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 granduncle 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

east. . . . . and which part of the muir foresaid hereby disponed lies in the parish of Barry and sheriffdom of Forfar." The said disposition and assignation also contained an obligation to infeft the said James Miln in the following terms:—"And thereintill I bind and oblige me and my heirs, duly, validly, and sufficiently to infeft, vest, and seize the said James Miln and his before-written (the same being past upon their charge) to be holden of me, my heirs or assigns in blench, for yearly payment of one penny str., to be made by the said James Miln or his foresaids to me, my heirs or assigns, at the term of Martinmas yearly, if the same be asked allenarly, and that for all other exaction, demand, or secular service whatsoever that can or may be asked or demanded furth of the said acres." The term of entry is declared to be Martinmas 1779, and there is a clause of warrandice by the disponer in the following terms:—"And likewise I oblige me and my foresaids to warrant these presents to be good, valid, and sufficient, and the subject hereby disponed to be free, safe, and sure to the said James Miln and his foresaids at all hands mortal."

It was admitted that the said 12 acres had been peaceably possessed by the defender's predecessors, and part of it let on leases from the date of the said disposition to the present time.

In 1866 the present pursuer purchased the estate of Ravensby from Mr Gardyne with all its pertinents, including the shares in the commonty of Barry Muir which were allocated in 1775, and the pursuer is feudally vested in the said estate.

The defender alleged—"Both at the date of his purchase of the estate of Ravensby in 1866, and of the excepted portion in 1869, the pursuer well knew that the 12 acres now claimed by him did not belong to his author Mr Gardyne. The pursuer is and has been for a long period prior to his purchase of Ravensby, resident in or near the town of Dundee, which is in the immediate vicinity of the estates both of Ravensby and Woodhill; and he well knew at the date of his purchase, and knows now, that these 12 acres have been possessed for more than forty years by the proprietor of Woodhill as his property; or at all events, he well knew, and knows now, that they formed no part of the estate of Ravensby, as belonging to Mr Gardyne, and as purchased by the pursuer. Along with the disposition of Ravensby he received delivery of the leases of the whole estate sold to him, none of which comprehend the 12 acres or any part of them, and he entered on possession of the estate at Martinmas 1866. No indication of any claim to the 12 acres was made until 1st April 1870, and no direct claim was made until 11th August 1870. The present action has been brought in the erroneous belief that as no infeftment has been taken by the proprietor of Woodhill in these 12 acres *nominatim*, the inequitable claims made in it will be sustained by the law of Scotland."

After a proof the Lord Ordinary (JERVISWOODE) pronounced this interlocutor:—

"*Edinburgh, 28th March* 1871.—The Lord Ordinary having heard counsel and made avizandum with the debate, proof, and whole process, and considered the same; Finds it proved as matter of fact that the 12 acres of ground or thereby to which the conclusions of the summons relate, and which are therein specially set forth, have been possessed by the defender Mr Alexander Hay Miln, his predecessors and authors, for forty years prior to the date of the present action, and that such possession has been had to the exclusion of the pursuer, his predecessors and authors; and finds as matter of law, that the pursuer has failed to establish that the writs and titles under which he holds, and is feudally vested in the lands and estate of Ravensby, extend to or include within their terms the said 12 acres of ground, or that the said titles are apt and sufficient to convey to him a right of property therein; and, with reference to the preceding findings, sustains the defences, and assoilzies the defenders from the conclusions of the summons, and decerns; Finds the pursuer liable to the defenders in expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

"*Note.*—The Lord Ordinary trusts that the terms of the interlocutor which he has now pronounced are such as in themselves to render sufficiently clear to the Court and to the parties the grounds in fact and law on which it is rested.

"He regrets that the course which he thought it right here to adopt, for the ascertainment of the facts by proof, before forming an opinion on matters of law, has necessarily led to considerable delay and expense in the conduct of the cause; but he may venture to hope that in any future stage of discussion it may be found that the questions to be determined are capable of being more satisfactorily dealt with than had no such proof been adduced."

The pursuer reclaimed.

WATSON and WEBSTER for him.

The SOLICITOR-GENERAL and MACKAY, for the defenders, were not called on.

The Court adhered.

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

Agent for Defenders—A. Howe, W.S.

COURT OF JUSTICIARY.

Monday, June 12.

(Lord Justice-Clerk, Lords Cowan, Deas, Ardmillan, and Jerviswoode.)

HOLLAND *v.* DICKIE.

Public House Statutes — Appeal — Competency — Exciseable Liquor. A party holding a certificate for an inn or hotel under the Public House Statutes was charged with an offence against these statutes in so far as he had supplied ale to persons in a state of intoxication, and was thereby liable to certain penalties, and his certificate was "liable to be forfeited and become void and null," as it was a third offence. On conviction he was adjudged to forfeit certain penalties, and in default thereof within fourteen days to imprisonment, and his certificate was declared void. The imprisonment, however, was not declared to be "upon his own charges and expenses" as directed by statute. *Held* (1) appeal was competent, since if ale was not "an exciseable liquor" within the meaning of the statutes, there was no offence; (2) ale was such an "exciseable liquor;" (3) the word "liable" was not informal; and (4) the conviction was valid.

The appellant is an innkeeper in Irvine, and holds