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

to the amount claimed not paid for: finds that said document or I.O.U. is an improbative document as it stands, and does not of itself prove that said arrears are due: finds that it can be proved only by the oath of the defender that he signed and granted said document as one of debt to the pursuer, and that failing the constituting of his claim in this manner by said document, that the pursuer can have recourse only to the oath of the defender also to establish the same as one of services performed and unpaid for, prescription having run upon the whole, as far as these are in any way properly or distinctly specified in his summons; therefore allows the pursuer such proof of the averments contained in his revised condescendence, so far as they refer to said points, and appoints him to lodge a minute of reference to the defender's oath as to the same accordingly."

The Sheriff (MONRO) on appeal pronounced the following interlocutor:—"Recals the said interlocutor *hoc statu*, and before answer allows the pursuer a proof that the writing No. 2 of process was written by the defender's son by the authority of the defender, and is signed by the defender; that it was granted on occasion of, and for the purpose of ascertaining an amount of balance of or arising from wages due by the defender to the pursuer, and was delivered to the pursuer accordingly, and that in return for the same the pursuer delivered up to the defender a previous writing granted by the defender of a similar nature, and that on the faith of said writing the pursuer continued in the employment of the defender, or otherwise acted in reliance on the same, or that the same was homologated by the defender; and to the defender a conjunct probation."

The defender appealed.

J. M'LAREN, for him.

GUTHRIE SMITH, for the respondent.

At advising—

LORD JUSTICE-CLERK—I have no doubt that the interlocutor of the Sheriff is right. I do not wish at present to express any opinion on the plea of prescription, or what is likely to be the result of a proof. The plea is taken to a debt which is not alleged to have been settled by termly payments. It is stated that the pursuer used to have general settlements with his brother at periods of two years. This is very different from a case where payments were habitually made at certain terms; and the allegation that one of these settlements took place within the years of prescription, seems to me to be quite relevant. The pursuer produces a document signed by the defender, acknowledging a sum to be due to the pursuer. It is not necessary to sustain that document now, or to go into the general question how far this I.O.U. is sufficient by itself to elide the triennial prescription, or susceptible of being set up by proof. But if it turn out that things were done on the faith of that document; and if it can be proved that another writing in the hands of the pursuer was delivered up by him on obtaining this I.O.U., I would think it very difficult to exclude *rei interventus*.

On the whole matter, I think the Sheriff was right in directing the specific facts to be ascertained.

LORD COWAN—I concur. We are not deciding any question of prescription. Proof has been allowed about the I.O.U., and it is indispensable to ascertain the circumstances under which it was granted,—if it was followed by *rei interventus* and all the other matters set forth in the record. Now, as I understand the judgment of the Sheriff, the proof allowed is confined entirely to the I.O.U. and the circumstances in which it was granted, so that the Court may consider its effect as either a document of debt in itself, or a document of debt which must receive effect in eliding prescription.

I should be sorry at present to express any opinion as to the applicability of the plea of prescription to the circumstances of this case.

Agent for Pursuer—Laurence M. Macara, W.S.

Agents for Defender—Millar, Allardice & Robson, W.S.

Saturday, June 10.

WALKER *v.* MELVILLE & MILN.

Prescription — Possession — Commonty — Infeftment.

In 1775 the respective shares in a commonty were allocated and divided under a decree-arbitral among the commoners, who were proprietors of adjoining estates. A, one of the commoners, sold to B, another commoner, part of his share of the commonty, consisting of 12 acres, and granted a disposition, upon which B never took infeftment. B and his successors continued to possess these 12 acres so purchased until 1866, when the lands belonging to A were purchased by C. *Held*, in an action at the instance of C, that the possession of the said 12 acres by B and his successors for more than the prescriptive period being to the exclusion of C's predecessors, that they were not comprehended by and included in the pursuer's title and infeftment, and he had no right thereto.

This was an action at the instance of Walker, proprietor of the estate of Ravensby, in Forfarshire, against the trustees of the late proprietor of Woodhill, in the same county, calling for reduction of certain deeds whereby the defenders claimed any right to or interest in a portion of the Barry Muir, extending to 12 acres or thereby, and for declarator that the said 12 acres were feudally vested in the pursuer, and for damages.

In 1773 a deed of submission was entered into between the Earl of Strathmore, proprietor of the Grange of Barry, Mr Miln of Woodhill, and Mr Gardyne of Ravensby, as having right to certain portions of two commonties called the Barry Muir and the West Links of Barry, in order that these shares might be settled and divided. Accordingly, in Dec. 1775, two lots of Barry Muir were allocated to Mr Gardyne of Ravensby, one of 17 acres and the other of 12 (being the ground in question in the present action). The said 12 acres were purchased by the defender, Mr Hay Miln's great-great grand-uncle James Miln, from Mr James Gardyne, then of Ravensby, conform to disposition and assignation granted by the latter in his favour, dated 26th May 1780. By this deed Mr Gardyne, in consideration of price paid, disponed to the said James Miln, his heirs or assigns, "heritably and irredeemably, without any manner of redemption, revertion, or regress whatever, all and whole that part of the muir called Barrie Muir, lying near the north-west corner thereof, consisting of about 12 acres, bounded by the lands of Carlungie on the north, a ditch and hedge lately made and planted by the said James Miln on the west, a stone dyke lately built by the said James Miln on the south, and part of the common road leading from the lands of Woodhill to the lands of Carlungie on the