But the present case is without special circumstances. It is nothing but a provision made without any onerous consideration, and without any circumstances that could constitute a special occasion for its being made.

It is said, that the wife renounces her legal rights. I do not think in this case, that comes to be a matter of great importance. The question here is not in regard to the wife's rights after the dissolution of the marriage. We have nothing to do with these. It does not appear, that there was any such importance attachable to the renunciation by her of her legal rights as to raise this deed into the condition of an onerous one. The rights of the children were not renounced—they are reserved, and exist even on the dissolution of the marriage. I concur, therefore, with your Lordships in thinking, that the appellant has not succeeded in making out a case.

LORD CHANCELLOR.—The appellant in this case is a pauper, and therefore we say nothing whatever about costs.

Interlocutors appealed from affirmed, and appeal dismissed.

For the Appellant, J. and A. Peddie, W.S.; John Greig, Westminster.—*For the Respondent* J. Walls, S.S.C.; Bannister and Robinson, London.

APRIL 5, 1867.

WILLIAM JENKINS, *Appellant*, *v.* ALEXANDER ROBERTSON and Others, *Respondents*.

Highway—*Res Judicata*—Declarator of Public Road—Compromise—Second Action—*Certain pursuers, chiefly magistrates of a burgh, raised an action of declarator of a public right of way, and obtained a verdict in their favour, but on a rule being made absolute for a new trial the parties agreed to certain terms of compromise, and the defenders were assoilzied* pro formâ, *and the authority of the Court was interponed to the agreement. Afterwards J. and three other individuals, not parties to the former action, raised a similar action of declarator against the same defenders, who pleaded* res judicata.

HELD (reversing judgment), *That the former decree was not* res judicata.

SEMBLE, *a decree in an action of declarator of a public right of way obtained without fraud or collusion, and if decided on the merits, is* res judicata, *and may be pleaded in bar of a second action as to the same public way, raised by other parties.*[1]

The pursuer, William Jenkins, brought an appeal against the interlocutors of the Lord Ordinary, dated 9th December 1863, and of the First Division, dated 9th June 1864, whereby the Court sustained the second plea in law for the defenders, viz. that the decree obtained by the defender in the former action was *res judicata*.

The action was raised in the name of three other pursuers besides the appellant, and the leading conclusion of the action was to have it declared, that a certain public right of way existed (describing it).

A previous action of declarator relative to the same public right of way was raised in 1860 at the instance of the provost and bailies of Elgin, the conclusion of the summons being the same. Issues were adjusted, and, after a five days' trial, a verdict was returned for the pursuers. A rule absolute for a new trial was obtained. The parties then began to negotiate, and ultimately the pursuers agreed to abandon part of their claim, and the decree of the Court was interponed to a minute of agreement dated February 1862, assoilzieing the defenders and discharging the rule for a new trial.

In March 1863, the present action was commenced, when the Lord Ordinary and First Division held, that the former judgment was *res judicata*.

The appellant, in his *printed case*, gave the following reasons for reversing the interlocutors:—1. Because the subject of the present action had never been adjudicated upon by any competent tribunal, the decree of absolvitor founded on by each of 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 cannot be affected. 2. Because 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.

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[1] See previous report 2 Macph. 1162; 36 Sc. Jur. 582. S. C. L. R. 1 Sc. Ap. 117; 5 Macph. H. L. 27; 39 Sc. Jur. 384.

The respondents in their *printed case* gave the following reasons for affirming the interlocutors: – 1. Because the said decrees of absolvitor pronounced by the Court in favour of the respondents in the action of 1860 amount to *res judicata*, and bar the present action. 2. Because 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, acquiesced in the mode of settlement adopted in that action by the decree of absolvitor pronounced in the respondents' favour, and is therefore excluded from attempting again to raise for judicial decision the questions disposed of by these decrees. 3. Because the decrees of absolvitor in favour of the respondents were duly pronounced in their favour after *litiscontestation* entered into between them and the appellant, or those who were entitled to represent, and did effectually represent the rights and interests of the appellants in the action of 1860. 4. Because, even assuming, that the decrees of absolvitor are challengeable on any grounds of law stated by the appellant, these decrees must be dealt with in all respects as valid and operative until formally set aside in a reduction or other competent process.

C. Scott and *J. S. Will* for the appellant.—The Judges of the Court below were wrong in holding the former decree to be *res judicata*. There was no judgment in the previous case at all in the shape of a judicial discretion exercised and applied to the subject; all that the Court did was ministerially to interpone its authority to a private arrangement. That kind of conclusion of a suit is not a judgment, and is not admissible evidence against third parties in reference to the same subject matter. But even if there had been a regular judgment of the Court, how can a judgment so obtained in a suit between the owners of the land and an individual professing to act for the public be binding on the rest of the public? To hold such a judgment conclusive would be to admit of the public rights being defeated by collusion, or at the discretion of whoever first raises an action. All the authorities discountenance such a result—*Tulloch* v. *Baird*, 21 D. 807; *Duke of Athole* v. *Torry*, 1 Macq. Ap. 65; *ante*, p. 96; *Reed* v. *Jackson*, 1 East, 355; *Petrie* v. *Nuttall*, 11 Exch. 569; Story's Eq. Jur. 858; *Duchess of Kingston's case*, 2 Smith, L. C. 642; Broom's Leg. Max. 323; Ersk. iv. 3, 3; Stair, iv. 40, 16.

The *Attorney General* (Rolt), and *Anderson* Q.C., for the respondents.—The Court below was right. The plea of *res judicata* is clearly as applicable to a decree in a declarator of a public right of way as in ordinary litigations between A and B. The subject matter of the suit was the same, the *media concludendi* the same, and though the parties were not the same individuals, yet they represented the same interests. There would be no end to successive actions as to a public road, if the judgment in one action were not conclusive of the matter—*Gordon* v. *Ogilvy*, M. 14070; *Rutherford* v. *Nisbet*, 11 S. 123; *Maule* v. *Maule*, 9 S. 876; 6 W. S. 586; *Earl of Leven* v. *Cartwright*, 23 D. 1038; *Greig* v. *Mags. of Kirkcaldy*, 13 D. 975; *Gray* v. *Machardy*, 24 D. 1043; *Young* v. *Cuthbertson*, 1 Macq. Ap. 455; *ante*, p. 309; *Spencer* v. *Lond. and Birming. Ry. Co.*, 8 Sim. 193; *Hopetoun* v. *Ramsay*, 5 Bell, Ap. Ca. 69.

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, 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. Under the circumstances I think 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 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 to be admitted that it cannot be *res judicata* if it is done by collusion or 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 civilized 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 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.

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 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—(*Greig* v. *Mags. of Kirkcaldy*, and *Maule* v. *Maule*, 5th July 1831). And we have the doctrine enunciated, I think, by LORD ST. LEONARDS 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. 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.

I do not think there has been any case cited, and that there is any 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 a 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 cases 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' 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, gave 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.

The *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 the question which migh tbe prejudiced by that form of order, unless your Lordships add some words. I take the words of LORD CURRIEHILL'S judgment, 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.

Appellant's Agents, D. Crawford, S.S.C.; Holmes and Co., Westminster.—*Respondents' Agents*, Gibson Craig, Dalziel; and Brodies, W.S.; Martin and Leslie, Westminster.

APRIL 11, 1867.

The Rev. GEORGE HAY FORBES, Burntisland, *Appellant*, *v.* The Right Rev. ROBERT EDEN, D.D., Primus of the Episcopal Church, and Others, *Respondents.*

Church — Jurisdiction—Voluntary Association—Episcopal Church—Altering Canons — *There is no direct power in courts of law to decide whether A or B holds a particular status according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the Court must make itself master of the questions arising out of the rules of the society, which are necessary to enable it to decide whether A or B is the party entitled. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or, indeed, to inquire into them at all, except so*