

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 assoziates 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,

were members, without the consent or knowledge of the pursuers: Finds that the pursuers, upon learning of the removal of said wall and railing, objected thereto, and that there followed a variety of communings and correspondence on the subject between them and the said committee: Finds that the said committee have now surrounded the said burying-ground with a kirb-stone or cope, eight or nine inches high: Finds that the pursuers did not, in the course of said communings and correspondence, enter into any arrangement by which they are barred, in any question with the said committee or the said defenders, from maintaining that they are entitled to the exclusive possession of said burying-ground, and to erect a suitable fence for the purpose of inclosing the same, so as to prevent persons from walking across it: Finds that the said railing which was removed by the said committee was injuring an outside stair of said old church: Finds that, in the whole circumstances of the case, neither the said committee nor the said defenders are now bound to erect any additional fence around said burying-ground, or to be at any farther expense in regard thereto: Finds that the pursuers, as in a question with the said defenders, are entitled at their own expense, to erect such a suitable fence as may be necessary to prevent persons walking across it, but that, having regard to the foresaid communings, and the expenditure which the said committee have been led to make for the purpose of so far meeting the wishes of the pursuers, such fence must consist of an iron railing or iron chain erected on the top of the said existing kirb-stone or cope: To the extent and effect of the foregoing findings, repels the defences: Finds and declares, as against said defenders, that the pursuers are entitled to erect such a fence as shall be sufficient to protect the said lair or burying-ground from being trampled upon or desecrated, said fence consisting of an iron railing or iron chain erected upon the top of the kirb-stone or cope now surrounding the said burying-ground, and not being of greater height than is suitable and necessary for such purpose: Interdicts, prohibits, and discharges the said defenders either by themselves, or by others acting on their authority, from interfering with the said lair or burying-ground, and from refusing to the pursuers, or their successors, or persons employed by them, access to the said lair or burying-ground at all reasonable times, and from molesting the pursuers, or their successors, or persons employed by them, in erecting and maintaining said fence as aforesaid; reserving right to the said defenders and all others having a legal interest, if necessary, to apply to the Judge Ordinary to have the foresaid restrictions as to the nature and construction of said fence duly enforced: *Quoad ultra*, dismiss the action, and decerns; and finds the said defenders liable in expenses, subject to modification; allows an account thereof to be given in, and when lodged remits the same to the auditor to tax and report.

Note.—The circumstances of this case are altogether peculiar. The old West Church of Greenock ceased to be used soon after 1839, when the church was removed to another site, under a decree of transportation by the Teind Court, which declared that the area of the old church should be used as a burying-ground in all time coming. Thereafter the church fell into a ruinous state. The churchyard continued to be used as the parochial burying-ground of Greenock until 1859, when it was shut up by public authority as being too

crowded. In 1863 the old church was restored for the purpose of being used as a *quoad sacra* church. The restoration of the church was carried through by a committee, of which the two defenders were members.

“The Lord Ordinary thinks it is clearly proved that the burying-ground in question has been very long in the possession of the pursuers’ family, at least for a century and a half, and that it was inclosed with a wall at all events since 1803. In 1838, while the old church was still used as the parish church, the wall was taken down and rebuilt by the pursuers, and a railing erected on the top of it, covering the whole area in the form of a cage. So matters remained until 1863. The Lord Ordinary has no doubt that, in this state of things, the pursuers were entitled to maintain right to exclusive possession of the burying-ground, and to keep it inclosed, so long at least as that right was not challenged by any party having right to the churchyard on the ground that the space occupied by the pursuers’ burying-ground was required for the necessary uses to which as a churchyard it is devoted.

“The pursuers’ ground abuts upon an outside wall of the church into which the railing erected in 1838 was fastened. In restoring the church in 1863 it was found that the railing had injured the stair, and it was removed without the knowledge of the pursuers. At the same time the inclosing wall was taken down and the pursuers’ ground thrown open. When the pursuers learned what had been done they objected, and required the committee to restore the wall and railing. Much discussion between the parties took place in consequence. The result at which the Lord Ordinary has arrived, on considering the correspondence and parole evidence, is that the committee, with the knowledge, and at least tacit consent of the pursuers, put up a kirb-stone or cope eight or nine inches high around the burying-ground, but that the pursuers still maintained their right to have such an iron railing or chain placed on the top of it as would be sufficient to prevent the ground being walked over. They were, however, willing to do this at their own expense. The committee had a great objection to this being gone, and on this point the parties finally differed.

“The objection of the committee to a railing or chain being put up was rested partly on the ground that it would in some degree impede the access to a door which is only used when the congregation are leaving the church, and partly on its injuring the appearance of the building. It seems doubtful whether it would materially affect the access more than the existing cope.

“As the question thus stood between the pursuers and the committee, the Lord Ordinary is of opinion that the committee were not entitled to prevent the pursuers erecting such a railing or chain as they proposed. He does not see that this could have been prevented by the heritors, if the church and churchyard had still been in full use as the church and churchyard of the parish, at least without some strong necessity for reclaiming the pursuers’ ground. But no objection has ever been taken to the pursuers’ exclusive possession and inclosure of their ground, by any parties having right to the churchyard as such. Neither the committee nor any body of persons whom they represent have any such right. They can only have right to access over it to the church, subject to the prior rights of all parties. Before they acquired

the church it had ceased to be a fabric dedicated to that use. It had in fact become a ruin, and was by decree of the Court appropriated to the purposes of burial. They could not, it is thought, by acquiring the church, and making alterations upon it, with reference to which the existing inclosure of a burying-ground became inconvenient, oust parties who had been in possession for an indefinite period of time.

"On the other hand, the Lord Ordinary thinks that the former railing having been improperly and injuriously attached to the stair of the church, the pursuers are not entitled to require it to be replaced, or to do so at their own hand. He is also of opinion that, looking to all that has passed between the parties, the pursuers are only entitled to erect such a railing or chain as is necessary to prevent the ground being walked over, and that they must do so at their own expense.

"The defenders maintain that, whatever may be the rights of the pursuers, the action has been improperly directed against them. The Lord Ordinary thinks that they are certainly not the proper parties against whom to direct conclusions for establishing the absolute and permanent right of the pursuers and their successors in all time coming, in the burying-ground, with the right of inclosing it. To that extent the action is dismissed, as well as in regard to the conclusions which the Lord Ordinary holds, as already explained, not to be well founded on the merits. But the pursuers having been interfered with, in regard to their rights to the burying-ground, by the committee, which is not a corporate or public body, they were entitled to direct their action against all or any of its members. The defenders do not ask that the other members of committee shall be called, and they have come forward to defend the action on grounds which, if well founded, would support the proceedings of the committee, and are entirely subversive of the rights of the pursuers. After the action was raised, both the defenders took an active part in causing an alteration to be made on the inclosing cope, for the purpose of restoring the ground to its former dimensions, showing that they took, along with other members of the committee, a control over the proceedings complained of. On the whole, looking to the course taken by the defenders, both judicially and extrajudicially, the Lord Ordinary is of opinion that they are liable to the limited decree now pronounced. But he thinks that the expenses in which they are found liable must be subject to a very considerable modification."

Both parties reclaimed.

GIFFORD and MACDONALD for pursuer.

MILLAR, Q.C., and BURNER for defenders.

The Court, after some discussion, made a remit to Mr Carrick, Master of Works in Glasgow, the import of which was, that the cope was not sufficient to carry an iron railing. On resuming consideration of the case, with the report, the Court appointed the defenders to surround the whole lair with a cope sufficient to carry the railing. The Lord Justice-Clerk did not dissent from the views of the Court, but concurred with hesitation. He was inclined to think that there was no desecration in walking over a lair in a churchyard, and that the proposed railing would be not only inconvenient, but even dangerous on dark evenings.

Agents for Pursuers—Hamilton & Kinneer, W.S.
Agent for Defenders—William Mason, S.S.C.

Friday, January 22.

EARL OF PERTH v. WILLOUGHBY D'ERESBY'S TRUSTEES.

Attainder — Service — Heir-apparent — Hæreditas jacens—Restoration Act—Heir-male—Title to Sue—Prescription—Production of Titles—Title to Exclude—Corruption of Blood—Satisfying Production—Unreduced Service—Alien. James Drummond, Duke of Perth, having been engaged in the rebellion of 1745, an act was passed which provided that he should submit to justice before 12th July 1746, and that if he did not submit he should be attainted of high treason. He died on 11th May 1746, before the period fixed for the submission, without issue, and was survived by his brother John, who was also engaged in the rebellion, was embraced in the statute, and survived the period fixed for submission. John was attainted, and the lands were seized by the Crown as forfeited. The estates thus seized were annexed inalienably to the crown by the Act 25 Geo. II, c. 41, and remained under charge of the Commissioners till 1785; but in 1784 an act was passed for restoring the estates to the heir-male of John Drummond, the attainted person. Titles were made up under the destination of the Act of Restoration. An action of reduction and declarator is now brought against the successors of the person who, in 1785, obtained a decree of declarator that he was at that time next heir-male of John Drummond, and the title libelled by the pursuer is that he is lawful heir-male in general to James Drummond who died in 1746 conform to service exped by him in that character. That service stands reduced. *Held* (1) That when the succession opened to John Drummond by the death of his brother James on 11th May 1746, he had a capacity to inherit, and although the Act of Attainder had a retrospective effect to a date anterior to his succession as heir-apparent, the estates passed to the Crown by John's attainder, and the pursuer's service could carry no right to the lands as in the *hæreditas jacens* of James; (2) That the forfeiture of an heir-apparent operates as a complete vesting of the Crown, not merely in the apparent-heir's right measured by his existing title, but in the estates themselves to which he is heir-apparent; (3) That the object and intention of the Restoration Act were to confer the estates on the heir-male and not the heir-male-general of the attainted person, and therefore, that in the latter character the pursuer had no title to sue the present action. Action therefore dismissed.

Circumstances in which held—(1) That a plea of prescription in absence of proof cannot be sustained without production of titles; (2) that a title to exclude could not be sustained without production of the title-deeds instructing it; (3) that a plea of corruption of blood in respect of the attainer of an ancestor would be a good answer against production of titles, but could not be entertained in presence of an unreduced service which presumes that the title libelled has been validly deduced.

Observed per Lord Justice-Clerk (Patton),