Counsel for the Pursuer—Jameson—Macphail. Agents—Melville & Lindesay, W.S.

Counsel for the Defenders — Wilson — Clyde. Agents—Mitchell & Baxter, W.S.

Wednesday, November 4.

SECOND DIVISION.

[Sheriff of Renfrew.

SIBSON AND OTHERS *v.* SHIP "BARCRAIG" COMPANY, LIMITED.

Shipping Law — Charter-Party — Commission on Freight Payable to Charterers — Condition-Precedent.

By a charter-party for the charter of a vessel on its arrival at the port of loading, it was stipulated that "a commission of three and three-quarters per cent. shall be paid to charterers on the estimated gross freight . . . on the completion of loading, or should vessel be lost." The charter-party also provided that the vessel, which was then on a voyage from A to B, should receive a cargo at C for carriage to a port as ordered by the charterers, the rate of freight being different for different ports of discharge, and freight being payable on delivery of cargo. The charterers were to have the right of ordering the ship from one port of loading to another, and also of cancelling the charter-party in the event of the vessel not passing survey at the port of loading, or not arriving at the port of loading by a certain date. The ship was lost on its voyage from A to B.

Held that the obligation to pay commission on freight was subject, like the other provisions of the charter-party, to the condition that the ship should arrive at the port of loading, and that this condition not having been fulfilled the commission was not due.

Opinion (*per* Lord Young) that the contract was *ab initio* void, the ship not being in existence when it was entered into.

This was an action brought in the Sheriff Court at Greenock by W. S. Sibson and Peter Kerr, merchants, Portland, Oregon, in the United States of America, trading under the firm of Sibson & Kerr, and Dewar & Webb, commission agents, London, their mandatories, against the Ship "Barcraig" Company, Limited, Glasgow, and Thomas Wylie Hamilton, shipowner, Port-Glasgow, the liquidator of the said company. The pursuers craved decree for £239, 1s. 1d. as commission alleged to be due to them in terms of a charter-party dated 14th May 1895 entered into between Messrs Sibson & Kerr and the owners of the "Barcraig." The following were the material clauses of the charter-party: — "This charter-party this day made and concluded upon between *Messrs Hamilton, Harvey & Co.*, owners of the '*Barcraig,' steel, of Glasgow*, of the measurement of 2061 tons register, or thereabouts, now *on passage New York to Shanghai, and with liberty to take not exceeding* 1500 *tons cargo thence to loading port for owners' benefit*, of the first part, and *Messrs Sibson & Kerr*, of Portland, Oregon, of the second part. The party of the first part agrees on the chartering to arrive of the whole of the said vessel (with the exception of the deck, cabin, and the necessary room for the crew, and the stowage of provisions, sails, and cables), or sufficient room for the cargo hereinafter mentioned, unto the said parties of the second part, for a voyage as follows:— The said vessel being tight, staunch, strong, and in every way fitted and provided for said voyage, shall, after discharge of inward cargo or ballast, be made ready, and shall receive on board at Portland, Oregon, and/or other loading-places as hereinafter provided, a full and complete cargo of wheat in sacks . . . . which the said parties of the second part bind themselves to ship, and being so loaded shall, upon receiving orders from the charterers, therewith proceed to Queenstown or Falmouth for orders, to discharge at a safe port (as instructed by charterers' agents) in the United Kingdom or on the Continent between *Havre* and *Hamburg*, both included, and there deliver the same as hereinafter provided, on being paid freight. If discharged at a port in the United Kingdom, as above, or at Havre, Antwerp, or Dunkirk, at the rate of 35*s.*, *say thirty-five shillings* sterling. If discharged at a port on the Continent, as above, other than Havre, Antwerp, or Dunkirk, at the rate of 40*s.*, *say forty shillings* sterling. *If discharged at Hamburg at the rate of* 37*s.*, *say thirty-seven shillings.* Freight payable in cash without discount, on true and faithful delivery of cargo at port of discharge (if on the Continent, at current rates of exchange on London) per ton of 2240 lbs. English gross weight, delivered. Charterers to have the option of ordering vessel from port of loading direct to any safe port in the United Kingdom or on the Continent as above, in which case freight to be *one* shilling and *three*pence less per like ton. . . . Vessel to be properly stowed and dunnaged; and certificate thereof, and of good general condition, draft of water and ventilation, to be furnished to charterers from *charterers' competent* surveyor. If the captain or charterers be dissatified with the certificate given, the matter in dispute shall at once be submitted to two other regular port marine surveyors, one chosen by the captain and one by the charterers, who, if they cannot agree, shall call upon a third surveyor; a majority decision and certificate shall determine the matter in dispute, and the cost of said special survey shall be borne by the party against whom said decision may be rendered. Should the vessel fail to pass a satisfactory preliminary survey, or in case of submission to arbitration should the decision be against the vessel, or should she be detained more than ten days for repairs, this charter to be void at charterers' option, such option to be declared at

the expiry of said ten days. . . . After discharge of inward cargo and/or ballast has been finally completed, vessel to proceed to such usual loading-place as may be ordered by charterers at Portland and/or Astoria and/or loading-places in the Columbia and/or Williamette rivers, and there receive the cargo in manner customary alongside afloat and/or from wharf. Charterers to have the privilege of additional moves, they paying towage. . . . Charterers' liability to cease on completion of loading; owners to have a lien on the cargo for all freight, dead freight, and demurrage under this charter-party. . . . Loading days not to commence before 1*st December* 1895 except at charterers' option. Should the vessel fail to arrive at Portland, Oregon, on or before six o'clock p.m. on or before 31*st January* 1896, charterers to have the option of cancelling or maintaining this charter on arrival of vessel. . . . A commission of *three and three-quarters* per cent. shall be paid to *charterers* on the estimated gross freight in U.S. gold coin (at the exchange of 48 pence) on the completion of loading, or should vessel be lost."

The pursuers narrated the clause as to commission last quoted, and further averred (Cond. 3)—"The vessel was lost before reaching the port of loading, and a commission accordingly became due to pursuers under the above-narrated provisions of the charter-party." The defenders answered (Ans. 3)—"Admitted that the 'Barcraig' was lost on the passage from New York to Shanghai, never having been heard of after leaving New York. *Quoad ultra* denied, and explained that the vessel having been lost as aforesaid, the said commission sued for is not due."

The pursuers pleaded—"Defenders being due and owing to pursuers the sum sued for as commission in terms of charter-party, as condescended on, pursuers are entitled to decree as craved."

The defenders pleaded, *inter alia*—"(1) The loss of the vessel having rendered fulfilment of the charter-party by either of the parties thereto impossible, its whole provisions were cancelled, and no commission is due to the pursuers. (2) The 'Barcraig' having been lost before arrival at the loading port, no commission is in any case due to the pursuers under said charter-party."

On 19th June 1896 the Sheriff-Substitute (HENDERSON BEGG) issued the following interlocutor—"Finds in fact (1) that by the said charter-party the defenders' company agreed 'on the chartering to arrive' of their vessel, the 'Barcraig,' therein described as then 'on passage New York to Shanghai' to the pursuers, for a voyage as follows, viz., that the said vessel should, after discharge of inward cargo or ballast, be made ready and receive on board at Portland, Oregon, or other loading-place in the United States as therein provided, a cargo of wheat, and therewith proceed to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom, or otherwise as therein expressed, and then deliver the said cargo on being paid freight, and, *inter alia*, to pay a commission of three and three-quarters per cent. to the pursuers on the estimated gross freight in U.S. gold coin (at the exchange of 48 pence) 'on the completion of loading, or should vessel be lost'; and (2) that the said vessel never reached her port of loading, having been lost on her said passage from New York to Shanghai: Finds in law that, on a sound construction of the said charter-party, the defenders are not in these circumstances bound to pay the said commission to the pursuers: Therefore assoilzies the defenders from the prayer of the petition: Finds them entitled to the expenses of process," &c.

Note.—"The preliminary words 'on the chartering to arrive' seem to me to constitute a condition-precedent to the whole obligations contained in the charter-party. The chartering which the parties thus referred to had not arrived at the execution of the document, but was 'to arrive' at some future time. At the date of execution the vessel was on a voyage from New York to Shanghai, so that necessarily a considerable time must elapse before she could be placed in any way at the disposal of the charterers at Portland or other loading-place in the United States. It thus seems clear enough that the chartering was not 'to arrive' till the vessel should be so placed at the disposal of the charterers, and in point of fact it never did arrive on account of the loss of the vessel on her voyage from New York to Shanghai. In these circumstances it is indisputable that the ordinary obligations contained in the charter-party are inoperative. The pursuers, however, maintain that an exception must be made of the clause on which they found their present claim, seeing that it specially provides for the case of the vessel being lost. Now, I quite agree that effect must be given to the words 'or should 'vessel be lost,' and that, having regard to the collocation in which they occur, they must refer to the loss of the vessel in some period of time *before* the completion of loading. But the clause is silent as to the length backwards of such period of time, so that the question comes to be which of two possible constructions is to be adopted, viz., the pursuers' construction that the period referred to runs from the date of the execution of the contract, or the defenders' construction that it runs from the date when the vessel should be placed at the charterers' disposal. Now, after giving this question careful consideration, I prefer the defenders' construction as most consonant with the meaning of the contract as a whole, while giving sufficient meaning and effect to the words 'or should vessel be lost.' Besides, if the clause is ambiguous it should be read *contra proferentem*.

"Further, I fail to see why the parties should have intended this single clause to be operative in the circumstances which have actually occurred. The commission referred to is not a brokerage payable to an intermediary for introducing the parties to each other, or for procuring the contract, nor is it liquidate damages for failure to

supply a vessel to the charterers. From the mode in which the amount falls to be calculated, the commission seems to be of the nature of a discount or deduction from freight, though not contingent on the freight being payable. But in whatever light it may be regarded, I do not see that, in the circumstances which have occurred, the pursuers have done anything to earn it.

"There seem to be no decisions directly in point, but some light is thrown on the construction to be put on the words 'on chartering to arrive,' by the cases with reference to the sale of goods 'on arrival,' mentioned in Benjamin on Sale, 4th edition, pp. 565 and 566, Bell's Com. (N. E.) i. 470, and Bell's Prin. sec. 108."

The pursuers appealed to the Sheriff (CHEYNE), who on 11th July issued the following interlocutor:—"The Sheriff having advised the process, recals the interlocutor of the Sheriff-Substitute of date 19th June last: Finds that on a sound construction of the charter-party founded on, and the vessel therein mentioned having admittedly been lost after the date of the execution thereof, the defenders are bound to pay to the pursuers a commission of three and three-quarters per cent. on the estimated gross freight that would have been payable had the contract been performed, and parties being at issue as to the amount of said commission, remits the cause to the Sheriff-Substitute with a view to this being ascertained, and for such further procedure as may be necessary."

Note.—"The construction of the clause in question which the Sheriff-Substitute has adopted, though unquestionably a possible one, strikes me as being a forced and unnatural one. It is no doubt true that under the terms of the charter-party the non-arrival of the vessel at Portland by a certain date relieved the charterers (in their option) from the obligation to supply a cargo, but it does not follow that her arrival at Portland was a condition-precedent of the whole stipulations of the charter-party, and in my opinion the particular stipulation on which the pursuers found is an independent and separable covenant. The commission there referred to is plainly in lieu of brokerage; the consideration for it was the execution of the contract; and this being its nature, I find it more natural and reasonable to suppose that, while the parties saw fit to stipulate that except in the case of an earlier loss of the vessel it should not be payable till the completion of loading, they contemplated and meant to provide for its payment in any event, than to suppose that they meant the defenders' liability for it to depend on the arrival of the vessel at Portland, and intended by the adjection of the words 'or should vessel be lost' to provide for the contingency—which is hardly likely to have been in their view—of the vessel's loss *in port* between the time she was ready to receive cargo and the time when the loading was finished.

"The agents stated at the discussion that, in the event of my arriving at a conclusion adverse to the defenders upon the construction of the charter-party, they expected to be able to adjust between themselves the amount to be decerned for, and suggested that in that event the case should be simply remitted to the Sheriff-Substitute."

Thereafter a proof was allowed, but the parties ultimately lodged a joint-minute of admissions by which they agreed to admit "... (*Second*) That if the pursuers were entitled to commission under the charter the amount of said commission was reasonably estimated at £225, 16s., and had the vessel been loaded under said charter-party in ordinary course the loading would have been completed by 13th February 1896. (*Third*) That the ship "Barcraig" was at the time of making said charter-party on a passage from New York to Shanghai (from which latter port she was to proceed to the loading-place as provided in said charter-party), and that she was lost during said passage, never having been heard of after leaving New York on or about 25th April 1895. The ship's voyage would in ordinary course be *via* the Cape of Good Hope, and she would in ordinary course have arrived at Shanghai in or about September 1895. In respect of which admissions they further agreed to renounce probation."

By interlocutor dated 23rd September the Sheriff-Substitute "allowed the joint-minute to be received, and in respect thereof discharged the order for proof; and further, in respect thereof, and of the interlocutor of the Sheriff dated 11th July 1896, ordained the defenders to pay to the pursuers the sum of £225, 16s. sterling, with interest thereon as prayed for."

The defenders appealed to the Second Division of the Court of Session, and argued—The charter-party must be construed as one contract. All its clauses must be considered together, and the interpretation most consistent with the document as a whole must be preferred. (1) The ship was lost on the voyage from New York to Shanghai, the exact date being unknown. The subject-matter of the contract was the ship, and it lay upon the pursuers to show that the subject-matter of the contract was in existence at the date of the charter. If it was not, then both parties were under a mistake in fact as to the existence of the subject-matter of the contract when the contract was entered into, and the contract was consequently void—Pollock on Contracts, 6th ed. 470; *Couturier* v. *Hastie*, June 27, 1856, 5 H.L.C. 673; *Emerson's Case*, June 30, 1866, L.R., 1 Ch. 433, as explained in *Paine* v. *Hutchinson*, March 17, 1868, L.R., 3 Ch. 388, *per* Page Wood, L.-J., at page 391. (2) The expression "chartering to arrive of the whole of the said vessel" showed that the arrival of the ship at the port of loading was a condition-precedent to the contract coming into operation at all—*Johnson* v. *Macdonald*, February 10, 1840, 9 M. & W. 600. (3) The expression "or should vessel be lost" referred to the contingency of the vessel being lost after she reached Portland but before the completion of loading. This was not a remote or unlikely contingency,

as the vessel might have been ordered under the charter from one port of loading to another, and in that case would have been exposed to the dangers of river navigation. (4) The amount of commission due could not be estimated till the port of destination was declared, as the rate of freight differed for different ports of destination.

Argued for pursuers—The clause of the charter-party founded on was a separate and separable contract for commission or brokerage. The other clauses referred to by the defenders could not affect the interpretation of this clause. It made no difference that the brokers were also charterers. The existence of the ship was not a condition-precedent to the performance of the contract of brokerage. The cases quoted by the defenders on this point were all cases of sale and had no bearing upon the present. [Lord YOUNG—How can this be a contract for payment of commission when the percentage is payable to the charterers themselves? Is it not just a stipulation for a reduction on the nominal amount of freight due?] What was agreed upon was that the charterers were to get a commission, which was not to be payable till the ship was loaded, but on the other hand, that the payment was not to be contingent on sea risks, and that therefore it was to be payable if the vessel was lost before completion of loading. It was the same as the expression "lost or not lost" in a policy of marine insurance. As to the difficulty about the amount due it was settled that a shipbroker was entitled to his commission calculated on the freight, without waiting till the value of the freight, if contingent, was determined, and the amount due to him was a jury question—Maclachlan on Shipping, 4th ed. 198; *Hill* v. *Kitching*, June 8, 1846, 3 C.B. 299. Moreover, here the question of amount was set at rest by the minute of admissions. The interpretation of the expression "or should vessel be lost" proposed by the defenders was strained and unnatural. The clauses as to arrival before 31st January and the ship failing to pass survey could not be founded on to curtail the rights of the charterers. The former could have no relation to the commission clause, for if the vessel had arrived late, and the charterers had refused to load, no commission would have been due, the loading not being completed and the vessel not being lost, and if the vessel were lost, then there was no need to cancel the charter under that clause.

LORD JUSTICE-CLERK—The clause which we are called upon to construe here is somewhat extraordinary in its terms. It is difficult to read it in any intelligible sense. It says—"A commission of three and three-quarters per cent. shall be paid to charterers on the estimated gross freight in U.S. gold coin (at the exchange of 48 pence) on the completion of loading or should vessel be lost." Under the charter-party it was agreed between the parties that "should the vessel fail to arrive at Portland, Oregon, at or before six o'clock p.m. on or before 31st January 1896, charterers" were "to have the option of cancelling or maintaining this charter on arrival of vessel." The fact is that the vessel was lost on the way to Portland and never came to any port of loading at all. But it is maintained on the part of the charterers that as the transaction did not take place through a broker, and a commission of three and three-quarters per cent. was to be paid to the charterers, on completion of loading, or should the vessel be lost, commission at that rate is now due, although no vessel ever appeared or was tendered at the port of loading. Their argument is that this was just brokerage for arranging the charter, and that a broker would have got his commission whether the vessel arrived or not. Now, this is certainly not the case of a broker who gets his commission for introducing the parties and bringing them together. This is a special stipulation that on the completion of loading or should the vessel be lost the charterers are to receive a certain percentage on the gross freight. It was pointed out that the amount of the estimated gross freight would have come to depend on what was done when the ship came in, for the rate of freight provided for by the charter-party was different according to the port at which the vessel was ordered to discharge.

Without definitely giving any opinion about the meaning of the words "to arrive" in the first part of the charter-party, I am of opinion that the Sheriff-Substitute was right and that his judgment ought not to have been reversed by the Sheriff. The clause which we have to construe may mean that the three and three-quarters per cent. commission is to be payable if the vessel was lost between the time of her arrival and the completion of loading. This is a possible and reasonable reading of the clause. The Sheriff concurs in that view. Now, if there is a possible and reasonable way of reading this clause which is favourable to the opposite party, I think, as it was drawn up by the party who is now claiming under it, and as it must be construed *contra preferentem*, that reading is the one we must adopt. I am of opinion that the Sheriff-Substitute's conclusion was the sound one and that we should reverse the Sheriff's decision, and revert to the judgment of the Sheriff-Substitute.

LORD YOUNG—I am of the same opinion. The clause founded upon by the pursuers is remarkable. It is difficult to comprehend the idea of a commission being paid by a shipowner to the charterer of his vessel. The word "commission" is plainly inapplicable. It was suggested that "brokerage" would have expressed what was meant better; but I have difficulty in following the idea that the word "brokerage," which signifies remuneration for services rendered by a person carrying on a particular and well-known trade, could be applicable to such a thing, or to understand why a commission or a sum of money should be paid by a shipowner to a merchant who has chartered his vessel. But there is an obliga-

tion to pay a certain sum—it is called commission—to the shipowner on the completion of the loading of the vessel. Well, on the completion of the loading of the vessel you can estimate the gross freight for which the charterer of the vessel will then have incurred liability. But I do not understand the idea of a percentage being paid beforehand upon the freight to a person who is under no liability for freight at all. Therefore I should say that this clause in the charter-party assumes, to begin with, or as the condition of its application, that the merchant who is to be paid a certain percentage on the estimated gross freight is liable for that gross freight; and he is to be paid beforehand, curiously enough, something which will render his liability for freight upon the terms of the charter-party practically less. He will have eventually to pay the whole freight stipulated in the charter-party for which he has incurred liability so soon as the vessel is completely loaded; but then so much money—a percentage upon the estimated amount—is put into his pocket beforehand so that it comes to be a reduction of the amount of his liability. I am therefore of opinion that one condition—the primary condition—of this singular clause being operative is, that there shall be liability for the freight, a percentage upon which is to be paid beforehand to the person liable in order to reduce the amount of his liability. Now, I think the condition of any liability on the part of the charterer of the vessel for freight is that the vessel shall arrive. That is the Sheriff-Substitute's view. The words in the charter-party are "to arrive," which Mr Aitken very properly said he felt himself bound to concur in reading as the defenders here read them—on the arrival of the ship at the port of loading, or at the port to which it is under obligation to go in order to receive cargo. That is the primary condition of the charter-party coming into operation—that the ship shall arrive. Now, it never arrived and consequently there never was an obligation upon the charterers to pay freight. It cannot be maintained that they ever were under liability to pay freight; and it is made more clear, if it is capable of being made more clear, by the two clauses in the charter-party to which I called attention. The first of them is, that upon the arrival of the vessel it shall be certified as in good sea-going condition to perform the obligations on the ship by the charter-party; and the charterers must be satisfied that it is. If they are not, and if it is not decided against them that they ought to be satisfied, the charter-party is void, and they are under no obligation at all. I do not need to read the words again—I read them while the case was in course of being argued. If the vessel does not arrive it cannot be certified as in a proper condition to fulfil the owner's obligations under the charter-party; and unless it is so certified and the charterers are satisfied with the certification to that effect, the charter-party is at an end, and there can be no obligation to pay freight. Then the other clause is, that if from any cause whatever — and the most obvious cause is the loss of the vessel—it does not arrive on or before the 31st January 1896, again the charter-party is at an end, unless the merchant, upon its subsequent arrival within a reasonable time thereafter, elect to go on although under no obligation to do so. Now, that could not be either. It did not arrive on or before the 31st of January, being at the bottom of the sea. Thus the charterers are under no obligation to pay freight, and for the reasons which I have already explained, I think this clause, which is the foundation of the action, is not applicable where they are under no liability to pay freight. Against this the only argument is upon these words—"Or should vessel be lost." Now, I cannot in a clause so altogether novel as to be unprecedented read these words as meaning that if the vessel is lost and never arrives at the port of loading, there shall be this obligation on the part of the owners, that they shall be bound to pay to the charterers a certain percentage upon the freight. In the circumstances as they admittedly exist, there is no obligation here upon either party under this charter-party. I therefore agree with your Lordship that the judgment of the Sheriff-Substitute ought in effect to be returned to, and that of the Sheriff recalled.

LORD MONCREIFF—I also agree that we should revert to the judgment of the Sheriff-Substitute. The clause upon which the pursuers rely is admittedly one of a novel and unusual character. I think it clearly lay upon them to show that that clause will bear the construction which they seek to put upon it. The strength of their case is that it contains a provision that commission is to be paid in the event of the vessel being lost. We certainly are bound to give some effect to these words, but I think it lies upon the pursuers to show very clearly that, whereas all the other conditions of the contract are dependent upon the arrival of the vessel at Portland, this condition is not, but applies to the case of the vessel never arriving at Portland at all. Now, I quite follow and appreciate the argument which Mr Aitken addressed to us that this was a separable contract for what was substantially brokerage—brokerage to be paid independently of the contract being carried out, upon the completion of the contract. But that is a very unusual kind of stipulation when made in favour of the charterers, and I think it lies upon the pursuers to show distinctly that the words upon which they found entitle them to payment of this commission although the vessel never reached the port at all. I do not think they have succeeded in doing that; on the other hand, I think that the owners have suggested an intelligible explanation of these words which is consistent with their referring to a time subsequent to arrival in port. We see from the contract that although the vessel was to come to Portland in the first instance, the charterers had it in their power to order her to proceed to various

other ports. And therefore after arrival she might have been lost on the way to one or other of those ports to which she might be destined by the charterers. That construction squares with the collocation of the words "or should vessel be lost" after the words "on completion of loading," and therefore they may refer to the case of the vessel being partially loaded at one port and proceeding towards another, and being lost on the way.

On the whole matter I think the Sheriff-Substitute has taken the sound view of the case, and that we should revert to his judgment.

LORD YOUNG — Perhaps I should say that I rather approve of the view which was urged upon us in argument, leading to the same result as the view we have adopted — I mean the view that there being nothing to show that the vessel was in existence at the date of this contract, but everything to suggest the reverse, the contract consequently was void altogether from the beginning and never came into operation at all.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Sustain the appeal and recal the interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of the Sheriff-Substitute dated 19th June 1896: Therefore of new assoilzie the defenders from the prayer of the petition: Find them entitled to expenses in this and in the Inferior Court," &c.

Counsel for the Pursuers—Ure—Aitken. Agents—J. & J. Ross, W.S.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—Salvesen. Agent—Wm. B. Rainnie, S.S.C.

Tuesday, November 10.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

HOULDSWORTH *v.* CALEDONIAN RAILWAY COMPANY.

Railway — Minerals — Agreement as to Minerals Required for Support — Notice under Agreement—Construction.

By agreement between a railway company and a proprietor through whose land the line was being reconstructed, the company became entitled to take without price any coal or minerals under or adjacent to their works, "not exceeding in all an area of 7 acres, which might be necessary for the support of the stations, bridges, and culverts on the existing line." They also became entitled to take and acquire at any time within one year from the opening of a proposed new line "an additional area of 4 acres," to be paid for at the rate of £500 an acre.

Within the time specified the railway company gave notice to the proprietor that, in terms of the agreement, they required to take certain areas of different seams of coal, the total area taken in each seam being under 7 acres, but the total surface being above 12 acres.

The proprietor repudiated the right of the company to take the areas claimed without payment, as falling under the first head of the agreement, but for twelve years thereafter left the areas mentioned in the notice unworked, and by his workings made it impossible to work out the coal so left.

In an action by the proprietor against the railway company, *held* (1) that the area mentioned in the agreement meant superficial area, and that the notice, as a notice under the agreement, was ineffectual; and (2) that it could not be regarded as constituting a new contract by way of offer and acceptance, as the proprietor had never accepted the offer in the sense in which it was made; and (3) that the railway company were therefore not bound to compensate the proprietor for the coal left unworked by him.

By minute of agreement dated 13th and 14th May 1876, between the Caledonian Railway Company and James Houldsworth of Coltness, it was provided as follows:—"*First*, It is agreed that the minerals under and adjacent to the present line of the Caledonian Railway, so far as it passes through the property of the second party (Mr Houldsworth), shall henceforth be held to be in the same position as to the second party's right to work the same, or to receive compensation for the value thereof if left unworked by desire of the company, and in all other respects as if the provisions of the Lands Clauses and Railway Clauses Consolidation Acts had been applicable to the original line of the Wishaw and Coltness Railway, and to the minerals under and adjacent to that line. *Second*, the first party (the Railway Company) shall have right to acquire, and the second party (Mr Houldsworth) shall allow them to take, without any price, any coal or other minerals not exceeding in all an area of 7 acres, which may be necessary for the support of the stations, bridges, and culverts on the existing line, and shall further have right to take and acquire any minerals for the same purpose, to an extent not exceeding an additional area of 4 acres, at any time within one year after the opening of the proposed new line (but not at any later period), to be paid for by the first party to the second party at the rate of £500 per acre; but in the event of the first party intimating to the second party, within the time specified, that less than the whole minerals in any part of the said area will suffice for the purpose for which they desire to acquire them, a deduction from the said price of £500 per acre shall be allowed by the second party corresponding to the proportion or percentage of the said minerals which the second party may thus be permitted to work." The coal under the