

tyan, instead of taking the marriage-contract provisions in her favour; and by a codicil of June 1872 she was given the further option, in the event of her leaving Glentyan, of accepting other special provisions made thereunder, in which case she must relinquish her claim to the general liferent of her husband's trust-estate, and to any other provisions from that estate beyond those specially set forth in the codicil. In these circumstances, a question arose between Mrs Stirling and the trustees under the settlement of December 1870, as to the extent of her rights under the third alternative, she contending that she was entitled to the interest of the £5000 in question independently of the codicil provisions, and the trustees maintaining that, as the money had been paid into Captain Stirling's hands, and was in point of fact merged in or mixed up with his estate at the time of the execution of the codicil, and he himself had the sole beneficial right to the capital of that sum, subject only to her liferent right to the interest, the declaration in the codicil was intended to exclude any claim on her part to receive the interest of the marriage trust-fund from the Captain's trust-estate. The question put to the Court was—Whether the trustees were bound, in the event specified in the codicil of June 1872, to pay Mrs Stirling, or the marriage-contract trustees for her behoof, the interest of £5000 over and above payment to her of the special provisions made for her by the codicil?

The Court answered the question in the affirmative.

Counsel for Mrs Stirling—Mackay. Agent—John M. Bell, W.S.

Counsel for the Trustees—Keir. Agents—Dundas & Wilson, C.S.

Thursday, November 20.

SECOND DIVISION.

[Sheriff of Caithness.

INSPECTOR OF POOR OF THE PARISH OF
LADY V. INSPECTOR OF PARISHES OF
ST CUTHBERTS, &C.

Poor—Settlement—Evidence.

In a question with the parish of A, whether the parish of B or C was the birth parish of a party and as such, liable in repayment to A of the cost of maintaining his widow, a pauper lunatic, proof held sufficient to establish liability on the parish of C.

This was an appeal in an action of relief brought by the Inspector of St Cuthbert's against the Inspector of Cross and Burness, or otherwise the Inspector of Lady, for payment of advances made by him as Inspector of St Cuthbert's for the maintenance of a pauper lunatic, the widow of John Manson, lighthouse keeper. From the time of her husband's death until her own death, in 1870, the pauper was confined in Morningside Asylum. John Manson at the time of his death had no residential settlement, and the question came to be, whether the parish of Lady or Cross and Burness parish was the parish of his birth settlement, upon which the burden of maintaining his widow was admitted to fall.

The Sheriff-Substitute (ROBERTSON), after a proof, pronounced the following interlocutor:—

“*Kirkwall, 29th May 1873.*—The Sheriff-Substitute having considered the closed record in this case, proof led by the parties respectively, both oral and documentary, productions and whole proceedings, and having heard parties' procurators thereon, Finds—1st, That it is proved and admitted that Flora M'Eachran was born in the parish of Campbeltown, Argyleshire, and was married at Greenock in 1830 to John Manson, who was a light-keeper in the service of the Commissioners of Northern Lights from 1837 to 1859; that the said Flora M'Eachran became a lunatic, and was confined in Morningside Asylum, where she was maintained as a patient by her husband, John Manson, until his death in 1859, and afterwards from the amount of a policy of insurance and sundry other monies left by him, till the same became exhausted; that on 26th October 1869 she became chargeable as a pauper lunatic on the Parish of St Cuthbert's, where the asylum is situated, and that her board had subsequently been defrayed by the Parochial Board of St Cuthbert's; that her husband, John Manson, had no residential settlement at the time of his death, and that the expense of the maintenance of the said pauper lunatic falls to be defrayed by the parish of his birth. Finds, secondly, That it is proved or admitted that David Manson, the father of the said John Manson, was lighthouse-keeper in the island of North Ronaldshay in 1806, and for a few years previously; that he had several legitimate children, and two illegitimate children born to him in North Ronaldshay; that he removed with his wife and family in 1806 from the North Ronaldshay Lighthouse to be keeper of the Start Point Lighthouse in Lady Parish, in the Island of Sanday, where he lived until the year 1814, when he and his family removed from Sanday. Finds, thirdly, that James Work, a native of Sanday, and cited as a witness for the pursuer, who in 1806 was ten years of age, depones, that David Manson had a family of five daughters and two sons with him when he arrived in the Start Point Lighthouse in Sanday in 1806, named William and John, that he knew them both, and that John was then about two years old. That Janet Guthrie or Dearness, a witness for the pursuer, also a native of Sanday, and who was seven years old in 1806, depones that she remembers that the said David Manson had two sons with him 'by his wife Sibella Baikie' on his arrival at the Start Point Lighthouse, William and John, and that John might be from one to two years of age; that William Angus, a witness for the pursuer, depones that he heard his father, James Angus, who died in July 1870 at the age of seventy-seven or seventy-eight, tell the defender William Harvey through the witness, some months before his death, that he remembered of David Manson and his family coming over from North Ronaldshay to the Start Point Lighthouse, and that the family consisted of two sons and some daughters, and that the youngest son was a child of one or two years old: That Mary Tulloch, wife of William Muir, North Ronaldshay, aged eighty, a witness for the pursuer, depones:—'I do not know whether David Manson had a son called John born of his marriage in North Ronaldshay.' That Isabella Cutt or Keday, aged eighty-two, residing in North Ronaldshay, and witness for the pursuer, depones that she knew David Manson, that he had a son who died in North Ronaldshay, and that he had no other son born to him there. That Mary Turfiss

or Tulloch, of North Ronaldshay, aged eighty-two, a witness for the defenders Baikie and Fea, deposes that she knew David Manson, and that she never heard of his having a son named John Manson. That Thomas Tulloch, aged seventy-three, a witness for the defenders, and a native of North Ronaldshay, deposes that he remembers when the Mansons removed from North Ronaldshay, that he saw them leave the island, and that there was no little boy among them. He never heard of any boy of the Manson family except David, who died in North Ronaldshay. That Mary Scott or Swanney, aged eighty-two, of North Ronaldshay, deposes that she knew David Manson and his wife, and that she neither knew nor ever heard that David Manson had any other son than David and William, or that he had a son named John; that a son named John was never baptised in church of North Ronaldshay at the public monthly baptisms there. That Joseph Tulloch of North Ronaldshay, aged seventy-nine, deposes that he knew David Manson, that he had a son named David who died in North Ronaldshay, and when he left for Sanday he had two daughters, and that he then had no son to his knowledge. He never knew or heard that he had a son named John. Finds, fourthly, that the said John Manson entered the service of the Commissioners of Northern Lights on 1st June 1820; that he was coxwain in 1836, that he was lighthouse-keeper at the Isle of May on 15th March 1837. That on 5th June 1839 he made a proposal for effecting an insurance with the Edinburgh Life Assurance Company on his life, in which he declares, under his own hand and signature, that the place and date of his birth are 'Start Point Lighthouse, 10th July 1808.' That a policy was issued on this proposal, and on John Manson's death the amount insured was paid to the Commissioners of Northern Lights, and applied by them to the maintenance of his widow, Flora M'Eachran, until the same became exhausted. That the Start Point Lighthouse is situated in the parish of Lady, Sanday, and is the birth parish of the said John Manson, and liable to the pursuer in payment of the expense of maintaining the said Flora M'Eachran in Morningside Asylum from the time she became chargeable as a pauper, on 26th October 1869, until her death in March 1872, and also in the expenses of her interment, and expenses of process; allows the defender, the Inspector of Lady parish for six days to give in objections, if he has any, against the items contained in the account libelled, and in the note of additional advances, No. 36 of process, with certification. Assolziez the defenders James Baikie and William Fea from the conclusions of this action. Finds the defender William Harvey, as inspector foresaid, liable to them in expenses of process. Appoints an account thereof to be given in, and, when lodged, remits the same to the Auditor of Court to tax and report, and decerns.

"*Note.*—The pursuer, the inspector of the parish of St Cuthbert's, has brought this action against the defenders, Baikie and Fea, inspectors of the parishes of Cross and Burness and North Ronaldshay, and the defender Harvey, inspector of Lady parish, for payment of advances made by him for the maintenance of Flora M'Eachran, a pauper lunatic, and widow of John Manson, sometime lighthouse-keeper in the service of the Commissioners of Northern Lights, in Morningside Asylum, which is situated in St Cuthbert's. John Manson

had no residential settlement at the time of his death, and the burden of maintaining his widow falls upon his birth parish. His father was a lighthouse-keeper in North Ronaldshay in 1806 and for a few years previously, and he removed in 1806 to the Start Point Lighthouse in Lady parish, Sanday. The pursuer and the defender Harvey contend that he was born in North Ronaldshay about the year 1804, while the defenders Baikie and Fea maintain that he was born in the Start Point Lighthouse on 10th July 1808. This is the sole matter in dispute between the parties.

"A great deal of the evidence, both oral and documentary, led by the parties on either side, has no direct or material bearing upon the point at issue. None of the witnesses swear in direct terms that John Manson was born either in North Ronaldshay or in Lady parish. The North Ronaldshay witnesses all say that they knew David Manson, that they never knew, or saw, or heard of a son of David Manson named John in that island. While the Sanday witnesses say that they remember seeing a child named John, one or two years old, son of David Manson, at the Start Point Lighthouse, in Sanday, in the year 1806, immediately after the arrival of David Manson in Sanday. The witnesses are old, and speak to what took place sixty-five years before, when most of them were children from five to ten years of age, and all were under twenty years old. The one side contradicts the other, not directly, but by inference, and sometimes the witnesses contradicted themselves, and no one swears directly to the exact time and place of John Manson's birth. The Sheriff-Substitute would have great difficulty in coming to a decision by the light of the parole evidence adduced, but fortunately there is one piece of written evidence which, in his opinion, clears all doubt on the subject of John Manson's place of birth. On 4th June 1839 he (John Manson) made a proposal for effecting an insurance for £134, 2s. with the Edinburgh Life Assurance Company, in which he states, under his own hand, that he was born at the Start Point Lighthouse, 10th July 1808. The original of that proposal is in the possession of the Assurance Company, and being bound with other proposals in a volume which the Company cannot part with, it is not produced, but the original proposal was exhibited to Sheriff Hamilton at Edinburgh, commissioner for taking evidence in this case, and the exhibitor, an official from the Assurance Office deposes that the answers to the queries in the proposal appear to be in the same handwriting as the signature of John Manson. An assurance was effected upon this proposal, and upon John Manson's death the amount insured was paid to the Commissioners of Northern Lights, and applied by them to the maintenance of his widow at Morningside Asylum.

"There is thus ample evidence that this proposal was made to the Assurance Office by John Manson, that he therein, under his own hand, declared himself to have been born on 10th July 1808, at the Start Point Lighthouse, which is situated in the parish of Lady; that an insurance was effected on the proposal, and upon his death that the amount insured was paid by the Company, and applied to the maintenance of his widow. Had a false date been given by Manson the policy of insurance would have been void; but the Company, who must have satisfied themselves by making the usual inquiries in such cases that his declaration

was correct, paid the amount insured without objection. He could have no object in stating a false birthplace in his proposal: it was the same to the Assurance Company whether he was born in North Ronaldshay or Lady parish, and the Sheriff-Substitute conceives that this conclusive evidence cannot be redargued or set aside by the parole proof led by the pursuer. None of the pursuer's witnesses can swear that John Manson was born in North Ronaldshay; and only two, James Work and Janet Guthrie or Dearness, even say of their own knowledge that he was a child of one or two years old when his father David Manson first arrived in Sanday in 1806. James Work was then ten years old, and he was seventy-five when he gave his evidence; Janet Guthrie or Dearness was seven years old in 1806. She says she was intimate with David Manson's children, but she afterwards seems to have mistaken John for his brother William. She also says that John was a truthful boy when she knew him. These two witnesses appear to have had a good deal of talk with each other and with the defender Mr William Harvey, about the birth of John Manson, before they were examined as witnesses in the case. The pursuer's witness, William Angus, had no personal knowledge of the Mansons, but he deposes that he heard his father James Angus, now deceased, tell the defender William Harvey, through the witness, that he remembered David Manson's first arrival in Sanday in 1806, and that he had then two sons, William and John; also that he heard his father say so on other occasions. The evidence of this witness is somewhat confused, and does not support the pursuer or defender's contention very satisfactorily. Isabella Cutt or Kelday, a North Ronaldshay woman, who is eighty-two years old, and who remembers David Manson and his family in that island, says that he had no other son in North Ronaldshay except a boy who died and was buried there. This is evidence against, and not for the pursuer and the defender Harvey; and the same applies to the evidence of Mary Tulloch or Muir, aged eighty, also a witness for the pursuer. The import of her evidence is that she, a North Ronaldshay woman, then about fifteen years of age, did not remember whether David Manson had a son named John born of his marriage in the island. The evidence of the pursuer James Craig, and of William Muir, was brought to contradict that of Mary Tulloch or Muir, and has no bearing on the merits of this case. On the other hand, three witnesses for the defender, Thomas Tulloch, aged seventy-three, Mary Scott or Swanney, aged eighty-two, and Joseph Tulloch, aged seventy-nine, all North Ronaldshay people, swear that they knew David Manson and his family when in that island, and that they did not know, or ever hear, that David Manson had a son born there named John. There was conflicting parole proof led for both parties as to whether there was a son born of the marriage of David Manson at the Start Point Lighthouse; but the Sheriff-Substitute considers that it is not conclusive on either side, and that it is unnecessary further to refer to it here. He apprehends that the written and signed declaration of John Manson contained in his proposal to effect an insurance sufficiently establishes that he was born at the Start Point Lighthouse, in Lady parish, Sanday, on the 10th July 1808, and that the evidence afforded by that document is not controverted

by the proof led by the pursuer and the defender Harvey."

On appeal the Sheriff (THOMS) pronounced the following judgment:—

"*Edinburgh, 17th June 1873.*—The Sheriff having considered the appeal for the defender Harvey, inspector of the poor of the parish of Lady, and whole process: Finds (1) that Flora M'Eachran or Manson, wife of the late John Manson, light-keeper in the service of the Northern Light Commissioners, has been, since 26th October 1869, and is a pauper lunatic, confined in the Royal Edinburgh Asylum at Morningside, in the parish of St Cuthbert's, Edinburgh, and that the parochial board of the parish of St Cuthbert's have, during said period, made advances and outlays on her behalf: (2) that the said John Manson had at the time of his death no residential settlement; (3) that the said John Manson was born at Start Point Lighthouse, in the parish of Lady, in or about the year 1808; (4) that the parochial board of the parish of Lady, as the birth parish of the said John Manson, is liable in repayment to the parochial board of St Cuthbert's of their said advances and outlays on behalf of the said Flora M'Eachran or Manson; and (5) that the parochial board of the parish of Cross and Burness, and the parochial board of North Ronaldshay, are entitled to absolver, with expenses of process against the parochial board of the parish of Lady: To the extent of giving effect to these findings, sustains said appeal, and recalls the interlocutor submitted to review, and *quoad ultra* dismisses said appeal, and adheres to the said interlocutor; Finds the parochial board of the said parish of Lady liable to the parochial boards of St Cuthbert's, Cross and Burness, and North Ronaldshay, in the expenses of this appeal: Reserves all questions of expenses *quoad ultra*; Allows accounts of the expenses hereby found due to be lodged, and when lodged, remits the same to the Auditor of Court to tax and to report, and remits the cause that the above findings may be applied, and the cause otherwise proceeded with."

Against this judgment the Inspector of Lady parish appealed.

At advising—

LORD NEAVES—We do not interfere with the principle that the pursuer in such a case as this must fix the liability on one of the defenders. Two parishes are here concerned by the pursuer. It is quite clear, and seems to be admitted on all hands, that the birth of the pauper lunatic's husband must have taken place in one or other of these parishes, and it has followed that the one avers birth in the other. There is a good deal of conflicting evidence, and, in the midst of it, there are two documents of importance by which it is recorded that he was born at Start Point Lighthouse. That information comes from the best existing sources. If the case for either of the defenders could have been strengthened by proof as to the parish registers, it would have been advisable, but it is not for the Court to supply what a party to a cause has omitted.

LORD MACKENZIE—The statements in the documents which appear sufficient to dispose of the case, come from different sources, and are worthy of every reliance. The entry in the proposal for a policy of life assurance is made under the hand of John Manson, who was not likely, considering

the peculiar history of lighthouse keepers and their families, to be under any mistake about the time or place of his birth. It is a direct statement in his own handwriting, fixing the precise date of his birth, and was made when he had every interest to be accurate, so as to effect a policy which could not be challenged on account of mis-statement. The documentary evidence was also corroborated by the parole.

LORD BENHOLME—The Sheriff-Substitute's interlocutor, which is very much a narrative of the evidence, is anomalous in point of form, though it can be said to have some advantage from the shape it takes, and the Sheriff-Principal has rightly recalled his findings, and substituted an interlocutor more in keeping with the regular and proper form. I found my judgment here upon the documentary evidence. After such a long interval of time as nearly seventy years, the accuracy of statements as to occurrences so far back by persons who were then mere children, is not to be depended upon. Here the written evidence is precise and direct, not constructive or inferential.

LORD MONCREIFF and **LORD COWAN** absent.

Counsel for Appellant—Duncan and Mackintosh. Agents—Horne, Horne, & Lyell, W.S.

Counsel for Respondents, the Inspectors of Cross and Burness and North Ronaldshay—Balfour and Young. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Inspector of St Cuthbert's—Marshall.

OUTER HOUSE.

[Lord Shand, Ordinary.]

DRUMMOND HAY, PETITIONER.

Process—Expenses.

An heir of entail in possession petitioned the Court for authority (1) to uplift a certain sum of money paid under an Act of Parliament by a Railway Company as compensation for certain portions of the entailed lands acquired by them; and further, (2) to apply this money in repayment *pro tanto* of sums expended on improving the entailed estate.—*Held*, on an objection raised against the Auditor's report, that the common expenses incurred in serving the double purpose of the application must be borne equally by the petitioner and the Railway Company.

This was a petition at the instance of Mrs Charlotte Elizabeth Richardson Drummond Hay of Seggieden, in the county of Perth, with consent of her husband Lieut.-Colonel Drummond Hay, for authority to uplift and apply certain monies which had been consigned by the Edinburgh, Perth, & Dundee Railway Company.

The application was made under the following circumstances:—

The petitioner is heiress of entail in possession of the entailed estate of Aberargie, in the parishes of Abernethy and Dron, in the county of Perth, and has made up a title to the whole of the lands embraced by the entail.

Under the powers conferred by "The Edinburgh, Perth, and Dundee Railway (Consolidation) Act, 1851," certain portions of this entailed estate were taken by the Edinburgh, Perth, and Dundee Rail-

way Company for the purposes of their undertaking. These portions were conveyed by Mrs Drummond Hay to the Railway Company by disposition, dated 5th November 1855, in consideration of the sum of £790, 15s., which had been fixed by arbitration as the amount of purchase-money and compensation, in respect of land taken and otherwise, to which the petitioner and the heirs of entail succeeding to her in the entailed estate were entitled. This sum of £790, 15s. was consigned subject to the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845, on a deposit-receipt by the Bank of Scotland, dated 14th January 1871, and the petitioner has uplifted the interest on the consigned sum down to 13th March 1873.

By the 26th section of the Act 11th and 12th Vict. cap. 36, it is enacted, "That in all cases where money has been derived from the sale or disposal of any portion of an entailed estate in Scotland, or of any right or interest in or concerning the same, or in respect of any permanent damage done to such estate under any private or other Act of Parliament," it shall be lawful for the heir of entail in possession, where he shall not be entitled to acquire the said money in fee-simple, to apply to the Court of Session for authority to uplift and apply it, *inter alia*, in permanently improving the entailed estate, or in repayment of money already expended in such improvements; and the heir so applying such monies is directed to set forth the sums proposed to be laid out, and the special purpose to which it is intended to apply them. Mrs Drummond Hay, since succeeding, has expended in permanent improvements, chiefly in additions to the farm-steadings and in drainage, a sum of £1474, 14s. 1d., conform to a state of expenditure put in process, and she desired to avail herself of the power conferred by the Act, and to uplift the consigned sum of £790, 15s., and apply it in repayment *pro tanto* of the sum of £1474, 14s. 1d. expended on these permanent improvements.

Mrs Drummond Hay is above 25 years of age, and the three nearest heirs of entail were duly called. The narrative of the petition concluded thus:—

"In terms of the 79th section of the said "Lands Clauses Consolidation (Scotland) Act, 1845, the North British Railway Company, as now amalgamated with and coming in place of the said Edinburgh, Perth, and Dundee Railway Company, the original promoters of the undertaking, for the purposes of which the said portion of the entailed estate was taken, are liable in the expenses of this application."

The petitioner prayed for intimation and service on the three next heirs, on their guardian-at-law, and on the North British Railway Co., and for advertisement, and, in conclusion, asked the Court "to authorise the petitioner to uplift the said sum of £790, 15s., consigned in the Bank of Scotland as aforesaid, and to apply the same in repayment *pro tanto* of the sums so found to have been expended on the entailed estate, and to grant warrant to and ordain the said Bank of Scotland to make payment to the petitioner of the said sum of £790, 15s., to be applied as aforesaid, together with the interest accrued thereon subsequently to 13th March 1873 for her own use, upon her granting a valid acknowledgment and discharge therefor; and further, to find the North British Railway Company liable in the expenses of this application," &c.