SUMMER SESSION, 1880.

COURT OF SESSION.

Thursday, May 13.

FIRST DIVISION.

[Lord Adam, Ordinary.

SCOTTISH LANDS AND BUILDINGS COMPANY (LIMITED) *v.* SHAW.

Sale—Heritage—Completion of Contract—Holograph.

A missive offer to purchase heritage was written and signed in the offerer's name by his brother and with his authority. The offer was accepted. *Held* that as the offer was not holograph of the offerer he was entitled to resile.

The question in this case related to the following missives of sale:—"Robert Gracie, Esq., 3 So. Charlotte Street, 7th October 1878.—Sir, I beg to offer for the tenement 42 North Bruntsfield Place, consisting of shop No. 43, occupied by myself, and the three houses above the said shop, occupied respectively by Taylor, Pattison, and Shaw, together with blinds, grates, gasfittings, and all other fixtures belonging to said tenement, the sum of three thousand pounds stg. (£3000), money payable on Whitsunday term, May 15th, 1879. Waiting your early reply, GEORGE SHAW." Robert Gracie to Mr Shaw.—"5th November 1878.—Dear Sir, I am now authorised to accept your offer of 7th ulto., to purchase the tenement No. 42 North Bruntsfield Place, consisting of the shop No. 43, presently occupied by you, and three dwelling-houses above, together with the whole fixtures and fittings so far as they belong to the proprietors, at the price of three thousand pounds stg., with entry at Whitsunday 1879, when the price will be payable.—ROBERT GRACIE."

It appeared that at the date of the above offer Shaw, the offerer, was disabled from writing by an injury to his hand, and that the offer was both written and signed by his brother in Shaw's name and by his authority. No *rei interventus* was alleged to have followed on these missives.

The pursuers of the action were the Scottish Lands and Buildings Company (Limited), for whom the acceptor Gracie acted as factor, and the defender was the offerer Shaw. The action concluded for implement of the contract of sale set forth in the above missives. The defender pleaded, *inter alia*—"The documents libelled not being probative, do not constitute a concluded agreement, and the action cannot be maintained."

The Lord Ordinary (ADAM) sustained this plea-in-law. He added this note to his interlocutor:—

"*Note.*—By a missive offer, dated 7th October 1878, which was accepted by the pursuers on 5th November 1878, the defender agreed to purchase from the pursuers certain subjects in North Bruntsfield Place at the price of £3000. A dispute arose between the parties as to whether a sum of £27, 10s., or a sum of £19, 10s., should be inserted in the disposition of the subjects as the feu-duty payable therefor. The pursuers have raised the action to enforce their view of the agreement, and it has been met by the plea which the Lord Ordinary has sustained, and which is, that the documents founded on not being probative do not constitute a concluded agreement.

"The letter of 7th October 1878, bearing to be addressed by the defender to Mr Gracie, the pursuers' factor or agent, and which contains the defender's offer for the subjects, was written by the defender's brother, and signed by him with his brother's name. It is therefore not holograph of the defender. No *rei interventus* is alleged to have followed on the missives. It appears to the Lord Ordinary to be essential to the constitution of the contract that both missives should be holograph—*Goldston* v. *Young*, Dec. 8, 1868, 7 Macph. 188. The letter was undoubtedly so written and signed by the defender's instructions, and it was maintained that his brother was his agent in the matter, and that the letter being holograph of him, was sufficient, and was binding on the defender—*Whyte* v. *Lee*, 22d Feb. 1879, 6 R. 699. The defender's brother, however, was not acting as the defender's agent in the matter. He merely acted as his amanuensis. Neither does it appear to the Lord Ordinary that the fact that the letter sent by the defender to the pursuer bore *ex facie* to be written and signed by the defender himself will bar the defender from now maintaining the legal pleas arising from the true character of the document. If, as the Lord Ordinary thinks, it is essential in all bargains as to heritage that the

documents constituting the contracts should be probative, there appears to the Lord Ordinary to be no room for the plea of personal exception."

The pursuers reclaimed, and argued—This case differed from *Goldston* v. *Young*, for here the whole deed was in one handwriting, and was thus holograph of the writer, who, if he acted as the defender's agent, would bind him—*Whyte* v. *Lee*. At anyrate, the defender was barred *personali exceptione*. There ought to be a proof of agency.

Authorities—*Goldston* v. *Young*, Dec. 8, 1868, 7 Macph. 188; *Home* v. *Morrison*, July 3, 1877, 4 R. 977; *Whyte* v. *Lee*, Feb. 22, 1879, 6 R. 699.

Argued for the respondents—The question was one of solemnity, and therefore the respondents could not be barred *personali exceptione*. It would have been an entirely different case had the brother signed in his own name. Then a proof of agency might have been allowed.

Authority—*Sinclair* v. *Waddell*, Dec. 8, 1868, 41 S.J. 121.

The case was argued before the Lord Probationer (Lee), who pronounced this judgment:—An absolute contract for the sale of heritage is said to have been concluded here by two documents called missive letters. The first of these purports to be an offer by George Shaw, whose name is appended to it, and is addressed to Robert Gracie. The other is an acceptance by Gracie. The defender pleads that this offer is not binding on him, because it is not his holograph writ, and the Lord Ordinary has sustained this plea.

It is admitted that the document is entirely in the handwriting of the defender's brother, and that it is signed by him for the defender. It is further admitted that it was sent by the defender to the pursuers' agent, and the pursuers contend that the defender having delivered the missive has adopted it, and that he is not entitled to plead that it is not holograph.

I am humbly of opinion that the Lord Ordinary is right. I think the contention that this document is to be regarded as holograph because it is all written in one hand is untenable. It is not holograph of the granter. And with regard to the argument that the defender is barred *personali exceptione*, I also think that the Lord Ordinary is right. The law requires that in order to constitute an effectual contract for the purchase of land writing is necessary, and that the writing must either be authenticated under the Act 1681 or be holograph. If not, there is *locus pœnitentiæ* so long as matters are entire. I think that this applies to the present case.

It has been suggested that the law of adoption might apply. I do not doubt that the defender might have adopted this missive. But it has always been held that the adoption must be in writing, and there is no such writing here. If the pursuers had desired to take advantage of the *locus pœnitentiæ*, they would have been entitled to resile when they discovered that the writing was not holograph. The defender could not have pleaded that he had adopted it. I therefore think that the interlocutor of the Lord Ordinary is right, and should be affirmed.

At advising—

Lord President—The contract which it is sought to enforce in this action is a contract for the purchase and sale of heritage; and it was conceded in argument that unless the missives by which the contract is alleged to have been constituted are holograph in the proper sense of the term, they cannot be the foundation of such a contract, because a sale of heritage cannot be effectually made except by writing, and by writing which is either tested or holograph. That is a rule of law which admits of no exception or qualification. In the present case it is not disputed that the missive acceptance is holograph of the person who subscribed it, and who undoubtedly was authorised to act for the pursuers. The offer is in a different position. It was not written by the person by whom it bears to have been signed, and against whom it is sought to be enforced. Both the body of the writing and also the signature are in another handwriting, and therefore are not holograph of the granter—*i.e.*, of the person whom it is sought to bind by it. I have never heard it doubted until the present case that where you speak of a holograph writing you mean a document which has been written by the person who is sought to be, or who is supposed to be, obliged by it. It is therefore needless to go further. This is not a holograph writing in the proper sense of that term.

The argument founded on the case of an agent writing on behalf of a principal, and signing the missive in his own name, has no application to the present case. That writing binds the agent, and only binds the principal if the agent was duly authorised; but if he can fix responsibility on his principal, then the principal also is bound. In such a case the writing is undoubtedly holograph, but it is holograph of the agent, not of the principal, and will bind the principal only where the agent has been duly authorised.

I do not think that it is necessary to go into analogies, because I think they have no application whatever. To speak of a document being adopted can have no application where the rule of law is that the writing must be of a certain character, which the writing here is not. The sale of heritage must be complete in itself. It cannot be eked out by parole, but must be entirely in writing, either holograph or tested, and here it is neither the one nor the other.

Lord Deas—I have not the slightest doubt that the judgment of the Lord Ordinary is right. If anything is settled in the law of Scotland, it is that in the sale of heritage the writings by which it is constituted must be either tested or holograph. No doubt improbative writings may be set up by homologation, but there is nothing of that kind here. The bargain depends on writings, and writings alone. The question as to the sufficiency of these writings is one of solemnity, not of intention. It is just as necessary when writings said to be holograph are relied on that they should be holograph of the granter, as in the case of tested writings that they should be regularly tested. The whole question here therefore is, whether the offer of 7th October 1878 is holograph of the defender? Admittedly it is not. That being so, it is of no materiality that it is holograph of someone else. The case of *Goldston* v. *Young* really does not require any discussion to show that the offer did not bind the defender. The law has always been clear in regard to heritage that a tested or holograph writing is

necessary, and it is too clear for argument that this document is not holograph of the granter.

Lord Mure—I am of the same opinion. The action is laid on a written contract, which is stated in the summons and condescendence to have been constituted by missives of offer and acceptance, of which the former is alleged to be under the hand of the defender and the latter under that of Mr Gracie, as representing and authorised by the pursuers. And the action is plainly so laid, because it is settled law that the sale of heritage cannot be constituted by parole. But it now appears that the offer was not written by the defender, but by his brother in his name; and what is proposed is that this brother should be allowed to prove that this was done by the instructions of the defender. It is therefore—as your Lordship in the chair has remarked—a proposal to eke out the defective missive by parole evidence, which I concur in holding is inadmissible.

Lord Shand—I am also of opinion that the Lord Ordinary's judgment should be adhered to. The argument for the pursuers does not appear to me to be affected by the case of *Goldston* v. *Young*, because in that case the body of the deed was in one handwriting and the signature in another. On the other hand, the pursuers cannot take advantage of cases of avowed agency, such as the case of *Whyte* v. *Lee*, where one part of the agreement is contained in a document entirely holograph of the agent of one of the parties and signed by him, and it is either admitted or proved that the agent was duly authorised. In the present case the writer did not profess to act as the agent of the granter. The Lord Ordinary has put the case clearly—"The defender's brother, however, was not acting as the defender's agent in the matter"—that is, in the transaction of the proposed purchase—"he merely acted as his amanuensis." The question, then, is, whether when a man authorises another to act as his amanuensis, and to sign his name, the writing is holograph of the person giving such authority? I am of opinion that it is not. The writing must be holograph of the granter, *i.e.*, of the person who proposes to bind himself. The pursuers' argument would seem to make a deed of settlement effectual without the signature of the granter, if written by an amanuensis only, who with authority added in his own handwriting the name of the testator as the testator's signature. Such a writing would, I think, be clearly invalid, as wanting the requisite solemnities of an effectual deed or writing.

An agent will bind his principal by a holograph writing if the agent has been duly authorised by his principal. But unless the writing in its material parts is holograph of the granter, whether the granter be principal or agent, I agree in holding that it will not be binding in a contract of sale of heritage.

The Court adhered.

Counsel for Reclaimers (Pursuers)—Solicitor-General (Balfour)—Lang. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Respondent (Defender)—Robertson—Darling. Agent—Thomas White, S.S.C.

Wednesday, May 19.

FIRST DIVISION.

[Lord Craighill, Ordinary.

YOUNG *v.* JOHNSON AND WRIGHT.

Agreement — Pactum illicitum — Contra bonos mores—*Settlement granted* ob turpem causam *Valid as regards Innocent Third Party.*

A mutual settlement executed by L. and a married woman with whom he had cohabited for upwards of ten years, and with whom he continued to live until her death, on the narrative of their mutual love and affection, and for the benefit of the survivor of them, contained a legacy of specific articles of jewellery by the woman to her niece. In an action by the niece for implement of the legacy, it was pleaded in defence that the whole settlement was void, as having been granted *ob turpem causam, i.e.*, for the continuance of the granter's immoral union. *Held* that the above facts did not warrant the inference that the deed was granted *ob turpem causam*, and decree given accordingly for the value of the articles bequeathed.

Opinions (*per* Lords Deas and Shand) that even had it been proved that the deed was null and void as granted *ob turpem causam*, the legacy to an innocent third party was clearly independent of any such consideration, and would remain good.

Peter Johnson and Elizabeth Wilkinson were married in 1858. About the year 1861 they separated, and for many years previous to her death, which occurred in March 1879, Mrs Johnson cohabited with a certain George Leitch. On 2d August 1877 she and Leitch executed a mutual settlement, whereby, on the narrative of their mutual love and affection, they nominated and appointed the survivor of them to be the sole executor and universal legatory of the predeceasor, conveying and bequeathing to him or her the whole moveable and heritable estate which should belong to them or either of them at the time of such predeceasor's death, under burden of payment of the predeceasor's debts and funeral expenses, and also of the maintenance in comfortable circumstances during her life, out of such estate of Elizabeth Young, who resided with them, and was a niece of Mrs Johnson. The mutual settlement further contained this clause—"And further, I, the said Elizabeth Wilkinson, with the advice and consent of me, the said George Leitch, and we both, with joint assent and consent, leave and bequeath to the said Elizabeth Young the whole wearing apparel and body-clothes, with the wardrobe containing same, together with all the jewellery of whatever description, including gold watch and appendages, belonging to or possessed by me, the said Elizabeth Wilkinson, at the time of my death, and wherever the same may be deposited or found, free of all expense or charges against the said Elizabeth Young, in token of the love and affection we mutually bear to her." Shortly after Mrs Johnson's death, this niece Elizabeth Young went to live with an aunt Mrs Hendrie, to whom the