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

body-clothes and some articles of jewellery belonging to the deceased were transferred by Leitch for her niece. Peter Johnson, with the advice and assistance of a Mr Hugh Wright, obtained possession of this jewellery from Mrs Hendrie, and subsequently pawned it.

The present action was raised by Elizabeth Young to have Johnson and Wright ordained to deliver up to her the specific articles of jewellery in question, or alternatively to pay £55 and interest in lieu thereof.

The defender Johnson averred on record—"The alleged mutual disposition and settlement is null and void. It was *ultra vires* of this defender's wife to execute any such deed without his consent and concurrence. What belonged to her at her death was his, and said alleged settlement is ineffectual to convey any part thereof, the 6th section of the Intestate Moveable Succession Act (25th May 1855) providing that where a wife shall predecease her husband, the next-of-kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof. Said alleged mutual disposition and settlement is also null and void, being between an adulteress and her paramour, and he cannot take any benefit under such a deed, or anyone else." He pleaded—"(5) The mutual disposition and settlement founded on being null and void, and *ultra vires* of the female granter, on the grounds stated, affords no title to the pursuer to claim the articles in question."

The Lord Ordinary (CRAIGHILL), after proof led, gave decree against the defenders conjunctly and severally for £30, as a reasonable estimate of the value of the jewellery, and in respect of the failure of the defenders to make the said articles forthcoming.

The defenders reclaimed, and argued—(1) The articles in question having been accumulated by Mrs Johnson after she left her husband, and was living with Leitch, were not *inter paraphernalia*, but belonged to her husband, the defender Johnson. (2) The settlement on which pursuer's claim rested was null and void, having been granted *ob turpem causam*, for the cementing and continuance of an immoral relation between the granters. Though this did not appear *ex facie* of the deed, it was inferred from the fact that they had been living together for many years, and continued to do so until Mrs Johnson's death. The deed being null and void as between the granters, no third party, even though quite unconcerned with the *turpis causa*, could take benefit under it, and the special legacy to pursuer fell with the rest of the provisions.

Authorities—*Johnstone* v. *M'Kenzie's Executors*. Dec. 4, 1835, 14 S. 106; *Hamilton* v. *Main*, June 3, 1823, 2 S. 356; *Smith* v. *White*, 1866, 1 L.R., (Equity Cases) 626; *Durham* v. *Blackwood*, 1622, M. 9469.

At advising—

LORD PRESIDENT—The jewels claimed by the pursuer in this action were left to her by a mutual settlement executed by George Leitch and Elizabeth Wilkinson, who was better known as Mrs Johnson, wife of the defender Peter Johnson, and two defences have been insisted in against the claim under this settlement. The first of these is to the effect that the jewels were not the property of Mrs Johnson, and that she had no power to bequeath them because they were not paraphernal, and the second is that the mutual settlement alluded to was granted *ob turpem causam*. These are the two objections.

Now, it appears from the evidence that these jewels were acquired by Mrs Johnson after she had separated from her husband and was living in adultery with Leitch, and it was maintained that articles which would be *inter paraphernalia* in ordinary circumstances, do not, if acquired while the wife be so living apart and in adultery, assume the character of paraphernalia—*i.e.*, that a woman so living cannot have paraphernal articles, unless such as belonged to her while she was living with her husband. I know no law in support of this proposition; and no exception to the rule that articles of this description belonging to a married woman are her property because they are paraphernal.

The second objection is that the settlement in question was granted *ob turpem causam;* and this is explained as meaning that this settlement was made in consideration of the granter's continuing to live together in adultery from the date of the deed till the death of Mrs Johnston. This is a matter of fact; no doubt it may be inferred from circumstances, but still it is a matter of fact whether or not the deed was granted for that consideration. Now, Mr Nevay stated to us the circumstances from which this inference was to be drawn, viz., that these persons were living together in adultery at the date of execution of the settlement, and for at least ten years previous, and that they continued to do so until Mrs Johnson's death. These are the whole circumstances from which the inference is to be drawn as to the consideration for which this mutual settlement was granted; and I think they are quite insufficient to justify any such inference in fact. On the face of the deed itself, and looking to the whole circumstances, there seems to have been no need for any such inducement to the continuance of this intercourse. It had become a part of their settled life; there was no proposal to interrupt it, and no desire to do so on either side; therefore the natural consideration, *i.e.*, to benefit the parties, is the consideration which one naturally adopts in the absence of any facts and circumstances leading to an opposite inference. The object of the settlement is plainly that in the event of Leitch's predecease Mrs Johnson should succeed to his goods. She had some small property of her own,—or rather, as it seems, of her husband's,—and whether they hoped that Leitch might be able to get that we do not know; but one other object of the settlement was to leave to the girl Elizabeth Young the wearing apparel, body-clothes, jewels, &c., belonging to Mrs Johnson, and, as far as that is concerned, there is no motive necessary beyond the desire to benefit this young woman. So, in regard to this legacy, and in regard to the settlement otherwise, there is no need to infer that a *turpis causa* had anything to do with the matter. The fact of living in adultery does not incapacitate anyone from the ordinary duties of citizenship, nor from what used to be called in the Roman law *testamenti*

factio; therefore there is no foundation for the inference in fact sought to be deduced. That is the conclusion I have come to as regards the property of these jewels, &c., and as regards the defender Johnson, who it seems has obtained possession of and pawned them, he is apparently not now in a condition to redeem them, and decree for their value must accordingly go out against him.

Lord Deas—It was contended by Mr Nevay that a married woman can have no paraphernalia if she is living with a man, not her husband, in adultery. I know of no law to support that. The fact of her being a married woman entitles her to have paraphernalia, and notwithstanding her adultery she remains a married woman so long as not divorced.

It was further contended that the mutual deed of settlement, by one of the clauses of which Mrs Johnson bequeathed the jewels in dispute to her niece, was a deed which came under the rule of law as to *turpis causa*, and is null out and out. Now, supposing it to be assumed that as between the aunt and her paramour the deed was to be regarded as a deed *in turpi causa*, I know no law which makes a bequest in it to an innocent third party necessarily a nullity. The niece here claims under the deed a bequest made to her by her aunt of these paraphernal articles. The aunt had a right to make that bequest independently altogether both of her husband and of her paramour. The jewels did not belong either to the husband or to the paramour. If the bequest had been made by the paramour to his wife's niece, it might have been suggested that the bequest to the niece was calculated to encourage the aunt to continue with him in adultery. But how the bequest by the aunt to her own niece could be expected to operate as an encouragement to the paramour to continue in adultery with the aunt has not been made intelligible. The law on this subject was carried to extreme lengths in some old cases, which Mr Nevay very naturally cited in his favour. But the law is not now administered with such unreasonable jealousy as it then was. There is one undoubted fact here which to my mind is of itself conclusive against the husband, viz., that by whomsoever these jewels might be claimed, being paraphernal, they could not belong to or be claimed by the husband Johnson, who neither had nor has anything to do with them.

Lord Mure concurred.

Lord Shand—I am of the same opinion on both points. As to the argument that the articles in question are not paraphernal, I have no further observation to make.

As to the point made against this provision by Mrs Johnson to her niece, I agree that even had it been shown that the stipulation as between Leitch and Mrs Johnson was bad, on the ground that so far as that stipulation was concerned the deed was granted *ob turpem causam*, yet this legacy to the niece would remain perfectly good. That is obviously reasonable. This part of the deed is simply a testamentary disposition by Mrs Johnson of her own property in favour of her own niece, separable and separate from all else in the deed, and it is impossible to show or to conceive that it was granted in reference to any immoral consideration which might be held to affect another part of the deed. Had it been a provision by Leitch, there might possibly have been an immoral consideration, but in the case of the aunt, affection for her niece is the obvious motive, and we have nothing to do with other considerations. I agree with your Lordships that there is not on the evidence proof to show that the deed was granted for an immoral consideration, and we have no sufficient ground to lead to the inference that it was so.

The Court adhered.

Counsel for Pursuer (Respondent)—Rhind—J. M. Gibson. Agent—D. Howard Smith, L.A.

Counsel for Defenders (Reclaimers)—Nevay. Agent—Robert Broatch, L.A.

Wednesday, May 19.

SECOND DIVISION.

[Lord Young, Ordinary.

HOPE JOHNSTONE *v.* HOPE JOHNSTONE AND OTHERS.

Entail—Heir in Possession—Provisions to Younger Children—Revocation.

A, the son of an heiress of entail, in his marriage-contract, to which his mother was a party, undertook to bind himself and the succeeding heirs of entail, if he should succeed to the entailed estate, to make payment to his younger children of a sum equal to three years' free rent of that estate. On succeeding to the estate, A executed in 1819 a bond in implement of the provisions of the marriage-contract, and in conformity with them; he subsequently executed three bonds of different dates, for sums amounting in all to £40,000, in favour of his younger children. By a trust-disposition and settlement dated 1853 he recalled all deeds of a testamentary character, with the exception of certain specified deeds which did not include the bond of 1819, and in 1867 he placed the bond of 1819 and the three subsequent bonds on record; at A's death three years' free rent amounted to £56,000.—*Held* (1) that A was bound by the provisions of his marriage-contract, and could not revoke the bond of 1819, granted in satisfaction thereof, and recorded; (2) that in point of fact it had not been revoked; and (3) that therefore the younger children were entitled to a sum of £56,000, the bonds of provision for £40,000 being taken to be *pro tanto* in satisfaction of the prior bond.

Question—Whether the obligations in the marriage-contract would have bound the heirs of entail if no bonds had been executed?

Succession—Cumulative Bequests—Debitor non presumitur donare.

A, in addition to the bond of provision of three years' rent of the entailed estate, bequeathed by his trust-disposition a sum of £7500 to his younger children out of his