itself, but as altering the whole character of a residential locality. But then I fear its weight is greatly taken off by the circumstance that there is no restriction in the titles against building on the back-ground. There is no express prohibition against such buildings, and although the pursuer argued with considerable force that there was an implied prohibition or understanding against them, yet in a matter like this, which is *stricti juris*, mere implication would not be enough. The back buildings alone would not remove a limitation affecting the front ones.

Fourth—It is said the aspect and uniformity of the block has been changed and destroyed by the conversion of the eastmost corner house into a hotel. It is explained that the main access to the hotel has been lowered to the level of the street, that ornamental balustrades, prominent lamps, and similar alterations have been erected so as to catch the eye and attract the attention of the public to the hotel, and so on, and that this spoils the uniformity or symmetry of the whole block. This seems true, but it was hardly maintained that upon the terms of the title-deeds any of these alterations could have been prevented by any of the neighbouring proprietors, and if this be so, then the circumstances referred to only lessen the defender's interest to enforce the restrictions in the titles. And so

Fifth—The pursuer objects that Mr Bunten has no interest to enforce the restriction even supposing it to be validly imposed by the titles. Now, I confess that the defender's interest to enforce the restriction does not appear to be very great. I do not think that the value of the defender's property would be materially affected though the whole centre houses were raised to the front so as to be one storey higher than they at present are. And I am disposed to lay out of view the somewhat fanciful interest which it is suggested the defender might have if at any time hereafter he should wish to strike out a window in his eastern gable overlooking his neighbour's roofs. But this is hardly the legal aspect of the case. I think the law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to show a uniform or symmetrical front or elevation, and if he has aptly and sufficiently stipulated for this in all the titles it will be given him though his only interest may be an æsthetical one. I do not think we could repel the defences on the mere ground of want of interest to defend.

Lastly—The pursuer has urged that even if his objections to the enforcement of the restriction are insufficient taken singly and separately, still when taken together they are more than sufficient completely to destroy the restriction and to bar the defender from now enforcing it.

Now, here the case for the pursuer is certainly very strong, and it is not without hesitation, and I repeat not without regret, that I have ultimately come to hold that, notwithstanding all that has happened, the limitation in the titles restricting the front height of the centre houses is still in force. In regard to most of the circumstances founded on by the pursuer it is to be observed that they are not really contraventions of the titles; they are not things to which the defender could have successfully objected, and therefore his acquiescence in them—I mean the acquiescence of the defender or his predecessors—cannot legitimately be founded on as inferring a departure from the express conditions of the titles. The defender and his predecessors acquiesced in these things simply because they could not help themselves, and not at all because they intended to waive any rights secured to them by their infeftments. The only circumstances, I think, on which the pursuer can truly found as indicating relaxation of the restrictions are—First, the upright storm windows, and second—and this is more than doubtful—the original erection of the dwellings with a square storey to the back instead of attics. But it would be very dangerous to lay down a rule that a party holding a restriction against his neighbour building in a certain way or to a certain height cannot relax that restriction in the least degree without abandoning it altogether—cannot even tolerate small storm windows which are almost entirely concealed by the front parapet without by such tolerance enabling his neighbour to build to what height he pleases. This would not be a reasonable doctrine, and it is not supported by any of the cases. The real principle seems to be that acquiescence goes no further than the things acquiesced in, or things *ejusdem generis*, and it is only when acquiescence shows a virtual departure from the whole servitude that it will receive such effect.

I think therefore that if we were to hold the restriction in the titles in the present case as abandoned, we would be going further than the Court have ever done in similar cases. Very little more might have done, and yet I feel myself compelled to hold that, although seriously shaken, and perhaps very nearly gone, the building restriction made a real burden by the titles is still enforceable, and I feel bound to adhere to the Lord Ordinary's interlocutor.

LORD ORMIDALE and the LORD JUSTICE-CLERK concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Balfour—Keir. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for Defenders (Respondents)—M'Laren—Lorimer. Agents—Ronald & Ritchie, S.S.C.

Saturday, July 20.

SECOND DIVISION.

[Sheriff of Berwickshire.

STOTT *v.* FENDER AND CROMBIE.

Partnership—Implied Partnership—Share of Profits.

T was sequestrated, and two cautioners in a cash-credit bond lost money by his failure. After he had been discharged, one of the cautioners becoming security for payment of the dividend, he recommenced business, calling himself "T & Co." Money was again advanced to him upon a cash-credit with another bank, the same parties being cautioners. With the funds thus raised the former bond was cleared off. All the profits of the business were to be paid in to the credit of the second cash-credit, and all the

disbursements were to be drawn from it. One of the cautioners alone was to have the power of operating on the account, and also of examining the books. T was to manage the business, and the cautioners had no claim for profits beyond that specified above. *Held*, in a question with a creditor of "T & Co.," that in the circumstances of the case this arrangement did not constitute a partnership, and that neither of the cautioners were liable as partners.

This action was raised in the Sheriff Court of Berwickshire by David Alexander Stott, leather merchant, Canonmills, Edinburgh, against Robert Fender, farmer, Northfield, Coldingham, and James Crombie, joiner in Dunse. The pursuer in his summons concluded for payment of £498, 12s. 1d., with interest, as due under certain bills accepted by Turnbull & Co. The circumstances of the case were as follows:—A business as tanner and skinner had been carried on in Dunse by John Turnbull up to February 24th 1871, who at that date was sequestrated, and James Crombie, one of the defenders, was elected his trustee. On 2d November 1868 Turnbull had opened a cash-credit account with the British Linen Co.'s Bank at Dunse for £400, the two defenders being his cautioners. The bank accordingly claimed as a creditor on his sequestrated estate, and on 31st August 1871 got payment from the estate of £41, 11s. 6d., and from the defenders the balance due, with interest, in all amounting to £383, 2s. 6d. Turnbull had on 9th March 1871 offered 4s. in the pound, tendering Crombie as his cautioner. His creditors had accepted this, and he was discharged on 19th April 1871.

After the discharge the business was carried on under the style of John Turnbull & Co., and in June 1871 the defenders, along with the firm of Aitchison & Rae, slaters, Dunse, and John Aitchison and James Rae, the partners of that firm, became security to the extent of £500 sterling on a credit or cash-account opened in the books of the Royal Bank of Scotland's Branch at Dunse in name of the defender James Crombie. The balance due on the cash-account with the British Linen Company's Bank was paid out of this credit, and moneys were lent therefrom to Turnbull to enable him to carry on his business. Subsequently to the resumption of business the pursuer supplied goods to John Turnbull & Co., in payment of which promissory-notes and bills granted and accepted by that company were given. He now sued the defenders for payment of these.

The pursuer alleged that the credit of the firm was obtained in many cases on the faith of the defenders being partners. He further averred (Cond. VII.) that soon after Turnbull's sequestration an arrangement was made between him and the defenders for carrying on the business under the firm of John Turnbull & Company, for their joint benefit, and among other things it was arranged that all moneys received by the firm should be paid into the second-mentioned cash-account, and all disbursements necessary for the carrying on of the said business should be made by cheque on the account, the cheques being signed by Crombie, who alone had this power.

The defenders in their separate defences stated that the pursuer and they were personally unknown to each other, and never had any business transactions. They admitted that for their own protection, and for that of Aitchison & Rae, it was arranged that Turnbull's books should be periodically examined by Crombie, and that the moneys received by Turnbull should be paid by him into the credit-account with the Royal Bank, cheques signed by Crombie being granted him for money required out of that account, Turnbull transacting the business wholly himself.

The pursuer pleaded—"The pursuer being a just and lawful creditor of the company of John Turnbull & Company to the amount libelled, and the defenders being partners of the said company, they ought to be decerned to make payment to the pursuer of the sum sued for."

The Sheriff-Substitute (Dickson) after proof pronounced an interlocutor finding for the pursuer in terms of the conclusions of the summons. In a note thereto appended the ground of the decision is summed up in the following sentence—"This is a case of latent partnership, and the question hardly arises . . . . of credit being given in consequence of the parties holding themselves out as partners. There was a substantial but a concealed partnership.

The defenders both appealed to the Sheriff (Pattison), who recalled the Sheriff-Substitute's interlocutor and pronounced these findings of facts—"(1) That previous to 24th February 1871 John Turnbull carried on business as a skinner and tanner in Dunse in his own name; (2) That having been sequestrated on 24th February 1871, under the Bankruptcy (Scotland) Act 1856, he on the 19th day of April 1871 obtained his discharge, following upon an offer of composition of 4s. in the pound, made by him and accepted by his creditors under that sequestration; (3) That the said composition, with the expenses of the sequestration, for which he undertook to provide, exhausted the available funds and effects falling under the said sequestration; (4) That from on or about the said 19th day of April 1871 until on or about the 4th day of March 1876 a company of John Turnbull & Company carried on business as skinners and tanners in Dunse; (5) That the moneys required for carrying on the said business of John Turnbull & Company were supplied by the defenders Robert Fender and James Crombie, chiefly through cheques drawn by the defender Crombie upon a cash-credit account for £500 with the Royal Bank of Scotland at Dunse, obtained by the defenders, upon which the defender Crombie was alone authorised to draw, and to which cash-credit the said John Turnbull was not a party or an obligant in the relative bond to the bank; and partly and occasionally also through cheques drawn by the said defender on his private account with the branch of the City of Glasgow Bank at Dunse; and the debts contracted in carrying on the said business were so paid by the defenders by cheques drawn, payable sometimes to the said John Turnbull or bearer, and sometimes to the creditors direct; (6) That the moneys drawn and received from customers and purchasers of their goods, and otherwise in the course of the business of John Turnbull & Company, were generally and with trifling exceptions paid to the credit of the said cash-credit account of the defenders; (7) That there were paid by the defenders to the said John Turnbull, from the said 19th day of April,

25s. sterling weekly in name of wages for his services in the said business—at the same time as and along with wages to others employed in the business; (8) That the books, and particularly the cash-book of the said John Turnbull & Company, were kept until November 1873 by George Ewart, accountant in Dunse, upon the employment of the defenders, subject to their inspection, and in said cash-book the sums drawn by means of the cheques above mentioned were entered, not as received from the defenders but as drawn from the bank; (9) That a balance-sheet, as at March 1873, was made out by the said George Ewart for the satisfaction of the defenders, which showed a profit of £144, 0s. 7d. as having been realised, but was not then in the shape of divisible cash; (10) That in said balance-sheet the sum of £500 obtained under the said cash-credit from the Royal Bank was entered as an asset or item of the capital of the company of John Turnbull & Company; (11) That in the sequestration of John Turnbull, in February 1871 above mentioned, a claim had been made by the British Linen Company Bank for a sum due upon a cash-credit account for £400 with the said bank, in name of the said John Turnbull, for which cash-credit the defenders were co-obligants, but in so far as regards John Turnbull's cautioners there remained due to the British Linen Company Bank, after crediting the said composition of 4s. in the pound paid to the bank, a balance amounting to £383, 2s. 6d., for which sum the defenders were liable to the bank, and for which it is admitted that neither John Turnbull nor his estate was legally liable to the defenders; (12) That among the sums paid by John Turnbull & Company, through the defender Crombie's cheques upon the cash-credit with the Royal Bank of Scotland above mentioned, was the above debt of £383, 2s. 6d., the payment of which is entered in the books of the said company and to the debit of the said cash-credit account of various dates in the years 1871, 1872, and 1873; (13) That there was no agreement in writing under which the said business was carried on as above set forth, or as to the division of the profits thereof; neither is there any trustworthy or sufficient evidence otherwise of any binding agreement between the parties other than what the above facts infer: Finds that in these circumstances the defenders are partners of the company of John Turnbull & Company, and are in law liable for the debts of the said company;" and he decerned against them accordingly.

"*Note.*—This case, like most cases of disputed partnership, is involved in some obscurity, and is attended with difficulty. That difficulty is enhanced in the present case by the absence of any definite written agreement entered into at the time regulating the obligations and rights of the persons concerned.

"The Sheriff has not proceeded upon the parole evidence adduced, the competency of which he much doubts, and the relevancy of which is not apparent. No doubt a partnership may competently be proved by parole evidence; but this is only corollary to or part of the doctrine that it can be established *rebus et factis.* The kind of parole evidence that is relevant and competent to prove a partnership therefore is the evidence of such *res et facta* as are of themselves *indicia* of the existence of a partnership. It by no means follows that parole evidence is admissible to prove, not the facts, but the mere terms or import of verbal arrangements between parties, or of their several understandings. In the present case the three witnesses—the defenders Crombie and Fender and John Turnbull—do not agree in their statements, which, besides, leave the terms of the arrangement, if any, indefinite in most important respects, and leave it doubtful if there was any distinct arrangement in which they all concurred, and it does not clearly appear that any distinct understanding even existed upon the subject. In any view, the evidence is liable to the observation that it is given *ex post facto*, and when the recollection and consequent representation of what had been agreed on before is very apt to be coloured by the immediate pressure of consequences, especially when no written agreement was entered into.

"The facts contained in the findings in the above interlocutor rest upon the books and writings produced, corroborated by the parole evidence as far as it goes.

"It is said that the object of the defenders in providing means to enable the business of Turnbull & Company to be carried on was, in the first instance at least, to recoup themselves what they had lost through their cautionary obligation for Mr Turnbull to the British Linen Company out of the profits or proceeds of the business which was to be carried on by him with their moneys. This may have been their motive or object, but there is nothing either in writing or in the parole evidence limiting their interests in the business to that.

"Turnbull, it will be observed, contributed nothing for the carrying on of that business except his personal services, and (which may have been of some value) the goodwill of his name and of the business which he had personally carried on though unsuccessfully. For his services he was paid weekly wages. For the moneys advanced by the defenders he did not come under any obligation of repayment to them. He did not grant any document making him debtor therefor to the defenders. The sums were drawn for debts represented by him to be due in the carrying on of the business, or for disbursements, such as wages to himself and others, necessary for that purpose. There was not any obligation on the defenders to make these payments. And they kept the control in their own hands by reserving to the defender Crombie alone the power of drawing upon the cash-credit for £500, that these moneys could be used by him only in the regular course of trade, and the supply could be at any time stopped at the will of the defenders. Turnbull was not himself liable to the bank for the moneys so drawn, or under any obligation to the defenders other than that of applying them to the purpose of the business. He was in effect their agent in employing the sums so drawn and handed to him. It does not appear, from anything either in the written or parole evidence, that he was to get any definite share of the profits of the business other than his weekly payment. Nor does it appear what was to be the division of profits at any time. It is clear, upon the ordinary principles of copartnership, that as the defenders advanced the capital embarked in the business they would, as in a question with Mr Turnbull, if he was their part-

ner, be entitled to repayment of that capital before any division among the partners of the surplus, if such had existed, after satisfying the whole debts and obligations of the business. The defenders therefore seem to have been principals in the business rather than copartners of Turnbull, and he was rather their agent for carrying on that business than in the independent position of a partner. The business while subsisting, having been carried on with the capital of the defenders, they were entitled to the profits, if any, realised therefrom. There was no agreement or contract to the contrary, nor anything by which they could have been prevented from carrying on the business as long as they might consider it beneficial, and with another manager than Turnbull, or from appropriating the whole profits, while they could put a stop to it at any time by simply withdrawing their obligation to the bank. As there was no actual division of profits, there is nothing to show directly that the defenders *de facto* received or participated in them. But the case is made out independent of such participation.

"In these circumstances, the Sheriff cannot doubt that the defenders are liable for the debts contracted in the carrying on of the business.

"It is argued by the defenders that the principle that participation in profits as a general rule implies partnership is no longer recognised, and is altogether exploded. No doubt it is provided by the Act 28 and 29 Vict. cap. 86 (5th July 1865)—"The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking, upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not of itself constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

"But this enactment is very limited in its application. In the first place, there must be advance of money by way of loan; and secondly, the condition as to payment of interest according to the profits, or by giving a definite share of profits, must be expressed by contract in writing.

"This statute has, therefore, no application in this case, because there was no contract in writing upon the subject between John Turnbull and the defenders that they were to be entitled either to a share of profits or to a rate of interest varying with the profits.

"In the second place, there is no proof of any advance by them to John Turnbull by way of loan. The defender Crombie draws cheques upon a cash-credit account with the Royal Bank of Scotland for £500, for which he and the other defender Fender were the sole obligants, and to which Turnbull was no party, or upon his own private cash-account with the City of Glasgow Bank. These cheques are drawn for sums represented as due in the regular course of the business of John Turnbull & Company; and Turnbull applies the amounts so drawn in the business of John Turnbull & Company accordingly. There is not alleged or proved any valid obligation on them to advance money to John Turnbull. The sums they were entitled to see applied to the purposes of the business. They thus kept control over the employment of the capital, and were not at all in the ordinary position of lenders. Besides, there is no document under Turnbull's hand acknowledging these as advances to him by way of loan, and the cheques do not prove that. The presumption is that the cheques were drawn by the defenders for their own benefit, and that Turnbull is merely their hand to draw the money. They not being his debtors to any extent, Turnbull's indorsement on the cheque is no proof of a loan. That is well settled in law. The books of Turnbull & Company, if competent evidence, do not prove it, for in them the sums are entered simply as drawn from the bank. The only thing that bears a semblance of proof of a loan in this case is the parole evidence, unsatisfactory as it is. The Sheriff need hardly say that such evidence is quite incompetent by the law of Scotland to prove an advance of money by way of loan. It appears to the Sheriff that the facts in the present case exactly correspond with the legal presumption that Mr Crombie's cheques upon the cash-credit with the Royal Bank were drawn for the defender's own purpose, viz., the carrying on of the business of Turnbull & Company for their behoof. In short, it was their own business. It was not an advance by way of loan to Turnbull as a person carrying on an independent business.

"It is not therefore necessary to consider whether the principle that participation in profits as a general rule implies partnership is exploded. But the Sheriff may say that, in his opinion, the authorities do not support any such proposition in the abstract. That participation in profits is not *per se* a conclusive test of partnership is well established. The case of *Cox* v. *Hickman*, which was decided before the Act of Parliament above referred to went upon that ground. And there are various decisions in the English Courts to that effect. But the participation in profits has always been, and still is, a very important element in the question of partnership or no partnership. The true doctrine may be stated to be this—that such participation does in the general case imply partnership, and that to do away with its effect it must be shown that the participation is attributable to some contract other than that of copartnery, and easily distinguishable from it. Upon this subject the Sheriff takes leave to refer to the judgment of the Master of the Rolls in the case of *Pooley* v. *Driver*, 28 and 29 November 1876, 5 L.R. (Ch. Div.) 459, where the cases of *Cox* v. *Hickman*, of *Mollno, March, & Company* v. *Court of Wards*, and many other cases therein referred to, are fully considered and commented on, and which opinion, if the Sheriff may be allowed to say so, correctly expresses what he holds to be the law on the point.

"As to the case of *Eaglesham & Co.* v. *Grant*, there was a distinct written agreement embodying the agreement of the defender Grant and the trader Munro, which showed clearly that nothing of the nature of a partnership existed between them, and that the defender Grant's connection with the business was truly of the nature of a security of the obligation which he undertook to guarantee payment of the last two instalments of Munro's composition; and the only return which he stipulated for besides was a commission at the rate of 7½ per cent. on all moneys received or recovered by him in connection with the carrying on of the business, it being expressly agreed that

the whole surplus after paying expenses and the commission were to belong to Munro, and therefore that case came quite within the principle of these English decisions. There is no agreement of that kind in the present case, and nothing to do away with the conclusion deducible from the facts as above set forth.

"The Sheriff has therefore given judgment for the pursuer, with expenses."

Both defenders appealed to the Court of Session.

Argued for them—Partnership was a consensual contract, apart from holding oneself out to be a partner, by which one might incur liabilities. The elements were a share of the profits and a share of the losses. It was erroneous to suppose that the right to a share of the profits was a test of partnership; that was not so. All that such a right amounted to was that it formed part of the evidence on which the existence of a contract of partnership might be based. Now in this case did the parties mean to become partners? It was clear they did not. Even on the question of profits there was here no evidence that they shared them. Fender and Crombie could only be held liable if under the guise of a loan they really had an interest in the concern. In point of law they must have held themselves out as partners to the person who was thus induced to deal with the firm, but that was not so.

Argued for the pursuer — Turnbull was the agent of Crombie and Fender, and was thus able to bind them. It was not essential to make out the exact nature of the partnership. After the first settlement no debt remained, and accordingly the cash-credit overdraft was not a debt due by Turnbull to Crombie and Fender, and they could not therefore stipulate for the first profits of the business being paid in to the bank in extinction of the debt without becoming partners in the concern by doing so. Here there was no debt at all; they could not, save by force of the arrangement entered into, interfere with Turnbull in any way. The best test was participation in the profit. This case was distinguishable from *Cox* v. *Hickman*, as the defenders wished preferentially to benefit themselves. The bargain came practically to this—"Prior to sequestration you had a good business." "If we do not advance money you cannot carry on, but we will do so, and get back (1) our money, (2) our former debt." That was partnership. An advance to an individual was one thing, to a business it was another. As to the matter of time, every partnership was limited by a date, and in the same way that date might be fixed as here by reference to an event. If an example were required, that of building societies might be taken.

Authorities—*Eaglesham* v. *Grant*, July 15, 1875, 2 R. 960; *Pooley* v. *Driver*, 5 L.R. (Ch. Div.) 458; *Ex parte Tennant*, 6 L.R. (Ch. Div.) 303; *Ex parte Delhasse*, 7 L.R. (Ch. Div.) 511; *Cox* v. *Hickman*, 8 Clark's H. of L. Cases. 268; *Bullen* v. *Sharpe*, 1 L.R. (C.P.) 86; Lindley, vol. i. 43.

At advising—

Lord Justice-Clerk—In this case the Sheriff-Substitute and the Sheriff have decided against the defenders, but on different grounds.

I cannot agree with the grounds of judgment on which the Sheriff has proceeded. His view is substantially this—that the case must be determined solely by the writings produced; that he finds from the cash book of Turnbull & Company that there was such a firm, and that all the drawings of the business were paid into a cash-account with the Royal Bank, operated on solely by Crombie—for which Turnbull was not liable; that all the funds for the business were derived from this cash-account by drafts by Crombie alone, and that Fender as well as Crombie was liable to the Bank for this account. From these facts he concludes that the business belonged to Crombie and Fender alone, and that Turnbull was a mere servant, and not even a partner, and he thinks that the parole evidence cannot qualify or control the inference in law which these facts justify.

It is not easy to understand in this view why Fender should be held to be a partner at all. That he was liable for the cash-account no more made him a partner than the same fact made the two other friends partners who had joined in the obligation. Fender neither operated on the account nor received the drawings, nor is there anything in the written evidence to show that he received or had stipulated that he should receive any benefit whatever from the concern. He had an interest in the arrangement, but this does not appear from the written evidence.

But what seems the fallacy of the view of the learned Sheriff, which is ably presented, is that these facts are quite insufficient to show that Crombie ever had any claim to any part of the profits of the trade. The arrangement which they imply indicates no more than a security for money advanced, or the conduct of a business under inspection. They do not show that in the business itself Crombie even interfered at all, and it would be quite consistent with all which the documents disclose that Crombie had no individual interest in it whatever.

In all such cases, however, the truth and reality of the facts must govern their legal relation. In the present case they are, as far as material, simple and undisputed, and indeed the 7th article of the condescendence for the pursuer sets them out with substantial accuracy although with doubtful relevancy. It is certain that the parties never meant to make a partnership. They meant to make an advance to enable Turnbull to start afresh, and to provide both a security for the repayment of that advance and the means of liquidating an old debt of their own. The way in which that was to be done was that all the receipts of the business were to be paid over to Crombie, and all the moneys for carrying on the business were to be drawn by him, until the advance by the bank was cleared off and the old balance of £383 was paid up. Beyond this it is certain that Crombie and Fender had no claim whatever on the profits of the concern, which belonged entirely to Turnbull. The question is, Whether, taking, or rather proposing to take, payment of this old debt out of the gross returns of the business made Crombie and Fender partners?

I am at a loss to find any element of partnership in this arrangement. That the gross receipts of the business were to be charged with the amount of this old debt and substantially impledged for the amount, is a security transaction and nothing else. The whole business would be free the moment that debt was paid, and it was not contended that if the business had been prosperous the alleged partners could have taken

any benefit by its prosperity beyond payment of their debt. Turnbull still held the whole stock-in-trade, and managed the concern exclusively and by himself.

It is said that this debt was discharged, and so it was; but it was open to the debtor, who was a free man, to revive it, and he did revive it as part of the consideration on which Crombie agreed to guarantee his composition to his other creditors. It was not a gratuitous arrangement, whatever the effect of that may be. The consideration which Turnbull received was of the most substantial kind, for he obtained easy payment of his composition, and a sufficient advance to start him afresh in business. To obtain the advantages stipulated Crombie and Fender ran considerable risks, and contributed a large consideration. So solid, in fact, were the responsibilities undertaken by Crombie, that while he has not received a shilling out of the business to account of this old debt, he is left with a great part of the advances of the bank to provide for. No question has been raised on the record as to the legality of this arrangement under the bankrupt laws; and even if there could have been room for such a question, the effect of a successful challenge on that head would never have been to create a partnership with Turnbull, but simply to annul the claim of Crombie to draw payments from the profits of the business, or to compel him to account for what he drew. For my own part it has not been made intelligible to me on what ground any such plea could rest.

It is needless to go into the authorities, for I think the present case entirely outside the principles even of the old and discarded doctrine of participation of profits. The case of *Grant* v. *Eaglesham* was so far more favourable that the assignee there never could have drawn anything but his commission. But there the apparent ownership and the actual benefit obtained were much greater, for there was an actual transfer of the business in *Grant's* case, while there was nothing here but financial supervision. The present is neither a case in which the defenders have tried to obtain the profits of partners under the guise of creditors, nor one in which those who were truly creditors have deceived the public under the guise of partners. It is no longer alleged that they held themselves out as partners, and I am very clearly of opinion that they never were or thought of being so.

The only other element in the proof on which the pursuer founds are certain alleged admissions of partnership said to have been made by Crombie. On the proof these have been reduced to one occasion, which occurred four years after the arrangement was made. Mitchell, who had done business with the firm, and was examined as a witness, certainly says that Crombie told him that he was a partner with Turnbull, and that he was influenced by that statement in the settlement of his account against Turnbull. Crombie denies that he made any such statement. That Crombie stated that he was assisting Turnbull I do not doubt, and that Mitchell inferred from what he said that he was a partner is probable. But this is far too slender a ground for the inference deduced from it, even if it were sufficiently established.

In regard to this matter, I observ ethat while the pursuer states that he himself furnished goods to Turnbull on the understanding that the defenders were partners, he does not even appear as a witness to support the statement.

Lord Ormidale concurred.

Lord Gifford — I concur entirely. The moment the argument that the defenders held themselves out as partners fails, we have only to inquire whether a real partnership subsisted. But no such position has been established; and accordingly no liability has been incurred.

The Court pronounced the following interlocutor:—

"Find that the pursuer and respondent has failed to prove that the appellants were partners of John Turnbull & Company: Therefore sustain the appeal; recal the judgments complained of; and find the appellant entitled to expenses in both Courts," &c.

Counsel for Pursuer (Respondent)—Trayner—Darling. Agent—H. B. Dewar, S.S.C.

Counsel for Crombie (Defender and Appellant)—Mair—Rhind. Agent—W. Steele, S.S.C.

Counsel for Fender (Defender and Appellant)—Balfour—Mackintosh. Agents—Frasers, Stodart, & Mackenzie, W.S.

Saturday, July 20.

FIRST DIVISION.

MITCHELL & OTHERS v. BURNESS.

Judicial Factor—Law Agent—Fees—Judicial Factor not Entitled to Act as Agent for the Estate.

A judicial factor, who was partner of a legal firm, employed that firm to conduct his defence to an action raised for division of the funds under his charge. *Held* that the firm were not entitled to any business charges against the estate in the factor's hands beyond those of outlay.

This was the sequel of the case reported *ante*, June 19, 1878, p. 640, and came before the Court now upon the report of the Auditor, who desired the Court to say whether he was to allow Mr Burness, the judicial factor, whose legal firm, Messrs W. & J. Burness, W.S., had acted as his agents, to charge the expenses incurred by him in defending the action against the fund. The Auditor doubted the competency of doing so, on the authority of *Lord Gray & Others*, Nov. 12, 1856, 19 D. 1.

It was submitted for Mr Burness that on the authority of *Scott* v. *Handyside's Trustees*, March 30, 1868, 6 M. 753 (Lord Deas' opinion *ad fin.*) there was an exception in favour of the factor in the case of process business.

At advising—

Lord President—The Auditor has not disposed of the question whether Mr Burness as law agent is entitled to make certain charges against the trust-estate, but has reported that point to us.

The state of the facts is this—Mr Burness was judicial factor, and while holding that office the firm of which he was a partner acted for him in the judicial proceedings connected with the