ALEXANDER HAMILTON, Appellant. No. 6.

JAMES RICHMOND and Others, Trustees of ANDREW LINDSAY, Respondents.

Oath—Loan.—Under a reference to the oath of party, whether a certain sum of money had been advanced in loan, found, (affirming the judgment of the Court of Session), That the oath did not prove that the money had been advanced in loan, and therefore the defender was entitled to absolvitor.

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2D DIVISION. Lords Reston and Cringletie.

HAMILTON raised, in the Sheriff-Court of Ayrshire, an action against Lindsay, for repayment of L.190, alleged to be the amount of a loan made by Hamilton to him. Lindsay insisted that it was not a loan, and denied that he ever promised to pay it. In the course of the subsequent proceedings parole proof was adduced as to the fact, and the declaration of Lindsay taken. The Court of Session, before whom the case had come by advocation, in respect the libel concludes 'for payment of a sum of 'money, alleged to have been given in loan to the defender, 'which was not capable of being proved by witnesses,' assoilzied the defender, without prejudice to Hamilton insisting in any other action which he might be advised to raise, and reserving to Lindsay his defences.

Hamilton having raised a new action, Lindsay alleged res judicata; denied that he had borrowed the money; and stated, that it had been put into his hands with the view to retire a bill, so as to enable Hamilton to be elected trustee on a sequestrated estate for which there was a competition. The Lord Ordinary, 'in respect of the judgment in the former action, and that the 'pursuer makes no reference to the oath of the defender, sus-'tained the defences;' and on advising representation and answers, adhered. Hamilton petitioned for alteration, or at least to be allowed to put in a special condescendence of the facts and circumstances alleged by him, and that the answers thereto might be subscribed by Lindsay himself. Thereafter the case having been taken up on condescendence and answers, their Lordships, on the 21st January 1820, refused the petition, and adhered to the interlocutor complained of: found Lindsay entitled to expenses since the date of the first interlocutor of the Lord Ordinary, and remitted to the Lord Ordinary to receive a reference to oath.

By a minute of reference Hamilton offered to prove, 1. That in the beginning of January 1812, John Deans, writer in Kil-

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marnock, held a bill, drawn by James Boreland, upon and accepted by Lindsay and James Richmond; and that this bill, with the interest then due upon it, amounted to about L.190. 2. That in consequence of the bankruptcy of the acceptor Richmond, the defender Andrew Lindsay having become liable to pay the full amount of this bill and interest, had sundry conversations with Hamilton upon this subject; in the course of which he stated, 'that he had received some notice or hint, that 'he would soon be called on by Mr Deans to relieve this bill, 'but that he had no funds provided for this purpose. 3. That 'in consequence of this arrangement, the defender, Andrew 'Lindsay, came to the house at which the meeting of Rich-'mond's creditors for electing the trustee on his estate was to be 'held; and on the forenoon of the day of the election, the pur-'suer met with him in a room of this house, and had the sum of 'L.190 ready to deliver to him, on the footing above explained; 'but before he had given the money to the defender, he was sud-'denly called out of the room upon particular business. A few 'minutes afterwards, Mr John Gregg, of Greenock-Mains, came 'to him for the money, and the pursuer being particularly en-'gaged, gave Mr Gregg the sum of L.190 to deliver to the defen-'der, who, after counting it, went to Mr Deans and retired the 'bill above-mentioned;' and this was afterwards amended by 'saying, that the pursuer agreed to accommodate the said defen-'der, Andrew Lindsay, for a short time with a loan of money 'for this purpose,' that is, for payment of the bill. Lindsay deponed, 'That he was joint acceptor of a bill along with 'James Richmond to James Boreland for L.166, or L.167 'sterling of principal, besides interest, and which bill was 'granted before Richmond's bankruptcy: That after James Bore-'land's death, his son and widow had some dispute about the 'succession to the property, and the bill was put, at least the 'deponent knows that it was in the hands of John Deans, writer 'in Kilmarnock, at the time the deponent paid it in Mauchline: 'That he does not recollect the period when James Richmond 'became bankrupt, but he recollects of a meeting of his creditors 'at Mauchline for the purpose of choosing a trustee on his estate, 'and which meeting the deponent attended: That the deponent 'was not ranked as a creditor on Richmond's estate: That the 'deponent was not asked to attend that meeting by any person, 'but went there from curiosity, and to look from him: That the 'pursuer did not ask him or forbid him to attend that meeting: 'That the deponent went into the room where Mr Deans was,

'where he remained about two minutes, and was sent for to the room where the pursuer and others were; but he cannot say how long he remained in that room: That while in that room the pursuer three different times offered the deponent money to retire the bill before-mentioned from Mr Deans, and this he did by holding out a bundle of notes, and telling the deponent it was for that purpose, all of which times he refused the money: That the evening before the election of trustee, the pursuer called upon the deponent, at his own house, about nine o'clock at night, and wished him to retire the bill before-mentioned, and to give it to the pursuer, as he supposed, for supporting his interest as trustee, to which the deponent then said that it was not convenient to advance the money, to which the pursuer answered, that he would assist the deponent to retire the bill: That the day of election, and after the pursuer had offered three times to lend him money to retire his bill, on the last of these occasions the pursuer left the room as fast as he could, and some others followed him: That there remained in the room with the deponent William Wallace in Moosback, William Wylie in Brigland, William Allan then in Wallacetown, John Gibbie of Middlethird, and James Richmond, the bankrupt: That shortly after the pursuer had left the room as above, John Gregg, then in Greenock-Mains, came into the room where the above persons and the deponent were: That the deponent did not see John Gregg, either in the house or out of it, that day, before he came into that room as above: That Mr Gregg took two of the persons present as witnesses that he would lend the deponent money to retire the above bill, to which the deponent answered, that he would borrow money from him nor no man to retire the bill, as he was not going to do it at the time: That John Gregg pressed the money on the deponent, but which the deponent refused, and gave him the same answer as before: That Mr Gregg took out a bundle of notes, put them into the deponent's hands, and desired him to go and retire his bill, take it home with him, and keep it, for that he the deponent would never be more troubled with it: That when Mr Gregg came into the room as above, he had the money in his hand as he supposed, at least the deponent observed a bundle or parcel in his hand. Being specially interrogated, depones, That he did not know, and could not believe that the money Mr Gregg gave him as above came from the pursuer, as twelve hours before that the pursuer told him that he had not the money, otherwise he would have made Deans give up the bill;

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‘ ponent in Murray’s inn, and which he three times refused, was
‘ the day following that upon which the pursuer made use of the
‘ expression as above. Being specially interrogated, if when Mr
‘ Gregg came into the room, and offered the deponent the money,
‘ which he afterwards accepted of, did he or did he not believe
‘ it was the money of the pursuer? depones, That he took no
‘ thought about them, and cannot say ay or no to the question:
‘ That before Mr Gregg gave the deponent the money as above,
‘ he had not spoken to him for some years. Interrogated, if
‘ when he received the money from John Gregg as above, the
‘ deponent conceived he was under an obligation to Mr Gregg
‘ or the pursuer? depones, That the deponent considered he was
‘ under no obligation either to the pursuer or any other man:
‘ That he never had any dealings with Mr Gregg before: That
‘ he retired the bill from Mr Deans before he left the inn. In-
‘ terrogated, if in any of the conversations the pursuer had with
‘ the deponent about assisting him in advancing money to retire
‘ the bill, did he the pursuer ever give the deponent to under-
‘ stand, that he was to give the deponent a present of the money?
‘ depones, That he never did: That he never said to any person
‘ that he borrowed money from the pursuer to retire the bill.
‘ And being interrogated, if the deponent did not say to James
‘ Merry, cooper in Mauchline, that he had borrowed money from
‘ the bailie (meaning the pursuer) to retire the bill from Mr
‘ Deans? depones, That he never did say so to him or any other
‘ person. Interrogated farther, if, since he got the money as afore-
‘ said, he ever expressed his wish to borrow a sum of money to
‘ repay the pursuer, or that he was on the look-out for money
‘ for that purpose? depones, That he never did: That he did
‘ not vote in the election of trustee on the above occasion: That
‘ when the pursuer called on him in his house at Mauchline, on
‘ the night before the election, and offered to assist him to retire
‘ the bill, the deponent said he would advise upon it. Interro-
‘ gated, whether he did or did not understand, that the money
‘ which he admits to have received from John Gregg was given
‘ in loan? depones, That he understood the money was given
‘ him by Mr Gregg to get the bill from Mr Deans.’

Parties were heard upon the import of this oath, and the Lord Ordinary pronounced the following interlocutor:—‘ The Lord
‘ Ordinary having, on the 14th instant, heard parties’ procura-
‘ tors on the import of the defender’s deposition, and whole
‘ cause, and having since advised the whole, finds that the de-

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'fender, with James Richmond, late of Auchincloech, granted a bill for about L.166 to James Boreland in Burnaan, which, after the death of the last, came into the hands of John Deans, writer in Kilmarnock: That James Richmond having become bankrupt, and his estate having been sequestrated, a competition took place for the office of trustee for his creditors, for which the pursuer was one of the candidates. Finds, that the pursuer wished and urged the defender to retire from Deans the said bill, probably believing that Deans would vote against the pursuer, and would not therefore part with the bill till after the election, unless he was required so to do by one of the acceptors, who had right to retire it. Finds, that the pursuer, on the night before the election, offered to accommodate the defender with money, with which he might retire the bill, which offer was not accepted; and on the day of the election he repeated that offer three times; which was as often refused. Finds, that after this, on same day, the pursuer, by his own admissions, sent John Gregg, then in Greenock-Mains, to the defender again, to offer to him money wherewith he might retire said bill, which Gregg, in presence of witnesses, offered to lend to the defender for that purpose, and which the defender again refused, telling Gregg that he would borrow money from him nor no man to retire his bill, as he was not going to do it at the time. Finds, that on this Gregg gave the defender the money, and advised him to go and retire his bill, take it home with him, and keep it, for the defender would never more be troubled with it; and that the defender did accordingly retire said bill. Finds, that in one part of the defender's deposition, in answer to a question whether he thought himself under an obligation to the pursuer or to Mr Gregg for the money, he deponed, that he considered himself under no obligation to the pursuer, or any other man; and, in another part, in answer to a question, whether the pursuer gave him to understand that he, the pursuer, was to give the defender a present of the money, the defender deposed that he never did; and, lastly, being interrogated whether he did or did not understand, that the money which he admits to have received from John Gregg was given in loan, the defender depones, that he understood that the money was given to him by Mr Gregg to get the bill from Deans. Finds, that from the combination of these different passages of the defender's depositions, that the true import of the whole is, that the defender did not only not agree to accept of the loan from the pursuer, and become bound for it

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'to him by an obligation to repay it, separate from and inde-
'pendent of said bill, but did positively refuse to receive such a
'loan; and that the purpose for which the money was advanced
'was, that he should retire the bill, and thereby prevent Deans
'voting on it against the pursuer in the election of a trustee on
'Richmond's estate. Finds, that in the course of the pleading it
'was stated for the defender, and not denied by the pursuer, that
'the said bill, when retired, was discovered to have been written
'on an improper stamp, and was therefore null, and had never
'been demanded to be given up by the defender to the pursuer
'since it had been retired, which fact of its nullity must have
'been probably unknown at the time the bill was retired. Finds,
'therefore, that this action is a plan devised to render the defen-
'der liable for the money due by said bill, by means of an alleg-
'ed separate loan positively denied by the defender, and there-
'fore assoilzies him, and decerns. Finds him entitled to expenses,
'the taxation of which remits to the auditor of Court, reserving
'to the pursuer, if he shall be so advised, to demand delivery of
'said bill from the defender, and payment of its contents, as
'accords.'

The defender, Lindsay, died before a representation against this judgment was advised. The process having been transferred against Lindsay's trustees, the Lord Ordinary pronounced this interlocutor:—'The Lord Ordinary having advised this repre-
'sentation, and considered the state of the process, as now wa-
'kened and transferred, sees that the fact alleged by the defen-
'der at the pleading, viz. that when the bill in the hands of
'Deans was retired, it was found to be written on unstamped
'paper, and thereby void; and as it appears to the Lord Ordi-
'nary, that the true purpose of advancing the money to the de-
'fender was to enable him to retire that bill, which would in all
'probability have been demanded from him if it had been worth
'demanding, and not to establish a debt against him indepen-
'dent of that bill; and that it would be unjust to make him pay
'a debt indirectly, when he was not liable for it directly under
'the bill; of new refuses this representation.' Hamilton peti-tioned; but the Court, on the 23d of January 1823, adhered.*

The Judges were of opinion, that although the precise nature of the transaction did not clearly appear, yet, as the pursuer had not proved a loan, he could not succeed in his action.

Hamilton appealed.

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* See 2. Shaw and Dunlop, No. 134.

Appellant.—The facts are established which prove that Lindsay knew that the money was given to him by the appellant in loan, and not as a donation. But even had that not distinctly appeared, it must be held to be in loan, and not in donation. Donation is never presumed, and here it is not even alleged. The money was not given either to oblige Lindsay to pay a debt not directly exigible, nor to procure his vote. March 8. 1825.

Respondents.—It is not maintained that the money was a donation. The loan libelled has been disproved. Instead of the appellant having substantiated any obligation to repay this money, it has been proved that the appellant, when the money was advanced, came under an express obligation that Lindsay should be no more troubled with the debt.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of be affirmed, 'with L.100 costs.'

Appellant's Authorities.—Stair, Inst. 1. 8. 2.; Bankton, Inst. 1. 9. 20.; Ersk. Inst. 3. 3. 92.; Mor. Dict. 1151.; Fount. Dec. vol. ii. p. 172. 644.; Ross *v.* Fidler, Nov. 24. 1809, (F. C.).

J. RICHARDSON—J. CAMPBELL,—Solicitors.

JAMES DUKE of ROXBURGHE, Appellant.—*Denman—Keay.* No. 7.

JAMES WAUCHOPE, W. S. Trustee, and Others, residuary Legatees of John Duke of Roxburghe, Respondents.—*Sol.-Gen. Hope—Sandford.*

Et e contra.

Tailzie—Bona Fides.—An heir of entail in possession having redeemed a wadset, (part of the entailed lands, and wadsetted under powers in the entail), by taking an unconditional discharge and renunciation, containing a procuratory of resignation ad remanentiam, which he, as superior, executed in his own hands; and having, on the supposition that he held it in fee simple, disponed the wadset to a trustee mortis causa; and the trustee having drawn the rents of the wadsetted lands for several years without objection, and paid the same to parties having right under the trust, by whom they were consumed;—Held, (affirming the judgment of the Court of Session), 1. That the wadset right was thereby extinguished, and did not remain a separate estate or right in the person of the reverser, which he could convey to his heir-at-law; and, 2. That both the trustee, and parties to whom the rents were paid, were protected by bona fides from repetition.

IN 1662 William Earl of Roxburghe, in virtue of powers under an entail executed by Earl Robert in 1648, granted a wadset right over the lands of Wester-Grange, and other parts March 9. 1825.

1ST DIVISION.
Lord Alloway.