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

No 225. interest it is that the conditions should be removed out of the way, these would have it in their power to make the writs pure and simpleby tearing off the conditional part. The common law and all lawyers agree, That writs thus lacerated and cancelled make no faith, L. 1. D. De Bon. Poss. Sec. Tab. et Gloss. *ibid.* and ad L. 3. C. De Edict. Div. Adrian. toll. Lauterbach Comment. Tit. De Fide Instrum. N. 56, 57. Mascard. De Probat. vol. 2. Conclus. 1261. N. 2, 4 Concl. 256. N. 4, 9.; with this the canon law agrees, Cap. 3. Extr. De Fide Instrum. whence the Doctors infer, That a writ razed, not in the narrative, but in the obligatory or dispositive part, should have no credit; and therefore, 26th November 1671, Pittullo *contra* Forrester, No 216. p. 11536, the Lords found a bond whereof about half a line in a material place, the term of payment, was so blotted and obliterated, that what had been thereon written before could not be read, to make no faith; and refused to it to be adminiculated by witnesses, because it was presumed that the words wanting might have been a clause to evacuate the bond.

Answered for the defender; The *lacuna* or defect in the writ quarrelled happened not *consulto*, but *casu*, by being exposed to the injuries of wet and air (the mother of rust and corruption in such kind of bodies), when the house of Pitcur was plundered at the Revolution by a troop of dragoons, who scattered the papers about the close; and nemo tenetur præstare casum fortuitum. All the authorities brought for the pursuer do concern the cases of vitiation or laceration *ex proposito*. In the practique betwixt Pittullo and Forrester, the bond in question had suffered manufacture and been vitiated; whereas here is neither vitiation nor laceration by the debtor in the bond, but only an accident happening to a writ once complete, whereof the obligation can only be dissolved by performance or discharge. That supervening accidents do not alter or take away obligations once formally constituted, is clear from the Title D. De his quæ in Testam. delentur, and the Tit. Cod. De Fide Instrum.; and from the known form of process for proving a tenor. Were it not absurd, that a writ entirely lost should be made up again as authentic as the original, and yet a writ torn by accident in any considerable clause shall be found absolutely null? Since all the essentials of the obligatory part of this bond are extant, that there might have been a resolutive clause is circumstantial and conjectural; and the obliteration of this conjectural part was altogether fortuitous without design; the asserter of a resolutive clause to have been filled up therein, ought to prove this allegeance, at least to give some evidence thereof. For preventing the suggested hazard of a creditor's turning a provisional bond to a simple obligement by wearing out the provisional clause, Non statim casum conquerentibus facile credendum est. L. 5. C. De Fide Instrum. but the *casus* is to be distinctly proved, as is done here; 2*do*, The provisional clause wanting follows in the end of the obligations in favours of other of the granter's Lady's relations; and therefore doth only concern these, and not the obligation in favour of the defender, which is simple and absolute; besides, that the term of payment of the sum

due to the defender, is different from the terms of payment of the other obligations. No 225.

Replied for the pursuer; Neither law nor lawyers make distinction, whether a writ be vitiated by industry or chance, or be cancelled, razed, and delete, vel si enormem patiatur fracturam; determining uniformly upon all that "regulariter non probant." Though the decision betwixt Pittullo and Forrester proceeded upon a vitiated paper, the reason given for it is what is here urged. The distinction of writs torn *consulto* and *inconsulto* is imaginary, and not only without foundation in law, but manifestly choketh reason and good policy; because it may fall out, that a writ purely and simply obligatory, may be destroyed *infortunio*, doth it follow that all writs in a party's possession who hath met with a mischanse, must necessarily be made up of what tenor the party pleaseth? The instances adduced for the defender from the title of the common law, De his quæ in Test. Delen. are nothing applicable to the present case; for testaments being presumed to remain with the testator, and being in his hands, law presumes that deletion or obductions therein happened from the change of his will; 2*do*, The provisional clause being subjoined to the obligement in favour of the defender, as well as those in favour of the Lady's other friends, it must affect all equally, remote or immediate.

The Lords found, That the bond founded on to instruct the compensation, is not a binding obligation; and therefore repelled the defence founded thereon.

Fol. Dic. v. 2. *p.* 153. *Forbes, p.* 620.

*** Fountainhall reports this case:

1712. *July* 19.—Halyburton of Pitcur being debtor by bond to Sir George Mackenzie of Rosehaugh, in 5000 merks, and also in some lesser sums by personal tickets, George Mackenzie, his son, raised a process in 1701 against Pitcur for payment, and which having slept by his death, the Earl of Bute, his heir of tailzie, wakens the process. Against which it was *contended* for Pitcur, He must have compensation, because Sir George Mackenzie had granted a bond for 6000 merks, to Margaret Halyburton, his sister, with a substitution in his favour, which existed. *Alleged* for Bute, The bond produced can found no compensation, being vitiated *in substantialibus*, cancelled, lacerated, and torn in several places, and so can never be probative in any judicatory whatever. *Answered* for Pitcur, It is very true, some parts in the middle of it are worn and holed, being either eaten by rats, or rather thrown out by the dragoons to the open fields, when they came and riffled his house in 1689, as disaffected to the Revolution; and he has proved by Sir James Ramsay of Banff, and other famous witnesses, that his papers at that time were abused, and found lying without the walls; and he produced other writs as ill mangled and lacerated as this, on that same occasion. He confessed, if any vestige of manufacture or work-

No 225. manship appeared upon it, he would not have had the confidence to use it; but ocular inspection shewed it to a demonstration that it was no industry or contrivance, but pure misfortune had spoiled it; and yet the essentials were entire, both the debtor's and creditor's names, the sum, the term of payment; and where it begins to be vitiated, it is quite a new period of other legacies left to third person's; and he had reason to be kind to his Lady's friends, for Pitcur, her brother, had altered his tailzie from heirs-male, to heirs whatsoever, in her favour; and he was preferred in the sale of Newtyle to Gairntully, though he offered more for it. It is true, the presumption lies against a vitiated writ, yet with the exception, where the way of its being spoiled can be condescended on, for then *præsumptio cedit veritati;* and a very congruous reading can supply what has been in the place eaten away, viz. that this bond was to be null, in case of children betwixt him and his Lady, but to subsist in force in case his children happen to die before her; which case actually existed. *Replied*, That a bond defective in a material part is improbative, *quoad* the whole, whatever way it happen; unless it be made up by proving the tenor, or by the party's oath, both which supplements fail here; and certainly the place torn is most essential, being the conditional and resolutive clauses, by which the obligation stands or falls, and it is most suspicious that the razure is made in that place; and its being done by the dragoons is but a mere conjecture and a *color quæsitus*; and the schemes invented for filling up the blanks are pure divination and dreams, and by a sharp wit can be varied in twenty shapes; and if there were room to guess, it should rather be in the event of his Lady's death, than his son's; for he declares this donative and gratuity to her relations shall be in full satisfaction to them of her paraphernalia and executry, which can admit of no sense but of her predeceasing. And the common law concurs; for the gloss ad l. 1. D. De bon. poss. secundum tab: determines "si a muribus rasæ sint tabulæ, non est iis credendum si rasura sit in ea parte super qua vertitur dubitatio," vide l. 3. C. De edicto divi Hadriani toll. So Louterbach ad tit. D. De fide instrument. affirms that "fides instrumenti infringitur et reprobatur, si sit cancellatum, rasum, innovatum, vel literæ non legibiles, vel scriptura deleta, vel enormem patiatur fracturam, regulariter non probat, nisi plura adsint exemplaria, vel in loco non suspecto fiat abrasio." And Mascardus De probat. vol. 4. concl. 1261, says positively, "cancellatio præsumitur facta ab eo apud quem reperitur," and who produces and uses it; and must be interpreted *contra proferentem.* Yea, the Lords went a greater length, 22d November 1671, Pittillo *contra* Forrester, No 216. p. 11536. where a bond was blotted and obduced only in half a line, or thereby, so that it could not be known what had been wrote therein, the Lords found it improbative and null, because it might have been some condition that would evacuate the bond; and they decided the same in a vitiated discharge betwixt James Bayne and Dr Scot, (*See* Appendix.) And in the case of the Earl of Lauderdale's iron charter-chest, which, in the English usurpation, had been put under ground,

the writs were so defaced that they were, in some places, scarce legible, and could never have been made up, had not the supreme authority of Parliament done it; and wherever a vitiated writ is produced *pessimum præsumitur* against the user. *Duplied* for Pitcur, That he had the rules of law on his side; for casum fortuitum nemo præstare tenetur; et ea interpretatio sumenda ut actus potius valeat quam pereat, and l. 5. C. De fide instr. says, iniquum est instrumentis vi ignis consumptis debitores quantitatum solutionem renuere, and Pope Alexander III. capit. 3. extra de fide instrum. si in narratione tantum abrasœ sunt non inde vitiatur. There was another circumstance urged against this bond, That Sir George, in the list of his debts owing by him, did not insert this bond, but mentioned Pitcur's bond in his list of debts owing to him; though it was said that men are not curious to propale bonds of this kind, to shun the disobliging of such friends as are omitted. The Lords, by a scrimp plurality, found this vitiated bond improbative and null; but there were three *non liquet*. If art or industry had any way appeared in the tearing this bond, all were clear it could prove nothing; but some had a conviction that it happened merely by chance and accident, without design. Yet the forecited law of the Emperor Gordian, l. 5. C. De fide instrum. says very well, " non statim casum fortuitum conquerentibus facile credendum est.

Fountainhall, *v.* 2. *p.* 757.

No 225.

1729. *February.* Duke of Roxburgh *against* Rutherford.

No 226.

It was found to be a nullity in an apprising, that the third sheet appeared, from ocular inspection, to have been made up and put in since the allowing of the apprising, though the apprising was offered to be supported by production of the letters and executions to which it was conform; which was not found relevant, it being sufficient to say, that *non constat* this was the apprising signed by the messenger; that the presumption was otherwise from the vitiation; and that therefore the writing can bear no faith. (*See* Appendix.)

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

1758. *January* 9.

Coutts and Company *against* Allan and Company.

No 227.
The literal terms of an obligation corrected from the circumstances of the case. The crop of one year had been inserted when it was evident another was meant.

On the 14th September 1754, Fairy, agent for Coutts and Company, wrote to Allan and Company, "Gentlemen, I acknowledge to have sold from 600 to 800 bolls of north-country meal, crop 1754, good and sufficient oat-meal, at 10s. 8d. Sterl. per boll, deliverable at the harbour of Irvine, as soon as wind and weather will allow; payable at Martinmas next, and the 1st January, in equal proportions."