

Tuesday, March 18.

## SECOND DIVISION.

[Lord Adam, Ordinary.]

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

(*Vide* Jan. 16, 1879, *ante*, p. 271.)

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

In valuing the "expectancy or interest" of the second and third substitute heirs of entail in an entailed estate, under sec. 5 of the Entail Amendment Act 1875—*held* (rev. Lord Adam, Ordinary, and *diss.* Lord Ormisdale) that an averment that the first substitute heir "was in good health, but had suffered from ailments which would tend to shorten his life" was not relevant to induce the Court to order an inquiry which was asked into the actual state of health of the first heir, but that his life must be taken as an average one.

*Opinion per* Lord Gifford *reserved* as to whether in any circumstances or upon any averments the Court would order an inquiry, or whether they would not in all cases under the section above quoted presume the life of the first heir to be an average one.

The facts of this case have been already reported *ante*, p. 271. The circumstances in which this discussion as to whether Captain M'Donald's life should be taken as an average one, or the precise state of his health ascertained, are fully detailed in the opinion of Lord Ormisdale.

The arguments of parties are sufficiently detailed in the former report, at pp. 273-4.

At advising—

LORD ORMIDALE—In this case we have had a very lengthened discussion, and the argument of the counsel for the parties was addressed to the Court in rather peculiar circumstances. The discussion took place on a verbal report by the Lord Ordinary, and there is no record of the case or of the circumstances connected with it. I shall therefore, in my opinion, go into more specific and detailed matter than I should otherwise have done. The process commenced by a petition at the instance of General M'Donald for disentail of his estates in terms of the statutes to that effect, and in pursuance of the Entail Amendment Act 1875, it was stated by him that he had obtained the consent to the disentail of his brother Captain M'Donald, the first succeeding heir of entail, but that the next two heirs, his sisters the Misses M'Donald, had not given their consent. It therefore became necessary to have the value in money of the Misses M'Donald's interests in the entailed estates ascertained. Accordingly the Lord Ordinary, by interlocutor of 30th January 1878, remitted to Mr Sprague, manager of the Scottish Equitable Society, as an actuary of well-known experience and ability, to inquire and report as to the value in money of the expectancy or interest in the entailed estates, with reference to the present application, of the Misses M'Donald respectively. In carrying out the remit so made to him Mr Sprague considered it necessary to ascertain the probable duration of Captain M'Donald's life, and with regard to this matter he reported

that the Captain was born on 23d March 1834, but that it appeared from the medical reports produced to the actuary that Captain M'Donald, although at present in good health, has suffered from ailments which in the opinion of the actuary reduced his prospects of life greatly below the average of persons of his age. Mr Sprague therefore reported that in his opinion Captain M'Donald's probable duration of life was only one-half of the expectation of life of healthy persons of his age, and that therefore, his real age being 44, it is fair and right that he should be assumed in the calculations to be 64 years of age. The Lord Ordinary having allowed Mr Sprague's report to be seen and objected to, objections were lodged for the petitioner General M'Donald. The 3d and 4th objections were as follows:—[*see ante* p. 271.] The Lord Ordinary repelled General M'Donald's 3d objection, and reserved consideration of the 4th or alternative objection. The case having then, in reference to that and other points, been brought under review of the Court by the reclaiming note for the petitioner General M'Donald, the Lord Ordinary's interlocutor, so far as it related to the petitioner's 3d objection to Mr Sprague's report, was adhered to on 15th January 1879; but in regard to the General's 4th objection the Court found 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 might direct. On the case going back to the Lord Ordinary, he, on 13th February 1879, remitted to Professor Sanders, M.D., and Dr Claud Muirhead to examine Captain M'Donald and report as to the chances of his life, and how many years ought to be added to his age in estimating the expectancy of the second and third heirs of entail. But it having turned out that Captain M'Donald, who was resident in England, in place of consenting, as the Court had been led to understand he did, to a medical examination, declined to do so without an autograph letter of authority from the General, and that the General has declined to grant such a letter; the Lord Ordinary has verbally reported this state of matters to the Court and requested to be directed as to how he should act in reference to the ascertainment of Captain M'Donald's probable duration of life.

The question which is raised is a very important one for the parties, for it appears from the statements made at the debate it would make a difference to the respondents of about £3000 if in estimating Captain M'Donald's probable duration of life twenty years were added to his life as proposed by Mr Sprague. For myself, I should have been disposed to appoint the petitioner General M'Donald to grant the letter of authority asked for by Captain M'Donald, if that had been insisted on by the respondents, but as the petitioner objects to grant the requisite letter of authority, and as the respondents do not ask that he should be ordained to do so, but that the Lord Ordinary should be directed to allow a proof in ordinary terms in regard to the probable duration of Captain M'Donald's life, I am of opinion that this is the course which should be adopted, the petitioner General M'Donald leading in the proof. But this course was strenuously opposed on the part of the petitioner, and it was contended for him that now, on account of its turning out that

Captain M'Donald would not unconditionally submit to medical examination, there was no alternative but to take his actual age as a basis for calculating the probable duration of his life, and that at any rate, supposing a proof were allowed, it lay upon the respondents to lead in the proof. The subordinate question as to which of the parties ought to lead in the proof is of comparatively little moment, although it appears to me, I must say, that it lies on the petitioner, as the party before us, and keeping in view that he is objecting to Mr Sprague's report, to show in the first place that twenty years ought not to be added to Captain M'Donald's age. But as this somewhat technical point cannot, I think, be of much consequence, I am willing to acquiesce in holding that the lead in the proof should be taken by the respondent if that be the opinion of the rest of the Court.

In regard to the other question, whether any proof at all ought to be allowed, I am very clearly of opinion that it ought. I was of opinion when the case was first considered by the Court in disposing of the petitioner's objections to Mr Sprague's report—and I am of opinion still—that the Lord Ordinary was right in holding that the ascertainment of Captain M'Donald's state of health was essential, and on this point I have to refer to the note of the Lord Ordinary to his interlocutor of 13th July 1878, and to quote the opinions of the Court in disposing of the reclaiming note against that interlocutor. It must be kept in view that the petitioner's third objection to Mr Sprague's report stands repelled in the final interlocutor, and that his fourth objection, which relates only to the number of years which must be added to Captain M'Donald's age, alone remains to be disposed of. Nor can I yield to the argument of the petitioner that there is no competent mode of inquiry as to Captain M'Donald's probable duration of life except a medical examination which he cannot be compelled to submit to. At present the Court cannot by anticipation deal with the proof that may or may not be tendered by the parties, but supposing that a medical examination of Captain M'Donald—an *inspectio corporis*—is the best evidence that can be adduced, it would by no means follow that, in the event of such evidence not being attainable, other though secondary evidence may not be competent. It rather appears to me that such evidence would be admissible provided all has been done to adduce the best evidence, and all such objections when set up by the petitioner, who refuses to grant a letter to Captain M'Donald, ought not to receive much consideration. But as the respondents will have it in their power to adduce medical gentlemen who have recently examined Captain M'Donald, and can speak perfectly well to his state of health, in no view would the objection referred to apply. They may, for example, be able to adduce the medical evidence of Dr Glyn, who subscribes the report which was procured and laid before the actuary. They may also adduce Professor Sanders, who might be able to give unexceptionable evidence in regard to Captain M'Donald's probable duration of life without again examining him, for it would appear from correspondence that not long before 4th March 1879 the Professor had already examined the Captain; and besides all that, the respondents

may be able by unexceptionable evidence, medical as well as non-medical, to establish the important fact referred to.

I am therefore of opinion that the Court ought now to direct the Lord Ordinary to allow the parties to have a proof *habili modo* as to what is the probable duration of Captain M'Donald's life, and if this course is taken it would be for the Lord Ordinary to direct how it should be taken. Professor Sanders, and it may be others—the petitioner himself, for example—may be examined before the Lord Ordinary, and the evidence of Dr Glyn and other witnesses outside Scotland may be taken on commission, and it will be for the Lord Ordinary, on the proof being concluded, to determine the point at issue.

LORD GIFFORD—This case is now before us on a verbal report by the Lord Ordinary (Lord Adam) asking for instructions in consequence of difficulties having arisen in carrying out the interlocutor of January 16, 1879. The chief difficulty is, that, contrary to the understanding of both parties when the interlocutor was pronounced—and the understanding is embodied in the interlocutor itself—Captain M'Donald has refused except under certain conditions, which the Court have no power to enforce, to submit to a medical examination with the view of obtaining a medical report regarding his prospects of life, and the question now is—what steps should be taken to ascertain the value of Captain M'Donald's life with the view of fixing the value or interest of the two Misses M'Donald, who are the next substitutes to him in the entail? We are asked to instruct the Lord Ordinary how to proceed. At last advising I was of opinion, having in this respect the misfortune to differ from your Lordships, that in the special circumstances of the present case there was no room, even of consent, for a remit to a medical man to examine Captain M'Donald, but that his life should be taken as an average one according to his age. I thought then that it would be inexpedient to allow either a proof at large of all facts and circumstances or a direct medical report, and, indeed, I thought that an inquiry into all the facts which the Misses M'Donald alleged as tending to shorten the probabilities of Captain M'Donald's survivance was so highly inexpedient as to be impracticable, and I went even so far as to think that whether Captain M'Donald consented to be medically examined or not, no such inquiry should be allowed, but that from the necessity of the case Captain M'Donald's life should be taken as an average one.

To the opinion thus expressed I still adhere, for I think the question just comes back to what it was there, with this difference, that it is now fixed that we cannot get Captain M'Donald's consent to a medical inspection. I think now, as I thought then, that a medical inspection should not be adopted, but I think it is still open—now that that course cannot be taken—to consider whether there should be a proof at large. I feel still, as I then felt, that the question is one of nicety and difficulty, and referring to my former opinion, I have only one or two observations to add thereto.

In the first place, if it had been alleged that Captain M'Donald was at the present moment

labouring under some known and ascertainable disease attended with danger to life, or if he were suffering at present from some wound or accident which might or probably would lead to fatal consequences, I by no means say that such an averment would not be relevant and might not be inquired into. If Captain M'Donald had met with, and were suffering from, a railway or other accident, the consequences of which would certainly or even probably be fatal, or if he were in an advanced stage of consumption, or in the crisis of a fever, I do not say that these circumstances might not affect the value of the Misses M'Donald's interest in the entailed succession. I reserve my opinion on such cases, and I decline to say what would be the proper course, whether proceedings might be sisted till the result of the illness or inquiry should be seen, or whether allowance should be made therefor, or what course should be taken in the circumstances. No such case is before us at present. Captain M'Donald is at present in good and average health. He is not at present labouring under any known or ascertainable disease, and he has sustained no injury from which there is to be dreaded in any reasonable sense a mortal or fatal result. No mere medical examination, even supposing Captain M'Donald submitted thereto, would, apart from the ascertainment of past facts and past events in Captain M'Donald's life and habits, or in his family history, enable a medical man to say, except as the merest guess, that his life was other than an average one, or that his age should be taken, instead of 44, his actual age, at 64, or at any other remote figure. It is in this position that I think the inquiry demanded by the ladies who are the next heirs of entail ought not to be gone into.

In the next place, I think the inquiry, if once opened, would, in many cases at least, be absolutely interminable. For what is it that these ladies propose to inquire into? It is of course all circumstances tending to impair Captain M'Donald's life or to render it shorter than it otherwise would be. Every act and every event in Captain M'Donald's life and history would in this view be relevant. Youthful indiscretions, if any, might be ruthlessly hunted up. I am not merely supposing this, for I see in the papers before me that such are suggested, and beyond all doubt, unless the inquiry were limited, such might be gone into and attempted to be proved. Captain M'Donald's habits, his mode of living, his diet, and in short his whole being and surroundings are to be asked about and sifted to the utmost. Where he has lived and what he has done are to be ascertained, and guesses are to be made as to what he will probably do, and what care and precaution he will probably take. Nay, more, his ancestral history for generations might be examined into, for this, you know, is always made a material inquiry by an insurance company; and all these are proper facts which cannot be ascertained by an expert by inspection, but must be ascertained by testimony or ordinary proof. I know not where such an inquiry would stop, and I fear if it were to be admitted here it must be admitted in every case where a postponed heir of entail avers that the life of a previous one is of less than average value.

Still further, all this inquiry and evidence is not to be led before a man of skill whose judgment

as arbiter is to be final, but is to be submitted to this Court, that the Judges thereof may guess—for it can be nothing but a guess—how far the life is to be regarded as an inferior or a deteriorated one. For myself, I am not qualified at all for such an inquiry, and though of course if the duty was laid on me I must do the best I can, it would be with the utmost reluctance that I would return or pronounce any verdict saying how long it is probable Captain M'Donald will live. Of course I admit frankly and fully that in one sense all these inquiries are perfectly relevant. Everything that I have mentioned, and multitudes of other things that might be mentioned, may possibly affect Captain M'Donald's life—Who is now and who probably will be his medical attendant—has he an aversion to taking medicine—or is he careless of himself, and what care does his wife take of him—where will he probably reside—and so on indefinitely. All these are speculative questions which a speculative purchaser of Captain M'Donald's reversionary interest might fairly inquire into, so far as possible, and might quite rightly take into account in forming a judgment of what price as purchaser he will give for the reversion. But these matters are not to be made a subject of proof at large before a court of law, and the statute can surely never have intended that this Court was to enter into such inquiries either directly or through a commissioner. But this, I apprehend, is what the Misses M'Donald now ask. They ask a proof of all facts and circumstances tending to show that Captain M'Donald's probabilities of life are less than the average. And then, as I formerly pointed out, the proof if competent is one which must be competent the other way also. If the petitioner General M'Donald had alleged that Captain M'Donald's life was a better life than an average one, I do not see, on the principles contended for by the respondents, how they could have refused to allow such a proof, and such a proof might be demanded in the very next case that occurs under the statute. If averages are not to be taken, but each individual case is to stand by itself, then there will be as many special lives above the average as those which fall below it. Tables of average will be useless, and the experience of the past will point only to multifold and endless investigations. And then Captain M'Donald, who is to be the unfortunate subject of this investigation, is not even a party to the case or to the present dispute, and has no interest therein to the extent of a single farthing. His consent has been already purchased and paid for, as it must be under the statute, and I more than question not only whether Captain M'Donald could possibly be compelled to submit to medical inspection, but whether he could be compelled to disclose the secrets, not to say the possible peccadilloes, of his whole past life. But suppose he was a party to the question, or suppose, what is still more pertinent, that the question had arisen, not with regard to his probability of life, but with regard to the probability of life of the respondents the Misses M'Donald themselves, or either of them—suppose the petitioner General M'Donald averred that those two sisters, who are postponed to the Captain in the tailzie, had bad lives, and that they were likely to die very soon, and that the petitioner therefore proposed to pay them under the statute a sum much less than the

average value of their reversion—suppose he proposed to state their ages at 60 instead of 50 and 49, and that he made the very same averments regarding them that they do now regarding their brother—would your Lordships have granted the petitioner a proof of such averments? I for one think not, and that though the ladies were necessarily parties to the proceedings in which they claimed compensation for the value of their interest in respect of the disentail.

In my former opinion I pointed out that no real injustice is done and no prejudice suffered by taking Captain M'Donald's life as an average one, for although when a life offers itself to an insurance company to be insured the insurance company always make inquiries into the individual and family history, and even into the personal habits of the proposer with whom they are making the contract, yet in selling or purchasing annuities they make no such inquiry, and when the lives of third parties are in question it often happens that all such inquiries are almost necessarily neglected. What the Misses M'Donald ought to receive are sums which would enable them to purchase from ordinary reversion companies, with sufficient security, contingent annuities which they would have the chance of getting if the estate had not been disentailed. Such purchases can always be made without any such inquiry as that now proposed. They are made, and necessarily too, upon averages.

I am therefore of opinion that we should direct the Lord Ordinary to refuse the proof at large which is now demanded by the respondents, and to ascertain the value of the expectancy or interest of the respondents on the footing that Captain M'Donald's life is an average one. I think there can now be no other result. I reach this conclusion, however, in the special circumstances of this case, and having regard to the nature of the respondents' averments, which I think would open up an impracticable field of inquiry.

**LORD JUSTICE-CLERK**.—I greatly regret that there should be a difference of opinion on the bench upon this question after the long and elaborate procedure that has taken place, and I regret it all the more because I must fairly own that I have not been able to come to so confident a view as your Lordships, or one altogether satisfactory to myself, as to the result. The case has been complicated by some misadventure in the course of the proceedings, and I should not have been ill pleased to have been able to deal with this on the procedure as a Special Case, without being put to resolving the more general question which Lord Ormisdale and Lord Gifford have discussed, and on which they have differed. The duty which is laid upon us is the duty, on a motion to that effect by the petitioner, to ascertain the value in money of the expectancy or interest in the entailed estate of these two ladies, being the second and third heirs in succession. Now, that is the duty laid upon the Court. It is left to their discretion to ascertain the fact in any way they think fit, and the first question is, What is the interest of these two expectant heirs of entail? It is said that General M'Donald is bound to satisfy the Court upon that matter because he is the petitioner, and to a certain extent that is a sound proposi-

tion. And he has satisfied the Court, I think, so far as the burden laid upon him is concerned, by showing us the expectancy of life of Captain M'Donald according to his age, and I am very clearly of opinion that there is no ground whatever for saying that he was bound to go beyond that. But then it is objected by the two heirs who are not consenting heirs that Captain M'Donald's life or expectancy or interest is not to be regulated by the average arising from his age, but that his is a special case, and that his life is below the average life; and they say they are entitled to prove that in order to show what the value of their own expectancy and interest is. I must own, my Lords, that I do not look with much favour upon that contention. I do not deny there is a good deal to say for it logically, but in a not altogether agreeable family contention I am not particularly impressed with favour in support of that view; but still it is one which they are entitled to have considered, and it is quite plain there is a very material interest which they have that it should be considered. The actuary to whom Lord Adam remitted this matter, and quite rightly—a man of the highest position in his profession—entertained the statement which was made on the part of the heirs of entail, and made apparently for the first time, and without any judicial authority he went into that question of whether the life was or was not an average. I think that unfortunate, because I think it would have been better if the Court had in the first place had an opportunity of considering whether that was or was not a regular, desirable, or expedient course of inquiry. However, the objection to the actuary's report loaded the life to an extent which made it that of a man of sixty-four instead of a man of forty-four, and the question came to be considered before us on those objections; and then it was stated that there need be no difficulty at all about the question of compelling Captain M'Donald to submit to a medical examiner, because he was quite willing to do so; and on that footing, and that footing alone, the remit to the Lord Ordinary was made, which carried the case back to the Outer House. I wish it to be very clearly understood that in agreeing to that interlocutor, or rather interponing it, I was giving no opinion whatever upon the general question, and I explained that in the clearest and most distinct terms. I said that my indication of opinion would probably have been the other way, but that since Captain M'Donald was willing I could not say that it was not a material and relevant element in the inquiry. But it now seems that we were all under a mistake—that Captain M'Donald did not consent, and he has not consented; and the result is that on the Lord Ordinary's report we must now decide what course we should follow. In these circumstances, and thinking that the parties were to a large extent committed on this matter, I do not know that I should seriously object to what, if there is to be an inquiry, I should deem by far the most expedient as well as the most competent mode of it. I do not know that I should object to a remit to the gentleman who had previously examined Captain M'Donald, and who by his previous information might be in a position to give us the information, before answer as to the effect of it, that we stand in need of. I have a

very clear opinion that that is the proper course in any circumstances of the kind, where we are obliged to have an inquiry to our own satisfaction. In any circumstances I should have objected to a proof at large. What we are to decide is not a question of fact, because the fact of the expectancy of Captain M'Donald's life is not ascertainable. No man can tell us how long he will live. Scientific men can only say what the average or proportion is of men of his age in regard to the length of time they are likely to live, and that is the expectancy as well as we can reach it. But that is a question of pure medical science, and if I had my way—if I had the power—I should have inquired into the scientific matter in regard to the medical question just as I should have inquired into the scientific matter in regard to the actuarial question, and sending the actuarial question to a man of skill out of Court, I should have sent the medical question to a man of skill out of Court, and I should have been inclined to choose a man who had information already on which he could have made his report, with such other inquiry as he might have found Captain M'Donald willing to submit to. I only say these things in explanation, because I understand your Lordships do not concur in that view, and therefore we are driven to decide the general question; and on that general question my opinion is that no sufficient statement has been made by the two heirs of entail to render it necessary that we should step out of the ordinary course or ascertain this question of expectancy by any except the ordinary rules. On this matter, though I do not see all the difficulties, and I do not rate them quite so high as did my brother Lord Gifford, my main ground is this, that I do not think it was intended that in the matter of expectancy of life—a matter which can never be dealt with with certainty—there should be inquiry into details of the nature pointed out, unless there is a manifest and clear justice to be obtained by it. Now, on the statement which is made I can see very clearly that it is quite possible we might have the most conflicting statements from men of equal attainments in science as to Captain M'Donald's life. The statements that are made on the part of the heirs of entail are not statements as to specific diseases or specific causes which in all probability would shorten his life, but statements of long-continued causes which may weigh with an insurance company in reducing the value of the life and thus affect the payment to be received, but which are not statements in reality addressed to the fact that his expectancy is shorter than that of an average life. I am not willing to go into that matter, and I am not willing that on the general purport of this clause of the statute it should be understood either that in any other case there is to be an actual inquiry into an examination of the party whose life is in question, or that a general statement such as we have here is sufficient to compel the Court to enter into an inquiry of that kind. It is a different matter altogether if specific acts are stated which necessarily lead to the conclusion that the life in question is not likely to be of the average duration.

On the whole matter, therefore, as we must decide this case, I regret the difference of opinion, and, as I have already said, I do not hold so strong or confident an opinion either way as to

make it quite satisfactory to my mind, but the result at which I have arrived is to concur with Lord Gifford, and I think we must remit to the Lord Ordinary to proceed on the footing that Captain M'Donald's life is to be taken as an average life.

The Court accordingly pronounced an interlocutor remitting to the Lord Ordinary to proceed with the cause on the footing that Captain M'Donald's life was to be assumed to be an average life, and to be estimated according to his present age, &c.

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

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

Wednesday, March 19.

## SECOND DIVISION.

[Lord Adam, Ordinary.]

### SMITH v. POLICE COMMISSIONERS OF DENNY.

*Property—Possession—Public Well—Right of Police Commissioners to Repair a Well on Private Property—General Police (Scotland) Act 1862.*

The proprietor of certain lands on which there existed a well used by the inhabitants of an adjoining village for the prescriptive period, applied for interdict against the local authority constituted under the General Police Act (Scotland) 1862 for cleaning and enclosing the well, so as to protect it against alleged pollution by drainage. *Held (diss. Lord Ormisdale)* (1) that the facts proved had established *prima facie* a possessory right on the part of the public; (2) that the local authority as such had a *locus standi* to vindicate the rights of the community represented by them to the effect in question.

*Observations per Lord Justice-Clerk* on the nature of the right to public wells and the mode of acquiring it.

*Question* as to the proper mode of establishing the rights of parties in such circumstances.

This was a suspension and interdict raised by Adam Smith of Dumbreck, proprietor of the lands of Boghead, in the parish of Denny, against John Archibald, clerk to the Police Commissioners and Local Authority, and also against the Police Commissioners of the burgh of Denny and Dunipace. The complainant sought interdict against the respondents from entering and trespassing upon the lands of Boghead, and from making, sinking, or "cradling" wells, or erecting pumps or other appliances in, upon, or in connection with any well or spring of water in the said lands, or otherwise using, appropriating, or interfering with the said well or spring; and also from occupying or possessing any part of the said lands, or laying down any materials thereon, or interfering with the surface or levels thereof, except in so far as authorised by or in conformity with the provisions of "The Public Health (Scotland) Act 1867;" and also from entering or