

## SECT. XIII.

## Act before Answer.

1661. December 4. BAILLIE of DUNNEAN against TOWN of INVERNESS.

BAILLIE of Dunnean pursues the Town of Inverness for violent intromission in his moss and molesting him therein. Both parties were content to dispute as in a molestation. The defenders *alleged* absolvitor; because the Town of Inverness was infeft in their burgh and burgh-lands, with common pasturage in Montkaploch, and offered them to prove the moss controverted was a part of Montkaploch, and that they have been in constant possession thereof accordingly. The pursuer *replied*, The defence ought to be repelled; because he offered him to prove that he was infeft in his lands of Dunnean, with parts and pertinents; and that the moss controverted was proper part and pertinent of his said lands, and that he was in use to debar the defenders therefrom, and to get moss-mail for tolerance to cast therein, and produced the same under the hand of nine of the citizens, and one by their clerk; and therefore, being *in libello*, ought to be preferred in probation. THE LORDS, before answer, granted commission to examine witnesses, *hinc inde*, upon the possession of either party; which being reported, the defenders craved the same, with the dispute, to be advised. The pursuer's procurators *alleged*, there was yet no litiscontestation, and they were not insisting, and the defenders could not compel them to insist, without a process to insist with certification; in which case they would get a day to insist.

THE LORDS found, that the probation being taken before answer, was equivalent to litiscontestation as to the points proposed, and that they might proceed, both to advise the points of probation and relevancy together, and might instantly decern accordingly; albeit it hindered not the parties to propone other allegiances, *in jure*, than it were in the dispute as in ordinary litiscontestation; and therefore the Lords considered the parties infeftments, especially that of the Town of Inverness, bearing, 'with liberty to them to cast feal and divot in the Mount of Kaploch, and several other Mounts, according as they were accustomed of before;' which clause the Lords found to be qualified and taxative, and not to give an absolute right of commonty, but only such as they had before, which behoved to be cleared by posterior long possession; and found, by the depositions of the witnesses, that that part of the Town of Inverness on the north-side of the water, only had been in possession by casting peats in the moss controverted, and that the same is a part of Montkaploch, and that the pursuer had proved the right of property therein; and therefore ordained the Town of Inverness, on the other side of the water, to desist from the moss controverted, and granted commission to settle the parties anent their place in casting in the moss, or in case of variance, to report.

No 300.  
Found that  
probation taken  
before answer was  
equivalent to  
litiscontestation.

*Fol. Dic. v. 2. p. 202. Stair, v. 1. p. 64.*