Case 88. John Robertſon of Goodlyburn, a Pauper, *Appellant*;
George Earl of Kinnoul, - - - *Reſpondent.*

5th *July* 1721.

Proceſs.—Act and Commiſſion.—A purſuer oppoſes the granting an act and commiſſion for examining the defender, a peer in London, in a matter referred to his oath, on the ground that he being old and poor, could not follow the examination: but the commiſſion is granted notwithſtanding.

Truſt.—A perſon executes an abſolute ſurrender of his feu, in favour of his ſuperior's ſon, but alleging qualifications of truſt in a ſeparate verbal agreement, the ſuperior ſwears that he remembered no terms of depoſitation, and the ſon, the grantee, ſwears, that he perſonally gave no conſideration for the deed, and that it was not delivered to him, but that every thing was tranſacted by his father; and he never heard of any conditions or truſt: it is found that the depoſitions did not ſupport the allegations of truſt.

AFTER the determination and judgment given in the former appeal, (No. 63 of this Collection), whereby the Houſe of Lords reverſed the "interlocutors complained of, as to ſo "much thereof whereby probation by the oath of the reſpond-"ent had been refuſed to the appellant, or which was grounded "upon ſuch refuſal, or pronounced or made in conſequence "thereof; and further ordered ſuch probation to be admitted, and "that after examination of the reſpondent upon oath, the Lords of "Seſſion ſhould proceed and decree thereupon as ſhould be juſt;" the appellant preſented a petition to the Court of Seſſion, praying them to ſummon the reſpondent before them to take his oath: his counſel, however, having moved their lordſhips for a commiſſion to examine the reſpondent in England, the appellant preſented another petition, ſetting forth that though ſuch commiſſions were often granted with conſent of parties, yet that no law could force him to conſent; and that the appellant was an old man and ſo reduced in his means, that he was not able to follow ſuch a commiſſion, where his preſence would be neceſſary, his all being therein at ſtake. But the Court, on the 28th of July 1720, "ordained the reſpondent to depone before the Ordinary, if he "ſhould happen to come to Edinburgh during the vacation; if "not, they granted a commiſſion to take the reſpondent's oath at "London." And upon the 25th of November 1720, the commiſſion was renewed upon the reſpondent's petition.

Interrogatories being ſettled by the Court, the appellant was examined thereon by a commiſſioner at London. The import of his depoſition was, that the reſpondent acknowledged, that the appellant never delivered the deed of reſignation to him the reſpondent in whoſe favour it was conceived, and that the reſpondent never gave the appellant any conſideration for the ſame. That he knew nothing of any conditions upon which the ſaid deed of reſignation was delivered; nor did he ever hear from the late Earl of Kinnoul, Sir Patrick Murray, or any other perſon whatever,

whatever, of any conditions upon which the ſaid reſignation was given; and had heard and verily believed that the conditions inſiſted upon by the appellant were referred to the oath of the ſaid late Earl, and that he deponed *negative* thereto.

On the 24th of February 1721, the Court "found and de-
"clared, that the depoſitions did not prove the allegations made
"made by the appellant, and therefore adhered to their former
"interlocutors in the removing." The appellant reclaimed, inſiſting that the reſpondent ſhould be decerned to account for the loſſes the appellant ſuſtained, by his being diſpoſſeſſed of the premiſes; but the Court, on the 28th of February 1721, "ad-
"hered to their former interlocutor, without prejudice to the
"appellant to raiſe, proſecute, and inſiſt in any proper action
"againſt the reſpondent for his intromiſſion with the appellant's
"goods, or any damages done to the appellant by diſpoſſeſſing
"him or otherwiſe, as accords."

The appeal was brought from "two interlocutory ſentences
"or decrees of the Lords of Seſſion of the 28th of July, and 25th
"of November 1720, and the affirmance thereof made the 24th
"and 28th day of February 1721. (*a*)

Entered 17 May 1721.

Heads of the Appellant's Argument.

As no deed could diveſt the appellant of the right and title to his eſtate, or convey the ſame to the reſpondent, unleſs it had been delivered to him by the appellant (which the reſpondent never pretended to prove was done, but only would have it preſumed to have been done, becauſe it is now in his power,) the appellant having fully taken off that preſumption, by the reſpondent's own acknowledgment upon oath, he conceives there can remain no further difficulty in this affair. And as the delivery of deeds is abſolutely neceſſary for altering property, ſo both law and equity require a valuable conſideration for the conveyance, (except where the deed itſelf bears to be made for love and favour;) and the reſpondent in his depoſitions has likewiſe moſt honourably acknowledged, that he never paid one ſixpence for the eſtate, and that he knows not, that any thing was paid for it by any other perſon.

The appellant conceives it would be hard above meaſure to proceed to other preſumptions, viz., that the ſaid deed was delivered to the reſpondent's father, and the price of the eſtate paid by him for the reſpondent's uſe, without any further proof; for by that rule, if an obligee in a bond ſhould execute a diſcharge *ſpe numerandæ pecuniæ*, which ſhould by any accident fall into the hands of a ſtranger, it would be in the power of that ſtranger, by giving that releaſe to the obligor, to releaſe him effectually, and put the obligor paſt relief, which juſtice cannot allow: The reſpondent therefore, before he can reap any benefit from the ſaid deed, muſt prove not only the delivering of it to his

(*a*) Theſe two laſt interlocutors are not mere affirmances of the two former, but on the merits; whereas the others are merely on the form of proceſs: but ſo it ſtands in the Journals.

father

father for his uſe, but likewiſe that his father paid the conſideration thereof.

It was contended by the reſpondent, that as the appellant had acknowledged, that there might be, when the decree of removing was paſſed, ſome of the feu duties in arrear, ſo that the ſaid decree, though only *ex parte*, being grounded upon ſome real debt, though not equivalent to the value of the eſtate, was capable of being confirmed by the ſubſequent voluntary ſurrender; and thus that the ſaid decree ought to be looked upon as the valuable conſideration of the deed.

Two cyphers put together are of no greater value than any one of them was before; a void deed can never ſupport a void decree. But theſe arrears of feu-duties were inconſiderable, and tendered before the decree of removing.

Heads of the Reſpondent's Argument.

It is the conſtant practice of the Court of Seſſion to grant commiſſions to examine parties upon oath, eſpecially if out of the kingdom: and the reſpondent was at that time attending the ſervice of Parliament, and was examined by a commiſſioner named by the appellant.

The reſpondent does indeed ſwear, that the deed was not delivered to him by the appellant, nor did he give any valuable conſideration for the ſame; but then he adds the reaſon, that the whole was tranſacted by the late Earl of Kinnoul, his father; to him the deed was delivered, and no doubt there was a conſideration given by him; and it is plain from the depoſition of the late Earl of Kinnoul, that the ſame was delivered without any condition. And the appellant likewiſe brought an action againſt Sir Patrick Murray, inſiſting that the deed was depoſited with him upon truſt, not to be given up but upon performance of the conditions before mentioned; and Sir Patrick being examined upon oath, ſwore that the ſaid deed was never depoſited in his hands, and ſo there could be no truſt repoſed in him; and accordingly the Court, on the 24th of February 1721, aſſoilzied the ſaid Sir Patrick from the appellant's action.

The appellant likewiſe inſiſted that one Mercer, the reſpondent's agent in Scotland, might be examined how he came by the ſaid deed; and whether he knew or had heard of any and what conditions, upon which the ſame had been depoſited: and Mr. Mercer being examined ſwore, that the ſaid deed was ſent to him by the late Earl of Kinnoul to be made uſe of in the action of removing at the ſuit of the reſpondent againſt the appellant, and had heard that the ſame was delivered by the appellant to the ſaid late earl; and that he never heard from the ſaid late earl, or any other perſon, of any conditions, upon which the ſaid deed was granted and depoſited, except what was inſiſted upon by the appellant in his pleadings.

The reſpondent's father obtained a decree againſt the appellant in 1707, voiding his right; the appellant continued to poſſeſs the premiſes after that as a tenant at will, and paid the rent for the ſame;

ſame; the appellant in 1713 executed a renunciation of all the title and intereſt he had to theſe premiſes, and that renunciation was abſolute without any condition; the appellant after that time has poſſeſſed as a tenant at will, and run greatly in arrear, which obliged the reſpondent to bring his action of removing againſt him, whereupon he recovered judgment; the reſpondent has been for ſeveral years kept in law ſuits by the appellant a pauper, and will in all events be a very great loſer.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the interlocutory ſentences or decrees therein complained of be affirmed.* Judgment, 5 July 1721.

The Appellants' Caſe is ſigned by himſelf.
For Reſpondent. *Rob. Raymond. Will. Hamilton.*

Ex parte

David Falconer, of Newtown, Eſq. - *Appellant;* Caſe 89.
The Principal and Maſters of King's College, and the Provoſt, Baillies and Council of Aberdeen, - - - - *Reſpondents.*

31ſt *Jan.* 1721-2.

Preſumption.—Two deeds of mortification in favour of the ſame perſons, but of different dates, and for different ſums, found in the grantors repoſitories, did not both ſubſiſt.
A proof of his intention allowed by the inſtrumentary witneſſes.

THIS appeal was upon a point preciſely ſimilar to the other appeal at the inſtance of the ſame appellant, (No. 84 of this Collection). In addition to the two deeds in the former appeal recited, relative to the education of the ſcholars at the ſchool of Conveth; the late Sir Alexander Falconer of Glenfarquhar, executed two others for maintaining and educating certain boys at the King's College of Aberdeen.

On the 3d of December 1712, Sir Alexander Falconer, by a deed upon the ſame recital with the firſt deed in the former appeal recited, left, mortified, and appointed 180*l.* Scots, payable yearly by his heirs out of certain lands, to the principal and maſters of King's College Aberdeen, for educating and maintaining three boys at the rate of 60*l.* Scots each yearly, at the Philoſophy College there; which boys ſhould be ſufficiently qualified, and be of the name of Falconer, in the firſt place, if any ſuch there were, and in default of them, of any other boys duly qualified, that ſhould be born or educated within the pariſh of Conveth; the firſt payment to be at the firſt term of Whitſunday, or Martinmas after his deceaſe. The patrons and preſenters were the ſame as in the former