No 301. 1672. *June* 21. The Laird of HERMIESTON *against* COCKBURN.

THE LORDS found, That in the case, and in all time coming, where witnesses are adduced before answer, they will only allow one term; so that upon any diligence, they will admit no witnesses but those who are cited by the first diligence.

Clerk, *Mr Thomas Hay.*

Fol. Dic. v. 2. *p.* 202. *Dirleton, No* 171. *p.* 69.

*** Gosford reports this case:

IN the action depending betwixt the said parties, by an act both parties being ordained to adduce witnesses *ex officio* before answer; it was *craved* for the Creditors, That they having taken out diligence against some witnesses, they might have a second term for citing of other witnesses.

THE LORDS did refuse the same, and declared they would grant but one term for citing of witnesses *ex officio*, either to the pursuer or defender.

Gosford, MS. No 492. *p.* 258.

No 302. 1672. *December* 6. CLELAND *against* CLELAND.

AFTER an act before answer for proving death-bed, parties can propone no new defence, nor crave terms to prove the same.

Fol. Dic. v. 2. *p.* 202. *Stair.*

*** This case is No 87. p. 3307, *voce* DEATH-BED.

No 303. 1674. *June* 4. COCKBURN *against* HALYBURTON.

After an act before answer no new proof is admitted by posterior acts of litis-contestation.

BY act of Parliament every minister being appointed to pay L. 40 to be a stock to universities, the Bishop of Edinburgh appointed George Halyburton his servant to be collector thereof within his diocese; but the said act of Parliament being rescinded, the Council did dispose of what was already collected, and gave a precept to Margaret Cockburn, relict of Mr Patrick Cook, minister at the Pans, for the supply of herself and many children, directed to George Halyburton to pay her a certain sum out of what he had collected; who being pursued thereupon, *alleged*, That he being but collector, was only liable for diligence in getting and keeping that collection, and that what he had received was kept in a lock-fast trunk within a chamber in the Bishop's house, where he lay, and that the trunk was broken up, and the money taken away without his fault; and it being *answered*, That he, as collector and mandatar, was absolutely liable for custody against theft, and could only have been liberated, if by force

the money had been taken away; neither did he adhibit all diligence, having left the money in a room, where he and other servants lay, which was ordinarily unlocked. No 303.

THE LORDS, before answer to the relevancy, allowed witnesses to be adduced *hinc inde*, concerning the stealth of the money, and the diligence or negligence in keeping thereof; which coming to be advised, the defender having failed in probation, did now offer positively to prove that the coffer was broken, the money stolen, and that he had used all diligence for preserving it; and alleged that this being an act before answer, and not an act of litiscontestation, he might now offer a positive probation, and might propone other defences.

Upon which occasion the Lords took into consideration the said points, as being of general concernment, and after full reasoning of the matter amongst themselves, they found that it was not only accustomed, but necessary in many cases, before discussing of the relevancy, to permit the probation of the matter of fact by such acts before answer, that when both the fact and the allegeances *in jure* thereupon were debated, they might at one breath determine the relevancy and the probation; for in many cases of great importance, it were of much disadvantage if one party had power to pick out two witnesses, and thereby carry the cause, as in the case of death-bed, going to kirk and market, being supported, or walking freely at a distance from any person; or in the case of declarators of property, or servitudes upon long possession, or of part and pertinent, where the allegeances commonly come to be contrary, and so could not, by an ordinary act of litiscontestation, be put to probation, seeing two contradictions cannot both be found relevant; therefore, the Lords have justly and necessarily admitted mutual probation upon the matter of fact, and have not preferred either party to the sole probation, whereby they might find the most pregnant probation of the truth. Therefore the Lords determined, that where probation was premised by acts before answer, no new probation of these, or any other points, should be admitted by posterior acts of litiscontestation, and therefore allowed the same terms and mean of probation by writ, witness, or oath, in acts before answer, as in acts of litiscontestation; and considering that the proponing of new points might draw processes in great length, therefore the Lords ordained the procurators to propone all that was competent and known the time of the act before answer, that litiscontestation might be made upon clear points, and probation before answer upon others, that so the same terms might be assigned for both, and at once the cause might be concluded, advised, and determined; which was intimated to all the advocates, being called in, and an act of sederunt appointed to be inserted thereupon.

Fol. Dic. v. 2. p. 202. Stair, v. 2. p. 268.

*** Gosford reports this case:

IN a pursuit at the instance of the Relict and Executors of the said Mr Patrick Cook, minister at Prestonpans, against the Executors of the said Bishop

No 303. and Halyburton his father, for payment of several sums of money upon Halyburton's subscribed receipt from several ministers, who had paid the same upon an act of Parliament, ordaining every minister to pay so much out of a year's stipend to the universities, which accordingly was discharged by Halyburton, as having order from the Bishop;—it being *alleged* that the money was stolen out of a locked chest; to which it was *answered*, That it was not put in a sufficient room, and there should have been such diligence used to preserve it as any rational man would have done for keeping of money; the LORDS, before answer, did admit to both parties to prove their allegeances; and, after advising of the depositions, finding that it was not at all proved that the money was stolen, the defenders' advocate did allege, that they being only in an act before answer, and the cause not being concluded, it was sufficient for them yet to offer to prove that the money was really stolen. It was *answered* for the pursuer, That the same allegeance having formerly been proponed and admitted to probation, wherein they had succumbed, they could never again be heard to propone that same allegeance, and crave the benefit of a new probation. THE LORDS having much reasoned amongst themselves upon the nature of acts before answer, whether they were against the ancient form of process or practice, and upon what necessity they were introduced, and how far they ought to bind the parties contained in the act, and what great inconveniences did arise from them, that allegeances being admitted to probation by both parties, and accordingly, witnesses being examined and writs produced, and the whole probation advised, yet notwithstanding, after long dependence and expenses, the parties might of new propone new allegeances and replies, whereupon there ought to be litiscontestation, and they have the benefit of the whole legal terms and diets before sentence; therefore, they ordained an act of sederunt to be made and intimated to the whole advocates, bearing, that as they found a necessity to continue acts to be made before answer, before they should discuss the relevance of allegeances where both parties were alike pregnant as to matters of fact, such as in reductions *ex capite lecti*, or in declarators of property or commonty, or of parts and pertinents, where the matter of fact ought to be first proved by both parties, and then the probation and relevancy advised together, an interlocutor pronounced, so as to take off the prejudice of perpetuating process to the great prejudice of the lieges, they ordained, that whensoever there is an act made before answer in any cause, that the advocates for both parties propone all other allegeances that they have *in jure* as in any other action; and the defences, replies, and duplies, which shall be found relevant, shall be specially set down in that same act; as to which it shall be an act of litiscontestation, and the pursuer and defender shall have the same terms for probation as in an ordinary act of litiscontestation, that so the whole cause may be concluded and advised at one time, and sentence pronounced, which will put a small end to all such actions.

Gosford, MS. No 688. *p.* 409.

*** Dirleton mentions the act of sederunt in the following terms:

No 303.

THE LORDS thought fit to make an act of sederunt, and to intimate it to the advocates, to the purpose following, viz. that when an allegeance is not admitted, but a joint probation is allowed before answer; if there be any other allegeance found relevant, and admitted to either, litiscontestation should be understood to be made as to that allegeance; *2do*, And likewise as to that effect, that the parties are concluded, and cannot be heard thereafter to propone any other allegeance; *3tio*, The terms being run as to an allegeance not discussed, they are concluded as to the probation of it, as if the relevancy had been discussed by a formal act of litiscontestation, whereas it is remitted to be considered after probation, seeing often *ex facto oritur jus;* and upon consideration of the circumstances after probation, the Lords have more clearness to determine relevancy.

Dirleton, No 183. *p.* 74.

*** This act of sederunt is dated 23d July 1674.

1744. *June* 27. ROBERTSON *against* ROBERTSON.

No 304.

WHERE a circumduction is craved on an act before answer, it is competent before the Ordinary on the acts to plead any point of law yet undiscussed in bar of the circumduction; but if no point of law is pleaded, decree must attend the circumduction on the act before answer, as well as on an act of relevancy; and were it otherways, there would be no form for keeping the cause in Court.

Fol. Dic. v. 4. *p.* 151. *Kilkerran,* (PROCESS.) *No* 5. *p.* 434.

SECT. XIV.

Wakening.

1628. *March* 27. Laird LENOX *against* Laird NIDDRIE.

No 305.

IF a process intented at a party's instance lie over a space, and before it be wakened, the pursuer making another person assignee to the action, the wa-