John Robertſon of Goodlyburn, - - *Appellant;* Caſe 63.
George Earl of Kinnoul, - - - *Reſpondent.*

16th *March* 1719-20.

Truſt.—Oath of Party.—A perſon who had conveyed his feu to his ſuperior's ſon, having contended that the conveyance was depoſited with a truſtee, till certain conditions were fulfilled: after obtaining the oath of the ſuperior, is alſo allowed the oath of the ſon, the diſponee.

Peer.—A matter referred to a peer's oath.

IN 1695, the appellant purchaſed a feu of the lands of Goodlyburn, and the Hole of Huntingtour, from Thomas Hay of Balhouſie, afterwards Earl of Kinnoul, the reſpondent's father, for the ſum of 3000 merks, to be holden of the ſaid Thomas Hay and his heirs as ſuperiors: and the appellant was to pay a feu duty for the ſame, amounting to about 20*l.* ſterling annually. Upon his feu-contract he was duly infeft upon the 26th of April 1695, and his inſtrument of ſaſine recorded.

The appellant having allowed his feu-duty to run in arrear, the reſpondent's father brought an action of reduction, improbation, and declarator againſt him before the Court of Seſſion, for reducing his ſaid feu-right; and decree in abſence was pronounced againſt him on the 16th of December 1707. (*a*)

The appellant ſtill continued to poſſeſs the lands. And upon the 31ſt of December 1713, he executed a deed renouncing, in favour of the reſpondent, all right, title, intereſt, claim of right, property, and poſſeſſion, which he had or could pretend to the ſaid lands with the pertinents; and he obliged himſelf voluntarily to remove from the ſame, and conſented that the reſpondent ſhould be at liberty to let the ſame. In April 1717 the reſpondent gave a notice to the appellant to quit the poſſeſſion of the premiſes at Whitſunday then next: and thereupon alſo he brought an action of removing againſt him in his own baron court. This action the appellant advocated to the Court of Seſſion, and he there ſtated, that the ſaid renunciation had been made upon terms, viz. that the ſuperior ſhould pay back to the appellant the foreſaid 3000 merks, which the appellant had paid for the ſaid eſtate; and ſo much for the improvements which the appellant had made, as ſhould be found to be juſt by two honeſt men, to be mutually choſen by the ſuperior and vaſſal; and, laſtly, that the ſuperior ſhould procure from his ſon the reſpondent, in whoſe favour the ſurrender was made, a leaſe of the premiſes to the appellant and his heirs for 19 years, upon the yearly payment of the foreſaid feu-duty as a reſerved rent:

That it was alſo agreed upon betwixt all the parties, when the ſurrender was executed, that the ſame ſhould not be delivered, but

(*a*) In the Journals this interlocutor is ſtated to be of the 16th of February 1707; but both the appeal caſes agree in giving the date of December.

only

only lodged in the hands of Sir Patrick Murray of Auchtertyre, a neighbouring gentleman, till the abovementioned terms ſhould be fulfilled to the appellant; but that the reſpondent prevailed upon the truſtee to deliver up the deed to him.

The Court of Seſſion on the 10th of December 1717 "de- " cerned againſt the appellant in the removing." The appellant preſented ſeveral bills of ſuſpenſion, offering to refer the depoſitation to the oaths of the late Earl of Kinnoul, of Sir Patrick Murray the alleged truſtee, and of the reſpondent himſelf, in whoſe favour the deed was made. The Court directed, that the late Earl of Kinnoul ſhould be examined upon oath, and he accordingly deponed that he remembered nothing of any terms of depoſitation. The Court by ſeveral interlocutors on the 5th of March, the 3d of April, the 22d of May, and 7th of July 1718, refuſed the bills of ſuſpenſion, as to the examination of the reſpondent, and Sir Patrick Murray.

Entered, 22 Dec. 1719.

The appeal was brought from " ſeveral interlocutory ſentences " or decrees of the Lords of Seſſion of the 16th of December " 1707, 10th of December 1717, 5th March, 3d April, 22d " May, and 7th July 1718."

Heads of the Appellant's Argument.

The aforeſaid decree of the 16th of December 1707, reducing the appellant's title to his eſtate, being in abſence, when the appellant knew nothing of it; and when he thought he had nothing to fear from his ſuperior, from whom he had ſo lately purchaſed the eſtate, and to whom a very ſmall arrear was due, the appellant conceives can never be ſuſtained, either to carry off his eſtate, of itſelf, or be a valid ground of the aforeſaid renunciation.

The renunciation never having been a delivered deed by the appellant to the reſpondent, it can never diveſt the appellant of his right in the eſtate, and no proof was ever offered to be made by the reſpondent of the delivery thereof; he would only preſume it to have been delivered becauſe it appeared in his hands. But the appellant offered to take off this, and all other preſumptions whatſoever, by referring the whole facts to the oaths of the late Earl of Kinnoul, the reſpondent's father, of the reſpondent, and of the truſtee in whoſe hands the deed of ſurrender was depoſited.

The oath of the late Earl of Kinnoul, without the oath of the truſtee, makes nothing againſt the appellant: his lordſhip does indeed depone, that he does not remember the terms of the ſaid depoſitation; yet in the ſame oath, he refers to the depoſition of the truſtee, who he ſays is an honeſt man and will tell the truth.

As the aforeſaid decrees and interlocutors appear to be contrary to law, they likewiſe ſeem to be very inconſiſtent with equity and juſtice; for though the appellant be by them ſtript of an eſtate and effects to the value of 1005*l.* ſterling and upwards, as appears by the ſtated account herewith delivered (*a*), which was

(*a*) An account of the price and payments, &c. made by the appellant is annexed to his caſe.

his all: yet in none of these decrees has the respondent so much as attempted to set forth any true or valuable consideration for the same; further, than that there might (when the said decree of reduction in the appellant's absence was pronounced) be a year or two of the feu-duty in arrear, amounting to the sum of 333*l.* 6*s.* 8*d.* Scots money at most, too small a purchase for the appellant's estate, and his many years' labour and expence in improving it. Besides, the arrears were legally tendered to the superior two years before the decree of removing was pronounced, as appeared from the instrument taken thereupon; and the law allows this to be sufficient to take off any pretence of a forfeiture for non-payment of the feu duties.

Heads of the Respondent's Argument.

The respondent's father obtained a decree in 1707 against the appellant, voiding his right; the appellant, after that, continued to possess the premises as a tenant at will, and paid rent for the same; the appellant in 1713 executed a renunciation of all right and title he had to the premises, and that renunciation was absolute without any condition. After that time the appellant has still possessed as a tenant at will, and has run greatly in arrear, which obliged the respondent to bring his action of removing against him, whereupon he recovered judgment: and the respondent has been kept in law suits for several years, by the appellant a pauper, and the respondent will in all events be a very great loser by the appellant's obstinacy.

After hearing counsel, *It is ordered and adjudged, that the interlocutors and decrees complained of as to so much thereof, whereby probation by the oath of the respondent is refused to the appellant, or which is grounded upon such refusal, or made in consequence thereof, be reversed: and it is further ordered, that such probation be admitted, and that after examination of the respondent upon oath, the Lords of Session proceed and decree thereupon as shall be just.* Judgment, 16 March 1719-20.

For Appellant, *Bat. Turnbull.*
For Respondent, *Rob. Raymond.* *Will. Hamilton.*