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, 1*mo*,—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; 2*do*, 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

transmit a part, why not the whole? But the Lords thought this was an exigence admitting no delay, without wounding the public faith given to the Bank, for making up their loss and damage, and putting a stop to our mint: and the Queen, being informed, has provided no other method for doing of it: and therefore judged they might warrantably proceed. *Vol. II. Page* 441.

1708. *June* 15. JOHN GORDON of GRANGE *against* The EARL of GALLOWAY.

JOHN Gordon of Grange, having borrowed 2000 merks from the Earl, gives him an infeftment in a part of his lands for his security, redeemable always upon payment of the foresaid sum; and the Earl having entered to the whole lands, there is a declarator raised by John Gordon, that the Earl is overpaid by his intromissions, and therefore ought to repossess him, and pay in the balance.

The Earl proponed this defence, That he was debarred and kept out of the possession by a preferable right, granted by this same Grange to the Viscount of Kenmuir, for 2900 merks, whereon infeftment clad with possession followed, prior to the right he made to the Earl: and, for proving thereof, he produced the heritable right granted to Kenmuir, with a seasine and decreet of poinding of the ground.

OBJECTED, 1*mo*,—That right to Kenmuir was never a delivered evident, but consigned in Provost Coltrain's hand, till William Gordon should deliver up to Grange some bonds he had of his; and this appeared by an instrument taken by Kenmuir against Provost Coltrain, and his oath in an exhibition.

ANSWERED,—*Nullo modo relevat* against my Lord Galloway, a singular successor, who now produced the said right in his own hands; and was not concerned in any depositation, which, however it might meet Kenmuir, it can never militate against him.

2*do*, Grange objected,—That, *esto* this were a preferable right, yet, I having put you in possession, you ought not to have quit it, unless removed by a sentence, and legally dispossessed; especially seeing you were obliged, by a clause in the bond, to have defended against that right; and though they would have prevailed, yet you should have bidden a process, ere you had quit the possession.

Which the Lords found, and therefore decerned against the Earl. For though a man is not bound to cast out unnecessary expenses, in opposing a clear uncontroverted right, yet here he had bound himself to it, and was to have allowance of his expenses he should ware out in defending against it.

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1708. *June* 18. GEORGE WORSLEY *against* JOHN GRAHAM of REDFORD.

STEWART of Ardvorlich, by a written contract, sells his woods to John Graham of Redford for 300 merks, and gets payment of the price, conform to his discharge. George Worsley, esquire, in the county of Surry, alleging he had bought the woods before, and given a crown of earnest, and two guineas in part