

peared. The Advocate who was Consulted by a private person about his Right to the possession of a house, having after he was made Advocate for the sovereign, Concurred and been Consulted both at the raising of Criminals, he was against his first Client for violent Retaining possession of the house aforesaid, and after the latter were Executed, for which he got not only the ordinary Penalty of his Office upon the account of his Concurrence as Lord Advocate, but also fees for his advice in the matter. He when the Criminal came in being removed from his office of Advocate for his Majesty appeared for his first Client. But as he was going to plead, the pursuer interrupted him, by saying that he could not open against him, because he had been Consulted and Retained for him, and knew the secrets of his cause. To which it was Answered, that the Lord Advocate taking fees from the pursuer of a Criminal process, is not understood to be of Indictam privatam as a private lawyer, but only Ratione officii in order to Continue in his publick office for the Interest of the King, which lays him under a Necessity to be a pursuer while it Endures, and therefore when that office ceases, he was at liberty to serve his first Client, or any other person. Nor could he propose any secrets of the pursuers cause, since there was Nothing but open Matters of fact to be proved. The Lord without pronouncing any formal Interlocutor, publicly gave it as their opinion, that he should leave the pleading for the Cause to be Managed by others; which he did. And thereafter the Lords Declared, that they did not allow, that the sovereign Advocate might take fees from a private pursuer by reason of his office as Lord Advocate, and not as the Lord private pursuers Advocate, 1 August 1712 Sir David Dalrymple.

It was once enacted that no Advocate writer or other should Consult plead or act in the Reduction of a person for treason without Warrant from the King and Parliament, under the pain of being held a favourer of a par laborer with traitors and liable

to their punishment Act 135 Parl. 8 J. 6. Which severity found to have been Carried out of the Canon law *ca. folius 5 de penit in 6.* But now Advocates and procurators are only allowed to plead and act for persons Accused of treason or any other Crime before any court without Licence, <sup>act 38 par. 11 J. 6</sup> *licentia*, But also the Judge may Compell them to plead Act 30 Parl. 11 J. 6. Yet nonuse the freedom to plead for persons Accused of treason, till they get leave from the Court, which is ordinarily granted to such advocates as the panels apply for by petition. Which Advocates, before they begin to plead, do commonly protest that no Expressions that may drop from their Mouth in the heat of Debate and Zeal for their Clients, be Misconstrued. But if any Advocate takes upon him to Vindicate his Verbal Escapes or Rash Expressions against the Government, he may be punished by Deprivation, *Stat. Haber Cod. Gul. de penit. def. 19. McLenzie Crim. part 2 pt. 20 § 3.*

According to the Civil law, l. par. 5, § 1, *ff. de public. judic.* And the received opinion of the Generality of the best Interpreters, an Advocate can not be admitted to Defend an Absent Criminal Capere. *Crim. part 5 qu. 105 n. 25 § 1 seqq.* Because one absent cannot be condemned to Capital punishment l. 3 pr. *ff. de penit. l. 1 § 1 de Requir. vel Absent. Damno.* And if he pleads, might Disappoint the sentence by Making his escape or Retiring out of the way before the trial is more safe when the offender is present: for the Judge will sometimes read guilt in his face or Gather it from his Answers. Again, it is Much the Interest of the person Accused if he had any possible Defence, to Appear and for that his lawyers do their duty, and for get nothing Material. But in the more Common Opinion of the Doctors an Advocate may not only excuse the Absence of a Criminal, make Dilatory and Declinatory Defences for him in Capital cases; But also may plead his Innocence of a Crime not suffering Corporal punishment, but only a pecuniary fine. which