No. 167. though his testimony is not altogether unexceptionable; and where there is no penury of witnesses, it may be a good reason for not examining him. And so far the practice of the Court has gone, particularly in the reduction of the sale of Walston, where the Lords refused to examine Walston's lawyers touching his incapacity, because there could be no penury. Nay, later practice hath much receded from the ancient strictness in respect to the examining of witnesses; that a witness, though exceptionable, is examined, reserving to the Judge to consider what weight he will give his testimony. The defender does not plead there are no inhabile witnesses; but that, where the witness is otherwise credible, the objection arising from the supposed influence of the adducer, however it may detract from his credibility, in competition with more impartial ones, yet is no objection to his examination; and such is the practice of other countries. See Simon van Leeuwen, in his Censura Forensis, Part. 2. Lib. 1. Cap. 29. N. 21. in fine.

In the next place, the matters upon which they are to be examined are such, to which they, and they only, were witnesses, viz. a communing with the pursuer where none else were present, whereby they are necessary; and to refuse their testimony, were to refuse the knowledge of a fact that may be very material to the cause: That as, in general, necessity supersedes all rules, so in a particular manner, where communings are to be proved, the communers are the only witnesses that can possibly be had; and, as they are chosen by the parties, this, as in the case of instrumentary witnesses, supersedes all objections. Besides, there is a separate consideration with respect to Mr. Graham, which removes all exception to his examination, namely, that at the period of the communing, there was no law-suit depending betwixt the parties. And with regard to the civil law, the reason thereof, to wit, the extraordinary connection there was betwixt the patron and client, is of no force with us, where it is to be presumed that their integrity will always get the better of their affection for their client. See L. 18. § 8. De Testibus.

The Lords sustained the objection.

C. Home, No. 242. p. 392.

1743. *July* 12. LINDSAYS *against* RAMSAY.

No. 168.
The objection to witnesses, that the one is lawyer and the other agent for the adducer, is good, though the occasion of their knowlege of

In the reduction of a testament made by James Man, when a few weeks past pupillarity, in favour of Helen Ramsay his mother, one of the reasons was, That the defunct had given no directions for the writing thereof, but that the testament had been got framed by his mother at Edinburgh, and presented to him at Dundee ready for signing, and that he had signed it, while utterly ignorant of the import thereof.

To redargue this, it was offered to be proved on the defender's part, That, before the testament was executed, the young man himself had taken the advice of a lawyer, how he could effectually test in favour of his mother, and had given

No. 168. the facts they were to be examined upon preceded the period of their being employed.

orders to his writer, who had been present at the consultation, to extend the testament in terms thereof, and that accordingly it was wrote by the said writer's servant agreeably to that advice; for proving whereof, the lawyer, the writer, and his servant, were offered to be adduced. But it being objected to the lawyer and writer, that they were the defender's lawyer and agent in the present cause, the Lords "Sustained the objection."

Some of the Lords, who had been for sustaining the objection in the Lord Braco's case, were for repelling it here, in respect the fact on which the witnesses were to be adduced had happened not only prior to the commencement of the cause, but before there was any view that any such cause was to be. Whereas, in Lord Braco's case, the communing was in the very view of preventing the process in which they were retained, should the communing not take effect.

But the Court had no regard to that distinction, in respect that, in all objections to a witness, the capacity of the witness is considered as at the time when he is adduced, without regard to the time when the fact happened on which he is to depone.

Kilkerran, No. 3. p. 595.

*** C. Home reports this case:

In the reduction betwixt these parties of James Man's settlement, it was averred by the pursuers, that the testator gave no directions to the writer to make out the testament, but that the same were given by the defender, in whose favours the same was made; and both parties being allowed, in common form, a proof of all facts and circumstances relative thereto, the defender cited Mr. James Graham advocate, James Ramsay writer to the signet, and Henry Cowie his clerk, as witnesses for her.

Objected: That the first was lawyer, and the other the ordinary doers for the defender.

Answered: Whatever force there may be in the objection in general, especially where there is a *copia testium aliorum*, yet in this case they were *testes necessarii*, as the first directed and advised the settlement, and the last wrote it; therefore they must be considered in the same light as if they had been instrumentary witnesses, in which case there could be no doubt that they would have been habile witnesses, And wherever lawyers or doers, from the nature of the fact admitted to proof, become *testes necessarii*, and the only persons who can give evidence thereof, which they have not learned during the dependence of the suit, or from their client, there the objection has always been repelled.

Replied: That, in some cases, witnesses, who are in general exceptionable, are admitted, when the circumstances of the case speak out that they are necessary, and when, at the same time, the objection to them does not arise from the fact and deed of the adducer; *E. G.* domestics, in cases of ocult crimes, tutors and curators, and near relations to the adducers, as to transactions which they alone can explain; as it would be hard to deprive any person of a piece of evidence,

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 allenarly, 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