could not be esteemed to be a decreet-arbitral, because it was subscribed by the gentlewoman, by her hand led at the pen by a notary, the which notary was one of the Judges arbitrators, and had subscribed the same as Judge-arbitrator, and so the said notary could not sustain at one time both the person of a Notary and Judge, more than into a judgment and process one person must not be both Clerk and Judge, et arbitria sunt instar judiciorum: To the which it was answered, That in divers respects the said person might sustain both the person of the notary to subscribe in the name of the woman, and to be also one of the Judges arbiters, and of the law a notary may be a Judge-arbiter, quia quilibet potest esse arbiter, qui non prohibetur. D. De arbitris.

No 89. the same time subscribe as Judge, and as notary for one of the parties.

The Lords found by interlocutor, that the said decreet ought not to be registered, and that the said notary might not be both Judge and also notary in the said cause; licet bona pars Dominorum in contraria fuerunt opinione.

Colvil MS. p. 360.

1586. *February.* The KING'S ADVOCATE *against* BRYSON.

No. 90. A witness in an execution was sustained, although there was a deadly feud between him and the debtor.

The King's Advocate, with the assistance of one Blackwood and Oliver Peebles, Sheriff-depute of Perth, pursued one Glouk and Bryson for the deforcing of an officer. It was alleged against the witnesses which were inserted into the executions, that they could not be witnesses, because the time of the alleged deforcement and execution, there was a man Harry Glouk, brother to the defender, and so there was deadly feud standing, and also the witness might depone de proprio facto; for if the man was slain in deforcing the King's officers, it would be a great presumption to change before the inquest in the pursuit of the criminal cause, they being present and assisting (it was alleged,) when the man was slain. To this was answered, That there could be no exception against the witnesses that were into the executions given in by the officer, qui fuerunt testes necessarii et instrumentarii, and behoved ay to be received. To this was answered, and heard upon an amend after it was repelled in the Outer-house, that of all law and equity where there was deadly feud contrario, et ubi subest causa inimicitiæ ex qua verisimiliter resultat inimicitia, as was in presenti causa by the slaughter of the defender's brother committed by the witness inserted, as was alleged, or at the least by their assistance and partaking, the same ought to be a relevant exception to repel the witness a deponendo, nam de jure, seeing repellitur inimicus testis, in L. 3. D. De testibus, et etiam habet locum in crimine lesæ Majestatis, vel in quocunque alio gravissimo debito, ut de nostra praxi observatur; and so neither as testes instrumentarii executionis aut quovis alio modo witnesses. The Lords nevertheless, for the most part, et fere omnes una voce dicentes permitted that the witness should be received.

Colvil MS. p. 416.