

cordingly when I look at the record I find that it was not so much by means of the forgery, as by means of having stolen the document that it is said to have been obtained. The theft therefore is the *gravamen* of the charge; the rest is rather introduced as part of the narrative; and besides this, the whole is coupled with a statement by the pursuers themselves, that it was the habit of the parties to go to the bank together and uplift and redeposit the money, and on all these occasions the defender signed the pursuer's name; so that the question is narrowed to this, that if the defender cannot prove that on this last occasion she had the pursuer's authority she must be convicted of forgery. I think, therefore, the amended issue should also be disallowed.

It would be altogether contrary to the ends of justice to allow either issue.

Lords CURRIEHILL and ARDMILLAN concurred.

LORD PRESIDENT—This case is somewhat new to me, but I concur in what has been said by Lord Deas. This is a civil action for recovery of a sum of money said to be in possession of the defender, and how is it alleged that it came into her possession? It is quite impossible that it can have come into her hands by forgery alone. Accordingly both theft and forgery are alleged in combination with uttering of the forged indorsation. Without the combination of these things the possession of the money is unaccounted for. The action would therefore, without these allegations, be quite irrelevant, and I think they must all be put in issue.

Agents for Pursuers—Hagart & Burn-Murdoch, W.S.

Agent for Defender—John Thomson, S.S.C.

SWAN v. MACKINTOSH AND OTHERS.

Limitation of Action—Road Act—Signeting—Execution. An Act of Parliament limited the right of action to six months. A summons was signeted and served on some of the defenders within the time, but was not served on the others till a day after it had expired. The defenders were all concluded against conjunctly and severally. *Held* that the action was "commenced" against all the defenders within six months.

J. R. Swan, accountant in Glasgow, raised this action against fifteen gentlemen who were trustees for the management of the statute-labour roads within the Dunoon district of Argyllshire, appointed under the Act 27 and 28 Vict., cap. 206. The action was one of damages for injury sustained by the pursuer on 12th Sept. 1865, in consequence, as he alleged, of the unfenced state of the road from Blairmore to Strone, which was due to the culpable neglect of the defenders.

The defenders pleaded in defence that the action was excluded by section 46 of the General Statute Labour Road Act, in respect it was not "commenced" within six months from the date of the occurrence libelled. The summons was signeted on 10th March 1866, and served on nine of the defenders on 12th March 1866, but not on the other six until 13th March 1866, being six months and one day after the occurrence.

The Lord Ordinary (Ormidale) sustained this plea as to the six defenders, and repelled it as to the others. The following is his

Note.—The wrong and injury of which the pursuer complains, having been done to, and suffered by him on the 12th of September 1865, while the present action was not commenced against

the defenders named in the interlocutor, till the 13th of March 1866, it is, in the Lord Ordinary's opinion, barred and excluded *quoad* those defenders by the statutory provision referred to in the defenders' first plea in law. On the other hand, the action having been executed against all the other defenders, on the 12th March, the Lord Ordinary thinks it must be held to have been commenced as regards them, within the statutory period, and therefore he has repelled the plea in question, in so far as the action is directed against them. The argument of the pursuer, founded on the assumption that the signeting of the summons on the 10th of March 1866, although it was not served on the defenders mentioned in the interlocutor till the 13th of that month, must be held to be the commencement of the action in the sense of the statute, appears to the Lord Ordinary to be unsound. The signeting of the summons was merely an act necessary to complete it, and render it a competent writ wherewith to commence the action; but the Lord Ordinary cannot hold that act to have been itself the commencement of the action against the defenders any more than the writing of the summons, or its subscription by a writer to the signet. The defenders were not parties to any of these acts, and of all of them they were necessarily ignorant, till served with the summons. It was only on the summons being served, that, in the words of Mr Erskine (3. 6. 3.) the proceeding could be said to be 'a begun action.'

"On the other hand, as the Lord Ordinary cannot doubt that the citation of the remaining defenders on the 12th of March was a commencement of the action, so far as they are concerned, within six months after the date of the wrong or injury complained of, he has repelled the plea in question, *quoad* these defenders.

"Although some discussion also took place in relation to the defenders' second plea in law, the Lord Ordinary does not think it would be right to dispose of it till parties have had an opportunity of being further heard—the more especially as that plea will now present itself under a somewhat different aspect than heretofore, in consequence of the action having been dismissed as to some of the defenders. It will now fall to be considered, whether with reference to the circumstance of the summons concluding against all the defenders as being conjunctly and severally liable, for one and the same fault, committed by them jointly, the action, seeing that it has been dismissed against some of the defenders, is relevant or maintainable against the others; and in regard to this point the Lord Ordinary has to direct the attention of the parties to the cases of *Leslie's Representatives v. Lumsden and Others*, 19th June 1856, 18 D. 1046; the *Western Bank of Scotland v. Bairds*, 20th March 1862, 24 D. 859; and the *North British Railway Company v. the Leadburn Railway Company, &c.*, 12th January 1865, 3 M.P. 340.

"The Lord Ordinary has only further to suggest that it might be well, before farther answer, that an order were taken for issues, as the question how far the action is now relevant or maintainable against any of the defenders could be best and most conveniently discussed, when it is seen in the form of an issue, how, and in what terms, the action is still to be insisted in."

The pursuer reclaimed.

RUTHERFURD CLARK and F. W. CLARK for him. YOUNG and GIFFORD for the six defenders, who had been assolizied.

At advising,

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 became 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