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to make good his defence, to produce Frankland to depone, and also to exhibit his books.

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. *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.

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.

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

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mitted against her husband? Or a son against his father?

libelled being denied by the defender, the pursuer, among other witnesses for proving it, cited the defender's wife, who objected to her as inhabile, *first*, As a woman; *2dly*, As she was his wife; for that she could not be allowed to depone against him without his consent.

Of the first no notice at all was taken, which, as it was the more general point, implied that it would have been repelled, had there been occasion to give judgment on it, though it cannot properly be said to have been repelled. But on the *2d*, the Court was much divided; and, by a plurality of only 7 to 5, sustained the objection.

The Lords, who opposed this decision, were very sanguine against it. They were of opinion, that no such objection lay in a civil cause; and that if any such had been thought to lie, it must have frequently occurred, and must have been settled by decisions. The answer was, That the only case wherein this point is observed to have been agitated favoured the judgment given, which is that of Erskine against Smith, July 23, 1700, No. 118. p. 16706. where, in a declarator of astriction, the defender's wife having been cited to prove the quantities of the multure, the Lords, says Fountainhall, inclined to think, that she could not be adduced as a witness, if her husband reclaimed.

But abstracting from precedents, the rules of humanity were by the plurality thought to justify the judgment given, which prevents the endangering the peace of families, should the wife be admitted, especially in such a case as this, to swear to the truth of a fact falling within the husband's proper knowledge, and which he had averred to be false. Nor were the majority moved by an observation made, that confessedly in the case of *præpositura*, the wife was admitted to depone against the husband; for that where the wife is *præposita*, she depones as a party, to which the husband, by the *præpositura*, is supposed to consent. It was also taken notice of, as carrying something of inconsistency in it, that the wife, who had a communion of goods with her husband, should be taken as a witness in effect against herself, upon which very ground the law of England, (*Vide* Wood's Institutes, Lib. 4. Cap. 4.) does not allow husband or wife to be adduced as witnesses against each other: And whereas the decisions of some foreign courts were referred to, repelling the objection, yet they are not approved by the authors who observe them. *Vide* Groenwegen, De Leg. Abrog. ad L. 3. C. De Testibus.

The same objection to the wife's being adduced as a witness against her husband in a civil cause was again sustained, July 18, 1744, Cameron against Lawson, where, at the same time, a boy past 14 was found to be a habile witness against his father.

Kilkerran, No. 5. p. 596.

*** C. Home reports this case:

The pursuer brought a process against the defender, for the price of some sheep he had sold and delivered to him, in which the defender alleged that the sheep

had not been delivered to him, but to one Mr. Shaw of Dalton; and that therefore he alone could be answerable for the price; upon which a conjunct proof was allowed to both parties, and the defender's wife was cited as a witness for the pursuer. Objected for the defender, That his own wife was an inhabile witness against him, as a wife's oath could not bring a debt upon a husband without his consent, which was introduced to prevent occasions of discord, and breaches betwixt man and wife: And indeed it amounts much to the same thing, as if the husband were called as a witness against himself, (to allow a wife to depone against her husband) which no law allows, in respect of the absurdity it involves in it, of blending characters together, altogether inconsistent. And for this reason it is, that where one undertakes to prove a point by witnesses, and one witness has deponed upon the matters in controversy, the same cannot thereafter be referred to the party's oath; and therefore, the whole that concerns any point must be referred to his oath as a party, or none of it *ob metum perjurii*.

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The identity of interests arising from the communion betwixt man and wife, must also render her a very unfit witness in all questions touching moveables that fall under the communion; and this doctrine is agreeable to the principles of the civil law, and opinion of the Doctors. See Stair, L. 4. Tit. 43. L. 4. and 5. D. De Test. and L. 6. C. Eod. Tit. Voet ad Tit. De Testibus, § 4. and 5. Mascardus De Probationibus, Num. 12. Wood's Instit. L. 4. C. 4.

Answered: That it was a rule of nature and justice, that every person, without exception, is bound to assist the injured with their testimony, in order to obtain redress. Neither does the civil law support the defender's doctrine, particularly the L. 4. De Testibus, as that law relates only to criminal cases; and in fact there is not one of those relations specially enumerated there, who are not every day called to give evidence.

In the next place, it may be observed, That after the defender had denied the delivery of the sheep, it was certainly competent to have proved the contrary by his oath; for here was not what may be called the *legalis turpitudo*. How unreasonable, therefore, is it to insinuate a *metus perjurii* must excuse a wife from swearing, when it could not cover the defender himself? Besides, neither that, nor any danger of maltreatment from the husband, are suppositions to be made; since every person ought to be supposed to do their duty. Besides, decisions ought to proceed on the rules of law and justice, whatever the inconveniencies may happen to be. See Sande, Lib. 1. Defunct 3. Bugnyon de Lois Abrogees, Lib. 2. Cap. 78.

The Lords sustained the objection.

C. Home, No. 255. p. 411.