

Oliphant of that Ilk. Petitioner

COURT OF THE LORD LYON

12 JUNE 2003

Heraldry - Chiefship of clan - Extinct Peerage - Destination of chiefship - Whether ineffective disposition of peerage effective to carry plain undifferenced coat of arms to nominated successor in peerage- Whether entail with name and arms clause by successor in chiefly coat of arms, but to the name and arms of a cadet branch only effective to carry chiefly arms by implication -Proof of descent.

Richard Oliphant of Condie, claiming to be the heir male of the first Lord Oliphant, petitioned the Lord Lyon for confirmation in his name, as Oliphant of that Ilk, Chief of the Name and Arms of Oliphant, of the plain undifferenced Arms of Oliphant. In 1633 following upon a resignation of the Lordship of Oliphant by the fifth Lord, the crown re-granted the Lordship of Oliphant to Patrick sixth Lord with a destination to the heirs male of his body. This Lordship of Oliphant became extinct on the death of Francis 10th Lord in 1748. In 1709 Patrick eighth Lord signed a disposition whereby failing heirs male of his body "the honour, title and dignity of Lord Oliphant with the rights, privileges and precedency due and belonging thereto and all patents, infestments and other rights" together with his lands were to pass to James Oliphant fifth of Gask and his heirs male. As this disposition was signed after the Treaty of Union it was ineffective in so far as the peerage was concerned. The heirs male of the Oliphants of Gask became extinct on the death of James Blair Oliphant 10th of Gask in 1847. James 10th of Gask had executed an entail of his estate of Gask with a name and arms clause relating to the name Oliphant of Gask. The petitioner founded his petition on the proposition that the disposition of 1709, while not effective to carry the peerage, was effective to settle the chiefly name and arms of Oliphant on the heirs male and that the Oliphants of Gask has not altered that destination.

Held, (1) that the petitioner has established his genealogical descent as heir male of the 1st Lord Oliphant and of the Oliphants of Gask (p 16G); (2) that the 1709 disposition, while not effective to alter the destination of the peerage, was a special destination effective to convey the dignity of the arms of Oliphant to James Oliphant of Gask and his heir male (p 151-J); (3) that the 1846 entail of the Estate of Gask with a name and arms clause relating to the name and arms of Oliphant of Gask had not altered the destination of the plain undifferenced Arms of Oliphant (p 15K-L); and warrant *granted* to the Lyon Clerk to prepare letters-patent officially recognising the petitioner as Oliphant of that Ilk and confirming to the petitioner and his heirs male, the plain undifferenced Arms of Oliphant of that Ilk.

Petition for official recognition of name and confirmation of arms

Richard Eric Laurence Oliphant of that Ilk (formerly of Oliphant of Condie) petitioned the Lord Lyon for official recognition in the name Oliphant of that Ilk, Chief of the Name and Arms of Oliphant. The facts of the case are fully set out in the opinion of the Lord Lyon.

On 12 June 2003 the Lord Lyon King of Arms issued the following warrant to the Lyon Clerk: "Edinburgh, 12 June 2003; The Lord Lyon King of Arms, having considered the foregoing Petition, with the Productions and Proof adduced, (Primo) for aught yet seen OFFICIALLY RECOGNISES the Petitioner as Richard Eric Laurence Oliphant of that Ilk, Chief of the Name and Arms of Oliphant; (Secundo) OFFICIALLY RECOGNISES the Petitioner's daughters in the names, styles and dignities as Iona Georgina Joanna Oliphant of Oliphant and Cleodie Flora Carolina Oliphant of Oliphant; (Tertio) for aught yet seen AUTHORISES the Lyon Clerk to

prepare Letters Patent MAINTAINING, RATIFYING and CONFIRMING unto the Petitioner and his heirs male, Chiefs of the Name and Arms of Oliphant, the following Ensigns Armorial, videlicet:- Gules, three crescents Argent. Above the Shield is placed a chapeau Azure furred Ermine (in respect that he is the representor of the baronial house of Oliphant). thereon an Helm befitting his degree with a Mantling Gules doubled Argent, and on a Wreath of the Liveries is set for Crest a unicorn's head couped Argent crined and armed Or, and in an Escrol over the same this Motto 'TOUT POURVOIR'; and on a compartment below the Shield are set for supporters two elephants Proper; and for his Badge for the Name of Oliphant a unicorn's head couped Argent crined and armed Or; and for his Standard three and a half metres long split at the end having Azure a St. Andrew's Cross Argent in the hoist, of two tracts Gules and Argent with his Badge in each of three compartments with the Motto "TOUT POURVOIR" in letters Or on two transverse bands Azure; and for his Pinsel 135 centimetres long and 60 centimetres high Gules, bearing upon a Wreath of his Liveries Gules and Argent his said Crest within a strap of leather Proper buckled and embellished Or inscribed with the Motto 'TOUT POURVOIR' in letters Argent all within a circlet Or, fimbriated Vert, bearing his title 'OLIPHANT OF THAT ILK' in letters Sable, the same ensigned of a chapeau Azure furred Ermine, and in the fly on an Escrol Sable surmounting his said Crest his Motto "TOUT POURVOIR" in letters Argent; and (Quarto) GRANTS WARRANT to the Lyon Clerk to matriculate the foresaid Ensigns Armorial in the Public Register of All Arms and Bearings in Scotland. "

THE LORD LYON KING OF ARMS (R 0 BLAIR). This 7s 'a petition by Richard Eric Laurence Oliphant seeking a grant of the undifferenced arms of Oliphant of that Ilk and for recognition as Chief of the Name and Arms of Oliphant

There is no recording of arms for Oliphant of that Ilk in the Public Register of All Arms and Bearings in Scotland since the commencement of that register in 1672. At Vol 1, p 95 of the register Lord Oliphant is named but no arms are recorded. Patrick, the sixth Lord Oliphant, would have been the holder of the peerage title in 1672. The Arms of Lord Oliphant are given in the armorial of Sir David Lindsay of the Mount as Gules three crescents Argent. At Vol 1, p 198 of the register, arms are recorded for Sir Laurence Oliphant of Gask who is described as "descended of a second son of the Lord Oliphant" as Gules three crescents Argent with one other crescent for difference.

The question to be determined in this case is what is the proper destination of the chiefship. The first Lord Oliphant was created by King James III about 1463 and was recognised as Chief of the Name Oliphant. The same principle applies today where the holder of a peerage granted in the family name only is recognised as chief of that name (Lord Spens, Petr, 1960 Lyon Register, Vol 46, folio 33).

In 1633 Laurence, the fifth Lord Oliphant, resigned the peerage title in favour of his cousin Patrick sixth Lord Oliphant. This resignation was confirmed by the Crown in a new grant of the peerage to Patrick sixth Lord Oliphant and the heirs male of his body by Crown Charter dated 2 June 1633. The charter includes a name and arms clause. On the death of the sixth Lord Oliphant the title passed to his son Charles and then to Charles's son Patrick who died without issue in 1721. The title then passed to Patrick's uncle William who died without male issue in 1728 whereupon the title passed to Francis, the son of Patrick's deceased younger brother. This Francis, the loth Lord Oliphant, died without issue in 1748. There were no further heirs male of the body of Patrick sixth Lord Oliphant and the peerage died out. This leaves to be determined what the destination is of the chiefship.

In 1709 Patrick, the eight Lord Oliphant, signed a disposition whereby failing heirs male of his body "the honour, title and dignity of Lord Oliphant with the rights, privilege and precedency due and belonging thereto and all patents, infestments and other rights and security whatsoever given, granted and conceived in favour of us and our predecessors of upon and concerning the

same" along with his lands in Banffshire were to pass to James Oliphant fifth of Gask and his heirs male, whom failing his heirs and assignees. Since this disposition was signed after the Treaty of Union it was ineffective insofar as the peerage title was concerned but it may have been effective to convey the other dignities associated with the peerage including the chiefship.

The history of the Oliphants of Gask was marked by protracted litigation in the 19th century concerning the ownership of the Gask Estate in the light of an entail executed by James Blair Oliphant 10th of Gask in 1846 and in terms of his will executed also in 1846. He died without issue in 1847. A series of court actions were raised after his death and the issues raised were not settled until 1867.

For the purposes of the present petition it is necessary to determine whether the terms of the 1709 disposition did or did not convey the Chiefship of Oliphant and, if it did, whether its terms still apply and whether the 1846 entail or will supersede or qualify the 1709 disposition. The 1709 disposition is a conveyance of land in Banffshire (not the original Oliphant lands which had already been disposed of), the peerage title and H the Arms as a dignity of the peerage. The arms are not specifically mentioned but it is clear that they must form part of the dignity referred to (see Mackintosh of Mackintosh, 1950 SLT (Lyon Ct) 2). The 1709 disposition is not written as a tailzie or entail and amounts to a special destination which would be effective unless and until it was evacuated (Cormack v McIlldowie's Exrs, 1975 SC 161; 1975 SLT 214). It is settled law that arms may be nominated to another party. In my view despite there being no specific mention of the Oliphant Arms in the 1709 disposition, they are impliedly nominated as a dignity of the peerage, even though the nomination of the peerage itself is ineffective. It is not possible under the law of arms for arms to become extinct as can occur with a peerage title. I accept therefore that the 1709 disposition was effective to convey the dignity of the Arms of Oliphant to James Oliphant fifth of Gask and his heirs male, whom failing his heirs and assignees whomsoever.

The next question is whether the 1846 deeds interfere with the 1709 destination. The terms of the 1846 disposition were "an entail of the lands and Barony of Gask in favour of himself and the heirs male of his body whom failing to the heirs female of his body whom failing to any person or persons to be named by him in any deed of nomination or other writ to be executed by him at any time during his life whom failing to the heirs male of the body of the deceased Dr K James Oliphant whom failing to the entailer's heirs male whomsoever whom all failing to his own heirs whomsoever and their assignees".

The entail referred to the Name and Arms of Oliphant of Gask. I do not believe that it was the intention, nor that it can now be construed, that this entail should apply to the Name and Arms of Oliphant simpliciter. There is no evidence to suggest that at any time did the Oliphants seek to adopt the undifferenced Arms of Oliphant. The position is that, after settlement of the litigation in 1867, the Oliphants did not pursue the question of the Chiefship of Oliphant which thus remained dormant until the present petition. Accordingly, I conclude that the 1846 entail and will do not supersede, so far as the destination of the undifferenced Arms of Oliphant is concerned, the provisions of the 1709 disposition. For the purposes of the present petition we need only have regard to the 1709 disposition.

Accepting that under the 1709 disposition the right to the undifferenced Arms of Oliphant passed to James Oliphant fifth of Gask and to his heirs male whom failing his heirs and assignees, it is necessary to follow the descent from this James Oliphant. On his death in 1732 his heir was his eldest son Laurence sixth of Gask who died in 1767. His eldest son Laurence Oliphant seventh of Gask died in 1792 and was succeeded by his eldest son Laurence Oliphant eighth of Gask who died in 1819. He was succeeded by his eldest son also Laurence Oliphant ninth of Gask who died unmarried in 1824. The succession then passed to his brother James Blair Oliphant 10th of Gask.

Evidence has been submitted which proves that the same line of Oliphants of Gask also succeed as heirs of the first Lord Oliphant. This line of succession passes, on the failure of heirs male of

the third Lord Oliphant, to the younger brother of the third Lord Oliphant, William Oliphant of Newton. On his death in 1588 his eldest son Laurence succeeded him dying about 1605 and being succeeded in turn by his eldest son Laurence who obtained a charter of the lands of Gask and was thus first of Gask. The line of succession passed from him to his grandson Laurence fifth of Gask mentioned above.

James Blair Oliphant tenth of Gask died in 1847 without issue. In the course of the litigation which followed his death extensive enquiries were made to identify any heirs male of Laurence Oliphant first of Gask without success. Thus it can be inferred that, at the conclusion of the litigation in 1867, the position was that no heir male of any of the Oliphants of Gask, including the fifth of Gask, had been found. The present petitioner now claims that he is the heir male and thus entitled to succeed to the undifferenced Arms of Oliphant.

The petitioner's claim is based on his descent from Alexander Oliphant, Albany Herald. By virtue of reference made to the entries in the Lyon Register at Vol 1, p 198, and Vol 1, p 387, it is clear that Laurence Oliphant third of Condie was descended from Alexander Oliphant, Albany Herald. The Oliphants of Condie were unable to substantiate a claim to the Gask property in the litigation following the death of James Blair Oliphant in 1847 because they could not show whether they were descended from William Oliphant of Newton through Albany Herald or through Albany Herald's wife Janet Oliphant.

Hugh Peskett has now identified a further charter of 1579 granted by William Oliphant of Newton making provision for his son Alexander and Alexander's wife Janet. I am prepared to accept this as confirmation that Alexander Oliphant, Albany Herald, was a son of William Oliphant of Newton. Thus it can be accepted that Laurence Oliphant third of Condie was descended from William Oliphant of Newton.

In 1985 Reginald Godfrey Laurence Oliphant of Condie, Younger matriculated the Arms of Oliphant of Condie and the descent of the Oliphants of Condie is set out in that matriculation. On his death in 1995 his son, the petitioner, succeeded him in the Arms of Oliphant of Condie. It can therefore be accepted that the petitioner is the heir male of the first Lord Oliphant and is entitled to the undifferenced Arms of Oliphant.

I have therefore granted the petition.

Counsel for Petitioner, Rothesay Herald (Agnew of Lochnaw, QC).