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, *exempli 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