Case 70. John Campbell, of Calder, Esq; - - *Appellant*;
Ruth Pollock, *alias* Campbell, - - *Respondent*.

7th *June* 1720.

Personal and transmissible.—A sum appointed by a father to be paid to a son, his heirs, executors, or assignees, at a day certain, was transmissible by the son, though he died before that day.

Pactum Illicitum.—An estate is settled by a father upon his son and his heirs, reserving a life-rent to a certain amount, and by the son's marriage-contract the estate is declared to be of a certain annual value: two years after the marriage the son by a deed declares that the estate was not worth so much *per annum*, but that this was done to please the wife's friends, and he grants bond to pay or allow the father to charge a sum upon the estate for provisions to his younger brothers and sisters, which should be in full of legitim: this was not *contra fidem tabularum nuptialium.*

Implied Discharge.—After granting this bond, the [illegible] made a new disposition of the estate to the son, in same terms with the marriage-contract; but this was not a discharge of the bond, allowing the father to charge the estate with childrens' provisions.

Fiar absolute limited.—In a son's marriage-contract it is covenanted, on the part of his father that lands and hereditaments of a certain annual value were to be settled and assured so as that the same should come to and be vested in the eldest son of the marriage, and other lands and hereditaments to remain to the son's use, reserving the father's life-rent of part: the son was fiar, and by his bond bound the heirs of the marriage.

BY articles of marriage in the English form, executed at London, in September 1688, between Sir Hugh Campbell of Calder and Alexander his eldest son (the appellant's grandfather and father) of the one part; and Lady Susanna Lort of Turnham Green, widow, and Elizabeth Lort her daughter, of the other part; in consideration of an intended marriage between the said Alexander and Elizabeth, and of a considerable marriage-portion, it was *inter alia* agreed as follows:

That the said Sir Hugh should within three months after the said marriage well and sufficiently settle and assure manors, lands, and hereditaments of a good, sure, and indefeasible estate of inheritance in fee simple, in possession, of the yearly value of 1000*l.* sterling, over and above all charges and reprises, to the use of Alexander the son for life, without impeachment of waste; remainder, as to part, to the intended wife for life for her jointure; remainder to the first and every other son of that marriage in tail male, with several other remainders over: and that the said Sir Hugh should in the same three months well and sufficiently settle and assure other manors, lands, and hereditaments, within Scotland, of the yearly value of 1500*l.* (over and above the first mentioned lands of 1000*l.*) to the use of the said Sir Hugh for life, and after his decease to the use of the said Alexander Campbell for life, without impeachment of waste, remainder to the use of the first and every other son of the said marriage in tail male, with several remainders over; and that in the deeds of settlement to be made of such estate there should be contained such provi-

soes,

ſoes, covenants, and agreements as ſhould be neceſſary for carrying the ſaid articles into effect.

The marriage accordingly took effect, and in November, 1688, Sir Hugh executed a diſpoſition, conveying and granting to the ſaid Alexander Campbell, and Elizabeth Lort his ſpouſe, and longeſt liver of them two in conjunct fee and life-rent, and to their heirs male and of tailzie, heritably and irredeemably, certain lands in Argyllſhire therein mentioned: and Sir Hugh, by the ſame deed, conveyed and granted to his ſaid ſon Alexander, and his heirs male and of tailzie, certain other lands therein mentioned. And he declared and obliged himſelf that all the ſaid lands were worth 2500*l.* per annum; and Sir Hugh reſerved his own life-rent in lands of 1500*l.* per annum.

The whole of the lands, ſo ſettled, were not worth the 2500*l.* which they were ſtated to amount to in their annual value, nor were they free from incumbrances. The appellant ſtates, that they were only worth about 1700*l.* per annum, and charged with debts to the amount of 10,000*l.*

In June 1690, the ſaid Alexander the ſon executed a deed, in which, after reciting the ſaid marriage-articles and conveyances, it is mentioned, "That the ſame were only entered into to pleaſe "the friends and lawyers of the ſaid Lady Suſanna Lort, that "there might be no ſtop to the ſaid marriage, and upon full aſ-"ſurance given by the ſaid Alexander to his father Sir Hugh, "of diſcharging him of that covenant, that the eſtate ſhould be "clear of all incumbrances, and likewiſe to give him a power to "charge the ſaid eſtate with proviſions for younger children." In performance of this promiſe, the ſaid Alexander, the ſon, releaſes Sir Hugh from the covenant or obligation to make the lands ſettled 2500*l.* per annum free of all debts, and accepts of the eſtate as it was, ſubject to and charged with all the debts of the ſaid Sir Hugh both real and perſonal; and likewiſe gave his bond with a power or faculty to Sir Hugh to charge the eſtate ſettled with 2000*l.*, to be paid to ſuch of his younger children as he ſhould by any deed under his hand appoint and direct; and the ſaid Alexander obliges himſelf to pay all the debts then owing by Sir Hugh, and all ſuch debts as Sir Hugh ſhould contract with his conſent, and likewiſe the ſaid younger children's proviſions; upon condition nevertheleſs that this proviſion ſhould be in full ſatisfaction of ſuch part and ſhare as they might claim of their father's perſonal eſtate after his deceaſe. This deed was a private tranſaction between the father and ſon, of which Lady Suſanna Lort had no notice.

In October 1691, Sir Hugh executed another ſettlement of his eſtate, in the ſame terms with that in November 1688, particularly engaging that the ſame was of the yearly value of 2500*l.*, free from all incumbrances; and upon this laſt deed infeftment was taken. The reſpondent mentions, that the occaſion of executing this ſecond deed was, that certain lands had by miſtake been omitted in the firſt. Neither this nor the former ſettlement were in the nature of a ſtrict entail by the law of Scotland.

Alexander the ſon died before his father Sir Hugh in 1696, leaving two ſons, Gilbert (ſince deceaſed) and the appellant. In November 1705, Sir Hugh by a deed executed by him, appointed 1000*l.* ſterling, with intereſt for the ſame from the date thereof, to be paid to Capt. George Campbell his younger ſon, (then wholly unprovided for) his heirs, executors, or aſſignees, at Martinmas 1710, by the heirs, executors, and repreſentatives of the ſaid Alexander: and he gave another proviſion of 10,000 merks Scots to his daughter Anne.

This Capt. George Campbell, having married the reſpondent, with whom he had a portion of 1700*l.* which was laid out in the purchaſe of a commiſſion and military equipage, on the 16th of July 1706 made his laſt will and teſtament in writing, whereby he gave and aſſigned to the reſpondent the ſaid ſum of 1000*l.*, with the intereſt thereof; and made her ſole executrix of his will. He ſoon after went to Spain, on military ſervice, and was killed at the battle of Almanza; and the reſpondent confirmed his teſtament in due form.

Payment of the ſaid bond being refuſed to the reſpondent, ſhe brought an action before the Court of Seſſion thereon, and in February 1712 obtained a decree of conſtitution againſt Gilbert Campbell, the appellant's elder brother, and afterwards in January 1713, a decree of adjudication for the ſame. Having thereupon brought an action of mails and duties, ſhe was now oppoſed by the appellant who had ſucceeded to the eſtate upon his brother's death, and who brought an action for reduction of the ſaid bond. Before commencing this latter action the appellant ſerved himſelf heir of proviſion and heir male in ſpecial to his father, in the barony of Calder, &c.; and at ſame time proteſted that ſuch ſervice ſhould not be conſtrued as a paſſing from the marriage-articles, or ſubjecting himſelf to the payment of his father's or grandfather's debts; and the grounds upon which he inſiſted for reduction of the reſpondent's claims, were, that the obligee dying before the term of payment of the bond, the ſame thereby became void; and that it was alſo void as being granted *contra fidem tabularum nuptialium.*

Upon report of the Lord Ordinary, the Court on the 7th of December 1717 "Found that the bond granted to Captain George "Campbell, his heirs and aſſignees, in anno 1705, payable at "Martinmas 1710, is binding, and was aſſignable by him not-"withſtanding he died before the ſaid term of payment; and "found, that the bond granted by Alexander to his father in "anno 1690 is not reducible as being *contra fidem pactorum nup-"tialium*, albeit it narrates a promiſe given by him to his father "before the marriage in reſpect the ſame was granted long poſ-"terior to the marriage; and that the grantor thereof by the "marriage-articles was provided to the free and full adminiſtra-"tion of the eſtate; and that the granting of a bond for ſuitable "proviſions to unprovided children was a rational deed; and "found, that Sir Hugh Campbell's diſponing the eſtate poſterior "to the bond, did not import a diſcharge thereof, in regard the

"bond

" bond did oblige the ſaid Alexander the grantor perſonally."— To this interlocutor the Court adhered on the 8th of January thereafter.

The appellant reclaimed, and the Court, upon the 8th of February 1718, " found, that the fee of the lands and hereditaments " mentioned in the marriage-articles was thereby provided to " Alexander, notwithſtanding of the clauſe, that lands and here- " ditaments of 1000*l.* ſterling were to be ſettled and aſſured, ſo " as that the ſame ſhould come and be veſted in the eldeſt ſon " of the marriage, and other lands to the yearly value of 1500*l.* " after the deceaſe of Sir Hugh and Alexander were to be ſettled " and aſſured ſo, that the ſame ſhould effectually remain to the " uſe of the ſaid eldeſt ſon of the marriage: but found, that the " private communing betwixt Sir Hugh and Alexander before " the marriage, whereby Sir Hugh was enabled to grant bonds " of proviſion to his younger children, and Alexander to become " obliged to the payment of theſe proviſions, and to undertake " other burdens not mentioned in the ſaid marriage-articles, was " *in fraudem pactorum nuptialium*; and with regard to the bond " granted by Alexander (though long poſterior to the marriage) " on the narrative of the ſaid prior communing, and in implement " thereof, bearing that the ſaid Sir Hugh's engagements and " obligements in the ſaid articles, in ſo far as they were by the " bond libelled, receded from, were only made and granted by " him in compliance with the ſaid Lady Suſanna Lort and her " lawyers and friends, that there might be no ſtop of the marriage, " found that the ſaid bond is not binding on the heir male of the " marriage."

Againſt this interlocutor the reſpondent reclaimed, and the Court, on the 17th of July 1718, " found that the condition in " the bond, that the proviſions to be granted to the children " ſhould be in ſatisfaction of their legitim and executry that " might have fallen to them, is a ſufficient onerous cauſe to ſup- " port the bond, albeit eventually there were no free moveables, " the father having reſerved a fund of 1500*l.* ſterling, yearly, " which might have afforded a fund for proviſions to the children." The reſpondent alſo ſet forth by petition to the Court, that Sir Hugh had, ſubſequent to the marriage-articles, paid debts contracted before that time of a greater value than the ſum in queſtion, which ought to be looked upon as a valuable conſideration for the ſame, and prayed diligence for proving that fact: the Court, on the 5th of December 1718, " ordained the appellant " or his doers to confeſs or deny the fact, viz. That Sir Hugh " did, after the marriage, pay debts contracted before to the value " of the debt ſued for." The appellant petitioned againſt this interlocutor, praying the Court to give judgment upon the points in diſpute, without putting him to the neceſſity of a ſearch through his papers to enable him to acknowledge or deny Sir Hugh's payment of ſome debts: but their lordſhips, on the 12th of December 1718, " granted diligence at the reſpondent's in- " ſtance before anſwer, for proving that Sir Hugh did pay debts

" contracted before the marriage, after the marriage-settlement, " to the value of the debt sued for."

A proof was accordingly adduced, and the Court, on the 29th of January 1719-20, pronounced the following interlocutor: " Having considered the several petitions and answers of the said " parties, and the probation adduced by the respondent, and the " whole writings and documents in process, especially the mar- " riage-articles, whereby the free and full administration of the " estate was agreed to be settled in the person of the said Alex- " ander Campbell, with the bond by the said Alexander to Sir " Hugh, containing a faculty to the father to grant competent " provisions to his unprovided children, not exceeding 2000*l.* " sterling, in full satisfaction of their legitim and portion natu- " ral, and all that could fall to them by their father's decease, " and the valuable provisions and life-rent reserved to the father " by the said marriage-articles, whereby he had a sufficient " fund to have provided for his children, if the said bond and fa- " culty had not been granted, *adhere* to the said interlocutor of " the 17th of July, 1718; and find that the bond of provision in " favour of Captain George Campbell, the respondent's husband " is a binding obligation on the appellant; and therefore assoilzie " the respondent from the said process of reduction at the instance " of the appellant against her."

Entered 3 Feb. 1719-20.

The appeal was brought from " several interlocutory sen- " tences or decrees of the Lords of Session of the 7th of " December 1717, and the affirmance thereof the 8th of Ja- " nuary following; also from the interlocutors of the 8th of " February 1718, the 17th of July and 12th of December 1718, " and also from another interlocutor of the 29th of January " 1719-20."

Heads of the Appellant's Argument.

By the express words of the marriage-articles, Alexander the son was only to be *tenant for life, with remainder to his first and every other son;* and these articles must still be the rule, for the deeds of 1688 and 1691, executed by Sir Hugh, whereby Alexander was made tenant in tail, were not in pursuance of the said articles, but a direct violation of them.

The deed executed by Alexander the son, releasing Sir Hugh of any of the covenants in the marriage-articles, and empowering him, notwithstanding thereof, to charge the estate with debt, was, as the appellant apprehends, a direct fraud against the articles: for as Alexander, who was bound jointly with Sir Hugh in these articles, could not release Sir Hugh's covenants in favour of the issue of the marriage; so Sir Alexander being by the articles intended to be only tenant for life, he could not do any thing, nor contract any debt, to be a charge on the estate.

The grant or assignment of all Sir Hugh's personal estate could not be any valuable consideration to support that deed, even though Alexander could have done any thing to encumber the estate; because the personal estate was of no value, Sir Hugh being

being indebted to the iſſue of the marriage in about 25,000*l.*, the lands ſettled being deficient 800*l.* per annum of the value he covenanted they ſhould be, and beſides charged with 10,000*l.* of debt.

Nor is it of conſequence, that Sir Hugh might after the marriage have paid debts to the value of 2000*l.* For, were that true, (which is ſtill denied), yet he did no more than he had covenanted to do as by the articles the eſtate ſettled was to be free from all incumbrances.

Heads of the Reſpondent's Argument.

The appellant contended in the court below, that the bond, being only payable at Martinmas, 1710, and the obligee dying before that time, it thereby became void, and that theſe words, "with power to the ſaid Captain George Campbell and his "above-written, after elapſing of the term of payment, to aſk, "crave, &c. *and diſpoſe of the ſame*," did imply, that the reſpondent's huſband could only diſpone or aſſign the bond after the term of payment was elapſed. But it is plain from the bond itſelf, as well as from the circumſtances in which the parties were at the time of granting it, that the bond is abſolute, bearing no condition, only the term of payment ſuſpended to a day certain, which never imports a condition. There is a great difference between a bond of proviſion, payable at a preciſe time in ſuch a year, and one payable to children at a certain age, which laſt has been underſtood to be conditional; but this bond is payable not only to George Campbell himſelf expreſsly, but to his heirs, executors, or aſſignees. He and the reſpondent were married a conſiderable time before the date of the bond; ſo that it was not to be imagined that the father deſigned that the bond ſhould become void, if his ſon died before the time of payment; and that his wife and children, if there had been any, ſhould have wanted ſubſiſtence, which muſt have been the conſequence, if the bond were conditional. But the plain reaſon why the payment of the principal was ſuſpended till the year 1710, was that, at the date of the bond, the appellant's elder brother was a minor, and if he had lived would have been of age before Martinmas 1710: and therefore Sir Hugh, leſt his guardians ſhould have thought themſelves under any neceſſity of paying the principal ſum for the eaſe of the eſtate, ſuſpended the payment of it till his grandchild ſhould be of age.

The granting of the faculty, by Alexander to Sir Hugh, was a rational deed; nothing being more juſt, than that the ſon, on whom the father had ſettled his whole, and even ſo great an eſtate, ſhould conſent to ſo ſmall a proviſion as one year's rent thereof to his five brothers and ſiſters; nor is it every burden impoſed by a ſon upon an eſtate diſponed to him and the heirs of the marriage, that can be reduced as *contra fidem*; but only a burden fraudulently impoſed, without either an onerous or rational cauſe. And as the deed was rational, ſo it was onerous, ſince it was granted with this expreſs condition, that it ſhould be in lieu

lieu and ſatisfaction to thoſe children of their ſucceſſion to their father's moveable or perſonal eſtate, which was wholly to pertain to the ſaid Alexander, and might have amounted to more than the ſum thereby provided to the younger children.

Deeds againſt the faith of marriage-articles muſt be done either before or after the contract, and before the marriage; but the granting of this faculty was a deed done deliberately two years after the marriage, when the ſaid Alexander was under no reſtraint, or apprehenſion of his marriage being hindered by his father. The ſettlement was already made and perfected, and the ſaid Alexander had thereby the abſolute fee of the eſtate, and might have contracted what debts he pleaſed thereon, there being no irritant or reſolutive clauſe in the ſettlement againſt it.

The appellant is ſerved not only heir of proviſion in general of the marriage, but heir male in ſpecial to his father, in the barony of Calder, &c. and ſo cannot quarrel any of his father's voluntary and gratuitous deeds, much leſs ſuch an onerous and rational deed as the preſent.

The appellant contended that the faculty granted by Alexander was diſcharged by the diſpoſition 1691, with abſolute warrandice, which reſerved no faculty to burden the eſtate. But this diſpoſition, 1691, was only to ſupply an omiſſion in the former diſpoſition as to ſome of the lands that had not been inſerted therein, as appears by the narrative whereon it proceeds. The warrandice in that diſpoſition can never be interpreted ſo as to warrant againſt the ſaid Alexander's own deeds, as thoſe proviſions in effect were, though the father had the power of diviſion. The deed granted to the father contains not only a faculty to burden the lands, but alſo a perſonal obligation on the ſon to pay proviſions to the extent of 2000*l.*; ſo that if the faculty to burden the lands were extinguiſhed, yet the perſonal obligation would ſtill remain.

As a further onerous cauſe for ſupporting the ſaid bond, the reſpondent did prove in terms of the probation granted to her, by her witneſſes and vouchers produced in the court below, that Sir Hugh had, after the marriage, paid above 2500*l.* ſterling for debts of that family, contracted before the marriage, and might have proved much more; all which he might have given to his younger children if he had looked upon them as unprovided for.

Judgment, 7 June 1720. After hearing counſel, *It is ordered and adjudged, that the petition and appeal be diſmiſſed, and that the ſeveral interlocutory ſentences or decrees therein complained of be affirmed.*

For Appellant, *Rob. Raymond. Will. Hamilton.*
For Reſpondent, *Tho. Lutwyche. Sam. Mead.*

In the Dictionary of Deciſions, vol. 2. p. 22. voc. *Pactum illicitum*, the interlocutory judgment of the Court of Seſſion (8th February, 1718), finding the bond granted in this caſe to have been *contra fidem tabularum nuptialium*, and therefore not binding on the heir of the marriage, is ſtated as an exiſting caſe. But that judgment was afterwards reverſed by the Court of Seſſion and ſuch reverſal affirmed upon appeal.