1704. *July* 3.

SIR FRANCIS KINLOCH of Gilmerton *against* WILLIAM FORBES of Tolquhon.

No 114.
A person out of the kingdom holden as confest, upon a citation at the market-cross of Edinburgh, pier and shore of Leith, as equivalent to a personal citation of one within the kingdom.

SIR FRANCIS KINLOCH, as having right to a decreet of furthcoming obtained against Sir Alexander Forbes of Tolquhon, as debtor to Adam Urquhart of Meldrum, pursued William Forbes of Tolquhon, as representing Sir Alexander his uncle, for payment.

Alleged for the defender, The decreet is null; for that, 1*mo*, Sir Alexander was held as confest, upon an edictal citation at the market-cross of Edinburgh, pier and shore of Leith, which was unwarrantable, as appears from a decision observed by Dirleton, February 5. 1665, No 38. p. 3708. And if a citation at the dwelling-house of one not personally apprehended within the kingdom be not sufficient for holding him *pro confesso*, because of the party's probable ignorance of what may be done in his absence; *multo magis* doth law presume ignorance of what is done, in a way more remote from one's knowledge and observation, against him at the market-cross when out of the kingdom. Nor is it sufficient to say, That Sir Alexander ought to have left a procurator when he went out of the kingdom, seeing *utcunque* such a procurator might have appeared and defended Sir Alexander, had the citation come to his knowledge, he could not have deponed for him; 2*do*, The decreet is null by act of sederunt, in so far as it stands scored at the minute-book, for not payment of the dues.

Answered for the pursuer, If an edictal citation at the market-cross of Edinburgh, pier and shore of Leith, were not a sufficient ground for holding persons *pro confesso*, there could be no furthcoming or constitution pursued against those out of the kingdom, but what is founded on writ; and so unjust men might defraud their lawful creditors, by withdrawing and going abroad. Nor doth the simile of an execution at one's dwelling-house not personally apprehended, hold in this case; because persons, while in the country, may, upon due enquiry, be got cited personally, whereas such as are furth thereof, are not only hard to be found, but also cannot be cited upon the warrant of any Judge of this nation, and are presumed to have settled procurators at the chief seats of justice, and where citations are appointed to be given. As to the cited decision, it doth not meet the case, for there only a warrant to cite a vagrant person, at the market-cross, in order to hold him *pro confesso*, was refused; 2*do*, The scoring in the minute-book proves nothing, being no act of a Judge; and to reduce decreets upon such a head were of dangerous consequence; for it is known, that the keeper of the minute-book lends the same daily to advocates' servants, agents, and others, whereby any decreet might easily happen to be scored in that book; and it were even too great a trust, to allow the keeper of the minute-book himself the power of annulling all sentences in his hands, by scoring at his pleasure. Again, the old obsolete act of sederunt, founded on,

bears only, that in case the clerks extract a decreet that is scored for not-payment of the macer-dues, they should *eo ipso* be liable to the macers for the same, but doth not in the least annul the decreet. No 114.

THE LORDS repelled the defences, and sustained the decreet of furthcoming.

Fol. Dic. v. 2. p. 183. Forbes, p. 259.

1710. *February* 11. CHARLES MACKAY *against* BAILIE PATON.

No 115.
Circumstances in a case of holding as confessed, which induced the Court to refuse to repone the heir of the defender, sued on the passive titles.

THE deceased Bailie Paton being pursued by Charles Mackay of Southfield before the Bailies of Edinburgh, on his promise either to denude of an adjudication on Clackmannan's estate, or pay L. 1000 Scots, there is a day taken to produce him to depone, but in regard he was valetudinary, a commission was given to William Legat, his own procurator, to take his oath; but when they came, the servant refused them access, in respect of his sickness; whereupon they took instruments, and the Bailies held him as confest, and decerned, and within a few days after he died; whereupon Mackay pursued Paton's son on the passive titles, and he craves to be reponed against the decreet taken out against his father when he was *moribundus*, and when on death-bed, at which time it is the greatest cruelty to disturb men, or take the least advantage of them; besides, why should he suffer for the refusal of a servant woman, who said her master was so ill he could admit of no company. And we know in such cases servants have special directions to refuse access to any but such as are well known. And must L. 1000 Scots be bound upon him for the servant's obeying orders, who was not to examine their errand or commission? If any thing could be fixed on the defunct, to shew his averseness to depone, something might be pretended, but he knew nothing of their coming to examine him at that time; and it is hard an instrument taken at his door, without his knowledge, should prejudge him or his heir. *Answered*, Law has prefixed limits for holding parties as confest; *first*, He is personally apprehended on the execution; *next*, A day is taken to produce him; *3tio*, On a representation of his sickness, a commission is granted for taking his oath at home, and his own procurator named for that effect, who certainly had got access if he had been willing to depone; and of so many steps he could not be ignorant. These cases of holding men as confest, and reponing them, are much *in arbitrio judicis*. If the party be still alive, there is less difficulty, but if by his death I have lost the mean of probation, it seems iniquous to loose the decreet, unless the *merita causæ* persuade it; therefore, the Lords here refuseth to repone Paton's heir against this decreet, holding his father so circumstantially as confest.

Fol. Dic. v. 2. p. 185. Fountainhall, v. 2. p. 566.