1743. *July* 2. ADAM *against* BRACO.

No. 167.
If lawyers and agents are to be admitted as witnesses for their clients?

In the question between the said parties, Whether the Lord Braco was liable to Mr. Adam as undertaker for the building of his house near Banff, and as such to pay him the price of the building at so much *per* rood of mason-work, or only for suitable honoraries as architect, and the agreed or current prices of such materials as had been furnished by him? There having been no explicit bargain alleged upon either side, the nature of their agreement depended upon circumstances. And it being alleged as material for Lord Braco, that in certain communings with Mr. Adam on the accounts given in by him, after the work was finished, and previous to the commencement of the process, he did not pretend to claim otherwise than as architect and furnisher; which communings Lord Braco offered to prove by one of his present lawyers, and his present agent, who were the persons that in his name communed with Mr. Adam and his son, when none else were present; the Lords "Sustained the objection, that lawyers and agents were inhabile witnesses in the cause wherein they were employed."

The circumstances were strong in this case. The witnesses offered, represented Lord Braco in the communing; and therefore it would have been unequal to admit them, when the other two communers, Adam and his son, could not be admitted. Next, the information could only come from those gentlemen themselves as to the matter on which they were offered to be adduced, and they had no doubt concurred in advising that it was proper to adduce them. In these circumstances the objection came in a strong light; but, independent of them, the objection in general was thought to be good.

Kilkerran, No. 2. p. 595.

*** C. Home reports this case:

Mr. Adams architect brought a process against Lord Braco for a suitable honorary for building a house to him, and for the agreed or current prices of such materials as he had furnished. But as it was not alleged that there was any explicit agreement betwixt them, an act, before answer, was allowed to both parties, for proving their different allegations. The defender cited Mr. Graham of Airth, and Hay of Montblairy, for proving some accounts which were at first given in by the pursuer, and communings betwixt the parties, where it was said none else were present.

Objected: The one was lawyer, the other agent for the defender; and according to Lord Stair's opinion, Title, Probation by Witnesses, "These are suspect witnesses for those that trust them, but they are not obliged to depone as to any secret committed to them." See L. ult. De Testibus.

Answered: The author does not say, that an advovate is an inhabile witness for his client; he only says he is suspect; consequently he should not be set aside,

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