specified particular acts of unchastity in November and December 1865 and January 1866.

In the course of cross-examining the woman upon whom the crime was said to have been committed, the prisoner's counsel proposed to ask her—Have you ever asked men into your house at night during the last six or seven years?

The ADVOCATE-DEPUTE objected to the question, because the only particular acts of which notice was given in the defence were limited to three months before the crime charged.

Replied, That the question was asked in support of the general averment of bad character. The question would be incompetent if it related to an isolated act six or seven years ago, but the panels offered to connect any such act by a continuous course of unchaste conduct down to the date of the alleged crime—Reid, 18th December 1861, 4 Irv., 124.

Lords COWAN and JERVISWOODE refused to allow the question to be put. The proof of isolated acts of unchastity six or seven years ago was irrelevant, and the defence contained no averment excepting as regards acts within three months of the crime.

After the examination of some witnesses, the charge was withdrawn and the panels liberated.

COURT OF SESSION.

Tuesday, May 15.

FIRST DIVISION.

BROWN *v.* JOHNSTON.

Process — Reclaiming Note — Competency. A reclaiming note in a suspension presented without a full copy of the note and answers appended to it, refused as incompetent.

William Brown presented, in the Bill Chamber, a note of suspension of a decree of removing pronounced against him by the Sheriff of Edinburgh, which the Lord Ordinary officiating on the Bills (Benholme), after answers were lodged, refused. Brown reclaimed.

JOHNSTONE, for the respondent, objected to the competency of the reclaiming note (1) that there was not appended to it a full copy of the answers to the suspension, as required by sect. 75 of the Act of Sederunt of 11th July 1828, which enacts "that there shall be printed and appended to every such reclaiming note a full copy of the bill, or bill and answers, and no reclaiming note shall be received or advised without having such copy annexed thereto;" and (2) that there was not appended a print of the inferior court record, as required by sect. 6 of the Act of Sederunt of 24th December 1838, which enacts that there shall be appended to the reclaiming notes "in all suspensions of final judgments of inferior judges a copy of the note of suspension, with the statement of facts and note of pleas-in-law, and the answers thereto, and also of the summons and defences, or record (if any), in the inferior court." He cited the cases of Simpson *v.* Somers, 22d May 1852, 14 D. 773; and Dickson *v.* Shirreff, 9th June 1830, 8 S. 895.

W. N. M'LAREN, for the reclaimer, argued that the Act of Sederunt of 1838 was directory only, and that it was subsequent to, and must be held to have repealed, the previous Act of 1828. But, even if the latter Act were still in force, it only required the printing of the note and answers, which had been done in this case, although, by a printer's mistake, it had been omitted to print that part of the answers containing the respondent's counter-statement of facts. He cited Meldrum *v.* Crichton, 1st July 1841, 3 D. 1132, and Fairman *v.* His Creditors, 5th December 1840, 3 D. 192.

The LORD PRESIDENT—I think the provision of section 75 of the Act of 1828 is in force. No doubt, under the other Act, the provision is only directory and not peremptory, and if that Act had stood alone the question here would have been different. But in the Act of 1828 there is a sanction of nullity. The only answer made is that there has been an accidental omission. I hold the counter-statement to be a part of the answers. As to the omission to print it being accidental, I am not disposed to receive that as an excuse. It is an important omission. If it be the fact that the printer made a mistake, it was the duty of the agent to correct it; and if there has been negligence on the part of the agent, I think that is a thing which we should not encourage. It is therefore our duty to refuse the note.

Lord CURRIEHILL concurred.

Lord DEAS—There is here a degree of slovenliness that we should not encourage. In the table of fees there is a charge allowed to an agent for revising proofs.

Lord ARDMILLAN also concurred, and said that there should be no doubt left that section 75 of the Act of 1828 is still operative.

The reclaiming note was accordingly refused as incompetent.

Agent for Reclaimer—A. Hill, W.S.

Agents for Respondent—Scott, Bruce, & Glover, W.S.

DUFF, ROSS, AND COMPANY, AND ANOTHER *v.* KIPPEN AND ANOTHER.

Proof—Trust—Writ or Oath—Act 1696, *c.* 25—An averment that a conveyance of machinery was not absolute, but merely in security, can only be proved by writ or oath under the statute 1696, c. 25.

This was a suspension and interdict presented by Duff, Ross, & Company, engineers in Glasgow, and John Ross, residing there, against Richard Kippen, now or lately residing in Glasgow, and William Anderson, accountant there, his commissioner or factor. The complainers sought to have the respondents interdicted from advertising or otherwise offering for sale, and from selling or disposing of, and from removing or taking away, the moveable machinery, implements, apparatus, and utensils at present within the premises No. 289 Garscube Road, Glasgow, and known as the Oakbank Engine Works, and which premises are now occupied by the complainers.

It appeared that John Duff was, prior to 1861, proprietor of certain heritable subjects at 289 Garscube Road, Glasgow, in which he carried on the business of an engineer, and that in 1858 he burdened these subjects to the extent of £1700, granting a bond and disposition in security over them for that sum. In 1861 a further sum of £2000 was paid to Duff by the respondent Kippen, and Duff granted a disposition conveying to him "all and whole the foresaid subjects in Garscube Road, known as the Oakbank Engine Works, together with the whole machinery, implements, apparatus, and utensils situated therein, and specified in an inventory thereof, docqueted and subscribed as relative thereto."

The complainers averred that this disposition, although *ex facie* absolute, was in reality granted

in security of a loan of money, and that in so far as it pretended to convey the moveable property, it was ineffectual, because there never had been any change of possession. The complainer Ross had in 1863 become a partner of the firm of Duff, Ross, & Co., and paid his share of the capital thereof on the footing that the tools and machinery were the absolute property of Mr Duff and at his disposal.

The respondents averred that the conveyance was in reality absolute, that no back letter had been granted, and that on the day following the execution of the disposition a lease had been granted by Kippen to Duff of the whole works and machinery, which lease had been followed by possession.

The respondents pleaded *inter alia* that it was incompetent to qualify or restrict the absolute right conferred by the conveyance, except by the respondent's writ or oath, or to found upon any understanding that the absolute conveyance was merely in security.

The Lord Ordinary (Barcaple) on 3d March 1866 found that it was incompetent for the complainers to prove that the disposition by Duff to the respondent Kippen was granted in trust or as a security, otherwise than by the writ or oath of the said respondent, in terms of the Act 1696, c. 25. His Lordship added the following

"*Note.*—The point debated was, whether the Act 1696 applies to the case. The Lord Ordinary thinks that it does. There are *two* classes of cases to which the statute has not been applied. In the one class a deed *ex facie* absolute is challenged as having been *a fraud in its inception*—as where the creditors of a bankrupt, or the trustee in his sequestration, challenge it as having been colourably granted for the purpose of protecting his property from the diligence of his creditors. In the other class of cases the existence of a latent trust is sought to be *established by a third party*, who is not in right of the truster, for some purpose different from that of enforcing implement of the alleged trust obligation. Middleton *v.* Rutherglen, 23 D. 526, was such a case. In the present case the complainers claim to be in right of the alleged truster, as purchasers and assignees from him; and in that capacity they seek to make good the latent obligation, which they offer to prove against the respondent as trustee. The Lord Ordinary does not think that there is authority or principle for exempting such a case from the operation of the statute.

"Some reference was made to the first section of the Mercantile Law Amendment Act, but there was no argument as to the application of that clause to the present case, and the Lord Ordinary expresses no opinion on the point."

The suspenders reclaimed.

A. R. CLARK and R. U. STRBCHAN, for the reclaimers argued that this was neither in form nor substance such a case as was struck at by the Act 1696. The statute did not apply to moveables which could be transferred, and were usually transferred, without writing.

GIFFORD and ORR PATERSON supported the Lord Ordinary's interlocutor.

The LORD PRESIDENT—In this case the real struggle betwixt the parties is possibly as to the right to what are called the moveables; but that is not the only question presented to us, and not at all the question we have to dispose of. The suspenders have set forth an averment and a plea that the title of Mr Kippen, which conveys both heritage and moveables, is truly a trust title. But it appears to me that this is a very convenient stage for ascertaining whether we are to deal with the moveables on the footing that the right is one of trust or not. The Lord Ordinary thought so, and has pronounced the interlocutor reclaimed against. I cannot say that I am convinced that the interlocutor, so far as it goes, is wrong. The deed here bears to be *ex facie* an absolute deed. Although the suspender Ross claims as coming in right of Duff, yet I cannot help looking to the fact that his right is derived from the same person who gave the right, whatever it was, to Mr Kippen. I see nothing in this case to take it out of the rule of the statute. What may become of the case afterwards I don't say, but it will be very difficult to hold that the deed is absolute as to the heritable property, and only a security as to the moveable.

Lord CURRIEHILL—What is sought to be interdicted is a sale of certain moveables which the suspender Ross says are in his possession. He objects to the sale on two grounds. First, he says the conveyance to Kippen, though *ex facie* absolute, is truly in security. Second, he says the subjects in dispute are the *ipsa corpora* of moveables, the right to which passes without writing, and that his possession of them alone gives him a title to them. The interlocutor of the Lord Ordinary leaves the second ground entire, and if the suspender can make out his allegations in regard to it, he may be yet quite successful, although he fails on the other ground. But the question decided is as to the effect of the written title. It has been found that the suspender's allegations as to that can only be proved by writ or oath. I think this decision is quite right. There might have been a question as to whether this is a trust in the sense of the Act. But I think that at common law, irrespective of the statute, when a person holds an absolute title, neither the granter of it nor any person founding upon his right, either as heir or singular successor, is entitled to dispute the validity of that title, unless he undertakes to prove his allegations by the writ or oath of the grantee. I think the objection to any proof in this case except writ or oath is good, both under the statute and at common law. The whole merits of the case, however, remain entire.

Lord DEAS—This case involves the question whether a deed is absolute or a security. If it is a security, I have no doubt it is a trust, and a large number of the cases which have occurred under the Act 1696 have been of that description. It is said that the Act does not apply to moveables. I rather think that that is now said for the first time. The cases are innumerable in which the Act has been applied to moveables. It is, I think, equally clear that wherever the Act applies to the cedent it applies to his assignee. That was never doubted. There was a question whether it applied to third parties other than the truster and trustee, or those in their right, but I never heard it said that if it applied to a party it did not also apply to all who derived right from him.

Lord ARDMILLAN concurred.

The reclaiming note was accordingly refused, with expenses.

Agents for Suspenders—Maclachlan, Ivory, & Rodger, W.S.

Agents for Respondents—J. & A. Peddie, W.S.

SECOND DIVISION.

RITCHIE'S TRUSTEES *v.* CRAIG'S TRUSTEES.

Legitim — Election — Homologation. — A child's marriage contract trustees having sued her