

bears only, that in case the clerks extract a decret 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 decret.

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

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

No 114.

1710. February 11. CHARLES MACKAY against BAILIE PATON.

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 deponé, 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 decret 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 deponé, 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 deponé; 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 decret, unless the *merita causæ* persuade it; therefore, the Lords here refuseth to reponé Paton's heir against this decret, holding his father so circumstantially as confest.

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

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