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Thursday, January 16.

SECOND DIVISION.

[Lord Adam, Ordinary.

M'DONALD (PETITIONER) *v.* M'DONALDS.

Entail—Disentail—Value of "Expectancy or Interest" in Entailed Estate—Statute 38 *and* 39 *Vict. c.* 61 (*Entail Amendment Act* 1875), *sec.* 5.

In an application for disentail a remit was made to an actuary to value the "expectancy or interest" of the second and third substitute-heirs of entail under section 5 of the Entail Amendment Act 1875. It appeared that the first substitute-heir was not a good life, and after an examination by a medical man, to which course the heir offered no objection, the actuary in computing the value to be placed upon his chance of succeeding to the entailed estate added twenty years to his actual age. The Lord Ordinary (Adam) found in terms. The Court in the special circumstances *adhered—diss.* Lord Gifford, who held that in computing the value the actual age must be taken, as a statutory value should not be made to depend upon the willingness or unwillingness of a person to be medically examined.

In valuing the "expectancy or interest" of substitute-heirs of entail under the 5th section of the Entail Amendment Act 1875 the Court will not take into consideration the chances of the heirs in question succeeding to the estate in fee-simple.

Observations *per curiam* on the case of *Wilson* v. *De Virte*, Dec. 19, 1877, 15 Scot. Law Rep. 239; 5 R. 328.

Major-General A. M. M'Donald on 13th November 1877 presented a petition to the Court under the Acts 11 and 12 Vict. c. 36, 16 and 17 Vict. c. 94, and 38 and 39 Vict. c. 61, for authority to record an instrument of disentail of the estates of Dalchosnie and others, of which he was heir of entail in possession.

The petitioner was born on 22d March 1830, and the three nearest heirs of entail who at the date of the application were entitled to succeed were the petitioner's brother Captain John Alan M'Donald, born March 1834, and his two sisters Misses Elizabeth Moore Menzies M'Donald and Adriana M'Donald, born respectively on 10th June 1827 and 30th November 1828. The only other heir of entail in existence was another sister Miss Jemima M'Donald, born in June 1832.

The petitioner produced a consent to the disentail by Captain M'Donald, but the two next heirs, the Misses M'Donald, refused their consent.

The Lord Ordinary (ADAM) remitted to Mr T. B. Sprague to inquire and report as to the value of the "expectancy or interest" of these two ladies in the entailed estate.

Mr Sprague's report was, so far as need be noticed, to the following effect:—The valuation roll was taken as the basis of calculation, and under it the net annual value of the estate was brought out to be £1672, 7s. 1d., and the actual value £48,000.

It was stated that a sum of upwards of £5000 had been expended on improvements which had not been yet constituted and charged on the estate, as, though a petition had been presented for that purpose, proceedings in it had been suspended since the present application had been made. This charge was objected to, and the actuary made his calculations on the alternative principles of allowing and disallowing it as a deduction.

The petitioner was a bachelor, and Captain M'Donald was married without issue. The latter was stated to be in good health, but to have formerly suffered from ailments which would tend to shorten his life. Upon a report by a medical man who had examined Captain M'Donald, who had offered no objection to that course being taken, the actuary in calculating Captain M'Donald's interest added twenty years to his actual life, making his calculations on the assumption that he was sixty-four instead of forty-four years of age The actuary further, looking to the fact that there was only one heir of entail in existence after the second and third substitute-heirs, added to the money value of their interest the value of the chance of their succeeding to the estate in fee-simple, which had the effect of more than doubling the estimate of their interests.

To this report both parties lodged objections, the objections for the petitioner being as follows:—1. Because the sum expended on improvements had not been allowed as a deduction. 2. Because the value of the privilege of delaying the charging of that expenditure for twenty years under the Entail Amendment Act 1875 had not been taken into account. "3. In respect that the actuary has made any deduction whatever in estimating the value of the life of Captain John Alan M'Donald . . . and has not made the valuation of his interest and expectancy, enuring to the petitioner by virtue of Captain M'Donald's consent to the disentail on the footing of his being of his actual age. 4. Alternatively to the last objection, in respect that the actuary has greatly over-estimated the number of years which should . . . be added to Captain M'Donald's age . . . and has dealt therewith as if he were 'dealing with proposals for insurance on the lives of persons whose expectation of life is below the average.' . . . 5. In respect that the actuary in estimating the expectancy of the second and third heirs has assumed that Captain M'Donald will have no issue, and has greatly under-estimated the expectancy of the petitioner having issue. 6. In respect that the actuary has made his calculations on the footing 'that the ages of the several heirs to be employed in the calculations should be those at the birthday, whether last or next, which is nearest to the' 14th November 1877, the date of the first interlocutor in the application. 7. In respect that the actuary has estimated the value of the 'chance' of the second and third heirs 'acquiring the fee-simple of the estate by surviving all the other heirs in the entail,' and

has thereby valued their interests as expectant fee-simple interests instead of confining the inquiry to the value of their expectant interests as heirs of entail. . . . It is understood that upon this principle the actuary has allowed to these heirs for this 'chance' a resulting value more than double what, on a proper interpretation of the Entail Statutes, and in particular of the 'Entail Amendment Act 1875,' sec. 5, the said heirs are entitled to as the 'value in money of the expectancy or interest in the entailed estate' of such heirs. 8. In respect that the actuary, by estimating the value of the expectancy of Miss Jemima M'Donald, and taking her existence, age, and probability of issue, into account, has introduced a fourth heir into the calculations. . . . 9. In respect that the actuary has calculated the value of the expectancies of the second and third heirs as a 'combined interest,' and has assumed as a matter of certainty that if the second and third heirs were the only surviving heirs of entail, on the event happening of the second heir coming into possession of the entailed estates the third heir would voluntarily consent to a disentail, and that (in the words of the report) 'the fee-simple could be dealt with by . . . the two, if both survived.' 10. Generally, that the petitioners's and Captain M'Donald's interests were valued too low, and the second and third heirs too high."

The second and third heirs objected—1. Because the report proceeded on the basis of an assumed annual value instead of the actual value; and 2, because the reporter proceeded on the assumption that the petitioner's was an average life, without taking into account the fact that he was in the army, and liable to be sent upon foreign service.

The Lord Ordinary (Adam) pronounced this interlocutor:— . . . Finds, with reference to the first objection for the petitioner, that the sum expended by him (prior to the presenting of this petition) on permanent improvements on the entailed estate proposed to be disentailed, of the nature contemplated by the Entail Acts, and capable of being constituted a burden on the said estate, ought to be allowed as a deduction from the value of the said estate: Repels the petitioner's second objection: Repels the petitioner's third objection: Sustains the petitioner's sixth objection: Repels the petitioner's seventh objection: Repels the petitioner's eighth objection; and *quoad ultra* reserves consideration of the petitioner's objections in so far as not disposed of: Further, sustains the first objection for the Misses M'Donald, and repels their second objection; and grants leave to the petitioner to reclaim.

"*Note.*—With reference to the petitioner's first objection, the petitioner alleges that at the date of presenting this petition he had expended a sum of £5401, 4s. 9d. on improvements on the entailed estate, and that a petition was in dependence for the purpose of constituting that expenditure a charge on the estate. To the extent to which this sum has been expended on improvements of the nature contemplated by the Entail Acts, either the petitioner himself, or anyone to whom he may expressly bequeath it, has it in his power to charge the estate with the amount. The estate is in fact indebted to the petitioner in the amount, and it is to that extent a less valuable succession to the next heirs of entail. It therefore appears to the Lord Ordinary to be a deduction which ought to be allowed in estimating the value of the succession, in the same way as if it had been already made a burden on the fee of the estate.

"The petitioner explained that he had not proceeded with the petition for having this improvement expenditure made a charge on the estate, because it appeared to him to be unnecessary to do so if the estate were to be immediately disentailed. It does not appear to the Lord Ordinary to be necessary that the sum should be actually charged upon the estate; but it will be necessary for the purposes of this petition that the sum with which the petitioner is entitled to charge the estate should be ascertained, and to that effect it may be desirable that the proceedings in the petition to charge should be resumed.

"The petitioner's second objection appears to be clearly unfounded.

"The question involved in the petitioner's third objection is one of great importance, and will be of constant occurrence in this class of cases. The question is, Whether under the 5th section of the Entail Amendment Act of 1875, when an heir of entail has declined to consent to a disentail, and the duty falls upon the Court of ascertaining the value in money of the expectancy or interest in the entailed estate of such heir so declining, the actual age of the heirs of entail is in all cases to be taken as the basis of the calculations which may require to be made?

"What the Court has to do is to ascertain the value in money of the expectancy or interest of the heir of entail declining to consent. It is obvious that the most material element to be taken into consideration in ascertaining this value is the probable duration of the lives of the other heirs of entail. But it is equally obvious that the probable duration of life of a person depends upon his state of health as well as upon his actual age. Were the Court to refuse to take into consideration the state of health of the person the probable duration of whose life is in question, it appears to the Lord Ordinary that great injustice would be done to the heirs of entail declining to consent to the disentail, and who by the Act of 1875 are compelled to sell their interest in the entailed estate. Suppose, for example, that the heir in possession or the nearest heir for the time was known to be hopelessly ill of an incurable disease, and had only a few months to live, it would be manifestly unjust to calculate the value of the interest or expectancy of the two next heirs on the footing that such heir in possession or nearest heir would attain to the average duration of human life. That, no doubt, is an extreme case, but it illustrates the principle contended for by the petitioner.

"That great difficulties may be encountered in ascertaining the state of health of the person the probable duration of whose life is the subject of inquiry is no doubt true. It is said, for example, that a medical examination is a necessary element in the inquiry, but that it could not have been the intention of the Legislature to compel heirs of entail to submit to a medical examination when, as in this case, they had no interest whatever in the question at issue, so that it would come to depend on the willingness or unwillingness of an heir of entail to submit to examination whether any reliable evidence could be got as to the state of his health.

"Whether the Court would compel an heir of entail to submit to a medical examination does not require to be determined in this case, because Captain M'Donald, the heir the state of whose health is in question, does not object to being examined; but the difficulty of the inquiry does not, in the opinion of the Lord Ordinary, absolve the Court from the duty of ascertaining by the best available means in its power the value of the interest or expectancy which may be the subject of inquiry.

"The Lord Ordinary has reserved for further consideration the petitioner's 4th objection. He may state that, in his opinion, the question whether or not the expectation of life of Captain M'Donald is below the average is not one which should be investigated by way of a proof before the Lord Ordinary, as the petitioner suggested. He thinks, however, that the petitioner is entitled to further inquiry. It appears to the Lord Ordinary that a medical man of eminence and experience in such matters should see Captain M'Donald, and communicate with Mr Sprague, who would then report to the Lord Ordinary how many years, if any, ought to be deducted from the average duration of life in Captain M'Donald's case, or, in other words, how many years, for the purpose of calculation, ought to be added to his life.

"It is obvious, however, that no inquiry at all will be necessary if the petitioner's views are right as to the 3d objection.

"The Lord Ordinary has communicated with Mr Sprague with reference to the 5th objection, and has ascertained from him that the state of Captain M'Donald's health does enter into the question of the probability of his having issue. The Lord Ordinary has therefore, for the same reasons, reserved the consideration of this objection.

"With reference to the 6th objection, in calculating the average of a large number of lives, the method adopted by the reporter no doubt is practically correct, but it was explained to the Lord Ordinary that it happened in this case that the birthdays fell on the same side of the line, and therefore that the method adopted became practically unjust. That being so, it appears to the Lord Ordinary that the petitioner is entitled to have the calculations made on the footing of the age of the parties, either at their last or next birthdays, as may be thought right. The Lord Ordinary has therefore sustained the objection.

"The Lord Ordinary thinks that the 7th objection falls within the principle of the case of *Wilson* v. *De Virte*, Dec. 19, 1877, 15 Scot. Law Rep. 239, and must therefore be repelled. It appears to the Lord Ordinary that if an heir of entail who shall succeed to an entailed estate shall either have the power of acquiring it in fee-simple by disentailing it, or, as in this case, shall be entitled to hold it in fee-simple as being the only heir of entail in existence, the interest of such heir of entail in the estate is much more valuable than if he had succeeded merely to a life interest in it. In the one case he can at any time sell the estate if he chooses for its full value; in the other case, his interest may or may not be of great value, as, being merely a life interest, its value will vary according to the time which from age or otherwise it is probable he will live to enjoy it. But if an heir of entail is thus in a position to acquire an estate in fee-simple, the Lord Ordinary does not see why, in calculating his chance of succeeding to it, that element should be left out of view.

"The Lord Ordinary has communicated with Mr Sprague with reference to the 8th objection, and has ascertained from him that in calculating the expectancy of life, &c., of Miss Jemima M'Donald, he has only done so in so far as it affects the interests of the previous heirs of entail. It was necessary to ascertain the probability of Miss Jemima M'Donald predeceasing her sisters in order to estimate the probability of their acquiring the estate in fee-simple by becoming the last heir or heirs of entail in existence. The Lord Ordinary has therefore repelled the objection.

"The Lord Ordinary understands from Mr Sprague that in calculating the interests of each of the Misses M'Donald the elements which he has taken into consideration are, as stated in the note to his report—(1) The chance of each succeeding to the estate and receiving the rental during her lifetime; and (2) The chance of each acquiring the estate in fee-simple *by outliving all the other heirs*. The Lord Ordinary has already expressed the opinion that both these chances ought legitimately to be taken into consideration. Mr Sprague has further informed the Lord Ordinary that the mode he has adopted in calculating their interests as a combined interest does not affect the result—which would have been the same had he calculated each of their interests separately. It would appear, therefore, that this objection is not well founded, and the Lord Ordinary has repelled it.

"The 10th objection is a general objection, and cannot be disposed of at present.

"The Lord Ordinary has sustained the first objection for the Misses M'Donald, because he thinks that the actual rental should be taken as the basis of the calculations, and not the rental from the valuation roll. The parties should have no difficulty in adjusting this matter.

"If the Lord Ordinary is right in holding that the chance of the objectors acquiring the estate in fee-simple is an element to be taken into the calculation, it is obvious that the value of the estate is material. The Lord Ordinary thinks that it ought to be ascertained by a remit to persons of skill in such matters.

"The Lord Ordinary has ascertained from Mr Sprague that it was not suggested to him by either party that the life of General M'Donald was other than an average life, and that he made his calculations accordingly. The Lord Ordinary has also ascertained from Mr Sprague that the fact that a general officer is liable to be ordered on active service is not considered as reducing his life below the average, if it be otherwise an average life. The Lord Ordinary has therefore repelled this objection."

The petitioner reclaimed, and argued—(The argument was chiefly in regard to the third and seventh objections). The petitioner's objections were mainly referable to the fact that the actuary had valued something which was not included under "expectancy or interest," the words of the statute.

In regard to the third objection, the actuary had dealt with it, not only from an actuarial but also from an insurance point of view, and in insurance offices the lives insured were all selected. In assessing the values of expectancies under the

statute it was necessary to make a general rule for future guidance on which to proceed. It would be impossible to lay it down as a general rule that the special circumstances and condition of every heir of entail should be looked into when calculating the value of the chance of succeeding heirs. The heir might refuse to be examined, and he could not be compelled, for he was no party to the proceedings. The only possible general rule was that the average chance of life should be taken at the then actual age of the heir.

On the seventh objection—It was only the value of the expectancy as heir of entail that was to be valued—the chance of succeeding in fee-simple was outside the entail altogether. The petitioner no doubt was near the end of the destination, but he should not be the worse off for that. His chance of being the last survivor and becoming heir in fee-simple was at least as good as any, and the value of his chance of this might swamp the value of the sisters' chances, and, as far as could be seen, the actuary had not taken this into account. An heir might have a claim to succeed in a number of different capacities—he was surely not to get compensation for all those, and afterwards be paid for his chance of succeeding as an "heir whomsoever." He was only entitled to get compensation for the capacity in which he was called in the entail. The purpose of the Statute of 1875 was to afford facilities to heirs of entail in possession and to encourage disentailing, and therefore any ambiguities should be interpreted in their favour—*Wilson* v. *De Virte*, December 19, 1877, 5 R. 328; 15 Scot. Law Rep. 239.

Argued for the Misses M'Donald — The expectancy or interest that the Court was to value must be held to be equal to a reversion, and therefore what was to be ascertained was the interest of a reversionary. The expectancy was worth what it would bring, and surely no intelligent dealer would enter into such a transaction without more particulars in regard to prior heirs than the age alone. What they wanted was not an inquisitorial inquiry, but such an inquiry as a man of business would make. Things which were notorious must be taken into account. Here all difficulty was removed, because the first heir had no objection to be examined.

In regard to the seventh objection—It was necessary to take into account and value all that the substitute heirs had a chance of succeeding to. Their "expectancy" was equivalent to their chance of succeeding *plus* what they got when they did succeed—Lord Ordinary (Rutherfurd Clark), in *Wilson* v. *De Virte*, quoted *supra*.

Their Lordships before advising the case pronounced an interlocutor remitting of new to Mr Sprague to report as to the footing on which several of his calculations had been made. The report was boxed on 21st December 1878, and the purport of it sufficiently appears from the opinions of the Court.

At advising—

Lord Justice-Clerk—This case raises some questions of considerable importance and of some difficulty in regard to the practical effect of the Statute of 1875 upon the right of the heir in possession to disentail an entailed estate on satisfying the three next heirs in to regard their right of "interest or expectancy."

The position of the present case is this:—The present heir in possession is Major-General Macdonald, and the succeeding heirs whose interest is now in question are, first, his brother Captain Macdonald, and then two sisters, and the question is on what principles the interest of these succeeding heirs are to be determined. In regard to Captain Macdonald, the younger brother, he has given his consent, and therefore as far as his interest is concerned no question arises. But of course in order to ascertain what the expectancy of the two sisters is, it is necessary to estimate in the first place certain chances of life and marriage in regard to the heir in possession, and in the second place the similar chances of the next heir Captain Macdonald. Then, again, in regard to the two last heirs, it is necessary, according to one view which has been maintained, to see not only what their own chances or expectancies would be of succeeding to this entailed estate, but also whether the fact that the remaining sister, who is not within this inquiry at all, is the last member of the destination, gives an additional value to the expectancy of all the heirs of entail as well as of the heir in possession.

We have had a very able report from Mr Sprague, than whom there can be no higher authority upon all these matters. We were anxious upon considering that report to have his views upon some of the questions which were necessarily suggested in the first report, and he has now given us very clearly the materials upon which our judgment should proceed.

I may say that in regard to the actuarial part of the inquiry I do not desire any further information. I think Mr Sprague has very clearly brought out the results of the views which we had under our consideration, and, in so far as these results are concerned, with one exception, I do not think it necessary to have any further professional assistance. But there are some important matters on the construction of the statute which are entirely outside the results which are the proper province of an actuary.

To the first report objections were given in on the part of General Macdonald, and I shall shortly state the views that have occurred to me upon some of these points.

In the first place, there is an objection that the sum of £5400 ought to be allowed, having been expended by the petitioner on permanent improvements, although not made formally a burden upon the estate. Apparently the parties have come to one as to this, or at least the actuary reports that that sum ought to be allowed. He gives us the result if it is allowed, and it appears to me that it is quite a reasonable charge, because although when this petition was presented this sum had not been made a statutory charge, it was capable of being so made.

The next question which arises is as to the chance of General Macdonald marrying, in regard to which we asked the actuary to give us some detail. I am quite satisfied to accept Mr Sprague's view upon that matter, and therefore I have nothing farther to say in regard to the report so far as it relates to that question. I might have supposed that in the case of a military man in possession of a landed estate the probabilities of his marriage were as high as in the case of one in any other social position; but I am quite content with the report.

The next question relates to Captain Macdonald's interest. Now, Captain Macdonald is a consenting heir. He wants nothing under this application—at least nothing which can be granted under the application. He does not want to saddle the entailed estate or the heir in possession with any payment. But it is said that in estimating the interest of the two succeeding heirs the life of Captain Macdonald is not to be taken as an average life, but, on the contrary, is to be taken as a life far within the average, and instead of taking him as a man of his own age, which is 41 or 42, and the chances of life applicable to that, the actuary has so far weighted him as to assume him to be of the age of 60. That is rather an arbitrary proceeding at any rate, because it depends upon information furnished not judicially, but furnished *ex parte* to the actuary in regard to the actual condition and probabilities of Captain Macdonald's life, and the question comes to be this, whether, in estimating the chances of life for such an inquiry as this, we are to take what is an average or an assumption from the tables, or to ascertain the fact for ourselves. I do not wish to give any opinion on the general question so raised, which I think is of very considerable importance, and I do not wish to give any sanction to the notion that in all cases it is either necessary or right that you should have a report or an investigation as an insurance company would if a life were offered for a policy. I do not say so, and I see very considerable difficulties in laying down any such proposition. But in this case we have been given to understand that to remove all objection Captain Macdonald is willing to have his chances of life ascertained as a matter of fact. It may be better, if there are no obstacles in the way, to ascertain the fact according to the truth of it, than to strike an average which may not be, and in this case probably is not, consistent with the fact. To assume the life as an average one may be a very proper and right thing in the ordinary case. In the present case I am far from saying that Captain Macdonald could have been obliged to submit to any such investigation, or that the parties in this case would not have been entitled to assume an average because he would not consent. His consent removes any difficulty I had, and I am disposed, on that footing, without expressing any opinion on that question, to allow his chances of life to be ascertained by actual examination.

I do not think it necessary to go in detail into any of the other objections excepting one, on which I have felt the greatest difficulty in this investigation. It is claimed on the part of the two ladies who are the two last heirs of entail under this application that their interests are not only to be estimated according to their expectancy to succeed to an estate subject to the fetters of an entail, but that we must take into account the chances of the third sister, who is said to be the last substitute of entail—the last member of the destination predeceasing them, and so opening the succession to the estate in fee-simple. It is said that that is part of the expectancy, and the result, as brought out by the actuary, is that the amount which the heir in possession will be obliged to pay as being the value of the expectancy is simply doubled by adding the value of the fee-simple to the value of the entail. I have come to be of opinion that that is not a legitimate element in the inquiry; that what the heir in possession is bound to do is to satisfy the expectancy of that limited number of the heirs substitute in regard to the succession under the entail. They have an expectancy of succession under the fetters of the entail. It is only under the fetters of the entail that they have any valuable expectancy at all. I do not think it consistent therefore with that provision that we should value all the contingencies by which the fetters of the entail can be defeated. It is manifest that there are many that might be suggested, apart altogether from the entail running out and coming to the last member of the destination. Farther, before the sisters can make out that they have any such expectancy there must be a proceeding to value the expectancy of life of one of the heirs of entail who is not involved in this inquiry at all. The statute implies that the heir in possession is to have the whole fee-simple of the estate provided he satisfy the expectancy of a limited number. In regard to the rest, their chances of life are of no moment whatever, nor do these, in my opinion, form any legitimate element of inquiry. The estate is the property of the heir in possession in fee-simple excepting in so far as he is burdened by the expectancy of the substitute heirs. Therefore if the heir of entail in possession is to be considered as a fee-simple proprietor burdened only by the expectancy of a certain number of the members of the destination, he does enough, I think, when he satisfies those members of the destination for the interest to which they might have succeeded under the fetters of the entail. Beyond that I do not think it is desirable that we should go.

The case of *De Virte*, which was referred to, was a case of a different kind, and there certainly an allowance was made for the chances of one of the heirs, within the limit, disentailing the estate. I must fairly own that I think that question, if it occurred again, would well deserve to be reconsidered, and the Court certainly, and the actuaries, were very much at a loss to know on what footing such an element or contingency should be valued. But that is a totally different matter from going outside the heirs whose interest is really in question, and going on to one, two, or it may be a dozen heirs-substitute to ascertain whether the chances of survivance would give them an appreciable interest in the destination running out and the acquisition of the estate in fee-simple. I do not think that that is a legitimate subject of inquiry. I am quite aware that cases might be put where considerable hardship may arise. Supposing the next heir of entail or the second heir of entail was himself the last member of the destination, it would be hard certainly that that interest which is defeated by the disentail should not be valued, but still the policy of the statute was to take the heir in possession as the fee-simple proprietor, and relieve him of the fetters on his allowing the substitute heirs the real value of their interest under the fetters of the entail.

On the whole matter, I propose, if your Lordships concur in the views that I have expressed, that we should find in terms of the views that I have suggested, and make findings to that effect, and then send the case back to the Lord Ordinary to have these given effect to in figures and have the rest of the questions between the parties disposed of.

Lord Ormidale—In this application by the petitioner General Macdonald for the disentail of the estates described in the petition, it has become necessary to ascertain, in terms of the 5th section of the Entail Amendment (Scotland) Act 1875, the value in money of the expectancy or interest in the entailed estates of Misses Elizabeth Moore Menzies Macdonald and Adriana Macdonald, the second and third substitute heirs of entail, the terms upon which the expectancy or interest of Captain John Allan Macdonald, the first of the substitute heirs of entail, having been arranged extrajudicially.

With the view of fixing the value in money of the expectancy or interest of the Misses Macdonald a remit was made by the Lord Ordinary (Adam) to Mr Sprague, as an actuary, to inquire and report, and upon considering that gentleman's report his Lordship pronounced the interlocutor now under review, by which he repels some of the objections which were taken to Mr Sprague's report, and sustains and reserves others. It is only with the objections which have been repelled or sustained that the Court can well deal with at present. When these are disposed of, as they will now be, the case will fall to be remitted back to the Lord Ordinary to give effect to the decision of the Court, and to take up and dispose of the reserved objections, at the same time applying the decisions on the disputed points in such a manner as to determine the whole cause.

It was thought right by this Court, before deciding the various points raised under the reclaiming note, to have an additional report on certain points from Mr Sprague, and that has now been obtained.

With these preliminary explanations, I shall now proceed to notice the objections in their order.

1 and 2. The first and second may be taken together. With regard to the first objection I agree with the Lord Ordinary, although at the same time I think it will be desirable before definitively acting on the assumption that the first objection is to be held as repelled, to require that the petition for constituting the improvements in question a burden on the entailed estates should be proceeded with to the length of having the exact amount ascertained, and that a reasonable time should be allowed to the petitioner to have this done. I have to suggest therefore that the interlocutor under review, so far as it relates to the first objection, should only be affirmed subject to the condition that the amount of improvement expenditure referred to should be duly ascertained in the application depending for that purpose. This indeed is the course pointed at by the Lord Ordinary himself in his note, although his interlocutor, as I read it, does not refer to any such qualification. That being done, it appears to me that any weight that might otherwise be supposed to attach to the second objection will be removed.

3. This objection, which the Lord Ordinary has repelled, involves, as his Lordship remarks, considerations of great importance. The objector has submitted that the actual age of Captain Macdonald should alone be dealt with, irrespective altogether of his state of health, past or present, even were it so bad as to lead to the conclusion that he had only a few months to live. It appears to me that the views of the Lord Ordinary on this point are substantially sound. I can find nothing in the statute requiring that the actual age should alone be taken into view. On the contrary, the statute is quite general in its terms, and does not prescribe in any respect the limits of inquiry. So far as this point is concerned, it is undoubted that the state of Captain Macdonald's health may very materially affect the expectancy or interest of the subsequent heirs in the entailed estates. Why, therefore, the state of Captain Macdonald's health as affecting the duration of his life is to be excluded from consideration I fail to see. At the same time, I can quite well understand that cases may occur in regard to which it might be practically impossible to ascertain the true condition of an heir of entail as regards health and prospect of survivance, and in such cases there might be no alternative but to take the actual age. The present, however, is not a case of that description, seeing that Captain Macdonald has no objection to submit to a medical examination as to his state of health; and that being so, I deem it unnecessary at present to determine whether in what, if in any, circumstances the medical examination of an heir of entail could not be enforced. And in the present case it will be for the Lord Ordinary to consider in what way the true condition of Captain Macdonald as regards his prospect of survivance can be best ascertained. For my own part, I should think a direct remit from the Lord Ordinary to one or two medical men of eminence to examine Captain Macdonald and report would prove satisfactory. I do not think, however, that the medical examination of an heir of entail as regards his or her capability of having issue ought to be entertained, and this for obvious reasons.

4 and 5. These objections have been reserved by the Lord Ordinary, and therefore need not be dealt with at present by the Court. The additional report of the actuary will probably be found by the Lord Ordinary of some service in his further consideration of these objections.

6. I concur with the Lord Ordinary in thinking that the sixth objection ought to be sustained, and for the same reasons.

7 and 8. These objections raise considerations of importance, and in my view of them they are attended with not a little difficulty. But ultimately I have felt myself unable to resist the conclusion that the chance or probability of the second and third heirs coming to be fee-simple proprietors of the estates do not form legitimate elements in valuing their interests in the entailed estates. It must be borne in mind that it is not the value of the heirs' "consent" to the disentail, but the value of their expectancy or interest as heirs of entail in the entailed estates, which falls, in terms of the statute, to be estimated. This may make a substantial difference. In valuing the "consent" of the heirs, if that had been the question, the chance or probability of their coming to have right to the estates in fee-simple might reasonably enough be urged by them for calculation, but the question under the statute is not the value of the heir's "consent," but of their expectancy or interest as heirs of entail in the entailed estates. This distinction is noticed by Lord Rutherfurd-Clark in the elaborate note issued by him as Lord Ordinary in remitting the case of *Wilson* v. *De Virte* a second time to the actuary for an amended report; and his Lordship's views seem to have been approved of by

the Court. It is true that the precise question as it has here to be determined was neither raised nor decided in the case referred to, but I think it is to some extent indirectly dealt with in that case, adversely to the views entertained by the present Lord Ordinary. I am therefore, especially as I understand that both of your Lordships have come to the same conclusion, for sustaining the seventh and eighth objections, and to that effect altering the Lord Ordinary's interlocutor.

9. This objection, I am inclined to think, in place of being repelled, ought to be reserved for disposal by the Lord Ordinary after he has had an opportunity of considering the additional report of the actuary, and has decided all the reserved objections.

10. I agree with the Lord Ordinary in thinking that this objection cannot be disposed of at present. I may here, however, remark with reference to the probability of the heir in possession marrying and having issue, that, so far as I see, there is no reason for holding that there is not as much chance of this as regards General Macdonald as in regard to any other gentleman of his position and circumstances. In short, it appears to me that such a chance in the case of General Macdonald ought to be calculated according to the highest scale applicable to such a matter.

Having now adverted, so far as it appears to me to be necessary, to the various objections which have been taken to the actuary's report, it would be premature to attempt to do more at present, or until the reserved questions have been disposed of by the Lord Ordinary. Till that has been done, the ruling of the Court and of the Lord Ordinary cannot be applied so as to bring out the amount of the money value of the second and third heirs' expectancy or interest in the entailed estates.

Lord Gifford—This petition raises some questions of very great difficulty under the 5th section of the Entail Amendment Act of 1875, and these questions are of great importance, for they will constantly occur in similar applications under the statute, and their determination may constitute a rule for all future cases.

The first question raised under the objections to the actuary's report relates to the sums which the petitioner has expended in permanent improvements of the entailed estate, and which sums he is entitled under the Entail Acts to constitute a burden on the lands. I think it is quite clear that the sums which the petitioner is entitled to constitute a real burden on the lands must be deducted from the estimated value of the estate before estimating the interests of the consenting heirs of entail. Their interest is not in the unburdened estate, but only in the net value of the estate under deduction of the improvement debts. I agree with the Lord Ordinary that if the estate is now to be disentailed it is not necessary that the improvement debts should be actually charged upon the lands and bonds granted therefor, for this would only lead to needless complication in granting deeds to be immediately cancelled, but the improvement debts must be ascertained, fixed, and allowed for in carrying out the disentail.

I think the Lord Ordinary is right as to the second objection. The improvement debts must be taken as at the date of the disentail.

The third objection raises a question of very great nicety and difficulty, and I am sorry to have the misfortune to differ from your Lordships. In estimating the value of the interest of Misses Elizabeth and Adriana Macdonald it is necessary to ascertain the value of the expectancy of Captain Macdonald, their younger brother, but who precedes them in the order of the destination. Captain Macdonald is 44 years of age and is at present in good health, but it is stated that he has suffered from certain ailments which it is said have had the effect of reducing his prospect of life greatly below the average of persons of his age, and the question is, Whether Captain Macdonald's prospect of life is to be taken at his actual age, that is, at an ordinary average life, or whether allowance is to be made for the injurious effects of the ailments which he has suffered by taking his age to be much more than it really is. It is proposed to calculate Captain Macdonald's interest as if he were 64 years of age, whereas his actual age is only 44. There is also a question whether any allowance is to be made for the possibility that Captain Macdonald may yet have issue? It is stated that Captain Macdonald is quite willing to submit to any medical examination.

I have felt the greatest hesitation in coming to a conclusion on the questions thus raised. I feel the full force of the observation that the pecuniary interest of an heir of entail in the entailed estate does not depend upon his age alone but upon his state of health, and upon everything which affects, however remotely, his prospects of life or of survivance, and however recondite or difficult of ascertainment the circumstances may be, however far the inquiry may stretch, and however delicate it may become, it is impossible to deny that everything which affects Captain Macdonald's chances of life or chances of having issue will and must affect the probabilities of the succession of his elder sisters, who are the heirs next called in the destination. I think it must be admitted that if either Captain Macdonald or his sisters were selling in open market their expectancy or chance of succeeding under the entail, every circumstance both of health and of habits of the preceding heirs, every incident of ancestral history, and every peculiarity of personal constitution in mind or in body, in habit and in conduct, would be taken into account by a prudent purchaser, who would form his estimate on the widest possible induction, and there is undoubted force in the observation that what a purchaser would do in the open market in estimating and ascertaining value, the Court must do under the very general words of the statute. I confess this was the impression I formed in the earlier stages of the argument.

But I have come to be of opinion, though still with doubt and hesitation, that however accurate in a philosophical or scientific aspect the view suggested may be, it is not possible to carry it out in practice. The inquiry must be limited somewhere, and the Court cannot be called upon to guess as a private purchaser might and probably would do as to the effect of remote circumstances or as to the probabilities arising from bodily, mental, or moral constitution, or habits. Many of these peculiarities it is practically impossible to ascertain—even after the utmost inquiry they can only be guessed at. In other cases delicacy forbids the

inquiry—for example, in reference to capacity for procreating issue—and in almost all cases the uncertainty of the result seems to suggest the extreme inexpediency of entering upon it.

In the present case it is proposed to inquire into the effect of the ailments from which sometime ago (I understand many years ago) Captain Macdonald suffered and it is said that in Captain Macdonald's case this inquiry will not be very difficult. But I do not myself see where such an inquiry would stop, either in this or in any other similar case. Captain Macdonald is in good health at present, and the question is not as to his present state of health but as to the effect of lesions or injuries suffered at a period more or less remote. It is not said that a medical man could form an opinion merely by seeing Captain Macdonald. He must also be informed of bygone facts regarding diseases which mere examination of the person would not disclose. I think it is almost certain that no two independent medical men would agree as to the effect of these bygone injuries—probably not even as to their nature. How far have the effects disappeared?—How far may the effects disappear still farther as time advances?—Will nature not effect a complete cure, or may not the effects be counteracted by constitution or by care? May Captain Macdonald not avoid risk by precautions or by medical aid? May he not survive the risks as he becomes older?—And so on, such questions might be put almost indefinitely, and they would or might probably all be differently answered by medical or other experts. How is the Court to deal with such a proof? It is said all this will be settled by the opinion of one medical reporter. But this would be just delegating to a medical expert the questions of fact of which the Court are to judge, and would virtually amount to a reference of the whole question of value to an arbitrator whose judgment would be final and into whose grounds of judgment the Court could not go.

Still further, Captain Macdonald might decline to submit to any medical examination whatever, and I rather think he could not be compelled to do so. It is not the value of his own interest that is in dispute, but only that of his two sisters. Captain Macdonald's interest has been settled by agreement, and must be so settled under the statute, for he is the next heir to the petitioner, that is, the heir presumptive, and by the statute he cannot be compelled to consent, and may at his own pleasure stop the disentail altogether or may name his own price. I do not think he could be compelled to submit to unpleasant and painful examinations merely to ascertain the interests of third parties with whom he has no contract and no privity, and with whom he might not even have relationship. It is true he is willing to be examined, but I think we must look to principle in such cases, for the next case may be one in which a party situated as Captain Macdonald is may refuse to be examined, and a statutory value must not depend upon the accident of a person being willing or unwilling to undergo examination, and I think it safest to decide this case irrespective of that willingness.

It is urged, and with great force, that all insurance companies have regard not to mere age but also to the actual state of health, and, it may be added, to the state of habits of the person whose life is assured. This is true to a certain extent, but it does not go very far. No doubt insurance companies do inquire into the health and habits of the person whose life they assure, but this is only to estimate the conditions of the applicant for assurance, and even this does not always apply. For example, in selling an annuity insurance companies are not in the habit of making any inquiry, and as a rule they will not give a larger annuity on an allegation that the annuitant is a bad life or has bad habits. And in dealing with reversions dependant on the lives of third parties, insurance companies, unless I am greatly mistaken, take the ages of third parties on which the reversion depends, and whom they have no right to examine at the actual age, and not at any supposititious age fixed on an inquiry as to special circumstances affecting the health or conduct of such third parties. Now, this is the analogy which I think really applies to the present case, and perhaps affords something like a test for trying the present question.

For what is it that Misses Elizabeth and Adriana Macdonald are to receive? It is the value of their reversionary interest—that is, a sum which would buy for them from an insurance or reversion company a contingent annuity exactly equal to the net rents of the entailed estate, and only to be enjoyed as and if they had succeeded to the entailed estate. Now, in purchasing such a contingent and reversionary annuity an insurance company would not sell it to the Misses Macdonald for a less sum on the allegation that Captain Macdonald, one of the preceding heirs, was an exceptional life or that his habits or profession or employment tended either to lengthen or to shorten life. A private speculator might possibly do this, but an ordinary insurance company, or the Government so far as it sells annuities, would refuse to estimate such remote, uncertain, and incalculable probabilities, and would merely take the age and the ordinary probabilities of life as deduced from the Government or the insurance tables, and I think this is the safe, if not the only practicable course in the present case.

Still further, if because Captain Macdonald unfortunately years ago suffered from certain ailments you are to shorten his probabilities of life either by twenty years or by any other number, I think it would follow that if it were alleged that Captain Macdonald were a better life than the average, this also must be allowed for and estimated. If you are to reduce the average by adverse circumstances, I think you must also enlarge it by favourable ones, otherwise it would be a most one-sided rule. Suppose it could be said truly that Captain Macdonald's constitution was far better than the average—that he never had a disease or a trace of a disease affecting life, that he came of a long-lived family, and that his habits and conduct made it certain that he should inherit the years of his fathers—I do not see why all this should not be as relevant for inquiry as the contrary view. Certainly a private purchaser of the Misses Macdonald's reversion would take all this into account, and wisely so; but the question is—Can the Court embark upon such an inquiry? or must it, just as insurance companies practically do when they sell a postponed and contingent annuity—contingent upon other lives—ignore such considerations as too remote, and proceed only on the average view.

Without going into further explanatory details,

I think, on the whole, that Captain Macdonald's chance of life should be taken at his actual age of 44, and not at an assumed age of 64, or at any other age than his actual one. I think any other course would be unsafe, and would lead to tedious, expensive, and uncertain investigations. I do not see, except of consent, how the questions raised, being mainly questions of fact, that is, bygone facts, could be settled otherwise than on a proof. I do not think we could compel the parties to take the results of an expert's inquiries as final except both parties agreed.

I am also very clearly of opinion that no inquiry or proof can be allowed as to the probability of Captain Macdonald having issue either of his present or of any future marriage.

I agree with the Lord Ordinary in reference to the sixth objection. It so happens that the mode adopted by the actuary is the most unfavourable for the petitioner, because of the dates on which the birthdays chance to fall as compared with 14th November 1877. It would be preferable to take either the last or the next birthdays with reference to each of the parties. It will make little difference in this case whether the last birthdays or the next birthdays are taken.

The seventh objection raises a question of great and of general interest, and I must add also of very great difficulty. The question is, whether in estimating the interest or expectancy of Misses Elizabeth and Adriana Macdonald the actuary must take into account the possibility that one or other of these ladies might by surviving all the other heirs of entail become the last member of the destination and so acquire the estate in fee-simple. This raises a question of principle of the broadest kind. It is undoubted that each of the two ladies has a possible chance of this occurring, and there are strong grounds for maintaining that this chance is a valuable one, and must be estimated in fixing the value of the interest.

The words of the statute are very general. The Court is directed to "ascertain the value in money of the expectancy or interest in the entailed estate with reference to such application of such heir or heirs declining or refusing or incapacitated to give consent as aforesaid," and we must apply these words to the circumstances of each case. I have come to be of opinion that the interest to be valued is the interest in the entailed estate, and not the interest in a possible fee-simple estate which can only emerge after the entail has expired and come to an end. The possibility that the entail may expire while the estate is in the possession of one or other of the ladies is not a right under the entail but a right at common law, which will only arise when there is no entail in existence, and I do not think that the statute intended that the chances of the entail failing altogether, and the value of a *spes successionis* at common law, should be estimated. The thing which is to be valued is "the expectancy or interest in the entailed estate," not the expectancy of getting a fee-simple estate as the heir *alioqui successurus* at common law. The chance of being heir at common law the ladies will still have notwithstanding the disentail, only that right will be defeasible as a fee-simple succession, and I incline to think that this is what the statute intended. To give the heirs more than the value of the entailed succession would be to give them the value of a common law *spes successionis* which they have not as heirs of entail at all, but as heirs-at-law of the granter.

The view I take is this—the petitioner General Macdonald is absolute proprietor of the estate, subject only to the deed of entail. He is not, as has sometimes been contended, a mere liferenter of the estate with certain powers of one of a series of liferenters; on the contrary, he is fiar of the estate—strictly and properly fiar—subject only to the disabilities created by the entail. Accordingly, when the law gives him the power of disentailing, it simply enables him to enlarge his radical right of fee by removing the disabilities, and the whole benefit of the enlargement accrues to him and not to the consenting heirs. They only get the value of their entailed interest. It was on this principle that *De Virte's* case, 5 Rettie 328, was decided, and this decision altered what it appeared was the practice or understanding of actuaries previous to its date. The actuarial view was that after deducting the life interest of the heir in possession, and the life interests and value of the powers of consenting heirs, the surplus value as it was called should be divided rateably among the heir in possession and the consenting heirs, but this view was negatived. The whole surplus value, as it was called, goes not to the heirs rateably but solely to the heir in possession, and the heirs whose interests are to be valued only get the value of their interests and no more. The whole value of the estate goes to the heir in possession, subject only to deduction in the present case of what he has agreed to pay to Captain Macdonald, and the value of the interests of Misses Elizabeth and Adriana Macdonald. There is a fourth heir, Miss Jemima Macdonald, but then under the statute she is to get nothing, and I think it is quite illegitimate to take her into account at all in order to enhance the shares of Elizabeth and Adriana. If Miss Jemima's interest required to be calculated—and admittedly this must be done if the fee-simple is to be taken into account—I do not see where the process would stop. There might have been several heirs named after Miss Jemima, and although this would diminish the prospect of the fee-simple estate, it would still remain a very valuable prospect and quite capable of being valued in money. I think the statute meant to draw the line at the end of the three next heirs, and to exclude more distant heirs altogether either as to their chance of liferent or of fee. On this point, therefore, though not without diffidence, I am for altering the judgment of the Lord Ordinary.

The only other question argued related, I think, to the probability of General Macdonald, the petitioner and heir in possession, marrying and having issue. General Macdonald is only 48 years old, in good health, and in the possession and enjoyment of a very considerable entailed estate. I think the probabilities that he may marry and have issue are in his case at least as high as they would be in the case of any other man of the same age. I should even go further, and say that it is more likely that a bachelor heir of entail in good health in possession of an entailed estate yielding £1700 a-year will marry than almost anybody of the same age, unless they also are in possession of an independence. I think therefore this probability should be taken on the highest scale shown on any of the tables referred to.

Lord Justice-Clerk—I have already stated that if I were to judge of this last matter simply by my own lights, I should be inclined very much to the result Lord Gifford points at; but I am not inclined to differ from a professional actuary like Mr Sprague on such a matter.

The Court pronounced this interlocutor:—

"Find, in regard to the fourth and alternative objection, that the chances of Captain M'Donald's life ought, in respect of Captain M'Donald's consent, to be ascertained in the ordinary way by such professional examination and report as the Lord Ordinary may direct: Sustain the seventh and eighth objections, and to that effect alter the Lord Ordinary's interlocutor: *Quoad ultra* adhere to said interlocutor, and with these findings remit to the Lord Ordinary to give effect to them, and to proceed with the cause; and reserve all questions of expenses."

Counsel for Petitioner (Reclaimer)—M'Laren—Pearson. Agent—A. P. Purves, W.S.

Counsel for Misses M'Donald—Kinnear—Robertson. Agents—Webster, Will, & Ritchie, S.S.C.

Saturday, January 18.*

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CAMPBELL *v.* CAMPBELL.

Succession—Special Destination—Effect of General Conveyance subsequently Executed.

Where certain lands were specially conveyed to a series of heirs, one of whom on his succession thereto executed a general disposition altering the destinations in the original deed, *Held* (1) in accordance with the case of *Thoms*, March 30, 1868, 6 Macph. 704, that the previous destination was evacuated, and (2) that that result was not altered by the fact that there were estates other than those specially destined to which the second deed might apply.

Circumstances which were founded on both within the general disposition itself and beyond it as restraining its operation, but which were *held* insufficient to do so.

Lieutenant-General Robert Campbell of Kintarbert was at the time of his death in 1837 possessed of the landed estates of Barrinellan (otherwise called Kintarbert), and of Crossaig and others, all in Argyllshire. By his general disposition and settlement, dated 5th November 1821, and recorded 26th May 1837, he, in the event of his dying without lawful heirs of his own body (an event which happened), disponed and conveyed his whole means and estate, both heritable and moveable, real and personal, to his nephew Lachlan M'Neill and the lawful heirs-male of his body, whom failing to his nephew Dugald M'Neill and the lawful heirs-male of his body, whom failing to his nephew Lieutenant Robert MacGibbon and the lawful heirs-male of his body, whom failing to his nephew Archibald MacGibbon and the lawful heirs-male of his body, whom failing to his cousin Lieutenant Dugald Campbell, on the half-pay of the 72d Regiment, and the lawful heirs-male of his body. By a codicil he made an alteration in the destination of the original deed with regard to Lieutenant Dugald Campbell which it is unnecessary to specify.

On General Campbell's death his nephew Lachlan M'Neill, who was also the pursuer's brother, assumed the name of Campbell in terms of a direction to that effect contained in the general disposition above mentioned, and made up a title to the estates as institute under that deed. He continued to possess under these titles till his death on 2d May 1852.

By his general disposition and settlement dated 24th November 1838, and recorded 14th May 1852, Lachlan M'Neill Campbell, therein designed as Lachlan M'Neill of Drimdrissaig, assigned and disponed his whole means and estate, both heritable and moveable, real and personal, to his brother-german Dugald M'Neill, sometime a Lieutenant in the 78th Regiment, and his heirs and successors, and failing him to the pursuer Miss Isabella M'Neill Campbell, (therein named Isabella M'Neill), who was his sister-german, and her heirs and successors.

Dugald M'Neill, who had also assumed the name of Campbell, died on 4th October 1874 without issue and without having altered or evacuated the destination contained in his brother's settlement. At the time of his death he was in possession of the estates in right of which he was under a feudal title made up under General Campbell's settlement and a personal title under his brother's settlement.

The pursuer brought this action to have it judicially declared that she was the party entitled to succeed to Barrinellan and Crossaig after her brother Dugald.

The defender John Breadalbane Campbell of Drimnamuchloch was the heir-at-law of Lieutenant-General Campbell, and the eldest son of Lieutenant Dugald Campbell, the substitute named in Lieutenant-General Campbell's settlement. The other substitutes called by that settlement both predeceased Dugald M'Neill without issue.

The summons concluded for declarator that Lachlan M'Neill of Drimdrissaig, afterwards Lachlan M'Neill Campbell of Kintarbert, nephew of Robert Campbell of Kintarbert, was at the time of his death on 2d May 1852 duly infeft, as institute or disponee under the said Robert Campbell's general disposition and settlement, dated 5th November 1821, in the lands of Barrinellan, Crossaig, and others; that by the general disposition and settlement of the said Lachlan M'Neill, otherwise Lachlan M'Neill Campbell, dated 24th November 1838, and recorded in the Books of Council and Session 14th May 1852, whereby he gave, granted, assigned, and disponed to and in favour of Dugald M'Neill, Lieutenant in Her Majesty's 78th Regiment of Foot, his brother-german, his heirs and successors, whom failing to the pursuer his sister-german, and her heirs and successors, All and sundry lands and heritages, goods, gear, debts, and sums of money, and in general the whole estate and effects, heritable and moveable, real and personal, of what kind or denomination soever or wheresoever situated, then belonging or that should

* Decided 11th Dec. 1878.