[*27th August* 1833.]

No. 2. JOHN MILLER, WILLIAM RAY, and WILLIAM THOMSON, Appellants.—*Lord Advocate* (*Jeffrey*)—*Wilson.*

MRS. MOODIE or ANDERSON, Respondent.—*Murray*—*Stewart.*

Obligation.—Circumstances in which held (affirming the judgment of the Court of Session), that a party who had granted an obligation to discharge a bond, and received part of the money, was relieved from implement of it on restoring the money.

Writ.—Question, Whether an obligation to grant a discharge of a heritable bond requires to be holograph or tested?

Stamp.—Question, Whether an unstamped obligation can be stamped after the cause has been heard in the Appeal Court?

1st DIVISION.

Lord Meadowbank.

THE respondent and her sister held a heritable bond over a property for 2,000*l.*, which they assigned in 1821 to a third party and received the amount, the respondent's share being 1,500*l.* She was at this time a widow, and had two children, to whom James Anderson, their paternal uncle, was served tutor at law.

The appellant, John Miller, was proprietor of certain heritable subjects in the village of Milnethort, over which he had granted an heritable bond for 275*l.* in favour of the other appellant, Wm. Ray. An arrangement was in 1824 entered into between the agent of the respondent and Mr. Ray, by which it was agreed to

transfer this bond to the respondent on payment of its amount to Mr. Ray. She alleged that in sanctioning this agreement she trusted implicitly to her agent, who was nearly related to Mr. Anderson, the tutor. The transfer was accomplished by a deed of assignation in favour of the respondent in life-rent, and to her two children nominatim, " and their respective heirs " and assignees, in fee," on which infeftment was taken. The money was part of the above sum of 1,500*l.* Thereafter both her children died, and their uncle Mr. Anderson was their heir at law. The subjects over which the bond extended were sold in 1828; and on the 1st of May of that year, the respondent addressed to Mr. Ray a letter in these terms:—

" Sir, I hereby acknowledge that you have now and " formerly fully and finally settled and paid to me the " bond and disposition in security granted to you by " John Miller, portioner in Milnethort, for 275*l.*, and " assigned by you to me: And I declare that I have no " farther claim under the said bond. And I hereby " oblige myself to subscribe and deliver a formal and " valid discharge as soon as the same can be prepared."

This document was neither stamped nor holograph, but the authenticity of it was not denied, and it was admitted that part of the money was paid to her. A few days afterwards the other appellant, Mr. Thomson, became bound to the purchaser that a discharge should be granted by the respondent.

It was then insisted, that, in order to grant a valid discharge, a title must be made up to the fee by Mr. Anderson, as the heir at law of the children, and that the respondent was bound to get this accomplished, or otherwise to make up a title in her own person. She

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resisted this; whereupon the appellants brought an action before the Court of Session, in which they concluded that she should be decerned "to make up a complete " and valid title in her person to the foresaid heritable " debt, and to grant and deliver to the pursuers a " formal and valid discharge and renunciation thereof, " and of the bond and disposition in security, &c. such " discharge being granted at the pursuers expense."

In defence she pleaded that she had been altogether misled as to the form of the title—that she had always supposed that the absolute fee belonged to her, and that her children were to succeed her only on her death; and that she never intended that their heirs should, in the event of their dying without issue, acquire right to the bond. She farther objected that the document founded on was not binding on her, being improbative and not stamped. The Lord Ordinary, on the 25th of May 1830, "sisted process for three weeks, in order " that the defender may take the steps necessary to " enable her to furnish a regular and valid discharge of " the bond mentioned in the libel." And on the 2d June he pronounced this other interlocutor:—" The " Lord Ordinary, in respect the defender maintains " that she is not bound at her own expense to take any " steps for making up and completing a title to the " heritable bond in question, and therefore declines to " take any steps under the interlocutor of 25th May " last,—repels the defences, and decerns against the " defender in terms of the whole conclusions of the " libel; finds expenses due," &c.

The respondent reclaimed to the Inner House, and renewed an offer she had formerly made to repay the money which she had received; whereupon the Court,

on 4th March 1831, pronounced this interlocutor:— "Recall the interlocutor reclaimed against; and in "respect of the offer made by the defender on the 19th "December 1828 (which offer has now been repeated "by her counsel), of consent, decern against her for "said sum, with interest due thereon since the 1st day "of May 1828, and until paid; and quoad ultra "assoilzie her from the conclusions of the action, and "decern: Find the pursuer liable in expenses, &c., sub-"ject to modification."* These were modified to 90*l.*

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The pursuers appealed.

Appellants.—The respondent was effectually bound, by her obligation of May 1828, to procure and grant a valid discharge of the bond. Her allegations as to having been misled by her own agent as to the terms of the transfer are quite irrelevant in the present question. The appellants are not said to have been participant in so misleading her; and in fact the transfer is taken precisely in the same terms in which she had previously executed a deed of settlement. Equally irrelevant is the plea that the obligation is not tested or holograph, because it was followed rei interventu, the greater part of the money having been paid to and received by her on the faith of it. If there were any weight attachable to the circumstance that it is not stamped, it is still competent to have it stamped.

Respondent.—The document libelled, being improbative, cannot establish any obligation against the respondent; and even if it were probative, being not stamped,

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* 9 S. D. B., 542.

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it cannot be looked at, and it is not competent to have it stamped in the Court of Appeal. Nevertheless the respondent has always been willing to grant a discharge according to her undertaking, which was on the footing that the bond belonged to her alone, and not that it belonged to the heir at law of her children, and she never contemplated any obligation to the effect of being at the expense of making up titles in his person. Besides, as the whole matter is founded on error, ample justice has been done to the appellants by the interlocutor ordering the money to be repaid.

LORD CHANCELLOR.—My Lords, I shall not now move your Lordships to dispose of this case finally, as there is one point at least which I wish to have the opportunity of looking further into, assuming that we are now to dispose of the question on the ground taken in the Court below, and passing over the two objections which arose upon the instrument not being stamped; 1st, Whether the instrument was such as to require a stamp, and if so, whether the stamping it now will do? I take it, that there can be no question at all that an instrument can be stamped pending the original hearing; and, 2dly, How far the pursuer, the present appellant, would have gone on in the case without that instrument altogether? Leaving those two points on one side, as the case has been argued at your Lordships bar on both sides upon the ground on which it was disposed of in the Court below, I should wish on one of the matters here argued to have an opportunity of further consideration before moving your Lordships to dispose of the question. My Lords, I should not have troubled your Lordships upon the present occasion had

it not been for some things which were thrown out at the bar with respect, not to the question of costs, because that has been, in the course of conversation during the argument, I think, put out of the way, but with respect to the small amount of interest involved in this question. My Lords, it never can be allowed, particularly in a Court of Appeal, to be urged as an argument against resorting to the Court for redress that the stake in the question is too small. If that topic were allowed to be urged here, or at least to be entertained by any Court of Appeal, to what would it lead?—to what purpose? Courts below might deal with small cases—with cases under certain undefined amounts—cases of a moderate or a small amount, with carelessness, and with indifference, as if it signified not how the case stood, or how hasty or, how erroneous their decisions might be upon matters of that description. Yet those matters may be of the greatest importance to the parties concerned; and it is a lesson that never can be taught to any suitors, that they may hold others out of their rights with impunity, or with the chance of those others not having all the redress which the Court of Appeal affords, provided those rights are below a certain undefined amount. My Lords, I am perfectly certain that no courts in this country, whatever the suitors may think, ever proceed upon any such grounds, but that they apply their minds with the same attention, with the same watchfulness, and with the same conscientiousness and scrupulous anxiety to the discharge of their important duties in small cases as in large ones. We often lament the bringing of cases here when the amount is so small that the result of the appeal cannot possibly save the party from a loss owing to that appeal; we also lament a misdecision of

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such cases below, which leads to this evil; but this is all we can well correctly say on the smallness of amount. My Lords, I thought it necessary to say thus much in consequence of some remarks that were made respecting the amount of the stake in this cause. I have seen many much smaller. The smallness of the amount is no reason why it should not meet with and receive the utmost possible attention here; and why error that has been committed—if error has been committed—should not be set right by your Lordships. For the reason I first stated, I shall move your Lordships that the further consideration of this question may be postponed.

Adjourned.

LORD CHANCELLOR.—My Lords, in the case of Miller v. Anderson, which stood over in consequence of my having some doubt particularly as to the question of costs, having now fully considered the matter, I am of opinion that the interlocutors ought to be affirmed, and that costs ought in this case to be given. I do not feel it necessary to enter further into the case than merely to suggest to your Lordships the propriety of affirming the interlocutors complained of, with costs, not exceeding 150*l.*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of one hundred and fifty pounds for her costs in the said appeal.

CRAWFURD and MEGGET—W. GOODALL, Solicitors.