tute, their willingness to purchase these. Two of the proprietors—Mr Whitson of Parkhill, and Dr Clerk Rattray of Coral Bank—were both desirous to purchase lot 3.

The Lord Ordinary (BARCAPLE) remitted to a man of skill to report as to what prices should be obtained for these lots. This having been done, his Lordship reported the case to the Court, with the subjoined note:—

"The Court having granted authority to feu the second, third, and fourth lots mentioned in the petition, conterminous heritors have intimated, under section 17 of the Statute, their willingness to purchase each of these, viz.:—Mr Thomas Hunter Whitson to purchase lots second and third; Colonel Clerk Rattray to purchase lot fourth,—and Doctor Clerk Rattray to purchase lot third; Mr Whitson and Dr Clerk Rattray are thus both desirous to purchase lot third.

"The Lord Ordinary is of opinion that these are all conterminous heritors in the sense of the Statute.

"In regard to the competing claims of Mr Whitson and Doctor Clerk Rattray to be preferred to the purchase of the third lot, the Lord Ordinary is of opinion that Mr Whitson, having been the first conterminous heritor who, in terms of the Statute, intimated his willingness to purchase that lot, which he did judicially in this process, he is entitled to have decree of sale pronounced in his favour on his paying the price which the Court may fix.

"The Lord Ordinary remitted to Mr Simpson, architect and land valuator in Dundee, who formerly reported on the rate of feu-duties to be fixed by the Court, to report as to the prices which should be obtained for each of the three lots. He has now reported, and the Lord Ordinary sees no reason to doubt that the prices which he suggests are suitable,—unless in the peculiar circumstances of this case, in regard to the third lot, the Court shall be of opinion that, before fixing the price of that lot, Doctor Clerk Rattray should be allowed to state what price he is willing to give for it. The Lord Ordinary is disposed to think that if he is willing to give more than the price suggested by Mr Simpson, that ought, in fairness to the benefice, to be fixed as the price at which the lot is to be purchased, but that Mr Whitson should be preferred to the purchase at that price if he is willing to give it. In the event of his declining to do so, it would go to Doctor Clerk Rattray, who, though he was later than Mr Whitson in coming forward to exercise his statutory privilege as a conterminous heritor, still did so within the statutory period of thirty days. The provisions of the Statute as to this matter are not precise, and the Lord Ordinary is not to be held as expressing a decided opinion in regard to it.

"Apart from this specialty in regard to the value of the third lot, the Lord Ordinary is of opinion that the prices suggested by Mr Simpson may be fixed by the Court as the prices of the respective lots."

MACDONALD for petitioner.

CLARK for Mr Whitson.

A. MONCRIEFF for Dr Clerk Rattray.

At advising—

LORD PRESIDENT—It is difficult to know what is the best course to follow here. My objection to the Lord Ordinary's suggestion is, that Dr Clerk Rattray is only to be allowed to state once for all what he is willing to give. It may induce him to offer a larger sum than the land is worth, and this, though a good thing for the benefice, might not be fair to the proprietor. I think our best course is to remit to the Lord Ordinary to inquire and report what is the largest price to be obtained from either of the competing conterminous proprietors.

The rest of their Lordships concurred.

Interlocutor accordingly.

Agents for Petitioner—Wilson, Burn, & Gloag, W.S.

COURT OF SESSION.

Thursday, July 16.

FIRST DIVISION.

COLT *v.* COLT'S TRUSTEES.

Trust—Construction—Denuding. A testator left in trust his whole means and estate, declaring that upon payment and extinction of the debts, obligations, expenses, and provisions contained in the trust-deed (including *inter alia* provisions to widow and children) the trustees should be bound to denude of the trust, and convey the residue to his eldest son. *Held* that the trustees were not entitled to anticipate the period of denuding by disponing the trust-estate to the eldest son on condition that he bound himself to satisfy the whole debts, obligations, provisions, and liabilities affecting the trust-estate.

This action was brought by George Frederick Colt, Esq., late of the 23d Regiment of Foot, now residing at Gartsherrie Cottage, Coatbridge, eldest surviving son of the late John Hamilton Colt of Gartsherrie, against the trustees of his father, to have it found that they are bound, in terms of his father's trust-settlement, to denude of the trust, and convey to him the whole estates so far as unsold, on his satisfying the debts of the truster, and granting them a discharge. The question, which turned on the construction of the trust-deed, was fully explained in the following interlocutor and note of the Lord Ordinary (ORMIDALE):—

"*Edinburgh, 28th January* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Finds that the late John Hamilton Colt, by his trust-disposition and settlement, left in trust his whole means and estate, heritable and moveable, for the purposes therein mentioned, and in particular for payment of his debts, the expenses of the trust management, of an annuity to his widow, and of certain provisions to his younger children; and declared that upon payment and extinction of his debts, and of the provisions and others constituted by his trust-disposition and settlement, his trustees should be bound to denude of the trust, and should dispone and convey his whole estates, so far as then remaining unsold, and the whole residue and remainder of the trust-estate, whether heritable or moveable, in favour of his eldest surviving son, whom failing, his other sons and daughters as therein mentioned; but subject to the declaration that the trustees should not denude in favour of the person entitled so to succeed to the residue of the trust-estate till he or she should have attained the age of twenty-five years: Finds that the pursuer was and is the eldest surviving son of the truster; that he is now upwards of twenty-five years of age; and that he states, in the 13th article of his revised

condescendence, that he has intimated to the defenders, the acting trustees under his father's trust-disposition and settlement, that 'he is ready and willing, and that he has repeatedly offered, and hereby offers, to pay or satisfy the whole of the debts, obligations, or liabities above mentioned in article 11, being the only debts, obligations, or liabilities of any kind affecting the trust-estate, or prestable by the defenders as trustees foresaid; to obtain and deliver to said defenders valid discharges or deeds of acquittance of the same in their favour; as also to grant and deliver to the said defenders, as trustees foresaid, a valid and sufficient discharge in their favour of their whole actings and intromissions as such trustees: Finds, in those circumstances, that on the pursuer making such payment and satisfaction and delivery to the defenders, in accordance with and in due implement of the trust purposes, as set out in the foresaid trust-disposition and settlement, the defenders, the trustees acting under the same, will be bound to denude and dispone, and convey in favour of the pursuer the whole residue and remainder of the trust-estate: *Quoad ultra*, and before pronouncing further, or in terms of any of the conclusions of the summons, appoints the case to be enrolled, that parties may be heard as to the application of this interlocutor, and in particular as to the manner in which the pursuer is to pay and satisfy the debts and provisions in question previous to the defender's denuding of the trust, and disponing and conveying the residue of the trust-estate in his favour."

"*Note.*—On a consideration of Mr Colt's trust-disposition and settlement in all its clauses, and especially keeping in view that, as regards the residue, his sons and daughters are called to succeed to it in a certain order, with survivorship and a destination over, the Lord Ordinary is not prepared to hold that the pursuer's right vested *a morte testatoris*, and this was scarcely contended for by the pursuer. Nevertheless, and assuming that there was no vesting *a morte testatoris*, the Lord Ordinary thinks the pursuer may be in a position to insist that the residue of the trust-estate in question should now be made over to him.

"Being past twenty-five years of age, the pursuer would now be clearly entitled to the residue, upon payment and extinction of the truster's debts, obligations, provisions and others, which are made the primary, and in that sense the preferable objects of the trust. He has accordingly offered to pay and satisfy these debts, obligations, provisions and others, by which the Lord Ordinary understands that payment or satisfaction is to be made in fair and reasonable accordance with and implement of the trust-deed. But in case of any misapprehension, and consequent embarrassment afterwards in regard to this matter, the Lord Ordinary has thought it better in the meantime not to pronounce decree in favour of the pursuer in terms of any of the conclusions of the summons. There appear to be about £35,000 of debts and provisions, besides the widow's annuity, still to be satisfied out of the trust-estate, before the pursuer can in any view be entitled to have the residue made over to him; and the defenders contended that the debts must be actually 'paid and extinguished,' and that funds sufficient for securing payment and satisfaction of the widow's annuity and the provisions of the younger children should be realised by the trustees themselves from the proceeds of the personal estate, and the rents and annual produce of the heritable estate, and in no other way, before they could be called on to denude of the residue in favour of the pursuer. They did not, however, contend that the trust must necessarily be kept up, and that they could not be called upon, or were not bound, to denude of the residue so long as the widow's annuity and the younger children's provisions were not literally extinguished by the death of the former, and the attainment of twenty-five years of age of the latter, and in regard to the truster's daughters, by their marriage or death. That, indeed, would be an unreasonable and unnatural view to entertain of the meaning and intention of the truster, for if given effect to it might, and probably would considering the manner in which the truster has dealt with the provisions to his daughters, prevent any one succeeding to and obtaining the enjoyment of the residue till not only the pursuer, but all the truster's other sons and his daughters, should be dead and gone. Accordingly, the defenders did not press any such view, but restricted themselves in argument, as their defence on record is restricted by their first two pleas in law, to contending that they are bound to hold the residue of the trust-estate till all the debts and obligations still remaining due have been paid and extinguished out of the rents and annual produce thereof, and in no other way.

"But the Lord Ordinary has been unable to sustain this contention of the defenders. The truster may, he thinks, be held as having intended, and his intention is the *regula regulans*, that the right of his eldest surviving son and heir to obtain possession of the residue should be suspended till the preferable debts and obligations should have been satisfied; but he cannot think that the truster meant that this should be done only out of the rents and annual produce of his estate and in no other way. Just suppose that the creditors in right of the debts and obligations were to give them up and discharge them; or suppose that the pursuer, having otherwise acquired or succeeded to means sufficient to pay them off, and that he was to pay and satisfy them out of such means, it could not on any plausible or sound principle be maintained that he was not entitled to have the residue made over to him on the grounds that the funds for such payment and satisfaction must arise exclusively from the annual rents and produce of the trust-estate. It will be observed, indeed, that the provision or declaration in the trust-disposition and settlement, in regard to the preferable debts and obligations being paid or satisfied out of the rents and annual produce of the truster's estate, is made not as a condition of the trustees denuding of the residue in favour of the pursuer, but rather as a reason or bar against their selling the heritable or landed estate, unless in their judgment that should be considered necessary or 'highly expedient.'

"A great many cases were cited in the argument addressed to the Lord Ordinary, and, among others, *Watt and Others* v. *Greenfield's Trustees*, 18th February 1825, 3 Sh. 544; *Stainton* v. *Stainton's Trustees*, 25th January 1850, 12 D. 571; *Reinsford* v. *Maxwell*, 6th February 1852, 14 D. 450; and *Pretty and Others* v. *Newbigging and Stewart*, 2d March 1854, 16 D. 667. Although the circumstances of these cases were different in each and in all of them from the present, it is thought that the principles recognised and given effect to in them by the Court are sufficient, so far as authority is necessary, to support the interlocutor of the Lord Ordinary so far as it goes. They shew, he thinks,

that while the intention and will of a testator must be given effect to, that may be done in a substantial and reasonable way, although not in the strict literal sense of the language used by him. Whether the pursuer is prepared, and will be able so to comply with the findings in the prefixed interlocutor, as to entitle him to decree as concluded for by him, remains to be afterwards considered; and, in particular, it remains for future consideration what will be payment and satisfaction of the widow's annuity and younger children's provisions, sufficient to entitle the pursuer to an effective judgment. The Lord Ordinary understood the pursuer's counsel to say that all the debts of the truster, as well as such of the provisions in favour of his younger children as are due and payable, would be actually paid and discharged; and that the widow's annuity, and such of the provisions to the younger children as are not yet due and payable, as, for example, the provisions to unmarried daughters, would be amply met and satisfied in due and reasonable accordance with the truster's directions regarding them."

The defenders reclaimed.

Dean of Faculty and Mackenzie for them.

Clark and Shand in reply.

At advising—

Lord President—(After quoting from the deed)—The deed is not one requiring any particular legal acumen to construe it. The destination in favour of the eldest son is not to take effect till the debts on the trust-estate are extinguished, that is to say, till the trustees can place the eldest son in an entirely unencumbered estate. The words of the deed are explicit:—"Upon payment and extinction of the said debts and obligations, expenses, provisions, and others foresaid, my trustees shall denude of this trust, and shall dispone and convey my whole estates" to the truster's eldest surviving son. Now if the pursuer can procure the debts to be extinguished in any other way, so as to put the trustees in a position to be able, in the *bona fide* exercise of trust-power, to hand him over the estate unencumbered, it would be quite lawful. But the question is, Is this the case here? And the answer must be, No. The pursuer is here trying to have the trustees ordained to hand over the estate encumbered. He no doubt promises to pay off the debts. But he has no means; and all he can promise is to change the debtor. He would become the debtor instead of the trustees. Now this is just a device for defeating the truster's intention, and one of the most transparent devices I ever saw. There is a distinction between this case and the case of *Stainton* v. *Stainton's Trustees*. There the thing requiring to be done before the heir received payment or delivery *was* done; but here not only is the thing not done, but it is to be prevented from being done. I am of opinion the interlocutor should be reversed.

Lord Deas—My opinion is, that if the Lord Ordinary's interlocutor were to be adhered to there would be no use in anyone making a trust-deed at all. (Quotes from the trust-deed the directions to the trustees to pay an annuity to the widow, and provisions to younger children.) The deed is full from beginning to end of provisions for these trustees to fulfil, the time for fulfilling which has not yet come; some are to be paid "after majority," others "on marriage," and so on. And the trustees propose to hand it all over to this gentleman (the pursuer) to do. None of the cases quoted have the slightest resemblance to this.

Lord Ardmillan—This is a deed with large administrative powers. It has been settled by several cases that in the case of such a deed anticipation in implementing its provisions may in certain circumstances be allowed; but it must not impair the provisions of the deed. If you can in 1868 perform by anticipation what ought to be done in 1878, leaving all interests unimpaired, then it may be done, as in the case of *Reinsford* v. *Maxwell*, quoted by the Lord Ordinary; but not otherwise.

Interlocutor recalled, and defenders assoilzied.

Agents for Pursuer—C. & A. S. Douglas, W.S.

Agent for Defenders—John Stewart, W.S.

Thursday, July 16.

LESLIE *v.* CRUICKSHANK.

Entail—Lease—Bona fides—*Fair Rent.* Circumstances in which *held* that a lease of farms on an entailed estate was not reducible as in violation of the entail.

Lieutenant-Colonel Jonathan Forbes Leslie, heir of entail in possession of the entailed estate of Rothie and others, in the county of Aberdeen, was the pursuer of this action, and James Smith Cruickshank, tenant of the farm of Newton, was defender. The farm of Newton forms part of the entailed estate. It used to be let as one farm, and in 1834 it was let as two farms on leases for nineteen years, one of them to Alexander Cruickshank, the father of the defender, and the other to Alexander Robb. In 1852, Robert Leslie, who was then heir of entail in possession, granted to Alexander Cruickshank a lease of the whole farm of Newton, except about twelve acres, for thirty-eight years. The pursuer alleged that the rent stipulated for in this lease was inadequate; that the rent was lower than that obtained under the former leases of the two farms, and that it was not granted in the fair and *bona fide* administration and management of the estate, but in *mala fide*, and in order to confer a benefit on the tenant, to the prejudice of the heir of entail. He raised this action of reduction of the lease.

After a proof had been taken, the Lord Ordinary (Ormidale) found that the lease in question was sought to be reduced by the pursuer as being in violation or contravention of the entail, in respect—1st, That it was granted for a diminished rent; 2d, That it was granted, not in the fair administration of the entailed estate, but for a rent so inadequate as to make it amount in legal principle to an alienation of the estate; and his Lordship found that the pursuer had failed to establish these grounds of reduction.

The pursuer reclaimed.

Clark and Harry Smith for him.

Young and Gifford in reply.

At advising, the opinion of the Court was delivered by

Lord Ardmillan—This is an action to reduce a lease granted by the late Mr Leslie, then heir of entail in possession of the estate of Rothie, to Alex. Cruikshank, the father of the defender. The grounds of reduction are, that the lease was granted in violation of the entail,—with diminution of rental—for an inadequate rent,—and not in the fair administration of the estate.

The two first of these grounds of reduction, as separate and distinguished from the two last