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 allegeance 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. 2*do*, 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.*

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1744. *January* 24. A. *against* B.

No. 170.
A witness within the forbidden degrees to both parties.

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 practique 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.*

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1744. *January* 31. CAMPBELL *against* CRAWFURD.

No. 171.
If a wife is to be ad-

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