

1744. *December 21.* M'LEOD *against* M'LEOD.

## No. 175.

In what cases  
an agent may  
be obliged to  
swear against  
his client.

In the question about the expense of a suspension and a multiplepounding by M'Leod of Cadboll against M'Leod of Genzies, Genzies having averred that the arrestments which were the grounds of double distress had been impetrated by Cadboll; and a proof thereof being allowed before answer; Genzies, among others, cited John M'Kenzie writer, Cadboll's agent: And he having objected that his agent could not be obliged to depone against him, the Lords "Repelled the objection, and found John M'Kenzie ought to depone upon all facts and circumstances that he knows with respect to Cadboll's endeavouring to procure the arrestments, prior to the time that the complaint anent the said arrestments was moved in the Court of Session in the process of suspension;" and thereafter refused, without answers, a petition in the agent's own name, which, though he had no difficulty in deponing, his brethren had prevailed with him to offer, because of the precedent.

What the Lords went on was, That although, after an agent is employed in defence of any action, he cannot be obliged to depone upon any thing communicated to him by his client in the course of the process; yet no agent can decline being examined upon the fact of his undertaking a criminal employment. Suppose, in the case of forgery, a copy of a deed had been sent to the agent, and he desired to cause forge a deed in terms of it, he could not in an improbation decline being examined on that fact: And as little, in this case, could he decline being examined, whether the impetrating the arrestments had been known to him before the question was moved, in defence of which he was afterwards employed; or whether he had advised the impetrating thereof.

*Kilkerran, No. 7. p. 598.*

\* \* \* D. Falconer reports this case:

In a process betwixt Macleod of Genzies and Macleod of Cadboll, Genzies prevailed, and Cadboll was found liable in expenses; and an arrestment thereof being laid on in his hands, at the instance of one Roderick Mackenzie, a suspension was obtained, and a multiple-pounding raised; at discussing whereof, it was alleged the said arrestment was impetrated by Cadboll, to stop payment; and therefore he was not entitled to his expenses: And John Mackenzie, writer to the signet, Cadboll's doer, being adduced as a witness, a question arose how far he could be examined against his client, as to any matter of fact intrusted to him in confidence?

The Lord Ordinary on the witnesses having advised with the Lords, found, "That he ought to depone upon all facts and circumstances that he knew with respect to Cadboll's endeavouring to procure an arrestment in his hands on the debt due by Macleod of Genzies to Roderick Mackenzie, prior to the time that

the complaint anent the said arrestment was moved in the Court of Session." And having afterwards, on a representation, formally taken the question to report, it was solemnly determined. No. 175.

Pleaded for Mr. Mackenzie, or Cadboll in his name: It is a rule in humanity that no man can be obliged to discover secrets intrusted to him, because otherwise all trust would be at an end amongst mankind: This applies to lawyers and agents, Stair, B. 4. T. 43. § 9. and so has been the constant practice, 15th July 1680, Earl of Northesk against Cheyne, No. 16. p. 353. observed by Fountainhall, 21st December 1675, Creditors of Wamphray against Lady Wamphray, No. 12. p. 347. and 10th February 1737, Scot against Lord Napier, No. 27. p. 358. it was found no question could be put to the defender's lawyers, but what could be put to himself. The distinction is groundless betwixt facts coming to the agent's knowledge before, and after process, since advice is generally given before, and is then most necessary.

Pleaded for Genzies: It is the duty of all members of society to bear evidence when called on; and even the nearest relations may be obliged to depone on facts that cannot otherwise be proved. Lawyers, it is true, are not obliged to discover any defects in their clients' rights, or any secret communicated to them as such, which, by being discovered, might cut them out of a right standing in their person; but this does not apply; for the only question proposed to be asked is, at whose desire he raised the letters of arrestment? And that lawyers are bound to answer such questions has been found, 14th November 1628, Beatson against Laird Grange, No. 5. p. 342. and 1st February 1666, ——— against Rollocks, No. 8. p. 344.

The Lords found agreeably to the former interlocutor.

It was observed by some of the Court, That Mr Mackenzie raised the letters, not as agent, but as a clerk of the Court; and therefore he ought to depone at whose desire he raised them.

Act. *J. Macleod.*

Alt. *H. Home.*

Clerk, *Justice.*

*D. Falconer, v. 1. p. 32.*

1745. February 21.

BURGH OF INVERKEITHING.

On the verbal report of an Ordinary on the witnesses, Whether in the contra-verted election in the burgh of Inverkeithing, now depending, one that was a party could be adduced as a witness by the other party; it was observed that the question had, in election-matters, been determined in the affirmative as often as it had occurred; and accordingly the objection was repelled.

No. 176.

*Kilkerran, No. 8. p. 599.*