The Lords, 24th July, were generally clear for adhering, though the defenders pressed for a delay; but at last the pursuer desiring it might be delayed, the Lords delayed it accordingly, and expressed that cause in the interlocutor.

The Lords, 20th February 1736, unanimously adhered to the interlocutor, finding the clerks liable.

No. 3. 1735, Dec. 12. YETTS *against* THE OTHER HOUSEHOLD TRUMPETERS.

THE Lords altered Lord Royston's interlocutor, and found none of the household trumpeters bound to communicate their fees for officiating at burials. One of their principal motives was, that they thought the lieges not confined to them alone, and so their fees were not casualties of their office, but the hire of their labour, 21st November 1735.

The Lords, I am told, adhered to their interlocutor, November 21st, finding the household trumpeters officiating at burials, not bound to communicate their fees to those not officiating. (I was in the Outer-House.)

No. 5. 1737, July 22. MR ROBERT FREEBAIRN *against* THE COMMISSARY CLERKS OF EDINBURGH.

See Note of No. 11, *voce* ADJUDICATION.

No. 6. 1737, July 1. DAME MARGARET and DOROTHEA PRIMROSE, *against* THE COMMISSARY CLERKS OF EDINBURGH.

WE were much divided in this case on the point of discussion, not indeed whether decreet could go against these clerks till the executor and cautioner were discussed; for we all agreed, that no decreet could go even superseding execution; and I own I have a difficulty how there can be such a decreet in any case where there is *privilegum discussionis,* since that gives the party power to suit execution, that is to use diligence, whenever he thinks the principal is discussed, though many questions in law may arise what is sufficient discussing,—though that has for some time been the general practice; but the question was, Whether the pursuer could insist in his declaratory conclusion to determine the point of law till the executor and cautioner were discussed?—and it carried that he could, (though by a very small majority.) The next question therefore was, Whether the Commissaries and their clerks were obliged to exact and take caution from executors nearest of kin, and what sort of caution? As to the first, the only thing that made it a question, was the pursuer's overlooking the instructions 1563, where they are expressly directed to take caution from the nearest of kin;—and upon my reading them, we all agreed. As to the other, Kilkerran observed, that in many cases caution is taken, but he knew no law or precedent for making the Judge liable if he took insufficient caution, as in the *cautio damni infecti,* and by ward superiors, liferenters, &c. except allenarly the case of caution for tutors and curators. But I distinguished betwixt the case where a Judge is enjoined *ex officio* to take caution, though nobody ask it, and where it is only to be taken at the suit of a party demanding it. That in this case, if the party who was

in Court did not object, it might be deemed an acquiescence in the sufficiency, if not insidious; but that did not hold in the case where a Judge was bound to exact caution, whether demanded or not. The edicts were also mentioned, that summon all and sundry to object to the confirmation and caution; but as I believe these edicts say nothing of objecting to the caution, which is not taken in Court, but by the clerk before extract, in which the Judge does not interpose, and other parties, except the clerk please, have no opportunity, so that argument would equally conclude to the case of caution for tutors and curators. I thought however, that the Commissaries were not liable; because by universal practice that is none of their province, but only their clerks, whose office it is. (However Arniston thought even the Commissaries liable by the instructions.) As to this question therefore we all agreed that they could not accept of elusory caution; 2dly, that it was not necessary that the cautioner should in reality be sufficient or responsible even at the time, if he was habit and repute so; 3dly, that it is not in all cases necessary that the cautioner be habit and repute responsible or sufficient for the whole inventory, *exampli gratia*, if the executor himself had a good free estate, especially in land, and was reputed a frugal man. Therefore upon the whole the interlocutor we gave was, that the clerks were bound to take such caution as was habit and repute reasonable good caution, according to the circumstances of parties at the time.

No. 7. 1738, Jan. 18. TRUSTEES OF MATHIESON'S CREDITORS *against* ROBERTSON.

See Note of No. 5, *voce* ANNUALRENT.

No. 9. 1740, Jan. 11. GIBB and KEITH *against* SCOTT, MILN, &c.

THE Lords found the Justices of Peace's sentences iniquitous, and contrary to law; and found Williamson, the private party, liable for the L.5 Scots in the bill, and annualrents thereof, and expenses of diligence thereon, and in the whole other damages and expenses of the pursuers, particularly the expenses of this process. But John Duncan, the Procurator-Fiscal, they found only conjunctly and severally with Williamson, in repetition of the L.10 Scots of fine paid, and no further, because he concurred only *virtute officii;* and as to the Justices, they found no sufficient evidence that the sentences proceeded from partiality or malice, and therefore assoilzied them, and also their clerk. This case was reasoned very long and fully, and what I mark it for is chiefly to show how delicate a matter we think it is to punish a Judge for a wrong judgment, even in a plain case; and as on the one hand no Judge, at least no inferior Judge, (who is not presumed to be a lawyer) ought to be punished for an error in judgment, for that happens in multitudes of cases even to the ablest lawyers and best of Judges, so on the other, a partial Judge should not only repair all damages, but deserves the severest punishment; and as partiality can hardly be otherwise proved than by the judgment itself, which may be so monstrously iniquitous, that it is impossible to excuse it by a pretence of ignorance or mistake, for that reason we have even fined Justices of the Peace for unjust and arbitrary imprisonments; without which it would be in the power of these inferior Judges to