

entirely different from those on which we decide this case.

The Court adhered.

Counsel for the Pursuers (Respondents)—Kinnear—Mackintosh. Agents—Messrs Frasers, Stoddart, & Mackenzie, W.S.

Counsel for the Defenders (Reclaimers)—Asher—Jamieson. Agents—Messrs Melville & Lindesay, W.S.

COURT OF TEINDS.

Monday, March 15.

(Before the Lord President (Inglis), Lord Deas, Lord Mure, Lord Shand, and Lord Rutherford Clark).

MACDOUGALL AND OTHERS (TRUSTEES OF ST COLUMBA CHURCH, OBAN) v. THE MINISTER AND KIRK-SESSION OF OBAN.

Church—Parish quoad sacra—Erection where New Church is for English Speaking Inhabitants of a Highland Town.

It is not incompetent to erect a new church and parish *quoad sacra* for the purpose of providing full English services for the English speaking inhabitants of a Highland town, although some of the inhabitants of the new parish may be unable to speak English.

Case where in such circumstances a decree of disjunction and erection was pronounced, erecting a new church and parish *quoad sacra*, and where the boundaries of the new parish had been amended subsequently to the presentation of the petition.

This was a petition by Charles Allan M'Dougall and others, trustees under the deed of constitution for a proposed new church and parish in Oban, to be called St Columba Church and Parish. The petition set forth, *inter alia*:—"That St Columba Church, now sought to be erected into a parish church, with a district attached to it *quoad sacra*, is situated in the united parish of Kilmore and Kilbride *quoad civilia*, and in the district thereof which was in 1867 erected into the parish of Oban *quoad sacra*. It was built upwards of four years ago, partly to suit the convenience of those residing in the western district farthest from the parish church, and partly for the purpose of providing the regular as well as the occasional inhabitants of Oban with services exclusively in English. The church has been found to be of much advantage to the inhabitants of the district proposed to be attached to it—which district is situated partly in the said united parish, and partly in the said parish of Oban *quoad sacra*—as well as to the numerous visitors who frequent the neighbourhood during the months of June, July, August, and September. That with reference to the population of the parish of Oban, which numbers, according to last census, 2576 souls, and is now believed to have increased to 3000, and to the fact that the permanent population is

largely augmented during summer and autumn by visitors and tourists; and with reference also to the extent and population of the united parish of Kilmore and Kilbride—which contains upwards of 800 inhabitants,—it is highly desirable that additional spiritual superintendence should be provided and permanently secured in connection with the Church of Scotland, and that for this purpose a certain portion of the said parishes should be disjoined therefrom, and erected into a new parish *quoad sacra*. . . . That with a view to the present application, the proposal for disjunction and erection of the church and parish of St Columba was, on 6th May 1879, considered by the Presbytery of Lorn, which Reverend Court resolved to approve of the proposed disjunction and erection; to find the same to be expedient and proper; to consent to the application to be made to the Court of Teinds therefor; and to authorise and recommend to the parties interested to take the necessary steps for having the same carried through with as little delay as possible. The said presbytery further marked off and designated the district which appeared to them to be suitable, and which they accordingly recommended should be attached *quoad sacra* to St Columba Church proposed to be erected. . . . [The proposed new district was then described, part of it being in the town of Oban, and part in the landward parish of Kilmore and Kilbride.] That this district is about two miles and one-half in length by about one mile in breadth, and contains a resident population of 1500 or thereby, which is augmented by visitors and tourists in summer and autumn to nearly 2000. St Columba Church contains 526 sittings, and of these 313 are let; and the building has been so constructed that a gallery, to contain 274 sittings, can be erected when required. There is a congregation of above 350 persons, of whom 175 are on the roll of communicants."

Answers to the petition were lodged by the Rev. John Smith and others, the minister and kirk-session of Oban. They averred, *inter alia*:—"In the year 1872 a movement was originated in the parish for the erection of a new church for the parish, mainly with a view of providing for the increased accommodation required for the summer visitors to Oban. The kirk-session also considered that the possession of two buildings would afford greater facilities for the conducting of services in both English and Gaelic during the summer months. They therefore entered cordially into the movement, subscribed themselves to the erection of the new church, and encouraged the members and adherents of the congregation to subscribe also. The kirk-session contemplated the transference of the endowment from the old church to the new, but they were not in a position to take any steps in this direction on the completion of the building of the church, as they were unable at that time to clear the new building from debt. . . . St Columba Church is scarcely half-a-mile distant from the parish church of Oban. The attendance in St Columba Church, except during the summer months, never exceeds 150, and the majority of those attending have seats in the parish church. The greater part of those stated in the petition to be communicants are summer visitors who have communicated in the church, and the number of seats let includes seats

let to summer visitors. . . . The permanent population of the parish of Oban is believed to be between 2500 and 3000 souls. Of these about two-thirds reside in the district proposed to be disjoined from Oban parish and erected into the parish of St Columba. No part of the parish of Oban is distant more than three-quarters of a mile from the parish church. The population of the district proposed to be disjoined from the united parish of Kilmore and Kilbride and erected into the parish of St Columba does not exceed forty souls. No part of this district is more than two miles and three-quarters from the parish church of Oban. The minister of the parish of Oban has no difficulty in efficiently attending to the spiritual interests of the parish, as the population is not excessive; and from the shape of the parish all the parishioners reside within a short distance from the church. The respondents consider that the interests of the Oban parish would suffer most seriously by the proposed erection, and that the religious interests of the district in no way require the erection of a new parish therein."

The Court after hearing parties remitted "to the Presbytery of Lorn to reconsider the proposed disjunction and erection, with special reference to the objections stated in the answers for the minister and kirk-session of Oban, and if on such reconsideration they still approve of the proposal, to report to the Court the reasons of their opinion."

The presbytery adhered to their approval of the proposed disjunction and erection, giving the following as their reasons:—

"1. That when on 2d March 1874 it was proposed to build a new church in Oban, the presbytery approved of the proposal, as they considered a new church needed 'for extending the usefulness of the Church of Scotland in Oban.'

"2. That the application for a building grant was entertained by the General Assembly's Committee, who in reporting their vote to the Assembly in May 1874 specially stated that the church was not to be the parish church.

"3. That after the building had been in use, it was proposed in 1876 to obtain a constitution erecting St Columba's into a chapel, which proposal was not entertained by the presbytery; but that after the matter had been laid before the General Assembly, that Court . . . after sundry procedure and inquiry, 'unanimously did sanction' the proposed erection on 21st February 1877.

"4. That the prosperity of the chapel since that time has been such that when in May 1879 it was proposed to make it a parish church, the presbytery, having learned that the General Assembly through its endowment committee had voted £1500 towards that object, and that the local parties were ready with the remainder of the money, approved unanimously of the measure—Mr Smith [the minister of Oban] dissenting as regarded the boundaries,—as being the natural outcome of their previous action in sanctioning the erection of St Columba into a chapel—the said approval being all the more cordial that the kirk-session of Oban had on 29th April 1879 approved of the erection.

"5. That the presbytery felt convinced that the best interests of the Church of Scotland rendered it of the utmost importance that a

separate parish should be erected, in view of the already large and ever-increasing population of Oban, and that the interests of the existing parish could in no degree suffer by that arrangement, in respect that St Columba's has already an independent organisation although without a kirk-session, while the income of the parish minister and the revenue of the parish church are larger now than they ever were.

"6. That the limited accommodation of the parish church, and its inconvenient situation as regards the modern part of Oban, render a new parish highly expedient, for without a kirk-session the usefulness of the chapel must be seriously crippled.

"7. That the erection of St Columba's into a second charge would prove unwise and inexpedient, as the two populations would not coalesce or work harmoniously together, as the experience of the last four and a-half years amply proves.

"8. That the non-erection of St Columba's into a parish, will, in the humble judgment of the presbytery, prove disastrous to the best interests of the church in Oban, and will alienate many of her liberal and influential supporters in the district."

A suggestion followed at the instance of the presbytery relating to a proposed alteration in the boundaries of the new parish.

When the report of the presbytery came before the Court, the case was again argued—the respondents mainly objecting that the proposed new parish was not so much a territorial division as a division according to language, because though there was a district to be attached to the proposed new church, yet many of the inhabitants in that district could speak Gaelic only, while the services in the new church were to be in English only.

At advising—

LORD PRESIDENT—When this case was before the Court previously, it appeared to me to be a case of some peculiarity, and we thought it desirable—in consequence of the statements which had been brought forward in the answers—that the presbytery should have an opportunity of reconsidering their decision with reference to these statements, and of giving the Court the grounds of their judgment, if they adhered to the resolution they had previously adopted. We have now that report before us, in the form of a minute of the presbytery, and I must say I have read it with great satisfaction. It gives a very distinct and intelligent account of the reasons which had weighed with the presbytery in approving of this proposed scheme.

The parish of Oban is a peculiar one in this respect, that there seem to be a large number of Gaelic-speaking people who attend the Gaelic services only, and a considerable number of English-speaking people—a great many of them visitors, no doubt—who attend the English services. And it probably will be the case that after this erection has been carried through, that the one will be the church of the English-speaking and the other the church of the Gaelic-speaking people. But that merely means that a territorial distribution of the district between the two churches will not precisely square with the attendance of the people at the two churches.

But that is a result which this Court can never secure, because although the form of our judgment in disjoining and erecting a district is to ordain the people of the disjoined district to resort to the new church as their parish church, they are not bound to obey that decree. They may go to other churches, and no doubt do, in the exercise of their will and pleasure, go to the church that is attractive to them. And therefore I think that this affords no practical objection to the proposed erection. On the other hand, it appears to me to be very desirable, for the reasons stated by the presbytery, that the erection should be made, and above all that the church of Saint Columba should have the benefit of a duly organised kirk-session. I think, on the whole matter, that the petition should be granted, but that effect ought at the same time to be given to the suggestion of the presbytery in regard to the alteration of the boundaries.

LORD DEAS, LORD MURE, LORD SHAND, and LORD RUTHERFURD CLARK concurred.

The Court pronounced decree of disjunction and erection as prayed for.

Counsel for Petitioner—Lee—J. M. Gibson.
Agent—J. B. Mackintosh, S.S.C.

Counsel for Respondents—Kinnear—Moody Stuart. Agents—Auld & Macdonald, W.S.

HOUSE OF LORDS.

Friday, March 12.

(Before the Lord Chancellor (Cairns), Lord Hatherley, and Lord Blackburn.)

M'DONALDS v. M'DONALD.

(In Court of Session March 19, 1879, *ante*, 16 Scot. Law Rep. 460, 6 R. 869.)

Entail—Disentail—Value of "Expectancy or Interest" in Entailed Estate—Estimate of Chances of Life of Intermediate Heir.

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.* judgment of Second Division of Court of Session) that seeing that the Legislature has laid down no rule for the valuation of such "expectancy or interest," any facts relating to the probable duration of life of the first substitute heir of entail may be inquired into, and that ailments such as are calculated to shorten life must be relevant to such an issue.

Held (also *rev.* judgment of Court of Session) that the chances of the second and third heirs of entail succeeding to the estates in fee-simple were elements to be considered in a valuation of their respective "expectancies or interests."

Observations upon the case of *De Virte*, Dec. 19, 1877, 5 R. 328.

This was an appeal in a petition for disentail, under section 5 of the Entail Amendment Act

1875, of the estates of Dalchosnie, Lochgarry, and Kinloch-Rannoch, presented by General M'Donald, the respondent. The Lord Ordinary (ADAM) had on 27th May 1879 pronounced an interlocutor in the cause approving of a report by an actuary to whom a remit had been made to value the "expectancy or interest" of the second and third heirs of entail; and on 31st May following he pronounced a second interlocutor, in which, "in respect of consignment in terms of the interlocutor of the 27th," he dispensed with the consent of these heirs and approved of the instrument of disentail. That interlocutor, on being reclaimed against, was adhered to by the Second Division on 7th June 1879. The questions raised by the appeal related to the principle of the valuation of the "expectancy or interest," in which the Court of Session had held, on March 19, 1879, 16 Scot. Law Rep. 460, 6 R. 869—(1) (*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; and (2) that the chance of the second and third heirs respectively acquiring the fee by surviving all the other heirs of entail was not an element of value that ought to be considered.

At delivering judgment—

LORD CHANCELLOR—My Lords, the respondent General M'Donald is heir of entail in possession of certain estates in Perthshire held under a tailzie dated in 1837. The nearest heirs of entail entitled to succeed to the estates after the respondent are his brother Captain M'Donald and his sisters, the two appellants.

The respondent has applied to the Court of Session for authority to disentail these estates. He has obtained the consent of Captain M'Donald, the next heir of entail, and as the appellants, the second and third heirs of entail, do not consent, it is necessary, under the Entail Amendment (Scotland) Act 1875, that the value in money of their expectancy or interest in the entailed estate should be ascertained to the satisfaction of the Court, and paid to or secured for them.

The Court has valued the interest of the first appellant at £973, and of the second at £745, and upon these sums being paid into the bank, has dispensed with the consent of the appellants and approved of an instrument of disentail.

The question is, whether the expectancy or interest of the appellants has been valued on correct principles?

Your Lordships are aware that under the Rutherford Act a Scotch entail created before 1848 could not be broken or opened without the consent of the three nearest heirs of entail, so that if the Act of 1875 had not passed, the consents of Captain M'Donald and the appellants would have been necessary, and the dissent of any one of the three would have prevented the disentail.

The first question as to value relates to the life of Captain M'Donald. He was born in 1834, and is married, but has no issue. The appellants offer to prove that Captain M'Donald, though at present in good health, has suffered from ailments which reduce his prospect of life greatly below