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

Weir did not avail themselves of the break in John Weir's lease; that the lease subsists until Martinmas 1878; and that John Weir has all along been, and still is, in possession of the subjects as principal tenant, and has right to continue that possession down to that term."

Against this interlocutor the respondent reclaimed.

ASHER and M'KECHNIE for him.

MAIR and RHIND for the complainer.

At advising—

LORD PRESIDENT—Nothing but juratory caution could be expected from a person in the circumstances of the complainer; and with regard to the points raised before us to-day, I do not intend entering much upon them, as that might be anticipating my judgment on a future stage of the case. I shall only say that I do not think any man is entitled *via facti*, and without any legal warrant, to remove and dispossess an occupant or tenant; and if any one threatens such illegal violence the Court will always grant an interdict.

The questions raised under the Sheriff Court Act do not apply to the case. I cannot say that I am of opinion that clauses 30 and 31 will not enable a landlord to eject a sub-tenant. For the former clause renders the lease itself sufficient warrant to eject tenants and sub-tenants. And so with the letter of removal mentioned in the latter clause. Under either of them, the landlord would be justified in removing a sub-tenant; but, unfortunately, he has lost his opportunity. He has let, not only six weeks, but a whole year and more, slip by without doing anything; and he now comes forward, asserting his right to proceed at his own hand, and without warrant. I think, therefore, there are abundant good reasons for passing this note, and that on juratory caution.

LORD DEAS—There was no attempt made by this landlord to proceed in the removing until more than six weeks after the alleged termination of the principal lease. This alone is quite fatal to his founding upon the clauses in the Sheriff Court Act. If that element were out of the way, delicate questions might have arisen.

What was attempted to be done was without warrant entirely; and the only thing said against this suspension was that the complainer is sub-tenant under a lease excluding sub-tenants. And the respondent's idea therefore seems to be that he can *brevi manu* be put to the door. But in a case like this, where the sub-tenant has been occupying under the landlord's nose for ten years, and where the tenant, though he may have received at one time notice to remove, has been allowed to remain on from year to year, the proposition is a most extravagant one. The landlord has no warrant of ejection, and we must therefore adhere to the Lord Ordinary's interlocutor.

The complainer moved for expenses, referring to the cases of the *Castle Douglas Railway Co.*, 22 D. 18, and *Rankin* v. *M'Lachlan*, 3 Macph. 134.

LORD PRESIDENT—I do not say whether the moving for expenses at such a stage is competent or not; but, at any rate, it is against the uniform practice of the Court to give them. Expenses refused *hoc statu*.

Agent for Complainer—William Officer, S.S.C.

Agent for Respondent—Thomas Carmichael, S.S.C.

Saturday, June 10.

SECOND DIVISION.

RUSSELL *v.* RUSSELL.

Triennial Prescription—Proof—Writ or Oath—Rei interventus. A farm-servant alleged that his master was not in the habit of paying him at each term, but that there were settlements at intervals, and that an I.O.U. for a certain sum was granted at one of these settlements. The defender pleaded prescription.—*Proof* allowed that the I.O.U. was granted for the purpose of ascertaining a balance; and also that the pursuer continued on the faith of that document in the defender's employment.

This was an action by Matthew Russell, a farm-servant, against William Russell, farmer at East Redburn, the pursuer's brother, concluding for "the sum of £166 sterling, being the balance of wages, including interest, due by the defender to the pursuer on the 15th day of May 1868, when the defender granted to the pursuer therefor the I.O.U. or document or voucher of debt more particularly after-mentioned, and which sum is still resting-owing by the defender to the pursuer, the said wages being for services rendered by the pursuer to the defender as a farm-servant on the defender's farm of East Redburn, continuously from Whitsunday 1828 to Whitsunday 1852; and also for services rendered by the pursuer to the defender on said farm from Whitsunday 1855 to Whitsunday 1861; and also for occasional services rendered by the pursuer to the defender on the said farm between Whitsunday 1861 and Whitsunday 1868, the pursuer and defender having, during the most of the said period from Whitsunday 1828 to Whitsunday 1868, and more especially after Whitsunday 1852, adjusted their account or ascertained the balance once every two years, when the defender granted and delivered a document to the pursuer acknowledging the balance due at its date, and received up at each such adjustment the document granted at the immediately preceding biennial adjustment, the pursuer having occasionally at those adjustments, and sometimes between them, received payments to account when he required the same, the last such adjustment having taken place at Whitsunday 1868, when, after giving credit for all payments made, and adding the interest then due, the balance due the pursuer was ascertained to amount to the said sum of £166 sterling, and there was delivered to the pursuer as in evidence of the said debt, the said I.O.U. or document or voucher of debt of that date."

The defender pleaded *inter alia*:—"(2) The alleged I.O.U. or acknowledgment of debt is improbative, being neither holograph nor tested, and the same does not constitute a legal obligation; (5) The pursuer's claim for arrears of wages for services rendered prior to 1867, and all interest arising thereon, is prescribed."

The Sheriff-Substitute (HORNE) pronounced an interlocutor by which he "finds that said alleged document is denied by the defender to have been the constitution of any debt between him and the pursuer, and that the genuineness of the same and its probative nature are denied: finds that it is also averred that the services for which said alleged document was granted by the defender to the pursuer were performed through a series of years, and