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

surface in question comprised five different seams, viz., main, splint, ell, and two inferior seams.

The line was opened on 26th April 1880, and on 19th April 1881 the Railway Company gave formal notice to Mr Houldsworth "that in terms and for the purposes of article 2nd of the said minute of agreement they require to take the areas of the main, splint, and ell coal, and other minerals under or above the same, as shown on the three plans sent herewith and signed as relative hereto." The plans sent showed certain areas in each seam, the total surface area being 12·853 acres. But the area taken in each seam was under 7 acres, and nothing was said as to any price to be paid, nor was any distinction made between the 7 acres to be taken free and the 4 acres to be paid for at the rate of £500 per acre. The notice was accompanied by a letter requesting a conveyance of the minerals.

After receipt of this notice Mr Houldsworth, on 14th and 17th May, wrote to his factor that it was based on a misconstruction of the agreement, and requested him to intimate to the Railway Company that their claim and notice were not in terms of the agreement, and that he would "hold them liable to pay for all coal left at their request anywhere beyond the 7 acres they select." The factor did not write direct to the secretary of the Railway Company, but he at once communicated Mr Houldsworth's view to Mr Landale, the company's mining engineer.

Thereafter the matter stood over, and on account of Mr Houldsworth being engaged in other matters, and a change of factorship, it fell aside for twelve years. The coal included in the plans sent to Mr Houldsworth with the notice was left untouched, but no conveyance of the coal was ever executed in favour of the Railway Company.

In 1893 Mr Houldsworth and his son, Mr Houldsworth junior, as liferenter and fiar of the estate of Coltness, raised an action against the Railway Company to have it declared (1) that by virtue of the agreement of May 1876 the defenders were entitled to require from Mr Houldsworth, without any price, the coal or minerals under a superficial area not exceeding 7 acres, and within a year after the opening of the line the coal or minerals under an additional superficial area of 4 acres, at a price of £500 per acre. (2) That by their notice of 19th April 1881 the defenders gave notice to require the coal and other minerals underlying the superficial area or areas delineated upon the three plans which accompanied the notice. (3) That the said superficial area or areas measured 12·853 acres, which was 1·853 acres more than the areas mentioned in the first conclusion of the summons. (4) That in consequence of the notice the pursuers had abstained from working the minerals underlying the said areas, and acquiesced in the acquisition thereof by the defenders, or otherwise had acted to the knowledge of the defenders as if they had received statutory notice not to work the said coals and minerals. (5) That the defenders were accordingly bound to pay the pursuers £2926, 10s., with interest from 19th April 1881, being at the rate of £500 per acre for the excess beyond 7 acres, or otherwise to pay £2000 with interest from 19th April 1881, being at the rate of £500 per acre for 4 acres, and such sum as might be found to be the compensation for the coal and minerals underlying the remaining 1·853 acres, in terms of the Lands Clauses Consolidation (Scotland) Act 1845 and the Railway Clauses Consolidation (Scotland) Act 1845; and to have the defenders ordained to pay the pursuers £2926, 19s. with interest, or otherwise £2000 with interest, and such other sum as might be ascertained to be the amount of the compensation foresaid with interest.

Two questions were thus raised under the action—(1) as to the construction of the agreement of 1876; and (2) as to the construction and effect of the notice of 1881. The contentions of the parties on these questions are fully set forth in the note to the interlocutor of the Lord Ordinary.

On 31st January 1896 the Lord Ordinary (KYLLACHY), after proof, pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the first conclusions of the summons: Assoilzies the defenders from the second conclusion, dismisses the third and fourth conclusions, and assoilzies the defenders from the fifth conclusion and the petitory conclusion thereto attached, and decerns."

Note.—"The first question I have here to decide is as to the construction of the agreement of 1876. By that agreement certain minerals belonging to the pursuers, under the old Wishaw and Coltness Railway, were placed under the provisions of the Railways Clauses Act, but they were so with certain reservations in favour of the Railway Company, which were expressed in the second article of the agreement. By that article the company became entitled at any time 'to take without any price any coal or other minerals not exceeding in all an area of 7 acres which might be necessary for the support' of certain specified parts of their line. They further became entitled to take and acquire at any time within one year from the opening of a certain proposed new line (which line was in fact opened on 26th April 1880) 'an additional area of 4 acres,' to be paid for at the rate of £500 per acre. And with respect to this latter area it was further provided that 'in the event of their intimating within the time specified that less than the whole minerals in any part of the said area will suffice for the company's purpose, a deduction from the said price of £500 per acre shall be allowed corresponding to the proportion or percentage of the said minerals which the proprietor may thus be permitted to work.'

"Two views have been presented as to the meaning of these reservations. The pursuers contend that each of the two areas falls to be measured upon the surface, the company being entitled (1) to select at any time any area or areas not exceeding in all 7 acres, and to acquire free of charge the whole coal

which may exist unworked within such area or areas; (2) to select (within a limited time) another area or other areas not exceeding in all 4 areas, and to acquire at the price of £500 per acre the whole coal existing unworked within these 4 acres; and (3) to obtain from the price stipulated for these 4 acres a proportional deduction in respect of any unworked coal which they (the company) might permit still to be worked.

"The defenders (the Railway Company), on the other hand, contend that the agreement gives them the right, so far as required for support, to claim, free of charge, an area, not of 7 acres in gross, but of 7 acres in each seam; and further, that in measuring the 7 acres, allowance shall be made for any 'rooms' or other spaces worked out in each seam, each pillar being for the purposes of the measurement a separate area, and the 7 acres being made up by accumulating in each seam the area of the total pillars standing intact.

"With respect, again, to the 4 acres, the company do not, as I understand, maintain that those acres may be selected in each seam, but they contend that the 4 acres are assumed to be solid, and that for any coal worked out in any seam before or after the agreement, the company are entitled to a proportionate deduction from the stipulated price.

"I am of opinion that on this question (the construction of the agreement) the pursuers are right. I find nothing in the language of the agreement which suggests that the area of 7 acres was to be 7 acres *in each seam*. It goes a long way to exclude that suggestion that there are in all five seams, and that as the areas taken might be different in each seam, the total area taken might be 35 acres instead of 7. It is, of course, possible that that was intended, but it is not, I think, probable. Another difficulty is, that in the view suggested the 7 acres and the 4 acres would have to be measured on different principles. That is also, as it seems to me, unlikely to have been intended. Again, there is this further difficulty—it is not disputed that if the whole coal in question had been solid, or assumed to be solid in each seam, the suggested construction would be inadmissible. But for the purposes of the agreement the coal as it stood is solid. The object in view was support, and for purposes of support an area of pillars was probably just as good as an area of solid coal. The object of the agreement was, as I read it, simply to prevent the removal of the pillars and of the solid coal which were known to underlie the areas stipulated, and that object was quite satisfied by the company obtaining right to the whole coal unworked within these areas.

"For the same reason I see no sufficient reason for excluding from the measurement the area occupied by the rooms in the different seams, or even the areas where rooms were situated vertically one above another in those seams. Seven acres of coal does not mean 7 acres coal solid in each seam from the surface downwards. Nor would this mode of computation square with at least the defenders' construction of the clause providing for a deduction from the £500 per acre payable within the 4 acres. In truth, however, this point is of little or no practical importance, for two reasons: In the first place, there are at least two seams within the areas in question where the coal is wholly solid and intact. In the next place, even with respect to the three upper seams the defenders' contention would only make a difference of about one acre, which in this case would not affect the result.

"I consider, therefore, that the pursuers are entitled to declarator in terms of the first conclusion of the summons.

"The second question in the case is as to the construction and effect of a notice given by the Railway Company to the pursuer on 19th April 1881, and professedly given under the second article of the agreement.

"The notice simply sets out that, in terms of and for the purposes of the said second article, the company 'require to take the areas of the main, splint, and ell coal, and other minerals under or above the same, shown on the three plans sent herewith, and signed as relative hereto.' The plans so sent show certain areas in each seam, the total surface area being 12·853 acres. But the area taken in each seam was under 7 acres; and nothing was said as to any price to be paid, nor was any distinction made between the 7 acres to be taken free and the 4 acres which had to be paid for at a certain rate.

"The pursuers contend that on its just construction this was, or included, a notice in terms of the agreement, and imported (1) a taking of 7 acres without price, and (2) a taking of 7 acres additional at the price of £500 per acre. With respect to the excess of 1·853 acres, the pursuers claim to treat the notice as one under the Railway Clauses Act, the price to be settled as in other cases of compensation. The defenders, on the other hand, argue that the notice plainly and on its face assumed their construction of the agreement, and took, or proposed to take, no more in all than 7 acres—that is to say, 7 acres in the sense of the agreement. They further contend that, such being the true construction of the notice, the proof shows that the pursuer accepted it, and must be held by acquaintance to have agreed to the company getting the whole coal shown on the three plans without payment or compensation.

"I am of opinion that on the construction of the notice the defenders are right. I think it clear that the notice was on its face a notice which assumed and implied the defenders' construction of the agreement. It is not, I think, possible to read it as the pursuers do. The service of three plans instead of one, the absence of all selection or definition of the 4 acres to be paid for, as distinguished from the 7 acres to be taken free, and, lastly, the admitted excess of the surface area beyond even 11 acres, appear to me to be conclusive on this matter. It is true that the area taken in each of the three seams is said to be taken

with the minerals 'above and below' the same; but I think the defenders are right in saying that this must be held to refer, not to the upper or lower seams, but to what are known as the 'associated minerals' which are to be found attached to most seams of coal.

"It follows, if I am right in this, that the notice as given was wholly inoperative, the pursuers being entitled to disregard it as outwith the agreement; and, on the other hand, the defenders not being bound by it unless accepted in the sense in which it was given. In that sense it might, no doubt, have the effect of an offer or proposal, and so form the basis of a new contract; but as a notice under the agreement, it appears to me to have been no notice at all.

"As I have said, however, the defenders' contention is that the notice in question—whether good or bad—was accepted by the pursuer, so that a new contract was in fact made. It remains to consider whether that somewhat improbable result can be reached upon the documents and proof. I am of opinion in the negative. It is proved that the pursuer, so soon as he received the notice, saw what it meant, and at once instructed his factor to repudiate the view of the agreement which it assumed. It is also clear that although the factor did not write, as he should have done direct, to the company's secretary, he at once communicated Mr Houldsworth's view to Mr Landale, the company's mining engineer, and that thereupon the matter stood over, and, owing to a change of factorship, fell aside until it came up last year. I cannot hold that in these circumstances there was any new contract. It seems enough to exclude that result that when the notice was sent it was accompanied by a letter requesting a conveyance of the minerals, and that owing to the pursuers' objection the preparation of the conveyance stood over, and no conveyance has yet been executed.

"On the whole, therefore, I think that the defenders are entitled to be assoilzied from the fifth conclusion of the summons and the petitory conclusion thereto attached. With regard to the second, third, and, fourth conclusions, they are in the circumstances inapplicable, and may be dismissed."

The pursuers reclaimed, and argued—The Lord Ordinary was right in his view as to the meaning of the agreement. He had gone wrong in holding that the defenders were not bound by their notice. That notice could be read in consonance with the proper construction put on the agreement, and it was of no consequence that the Railway Company, when they gave the notice, were under a misapprehension as to the interpretation to be put on the agreement. When parties were entering into an agreement there must be *consensus in idem*, but the same rule did not apply after the contract was completed, when one of them was exercising their rights under the agreement. The same rule did not apply to actings under an agreement as to the making of an agreement — *Buchanan* v. *Duke of Hamilton*, March 8, 1878, 5 R. (H.L.) 69; *Stewart* v. *Kennedy*, March 10, 1890, 17 R. (H.L.) 25; *Cooper* v. *Phibbs*, 1867, L.R., 2 Eng. and Irish App. 149, opinion of Lord Westbury, p. 170; *Directors of Midland Great Western Railway of Ireland* v. *Johnson*, 1858, 6 Clark (H.L. Rep.) 798. If the notice defined an area in the sense of the agreement, it must be given effect to in terms of the agreement. If the notice was held not to be a notice in terms of the agreement, it constituted a new contract under which the defenders were liable for the price of the coal taken by them.

Argued for the defenders—Their construction of the agreement was the right one, viz., that they were entitled to 7 acres of solid coal irrespective of superficial area. The notice was therefore in order, and under it no more coal was taken than was authorised by the agreement to be taken free of cost. But if it was held that the Lord Ordinary's construction of the agreement was right, the notice was inoperative as it plainly bore on the face the interpretation put by the Railway Company on the agreement. No new contract could be held to have been made by the notice, as the pursuer had repudiated the notice in the sense in which it was given.

At advising—

LORD TRAYNER—I think the Lord Ordinary's construction of the agreement is right. The construction of that agreement does not appear to me to be attended with difficulty, when attention is given to the purpose which the agreement was intended to effect. What the defenders wanted was support for their stations, bridges, and culverts, to ensure which they desired to have right to the minerals under and adjacent to their works, which, if removed by the pursuer, would render their works insecure. Accordingly, what was agreed to was this, that the defenders should have right to the minerals in an area of 7 acres to be selected by them without any price, and if necessary the minerals in an additional area of 4 acres at a price agreed upon. This entitled the defenders to select any area or areas of surface not exceeding in the one case 7 acres, and in the other 4 acres, beneath which the minerals then and there existing were not to be worked or removed by the pursuer, but left for the support of the defenders' works. That, in my opinion, is the plain meaning and effect of article second of the agreement.

In April 1881 (that is, about five years after the agreement was executed) the defenders gave notice to the pursuer that they required to take, for the purposes of the agreement, certain minerals which they specified as "the areas of the main, splint, and ell coal, and other minerals under or above the same," shown on the three plans sent therewith. From these plans it was apparent that the defenders wished to take, not the minerals under 7 acres of surface, but 7 acres of minerals in different seams and different localities—that is to say, not the minerals underlying the same surface, or underlying each other, but minerals in different seams and locali-

ties, amounting in the aggregate to about 16 acres, namely, as estimated by the pursuer, about 7 acres in the main, about 7 acres in the splint, and about 2 acres in the ell. This was what the defenders thought, and now maintain (erroneously in my view) they were entitled to under the agreement. This notice was communicated to the pursuer, who saw at once the claim which that notice covered, as is plain from his letters of 14th and 18th May 1881 to his factor Mr Bain. He requested Mr Bain to intimate to the defenders at once that their claim and notice was not in terms of the agreement, and that he would "hold them liable to pay for all coal left at their request anywhere beyond the 7 acres they select." No such intimation was given to the defenders. The coal marked in the plans sent to the pursuer with the defenders' notice was left unworked, but no conveyance of it was ever executed in their favour. The pursuer now sues for the price of that coal, but I agree with the Lord Ordinary in thinking that the defenders are not liable therefor. The notice, as a notice under the agreement, was ineffectual, because it was a notice which the agreement did not warrant. It cannot be regarded as constituting a new contract as by offer on the defenders' part, because the pursuer never accepted it in the sense in which it was given. On the contrary, he repudiated it in that sense—the sense in which he knew the offer (if it is regarded as an offer) was made. The defenders are not liable therefore for the price of the coal as under contract. But, lastly, the pursuer maintains the defenders' liability, on the ground that in his working subsequent to the notice, he has left unworked the coal referred to in the notice, and that in consequence of such subsequent workings it is now impossible for him to work the coal so left. I cannot see how this imposes any liability on the defenders. They required the coal in question to be left unworked on a view of their agreement which entitled them to what they required. The pursuer knew that the defenders were acting on that view of the agreement, and while he differed from them as to their views, he did not communicate this to them. He practically acquiesced in the defenders' view as now appears by leaving unworked the coal specified in the defenders' plans. But for that the defenders are not responsible. And if the pursuer has at his own hand so worked part of his mineral field as to deprive him of the power of working some other part, *sibi imputet*. The pursuer's loss, if it should turn out to be a loss, is the direct consequence of his own procedure, and is not attributable to the defenders.

LORD MONCREIFF—I am of opinion that the Lord Ordinary has come to a sound conclusion both as regards the agreement of 1876 between the pursuer and the defenders, and as to the construction and effect of the notice given by the railway company to the pursuer, professedly under the second head of the agreement, on 19th April 1881.

On the first point I think that the pursuer's construction of the agreement is the more reasonable, viz., that the areas to be taken were to be measured upon the surface, the railway company being entitled to the coal underlying the area so measured. The object in view was support, and I think the railway were only entitled to take the strata in the condition in which they then were, and that they were not entitled to be compensated for any spaces which had been worked out by getting solid coal in some other place or seam.

On the second question, in which the pursuer is reclaimer, I think it is clear that the notice given by the railway company in April 1881 was given under a mistaken idea of the construction of the agreement of 1876; that the pursuer at once discovered this, challenged the validity of the notice, and declined to grant a conveyance of the coal.

In these circumstances I do not think that he is entitled to found on that notice, partly as a notice given on a correct reading of the agreement, and partly as a notice to take under the Railways Clauses Act.

In the result I think the interlocutor should be affirmed as it stands.

LORD JUSTICE-CLERK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuers—D.-F. Asher, Q.C.—H. Johnston—M'Clure. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Defenders—Lord Advocate (Graham Murray, Q.C.)—W. C. Smith. Agents—Hope, Todd, & Kirk, W.S.

Thursday, November 19.

FIRST DIVISION.

[Sheriff of Lanarkshire.

BLACK *v.* BARCLAY, CURLE, & COMPANY.

Reparation—Master and Servant—Employers Liability Act 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 1—*Relevancy.*

A rivet-tester was killed by falling from a scaffolding on which he was working in a steamer's hold. In an action brought by his widow against his employers to recover damages under the Employers Liability Act, it was averred that the deceased was engaged in his work on the instructions of a foreman to whose orders he was bound to conform; that to perform his work he required to stand on the scaffold, the construction of which was described, and which was raised about ten feet from the bottom of the steamer's hold; and that while he was standing on the scaffold a tackle which was being used in hoisting a large iron beam came into