

1716. July 17. JAMES WATSON *against* Mrs ANDERSON and Others.

No 5.

Found, that a gift of King's Printer was not irritated by the circumstance, that the patentee had not taken the oaths prescribed by law. His assignation of the right was, notwithstanding, found good.

By articles of agreement, betwixt James Watson, Mr Robert Freebairn, and Richard Watkins, *anno* 1711, it is provided, That if a gift of Queen's printer in Scotland were obtained in any of their names, they should all three be equally concerned therein. Mr Freebairn obtains the gift, to take place after expiration of Mrs Anderson's, (but did not take the oaths in due time conform to law,) and then accordingly he disposes a third part thereof to James Watson, who thereupon obtains a declarator against the other two, declaring, that he was one of his Majesty's printers equal in all respects with them in order that he might enjoy the benefit thereof with the privilege of printing bibles: But then Mr Freebairn obtains a new gift, which never was communicated to Mr Watson, who also thereafter pursued a declarator of the foresaid sole privilege against Mrs Anderson, as still encroaching upon the privilege of his Majesty's printer after her gift was expired:

In which process it was *objected* by Mrs Anderson, *imo*, That the declarator could not be sustained, in regard that Mr Freebairn the patentee was not qualified according to law by taking the oaths as prescribed; and though the pursuer himself was so qualified, that was not enough, because the patent was in Mr Freebairn's name, and Mr Watson was only assumed as a printer; *2do*, That the gift was null, in regard it was granted during the currency of Mrs Anderson's gift, and so had not a legal *modus vacandi*; *3tio*, That, since the gift in question, Mr Freebairn had procured in his own name a new gift, which was not communicated to Mr Watson, which necessarily derogated from the first.

Answered for the pursuer, to the *first*, That *in dubio* Mr Freebairn's being qualified ought to be presumed; *2do*, Since he is not convicted for not qualifying, he ought to be continued in possession, which the Lords use to do in case of pursuits for ministers' stipends, not being quarrelled by the government, and no sentence of conviction against them; and that it was incompetent for the defender, now only a private printer, to make any such objection; *3tio*, The Lords' decret declares the pursuer one of his Majesty's printers, who is duly qualified; for, though the patent be taken in Mr Freebairn's name, yet it is also to his partner's; and he having, by contract, previous to the gift, agreed that the other two should be partners, he did, upon obtaining the gift, dispoise a third part of it to Mr Watson, upon which the Lords declared as said is; and therefore he is to be considered as one in the patent, and, being duly qualified himself, could sustain no prejudice by the other's omission.

To the *second*, *answered*; That the pursuer's gift is declared to commence only from the expiration of Mrs Anderson's, which accordingly is now expired; and consequently she had no interest to quarrel the new gift, seeing it neither

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.