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

defenders, or by some one for whom they are responsible. At all events, it had been in that position for such a length of time before the casualty that its position must have been, or ought to have been, within the knowledge of the defenders and their officers, for whom they are responsible. In so placing the buoy, or allowing it to remain in the position it was in at the time of the casualty, the defenders misled the master of the pursuer's vessel, and were the cause of the casualty referred to." He further averred that the casualty was caused solely on account of the gross negligence and carelessness of the defenders or their officers and servants, for whom they are responsible, in placing or allowing the buoy to remain in the place it was at the time of the accident.

He pleaded—"(1) The defenders being empowered to levy rates for the purposes condescended on, and they having also, in virtue of the powers in them vested, assumed the maintenance of, and become responsible for having in a proper position, the said buoy at Fairlie Patch, they are bound to put said buoy in a position so as to be a beacon to ward vessels off the danger there. (2) The defenders having by their gross carelessness or negligence, or by the gross carelessness or negligence of their officers or servants, for whom they are responsible, placed the said buoy, or allowed it to remain in the dangerous position it was in at the time of the casualty to pursuer's steamer, and said casualty having taken place in consequence of the buoy being so placed, the pursuer is entitled to decree as craved."

The defenders denied the pursuer's averments, and explained that the casualty occurred solely through careless or improper navigation on the part of those in charge of the steamer.

They pleaded—"(1) The pursuer's statements are irrelevant, and insufficient to support his pleas. (2) The casualty in question not having been due to the fault of the defenders, they should be assoilzied."

A proof was taken, the import of which fully appears in the opinions of the Lord Justice-Clerk and Lord Young.

The Sheriff-Substitute (GUTHRIE) found "that the defenders were in fault in having the red buoy placed by them to indicate the position of said shoal in a wrong position, and not in accordance with the code or system of buoys generally observed and recognised in Scottish waters; but that, notwithstanding this, the accident would not have happened if the master of the 'Scotia' had used ordinary and reasonable care in her navigation: Therefore assoilzies the defenders," &c.

The pursuer appealed, and argued—The principle on which a private person or company is liable for damage occasioned by the negligence of its servants, applied to any corporate body which was entrusted with the performance of a public duty, and received therefrom no profits or emoluments for itself—*The Mersey Docks Trustees* v. *Gibb*, June 5, 1864, L.R., 1 Eng. & Ir. App. 93; *Virtue* v. *Commissioners of Police of Alloa*, December 12, 1873, 1 R. 285; *Thomson* v. *Greenock Harbour Trust*, July 20, 1876, 3 R. 1194; *Holman* v. *Irvine Harbour Trustees*, February 1, 1877, 4 R. 406; *Dormont* v. *The Furness Railway Company*, April 5, 1883, L.R., 11 Q.B. Div. 496. That being so, the defenders were liable if negligence were proved against them. The import of the proof was that the proximate cause of the casualty was the wrong position of the buoy, which misled the master of the "Scotia," and for which the defenders were responsible. To entitle the defenders to succeed on a plea of contributory negligence (given effect to by the Sheriff-Substitute), they must show—Lord Neaves in *M'Martin* v. *Hannay*, January 24, 1874, 10 Macph. 411—that it was more than mere speculation that the master was in fault in navigating the vessel. It was not necessary to bring home knowledge of the improper position of the buoy to the defenders. It was a culpable omission on their part that they did not know the position of the buoy, and see that it was properly placed—*Heaven* v. *Pender*, July 30, 1883, L.R., 11 Q.B. Div. 503.

The defenders replied—The principle of law settled by the *Mersey Dock Trustees* and *Virtue* v. *Alloa Police Commissioners* cases, cited by the pursuer, was not disputed. If fault were established against the defenders, they were bound to make reparation to the pursuer. But fault by misplacing the buoy would entitle the pursuer to recover only if he were in a position to prove either (1) that the buoy was originally in a certain position relatively to the Patch, that those in command of the steamer knew that position, and, relying on that knowledge, took a certain course which led them on the rocks owing to the buoy having got out of its place through the fault or neglect of the defenders; or (2) that the defenders had adopted a system of buoyage which necessitated their placing the buoy in a particular place, and the pursuer knowing the system, and relying on the buoy being in its place as prescribed by the system, ran upon the rocks on account of the buoy having been allowed through the defenders' fault to get out of its place. But the pursuer was not in a position to aver either of these propositions; for (1) his captain never knew the original position of the buoy, even assuming it was found to have got out of that position, he could not therefore be misled by the change; and (2) his captain obviously was navigating upon an entirely erroneous understanding of the rule of the road so-called. His impression was, that if, on taking a berth anywhere on the estuary of the Clyde, he kept red buoys on his starboard hand he was in perfect safety. Now, the rule was that buoys are coloured with reference solely to the passage to the principal port in the estuary, viz., in the case of the Clyde, Glasgow. In making for Fairlie, or any other wayside anchorage, the rule was not applicable, and the navigator who has not local knowledge of the dangers is bound to look at his chart. The captain of the "Scotia" had no local knowledge, on his own admission; he had no proper chart of the locality; and he did not sail by even the imperfect chart he had, but relied exclusively on his erroneous theory of the rule of the road. Hence the disaster. His own ignorance and recklessness being thus the proximate cause of the accident, it was unnecessary to consider the question of contributory negligence.

At advising—

LORD JUSTICE-CLERK—This case has arisen out of an accident which befell the vessel in question on entering the harbour of Fairlie, on the estuary

of the Clyde, the vessel having struck on a sandbank called Fairlie Patch, which lies straight in the approach to the small harbour of Fairlie, which is entered from the main channel of the river Clyde at right angles. The action is laid against the Trustees of the Clyde Lighthouses, and the ground of action substantially is that it was their duty to have a buoy placed on Fairlie Patch to indicate the sandbank, that this buoy was placed there, but was moved to an improper and misleading position, and the result was that the captain of the vessel when navigating into Fairlie harbour kept the rule of the road, leaving the buoy coloured red on his starboard bow, and ran the vessel on the rocks, being misled by the position of the buoy. That is the simple outline of the case on record, and it is a question of the damage done by the buoy having been moved into an improper place by the negligence of the Trustees. There are three questions raised. The first is, whether the Trustees would be responsible for the action on the assumption of the truth of the averments made on record? The Sheriff assumes they would be, and I am inclined to agree with him if it were necessary to consider the question. The second proposition was that the buoy had in point of fact been moved, and that therefore they were responsible for its improper position. The third proposition was that the place into which it was moved was misleading, because a master entering the harbour was to keep the buoy on the starboard bow, and so keeping it, was entitled to believe the channel was safe. I do not think it necessary to enter upon the first of the questions as to the liability of the Trustees, or to consider the second, whether or not the buoy had been moved in point of fact. I cannot say that I think this latter point has been established by the evidence, and, at all events, it has been left in great obscurity. But the case, in my opinion, is capable of a much simpler solution. It is based entirely by Gillies, the master, on the supposed rule of the road, and we need not go further than his testimony to ascertain on what footing he was acting when the "Scotia" ran on the rocks. If it turns out that he was wrong in his assumption as to the rule of the road, irrespective of the movement of the buoy, there is an end of the case. Now, this is what Gillies tells us of the way in which he was navigating the vessel into Fairlie harbour — "In coming up to the buoy, I was giving it an extra wide berth. I was steering by the buoy and the land. It is a red buoy. (Q) What is the rule of the road about steering by a red buoy?—(A) When you are entering a berth or a river, you keep all red buoys on the starboard hand. (Q) Is there any rule as to how far you must keep off a red buoy?—(A) It is a generally understood thing that if you keep clear of them you are clear of all danger." That, then, is the view of the master, and if he is right there might have been a question, but if he is wrong there is no question—it was owing to his own mistake that the occurrence took place. Again, at the end of his evidence he says—"Being referred to passage in defenders' minutes, dated July 1858, and the following rule, that 'in entering a port all buoys on the starboard hand to be coloured red, and all buoys on the port hand to be coloured black, and chequered buoys to denote centre dangers,' depones—That is what I have understood all along. The buoy on Fairlie Patch was a buoy to which this rule applied; it was a red buoy. (Q) Being a red buoy was it bound to be in such a position that if you kept on the starboard you should be in safety?—(A) It is well known that that is where red buoys are placed. Being a red buoy, and kept on the starboard hand, we would be all right. (Q) The fact that it was a red buoy, and placed at the entrance to Fairlie, would indicate that they would be safe on the starboard side, would it not?—(A) I considered so at the time we entered Fairlie we were steering partly by the land and partly by the buoy. The chart had no influence upon my mind except in confirming the idea that the buoy should be placed on the starboard hand." I have come to be very clearly of opinion Gillies' view of the rule of the road was entirely erroneous. He had no right whatever to assume that in entering Fairlie harbour if he kept the buoy on his starboard hand he would be safe, and in my opinion it is the rule that in entering the harbour he was bound to look to his chart. This is the view of Mr Stevenson, the engineer, whose opinion in such a matter I should be loth to treat lightly. He says that Gillies notion of the mode of entering was an entire misapprehension of the real rule of the road; and again he tells us—"The original position of the buoy fulfilled two purposes. One was to indicate the direction in which a passing vessel should go in order to come to Glasgow, which is the centre of this district, and the other was to show the south side of Fairlie Patch, so as to enable all vessels to go through that narrow access. In laying down our rule that in entering port from seaward red buoys must be left on the starboard hand, and black buoys on the port hand, we prescribed these colours with reference to particular ports; in this district Glasgow was the centre. We did not have in view wayside roadsteads in laying down that rule. We did not prescribe any rule for buoying an open roadstead like Fairlie. I am not aware of any rule where you are dealing with only one buoy. The great object is to put down the position and information without misleading. (Q) If a stranger is coming up and sees a red buoy, what is his duty?—(A) To keep it on the starboard hand if he belongs to the passenger trade, and if he is not going to any small harbour and out of the navigable channel." And again he says—"The minute of 1858, which states that in entering port all buoys on the starboard coloured red, and all buoys on the port coloured black, does not fully explain what is meant. That is for passing trade bound to one of the centres. On the east coast it will be the Firth of Forth. (Q) If the Fairlie Roads is my port, must I not keep the buoy on the starboard hand?—(A) Yes, but that is not the meaning of this buoy at all. This buoy is to show the way for passing vessels." According, then, to Mr Stevenson, the rule had reference only to particular ports, of which Fairlie was not one, and to the navigation of the main channel, and the master should have looked to his chart. But he did not do that, and therefore there is an end of the case. If we find that the master was navigating on an entirely erroneous assumption, and that he did not look to his chart, which alone could have enabled him to navigate the steamer safely, the moving of the buoy could have no bearing on the case at all. Therefore,

on the whole matter, I am of opinion that we ought to dismiss the appeal.

Lord Young—I am of substantially the same opinion—that is to say, I think the pursuer has entirely failed in his case, and that not because of contributory negligence on his part, as the Sheriff-Substitute puts it, but because the fault imputed to the defenders as ground of action has not been established but negatived by the evidence. The few observations which I have to make will only have reference to one ground of judgment, though it will be the same in the actual result as that reached by the Sheriff-Substitute. The action substantially lies on this medium in point of fact. Some ten years before the accident this buoy got shifted from its proper place and was standing on the chart which people are entitled to look to for their safety in a wrong and dangerous place, where it acted as a trap and decoy, and this fatal change was attributable to the negligence of some officer of the defenders in not having put it down in a proper place where it was before when it was lifted to be cleaned. The pursuer in cond. 15 says—"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." And in 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 defenders, or by some one for whom they are responsible. At all events, it had been in that position for such a length of time before the casualty that its position must have been or ought to have been within the knowledge of the defenders and their officers for whom they are responsible. In so placing the buoy, or allowing it to remain in the position it was at the time of the casualty, the defenders misled the master of the pursuer's vessel, and were the cause of the casualty referred to."

This is a distinct enough averment in point of fact that there was a proper position in which it originally was on the chart, but that by the fault of the defenders it got shifted into a dangerous position, and in consequence the accident occurred. The pleas-in-law are also conform to that. The Sheriff-Substitute on the evidence found in point of fact that "the defenders were in fault in having the red buoy placed by them to indicate the position of the said shoal in a wrong position, and not in accordance with the code or system of buoys generally observed and recognised in Scottish waters. It is there I differ from the Sheriff-Substitute, and I agree with your Lordship. In my opinion it is not proved that the buoy was shifted. There is evidence on the subject, but the import of the whole is that it is not sufficiently proved that it was shifted. I think it was on the south side till after the accident; it was shifted to the north by Mr Stevenson, according to whose evidence (and it is the import of the whole) either position was right. I agree with your Lordship there is no evidence that it was in a wrong position, nor that it was shifted from a right position to a wrong one. The purpose of the buoy was mainly to call the attention of those navigating the waters, and who were not from habitually haunting those waters well cognisant with them, to a danger, and therefore to the necessity of consulting their charts.

So putting the judgment, and simply negativing the sole ground of action in fact put forward by the pursuer, is, I think, the best course we can take, though I agree in thinking that the captain probably got into the danger by taking the rule of the road in a wrong sense. I should therefore be satisfied with a judgment negativing the statement that this buoy had been shifted, and that it stood in a wrong and dangerous position at the time of the casualty.

Lord Justice-Clerk—I desire to add to what I have said that I entirely agree with Lord Young, but the view I have taken as to the rule of the road is, I think, quite sufficient to prevent success on the part of the pursuer.

Lord Craighill—I concur in the ground of judgment proposed by Lord Young.

Lord Rutherfurd Clark—I am of opinion that the defenders are entitled to absolvitor on the ground that the pursuer has failed to prove that the buoy was shifted or put down, or ever was, in a wrong place.

The Court pronounced this interlocutor—

"Find that it is not proved that the buoy mentioned in the record was shifted and placed in a wrong position by the defenders: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; of new assoilzie the defenders from the conclusions of the action," &c.

Counsel for Pursuer (Appellant)—Trayner—R. V. Campbell. Agents—Cumming & Duff, S.S.C.

Counsel for Defenders (Respondents)—Ure. Agents—Campbell & Smith, S.S.C.

Wednesday, February 6.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* URQUHART.

Public Company—Director—Director obtaining Personal Benefit to the Prejudice of the Company.

In an action of implement and adjudication by a railway company against one of its own directors, founded on an alleged agreement between him and the company to the effect that, in order that the company might acquire a field adjoining one of their stations for increased station accommodation, he should, jointly with the company, buy the whole estate of which that field