

ANTHONY SAWYER, - - - *Appellant;*  
 Earl of MARCH and RUGLEN, - *Respondent.*

1750.  


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 SAWYER  
 v.  
 EARL OF  
 MARCH.

2 April 1750.

PROOF.—WITNESS.—An instrumentary witness admitted *cum nota* to prove the delivery of the deed, although he was agent in the cause for the party proposing to adduce him.

APPEAL.—A judgment of the Court of Session refusing to examine the appellant's agent in the cause, being reversed; and it being stated by the respondent, that by another interlocutor, (not appealed from), a similar objection to the admissibility of his agent had been sustained; the House of Lords authorised him to present a petition against that interlocutor, although the reclaiming days had then expired.

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[Falc. Kilk. Elchies, *voce* Witness, No. 29. Mor. 16757.]

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THE Countess of Ruglen, by deed of assignation, No. 91. in January 1747, conveyed an heritable bond to her husband, (the appellant.) Upon her death, a competition regarding it arose between him and her son, the Earl of March and Ruglen, in which the question came to be, whether or not the deed of assignation in the appellant's favour had been delivered.

In order to prove the delivery, the appellant adduced John Ritchie, W. S. one of the instrumentary witnesses to the deed. It was objected to his competency as a witness, that he was the appellant's agent in the cause, had given partial counsel, and had been present at consultations upon the very point at issue;—that although he was a necessary

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witness to prove the execution, yet the delivery was no part of the execution, but could easily be established by other unobjectionable witnesses, if the deed had really been in the appellant's possession.

It was answered, that whatever effect this objection might have upon the credibility of the witness, it could not affect his competency; that the execution and delivery of the deed having taken place at the same time, there were, and could have been, no other witnesses present but the instrumentary witnesses, and if the appellant's agent be admitted to be a competent witness to prove the granter's subscription, he must be equally so for proving the delivery, which was in effect a part of the execution of the deed.

The Court, upon the report of the Lord Ordinary, (Nov. 21, 1749,) "sustained the objection against John Dickie, and found that he could not be received as a witness in this cause," &c.

Entered  
 Feb. 1, 1750.

The appeal was brought from part of the interlocutor of 21st November 1749.

*Pleaded for the Appellant*:—The objection to Mr. Dickie, of his being agent in the cause, cannot affect his competency; how far it may affect his credibility will be a matter for the consideration of the Court. The deed was subscribed and delivered at one and the same time. Mr. Dickie was a witness, and a very proper one, to this transaction, being the granter's ordinary agent, and the writer of the deed. He is admitted to be a good witness for proving the subscription, and why he should not be equally good for proving the delivery made at the very time of subscribing, it is impossible to find out. Of both these acts he was equally wit-

ness, and no sound reason can be assigned for disqualifying him to testify the one, when he is a necessary evidence for proving the other.

*Pleaded for the Respondent*:—1. By the established rules of law, no witness can be examined in a cause, who is employed in the suit by the party who produces him. Every witness examined in a civil cause, must clear himself by oath of partial counsel, and it is here admitted by the appellant that Dickie is his agent in this very cause.

2. Ronald Crawford, clerk to the signet, was produced as a witness for the respondent. The appellant objected to his competency, on the ground that he was agent for the respondent in the cause; and the fact being admitted, Mr. Crawford was rejected by an interlocutor of the 13th December 1749, finding that he could not be received as a witness for the respondent; and, therefore, the rule of law and justice *quod quisque juris in alterum statuerit, ut ipse eodem jure utatur*, ought to take place.

After hearing counsel, “ it is ordered and ad-  
 “ judged, &c. that so much of the interlocutor of  
 “ 21st November 1749, whereby the objection  
 “ against John Dickie is sustained, and it is found  
 “ that he could not be received as a witness in this  
 “ cause, and also so much of the subsequent in-  
 “ terlocutor as adheres thereto, be reversed; and  
 “ that the said John Dickie be received and exa-  
 “ mined as a witness in this cause, *cum nota*: And  
 “ it is further ordered, that the respondent be at  
 “ liberty to apply by petition to the Court of Ses-  
 “ sion, against an interlocutor pronounced on the  
 “ 13th December last, whereby the said Court  
 “ sustained an objection against the competency of  
 “ Ronald Crawford, who was produced as a wit-

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Judgment,  
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“ness for the respondent, in this cause, notwithstanding the strict time limited for reclaiming against the interlocutor, is expired.”

For Appellant, *Alex. Lockhart, A Forrester.*  
For Respondent, *W. Murray, A. Hume Campbell.*

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THE LORD ADVOCATE, - - - *Appellant;*  
ALEXANDER, LORD FORBES OF PIT- } *Respondent.*  
SLIGO, - - - - - }

1 February 1751.

FALSA DEMONSTRATIO.—FORFEITURE.—Alexander, Lord Forbes of Pitsligo, found by the Court of Session to be not attainted by the attainder of “Alexander, Lord Pitsligo.” Judgment Reversed.

[*Elchies, voce Forfeiture, No. 9 and 10.*]

No. 92. ALEXANDER FORBES of Pitsligo, was by letters under the Great Seal, in 1663, created a baron of Scotland, by the title of Lord Forbes of Pitsligo. In 1690, the peerage devolved upon his great-grandson, the respondent. The estate, in the meantime, had been carried off by debts, but was repurchased by the respondent, who obtained from the crown a new charter in his own favour, by the name of Lord Forbes of Pitsligo, upon which he was infest.

By an act of the 19th of Geo. II. entitled “an act to attain Alexander Earl of Kellie, Alexander Lord Pitsligo, and others, of high treason,” it was