Saturday, November 10.

FIRST DIVISION.

BEATTIE, PETITIONER.

Husband and Wife—Parent and Child—Custody of Children.

A petition was presented by a husband whose wife had left his house, for custody of their son aged fourteen months. The wife then raised an action of separation and aliment on the ground of cruelty, and when the petition was heard, moved the Court to sist it until the determination of the action. Motion *refused*, and petition *granted*, on the ground that there were no such allegations in the action as to the husband's moral character as, even if proved, would disentitle him to the custody of the child.

This was a petition by George James Beattie, builder, Edinburgh, for the custody of his child. The petitioner set forth that he was married on 6th October 1881 to Ellen Eliza Watson, and that he and his wife lived together until 17th February 1882, when she without cause deserted him; that since then she had been living with her mother and brother in Glasgow; that on 20th September 1882 a son was born of the marriage, viz., William Beattie; and that the petitioner requested his wife to deliver up the child, but she refused to do so.

Mrs Beattie lodged answers, in which she stated that she was forced to leave her husband owing to a consistent course of unkindness and cruelty, which ended in actual assault. Along with these answers was produced a copy of the summons and condescendence in an action of separation and aliment against the petitioner on the ground of cruelty, and containing a conclusion for custody of the child. This action had been called when parties were heard upon this present petition. Her allegations in it were that the petitioner had used, on several occasions, violent, insulting, and threatening language to her, had greatly alarmed her by his violent conduct, and on one occasion had struck her and seized her by the throat, thrown her down, and pressed his knee upon her side so as to bruise it. Her only averment as to his character in other respects was "the habits of the defender are such as to render him not a proper guardian for the child, which if it were committed to his care, would, the pursuer believes, suffer in its training and character."

Petitioner's authorities—*Bloe* v. *Bloe*, June 6, 1882, 9 R. 894; *Lilley* v. *Lilley*, January 31, 1877, 4 R. 397; *Lang* v. *Lang*, January 30, 1869, 7 Macph. 445; *Stewart* v. *Stewart*, June 3, 1870, 8 Macph. 821.

The respondent argued — The petition should be sisted until the decision in the action of separation and aliment — *M'Farlane* v. *M'Farlane*, March 9, 1847, 9 D. 904; 24 and 25 Vict. cap. 86, sec. 9; *Symington* v. *Symington*, March 18, 1875, 2 R. (H. of L.) 41—Lord Chancellor at p. 43, and Lord O'Hagan at p. 46.

At advising—

LORD PRESIDENT—The only question here is, whether we should accede to the motion of the respondent to sist this petition until the issue of the action of separation and aliment?

Now, if this action of separation which has been raised had contained allegations against the moral character of the husband, or to the effect that his association with the child would be detrimental to its physical or moral welfare, and if those allegations had been pointedly and well made, I do not say that I would not have been prepared to accede to this motion. I find, however, nothing but allegations of cruelty following on threats and bad language; and even supposing that these are proved, and that decree of separation is granted upon the ground of that cruelty, it seems clear upon authority, and especially having regard to the case of *Lang*, that that decree would not be a good answer to a petition by the father for custody of the child.

I think therefore that this motion must be refused, for otherwise it would imply a departure from the course followed in previous petitions.

LORD DEAS concurred.

LORD MURE — I agree with your Lordships. If there were in the action of separation and aliment a relevant allegation against the character of the father, against his fitness to take charge of the child on account of his moral character, I should not say that I would not be disposed to sist the petition until the facts were investigated in that action. That is what was done in the case of *M'Farlane*. There the Court were of opinion that the facts should be ascertained. But here we have no allegations of that sort, and therefore I think the petition should be granted.

LORD SHAND—I am of the same opinion, for notwithstanding the able argument of Mr Murray, I think the petitioner has failed to distinguish this case from the cases of *Bloe*, *Lilley*, and *Lang*.

In *Lang's* case it was held, even after decree of separation and aliment on the ground of cruelty, that the father was entitled to the custody of two pupil children. Here we are asked to sist this petition till the action is decided, but even if it be assumed that the mother will succeed in the action, still *prima facie* on the case of *Lang* the father will be entitled to the custody of the children. That being so, we could not refuse this petition unless we were to go back upon the cases which have been decided, and throw doubt upon the decision in the case of *Lang*, which I am not prepared to do.

The Court pronounced this interlocutor—

"Find that the petitioner is entitled to the custody of the child of the marriage between him and the respondent: Therefore ordain the respondent forthwith—that is to say, on Friday next at 12 o'clock noon—within the Grand Hotel, Glasgow, to deliver up the said child to the petitioner, or to anyone authorised by him to receive delivery; but reserving to the respondent right of access to the said child, viz.—The petitioner to send the child to the respondent in the Royal Hotel, Princes Street, Edinburgh, on a visit to her once a week on any day she may select, to remain with the respondent from 11 A.M. to 6 P.M., the whole expenses incidental to such visits being defrayed by the respond-

ent, and the respondent to be also entitled, but without any attendant, to visit the said child in the petitioner's house without the petitioner being present, at any time she may desire; *quoad ultra* continue the cause that either party may hereafter move the the Court in the event of any change of circumstances: Find no expenses in the cause due to either party."

Counsel for Petitioner—J. P. B. Robertson—Dickson. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Counsel for Respondent—Trayner—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Tuesday, November 13.

FIRST DIVISION.

SPECIAL CASE—SKINNER AND OTHERS.

Succession — Writ — Holograph Writing — Superscription — Unsigned Testament.

In the repositories of a deceased person there was found at his death a testamentary writing holograph of him, commencing with his name, and complete in all respects except that it was unsigned. *Held* that in the absence of his signature it could not receive effect as his will.

Alexander Skinner, Newtown of Abbotshall, Kirkcaldy, died unmarried on 1st December 1882, leaving certain heritable property, and leaving also moveable estate which was of very small value, and was not referred to in this Special Case. After his death a holograph writing of a testamentary character was found in the deceased's repositories, lying in an escritoire where he kept papers of importance, folded and laid in a pigeon-hole or compartment along with other documents. This writing commenced as follows—"I, Alexander Skinner, being desirous to settle my affairs so as to prevent all disputes in regard to them after my death, do hereby nominate and appoint my niece Maggie Skinner Forbes, residing with her mother Mrs Margaret Skinner or Forbes, 291 High Street, Kirkcaldy, and the said Mrs Margaret Skinner or Forbes, both of them, to be my sole executors of my whole estates, heritable and moveable, real and personal, and I hereby convey to them all the writs, titles, and vouchers, and all such documents as is required by me to enable them to execute my last will and testiment, and which is to be as follows"—The deceased then proceeded to dispose of his heritable and moveable estate, giving directions also as to the disposal of the residue. The document concluded with these words—"And this written at Newtown of Abbotshall by my own hand this 17th day of July 1882." There was no signature.

This was a Special Case stated for the opinion of the Court upon the question whether this document was a valid testamentary settlement of the deceased's heritable estate, the parties to which were Robert Skinner, the heir-at-law of the deceased, of the first part, and Miss Margaret Skinner Forbes and others, heritable disponees under the said holograph settlement, of the second part.

Argued for the first party—This document not being signed by the deceased was invalid, and therefore insufficient to convey the heritable property which belonged to the deceased, which therefore belonged to his heir-at-law—Stair, iv, 42, 6; Bell's Dict. i. 82; Menzies 131; *Currence* v. *Halkett*, 2 B. Supp. 121; *Titill*, Dec. 6, 1610, M. 16,959; *Dunlop* v. *Dunlop*, June 11, 1839, 1 D. 912; *Baird* v. *Jaap and Others*, July 15, 1856, 18 D. 1246; *Speirs* v. *Home Speirs*, July 19, 1879, 6 R. 1359.

Argued for the second parties—The document was valid to convey the heritable property according to the rights and interests therein specified. Subscription was merely one of the evidences of completed intention, and not absolutely the only evidence of it — Act 1540, c. 117; *Hamilton* v. *White*, June 15, 1882, 9 R. (H. L.) 53; Dickson on Evid. 757, 759; *Gillespie* v. *Donaldson*, December 22, 1831, F.C., 10 S. 174; *Weir* v. *Robertson*, February 1, 1872, 10 Macph. 438.

At advising—

LORD PRESIDENT—The question in this case is whether an alleged testamentary paper left by the late Alexander Skinner, and found in his repositories, is invalid by reason of its being unsubscribed. The body of the deed is holograph, and it bears to dispose of the entire estate of the deceased. It contains a nomination of executors, and it concludes as follows—"And this written at Newtown of Abbotshall by my own hand this 17th day of July 1882." The following circumstances are also admitted — "After the funeral the deceased's repositories in his house at Newtown aforesaid were searched, and the only document of a testamentary character found therein was the document above mentioned. It was discovered lying in an escritoire where he kept papers of importance. It was folded and laid in a pigeon-hole or compartment of the escritoire along with other documents. It is holograph, and contains *in gremio* the name of the granter, but it is unsigned."

Now, as to the general rule that holograph writs in order to be binding on the granter require subscription, I do not think there can be any dispute, and if that is the general rule, it surely has very special application to testamentary writings, for they are almost invariably found undelivered in the repositories of the person making them.

I do not think it will be disputed now that the rule laid down by Lord Stair in the passage cited to us correctly expounds the law of Scotland. It is important to observe the connection in which Lord Stair states his general proposition. It is under this title—"Probation by Writ," and after mentioning what had been up to that time the general practice, he makes this statement in section 3 of the title—"Of a long time the attestation of writs was by the superscription or subscription of the name, designation, or title of the party. Kings do superscribe and their secretaries subscribe to their epistles, or to a breviate or docquet of larger writs, because princes have not the time to peruse the whole body, wherein there is much formality. Others do only subscribe." Thus clearly superscription is the prerogative of royalty, and no man except the king can bind himself in that way.

After describing the introduction of our rules as to the formal attesting of writs, Lord Stair goes on in the 5th section to express his great prefer-