

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.

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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 briefs 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 buy 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 deputies, 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-

tion, which accordingly being done, the LORDS ordained either party to prove the custom of the Chancery; and accordingly the witnesses being examined, and Sir William having produced the manuscript scrolls written by Mr Willing Hog and his servants during his remaining in the office, it was *alleged* for Sir William, That Mr William Hog had done several deeds of malversation, which were not only prejudicial to the public, but also were like to have turned Sir William out of his office; in so far as by the 7th act, session 3d of his Majesty's second Parliament, in the year 1672, it is expressly provided, That seeing the interest of the subjects are greatly prejudged by the neglect of registering charters, infestments, gifts, commissions, and other writs which did pass the Great and Privy Seals; therefore ordains the same to be registered in all time coming, before the Seal be appended, and the keepers of such registers are ordained to register them, and, by their subscriptions, mark them on the back, before they be given out to be sealed; so that Mr William having omitted to register these writs, and to fill them up conform to the act of Parliament, he was justly deprived of his office; as also, it appears by the scrolls produced, that he has not only contravened the act of Parliament, but the constant custom of the Chancery that was observed before the act of Parliament, in so far as the scrolls of the charters and writs want the titles, date, and precepts of sasine, and in many of them blanks left when they could be filled up; as also, it was evident from the scrolls, that there were several patents of honour, as the Lord Kintore's, the Lord Sinclair, Earl of Caithness, Earl of Strathmore, the Lord Rodger, which, by the inviolable custom of the Chancery, ought to be written on parchment, are only written on paper. Rodger, which Sir William was forced to tear out of the book after Mr William was turned out of his office, and to register them in parchment according to the custom of the Chancery, they being heritable patents of honour, and so of the nature of heritable rights, which should be registered in parchment for the better preservation; and it will appear by the depositions, that after the pursuer was turned out, Sir William was forced to get up the warrants of the Privy and Great Seals, and caused not only of new write out perfect scrolls in place of those condescended upon, and were defective, as wanting precepts of sasine, date, and otherways vitiated, and material clauses omitted; as also, was necessitated to make up the records by writing over above fifty more, which the pursuer had altogether omitted, albeit the same were passed the Great Seal, and for which Sir William might justly have turned him out, seeing he must be answerable for the servants in the office; and albeit the gift was granted to the pursuer during his lifetime, and that Sir William had received money for the same, yet the gift can be no otherways understood but *ad vitam vel culpam*, so that the pursuer having malversed, Sir William might justly deprive him of his office; and it was never the custom of the Chancery, in writing of the scrolls, to leave out the titles, dates, and precepts of sasine, and other material clauses; at least, if at any time there was any left out, there was al.

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ways a blank left for filling them up, which accordingly thereafter was done, and bound up in books, for otherways, it would not have answered the design of such a register, which was to keep a perfect record of all the signatures that passed the Chancery; and if there was any such omission before by the custom of the Chancery, yet the same being corrected by the act of Parliament, any such evil custom could not be a warrant to the pursuer to follow these examples; and albeit Sir William is obliged by his gift to furnish the pursuer parchment, and albeit that had not been done, yet he should have provided the same; and he being collector of the dues of that office, he might have retained as much in his own hand as would have paid the parchment; and albeit some of the books were filled up by Sir William, when there was a visitation appointed by order of the Privy Council, yet the scroll of the charters produced, and the patents of honour condescended upon, were all written by the pursuer and his servants, which are absolutely imperfect, and such of them as are recorded are only in paper, contrary to the law and custom of the Exchequer, which is clearly proved by the witnesses adduced, who albeit some of them be servants in the Chancery, and may be turned out at pleasure, yet they are the most proper witnesses, seeing they are presumed best to know the custom of the Chancery, and can best clear the pursuer's deeds of malversation.

Answered; That if the pursuer was behind in filling up of the register, it was Sir William's fault, who was obliged to furnish him parchments, and did not do it; and he was not obliged to buy it on his own charges, nor give it out of Sir William's money, if he had any in his hand, as he did not, unless he had express orders for that effect; and that it will appear by the testimonies of the witnesses, that he was much more exact in writing and filling up of the register than any of his predecessors; and Mr John Brown, who was his immediate predecessor when he was turned out, was above three years behind; almost all the registers of Scotland are above a year and a half behind; and albeit many of the charters and signatures that were filled up had been wrong written, and wanted the title and precepts, yet that was no negligence nor malversation in the pursuer, because it is the constant custom of the Chancery to write the charters and signatures in single sheets of parchment, and to leave the titles and precepts blank, ay and while they came to such a number as to make up a book, and then to compare, correct, and revise them before they be bound up in a competent book; and he ought to have the same privileges which his predecessors had, to mend any thing that was amiss, so that unless there had been defects in the single sheets after they were bound up in a book, albeit there had been some defects in the single sheets before they were bound, which might have been mended, cannot be imputed to him, either as negligence or malversation; and if there was any defect in those registers that were filled up, it was Sir William's own fault, for there being a visitation appointed by the Lords of Privy Council, Sir William set eight or ten men to work at once, to fill up the several sheets of parchment; and such was the

precipitant haste, that he caused them to write all the Sabbath-day in his own house, and they being strangers to the custom of the Chancery, did not know how to insert the precepts; and it will likewise appear by the testimonies, that it was the custom of the Chancery to give out the principal charter to the party who gave them only back a double to be registered, and which the pursuer complained of to Sir William at several times, but got no redress; and the reason why these charters and other signatures were not written on parchment was, because there could be no parchment gotten at that time in Edinburgh, and they were written on strong thick paper, which is almost as good as parchment; and Sir William was never in use to turn out of any of his servants at his pleasure, except Andrew Aitchison, who pursued him before the Privy Council upon that same ground; and however he might turn out any of the servants that bruiked his office during pleasure, yet he cannot turn out any person that has his office during lifetime, and for an onerous cause, and which Sir William, by his gift, was expressly obliged to warrant; and if a man cannot remove a moveable tenant at his own hand without a warning and order of law, far less can Sir William remove the pursuer upon any pendent act of malversation, unless the malversation be first instructed before a competent judge; and no respect ought to be had to the testimonies of these witnesses adduced by Sir William, several of them being servants in the chamber, who may be turned out at pleasure, no more than a moveable tenant or servant can be received a witness; so that the pursuer having acted according to the custom of Chancery that was in use, even since the late act of Parliament anent the registering of charters and other signatures before they pass the seals, he cannot, upon that ground, be deprived of his office which he bought at an equivalent price. THE LORDS reponed Mr William Hog to his place in the Chancery as formerly, and ordained Sir William Ker to receive him to the office; but found, That he had no power by his gift to substitute any person in the place, and therefore appointed him to exercise the said office, either by himself or his servants, for whom he should be answerable, and not by a substitute.

Fol. Dic. v. 2. p. 292. Sir P. Home, MS. No 41. v. 1.

* * * Fountainhall reports this case:

1679. February 27.—SIR WILLIAM KER, Director of the Chancery, having turned out Mr William Hog, one of the writers there, pursues him for opprobrious language, taking away the registers, &c. and Mr William pursues Sir William for illegally depriving him, he having given him 1200 merks for it. The Lords of Privy Council referred to the Judge Ordinary to consider the commensuration between the delict and punishment, if it merited deprivation yea or not; *medio tempore* during the dependence suspended him *ab officio*, and

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ordained him to crave the Council, and the said Sir William pardon, for calling the said Sir William, his master, capricious, though many thought the character true.

1680. *February 3.*—IN the action Mr William Hog *contra* Sir William Ker, (27th February 1679,) it was debated whether a master upon his servant's malversations might summarily remove his servant from his office, and put him to complain and purge his innocence, and seek to be reponed; or if the master must first apply, and complain; and the case of an apprentice was instanced, where the master may turn him out of his service for faults. THE LORDS finding Mr William already dispossessed, and that the Privy Council had found some ground for it, they waved the reponing him, and allowed Sir William to condescend on malversations, and *medio tempore* ordained Mr Hog to stand as he is. Though we say *via facti spoliatus ante omnia est restituendus*.

Fountainhall, v. 1. p. 45, & 81.

1681. *December.*

DAVID DENHOLM *against* SIR WILLIAM BRUCE and WALTER RIDDELL.

No 20.

Where the Clerk of the Bills had admitted a minor as cautioner whose bond was reduced, the clerk was notwithstanding bound to produce the bond, because there might have been an attestation on the back of it.

DAVID DENHOLM, as executor to William Denholm his father, having given in a bill of complaint to the LORDS against Sir William Bruce and Walter Rid- del, his servant, craving, that they may be found liable to him for a debt, in in respect they had admitted an insufficient cautioner in a suspension, being a minor, who had obtained the bond reduced upon minority and lesion; as also, that the bond of caution was abstracted; *answered* for the clerks of the bills, That they could not be liable for admitting a cautioner that was minor, he being otherways sufficient, seeing they were not obliged to know his age; and they cannot be liable upon that ground, that the bond of cautionry is not produced, because it being reduced at the instance of the granter upon minority, it can be of no use to the pursuer. *Replied*, That the clerk of the bills ought to enquire as to the party's age that he receives cautioner, as well as to his sufficiency, and he ought much more to be liable if he admit a minor cautioner, than if he admit an insufficient cautioner; because, that a party is minor, it may ordinarily be known by seeing of him, at least, may give a ground to enquire as to his age, whereas a party's sufficiency cannot be so easily known; and seeing the clerk of the bills gets such a large allowance, he ought to be liable for a more diligent and strict enquiry anent the condition of any person he receives cautioner; and albeit this bond be reduced at the instance of the cautioner upon minority and lesion, so that it cannot be effectual against him, yet the clerk must must be liable, unless the bond be produced, because there might have been an attestation upon the bond by another person, who, upon that ground, might be liable for the debt; and it is very presumeable, that the