gard Walter was satisfied. It was alleged, That they should be assoilyied, in respect, by the comprising, Walter was only liferenter with his wife, and could do no deed in prejudice of his wife and daughter. It was answered, That, by the bond, he had power to dispose upon the money, notwithstanding of the joint liferent of his wife and the fee in favours of his daughter; and that clause anent the power of disposal, in favour of Walter, ought to be holden as repeated in the comprising as in the bond,—the bond being the ground thereof, though, by negligence, the clerk has omitted the same; and parties not being obliged to look after such formalities, the clerk's negligence should not prejudge them, the matter itself being so clear. The Lords repelled the allegeance, in respect of the answer.

No. 84, *Page* 65.

1663. *June.* THOMAS WILKIESON *against* THOMAS CRANSTOUN.

THOMAS Wilkieson obtains a decreet of removing against Barbara Sanderson, for removing from a burgess acre in Lawder; which was suspended by her and by Thomas Cranstoun in Lawder, (who was called to the giving of the said decreet,) upon this reason, That Barbara is tenant to the said Thomas, who has disposition of the said burgess acre from his father, who had right thereto from his mother, and, by virtue of the said rights, [has been] above seven years in possession. Answered, Not relevant, unless the said Thomas or his father were infeft; whereas the charger is infeft. Replied, That any infeftment the charger has, is only upon an apprising, whereupon he obtained letters of horning and compelled the bailies of Lawder to infeft him: which being done *superabundanter*, cannot prejudge the defender's right, which is sufficient without a seasine; because he offers himself to prove, that the constant custom of the town of Lawder, among the burgesses, is, to transmit their rights to burgesses acres by naked dispositions and acts of the Town-Court; concerning which acres there are divers other privileges singular, and not elsewhere in any other burgh; for there being of old disponed, by the king, 150 acres to 150 burgesses of Lawder, they were disponed with this quality, that there can be no more or fewer burgesses than there are burgess acres; and no burgess can possess more than one; and they are not transmittable to any but to a burgess, who is never infeft, but bruiks, by an Act of Court, with a naked disposition. The Lords, before answer, ordained the charger to condescend whether the person from whom he comprised was infeft or not.

No. 86, *Page* 67.

1665. *January.* WILLIAM GRAHAM of BLUETWOOD *against* JOHN and WILLIAM BROUN.

JOHN and William Broun having comprised the lands of Overharcleugh from Robert Johnstoun *in anno* 1655, and William Graham of Bluetwood having comprised the said lands within year and day; he pursues the first comprisers for

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-creditrix 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