Dec. 18, 1827, 6 S. 261. The above Act only gave effect to this case, and according to a sound construction of the Act the defender was subject to the Sheriff's jurisdiction.

The Lords made avizandum with the case.

At advising—

Lord Rutherfurd Clark—The question in this case is, whether the Sheriff of Lanarkshire has jurisdiction over the defender by virtue of the 46th section of the Act of 1876? The answer depends on this consideration—whether at the time when the petition was served the defender was carrying on a trade or business and had a place of business within the county. Both elements must concur in order to sustain the jurisdiction.

The defender is judicial factor on the trust-estate of the late Mr Logan of Eastshield. As such he is proprietor in trust of the estate. But it was not contended that he was subject to the jurisdiction of the Sheriff of Lanarkshire by reason of his owning property within the county. The case of the petitioner was laid on the statute.

Mr Logan died in May 1881. It appears that he farmed part of his estate, and also carried on a lime-work situated upon it. Whether he was carrying on a trade or business in the sense of the Act I do not stop to inquire; for we are not concerned with the jurisdiction which the Sheriff possessed over Mr Logan, but with the question whether he has jurisdiction over the defender.

The trustees named by Mr Logan did not accept, or otherwise failed, and the defender, a solicitor resident in Edinburgh, was appointed judicial factor on the trust-estate. He did not carry on the lime-work on the farm. He did nothing more than realise the moveable estate by selling the stock and cropping. He confined himself in the strictest sense to the duties which devolved on him as judicial factor.

I cannot concur that in thus acting the defender can be held to have been carrying on any business. The Sheriff seems to think that as the truster carried on business in Lanarkshire, the defender as his representative "must also be held to do so for the purpose of winding-up." It is quite possible that a representative in order to realise may carry on the business of his predecessor. But to realise is not necessarily to carry on the business. To sell the effects and ingather the debts of a deceased trader is not to carry on his business. If it were so, every representative or trustee of a deceased trader must carry on business—a proposition which in my opinion is not well founded either in fact and law.

The statute is not intended to transfer to a successor any of the qualities which belonged to his predecessor. The jurisdiction is created over the individual himself. It is not confined to any particular estate, but it is universal. Therefore, if the defender was subject to the jurisdiction of the Sheriff of Lanarkshire in this action, he was also subject to the same jurisdiction in any action which might have been raised against him. Hence it follows that the jurisdiction against the defender cannot depend on any representative character which he may possess, but must arise from his own individual position.

Looking to the proof which has been led, I see nothing in it to show that the defender was carrying on business in Lanarkshire when this petition was served on him, or that he had any place of business there. He did nothing more than sell some effects which belonged to the truster. But I think it would be out of the question to hold that such an act brought him within the statutory category of "a person carrying on a trade or a business." Still less can I see that he had in any sense of the statute, or in any reasonable sense of the phrase, a place of business in Lanarkshire.

In my opinion, therefore, the action must be dismissed.

Lord Craighill—I concur in the conclusion arrived at by Lord Rutherfurd Clark, and think it unnecessary to say more.

Lord Justice-Clerk—I also concur, and have only to say that in my opinion if the views expressed by Lord Gifford in the case of *M'Bey* v. *Knight* are to be followed, they are *a fortiori* of the present case.

Lord Young was absent.

The Lords pronounced this interlocutor—

"Find that the appellant (defender) resides in Edinburgh, and has his place of business and carries on business there, and has not a place of business and does not carry on business elsewhere: Therefore sustain the appeal, recal the interlocutor of the Sheriff, dismiss the petition, and decern."

Counsel for Appellant—Hon. H. J. Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.
Counsel for Respondent—Mackay—Baxter. Agent—Hector J. M'Lean, W.S.

Saturday, February 25.

SECOND DIVISION.

HOGGS *v.* CALDWELL.

(Before Lord Justice-Clerk, Lords Craighill and Rutherfurd Clark.)

Landlord's Hypothec — Caution — Relevancy of Defence.

In a petition for sequestration by a landlord under his right of hypothec, the tenant pleaded in defence that he had not obtained possession of certain adjacent subjects let to him by verbal agreement subsequently to the written lease. *Held* that such an illiquid claim was not a relevant ground of defence.

Process—Caution for Expenses.

The Court is always unwilling to compel a defender to find caution for expenses.

This was an appeal from the Sheriff Court of Midlothian in a petition for sequestration by a landlord under his right of hypothec. By written lease dated in 1878 the defender became tenant for a period of seven years of the Beehive Inn, Grassmarket, Edinburgh, at a rent of £200 for the first four years, and £220 for the remaining three years of the lease. By subsequent verbal agreement there were let to the defender two additional rooms and a cellar in Clydesdale Close, upon payment of additional rent of £10 and £6 per annum respectively. Up till Martinmas 1880 the defender paid the stipulated rent.

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-