

count and reckoning of the byrun maills intromitted with by them, that he may come in *pari passu* with them, conform to the late Act of Parliament, and may be preferred alike, the first compriser having only his charges allowed to him in the first end. It was alleged for Brouns, That, as to the byruns, they are *bona fide possessores*, having uplifted and consumed the same, according to the standing law in force for the time; and there is neither law nor reason to make them countable to a party having a posterior right, for what they had so uplifted before the making of that supervenient law. It was answered, The law makes no distinction, but brings in both together, and prefers only the first compriser as to the expense. The Lords found, That though the pursuer, Graham, should come in *pari passu*, yet not so but that the defenders should *lucrari*, and be preferred as to what they *bona fide* uplifted, according to their right and the law then standing;—for which, nevertheless, the Lords found, The defenders should count, to the end, the expense wared out may be first allowed to them, and the remainder ascribed for payment of the debt *pro tanto*; and, for the superplus debt, the pursuer and defender are to come in *pari passu*.

No. 134, Page 97.

1665. July.

CALDERWOOD *against* PRINGLE.

[See Dictionary, page 3036.]

IN the cause debated the last winter session betwixt Calderwood and Pringle, concerning the contract of marriage altering the old tailyie, according to the then interlocutor, the original charter was produced; which bears a clause, that the vassal should not alienate without the superior's consent. Notwithstanding whereof, the former debate being resumed, the Lords sustained the process against the heirs-male.

No. 155, Page 110.

1665. July. MARGARET STEVINSON and THOMAS NEWTOUN *against* MARGARET KER.

THERE being a process pursued at the instance of Margaret Stevinson and Thomas Newtoun against Margaret Ker, as executrix or intromissatrix with the goods and gear of umquhile William Stevinson, her husband, who was bound as cautioner for Sir Alexander Belshes of Tofts, for payment of £500 contained in a bond;—it was alleged, That she could not be convened *ut supra* for payment; because she is executrix-creditrrix confirmed to her husband upon a bond made by him to her divers years before his decease, which was all the provision she had to live on. It was answered, That the bond being a donation *stante matrimonio*, it could not prejudge lawful creditors. Likeas, it wants witnesses; and, unless it were proven that it was truly subscribed of the date therein mentioned, it must be holden to have been done on deathbed, and it can be of no other force than if it had been done on deathbed. It was replied, That there being no contract of marriage betwixt the parties, and the defender