had undertaken to take up these shares; the telegram which he forwarded to the meeting of shareholders, and the fact that he persuaded two of the directors along with himself to advance the payment of these shares, brings out very distinctly his view of the matter, but that cannot be said to be sufficient.

My impression is that while Waddell thought that Torrance had already taken these shares, what Torrance really said was that he might some day take them. One must throw overboard entirely Torrance's evidence. At the time of the proof I did not believe Torrance when he said that "he had all along thought the thing a rotten concern and he would have nothing to do with it." If Torrance had maintained that his position was that at some future date he might be persuaded to take shares in the company that would have been intelligible. His whole actings from beginning to end were very unlike those of a business man, and his not repudiating the letters of allotment and keeping them among his papers are not satisfactorily accounted for. The liquidator, it appears to me, was put in a very peculiar position, after all that had taken place in the matter, and he was bound I think to try this question.

Lord Deas was absent.

The Court directed the liquidator to remove the name of William Torrance from the register of shareholders of the Glenduffhill Coal Company.

Counsel for Liquidator — Lorimer. Agent — John Latta, S.S.C.

Counsel for Torrance—Mackintosh—Darling. Agents—Waddell & M'Intosh, W.S.

Thursday, November 16.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

ANDERSON *v.* ALSTON AND ANOTHER.

Sale—Mineral Field—Mode of Estimating Profits—Depreciation—Interest on Price.

A right to work the minerals in an estate was sold in consideration of a certain sum paid by the purchaser, and of a further sum of £200 to be paid by him out of "the first and readiest of the profits." The field remained unworked for nineteen years, and was thereafter let to tenants. In an action under the clause in the disposition to obtain payment of the said £200, *held* that before "profits" in the sense of the disposition could be said to exist, interest on the sum already paid by the purchaser, as well as a sum to meet the depreciation of the subject by partial exhaustion of the minerals, must be taken into account.

By disposition dated 9th June 1853 Thomas Anderson of Langdales and Robert Anderson, one of his sons, who were *pro indiviso* proprietors of Langdales, sold to James Thomson Rankin two-thirds *pro indiviso* of the whole coal and ironstone, &c., in and under and unwrought from the mineral field of Langdales and Luckenhill. The consideration stated in the disposition was the sum of £800, and also a further sum of £200 to be paid by the purchaser to the sellers out of "the first and readiest of the profits which may be derived from the said minerals."

Thomas Anderson of Langdales, who died in 1869, by disposition and settlement conveyed to his son Thomas Anderson, the pursuer of the present action, his half *pro indiviso* of the said lands of Langdales, reserving to the said James Thomson Rankin and his heirs and assignees the minerals conveyed by the foresaid disposition.

Robert Anderson, by disposition dated 30th May 1857, sold to Thomas Waugh, Slamannan, and Mrs Elizabeth Waugh, his spouse, his half *pro indiviso* of the said lands, substituting them in his full right to call for implement of the whole stipulations prestable in the said disposition of the minerals. Under this disposition Thomas Waugh and his wife were infeft, and on the 16th May 1873 they disponed to the present pursuer their half *pro indiviso* of the said lands.

By assignation dated 2d and 20th October 1880 the whole children of the deceased Thomas Anderson, and one of them, Robert Anderson, as his heir-at-law, conveyed to the pursuer, Thomas Anderson the younger, above mentioned, absolutely and irredeemaby, their whole interest under the foresaid disposition of minerals granted by Thomas and Robert Anderson in favour of James Thomson Rankin, and, *inter alia*, the sum of £200 already mentioned, and their whole right to demand the portion of the price still unpaid. Thomas Anderson, the pursuer, was executor-dative *qua* one of next-of-kin to his father. James Thomson Rankin had died intestate in 1861, and was succeeded by his son Patrick Rankin, who died on 10th January 1880, and was succeeded by Mrs Alston and Anne Rankin, the present defenders, as his general disponees. During the lifetime of James Rankin the minerals had never been wrought, but a lease was entered into by his son Patrick Rankin in 1872 for a period of twenty-one years from Martinmas of that year. By the terms of this lease various annual sums were to be received by the landlord between the years 1876 and 1881 in name of rents, or, in the landlord's option, of lordship.

In this action the pursuer claimed payment of the sum of £200 as profits earned under the lease, and due to him in respect of the clause in the original disposition giving a right to £200 out of "the first and readiest of the profits." He averred that the profits claimed by the pursuers and their authors greatly exceeded £200. Alternatively he asked an accounting of the rents and profits derived by the defenders from the minerals, and payment of such sum, not exceeding £200, as should be due to him on such accounting.

The total sum received for rents from Whitsunday 1876 to Martinmas 1881 was shown by a statement produced with the defences to be £877, 17s. 7d. The defenders averred—"No interest or return was received from said minerals or for the said sum of £800 originally paid by James Thomson Rankin therefor from 1853 till 1873, and the statement produced shows the whole return that has yet been received. The whole of the said minerals were valued as at January 1880, so far as belonging to the said Patrick Rankin, and the value did not amount to over £570. No profits whatever have been derived from the mine-

rals originally purchased by James Thomson Rankin in 1853."

The defenders pleaded, *inter alia*—"(3) No profits having been made from the said minerals, and the defenders having stated the whole sums received therefrom, the defenders should be assoilzied. (5) The defenders are not bound to pay any sums to the pursuer till they have received from the said minerals the original price of £800, with the interest thereon at the rate of five per cent. from 1853."

On the 17th June 1882 the Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds that in terms of the disposition in favour of the now deceased James Thomson Rankin, set forth in the condescendence, the defenders are liable to make payment to the pursuer of the sum of £200 out of the profits which may have been or may yet be derived by them or their predecessors from the minerals thereby conveyed: Finds that in ascertaining the amount of such profits the defenders are entitled to deduct from the whole sum received by themselves or their predecessors the whole sum of £800 paid by the said James Thomson Rankin as the price of the said minerals, with interest thereon at five per cent. since payment: Appoints the case to be put to the roll for further procedure, and grants leave to the pursuer to reclaim if so advised.

"*Opinion.*—The predecessors of the pursuer were proprietors of two-thirds of the minerals in and under the lands described in the condescendence, and in June 1853 they sold these two-thirds to the predecessor of the defenders in consideration, as the disposition bears, of £800 immediately paid, and of a further sum of £200 out of the first and readiest of the profits which might be derived from the said minerals. The parties are agreed that for many years the purchasers and their representatives received no return from the minerals, which indeed were not wrought until the year 1874. But in 1872 they were let, along with the remaining third, for payment of certain rents or lordships to be divided between the *pro indiviso* proprietors in proportion to their shares in the subject of lease. It is not disputed that since 1873 the defenders and their predecessors have received the proportion of rents applicable to the *pro indiviso* share in question, nor is it disputed that if, upon taking into account the whole sums so received, the purchasers and their representatives, including the present defenders, can be shown to have made £200 or more of profit upon the transaction, the defenders are bound, in terms of the stipulation expressed in the conveyance, to pay that sum to the pursuer, with interest from the date at which it can be shown to have been earned. But the parties differ as to the meaning of the term 'profits' as used in the clause in question, and they are agreed in asking a judgment upon the question of construction, as to which they are at variance, without further inquiry into the facts.

"The pursuer says that profit means the excess of the return in any year over the working expenditure of the year, without taking into account the original cost of the mineral strata from the working of which the profit is to be earned. The defenders, on the other hand, maintain that the word profit must be construed with reference to the transaction between the parties, which they say must be regarded as a transaction of purchase and sale upon which no profit can be earned until the subject purchased has been resold by the purchaser for something more than he paid for it. I think the defenders are right. The contract does not give the seller a charge upon profit earned *de anno in annum*. The mineral strata are sold out and out, and the seller stipulates that in addition to the fixed price already paid he shall have a further sum of £200 as soon as the purchaser has derived so much profit from the transaction. There is no stipulation as to the manner in which the minerals are to be worked for the purpose of ascertaining the profit earned. The purchaser might have worked them himself for a period of years, or he might let them, or, without working the minerals at all, he might have sold them *in situ* for a fixed price, and the stipulation as to a further payment out of profit would be equally applicable to either of these events. Now, if he had sold the minerals *in situ* as he bought them for £1000 or more, it seems to be clear that a profit of £200 would have been earned, and that he would have had to make the stipulated payment out of that profit, and I think it equally clear that if he had sold for less than £800 he would not have sold at a profit at all, but at a loss, and that nothing would have been payable as out of profits which never were earned. I cannot see that it should make any difference as to the effect of the condition if instead of selling the whole mineral strata unwrought he had thought fit to work the minerals and sell them piece by piece as they were brought to the surface, and if after working them for a year or a period of years they were found to be exhausted after yielding a return of less than £800 upon the whole, it does not seem to me that he would have made a profit on the adventure any more than if he had sold the whole *in situ* for a similar sum. Nor can it vary the result that he has let them to a mineral tenant, since a mineral lease is simply a sale out and out of so much of the minerals as can be worked during its subsistence. I find nothing in the nature of the transaction or in the terms of the contract which enables me to refer the word 'profit,' as employed in the clause in question, to anything else than the entire adventure in which the pursuer had engaged, and so reading the clause I think the purchaser cannot be said to have made any profit out of the mineral strata which they have purchased until they have repaid the prime cost with interest."

The pursuer reclaimed, and argued—Whenever the defenders began to work the minerals with a return then profits began to come in. By the terms of this disposition the pursuer was entitled to be paid out of the first earnings. The Lord Ordinary had proceeded upon a wrong basis by assuming that profits upon the transaction are the same as profits on the minerals. If that view were right, the true profit could not be ascertained until the minerals were worked out, for there might be profit one season and loss the next.

Authorities— Lindley on Partnership, i. 786 and 791; *Rishton* v. *Grissel*, 1868, L.R., 5 Eq. 326.

Argued for defenders—The pursuer attempted to import into the word "profits" the element of time. "Profits" is a flexible word, and there is nothing in the deed about periodical ascertainment. The word "profit" occurs here in a deed of sale, and the question can only arise after the

sale has taken place. The working of minerals is really a piecemeal re-sale. Some regard must be paid in a case like this to the capital sunk in the purchase and to the depreciation of the subject. This action was in every respect premature.

The pursuer admitted by minute that the sum of £877, 17s. 7d., stated by the defenders to have been the total sum received for rents to Martinmas 1881 was the sum truly received by them.

At advising—

LORD PRESIDENT—In 1853 Thomas Anderson and Robert Anderson sold to James Thomson Rankin two-thirds *pro indiviso* of a mineral field, and in the disposition to Rankin the consideration of the sale is thus expressed—"In consideration of the sum of £800 sterling instantly advanced and paid to us . . . as the price and value of the said two-thirds *pro indiviso* of the whole coal, ironstone, limestone, . . . and in consideration of the further sum of £200 sterling, hereby covenanted to be paid by the said James Thomson Rankin out of the first and readiest of the profits which may be derived from the said minerals when sold," &c. The mineral field thus conveyed was unwrought, and it was therefore in every respect a speculative subject, and the fixing of a fair price was much more a matter of conjecture than if the sale had been that of an ordinary landed estate. One can easily understand, therefore, that there might be a considerable difference of opinion between the parties as to its value, and accordingly the sum of £800 was fixed upon as the price of the subjects, but it was at the same time agreed that if the venture should turn out profitable for the purchasers something should be added, and it is with reference to the additional sum of £200 which was to be paid in a certain contingency by the purchasers that the present dispute has arisen. The words of the deed are, "£200 to be paid . . . out of the first and readiest of the profits." Now, the Lord Ordinary has thus construed these words in the following passage in his opinion—"If he had sold the minerals *in situ* as he bought them for £1000 or more, it seems to be clear that a profit of £200 would have been earned, and that he would have had to make the stipulated payment out of that profit, but I think it equally clear that if he had sold for less than £800 he would not have sold at a profit at all, but at a loss, and that nothing would have been payable as out of profits which never were earned." Now, I am not prepared to affirm that interpretation of the clause in the contract. I think that the meaning of the parties was something different, for it might be that no profits could be ascertained until all the minerals were worked out, and clearly that was not the intention of the parties, because, supposing the pursuer wrought the minerals by himself or by means of a tenant, and thereby got a return showing a balance of nett profits on a stated profit and loss account, it would never do to postpone until the termination of the lease the consideration of whether he had got his £800 and five per cent. interest down to that period. Another construction which might be put upon this clause would be to hold it as pointing to the working of the minerals, and while not excluding the case of a re-sale, to view as more in the contemplation of parties the case which has actually occurred, namely, of the field being worked by tenants. A considerable time has passed since the purchase, nineteen years having elapsed between the date of the disposition and the date of the lease, yet it has not been suggested that there has been anything improper in this delay, and the lease having at length commenced in 1872, the question to be determined is, what are "the first and readiest profits" in the sense of this disposition? There can be no doubt that so soon as nett profits can be shown then the seller is entitled to be paid his £200, or a proportional amount thereof; but then how is this profit and loss account to be stated? It appears to me that the pursuer has completely failed to show to us that any profit has been realised at all, for all that he has laid before us is a statement of the gross return paid by the tenant from 1874 to 1881, amounting in all to £877, 17s. 7d. But the gross amount paid by the tenant is not all that is to enter into a profit and loss account like this, for it must be kept in mind that prior to the payment by the tenant in 1876 the landlord had been kept out of the interest of his money for twenty-three years, and therefore that interest falls to be placed on the debit side of the account. In considering, accordingly, whether in the year 1876 there is any profit out of which this sum of £200 might be paid, we find, on the contrary, that there is a very heavy balance upon the other side, for it is clear that there can be no profits, in the ordinary sense of the word, unless there be a balance over and above the original cost of the mineral field.

Down to November 1881, on the showing of the pursuer (who adopts the statement of rents said by the defender to have been received), the sum received only amounts to £877, 17s. 7d. Now, it is plain that that sum is not sufficient to wipe off the balance of interest which existed in 1876, and has gone on increasing ever since. Now, this itself is sufficient to decide the present case, but I think it right to say that interest upon the £800 is not the only debit entry in this account. The character of the subject must be taken into account; being a mineral field, it is so far exhausted in yielding this profit, and the question how far the field is diminished each year by working has also to be considered. These items must be set against the rent, and if any surplus is obtained over and above these, that will be profit in the sense of this deed; but there has been no chance of this hitherto, nor does there appear to be any immediate prospect of such a return.

I am therefore for finding that the pursuer has failed to establish to our satisfaction that any profit has been realised within the meaning of the words of this deed, and that the defender should be assoilized from the conclusions of this action.

LORD MURE—It does not appear to me that it would be safe to allow the Lord Ordinary's interlocutor to stand as it is at present, and I agree with your Lordship in the reasons which have been stated against it. The question is, what meaning is to be attached to the words "the first and readiest of the profits." For twenty-two years no attempt seems to have been made to work the minerals. It was not until 1876 that rents under the present lease began to come in, and hence the difficulty which has arisen in deciding upon what principle profits are to be determined. I think with your Lordship that interest on the price of £800 must be set against the sum said to be the "profits," and that there is a large balance of interest against the pursuer even down

to 1881. It appears to me, on that ground alone, that no profits in the sense of the words of this clause have yet been realised, and that the pursuer cannot ask for payment of any part of the £200. I therefore agree with your Lordship in the decision at which you have arrived.

Lord Shand—I am of the same opinion. No doubt the clause in question does not expressly mention the events which are to create the profits, but it is clearly implied that this sum of £200 is to be paid out of the profits which are to be derived from the minerals. Now, these profits can only be realised by working the minerals or by a re-sale of the field. But the question still remains, What are profits? Are they mere receipts, or something more? These minerals cost the buyer originally £800, and it is clear that whether there is a sale or a working of the field after the purchase the sum so paid must be taken into account, and interest thereon must be a first charge upon the profits. In the case of a re-sale the purchaser parts with the minerals, and the profit, if any, is just the difference between the purchase and the re-sale price, and therefore had the minerals in the present case been sold at a recouping price the pursuer would have been entitled to succeed. That, however, is not what has occurred. The minerals have been worked by tenants, and I do not think that the purchaser is entitled to be recouped in principal and interest before accounting for any profits which he may thus have realised. I think that a profit and loss account must be made out containing on the one side the rents, and on the other interest, arrears of interest, and a sum for depreciation, and if any surplus remains that must be held as "the first and readiest of the profits." It was maintained that the question of arrears of interest was not a proper element to introduce into the present case, but with a transaction of sale and purchase which discloses £800 as the price of the minerals, and a question having arisen as to whether or not profits have been earned on the working of these minerals, it is essential, in order to arrive at a fair result that interest on the purchase price be taken into account. I therefore agree with your Lordships in the proposed decision.

Lord Deas was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

Counsel for Pursuer—Gloag—Low. Agents—Russell & Dunlop, C.S.

Counsel for Defenders—J. P. B. Robertson—Lang. Agents—J. & A. Hastie, S.S.C.

Thursday, November 16.

SECOND DIVISION.

[Sheriff of the Lothians.

MINTONS *v.* HAWLEY & COMPANY.

Process—Expenses—Draft Summons — Payment before Service of Summons.

The cost of preparing a summons to enforce payment of a debt cannot be recovered from the debtor if he offer to pay the debt before the summons is served.

Cheque—Legal Tender—Acceptance of Cheque—Bar.

A debtor against whom proceedings had been threatened to enforce payment of an account, sent his cheque in payment of it, which was declined by the creditor's agents, who demanded to be paid along with the amount of the account the cost of a draft summons which they had prepared but had not yet served. The debtor then sent the cheque to the creditor, who retained it, and acknowledged receipt, but eventually returned it and raised an action for the amount of the account with expenses. *Held* that the action being in reality only raised to recover the expenses of preparing the summons, and the defender having paid his debt before the action was raised by cheque which the pursuer had accepted, the defender fell to be assoilzied with expenses.

This was an action raised in the Sheriff Court of Midlothian for payment of an account of £33, 3s. 5d. The pursuers were Messrs Minton, tile merchants, Stoke-upon-Trent, and the defenders were William Hawley & Co., Edinburgh, and William Hawley the sole partner thereof. The pursuers used arrestment upon the dependence. The action was raised in the following circumstances:—

On the 29th April 1882 the pursuers' agents, Messrs Irons & Speid, wrote to Mr Hawley for payment of the account of £33, 3s. 5d. above mentioned. This debt had been the subject of action by the pursuers in the English Courts at Westminster, but the defender successfully challenged the jurisdiction over him of these Courts on the ground that he was a domiciled Scotsman carrying on business in Edinburgh. On the 5th May the defender's agent, Mr Robert Menzies, S.S.C., replied as follows to a letter of Messrs Irons & Speid, S.S.C., demanding payment on behalf of the pursuers by 3d May:—"I understand that you have now paid the taxed expenses in the High Court [*i.e.*, the expenses of the pursuers' attempt to make the defender subject to the English Courts], and I will advise Mr Hawley that he had better pay the account, although he has several pleas he could urge in defence. He is from home in England this week, but I expect to see him on Tuesday or Wednesday, when you will hear from me further. Be good enough therefore not to take any further proceedings in the meantime, as I have no doubt Mr Hawley will take my advice and pay the cash without further trouble." On the 6th May Messrs Irons & Speid, S.S.C., wrote to Mr Menzies in the following terms:—"As our instructions were very peremptory, we have already prepared a summons in this case, and can only delay serving it on condition that you pay the expense thereof. If you agree to this, we shall be glad to grant the delay requested in your letter, but shall require to hear from you in the course of Monday forenoon [8th May] to this effect, otherwise we have no alternative but to proceed." On the 8th Mr Menzies replied—"I did not wish any delay in paying this further than that you would await Mr Hawley's return from England, which was surely most reasonable. Mr Hawley returned on Saturday, and this forenoon he sent me his cheque, pay-