The LORD PRESIDENT—I am of opinion that this plea falls to be repelled as to all the defenders. Looking to the nature of the action, and the fact on which it is laid, the defenders being charged with a joint wrong, and concluded against jointly as well as severally, the action was well commenced, not by the libelling or signeting, but by the summons being put into the hands of a messenger for service on all the defenders. If well begun against one, it was well begun against all.

Lord CURRIEHILL—Had this summons not been served on some of the defenders within the six months, I would have had great difficulty in holding that the action had been commenced in proper time, in terms of the Act of Parliament, for in that case there would merely have been a writ issued under the signet warranting proceedings to be commenced. But within the six months, the pursuer of the action executed the summons against several of the parties libelled against. The action had therefore been commenced by him. It was, moreover, commenced for the purpose of enforcing an alleged obligation, in which the defenders cited and the others are sued as joint obligants; and the process of summoning these joint obligants, although not completed, was commenced within the prescribed period.

In construing the Act in this way, I think we are following the analogy afforded by the construction put on other Acts relative to the limitation of actions, as, for example, the Act 12 Geo. 3, c. 72, as to bills of exchange and promissory notes, under which it is held that an action or diligence, within the six years, against one or more of several obligants, satisfies the condition of the statute as to all of them.

Lord DEAS—I concur. The question is whether this action was commenced against these six defenders within six months in the sense of the Act. The action is raised against all the defenders conjunctly and severally, and it is quite plain from the Lord Ordinary's note that, assuming the action to be dismissed *quoad* the six, the others mean to maintain that the action is gone altogether. I don't give any opinion whether the signeting of a summons is the commencing of an action or not. It is a very important step, and diligence may follow upon it without service. But we have here, coupled with the signeting, service on several of the defenders. Suppose one of several defenders keeps out of the way till too late, or suppose he could not be found for a day or two, I think it would be a strong thing to say that the action had not commenced.

Lord ARDMILLAN—I must confess I have had greater difficulty in this case than your Lordships, and my difficulty is not altogether removed. I am pretty clear that, apart from any special statutory provision, the signeting of a summons is not itself enough to create a depending action, and I think that a summons, though signeted, could not be transferred against the heir of a defender unless it had been executed against him.

The next point, as to which I think there is not much difficulty, is that, in the general case, an action against several defenders is separable in its nature; but it must be executed against each defender, and it is not, unless in exceptional cases, a "begun action," as it is called by Erskine, against any defender until it is executed against that defender. Here there is a protection given by the statute against individual liability, for there is no proper liability as trustees in such a matter; and my difficulty has been whether, if it be correct that the action is separable, and that it is not a depending action before execution, it can be held to be a commenced action against all the defenders when executed only against some of the defenders. No doubt it is important that the liability here is for a joint wrong, and that the defenders are conjunctly and severally concluded against, and there are some analogies in our law which support the view that an action may perhaps be considered as commenced against all if it be well commenced against one. That this ground of decision is altogether satisfactory to my mind, I cannot quite say. It has some force, and as your Lordships think it sufficient, I have not formed an opinion clear enough to induce me to dissent. All that I say is, that I feel a difficulty in agreeing with your Lordships.

The Court therefore recalled the Lord Ordinary's interlocutor, and repelled the defenders' first plea in law as against all the defenders, with expenses.

Agent for Pursuer—J. Y. Pullar, S.S.C.

Agents for Defenders—Hill, Reid, & Drummond, W.S.

LYELL *v.* GARDYNE (*ante*, vol. ii., p. 251).

Road—Right of Way. New trial granted in a right of way case, in which the jury had found for the pursuer.

This is a right of way case at the instance of Mr Lyell of Gardyne against Mr Gardyne of Middleton. The properties of these gentlemen are in Forfarshire, and they adjoin each other. The right of way in question is along a road forming the approach to the mansion-house of Middleton. The jury having found a verdict for the pursuer,

MACKAY, for the defender, moved for a rule, which was granted.

WATSON, for the pursuer, showed cause.

SOLICITOR-GENERAL was heard in reply.

At advising,

The LORD PRESIDENT—In this case there were three issues laid before the jury. The first claimed a right of public road for all purposes in a particular line through the defender's lands, entering at the west side thereof, proceeding past his mansion house, and issuing from his lands at the north; the second claimed the same road as a road for foot passengers only; and the third claimed another road for foot passengers only through the defender's lands. As regards the third issue, the jury found for the defender, and the pursuer has not complained of their verdict. Upon the other two issues the jury were substantially for the pursuer, but having found for him on the first, it become unnecessary to return any verdict on the second issue, as the first included it. A rule was granted to show cause why a new trial should not be had, and we have had the case very fully argued. I have come to the conclusion that there ought to be a new trial, and I will state the grounds of my opinion very shortly, because I think it is very inconvenient and often prejudicial, when there is to be a new trial, to go into the details of the evidence. There are, however, peculiarities in this case which I cannot avoid noticing. Although the issue puts the question whether this road has existed for forty years or for time immemorial, it turns out to be the case, and it is not disputed by the pursuer, that since the year 1841 it has not been used as a public road—that is, that for twenty-five years this pursuer and the rest of the public have not used it. Then it is necessary to observe the precise position of the pursuer. He sues as one of the public not as an adjoining proprietor; and

he claims the road as a public road, and not as a road which he holds or claims a right to in virtue of a servitude belonging to his estate of Gardyne. It would probably have been sufficient for him that he and his tenants had a servitude right to use the road, but that is not the nature of his claim. In the next place, it must be kept in view that this road was in its origin apparently a road of access to the mansion-house of Middleton, and made as such. Now, in dealing with a case attended by these peculiarities, it is very necessary to make sure that the jury distinctly understood that evidence that might be sufficient to establish a use of road for time immemorial by tenants of an adjoining estate will not be sufficient to make it a public road. I think that is a consideration of great importance where the action is sued by one person only, and where the great bulk of the evidence is of use by that person himself and his tenants. Such evidence might prove a right of servitude, but not a right of public way. And this view of the case becomes far more important when one attends to another fact in the history of this road—namely, that in 1792 there was some kind of arrangement betwixt the then representative of the estate of Middleton on the one hand, and of the estate of Gardyne on the other, the sole record of which we have in a letter dated 14th April 1792, addressed to Mr Gardyne, the defender's father, by Mr Lyell, the grandfather of the then pupil proprietor of Gardyne and his mother, who sets herself out in it as "tutor and factor" for her son. This letter certainly discloses some kind of antecedent dispute betwixt the parties. What it was we have no evidence, but it was about roads; and this letter was evidently intended to terminate that dispute in this way — that, as regards certain roads, the proprietor of Middleton will, if asked, grant permission to the proprietor of Gardyne and his tenants to use them, while on the other hand the proprietors of Gardyne own that neither they nor their tenants have any title or right to do so without such permission. It is made matter of controversy whether this letter applied to the road in question. I confess I have no doubt about that. It refers to "any roads within the park dykes of Middleton." I think the letter establishes this—that in 1792 there was an arrangement betwixt the representatives of these two estates that the proprietor of Gardyne was to be allowed, by permission, to use the road, and that those who were then attending to the interests of the young laird of Gardyne were satisfied that neither he nor his tenants had any right to use the road. Now, it would be strange if the state of possession immediately after 1792 was not in conformity with the arrangements then made; and I think that all the possession which followed is quite consistent with, and is quite accounted for by, the terms of this letter. Now this makes a very serious break in the case of the pursuer, for while he is shut up to the year 1841 at the one end of the prescriptive period, he is embarrassed at the other by this letter in 1792. Any evidence by persons other than those living at Gardyne is very limited. No doubt there is some, but I rather think the bulk of the evidence is that of the people of Gardyne. I have to observe farther in connection with these peculiarities of the case, that this is not the first time the parties have been in Court litigating about this road. There was an action in the Sheriff Court in 1841, when there was a much better case for the pursuer than now. He had not then as now to go back for twenty-five years before the date of the action. But although that action was raised, it does not seem to have turned out very favourably for the pursuer. And it is remarkable that one of the defences turned on the letter of 1792. The defender stated "that the late Mrs Lyell of Gardyne, the petitioner's mother, who was curator and factor for her son, Thomas Lyell, applied to David Gardyne of Middleton for permission to pass occasionally by the West Avenue of Middleton, when they happened to be going to Arbroath, and Mr Gardyne granted the favour during pleasure, on which occasion the following letter was granted." This was the letter of 14th April 1792; and the answer to that statement is rather a strange one, keeping in view that the gentleman who made it was the child on whose behalf the letter had been granted. It is this:—"Denied that the late Mrs Lyell of Gardyne applied to the late David Gardyne of Middleton for permission to pass occasionally by the west avenue of Middleton, or that she granted the letter in question, or that said letter applies to the road in question. That road is not within the 'park dykes of Middleton.' There are other roads within these dykes and within these parks which may form part of the avenues or policies to which the letter may apply, and to which the petitioner lays no claim. The letter, moreover, is not a probative writing. It is neither holograph, nor is it signed and tested in terms of the statute. It has never been recorded, and the petitioner never saw or heard of it till this discussion arose. It moreover bears to be granted by parties who had no title to grant it—viz., Thomas Lyell, the petitioner's grandfather, who had denuded himself of the property by contract of marriage, dated 27th October 1766, entered into betwixt his son, the late Alexander Lyell (the petitioner's father), and Mrs Margaret Renny, in favour of his son, the said Alexander Lyell, on which the latter was infeft, conform to instrument of sasine, dated 27th August, and registered in the particular register of sasines, &c., for Forfarshire, the 17th September 1767, and the petitioner's mother, who could not give away any right which belonged to the lands of Gardyne." It would rather seem from this that the right was then supposed to be a servitude, for it was not beyond the power of the petitioner's mother to admit there was no public road. Anybody may grant that admission; but, if this letter was giving away a right which belonged to the estate of Gardyne, then the claim in this issue is altogether a mistake, and it should have been a claim for servitude and not for right of way as a public road. Upon the whole matter, and without saying more, for I am unwilling to enter on the evidence, I think this is just one of those cases which is not in a satisfactory state upon the present verdict of the jury. What its ultimate fate may be, I do not anticipate. A different case may be laid before the jury by the pursuer, or by the defender, or by both, and I do not anticipate what the ultimate result may be; but I am quite satisfied, looking to the nature of this case, as affecting a heritable estate, and the condition in which the evidence is, that the evidence is not a foundation for the verdict, and that it ought to be submitted to another jury. I would therefore be for making the rule absolute for a new trial, reserving the question of expenses.

Lord CURRIEHILL—I concur.

Lord DEAS—I am entirely of the opinion expressed by your Lordship that it is not expedient to go into detail in reference to a case where there

is to be a new trial. There are two things however in this case, the fact that this road, whether it was originally made as a road to that mansion-house or not, is now the road to the mansion-house, which always involves considerations of law, as well as of evidence—and the fact of the peculiar position of this pursuer, the right which he formerly claimed to the road, and the alleged permission given to him and those connected with his estate to use this road for a long period of years, which might naturally lead a jury to think that that was evidence of a public road. These considerations, as well as others, make it somewhat a peculiar case, and not one of those ordinary cases, in which the opinion of a jury can be just at once accepted.

Lord ARDMILLAN—I have nothing to add. I entirely concur with your Lordship's view of the case.

The rule for a new trial was therefore made absolute. Expenses reserved.

Agent for Pursuer—Jas. Webster, S.S.C.
Agent for Defender—Alex. Howe, W.S.

Friday, March 15.

FIRST DIVISION.

CAMPBELL *v.* M'KINNON AND OTHERS.

Lease—Constitution. Terms of documents, being the writings of the proprietor, which *held* to constitute a valid lease for 99 years.

Lease—Pertinents—1449, *c.* 18—*Singular Successors Held* that a tack for 99 years was binding on a singular successor of the lessor, not only as to the principal subjects, but also as to a right of pasturage, which was a pertinent thereof.

Charter — Subjects comprehended. Held that a vassal had no title to a right of pasturage which was not specified in his charter, although he had previously possessed the right as tenant, and had continued that possession for many years after getting the charter. *Question*—whether a person with a right as tenant to a lease and a right as vassal of the same subjects can ascribe his possession to either, and *Opinion* that he cannot.

This is an action at the instance of Mr Campbell of Aros, who is proprietor of the estate on which the village of Tobermory is built. It is brought against the parties who are in possession of all or the greater part of the land on which the village is built, and who are possessed of a privilege of pasturing cattle on the neighbouring hill ground called the "Muir Lawn;" and the summons concludes to have it declared that the pursuer has the sole and exclusive right of property in the subjects described therein "and that free of any servitude or other right in favour of the defenders, or either of them, to graze their cows, horses, or other bestial, on the foresaid lands of Aros and the several other lands and others before described, or any part thereof, and that the pursuer and his tenants and servants in the said lands are entitled to prevent and exclude the defenders from grazing or pasturing their cows, horses, or other bestial on the said lands or any part thereof." There are also conclusions for decree of removing from the subjects against the defenders; but in the course of the discussion in the Inner House a minute was lodged for the pursuer withdrawing these conclusions in the meantime, under reservation of all questions relating thereto. The defence was that the defenders had acquired right to the subjects, with the privileges attached thereto, and that therefore they should be assoilzied. The defenders consisted of three classes—(1) rentallers without formal leases; (2) tenants with formal leases; and (3) feuars. These parties all derived their rights from a predecessor of the pursuer, and he pleaded that the leases were not binding on him as a singular successor.

The Lord Ordinary (Kinloch) found that the defenders had failed to establish in a legal and competent manner the right of grazing claimed by them, and therefore found and declared in terms of the summons. His view was that the legal character of the right claimed was a right of servitude which might be constituted either by grant or prescription, but must be in favour of a dominant over a servient tenement, and so constituted as to operate a real right before it can effectually pass against a singular successor. No such right can so pass which is constituted by a merely personal grant. He thought the claim of the feuars was unfounded because the charter contained no mention whatever of pasturage. And although the holders of formal leases had an express right of pasturage conferred on them by their leases, which was binding on the granters of the leases, his Lordship thought it could not be enforced against a singular successor. It was a mere personal contract. A lease is so also in legal character, but by statute it is made effectual against singular successors. But this statutory provision only applies to the leasing clauses, and not to a right of pasturage separately given in the deed and for a separate consideration. In regard to the others, the rentallers, the same considerations excluded their claim, assuming their leases to be valid.

The defenders reclaimed.

DEAN of FACULTY, F. W. CLARK, and BLACK, for them.

LORD ADVOCATE (Patton), FRASER, and GIFFORD, for the pursuer.

At advising,

Lord CURRIEHILL—It is of importance to attend to the shape of this action. It is not at the instance of the inhabitants to have the nature of their rights declared. The defenders are merely resisting the demand of the pursuer for a decree in this action. They are not calling upon the Court to ascertain the nature or extent of the right or title under which they are in possession. It is at the instance of the owner of the lands; and hence, unless it shall appear that the defenders have no right whatever to the pasturage claimed by them, the pursuer will not be entitled to decree in this action. All we have to do, therefore, is to inquire whether the defenders have vested in them any right whatever to this privilege of pasture. The defenders do not claim the right to pasturage as being a separate subject. They do not claim an exclusive right to any portion of the muir lawn. What they claim is that each of them, as lessee or feuar of a lot of building ground in the town of Tobermory, shall enjoy—only as a pertinent of that subject and connected therewith—a privilege in common with the other owners of the houses in the village of sending bestial to pasture on the muir lawn. What we have to ascertain, therefore, is, whether or not the defenders have an existing right to such lots of ground in the town of Tobermory? and if they have, whether or not such a pertinent is attached to each of their lots? In order to ascertain