1676. *February* 5. HEPBURN *against* The LAIRD of HILTOUN.

No 107.
A messenger's execution bore, that he was refused access, because the defender was unwell. The defender was held as confessed.

MR JOHN HEPBURN, minister at Earlstoun, having charged the Laird of Hiltoun for his stipend, he suspended on this reason, that the minister had possessed a house in Hiltoun, belonging to the suspender, for several years. It was *answered*, That the possession of this house could import no rent, because he offered to prove by the old Lady Hiltoun's oath, from whom he had the possession of this house, that it was by her tolerance to possess four rooms of the house that were standing waste, without any duty; which being found relevant to be proved by the Lady's oath, the charger by a diligence upon the fact, sent a messenger to the Lady's house, who returned an execution, bearing, that he delivered a copy to Hiltoun himself, in the house, who declared, that the Lady was unwell, and would not suffer him to go to the room where she was, affirming that she was unwell; whereupon the minister craves, that she may be holden as confest. It was *alleged* for Hiltoun, That she could not be confest, because she was not personally apprehended. It was *answered*, That the certification to be holden as confest, being justly introduced by our custom, against the contumacy of parties who refuse to depone, albeit ordinarily it takes place where the party is personally apprehended, yet there are singular cases excepted, as when a party is out of the country, or latent, for then they are holden as confest on a citation at the market cross; and likewise if the messenger know or condescend upon a special evidence, that the party is in the house, and was hindered to have access to deliver a copy, as was found in the case of William Yeoman, that the executions did bear, that the messenger did hear the party speak, and that he thrust *to* the door upon him, and would not suffer him to enter to give a copy, and much more here, where Hiltoun himself who was the only party, received the copy from the messenger in his mother's house, and would not suffer the messenger to go to her, pretending that she was unwell; and though in the case of Lindsay and Swintoun *contra* Inglish, No 102. p. 12030. decided the 5th day of July 1670, the executions bearing, that the messengers knew that the party was within the house, but that his wife forcibly keeped them out, the LORDS did not hold the party as confest, but granted a diligence to cite them at the market cross, being *difficilis inventionis*, with certification to be holden as confest, yet there was no particular evidence of the knowledge of the messenger and witnesses, that the party was in the house; but here Hiltoun acknowledged, that his mother was in the house, but refused access to her, because she was unwell, which was no just reason, because the sight of her was sufficient to have given a copy.

THE LORDS in consideration of the circumstances, held the Lady as confest upon this execution, the copy having been given to Hiltoun himself, who had acquiesced to his mother's oath, not as a witness, but as a party.

Fol. Dic. v. 2. p. 183. Stair, v. 2. p. 410.