

REPORTS

OF

CASES ON APPEAL FROM SCOTLAND.

GABRIEL NAPIER, Writer in Edin- } *Appellant*;
burgh, - - - - - }
PETER NAPIER of Napierstoun, } *Respondents*.
and MARGARET YOUNG, his }
Spouse, - - - - - }

1726.

NAPIER
v.
NAPIER.

*29th April, 1726.**

BANKRUPT.—*Act 1621, c. 18.*—A debt having been made over by a person, in favour of his wife, *stante matrimonio*, and by her assigned to a second husband, as part of her tocher; the assignation was found not reducible at the instance of a creditor of the first husband.

Costs—L.80, given to respondents.

JOHN LIDDELL executed a conveyance of his lands of Craigannet, to himself in liferent, and to Francis Napier (father of the appellant), and his heirs in fee, with a clause of absolute warrandice. The deed recites, as the consideration for granting it, No. 1.
Nov. 16, 1693.

* This date is within the period embraced by Mr. Robertson's Reports. The case is one of those in which Mr. R. was unable to procure the printed papers.

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that Napier had paid certain sums of money, and performed many good services to the granter; and it contains a proviso that his issue male might redeem the same, on payment of the sums so advanced, and failing his issue male, that he might burden it to the amount of [*blank*], for provisions to his daughters. Napier was infest thereon, but his infestment was not recorded till January 1694.

Dec. 1693.

Shortly after granting the above deed, Liddell married Margaret Young (the respondent), and by the marriage articles, in consideration of 1000 merks to be paid by her father, the half of the said lands of Craigannet were settled upon her for

Dec. 20, 1693.

jointure. She was infest, and her sasine duly re-

Dec. 27, —

corded. Thereafter, Liddell assigned to her the 1000 merks due by her father. By another deed, reciting that she was to defray his sick-bed and funeral expenses, he conveyed to her a bond for 600 merks; and, lastly, he executed in her favour a general assignment of half his moveables.

May 1699.

He died, and Margaret having entered into possession of the half of the lands of Craigannet, was married to Peter Napier (respondent), and by her marriage articles, conveyed to him her whole effects, real and personal; and, upon her father obliging himself to pay to him 2000 merks in name of portion, she, with her husband's concurrence, granted to him a discharge of the 1000 merks previously due by him.

Nov. 1721.

Gabriel Napier (the appellant) raised an action in order to set aside these several assignments under the act 1621, in regard they were granted in

defraud of his claim of damages, under the clause of warrandice in his father's disposition, which was prior in date.

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The conveyance of one-half of the moveables was reduced, in respect it had not been granted for any onerous cause. That of the 600 merks bond was sustained, in respect it was granted for the funeral expenses, &c.

Dec. 23, 1721.

July 13, 1722.

The appellant further insisted for repayment of the 1000 merks (assigned by Liddell to Margaret, and by her to her present husband, and paid to him), on the ground that the assignation was reducible, under the act; and likewise that it was a deed by a husband to his wife, *stante matrimonio*, and therefore to be presumed gratuitous and revocable. The Lords by various interlocutors found, "that Peter Napier, the husband, having received payment of the sum of 1000 merks for an onerous cause, viz. in satisfaction of a part of his wife's tocher, was not liable to repeat;" and they likewise found "Margaret Young not liable to repeat the 1000 merks received by her husband."

The appeal was brought from "several interlocutors of the Lords of Session in Scotland, of the 10th and 20th November 1722; the 25th and 28th June; the 20th November; and 13th December 1723; and of the 11th July 1724."

Entered
Jan. 28, 1726.

Pleaded for the Appellant:—The appellant was a lawful creditor to Liddell, by the warrandice contained in the disposition, in as far as the half of the lands had been possessed by his widow since his death.

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By the act 1621, a gratuitous assignment is reducible, at the instance of any anterior creditor; and by the constant interpretation of that statute, a conveyance in favour of a conjunct person, more especially a wife, is presumed gratuitous, and such conjunct person obliged to prove a valuable consideration; which in this case has not been done.

The appellant's disposition was not gratuitous, as is proved by the recital of the deed itself. But even assuming that it had been gratuitous, this could not import a faculty to make any provision for a wife out of the lands disposed, the personal estate being sufficient for that end. Moreover, the appellant does not dispute the jointure provided for the wife; but still there is no doubt, that were Liddell himself alive, or had an heir, the disponee, in right of that clause of warrandice, would be a creditor against them to the extent of that incumbrance. Had this jointure existed at the time of Napier's disposition, Liddell might have granted warrandice against it in the way that he has done; and although such warrandice could not create a power to impeach the jointure, it would certainly give a claim of damages against his other effects.

Margaret is liable to repeat the 1000 merks, because the assignment from her first husband to her was null and reducible under the act 1621. By her father's granting his obligation to her present husband and paying it up, the case was the same in law, as if at the date of the marriage articles she had received the money from her father, and delivered it to her husband, who had lent it back to her father upon his bond; seeing that upon her

discharging her father, he became bound to her husband, who accepted of his obligation in satisfaction *pro tanto* of her portion.

At all events, Margaret is liable in repetition of the sum after the dissolution of her present marriage in case of her surviving, as she cannot pretend that she received it for any valuable consideration, but only *donatione inter virum et uxorem*, which of all donations is the most easily reducible.

Peter Napier, the husband, is liable for the 1000 merks, because a purchaser from a conjunct person, who has received a right from a bankrupt, is by law in the same condition with the conjunct person, whether he purchased for a valuable consideration or not. And the argument is stronger in the present case, where the right made to Margaret Young bears expressly that it was gratuitous (“for love and favour,”) which quality of his author’s right Peter cannot pretend to have been ignorant of.

Pleaded for the Respondents:—The conveyance to the appellant’s father being voluntary, he can scarcely be considered as a creditor on the warrantice within the meaning of the act.

As to the 600 merk bond, it was assigned for a valuable consideration; the Judges being fully satisfied by the proofs brought, that the respondent, Margaret, had paid her husband’s death-bed and funeral expenses, &c. to the value of L.1130, 7s. 4d. Scots.

It did not appear that the 1000 merks paid to the respondent, Peter, was the same 1000 merks which had been assigned to the respondent, Margaret, by her first husband, there having been no

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direct translation of it by her to him. It was a part of 2000 merks stipulated by the marriage articles to be paid to Peter by Margaret's father, in full of all she could claim by his decease, and it was received as such.

But supposing that the 1000 merks had been in consideration of the assignation to Margaret by Liddell, her first husband, yet as Peter received it for a valuable consideration, as a part of his wife's portion, and as there did not then appear, nor for twenty years after, any ground of debt against the assignee, he ought not to be liable to repeat, because there is in the act 1621, an express saving of the rights of all persons purchasing even under such voluntary deeds, "for just and competent prices, or in satisfaction of their lawful debts," from such voluntary assignee; and the case of the respondent, who accepted the 1000 merks in payment of his wife's portion, is expressly within the saving of the act.

Judgment
 29th April,
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After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and that the several interlocutory sentences therein complained of be, and the same are hereby affirmed; and it is further ordered, that the appellant do pay, or cause to be paid to the respondents the sum of L.80 for their costs in respect of the said appeal."

For Appellants, *J. Willes* and *Wm. Lee*.

For Respondents, *C. Talbot* and *W. Hamilton*.