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-

able to Messrs Minton, for the amount of their account, viz., £33, 3s. 5d., which I now send you." On the same date Mr Irons wrote to Mr Menzies:—"We have yours of this date, enclosing cheque by Mr Hawley in favour of Messrs Mintons, which we return, as we cannot accept this in payment of the debt claimed. We have already intimated to you that unless your client was prepared to pay expenses, as the summons was ready for service we could not give delay. If you choose you can accept service this afternoon to save your client trouble." Mr Menzies replied to Mr Irons:—"I have received your letter of this date, returning Mr Hawley's cheque, and declining to accept of it in payment of the debt claimed because you say the summons was ready for service and you could not give delay. I did not ask delay, and tendered you cheque for payment. I never before heard of such a reason given, when payment of a debt was offered before a summons was served, for refusing payment. Had you said that you wanted cash instead of Mr Hawley's cheque you could have had it, and I tender you my own cheque for the amount so that you may not have any ground of excuse on this head. I decline to accept service, and if you proceed with your summons it will be defended, and expenses claimed." The defender then forwarded the cheque to the pursuers at Stoke-upon-Trent, and they acknowledged receipt, and retained the cheque, which was paid into their account with the National Provincial Bank of England (Limited), Stoke-upon-Trent, and was sent down by that bank in the course of business to the Commercial Bank in Edinburgh for payment, but within a few hours of its being received by the Commercial Bank in Edinburgh, and before payment could be advised, the bank received a telegram from Stoke-upon-Trent to return the cheque. On 12th May Irons & Speid wrote to Mr Menzies:—"We had your favour of the 8th current, and have waited for payment of the debt till we could wait no longer. Our instructions were peremptory to recover payment, and you are well aware that a cheque payable to Messrs Mintons and crossed could not in any sense be regarded as payment. Payment of this debt has never been offered, and not even your own cheque has been tendered. The summons had therefore to be served. To-day we learned with some surprise that Mr Hawley had adopted the surreptitious method of forwarding a cheque direct to our clients, which, however, can only be accepted to account of the debt and costs, if accepted at all." On the 13th Mr Menzies replied:—"I have received your letter of the 12th inst., and must express my surprise that you should have served a summons in this matter after I sent you my client's cheque for the amount, which undoubtedly was payable to your client, and which you could have forwarded. Besides this, and so that you might have no excuse for serving a summons, I offered you my own cheque in payment, Had you been willing to take this it would not have caused you much trouble to have sent a clerk with a receipt to my office in exchange for the cheque tendered. When you sent back Mr Hawley's cheque I sent it to him, and he at once sent it direct to his creditors, which he was quite entitled to do. There was nothing surreptitious in this after you declined it, and the cheque so sent has been accepted. The service of the summons therefore was quite unnecessary and uncalled for. I have received instructions to defend it, and have lodged appearance."

The pursuers pleaded—"(1) The sum sued for being due and resting-owing by the defenders, the pursuers are entitled to decree, with interest and expenses as concluded for. (2) The defenders not having paid the said debt when due on application therefor being made, the pursuers are entitled to decree as concluded for. (3) The defenders not having paid, nor made a legal tender of payment of the sum sued for, the pursuers are entitled to decree with expenses."

The defenders pleaded—"The defenders having made payment of the principal sum sued for three days prior to the summons being served they are entitled to absolvitor with expenses."

The Sheriff-Substitute (HAMILTON) found that the account sued for was admitted to be due, and decerned in terms of the libel, with expenses. He added this note:—"The pursuers were not bound to accept the defenders' cheque as a payment of the account sued for, and, in point of fact, they did not accept it. It is thus strictly true that 'neither payment nor a legal tender of payment has been made by the defenders,' and the pursuers are clearly entitled to expenses."

The defenders appealed to the Court of Session, and argued — The action fell to be dismissed. The debt sued on had been paid by cheque, which had been accepted, and which was sent three days prior to the service of the summons. There was nothing surreptitious in sending it to the pursuers direct. This action was in the circumstances incompetent.

Authority—*Dougal* v. *Marshall*, March 7, 1834, 12 S. 532.

The pursuers replied—No legal tender of the amount sued on had been made. The payment by cheque, which was made surreptitiously, had been repudiated. They were entitled to the expenses of preparing the draft summons—expenses which had been made necessary by the dilatoriness of the defenders.

Authority—*Campbell* v. *Campbell*, February 28, 1843, 5 D. 753.

The defenders before the conclusion of the argument renewed their offer to pay the debt, and on the order of the Court payment was made at the bar.

LORD JUSTICE-CLERK—I remain of the opinion I expressed at the commencement of the discussion that this case should never have come into Court. I do not think I have ever seen a case like the present. It is quite contrary to what we would expect to find between reasonable and respectable agents such as these gentlemen certainly are. It is probably true that Mr Hawley had been dilatory in fulfilling his obligations under his contract with Messrs Minton, and I daresay the proceedings in the English litigation may have caused them some reasonable dissatisfaction. When the correspondence began on the 29th of April, hostilities were intimated, and Mr Hawley was warned that unless he paid the money by the 3d proceedings would be taken against him for recovery. But it appears in the statement of facts for the defender that Mr Menzies (Mr Hawley's agent) wrote Messrs Irons & Speid, and informed them that Mr Hawley had gone to England for a few days, but would return in the beginning of the following week, and that the debt would be paid

on his (Mr Menzies') advice. On the 5th May Mr Menzies wrote to the pursuer's agents to that effect. Then on the 6th May, and without waiting to see if Mr Hawley had come home, Messrs Irons & Speid write as follows:—"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." On the 8th May, Mr Hawley having returned on Saturday the 6th, Mr Menzies writes that "Mr Hawley returned on Saturday, and this forenoon he sent me his cheque payable to Messrs Minton for the amount of their account, which I now send you." On the 12th May, after declining to accept the cheque, Messrs Irons & Speid wrote to Mr Menzies: — "Our instructions were peremptory to recover payment, and you are well aware that a cheque payable to Messrs Mintons and crossed could not in any sense be regarded as payment. Payment of this debt has never been offered, and not even your cheque tendered. The summons had therefore to be tendered. To-day we learned with some surprise that Mr Hawley had adopted the surreptitious method of forwarding a cheque direct to our clients, which, however, can only be accepted to account of the debt and costs, if accepted at all." To this Mr Menzies then replies that he is surprised that the summons should have been served after Mr Hawley's cheque for the amount had been sent. He adds—"Besides this, and so that you might have no excuse for serving a summons, I offered you my own cheque in payment. Had you been willing to take this, it would not have caused you much trouble to have sent a clerk with a receipt to my office in exchange for the cheque tendered. When you sent back Mr Hawley's cheque I sent it to him, and he at once sent it direct to his creditors, which he was entitled to do. There was nothing surreptitious in this after you declined it, and the cheque so sent has been accepted. The service of the summons was therefere quite unnecessary and uncalled for." Now, I am of opinion that the matter should have ended here. To incur all the expense of this action because a sum of fifteen shillings, the cost of the draft summons, was not paid was wholly unjustifiable. The debt was paid beyond all doubt, and there is no excuse whatever for further expense to recover the expense of drafting the summons. As to the question of legal tender I need say nothing, but on the matter of expenses, that is always in our discretion, and being of opinion that Messrs Irons & Speid were wholly and absolutely wrong, I think the defender should not only not be found liable in expenses, but is entitled to recover expenses from the pursuers.

Lord Young—I am of the same opinion. I quite agree that a cheque, like a bank note, is not a legal tender, and any creditor who is offered payment through this medium is entitled to reject it if he pleases, just as he may reject bank notes or silver beyond a certain amount; but sensible people take payment by such medium if they have no reason to distrust it, and so in the ordinary case all considerable sums are paid by cheque, and although we must respect the law of legal tender —and I do not wish to say a word against it—we shall be ready to hold that payment by a cheque is proper payment of an account if it is accepted by the creditor, sent by him to the bank and duly honoured there, for it then becomes legal tender. Now, when this cheque was sent on the 8th of May to Messrs Minton it was sent quite properly, and they, acting as reasonable people, acknowledged receipt and retained the cheque, which was paid into their account with the National Provincial Bank of England (Limited) Stoke-upon-Trent, and it was sent to Scotland in the ordinary course of business. I consider that the cheque was accepted as payment provided that it was honoured, and that thereafter there was no question of legal tender in the case. But then within a few hours of its being received by the Commercial Bank in Edinburgh, and before payment could be advised, the pursuers asked to have the cheque returned, and the summons was served three days subsequent to the payment having been made. I am quite of opinion that payment having been made before the action was raised, we should take no account of this action, which ought never to have been brought. I am further of opinion that the defender is entitled to expenses both in the Inferior Court and in this.

Lord Craighill concurred.

Lord Rutherfurd-Clark—I am of the same opinion. I regret very much that these proceedings ever came before us. I quite concur with your Lordships in thinking that the pursuers by their own conduct accepted the cheque in payment of their debt, and this is not altered by the fact that the cheque was stopped by the telegram from Stoke-upon-Trent. That being so, I am of opinion that the pursuers are no longer entitled to raise an action, for the debt had been paid. The secret of the whole matter is that the action has been raised nominally for the purpose of recovering the debt, but really for the purpose of recover the expenses attending the preparation of the draft summons. Now, it is not a proper course to raise a summons not for the debt but for the cost of a draft summons. When a pursuer gets decree in an action, he gets decree for the cost of the summons, for that was a necessary step to obtaining payment; here the ordinary process is reversed, for the summons is not raised to get payment of the debt—which had been paid—but to get payment of the cost of the draft summons. If that sum was worth suing for—if this question was worth trying—it should have been raised in the Small Debt Court for the cost of the draft summons only.

The Court recalled the judgment of the Sheriff-Substitute, dismissed the action, and found the defenders entitled to expenses in both Courts.

Counsel for Appellants — Rhind. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Trayner—Thorburn. Agents—Irons & Speid, S.S.C.