No 25. protested for cost, skaith, and damage; and then raises a process against the Earl of Eglinton, Sheriff-principal, Fulwood, the Sheriff-depute, and Robert Alexander, who exercised as clerk, to hear and see it found and declared, that he has the sole right, and they decerned to admit him, and to pay the bygone profits and emoluments of the place since 1696. *Alleged* for the Earl of Eglinton, That being heritable Sheriff, he had, by virtue of his office, a power to nominate and input a Sheriff-clerk, so the Secretaries' gift was null. *Answered*, The disposing of the offices belonging to the Crown, and particularly that of Sheriff-clerks, appertained to the Secretaries, and not to the Sheriff, unless he had a special power and faculty so to do by his charter, (as the Earl of Rothes, in the heritable Sheriff-ship of Fife has), which my Lord of Eglinton has not. *Replied*, Though it was not *nominatim* expressed in his right, yet it followed in consequence as a part and pertinent of the office. *Duplied*, In this point an heritable and a temporary Sheriff made no difference; and a Sheriff, during life, never pretended to name a clerk; and this very same office had been gifted by the Earls of Murray and Melford, when secretaries, so they were in possession. THE LORDS found that the Earl of Eglinton, not having an express power in his charter to nominate Sheriff-clerks, he had not right to dispose of the said place; but that the same belonged to the Secretaries of State; and therefore ordained Richardson, the pursuer, to be admitted and received to the said office.

Then he insisted in his other conclusions, to have the bygone profits. Against which it was *alleged*, That Robert Alexander, being admitted by a gift from the Earl, and in possession, he was *in bona fide*, ay till the Earl's right was found null and insufficient. *Answered*, The intimation of the pursuer's gift, and instrument of requisition, did certainly put him *in mala fide*. THE LORDS remitted this point to be further heard by the Ordinary. Thomson *contra* Law, No 17. p. 1737.

Fountainhall, v. 2. p. 284.

1710. *January* 18.

The MAGISTRATES of Montrose *against* Mr ROBERT STRACHAN, Schoolmaster.

No 26.
A Schoolmaster in a Royal Burgh, whose admission bore neither during pleasure nor *ad vitam*, found not to be removeable arbitrarily at the pleasure of the Magistrates.

THE Magistrates of Montrose, by an act of their Town-council the 10th August last, declared, That the said Mr Robert Strachan should not continue their schoolmaster longer than till the term of Martinmas next; which act being intimated, the Magistrates, by another act, the 9th of November, declared his school vacant, and decerned Mr Robert to deliver up the keys to the Magistrates.

He suspended, and *alleged*, That being admitted Schoolmaster simply, and not during pleasure, he had right to enjoy his office *ad vitam aut culpam*; and generally gifts to offices are so understood, when not otherwise expressed; and it were a very great discouragement, for men who are fitted for their employ-

ments, to be removed summarily, without malversation, and especialiy in Royal Boroughs, where the change of Magistrates happening yearly, new Magistrates have often new friends to advance; and, in this case, the suspender had served many years as doctor in the same school, and thereby given evidence of his capacity, upon which account he was advanced; and generally Professors, and Masters of Universities, are admitted in the same manner, their gifts neither bearing for life, nor during pleasure; yet such cannot be removed without a fault, as was found in the case of the Magistrates of Edinburgh *contra* Mr Andrew Massie, Regent in the College of Edinburgh, who was reponed to his office, notwithstanding he was deprived by a sentence of the Magistrates. See APPENDIX. No 26.

It was *answered*, That the Schoolmaster is the Town's servant, and not having his place for life, depends entirely upon their pleasure; and it were of very bad consequence, if it were found otherwise, because it might often happen, as in this particular case, that the school might daily decay, to the great prejudice of the neighbouriug gentlemen, and the inhabitants within the town, who would be obliged to send their children to other places, or lose the opportunity of their education, which was the true cause of removing the suspender; and yet, if there were an absolute necessity to prove a malversation, it were a matter of great difficulty, if at all possible.

"THE LORDS found no necessity to condescend upon any malversation; and also, that the Magistrates could not arbitrarily, at their pleasure, remove their schoolmaster; but that for any just and reasonable cause they might; and ordained the Magistrates to condescend, before the Ordinary, upon a just and reasonable cause for removing the suspender."

Fol. Dic. v. 2. p. 292. Dalrymple, No 90. p. 127.

*** Fountainhall reports this case:

THE present Magistrates and Town-council of Montrose, having, by their act, deposed Mr Strachan, their Schoolmaster, from his place, he gives in a bill of suspension, and obtains it past; and, at discussing, insists on these reasons, that, by his act of admission, he is installed in that office, without mentioning either *ad vitam et culpam*, or *durante beneplacito*, which can admit no other interpretation, but that he was to hold it *quamdiu se bene gesserit*; and he was ready to subject himself to any censure, if either malversation or insufficiency could be made out against him; and all his predecessors had enjoyed the place during their life; and there was no other quarrel against him, but that one of the present Magistrates had a friend he designed to put in, and if this were allowed, the Schoolmaster's place would be very precarious; for when a new set of Bailies come in, they will turn out the former, to make room for their own, which diversity of masters, and way of teaching, will ruin any school. And lately, since the Revolution, the Magistrates of Edinburgh, having deposed Mr

No 26. Andrew Massie, the Regent in their College, his gift not bearing *ad vitam*, the LORDS reponed him, unless they condescended on a fault; and through all the Colleges of Scotland the Regents have no other admission, and yet look upon their places as secure, except upon reasonable causes, inferring deposition. Yea Bartolus goes a greater length, that where officers stand upon the foot of pleasure, even that must be a *beneplacitum rationale*, and not *arbitrarium*. *Answered* for the Magistrates, See 14th February 1665, The Town of Edinburgh against Sir William Thomson, their clerk, No 5. p. 13090, whom they had deposed, where it was pleaded how far a *culpa levis* is sufficient to put out a servant; and though they are not bound to give any reason, no more than a master needs when he puts away his servant at the term, yet here they want not sufficient causes; for they, using to have a very flourishing school, not only for the inhabitants' children, but for the neighbouring heritors and gentlemen, now it is quite sunk and decayed, and lost its reputation, which they only seek to retrieve; for this office wholly depends, both as to salary and admission, on the town; so they are tied to give no reason for their changing him, there being neither separate patron nor mortifier but themselves. What if a Baron establish a Schoolmaster, to serve within the bounds of his barony, will he pretend to sit against his master's will? and a burgh royal cannot have less power. And, if they would secure themselves, they should not accept till they bargain for a gift *ad vitam;* and the Town suffers exceedingly, who, in place of 100 scholars, have not 20 now. The Lords thought the education of youth a matter of vast importance to the kingdom, that grammar-schools be furnished with men of probity, learning and prudence; but, on the other hand, they were not to be turned out at the caprice and arbitriment of new Magistrates; and therefore ordained the town to condescend on some rational grounds of their dissatisfaction, either from immoralities, insufficiency, malversations, or unsuccessfulness in his way of teaching or discipline, and to give some evidence and instruction thereof, that the Lords might consider whether they merited deprivation or not.

Fountainhall, v. 2. p. 555.

*** Forbes also reports this case:

1710. *January* 17.—THE Magistrates and Town-council of Montrose having, in August 1704, elected Mr Robert Strachan to be master of their Grammar-school, and lately, by an arbitrary act of their council, deprived him of his office, and declared the school vacant, he suspended upon this ground, That the town could not *ad libitum* turn him out, without qualifying and proving malversations against him.

Alleged for the chargers, Seeing the suspender's act of admission doth not appoint him to be Schoolmaster expressly during his lifetime, it is understood to be during pleasure; and, therefore, the chargers, who are patrons of the school,

put in the master, and pay his salary, may, by their inherent power, turn him out as an ordinary servant, without rendering a reason for so doing. No 26.

Answered for the suspender, Whether he be the Town's servant or not, he is not in the case of an ordinary hired servant, that may be put away at pleasure; and his commission, not bearing the clause *durante beneplacito*, gives him right to the office *quamdiu se bene gesserit*, as was decided in the case of the Town of Edinburgh against Mr Andrew Massy. And it would be ruinous to the instruction of youth, to allow of an arbitrary chopping and changing of Schoolmasters.

THE LORDS found, That the chargers could not arbitrarily remove the suspender from his office, but for reasonable causes, and found, that either ignorance or insufficiency was a sufficient reasonable cause to deprive him, without necessity to condescend upon malversations.

Forbes, p. 386.

1716. *July* 10.

JULIAN and BEATRIX DEWARS *against* The CLERKS of the Bills.

No 27.
Where a bond of juratory caution had been lost, and another substituted, the clerks of the bills were found no further liable than *subsidiarie* for any damage consequent on the omission.

THE deceased Sir James Cockburn having suspended a charge given him by the said Dewars, upon juratory caution, did find his son, Sir William, cautioner, and consigned a disposition in common form; which suspension being discussed by the chargers against Sir William, they obtained the letters orderly proceeded; and having applied to the clerks of the bills for the bond of cautionry, it was amissing; but Sir William, at the said clerks' request, renewed the same, which, together with Sir James's disposition, they offered to the chargers, which they refused, and gave in a complaint to the Lords, wherein they *contended*,

1*mo*, That the clerks were immediately liable, and not *in subsidium* only, because they were, by their office, obliged to receive a bond of cautionry, which, how soon the suspension was discussed, the complainers had interest to claim; and, if the clerks neglect to take such a bond, or (which is the same thing,) pretend that it is lost, they are liable for the debt and damage, as was found, 17th November 1680, Ogilvie against Riddel, *voce* REPARATION.

2*do*, That they were not obliged to accept of a new bond of cautionry in place of the old; because, whatever was given in to the clerks, at passing of the suspension, the complainers had right, at discussing, to demand the same *specifice*; and the clerks could not otherwise free themselves of that obligation to them, than by delivering the same specific writs which they got, and they are liable for the informalities thereof; for, if they should take a bond of cautionry, without date or designation of witnesses, the party would not be obliged to take the bond, but the clerks would be liable.

Answered for the clerks, to the *first*, That, since the first institution of their office, there was never an extract required of a bond of cautionry taken in the way