Yet it is affirmed there was a decision in the case of one Caldwel, sustaining depositions, though not subscribed by the parties. It may be they could not write, or this nullity was not objected. Some say, in the time of the English usurpation, it was not necessary that witnesses should subscribe their depositions; but this I hardly trust. In this cause it was debated, that this decreet, being *in foro*, upon a plenary probation, was now irreducible, not being reviewed within a year; conform to the 12th Act, Parl. 1661. But the Lords went over that, which seems only to allow a summary procedure, and dispense with some formalities of law, in quarrelling decreets in the English time; but does not hinder to draw them in question afterwards, *via ordinaria*, by reduction. *De revisione impetranda intra biennium*, see *Bourit. de Offic. Advoc. c.* 34.

Though the Lords have not regarded the probation already made, yet we may consider what use may be made of it, from Andr. Gayl. *lib.* 10, *obs.* 103. *Vide etiam quæ eleganter habet Imbert. in forens. institut. lib.* 1, *c.* 43.

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November 26.—In Sir David Balfour, Lord Forret's cause, against Heriot of Ramorney, and Mr John Craig her husband, (16th Jan. 1679;) the Lords having advised it, they found, by the writs and testimonies of the witnesses adduced by either party, that the heritors and possessors of the lands of Pitlessie, now belonging to the Lord Forret, have common pasturage over all Edin's-muir benorth the cart-gate of Pitlessie, and also over all the Munk-moss; and that they also have the privilege of casting peats, feal, and divots, through the said muir and moss, except two acres in the south-east nook of the said moss. And that there are no interruptions proven on Ramorney's part, preceding the decreets now turned into a libel, which are only in 1656. And find, that a part of the said common muir has been appropriated and riven out in the east side of the hollow at the back of Richard Pryde's house; and ordain Ramorney to lay the same in again, to be common to both parties. And find, that the mill-dam and mill-land of Pitlessie have been, past memory, as it now is; and that it is not the occasion of the regorging the water upon the mill of Ramorney; and that the stone called the witterstone is not a stone for regulating thereof: and therefore ordain the said mill and mill-dam to stand as now they are, and the march-stones in the muir and moss to be taken up and removed away. And assoilyie from the two decreets now turned into a libel. *Vol. I. Page* 66.

1679. *November* 27. ROGER MOUAT, Skipper, *against* SOMERVILLE.

ROGER Mouat, skipper, pursues Mr William Somerville for payment of sundry debts contained in his father's bonds. ALLEGED,—They were granted on death-bed; and he, as heir, had a reduction thereof depending *ex eo capite*. ANSWERED,—They offered to prove an antecedent onerous cause, prior to his contracting the said mortal sickness; and it is very well known that bonds granted to tradesmen, though upon death-bed, yet if the furnishing be proven, are sustained. Yea, in the general, a prior onerous cause proven will sustain bonds against that nullity of death-bed; as was found, *27th July* 1678, *Heriot.*

This being reported, the Lords, on 28th of November, before answer, or-

dained Roger Mouat to produce Thomson's old retired bond and discharge, which Mouat paid for John Somerville, and for which it is alleged that Somerville gave this new bond to Mouat on his death-bed, which is now quarrelled: and to produce all other adminicles and documents by which it can be made appear that this new bond was granted by John for that old one, and so that it had an antecedent onerous cause. *Vol. I. Page* 66.

1679. JOHN STRAITON *against* GILBERT BELL.

July 25.—IT was queried,—There is an effectual comprising by taking infeftment thereon: there is another comprising led within the year, conform to the 62d Act 1661, but no infeftment taken thereon, which by law comes in *pari passu* with the first: thereafter there is a third comprising led, whereon infeftment is taken. The first apprising is extinct and satisfied by payment; the second appriser thereupon finds it necessary to infeft himself; and so takes seasine. The competition of preference fell in between the second and third appriser. The third contends, that, though he was the last appriser, yet he was the first infeft. The second alleges, he was *in bona fide* not to take infeftment as long as the first continued in being, unextinguished, since he was, *fictione juris*, a part thereof, and his posterior infeftment must be drawn back to the date of his apprising.

REPLIED,—It cannot retrotract, because the third appriser who is infeft is a *medius obex* and *impedimentum* betwixt the second.

This is a very debateable point. See it decided *infra*, *6th November* 1679, *Straiton*. *Vol. I. Page* 53.

November 6.—In the action (mentioned 25th July last,) betwixt John Straiton and Gilbert Bell, anent the three apprisers;—the Lords found the second appriser, though last infeft, yet he was preferable in the competition to the third appriser, infeft before him; because, being within year and day of the first apprising, he was, by Act of Parliament, once a part thereof; and, during the time of its existence, he needed not take infeftment. *Quid juris*, if the second appriser had not been infeft at all? See thir parties, at 28th current. *Vol. I. Page* 61.

November 28.—In the action, Straiton and Bell, (mentioned 6th Nov. curt.) it was questioned, whether a decreet of adjudication of lands lying in the Canongate may be legally obtained before the bailies of Edinburgh.

It was ALLEGED, not to be *forum competens ratione re sitæ et domicilii*, the Canongate not lying within the royalty of the burgh. See *2d December* 1675, *Nasmith*.

It is but a late practice that adjudications were pursued before the sheriffs and other inferior judges; for Hope tells us, they were, in his time, only competent before the Lords. Yet this day the Lords found a decreet of lands, lying in the Canongate, pronounced, by the bailies of Edinburgh, valid, as given *a judice competente*, in respect of the custom these thirty years past, and that they have been in use to give such decreets. *Vol. I. Page* 66.