[10*th July* 1833.]

No. 31. ELIZABETH RALSTON or ALLISON, Appellant.—*Solicitor General* (*Campbell*).

JOHN ROWAT, Respondent.—*Follett—M'Neil.*

Process—Proof.—In a reduction of a deed of settlement instituted by a party who had been served heir to the grantor, he adduced a witness who deponed that he considered himself a nearer heir than the pursuer; that he had intimated to the defender his intention to challenge the deed, and although he did not obey a charge which he got to enter heir he reserved his right to do so; that he believed he had not been served; that his mother was third cousin of the grantor, and he was grandson of the daughter of the grantor's ancestor, whose marriage he had not yet been able clearly to prove, although he had not yet made all the exertion in his power to do so; that he had nothing to do with the present case, but that, although he had not made up his mind to do it, he might challenge the deed, if he proved his propinquity; that he certainly did not withdraw his claim as heir at law, and had not renounced it in favour of the pursuer:—Held (reversing the judgment of the Court of Session), that he was a competent witness.

2D DIVISION.

THE appellant, as one of the heirs-portioners of provision and of line served and retoured to the deceased John Allan of Ellsrickle, brought against the respondent an action of reduction of a deed of settlement alleged to have been executed on the 19th August 1829 by Allan, in favour of the latter, on the ground of informality in

the subscription, and also on that of death-bed; and the following issues were prepared:—" Whether the dis-
" position and deed of settlement, No. 7. of process,
" dated 19th August 1829, sought to be reduced, is
" not the deed of the late John Allan of Ellsrickle?"
" Whether on the said 19th day of August 1829, the
" date of the said deed, the said John Allan was on
" death-bed?"

The case came on for trial (18th July 1832) before the Lord Justice Clerk and Lord Mackenzie and a Jury, when the appellant proposed to adduce as to both issues Dr. Robert Buchanan, a surgeon in Dumbarton. On being examined in initialibus by the respondent he " de-
" clared that Mr. John Kennedy, writer in Glasgow, was
" his agent in December 1829, and that he Dr. Buchanan
" as heir-at-law desired the said John Kennedy to in-
" timate by letter to Mr. John Leslie, the agent for
" John Rowat the defender, his intention to challenge
" the said deed; and the said witness read the said
" letter to the Court, and which letter is in the terms
" following: viz.—' Glasgow, 2d December 1829.—
" ' Dear Sir, I am directed by Dr. Buchanan of Dum-
" ' barton to intimate to you, as agent for Mr. John
" ' Rowat of Whiteshawgate, that his (Dr. Buchanan's)
" ' not obeying the charge given him on the 3d ult.
" ' will not be held as any acquiescence in the validity
" ' of Mr. Rowat's title as disponee of Mr. John Allan,
" ' which title he accordingly reserves to himself to
" ' challenge and set aside, as well as to enter heir to
" ' the deceased Mr. Allan when he shall see it expe-
" ' dient to do so. I am, &c.' And being cross-inter-
" rogated, he declared that he could not say whether any
" step had been taken. Some inquires had been made,

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" but he was not prosecuting any action at that time; " there was then no pending action. The late Mr. Allan " was third cousin of witness's mother; he is grandson " of a Mrs. Macfarlane, daughter of John Allan, and he " had to connect himself with this John Allan through " his grandmother. That John Allan was a writer in " Glasgow in 1725; that a difficulty in proving his mar- " riage occurred, and consequently of the legitimacy of " Mrs. Macfarlane; that he the witness had made some " exertions to clear this up, but certainly not all that " could be made. Some records had been searched, and " an advertisement put in the newspapers for the pur- " pose of removing this difficulty: it has not yet been " removed. He had not been served heir, he supposed; " but he was perfectly ignorant of the steps necessary; " that this is the obstacle not yet removed. He had " nothing to do with this lawsuit, nor contributed to it; " but if he proved his propinquity and proved his pedi- " gree he might challenge this deed. He had not made " up his mind, and had not made any inquiry for about " a year." Having been re-examined by the counsel for the respondent, he declared, " that he certainly did " not withdraw his claim as heir-at-law; at that mo- " ment he considered himself a nearer heir than " Allison (the pursuer) or Purdon (the other heir- " portioner). He had not renounced his claim in their " favour."

On this the respondent objected that he was inadmissible, and the Court sustained the objection. The appellant excepted to the opinion, and declined to proceed with the cause, when the jury found for the respondent; and the Court, on 27th February 1833, refused a bill of exceptions.

Mrs. Allison appealed.

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Appellant.—There is no evidence on the record to show that Dr. Buchanan at the period of his being called as a witness had any interest whatever in the issue. It is admitted that the whole facts out of which the interest is said to arise are contained in the witness's initial examination, as embodied in the bill of exceptions, and that unless his rejection is justified by the facts therein set forth it cannot be justified at all. But assuming all the statements in that initial examination to be true, they do not prove that Dr. Buchanan had any interest whatever in the issue. They do not even amount to proof of a belief or opinion on the part of the witness that any interest existed. The substance of the witness's statement is, that the late Mr. Allan of Ellsrickle was a third cousin of the witness's mother, the connexion being deduced through a person of the name of John Allan, who was a writer in Glasgow in the year 1725, and who had a daughter, Mrs. Macfarlane, who was the witness's grandmother. There is no statement of the relative degree of propinquity in which the appellant stands to the deceased, so as to make it appear on the record that the appellant's connexion with the deceased is more remote than that of the witness, unless it be considered that this is afforded by the witness's statement,—"that he considers himself" as standing in a nearer degree. But it is not necessary for the appellant to rest any thing on this defect; because, as the interest of Dr. Buchanan does not depend on the degree of natural relationship in which he may stand to the deceased, but on his possessing the status of lawful heir, it is of no importance whether his degree of relationship

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be nearer than that of the appellant, unless his connexion is deduced through legitimate channels. But Dr. Buchanan does not say that he is a lawful descendant of John Allan. On the contrary, he expressly admits that there is no evidence that John Allan was ever married, and, consequently, no evidence that the witness's grandmother was other than a natural daughter. He does not even say that there was a tradition in the family in regard to his great grandmother's marriage, or an understanding that his grandmother was a legitimate daughter. Nor does he say that he himself believes that she was so. In these circumstances, Dr. Buchanan's statement could not have been held as amounting to a distinct assertion of legal propinquity. But the case does not stand on this negative ground. The witness not only does not state himself to be the lawful descendant of John Allan, but depones to circumstances which render it extremely improbable that he is so. He admits that the records had been searched, and that evidence of John Allan's marriage had been advertized for without success; that he had ceased for some time to make any further inquiry, and that he was not prosecuting any action on the subject. When the remote nature of the fact of John Allan's marriage is considered, these circumstances amount to a very strong presumption that Dr. Buchanan has no reasonable prospect of being able to establish it, and, accordingly, he does not say that he has. All that he says, is, " if he proved his propinquity and proved " his pedigree he might challenge this deed." When to these circumstances is added the admitted fact, that the appellant stands legally vested under a formal service with the character of one of the nearest lawful

heirs of Mr. Allan of Ellsrickle, it is going too far to hold Dr. Buchanan's testimony as proving that he is entitled to that character in preference to the appellant.

But even assuming that his evidence established that he was the nearest lawful heir of Mr. Allan, it would not prove Dr. Buchanan to have such an interest in the issue as the law considers necessary to exclude him from being examined as a witness. The rule as to the interest that disqualifies from being a witness is substantially the same in Scotland as in England. Accordingly, the English authorities on the subject were recognized and founded upon by the Judges in delivering their opinions. The result of the authorities is, that in order to exclude a witness, his interest must be a certain, direct, and immediate interest in the issue of the cause; the test of which is, that the verdict or decree to be pronounced may be produced for or against him in a subsequent action to which he may be a party. The bias of the law is, for very obvious reasons, towards admitting witnesses, leaving the degree of credit to be given to them to be determined by the jury. "The old cases on "the competency of witnesses," says Lord Mansfield, "have gone upon very subtle grounds; but of late "years the Courts have endeavoured as far as possible, "consistently with those authorities, to let the objection "go to the credit rather than to the competency of a "witness. Accordingly, it is now fully established "that in order to disqualify a witness on the ground "of interest, the interest must be certain, and not "contingent, and also a direct interest in the issue of "the cause. It is not enough that a witness stands in "a similar situation with a party for whom he is called, "or that the verdict to be given may come to the ears

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" of a future jury, so as to affect their judgment in " the witness's case." In the words of Mr. Justice Buller, " In order to show a witness interested, it is " necessary to prove that he must derive a certain " benefit from the determination of the cause either " one way or other." In like manner Chief Baron Gilbert lays down the rule thus: " The law looks upon a " witness as interested where there is a certain benefit or " disadvantage to the witness attending the consequence " of the cause one way."* In the noted case of Bent v. Baker† Lord Kenyon is reported to have said, " I think " the principle is this:—if the proceeding in the cause " cannot be used for him he is a competent witness, al- " though he may entertain wishes upon the subject, for " that only goes to his credit, and not to his competency." This accordingly has in the later practice been considered the true test of a disqualifying interest. Mr. Serjeant Peak deduced the following as the rule resulting from a variety of decisions to which he refers:—" The general rule now " established is, that no objection can be made to a " witness on this ground, unless he be directly in- " terested, that is, unless he may be immediately bene- " fited or injured by the event of the suit, or unless " the verdict to be obtained by his evidence or given " against it will be evidence for or against him in " another action in which he may afterwards be a party. " Any smaller degree of interest, as the possibility that " he may be liable to an action in a certain event, or " that, standing in a similar situation with the party " by whom he is called, the decision in that case may " by possibility influence the minds of the jury in his

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* Gilb. Ev. 106. † 3 T. R. 27.

"own, or the like, though it furnishes a strong argu-
"ment against his credibility, does not destroy his
"competency."* The same principle is followed in the law of Scotland. "Interest in the cause," says Lord Stair, "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
"and not to the verity of the cause."† The law is laid down in similar terms by Lord Bankton, and has been uniformly acted upon in the later practice of the Courts.

The legal test, therefore, of Dr. Buchanan's interest is, whether any verdict to be pronounced in the cause could be produced as res judicata for or against him in any subsequent action to which he might be a party? It is clear that it could not, because the doctrine of res judicata is founded on an implied contract between the litigating parties to abide by the judgment to be pronounced as final and definitive between them, and therefore can only be pleaded for or against those who were parties to the contract.‡

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* Peake, Ev. 141.

† Stair, b. 4. tit. 43. s. 7.

‡ *Authorities.*—Walton v. Shelley, 1. T. R. p. 300; Bent v. Baker, 3. T. R. p. 27; Bankton, 2. p. 645, M'Kenzie, Murray's Rep. vol. 2. p. 219, Forbes, Murray's Rep. vol. 3. p. 44; Bank. 4. tit. 25. s. 7; Campbell v. Grange, 20th March 1543, Balfour, 564. Mor. 4717; Elder v. Ferguson, 2d Feb. 1610; Mor. 14049; Clume v. Harthill, 17th Feb. 1631, Mor. 14055; Stair, b. 4. tit. 40. s. 17; A. v. B., Mor. 14032; Glendinning v. Earl of Nithsdale, 6th and 13th Jan. 1675, Mor. 12226. 12227. 14031. and 14032; Gadgirth v. Auchinleck, 26th Jan. and 13th July 1631, Mor. 9707. 9709. 9710; Anderson v. Fleming, 9th Jan. 1695, Bro. Supp. 4. p. 297; Phillips, vol. 1. p. 53; Peak.; Britton, Mur. Rep. vol. 4. p. 46. Campbell, ibid. 176, Clark, ibid. 3. p. 452.

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Respondent.—The examination of Dr. Buchanan established—1st. That he was reputed to be the heir of law, or one of the heirs-at-law of Mr. Allan, and in that character had been regularly charged to enter heir. 2d. That he did not disavow that character, but believed himself to be a nearer heir than the appellant. 3d. That when charged to enter heir he reserved to himself to take that step, and to challenge the deeds of Mr. Allan when he should see it expedient to do so. 4th. That he had taken certain steps with a view to the establishing of his right. 5th. That he had not relinquished his purpose of challenging the deed, and at that moment considered himself the true heir. 6th. That unless his grandmother was illegitimate, which is not to be presumed, he is a nearer heir than the appellant. Now according to the rules and principles of the law of Scotland, a clear objection of interest arises sufficient to exclude the witness. The law of Scotland recognizes a variety of grounds for excluding witnesses. Relationship within certain degrees is recognized as a ground for excluding witnesses, because the law presumes that their minds will be biassed in favour of one side. Agency and partial counsel are recognized as grounds for excluding witnesses on the same presumption, and because they are indications of zeal and interest on one side. Ultroneousness, or coming forward to give evidence without the compulsitor of citation, is for the like reason recognized as a ground for excluding witnesses. Interest in the cause, so as to be affected by the issue, and that either immediately or directly, or by plain inference, such as the witness, if he be a person of ordinary understanding and forethought, cannot fail to make, is recognized as a sufficient ground to exclude the witness,

whether the interest be such as affects him patrimonially, or such as affects him in his character and reputation. This last ground of exclusion is very rigidly observed. Thus, Mr. Tait says*, "If a tenant "of a mill, having a right of thirlage, have raised "processes for abstracted multures against the different "tenants of the barony, though in point of form these "different actions are separate and independent, no "one defender seems to be a competent witness for "another, as far as their defences are connected, as he "must see the influence which his deposition must have "upon his own cause."

The proposed witness has a personal interest to promote a verdict and judgment in favour of the appellant reducing the deed of Mr. Allan. He has also a personal interest to prevent a verdict and judgment in favour of the respondent upholding the deed of Mr. Allan; and the circumstances in which he states himself to be placed, in reference to the subject matter of the cause, are such as to give, in the estimation of law, such an undue bias as to render it unsafe to admit his testimony.

LORD WYNFORD.—My Lords, I am to move your Lordships to proceed to judgment in a case that was argued before your Lordships the other day, which was an appeal, in which Mrs. Elizabeth Ralston was the appellant, and Mr. John Rowat was the respondent. This is what is called an action of reduction and improbation; it was instituted for the purpose of setting aside a deed which had been executed by a person of the name

* Treatise on Ev. p. 363. et seq.

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of John Allan in favour of the respondent. It was sought to set aside that deed upon two grounds; first, that the deed had never been executed by John Allan; and, next, that at the time of the execution by John Allan, supposing it to have been executed, John Allan was upon his death-bed and incompetent. For the purpose of proving one of those facts a person of the name of Dr. Buchanan was called. Dr. Buchanan was examined on what your Lordships here understand by the voir dire, but, as it is called in Scotland, in initialibus—that is, an examination for the purpose of sustaining an objection to his testimony. It appears that upon that examination he gave evidence as follows:—

" The late Mr. Allan "—that is, the person who made the deed of settlement, " was third cousin of witness's " mother; he is grandson of a Mrs. Facfarlane, daugh- " ter of John Allan, and he had to connect himself " with this John Allan through his grandmother." John Allan, the maker of the deed, was therefore his great grandfather:—" that John Allan was a writer in " Glasgow in 1725." The deed proves that. Your Lordships will see the difficulty that must attend this man making out any thing like a title, on which the question of his admissibility will mainly depend:—" that " a difficulty in proving his marriage occurred, and " consequently of the legitimacy of Mrs. Macfarlane. " That he, the witness, had made some exertions to " clear this up, but certainly not all that could be " made. Some records had been searched, and an ad- " vertisement put in the newspapers, for the purpose of " removing this difficulty;—it has not yet been removed. " He had not been served heir, he supposed; but he " was perfectly ignorant of the steps necessary; that

" this is the obstacle not yet removed. He had nothing " to do with this law suit, nor contributed to it; but " if he proved his propinquity and proved his pedigree " he might challenge this deed. He had not made up " his mind, and had not made any inquiry for about " a year: that he certainly did not withdraw his claim " as heir-at-law." My Lords, upon this it was insisted that Dr. Buchanan could not be examined as a witness, inasmuch as he stated that he had some reason to believe,—not stating any positive opinion,—but that he had some reason to believe that he was a nearer heir than the pursuer. He had instituted no proceedings however, and it was clear that he had not removed the difficulty as to the legitimacy of his grandfather; and if that difficulty could not be removed, he was no more the heir of this party than he was of any one of your Lordships. This evidence having been objected to, the two learned Judges who attended the trial sustained the objection, and he was not examined, in consequence of which the pursuer failed in his case. My Lords, under these circumstances, by a late statute that is made the statute law of Scotland, in which it is agreeable to the law of England, the parties tendered a bill of exceptions, to bring before the Court the question of the admissibility of the evidence of Dr. Buchanan. The question came under the consideration of the Court of Session, and the Court of Session decided that Dr. Buchanan was not a good witness. I have, however, the satisfaction to state to your Lordships that that judgment was not supported by the unanimous judgment of the Court; it was pronounced by a majority of three to two. There was a circumstance in the case which your Lordships know is provided for; the Lord Com-

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missioner of the Jury Court, Lord Commissioner Adam, gave his opinion in that state of the proceeding in which he is empowered to take a part in the decision. My Lord Commissioner Adam's opinion was against the judgment of the Court of Session. My Lords, thus stands the case on the ground of authority;—taking the authority of Lord Commissioner Adam to be of weight, it was decided only by a majority of one. Now, I have the greatest respect for the learned Judges of the Court of Session; from the judgments I have seen in this House, they are entitled to all the respect due to the Judges in any court of justice in this kingdom; but I may perhaps be permitted to say, that if I was to make a distinction between one Judge and another upon a question of evidence, I should certainly be disposed to prefer the authority of my Lord Commissioner Adam, who had had considerable practice in the courts of justice in this country before he was appointed to that office in Scotland, and was also a Scotch advocate, and intimately acquainted with the principles of Scotch law, and who has had for several years his whole mind directed to the consideration of questions of evidence, being the presiding Judge in that Court of Scotland in which these questions principally arise. I cannot help thinking, therefore, that if we look at authority only, the weight of authority is strongly opposed to this decision. My Lords, if this were a question to be decided by English law, I do not think any learned Judge in any Court of Westminster Hall could hesitate for a moment. Those of your Lordships who are familiar with the law of evidence well know that it is now a settled rule in Westminster Hall to incline against objections to the competency of

a witness, and to allow objections to prevail only against credit. It has been settled, ever since the case of Walton v. Shelley*, which was decided by Lord Mansfield a great many years ago, that no objection to competency can be sustained unless the witness has a direct interest, that is, unless the record in that cause can be either used for him or against him; and ever since the decision of Bent v. Baker undoubtedly it would not go to his competency, though it may go to his credit. I might mention to your Lordships another case which occurs in the English courts;—a man's heir-at-law may be called as a witness to prove the father's right to the estate, though the instant the breath is out of the father's body the estate descends upon the heir. The remainder-man, if there is one, cannot be called as a witness because he has a vested interest. The heir-at-law has no interest which can be made any immediate use of; he has a contingent estate depending upon his surviving his father, and something like a moral certainty that whenever his father shall die he will succeed to the estate. That certainly is a stronger case than the present, for what has this man? I do not think it very likely that he will ever have a vested interest; he has been trying for several years to establish the legitimacy of his grandfather, and cannot do it at present; it is at most but a contingent interest—I should say scarcely any. I submit, therefore, to your Lordships, that if this case was brought in and discussed in an English court of justice, no Judge would hesitate; however the objection may apply to the credit of the witness, it leaves his competency untouched. But your Lordships

* Walton v. Shelley, 1. T. R. p. 296.
† Bent v. Baker, 3. T. R. p. 27.

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are now sitting on a Scotch case. It was not argued at your Lordships bar—the question was hardly raised—whether it is that sort of contingent interest which I perceive disqualifies in Scotland. It was put upon the ground that it was impossible this witness could have any interest at all, and that was put upon the ground that the judgment in this case could not be used in a cause to which he was a party. I have stated to your Lordships that the principle of the English law is, that if the judgment cannot be used for or against him, a man is competent in this country. It appears to me, from the cases referred to, and which your Lordships will find in the printed cases, there is no great difference between the law of Scotland and the law of England with respect to interest, though there certainly is considerable difference between the law of Scotland and the law of England as to evidence in other particulars. My Lord Stair, a great authority, as your Lordships know, in the law of Scotland, lays down this as the law, very much the same as would be laid down in Westminster Hall,—"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 and not the verity of the "cause." My Lord Bankton has also stated the law nearly in similar terms. Now then, my Lords, we are to see whether this judgment could ever be used in favour of or against this person; and here it appears to me that the principle of the law of Scotland is the same as that of the law of England—that the judgment could be used only between the same parties, except in one or two cases which I will mention by

and by. It is undoubtedly clear that no judgment can be given in evidence, unless the individuals were parties in the cause, unless they take the estate under the other. It is quite clear that this witness called is not party or privy in any way to this cause, for if he comes in he proves the present pursuer is an intruder; he says, "You have no right—I do not claim under you—"I am no successor of yours, (which is the ground of decision in one or two of the cases I shall presently have occasion to mention,) "but I come because I have "a preferable title." They are as perfect strangers to each other as any persons can be. Lord Stair says, "The "first and most common exception in all processes "is exceptio rei judicatæ; that the controversy is "already decided by a competent judge, which is rele-"vant, albeit it would be a decreet of an inferior "court, which, if it have no evident nullity, is relevant "till it be reduced; neither is the nullity a reply, "but an objection arising from what appears in the "decreet, for if it be a nullity arising from the pro-"cess and minutes it cannot be insisted on till these "be called for and produced in a reduction. Res judicata "is relevant, not only being a decreet between the pur-"suer and the defender, but it is sufficient if it was "between their predecessors and authors." So that your Lordships perceive Lord Stair states, that the objection cannot be received at all, unless they were parties, or connected with these parties. My Lord Bankton says,—"This exception lies where the case that "was formerly judged between the parties and their "authors is sought to be judged again while that judg-"ment remains unreversed; for it cannot be brought "under cognizance again,—the rule being, that res

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"judicata pro veritate habetur, the judgment of a "court is held to be true and just;" and again, "it is "a rule, that inter alios acta vel judicata aliis non "nocere, conform to the rubric and whole laws in the "title of the code so inscribed." That is not only, your Lordships know, the principle of those courts, but it is expressed in precisely the same words by English lawyers; they have derived this rule from the same source from which the Scotch lawyers have derived it, namely, from the civil law; they therefore have expressed the rule in precisely the same language. My Lords, if that be so, then it appears to me it is perfectly clear that this judgment never could be made use of in any cause in which Dr. Buchanan might be a party. Dr. Buchanan being no party in the cause in which the point arose, it was, I think, admitted at the bar, that supposing the present pursuer should get into possession, and Dr. Buchanan should then set up a claim against him, and establish the legitimacy of his grandmother, the present title would hardly be permitted to stand, as he would seek to reduce the deed as against the person pursuing. But it was argued, and very ingeniously argued, by a learned counsel at the English bar, Mr. Follett, that this would have the effect of giving Dr. Buchanan possession, and he insisted that, according to the English law, that would render Dr. Buchanan liable to objection, because a tenant cannot be called now in support of the defender's case, because it supports his own possession. But your Lordships will at once see the difference. In that case the effect would be to turn the tenant out of possession. Now here a great many other steps must be taken before he can be got out of possession; he cannot be got out of possession

without having to overcome difficulties which would not occur in that case; and it cannot be said that he is directly interested in the event of the cause; he has only a contingent interest dependent on various circumstances. It is said that he is interested, because, if he proved that this deed could not be set up against him the appellant would get into possession. Suppose he did, another suit will dispossess him; and I think there would be no difficulty, by some rule of proceeding in the Scotch court, to provide that he should not be allowed to say that the reduction, obtained by the judgment in a case in which he was a witness, ought, so far as respected him, to be binding. My Lords, two cases were cited which I have not looked into, because I did not feel it necessary. It was said that, by the law of Scotland, if a man is indicted for perjury and convicted, and he shall afterwards obtain a pardon, the prosecutor might sue for the injury done to his family by the perjury, and that the judgment and conviction in the case of the perjury would be evidence in that second cause. My Lords, undoubtedly in that respect the law of Scotland differs from the law of England; for your Lordships know that an indictment of perjury has been rejected in our courts, and it has been said it could not be received, because, in the first place, the parties were not the same; that in one the King was the prosecutor, and the plaintiff in the other. My Lords, if those cases are of any authority, undoubtedly there is a different law in Scotland; but suppose that be the law of Scotland, does it bear on this case? No, it does not, unless the actual prosecutor in the indictment, and the plaintiff in the action suing for damages, is precisely the same; and that, there-

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fore, the Scotch courts consider that it is a determination exactly between the same parties, not merely the nominal party, but the real party, being the party at whose instigation the prosecution was instituted, and also the same party, who brings the action. Another case has been cited at the bar, namely, the case of an indictment for piracy, where there has been an action afterwards brought by the person who was injured against the person who was benefited by that piracy. To this, I should beg to submit, precisely the same observation applies. Another case was cited, the case of Rutherford v. Nisbett's trustees*, in which it was found that a judgment pronounced in favour of an individual, whose service as heir of provision had been called in question on the ground of illegitimacy by the immediate heir of provision entitled to succeed, failing lawful issue, was effectual against a subsequent heir of provision attempting reduction on the same ground. Now, my Lords, it is material to attend to the ground on which the Court decided that case. The Lord Ordinary says, "The general rule of law is clear, "that in order to found the exception of res judicata "(for it is an exception to be pleaded, not a ground "of incompetency in the action,) it must appear that "the former suit was between the same persons, concern-"ing the same thing, and on the same cause of action." (That is the principle I have already stated.) "But "the question here is, whether the pursuer, insisting "as heir apparent under a special destination, is not "to be considered as the successor of the former ap-"parent heir in this matter?" He is let in, therefore,

* Rutherford v. Nisbett's Trustees, 12th Nov. 1830, 9 S., D., & B. p. 3.

as we should say, as the privy of the party in the former suit. Your Lordships will observe, that the person against whom the case had been decided before proceeded precisely on the same grounds on which the then pursuer proceeded, namely, the ground of the legitimacy of the party holding the estate. The first pursuer having gone out of the way by death, the second pursuer comes, the interest of the pursuer devolving upon him. He brings this action; he is to be considered, as we should say here, privy to the interests of the first pursuer. Upon that ground the judgment pronounced in the former case was considered, on the principle of res judicata, as applying to the case then under consideration; but, as your Lordships see in the present case, Dr. Buchanan is no successor of the present pursuer; on the contrary, what he says is this,—"The present pursuer has nothing to do with this estate; "the moment this deed is set aside the estate is mine, "and not yours. I stand nearer in blood to the settler "of this estate than you do, and therefore you have "nothing to do with it." It appears to me, therefore, that this case does not bear upon the point; that it is distinguishable from it, and upon that ground I have ventured to state to your Lordships that the present pursuer is an utter stranger to Dr. Buchanan, and Dr. Buchanan must be treated as such in case he instituted any proceedings, and that consequently he is not within the principle established in the cases which have been relied on; and I think I have now adverted to all the cases which have been referred to in the course of the argument, and stated the principles on which they were decided. I think this case does not come within the exception established by those cases, but is to be governed by that principle of law which I consider to be

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equally the law of Scotland and of England,—that no judgment can be given in evidence; and this appears to be the opinion of the majority of the Judges; for though they decide that the witness is not competent, three of them appear to me very distinctly to admit the principle. I cannot help thinking, therefore, that this case is to be governed by that general principle,—that this is not to be considered as res judicata between Dr. Buchanan and the persons who are parties to this cause; and I am also of opinion (but I speak with more diffidence upon that part of the case than I do upon the other, because that was not much argued,) that Dr. Buchanan's interest is of that uncertain contingent kind that it is impossible for any court of justice to object to his competency, and that the objection operated only to his credit. I feel it, therefore, my humble duty to submit to your Lordships that this judgment ought to be reversed. I state again that I feel very great regret that I should have to call upon your Lordships to reverse a judgment of the learned Judges of the Court of Session; men possessed of knowledge much greater than the individual now addressing your Lordships can pretend to; but in the present case I am removed from that difficulty by the observation I made at the outset, that, considering the superior knowledge of Lord Commissioner Adam upon the law of evidence, it appears to me that the balance of authority in the Court below is against the decision. I move your Lordships that this judgment be reversed.

The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be, and the same is hereby reversed.

ALEXANDER DOBIE,—GEORGE WEBSTER, Solicitors.