After intimation and service on the three next heirs of entail had been made, the Lord Ordinary (KINNEAR) remitted to Mr J. Mansfield Mackenzie, W.S., to inquire into the circumstances of the petition, and to report. In his report Mr Mackenzie raised two questions for the consideration of the Lord Ordinary—(1) The power given to the heirs of entail was to grant "to their other children, if any they shall have besides the apparent heir, provisions," &c. Mr Byres had no child who was apparent heir, and the question arose whether it was competent for him under the clause in the deed above quoted to make the provision for his daughter. On this question the reporter referred to *Dickson* v. *Dickson*, July 3, 1851, 13 D. 1291—*aff.* June 12, 1854, 1 Macq. 729. (2) Assuming that Mr Byres could, under the entail, make provision for his children, the reporter raised the question whether he was entitled to exercise the power, seeing he had only one child. The reporter considered that to hold as the meaning of the clause that he was not, would be to give a very narrow and constrained reading to the deed of entail, and that as no other provision was made in the deed applicable to the case of an heir of entail leaving only one child besides the heir-apparent, this was within the intention of the deed.

Argued for the petitioner—The daughter here was entitled to the sum mentioned in the bond of provision in her favour, although the deed of entail only spoke of children other than "the apparent heir." She would have been entitled to her provisions if these had been made under the Aberdeen Act, and the words in the clause of the deed were equivalent to the words in the Aberdeen Act.

Authority—*Dickson* v. *Dickson*, *supra cit.*

The next heirs of entail appeared, and argued—The daughter was not entitled to her provision under the clause in the deed of entail. As her father had no child who was apparent heir, she could not be described as a child of his "other than the apparent heir." The existence of an heir-apparent was an antecedent necessity to the faculty of the deed being carried out.

Authorities—*Dickson* v. *Dickson*, *supra cit.*, and February 4, 1852, 14 D. 432.

The Lord Ordinary, after considering the report, issued an interlocutor, in which he found "that the utmost amount with which the deceased James Gregory Moir Byres could competently burden the entailed lands and estate, and the heirs succeeding to him therein, on account of provisions in favour of his daughter, was £4117, 13s. 2d., and granted warrant to the petitioner to execute a bond and disposition in security over the entailed land and estate to the amount of that sum."

Counsel for Petitioner—Lockhart. Agents—Ferguson & Junner, W.S.

Counsel for the Three Next Heirs—Wallace. Agent—David Turnbull, W.S.

Counsel for the Marriage-Contract Trustees of Mrs Brooke—Mackay. Agents—Mackenzie & Kermack, W.S.

Wednesday, February 6.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

RAMSAY *v.* STRAIN.

Arbiter — Clause of Arbitration — Arbiters not Named.

A disposition of coal under an estate contained a clause whereby the disponee bound himself to pay compensation for damages done to the surface, "as the same shall be ascertained by neutral persons to be mutually chosen." Nearly one hundred years after, the proprietor of the surface, founding on the obligation contained in the disposition, demanded from the person in right of the coal compensation for damage done to his houses by the defender's workings. The defender stated that the damage was done by workings carried on 30 years before, for which the pursuer's author had been fully compensated, and that no further damage had been caused by his workings. He pleaded that the arbitration clause excluded the action. The Court (*alt.* judgment of Lord Kinnear) *repelled* this plea, on the ground that the action involved an issue of disputed fact, and fell within the general rule that a reference to arbiters not named was ineffectual.

By contract dated 19th March 1788 Zacharias Anderson disponed to Robert Gray and the other partners of the Westmuir Coal Company, and their disponees whomsoever, the whole coal of all and whole that small park or enclosure lying near the east end of the town of Airdrie, consisting of about three acres, but under certain obligations which were thereby appointed to be engrossed in subsequent conveyances of the coal under pain of nullity. One of the obligations was in the following terms:—"And further, the said Robert Gray binds and obliges him and his said partners and their foresaids to satisfy and pay the annual damages to be done to the surface of the said lands, and the damages to be done to any houses, buildings, dykes, or fences upon the same by the sinking and working the said pit and erecting the necessary machinery, forming of coal-hills, ginways, roads, and ways, or by any other means employed in working, raising, and carrying of the said coal in consequence of the rights and liberties before granted, which damages shall be paid to the said Zacharias Anderson or his foresaids, as the same shall be ascertained by neutral persons to be mutually chosen." The property was acquired and held by James M'Laren, who disponed it to his son William Sinclair M'Laren, who in turn disponed it to Andrew Ramsay, by disposition, dated 9th December 1881, which expressly conveyed to him all right to damages, so far as the same might be due by the Westmuir Coal Company by their mineral operations in terms of the foresaid contract between Zacharias Anderson and Robert Gray and the other partners of the Coal Company. Hugh Strain had at the date of this action the sole right to work the coal under the 3 acres, but under the obligations originally incumbent on the Westmuir Coal Company.

In this action Ramsay claimed from Strain the sum of £500 as compensation for damage done to certain houses of his erected on the said piece of ground, and which damage he averred had been caused by subsidence of the surface attributable to the defender's working of the coal.

The defender averred that the pursuer's buildings were erected in 1839, and his author was from 30 to 40 years ago paid by the then proprietors of the minerals for the whole damage done or to be done to the property and buildings referred to in this action by the workings of the minerals, and that no further damage had arisen for which he was responsible. He had offered to refer the claim to arbitration

The pursuer pleaded—"(2) The pursuer, in virtue of his titles to the surface and the assignations therein contained, is entitled to recover damages for the whole period of the defender's possession of the minerals. (3) No arbiters being named in the contract of 1788, the reference clause is ineffectual; and *separatim*, it is inapplicable to the circumstances out of which the present action has arisen."

The defender pleaded—"(2) The action is excluded by the provision for arbitration in the contract founded on, or otherwise, and in any event, the amount for which the defender is liable (if any) falls to be determined by arbitration, and decree can only be pronounced in terms of the arbiter's award. (6) *Separatim*, the pursuer has no title to sue for any damage done to his property or buildings except for damage done arising from workings carried on since he acquired the property; and the defender is not liable for any workings other than those carried on by himself."

The Lord Ordinary (KINNEAR) found that in terms of the contract the damages sought to be recovered in this action fell to be ascertained by neutral persons to be mutually chosen by the parties, and found that the pursuer was bound to concur with the defender in choosing persons of skill in order that the claim for damages might be determined by them in terms of the said contract.

"*Opinion.*—The pursuer maintains that the clause of reference in the contract upon which he sues is ineffectual because it contains no nomination of arbiters, and that he is therefore entitled to a proof. But the obligation upon which his claim for damages is based expressly provides that 'such damages shall be paid as the same shall be ascertained by neutral persons to be mutually chosen.' The case therefore falls within the well-established rule, of which *Smith* v. *Wharton* (*Duff*, 5 D. 750, is an illustration, that a reference which is requisite to liquidate an obligation will be good although to persons not named.

"The pursuer relied upon *Hendry's Trustees* v. *Renton*, 13 D. 1001. But the doctrine in question was expressly recognised in that decision. It was held that a general submission to arbiters not named of all disputes and differences which might arise between the parties to a mineral lease could not be sustained. But besides the general clause, there was a special arbitration clause with reference to surface damage which it was declared should be awarded by two neutral 'men to be chosen;' and there was a similar obligation that at the termination of the lease the machinery should be offered to the landlord at a price to be fixed by two 'neutral men to be mutually chosen.' The distinction between such clauses as these and the general clause of submission, which alone the Court was asked to enforce, is pointed out by the Judges, none of whom entertained any doubt that where, as in the instances cited, a reference for the purpose of extricating a special stipulation in a contract is made part of the stipulation itself, it will be effectual even although the arbiters are not named."

The pursuer reclaimed, and argued—The whole question here was whether any damage had been done for which the defender could be made liable, and was a dispute in the strictest sense of the word. It was, then, a question purely for a proof, and not a question for the valuator under the arbitration clause in the contract. The arbiter was only to assess the damage if it was due; the case fell under the general rule that a clause of reference which contained no nomination of arbiters was ineffectual. The only exceptions to this general rule were cases where the subject referred to the arbiter were the assessment of damages due or the fixing of a price.

Authorities—*Merry & Cuninghame* v. *Brown*, July 15, 1859, 21 D. 1137, Lord President's opinion; *Campbell* v. *Shaws Water Company*, June 2, 1864, 2 Macph. 1130; *Howden & Company* v. *Dobie & Company*, March 16, 1882, 9 R. 75.

The defender replied—The arbitration clause was quite effectual, and the general rule did not apply. What was here referred to the arbiter was merely the fixing of a sum to be paid under the contract for physical injury to the surface.

At advising—

LORD M'LAREN delivered the opinion of the Court:—In this case the pursuer, who is proprietor of 2 roods of ground in the town of Airdrie, with the dwelling-houses thereon, claims from the defender, a coal-master at Airdrie, the sum of £500 as compensation for damage done to his houses by the working of the coal of which the defender is the proprietor.

The defender founds on a clause in the disposition of the coal to his predecessors whereby the disponee undertook to pay compensation for damages done to the surface, "which damages," the deed provides, "shall be paid to the said Zacharias Anderson (the disponer), or his foresaids, as the same shall be ascertained by neutral persons to be mutually chosen."

The Lord Ordinary has found that the pursuer is bound to concur with the defender in choosing persons of skill in order that the claim for damages may be determined by them in terms of the contract, and it is for consideration whether the reference to mutual persons prescribed by the deed of conveyance amounts to a renunciation on the part of the pursuer of his right to submit his claim of compensation to the decision of a court of law.

In such cases it is to be kept in view that the rule against references to persons unnamed is a general rule of the law of Scotland, founded on considerations of public policy. The rule applies only to references of matters in dispute, but where the parties to a contract are able to come to an

agreement as to their relative obligations, and desire that the compensation to be paid by the one to the other for something done in execution of the contract should be fixed by a referee, this is not regarded as a dispute in the sense of the rule, and such a reference will be effectual although made to persons to be mutually chosen. In all questions as to the effect of a reference to persons unnamed it is necessary to consider the precise question on which the parties have differed, because there may be differences of mere amount which fall to be settled by reference to parties mutually chosen, and there may be differences of law or fact which have nothing to do with the estimation of damages, and which are not the proper subject of a reference to persons unnamed. I do not see how it is possible to frame a definition for determining whether a difference belongs to the one class or to the other. In each case the ground of action and defence must be examined for the purpose of ascertaining what are the matters truly in controversy between the parties. If there is really nothing in question but an assessment of compensation, the reference must take effect according to the agreement of parties. In this I agree with the Lord Ordinary—indeed, I do not think there is any difference of opinion between your Lordships and the Lord Ordinary in regard to the law applicable to such cases.

It appears to me, however, that the question which has arisen between the pursuer and the defender involves something more than the mere assessment of compensation. The defender says that the pursuer's tenements were damaged by the working of the ironstone below the surface between thirty and forty years ago, and that the pursuer's author was fully compensated for this damage, and that no further damage has arisen in consequence of his (the defender's) working. This is an issue of disputed fact, and in my opinion a reference of such a dispute to arbiters unnamed is not binding.

The present case offers an illustration of the propriety of the rule against references to parties unnamed. The clause of reference occurs in a deed of conveyance executed in 1788, and it is sought to be enforced, not between the contracting parties, none of whom can possibly be in life, but in a question with a purchaser deriving right through a whole series of titles of transmission. There does not seem to be any reason either of convenience or of principle entitling proprietors of adjacent subjects to tie the hands of their unborn successors so as to disable them from resorting to the Queen's Courts for the settlement of their differences. The rule which makes it necessary that arbiters should be named is a practical restraint on the exercise of such assumed powers, and I think the rule should be maintained, except in cases of proper assessment of damages, where the fact of damages is not in dispute. I am therefore of opinion that the case should be remitted to the Lord Ordinary for proof.

Lords Young and Rutherfurd Clark concurred.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court recalled the interlocutor of the Lord Ordinary, and remitted the cause to his Lordship, reserving all question of expenses.

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

Counsel for Defender—Guthrie Smith—Dickson. Agent—William B. Glen, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Sheriff of Lanarkshire.

BUCHANAN *v.* CLYDE LIGHTHOUSE TRUSTEES.

Shipping Law—Reparation—Contributory Negligence—Rule of the Road.

The owner of a steamer which had sustained considerable damage by striking on a rock while she was entering a small harbour on the Clyde, raised an action of damages against the Trustees of the Clyde Lighthouses based on the averment that the cause of the accident was that they had shifted a red buoy, which was placed to mark the rock, into an improper position, and that this misled the master, who was steering according to the rule of the road at sea so as to pass the buoy on his starboard hand. The Court *assoilzied* the defenders, on the ground that it was not proved against them that the buoy had been shifted, or was in any improper position, when the casualty happened—the Lord Justice-Clerk *being of opinion* further that the master had contributed to the casualty by taking an erroneous view of the rule of the road, and by neglecting to consult his chart while entering the harbour.

On the 21st March 1882 the steamer "Scotia," then plying between Millport and Ardrossan, was proceeding from Millport to Fairlie Roads in order to anchor for the night, when she struck on a rock forming part of the shoal known as Fairlie Patch, and was considerably damaged. This action was raised by her owner for the amount of damage sustained by her against the Trustees of the Clyde Lighthouses, who were by statute vested with the management of the lights, buoys, and beacons in that part of the Firth of Clyde. The pursuer averred:—When the casualty took place, the master, Gillies, following the rule of the road, steered the "Scotia" according to the rule of the road and according to the chart so as to keep to the sea side of the buoy on Fairlie Patch, giving it a good berth on the starboard. "(Cond. 15) The buoy, instead of being on the west side of Fairlie Patch, as indicated on said chart, was on the south-east or shore side thereof. The west or sea side of the Patch was the proper place where the buoy in question ought to have been, and in construing the foresaid rule of the road the master of the pursuer's vessel relied on its being there. In the place the buoy was situated at the time of the casualty referred to, it, in following out the foresaid rule of the road, was a trap to lead vessels upon the rock instead of being a beacon to ward them off the danger." "(Cond. 16) The said buoy at Fairlie Patch was placed in the position it was at the time of the foresaid casualty by the officers of the