south of the said channel, in so far as lying between the channel and a house occupied by Margaret M'Kenzie, and that the said wire fence divides the pasture land from the remainder of the petitioner's lands of Grantfield lying on the opposite side of the said channel: Finds, in point of law, that in the aforesaid state of the facts the petitioner is entitled to be maintained in possession of the said pasture land west and south of the said channel lying between the channel and the said house occupied by Margaret M'Kenzie, until the right of property be determined in the competent Court, and therefore continues the interdict, and decerns the respondents to remove the said wire fence: Finds the petitioner entitled to expenses of process," &c.

On appeal the Sheriff (COOK) recalled the 4th finding, but *quoad ultra* adhered.

Sir Charles Ross advocated.

CLARK and RUTHERFURD for advocator.

MILLAR and J. C. SMITH for respondent.

The Court adhered, holding it to be clear that the respondent held a title to which his possession, which was sufficiently proved, might fairly be ascribed, while the advocator produced only a title which did not expressly include the ground, and on which no possession followed.

Agents for Advocator—Maclachlan & Rodger, W.S.

Agent for Respondent—W. R. Skinner, S.S.C.

Tuesday, February 16.

SECOND DIVISION.

STEWART & M'DONALD *v.* M'CALL.

Master and Servant—Contract of Hiring for a period of Years—Missive Letters—Probative—Rei interventus—In re mercatoria. *Held* that a contract of hiring for any period exceeding a year, where no *rei interventus* has taken place, can be proved only by a probative writing, the privilege of mercantile transactions not applying to such a contract.

This was an advocation from the Sheriff-court of Lanarkshire of an action at the instance of Stewart & M'Donald, warehousemen in Glasgow, against John L. M'Call, salesman there. The summons concluded as follows:—"Therefore, the defender ought to be decerned to enter and continue in the service of the pursuers, in the capacity of a salesman, for the term of two years from and after the 1st day of February current, 1868, in terms of an engagement entered into by the parties, and embodied in missive letters, upon the 20th day of December 1867; or otherwise the defender ought to be decerned to pay to the pursuers the sum of £200 sterling as damages, and in compensation of the loss and inconvenience sustained by the pursuers through the defender's breach of the said engagement, by failing and refusing to enter and continue in the pursuers' service as a salesman, in terms of the engagement and contract constituted by the said letters, with the interest thereof, at the rate of 5 per cent. per annum, from the date hereof till payment; in either case with expenses."

The following defence was stated to the action:—(1) A denial that the engagement libelled was ever entered into, or that the pursuers sustained the loss sued for; (2) That the missives founded on were not binding, that they were neither holograph nor tested, and that when subscribed by the defender they were blank *in essentialibus*, and he never authorised their completion; and (3) That before the missives were signed by the pursuers the defender withdrew from the proposed engagement, and so intimated to the pursuers.

The following writings passed between the parties, and were founded on by the pursuers:—

"(5) Agreement between the Advocators and the Respondent, dated 1st February 1868 and 20th December 1867.

"Glasgow, 1*st February* 1868.

"Messrs Stewart & M'Donald.

"Gentlemen,—I hereby become bound to serve you in the capacity of *salesman* to the best of my ability, for the term of *two years* from the date hereof, at a salary of £160 *and* £170 per annum, it being understood that in the event of any gross impropriety of conduct occurring on my part, the right will be conferred on you to break this engagement.—I am, gentlemen, yours respectfully,

"JOHN L. M'CALL.

"The services of *Mr John M'Call* are accepted by us on the terms above expressed.

"STEWART & M'DONALD.

"20*th December* 1867.

"(6) Letter, Respondent to Advocators, dated 20th December 1867.

"102 *Brunswick Street, Glasgow*, 20*th December* 1867.

"Messrs Stewart & M'Donald.

"Gentlemen,—I beg to state I regret having been so hasty in applying and accepting your kindness for giving me the chance and engagement. After reconsidering the matter, and taking all into consideration, changing my position, &c., I have arranged to accept a re-engagement with my present employers. I confess I made a great mistake in accepting so hastily, but hope you will excuse me when you know my position in which I am placed, and will make any apology you may require, if you will please look over this, and oblige, yours very respectfully, "J. M'CALL."

Some further correspondence took place which is not material.

The Sheriff-substitute (GALBRAITH) repelled the second plea in law stated in defence, in respect the missives founded on were writings *in re mercatoria*, and allowed a proof.

The Sheriff (BELL), on appeal, altered, and pronounced the following interlocutor and note:—"Having heard parties' procurators on the defender's appeal, and thereafter made avizandum with the cause, recals the interlocutor appealed against: Finds that a contract of hiring for any period exceeding a year, where no *rei interventus* has taken place, can be proved only by a probative writing, that is a writing which is either holograph of the contracting parties or executed with the statutory solemnities: Finds that the missive letters, No. 5-5, referred to and founded on in the summons, are *ex facie* and admittedly not holograph, being partly lithographed and partly written, and are not tested or otherwise probative, and bear no intelligible date or dates, the acceptance being apparently anterior to the offer: Finds that said missives are not documents *in re mercatoria*, and are not privileged as such: Finds that it is admitted by the pursuers that no *rei interventus* followed on these missives, the defender never having entered into

said pursuers' service; finds that they afford in themselves no evidence of any valid contract binding on the defender: Therefore sustains the defence set forth in the second article of the minute of defence, and assoilzies the defender from the conclusions of the action. But, in respect it is instructed by the defender's holograph letters, Nos. 5–1 to 5–4, that he entered into some engagement with the pursuers, from which he resiled without their consent, finds no expenses due, and decerns.

"*Note.*—Missive letters, mandates, and obligations in mercantile affairs, although not holograph, are valid without being attested by witnesses, or having the writer's name. This is an indulgence granted on account of the necessary rapidity in mercantile transactions, in which the writings almost always take effect before the evidence as to their authenticity is likely to be lost or impaired by lapse of time, and also on account of their often passing between subjects of different states, in which the law regulating the form of writings varies.—See Tait on Evidence, p. 120, and Dickson on Evidence, sect. 784. But these reasons have no applicability to a contract of hiring for a period of years; and it is quite settled, *first*, that such contract must be in writing, and *second*, that if the writing be not holograph, and not rendered effectual by *rei interventus*, it is probative only if duly tested according to law. Thus Mr Dickson says (sect. 564), 'Writing is essential to the constitution of contracts of service for any longer period than a year, neither parol nor oath of party being admissible to prove them, unless there have been *rei interventus*;' and again (sect. 566), 'Where writing is required to prove a contract of service, it must be probative or holograph, and an informal missive without *rei interventus*, cannot be set up even by oath of party.' In Baird's Law of Master and Servant, sect. 49, the writer says—'In Scotland, when the engagement extends beyond twelve months, the contract for its constitution and proof must be reduced into the shape of a regular and solemn writing, and until this be done, either of the parties may withdraw from the engagement without being liable in damages.' In Barclay's Digest, vol. ii. p. 586, the law is equally explicitly laid down in these words—'The writings' (containing a contract of service for more than one year) 'must be probative by being severally holograph of the parties thereto, or duly tested according to law. See also to the same effect Tait on Evidence, p. 298; Blair's Justice, p. 299; and Fraser on Domestic Relations, vol. ii, p. 373. The dicta of all these institutional writers are amply supported by the decisions they quote. Of these, reference may be made in particular to *Caddell*, Mor. 12,416; and *Paterson*, June 17, 1830, in which latter case the report bears that 'Lord Gillies delivered a decided opinion that a contract of service for three years required to be attested by a regular instrument, or to be followed by a *rei interventus*, without which it was not binding, even for a single year,' and the Court so held."

The pursuers advocated.

SHAND and ASHER for them.

GORDON, Q.C., and LANCASTER for respondent.

The Court adhered on the grounds stated in the judgment of the Sheriff.

Agents for Advocators—J. W. & J. Mackenzie, W.S.

Agents for Respondent—J. & R. D. Ross, W.S.

Tuesday, February 16.

TURNER AND MACKENZIE *v.* ARBUCKLE.

Churchyard—Private Burial Ground—Exclusive Possession. Circumstances in which the Court appointed certain operations to be performed in connection with a piece of ground in a churchyard claimed as a private burial ground, with the view of protecting the exclusive possession had by the parties claiming to be in right of it.

The ground of action in this case was an alleged interference with a lair on the east side of the Old Church at Greenock, which had been used for a long period as a place of burial by the pursuers' ancestors. The action was directed against two of a committee appointed at a public meeting held in Greenock to carry out a scheme of restoring the Old Church, which originally was the parish church. It appeared that the churchyard surrounding the church had been for many years so full that in the year 1859 it was thought proper to shut it up, under the authority of the Burial Grounds Act, 18 & 19 Vict. c. 38. In the year 1841, the church having got into a ruinous state, the situation of the parish church was altered, and a new one erected in Nelson Street. About that time a resurrectionist cage was erected by the pursuers over and around their lair, and the cage was built into the church. It thereupon became necessary to remove the cage, which was done without any notice to the pursuers. It was part of the scheme of restoration to open up an ancient doorway on the east side of the church, and the re-erection of the cage would have been an obstruction to the access to the church by that door. The committee decided against the re-erection of the cage by the pursuers, who were not thought to have an interest to do so. They were, however, allowed to erect a tablet to the memory of their ancestors on the wall of the church at the head of the lair. This was done, and the lair was covered with Caithness cement, and surrounded by a neat cope. The pursuers, however, further insisted that they should be allowed to surround the lair with a railing, so as to prevent desecration by its being walked over. To this the committee objected (1) That the railing would cause an obstruction; (2) That it was no desecration to walk over a lair in a churchyard: and (3) That, at any rate, the churchyard being so full, the pursuers themselves committed the desecration of which they complained by walking over the lairs of other people.

The Lord Ordinary (BARCAPLE), pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the closed record, proof, and whole process—Finds that, at least since the beginning of last century or thereby, the lair or burying-ground referred to in the conclusions of the Summons has been used and possessed by the ancestors of the pursuers and by the pursuers themselves as a family burying-ground: Finds that, since the beginning of the present century, it was enclosed with a low wall which was taken down and a new wall erected by the pursuers, with an iron railing on the top of it, in 1838: Finds that the pursuers have a sufficient title to sue this action: Finds that in 1863 the said wall and railing were removed by orders of the committee for the restoration of the old West Church of Greenock, of which committee the defenders, Alexander Mackenzie and George Arbuckle,