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

father's trustees for payment of *legitim*, they pleaded in defence—(1) that as tutors to the child they had elected to take, on the child's behalf, the provisions of her father's settlement; and (2) that the child herself had homologated her father's settlement in her marriage contract. Circumstances in which held that both these pleas were irrelevant.

This is an action of count and reckoning brought by the trustees appointed under the antenuptial contract of Jane Paterson Craig, daughter of the late Alexander Craig, of Tradeston Mills, Glasgow, and John Ritchie, lieutenant in the Bombay Artillery. The defenders are the trustees nominated in the trust-settlement of Mr Craig, of date 26th January 1843. The conclusions of the action are that the defenders should count and reckon with the pursuers in respect of Mr Craig's moveable estate, so far as they are in right of legitim through Mrs Ritchie. By Mr Craig's settlement the liferent of the whole of his estate was given to his widow, it being declared alimentary, and burdened with the maintenance and education of the children of the marriage. The fee was given to the children equally, but their shares were declared not to vest until the death of their mother. Mr Craig died in 1844, survived by his widow and two children, Alexander Craig and Jane Paterson Craig. His trustees having accepted, then entered upon their office. By the trust-settlement they were also appointed tutors and curators to the children, but no judicial inventories were made up by them, in terms of the Act 1672, c. 2. The children continued to live with and to be supported by their mother; and the trustees, as directed by the trust-settlement, paid over to her the annual proceeds of the estate. Alexander Craig, the son, died in pupillarity in 1850. In 1859 Jane Paterson Craig, being then a minor, was married to Mr Ritchie, and an antenuptial contract of marriage was entered into between them, to which her mother Mrs Craig was also a party. By this contract Mrs Craig conveyed an annuity of £250 yearly in favour of her daughter, Mr Ritchie, and the children of the marriage, successively as they might survive; and Mrs Ritchie made over to her husband all her property, heritable and moveable, and whatever she might conquest or acquire, during the subsistence of the marriage. The pursuers in 1861 obtained themselves decerned executors-dative to Alexander Craig, the son. Mrs Ritchie died soon after her marriage, and in minority.

Defences were put in by Mr Craig's trustees, in which they stated that they had accepted both of the office of trustees and of tutors and curators, and in the latter capacity had elected to take on behalf of the children the provision given to them by their father's settlement, that being more for their advantage in view of the obligation on the part of the mother to maintain the children and the extent of the estate than the legitim to which they were entitled. The defenders stated the legitim as at the date of the truster's death to amount to £40 yearly to each of the children. The pursuers, on the other hand, claim £5000 as the value of the joint legitim at that date.

The defenders proposed issues of election on their part on behalf of the children, and homologation by Mr and Mrs Ritchie of Mr Craig's deed of settlement. The pursuers objected to both issues as unsupported by relevant averment.

N. C. CAMPBELL and C. T. COUPER, for the pursuers, argued—By the death of Mr Craig a right to legitim vested *ipso jure* in the children, to entitle them to which it was not necessary that they should make a claim. By the death of Alexander Craig, the son, his share accrued to his sister, Mrs Ritchie, and she did nothing up to the period of her death, which occurred in minority, to renounce it. The trustees were not entitled, as tutors and curators, even admitting that they properly accepted and acted as such, to renounce the children's right to legitim, and it is nowhere relevantly averred that they did so. The pursuers were entitled to maintain the action as trustees nominated under the marriage contract of Mrs Ritchie and her husband, her legal assignee.

The SOLICITOR-GENERAL and A. MONCRIEFF, for the defenders, answered—As to the share of legitim claimed through Alexander Craig, the son, the action is untenable, in respect that his tutor, on his behalf, elected to take the provisions under his father's settlement, and that the said election was for the manifest advantage of the pupil. The claim of the pursuers, as in right of the late Jane Paterson Craig or Ritchie, is barred by the homologation of her father's deed of settlement on the part of Mrs Ritchie and her husband in their antenuptial contract of marriage. By accepting the provisions made by Mrs Craig in the marriage contract Mr and Mrs Ritchie waived their legal rights, both through Mrs Ritchie and her brother.

The LORD JUSTICE-CLERK said—The shape which this question has taken in the course of the discussion is a little different from what appears on the face of the papers; but the real question is whether the trustees of Mr Craig, who are called as defenders, have stated any relevant defence. It is quite true that the case does not come to an end even if there is no relevant defence; but we are in a position to dispose of the defences, which, I think, are irrelevant. The settlement of Mr Craig gave a total liferent of his estate to his widow, and divided the fee among the children in certain proportions only if they survived their mother. If they predeceased, they took nothing under the settlement. The children were in pupillarity at the time of their father's death, and they had a right to legitim independently of the provision in their father's settlement; and so far as I can see, their claim of legitim would not have excluded their provision under their father's settlement, because it does not say that the contingent gifts of the settlement were to be in full of legitim. In that state of matters, I doubt whether any guardian could renounce claims of legitim for children. It may be said that the election may be necessary in certain circumstances where the election is for the benefit of the ward, and the administration of the estate renders it indispensable in the interest of third parties that the election should not be postponed. But I see no ground of any such necessity here. It does not appear to me that the administration of Mr Craig's estate would have been at all different whether the claim of legitim had been maintained or not. If not, then the widow got the whole liferent; and if it were, the result would practically still have been the same, because then the mother would have heen the administrator of the whole estate for herself and for her children. I do not see therefore, that there was any case of urgency which required the trustees to make the election which it is said they did. Further, assuming the trustees had a power to elect, it is quite clear they did not do it. They did not, in the first place, accept in terms of the Act of Parliament. The Act provides that no tutor or curator shall have power to accept the office until he has made up inventories and complied with other solemnities. Now, nothing having been done by the trustees of Mr Craig to

enter on their office, I do not see how they could make the election. They may have had an opinion in their own minds that the election of the provisions of the father's settlement might be a good thing for the children, but a mere opinion existing in their minds will hardly be accepted as an equivalent to the discharge of the office of tutor in regard to so delicate a matter as making an election; and therefore I look on all the averments from the 6th to the 10th of the defenders' statements as being entirely irrelevant.

The only remaining matter regards the averment made as to what occurred on Mrs Ritchie's marriage. Her brother died in pupillarity, and Mrs Ritchie succeeded to her brother's share of legitim, and therefore she was entitled to the whole of it if she was entitled to any part of it. Mr Ritchie claims as assignee of his wife, and there is no doubt about his title. But it is said that in the marriage contract Mr Craig made a handsome provision in the shape of an annuity, and it is said that Mrs Ritchie and her husband could not take this without homologating the settlement of Mr Craig. That depends, in the first place, upon whether they knew their legal rights. My impression is that all parties were unaware of their legal rights; and in these circumstances it is impossible to hold the acceptance by the daughter of a free gift from the mother as a renunciation of her legal rights. I am therefore of opinion that we should repel the defences, and remit the case to the Lord Ordinary to proceed with the accounting. But as the case does not end here, and the interests of Mrs Craig may be involved, I think it is proper that the process should be intimated to her.

The other Judges concurred; and the case was remitted to the Lord Ordinary.

Agents for Pursuers—Hill, Reid, & Drummond, W.S.

Agents for Defenders—Wilson, Burn, & Gloag, W.S.

Wednesday, May 16.

WHOLE COURT.

CAMPBELL *v.* CAMPBELL.

Declinator.—A Judge having declined on the ground that the mandatory of one of the parties was his brother-in-law, the declinator sustained.

Lord KINLOCH stated that the advocator, Mr Campbell of Boreland, was his nephew by affinity, being the son of his wife's sister, but that, after the recent decision in regard to the declinator of the Lord President in the case of Gordon *v.* Gordon's Trustees, he did not suppose that this relationship would be sufficient to entitle him to decline. But there was another party to this case—namely, General Campbell, who was mandatory for the advocator. He was his Lordship's brother-in-law, being his wife's brother. This relationship, his Lordship continued, was a clear disqualification, for it was decided in the case of Ommaney *v.* Smith, 13th February 1851, 13 D. 678, not only that a mandatory's brother-in-law could not act as judge, but also that procedure which had taken place for seven years, the judge being so related, fell to be quashed. He therefore declined to judge in this case.

The LORD PRESIDENT said that as there was one good ground for sustaining Lord Kinloch's declinator, as settled by the case of Ommaney, it was unnecessary to say anything as to the other. He thought they must sustain the declinator.

The other Judges concurred.

FIRST DIVISION.

TEASDALE *v.* MONKLAND RAILWAYS COMPANY.

Issue.—Form of issue in an action of damages for injuries sustained by a station-master when travelling on a railway engine, the defenders, the railway company, denying that he had any right to be on the engine at the time.

In this case the following issue was proposed by the pursuer:—

"Whether, on or about the 23d day of April 1864, the pursuer, while proceeding to Airdrie on one of the defenders' engines, was severely injured by a quantity of steam and boiling water suddenly issuing from the firebox in connection with the boiler, in consequence of the defective state of the said engine, through the fault of the defenders, to the loss, injury, and damage of the pursuer?"

The pursuer was station-master at Slamannan, but he alleged that the defenders, through their manager, had stipulated with him, as part of their contract with him, that they were to convey him on one of their engines from Airdrie to Slamannan every morning, and back to Airdrie every evening. This was denied by the defenders, and they objected to the issue proposed, that it did not include this disputed matter. They founded on the case of Hamilton *v.* Caledonian Railway Company, 18 D. 999, and 19 D. 457.

The Court altered the issue to the effect of adding after the word "engines," the words, "with the leave of the defenders."

Counsel for Pursuer—Mr Scott and Mr F. W. Clark. Agent—Mr D. F. Bridgeford, S.S.C.

Counsel for Defenders—The Solicitor-General and Mr Mackenzie. Agents—Messrs A. G. R. & W. Ellis, W.S.

SECOND DIVISION.

GARDNER *v.* M'GAGHANS.

(*Ante*, vol. i., p. 205.)

Reparation—Slander—New Trial. Verdict of a jury in an action of damages for slander set aside as contrary to evidence, and a new trial granted.

This was an action of damages at the instance of John Gardner, joiner, residing in Home Street, Edinburgh, against Mrs Mary Keddie, now wife of Michael M'Gaghan, and the said Michael M'Gaghan for his interest. The ground of action was that the defender, within her own residence in Edinburgh, falsely and calumniously accused the pursuer of having stolen her late husband's watch, and thereafter caused him to be apprehended and taken to the Police Office. The following issues were sent to the jury:—

"1. Whether, on or about Monday the 24th day of July 1865, and in or near the female defender's house in Spittal Street, Edinburgh, the female defender, maliciously and without probable cause, apprehended, or caused the pursuer to be apprehended, and thence conveyed to the Fountainbridge station of the Edinburgh City Police, to the loss, injury, and damage of the pursuer?

"2. Whether, on or about the 24th day of July 1865, and on the way between the female defender's house in Spittal Street and the Fountainbridge station of the Edinburgh City Police, the female defender did falsely and calumniously, in the hearing of Mrs M'Gregor,