Thursday—Friday, April 4—5.

JENKINS *v.* ROBERTSON AND OTHERS.

(In Court of Session, 2 Macp. 1162.)

Res Judicata—Road—Public Right of Way. An action having been raised by certain parties for the purpose of declaring a public right of way, which was after considerable litigation compromised, decree of absolvitor being pronounced of consent—*Held* (rev. C. of S.), in an action afterwards raised by other parties for the same purpose, that this decree was not *res judicata*. *Question* whether any individual is entitled to assume the position of representative of the public in a right of way case so as to bind the public.

Appeal—House of Lords—Competency. Objection to the competency of an appeal to the House of Lords that it was presented by only one of three pursuers in the Court below—*repelled.*

This was an appeal from a decision of the First Division of the Court of Session sustaining a plea of *res judicata* in an action of declarator raised in 1863, seeking to have it found and declared that "there exists a public right of way for foot-passengers along the right bank of the river Lossie, upon the property of North College, extending from the public road near the south or west end of the Cathedral, or East Brewery Bridge, Elgin, and running along the said river to the public road leading from Elgin to and past Deanshaugh," &c. The pursuers of the action were William Jenkins, shoemaker in Elgin; William Halket, gardener, Elgin; Alexander Youngson, Lossiemouth; and Alexander Simpson, of Llanbryd. The defenders were Alexander Robertson, of the National Bank of London; William Grigor, writer in Elgin; Charles Horsfall Bill and William Hay, both residing in Elgin.

The defenders pleaded *res judicata*, inasmuch as a similar action for precisely the same object had been raised in 1860, and settled in 1862. In the former action, the Provost, Bailies, and Town Council of Elgin, and two of the inhabitants of Elgin were pursuers, and the costs were alleged to be provided out of the funds of the burgh. The defenders were the same as in the present case. An issue was duly settled in the former action putting the question whether there had existed from time immemorial the public right of way alleged, and the trial took place before the Lord Justice-Clerk (Inglis) in July 1861. The jury found a verdict for the pursuers. Afterwards a rule was made absolute for a new trial on the ground that the verdict was contrary to evidence. The pursuers thereafter wished to settle the action, and they agreed to consent to a decree of absolvitor in favour of the defenders. That agreement was dated 26th March 1862. The order for the new trial was then formally discharged.

It was after an interval of nine months from the last-mentioned agreement that the present action was raised. The Lord Ordinary (Jerviswoode) held that the plea of *res judicata* was good, because the question raised in the present action was substantially the same as in the former action, and between substantially the same parties; for though the pursuers were different individuals, still, they both represented the public. He thought that it was immaterial that the former action was in a certain sense abandoned before it was pursued to its final issue by a second trial, for, as the case was hopeless, there was no reason why the former pursuers should go on spending money in further litigation. On reclaiming note, the First Division adhered (Lord Curriehill dissenting). On the one hand, the majority said that if the former action and decree were not held binding, such litigation as to public roads would never end, for there would be always new pursuers starting up and renewing the contest, in the hope of being more successful than the former pursuers. On the other hand, Lord Curriehill said it was a question of great importance to the public; and it was a most startling doctrine that any three individuals had authority thus to bind the public, and deprive the public, or rather enable other private individuals to deprive the public, of the highways of the kingdom which had been used from time immemorial. He said he did not see how the individual pursuers in such an action became the representatives of all the subjects of the British empire, and he saw neither principle nor authority for the doctrine. Moreover, the litigation in the former case was compromised, and was in effect only a transaction, which was an additional reason for not holding it conclusive in a question as to public rights; for how could any persons pursuing such an action, by a voluntary transaction with the other private parties whom they called as defenders, abandon the right of the public to one of its public highways?

The pursuer Jenkins appealed.

CHARLES SCOTT and J. S. WILL, for the appellant, argued—(1) That the subject of the present action had never been adjudicated upon by any competent tribunal—the decree of absolvitor founded on by the defenders being the result not of a trial of the cause, but of an arrangement to which the appellant was not a party, and by which he could not be affected; and (2) that the two actions having been raised by two different sets of pursuers, who were neither the same individually nor in any way related to each other, the plea of *res judicata* was altogether inapplicable, and ought to have been repelled.

ATTORNEY-GENERAL (Sir John Rolt) and ANDERSON, Q.C., for the respondents, objected to the competency of the appeal on the ground that it was presented by only one out of the three pursuers in the Court below. They argued that the right of the public to a roadway was one and indivisible—not a right which some of the public have and others have not; either all have it or none have it. It was *publici juris;* no individual could sue for his individual share; he must sue for the entirety. If any one was allowed to sue for the whole, it must be as representing the community, and success or failure must bind the community. The action was brought in the interest of the public by three parties, two of whom submitted to the interlocutors appealed against. The original suit was representative, and if fairly and honestly conducted, it must be taken to include the public quite as much as the individual litigant suing in his own individual right.

The LORD CHANCELLOR, after referring to the minutes of the Appeal Committee, observed that the question of the competency of the appeal by one of three pursuers had already been determined. It was held by the Appeal Committee that the absence of two of the pursuers was no reason why the appeal should not proceed.

On the merits, the respondents argued—(1) That the decree of absolvitor pronounced by the Court in favour of the respondents in the action

of 1860, amounted to *res judicata*, and barred the present action; (2) That the appellant, who was directly interested in the result of the action of 1860, and was not merely in the full knowledge of its dependence, but actually took part in the proceedings under the same, and acquiesced in the mode of settlement adopted in that action by the decree of absolvitor pronounced in the respondents' favour, was therefore excluded from attempting again to raise for judicial decision the question disposed of; (3) That the decree of absolvitor in favour of the respondents was duly pronounced in their favour after *litis contestatio* entered into between them and the appellant, or those who were entitled to represent, and did effectually represent, the rights and interests of the appellant in the action of 1860; (4) That, even assuming that the decree of absolvitor was challengeable on any grounds of law stated by the appellant, it must nevertheless be dealt with in all respects as valid and operative until formally set aside in a reduction or other competent process.

At advising,

Lord Chancellor (Chelmsford)—My Lords,—I have very few observations to make on this case in advising your Lordships to reverse the interlocutors appealed from. It appears to me that the interlocutor in the former action of declarator of the public right of way having been the result of a compromise between the parties, it cannot be considered as a *judicium;* nor can it be admitted as *res judicata*. On that point I desire to express no other opinion, nor in any other words than those I have now used.

I confess, however, that there is one part of the question on which I entertain very considerable doubt, and that is whether any individual may constitute himself the representative of the public in an action of declarator of a public right of way so as to preclude an action by any other person, and to make the plea of *res judicata* a bar to such action. But, my Lords, whatever doubt I may entertain on that point, I feel so much respect for the opinion of the majority of the learned Judges in Scotland, that I desire merely to express that doubt that I may not be supposed to agree entirely in the conclusion at which they have arrived. My Lords, under the circumstances, I think that these interlocutors should be reversed, and the case remitted to the Court below to be proceeded with.

Lord Romilly—My Lords,—I concur in the judgment which has been expressed by the Lord Chancellor in this case. Upon the first point I desire to express no confident opinion either one way or the other. I apprehend that, according to the English law, it would be certain that no party would be precluded in such a case by a prior judgment, and that all the effect that could be given to it would be that that judgment should be given in evidence upon any subsequent trial of the question. But though that be so, I cannot but remember that the English law is not familiar with that form of action (which appears to me a very desirable one) which obtains in Scotland, called an action of declarator, in which the whole of the question might be gone into. And I am by no means prepared to say that if the question had been fully gone into, and fully discussed, and the Court had come to a judicial decision on the subject, that decision would not have bound all persons subsequently who attempted to try the same question. In many parts of the argument which has been put before your Lordships by Mr Scott (certainly a most able argument) he pointed out that the pursuers could not represent the public. If that be so, the public can never be represented in any similar action, because they must always be in the same situation. Therefore, having regard to this particular form of action, I should hesitate a long time before I dissented from the Court below on the first point.

But, on the second point, I entertain a very clear opinion. *Res judicata*, by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that the one side or the other side is right, and has pronounced a decision accordingly. But when an action of declarator is brought, and a verdict is obtained by the pursuers, and that is set aside, and then an arrangement takes place by which, in consideration of the payment of a sum of money, an interlocutor is pronounced for the defenders and the Court simply registers that interlocutor, without expressing any judicial opinion on the subject, I am of opinion that it is contrary to all principle to consider that that can be treated really as *res judicata*. It is to be observed that it is admitted that it cannot be *res judicata* if it is done by collusion or by fraud. It is argued that in this case no fraud is alleged or proved; but it is very difficult in a case of this description to prove fraud, and if this were held to be a binding judgment, by reason of *res judicata*, it would follow that in every case, where in fact one person had brought an action of declarator and it had been compromised, the public would be bound, unless somebody could prove that there had been fraudulent collusion between the parties. I am of opinion that that is not the meaning of *res judicata* according to the law of any civilised country. I am also of opinion that it was not fit for the Court to go into the question whether this was a reasonable compromise or not. It was impossible that the Court could ascertain that. The Court exercised no judicial function upon the subject. It merely exercised an administrative function by recording the interlocutor which had been agreed to between the parties. For these reasons, my Lords, I concur with the Lord Chancellor in the opinion that these interlocutors ought to be reversed.

Lord Colonsay—My Lords,—Upon the first point which has been argued here—namely, whether in a case of this kind, a verdict and judgment obtained on the question whether a right of way is a public right of way is or is not to be conclusive against another party attempting to try the same question, I confess I have a very distinct opinion. My opinion is, that when in a case of this kind an action of declarator to establish a public right of way is tried upon the issue whether it is a public right of way or not, the verdict and judgment upon that point, when allowed to become final, is a conclusive settlement of that question.

My Lords,—I apprehend there is a material distinction between the law of Scotland and the law of England upon this subject. I mean as to the form of procedure. I am not aware that in the law of England there is any such a thing as an action of declarator to establish a right of public way, open to any individual in the community or in the world at large who may choose to raise it; but if there is such a right open by the law of Scotland, then it comes to be a material question whether there can be any conclusion put to such an inquiry. It is because the door is so

widely open that there must be a mode of shutting that door in due time; and I apprehend the *dicta* we have on this subject are very clear and conclusive. We have the *dictum* of a very eminent judge, Lord Fullerton, indicated in two cases. And we have the doctrine enunciated, I think, by Lord St Leonard's, in one case leading to the same result, that if the question is tried, say at the instance of the heritor, in order to have a declarator, upon the question of a public right of way, and if that action has been instituted against parties who truly have an interest to maintain the public rights, a judgment in his favour in that action would be a conclusive judgment.

Now, in this particular case, the parties who raised the action of declarator were the parties who, perhaps of all others, had most interest in having this public right of way established—I mean the inhabitants of Elgin, or those who represented the inhabitants of Elgin, and some other persons who resided in the neighbourhood. If the case had gone on to a conclusion in the ordinary course by a verdict and judgment, and if, for instance, the judgment had been in favour of the heritor in this case, instead of against the heritor, I apprehend it would have been conclusive, because the interest of the public was fairly represented. What we look to in such a case is whether the interest has been fairly represented. If it has been fairly represented, then that interest is for ever concluded by the verdict and judgment. But it is a different matter if, when an action of this kind having been instituted, something is done which interferes with the ordinary course of justice and limits the question which is tried.

My Lords,—I do not think there has been any case cited, and that there is no case to be found in the books, which is adverse to the decision that has been pronounced upon the first point in the present case. The only case that has been at all relied on is one in which a question was raised as to *lis pendens*. That was not a judgment on this point. The question there was whether a second action raised while the first was in dependence, was to be allowed to be proceeded with, or whether it was to stand over until it was seen whether the first action was proceeded with fairly. If the parties who brought the first action had sold the interest of the public, or had suddenly abandoned the case without cause, then there would have been no *res judicata*. But it was not decided that if the first case were fairly tried out the second case would be allowed to proceed further. It was no judgment upon that point. I think that all our authorities and the *dicta* of Judges go to this, that where a case is tried in reference to an interest, and that interest has been fairly represented, others who stand in the same interest are not entitled to renew it. Now, what is the interest here? The interest is the interest of the public in this right of way. That is the question. And what is the conclusion sought by the action? To have it declared that there is this public right of way. The question at issue is—A public right of way, or no? What right had the pursuers in this action to try the question? They represented the interest of the public. Therefore, I am clearly of opinion that the judgment was right upon the first point.

But then comes the second point. That was considered in the Court below as a question of great difficulty. Every one of the Judges expressed his opinion upon that question with hesitation. We have now heard the case argued again. I myself, in the Court below, expressed my opinion upon that point. I by no means entertained a confident opinion upon it, though I was not disposed to alter the judgment of the Lord Ordinary. But there is an element in the case which I am bound to say I think may be founded upon to sustain the judgment which has been proposed by your Lordships. I mean, that there was something given for the settlement of the case—it was, to a certain extent, purchased. Now, that is a point which, I think, may be founded upon as disturbing the ordinary course of procedure. Had another course been followed by the defenders in the action, they might have followed out their notice of trial by a special jury; and if they had obtained a verdict, or the other party had failed to maintain his action, the case might have stood in a different position. But when the defenders in the action, the heritors, give something to the other party for obtaining the judgment, that introduces an element as to which I cannot say that it does not entirely sustain your Lordships' decision.

ATTORNEY-GENERAL — Will your Lordships pardon me for making a suggestion as to the form of your Lordships' order? Your Lordships would reverse the second finding of the interlocutor which has sustained the second plea in law, that is, the plea of *res judicata*. Then there comes this question, which might be prejudiced by that form of order unless your Lordships add some words. I take the words of Lord Curriehill's judgment at page 14 of the printed case, and I would suggest that it would be right to add that it is without prejudice to the question whether the respondents are entitled to prove (I do not ask for liberty to prove, but that that question should be left open to us to prove) that the pursuers in the present action are identified in the manner he refers to with the pursuers in the former action.

LORD CHANCELLOR—My Lords,—I do not think your Lordships can be called upon to take the course suggested by the Attorney-General. The question is whether these interlocutors ought to be reversed or not. I apprehend that your Lordships are of opinion that they ought to be reversed, and that the case must be remitted to the Court of Session to be proceeded with.

Lord COLONSAY—If the case is remitted to the Court of Session to be proceeded with, it will start from the point at which it was when the Lord Ordinary pronounced his interlocutor which has been brought under review, and which was affirmed by the Inner House. The other inquiry is left open.

Mr SCOTT—I have to ask your Lordships for the costs.

LORD CHANCELLOR—Costs are never given when there is a reversal.

Interlocutors reversed, and cause remitted to the Court of Session to be proceeded with.

Agents for Appellants—D. Crawford and J. Y. Guthrie, S.S.C., and Holmes, Anton, Greig, & White, Westminster.

Agents for Respondents—Gibson-Craig, Dalziel, & Brodies, W.S., and Martin & Leslie, Westminster.