An innkeeper in Motherwell inserted an advertisement in the *Glasgow Herald* in the following terms:—"Spirit shop for sale in the stirring burgh of Motherwell, convenient to the Cross; a rare opening to a person of enterprise. It is seldom such an opportunity occurs. Utensils and fittings at a sum. Stock, &c., at valuation. Parted with solely as the present tenant is retiring from the trade. Has always done a large business. For particulars, apply personally to D. Crichton, auctioneer, Coatbridge, who only can conclude a bargain." One of the complainers, being anxious to get the other complainer, his son, into business, negotiated for the purchase from the advertiser of the stock, fixtures, &c., of the house. The nett amount of the purchase was £99, 18s. 0½d., of which £50 was paid in cash, and a bill was granted by the complainers for the balance of £49, 18s. 0½d. The respondent, at the time of the purchase, was a creditor of the advertiser for sums advanced to him, and acquired right in partial liquidation of these advances to the said bill, in virtue of a special indorsation by the advertiser to "pay Mrs Janet Laird or Gibb or her order." The present action is a suspension of a charge upon this bill, and is rested on the allegation by the complainers that the purchase was made on the strength of statements as to the flourishing nature of the business, which were not true, but, on the contrary, were fraudulent, and were made with the object of entrapping the complainer into a purchase. It was further said that the respondent was not an onerous holder of the bill, that she was a conjunct and confident person with the advertiser, that one of the complainers was a minor at the date of granting the bill (being then only twenty years of age) and that the respondent had become possessed of the bill after it fell due.

The complainers consigned the amount of the bill. It was not disputed by them that they had been in possession of the premises with the stock and fixtures purchased, from the date of the granting of the bill (a period of six months) and that they were still in possession. And further, it was admitted that they had made no attempt to set aside this transaction by a process of reduction.

Lord Barcaple had refused the note of suspension with expenses, and to-day the Court unanimously adhered. Their Lordships were of opinion that the complainers' statements, even though taken to be true, were not relevant to warrant the suspension of the charge on the bill, whatever effect they might have had in a process of reduction.

Agent for Complainer—W. Officer, S.S.C.
Agent for Respondent—John Leishman, W.S.

Tuesday, June 4.

FIRST DIVISION.

HOEY *v.* M'EWAN & AULD.

Obligation—Contract of Service—Partnership—Death of Partner—Specific Implement—Damages. H. contracted with the firm of M'E. & A., accountants, to serve them as clerk for five years for an annual salary and a per centage on profits. One of the partners of the firm died during the currency of the contract. The remaining partner refused to act any longer on the agreement. Held that the contract was one of personal service, terminated by dissolution of the firm consequent on the death of the partner; that there was no breach of contract by death of the partner; and that H. could neither get specific implement nor damages, but only the balance of annual salary due for the period between the partner's death, and the end of the year of service, under deduction of his earnings in other ways during that time.

This was an action brought by David George Hoey, accountant in Glasgow, against M'Ewan & Auld, accountants in Glasgow, and William Auld, the surviving partner of that firm, and the representatives of Andrew M'Ewan, the other and deceased partner; and the object of the action was to enforce implement, or obtain damages for breach of an agreement between the pursuer and the firm of M'Ewan & Auld. The pursuer averred that when he first entered the service of the firm, he was given to understand by Mr M'Ewan, the senior partner, that, if he worked for it, he might expect, at a future period, to become a partner; that in May 1865 some negotiations took place between the partners and him resulting in a minute of agreement "that Mr Hoey shall continue to have his salary, at the rate of £300 per annum, up to and including the 30th day of September next; that from the 1st day of October next, and thereafter during the space of five years from that date, Mr Hoey shall be paid annually, in addition to his salary of £300 per annum, an allowance of 10 per cent. on the profits arising from the business of Messrs M'Ewan & Auld; that in consideration of the salary and allowance above provided for, Mr Hoey shall devote his whole time and attention to and in promoting the interest of the business of the said firm of M'Ewan & Auld." This agreement was signed by the pursuer, and by M'Ewan & Auld, and Andrew M'Ewan. The pursuer continued in the employment of the firm. He averred that when the agreement was entered into, M'Ewan was in bad health, and that this was partly the reason why the firm determined to raise the pursuer at once into a more important and responsible position. Owing to M'Ewan's bad health, the pursuer had to do a great deal of the accounting work of the firm, and his position and duties resembled more those of a partner than a clerk.

Mr M'Ewan died on 11th June 1866. Thereafter the defenders refused, after that date, to fulfil the agreement. Mr Auld carried on the business of the firm until 18th June 1866. He then assumed Mr J. Wylie Guild, accountant in Glasgow, as partner. The combined business was now carried on by the firm of Auld & Guild.

The defenders' averments were to the effect that in May 1865 Mr M'Ewan mentioned to Mr Auld that the pursuer had signified a desire to be admitted a partner; that Mr Auld was strongly opposed to this, and it was ultimately arranged merely to allow the pursuer a per centage over and above his salary; that Mr M'Ewan carried out the arrangement by concluding with the pursuer the agreement founded on, Mr Auld not being aware at the time of any written agreement having been entered into. After M'Ewan's death, in June 1866, Mr Auld intimated to the pursuer that from that date his service was terminated by the dissolution of the firm consequent on M'Ewan's death. The defender, Mr Auld, farther averred that since the date of the said agreement the pursuer had on several occasions represented himself as a partner of the firm, which he was not authorised to do, and also that he had, in violation of the provisions

of the agreement, performed business on his own account, of the same kind as that performed by the firm of M'Ewan & Auld.

The defenders pleaded that the contract came to an end by the death of M'Ewan in June 1866, and farther, that they were entitled to *absolvitor* in respect of the conduct of the pursuer while in the service of the firm, and of his violation of the obligations undertaken by him under the agreement.

The case was reported to the Inner-House on the adjustment of issues, the Lord Ordinary (BARCAPLE) adding a note in which he indicated an opinion in favour of the defenders. Precise implement could not be given, as the company which the pursuer had to serve no longer existed. On the other hand, the pursuer could not get his salary and share of profits while free to work for himself. The action seemed to resolve into one purely for damages. In the present case the company was entirely dissolved, one of the partners having formed a connection with another partner. His Lordship thought that it must be held to be an implied condition in the contract founded on that it should expire on dissolution of the company by the death of either partner.

A. R. CLARK and H. J. MONCRIEFF for pursuer.

GIFFORD and A. MONCRIEFF for defenders.

At advising—

LORD PRESIDENT, after narrating the facts of the case, and stating that the contract was between the pursuer and M'Ewan & Auld as a firm, there being no subscription by the individual partners, said—Upon these averments this summons is founded, and it is substantially an action to enforce, under two alternatives, an agreement of service for the full period of its endurance, the first conclusion being for specific implement, and the second, failing implement, for damages. The Lord Ordinary has indicated an opinion that, from the nature of the pursuer's contract, it must be held to have been all along an implied condition that it should expire by the death of either party. In that opinion I substantially concur. The only party contracting with the pursuer, on the face of this agreement, was the firm of M'Ewan & Auld, and that firm being dissolved by the death of M'Ewan, the senior partner, the party who had contracted with him ceased to exist. The death of M'Ewan was the death of one of the parties to the contract. It was the same as if the contract had been between M'Ewan as an individual and Hoey. There is a good deal of delicacy in the principles of law applicable to this case, and some cases in the contract of location are not very far away from the present; and, accordingly, the pursuer's counsel tried to treat the case as one of *locatio operis* or *locatio operis faciendi*. If it had been so, the result would probably have been different; for in such a case, as where a wall is to be built, or a drain is to be made, the contract has special reference to a particular physical matter; and, on the death of the party employing the contractor, the property of the subject passes to his heir or executor or legatee, as the case may be, and with the property of the subject passes the obligation of that contract for altering the subject entered into by his predecessor. But I can quite understand, too, that such things may happen in a contract of that kind as may bring it to an end, though parties contemplated that it should be of continuous endurance. If the subject perish by a *damnum fatale*, that would end the contract, although it was for a term of years, and although the contractor was to be remunerated by a yearly allowance, and there would be no claim of damages on either side. But, looking to the case in hand, we find it is purely a contract of personal service, and the duties of Hoey under the contract could be rendered only to the person with whom he contracted. He contracted to serve personally the firm of M'Ewan & Auld. It is the same as if he had contracted with M'Ewan as an individual. He was to receive, in return for his personal services, a fixed salary and a per centage on the profits of the business. This was purely a personal contract, and cannot subsist after the death of the employer. The difficulties furnished by the terms of the contract itself are not small; for when Hoey demands specific implement, he has this difficulty, that he must call on the Court, or a jury, to estimate what would have been the profits of the firm of M'Ewan & Auld if they had gone on with their business to 1870, under the same circumstances as they stood under when the contract was made—*i.e.*, the Court, or the jury, are to speculate on what would have been the profits if M'Ewan had lived; and the pursuer proposes to avoid that difficulty by asking damages. And he is entitled to damages if there is a breach of contract, but not unless there is such a breach. There is no other legal category, except action for breach of contract, under which this can be put. But does a man, by dying, commit a breach of contract? Death is quite a different case from bankruptcy. That is a breach of contract in many cases with which we are familiar. If a man who undertakes to pay a salary becomes disabled from performing his part of the contract by bankruptcy, that is a personal fault. Although it is sometimes perfectly innocent, it is yet a fault to each creditor who is not paid in full. And so the party can come against the sequestrated estate and rank, according to well established rules, for the value of the contract he thus loses. But a party's death is another matter, and there is no authority that in such a case there is any breach of contract. I therefore agree with the view of the Lord Ordinary. But I am disposed to qualify that to this extent. This is a contract which contemplates an annual payment. The pursuer was entitled to an annual salary of £300. The contract was brought to an end by the death of one of the parties while the annual salary was current. It appears to me that that annual salary was one and indivisible. There is no room for the Apportionment Act here, and no rule of law operating in the same way, and no authority for splitting the £300, and giving merely such portion as was earned up to the time of death. I rather think that Hoey is entitled to £300 down to the 1st October following after M'Ewan's death. His claim of profit is out of the question; but as far as salary is concerned, I think he has a claim, and I am disposed to think that in this action he may have his claim sustained under the first conclusion. But this concession must be qualified, because if, as is alleged, Hoey has been carrying on business of his own, that may prevent him from claiming the balance of his salary.

LORD CURRIEHILL concurred.

LORD DEAS thought that the claim in a case of this kind was an equitable claim. It was a jury question, where the nature and endurance of the contract and other circumstances should all be taken into account, and where the Court should make themselves acquainted with the whole circumstances before finding anything as to the claim of the pursuer.

Lord Ardmillan concurred with the Lord President.

The Court pronounced an interlocutor finding that by the death of M'Ewan the firm was dissolved; that thereby the contract came to an end; that the pursuer could not sue the surviving partner, or the representatives of the deceased partner, for specific implement or for damages; but that he was entitled to as much of his salary as effeired to the period between the death of M'Ewan and the 1st of October following, and had not been earned by him otherwise during that period.

The pursuer was ordained to lodge a minute stating what he had been earning during the period specified.

Agents for Pursuer—Maconochie & Hare, W.S.
Agents for Defender—Hamilton & Kinnear, W.S.

Tuesday, June 4.

MIEN *v.* MIEN'S TRUSTEES.

Landlord and Tenant—Removing—A. S., 14th Dec. 1756—Suspension—Juratory Caution. In a suspension of a decree of removing, Held (1) that a summons of removing under the Act of Sederunt 1756 did not require to libel a written title of possession, and was competently directed against a party possessing on tacit relocation or by mere sufferance; and (2) in the circumstances, the complainer's case being plainly bad on the merits, that he could not be allowed to suspend on juratory caution.

Alexander Mien, presently occupant of the farm and lands of Hopehouse, in the parish of Jedburgh, presented a note of suspension against the trustees of the deceased James Mien of Hunthill, of a charge upon a decree of removing obtained by the respondents against the complainer in the Sheriff-court of Roxburghshire on 15th December 1864. The complainer had been tenant of the lands on an eighteen years' lease, which expired at Whitsunday 1862. The summons of removing was brought on 30th September 1864, under the Act of Sederunt 14th December 1756, and 16 and 17 Vict., c. 80, § 29, and asked removal of the complainer from the said lands, which it was averred he possessed on tacit relocation, at Martinmas 1864 and Whitsunday 1865. The complainer's defence was, that the action was incompetent, in respect (1) it did not found on the tack on which the complainer had possessed the subjects, nor aver any facts to show that the original right of possession had expired, or how the tacit relocation commenced; and, in particular, it did not state that the complainer's term of possession had expired; (2) it did not libel the section of the A. S., 1756; (3) that that A. S. merely applied to cases where the possession was regulated by written tack or other legal equivalent; (4) *lis alibi pendens;* (5) no title; (6) the complainer's possession had not expired. The Sheriff-substitute decerned against the complainer; and this judgment was adhered to by the Sheriff on 30th January 1865. Mien brought a suspension.

The Lord Ordinary (Barcaple), in respect that the note of suspension was presented without caution, refused the note, and found the complainer liable in expenses.

The complainer reclaimed.

Watson and Asher for complainer.

Clark and Mackintosh in answer.

The Court adhered.

Lord President—A party asking the indulgence of being allowed to find juratory caution instead of sufficient caution must first show that he has something to say for his case on the merits; that he has some reasonable ground on which he can show that he will ultimately prevail in suspending the removing. But I look in vain for that here. The complainer's defences in the Inferior Court are untenable. The complainer apparently possessed on tacit relocation. If not, then he had no foundation at all for his possession. He plainly had no right. He was there either on tacit relocation or mere sufferance. He says (1) that the summons did not found on the tack, &c. (reads 1st, 2d., and 3d objections.) All these are bad. This is a removing under the 2d section of the A. S., and the summons of removing was to come in place of warning under the Act 1555. When a summons of this kind is instituted before a Judge Ordinary, and called forty days before the term, it is equivalent to a warning in terms of the statute, and the judge is to determine in the removing in terms of that Act, in the same way as if a warning had been executed in terms of the Act of Parliament. Now, this summons sets forth that the complainer ought, in terms of the A. S. and Act of Parliament, to be ordained to flit and remove himself, &c. from the said farm and lands as then occupied and possessed by him on tacit relocation, and to leave the same void, to the effect the pursuers of the removing might enter thereto and peaceably possess the same in time coming. It seems to me that it would be very dangerous to hold that anything more precise is necessary in such a summons of removing. There is neither authority nor necessity for it. The defender may prove his title of possession. If he has it, it will be a good answer. If he has not, I don't see why he should not remove on warning. Therefore the defences in the Inferior Court are out of the question and cannot be made available. But it is said that, since decree of removing, there have been negotiations which have resulted in an agreement, one part of which was, that the complainer was to get a new title in the form of a liferent lease. It is plain to me, on the complainer's own showing, that that is untenable, and that he has no right to get that new title. If he had such a right, one would have expected that he would have enforced it long ago. There is some peculiarity in this that the decree of removing has not been enforced for so long a period. But it is plain that, from the relationship of the parties, attempts were made to settle the matter amicably, and so the delay is accounted for. Now that it is enforced, there is no objection to it in law or otherwise, and therefore no occasion to consider whether, in other circumstances, the complainer might have been allowed to suspend on juratory caution.

The other Judges concurred.

Agents for Complainer—White-Millar & Robson, S.S.C.

Agent for Respondent—John Rutherford, W.S.

Tuesday, June 4.

MACKINTYRE & OTHERS *v.* MULHOLLAND.

Bankruptcy—Cessio—*Liberation.* Circumstances in which a party found entitled to the benefit of *cessio.* Warrant of liberation granted.

Mulholland, on 2d January 1867, petitioned in the Sheriff-court of Stirlingshire for *cessio.* He had