[HEARD 20*th*, JUDGMENT 31*st* *May*, 1847.]

ANN WOOD or WILLOX, wife of SIMON WILLOX, Farmer, at Blackmyre, St. Fergus, and Others, *Appellants*.

BELL or ISABELLA YOUNG or FARRELL, relict of the late JOHN FARRELL, residing in Stonehaven, *Respondent*.

Witness.—Competency of.—Evidence.—Objection to Witness.—In order to support an objection to the *competency* of a witness on the ground of interest, it is not enough to show that the result of other proceedings at the instance of the witness, will depend upon the same facts as he is called to establish, so that he has an interest *in the question* at issue, it must be shown that the witness has an interest *in the event* of the action in which he is called, by being able to use the verdict or judgment either as *res judicata*, or as evidence in his own proceedings, or by deriving from it some other as direct and immediate advantage.

ALEXANDER WOOD died, leaving considerable estate, both real and personal. The Respondent alleging herself to be the cousin once removed of the deceased, as being the grand-daughter of an *aunt* called *Margaret* Wood, procured herself to be served his nearest and lawful heir.

The Appellants alleging themselves to be the cousins once removed of the deceased, as being the grand-children of an *uncle*, brought an action for reduction of the Respondent's service. In this action an issue was sent for trial, "Whether "Mrs. Ann Wood or Willox and Mrs. Elizabeth Wood or "Pope, are the nearest and lawful heirs-portioners of Alexander "Wood, of Woodburnden, deceased."

At the trial of this issue, the Respondent contended that the common ancestor of the deceased was James Wood, who had a son James and a daughter Margaret, that the deceased

was the son of James, and that she was the grandchild of Margaret.

On the other hand, the Appellants contended that the common ancestor of the deceased was George Wood, who had two sons, George and James, and no daughter named Margaret, that the deceased was the son of James, and that they were the grandchildren of George.

The Appellants, in order to prove their pedigree, proposed to examine Elizabeth Wood, a younger sister of their father, and cousin-german of the deceased. This witness, in an examination *in initialibus*, answered that she was the aunt of the Appellants, and that the deceased left both lands and money.

The Respondent objected to the admissibility of the witness, on the ground that if the Appellants succeeded in proving themselves to be the heirs of the deceased, Elizabeth Wood would be one of his next of kin, "and had an interest in the "succession." The Appellants did not deny that in that view, the proposed witness would be one of the next of kin; but they denied that she had an interest in the issue in the cause. The Judge presiding sustained the objection, and refused to allow the witness to be examined, whereupon the Appellants excepted to this rejection of evidence; and thereafter the jury delivered their verdict for the Respondent.

A bill of exceptions was argued before the Court and disallowed on the 2nd March, 1847.

The appeal was against this interlocutor.

The Hon. Mr. Wortley for the Appellants.—So far as the examination of the witness objected to went, or as any other evidence exists, it only appears that the deceased died leaving lands and money. It nowhere appears, whether he died testate or intestate; whether his debts were paid, or whether, if they were paid, there would be any free executry for his next of kin to take, supposing him to have died intestate. Even assuming,

therefore, the effect of the witness's evidence might in some way aid her in establishing that she is one of the next of kin; *non constat* that she had any interest to establish that character.

But admitting that the witness had such an interest, there was no question as to the *personal* estate, which alone she could take as next of kin. The question regarded the *real* estate of the deceased, the succession to which is altogether distinct from the succession to the personal. A verdict for the Appellants gained through the evidence of the witness, and establishing their characters as heirs-portioners, would not establish the right of the witness to the moveables, and as little will the verdict in favour of the Respondent disaffirm such right. Her right will remain precisely as it did before this question originated, and if the service of the Respondent should stand unreduced, it will not operate any bar to the establishment of the witness's right, if it exist, to obtain confirmation as executrix of the deceased.

Although, therefore, it be true that the witness, in the terms of the objection taken to her examination, is interested "in "the succession," she is no way interested in the event of the Appellants' action, or in their success in the trial of the issue. The conclusions of the action have no reference to any estate or interest upon which she has a claim of any kind whatsoever. It is not pretended that the witness had any right to the character of heir; she could neither, therefore, have prosecuted a brieve of service herself, nor appear to oppose that of the Respondent's, nor can she now seek to reduce it after it has been obtained.

It may very well be that she has an interest, in the popular sense of that expression, in seeing her relative succeed, not only because of their relationship, but because her own right to the character of next of kin may depend upon the same circumstances as will establish their right to the character of next

heir. But that is not such an interest as will justify the exclusion of her testimony. It is a circumstance for the jury to weigh in judging of the credit due to her testimony as giving a bias one way, but it is no objection to her *competency* as a witness. In order to exclude her, her interest must be direct and immediate; there must either be a benefit to be derived to her immediately from the verdict, or an injury to be avoided. It is not enough that she stands in the same situation as the party calling her, and that having a similar case to be tried, the result of the verdict in the action in which she is examined may influence the jury in her own case.

The law in England upon this subject has been settled ever since the case of Walton *v.* Shelley, 1 *Ter. Rep.* 296, followed soon after by the case of Bent *v.* Baker, 3 *Ter. Rep.* 27, where one underwriter was allowed to be called as a witness for another in regard to his liability under a policy upon which they were both liable, and in regard to which an action was at the time depending at the instance of the plaintiffs against the witness. Lord Kenyon said, that "although the witness stands in the same "situation with the party for whom he is called to give evidence, "there is no doubt but it may influence his testimony, but this "does not render him incompetent, that only goes to his credit, "not his competency, if the proceedings in the cause cannot "be used for him." Bent *v.* Baker was followed by Wood *v.* Teage, 5 *Barn. & Cres.* 336. There it was ruled that an executor who took a pecuniary interest under a will, was a competent witness for the defendant in an ejectment against a devisee, the question turning upon the sanity of the testator at the time of making the will. The Court observed that the verdict would only have the effect of establishing the will as to the real property, but it would not be any evidence in the Ecclesiastical Court as to the personality—there the suit would be treated as *res inter alios acta.* So in Nightingale *v.* Maisey, 1 *Bar. & Ad.* 439, a widow was held to be a competent witness for

her son, to establish that he was heir-at-law of her husband, although the effect of her evidence was to show a seisin in law in her husband, which in other proceedings at her own instance would give her a right to dower out of the lands in question, and the ground of her admission was, because she could neither use her own evidence nor the verdict in these other proceedings; and more recently, in Wildgoose *v.* Pearce, 5 *Mees. & Wels.* 506, one party claiming an interest under a will, was held a competent witness for the plaintiff, in an ejectment, whose action was founded upon the will, and where the question at issue was the competency of the testator to make the will.

The rule of law thus well established in England, that the wishes of a witness, however influenced, where he cannot derive any direct benefit from the proceedings in which his testimony is required, will go only to his *credibility*, not to his *competency*, is no way different from the law as established in Scotland, both by text-writers and by decisions of the Courts. The cases in England give only a fuller illustration of a principle recognised both in England and Scotland. *Stair*, IV. 43, 7, says, "interest *in the cause* makes witnesses inhabile *as to that cause* "if they gain or lose thereby; but that *fovent consimilem* "*causam* is not a good objection, for that conjunction of interests "relates to the relevancy, and not to the verity of the cause;" and *Bell* in his principles says, "the interest, in order to dis- "qualify, must be present, certain, and immediate." "It is not "a disqualifying interest that the witness has a wish for the "success of the party who calls him, or some eventual prospect "or hope of advantage in the issue," "these, though they may "influence his testimony, go to his credibility only, neither is "it enough that the witness has a *similar* case to maintain, if "the verdict or judgment cannot be used in his favour."

These *dicta* are supported by the decisions of the Courts; thus, in Marshall *v.* Anderson, *Mor.* 16787, two witnesses

alleged to have committed adultery with a married woman, who called them in an action for divorce grounded upon the adultery, were by a judgment of this House, reversing that of the Court of Session, admitted as competent, in disregard of the objection sustained by that Court that the witnesses had an interest to give evidence for the defender, because they could not give it for the pursuer without disclosing what would ruin the defender, in whom they must be supposed to have an interest, and might subject themselves in damages to the pursuer. So in Innes *v.* Glass and Co., 4 *Murr.* 163, where the question was, whether damage to a ship had been caused by the fault of the master and seamen, these persons were admitted as competent witnesses, although it was objected that their evidence given one way might expose them to a claim for relief. *Adam, Ld. Ch. Com.* said, "unless the verdict is evidence for or against the witness in the "question of his liability, the objection is not good, the facts "alleged go only to the credit of the witness." And in Campbell *v.* Davidson, 4 *Murr.* 176, a legatee was admitted to prove a deed, although the effect of his evidence went to increase the fund from which his legacy was payable. These authorities are supported by a judgment of this House in Ralston *v.* Rowat, 1 *Cler. & Fin.* 424, 6 *Wil. & Sh.* 480; there, in an action to reduce a settlement upon the head of deathbed, the medical attendant of the testator was admitted as a witness for the pursuers, although he swore that he considered himself to be a nearer heir of the testator than the pursuers, and upon this ground, that the verdict could not be used for or against the witness in any proceedings which he might afterwards adopt to establish the character which he asserted he had a right to.

In the present case, the verdict, if given for the pursuers, not only will not establish or assist any claim to the personal estate of the deceased, in which alone the witness is pretended to have an interest, but it will not even establish the claim of the pursuers to the realty. The only effect it will have will be

to remove the objection to sue, and to let in the objection to the Respondent's service. But even if the effect of the verdict would go much further—even if it would establish in the pursuers the character of heirs, that would not advance the claim of the witness to the personalty one step. It might raise a presumption in favour of the claim, but that is not such an interest as, according to the rules of law received in either country, would exclude the testimony of the witness, whatever effect it may have upon her credibility.

Mr. H. Robertson and *Mr. Anderson* for the Respondent.—It is not denied that the pedigrees of the Appellants and of the witness are identified, and that if the Appellants are established to be heirs-at-law, the witness must be one of the next of kin, to the exclusion of the Respondent in either character, and the witness has herself sworn that the deceased left both real and personal estate. The witness, therefore, had a strong and evident interest in the issue of the cause, as although it related only to the real estate, the succession to this depended upon the same facts as the succession to the personal estate, and the result of the discussion as to the one, must necessarily have a material effect upon the discussion as to the other.

If the verdict should be for the Respondent, she will be assoilzied from the reduction, and her retour as heir will be confirmed. In any contest with the witness for the personal estate, the Respondent would be entitled to use the verdict as showing that she had established the character of heir upon the pedigree which she asserts, and little, if any, additional evidence would be necessary to establish her right to the character of next of kin. Her service would have the benefit of having been impeached and yet confirmed.

If, on the other hand, the verdict should be for the Appellants, the Respondent's service will be reduced. The witness, in claiming the personal estate, will have nothing to apprehend

on that score, and will be entitled to use the verdict as showing that the Appellants have established the character of heir upon the pedigree which the witness asserts.

Now it is certain that retours of service are competent evidence in questions of pedigree, *Stair*, III. 5, 35, *Ersk.* III. 8, 36. This is more particularly the case with reference to *special* services which have been expede in the face of opposition—these constitute not only competent but very important evidence—and generally where the issue is upon matter of fact, as it is in the present case, it is competent to produce in evidence judicial proceedings to which both of the parties were strangers. *Stair*, IV. 43, 7, says, "Interest in the cause makes witnesses "inhabile as to that cause, if they can gain or lose thereby. "But that *fovent consimilem causam* is not a good objection, "for that conjunction of interests relates to the *relevancy*, not "to the *verity*, of the cause." So in a case from *Durie*, to be found in *Mor.* 9709, a widow having, in a question with one party, been found to have intromitted with her husband's estate, that matter was held not to require proof in a question with another party. In Kaidislie *v.* Lauder, *Mor.* 14027, a decree establishing in one case that a party was heir of his father, was held to prove the same fact in another, so long as the decree was unreduced, although the party offered to prove that the decree passed in absence, and pleaded that *res inter alios judicata aliis non nocet, et deducta in uno processu non probant in alio.* In Machargs *v.* Campbell, *Mor.* 12451, the sentence of a court-martial was allowed to be used in an action of assythment by the friends of the deceased in order to prove his death, and in Maxwell *v.* Bonar, *Mor.* 6288, the retour to a brieve of idiotry and furiosity was allowed to be received as evidence in a case with persons who had not been parties to the enquiry under the brieve; the retour, until reduced, being received as evidence.

In Angus *v.* Mags. of Edinburgh, 4 *Murr.* 343, one party

using a public market was not allowed to be examined as witness for another in a question as to the customs of the market, because he might have used the verdict in any case that might have been raised against himself by the proprietors of the market. These cases are referred to by *Tait on Evidence*, as showing that the "true criterion for judging whether the "witness has an interest in the issue of the cause, is to consider "whether the verdict or judgment can be afterwards used, "whether for or against, either as *res judicata* or as *evidence of* "*a fact* in any other action."

Ralston v. *Rowat*, although apparently a case in favour of the appeal, when it is examined will be found to be quite consistent with the judgment in the Court below. The witness had as much interest to defeat the case of the party on whose behalf he was called, as that of the party against whom he appeared, for he could not establish his right as heir of the testator whose will was in question until he had reduced the service of the pursuer of the reduction as his heir, and in such a proceeding the verdict that might be given in the reduction could neither be used for nor against him. But in *Watson* v. *Glas*, a case decided subsequently to *Ralston* v. *Rowat*, the witness tendered by the pursuers of the issue to prove that they were the heirs of the deceased was the aunt of the pursuers, so that, proving the propinquity of the pursuers, she proved her own, and her right as next of kin. An objection to the competency of the witness was sustained by the Judge at the trial of the issue, and his judgment was supported on the hearing of a bill of exceptions. The facts in that case were nearly the same as in the present, and the question of law was identical.

Mr. Wortley in reply.—The report of *Watson* v. *Glas* cannot be depended upon—the judgment is made to rest upon this, that a service is not *res inter alios*, but *res judicata*, to the effect of being used in any subsequent action as to personalty, a posi-

tion manifestly untenable, as there is no proceeding which has less the character of anything like a judicial determination, and so far from all the lieges being entitled to be present, as Lord Corehouse, the only Judge whose opinion is given at any length, is made to say, none are entitled to appear but those who claim the *status* of heir. But whatever may be the particulars of that case, its decision has not been sanctioned by this House, and is opposed to its solemn judgment in *Ralston* v. *Rowat*, where the principles contended for by the Appellant are distinctly recognised.

LORD CHANCELLOR.—My Lords, in this case, which was heard before your Lordships some time since, I have to submit to your Lordships that the judgment of the Court below is erroneous, and ought to be reversed. The case arose in a suit to reduce a service by which certain parties had procured themselves to be served as heirs to a party deceased. The suit was instituted by persons claiming to be heirs, contending that the service had been improperly made, and therefore seeking to have it reduced. That was met by a preliminary objection, that these parties were not heirs; and to try that preliminary objection, before the parties could be admitted to question the propriety of the service, an issue was directed, "Whether the pur- "suers, Mrs. Ann Wood or Willox, and Mrs. Elizabeth Wood "or Pope, are the nearest and lawful heirs-portioners of Alex- "ander Wood, of Woodburnden, deceased."

Upon the trial of that issue a witness, Elizabeth Wood, was produced, and it appearing that she was the aunt, I think, of the party deceased, or in some way connected with the family, and that in the event of the pursuer being right, and the service being wrong, she would become in future a party entitled as next of kin, an objection was raised to her competency as a witness, and the learned Judge being of opinion that she was not competent, the matter was brought before the Court of

Session, and four of the learned Judges were of opinion that the objection ought to prevail.

Against that decision the appeal is brought to your Lordships' House, and the question now is, whether the witness stood in such a situation as to make her incompetent to be examined upon the issue so directed.

Now, my Lords, if the Scotch law upon this subject were the same as the law of England, the point would not require much argument, because it is quite clear that the result of the trial could not directly affect the interest of the witness, the issue to be tried being whether the pursuers were the nearest heirs of the deceased, whereas the only way in which the witness could be connected with the property was, that in the event of a certain pedigree being established, she would be entitled to a share of the personal property.

My Lords, we had several cases referred to, and there is one to which I am particularly anxious to call your Lordships' attention, because it seems to me that even if it is not directly applicable in point of fact, it clearly establishes the principle upon which this case ought to be disposed of, I mean the case of *Allison* v. *Rowat*, which came to this House from the Court of Session. There the suit was instituted for the purpose of reducing a deed of settlement on the ground of deathbed, by persons claiming to be heirs. A witness was called who stated that the pursuer was not heir, but that he himself was heir; upon which the objection was taken that he could not be examined, and that objection prevailed in the Court of Session, but was reversed when the case came to this House.

Now when the case came to this House, the opinion of this House assumed that upon a subject of this sort there was no distinction between the law of Scotland and the law of England; indeed, it would be very strange if there were, for this is a rule adopted for the purpose of better ascertaining the truth upon subjects of investigation by Courts of Law, and I see that in the

opinions of the learned Judges in the two cases which have occurred before the Court of Session, in arguing upon the law they refer to English authorities, and that they all, whichever view they take, recognize the principle, that the same rule is operative and ought to prevail in the two countries. I mean so far as regards the question under discussion, how far a witness is incompetent on the ground of interest. If that were so, it would lead to the conclusion that this certainly can be no objection to the admissibility of the witness upon the ground of interest. I am not now speaking of the late Act of Parliament, but of the law as it stood anterior to the late Act of Parliament, the Act itself not being applicable to Scotland.

Now, my Lords, in order to see how far this question of interest applies to this witness, we must consider what the course of proceeding was in which the witness was called to be examined. The suit being a suit to reduce the service of the party claiming as heir, as a preliminary step, not for the purpose of deciding the question, but for the purpose of ascertaining whether the pursuers were in a situation to raise the question at all, an issue is directed to enquire whether the pursuers are or are not heirs, that is to say, whether they are in a situation to entitle them to challenge the service obtained by the defender.

Now, I have before said that the result of that trial could not by possibility be used for or against the witness, the witness having nothing to do with the heirship, but claiming a share in the personalty, although the pedigree entitling the pursuers to sue in this action might be the same which would entitle the witness to claim a certain portion of the personalty. It is not attempted in argument to show that the result of the trial of that issue in which the witness was proposed to be examined, could be used directly for or against the witness, but the argument stands thus, although the result of that trial could not be used directly for or against the witness, it would lead probably

and indeed would certainly lead to this result in the suit itself, that it would reduce the service of the defender; now that would not at once operate for or against the witness, but it might come circuitously into operation for the witness in this way, if after that had been accomplished the witness instituted a suit under a different jurisdiction, for the purpose of establishing her heirship as entitled to a portion of the personalty, that would raise a question as to the pedigree under which she claimed, being the same as that under which the pursuers in this suit claimed. Then it is said, if she were to seek to establish her title, it is clear that though this would not be direct evidence for her in proof of her own case, yet if it were not for the judgment that might be obtained in this suit, the retour might be produced as evidence to rebut the pedigree under which she claimed; and in order to get rid of the effect of that piece of evidence, the judgment which might be obtained in the suit pending, in which the issue was directed, might be produced; so that the result is that the effect of the verdict which might be obtained, if it should be obtained by means of the evidence tendered, or at least to which the evidence tendered would contribute, would be ultimately and circuitously to make it a piece of evidence, which, as the matter now stands, it could not by possibility be.

My Lords, it is quite clear that that is not a species of interest which would prevent the witness from being a competent witness.

Then there is *Watson's* case, which it is said raises very much the same question. My Lords, I do not enter into that case, it is a very recent decision of the Court of Session, and if the Court of Session have come to an erroneous conclusion in one case, it is not much to be wondered at that they should have come to a similar conclusion in a case which was but a very few years antecedent to it. In fact, the conclusion to which they came in *Watson's* case, has probably led to the very

error which they have fallen into in the judgment upon which we are now to pronounce our opinion in the present case. *Watson's* case is not a case of sufficient standing to show that the law of Scotland upon this subject is different from the law of England. But with respect to the other case that was cited, of *Allison* v. *Rowat*, I think that we are bound by the principles laid down there, from which I have no disposition to depart, and which places the law of Scotland on the same footing as the law of England in a matter of this sort, as to the incompetency of witnesses upon the ground of interest, and if there were any balance between the two cases, the decision in the case of *Allison* v. *Rowat*, being a decision of this House reversing a decision of the Court of Session, which involved the same objection as the present, would settle the question, and therefore I cannot think that the case of *Watson*, which was relied upon by the Court of Session, ought to induce your Lordships to do otherwise than adhere to the principle laid down in *Allison* v. *Rowat*, and establish the principle that the law which prevails in this country upon the subject is also applicable to Scotland.

I therefore move your Lordships that the judgment of the Court of Session be reversed, and that a new trial be directed.

LORD BROUGHAM.—My Lords, I am of the same opinion. It appears to me that the Court below has been misled, partly by *Watson's* case and partly by their Lordships not having formed a perfectly clear and accurate notion of the objection of interest in the question, as distinguished from interest in the event, which ought to exclude, and in England would have excluded, a witness prior to Lord Denman's late Act, and which in Scotland is still an objection to the competency of a witness.

My Lords, when I say that their Lordships did not seem to me to have formed a perfectly clear notion of the objection

raised, I go upon this, that the three learned Lords who chiefly refer to the case of *Watson*, *Lord Mackenzie*, *Lord Cockburn*, and *Lord Fullerton*, and even *Lord Jeffrey* (though he differed from the judgment of the rest), all consider that but for the case of *Watson* it would have been a case of difficulty. I see no difficulty in it whatever. *Lord Jeffrey* also states that he should have felt still greater difficulty but for that case than *Lord Fullerton*.

My Lords, when I say that there is no difficulty whatever upon the question of interest, as disqualifying a witness to give evidence in the Court below, my meaning is this,—the interest must be not only in the result, in the event of the trial of what their Lordships call the issue of the cause (and not simply an interest in the question), but it must be a direct and immediate interest, and it will not do to say that it removes out of the way, in another case which may possibly arise or may not, a difficulty in the way of the party. If it leaves the case in question, it will not do merely to say that it removes a topic in the argument; that is not an interest which disqualifies a witness, it must be such a direct and immediate interest that he may be said to be swearing for himself, or swearing against an adversary to himself, in any testimony which he gives.

Now the case which I put to the learned counsel in the course of the argument, I do not think was got rid of by observation at all. The argument here is, that the propinquity of the party giving the evidence might come in question in another suit, possibly in another Court, touching the personalty, and that therefore if the witness objected to, and upon whose evidence the question arose, gave evidence one way, namely, against the service, the result would be, that the service could no longer be given in evidence against her possible claim in the other suit; consequently, it was said that she had an interest in giving evidence against the service, inasmuch as she was removing, by

her testimony, a possible obstacle out of her way in a possible suit which she might maintain elsewhere, or in another Court, and *alio intuitu*, this being respecting heirship, that being respecting personal estate.

Now, my Lords, nothing can be more clear than that a party may have an interest in getting rid of a witness, as well as in getting rid of documentary evidence, as a service or a retour. If I am the obligor in a bond, and A. B. is the attesting witness to that bond, and there is no other witness, and it is a bond under twenty years old, and consequently must be proved by the testimony of the witness, nothing can be more clear than that I should have an interest in disqualifying A. B. as a witness. Now before the late Act of Lord Denman, which is an excellent remedial Act, which removed the objection to the competency of a witness arising from a conviction for felony, continuing the objection to his credit but not to his competency, nothing can be more clear than that prior to that Act, if A. B. had been convicted of felony, he could not have been examined as a witness to prove anything, even the execution of a bond. I am called as a witness upon the indictment of A. B. for felony. Can anybody suppose that I could not be examined as a witness because the bond was produced in order to prove that he was an attesting witness, and that therefore I had a direct interest in removing him out of the way? "No," the Court would answer, "this is an indictment for felony, and that ques-"tion is a totally different one; it is a question respecting the "possible interest which the witness may have in removing out "of his way an instrument which is capable of being given in "evidence against him." No such remote, possible, or contingent interest ever can be allowed to prevail against the demand of the law, which requires a direct, immediate, and certain interest in the party sought to be disqualified thereby.

My Lords, the case of Watson was in the year 1833. Their Lordships in the Court below seem to have been very much

moved by that case. It may be said that in the Court below they were bound by it, they seemed to have thought themselves so, but coming before us, we are not bound by it. But besides that, there is the other case of *Allison* v. *Rowat*, which is still stronger in favour of receiving the evidence, and against the conclusion at which their Lordships have arrived, than the case of Watson was for rejecting the evidence, and in support of the conclusion at which their Lordships arrived. That case was, I believe, in the very same year decided by this House, in the year 1833. Whether it was decided so far before the case of Watson, as to have been capable of having been argued in the case of Watson, I really do not know. The two cases could not have stood together, and your Lordships would not be bound by the case of Watson. Now *Allison* v. *Rowat* is material, as showing not only what the English law would be upon this subject, but it is most material to show that there was no difference between the two systems of jurisprudence in this respect, because the principles of English law were recognized in that case fully and exclusively.

But there is also another ground beside the argument stated by my noble and learned friend. It is not a matter of positive law, but it arises from the old and long established rules as to the reception or rejection of evidence which governed in this country, and the Scotch law is very much the same as the English law in this respect. When we look to old authorities, *Stair* and *Bankton*, we find that they adopt, almost in terms, that well known case of *Bent* v. *Baker*, which distinguishes interest in the event from interest in the question, and which has ever since been held to be the governing law upon the subject, until both interest in the event and interest in the question were abolished, as forming any objection to the admissibility of the evidence, by the salutary and remedial Act of Lord Denman. One can hardly conceive a more direct interest, as far as bias upon a man's mind goes, than there was in the case of *Bent* v. *Baker*;

it was this—the witness was called to negative the sea-worthiness of a vessel in the case of a policy of insurance, or to support some other objection, by which the underwriters would have escaped. Everybody knows that even where there is no consolidation, when there is a question between one underwriter and the assured, substantially one trial decides for all, and therefore the bias is strong on the mind, yet the evidence of any underwriter except the defendent is admissible, upon the principle that there there is only a bias arising from an interest in the question, and not in the event. If there had been a consolidation it would have been different, for the witness would have been a party in the cause.

My Lords, the Scotch law lays down the rule in words which are rather remarkable. It uses the expression that it is not enough that the parties should be *foventes ad consimilem causam* (that is the expression of the old lawyers), but they must have an interest in the event itself, and so far, therefore, the principle of the Scotch law is precisely the same with the doctrine in the case of *Bent* v. *Baker*. Underwriters are not incompetent witnesses for one another. They must have a direct interest in the event of the suit in support of which they are called, to render them incompetent. Therefore, my Lords, I am of opinion that, viewing this case both upon principle and upon precedent, without doubt there is no difficulty in it. I differ from their Lordships in the Court below, who think there would have been a difficulty but for *Watson's* case; and I differ in thinking that *Watson's* case created any additional difficulty; it raises no difficulty at all. If *Watson's* case was cited on the one side, there is the case of *Allison* v. *Rowat*, which is stronger, on the other. The Act of Lord Denman, I believe, does not extend to Scotland. I am sorry it does not. It ought clearly to extend there, for it is just as good law for the one country as for the other, and I hope no long period will elapse before it is extended to Scotland.

WOOD *v.* YOUNG.—31st May, 1847.

[*Mr. Anderson.*—My Lord, I find that Ralston's case was cited in Watson's case.]

LORD BROUGHAM.—And they tried to differ the two cases.

[*Mr. Anderson.*—Yes, my Lord. Watson's case did not occur till 1837, and Ralston's case was in 1833.]

LORD BROUGHAM.—It is quite immaterial. If this case is wrong, Watson's case was wrong.

LORD CAMPBELL.—My Lords, I am of the same opinion. I think that this was a competent witness for the pursuers upon the trial of this issue. With respect to objections to the competency of the witness on the ground of interest, I apprehend that the law of England and the law of Scotland are exactly the same as the law of England was before Lord Denman's Act. It appears from the authorities in the institutional writers to which my noble and learned friend has referred, that they very distinctly anticipate the rule laid down in *Bent* v. *Baker*—they did show that interest in the question is not enough to disqualify, but that there must be an interest in the event of the suit.

Now, my Lords, when a witness is objected to on the score of interest, it must be on one of two grounds; either that the verdict in accordance with the evidence which he gives, may afterwards be given in evidence for the witness, or that the witness will from the result of the suit directly obtain a benefit if the verdict shall be according to the evidence which the witness gives. Both of those grounds of objection have been made in this case, but it seems to me that neither of them is supported.

Now with regard to the objection that the verdict which may be pronounced for the pursuers might be given in evidence in favour of the witness, I take it that it is quite clear that that is untenable. My Lords, independently of this objection, which is pointed out by the Judges below, if the verdict were

given upon her evidence, although *prima facie* the verdict might be evidence in another case, the single circumstance of its being shown to be upon her evidence that it was given, would be enough to prevent any weight being given to it, but as to that the Judges seem to entertain some doubt, and that is not the ground upon which I rely.

But, my Lords, it is quite clear to me that that verdict could not be given in evidence by Elizabeth Wood. In the first place, the verdict *per se* clearly could not be given in evidence, because the verdict would be merely upon the issue, "whether the pursuers were cousins and nearest lawful heirs-"portioners of Alexander Wood, the deceased;" it is quite clear that that verdict could not be given in evidence.

Then what could be given in evidence? The judgment? No, my Lords. Supposing that the service is set aside upon the verdict pronounced upon the issue, what would be the consequence? The consequence, I take it, would be that the service and the retour would be annulled, would be cassed, would be annihilated, and would be as if they had never had an existence. There would be no occasion to resort to the circuitous process of allowing the service and the retour to be given in evidence, and then to give in evidence to destroy it the judgment whereby it would be cassed. I take it that no professional man would venture to give the service in evidence with a knowledge of the fact that it had been set aside by the solemn judgment of a Court. My Lords, there would be no occasion at all to give in evidence the judgment, showing that the service had been cassed in order to destroy the effect of the service, because the service itself would never be attempted to be given in evidence.

Therefore, in no point of view can the objection be maintained, that the verdict, or the judgment upon the verdict, might be given in evidence in favour of the witness, if she should afterwards bring an action or institute some proceeding

for the purpose of recovering a share of the personalty of Alexander Wood.

The question, therefore, my Lords, is, whether Elizabeth Wood has any direct interest in the result of this suit, and it is stated in this way, that the result of this suit will be that the service and the retour which are a bar in her way if she should set up her claim to a share in the personalty, would be destroyed by the evidence which she gives. But, my Lords, let me suppose the necessary consequence of this verdict upon the issue to be that the service shall be set aside, (I am not clear that that follows, but I suppose it to follow), what is the consequence? It is merely that she, by her evidence, will get rid of a piece of evidence which would stand in her way if she should seek to recover a share of the personalty. That is the strongest manner in which it can be put, that she is to get rid of a piece of evidence against her, which would not be at all an insuperable objection, but which would stand in her way, and which might be given in evidence if she should institute a process for the purpose of recovering a share of the personalty. It would be very strange if that were to disqualify the witness, because, supposing that the service is evidence upon a proceeding brought by her in respect of the personalty, which the Judges below have not said, but supposing it were evidence, it would not weigh a feather, because these services, though they are receivable, are utterly immaterial; but, my Lords, supposing that it really were substantial evidence, it would only be a piece of evidence. Although the service were set up, she may yet be able to make out her claim to the personalty, and if the service is set aside, she still may not succeed; therefore the service standing or being set aside does not necessarily lead either one way or the other to her recovering or not a share of the personalty. It is merely that she would get rid of a piece of evidence which, perhaps, might otherwise turn the scale against her, that is the whole.

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There is no case in England in which a Court has held that such an interest will disqualify a witness. The interest in the result of the suit must be an interest in the nature of something substantial, something in the shape of lands, or goods, or money, which shall come to the witness, or shall be lost by the witness, as the direct and necessary result of the suit upon the trial of which she is called as a witness.

My Lords, I think that the objection is untenable on either ground, and that the judgment of the Court below ought therefore to be reversed. With regard to the case of *Watson*, I do not think it at all necessary to consider whether it differs or not from the present case, because even if it were on all fours with it, there are other cases which are equally in point, and I should feel bound, having the honour to be where I now am, to say that I should disregard *Watson's* case, because it is practically disposed of, and is contrary to the rule which has been laid down by this House on former occasions.

My Lords, I entirely concur in the opinion which has been expressed by my noble and learned friends, that this judgment ought to be reversed.

LORD BROUGHAM.—I ought to have expressed my total dissent from the doctrine which has been laid down in the Court below, which is a strange and novel one, that upon a verdict being given in one case in accordance with the evidence of the party in another case, but who was in the former case a witness, the Court will consider that the verdict passed upon the evidence of the party himself. It seems to me tobe the most extraordinary doctrine that I ever heard. The Court never can look into the evidence on which the verdict had passed.

Ordered and adjudged, That the interlocutor complained of in the appeal be reversed: And it is further ordered and adjudged, That the

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bill of exceptions referred to in the said interlocutor of the 2nd (signed 3rd) of March, 1847, be allowed, and that a new trial be granted: And it is also further ordered, That the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment.

JOHN HUNTER—JOHNSTON, FARQUHAR, and LEACH, Agents.