At Whitsunday 1881 the defender, it was alleged, owed the pursuers £108, being the half-year's rent payable at that date, and the landlord then, under his right of hypothec, petitioned the Sheriff to sequestrate the furniture and other effects in the Beehive Inn, and in the premises connected with the inn, and the defender was alleged to be hopelessly insolvent and notour bankrupt.

The defender in a statement of facts declared that he never got possession of the cellar accommodation. He stated that operations were commenced for fitting up the cellar, when the proprietors were interdicted from proceeding with the work, and that in consequence he was compelled to use part of his stabling for cellar purposes. Considerable loss was, he alleged, occasioned thereby, and for that right of action was reserved. Among the defender's pleas-in-law were the following—"(2) The defender never having got full possession of the premises, he is not liable in the rent thereof. (4) In any view, the defender having claims arising out of his tenancy of the premises far exceeding any rent due, the present proceedings were nimious and oppressive, and ought to be stayed."

On the motion of the pursuer the Sheriff-Substitute ordained the defender to find caution for the expenses of the process. In a note the Sheriff said—"The present case does not seem to fall within the category of those in which the Court has relieved an insolvent and notour bankrupt from the necessity of finding caution for expenses as a condition of defending an action of a personal character brought against him. The present is an ordinary sequestration followed out by a landlord against a tenant in arrear. Of the latter's insolvency and notour bankruptcy there seems to be sufficient proof."

On appeal to the Sheriff-Depute the judgment of the Sheriff-Substitute was affirmed.

The defender then appealed to the Second Division of the Court of Session. He argued that caution is required of a bankrupt defender only in very exceptional circumstances, as when the defence stated is a frivolous one.

The Lords, without deciding whether caution should have been required or not, heard the defender's counsel on the merits, but did not call for any reply.

At advising—

Lord Justice-Clerk — I have always been averse to closing the mouth of a defender by ordaining him to find caution. I do not say that there are not circumstances in which that is not the right course, but it is always undesirable to put a man in such a position. The present case, however, is a clear one, for the defender has stated no relevant answer to this petition for sequestration. It turns out that the lease is dated in 1878, that the defender entered into possession, and that he paid two years' rent. He does not deny that the rent is in arrear, but he says there was a stipulation he should have possession of this cellar. I do not think he can set off an illiquid claim of that sort against the clear stipulation of the written lease. I think, therefore, that we should recall the interlocutor of the Sheriff-Substitute, and find that the defender has stated no relevant defence, reserving to him any claim of damages he may have.

Lord Craighill concurred.

Lord Rutherfurd Clark—I concur. I am always reluctant to compel a defender to find caution, and I am not much in favour of that course even where the defence is a frivolous one. It is much easier to repel the defence, as we propose to do here.

Lord Young was absent.

Counsel for Pursuers — Campbell Smith—Henderson. Agents—Horne & Lyell, W.S.
Counsel for Defender — Nevay. Agents — Charles & George Robb, L.A.

Tuesday, February 28.

SECOND DIVISION.

[Lord Fraser, Ordinary.

FORBES *v.* FORBES' TRUSTEES.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

Succession—Legacy—Intention of Testator—Condition.

A testator directed his trustees to pay a sum of money to the adopted daughter of his brother "contingent on her declaring in writing that she shall not renew her engagement of marriage with J. M." She offered to sign a declaration in these terms, which, however, the trustees refused to accept, averring that since the death of the testator a marriage had been arranged to take place between them. In an action at her instance to obtain payment of the legacy, the Court *held* that the trustees were entitled, in order to comply with the manifest intention of the testator, to withhold payment until she further declared in writing that "no engagement of marriage between me and J. M. subsists at the present time." Thereafter she married the said J. M., and the Court assoilzied the defenders.

Dr George Feddes Forbes left a will the 18th purpose of which was in the following terms:—"I bequeath to Miss Jane Fraser or Forbes, the adopted daughter of my late brother Duncan George Forbes of Millburn, the sum of £1000, in token of my opinion of her devoted care and attention to my late brother during his last illness. This bequest I, however, make contingent upon her declaring in writing that she shall not renew her engagement of marriage with Mr John Maccallum." Miss Jane Fraser or Forbes, the legatee, accordingly wrote to the trustees acting under Dr Forbes' will asking the nature and form of the declaration which they proposed to take from her. In reply to this letter they wrote that the declaration "should be in the terms pointed out by Dr Forbes' will." Thereafter they sent a draft declaration which they proposed should be made by Miss Forbes. But this declaration contained, besides the condition mentioned in the said last will and testament, the following statement:—"And considering that when I was with Dr Forbes at 33 Queen Street, Edinburgh, during his last illness, my engagement of marriage with Mr Maccallum was broken off, and that no engagement of marriage between him and me sub-

sists at the present time." This Miss Forbes refused to sign, offering to sign a declaration strictly in terms of the condition in Dr Forbes' will. Thereafter the trustees declined to pay her the legacy except under the condition prescribed by them. In these circumstances Miss Forbes raised the present action to have them ordained to pay her the sum of £1000 sterling, the amount of the legacy.

She pleaded—"(1) The condition attached to the said legacy being illegal, must be held *pro non scripto*, and the pursuer is entitled to payment of the said legacy without making the declaration referred to in the trust settlement of the deceased. (2) *Esto* that the said condition is entitled to receive effect, the pursuer being the party entitled under the testament to payment of the said legacy, and having offered to purify the condition attached to it, decree ought to be granted, with expenses. (3) The defenders, as trustees foresaid, on receiving the declaration mentioned in the said last will and testament, are liable in payment to the pursuer of the said legacy."

The defenders explained in reply that since the death of the testator, or at all events since the date of the said trust-settlement, the pursuer's engagement with Mr Maccallum had been renewed, and they believed and averred that a marriage had been arranged to take place between them. In these circumstances the defenders were advised that the granting by the pursuer of the declaration proposed by her was a mere evasion of the condition intended by the testator to attach to the legacy in question, and not truly a compliance with it. They consented to pay the legacy on the conditions prescribed by them.

They pleaded—"(1) In the circumstances which have emerged, the granting of a declaration in the terms proposed by the pursuer is not a purification of the condition under which alone she is entitled to claim the legacy in question, and the action accordingly ought to be dismissed. (2) On a sound construction of the trust settlement of the late Dr Forbes, it was his intention that the pursuer should not be entitled to the legacy in question if she at any time renewed her engagement of marriage with Mr John Maccallum. (3) The defenders are at all events entitled, as a condition of paying over the said legacy to the pursuer, to receive a declaration signed by her in terms of the draft proposed by them."

The Lord Ordinary (FRASER) repelled the first plea stated for the pursuer, sustained the third plea for the pursuer, and repelled the whole pleas for the defenders; therefore decerned against the defenders in terms of the conclusions of the summons.

He added this opinion:—"It is settled law that a condition attached to a legacy that the same shall be payable only if the legatee shall not marry a certain individual is a lawful condition, and therefore the first plea-in-law for the pursuer has been repelled (*Ommaney* v. *Bingham*, 3 Pat. App. 448; *Graham* v. *Graham*, 1 Sh. App. 365).

"On the assumption that the averments of the defenders are well founded, viz., that since the date of settlement the pursuer's engagement with the prohibited individual John Maccallum has been renewed, and that a future marriage between the pursuer and him has been arranged, the Lord Ordinary is of opinion that if the pursuer declare 'in writing that she shall not renew her engagement with Mr John Maccallum' the defenders must pay the legacy. The testator trusted simply to the word and honour of the adopted daughter of his brother that she would not renew the engagement with John Maccallum, and this was the only safeguard to which he trusted. It is very evident that if he had thought that she would renew that engagement she never would have had bequeathed to her a legacy of £1000. But then, instead of framing his settlement in such a way as to meet the case which has occurred, he has left his testamentary arrangement in such a shape that his trustees must pay the money upon getting a certain declaration from her, while at the same time they have in their own power the means of proving its untruth. The defenders are not authorised to inquire as to the truth or falsehood of the declaration which the pursuer tenders to them. They are simple administrators to pay over the legacy on receiving the writing, and cannot by imposing a new check of their own creation endeavour to carry out the intention of the testator."

The defenders reclaimed, and argued—The plain and obvious meaning of the condition attached to the legacy by the testator was that the pursuer should not marry Maccallum. This condition the trustees were bound to give effect to. To take a declaration in the form proposed by the pursuer would be simply to give effect to a violation of this condition—*Hay* v. *Wood*, Nov. 27, 1781, M. 2982.

The pursuer replied—The testator had himself in words dictated to her the terms of her receipt. She was willing to sign a declaration strictly in these terms. It was not relevant for the defenders to examine into her state of mind to aid them in their carrying out these terms.

At advising—

LORD YOUNG—This is a case of a contingent legacy. The testator bequeathed £1000 to the present pursuer contingent on her declaring in writing that "she shall not renew her engagement of marriage with Mr John Maccallum."

Now, this language implies that there was an engagement at one time between her and Maccallum known to the testator, and known or believed by him to have been broken off. The language is brief, but clearly implies this knowledge or belief on his part of the engagement, and the trustees inform us that that which is clearly implied from the words is according to the fact, explaining that since the death of the testator, or at all events since the date of the trust settlement, the pursuer's engagement with Maccallum has been renewed—that is to say, that the engagement which the testator referred to as having once existed and as having been broken off had been renewed. They proposed, therefore, with a view to carrying out the intention of the testator, that she should sign a declaration to the effect that the engagement had not been renewed, and further, to the effect that she would not renew it. She declined to do this, and brings this action simply for payment of the bequest against the trustees, and offers to sign only one form of declaration. Now, I think it is quite clear that what the testator intended was that she should not marry Maccallum. That was clearly his meaning, for if she had been engaged to marry

Maccallum, and had broken off the engagement, and declared truly that she would not renew it, that was equivalent to saying that she would not marry Maccallum. Of course, a declaration not to renew her engagement, equally with one not to marry Maccallum, might be broken afterwards, and the engagement renewed or the marriage performed. The intention, then, of the testator was that she should not marry this man. Now, it is a rule of law of the most extensive application in dealing with wills that effect must be given to the intention of the testator as deducible from the whole language used by him, and that one is not to be bound in so dealing with them by particular words which might frustrate the manifest intention. That rule, then, being applied here, and the intention to impose a condition on the legatee that she should not marry Maccallum being judicially deducible from the whole language of the deed, I am not disposed to sanction the view of the Lord Ordinary, according to which she would get the bequest on signing a declaration manifestly inconsistently with the intention of the testator who enforced it. What form our judgment must take so as to give effect to the will of the testator may be a matter for consideration. I myself should rather favour the view that she should sign a declaration to the effect that she will not marry Maccallum. This is, I repeat, what the testator meant, and it will answer every point and carry out his intention exactly. I do not think the words used in the settlement were meant to dictate the exact language of the declaration. Whether, however, it should be varied without some further proof I do not say in the view I take, but if your Lordships concur as to the meaning of the testator and the effect which is in consequence to be given to the declaration, probably the parties will see their way to adjust matters without proof, and indeed without difficulty as to the form of judgment.

Lord Rutherfurd Clark—I am also of the same opinion as your Lordship has just expressed. I think the meaning, and the very plain meaning, of the settlement is, that the legatee was not to obtain the £1000 unless she signed a declaration to the effect that she was not engaged to marry and would not marry Maccallum. I quite accede to what has been said on her part that the testator placed great confidence in her honesty; and if the declaration had been emitted by her, and been consistent with the state of facts existing at the time it was made, I do not think the trustees could refuse to pay her on the ground that there was a question as to whether her intentions were or were not fair and honest as to the marriage. But although the trustees cannot challenge her intentions, I do not think they are barred from taking notice of the true state of affairs and saying that she is married to Maccallum, or that she is under an existing engagement to marry him. I am of opinion, therefore, that the Lord Ordinary's interlocutor must be recalled, though what should be next done may be matter to be reserved.

Lord Craighill—I am of the same opinion. The Lord Ordinary has, I think, taken the letter instead of the spirit of the will, and by so doing has entirely frustrated the intention of the testator. Of course, if we were bound to take the very words of the declaration from the settlement irrespective of the obvious intention, the pursuer would be entitled to prevail; but we must construe the will according to the rule of law quoted by your Lordship, and therefore we must recall the Lord Ordinary's interlocutor. It appears to me that the testator was aware that there had been an engagement between the pursuer and Maccallum, and also that it had been broken off, and what he desired was, that at the date when this legacy was to be paid there was to be no subsisting engagement between these parties, and that it should never be again in existence.

I am therefore clearly of opinion that the Lord Ordinary's judgment cannot stand.

The Lord Justice-Clerk was absent.

The case was continued in order that Miss Forbes might have an opportunity of making the declaration suggested by the Court as the condition of getting payment of the legacy.

Thereafter, her counsel having intimated that she had married Maccallum, the Lords in respect thereof recalled the interlocutor reclaimed against and assoilzied the defenders from the conclusions of the action.

Counsel for Pursuer—Solicitor-General (Asher, Q.C.)—C. J. Guthrie. Agents—J. & A. Peddie & Ivory, W.S.

Counsel for Defenders—Lord Advocate (Balfour, Q.C.)—Jameson. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, February 28.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ROYAL BANK OF SCOTLAND *v.* PENNEY (MILLAR & COMPANY'S TRUSTEE).

Bankruptcy—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 65—*Valuation and Deduction of Security in Ranking for Dividend.*

In determining whether a security must be valued and deducted from the claim of a creditor in a sequestration, as being a security over the estate of the bankrupt, regard is to be had exclusively to the estate of the bankrupt as at the date of the claim, and not at the date of the creation of the security.

Certain Government bonds were deposited with a bank in security of a cash-credit account to be opened in name of a firm. The bank's understanding at the time as to the ownership of the bonds was not clearly established. The firm having become bankrupt, the bank claimed to rank on their estate for a dividend on the sum due to them under the said cash account. The trustee in bankruptcy admitted their claim only under deduction of the value of the securities. It appeared from a proof that the securities were at the date of the loan the property partly of one and partly of another of the three partners of the firm, and were endorsed directly to the bank without ever having become the property of the firm, but that one of these partners having