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 Railway 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.

The Lord Ordinary, after the petition had been duly intimated and served on the parties named, remitted to the Auditor of Court to report on the question of expenses.

The report of the Auditor, dated 4th November 1873, was as follows:— "In consequence of a remit by Lord Shand (Ordinary) the Auditor has examined the foregoing account, and taxed the same in presence of the agents for the parties at the sum of £33, 12s. 8d. sterling, reserving for the determination of the Court the question of the liability of the Railway Company for the sum of £9, 5s. 7½d., included in the taxed amount (£33, 12s. 8d.) now reported, as to which reference is made in the subjoined note.

"*Note.*—This application embraces two matters —the constitution of improvement against the heirs of entail, and power to uplift and apply compensation money in payment of the improvement expenditure, the former under the Entail Amendment Acts, and the latter under the Lands Clauses Consolidation Act.

"The Auditor has taxed the expenses as against the Railway Company at the sum of £33, 12s. 8d. In doing so he has allowed what may be described as the general expenses of the application, such as the drawing and printing the petition, bringing the application into Court, obtaining order for intimation, &c. In this he has acted in conformity with his own practice, and he believes with that of his predecessor. But an objection has several times, at audits of similar accounts, been suggested, and has at the present audit been formally stated and urged, that the general expenses being available equally to both branches of the application, and the Railway Company being liable only for the procedure under the Lands Clauses Act, these expenses ought to be apportioned between the petitioner and the Railway Company. The answer by the petitioner is that the Railway Company are not charged with a larger sum of general expenses than they would have been had the petition been confined to the power to uplift and apply. But this is open to the reply that the same expenses would have been incurred had the application been confined to the constitution of improvements, and would in that event have fallen wholly on the petitioner, and that the saving effected by the conjunction of the two matters should not be imputed wholly to either, but that the petitioner and Railway Company should each participate.

"The question in the present case is not of much importance in a pecuniary point of view, but it is of frequent recurrence, and the Auditor is desirous to have it authoritatively settled for his future guidance. His own opinion is very decided, that the contention of the Railway Company is well founded, and were he dealing with the question for the first time he would be inclined to hold that general expenses should be equally divided, but in the face of the practice which has prevailed he does not think it right to give effect to the objection without the sanction of the Court, or to subject either party to the expense of disposing of the question by way of objection to his report. He has therefore reserved it for the consideration of the Lord Ordinary. Should his Lordship decide in favour of the objection, the taxed account now reported will be restricted to £24, 7s. 0½d."

The Lord Ordinary, on 12th November 1873, pronounced the following interlocutor, which, by acquiescence, became final:— "The Lord Ordinary having heard counsel for the petitioner and the North British Railway Company on the objections stated by the said Company to the petitioner's account of expenses, No. 30 of process, reserved by the Auditor, sustains the said objections, and disallows the charges in the petitioner's account to the extent of £9, 5s. 7½d.: Approves of the Auditor's report on the said account; and decerns against the North British Railway, as now representing the Edinburgh, Perth, and Dundee Railway Company, for the sum of £24, 7s. 0½d., the taxed amount of said expenses.

"*Note.*—The point reserved by the Auditor for the consideration of the Court appears to present itself for decision now for the first time, since in the cases of *Torphichen* (13 D. 1400) and *Erskine* (14 D. 119), the only matter discussed, and on which a decision was given, was brought forward entirely by the necessity for ascertaining whether the improvement expenditure was of such a nature as to form a good charge against the heirs of entail. On this question the companies succeeded to the full extent for which they then contended.

"In the present case the respondents, the North British Railway Company, referring to the double object of the application, as appearing from its prayer, maintain that, while on the one hand they must pay the proper cost applicable to the uplifting and applying the consigned money, and the petitioner must bear the proper cost of substantiating his claim for improvement expenditure, the expenses otherwise of the proceedings which may be called the common or general expenses of the application ought to be borne equally by them and the petitioner.

"The Lord Ordinary is of the opinion expressed by the Auditor on this subject. The common expenses have been incurred in serving the double purpose of the application, and the expense in relation to one of these purposes is payable by the petitioner, and in relation to the other by the respondents. It is an advantage that the double purpose admits of being effected under one petition in place of two, and there seems to be no good reason for holding that this advantage should accrue to one only of the parties interested. It is but reasonable that the petitioner as well as the respondents should bear a share of the expense, for, as the Auditor observes, when the petitioner in support of her contention, alleges that the same expense would have been incurred and payable by the Railway Company had the application been limited to the application of the consigned money only, the Company may with equal justice say the same expense would have been incurred and payable by the petitioner had the application been limited to its first branch, viz., the constitution of the improvement debt only.

"Taking this as the sound view if the point now arose for the first time in practice, the remaining question is whether the contrary practice which has gone on for a considerable time, should prevent the application of a principle which appears to have reason to commend it. The practice to which reference has been made applies to a limited class of applications only, viz., those which embrace a constitution of improvement debt as a part of them. It has not followed on any decisions or *dicta* by the Court favourable to the petitioner's view, and although before the Auditor the objection has been suggested in previous cases, it has only now been formally stated

and urged and brought before the Court. It appears to the Lord Ordinary, in these circumstances, that nothing has occurred which should prevent him from giving effect to what he believes to be a reasonable contention on the part of the respondents, and he has accordingly decided the point reserved by the Auditor in their favour."

Authorities—*Moncreiffe*, 21 D. 1359; *Torphichen*, 13 D. 1400; *Erskine*, 14 D. 119.

Counsel for Petitioner—Adam. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Balfour. Agents—Dalmahoy & Cowan, W.S.

Wednesday, November 19.

FIRST DIVISION.

[Lord Shand, Ordinary.

GLASGOW, & NEWCASTLE, & MIDDLESBOROUGH STEAM SHIPPING CO. *v.* WATSON.

Executorial Contract—Timeous Acceptance.

Where an offer to furnish goods remained unaccepted for upwards of two months, and no express agreement to keep the offer open was proved, *Held* that acceptance after such a lapse of time could not be regarded as timeous.

On 5th August 1871 the defender in this action, in answer to a previous communication, wrote to the pursuer in these terms:—"Your kind favour of 4th Aug. to hand, and in reply, beg to offer you my Watson's Hortley steam coal for one year at 7/ per ton, alongside at Grangemouth. Hoping the above will meet with your approval, etc." To this no written reply was returned until 13th October, when a letter in the following terms was sent on behalf of the pursuers to the defender:—'Referring to your offer of 5th Augt., to supply us with coals for one year, I hereby accept the same. Your Mr Simpson promised from time to time to arrange a different mode of delivery, otherwise I would have accepted your offer earlier." The defender thereafter refused to supply the coals at the price mentioned in the above letter, and in consequence the pursuers had to supply themselves with coal at an increased price. The difference to the Company thereby occasioned was estimated at £654, 11s. 3d. sterling, and for this amount, accordingly, they sued the defender.

Proof was led, and on 23d June 1873 the Lord Ordinary (SHAND) pronounced the following interlocutor—"The Lord Ordinary having considered the cause, with the proof and productions, Finds that on 4th August 1871 the pursuers, through Daniel Reid, shipowner in Glasgow, one of their partners, applied by letter to the defender to know at what rate per ton the defender could supply coals to the pursuers' steamers at Grangemouth for a twelvemonth; and that, in answer thereto, the pursuers received from the defender a letter of the following date, in which the defender offered to supply his Hartley steam coal for one year alongside at Grangemouth at 7s. per ton: Finds that the steamers referred to in the first of said letters were the pursuers' steamers, the 'Prince,' 'Alice,' and 'Palermo,' trading between Grangemouth and Newcastle and Middlesbro', and that this was known to the defender; Finds that at a meeting which took place within a few days of the receipt of the last mentioned letter, between the pursuers and Andrew H. Simpson, the defender's salesman, who was authorised to transact business on his behalf, it was agreed between the pursuers and Simpson that the defender should send a quantity of coal to the pursuers in order that the pursuers might make a trial of the same; that some time thereafter coals were sent accordingly by the defender, and that the trial proved satisfactory; Finds further, that during the time when the said trial was being made, and thereafter, the defender's offer of 5th August 1871 to supply coals to the pursuers was kept open by the defender for the pursuers' acceptance, by negotiations between the pursuers and the defender's salesman Simpson, as to the defender's furnishing lighters from which to load the coals on board of the pursuers' steamers, and that while the negotiations were so open, the pursuers, on 13th October 1871, by their letter of that date, accepted the defender's said offer of 5th August 1871: Finds that thereby a concluded contract was entered into between the parties, whereby the defender undertook to supply his Hartley steam coal to the said steamers in such quantities as might be required for their trading for one year; Finds that, in breach of the said contract, the defender failed and refused to supply said coals, and that the pursuers thereby suffered loss and damage to the extent of £542 15s. 7d.; Decerns against the defender for payment to the pursuers of that sum: Finds the pursuers entitled to expenses: Allows an account thereof to be given in; and remits the same when lodged to the Auditor, to tax and to report.

"*Note*—The present action is one of damages for breach of contract, founded on the averment that on 13th October 1871 a contract was concluded between the parties, by which the defender undertook to supply coals for the pursuers' steamers for a year after that date, at Grangemouth, at the rate of 7s. per ton. It is not disputed that the defender declined to supply the coals, though repeatedly required to do so; and, assuming a contract to have existed, it is further not disputed that the loss and damage sustained by the pursuers in having to purchase coal elsewhere to supply their steamers amounted to £542, 15s. 7d, the sum for which the Lord Ordinary has granted decree.

"The difference between the parties thus truly resolves into the question, whether there was a concluded contract between them or not. There is a direct conflict in the evidence on this subject given by the pursuers Daniel Reid and John Reid and the witnesses Simpson and Connell for the defender. The Lord Ordinary is of opinion that the truth is with the pursuers, and that by the proof they have established their averments on record.

"The negotiations between the parties originated in the letters of 4th and 5th August 1871, referred to in the preceding Interlocutor. The pursuers' acceptance of the defender's offer, contained in the last of these letters, was only sent to the defender on 13th October 1871, upwards of two months after the date of the offer. In the meantime coal had risen in price, and it is clear that unless the defender's offer of 5th August was kept open for acceptance by arrangement between the parties, the acceptance came too late, and could not make a con-