

FIRST APPEAL.

GILLESPIE, ET AL., APPELLANTS.
 RUSSEL, ET AL., RESPONDENTS.

1859.
 July 15th, 17th,
 18th, and 22nd.

SECOND APPEAL.

RUSSEL, ET AL., APPELLANTS.
 GILLESPIE, ET AL., RESPONDENTS.

Res judicata.—For want of facts relevant and sufficient to support the conclusions of the libel the Court of Session had assoilzied the Defenders from the first action “*as laid*,” but without pronouncing any final determination on the merits of the cause. Held, by the House (affirming the Interlocutors appealed from) that this decision was no bar to a second action for redress in the same matter, but proceeding upon new allegations.

OF this case there are three reports, given at its different stages, in the Second Series of the Court of Session Cases (a). The House confined its judgment to the question of *res judicata*.

The two Appeals were both heard and disposed of together.

The action out of which the first Appeal arose commenced with a summons dated 17th March 1854, by Mrs. Honeyman Gillespie, of Turbanehill, in the county of Linlithgow, with the concurrence of her husband, against the Messrs. Russel, who are coal masters near Falkirk, in the same county. The condescendence averred that Mrs. Gillespie had been in-

(a) Vol. xvii. p. 1, vol. xviii. p. 677, and vol. xix. p. 897.

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duced by fraudulent misrepresentations on the part of Messrs. Russel to let to them a coal field of much greater value than she had supposed; and the object of the action was to have the instrument of lease set aside.

The *Lord Ordinary* pronounced the following Interlocutor:—

10th July 1855.—The Lord Ordinary finds that the Pursuers have not averred facts relevant and sufficient to support the conclusions of the libel, and assoilzies the Defenders from the conclusions of the action, and decerns.

On a Reclaiming Note the Lords of the First Division pronounced the following Interlocutor:—

28th February 1856.—Refuse the desire of the note, and adhere to the Interlocutor of the Lord Ordinary reclaimed against; with this variation, that instead of assoilzieing “the Defenders from “the conclusions of the action,” the Lords assoilzie the Defenders from the action *as laid*, and decern.

Against these Interlocutors Mrs. Gillespie appealed to the House.

The second Appeal arose out of an action which commenced with a summons dated 29th April 1856, by Mrs. Honeyman Gillespie, with the concurrence of her husband, against the same Defenders, and with the same object. In this action she made new and more pointed allegations than in the former.

The Messrs. Russel put in a plea of *res judicata*.

The *Lord Ordinary*, by his Interlocutor of 26th February 1857, repelled the plea of *res judicata*, and found that Mrs. Gillespie had alleged facts relevant to go to trial.

The Messrs. Russel reclaimed, and the Lords of the First Division, by Interlocutor of the 26th June 1857, adhered to the *Lord Ordinary's* Interlocutor, so far as it repelled the plea of *res judicata*.

Against these last two Interlocutors, pronounced in the second action, the Messrs. Russel appealed.

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The *Attorney-General* (a), Mr. *Roundell Palmer*, and Mr. *Young*, for the Messrs. *Russel*, maintained that here was *res judicata*. They cited *Vinnius* (b). The judgment in the first action was conclusive, except in the sole case of *Res noviter veniens ad notitiam*, which was not alleged by Mrs. *Gillespie*. The *Judicature Act* (c) bound the Court below to pronounce a judgment on the merits. To allow this second action would be to subvert the great principle that no man shall be twice vexed in respect to the same subject-matter. Moreover the plea of "competent and omitted," excludes the second action.

[Lord *BROUGHAM*: That plea is not good against a Pursuer, so as to bar an action on a different *medium concludendi*.]

We say the *media concludendi* are the same in both actions. *Campbell v. Campbell* (d).

Mr. *Rolt* and Mr. *Anderson* for Mrs. *Gillespie* cited Lord *Stair* (e); *Strathmore v. Strathmore's Trustees* (f); *Macdonald v. Macdonald* (g). They did not desire a correction of the decision in the first case, so they got an affirmance in the second.

The LORD CHANCELLOR (h):

*Lord Chancellor's
opinion.*

My Lords, in these cases I understood both sides to say that they would be satisfied if the House gave judgment on the sufficiency of the plea of *res judicata* pleaded in the second action of reduction.

I am of opinion that this plea is insufficient. We must consider what is the matter that has been

(a) Sir Richard Bethell.

(b) De Re judicata, Comm. 4. 13. 5.

(c) 6 Geo. 4. c. 120.

(d) 16 Shaw & Dunlop, 632. (e) B. 4. t. 40. s. 16.

(f) 24th May 1833; 11 Shaw & Dunlop, 644.

(g) 26th May 1840; 2 Sec. Ser. 889.

(h) Lord Campbell.

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adjudged in the first action of reduction. If the absolvitor had been a general absolvitor on the merits of the cause, there would have been strong ground for contending that the judgment in the first action was a bar to the second, for the parties are the same, and the petitory conclusions are substantially the same. To see what was adjudged we must look to the record, and this shows that in the first action there was no final determination of the merits of the cause.

The Defenders' second and third pleas in law (a) are in the following words:—

“2. The statements in the condescence are irrelevant and insufficient to support the conclusions of the action; and generally the action is irrelevantly and insufficiently laid.

“3. In particular the condescence contains no relevant allegation of facts to show fraud on the part of the Defenders, and to support the reductive conclusions upon that ground.”

These were the two pleas, and the *Lord Ordinary* expressly confines his judgment to them. He finds that,—

The Pursuers have not averred facts relevant and sufficient to support the conclusions of the libel.

He therefore sustains the second and third pleas for the Defenders, and assoilzies them from the conclusions of the action. He assoilzies them only on the ground which he has stated, namely, that for want of proper allegations and averments “the action was irrelevantly and insufficiently laid.” This Interlocutor, as framed by the *Lord Ordinary*, when properly examined, shows that there was no final determination on the merits of the cause.

But being brought by appeal before the First Division of the Court of Session, it was varied in a manner which seems to me to remove all doubt upon

(a) This refers to the first action.

the subject. Instead of assoilzieing the Defenders from the conclusions of the action, these are the words used by the First Division of the Court of Session :—“The Lords assoilzie the Defenders from the action *as laid*,” the second plea being that the action was irrelevantly and insufficiently laid.

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There is, indeed, no express declaration on the face of the Interlocutor that this judgment was without prejudice to another action being brought which might contain proper averments and allegations; but such seems to have been the necessary intention of the Court.

The Counsel for Russel and Son contended that by the Judicature Act the Court was bound to decide finally upon the merits of the cause. If the judgment of the Court has abstained from finally deciding on the merits of the cause, the judgment cannot be deemed a bar to another action. The authority of Vinnius therefore, and the cases cited about “competent and omitted,” have no application.

In the second action of reduction I think that the action is *properly laid*, for the summons and condescendence contain apt averments and allegations, and disclose facts which, if true, prove that the Defenders not only failed to communicate important information which was exclusively in their possession, but resorted to artifice, simulation, and fraud to deceive the Pursuers, and to prevent them from coming to the knowledge of the existence of the vein of valuable gas coal. The consequence is that issues are properly directed; a jury will say whether the Pursuers' averments and allegations of fraud are true, and complete justice will be done between the parties. But to hold that the judgment in the first action, which decided matter of form only, is a bar to the second action which is properly laid, would in my

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opinion be a denial of justice. The result is, that according to the arrangement made, the first Appeal being withdrawn, the second Appeal will be dismissed.

*Lord Brougham's
opinion.*

LORD BROUGHAM :

My Lords, I entirely agree with my noble and learned friend. I have no doubt whatever that the Interlocutor in the first action was only an absolvitor of the Defenders from the conclusions of the libel *as laid*; and this I should be disposed to think, even if the Court of the First Division had not amended the Interlocutor of the *Lord Ordinary* by adding the "as laid;" but they having added those words, I agree with my noble and learned friend that the object of the Court was to make it clear that the Pursuers had still the power of bringing a fresh action. So that there can be no doubt whatever that this is not *res judicata*.

*Lord Cranworth's
opinion.*

LORD CRANWORTH :

My Lords, looking at the language of the Interlocutor, all that is in terms decided is as my noble and learned friend has pointed out. The second and third pleas of the Defenders are "the statements in the condescence are irrelevant and insufficient to support the conclusions of the action, and generally the action is irrelevantly and insufficiently laid; and in particular the condescence contains no relevant allegation of facts to show fraud on the part of the Defenders, and to support the reductive conclusions upon that ground," that is, upon the ground of fraud. There is no doubt that in terms all that the Interlocutor decides is in favour of these two pleas. I cannot conceal from your Lordships that I have entertained, and, but for the unanimous opinion of the rest of your Lordships who have heard the case, I confess that I should still

entertain some doubt whether or not, as the Interlocutor is now framed, the true meaning of it is not that upon the ground of fraud the Court adjudged in favour of the Defenders. But, however, that does not appear to be the view taken by three out of the four Judges in the Court below, and I find that all your Lordships, except myself, take the same view as the great majority of the Judges of the Court below took ; therefore, all I can say is that I agree in the views of my noble and learned friends who have already addressed your Lordships, though not certainly with entire satisfaction as to the correctness of the conclusion at which I have arrived.

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My Lords, I think that the question has been properly reduced to a consideration of the Interlocutor of the Court of Session in the second action of reduction. If the Court of Session were right in holding that the subject of that action was not *res judicata*, then it will be unnecessary, as regards the Interlocutor in the first action of reduction, to consider anything but its nature and effect without at all discussing its propriety. The *Lord Ordinary* in the first action decided upon the second and third pleas in law of the Defenders, and assoilzied them from the conclusions of the action. Those conclusions were that the missive of agreement, in so far as it included the mineral substance in question, should be reduced and declared to be null and void. The Court of Session adhered to the Interlocutor of the *Lord Ordinary*, but with this variation, that instead of assoilzieing the Defenders from the conclusions of the action, they assoilzied the Defenders from the action as laid. Now, although assoilzieing the Defenders from the conclusions of the action was in effect assoilzieing them from the action

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as laid, as my noble and learned friend (a) has observed, yet the Court of Session appear to have thought that the variation which they introduced into the Interlocutor would more accurately describe a judgment given upon the second and third pleas which went to the sufficiency of the statement of the cause of action.

The second summons and condescendence state a case which, if proved, will entitle the Pursuers to a reduction of the missive of agreement. To this the Defenders plead *res judicata* in respect of the judgment in the previous action of reduction. The *Lord Ordinary* repelled the plea of *res judicata*, and the Court of Session adhered so far to his Interlocutor. The Appeal complains of these Interlocutors on the ground that the subject of the second action was *res judicata*. This, of course, sends us to the judgment in the first action. We have nothing to do upon this Appeal with the question whether the Court of Session was right or wrong in deciding that the summons and condescendence in the first action was irrelevant, nor is it necessary to consider whether they did not contain allegations which might be equivalent to those in the second action, and which might have admitted the Pursuers to proof of a case to the same extent as upon the second action. The only point necessary to be decided is whether the judgment in the first action enabled the Defenders to plead it as *res judicata* to the second action. It is unnecessary for this purpose to look further than the record, which upon the face of it expressly confines the judgment to a determination upon the sufficiency of the action as laid. It might, perhaps, have been competent for the Court of Session to deal differently with the first action, but your Lord-

(a) Lord Brougham.

ships are not called upon to say what they might have done, but what was *de facto* the judgment of the Court in that action; and as there can be no doubt that all which they intended to decide, and which, in fact, they did decide, was that the action was irrelevantly and insufficiently laid, they cannot be said to have decided anything as to the merits of a case sufficiently laid as it is in the second action; and therefore the Interlocutor, deciding that the plea of *res judicata* ought to be repelled was right, and must be affirmed.

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JUDGMENT ON BOTH APPEALS.

Ordered, That the original Appeal, by the consent of parties, be and the same is hereby withdrawn.

Ordered and Adjudged, That the Appeal (in the second cause) be dismissed, and that the Interlocutors therein complained of be and the same are hereby affirmed.

CONNELL & HOPE—DEANS & ROGERS.