

No 16.

1680. *January 16.*AITCHISON *against* KER.

The Director of the Chancery may recal commissions granted by him, and dismiss his Clerks at pleasure.

ANDREW AITCHISON having had commission from Sir William Ker, Director of the Chancery, to write in the Chancery, and being turned out by him, pursues him to repon him to his service. The defender *alleged*, Absolvitor; because the commission being a mandate, is revokable at pleasure, and bears no definite time; and it was never heard, that a servant in an office had any further right than during his master's pleasure, which is the common practice of all that have offices. It was *answered*, That special consideration ought to be had in the Chancery, there being so few alive who know the stile and forms of it, which being the record of the rights of the most important lands and estates in the kingdom, and of the services and retours of all heirs, none can serve therein, but such as have a particular breeding for that purpose, which the pursuer had for these 15 years with John Aitchison, who had been writer in the Chancery above 40 years, which being a public concern, Sir William should not be suffered to put a skilful servant out of the chamber, unless he can supply the same with a sufficient one.

THE LORDS found the defence relevant, that the Director might recal his commission, and put out his own servant at his pleasure, albeit it be a public concern, that the Chancery should be served with sufficient bred servants; as to which, the Council have given commission to those of their number, who are Lords of Session, to take inspection of the Chancery, how it is served, and the forms thereof observed.

Fol. Dic. v. 2. p. 293. Stair, v. 2. p. 740.

1680. *February 19.*The CLERK REGISTER *against* SIR WILLIAM PRIMROSE.

No 17.

The Clerk of Notaries is, by his office, bound to call in and keep the prothocals of notaries.

THE Clerk of Register having given in a complaint against Sir William Primrose, Clerk of the Notaries, that he did not attend that office, he not residing in town, and that he was not qualified therefor, and had malversed therein, in so far as, by the act of Parliament 1617, cap. 22. it is statuted, that the prothocal of notaries shall, within 15 days after the notary's death, be brought in to Edinburgh, and delivered to the Clerk Register, or his deutes, to be retained and kept by his deutes appointed to that effect; likeas, the said Sir William Primrose being admitted to the said office upon the first day of November 1666, by his commission, inserted in the books of Sederunt, he is specially entrusted to call in and pursue for the notaries' prothocals, and to keep the same; and yet, to this day, he hath never called for one prothocal, to the great detriment of the lieges, albeit he hath taken caution for all the notaries admitted, for

bringing in their prothocals within 15 days after their decease, whereby he had ready execution; and as, by his office, he is obliged to mark the prothocal books of notaries, and to give new books when the old books are produced to him, and by that great trust of prothocals, he ought to have perused the prothocals that were filled up, and if they were not authentic and formal, to have certified the Lords, that such notaries might be discharged, and no more books given them, and ought to have been ready, upon all occasions, to exhibit to the lieges prothocals for extending and transuming instruments; all which he hath neglected, and managed his place for mere profit, endeavouring to get all persons passed notaries, and thereby get compositions, the most ignorant being most ready to give the greatest compositions, and giving out books so large, that would last a whole life; so that it could never appear, whether the notaries malversed in their office; albeit it be evident, by the whole tract of the acts of Parliament, what care hath been taken for having qualified notaries, and their prothocals to be brought in, and kept for the use of the lieges. The defender *alleged*, Absolvitor; because, by his office, there is no more required, but to draw bills for admitting of notaries, and acts of admission, and to take caution for bringing in the prothocals, and marking their books, which he hath always done, which requires very little qualification; likeas, he hath power of deputation by his commission, and hath skilful deputes, and neither do the acts of Parliament expressly oblige any to bring in prothocals, but the wives, bairns, and cautioners of notaries; and there is no ground of deprivation upon so inconsequential an inference from one act of Parliament; and seeing Sir William is willing to take his directions in time coming, and that his predecessors in his office were not in custom to call in prothocals, his neglect cannot amount to a sufficient ground of deprivation. It was *answered*, That it appears by the records, that, before his time, prothocals were called in; and it is ridiculous to pretend, that the bonds for taking in of prothocals were to no effect, but that none were obliged to call for them, but the notaries' wives, bairns, and cautioners, might safely keep them, and that the Clerk to the Notaries, though he had these bonds, was never to put them in execution, though he is expressly commissioned so to do, which, though it be in the terms, with power to him to call in the prothocals, yet that is not a mere faculty at his discretion, but a commission or mandate, requiring diligence, which he hath wholly neglected; and albeit his commission bear a power of deputation, yet that doth not exempt him also from skill and attendance; and albeit the Clerk Register, by his commission from the King, hath power to depute, yet he cannot give power to deputes to constitute deputes, *nam delegatus non potest delegare*, though deputes may have servants under them, they can have no deputes that can sign for them, or perform the trust.

THE LORDS found the Clerk of the Notaries, by his office, obliged to call in and keep the prothocals of notaries, which being special in his commission, and

No 17. being wholly neglected by him for so many years, is a malversation of knowledge and importance, inferring deprivation.

Fol. Dic. v. 2. p. 292. Stair, v. 2. p. 759.

1681. June 9.

KEITH *against* The EARL of SOUTHESK.

No 18.

A Sheriff de-
pute being
denounced at
the horn, this
was found not
to exclude
his substitute.

SIR JAMES KEITH having received a deputation from the King to be Sheriff-depute of Forfar during his life, and the King having thereafter given a gift of the Sheriffship to this Earl of Southesk and his father, and the longest liver, during their life; they do also grant a deputation to Sir James during their life of the said office, with the emoluments thereof, with a power to substitute deputies; and, accordingly, he did substitute; yet this Earl of Southesk, by an act in the Court book produced, put in another depute, the act bearing this reason, that Sir James did not reside in the shire. Sir James did thereupon pursue the Earl and his depute for wrongous putting him and his substitute from the office and emoluments thereof. The defender *alleged, imo*, That he did no wrong in putting in another depute; because the pursuer, though he had a power of substitution, yet that could only be interpreted for singular occasions in his necessary absence; but did not liberate Sir James from the ordinary exercise of the office; therefore, Sir James having deserted the office, being several years in England, he was justly excluded therefrom, as having relinquished the same; *2do*, Sir James was denounced, and his escheat gifted, whereby he could not stand in judgment, and so could not ordinarily exercise the office, and, in consequence, upon both these grounds, his substitute was excluded; *3tio*, Sir James was malversant, not having relieved the principal Sheriff of making the æques, and of the taxations; and being a person insolvent, could not be allowed to intromit with the King's dues, countable by the Sheriff in Exchequer; *4to*, Both by the nature of his office, and by his gift from the Earl, he is answerable for his substitute. *Ita est*, his substitute was malversant in not attending the ordinary diets of Court; and Sir James, or his depute, were malversant in causing condemn and execute two persons for theft unwarrantably; and though the Court book produced bears, that they were condemned upon their confessions judicially, yet it was offered to be proved, that they were impannelled before prior inquests, and were assoilzied; and yet, against law, a new inquest was called, and condemned them, though the verdict of the first inquest was not annulled. The pursuer *answered*, That, as to the æques and taxations, the not relieving the Sheriff thereof was no crime deserving deprivation; *2do*, He produced receipts, bearing, that he had paid both during the time he or his deputies were suffered to serve; and, as to his substitute's non-attendance, or the unwarrantable condemnation of the two thieves, he opposes the Court book produced, wherein the sentence of both the thieves is set