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-

boyne, as to whom *casus omissus habetur pro omisso.* So interlining or blotting writs have always been sustained to annul them, November 22d 1671, Pittillo *contra* Forrester, No 216. p. 11536; December 13th 1627, Hepburn *contra* Lyel, No 5. p. 1779. Which is agreeable to the civil law, L. 45 § 8. D. De jure fici, and to the custom of other nations, Tholosan, Lib. 36. cap. 5. § 5. Guido Papa, Lib. 22. Boer. Decis. 291. Vulteius Tom. 2. Consil. 28. § 17.; and Clarus Sentent. Lib. 5. No 224.

The Lords found, that the interlining is unwarrantable; and remitted to the Ordinary to enquire about the author in order to punish him; but found, that the assignation without the interlined words, did sufficiently convey the whole sum of 3500 merks; and therefore repelled the defender's objection, and sustained the assignation.

Fol. Dic. v. 2. p. 153. Forbes, p. 369.

1712. *July* 18. The Earl of Bute *against* James Halyburton of Pitcur.

No 225.
A bond being granted under a condition, and the clause containing the condition being cancelled and torn, the bond was found ineffectual.

Sir George Mackenzie of Rosehaugh Lord Advocate, by his bond 10th December 1684, for certain good causes and considerations, obliged himself, his heirs, executors, and successors, to pay to Margaret Halyburton daughter to Pitcur, which failing to James her brother, &c. the sum of 6000 merks at the next term after her or his attaining the age of ten years complete, with annualrent thereafter during the not payment; as also, he obliged himself and his aforesaid, to pay to George Halyburton his wife's uncle's children, and some other relations of his wife, several sums of money payable a year after his wife's decease, under a certain condition and provision, which is now all cancelled and worn away except the last words, bearing "the bond to be in satisfaction of all that any of his wife's relations could claim from the granter or his successors any manner of way, as paraphernalia, donation, &c." In the year 1686, Sir George got an heritable bond and infeftment from Pitcur in his lands for 5000 merks: George Mackenzie, son and heir to Sir George, in the year 1701, commenced a process against James Halyburton of Pitcur, as representing his father, for payment of the 5000 merks, and some other sums contained in other bonds, which is now wakened by the Earl of Bute, the pursuer's heir of tailzie. The defender proponed compensation upon the 6000 merks, which by the first bond was payable to him failing his sister, who is dead.

Alleged for the pursuer; The bond, so miserably lacerated and cancelled in a most material and substantial part, namely the condition under which it was granted, is noways probative of the compensation; seeing the mank part of the bond might have contained a clause evacuating the same in a certain event; if such a bond were sustained, all our writs in Scotland conceived under such conditions (and a great many are so conceived) coming in the hands of persons whose