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

the earnings of the workman at the time of his death."

Held that the mother of a deceased workman, who had been deserted by her husband and was in part dependent on her son at the time of his death, was not entitled, her husband being alive, to sue for compensation under the Act.

This was an appeal at the instance of Mrs Agnes Wilson or Campbell, 116 Renwick Street, Kinning Park, Glasgow, on a case stated under the Workmen's Compensation Act 1897, in an arbitration under that Act between the appellant and Barclay, Curle, & Company, Limited, shipbuilders, Whiteinch, Glasgow.

The Sheriff-Substitute (MITCHELL) stated as follows—"The appellant averred that her son Alexander Campbell was in the employment of the respondents, and that he fell into and was drowned at Princes Dock, Govan, in, on, or about a factory within the meaning of said Act belonging to the defenders.

"The appellant further averred in her condescendence—'The applicant, who is the mother of the deceased, is not a widow, but has been deserted by her husband, whose present address is unknown to the applicant, although she believes that he is in some part of South Africa. The applicant has not only been deserted by her said husband, but has received no aliment or assistance from him for a considerable time. At the time the said deceased Alexander Campbell met his death on 29th March last, the applicant was the only person dependent upon the deceased, and she was solely dependent upon him, as her husband had deserted her and was not contributing to her support, and she personally was only able to make a shilling or two occasionally as a charwoman. The said deceased Alexander Campbell on 29th March last was in the employment of the respondents, and was paid a weekly wage of 10s., which wages he regularly handed over to his mother after receipt of same from his his employers.' It is also averred that the appellant was 'solely and wholly' dependent on the deceased.

"The respondents admit that appellant was drowned at Princes Dock, Govan, they believe, on 27th March 1903, and that he was in their employment. They deny that his average weekly earnings were 10s. per week, and that the appellant was solely, or solely and wholly, dependent upon him. They do not admit the other foresaid averments of appellant. Respondents' first plea is 'No title to sue.'

"Parties were heard before me on the respondents' said plea of 'No title to sue,' and on 13th November 1903 I sustained that plea.

"I therefore dismissed the application, and found the respondents entitled to expenses."

The question of law for the opinion of the Court was — "Whether a married woman, who avers that her husband deserted her, and that his present address is unknown, although she believes he is in some part of South Africa, and that she has received no aliment or assistance from him for some considerable time, is entitled to sue an application under the Workmen's Compensation Act 1897 in respect of the death of a son, on whom she avers she was 'solely and wholly' dependent, save that she was able to make a shilling or two occasionally as a charwoman?"

Argued for the appellant—The Workmen's Compensation Act 1897 was to be liberally interpreted. The definition of "dependants" in the Act (sec. 7 (2) (*a*)) applicable to England and Ireland clearly included the appellant, and this was an element to be considered in construing the clause (sec. 7 (2) (*b*)) defining "dependants" in Scotland. No case was on its merits more worthy of favourable consideration than the case of a deserted wife in the position of the appellant. There was in fact one person, and one person only, who had suffered loss by the death of this man, viz., his mother, the appellant. The argument for the respondents proceeded wholly on a much too technical reading of sec. 7 (2) (*b*), whereas the real question to be regarded in determining whether a person was a "dependant" was the question whether in fact he or she was in a position of dependency on the injured workman. The desertion of the husband was equivalent to the renunciation of his rights, so that the case of *Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, 30 S.L.R. 916, did not apply. The position was that the husband, who was the only other person entitled to sue, had given up his claim or refused to press it, and in these circumstances the appellant had a right to sue—*Pollok* v. *Workman*, January 9, 1900, 2 F. 357, 37 S.L.R. 270, *per* Lord Justice-Clerk; *Darling* v. *Gray*, May 31, 1892, 19 R. (H.L.) 31, *per* Lord Watson, 29 S.L.R. 910.

Argued for the respondents—Section 7 (2) (*b*) of the Act, in defining "dependants" in Scotland, made it an essential condition that the person should be entitled, according to the law of Scotland, to sue the employer of the workman for damages or *solatium* in respect of the death of the workman. "Dependants" was thus defined by a reference to common law, and it was clearly settled that at common law a married woman could not sue in her own name for damages arising from the death of her son, her husband not having renounced his right of action—*Whitehead* v. *Blaik*, July 20, 1893, 20 R. 1045, 30 S.L.R. 916; *Aitken* v. *Gourlay & M'Nab*, March 4, 1903, 5 F. 585, 40 S.L.R. 398. It had been expressly decided, following the case of *Whitehead, supra*, that the mother of a deceased workman was not entitled, the father being alive, to sue for compensation under the Workmen's Compensation Act — *Barrett* v. *North British Railway*, July 11, 1899, 1 F. 1139, 36 S.L.R. 874. The fact of the husband being in desertion was in no sense a renunciation of his right to sue, for it did not affect his liability, if he could be found, to aliment his children, or the liability of his children to aliment him—*Foxwell* v. *Robertson*, May 31, 1900, 2 F. 932, 37 S.L.R. 726.

LORD PRESIDENT—The question in this case is whether a wife who has been deserted by her husband, and has received no aliment from him for a considerable time, is entitled to claim compensation under the Workmen's Compensation Act 1897 from the employers of a son of the marriage, by whom she was in part at least supported, when he was accidentally drowned while in their employment.

The following appears to be the material facts—The appellant's son, while in the employment of the respondents, was drowned on 29th March last by falling into the Princes Dock, Govan, in, on, or about a factory belonging to the defenders, within the meaning of the Act. The appellant is not a widow, but she has been deserted by her husband, whose present address is unknown to her, although she believes that he is in some part of South Africa, and she has received no aliment or assistance from him for a considerable time.

At the time when her son was drowned she was dependent, and was the only person dependent, upon him, and she is only able to make a shilling or two occasionally by acting as a charwoman. Her son received from the respondents a weekly wage of 10s., which he regularly handed over to her.

The respondents plead that she has no title to sue, and the Sheriff-Substitute has sustained this plea.

The answer to the question depends upon the construction and effect of the provisions of the Workmen's Compensatiou Act 1897, by the First Schedule (1) (*a*) (i) of which it is, *inter alia*, provided that where death results from the injury, if the workman leaves any "dependants" wholly dependent upon his earnings at the time of his death, the sum payable shall be ascertained as therein stated; and by section 7 of the Act it is, *inter alia*, declared that "dependants" means (*b*) in Scotland such of the persons entitled, according to the law of Scotland, to sue the employers for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death." The answer to the question put in the case therefore in my judgment comes to depend upon whether the appellant would have been entitled according to the law of Scotland to sue the respondents for damages or *solatium* in respect of the death of her son if his death had been caused by fault on their part.

It is well settled as a general rule in the law of Scotland that a married woman whose husband is alive is not entitled to sue an action for damages arising from the death of one of her children. Thus in *Whitehead* v. *Blaik* (20 R. 1045) it was held that a married woman, even with the consent and concurrence of her husband, had no title to sue for damages in respect of the death of her son, her husband not having renounced his right of action. Again, in the case of *Barrett* v. *North British Railway Company* (1 F. 1139) the Court (following *Whitehead* v. *Blaik*) held that the mother of a deceased workman, whose parents were in part dependent upon him, was not entitled, the father being alive, to sue for compensation under the Act. It is not alleged in the present case that the appellant's husband is dead, but only that he has deserted her, so that the question arises whether his desertion is equivalent for the purposes of the present question to his death, and I am of opinion that it is not. In this connection I may refer to the case of *Aitken* v. *Gourlay & M'Nab* (5 F. 585), in which it was decided that a woman who had divorced her husband for desertion, and who alleged that she did not know where he was, or whether he was alive, had not a title to sue an action for damages for the death of one of the children of the marriage against persons to whose negligence it was alleged that the death was due.

The decided cases appear to me to establish that a person in the situation of the appellant is not, according to the law of Scotland, entitled to sue the employers of one of her children for damages or *solatium* in respect of the death of such child under the circumstances stated in the case, and I therefore think that she is not a "dependant" of her son within the meaning of section 7 of the Workmen's Compensation Act of 1897. But if this is so she is not entitled to insist in her claim under that Act.

For these reasons I am of opinion that the question put in the case should be answered in the negative.

LORD ADAM — The answer to the question in this case depends on the construction of section 7 (2) "dependants" (*b*) of the Workmen's Compensation Act 1897—[*His Lordship quoted the section*]. It is obvious from this clause that before a claim can be insisted on under the Act (1) the claimant should be a person entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman, and (2) the claimant should be wholly or in part dependent upon the earnings of the workman at the time of his death. Now, there is no question that the claimant here was solely dependent on the deceased workman. Accordingly, the only question is whether the claimant is one of the persons who by the law of Scotland are entitled to sue the employer for damages or *solatium* in respect of the death of the workman. It is perfectly settled that if the claimant (the deceased man's mother) had been living with her husband she would have had no right to sue for damages. The right to bring such an action belonged solely and entirely to the husband. Here the claimant has been deserted by her husband. But the husband none the less retains his right to sue such an action of damages. The fact that the husband has not brought such an action does not affect the legal question or confer a right on the wife to sue. It is unnecessary to say more, as the matter is conclusively settled by the cases to which your Lordship has referred. Accordingly I am of opinion that the appeal should be refused.

LORD M'LAREN—I agree with your Lordship and Lord Adam as to the conditions under which this question is raised, and also as to the manner in which this question should be answered. The condition of the statute is that the person who institutes a claim must be in a position to raise an action for damages or *solatium* against the employer, supposing that the employer were in fault. Now, the claimant in this case might, if she survived her husband, have a claim to institute such an action; but again, if she should predecease her husband, she not only has no claim but never would have a claim. I cannot read the statute, when it gives a definition of persons who are entitled to raise an action of damages, as meaning that you are within the class if you have the possibility at some future time, and under events which may never occur, of coming within the definition. What is plainly meant is that at the date of making a claim against an employer the claimant must be a person who in the event contemplated would be entitled to raise an action of damages. Now, I agree with your Lordship that as the father of the deceased young man is in life, although living apart from his wife, he is the only person who could raise such an action, and that the mother, who is not in that position and is unable to comply with the statutory requirements, cannot do so.

LORD KINNEAR concurred.

The Court dismissed the appeal.

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

Counsel for the Respondents — Wilson, K.C.—Younger. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, February 6.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SMITH *v.* HARVEY.

Writ—Sale of Heritage—Improbative Writ Adopted as Holograph.

Circumstances in which *held* that a contract of sale of heritage entered into by an offer and acceptance, which were both written by the law-agent for the seller and bore to be "adopted as holograph" by the respective parties, was not binding on the purchaser.

Observations on the mode of validating improbative writs by the words "adopted as holograph."

Contract—Consensus in idem—Acceptance Less Full than Offer.

A purchaser offered to buy a lodging-house, with the fittings and fixtures therein, and the goodwill of the business there carried on. The seller accepted the offer to purchase the lodging-house, fittings, and fixtures, but made no mention of the goodwill.

Opinion (*per* the Lord President) that there was no *consensus in idem* between the parties.

Opinion (*per* Lord Kinnear) *contra.*

Process—Summons—Principal and Accessory Conclusions—Conclusions for Implement or Damages—Conclusions for Implement Dismissed.

In an action against the purchaser of a house, concluding that he should be ordained to implement the contract of sale, and, failing implement, for damages, the Lord Ordinary dismissed the action so far as concluding for implement as premature, but found the defender liable in damages. The pursuer did not reclaim against the interlocutor dismissing the conclusions for implement, and before the case was heard in the Inner House altered the subjects which he alleged he had sold.

Opinion (*per* Lord Kinnear) that as the pursuer could not obtain a decree for implement he had no right to damages.

This was an action at the instance of Edward Harvey, spirit merchant, Lochgelly, against John J. Smith, lodging-house keeper, 88 Candlemaker Row, Edinburgh, concluding that the defender should be ordained "to implement and fulfil in all respects his part of the missives of sale of the subjects in Lochgelly used by the pursuer as a lodging-house, with the fittings and fixtures therein, and the goodwill of the business carried on in the premises, entered into betwixt him and the pursuer, dated the 5th day of May 1902, by accepting a valid disposition containing all usual and necessary clauses executed by the pursuer in his favour of all and whole these premises in High Street, Lochgelly, used as a lodging-house and belonging to the pursuer, with the fittings and fixtures therein and the goodwill of the business carried on in the premises, and tendered to him, and also by making payment to the pursuer of the sum of £1200 sterling, the agreed-on price and value of the said premises in Lochgelly and others, with interest."

There was a further conclusion "that in the event of the defender failing within one month from the date of the decree to follow hereon to implement the foresaid missives of sale" he should be ordained to make payment to the pursuer of the sum of £250 in name of damages.

The pursuer founded on an offer made by the defender to the pursuer, and on a letter of acceptance by the pursuer, both dated 5th May 1902. The offer of the defender, which was produced, bore that the defender offered "to purchase from you the subjects in Lochgelly used by you as a model lodging-house, together with the fittings and fixtures therein, and the goodwill of the business carried on in the premises, at the price of £1200," on the following conditions—(1) that entry should be given by 1st June 1902, when the price should be payable; (2) of the said price the