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

grounds, have not been insisted in, and have not been instructed. The pursuer's case has been put on the two last grounds—viz., that the lease was granted for an inadequate rent, and not in the fair administration of the estate. These two grounds must be considered together. The lease is for thirty-eight years, a term of years permitted by the entail. Diminution of the rental is not proved, the rent under the new lease being, I think, about £2 in increase of the former rent. No grassum or other consideration has been instructed. There are no facts appearing on this proof sufficient to sustain a charge of fraud or *mala fides*, either on the part of the lessor or the lessee. It is true that the tenant and the landlord were brothers-in-law. But that circumstance has not been founded on as of much importance, and, taken by itself, cannot be so considered. All that is said is—that a higher rent might have been got, and that, therefore, the stipulated rent was inadequate. Now, on the one hand, I am of opinion that what may be called gross inadequacy is not necessary; but, on the other hand, I am of opinion that a slight difference, a trifling inferiority to estimated value, is not sufficient. My view is, that if there was in point of fact such clear and substantial inadequacy of rent, that no sensible man administering his own estate could be reasonably supposed to have made such a transaction, or to have accepted such a rent, then, in point of law, that would afford sufficient ground for reducing the lease. Even though the period of lease be permitted by the entail, though there be no grassum or other such consideration, though there be no actual fraud or *mala fides* on the part of lessor or lessee, the inadequacy of rent may be so manifest and so great as to exclude all reasonable supposition of fair administration. If so, the lease cannot stand.

But where, as in this case, there is no grassum, and no fraud, it can only be on very clear grounds, that a lease for a permitted period can be set aside. An heir of entail in possession is proprietor with full powers, in so far as not restrained by the entail, and every *bona fide* act of proprietary administration, within the scope of his powers, is effectual.

It appears to me to be extravagant to maintain that the highest offer of rent must always be taken by an heir of entail otherwise the lease is reducible. There is no law, and no common sense, to support that proposition. A man administering his own absolute and unfettered estate does not act upon it. Many judicious considerations may lead him to prefer a lower to a higher offer. A tenant of good means, of good character, of active and diligent habits, with an intelligent mind, and a spirit of improvement, may really be more desirable and suitable than another tenant making a higher offer. The validity of such a lease as this, granted for a permitted period, without grassum and without fraud, cannot depend on the mere question, whether the rent was, or was not, a little lower than might possibly have been obtained. The true question is, whether the lease was granted in the fair administration of the estate? Alienation is prohibited; and in one sense every lease is an alienation; but the law sustains a lease if it is for a permitted period, or for a period of ordinary endurance, and if in its provisions it is fair and reasonable, such as would be granted in the exercise of a fair and ordinary administration. This is the view of the law so clearly explained by Lord Chancellor Eldon in the case of the *Queensberry Leases* (1 Bligh's Rep.).

I have accordingly studied the proof in this case with the view of ascertaining whether the lease granted in 1852 to the late Mr Cruikshank was on terms so unreasonable, and for consideration so inadequate, as to be inconsistent with the fair administration of the property.

If the duration of the lease had not been for a permitted period, or if any grassum or other consideration had been received, it would have been for the tenant to support the lease by evidence. But in this case it is for the landlord, pursuer of the reduction, to instruct his grounds of action. The result of repeated perusal of the proof has been to satisfy me that no sufficient grounds of reduction have been instructed.

Probably the rent was lower than might possibly have been obtained. But the farm was high and late, and requiring improvement. The lease was long, but no longer than permitted, and for such a lease a good tenant was as desirable as a good rent. This tenant was an active and diligent man, willing to apply his industry and his capital to the improvement of the land; and it appears that he did so. Now, it might well be that a proprietor of the estate in fee-simple, consulting his permanent interest and administering his estate wisely, would prefer such a tenant even to one making a higher offer.

On the question of fact, in regard to the fairness of this lease and this rent, as in 1852, there is certainly conflicting evidence. I have done my best by analysing and comparing the testimony of the witnesses to arrive at a satisfactory result.

The lease was in 1852. The lessor survived till 1861. The lessee died in 1858. The rent in the lease of 1852 is not lower than the rent of similar farms on the estate and in the neighbourhood. On two points there is a total absence of evidence on the part of the pursuer. First, there is no proof of any attempt or desire by the landlord to benefit himself at the expense of the heirs of entail. The provisions of the lease affect the lessor as they affect the succeeding heirs,—a point considered important by Lord Eldon. Secondly, there is no proof of any offer of a higher rent, and yet there was no secrecy, and offers might have been made. Still there is evidence deserving serious consideration.

We have evidence of opinion of estimated value, by skilled witnesses of great respectability and intelligence, on both sides. I feel quite unable to decide on comparison of such testimony. With Mr Souter, Mr Beattie, and Mr Robert Walker, on one side, and Mr Wilson, Mr Geddes, and others, on the other side, I cannot find safe grounds for judgment in this proof by valuation. It is not on the balance of speculative opinion that a question of this kind can turn.

Then there is evidence of the acreage of the farm, with the proportions of arable, and pasture, and hill land, and on this point the pursuer has strongly founded on a plan of the farm bearing to be dated in 1850, and stated to have been then made by a George Cruikshank now dead. The pursuer's evidence is, to a great degree, rested on this plan, and on the view he takes of it.

At that time the farmer was pursuing a course of improvement, and just about to enter upon a new lease. The landlord and his factor knew this, and prepared the lease. The plan may have been made to represent the actual condition of the farm at its date; on the other hand, it may have been made (and not the less probable that it was prepared by

George Cruikshank, who was a relative of the tenant) with a view to obtain an improving lease, and to represent the prospective state of the farm as it would be affected by the improvements in progress and contemplation. We have no materials for deciding with any certainty on this point. There is no evidence on the subject; and although duplicates of the plan are in process, the one produced by the landlord, and the other by the tenant, and although the landlord's factor was examined for the pursuer, the matter is left without explanation, and the maker of the plan is dead.

I cannot say that, in the absence of evidence, there is any presumption on which I can decide that this plan represented the actual state of the farm in 1850, and not the effect of intended improvements. Considering that it was prepared during the negotiations for a new lease, and by, or for, a tenant who was certainly contemplating and planning improvements, I cannot reject as impossible, or even very improbable, the supposition that it was a plan of the farm as it was proposed to make it. If the testimony of the Rev. Mr Walker is believed, and some effect given to the corroboration by Dr Bartlett, then the defender's view of the prospective character of this plan is confirmed.

In regard to Mr Walker, there appears no reason to doubt the meaning and import of his testimony, which is quite clear and distinct. The pursuer's counsel accordingly felt that he had no alternative but to challenge its truth. I do not think that the Rev. gentleman's evidence can be viewed as wilfully false; and, if not so, it cannot be set aside or disregarded, the more especially as he is to some extent confirmed by Bartlett, and as on several points he might have been contradicted by the factor, Mr Chalmers, whom the pursuer had the opportunity of re-examining if he thought fit. Therefore, I leave the plan, and the evidence given on assuming the pursuer's theory in regard to the plan, out of view.

We must seek elsewhere such proof as we can now get of the proportion of the farm which was arable in 1852, so as to reach the fair rent.

It is stated in the pursuer's rental and relative note that the arable acreage in 1866 was 436—(p. 33)—but adding a piece sub-let, it comes to about 470. And so says Mr Davidson—(D. Proof 4). Mr Whyte states it at 430 in 1855. But it is proved that between 1852 and 1855 there was in many ways active and extensive improvement, and, without going into details, I may say that I think it is sufficiently established that in 1852 there were not much above 340 arable acres on the farm. This is according to the opinion of Mr Geddes, a man of great skill and experience, and of Mr Wilson; and is, I think, the result of the evidence of nearly all the persons well acquainted with the farm and its course of improvement.

The testimony of Mr Whyte, who in 1855 valued for public purposes, is most important. He states the value, as in 1855, at £260 a-year, taking the rent at 12s. per acre, and in so stating it he was not acting for either party, but as an impartial valuator. There is no reason to doubt that he valued fairly as at 1855. But there were, according to some witnesses, about 90 acres less under cultivation in 1852 than in 1855, which reduces the value in 1852 to £206, corresponding exactly to Mr Geddes' evidence that £205 was a fair rent in 1852, while some other witnesses state it at £200. Even supposing that the extent of improvement between 1852 and 1855 was not so great as the defender maintains—take it at 60 acres instead of 90—still the rent in 1852, on Mr Whyte's calculation, would be £224 and no more. This is on the assumption that 12s. an acre was a fair rent, as Mr Whyte and Mr Geddes take it; and this is confirmed by comparing it with the farms and rents on the same estate, as explained by many witnesses. It seems to me that to ascertain the fair rent in 1852, we shall find it within a range varying between a minimum of £200 and a maximum of £240 or £250. The actual rent and prestations in the lease of 1852 was as near as possible £207.

In a case like this, and after the lapse of many years, exactitude of figures is not attainable. Much must be left to the judgment and discretion of the parties. The proprietor was entitled within reasonable limits to prefer the tenant whom he thought most desirable, and most likely to do justice to his land.

I cannot say that, under all the circumstances,—taking into consideration the character of the tenant and the nature of the farm,—the rent in 1852 was a rent so clearly inadequate as to be unfair and unreasonable, and inconsistent with the just and ordinary administration of the estate. I could well understand that a landlord unfettered by an entail, might prefer to accept £207 from a tenant of character and means whom he knew, rather than £220 or £240 from a tenant whom he did not know so well or esteem so highly.

This tenant expended a large sum in improving the land, in draining, fencing, reclaiming, manuring, and even building.

No offer to remunerate him, no recognition of his right to remuneration, for this expenditure has been made by the landlord who seeks to reduce the lease. To decern as craved against this defender would be to him ruinous.

On the whole matter, I have arrived at the same opinion as the Lord Ordinary, and I suggest to your Lordships that the defender should be assoilzied from the conclusions of this action.

Adhere.

Agent for Pursuer—John Auld, W.S.

Agent for Defender—Alex. Morrison, S.S.C.

Thursday, July 16.

SINCLAIR *v.* WEDDELL.

(*Ante*, p. 601.)

Lease—Issue. A missive of lease holograph of one of the parties and signed by both, but unattested, containing no term of entry, and not followed by *rei interventus, held* invalid as a lease, and an issue thereon *disallowed.*

Lease—Verbal—Issue. On a verbal agreement to let certain subjects "for seven years, or at least for one year from Whitsunday 1867," issue whether the subjects were let "for the period of one year from Whitsunday 1867" *disallowed.*

This was an action of damages at the instance of David Sinclair, a public-house keeper and flesher at Armadale, in Linlithgowshire, against James Weddell, farmer at Woodend, for non-implement of an alleged lease, which was in these terms:—"Woodend Farm, 28th January 1867.—It is agreed by David Sinclair and James Weddell for the public-house in Bathgate for seven years' lease, the public-house to be £18 yearly, the flesh shop