to these shares was vested in Robert and Arthur Ogle.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court answered the question of law in the affirmative.

Counsel for the First and Third Parties—Smith, K.C.—Balfour. Agents—Mackenzie & Black, W.S.

Counsel for the Second Parties—Younger. Agents—J. & J. Ross, W.S.

Saturday, February 6.

SECOND DIVISION.

[Lord Low, Ordinary.

FOLEY *v.* COSTELLO.

Succession—Testament—Writ—Holograph—Subscription.

Held that an unsubscribed holograph document beginning with the words "I will all the money I have," written below the words "I, Ethel F. Costello," which latter words were underlined and bore the appearance of a superscription, could not receive effect as a will, and that it was incompetent to prove by parole evidence that the writer intended it to receive such effect.

Skinner v. *Forbes*, November 13, 1883, 11 R. 88, 21 S.L.R. 81, and *Goldie* v. *Shedden*, November 4, 1885, 13 R. 138, 23 S.L.R. 87, *followed*.

This was an action at the instance of John Joseph Foley, 55 Park Avenue, Sandymount, Dublin, against Hubert Costello, 52 Witton Road, Aston, Birmingham, and others, the next-of-kin of the deceased Miss Ethel Frances Costello, 12 Wellington Street, Portobello. The summons concluded for declarator that the following writings, namely—"I, Ethel F. Costello, I will all the money I have to John J. Foley, who is to pay two legacies out of it to one of £100 to *Hattie* Harriet Mason, and one of £50 to Raymond St Clair Swanson. All personal belongings to go to Jessie St Clair Swanson, Glasgow. I wish my body to be cremated if it is possible to gratify that wish. I also wish Dr John Balfour, Portobello, to use means to ascertain beyond all possibility of doubt that death veritably and indeed taken place within forty-eight hours of my reputed death. I desire these measures to be taken if possible"—were holograph of the said Miss Ethel F. Costello, and formed a valid and effectual testamentary settlement of her estate and affairs.—[*The word "Hattie" above had a line drawn through it*].

The pursuer averred—"(Cond. 3) On or about Monday, 19th January 1903, Miss Costello drew out in her own handwriting a document in the following terms—[*The document is quoted above*]. (Cond. 4) On Monday, 19th January 1903 Miss Costello informed Miss Mills, a friend of hers who resided at the same address, that she had made her will. (Cond. 5) Again on Tuesday evening, 20th January 1903, Miss Costello, in conversation with Miss Mills, referred to the fact that she had settled her will, and informed her of its contents. These were identical with the contents of the document referred to. (Cond. 6) Early on Wednesday morning, 21st January 1903, Miss Costello came into the kitchen of the house at 12 Wellington Street, Portobello, and informed her landlady Mrs Blakely that she was dying. She asked Mrs Blakely to send for a doctor, and added that she had made her will. In point of fact the document above referred to was then pinned on her night-dress, where it had been affixed by Miss Costello herself, and it constituted the will she referred to. (Cond. 7) A doctor was immediately summoned, but Miss Costello became unconscious, and died about 6·30 a.m. on the morning of the said 21st January 1903. (Cond. 8) The document condescended on is holograph of Miss Costello. It was intended by her to constitute, and does validly constitute, her last will and testament."

The words with which the writing quoted above opened, "I, Ethel F. Costello," were underlined, and the writing proceeded on a new line, below these words, so that they occupied the position of a superscription.

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons."

On 12th December 1903 the Lord Ordinary (LOW) allowed the pursuer a proof of his averments, with the exception of those in condescendence 4 and 5.

Opinion.—"The pursuers in this action seek to have it declared that a writing of a testamentary nature, holograph of the deceased Miss Costello, and commencing 'I, Ethel F. Constello,' but not subscribed by her, constitutes a valid testamentary settlement.

"I do not think that it has ever been doubted that the proper and recognised method of authenticating a holograph will so as to show that it is not a mere draft or memorandum for future consideration, but the completed act of the writer, is that it should be subscribed with the writer's name. There has, however, been very considerable difference of opinion as to whether the want of subscription can be supplied by extrinsic evidence, and in particular by the evidence of facts and circumstances from which it may be inferred that the writing though not subscribed was the expression of the final and completed will of the writer.

"There have been a series of cases in the First Division in which the doctrine that a holograph will is not valid unless subscribed by the testator has been affirmed with increasing strictness.

"The first case was *Dunlop* v. *Dunlop* (1 D. 912), in which all the Judges, while affirming that rule, indicated the opinion that there might be circumstances in which effect would be given to a holograph will although unsubscribed.

"The next case was *Skinner* v. *Forbes* (11 R. 88), in which the rule laid down in the case of *Dunlop* was followed, but none of the Judges gave any countenance to the view which had been indicated in the latter case, that an unsigned holograph will might be validated by extrinsic circumstances. On the contrary, it was pointed out that if exceptions to the rule were admitted it would come, in each case, to be a balancing of probabilities.

"There was, finally, the case of *Goldie* v. *Shedden* (13 R. 138); there the alleged will was in these terms—'Mr Lewis Shedden I leave this to my sister Janet Shedden.' These words were written upon the back of a bank deposit-receipt, and evidence was led to the effect that the testator wrote the words upon the deposit-receipt shortly before his death, and handed the receipt to his sister Janet, who had nursed him during his illness, saying, 'This is yours, and no other one's,' and that she then took the receipt and put it in her chest.

"It was argued in that case that there could be no doubt that, as a matter of fact, Mr Shedden intended the writing to be a completed will, and that by delivering it he had put it out of his power to resile.

"The First Division, however, affirming the judgment of Lord M'Laren, held that as the writing was not subscribed no effect could be given to it.

"The result of these decisions seems to me to be that according to them subscription is essential, or practically essential, to the validity of a holograph will. Accordingly, if there were no other judgments of equal authority, I should have thought that the holograph writing in this case could not receive effect, and that the special circumstances averred (which I shall consider more particularly presently) could not affect that conclusion.

"There is, however, at all events one case in the Second Division which it is not easy altogether to reconcile with the view expressed in *Skinner* v. *Forbes* and *Goldie* v. *Shedden*. I refer to the case of *Russell's Trustees* v. *Henderson* (11 R. 383). The circumstances of that case were very special. Miss Margaret Russell some two years before her death handed a sealed packet to her nephew James Henderson, saying that it contained her will and was not to be opened until after her death. After her death the packet was found to contain a holograph writing of a testamentary nature, which was dated, but was not subscribed, and which commenced, 'I, Margaret Russell, do hereby make my last will and testament.' On the outside of the packet which was handed to Henderson was Miss Russell's signature, and the words 'James Henderson' also in her handwriting. Attached to the packet by a piece of string was an envelope addressed 'To James Henderson from Margaret Russell,' in Miss Russell's handwriting, and the envelope contained a letter holograph of Miss Russell, and dated the same month and year as the unsigned will, which stated that she had rewritten her will 'for this year,' and gave directions as to where she wished to be buried. The letter was signed 'Your loving Aunt Margaret.'

"The Second Division held (1) that the delivery of the packet to Henderson, along with the declaration which Miss Russell then made to him showed that she considered the writing to be a completed and effectual settlement of her affairs; and (2) that the signatures on the cover of the packet, and on the envelope of the letter, which was an appendage to the will, were sufficient authentication of the will under the hand of the testator.

"The special circumstances in that case were very strong, and it would not be easy to come to any other conclusion than that arrived at by the Second Division, if equivalents to subscription of a holograph will are to be allowed. My impression, however, is that the learned Judges who decided the cases of *Skinner* and of *Goldie* would have held the writing not to be valid as a will.

"I may also refer to the case of *Burnie's Trustee* v. *Lawrie* (21 R. 1015, 31 S.L.R. 841), in which the Second Division held that an unsubscribed holograph writing written below a subscribed holograph trust settlement, and containing bequests of specific articles, was effectual. That was a special case, and the judgment of the Court was given by Lord Young, with whom the Lord Justice-Clerk concurred. The only remaining judge present was Lord Rutherfurd-Clark, who, although he did not dissent, indicated a doubt as to the soundness of the conclusion arrived at.

"So standing the authorities, I think that it is impossible to regard the law upon the point as settled. It is therefore necessary to see what are the circumstances which the pursuers aver as taking this case out of the ordinary rule. These are contained in the articles 4, 5, and 6 of the condescendence.

"In article 4 it is averred that upon 19th January 1903 (the day upon which the will, which is undated, is said to have been written) Miss Costello informed a friend, Miss Mills, that she had made her will. In article 5 it is averred that upon the following day Miss Costello again spoke to Miss Mills about her will, and told her in terms identical with the writing in question what its provisions were.

"I am of opinion that in no view are these averments relevant to be remitted to probation. It seems to me that the recollection of a witness of what was said by the alleged testator in a casual conversation is plainly insufficient to make up for the want of subscription.

"The averments in article 6 are of more importance. It is there averred that early upon the morning upon which she died Miss Costello came into the kitchen of the house in which she resided, and said to her landlady that she was dying, and asked that a doctor should be sent for. Miss Costello, in fact, died shortly afterwards, and the writing in question was found pinned on to her night-dress. If that was

the case, I think that the natural inference is that she pinned the writing to her night-dress in order to secure that it should be seen and acted on.

"I confess that my own view is that, even assuming the averments to which I have last referred to be true, the writing cannot be regarded as a valid will.

"There have been, however, and I suppose still are, differences of opinion in regard to the authentication of holograph wills, and therefore I think that the proper course for me to follow is to ascertain the facts before pronouncing judgment. The case will then be ripe for final decision whatever view of the law be taken. Further, it may turn out that the true facts are not what the pursuers aver, and that the actual circumstances do not raise the questions of difficulty which I have been considering.

"I shall therefore allow the pursuers a proof of their averments, with the exception of those in articles 4 and 5 of the condescendence."

The pursuer reclaimed, and argued — Though if a holograph document was unsigned the presumption was against its being an expression of the writer's last will, yet if there were extrinsic circumstances rebutting that presumption, the Court would give effect to the writing as a will. In the present case there were relevant averments of extrinsic circumstances of which proof should be allowed without exception — *Dunlop* v. *Dunlop*, June 11, 1839, 1 D. 912; *Skinner* v. *Forbes*, November 13, 1883, 11 R. 88, 21 S.L.R. 81; *Goldie* v. *Shedden*, November 4, 1885, 13 R. 138, 23 S.L.R. 87; *Russell's Trustees* v. *Henderson*, Dec. 11, 1883, 11 R. 283, 21 S.L.R. 204. The directions as to cremation were undoubtedly intended to receive effect on the death of the testatrix, and her writing could not be accepted as only in part an expression of intention; her name at the beginning underlined was a signature.

Argued for the respondents — No proof should be allowed. Subscription was essential, and its place could not be supplied by parole evidence—Stair, iv. 42, 5; *Hamilton's Trustees* v. *Hamilton*, November 28, 1901, 4 F. 266, 39 S.L.R. 159.

At advising—

LORD JUSTICE-CLERK—In this case the deceased lady Miss Costello left a paper which bore to leave certain legacies, and which directed that means should be taken to make it certain that she was really dead if found apparently so, and that she desired to be cremated.

There is no subscription to the document, which begins with the words "I, Ethel F. Costello," a stroke being drawn below these words, and then follows the detail of the legacies and the other directions I have mentioned.

I am very clearly of opinion that this must be held to be an unexecuted document, and that no evidence is admissible to set it up. The words written at the top are in their sense a statement of who it is that proposes to do certain things, but I cannot hold it to be a signature of the person. But even were it otherwise, the document to be effectual required subscription. The cases which were quoted at the debate are very strong, and I think it must be held that without something which can be looked upon as a subscription to a document purporting to be a will it cannot receive effect. The law is well settled, and there is no special circumstance in the present case which could justify any modified view being taken. Indeed, my view is that where there is no subscription, circumstances cannot have any effect to set up as valid an unsubscribed will.

I am therefore in favour of recalling the interlocutor and dismissing the action.

LORD TRAYNER—The Lord Ordinary has allowed a limited proof in this case, and the pursuer maintains that he is entitled to a proof of his whole averments. I agree with the Lord Ordinary that the pursuer's averments of which a proof has been refused should not be remitted to probation. These averments are irrelevant, and if proved, or even admitted, would not aid the pursuer in establishing the alleged fact that the late Miss Costello had validly executed the writing produced and said to be her will. The proof which the Lord Ordinary has allowed has been allowed by him (as I understand his opinion) out of deference to certain decisions which tend to support the view that facts and circumstances may be supplied to give validity to a writing intended by the writer of it to be testamentary although it has not been subscribed. At the same time his Lordship has expressed his own opinion that even if the special circumstances here averred, and of which he has allowed a proof, were fully established, the writing founded on by the pursuer could not be regarded as a valid will. I agree with this opinion. I think the law of Scotland requires subscription as the essential and only admissible evidence of a concluded expression of will on the part of a testator. It has been so decided more than once. The cases of *Skinner* and *Goldie* referred to in the debate are I think conclusive upon this matter. In my opinion the rule is inflexible—no subscription no will—and to admit the consideration of facts and circumstances to modify old rules would be very inexpedient and dangerous. The case of *Russell*, relied on by the pursuer, was a very special case indeed, while the case of *Burnie's Trustees* was not so special. In so far as these cases conflict with the cases of *Skinner* and *Goldie* I am not prepared to follow them. That being my view, I think (as the Lord Ordinary evidently did) that no proof in the case of any or all of the pursuer's averments could avail him or entitle him to the decree he asks. I may notice, however, in a word, the one special circumstance the pursuer adduces as showing that this document, not subscribed by the writer of it, was intended by her as her testament disposing of her estate. It is that when she believed or knew she was dying she pinned the

document to the breast of her night dress. How the pinning of this document to her night dress would make it more of a will than if held in her hand or indeed upon her desk I cannot understand. But the terms of the document satisfy me that what induced Miss Costello to put it so prominently forward was not any wish to call attention to it as her direction for the disposal or distribution of her estate, but an anxious desire that the doctor should make certain her life was extinct before anything was done with her body by way of interment or cremation.

The defenders maintain that the action is irrelevant and should be dismissed. I am of that opinion.

LORD MONCREIFF—This is rather a hard case, because there is little or no doubt that Miss Costello understood and intended the document to be her completed will.

My impression, from an examination of the photograph of the will (but this is not apparent on the will as printed), is that in signing her name at the top she intended to authenticate the document. The name "Ethel F. Costello" is written as a signature, and underlined as signatures often are, and there is a space of about an inch between the signature and the body of the will. But superscription is confined to royalty, and I know of no case in which superscription by a subject has been sustained as equivalent to subscription, except in the case where a postscript, or even a codicil (though this is more doubtful), has been sustained though written under a signature. But in those cases the signature was really a proper subscription of the principal letter or will.

It is true that in the case of certain writs subscription has been dispensed with. But these were not testamentary writings; they were obligatory writings delivered for the purpose of being acted upon. "But," as Lord Fullarton says in the case of *Dunlop*, 1 D. 921, "that will not apply to testaments where there is no delivery during the lifetime of the granter." The question in such cases is not merely whether the document in question is a memorandum or a will. A man often writes his will in full, intending it to be complete, but delays to sign it as long as he can. One advantage of having a fixed rule making subscription obligatory is that so long as the subscription is not adhibited there is no risk, if he dies before subscribing it, of the document being set up as a complete will, contrary to the real intention of the testator.

It is not enough that there is no moral doubt of the writer's intention. In the case of *Dunlop* (1 D. 922) Lord Gillies said — "It is, however, my belief that the party died in reliance that this writing was a valid and finished will. It begins in a very solemn and deliberate manner, and proceeds to a general distribution of his estate. But I am nevertheless of opinion that we cannot give effect to it as it is not subscribed by him."

If, then, the deed is defective owing to the want of subscription, the next question is whether that defect can be remedied by parole proof of conversations and facts and circumstances tending to show that the testatrix intended the will to be a completed expression of her testamentary wishes. If proof were to be allowed at all I should not be disposed to limit it as the Lord Ordinary has done; but I am of opinion that the whole of the proof offered is irrelevant. I am prepared to follow the judgments in the cases of *Skinner* v. *Forbes* (11 R. 88) and *Goldie* v. *Shedden* (13 R. 138), and to adopt the interpretation put by the learned Judges in those cases on the passage in Stair, iv. 42-6.

The result is to hold that practically subscription is the test of a holograph will, and that the want of subscription cannot be supplied by parole proof. As I have already said, the enforcement of this rule may operate hardly in some cases, but it is safer that it should be understood to be the law and enforced than that there should be a conflict of parole evidence as to the deceased's intentions. The result therefore will be that while we hold that the document is holograph of Miss Costello we hold that it does not form a valid and effectual testamentary settlement.

LORD YOUNG was absent.

The Court recalled the interlocutor reclaimed against and dismissed the action.

Counsel for the Pursuer and Reclaimer—Salvesen, K.C.—Munro. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Defenders and Respondents — Orr—Findlay. Agents — Clark & Macdonald, S.S.C.

Counsel for Minor Defenders and Respondents and their *Curator ad litem*—T. B. Morison—J. A. Christie. Agents—Sibbald & Mackenzie, W.S.

Saturday, February 6.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CAMPBELL *v.* BARCLAY, CURLE, & COMPANY, LIMITED.

Master and Servant — Workmen's Compensation Act 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7 (2) (*b*), *First Schedule* (1) (*a*) (i)— *Dependants — Deserted Wife — Title of Mother to Sue.*

The Workmen's Compensation Act 1897 enacts—First Schedule (1)—"The amount of compensation under this Act shall be (*a*) where death results from the injury (i) if the workman leaves any dependants." . . . Section 7 (2)—"'Dependants' means (*b*) in Scotland such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon