

of £100 sterling, yet that he was, by the subsequent agreement, only bound to grant a real right out of the lands of Ayton; though *novatio non præsumitur*. But, in regard he had not as yet given that infestment, they found the Earl personally liable for the bygones, since the date of the contract in 1683, and in time coming, until he offer the said real security; and that, in regard he has, by his oath, acknowledged that he has possessed these lands, worth 5000 merks *per annum*, and that the rights condescended on neither excluded himself from the possession, nor could have debarred Kymmergham, if he had been infest, seeing they are not real burdens affecting the lands of Ayton; and though there was a provision in the tailyie, burdening the heir with all the debts, yet that did not make it real. And as for Muirie's bond, it was only conditionally conceived, and made payable in a year after Ayton, the granter's death, if so be he had wanted heirs of his own body: but *ita est* his daughter succeeded, was served heir, and possessed; and so the bond was extinct; not being like a tailyie, where the clause *quibus deficientibus has tractum temporis successivum*, so that, *quandocunque* the heir fails, the next member of the tailyied succession takes place. Some moved, that the interlocutor, making the Earl liable for bygones, should only begin from the time that Kymmergham performed his part of the articles, by delivering up the papers to my Lord; but they found there was neither *mora* nor *culpa* on Kymmergham's part, and, *esto* my Lord had been lesed through the want of them, yet *sibi imputet* since he had not required them. *Vol. I. Page 591.*

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1694. *January 12.* SIR DONALD BAYN of TULLOCH *against* ROSS of BALNAGOWAN.

SIR Donald Bayn of Tulloch pursuing a spuilie against Ross of Balnagowan, and several of his tenants, he, by a petition, craved the Lords would grant him an edictal citation against the depredators: seeing he was content to cite Balnagowan himself personally; but for his men, they skulked in the Highlands, *ubi non erat tutus accessus*, and that no messenger would undertake to execute it against them.

The Lords considering if this were once granted, every one would pretend the same necessity; and so there would be no more citations to parties, either personally or at their dwelling-houses, in the Highlands; and that citations at the next market-cross could not certiorate them; they refused the desire of the bill, unless it had been in time of war or outbreaking among them. And yet there are some parts where, in the most peaceable times, messengers dare not adventure amongst them. *Vol. I. Page 591.*

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1694. *January 16.* THE SISTERS of SCOT of BROADMEADOWS, Petitioners.

THE sisters and apparent heirs of Scot of Broadmeadows gave in a petition, craving a factor might be named, to intromit with the father's and brother's moveables, and sell them; and to set the land and lift the rents, until they get fuller information of his death in Jamaica. Some were against it, seeing they