

The Court adhered.

Agent for the Complainer—Wm. Mason, S.S.C.

Agents for the Respondents—H. & A. Inglis, W.S.

Friday, June 9.

LEEMING (DOUGLAS' TRUSTEES) v. CARSON
AND OTHERS.

Trust—Antenuptial Settlement—Agent—Creditor—Infertment—Agreement—Security—Fraud. D, by antenuptial settlement, conveyed certain heritable subjects (his whole estate) in trust for behoof of his intended spouse and their issue. L, the party who was acting for the lady with full powers, and who subsequently was the acting trustee under the trust, transmitted the settlement to C, D's agent, to take infertment in favour of the trustees. C, who was a personal creditor of D, delayed to take infertment till he had got from D a bond and disposition in security over a part of the subjects. *Held*, in an action of reduction and damages at the instance of the trustees against C, that the terms of the correspondence which passed between C and L showed that it had been agreed that C should either be paid his debt, or get a security over the property preferable to the trustees' infertment, and consequently that it was no fraud on the part of C to secure his own debt before infertting the trustees.

In 1847 the late George Agnew Douglas contemplated marriage with Miss Catherine Hoghton of Liverpool. The present pursuer, Mr Leeming, who is a solicitor in Manchester, was an uncle of Miss Hoghton, and acted for her in the negotiations previous to the marriage. Mr Douglas was possessed of certain heritable subjects in the burgh of Wigtown, which appear to have constituted his whole estate. Miss Hoghton was not possessed of any fortune. The defender Mr Carson was Mr Douglas' factor and agent in Wigtown. He was also a creditor of Mr Douglas for £200, for which he held his bill. In the spring of 1847 an antenuptial settlement was prepared, by which Mr Douglas conveyed the subjects in Wigtown to Mr Leeming, and Mr Rankin, now deceased, as trustees. The trustees were directed to pay the rents of the estate to his intended spouse during her life, and after her death to the issue of the marriage. By the trust-deed Mr Douglas renounced his *jus mariti* and right of administration over the rents of the trust-estate. On the 29th April 1847 Mr Leeming forwarded the trust-settlement to Mr Carson to take infertment in favour of the trustees. Mr Carson in reply drew attention to his debt, and pointed out that infertment in favour of the trustees would prevent the property being made available to meet his debt. The understanding of the parties, and the position taken up by them, on which the present action mainly turned, will be seen from the following correspondence:—

William Carson to Thomas Leeming, dated 25th March 1847.

“... There is a debt of £200 due by Mr Douglas to me by bills for which he wished to grant security over the houses, with interest.

The security is not made out; in the meantime the titles stand hypothecated therefor.”

William Carson to George Agnew Douglas, dated 1st April 1847.

“... Will I send you a bond for the £200 for signature.”

George Agnew Douglas to William Carson, dated 7th April 1847.

“... You ask me if you will send me a bond for the £200 for my signature. Had I not been getting the above-mentioned deed of settlement drawn out, I should have answered—Send it by all means—but as my property will now be quite safe, I leave it entirely in your option. It would save me the expense of a bond were you to rest satisfied with my bill.”

Thomas Leeming to William Carson, dated 29th April 1847.

“I beg to forward this settlement. . . . You will be kind enough to get the instrument of seisin registered within the proper period, and return the deed to me.”

William Carson to Thomas Leeming, dated 4th May 1847.

“... On looking over the deed of settlement, I observe there is no provision made for the payment of the £200, and interest due by Mr Douglas upon bills, which I explained to you when here. I have not yet taken any bond upon the property for the money, and I do not observe that Miss Hoghton or her trustees would be bound to pay this debt. I have the utmost confidence in the integrity of the parties, still I wish the matter put upon such a footing as to prevent the least chance of a misunderstanding about it. Please say what Mr Douglas proposes about this debt.”

William Carson to George Agnew Douglas, dated 6th May 1847.

“... On looking over the deed, I observe that there is no provision made for the payment of the £200 bill and interest. I have been unwilling to put you to the expense of an heritable bond and infertment, but as your wife's marriage-settlement might cut out any claim upon the property for that money, I think it is but right that something should be done about that before passing the infertment, and I have written Mr Leeming to that effect.”

Thomas Leeming to George Agnew Douglas, dated 11th May 1847.

“... I have by this night's post written to Mr Carson to desire him to withhold the registering of the deed for the present, in order to enable me to carry out the course I have under the circumstances suggested.”

Thomas Leeming to William Carson, dated 11th May 1847.

“As Mr Douglas is anxious to discharge the debt of £200 which he owes to you, and at the same time raise a little ready money for his own purposes, he is desirous of mortgaging or hypothecating the property at Wigtown. I think I can find him the money for this purpose, but the settlement unfortunately does not contain any

power to hypothecate. I have therefore suggested that the deed should be reingrossed and executed afresh, adding a power for this purpose. If you see no objection to this course, I should wish you to defer registering the instrument of seisin, as I apprehend such course cannot be carried out after that is done, and shall be glad to hear from you in reply."

William Carson to Thomas Leeming, dated 5th June 1847.

"... I shall be glad to hear from you as soon as you can. I suspect I will have to take a security from Mr Douglas over the subjects, and take infettment. This may secure the present sum, but the interest will not be secured at all. Be good enough to correspond with the parties, and say whether or not I am to return you the marriage-settlement, and what is now to be done to secure all parties."

Thomas Leeming to William Carson, dated 24th June 1847.

"I have seen Mr Douglas on the subject of your letter of the 5th inst., and we have come to the determination of preparing a fresh draft, or rather altering the late one, so as to give the trustees a power to raise money, which I think I can get for the purpose of discharging your claim, and to answer his immediate necessities. You had better, therefore, return me the marriage-settlement by return of post, so that no time may be lost."

William Carson to Thomas Leeming, dated 3d July 1847.

"... I understand the object of the parties now is to remodel the contract, and allow the trustees to have power to borrow money to pay off the £200 due by Mr Douglas, and to borrow more money. I am relying upon Mr Rankin and yourself, as well as the contracting parties, either to get the loan immediately paid, or proper security given for the money. I had a security prepared for Mr Douglas' signature, but have not urged the granting of it, as probably you mean to pay up the loan."

William Carson to Thomas Leeming, dated 19th July 1847.

"I wrote you on the 3d inst., returning the marriage-contract between Miss Hoghton and Mr Douglas, and have not since heard from you in answer.

"I have had a letter from Mr Douglas, and am anxious to have matters put right with regard to the £200. Mr Douglas is quite willing to grant a bond over the property for that money. Please write me in course of post what is to be done with the marriage-settlement, and whether or not it has been re-engrossed."

On the 22d July Mr Douglas executed the marriage-settlement, which, as adjusted, contained a clause authorising and requiring the trustees at any time during the subsistence of the marriage, on being requested to do so by any writing under the hand of Mr Douglas, to raise on the security of the subjects conveyed a sum not exceeding £2000 for his proper use and behoof, and to be payable to him. The next day (23d) Mr Leeming sent the settlement to Mr Carson:—

"I inclose you this marriage-settlement re-

ingrossed, which now contains a clause empowering Mr Douglas to mortgage the property, and I am endeavouring to effect a loan for that purpose, out of which it is his intention to discharge your claim. Should I not be able to succeed in this purpose, and satisfy you in that way, then Mr Douglas will give you a bond over the property.

"You will be kind enough to get the seisin taken and registered as early as possible, and return the settlement to me."

William Carson to Thomas Leeming, dated 28th July 1847.

"I am favoured with yours of the , in a parcel containing the deed of conveyance or marriage-settlement of Mr G. A. Douglas, in order to pass infettments. So soon as the instruments are completed and registered, you will hear from me."

On the 27th July Mr and Mrs Douglas were married. On the 22d December 1847 Mr Carson again wrote to Mr Leeming:—

"Before transmitting sasines over Mr Douglas' property, along with the marriage articles, would you be good enough to say what is to be done about the £200 lent to Mr Douglas before the marriage, and which you said you thought you could get otherwise. The money must either be paid or a proper security over the property for it."

William Carson to Thomas Leeming, dated 31st December 1847.

"... You will excuse me for being anxious about getting the bond executed, and the matter completed as mentioned in my letter."

Mr Carson continued to press Mr Douglas for a settlement of his debt. Some correspondence took place between them during the year 1848, in which Mr Carson proposed that a house in Wigtown, part of the property comprised in the marriage-settlement, should be sold to meet the debt. To this Mr Douglas appears to have been willing to agree, but Mr Leeming, when consulted, took up the position that Mr Douglas had effectually divested himself of the whole property by conveyance to the marriage-contract trustees. On the 26th January 1849 he writes to Mr Douglas as follows:—

"Mr Carson is quite astray in his notions of a marriage-settlement; it is quite inconsistent to imagine that settled property can be made available for the payment of a husband's debts. The interest of the wife cannot be thus defeated, and her issue also take an interest which may not be destroyed without a breach of trust. There are in the settlement, it is true, powers to mortgage and to sell, and these powers are very properly limited; if they were not so the objects of a settlement would not be attained. I have explained to you the nature and extent of these limitations which preclude the trustees from selling for the purpose of discharging the claim of any creditor. Perhaps it may not be long before you are in Manchester, when I shall be glad to take that opportunity of explaining these matters more particularly to you."

In March 1849 Mr Carson at length took infettment in the subjects contained in the marriage-settlement, with the exception of the house just mentioned. In May 1849 Mr Douglas, whose affairs had become much embarrassed, was induced, under pressure of diligence, to grant a bond and disposition in security for £200 in favour of Mr Carson over the house in question.

In July 1849 Mr Carson, acting with the authority of Mr Douglas, sold the house to the late William Fraser for £206. The disposition bore to be by Mr Douglas, with the consent of Mr Carson, as holder of the bond and disposition in security before mentioned.

The house was subsequently transmitted by William Fraser's trustee to James M'Master, who granted a bond and disposition in security over it in favour of Gordon Fraser.

The sale to Mr Fraser was not directly intimated to Mr Leeming. But in accounts of the trust-estate rendered by Mr Carson at Martinmas 1847 it was referred to. Meanwhile, on 22d January 1849, Mr Leeming wrote to Mr Carson:—

"I have written frequently to you to be kind enough to return to me Mrs Douglas' marriage-settlement, which I have not yet received. May I again beg of you to return it to me without delay, as myself and co-trustee consider ourselves responsible for the custody of it, and the infestments must of course have been taken long since."

After several applications, Mr Carson, in October 1849, returned the marriage-settlement to Mr Leeming, but without the infestments.

Mr Douglas died in 1862, and Mrs Douglas in 1865. There was issue of the marriage—a daughter, Miss Euphemia Douglas, still alive.

In March 1870 an action was raised by the trustees under Mr and Mrs Douglas' antenuptial settlement against Mr Carson, and also against William Fraser, heir-at-law of the late William Fraser, the trustees of the late William Fraser, James M'Master, and Gordon Fraser. The summons concluded for reduction of the bond and disposition in security over the house in Wigtown before mentioned, granted by George Douglas in May 1849 in favour of Carson, the disposition of the house to William Fraser of July 1849, and the whole subsequent titles and deeds affecting the house. There was a conclusion of count and reckoning against the various defenders for the period of their intromission with the rents; and a conclusion of damages against Carson.

The grounds of action were shortly as follows:—That in failing to take and record infestment in the house referred to, in order that it might remain available as a security for his debt, Mr Carson had acted fraudulently, and in violation of his duty as agent. That the subsequent bond and disposition in security by George Douglas was invalid, in respect that it flowed from one *non habente potestatem*, and so with regard to the disposition to William Fraser and the subsequent deeds of transmission.

The pursuers averred that Carson had kept them in ignorance of the fact that he had not infest them in the house in question.

Mr Rankin, one of the pursuers, died shortly after the action was raised.

The Lord Ordinary (ORMSDALE) assoilzied the other defenders, but found Carson liable in £422 of damages.

The ground of his Lordship's judgment against Carson was, that though he was entitled to take all legal measures to enforce payment of his debt, he had engaged to get the marriage-settlement trustees infest in the whole property, and was therefore bound to fulfil that engagement.

Carson reclaimed.

KEIR for him.

R. V. CAMPBELL for the other defenders.

SCOTT and REID for pursuer.

At advising—

LORD DEAS—I shall state, first, the relative position in which parties stood at the time the deed was granted on which this action is founded; secondly, what appears to me to have been the agreement these parties then made; thirdly, by what evidence—and more particularly by what written evidence—that agreement is proved; and lastly, the legal results. In 1847 Mr and Mrs Douglas were engaged to be married. Mr Carson was acting to some extent as the agent of Mr Douglas. He was only a sub-agent. Mr Leeming was the proper agent, under whom Carson was acting. Mr Carson had made some advances to Mr Douglas, for which he held his bill for £200. Mr Leeming was the uncle and the solicitor of the lady. As far as we see she had no other adviser. She took no part in the negotiations. Whatever Mr Leeming engaged for her, reasonably and fairly, she was bound by—she and the issue of the marriage. Mr Douglas was possessed of certain heritable subjects, which seem to have constituted substantially all that he had. The lady had nothing. It does not appear that Mr Douglas was pressed by any one to make over substantially all that he had to the lady. It rather appears that this was his own wish—a further indication of this, that the trust-deed was so drawn as to de-vest Mr Douglas even in his own lifetime. It is more like a desire upon his part to protect the estate against his creditors than to make a provision exacted on the part of the wife. The deed was prepared in the form of a conveyance of that property to Mr Leeming and Mr Rankin, now deceased, as trustees.

That being the position of parties, I come (2dly) to inquire what agreement was made in reference to Mr Carson's debt. There is no great probability that Mr Carson, connected as he was with the negotiations, and knowing that Mr Douglas was about to endow his wife and family, contemplated that part of what the wife and family were to be endowed with was his £200. The agreement seems to have been that Mr Carson's debt was to be in some way or other provided for. The agreement at length took this specific form. The debt was to be provided for in one of two ways—either Mr Douglas was to grant a bond and disposition in security over part of the property, or else the power of borrowing, which was inserted in the settlement as adjusted, should be exercised to the extent of £200. If the first method was adopted, that must be by bond and disposition in security before infestment was passed in favour of the trustees, which would have excluded any such security. 3dly, What is the evidence of this agreement. First, a deed was prepared which did not contain any power of borrowing. The correspondence on that, though not that which rules the case, is still material. It begins 25th March 1847. Mr Carson writes to Leeming, mentioning his debt. On the 7th April Mr Douglas writes to Carson (*reads letter*). On the 27th April Leeming sends the settlement to Carson. On the 4th May Carson writes to Leeming, and on 6th May to Douglas (*reads letters*). On the 13th May Leeming writes to Douglas most distinctly—"I have written to Mr Carson to desire him to withhold the registering of the deed for the present, in order to enable me to carry out the course I have under the circumstances suggested." (His Lordship then proceeded to read the subsequent correspondence, and in particular the letter of Leeming to

Carson, dated 23d July 1847.) This is after the second deed has been executed. Nothing can be more distinct than the intimation, that if a loan cannot be effected for paying up the debt, Mr Douglas will grant a bond over the property. No doubt he tells Carson to take infefment. But he surely does not mean to say that he is to do so without getting his money or a bond. Then come the letters of Carson to Leeming, dated 28th July, 22d and 31st December 1847. A further correspondence follows, in which Mr Leeming insists on the settlement being registered. But had he any right to insist? He had agreed that Carson should get a bond over the property if the money was not paid; and after the thing was done that he agreed to, he had no right to go back on the agreement. The result is that a misunderstanding ensues between Leeming and Carson, and the latter refuses to give up papers connected with the trust.

But the question now before us is, What are the legal rights of parties arising out of the agreement. I do not think it matters much whether Leeming was quite aware of all that Carson subsequently did—the obtaining of the bond, and the sale of the property. But Mr Leeming cannot say that he was kept in ignorance. The income of the trust-estate was paid to him and his co-trustee. In the account rendered Martinmas 1849 occurs the item “interest of £200 bill from May 26 till price of house paid by Mr Fraser.” Mr Carson very properly did not take the bond over the property generally, but over a house which admittedly sold for about £200. I think a knowledge both of the bond and the sale on Mr Leeming’s part is made out; and as regards the bond, I do not see how he could be surprised at that.

There is no necessity for going into the parole evidence. This is really an agreement by the lady, through Mr Leeming, that before the marriage-settlement shall take effect Mr Carson’s debt is to be provided for, either by his being paid or by his getting a bond over the property. That agreement is binding. The rule, that where parties enter into a probative deed its terms cannot be controlled by previous correspondence, has no application here, where it is proved that the deed itself is to be subject to the agreement. There is no difficulty in fact or in law in holding that Mr Carson was entitled to do what he did. There may have been delay on his part, and he may have not been as explicit to Leeming as he might have been. But I cannot find the slightest evidence to support the Lord Ordinary’s findings of fraud or violation of duty on his part. The only question is, Whether in point of law Carson is enabled to maintain his defence? As to his *bona fides* and substantial right to do what he did there can be no doubt. Another view of the case which might be taken is, that, even supposing him not legally entitled to do what he did, still no damage has resulted to the estate. But I rest my opinion on the position that he has done nothing but what in point of law he was entitled to do.

LORD ARDMILLAN—As this action is now presented to us, the only reclamer being Mr Carson, it is substantially an action of damages against the defender Mr Carson. The Lord Ordinary has found him liable in £422 of damages to the pursuer Mr Leeming, trustee under the antenuptial settlement of Mr and Mrs George Douglas.

The facts are few and simple. Mr Carson was

a just creditor of Mr Douglas to the extent of £200 at and prior to the date of the marriage of Mr Douglas, which took place on 27th July 1847; and he was known by Mr Leeming to be a just creditor of Mr Douglas.

After the clear and ample explanations already given, it is not necessary for me to enter on the details of the correspondence and the evidence before us. But I am of opinion that the whole must be considered in order to form a just estimate of the position and the rights of the parties. If this case depended only on the letter by Leeming to Carson of 23d July 1847, and Carson’s reply of 28th July 1847, and the conduct of Mr Carson in reference to the instructions given for the taking and recording infefment on the marriage-settlement, I could not come to the conclusion that Mr Carson, in delaying to take and record the infefment as directed, acted correctly. If the question at issue were narrowed to that point, I could not refuse my assent to some of the observations made by the counsel for the pursuer.

But I cannot, in justice to Mr Carson, deal with the case on that footing. We must consider his position as a creditor of Mr Douglas, and known by Mr Leeming to be so; and we must consider the whole prior correspondence between Mr Leeming, as the uncle, and the agent of Miss Hoghton, the young lady about to be married to Mr Douglas, on the one hand, and Mr Carson, on the other hand, as to some extent agent for Mr Douglas, and also as creditor of Mr Douglas on the other hand.

Looking to this prior correspondence,—the consideration of which in such a question as this is not excluded by any rule of evidence, but is most important,—I am clearly of the opinion which has been already expressed by Lord Deas. The result of my consideration of that correspondence, and of the evidence before us, is, that Mr Carson was, in regard to the security for his debt, misled and beguiled by the letters of Mr Leeming, and that, in delaying to take and record the infefment on the marriage-settlement, he acted in *bona fide*, and not in breach of any honourable or equitable obligation. He was protecting himself from injustice, and extricating himself from a position in which Mr Leeming ought not to have placed him. There are indeed some averments of fraud upon the record. Fraud is alleged by the pursuer both against Mr Carson and Mr Douglas. I am quite satisfied that no fraud whatever has been established, and that the conduct of Mr Carson throughout the transaction, though to some extent indiscreet, was not otherwise than strictly honourable.

I cannot concur in the observations unfavourable to Mr Carson’s conduct which the Lord Ordinary has made. Of his honesty I entertain no doubt; and I think that he has done nothing inconsistent with good faith.

If this case involved in its result and effect nothing more than a question between Mr Leeming and Mr Carson I should really have no difficulty in disposing of it in favour of Mr Carson.

The only difficulty arises from the consideration, that Mr Leeming sues as trustee for Euphemia Douglas, the only child of the marriage, and having the beneficial interest in the property conveyed by the marriage-settlement. But, even in this view of the case, I cannot doubt that the true position of Mr Carson, and the conduct and letters of Mr Leeming, in regard to the marriage-settlement,

must be considered. In Leeming's letter to Carson of 24th June 1847, he writes:—"I have seen Mr Douglas on the subject of your letter of the 5th inst., and we have come to the determination of preparing a fresh draft, or rather altering the late one, so as to give the trustees a power to raise money, which I think I can get for the purpose of discharging your claim, and to answer his immediate necessities. You had better, therefore, return me the marriage-settlement by return of post, so that no time may be lost." That was the first contract prepared. It was afterwards abandoned, and a new contract prepared, with a special clause giving Mr Douglas power to require the trustees to borrow. With reference to the second deed, Mr Carson on 3d July 1847 writes to Leeming, saying:—"I understand the object of the parties now is to remodel the contract, and allow the trustees to have power to borrow money to pay off the £200 due by Mr Douglas, and to borrow more money. I am relying upon Mr Rankin and yourself, as well as the contracting parties, either to get the loan immediately paid, or proper security given for the money. I had a security prepared for Mr Douglas' signature, but have not urged the granting of it, as probably you mean to pay up the loan."

There can be no doubt that the understanding of both these parties was that Mr Carson's debt of £200 should be paid or secured, and not be prejudiced by the settlement, and this is evident, even in the letter of Mr Leeming of 23d July 1847, transmitting the marriage-settlement.

In the face of all this clear indication of the true understanding of the parties, what does Mr Leeming swear when examined as a witness? He says:—"Mr Douglas had been applying to me to raise money, but I do not know that it was particularly for the purpose of paying Mr Carson's debt. I never understood that the £2000 were to be borrowed for that purpose. They were to be raised to enable Mr Douglas to carry on his business as a wine merchant, or any other business that he might choose to engage in afterwards. I am quite sure I understood that no part of it was to be applied in payment of Mr Carson's bill. There is this to be said, however, that if I had raised the £2000 upon the property, it would have been paid to Mr Douglas, and he could then have discharged any debts that he was liable for. I would not have consented to raise that £2000 for the purpose of paying Mr Carson."

It is only necessary to compare the statements in Mr Leeming's letters at and prior to the marriage with the testimony of Mr Leeming, as to what he really meant and understood, in order to be quite satisfied that Mr Carson's just debt was in great danger, and that in protecting himself in the manner he did he was rescuing himself from a position into which he had been misled and beguiled.

Not even the child of the marriage for whom Mr Leeming sues, and whom in that correspondence he may be said to have represented, can take benefit from deception, or take advantage of the position in which Mr Leeming had placed Mr Carson. The result has simply been, that the just debt of Mr Douglas has been paid, and yet we have here an action of damages and an award of damages against the creditor, who has defended himself against a wrong, and has obtained no more than payment of his just debt.

It is important to notice the dates of the pro-

ceedings which we are now considering. So early as February 1847, Leeming knew that Carson was a creditor of Douglas. Very soon after he knew the amount of the debt, and he knew that Carson desired to obtain, and that Douglas was willing to give payment if possible, or at least some security for that debt. The date of the marriage-settlement and of the marriage was in July 1847. The date of the bond for £200, given by Mr Douglas to Mr Carson, is 24th May 1849; and the existence of that bond was known to Leeming very soon after its date. Indeed it appears that he saw the deed, I think the extended deed, before it was executed. George Douglas died in March 1862; Mrs Douglas died in December 1865; and this action was raised on 18th March 1870.

I am not now alluding to any plea of *mora*. No such plea has been stated, and if the pursuer had had on the merits such a case as he has on record alleged, the plea of *mora* would not be applicable. But we are in a question of damages, and in dealing with that question the dates which I have mentioned are important. This action was not raised till 21 years after the date of the bond challenged, and 9 years after the death of George Douglas. The fact that George Douglas, the debtor to Mr Carson and the granter of the bond, and now alleged by the pursuer to have been a party to a fraud in the matter, lived without suit or challenge for 12 years after the date of the bond, is surely not without importance.

While Mr Douglas lived Leeming might have sued him, or if he sued Mr Carson might have called Mr Douglas as a party. But he never did so. Again, Mr Douglas could have required the trustees to grant a bond, and I am disposed to think that Mr Carson could have adjudged Mr Douglas' faculty, under the marriage-settlement, to require the trustees to grant security and pay the debt. But Mr Leeming took no step whatever for many years after Mr Douglas' death. The house property which the bond covered has been sold, and the purchasers have been assuozied. The just debt of Mr Douglas to Mr Carson has been paid, and the question is,—shall this Court, looking to the whole circumstances of the case, and to the conduct and correspondence of the parties, award damages against the creditor who has obtained payment? If no wrong has been done causing damage, no damages can be awarded.

I am of opinion that no damages are due,—that without proof of fraud the pursuer has no case against Mr Carson,—that fraud has been alleged on record,—and that the allegation of fraud is altogether unfounded.

LORD KINLOCH—I am of opinion that the Lord Ordinary has come to a wrong conclusion in this case.

I think the error of his Lordship is to a large extent attributable to his having regarded Mr Carson mainly, if not exclusively, in the character of agent for the marriage-contract trustees, and not having sufficiently kept in view that Mr Carson had a personal interest as creditor of Mr Douglas, the husband, antagonistic to that of the trustees. Perhaps it is to be regretted that these two different capacities were combined in one individual. But Mr Carson is entitled to have it said that he never for a moment concealed his antagonistic interest; on the contrary, brought it forward from the first, and persistently maintained that effect was to be given to it preferentially to the right of the marriage-contract trustees.

The pursuer, Mr Leeming, clearly acted on behalf of the intended wife; and the arrangements made with him must be considered the arrangements on which the marriage-contract was adjusted. The proposition was that the whole property of Mr Douglas should be conveyed to the marriage-contract trustees, to be held by them for the benefit of the wife in life, and the children in fee. Mr Carson distinctly explained that there was a debt of £200 due to him by Mr Douglas, which it was indispensable should be paid off, and the propriety of doing this was not disputed. Two modes were suggested of accomplishing this object. The one was by raising the money under a faculty to borrow £2000 for Mr Douglas' proper behoof, inserted in the marriage-contract as ultimately adjusted. The other was by Mr Douglas granting a bond over one or more of the properties in Mr Carson's favour, which should be preferable to the right of the marriage-contract trustees. In one or other of these ways I consider it to have been fully agreed between Mr Leeming and Mr Carson that the debt to Mr Carson should be wiped off. Mr Leeming was to endeavour to raise the money by loan under the faculty;—the understanding, as I think, being that the transaction was to be so completed that Mr Carson was to receive the money simultaneously with the completion of the marriage-contract arrangements. If this was found impracticable, Mr Douglas was to grant a bond in Mr Carson's favour,—that is to say, a bond preferable to the conveyance in the marriage-contract, for otherwise the transaction would have been meaningless.

That this was the concluded arrangement between Leeming and Carson I think conclusively proved by the correspondence, and in particular by the letter of Mr Leeming to Mr Carson, of date 23d July 1847, sending the marriage-settlement to have sasine taken on it, in which he says:—"I enclose you this marriage-settlement re-enclosed, which now contains a clause empowering Mr Douglas to mortgage the property; and I am endeavouring to effect a loan for that purpose, out of which it is his intention to discharge your claim. Should I not be able to succeed in this purpose, and satisfy you in that way, then Mr Douglas will give you a bond over the property."

Mr Carson delayed for some time taking sasine on the marriage-contract, evidently with the view of his debt being arranged in the one or other of the two ways contemplated, before this step should be taken. He in plain terms gave Mr Leeming to understand that this was his view, as in his letter to Leeming of date 22d Dec. 1847, written five months after the letter of Leeming immediately above quoted. A correspondence ensued, which continued down to May 1849, in the course of which Mr Leeming ultimately took up the ground that Mr Carson's debt was not such as could be made a preferential charge on the marriage-contract funds. I consider this to have been directly at variance with the concluded arrangement made between him and Carson. Mr Carson seems to have thought the same; and in May 1847, by application of some pressure to Mr Douglas, he obtained a bond from him over one of the properties, which he afterwards sold for £206—being just as near as may be the amount of Mr Carson's claim. He took sasine on the marriage-contract in the other properties exclusively of this one.

The present action, not raised till 1870, after the death of both Mr and Mrs Douglas, leaving a

daughter, concludes for reduction of the bond thus taken by Carson, and of the disposition granted on the sale, and subsequent titles; or alternatively for damages, on the ground of the marriage-contract estate having been wronged by Mr Carson's alleged improper proceedings, to the extent of losing this property. The reductive conclusions have been found untenable in a question with *bona fide* purchasers. But the Lord Ordinary has given effect to the conclusion for damages.

I am of opinion that no well-founded claim of damages exists in the circumstances of this case. The alleged ground of damage is that Mr Carson did not perform his duty nor fulfil his instructions, as agent of the marriage-contract trustees, by taking infetment in the whole properties, but improperly reserved one of these as the subject of a bond to himself. But this ground of damages involves, as I have already hinted, entire forgetfulness of the two essential facts: *first*, that Mr Carson was not merely agent for the marriage-contract trustees, but was in his individual capacity a creditor of Mr Douglas for £200; and *second*, that in this capacity he expressly contracted with Mr Leeming that the debt should be paid preferentially to the right of the marriage-contract trustees. The facts being so, I think it is altogether out of the question to maintain a claim of damages for the loss to the marriage-contract estate of the £200, because it was the express arrangement when the marriage-contract was adjusted that the marriage-contract estate should be subjected to this very abatement. There is here no question as to the terms of the marriage-contract, or the competency of controlling these by the evidence of correspondence. The ground of action is that Mr Carson's instructions to take sasine on the marriage-contract were wrongfully frustrated or not fulfilled by him. To decide this question it is necessary to look to the correspondence, in order to discover what his instructions truly were. The correspondence, I think, clearly shows that the step of taking sasine was always subject to the arrangement that Mr Carson's debt was to be preferentially secured. Hence I consider it to be manifest that, in this amount of £200 being abstracted from the marriage-contract estate nothing happened but what from the first was contemplated and arranged on all hands. This makes a claim of damages altogether unfounded. I do not think it necessary to decide whether Mr Carson took, in all respects, the best possible way of effecting his object. My ground of judgment is, that what he did inflicted no damage on the marriage-contract estate; and therefore no claim of damages lies against him.

The Lord Ordinary's interlocutor should, I think, be altered, and judgment of absolvitor pronounced.

LORD PRESIDENT—It is necessary to distinguish carefully between the character in which Mr Leeming pursues this action and that in which he was negotiating in 1847. As the pursuer of this action, he represents the trust and the beneficiary under it, and is not liable to be met by an objection arising from his previous conduct any more than if a judicial factor were suing. In his negotiations he represented the lady with the fullest powers. It is manifest that he was empowered to treat so as to secure the best marriage-settlement he could. He was entitled and empowered to take or give up rights to any amount. Such being his position, it is proved beyond doubt

that he agreed with Carson that before Mr Douglas' estate was transferred to the trustees, Carson's debt of £200 should be provided for in one of two ways—either by being paid out of a loan to be effected by Mr Douglas, or by Carson obtaining a security over a portion of Douglas' estate, which in that event would necessarily be not available for the trust. The correspondence proves the existence of the agreement. Leeming was not entitled to do anything in violation of the agreement. In these circumstances, the trust-deed was executed by Douglas on the 22d July 1847, and the marriage took place on the 27th July. Upon the 23d July Leeming sent the deed to Carson, in order to get infetment passed upon the conveyance in favour of the trustees. Now, if Leeming had made no reference to Carson's debt, and had simply desired him to pass infetment on the deed, and Carson, without reference to the debt, had undertaken to do so, it would have been difficult to say that there had not been a violation of duty on Carson's part. But that was not the position. In the letter transmitting the deed, Leeming says (*reads letter of 23d July 1847*). It is impossible to contend that Leeming wrote that letter in ignorance of its effect. He is an English practitioner, but his letters show that he knew a good deal of Scotch law. If sasine had been taken on the conveyance to the trustees as it stood, it would have been impossible afterwards for Douglas to give Carson a bond over part of the property so conveyed. Leeming must have meant that infetment was not to be taken until it should be ascertained whether Carson was to get his debt paid out of a loan to be raised by Douglas, or was to get a bond over the property. The only other alternative is that he meant to cheat Carson. He had positively agreed that Carson's debt was to be provided for in one of two ways; and if he meant to get Carson into the position of having taken infetment on the whole, he would have been acting dishonestly. I prefer to take the first alternative, that Mr Leeming intended no such wrong. Carson does not acknowledge receipt till 28th July. I am not well satisfied with his letter of that date, followed, as it was, by long silence. It would have been more satisfactory, and more consistent with the frank way in which he had acted up to this point, to have written back—"You have sent this deed to be completed by infetment, but I cannot follow your instructions until my debt has been provided for." But I cannot but think that the position of Leeming, and his silence for eighteen months, without making any inquiry after the sasine, goes far to show that he understood what Carson was about. He did not expect infetment to be taken; and that for the simple reason that there was no final arrangement about the debt. This view is confirmed by two letters written by Carson in the interval—22d and 31st December 1847. These letters are quite inconsistent with the idea of sasine having been passed. Even in his letter of 22d Jan. 1849 Leeming expresses no anxiety about the sasine, but asks for the trust-settlement. From this time I cannot help believing that parties were aware that the settlement had not been completed by infetment. When Carson proceeded in 1849 to obtain from Douglas a bond and disposition in security, not over the whole property, but over a part just sufficient to secure his debt, and afterwards to sell that part, I cannot think that he was committing any fraud. He was asserting his own right. If he had not

asserted it in this way it would have been competent to him in another. If Leeming had written, "I insist on infetment being taken on the settlement," Carson might have secured himself otherwise. No infetment having been taken up to this time, he might have adjudged the whole property for his debt. But he took payment in a more amicable way, and in a way less expensive to Douglas. By the bond and disposition in security which he obtained, he has operated nothing more than payment of his own debt. In May 1849, when he took the bond and disposition in security, it would have been better, for his own sake, if he had intimated to Leeming what he had done. But I cannot say that there was any fraud or dereliction of duty in not doing so.

While Carson was acting in two characters—partly as agent in carrying through the marriage-settlement, and at the same time as a creditor—he made no concealment that these two characters co-existed, and that he intended to prefer his own claims to the trust. I have come to the conclusion that to award damages to Carson is practical injustice. The trust is not, and never was, entitled to this £200, in whatever form it stands. The person who in law stands vested in it is Carson, and I see no reason in equity for reducing the transaction. The £200 belonged to the beginning to Carson, and never to the trust.

The Court recalled the interlocutor of the Lord Ordinary, and assolizied Carson as well as the other defenders, with expenses.

Agent for pursuer—John Walls, S.S.C.

Agents for Mr Carson, and for William Fraser, and Fraser's Trustees—Tods, Murray, & Jamieson, W.S.

Agents for James M^cMaster and Gordon Fraser—Matland & Lyon, W.S.

Thursday, June 8.

SECOND DIVISION.

HAMILTON v. STEELE.

Suspension—Partnership—Effect of Termination of Contract—Diligence on Bill between Partners.

Where partnership at will was terminated as at 10th February 1870, circumstances in which *held (diss. Lord Cowan)* that a bill dated 17th March 1870, which was the renewal of a bill between partners to be paid from the proceeds of goods sold, was truly a bill between partners, with reference to a partnership transaction, and not a bill drawn and accepted as between individuals; was not affected by the previous termination of the partnership, and therefore could not form the ground of summary diligence.

By missive dated 3d August 1869, Hamilton and Steele entered into a contract of copartnership for the manufacture of shale oil at Broxburn. Steele was to advance £1350 and Hamilton £300 for the purposes of the concern. The partnership was at will—there being no term of endurance in the missive, and it did not contain any provision as to the name of the firm, but an existing lease of the works where it was intended to carry on the business was to be obtained in Hamilton's name solely. Hamilton was the managing partner, and carried on the business for some time, but Steele constantly complained that Hamilton would not keep