

Court of the Lord Lyon
Interlocutor of the
Lord Lyon King of Arms
in
the Petition of
ROBERT ALEC SNOW IRVING OF
BONSHAW
Chief of the Name and Arms of Irving
of Bonshaw
of date 8 November 2013

Edinburgh , 25 August 2014. The Lord Lyon King of Arms, having considered the foregoing Petition and arguments for the Petitioner, (Primo) RECOGNISES the Petitioner in the name, style and dignity of Robert Alec Snow Irving of Bonshaw, CHIEF OF THE NAME AND ARMS OF IRVING OF BONSHAW for aught yet seen; and (Secundo) GRANTS WARRANT to the Lyon Clerk to prepare Letters Patent maintaining, ratifying and confirming to the Petitioner and his heirs bearing the name of Irving of Bonshaw the following Ensigns Armorial, videlicet:-Argent, three holly leaves Proper. Above the Shield is placed an Helm befitting his degree with a mantling Vert doubled Argent, and on a Wreath of the Liveries is set for Crest an arm gauntleted holding a branch of holly consisting of seven leaves all Proper, and in an Escrol over the same this motto "HAUD ULLIS LABENTIA VENTIS". On a Compartment strewn with holly leaves below the Shield are set for Supporters two snow leopards rampant guardant Proper; and upon a Standard four yards in length with rounded end, having Azure, a St Andrew's Cross Argent in the hoist, tierced of three liveries Vert, Argent and Vert, is depicted his said Crest twice along with his Motto "HAUD ULLIS LABENTIA VENTIS" in letters Or upon two transverse bands Sable; and for Pinsel, four and a half feet long by two feet in height, Argent bearing his Crest within a strap Vert buckled and embellished Or inscribed with the Motto "HAUD ULLIS LABENTIA VENTIS" in letters Or all within a circlet Vert bearing the Petitioner's title "Irving of Bonshaw" in letters Argent and in the fly an Escrol Vert bearing in letters Argent the Motto "HAUD ULLIS LABENTIA VENTIS", And Grants Warrant to the Lyon Clerk to matriculate the same in the Public Register of All Arms and Bearings in Scotland.

Petition of ROBERT ALEC SNOW IRVING OF BONSHAW, Captain (Retired) Royal Navy residing at The Chapel, Wood Lane, Chapmanslade, Nr. Frome, Wiltshire BA13 4AT

FINDINGS AND REASONS

1. The Petition was lodged on 8 November 2013. The Petitioner seeks official recognition of Change of Name for himself and his son and heir apparent and confirmation of Chiefly Arms of Irvings of Bonshaw, Chiefs of the Honourable Border Clan Irving with the grant of Supporters, Standard and Pinsel. In accordance with the Interlocutor dated 7 January 2014, an advertisement of the Petition was made once in the Toronto Globe, once in The Herald, and once on the Clan Irving website. The Interlocutor ordered any person claiming title or interest to lodge Answers within 42 days. This period was extended to 31 March 2014.

2. There were no Answers lodged at the end of the extended period.

3. In considering this Petition, I had before me the following evidence:–

(i) the Inventory of Productions for the Petitioner containing productions 1 to 18.

(ii) a second Inventory of Productions lodged on 9 July 2014 containing productions 1 to 4 including extracts and photocopies from the “Book of Irving” (at production 4). There was also lodged on the same date a List of Authorities, 1 to 12.

(iii) entries in the Public Registers, including the Public Register of All Arms and Bearings in Scotland (hereinafter referred to as “the Lyon Register”).

(iv) a Note for the Petitioner prepared by the Petitioner’s senior counsel (Sir Crispin Agnew of Lochnaw, Bt., QC, Rothesay Herald of Arms).

4. Having considered all the evidence before me, and taking account of the Note by the Petitioner’s senior counsel who, in chambers on 9 July 2014, made the following submissions:–

(i) That the Arms follow the estate in terms of the case of Cuninghame v Cunyngham, (1849) 11 D 1139.

(ii) That if it is accepted that the descent of the estate and Arms as narrated in the position to Robert Nasmyth Irving of Bonshaw is correct then the next step in succession is to link Colonel John Beaufin Irving's succession which, it was submitted, has been shown. It was submitted that the disentailment of the estate and the settlement by the Reverend John Irving of Bonshaw on 3 August 1853 leaves in succession the Arms to the heir male of Robert Nasmyth Irving of Bonshaw and that Colonel John Beaufin Irving is the heir male.

(iii) It was further submitted, with reference to Colonel John Beaufin Irving's petition to the Sheriff, that it should be noted that he sought to be recognised as the next "heir of provision" under the disposition of the Reverend John Irving of Bonshaw. It was submitted that Colonel John Beaufin Irving was the next heir entitled to take the estate under the disposition following the death of Robert Nasmyth Irving of Bonshaw. While the petition failed, this was because the trustees of the late Robert Nasmyth Irving had taken infestment following his death and there is no suggestion in the defences to the petition that Colonel John Beaufin Irving was not the next heir. The matter was appealed after the refusal of the petition by the Sheriff to the Court of Session but was compromised by the agreement (the details of which are unknown), however Colonel John Beaufin Irving gained ownership of the estate burdened by the obligation to meet the debts.

(iv) It was submitted that Colonel John Beaufin Irving saw himself as entitled to the undifferenced Arms and chiefship of Irving of Bonshaw and that this was reflected in the new productions produced on 9 July 2014, including family obituaries and the photocopies and extracts from the "Book of Irving".

(v) Senior counsel then submitted that if the estate with the Arms were succeeded to by Colonel John Beaufin Irving as male heir of the line or as "heir of provision" then the Petitioner is entitled to the undifferenced Arms and chiefship of the Border Irvings as he is the successor to Colonel John Beaufin Irving in terms of the Colonel's Will.

(vi) It was further submitted that when Colonel John Beaufin Irving acquired the estate he was entitled to the undifferenced Arms and that his matriculation of Arms in the Lyon Register in 1891 was to establish his genealogy and at that time the design of the Arms he matriculated was that to which he was entitled with a difference of a crescent.

(vii) It was also submitted that with reference to Walker & Walker, Law of Evidence in Scotland, 3rd edition, paragraph 26.21.3, that the evidence lodged of the surrounding circumstances and understanding of Colonel Irving's position supports the view that in his Trust Deed and Settlement recorded in the Books of Council and Session on 26 October 1925 the words on page 214 of the Disposition, 'together with the "Irving" Crest and Coat of Arms' refers to the undifferenced Arms of Irving of Bonshaw and not to those he recorded in 1891 as they were for the purposes of establishing his genealogy.

(viii) It was further submitted under reference to MacDonald of Keppoch Petitioner (No. 3) 2004 SC 438 at [26] that with regard to the burden of proof resting on the petitioner in this case that the presumption, *non apparentibus non existentibus praesumuntur*, should apply.

(ix) It was submitted that the Petitioner had advertised in The Herald, in Canada and on the Clan website, and had given an extended time for any party to lodge answers. It was submitted that reliance was placed on the presumption that those who do not appear do not dispute the claim.

5. By way of introduction to my findings and reasons in this case and for the sake of clarity, the Petition before me is heraldic in nature. I am asked to recognise the Petitioner as chief of the Name and Arms of Irving of Bonshaw. This is within my jurisdiction. The Petitioner seeks the confirmation of the undifferenced Arms of William Irving of Bonshaw together with supporters, standard and pinsel. The arms are recorded in Volume 1, folio 335 of the Lyon Register in the following terms:

William Irwine of Bonshaw Bears argent three hollin leaves proper. Above the shield ane helmet befitting his degree mantled gules doubled argent Next is placed on ane torse for his crest ane arme g...[gauntleted] holding ane branch of hollin consisting of seven leaves all proper The motto in ane escroll Haud ullis labentia ventis.

6. At this stage I would like to make clear that the Petitioner seeks recognition as Chief of the Honourable Border Clan Irving of Bonshaw, as a long established independent branch of the Clan Irvine. The Border Clan Irving was recognised by the Crown as a clan by Act of Parliament 1587. The distinction, recognised in the Lyon Court, is that the chief is "Chief of the Honourable Clan Irvine" whereas the branch chief is "Chief of the Honourable Clan Irving of Bonshaw" where the "of Bonshaw" indicates that the family is a branch chief. Examples include Macleod of Macleod who is Chief of the Macleods and Macleod of Lewes who has been recognised as "Chief of the Clan Macleod of Lewes" an independent but branch clan. I have concluded that the appropriate designation of recognition for the Petitioner is Chief of the Name and Arms of Irving of Bonshaw. I have reached this conclusion as a matter of consistency in relation to the Irving Clan as the designation in the Lyon Register for Irving of Drum is "Chief of the Name and Arms of Irving of Drum".

7. The approach I am adopting in this Petition follows the common-sense view that there is no fixed or uniform practice on the matter before me. In the words of Lord Jeffery in the case of *Cuninghame v Cunyngham*, (1849) 11 D 1139:—

"There may be cases in which the heir of line will exclude the heir male and there may be cases where the converse is heard."

8. I have also followed the sometimes called 'the Jeffery principle', again expressed by Lord Jeffery in the same case:-

"In my opinion the common-sense rule is, that the chief armorial dignities should follow the more substantial rights and dignities of the family. If the heir male succeeds to the title and estates, I think it reasonable that he should succeed to the armorial bearings of the head of house."

9. I have also noted the view of Lord Lyon Innes of Learney in the case of Mackintosh of Mackintosh, Petitioner, 1950 SLT (Lyon Court) 2, where he states,

"that an heir succeeding under a Trust Disposition and Settlement to the principal mansion-house, and the substantial rights and dignities of the family, was entitled so succeed to the undifferenced arms in preference to the heir male."

10. Also, in the case of Munro-Lucas-Tooth, 1965 SLT (Lyon Court) 2, at page 8, I note,

"In Cuninghame v Cunyngham, 1849, and Maclean of Ardgour v Maclean, 1941, it was found that the Arms, wherever legally possible, should follow the descent of the principal estate, but the Arms themselves are incorporeal feudal heritage (Lord Aitchison, 1961, S.C. 8683).

Under recent succession legislation inheritance of incorporeal heritage may become progressively more difficult and less possible, thus the Arms as incorporeal heritage still governed by the old law attain an even more enhanced importance, since devolution of the Name and Arms are likely henceforth to become the only surviving legal entity from which the representation or headship of a House depends, and consequently the increased focus of Scottish family settlement.

11. I have given consideration to a number of other cases including Earl Haig, 1950 SLT (Lyon Court) 26, where the Petitioner was of a junior line but had acquired the principle Haig estate of Bemersyde. This case comments on the sale of lands and the attraction of chiefship.

"Lyon Register shows numerous examples of cadets inheriting an ancestral estate by some devolution or tailzie getting the undifferenced arms as Chief: in Lyon Court every petitioner must prove his case and right to arms, ..."

12. In the case of MacMillan of MacMillan, 1951 SLT (Lyon Court) 5, there was a discussion of the question of the Representer of a family or clan. The case supports the position that the Representer

of the family was proprietor to the ancestral arms without brisure or mark of cadency. This position was held by Lords Dunedin, Shaw and Sumner on 12 December 1921 in the case of Stewart-Mackenzie v Fraser-Mackenzie, 1922 SC(HL) 39, 1922 SLT 18.

While no other authority is needed for this position the same view is reflected by Sir George Mackenzie of Rosehaugh, in the twenty-first chapter of his treatise, "The Science of Heraldrie".

13. My attention was also drawn by senior counsel to three 18th century cases which dealt with the forfeiture of estates after the 1745 uprising – Lord Forbes of Pitsligo v King's Advocate (1749) Mor 4155; Cameron v King's Advocate (1749) Mor 4161 and Macpherson v King's Advocate (1749) Mor 4160. In the case of Cameron v King's Advocate, it was found that despite the loss of the estate the territorial designation of such a person forfeiting his estate was retained.

It is stated in the case:–

"John Cameron continued to be properly enough, according to the use of speech, called Locheil, and Old Locheil, notwithstanding his attainder:, and, he was attainted by that name, behaved, if he had got pardon, to have been pardoned by the same; people lose their rights by forfeiture, but not their ordinary names; and these designations do not necessarily imply either that property or the right of apparenacy, to the estate from which they are taken, but are only popular descriptions, by which persons are sufficiently distinguished."

14. Finally, in a consideration of the case law relating to this Petition let me turn to a matter of practice within the Lyon Court. The Lyon Court practice and guidance is that matriculation of family arms should be carried out every third generation or every 81 years. However, this is a practice and I would wish to make it understood that the rights of someone to inherit undifferenced Arms are not compromised by the absence of a matriculation within this guidance. For the sake of clarity a person who no longer owns the land but does represent the family long associated with that land need not take any action to retain their rights. There is no need, for example, for a petitioner who seeks a territorial designation to specifically retain or restrict its use on others, if the land is sold.

It appears to me to be a generally established principal that once a family has established a link between the Arms and the territorial designation, then the representative of that family is entitled to those Arms and is entitled to the designation that goes with those Arms even when the estate is sold off and even if intervening generations have not rematriculated or used the arms and designation. In essence, the right is not extinguished by such lack of intervention. There are examples in which this practice has been followed and where new owners of an estate have adapted or changed a territorial designation in relation to the property so that they bear a differenced territorial designation.

15. Turning now to the facts and circumstances of this petition. I make the following findings:–

(i) I am satisfied that the undifferenced Arms and Ensigns Armorial of Irving of Bonshaw passed from William Irving of Bonshaw (died 1742) to John Irving of Bonshaw (died 1747), and then to William Irving of Bonshaw (died 1772).

(ii) I am satisfied that William Irving of Bonshaw (died 1772) entailed the estate of Bonshaw by Deed of Entail dated 19 December 1764 and recorded in the Register of Tailzies on 7 March 1775 to the heirs of tailzie set out in the Deed under the provisions and conditions:–

“That the whole heirs of provision above written succeeding to my said Lands and Estate and others disposed shall be bound to assume bear and use my Surname, Style and Arms of Irving of Bonshaw, and that in all time after their succession to my said Lands and Estates ...”

(iii) That the succession passed under the entail until the Reverend John Irving Bonshaw (born 1797, died 1870) disentailed the Lands and Estates of Bonshaw on 3 August 1853, in terms of the agreement to disentail the estate. The Lands and Estate under the disentailment went to the said Reverend John Irving Bonshaw and to John Irving the elder, whom failing to James Irving the younger and in life rent to the heirs male of the body of the said James Irving the younger in fee whom failing to other heirs therein set out.

(iv) That on 29 October 1858 the estate passed to Robert Nasmyth Irving of Bonshaw who died on 8 March 1894.

(v) That following Robert Naysmyth Irving of Bonshaw’s death, Colonel John Beaufin Irving presented a petition in the Sheriff Court in which he sought to be recognised as “heir of provision” to the estate of Bonshaw under the disposition of John Irving of Bonshaw.

(vi) The Petition was refused because the trustees of the late Robert Nasmyth Irving of Bonshaw had become infert in the estate. Then followed an appeal to the Court of Session concerning the succession of the estate. The proceedings before the Court of Session were dismissed as the parties entered into a Joint Minute. The terms of the Joint Minute are not fully known, but following the compromise the trustees disposed the estate of Bonshaw to the Colonel burdened with an obligation to meet the debts

(vii) That Colonel John Beaufin Irving was the next heir entitled to take the estate under the disposition following the death of Robert Nasmyth Irving of Bonshaw.

(viii) That there is no suggestion in the defences to the petition that Colonel John Beaufin Irving was not the next heir.

(ix) That following the acquisition of the estate of Bonshaw by Colonel John Beaufin Irving he considered himself to be Chief of the Irvings of Bonshaw.

(x) That by the acquisition of the estate of Bonshaw by Colonel John Beaufin Irving he succeeded to the Name and Arms of Bonshaw. The Name and Arms of Bonshaw, irrespective of the estate, fell to be succeeded by Colonel John Beaufin Irving.

(xi) That the matriculation of Arms by Colonel John Beaufin Irving in Volume 12, folio 63 of the Lyon Register was for the purposes of establishing his genealogy.

(xii) That Colonel John Beaufin Irving was the great grandfather of the present Petitioner and in terms of the Trust Disposition and Settlement registered in the Books of Council and Session on 26 October 1925 by Colonel John Beaufin Irving, who died on 8 April 1925, he disposed "the Lands and Estate of Bonshaw to his trustees and life rent use of his second son Robert Beaufin Irving and on his death to be disposed and conveyed to the eldest heir male of the body of the said Robert Beaufin Irving and failing any male issue of my said son Robert Beaufin Irving, I direct that the said Bonshaw Estate ... be conveyed by my trustees to my grandson Robert Irving Snow ..."

(xiii) The Trust Disposition and Settlement therefore sets out the succession in relation to not only the estate but the "Irving Crest and Coat of Arms" which have been inherited under the law of succession by the Petitioner, namely Robert Alec Snow Irving.

16. I have reached these findings in fact for the following reasons:

(i) That there is clear evidence that the undifferenced Arms or Ensigns Armorial of Irving of Bonshaw are recorded in the Lyon Register, Volume 1, folio 335.

(ii) That the productions contained in the first Inventory of Productions satisfy me that these undifferenced Arms were passed from William Irving of Bonshaw to John Irving of Bonshaw and then to William Irving of Bonshaw.

(iii) I am satisfied that William Irving of Bonshaw entailed the estate of Bonshaw by Deed of Entail dated 19 December 1764 and that this Deed is evidence of that finding.

(iv) The productions also provide evidence that the succession passed under the entail until the Reverend John Irving of Bonshaw who disentailed the Lands and Estate of Bonshaw on 3 August 1853. The provisions of this Deed were followed until the estate passed on 29 October 1858 to Robert Nasmyth Irving of Bonshaw.

(v) That the productions also showed that the trustees disposed the estate on the death of Robert Nasmyth Irving of Bonshaw to Colonel John Beaufin Irving who, I am satisfied, looking at the totality of the evidence, was the male heir of the line.

(vi) That the productions in the Sheriff Court petition and Court of Session case concerned the recognition of Colonel John Beaufin Irving as the "heir of provision". This position was not challenged in the defences to the Sheriff Court action and while the matter was eventually decided by "arrangement" I am satisfied, again, looking at the totality of the evidence that it was not disputed that Colonel John Beaufin Irving was the "heir of provision".

(vii) Colonel John Beaufin Irving was the great grandfather of the Petitioner and as such, in terms of his Trust Disposition and Settlement recorded in the Books of Council and Session on 26 October 1925 the petitioner's father and himself have now succeeded to the Arms and Name of Irving of Bonshaw. This position is supported, again, by the production in the first Inventory, particularly the Trust Disposition and Settlement, but also the production headed "Lairds of Bonshaw" showing the family tree and genealogy which leads to this position. The legal documents and this genealogy, alongside the ancillary material produced from the Book of Irving and obituaries, have led me to conclude this is the position.

(viii) The Petitioner has not sought to prove that the senior male lines of his family have been extinguished. He has, however, produced a letter of renunciation from Gagy A. Irving III who is in the United States of America and is a possible male heir of the family. The evidence before me may not be as clear as would be definitive with regard to other male lines of the family, however, when looked at in its totality the petitioner's position has been that he has not sought to extinguish any male or female lines that might have a claim to the chiefship, because the petitioner's case is that the family representation of Irving of Bonshaw was settled along with the estate of Bonshaw and thus came to the estate of Colonel John Beaufin Irving. This position I have accepted and have concluded is correct on the facts and circumstances before me and supported by the law. In considering this matter I have also had regard to the burden of proof that while resting on the petitioner it was submitted to me that the presumption *non apparentibus non existentibus praesumuntur* should apply in this case. I refer to the Opinion of the Court of Session in *MacDonald of Keppoch Petitioner (No. 3) 2004 SC 438* where the Court says:

"[26] In order to make good that deficiency in the evidential effect of the *sloinneadh*, the petitioner relies on a presumption that a proven line is the senior one. In support of the existence of a presumption to that effect, counsel relied on *Stair's Institutions of the Law of Scotland, III, v, 35*:

"Yea, any degree being presumed to be the nearest degree, unless a nearer degree be instructed". Counsel also relied on the presumption that those who do not appear to dispute a claim do not exist (Macnab of Macnab, Petr, per Lord Lyon Innes of Learney at 1957 SLT (Lyon Ct), p 4). In Macnab the presumption was expressed in a brocard "non apparentibus non existentibus praesumuntur", attributed, without further specification, to "the late Sheriff Macphail" (see also counsel's article on "Heraldry" in the Stair Memorial Encyclopaedia: The Laws of Scotland, Vol 11, para 1623; cf the brocard de non apparentibus et non existentibus eadem est ratio, Trayner's Latin Maxims, p 148, to which passing reference is made in Handyside v Lord Advocate, per Lord Skerrington at 1909 1 SLT, p 269, and McCarroll v McKinstery, per Lord Sumner at 1926 SC (HL), p 12; 1925 SLT, p 647). Counsel submitted, echoing the terms of the passage in his article cited above, that these presumptions are acceptable in this context because a wrongfully excluded senior stirps can reduce the matriculation within the prescriptive period."

I have also concluded that this, in general terms, is the correct approach in law but also is correct in terms of the facts and circumstances in this case. The petitioner has proved a pedigree descent from a person entitled to the Name and Arms of Irving of Bonshaw and has established a legal claim to that Name and Arms which descended with the estate to his father. The Petitioner has also advertised the Petition in The Herald, in Canada, and on the Clan Irving website. An extension from the usual forty day period was given for parties to answer and no answers were lodged. No Irving has come forward to challenge the Petitioner's claim following that advertisement and accordingly that presumption has come into play.

(ix) I have also carefully considered the intention and understanding that Colonel John Beaufin Irving may have had in instructing the Trust Disposition and Settlement of 1925. I have considered whether his recording of Arms in 1891 was the Arms that he was seeking to be included in his succession in the Deed of 1925. However, looking at the surrounding circumstances to this there are several factors that have led me to conclude that this was not the case. Firstly, he recorded his Arms in Volume 12, folio 63 of the Lyon Register in 1891, which was before he took up ownership of Bonshaw in 1895. The Lyon Court books show that Colonel John Beaufin Irving visited the Lyon Court, with his solicitor, on 25 August 1897 and that he sought on that occasion to amend the narrative of his genealogy and not the amendment of his Arms. I have concluded that this is evidence of the surrounding circumstances to show that the intention of Colonel John Beaufin Irving was to amend his genealogy and not to establish any rights to the undifferenced Arms of Irving of Bonshaw as he had already matriculated the Arms he was entitled to.

(x) Again, with regard to Colonel John Beaufin Irving's understanding in relation to the Trust Disposition and Settlement of 1925, while I place no significance on family histories and that the "Book of Irving" as read by myself is not verifiable, I do, however, accept that the extract

photocopies from the “Book of Irving” showing that Colonel John Beaufin Irving designated himself chief and that he flew the banner of the undifferenced Arms above Bonshaw Tower, along with the obituaries of the Colonel and his second son, are supportive of the view that he saw himself to be Chief of the Name. I have reached this conclusion bearing in mind the paragraph contained in Walker & Walker, Law of Evidence in Scotland, 3rd Edition, paragraph 26.21.3. There is sufficient surrounding evidence from this material to support the view that Colonel John Beaufin Irving saw himself as Chief of the Irving of Bonshaw Family.

(xi) I now turn, for the sake of completeness, to give my opinion in relation to the several entries in the Lyon Register which are relevant to this petition:–

a. The undifferenced Arms of Irving of Bonshaw, as previously stated, were recorded in 1672 in the Lyon Register and there have been no subsequent recordings of the plain undifferenced Arms since that date. I am of the opinion that despite the long period from the original undifferenced Arms until the lodging of this Petition before me, then the representative of the family who can establish a right through succession to the Arms, as the Petitioner has, then becomes the person who is entitled to the coat of arms and the territorial designation as recorded by William Irving of Bonshaw in 1672. That no branch of the Petitioner’s family did seek an official recognition as Irving of Bonshaw since the 1672 matriculation. This does not prevent them from making a claim now because the right to the Arms and the territorial designation are not lost by non-use or by the absence of the claim.

b. The Petitioner’s great grandfather matriculated Arms in Volume 12, folio 63 of the Lyon Register. Those Arms, I have concluded, were differenced Arms as Colonel John Beaufin Irving was then a junior branch of the Irving family. I note that this was not uncommon for armigerous junior branches to record such differenced Arms and then to succeed to the plain undifferenced Arms and, as such, to have two coats of arms.

c. Mrs. Eileen Mary Keys-Irving of Bonshaw matriculated Arms in 1971 in Volume 52, folio 96 of the Lyon Register. I have noted that this recording was made 13 years after Mrs. Keys-Irving of Bonshaw had purchased Bonshaw Tower. I can find no evidence that Mrs. Keys-Irving of Bonshaw’s matriculation was served on the Petitioner’s father who would have been entitled to claim the territorial designation at the time. I can find no evidence that the matriculation was subject to any form of notice. I have therefore concluded that this matriculation cannot be held against the Petitioner or his branch of the family in relation to this present claim.

d. Finally, in consideration of the matriculations in the Lyon Register, let me now turn to the petitioner’s son’s matriculation (Rupert Christopher Irving) in 2011 (see Volume 91, folio 73 of the Lyon Register). The Petitioner’s son matriculated Arms which appear to have been originated and recorded by Colonel John Beaufin Irving prior to his acquisition of the Bonshaw estate and I have concluded this was primarily to prove in the entry the genealogy of the branch of the family to which the Petitioner belonged. I have concluded that this matriculation was for the purpose of establishing

a genealogy which related to the present Petitioner and his claim to the chiefship. Rupert Christopher Irving matriculated differenced Arms as a cadet and was not claiming any chiefly designation in the 2011 matriculation.

In summary, I am of the opinion that none of the matriculations (b) to (d) above undermine the Petitioner's claim when they are seen in the context of the totality of the evidence before me.

17. Having made the Findings in Fact above, and given the reasons for those findings, I have reached the conclusion that :-

(i) That the Petitioner is entitled to the Official Recognition of Change of Name and likewise his son and heir apparent;

(ii) That the Petitioner is entitled to confirmation of the Chiefly Arms of Irving of Bonshaw with a Grant of Supporters, Standard, and Pinsel.

(iii) This decision, I have concluded, should be "for aught yet seen". I have reached this conclusion because it would be wrong to exclude any existing senior stirps despite the findings I have made above, and if a better claim is established the matriculation can be reduced within the twenty year prescriptive period. I therefore have concluded in making my decision that it should be subject to "for aught yet seen". This follows the position given by Lord Lyon Thomas Innes of Learney in the case of Macnab of Macnab, 1957 SLT (Lyon Court) 2, in which he states that the reason the Lyon Court allows a confirmation or matriculation based on prescription gives a rival claimant twenty years in which to seek to reduce the confirmation or the matriculation and see MacDonald of Keppoch Petitioner (No. 3) 2004 SC 438 at [34] where the Court of Session considered that a finding of for aught yet seen was appropriate where the genealogy depended on presumptions such as non apparentibus non existentibus praesumuntur. This being the lawful period of prescription required for the confirmation or matriculation to be outwith any challenge.

(iv) It should be noted that the principle behind this position is that heritable property, and that includes Name and Arms, should not be without an infeft proprietor because the Superior (the Crown) would not want the feu vacant. I would also make it clear that I am of the view that chiefship should not be vacant simply because there is a possibility that someone else might have a claim. I have taken this position as a common-sense approach on the matter. Hence, in the case of the Irvings of Bonshaw, they should have a Chief and any person who has a better claim has twenty years in which to challenge this decision.

(v) After considering the totality of evidence before me, the note of evidence from the Petitioner's senior counsel, the submissions and points made by him on 9 July 2014, and the

relevant case law, and bearing in mind the burden of proof rests with the petitioner, I have concluded that the petitioner has discharged this burden of proof and that the Petition should be allowed.

18. The Petition is allowed.

.....

Dated: 25 August 2014

Joseph John Morrow

Lyon