Peerage* (the general editor being Lyon Sir James Balfour Paul) notes that the then (1906) Sir Thomas Montgomery Cunninghame was the representative of the first Baronet and "in default of any nearer heir-male would be the heir-male of the earldom." (p. 238). The *Complete Peerage*, referring to Sir Adam Fergusson's claim to the peerage in 1796, notes that this, "was opposed by Sir Walter Montgomery Cunningham as heir-male, in right of his descent from Andrew, second son of Earl William, 1540-48." In his *Tartans of the Clans and Families of Scotland* Lyon Sir Thomas Innes of Learney wrote, "The chiefship is regarded as being in the House of



Cunningham of Corsehill, deriving from the Honourable Andrew Cunningham of Corsehill, second son of the 3<sup>rd</sup> Earl of Glencairn [numbered 4<sup>th</sup> Earl in the *Complete Peerage*]. Sir Alexander, 7<sup>th</sup> Laird of Corsehill, was created a Baronet in 1673, and his representative, Sir William Montgomery Cunninghame, 11<sup>th</sup> Baronet, is regarded as the present chief of the name of Cunningham, and rightful heir to the Earldom of Glencairn.” (*The Tartans of the Clans and Families of Scotland*, 7<sup>th</sup> edition, Edinburgh and London, 1964, p. 106.) I should emphasise, however, that no proofs were laid before this Court regarding the right of succession to the Earldom of Glencairn.

So far as I am aware no other claimants to be heir-male of the family have come forward in the years since 1797. The presumption *non apparentibus non existentibus praesumuntur* should only be applied with considerable caution lest, like public policy it becomes “an unruly horse”, but I believe that it is apposite here (see *Macdonald of Keppoch (no. 3)*, 2004 SC 483 at 490). It seems to me, therefore, that there is good reason to believe that the Respondent is indeed the heir-male of the family of Cunningham, and I am prepared to recognise him as such for aught yet seen. I suggest that the appropriate style is “Cunningham or Cunninghame of that Ilk.”

I, therefore, SUSTAIN the fifth and sixth Pleas-in-Law for the Petitioner; REPEL the Pleas-in-Law for the Respondent; SUSTAIN the first and second Pleas-in-Law for the Petitioner, subject to amendment; RECOGNISE the Petitioner in the name of Cunninghame of that Ilk, and CONTINUE the Petition for finalisation of remaining matters.

(Signed) David Sellar  
Lyon

Acta Rothesay Herald, Gillespie Macandrew LLP (for the Petitioner) alt. Ormond Pursuivant  
(for the Respondent)