

was, nor could be used till the expiration of her's, and there is the *modus vacandi* declared, viz. when her's should expire.

No 5.

To the *third, answered*; *1mo*, Such a second gift could not take away a *jus quæsitum* by the patent, being a gift for a number of years; and though Mr Freebairn's name is in the gift, yet, being to partners and assignees, and actually assigned, and the Lords' declarator following thereon, Mr Freebairn could obtain no second gift to evacuate the pursuer's right; *2do*, It is *jus tertii* to the defender.

"THE LORDS found the pursuer's interest and title by the gift did not fall or become irritated by Mr Freebairn's not qualifying within three months of the date of the gift; and repelled the defence, that after the said first gift to Freebairn, he obtained a second gift before the time at which the first was to commence; as also, repelled the defence, that the said first gift was granted before expiring of the former gift in favour of the defender, the said gift to Freebairn being to commence at the ish of the said former gift given to the defender."

Act. Sir Walter Pringle.

Alt. Sir James Naesmith.

Clark, Mr Kenzie.

Bruce, v. 2. No 18. p. 22.

SECT. H.

Citation *cum Processu*.

1672. January 24.

The LAIRD of LUSS, and GEORGE GLENDINNING, against The EARL OF NITHSDALE.

No 6.

THE Earl of Nithsdale being pursued, as heir of tailzie to the last Earl of Nithsdale, for payment of a bond granted by him to the Laird of Luss, it was *alleged*, No process, because the heirs of line were not cited. It was *replied*, There was no necessity, unless the pursuers could condescend that they had an estate which might be discussed.

THE LORDS sustained the defence, and found there was a necessity to cite them, albeit, when they were cited, the heir of tailzie the defender behoved to condescend upon an estate in their person, which might be discussed, otherwise they might immediately insist against him.

Fol. Dic. v. 2. p. 301. Gosford, MS. p. 238.

* * Stair's report of this case is No 45. p. 3565. voce DISCUSSION.