may resemble it in their constituent elements. The common rock or common clay or subsoil of a district could never be worked in such a way, and none of the other seams of fireclay in the land in question are at present workable to profit—at all events by means of underground workings. This may not in itself be conclusive, but it presents an element of some importance in considering whether the respondents' fireclay is a substance which is exceptional in the sense in which that word is used by the Lord Chancellor. Taking the evidence as a whole, and applying to it the law laid down by the House of Lords, I reach the same conclusion as the Lord Ordinary on what is primarily and mainly a question of fact, namely, that the respondents' fireclay is a mineral within the meaning of section 70, and that accordingly the appellants are not entitled to the interdict which they ask.

The Court adhered.

Counsel for the Reclaimers (Complainers)—Clyde, K.C.—Cooper, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—D.-F. Scott Dickson, K.C.—Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Saturday, July 16.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

THE SCOTTISH NORTH-AMERICAN TRUST, LIMITED) *v.* FARMER (SURVEYOR OF TAXES).

Revenue—Income Tax—Profits or Gains—Deductions of Interest on Short Loans—Income Tax Act 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 100, *Sched. D, First Case, Rule* 3.

Held that a financial and investment company in striking the balance of its profits or gains was entitled to debit its profit with interest paid to bankers in New York on short loans, as such loans were not capital.

The Income Tax Act 1842 (5 and 6 Vict. cap. 35) enacts, sec. 100—"And be it enacted that the duties hereby granted, contained in schedule marked D, shall be assessed and charged under the following rules. . ."

"*First Case.*—Duties to be charged in respect of any trade, manufacture, adventure, or concern in the nature of trade not contained in any other schedule of this Act."

"*Rules.*"

. . . . . .

"*Third.*—In estimating the balance of profits and gains chargeable under Schedule D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from, such profits or gains, on account of . . . . . any capital withdrawn therefrom, nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern. . . . . ."

"*Fourth.*—In estimating the amount of profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains."

The Scottish North-American Trust, Limited, being dissatisfied with a determination of the Commissioners for the General Purposes of the Income Tax Acts and for executing the Acts relating to the Inhabited House Duties for the County of Edinburgh, at a meeting held by them at Edinburgh on 22nd December 1908, required the Commissioners to state a case for the opinion of the Court of Session as the Court of Exchequer in Scotland.

The Case stated—"The Scottish North American Trust, Limited (hereinafter referred to as the company), appealed against an assessment for the year ending 5th April 1909 on the sum of £2404 (duty £120, 4s.) made upon it under the Income Tax Acts in respect of the profits of the business carried on by it, based upon the average yearly profit during the twenty-seven months from the date of the company's incorporation to 31st October 1907. The ground of appeal was that in arriving at the assessable profits deduction had not been allowed of the interest paid by it to bankers in America.

"The assessment was made under 5 and 6 Vict. cap. 35, sec. 100, Schedule D, First Case; 16 & 17 Vict. cap. 34, sec. 2, Schedule D; and 8 Edw. VII, cap. 16, sec. 7, and the sum assessed was arrived at as follows:—

	Year to 31st Oct. 1907.	15 Months to 31st Oct. 1906.
Balance of profit as per P. & L. account	£4911 7 11	£6119 2 5
Less balance brought forward from previous account . . .	1119 2 5	
	£3792 5 6	
Add sums debited as expenses and not allowable as deductions:—		
Suspense account		414 15 4
Income tax . .	108 18 11	378 2 2
Interest paid to bankers in America on loans by them to the company .	457 6 13 4	80 5 4
	£847 7 17 9	£6992 5 3
Deduct taxed dividends received by company . .	2179 0 5	7882 8 5
Profit for year to 31st October 1907	£6298 17 4	
Loss for fifteen months to 31st October 1906 .	890 3 2	
Total profit for 2¼ years . . .	£5408 14 2	
Average yearly rate of profit . .	£2404 0 0	

"The following facts were admitted or proved—

"The company was incorporated on 27th July 1905 under the Companies Acts as a company limited by shares. The capital (authorised, subscribed, and paid up) of the company is £100,000, divided into 100,000 shares of £1 each. The registered office of the company is in Edinburgh, where the directors and shareholders meet, whence the affairs of the company are managed, and where all the profits of the company are assessable.

"The objects of the company as set forth in the third article of its memorandum of association are, *inter alia*, as follows—(1) To carry on investment, financial and banking business in the United Kingdom of Great Britain and Ireland, India, the British colonies and dependencies, the United States of America, and in any other foreign countries or states. (2) To purchase, invest in or upon, or otherwise to acquire, hold, sell, pledge, charge, dispose of and deal in all or any securities or investments of all classes and descriptions . . . of any company, person, firm, corporation, or trust carrying on or formed to carry on business in the United Kingdom of Great Britain and Ireland or India, or any British colony or dependency, or in the United States of America, or any other foreign country or state, or in the shares, stocks, bonds, debentures, obligations, scrip, or securities of any British Colonial or Foreign Government or authority, supreme, municipal, local or otherwise. . . . (8) To borrow and raise any sum or sums of money by way of loan, discount, cash credit, overdraft, or guarantee, or upon bills of exchange, promissory-notes, bonds, and dispositions in security, cash-credit bonds, debentures, debenture stock, mortgages, deposit-receipts, or in any other manner, and to grant security for all or any of the sums so borrowed, or for which the company may be or may become liable, and by way of such security to dispone, mortgage, pledge or charge the whole or any part of the property, assets, or revenue of the company, including uncalled or unpaid capital, or to dispone, transfer, or convey the same absolutely, or in trust, and to give to lenders or creditors powers of sale and other usual and necessary powers. (9) To deal with any bank, bankers, or others in the way of placing money on current account or deposit, or to borrow money from such banks or others, either with or without the deposit, pledge, or assignment of securities. . . . (30) To procure the company to be registered or recognised in any British colony, dependency, or possession, or in any foreign country or state.'

"In the course of its business the company purchased in New York certain bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the company's available cash, and certain of the securities which were lying in New York were pledged to Messrs Ladenburg, Thalmann, & Company, the company's bankers in New York, in consideration of which the bankers allowed the company's bank account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the company bought and sold securities, and the company was charged periodic interest at current rates from day to day. In September 1906 Messrs Ladenburg, Thalmann, & Company opened a loan account, in addition to the ordinary overdraft with the company in New York, on which they granted a loan not exceeding £200,000 to the company for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated, and the balance was transferred to current account. Messrs Ladenburg, Thalmann, & Company collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the company. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month, the interest was debited to the overdraft on the current account.

"For the company it was *contended* that the item of interest paid to bankers in New York is not liable to tax, and should therefore be deducted before arriving at the net profits assessable for income tax. The interest in question is not annual interest payable out of the company's profits or gains within the meaning of Rule 4 to Case 1 of Schedule D. It is a disbursement or expense incurred by the company in the company's business, and allowable by Rule 1 to Cases 1 and 2 of Schedule D. It is contrary to the whole scope of the Income Tax Acts to treat the interest accruing to an American citizen from advances over property in America as taxable merely because the owner of the property is resident in the United Kingdom. The assessment also is entirely opposed to the principle of taxation at the source. That principle presupposes the right of the person paying the tax in the first instance to recoup himself from some other person. In this case the company maintains that there is no liability upon it to tax, as the interest is deducted by the lenders from dividends on securities in their own hands the company has no opportunity of deducting the tax on paying the interest. The case of the *Anglo-Continental Guano Works* v. *Bell*, 1894, 70 L.T.R. 670, is not a parallel, as in that case money was advanced by the company, whose head office was in Hamburg, to their London branch, and the profits assessed were all earned in the United Kingdom, and on that account were liable to British income tax. The present case is different, the loan being made in America on the security of the property there, and the interest paid to the American bankers is outwith the scope of the Income Tax Acts. The case of the *Alexandria Water Company, Limited* v. *Musgrave*, 1883, L.R., 11 Q.B.D. 174, 49

L.T.R. 287, 1 T.C. 521, is not analogous to the present.

"The Surveyor of Taxes (Mr Richard Farmer) maintained—(1) That the interest in question was interest upon capital employed in the business of the company, and that therefore, by reason of 5 and 6 Vict. c. 35, sec. 100, Case 1, Rule 3, it could not be set against or deducted from the profits of the said business; and (2) that the present case is governed by the decisions in the cases of the *Anglo-Continental Guano Works* v. *Bell*, 1894, 70 L.T.R. 670, 3 T.C. 239; and *Alexandria Water Company, Limited* v. *Musgrave*, 1883, L.R., 11 Q.B.D. 174, 49 L.T.R. 287, 1 T.C. 521.

"The Commissioners on consideration of the facts and arguments submitted to them were of opinion that the interest paid to bankers in America was not a legal deduction for income tax purposes, and accordingly they refused the appeal and confirmed the assessment.

"The Commissioners were also of the opinion that the sums of money raised by loan and overdraft were utilised as additional capital."

Argued for the appellants—The company was a company which traded in money and investments, and the profits could only be ascertained by setting outgoings against receipts of interest. The interest paid on short loans was payment of the nature of current expenditure, made with a view to the earning of profits, and hence was not subject to tax—*Inland Revenue* v. *Stewarts & Lloyds*, July 20, 1906, 8 F. 1129, especially Lord M'Laren at 1132, 43 S.L.R. 811. [The LORD PRESIDENT referred to *Strong & Company, Limited* v. *Woodifield*, [1905] 2 K.B. 350, Collins, M.R., at 356.] There was no prohibition in any of the rules of the deduction they wished to make. Rule 4 of the first case did not apply here, for the interest was on short loan, never exceeding six months. The words used in rule 4 of the first case were similar to those under construction in *Goslings & Sharpe* v. *Blake*, 1889, 23 Q.B.D. 324, and only applied to interest for at least a year. Rule 3 of the first case did not apply to this case. The capital of the company was not increased by the loans, which being of a temporary character were very different from debenture capital, and accordingly the present case differed from *Alexandria Water Company* v. *Musgrave*, 1883, 11 Q.B.D. 174, 1 Tax Cases 521, which was referred to in *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. 309, by Lord Herschell at 325. The *Anglo-Continental Guano Works* v. *Bell*, 1894, 70 L.T. 670, 3 Tax Cases 329, was of doubtful authority. "In practice, however, such interest had always been allowed as a deduction up to the time of that decision, and it has since been continued to be so allowed"—Dowell, 6th ed., p. 188. Section 24 of the 1888 Act made interest other than annual come under the rule as to deduction of interest at the source, but the principle of taxation at the source presupposed the right of the person paying the tax to recoup himself from some other person.

Argued for the respondents—The Commissioners had found in fact that the sums in question were being utilised as additional capital. A trader who increased his capital by borrowed money could not deduct the interest he paid on the money so borrowed—*Anglo-Continental Guano Works* (*cit. sup.*); *Alexandria Water Company* (*cit. sup.*), which, so far as was necessary for their contention, had received the approval of the House of Lords in *Gresham Life Assurance Society* (*cit. sup.*), Lord Halsbury at 315, Lord Watson at 320, Lord Herschell at 325; *Arizona Copper Company* v. *Surveyor of Taxes*, November 20, 1891, 19 R. 150, especially Lord President Robertson at 153, 29 S.L.R. 134, 3 Tax Cases 149; *Magistrates of Portobello* v. *Surveyor of Taxes*, July 10, 1863, 27 S.L.R. 863.

At advising—

LORD SALVESEN—The appellant company carries on an investment business, and in addition to the power to deal in securities and investments of all classes it has also power to borrow and raise sums of money by way of loan, discount, cash credit, overdraft, &c., and to grant security for any of the sums borrowed. In the course of its business during the financial year ending 31st October 1907 the company took advantage of this last-mentioned power to borrow money in New York for a period of six months, and a loan was arranged for a further period of like duration, after which the loan was repaid. The object of the loan was to enable the company to purchase investments at what is believed to be a favourable time, but when it had no capital of its own available. Formerly money had been borrowed on overdraft, but as better terms could be obtained from the company's bankers in America for a loan for six months on the footing of the company depositing the securities purchased with the borrowed money, this method of borrowing was resorted to. In stating the profits for the year in question the appellant company deducted the amount of interest paid to the American bankers; but this deduction has been disallowed, on the ground that the interest in question was interest on capital employed in the business of the company, and therefore could not properly be deducted from the profits of the business. The question for decision is, Whether the interest was properly deducted in ascertaining the profits?

If the question had arisen for the first time for decision it would humbly appear to me to present no difficulty whatever. From an ordinary business point of view it seems preposterous to suggest that the money which a trader pays to a bank upon overdraft or on a secured loan forms part of the profits or gains of his business. Money which he receives by way of interest will no doubt in the ordinary case go to swell his profits; but how payments which in fact diminished his receipts should be regarded as in any sense part of his income it is at first sight very difficult to understand. The first rule of the first case under Schedule D does not appear to me to create any diffi-

culty. So far as I can see, the third rule has no application to the facts of this case; and the fourth rule, which provides that "in estimating the amount of the profits no deduction shall be made on account of any annual interest," applies only where the annual interest is payable out of such profits. The interest which a trader pays to a bank with which he deals for financial accommodation is not in any sense payable out of profits. It is an ordinary claim of debt with which the whole assets of the company or trader are chargeable. There is, besides, the further point which was made by the appellants that the fourth rule is not applicable at all, because the interest which has been deducted here was not annual interest, but interest upon short loans, each of which was only for half a year; and according to the decision in the case of *Gosling*, 23 Q.B.D. 324, a customer of a bank who pays interest on such a loan is not entitled in making the payment to deduct income tax from it. It follows that in the case before us the appellant company could not have deducted income tax from the interest which they paid on the short loan already referred to even if the money had been borrowed from English bankers, and apart from the specialty that the loan was made to them by American bankers, who are not liable to be assessed under our income tax laws.

The fourth rule was the subject of interpretation by the House of Lords in the *Gresham Life Assurance Society*, 1892, App. Cas. 309. The Society as part of its business granted annuities in consideration of a lump sum, and in making up its balance-sheet deducted from its gross income the sums paid in discharge of its annuity contracts. The obvious propriety of this from a business point of view did not prevent the Inland Revenue from maintaining that the interest which the Society paid in discharge of its contractual obligations formed part of its income for the purpose of assessment under the Income Tax Acts, and this view received the support both of the Queen's Bench's Division and of the Court of Appeal. Fortunately for the taxpayers of the country the House of Lords had no difficulty in reaching the opposite conclusion, holding that such annuities were not within the meaning of rule 4 payable out of profits. Lord Watson said—"Until the payments which they necessitated had been taken into account it cannot be ascertained whether there are any profits and gains or not." I think exactly the same thing may be said of the interest paid by the appellant company to their bankers.

The same principle lies at the root of the judgment in the case of the *Inland Revenue* v. *Stewart & Lloyds*, 8 F. 1129. The question in that case was whether certain expenditure could be properly deducted before profits were ascertained, and your Lordship in the chair said that "it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned." Assuming that to be the test, it would certainly be a strange abuse of language to say that interest which a trader has had to pay on money borrowed for the purposes of his business is an application of the profits earned when it may be that the interest exceeds the total amount of the profits.

The only difficulty I have in the case arises from the decision of the Queen's Bench Division in the *Anglo-Continental Guano Works* v. *Bell*, 3 T.C. 239, where it was held that the interest paid by a company on short loans from its bankers in order to enable it to pay cash for goods ought not to be deducted in arriving at the profits of the company for income tax purposes. That decision is not binding upon us, for it has never been approved in the House of Lords, or so far as I know in any subsequent case, and it appears to me to conflict with the opinions of the noble Lords who decided the *Gresham* case. The reasoning by which the judgment was supported is in effect that the profits of a business must be ascertained as such without reference to the consideration whether or not a particular partner or all the partners are trading with borrowed capital; and as supporting this view of the law reference was made to the *Alexandria Water Company* .v. *Musgrave*, 11 Q.B.D. 174, where it was held that no deduction can be made from the profits of a business carried on by a company for the interest payable on its debenture capital. The decision in the latter case was expressly approved by the House of Lords in the *Gresham* case, and may therefore be taken to be settled law, although the noble Lords who decided it expressly stated that they did not concur in all the reasons assigned by the Judges of the Court of Appeal for their decision. Lord Herschell held that the interest to the debenture-holders was payable out of profits and that there was no more reason why interest on such debenture capital should be deducted from the profits than interest on share capital. As a rule the point is quite immaterial, because companies in paying their debenture interest deduct the amount of income tax from the recipients, who accordingly pay the income tax. But the same principle cannot be applied in my opinion to interest paid on short loans or overdrafts to a banker by a trading firm. As I have already pointed out, such trading firms are not entitled to deduct income tax from interest which it pays to its bankers, but the bankers must pay income tax upon such portion of the interest as goes to make up their net profits from their business. It would be just as reasonable to hold that a trader was not entitled to take into account in arriving at his profits the rent which he pays for premises in which he carries on his business. Rent is just interest payable for the use of real property, and Lord Watson points out that it was one of the many startling results which the contention of the respondent in the *Gresham* case would involve that such rent would have to be added to the profits instead of being deducted from them. "Profits or gains must be ascertained on ordinary principles

of commercial trading" (*per* Lord Halsbury), and to the commercial mind it would seem a strange thing that a trader should pay income tax on money borrowed for the purpose of his business and in the ordinary course of it, and which if his total profits were less than the interest he paid would have to be paid out of capital and not out of profits at all. Sums paid on the discount of bills or on overdrafts on bank accounts would on the same principle not form a deduction from the trader's profits, but be added to them for income tax purposes, with the result of creating hopeless confusion in commercial bookkeeping, and of enabling the Income Tax Commissioners to levy the tax on substantially the same sums from the person who paid and from the person who received the discount or interest. I am of opinion, accordingly, that the decision in the *Anglo-Continental Guano Company's* case ought not to be followed here, and that we must hold that the Commissioners were wrong in the decision at which they arrived.

LORD JOHNSTON—I agree with your Lordship in thinking that the determination of the Commissioners in this case was erroneous. The question is whether, in striking the balance of profits or gains of this company, the company is entitled to debit their profit with interest paid to bankers in New York on short loans. It is immaterial that the loans were obtained and used in a foreign country. It is equally immaterial in what form these loans were obtained. They were short, in the sense that they were for short and indefinite periods, borrowed as occasion required, and repaid as opportunity permitted. They were in fact banking facilities or advances such as are represented by the ups and downs of a banking overdraft account.

The company is to be charged duty in respect of its trade (Act of 1842, Schedule D, First Case); and its trade is the dealing in foreign securities. The duty is (First Case, Rule 1) to be computed on a sum not less than the full amount of the profits or gains of such trade without other deduction than is thereinafter allowed. The Inland Revenue say that in estimating the balance of profits and gains and assessing the duty thereon, no sum (First Case, Rule 3) shall be set against or deducted therefrom "for any sum employed or intended to be employed as capital in such trade," and maintain that the sums in question, borrowed as above mentioned, were so employed as capital. It is fully recognised that the profits or gains of a trade in the sense of the Income Tax Acts are not the profits which reach the partners, or the net profits, but the profits which the business regarded as an entity makes by the employment of its capital, and that its capital may be supplied by borrowing as well as contributed by the partners. But that leaves open the question, When does borrowed money become for the purposes of the Income Tax Acts capital of the concern, in respect of which there is to be no deduction in name of interest? and when is it not capital in such sense? so that interest paid for its use is (First and Second Cases, Rule 1) a disbursement or expense, "being money wholly or exclusively laid out or expended for the purposes of such trade."

The dividing line is not easy to draw or to define. But I think that as the term "profits" has in applying the statutory provisions been "understood in its natural and proper sense—in a sense which no commercial man would misunderstand" (*per* Lord Halsbury, L.C., in *Gresham Life Assurance Society* v. *Styles*, L.R., (1892) A.C. 315), so may the term "capital" be understood.

It may be well said that if money is borrowed on a permanent footing as from year to year, the capital of the concern is in a commercial sense enlarged thereby, and the business is extended, whereas no commercial man would consider that his banking facilities were part of his capital, or the consideration he paid for them anything but an expense of his business. And consistently with this it is provided (First Case, Rule 4) that "in estimating the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains." It is true that this is a negative provision only. It does not say that interest which is not annual may be deducted. But the natural inference is that a distinction is drawn with intention between interest which can be properly described as annual, though it may be paid at shorter terms, and interest which cannot be so described, but is casual or anything from day to day upwards short of annual. I think that the distinction between the two classes of cases may be somewhat aptly described by the use of a term of the Scots law. Where the interest is payable in respect of an obligation having "a tract of future time," it may in the sense of the statute be understood as annual, and where not, not. See opinions of Esher, M.R., and Lindley and Bowen, L.JJ., in *Goslings & Sharpe* v. *Blake* (L.R., 23 Q.B.D. 324).

And it may be appropriately noticed that the fourth rule of the First Case of Schedule D must be read along with section 102 of the Act, which provides for payment or deduction at the source, as it is said, of income tax on all annuities, yearly interest of money, or other annual payments, and for its deduction by the obligor in making payment to the obligee. That shows that in the conception of the Act money lent to a business on a tract of future time is capital invested in it, which should be treated as sharing in profits to the extent of the interest payable upon it, and though for convenience of collection the profits are to be treated as a whole, the true owner of this capital should bear his share of tax by deduction on settlement between him and his debtor.

But this provision in section 102 accentuates the distinction between annual

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-