

No. 88. by the evidence he saw that his father had done it. Whether the sight of the charter 1687, and not being apprised of the objection to which it lay open, or whether his father might not have chosen to pay this in order to keep well with his noble superior, the defender will not pretend to say; but that he was wronged, is obvious; and this undue exaction for time past, will not oblige him to continue it in time coming; nor will it fix upon him such an acceptance of the charter 1687 and precept 1721, as to overthrow all his former title deeds to these lands.

Observed from the bench, *non agebatur* by the charter 1668 to give any new right, and though a *Novodamus* is thrown in; yet it is qualified by a *salvo jure nostra*, which is a contradiction.

The Court was of opinion the charter 1668 was null.

“The Lords found the lands redeemable for 6000 merks.”

Act. *Ferguson.*

Alt. *Burnet, Lockhart.*

Reporter, *Lord Coalston.*

J. M.

Fac. Coll. No. 37. p. 72.

* * * In the case Ewing against Semple, 20th July, 1739, No. 11. p. 1352. *voce* BASTARD, it was objected to a bond, that the writer was not designed before inserting the testing clause, and that he was designed only by adding to the name of one of the witnesses, “writer hereof.” The Lords repelled the objection.

* * * In the case Scot against Dalrymple, 17th January, 1781, No. 212. p. 8838, it was objected to a disposition, that the writer’s designation was erroneous, in so far as he was termed “writer to the signet,” instead of “clerk to A. B: writer to the signet.” The Lords repelled the objection.

SECT. IV.

Instrumentary Witnesses.

1583. *April.* LAIRD GORMOCK *against* The LADY.

No. 89.

Found that
a witness
could not at

There was a decreet-arbitral given betwixt the Laird of Gormock and the Lady sought to be registered. It was alleged that it ought not to be registered, nor

could not be esteemed to be a decret-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.

The Lords found by interlocutor, that the said decret 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.

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

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

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 inimicitiae 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.

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