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 consignation 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 Ormidale) 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 Rutherfurd 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

the average of persons of his age. The respondent, on the other hand, contends that Captain M'Donald's life should be taken as an average one, according to proper life tables, and this has been the opinion of the majority of the learned judges.

I am sorry that I cannot concur in this opinion. It might have been a convenient and reasonable course for the Legislature to have laid down some rule by which these expectancies or interests should be valued, and the Legislature might have said that in all cases the probable duration of life should be calculated according to some of the well-known tables, but it has not done so. In that state of things it appears to me that the appellants have a right to bring before the Court, or before any actuary or valuer to whom the case is referred, any facts relevant to the probable duration of Captain M'Donald's life and his state of health; and the ailments from which he has suffered, if calculated to shorten life, must be relevant to such an issue. I see no inconvenience in this course to the respondent. The *onus* of proof will be upon the appellants. The respondent will prove the age of Captain M'Donald, and the probable duration of an average life at that age, and it will be for the appellants to prove that Captain M'Donald's is not an average life, and why.

The other point in dispute arises in this way—A younger sister of the appellants, Jemima M'Donald, is the fourth heir-of-entail, and she is now the last in the entail. If she should be dead without issue when the appellant Adriana, the third heir-of-entail, succeeds, if she does succeed, then Adriana will be absolutely entitled to the fee of the estates, whereas if Jemima or any of her issue are in existence at that time, Adriana will be virtually no more than a life-renter, unless she obtains the consent of Jemima or her issue to disentail. The same would be the case as to the appellant Elizabeth if she were to survive Adriana.

It is contended by the appellants that in valuing the interests of Elizabeth and Adriana, their interests should not be treated as those of liferenters only, but the possibility should be taken into account that when the survivor of them comes into possession Jemima may be dead without issue.

The Court of Session were of opinion that this was not an element of value which ought to be considered. My Lords, I am unable to concur in that view. The question, I think, to be asked is this—Supposing the Act of 1875 had not passed, what would have been the interest which the appellants would have enjoyed in specie supposing they had refused their consent to disentail? It cannot be doubted that what the surviving appellant would have enjoyed would have been an interest equal to a liferent, or equal to a fee, just according as Jemima was or was not at the time dead without issue. This is the amount of interest that would have been enjoyed in specie, and this, as it appears to me, is the interest that must be valued. If a Scotch estate was entailed on A, a bachelor of 70, then on B, a spinster of 70, then on C, a spinster of 75, and an Act of Parliament required "the expectancy or interest of B in the entailed estate" to be valued, I cannot doubt that the valuer must have taken into account that when B succeeded, C might be dead and the estate of B an unshackled fee. The valuation in the case before your Lordships may, and probably will, be a matter of difficulty, depending as it does on contingencies not merely of death but of marriage and of having issue; but this is the task which the Legislature has assigned to the Court, and however difficult it may be, it must, in my opinion, be discharged.

My Lords, I think the interlocutors under appeal should be altered, but I have felt much doubt as to the form in which the alteration ought to be made. The case is one in which the interposition of any delay may lead to serious alteration by death or otherwise in the rights of the parties; and, on the other hand, it may be that the respondent will not desire to disentail if he has to pay a larger sum for consents than the sums already approved by the Court. The actuary to whom the question of valuation was referred by the Court, at the time when he took into account the elements which I think ought to enter into the calculation, put the value of the interest of the appellants at £8122, if I rightly understand the figures; and I understood at your Lordships' bar the counsel for the appellants to say that if this sum were secured they would be willing to consent to the immediate disentail, the inquiry into the exact value taking place afterwards. If, therefore, your Lordships concur with me as to the principle of the valuation, I should propose a motion in this form—The appellants having consented to an immediate disentail of the estates in question on the terms of the respondent paying within twenty-one days into the British Linen Company's Bank such a sum as with the sum already deposited will make up the sum of £8122 as a security to answer the valuation hereinafter directed to be made, the Lords Spiritual and Temporal declare, that in the event of such payment being made within the time aforesaid, the interlocutors of the 31st May 1879 and 7th June 1879, so far as they approve of the instrument of disentail and interpone authority thereto, and grant warrant for recording same in the Register of Entails, be affirmed; and in that event refer it to the Court of Session to ascertain anew the value in money, as at the date of the instrument of disentail, of the expectancy or interest of the appellants in the estates within the meaning of the Entail Amendment (Scotland) Act 1875. In the event of payment of the said sum not being made within the time aforesaid, reverse the interlocutors appealed from *simpliciter*. In either case the respondent to pay to the appellants the cost of this appeal.

If I am wrong in the figures which I have used (£8122), the parties will correct me, and I wish also to add that I have taken these figures merely because they were given by the actuary, and not as adopting either the mode or result of his calculations, which the Court may see fit on the new inquiry not to adhere to. The sum arrived at by the actuary certainly appears to be under the circumstances a very large one.

Lord Hatherley—My Lords, two points, each of them of considerable importance, have arisen in this case, which comes before us upon an appeal from a decision of the Court of Session in Scotland in proceedings which were taken there

under the Act commonly called the Rutherfurd Act, and the subsequent amending Act of 1875 as to the disentailing of estates in Scotland. I shall not enter at length into the nature and effect of those two Acts, but I will proceed at once to consider the questions which have been raised in this appeal.

The estate in question is subject to an entail created by Major General M'Donald. The General is in possession by virtue of that entail, and the three next in succession to him are his brother Captain M'Donald (the nearest heir), his sister Elizabeth Moore Menzies M'Donald, and his sister Adriana M'Donald. These two ladies not having consented (Captain M'Donald has) to a disentailing of the estate in question, it became necessary to ascertain under the Act of 1875 the value in money of their expectancy or interest in the entailed estate with reference to the application of General M'Donald. In making this valuation it became necessary to value also the interest of the first heir next to the heir in possession, that is, the interest of Captain M'Donald. The first of the two questions I have referred to is, Whether in valuing the life of Captain M'Donald, who was the first heir next to the heir in possession, the actuary should value it according to the tables which are used by actuaries for estimating contingencies of this character as an expectation of life simply measured by the age of the subject, or whether the state of health and other matters affecting life should also be taken into consideration in arriving at the value? I think that it is impossible to exclude evidence strictly applicable to the particular circumstances of the case, and tending directly to affect the probable duration of life, from such an inquiry as the Act of 1875 prescribes. Many cases may occur or may be suggested in which it is all but certain that the ordinary expectation of life of a man of a given age would not represent the probable value of the life of an individual. The table averages were in fact at first deduced from the total number of men of a given age in all possible states of health, and any one life which is selected may be the lowest of the class as regards health. I think it is right to admit the evidence of the calculated tables applying to any given age as *prima facie* proof, but it should be open to the other side to lead proof of facts manifestly affecting the alleged average in the particular case. For instance, take the case of a man known to be on his deathbed with consumption—the value of the expectation of life according to the tables would not at all represent the true value in that particular case. If you take at the average value any one life out of a class upon which the average is taken, and disregard the circumstances affecting that individual, the effect may be to arrive at a valuation in some cases far above, and in other cases far below, the actual value of that particular life. I do not see how under the words of the Act an inquiry into facts manifestly affecting the alleged average in the particular case can be shut out.

The second point which has arisen has occasioned me much more doubt and hesitation than the first point. It is this—the first three heirs being the Captain and his two sisters, the fourth heir in the entail is another sister named Jemima. According to the Act of 1875, her interest is not to be taken into account, but if she should die without issue in the lifetime of either of her sisters, then the sister on coming into possession as heir of entail will be entitled to deal with the fee-simple free from the fetters of the entail. Should this interest be valued as part of the interest of either of those sisters under the directions of the Act of 1875, namely, as "an interest or expectancy in the entailed estate," with reference to this disentailing application?

I have had the opportunity of seeing the opinions of your Lordships who with me heard this matter argued, and I have read with great attention the opinions of the Judges in the Court below, and I have, though with much doubt, come to the same conclusion that the view contended for by the appellants is right. As I read the two disentailing Acts of Parliament, they seem to have proceeded on the principle that the long periods of entail sanctioned by previous legislation and by the previous state of the law ought to be abridged, but at the same time that such abridgment should take place with due regard for vested interests, in so far as they would not frustrate the purpose of the Act itself, namely, the intended earlier release of the entailed estates from the fetters which virtually exclude them from commerce. In the Rutherfurd Act 1848 a system of consents was established by which the heir in possession might acquire the unfettered dominion. These consents were to be the consents of the first three substituted heirs in succession after the heir in possession. This Act, however, gave no control to the heirs beyond three which could prevent the disentailing of the property. The Act of 1875 modified this arrangement by directing that the immediate heir next to the owner in possession must give his consent, or else the disentailing instrument should not be allowed, but that the next two heirs, if they would not, or from disability could not, consent, should be bound by a deed approved of by the Court—provided that the Court satisfied itself of the value of the expectancy (in the words I have mentioned), and that such value was secured to the satisfaction of the Court. This being done, the fourth and subsequent successive heirs were barred by the allowance of the deed. The effect of this enactment was to disregard altogether the interests more distant than that of the third heir in expectancy.

The question now before your Lordships is of a somewhat singular character, regard being had to the circumstances, namely, whether an interest which arises in the third heir only in consequence of the interest of the fourth heir and subsequent heirs being exhausted, namely, the chance of the fourth heir dying before the third heir and with out issue, should be valued? Suppose the fourth heir to be the last, so that there is no heir beyond the fourth who could insist on the fetters imposed on the estate being brought into effect when it comes to the third heir, the question is, whether this is an interest or expectancy directed to be valued by the Act of 1875? Is it an "interest or expectancy in the entailed estate?"

The Legislature in its desire to achieve the object it had in view, namely, the liberation of estates subject to entail, has nevertheless, both in the Rutherfurd Act and the Act of 1875, intimated the extent to which it thought justice required consent in the one case, and compensation in the other, in respect of vested interest,

stopping at such a degree of interest as any third substitute heir could acquire by the entail, or, as it is expressed in the Act, "in the entailed estate." It appears to me probable that what the Legislature was aiming at was "the entailed estate" only as created by the deed of entail, and the interest now in question is an interest which is beyond the entail, and indeed after the interest in the estate tail has passed into the second or third heir, and is only arrested at the decease of the third heir by the fact of the next or fourth heir or his issue not being in existence to receive it, and that the interest which the third heir may acquire and dispose of by reason of the termination of the estate tail taking place immediately on the death of Jemima without issue is the original fee-simple which has been allowed to remain fettered so far as to carry it in its fettered state to the third heir in succession, but which became free from the fetters when it had reached the third heir, who founds her claim, not as interested in the entail, but as the unfettered fiar and mistress of the estate from the failure of the entail.

We have the singular result of an interest in the third heir which is to be valued under the Act of 1875, and which results from the failure, not of prior, but of subsequent limitations to the fourth heir which would not be the subject of any compensation if vested in that heir herself. I feel great difficulty in coming to such a conclusion. The only case cited before us is that of *De Virte* (Dec. 19, 1877, 5 R. 328), which certainly seems to have proceeded on some such view; but we have in the present case the opinions of the majority of the Judges in the Court below in favour of that view, and I feel the words of the Act, "expectancy or interest in the entailed estate," very strong, and though I should from the nature and purport of the two Acts of Parliament be led to the conclusion that so extended a meaning ought not to be given to them, yet the words used would be sufficient to include all the interest in the estate coming to her by the results of the entail and taken from her by the Act.

I have had to consider what from the nature and the purport of these two Acts of Parliament would be the reasonable and probable construction of the words I have referred to, and I do feel strongly that the nature and intent of the Acts of Parliament are so very clear that I should have expected to find a different legislative enactment when we come to the enacting part, on which this particular question arises. At the same time, I cannot say that I find words in the Act that would support the meaning which some of the learned Judges in the Court below thought the words I have referred to would bear. If I came to the other conclusion, I should have to do so upon a very forced construction, because although it is not the entail itself which causes this reversionary interest, as we should call it in England, to fall into possession, still it is in consequence of the reversionary interest that the estate tail cannot be barred, for the Court is not authorised to allow it to be barred except upon the condition of having the whole "interest or expectancy" of the person against whom they allow it valued, according to the position which he or she may occupy at the time when the disentailing deed is proposed to be executed. Any changes which may have taken place must have all proceeded from the effect of this disentailing deed, and it is owing to the effect of the disentailing deed that this lady acquired her interest in the estate. I think this interest in the estate is part of the "interest or expectancy in the entailed estate" directed to be valued.

Therefore it appears to me that we must hold, as my noble and learned friend on the woolsack has proposed, that the decision of the Court below as to the valuation of the interest was erroneous in so far as it omitted the valuation of this particular interest, which appears to be not only a substantial interest, but one of very considerable value and importance. Moreover, this is a question of principle, and one probably of not very unfrequent occurrence; therefore it is well to settle it at once by a decision of your Lordships' House upon the subject. I agree, therefore, in the order which my noble and learned friend the Lord Chancellor has suggested to your Lordships. I think that the right time for the valuation to begin is the date of the execution of the deed, because as soon as the deed is executed it takes its full effect upon the conditions being complied with. It will not take its full effect until certain conditions have been complied with, but when they have been complied with it will immediately take its full effect, and its full effect will begin from the date of the execution of the instrument itself. Subject to the figures being correct—as to which I am not prepared to express a clear opinion—I think that the proposed order is right. As regards the costs of the appeal, the appellants having succeeded in the case they have brought to your Lordships' bar, must have their costs. According to the common rule, the unsuccessful party must bear the costs of the appeal.

Lord Blackburn—My Lords, the respondent is heir of entail in possession of an estate held by virtue of a tailzie dated prior to the 1st August 1848. Before the 11th and 12th Vict. cap. 36, commonly called the Rutherfurd Act, lands might in Scotland be fettered in perpetuity. That Act was passed on a preamble reciting that "The law of entail in Scotland has been found to be attended with serious evils both to the heirs of entail and to the community at large." The first section provided that entails made by deeds of tailzie dated after 1st August 1848 might be barred by an heir in possession whenever that heir was born after the date of the entail, and being of the age of twenty-five, or when he could obtain the consent of an heir-apparent born after that date and of that age; and the second section gave a precisely similar power as regarded entails made by deeds of tailzie before that date, when the heir in possession or heir-apparent was born after 1st August 1848. But if this had been all that was done, the evils arising from so large a portion of land in Scotland being already under the fetters of tailzies would have continued till 2d August 1873, when first it became possible that an heir of the full age of twenty-five born after 1st August 1848 could exist.

From that time the estates bound by the fetters of entail made before 1st August 1848 would continually diminish in number as heirs either in possession or heirs-apparent born after 1st August 1848 attained the age of twenty-five. Such entails would not necessarily come to an end till the lapse of a lifetime from that date, though the number

remaining sixty years after 1848 would probably be very few.

It was thought proper to make provision for an earlier unfettering of such estates, and by the third section it was provided that an heir of entail in possession under such a tailzie might disentail if he could obtain the consent of the three nearest heirs who at the date of such consent were for the time entitled to succeed to such estate; and by section 31 the Court of Session might appoint a guardian to any such heir under incapacity who should be entitled "with or without consideration" to consent for that heir.

I think the object of the Legislature was to enable the lands to be disentailed, but to give each of the three first heirs an unfettered discretion as to whether they would protect the entail or not, and to allow him to bargain as he pleased with the heir in possession. Such an heir may, and I believe often does, refuse his assent, from a belief that they ought not to disturb the provisions of the person from whom they derive their interest in the estate, or because he thinks it more for the interest of the family to preserve the entail. When no such motives for refusing the consent existed, an heir probably sometimes drove an extortionate bargain; but the heirs whose consent was asked for often, and I suppose the guardians of an infant heir on his behalf usually, said that they required to be paid the fair value of their consent, but would not ask more, and consequently actuaries were often asked to put a value on such consent, depending as it necessarily did in a great degree on the probabilities of the duration of life, marriage, and issue. No such valuation, however, could in any way be brought under the review of a Court.

I do not think it necessary to say more about the Rutherfurd Act, the provisions of which are in this case only material in as far as they aid in construing the Act of 1875, which amended that Act, and must be construed along with it. The terms of that Act must be fully in the minds of your Lordships, and I need not read them. I think the object of the Legislature must have been to give further facilities for freeing lands entailed from the fetters imposed on them by entails prior to 1848. Those lands are yearly diminishing in number as heirs born after 1848 become either heirs in possession or heirs-apparent. But it seems to have been thought that the process by which such lands were unfettered was too slow. The age at which an heir in possession or apparent could consent was reduced to twenty-one, and the nearest heir alone was left in the position of having an absolute right to forbid the disentailing; and the Court of Session was empowered to dispense with the consent of the second or the third heir, but a condition-precedent was attached to the exercise of this power. The Court is required "to ascertain the value in money of the expectancy or interest in the entailed estate, with reference to such application (*i.e.*, the application of the heir in possession to disentail the estate), of such heir refusing to consent." It is on the true construction of this provision that this case depends. The appellants have only raised two points as to the mode in which the valuation has in this case been taken, in such a way as to bring them before this House. If in both of these the Court of Session is right, the valuation (whether objectionable on other grounds or not) stands good, and the appeal must be dismissed; but if in both or either of these points the Court of Session has in the opinion of this House gone wrong, the valuation as made is not right. And, as I think, though the Court of Session are to decide summarily, they are to decide judicially, and any error in principle will prevent the valuation from standing; and so, if both or either is wrong, it will fall to be considered what is to be done. I cannot pronounce judicially on any point except those two brought before this House, and I wish to avoid expressing any opinion on such points except in so far as it is necessary to consider them with a view to disposing of these two points.

The Legislature has cast on the Court of Session the task of "ascertaining the value," and when it is "ascertained to the satisfaction of the Court," tells them what to do. But the Legislature has given no directions at all as to how or in what manner the Court is to ascertain the value. In the Succession Act 1853 (16th and 17th Vict. cap. 51), sec. 21, it is directed that interests during periods depending on lives shall be estimated according to the value given in certain tables annexed to that Act, so as to leave nothing to be ascertained except the age of the parties. Nothing of the sort is done in this Act; but I think the Legislature knew that the value of an expectancy must, in a great degree at least, depend on the probabilities of the duration of life, the chances of marriage, and the chances of such marriages proving fruitful. They must, I think, have known that actuaries had tables, founded on extensive experience, on which they acted, which enabled them to value with considerable accuracy the probabilities of life; and that though the experience on which calculations as to the probabilities of marriage and issue were based was much narrower, and the results more subject to uncertainty, yet that some calculation could be made in that way and none could be made in any other. I think, therefore, that the Legislature must have contemplated that the Court would call in the assistance of an actuary to report to them on all those matters which properly come within the province of an actuary. Such was the course taken in *De Virte* v. *Wilson*, 5 R. 328, the only other case in which as yet the Court has had to act, and such was the course taken in the present case. No objection was made on either side, but I do not think any could have been taken on either side. But when questions not properly determinable by an actuary arise, I think they must, unless the parties have agreed to take the actuary as arbitrator, be ascertained in the manner appropriate to the particular question. In this case, when a question as to the value of the lands arose, the Court did not refer that to the actuary but to a valuer. The first thing to be ascertained by the actuary in this case was the probability of the heir in possession, the respondent, dying without male issue in the lifetime of each of the appellants, for unless he did so they could get nothing. No point has been raised as to the mode in which this has been finally ascertained. The next thing to do was to ascertain the probability of the nearest heir, Captain M'Donald, so dying. The age of the Captain, the fact of his being married, and the age of his wife, were not finally disputed. But the agent for the appellants brought before the actuary this statement:—"As

regards Captain M'Donald himself, it is right to bring under the notice of the actuary the facts that in the year 1858 he fell over the cliffs at Kinsale and injured his head, and that he subsequently suffered from concussion of the brain. Abscesses formed in the wound which was made by the fall, and splinters of bone came away from time to time. In consequence of this fall he was an invalid for many months. He subsequently was obliged to leave the army in consequence of a medical board deciding that after his accident he could not stand a warm climate; and at or about that time he suffered very much from the heat at Gibraltar, where he was stationed. Since his discharge from the army he has been in very bad health, and subject to epileptic fits, and on several occasions his life has been almost despaired of. He had one of these fits so late as April 1877, at which time it was not expected he would survive. These circumstances, it is submitted, go materially to reduce the value of the life interest of Captain M'Donald."

The contention of the respondent is that the actuary ought to proceed solely on the statistics relating to the value of an ordinary life, and that every other averment is irrelevant. I think the Legislature might have enacted this, but I think they have not; and I think it is impossible to hold that no exceptional case can vary the calculation. An extreme case may test this principle. An heir may be a young man, the expectation of whose life would be forty or fifty years. Suppose it to be averred that before the application to disentail the estate is made he met with an accident occasioning injury to the spine, inducing incurable paralysis, so that he must pass the remainder of his life on a couch, and though he may linger for a time cannot live long, would it be proper to say that no inquiry should be made into such an allegation as this? Lord Gifford shrinks from pushing his argument so far, and I think with reason. I think that the probability of life of an average man of that age is *prima facie* the proper basis of an actuary's calculation. And I think Lord Ormidale seems not to deny that there may be cases in which there may be such insuperable difficulty in ascertaining the effect of exceptional circumstances on the value of the life as to leave no alternative but to take the actual age.

I agree with Lord Gifford that the Court ought not to attend to every allegation of something on which a guess might be made. I think it must be something on which the Court thinks an estimate may be reasonably made. It is easier to put cases as to the expectancy of marriage or issue, in which it would be proper to reject such averments, than as to the expectancy of life. But I can put one—The probability of life of a man residing in England is certainly greater than that of the same man residing in the tropics. Insurance companies habitually act on this, and protect themselves by putting in their policies a provision that the policy shall be void if the assured without their licence goes into prohibited districts—I think generally between the 32d parallel of north latitude, and the 32d parallel of south latitude—and they grant such licences on the terms that an increased premium shall be paid whilst he is within the prohibited space. Yet I think an averment that the heir of entail was a keen sportsman who would enjoy elephant shooting, or a man of scientific tastes who would like to explore the course of the Niger or the sources of the Nile, and was therefore likely to go to Central Africa, should be rejected as irrelevant, not on the ground that his doing so would not affect the probability of his living, but on the ground that there could not be any reasonable estimate of the chance of his so travelling. In this I agree with the Lord Justice-Clerk, and I agree with him in thinking that it would be proper in any other case to reconsider the propriety of the decision of the Lord Ordinary (Rutherfurd Clark) in *De Virte* v. *Wilson*, under which the actuary was permitted to make a guess at the chance of Mrs Wilson's children being, if she came into possession of the estate, liberal to her. In all other respects Lord Rutherfurd Clark's note on that case seems to me very sound.

But then I cannot think that the averments here made are irrelevant on this ground. Had the only averment been that Captain M'Donald had twenty years ago met with a bad accident, I might have hesitated. But it goes much further. It is said that "he has been in very bad health and subject to epileptic fits, and on several occasions his life has been almost despaired of. He had one of these fits so late as April 1877, at which time it was not expected he would survive." It may be that the facts are greatly exaggerated, but if correctly stated, it becomes, I think, a question for medical skill to say whether such facts, when ascertained, do not show that the vital energy has been diminished, and if so, how much. I think if that is found, it is a very convenient form to say that as much has been taken out of his vital energy by this accident as would have been taken out of an ordinary man's vitality by so many years of ordinary life. And then it becomes a question for an actuary what difference that makes. In the first report of the actuary in this case he assumed, without, I think, sufficient grounds or sufficient authority, that it had taken as much out of Captain M'Donald's vital energy as twenty years of ordinary life, and then came to the conclusion, which I suppose was correct, that on that supposition about 70 per cent. should be added to the value of expectancy of the appellants. When this case was before the Lord Ordinary, and when it first came before the Court of Session, it was supposed that Captain M'Donald had no objection to submit to a medical examination. The interlocutor of 16th January 1879 was framed in conformity with the views of the Lord Justice-Clerk and Lord Ormidale, but contrary to the view of Lord Gifford. By it the Court found 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 . . . . and remit to the Lord Ordinary to give effect to them, and to proceed with the cause, and reserve all questions of expenses." It seems to me that this was a proper and sensible course to take. It turned out, however, that Captain M'Donald did not choose to be examined, and on that change of facts the Lord Justice-Clerk changed his opinion as to the proper course to be pursued, and this interlocutor was recalled and another substituted:—"19th March 1879.—Remit to the Lord Ordinary to proceed with the cause on the footing that Captain M'Donald's life is to be assumed to be an average

life, and to be estimated according to his present age; and also remit to the Lord Ordinary to dispose of all questions of expenses."

It was argued at the bar that without a personal examination of Captain M'Donald no medical opinion could be formed. In this I cannot agree. I do not doubt that it would be more satisfactory that such a personal examination should take place, and I hope that Captain M'Donald will not persist in his objection, but I do not think it indispensable.

I have no skill in medicine myself, but both in civil causes and in criminal causes I have had many medical men give evidence before me, and I think I am warranted in asserting that they in their diagnosis attach much importance to the history of the case—the antecedent facts. These they must in general ascertain as they best can. But a medical man finding a patient suffering from symptoms, and learning that he had recently been a passenger in a railway train when an accident happened, would not disregard that fact, and might probably on that fact think that the symptoms indicated the effect of a shock to the brain. If there was no such fact, but he learned that just before the illness came on the patient had been working in an ill-ventilated mine, or even sitting for hours in an ill-ventilated court or theatre, he might on that fact think that the symptoms indicated the effect of blood poisoning. In the present case I should expect that a medical man, either ascertaining for himself, if the Court refers it to him to do so, or learning from the findings of the Court what the facts were, might say—"The illness of Captain M'Donald in April 1877 may either have only indicated that he ought to take care not to expose himself to the sun, but if he does take such care he may live as long as anyone else; in which case I do not see how any estimate can be put on the diminished value of his life. Or it may have indicated that his constitution was impaired. If I had to judge only from the symptoms as reported to me, I should have inclined with some doubt to one of these opinions|"—stating which it was. "But learning that during the three years that have since elapsed Captain M'Donald has been in good health," or "has been suffering repeated though slight attacks of the same sort" (as the case may be), "I am confirmed in that opinion," or "I am convinced that that opinion was erroneous." I think, therefore, it is important in remitting the case so as to obtain the assistance of a medical man, to provide how such facts, which I think must be important, are to be ascertained.

The second point is one which may be treated more concisely. The heir in possession of an entailed estate in Scotland is the fiar, fettered as far as the provisions of the tailzie fetter him and no further. If there is no one in existence who can enforce these fetters, he has the absolute fee. From this it follows that if it can be ascertained that all the heirs in existence will die without issue the last survivor of the existing heirs will have the fee. A person who is in a tontine has a calculable interest in his expectancy of being the survivor. Ought the analogous expectancy of one of the three heirs of entail to be the last survivor to be valued in this case, where there are four existing heirs after the heir in possession? The actuary has in this case valued it, and—what I should not have anticipated—found that it more than doubles the sum to be paid to these ladies. On objection the Lord Ordinary thought he had done right. But all three Judges of the Second Division were of a contrary opinion. I have doubt and hesitation on this point, and if it rested solely with me I am not prepared to reverse their decision that this should not be valued. The Rutherfurd Act proceeded on the assumption that the interests of the fourth heir under the fetters of the entail were too remote to make it proper to consult him as to the propriety of disentailing. This result of the ladies only arising after the fourth heir has died without issue is still more remote. The words used in the amending Act of 1875 are not such as to make me believe that those who used them had the point present to their minds. But the object of the Act being to facilitate the disentailing of estates, if the words used are such as to be capable of bearing the construction that the only thing to be valued is the expectancy under the fetters of the entail whilst they exist, and not the expectation of the fee that may arise after they have expired, I think we should put on the Act of 1875 that construction which will forward the object of the Act. But I am not prepared to dissent from what I understand to be the opinion of both the noble and learned Lords who heard the argument, that the words of the Act are not such as to be capable of bearing that construction.

Lastly comes the question, What is now to be done? I do not think that the valuation obtained on a wrong principle can stand. And if that is set aside simply, the disentail which has been made cannot stand. But if one of the heirs should die during the protracted litigation, the object of the petitioner, the respondent, is baffled; and I think that should not be allowed. The respondent though willing to pay the sum at which the Court has valued the interests of the two ladies, may not be willing to pay four times that amount. If so, the Court of Session will have to say what is to be done as to the costs incurred under the petition. If he is willing to pay whatever be ultimately found to be the value, I think it would be the reasonable course that he should pay into the bank, or otherwise secure to the satisfaction of the Court of Session, a sum equal to the utmost amount which it is probable will be added to the value at present come to, and that the litigation should proceed—if the parties wish it, which I hope they may not—as to that sum, the estate remaining disentailed. I think the form of order proposed will be proper if the sum mentioned is the right figure. I have not investigated that.

The costs of the appeal to this House should, I think, be given to the successful party—that is, the appellants.

An order was thereupon pronounced in the terms suggested at the close of the Lord Chancellor's opinion, *supra*.

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