

1708. *June 5.* DAVID THOMSON *against* MARION GRAY and MARGARET DEANS.

DAVID Thomson, merchant in Edinburgh, pursues Marion Gray, wife to Deacon Gavinloch, and a widow called Margaret Deans, for the price of fifty-nine stone of butter sold them, at £4 Scots per stone: and the price being referred to oath, it was confessed; but the quantity and delivery being denied, a day was taken to prove the same *prout de jure*. And the clerk of the weigh-house being adduced, he deponed, conform to a note extracted out of his books, that there was fifty-nine stone weighed, and that he saw part of it delivered; and one Gardner, who carried it to the weigh-house, concurred with him: so that the quantity was sufficiently proven. But how much the defenders received was not clear; for it seems, that, the market price falling, they refused to accept of, and endeavoured to cast it back in Thomson the seller's hand; for supplying whereof, they offered to prove the delivery and receipt thereof by their oaths.

Against which it was OBJECTED, *Imo*,—This is to alter the act of litiscontestation, which is a judicial contract, and the pursuer having elected one manner of probation, he cannot recur to another; *2do*, Marion Gray is clad with a husband, who will not suffer her to depone to his prejudice.

ANSWERED,—Though two witnesses have deponed on the quantity weighed, and only cannot be special as to the precise quantity, there can be nothing more reasonable than that, in supplement of this *semiplena probatio*, you should depone how much you got of the butter. And, as to the *second*, she being *præposita negotiis*, and allowed to keep a stand in the weigh-house, you cannot hinder her to depone upon the subject of the prepositure. And, in apothecaries' and other tradesmen's accounts, there is nothing more ordinary than this *juramentum suppletorium, ne debitores locupletentur cum alterius jactura*.

The Lords repelled the objections; and ordained her to depone anent the quantity received; and if she adject any quality to her oath, that the bargain was resiled from and given over before delivery, the Lords would consider the import thereof at advising of her oath, how far it could exoner, or bring it under the case of *quanti minoris*, to lessen the price, *Vol. II. Page 440.*

1708. *June 11.* The DIRECTORS of the BANK, Petitioners.

THE Directors of the Bank represent to the Lords, That, by an Act of Privy Council in April last, calling in sundry species of money to be recoined in English pieces, it was recommended to the Lords of Session to see what quantity was brought in to the bank, that they might have allowance of it, conform to the Act of Parliament; seeing it expired the 15th June instant.

The Lords named two of their number to take an inventory of the quantity brought in.

It was objected by some of the Lords,—That the Privy Council, being now dissolved and abolished since the 1st of May last, they could not delegate their power to last and continue after their own was at a period; for, if they could