tion, nor the expense of extending the same, in respect that (1) Mr Morrison, in preparing the said disposition, did not act as the agent or on the employment of the defender; (2) by the terms of the agreement between the defender and Mr Morrison no further or other expense was to be payable by the defender than the said £160 in name of commission, and the stamp required for the disposition; and (3) Mr Morrison not having been a certificated agent at the time in question, was not and is not entitled to charge *ad valorem* fees." He also maintained that the pursuer was barred from maintaining the present action by the settlement on 9th December in the full knowledge of all the circumstances.

After a proof, the Lord Ordinary (ORMIDALE) held that £160 was all that the defender was liable to pay; that the pursuer sued for the £87 as assignee of Morrison; and that as the right to sue for this was in the pursuer himself, not in Morrison, he could not sue under the assignation; and as Morrison's employment was by the pursuer, not by Duncanson, the pursuer could not sue under that contract; and that, in any event, the defender was protected by the discharge granted by the pursuer on 12th December.

The pursuer reclaimed.

SHAND and LANCASTER for him.

BALFOUR and J. M. LEES in answer.

At advising, the opinion of the Court was delivered by Lord Neaves. Under the missives Dobbie was to have a free title. What a free title meant was not disputed. And Duncanson was either to pay it or reimburse Dobbie in the payment of it. It had been argued that Dobbie sued here only as assignee of Morrison, and this was the view the Lord Ordinary had taken. But in reality Dobbie here sued in his own right, and that he fortified by founding also on the assignation unnecessarily did no harm. But he also sued as assignee of Morrison, for the £160 of commission. Morrison had been the procurer of a purchaser apparently in the matter, and he said it was stipulated he should get one per cent of commission on the price. He was therefore *in petitorio* as to the commission. He had no written evidence to prove this agreement. The only evidence was his own oath so far as supported by the defender's statement. But the defender gave a different account of the matter. No doubt he said one per cent was agreed upon at first, but that was on the footing that according to the usual form he should pay only half of the cost of the titles. But when it was arranged that he was to pay both sides he only agreed on the understanding the pursuer's title was to come out of the £160. The preponderating evidence was in favour of this view of the agreement, and therefore Duncanson should first pay Dobbie the cost of the title, viz., £87, and the balance of £160, less this sum, to Dobbie as assignee of Morrison. The Lord Ordinary had dealt with matters in his interlocutor which were practically of little importance, such as the discharge was, which was not a very formal one. His interlocutor must therefore be recalled, but practically the same result would be arrived at.

Agent for Pursuer—D. J. Macbrair, S.S.C.
Agents for Defender—Ronald & Ritchie, S.S.C.

Saturday, June 10.

FIRST DIVISION.

RITCHIE *v.* RITCHIE.

Proving the tenor—Casus amissionis—*Violence—Adminicles—Draft Deed—Parole Proof.* When a marriage-contract had been violently destroyed by the husband, against whose legal rights its whole clauses were directed, and where the draft from which the deed was originally extended had been lost after the raising of an action of proving the tenor, *Held*, in a subsequent action of proving the tenor, libelling on the copy of the draft contained in the certified copy summons in the former case, that, where the *casus amissionis* was violence, particularly committed by one whom the deed laid under obligation, the general rule of law requiring written adminicles of evidence did not apply, and that in the circumstances of the case the parole evidence established the tenor.

Held farther, that the copy of the missing draft, sworn to by the writer and comparer, was no more than parole evidence.

Question, whether the draft of a deed is a proper adminicle in a proving of the tenor.

This was an action of proving of the tenor of an antenuptial contract of marriage, brought at the instance of Mrs Ritchie against her husband. She had in July 1870 raised an action in the Sheriff-court of Banff (*vide ante*, p. 13), for delivery of the principal deed, in the course of which action the circumstance of its destruction by the husband was discovered. The draft of this document, from which it had been extended for signature, was produced in that action by the agent who drew it, and founded on by the pursuer. Thereafter, on 3d November 1870, Mrs Ritchie brought an action of proving the tenor of her marriage-contract, taking its terms from the above mentioned draft. After raising this action, but before it came before the Court, the draft which had been produced in process was lost. Accordingly the first action was allowed to drop and the present action was raised, founding upon the copy of the said draft, "written by Thomas Valentine Pollock, clerk to Alexander Morison, S.S.C., the pursuer's agent, and compared with the said draft by the said Thomas Valentine Pollock and William Cheyne, also clerk to the said Alexander Morison," and "contained in the certified copy of the summons in the said (first) action of proving the tenor."

Before answer as to the sufficiency of the adminicles, or of the *casus amissionis*, their Lordships "allowed the pursuer to prove the sufficiency of the adminicles, and of the *casus amissionis* of the writ libelled on, the terms of which is sought to be proved, and also to prove the tenor of the said writ," and allowed the defender "a conjunct probation anent all these matters."

From this proof it appeared that the pursuer and defender had been married in 1863; that at the time of the marriage the pursuer was possessed of some little property which she desired to withdraw from the *jus mariti* of her husband; accordingly a marriage-contract excluding the defender and his creditors from the pursuer's property was drawn by Mr Alexander Murray, Solicitor in Portsoy, and extended by his clerk John Thomson James, and executed by the parties in presence of Murray

and James as witnesses. After being executed the deed was delivered over to Mrs Ritchie, who took it home, placed it in a locked chest, in a linen press also locked, in a room upon the first floor of their house. She kept it there until its destruction in June 1870. The deed never was recorded, though the pursuer had received advice both from her brother, to whom she had shown it in the early part of 1870, and from Mr Allan, Solicitor, Banff, to have it put on record. In June 1870, on the defender's own evidence, supported by collateral circumstances, in the pursuer's absence he broke into her press and broke open the chest in which the document was kept, took out the deed and burnt it.

The pursuer's brother James Wilson swore to the contents of the draft, as embodied in the summons, being the same as those of the deed given him to read in the early part of 1870. John Thomson James and James Mackay, clerks to the said Mr Murray, gave evidence as to the draft of the deed now lost, and a copy made from it. There was farther adduced certain evidence as to the loss of the draft, and the testimony of Pollock and Cheyne above mentioned, as to the identity of the copy, engrossed in the summons in the first action, with the original draft.

On this evidence the case came up for hearing.

ASHER, for the pursuer, after alluding to the proof of the previous existence and *casus amissionis* of the deed, maintained that, on a consideration of the authorities on the subject, it would be found, that there were three classes of cases in which the practice of the Court admitted a departure from the general rule, which required written adminicles of evidence in proving the tenor of a deed. These were—

1. When the nature of the deed makes it improbable that any writing will follow upon it.

2. When the deed is a marriage-contract, and marriage has followed.

3. When the deed has been lost by an act of violence, and particularly when perpetrated by one on whom the deed is alleged to have laid obligations.

He therefore contended that, as the deed in question came under all these categories, and especially as it was admitted to have been destroyed by the violence of the husband, against whom the whole of its clauses were directed, the rule of law requiring the production of written adminicles did not apply to the present case. Authorities referred to —Ersk. iv. 1, 55; *Cunninghame*. 9 June, 1674. M. 15,794; *Kennoway*, 18 Feb., 1752, M. 12,438; *Lillie*, 4 Dec., 1832, 11 S. 160; *Cranstoun*, 22 Jan., 1674. M. 15,794; *Boyter* v. *Rintoul*, 10 March, 1832, 5 Deas and Anderson, 215; H. of L., 6 W. and S., 394; *Frendraught*, 19 July, 1636, M. 15,788.

No appearance for the Defender.

At advising—

LORD PRESIDENT—The first and most important fact in this case is,—that there is no doubt about the *casus amissionis;* and the nature of that *casus amissionis* has a very important effect on the case generally. The deed was destroyed in June 1870 by the defender, the husband of the pursuer, as he himself admits. It was operative, as an obligatory instrument, against him and no one else; and the circumstance that he, by a delinquency of a serious kind, caused the destruction of the deed, taken in connection with its being obligatory against him only, makes the case of the pursuer peculiarly favourable. I think that by parole evidence the tenor of the deed has been satisfactorily established, but it is by parole evidence alone, for we have not even the draft. It is not necessary to say whether a draft is in all circumstances within the description of an adminicle. All we have here is a copy of the draft, and the evidence of witnesses as to its identity with the draft, the draft itself being lost. But that is mere parole evidence of the tenor of the draft, connecting its tenor with the principal deed. In the circumstances, looking to the *casus amissionis* and the nature of the deed, I think we may grant decree without any adminicles, but only on the express ground that in such cases adminicles may be dispensed with.

LORD DEAS—It is most important at the outset to consider in each case the nature of the deed the tenor of which is sought to be proved. Here it is one, as your Lordship has observed, which affected nobody but the husband, who admits that he himself destroyed it; that is to say, affects nobody by way of burden or limitation. On him the whole restrictions of the deed are laid; and the reason of this is clear. The wife was possessed of certain house property and others, and the substance of the deed is that the husband was to have no right to interfere with any of these subjects. The reason is satisfactorily explained. The husband was possessed of nothing; and from his previous life the wife had no great confidence in his future habits and conduct. Well then, these being the circumstances, he is the man who destroyed this deed, and by what was undoubtedly a criminal act.

I agree with your Lordship that it is competent to prove the tenor of this deed without written adminicles; and that even without them we have still sufficiently satisfactory evidence. It is not necessary for me to go into the details, but I merely add that, though we have no proper written adminicles, yet we are not altogether without writings. I give no opinion about the competency of the draft of a deed as an adminicle, as it is not essential to the case; but I certainly would be slow to say that any sort of writing was to be excluded as evidence in a proving of the tenor. I do not think that, in order to make a document competent evidence, it is necessary that it should be in any sense probative. Though it be not so, it may still be a document quite competent to look at and consider in an action of proving the tenor. Now here the original draft of the deed has been lost, as well as the deed itself destroyed, and what we have is a copy of the draft, proved by parole evidence to be correct; and I think it is a competent form of evidence. Moreover, I think it is somewhat more than parole evidence—I think it is a piece of real evidence, and very important evidence too. But no matter what category it belongs to—suppose even that we had not got it at all—I think we might still have been able to grant decree of proving of the tenor of this deed. It is indeed very fortunate that we have got it; and I have no doubt, therefore, about giving decree.

LORD ARDMILLAN—It is not necessary to go beyond the particular case before us, and in that I have no doubt whatever. In the proving of the tenor of a deed the pursuer must instruct (1) that the writing once existed; (2) its loss, and the *casus amissionis;* and (3) its tenor.

Now, where the writ has been lost accidentally, the proof of the *casus amissionis* is no proof of the

original existence of the deed. The proof of the one does not run into the proof of the other. Distinct proof is needed of the previous existence of the deed. But here, from the nature of the *casus amissionis*, the proof of the loss runs into the proof of the prior existence of the deed, so as to be satisfactory proof of both. For what was the deed lost? It was the marriage-contract of the party destroying it. He admits having destroyed it. Here, therefore, proof of the loss is of itself proof of the existence and nature of the deed, whose tenor is sought to be proved. The only party burdened and restricted by it proves its existence.

The next question is, What was the tenor? I think Mr Asher's argument on this point exceedingly instructive; and that he has quite made out that where the document has been destroyed by the party burdened by it the Court will dispense with adminicles required in other cases. It may be that the absence of any signed document reduces the proof in the case to parole evidence, with collateral or subsidiary aid; or it may be, as my brother Lord Deas thinks, that the draft produced is a piece of real evidence. Some day it will be necessary to solve this question, but I do not think it is so here, as I am satisfied, in the circumstances of the case, that the tenor of this deed is sufficiently proved.

LORD KINLOCH—I am of the same opinion as your Lordships, and consider that a very wholesome principle which your Lordship has enunciated. I agree that, in a case such as the present, the tenor of a deed may be proved without adminicles in the proper sense of the term. I am not prepared to give any general definition of the term adminicle; at the same time, I am not disposed to say that a draft of a deed is not an adminicle—but the decision of that point is unnecessary in the present case. All we have here is parole evidence of what the draft was. But it is parole evidence of a very strong kind. It is not that of men speaking after the lapse of years, but of one who lately took a copy of the deed, and satisfied himself at the time that it was correct. This goes beyond the scope of parole, and approximates to written proof; but it cannot be said to go the length of an adminicle; still, looking to the principle referred to above, and without deciding any other case than the present, I am entirely satisfied, with your Lordships, that we should declare the tenor of the deed proved.

Expenses allowed to the pursuer under deduction of these caused by the loss of the draft in the first process.

Agent for Pursuer—Alex. Morrison, S.S.C.

Saturday, June 10.

LOGAN *v.* BROWN.

Landlord and Tenant—Removing—Process—Suspension—Juratory Caution—Statute 1555, *c.* 39, *and* 16 *and* 17 *Vict. c.* 80, §§ 30, 31. Circumstances in which it was *held* that a sub-tenant was entitled to have a note of suspension and interdict passed on juratory caution against a threatened ejectment by the landlord, the landlord's notice to remove not proceeding upon any legal warrant, either under the statute 1555, or under the Sheriff Court Act of 1853.

Andrew Brown, the respondent, was proprietor of certain heritable subjects at Wester Mugdock, Milngavie, which by lease, dated 3d March 1859, were let to James Weir for nineteen years from Martinmas 1859. The said lease contained a clause entitling either party to terminate the lease at the end of the first ten years, or at Martinmas 1869, upon three months' notice. James Weir was succeeded by his son John Weir in 1865, who remained in possession of the subjects let, though it was maintained by the landlord that he had taken advantage of the break at the end of the ten years, and that the tenant was now possessing under a new lease granted at Martinmas 1869. The lease excluded sub-tenants and assignees.

In 1866 James Logan, the complainer, became a sub-tenant of Weir's, in a small house and garden, &c., upon the farm. He continued to occupy these subjects as a yearly tenant till 1867, when, upon executing certain repairs, he obtained a missive of lease of them from Weir for the remainder of his (Weir's) lease of the farm. In entering into this agreement the complainer was not made aware of the break in Weir's lease, and believed it had still eleven years to run.

Thereafter, at Whitsunday 1869, Weir attempted to remove the complainer from his tenancy, but after various procedure in the Sheriff-court and Court of Session, he entirely failed.

On 4th April 1871 the complainer was served with a notice by a messenger-at-arms, at the instance of the respondent, warning him to remove at Whitsunday 1871. The said warning was alleged by the complainer not to have proceeded upon a precept of warning by the proprietor, and wanted all the other requisites of a warning either under the Act of 1555, or under the Sheriff Court Act of 1853. The complainer therefore brought this suspension and interdict to have the respondent prohibited from ejecting him without the warrant of a competent court of law.

The Lord Ordinary on the Bills (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, 25th May* 1871.—The Lord Ordinary having heard the counsel for the parties, and considered the note of suspension and interdict and answers,—on juratory caution, passes the note and continues the interdict, and grants commission to the Judge Ordinary of the bounds to take the complainer's oath anent juratory caution, and to report.

"*Note.*—The Lord Ordinary is of opinion that the complainer is entitled to have the note passed, and the interim interdict continued, prohibiting the respondent from ejecting him, without the warrant and authority of a competent court of law, from the subjects which he claims right to possess, as the sub-tenant of John Weir, until Martinmas 1878. Even although the principal lease had been terminated at Martinmas 1869 by the respondent availing himself of the break therein contained, and although the principal tenant had removed at that term, the respondent cannot, it is thought, eject the complainer, except upon the decree of a competent court. The provisions of the 31st section of the Sheriff Court Act of 1853, which were alone founded on by the respondent, do not appear to authorise such ejection by the respondent, because more than six weeks have elapsed since the expiration of the term of endurance. The letter of removal, also, is not in the form contained in schedule K annexed to the Act. Further, the complainer avers that the respondent and John