

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

down, and their judicial confession ; and there is nothing in the books to show any formal trial ; likeas, the book bears, that his substitutes had sitten three or four days before the act admitting another in a tract of Courts before ; and albeit a Sheriff might *brevi manu* exclude his own depute for not attendance, when he had long neglected Courts, yet there was no pretence to exclude a depute, constituted *ad vitam* by the King, before the Earl's right, and by the Earl himself ; for though the Earl might have named a depute *pro tempore*, if the pursuer, or his substitutes, had not attended, or, after their long absence, had hindered them to return, yet it being clear by the book, that the substitute was recently in exercise of the office, the Sheriff-principal, at his own hand, could not put in another.

THE LORDS having, before answer, ordained the matter of fact alleged, to be proved, as either party desired, allowing them to be further heard at advising, they found this was an act before answer, equivalent to an act of litiscontestation, and refused any new allegiances, or new probation, upon other acts of malversation, but prejudice to the Earl to insist thereupon, by way of action, as accords : And the LORDS found, that Sir James's deputation by the King and the Earl was cumulative, that there was no desertion, or voluntary and wilful absence of Sir James, or his substitute, proved, and that his being denounced did not exclude his substitute, and that there was no malversation proved ; and, therefore, decerned Sir James to be reponed, and appointed an auditor for the bygone emoluments.

Fol. Dic. v. 2. p. 292. Stair, v. 2. p. 872.

* * * Fountainhall reports this case :

IN Sir James Keith of Caldham his declarator against the Earl of Southesk, for repossession to his place of being Sheriff-depute of Angus, or Forfar, from which he was illegally thrust by Southesk, and another placed by him as Sheriff-principal, as also for the bygone emoluments ; Southesk *alleged, imo*, Sir James deserved deprivation ; for he became furious and hypochondriac, and unfit to exerce ; *2do*, He deserted it, and staid at London three years ; *3tio*, He committed many injustices, and hanged one for a thief without probation ; for the assize having cleansed him, he forced them again to re-inclose, contrary to the 97th act, Parliament 1587, and to return him guilty ; and condescended on sundry other malversations. *Answered to the first and second*, His misfortune is not to be objected nor upbraided now, when he is sober ; and he had a depute who served for him ; and, as to his malversations, denied the same. And probation being led upon the several points, and advised by the Lords this day, " They found the malversations not proved ; and, therefore, repelled the Earl's defences, and reponed Sir James to his office : And, further, (which was not expected by any, but that the bygone fruits would have been found *bona fide percepti*,) the LORDS ordained the Earl to account to Sir James for the bygone

No 18. emoluments and profits of the place, during the time he had been debarred by him."—See a decision, somewhat contrary to this, in *Durie*, 17th February 1624, Thomson, No 17. p. 1737.

Yet my Lord Southesk thinks his own declarator is entire, and reserved to him; so that, if in it he prove any relevant malversations against Sir James, the Lords will yet receive them, and deprive him. Sir James not being yet fully cured of his distemper, it was thought the Lords should not have reponed, but only given him a competent annuity or aliment out of the office, during his life.

Fountainball, v. I. p. 141.

No 19.

1681. *December.*

HOG against Sir WILLIAM KER.

A Clerk of Chancery was found to have no power by his commission to delegate a substitute, and therefore was ordained to exercise the office by himself, or his servants, for whom he should be answerable.

A person having been made one of the Clerks in Chancery by the Director, to whom he paid a valuable composition for the office, it was found, that the Director could not dismiss him for alleged malversations without the sentence of a judge.

SIR WILLIAM KER, Director of the Chancery, having granted a gift to Mr William Hog, Advocate, to be one of the Clerks of Chancery during his lifetime, and allowing him the benefit of all patents and other writs passing the Great Seal, and writing of brieves and attornies, with power to him to exercise the office by himself, or his servants, for whom he should be answerable; and he having continued in the office for the space of a month, Sir William did turn him out, and put another in his place; and Mr William having raised a declarator before the LORDS, craving, that he may be reponed to his office until he were legally removed by a sentence of a competent judge; and Sir William having alleged upon Mr William's negligence, and several acts of malversation; and it being *answered* for the pursuer, That albeit he had malversed, as he did not yet, he could not be summarily deprived of his office without the sentence of a competent judge, he having paid a composition for his office, and the gift being granted to him for his lifetime; so that it was not in Sir William's power to turn him out at his pleasure, as he may do other servants in the Chancery, who bruiks only their offices during pleasure, and were gratuitous, having paid nothing for it; and this is a matter of universal concernment, for if that were sustained, by the same reason, all those that are substitutes in any office in Scotland, albeit they bought the same at a dear rate, might be turned out by their constituents, so as the Register may turn out the principal Clerks of Session, and they might turn out their under-clerks, and the Sheriffs their deputes, and the Lord Lyon the heralds and messengers, &c. albeit they had acquired their offices for a full and legal price; and it were against reason, that they should be allowed, at their own hands, to deprive their substitutes, which they would be ready to do, whether there were reason for it or not, of purpose, that they might get a new composition from another, if they were allowed to be judges in their own cause, and deprive their substitutes at pleasure, without the sentence of a competent judge. THE LORDS, before answer, ordained Sir William to condescend upon the acts of malversa-