

No. 168. which appeared from the nature of the thing absolutely necessary, and this without any fault of the adducer ; and therefore, if the pursuers laid their objection upon that head allennarly, that the witnesses had been her ordinary doers in all her affairs, the same could not be good. But the present case is quite different ; for not only were these witnesses the defender's ordinary doers, at the time she got the settlement made, but, when it came to be challenged, she employed them to manage the defence, and accordingly, they have been appearing for her from the beginning. It is upon this last employment the pursuers lay their objection ; which arises from no necessity of the case, but entirely from the defender's own fact and deed : She had it in her power to adduce them as witnesses ; but as she inclined to take their assistance in managing her law-suit, she thereby passed from any aid they could give her in another capacity.

The Lords sustained the objection as to Messrs. Graham and Ramsay ; but found that Henry Cowie should be admitted, since he was writer of the deed.

*C. Home, No. 245. p. 396.*

1743. *July.* EXECUTORS OF THE EARL OF LONDONDERRY *against* EARL OF STAIR.

No. 169:

Though regularly a witness ought to be brought into Court by the party who is to make use of his testimony, yet there may be certain connections and circumstances which may make this the duty of the other party.

In the year 1720, the Earls of Londonderry and Stair gave bond to Frederick Frankland for a considerable sum ; and, of the same date, the Earl of Stair gave to the Earl of Londonderry a bond of relief or indemnification. After the Earl of Londonderry's death, his executors brought a process against the Earl of Stair *anno* 1740, libelling, that the Earl of Londonderry had paid and retired the bond due to Frederick Frankland ; and concluding, that the defender, in terms of his bond of indemnification, should repay the same. For the defender the following fact was set forth : That being in France the time of the *Mississippi*, he was unwarily drawn in to deal with the Earl of Londonderry in the French actions, upon which ground Londonderry came to have a considerable claim against him ; that the French stocks being discovered to be a mere bubble and cheat, Londonderry having returned to London was ashamed to ask payment directly, but fell upon a stratagem : He pretended to the defender to be in need of a sum of money, and asked him to be surety. The bond to Frederick Frankland, which contained pretty much the same sum with the French debt, was subscribed by both upon this footing. But, before parting, the defender, instead of receiving a bond of relief, being put in mind of the French debt, was prevailed upon to grant the bond of relief to Londonderry. Upon this fact the defence was founded, that there was no money advanced upon the principal bond ; that Frankland has no claim against the Earl of Londonderry upon that bond ; and therefore the Earl of Londonderry could claim no relief from the defender of a sum he had neither paid nor was bound to pay. The Court, before answer, having ordained Frederick Frankland's oath to be taken, and his and Londonderry's books to be produced, the pursuers reclaimed, and insisted, that it was the defender's business, in order

to make good his defence, to produce Frankland to depone, and also to exhibit his books. No. 169.

In answer, the defender admitted it to be a general rule, That the party who makes the allegation ought to produce his evidence, whether writ or witnesses; but insisted, that there is no rule without an exception, and that the present case ought to be an exception, for the following reasons: If the defender offer to prove his allegiance by a writing in the pursuer's own hands, or by a writing which belongs to the pursuer, it is he, not the defender, who must produce this writing. If the witness condescended on by the defender be the pursuer's wife, or servant, or child *in familia*, the pursuer must produce the witness. The same exception must hold in the present case. Frederick Frankland is out of the reach of this Court, and the defender has no means to force him to give evidence here; but it cannot be difficult for the pursuer to produce the witness and his books, considering the intimate correspondence, which, by this very process, appears to have subsisted betwixt the Earl of Londonderry and him. *2do*, This case must be considered in the same light as if the Earl of Londonderry, upon his pretended payment, had taken an assignment to the principal bond, and had made it the foundation of this process. In that case the pursuers must have produced Frederick Frankland; because it is a rule, That when the cedent is appealed to to prove a defence, it is the assignee who must produce him, not the defender.

“ The Lords adhered.”

*Rem. Dec. No. 45. p. 73.*

1744. January 24.

A. against B.

On the verbal report of Lord Elchies, the Lords sustained the objection to a witness, That he was related, within the forbidden degrees, to the adducer; notwithstanding of the answer, That he was the like relation to the other party.

There are a variety of ancient practiques to the same purpose taken notice of in the Dictionary of Decisions. But as there does not appear to have been any practise upon it recorded for more than a century past, it was now again questioned; in so much that the Ordinary had at first repelled the objection, as he informed the Court; but afterwards, on account of the ancient practice, stated it to the Court.

*Kilkerran, No. 4. p. 596.*

No. 170.

A witness within the forbidden degrees to both parties.

1744. January 31.

CAMPBELL against CRAWFURD.

In the process, John Campbell of Lagwyne against William Crawford of Kiers, for the price of a parcel of sheep sold and delivered to the defender, the price

No. 171:

If a wife is to be ad-