

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 decret could go against these clerks till the executor and cautioner were discussed; for we all agreed, that no decret could go even superseding execution; and I own I have a difficulty how there can be such a decret in any case where there is *privilegium 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 allenary 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