No 222.

1705. *December* 20. Scrymgeor *against* Betson.

An objection against an execution of an apprising served against a minor, that tutors and curators were not mentioned in the body of the execution, but interlined, was repelled, in respect it did appear by ocular inspection that the same was done *ex incontinenti*, and that all was done with the same hand and same ink.

Fol. Dic. v. 2. *p.* 153. *Fountainhall.*

*** This case is No 103. p. 3758, *voce* Execution.

No 223.
A gift under the Great Seal sustained, though some words were superinduced in the warrant, and others not material therein scored, in respect the superinduced words were, in effect, in the warrant in other words not superinduced, and the margin subscribed by the keeper of the Seal bore, that the scoring was by order of the Chancellor, and with consent of the donatar, who had most reason to quarrel it.

1709. *February* 4. Sir Alexander Cuming *against* John Vere Kennedy.

The Lords having found Sir Andrew Kennedy's deprivation upon malversations, had the same effect as his natural death, against his son John Vere Kennedy (see Appendix); he objected that Sir Alexander's gift was null, because the warrant was razed and vitiated in two places; these words 'past 'per Saltum' being superinduced, and a clause therein, Whereby her Majesty doth annul Sir Andrew and his son's right upon malversations scored, and the margin opposite thereto subscribed by the keeper of the Great Seal, bearing, that such lines were deleted by the Chancellor's order, with consent of Sir Alexander Cuming.

Alleged for Alexander Cuming; 1*mo*, Seeing the Queen doth not impugn Sir Alexander's gift, but on the contrary, hath authorised his pursuit by a letter, and given him a new gift ratifying the former, and dispensing with any nullities or informalities therein; it is *jus tertii* to Mr Kennedy to object, any pretended right he had being terminated and out of doors by the decreet of reduction against his father; 2*do*, *Et separatim*, superinducing the words *per Saltum* is an objection of no moment; seeing, 1*mo*, The equivalent words are there not superinduced, viz. without passing any other seal or register; 2*do*, The words deleted in the warrant being not material, and in Sir Alexander Cuming's favour, and the docquet, which is an epitome of the gift, being full and entire, the Chancellor (who is Judge of what might be superfluous) might warrantably score the same: For, in countries where the Chancellor is remote from the Sovereign, he (as the Exchequer doth with writs directed to them) may lawfully score what is superfluous, and not in the common stile, without reporting the matter to the Sovereign. It was ordinary for the Exchequer to strike out even substantial parts of signatures, when quarrelled by third parties having interest; and when the Queen trusts the Chancellor (in place of the Exchequer) with the sole power of expeding the signature *per Saltum*, he has the same discretionary judgment they would have had for that effect; yea, the etymology of the word, from *cancellare*, imports as much.

No 223.

Answered for Mr Kennedy; 1*mo*, Any person who has interest in the subject conveyed by a gift, may competently object any nullity therein; and the new gift cannot support the first null gift, because procured after Mr Kennedy had pleaded his *jus quæsitum* by the nullities. 2*do*, It is too nice to distinguish here betwixt what is material, and circumstantial. By our constitution, the Chancellor is *custos magni sigilli* without any judicative or correcting faculty; his business being only to append the seal upon her Majesty's order; or, at most, if he find any thing contrary to law, the rights of the Crown or the subject, he may delay to affix the seal till her Majesty be first acquainted. Mr Kennedy thinks himself not obliged to debate whether he was prejudiced by the scoring or not; seeing the writ is not the same as it past her Majesty's hand, and consequently null. There is no parallel betwixt the Chancellor's office and the Exchequer; because, when any thing passed her Majesty's hand to be revised by the Exchequer, which is an established court of judicature, it bears expressly to be with consent of the Lords of Treasury and Exchequer; whereas no grant under the Great Seal bears to be with consent of the Chancellor or keeper. So sacred is the royal subscription, which no man should touch out of the ordinary and known form; that Gray of Hayston, *anno* 1677, having acquired a part of a barony holding ward of the King, and documented the proportion of his lands to the whole barony, and procured a signature blank in the tax-ward duties, he was fined in L. 1000 Sterling, and the gift annulled, for his filling up the blank with the true duties.

Replied for Sir Alexander Cuming; Though no person dare add to the royal will without a new allowance, the Chancellor may score what is superfluous, without vitiating the rest; for deletion doth not annul a writ, where the words scored can be read, or where it appears from what precedes and follows, that they are not substantial, or the margin authorised doth mention what is deleted, Stair, lib. 4. tit. 42. §. 19. Hayston's case is not to the purpose; for he presumed to add his own tax-duties with his own hand, without any authority, and without telling how it was done.

The Lords repelled the objections against Sir Alexander Cuming's gift.

Then it was *alleged* for Mr Kennedy; Suppose his father's deprivation be found equivalent to his natural death, the son's right is not thereby terminated, but survives during her Majesty's pleasure.

Answered for Sir Alexander Cuming; The Queen hath sufficiently signified her pleasure to remove Mr Kennedy from the office, by her new gift in favour of Sir Alexander Cuming.

Replied for Mr Kennedy; Her Majesty cannot be understood to have revoked his gift, unless she had declared her intention to revoke the same, after it became a gift during pleasure, by the Lords' interlocutor finding the father's deprivation equivalent to his natural death; whereas Sir Alexander's new gift was prior to the said interlocutor, and so contrary to the claim of right, viz. a disposing of John Vere Kennedy's forfeiture before sentence.

No 223. The Lords found, that the Queen's gift to Sir Alexander Cuming, though anterior to the interlocutor, finding Sir Andrew's deprivation to be equivalent to his natural death, did vacate and extinguish John Vere Kennedy's right; because the said interlocutor was declaratory, and ought to be drawn back to the date of Sir Andrew's deprivation, which preceded Sir Alexander's last gift.

Fol. Dic. v. 2. p. 153. Forbes, p. 315.

1709. *December* 21.

Mrs Lyon *against* The Earl of Aboyne, and his Tutors.

No 224.
Words interlined in an assignation found unwarrantable; but as the deed without the words interlined did sufficiently convey the sum in dispute, it was sustained.

John Lyon of Muiresk, having granted an assignation in favour of John Riddoch writer in Edinburgh, narrating, That 3500 merks were resting to John Lyon by Charles Earl of Aboyne, and that the assignee had advanced to the cedent a certain sum of money in lieu of the foresaid sum of 3500 merks, therefore he did assign him to the said sum of 3000 merks and annualrents thereof and obliged himself to warrant the said assignation of 3500 merks against his deeds done or to be done; John Riddoch transferred the right in favour of the said John Lyon's relict, who upon a registered extract of the assignation, bearing 3500 merks interlined in the dispositive clause, pursued John the present Earl of Aboyne, as representing Earl Charles his grandfather, for payment of the said sum.

Alleged for the defender; He must be assoilzied, because the writ which is the ground of the pursuit, is vitiated by the interlining, and consequently null.

Replied for the pursuer; She cannot be prejudiced by the interlining; because the assignation doth, without it, sufficiently convey the whole 3500 merks; seeing the dispositive clause refers simply to the narrative mentioning the whole 3500 merks, and acknowledges the receipt of the value of that whole sum, which is also mentioned in the clause of warrandice. So that it appears from the narrative, onerous cause, and clause of warrandice, that the 500 merks has only been forgotten through oversight in the dispositive clause; and it were dangerous to find, that even the vitiation of an extract (which is more than interlining) doth annul the principal writ; seeing extractors may readily mistake and amend words. Nor doth vitiation annul any papers, unless it be in substantials, or be such as the words vitiated cannot be read or understood.

Duplied for the defender; As in dispositions and charters of alienation, however extensive the narrative and *tenandas* be, nothing is understood conveyed, but what is in the dispositive clause; so the dispositive clause only in the pursuer's assignation can be noticed. And whatever action upon the warrandice might be competent against the cedent's representatives, to assign *de novo*, as to the remainder; that could never found a pursuit against the Earl of A-