[*5th April* 1834.]

No. 10. ARTHUR JOHN ROBERTSON, Appellant.—*Lord Advocate (Jeffrey)*.

MRS. LETITIA ETTLES, Respondent.—*Dr. Lushington.*

Stamp Act—Bill.—Held (reversing the judgment of the Court of Session), that a bill written on a stamp of lower value than required by law is null as a ground of action; and circumstances in which this was not obviated by other documents being libelled on.

1st Division.
Lord Corehouse.

THE respondent, Mrs. Ettles, raised a summons in 1830 before the sheriff of Inverness-shire against the appellant, setting forth " That where the said Mrs. Le-" titia Ettles, pursuer, by her bill, dated the 27th day " of February, in the year 1816, drawn by her upon and " accepted by Masterton Robertson, Esq., of Inches, " advocate, now deceased, ordered him, twelve months " after date, to pay to her, or order, the sum of " 145*l.* 19*s.* 4½*d.* sterling money, for value received, as " the said bill bears; and which bill will be produced " at the first calling hereof, and is herein holden as " repeated brevitatis causâ: That on the 10th day of " February in the year 1817 the said Masterton Robert-" son executed a trust deed for behoof of the said " Letitia Ettles, pursuer, and his other creditors, in " favour of David Welsh, Esq., writer to the signet

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" in Edinburgh, wherein the said bill and sum of
" money therein contained, and a separate debt of 35*l.*
" sterling due to the pursuer, are recognized and ranked
" as just and true debts due by him; and upon the
" precept of sasine contained in the said trust deed
" the said David Welsh was duly infeft and seased, as
" trustee for the use and behoof of the pursuer and
" the said other creditors, whereby the pursuer became
" a heritable creditor for her said debt; and accord-
" ingly she acceded to the said trust, and signed the
" deed of accession along with the other creditors on the
" 11th day of February in the year 1817, and she was
" entered and ranked accordingly, as the said trust
" deed, infeftment thereon, and deed of accession
" thereto in themselves more fully bear: That in or
" about the year 1822 the said David Welsh, as trus-
" tee foresaid, by the hands of the late John Mac-
" tavish, solicitor in Inverness, factor on the estate of
" Inches under the said David Welsh, made payment
" to the pursuer of the foresaid separate debt of 35*l.*,
" and interest due thereon, but could not, for want of
" funds at the time, pay the foresaid bill, which with
" the contents thereof was made a real burden, and
" became heritably secured upon the lands and estate
" of Inches in manner foresaid: That the said Master-
" ton Robertson having died in the month of October
" 1822 years, the said David Welsh, notwithstanding,
" still continued the management of the estate as
" trustee for the pursuer and the other creditors; but
" in the year 1825 he renounced and gave up, or at
" least made over, the foresaid trust in favour of
" Arthur John Robertson, Esq., now of Inches, the
" eldest son and heir of the said Masterton Robertson,

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" his father, with the burden, however, of the pursuer's " debt as contained in the said bill, trust deed, infeft- " ment, and deed of accession; and thereupon the " said Arthur John Robertson made up titles, &c., " whereby, and by his other actings and behaviour, he " represented and now represents his said father as " heir foresaid, and also as executor and universal " intromitter on all the passive titles known in law; " &c., and thereby subjected himself liable to the pur- " suer for payment of the said bill, and principal and " interest therein contained, and afterwards rendered " a heritable debt in manner foresaid; as the said " renunciation and reconveyance by the said David " Welsh, and the foresaid titles expede by the said " Arthur John Robertson, in his character of heir and " executor foresaid, in themselves also more fully bear." She therefore concluded, that "the said Arthur John " Robertson, defender, as heir and executor foresaid, " and as otherways representing the said Masterton " Robertson, his father, on one or other of the passive " titles known in law, and thereby subjecting himself " to the payment of all his father's just and lawful " debts, and particularly the aforesaid debt due to the " pursuer in manner aforesaid, ought and should be " decerned and ordained, by decreet of me or my " substitute, to make payment to the pursuer, the said " Mrs. Letitia Ettles, of the foresaid principal sum of " 145*l.* 19*s.* 4½*d.* sterling, and the legal interest thereof " since the same fell due and in time coming during " the notpayment contained in the foresaid bill, trust " deed, and infeftment, and relative deed of accession, " and renunciation and reconveyance, all above-nar- " rated."

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In defence the appellant pleaded that the bill was prescribed, in answer to which the respondent maintained, on various grounds, that the plea was elided.

The record being closed, the sheriff pronounced this interlocutor:—" Sustains the plea of prescription, but " allows the pursuer to prove the debt contained in " the bill libelled on, and that the same is resting owing " by the writ or oath of the defender." Mrs. Ettles thereupon brought an advocation; and the appellant, for the first time, pleaded that as the bill was written on a 4*s.* 6*d.* instead of a 5*s.* stamp it was null, and could not form the ground of an action.

The Lord Ordinary pronounced the following interlocutor:—" The Lord Ordinary having considered the " closed record, &c. advocates the cause; alters the " interlocutor of the sheriff; decerns against the re- " spondent in terms of the libel; finds him liable in " the expenses incurred in this and the inferior Court; " and remits the account," &c.

" *Note.*—In the inferior Court the only objection " stated against the claim of the advocator was, that the " bill by which the debt had been originally constituted " was extinguished by the sexennial prescription. After " the parties came to discuss the reasons of advocation in " this Court, the respondent found out a new plea, viz. " that the bill was written on a 4*s.* 6*d.* instead of a 5*s.* " stamp. Either of these objections might have been " sufficient in point of form to cast the action, if it had " proceeded exclusively on the bill. But that is not " the case. The libel narrates a variety of documents " importing a recognition of the debt, and concludes, " not merely for payment of the bill, but of the debt as " vouched by those documents.

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" On the merits, it is enough to say that the sum now " claimed, with the addition of another sum on open " account, and formerly paid, was given up by the " truster in the list of his debts; that it was expressly " stated to be due in the trust deed subscribed by him, " and also in the infeftment taken upon it by the trustee; " that it was recognised during all the proceedings " under the trust by the trustee and his agents, as " appears from the minutes of the creditors, and letters " produced; that it makes part of the sum stated as " unpaid in the accountant's report at the close of the " trust management; and that it is again mentioned " in the deed of reconveyance in favour of the respon- " dent. It is true that the trust deed contains the " usual clause of style, reserving right to the truster, " the trustee, and the creditors, to object to the debts " as therein enumerated. But that reservation can " import nothing more than that they shall be entitled " to object within a reasonable time, and while the " claimants have an opportunity of proving their debts. " In this case no objection was stated by the truster in " his lifetime, by the trustee or the creditors during " the trust management, or by the respondent, the heir " and representative of the truster, till this action was " raised, thirteen years after the date of the trust deed. " After so long a period, during which the advocator " was induced to believe that her debt, as ranked, was " admitted, and after the agent for the trustee had ex- " pressly written to her that it was sufficiently constituted, " the Lord Ordinary holds that the respondent is " barred, both by delay and by personal exception, " from sheltering himself under the clause in question. " This plea is particularly strong, as it applies to the

" defence of the sexennial prescription, which did not " expire till five years after the date of the trust deed, " to which the advocator acceded, and which not only " recognized the debt, but stipulated for a supersedere " of diligence.

" But it is no less applicable to the defence upon the " stamp laws. If that objection had been stated in the " truster's lifetime, the advocator might have had an " opportunity of constituting the debt, if not by other " documents, at least by a reference to his oath—an " opportunity which she has lost in consequence of " thirteen years delay, and the belief which, from the " conduct of the parties, she was warranted to entertain. " It is said that the bill was not lodged with the trustee, " and this seems to be admitted; but he may have " inspected it in the hands of the advocator, or of " Mackenzie, or his partner, who acted for her, and " who were also agents for the trustee. At any rate, it " was incumbent on the trustee to have examined the " document before he suffered so many acts of recog- " nition to take place, and that during a period of so " many years. And if this defence would have met the " trustee acting for behoof of competing creditors, it " must be still stronger against the son and representa- " tive of the truster since the retrocession of the trust " estate.

" The case of Crawford's trustees (25th May 1827), " on which the respondent relies, in so far as it is " applicable, is a precedent against him. The bill " there was found prescribed against certain parties " whose names were upon it, although it had been " lodged under the sequestration of another obligant, " but at a meeting different from that which the statute

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" requires, and not in the hands of the trustee or sheriff " clerk, as directed. But with regard to the bankrupt " himself, with whose trustee, under a private trust, it " had been lodged and recognised, no doubt was enter- " tained by the Court that the sexennial prescription " was barred."

This interlocutor having been adhered to by the Inner House on the 15th of February 1833*, Robertson appealed.

Appellant.—The summons expressly libels on the bill as the ground of the debt sought to be recovered, and as it is null under the stamp laws it could not be founded on, either as the ground of action, or as the voucher of a debt.

Even if it could be held that the summons does not libel exclusively upon the bill, still the bill, in disposing of the merits of the case, must be laid out of view, and consequently there is no legal evidence to prove the debt in favour of the respondent.†

Respondent.—In the circumstances of this case, the appellant is barred by personal exception, and by delay, from pleading the defence upon the stamp laws, against the bill.

The bill is written and dated at " Inches," the residence of the acceptor, Masterton Robertson. From the appearance of the writing, as well as by the presumption of the law, this bill is the individual production, as it was

* 11 S. & D., 397.

† Other pleas were maintained, but as the judgment was pronounced in respect of the objection to the stamp they are not reported.

the legal obligation, of that person. It was by him delivered to the respondent as the security and voucher of her debt, of which of course she had no warning to preserve any other evidence.

No objection was taken upon this ground on the part of Masterton Robertson, between the date of the acceptance and the accession of the respondent to the trust; and accordingly no new or more perfect obligation was required by her upon that occasion.

Neither was any exception stated to the bill, during the life of Masterton Robertson, and the respondent has therefore lost the opportunity, otherwise available, of referring the subsistence of the debt to the oath of the debtor himself.

Even after the death of Masterton Robertson a total silence was observed as to the defect of stamping, as well as to all other objections, not only during the whole proceedings of the trust, but after the retrocession of the estate to the appellant, and down to the debate before the Lord Ordinary in the Outer House. All other means, therefore, originally competent to the respondent for establishing her debt, either by parole testimony, or by subsidiary writings, are now unattainable or extinguished; and as, during all that period, the respondent was called upon for no other evidence of her debt than that furnished by the bill, but was held and treated upon all occasions as an undoubted creditor in virtue of that document alone, the appellant cannot now object to it as a ground of claim.

But even in the absence of the bill there is enough in the facts alleged, and the other documents produced, to support the conclusion at the instance of the respondent for payment of the debt.

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LORD CHANCELLOR.—I need not trouble your Lordships with any observations in this case. It is quite clear that the interlocutors cannot stand; they must be reversed, but simply on the ground of the stamp act.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed.

JOHN MACQUEEN—DAVID CALDWELL and SON, Solicitors.