interest of money and interest which is not annual in the sense of the Act. For if that latter interest is not to be a deduction in ascertaining profits to be brought into charge, but like annual interest is to be taxed in the hands of the debtor, then there is, firstly, no provision for the debtor recovering by deduction from his creditor, who ought to bear the burden of the tax just as much as the creditor in annual interest; and secondly, as that interest, not having been indirectly or at the source obnoxious to income tax, ultimately chargeable against the creditor, must enter into the computation in ascertaining the creditor's profits to be brought into charge, it will, having been taxed once in the hands of the debtor, be taxed, in whole or in part, a second time in the hands of the creditor, contrary to the general scheme of the Act.

Two cases were cited by the Inland Revenue in support of the Commissioners' deliverance, both of them from the English Courts. The first — *Alexandria Water Company*, L.R., 11 Q.B.D. 174—does not advance their contention. It only decided that interest on debentures of a company is a charge on profits and subject to tax at the source or in the hands of the company, notwithstanding that the company's revenue was derived entirely from an adventure in a foreign country, and that the debenture-holders were entirely foreigners residing in that foreign country. I see nothing to raise any doubt as to the soundness of this judgment so far as it goes, for there was an important point reserved, but it does not touch the present question.

The other case is more nearly apposite. It is the *Anglo-Continental Guano Works* v. *Bell*, 1st March 1894, 70 T.L.R. 670. A foreign firm had a branch house in England, which was conducted on the footing of a separate business. The English house obtained short loans, or accommodation for the conduct of its business, from the foreign firm and from foreign bankers. I think the case may be relieved of any question regarding the advances by the foreign firm. For I think the Court regarded the foreign firm as really *eadem persona* with the English house. But as regards the advances from bankers, the case is truly *in pari casu* with the present. Though not binding upon us, the authority is one which I must regard with all respect. But after carefully examining it I am not satisfied with the reasoning of the learned Judges who determined it. The authority of the case is indeed prejudiced by the following note on the case in Dowell, 6th ed., p. 188, which I assume is a correct statement in point of fact—"In practice, however, such interest had always been allowed as a deduction up to the time of that decision, and *it has since continued to be so allowed.*" The conclusion which I have myself arrived at is that the deduction in question is not one prohibited by the first case, rule 3, as interest on capital employed in the trade in the sense of the statute, and is one permitted under the first and second cases, rule 1, as "money wholly and exclusively laid out or expended for the purposes of such trade," and accordingly that the Commissioners' deliverance is erroneous.

LORD PRESIDENT—I am of the same opinion. I cannot see how temporary accommodation in the course of business ever is or ever can be capital.

The LORD PRESIDENT intimated that LORD KINNEAR also concurred.

The Court reversed the determination of the Commissioners; found that in arriving at the amount of the assessable profits of the company they ought to have allowed deduction of the interest paid by it to bankers in America; and remitted to the Commissioners to adjust the assessment in conformity with the above findings.

Counsel for the Appellants—Fleming, K.C.—Lord Kinross. Agents—Guild & Shepherd, W.S.

Counsel for the Respondent—The Solicitor-General (Hunter, K.C.)—Umpherston. Agent—Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Thursday, July 14.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

A. & A. CAMPBELL *v.* CAMPBELL AND ANOTHER (CAMPBELL'S EXECUTORS).

Partnership—Title to Sue—Prescription—Triennial Prescription—Reconstruction—Continuity of Accounts Before and After Reconstruction.

A firm of law agents raised an action for factor fees and commissions on an account which covered a period of nine years. During the whole period the firm name remained the same, but at the end of the fifth year the firm was reconstructed. The defenders pleaded—"No title to sue." *Held* (*aff.* judgment of Lord Skerrington, Ordinary) that in the absence of an assignation from the old to the new firm the existing firm had no title to sue for the earlier portion of the account, and action *dismissed.*

Opinion (*per* Lord Ordinary Skerrington) that the account was not a continuous account but two separate accounts, the earlier of which would be open to the plea of the triennial prescription.

Agent and Client—Employment—Remuneration—Proof—Writ or Oath.

In an action by a firm of law agents to recover remuneration alleged to be due, the Lord Ordinary (Skerrington) on the ground that the defenders' case was that there existed a number of circumstances giving rise to the infer-

ence no charge was to be made, allowed them, before answer, an unlimited proof.

A. & A. Campbell, W.S., Edinburgh, raised an action against Mrs Charlotte Campbell and another, executors-nominate of the late Arthur Campbell of Catrine, in which they sued for £1916, 8s. 3d. with interest thereon, being factor fees and commissions which they averred had been incurred by Mr Arthur Campbell to them.

The pursuers pleaded—"(1) The pursuers having done professional work for the deceased, are entitled to ordinary professional remuneration for that work. (2) The deceased having been justly indebted and resting-owing to the pursuers in the sum sued for, the pursuers are entitled to decree therefor against the defenders as his executors-nominate. (3) The statements of the defenders in Article 6 of the statement of facts, with reference to the understanding and agreement therein averred, can be proved only by writ or oath."

Article 6 of the defenders' statement of facts was—"After the said Arthur Campbell retired from the partnership [31st July 1889], he left a certain amount of his business with A. & A. Campbell, including the collection of part of his income and the disposal thereof, but he himself personally attended to a good deal of his own business. Each year A. & A. Campbell made up, as at 31st July, and rendered a cash account between A. & A. Campbell and the said Arthur Campbell, allowing periodical interest on the balances at Arthur Campbell's credit, bringing the account to a balance at 31st July, and carrying forward the balance to the following year. In consideration of the said Arthur Campbell's having made over the business without any payment therefor, and of the valuable assistance and support which he rendered to his brother George, it was the understanding and agreement of the brothers that A. & A. Campbell should make no charge for the services rendered to Arthur Campbell. Accordingly no accounts for business services were ever rendered to the said Arthur Campbell, except that by special arrangement one or two accounts for particular pieces of work were debited to him in the cash accounts. No factor fee or commission was ever charged or debited in the annual cash accounts made up as aforesaid. . . ."

The defenders pleaded, *inter alia*—"(1) No title to sue."

The *facts* of the case are given in the opinion of the Lord Ordinary (SKERRINGTON) who on 14th June 1910 pronounced the following interlocutor—"Sustains the first plea-in-law stated for the defenders in so far as it applies to the account sued for prior to 31st July 1904, and to that extent and effect dismisses the action, and decerns: Before answer, allows the defenders a proof of their averments in Article 6 of the statement of facts and the pursuers a conjunct probation."

Opinion.—"The pursuers are a firm of Writers to the Signet in Edinburgh calling themselves A. & A. Campbell, and they sue for factor fees and commissions on an account for the period from 31st July 1889 to 31st December 1908. The firm consists of two partners, Mr George Campbell and Mr George Alexander Wright. The firm was constituted on 31st July 1904, and for a number of years prior to that date Mr George Campbell carried on the business by himself under the name of A. & A. Campbell. In these circumstances the creditor who is entitled to recover the account so far as applicable to the period from 31st July 1889 to 31st July 1904 is Mr George Campbell, and he could sue either in his own name or under the name by which he carried on business, viz., A. & A. Campbell. But the A. & A. Campbell who are the pursuers of the present action are the existing firm of that name, and are not Mr George Campbell as an individual. I see no answer to the first plea-in-law stated for the defenders, which is that the pursuers have no title to sue. The objection is a technical one, and could be easily put right by Mr George Campbell bringing a separate action or moving to be allowed to amend the present action by adding his name as a pursuer, and by adding an alternative conclusion for payment to him as an individual of the portion of the account incurred prior to 31st July 1904. But the pursuers have intentionally refrained from so libelling their summons because it was seen that if the action was laid in that way the claim for the earlier part of the account would fall under the triennial prescription, and the debtor Mr Arthur Campbell being dead, and there being no written evidence, the pursuers' case would be no further forward.

"The question whether, from the point of view of the triennial prescription, the account is one continuous account or is two separate accounts does not really arise, seeing that I dismiss the action so far as regards the portion of the account prior to 31st July 1904. I may say, however, that I have no doubt that the plea of triennial prescription applies to the earlier part of the account. I see no legal principle upon which an account for work and services done by an individual can be treated as identical with a subsequent account for work and services done by a firm, and it does not seem to me to be in the least material that the individual while doing such work chose to describe himself by a firm name. I was referred to certain dicta of the Lord Justice-Clerk (Patton) in the case of *Wotherspoon* v. *Henderson's Trustees* (1868), 6 Macph. 1052, to the effect that it was not every change in the constitution of a company which would disturb the continuity of its current accounts. These dicta were purely *obiter*, as no question of that kind fell to be decided in the case of *Wotherspoon* any more than in the present case. A partnership may by agreement continue notwithstanding the death of a partner or the retiral or assumption of a partner, and in such a case where there is continuity in the company there will be continuity in the accounts due to the company. I have

difficulty in figuring a case where a company has been dissolved and reconstructed but where the accounts due to the two companies should be treated as one account.

"I accordingly sustain the first plea-in-law stated for the defenders so far as applying to the portion of the account prior to 31st July 1904, and to that extent and effect I dismiss the action.

"There remains the question as to the portion of the account from 31st July 1904 onwards. The defenders set forth in their statement of facts (particularly in statement No. 6) various facts and circumstances from which they say that it may fairly be inferred that the work was done on the footing that no charge was to be made therefor. The pursuers' counsel founded on the case of *Taylor* v. *Forbes*, 1853, 24 D. 19, and maintained that this defence could be established only by the pursuers' writ or oath. If it were necessary I should hold that I am not bound to follow the decision in *Taylor's* case, because I think it appears from the subsequent case of *Scotland* v. *Henry*, 1865, 3 M. 1125, that *Taylor's* case was a very special one, and I do not think that it would be held nowadays that a contract of the kind referred to is an innominate contract of such an extraordinary character that proof ought to be limited to writ or oath. But, as I have already indicated, I do not read the averments as meaning that the defenders undertake to prove by the testimony of witnesses that a parole agreement was entered into between the two brothers that the work was to be done gratuitously. The defenders' case is that there exist a number of circumstances which give rise to the inference that no charge was to be made. There is an analogy between the present case and a case where the defender undertakes to prove presumed payment. It is not competent to prove money payments except by writ or oath, but a defender may prove facts and circumstances which give rise to the inevitable inference that the debt has been satisfied or discharged in some way or other. I allow the defenders a proof before answer of their averments in statement 6."

The pursuers reclaimed, on the point as to title to sue, and in addition to *Wotherspoon* v. *Henderson's Trustees* (July 10, 1868, 6 M. 1052, 5 S.L.R. 689), referred to Bell's Prin., sec. 357.

The defenders were not called on for a a reply.

LORD PRESIDENT — This case seems so clear that it is impossible to state an argument on the other side. The Lord Ordinary has dealt with it clearly, and I entirely agree with his Lordship. The matter can be put even more shortly. There is no authority for firm B suing for a debt due to firm A unless it has something in the nature of an assignation. I am therefore for refusing this reclaiming note.

LORD KINNEAR, LORD JOHNSTON, and LORD SALVESEN concurred.

The Court pronounced this interlocutor—

". . . Adhere to the said interlocutor: Refuse the reclaiming note: Remit the cause to the Lord Ordinary to proceed as accords, and decern."

Counsel for the Pursuers (Reclaimers)—Sandeman, K.C.—Spens. Agent—Party.

Counsel for the Defenders (Respondents) — Blackburn, K.C. — Chree. Agents — Cooper & Brodie, W.S.

Thursday, July 14.

FIRST DIVISION.

STEEL AND OTHERS (ROBERTSON'S TRUSTEES) *v.* ROBERTSON.

Succession—Testamentary Writings—Construction—Denuding of Trust Funds—Vesting—Repugnancy—Acceleration of Payment—"One-third Part of the Annual Income of the Residue"—Direction to Pay at Majority with Subsequent Direction in Codicil not to do so but to Pay One-half at Twenty-six.

By his trust-disposition a testator provided for his trustees paying certain small annuities "out of the free annual produce of the remainder" of his estate, and directed—"(Fifth) That my trustees shall pay one-third part of the annual income or produce of the residue of my means and estate" to his widow, "and (Lastly) That my trustees shall hold the residue of my said means and estate (subject always to the foresaid liferents) for behoof of the whole of my children, . . . and my trustees shall pay over to such of my children as may be sons their or his share on attaining the age of twenty-one years complete. . . . But declaring that the said provisions in favour of my children shall not vest until the respective terms of payment of the same, and until the terms of payment my trustees shall apply the free annual proceeds or income of the presumptive portion of each child for his or their maintenance and education: And notwithstanding what is above written, my trustees shall have power to make payment to any of my sons, out of the capital of his presumptive portion, of a sum or sums not exceeding in whole one-half of such son's portion, for his advancement in life." And by a holograph codicil, dated when his only son was approaching majority, he directed his trustees "not to pay my son . . . his share of my estate at the age of twenty-one years as stated in my will, but to pay him half of his share at the age of twenty-six years should he want it."

After the testator's son had attained twenty-one years but was under twenty-six, the widow still surviving, *held*, in a special case, (1) that "one-third of the