

‘ said Advocate is not made a party to this ap-
 ‘ peal ; nor was the cause finally determined by
 ‘ the said Lords of Session :’

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 OF MONTROSE
 v.
 ERSKINE.

“ It is therefore ordered, &c. That the said pe-
 “ tition and appeal be, and is hereby dismissed
 “ this house ; and that it be, and is hereby remit-
 “ ted to the Court of Session in Scotland, for that
 “ Court to proceed in the cause according to law
 “ and justice, and to determine thereupon, with
 “ respect to the points which remain undetermin-
 “ ed, and that afterwards the parties on either side
 “ be at liberty to appeal to this House, as they
 “ be advised.”

GEORGE, MARQUIS of Annandale, - *Appellant* ;
 The EARL and COUNTESS of Hopetoun, *Respondents*.
et è contra.

15th February, 1739.

MUTUAL CONTRACT.—PASSIVE TITLE—ACT 1695, c. 24.—Cir-
 cumstances of an obligation incurred by an apparent heir,
 under which the next heir, passing him by, and serving to a
 remoter ancestor, was found liable, without relief against the
 executry, or other separate estate of the apparent heir.

[Elchies, No. 12—*voce* Mutual Contract.]

JAMES, Marquis of Annandale, succeeded to the No. 45.
 title and estate of Annandale in 1721. Shortly
 afterwards, by the death of his younger brother
 William, the succession to the maternal estate of
 Craigiehall opened to his sister, the Countess of
 Hopetoun, who was the first substitute then in ex-
 istence. . But the right of the Countess was de-

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feasible, upon the existence of a second son of her brother James. However, notwithstanding the Countess's right, Marquis James continued in possession of both estates in virtue of a mutual agreement, and in 1726 he executed a settlement of the estate of Annandale in favour of Lord Hope, her eldest son, with certain other substitutions.

In the event of Lord Hope's not succeeding to the estate, it was provided that the entail of Craigiehall should be registered, and that the Countess should be served heir of entail. On the other hand, she, with the consent of her husband, discharged the Marquis of all claims he had for the bygone rents, and assigned to him the rents for the year 1725, and all subsequent years during their joint lives ; but under certain conditions. Whence the present question arose, of which one was as follows :—“ But if it should happen the said Marquis to have no heirs of his own body to succeed to him in the estate of Annandale, and that neither the Countess, nor any of her children, should happen to succeed to him in the estate of Annandale, then, and in that case, any person who should succeed to that estate, not being procreated of his body, should be obliged not only to refund to the Countess, and her foresaids, the said rents of Craigiehall ; to be received by the said Marquis during the joint lives of him and her, at the rate of L.450 yearly, with interest ; the rent of the year 1725, bearing interest from Whitsunday, 1726, and so forth as to subsequent years, but also the said heirs succeeding to the estate of Annandale, who should not be procreated of the Marquis's body, should be further bound to pay to the said Countess, and her foresaid, the

“ further sum of L.1225, or, at the option of the
 “ Countess, a sum equal to half of the rents more.”

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Marquis James died in 1730 ; and, upon his death, Marquis George, the appellant, (his younger brother by a second marriage) brought an action of exhibition and reduction against Lord Hope, to set aside the said settlement of 1726, as made by a person who had never been feudally vested in the estate, so as to enable him to make the said deed ; and in this action, after a variety of procedure in the Court of Session, and in the House of Lords, he ultimately succeeded, and obtained decree setting aside the only feudal right to the estate of Annandale, which Marquis James had made up, and consequently also reducing the said settlement made by Marquis James in favour of Lord Hope. Upon this, the respondents brought the present action against the appellant for payment of the rents of the estate of Craigiehall ; viz. L.450 for five years, being the time Marquis James was in possession of that estate, from the year 1725, until his death, together with the interest, and likewise for the sum of L.1225, which was to be paid upon the same contingency. The pursuers insisted, that although the title of Marquis James had been reduced, yet, as he had the appearance of a title, creditors might contract with him *bona fide*, and they founded upon the act 1695, for obviating the frauds of apparent heirs. In defence, it was maintained that, although the appellant had served himself heir to his father Marquis William, who was a remoter predecessor than Marquis James, yet the debts in question were not of the description protected by the act, that they were voluntary, and not contracted for a valuable consideration ;

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and this was particularly the case with regard to the sum of L.1225, which had been agreed upon; and the appellant also maintained that, even supposing it to be a just debt, yet the other representatives of Marquis James, and especially the Countess of Hopetoun, his executrix, were also liable, and that he was entitled to relief against her.

Dec. 17, 1725.

The Lord Ordinary found, ‘ That the defender
‘ (the appellant) was liable in performance of the
‘ articles of agreement libelled, not by virtue of
‘ Marquis James’s feudal title, since that title had
‘ been reduced, but by virtue of the act 1695, as
‘ having passed by his immediate predecessor,
‘ Marquis James, (who was more than three years
‘ in possession) and as having served himself to a
‘ remoter predecessor; and found, that the arti-
‘ cles of agreement was an onerous transaction,
‘ and therefore repelled the defence that the same
‘ was gratuitous, and did not fall under the said
‘ act: and in respect of the conception of the said
‘ articles of agreement, found the present Marquis,
‘ the defender, had no ground of relief competent
‘ to him against the executory, or any other se-
‘ parate estate belonging to the said Marquis.’

June 24, 1736.

The Lords found, ‘ That notwithstanding the
‘ reduction of Marquis James’s title, the one-
‘ rous debts of the said Marquis may affect the es-
‘ tate of Annandale; and they adhered to the in-
‘ terlocutor of the Lord Ordinary, finding the
‘ transaction between Marquis James and the Earl
‘ and Countess of Hopetoun, an onerous transac-
‘ tion; but they found that in as far as the pur-
‘ suer founded their claims upon the act of Par-
‘ liament, 1695, relief was competent to the de-

‘ fender against the executory, or any other separate estate of Marquis James, as accords.

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‘ The Court (6th July, 1737) adhered as to the finding that the transaction in question was onerous, and that such onerous deeds affected the estate ; and remitted to the Lord Ordinary to hear parties upon the point of relief.’

Upon the report of the Lord Ordinary, the Court found, ‘ that so far as the Marquis of Annandale is liable on the act, 1695, there is relief competent to him against the separate estate ; but found, that Marquis James, having stood infeft by charter and seisin, which infeftment was effectual to creditors, that he, having charged the present Marquis, the heir succeeding to him in that estate, in favour of the Countess ; that Lord Annandale had no relief against the separate estate.’

An appeal was brought by the Marquis of Annandale from those parts of the above interlocutors which found the transaction in question onerous ; and that he was liable to perform the same, by virtue of the act 1695 : and it also complained of that part of the last interlocutor, in so far as it found that, by reason of Marquis James’s feudal title, he had no relief against the separate estate.

Entered
Feb. 17, 1738.

A cross appeal was brought by the Earl and Countess of Hopetoun from those parts of the above interlocutor, which found that the appellant, the present Marquis, in so far as he was liable upon the act 1695, had relief competent to him against the separate estate.

Entered
March 20.

ON THE ORIGINAL APPEAL.

Pleaded for the Appellant (the Marquis :)—Marquis James never enjoyed the estate by any good

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feudal title. His infeftment has been finally reduced. He therefore had no power to burden the appellant with debt, least of all to cut off his relief. The appellant does not represent him in any way; nor is he liable for any of his debts except such as may fall under the statute 1695.

Now the statute does not apply: for Marquis James did not enjoy the estate as apparent heir, but under a bad title, constituted by charter and seisin, which have since been reduced, and therefore the case is not within the act 1695. But, besides this, the respondent, the Countess of Hopetoun, was no creditor of Marquis James within the meaning of the act; for, as against him, she could never have made any demand; and, as against the appellant, her demand is not onerous, (*i. e.* for a valuable consideration, and such only are within the act,) but merely gratuitous and fraudulent, which appears from the nature of the transaction, and all the circumstances attending it.

Pleaded for the Respondents, (the Earl and Countess of Hopetoun:)—The debt claimed is for a full and valuable consideration. The Countess of Hopetoun had an undoubted right to the rents of Craigiehall from 1724, to the death of Marquis James; and those rents, having been received by the said Marquis, are, without doubt, a full consideration for the claim in so far as regards them. With regard to the sum of L.1225, this is also an onerous debt, being for the previous rents from 1721, when the succession opened, which would have amounted to a greater sum.

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ON THE CROSS APPEAL.

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Pleaded for the Appellants, (the Earl and Countess of Hopetoun:)—The statute 1695, so far as it subjects the heir to the debts of the immediate predecessor, gives the creditor the same claim against the estate of the deceased debtor, as he would have had if the debtor had made up a regular feudal title. In that case, the next heir could neither contest the debt, nor have any claim of relief; and the present statute has not pointed out, or intended to give him any such relief. Besides, it being the evident intention of the deceased person, that his executor and other separate estate should be free, and the particular estate charged with the debt, it would be unjust and contrary to this intention, to allow the heir passing by his immediate predecessor to throw this burden upon the executry.

Pleaded for the Respondent, (the Marquis:)—The act 1695 was not passed for the sake of the debtor, nor for the relief of any separate estate belonging to him, but as a further security to fair and onerous creditors; and therefore if the heir, for the advantage of the executor, be obliged to pay a debt properly moveable, he has an undoubted claim of relief upon the executry, to which the debt properly belonged.

After hearing counsel, ‘it is ordered and adjudged, that such parts of the interlocutor of the 24th January, 1736, and 31st January, 1738, whereby it is found, ‘That in as far as the respondents, the Earl and Countess of Hopetoun, founded their claim upon the act of Parliament 1695, and the appellant was found liable on the said act, relief was competent to him against the

Judgment,
Feb. 15, 1739.

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“ executry, or any other separate estate of Mar-
 “ quis James,’ be, and are hereby reversed ; and it
 ‘ is hereby declared, that from the nature of the
 ‘ pursuer’s demand, and the frame of the articles,
 ‘ January 1727, no such relief is competent in the
 ‘ case to the appellant, the Marquis ; and it is
 ‘ farther ordered and adjudged, That so much of
 ‘ the interlocutor of the 8th February, 1738, where-
 ‘ by it is found ‘ that the said Marquis is liable to
 “ the respondents for the sum of one thousand,
 “ two hundred and twenty-five pounds sterling,
 “ over and above the five years’ rent, in terms of
 “ the libel and articles of agreement libelled on,’
 ‘ be, and the same is hereby reversed ; and it is
 ‘ hereby further declared, that the said appellant
 ‘ is not liable for the said sum of L.1225, or at the
 ‘ option of the said Countess, to such sum as should
 ‘ be equivalent to half of the rents of Craigiehall,
 ‘ to be uplifted and received by Marquis James, at
 ‘ the rate of four hundred and fifty pounds, men-
 ‘ tioned in the said articles, the same appearing to
 ‘ be gratuitous as to those particular sums ; and it
 ‘ is further ordered and adjudged, that the other
 ‘ interlocutors complained of, be varied, cassed,
 ‘ and rectified, agreeable to this determination ;
 ‘ but that the said interlocutors, in all other re-
 ‘ spects, be, and are hereby affirmed.’

For Appellant, *James Erskine* and *W. Murray*.

For Respondents, *Ch. Areskine* and *J. Sharp*.