

MARJORY STEWART and PATRICK GRAHAM, her Husband, - - - - -	}	<i>Appellants;</i>	1780. <hr style="width: 50%; margin: 0 auto;"/> STEWART, &c. <i>v.</i> GARDNERS.
ANN, MARY, and JOHN GARDNERS, and THO- MAS GARDNER, their Father, -	}	<i>Respondents.</i>	

House of Lords, 24th April 1780.

SALE OF SUCCESSION—AGREEMENT—OBLIGATION—DISCHARGE—

NOVATION.—An agreement was gone into by the residuary legatees in a settlement with the widow of the deceased testator, whereby the latter agreed to purchase their right of succession for a fixed sum, they assigning their interest over to her. Stewart, a neutral party, on behalf of the widow, interposed, and allowed his name to be used in the transaction; and as the estate of the deceased was not then realized, became absolutely bound to pay the respective sums at which their interest was bought up. Thereafter the widow herself transacted with the beneficiaries, and granted bonds to some of them for the amount, without the interference of Stewart, and she granted time for payment. The widow afterwards fell into poverty, and could not pay. Held that Stewart was still bound, and that he was not released by the new transaction had with the widow herself, as that was a mere bond of corroboration, and did not discharge him.

The late Dr. Dalrymple, who had practised as a surgeon in St. Christophers, acquired a considerable fortune, and returned to Scotland and purchased an estate.

In advanced life he married Margaret Wemyss, then only Dec. 21, 1766. 20, and some short time thereafter executed a settlement conveying his whole estate and effects, real and personal, to Jan. 31, 1767. Margaret his wife, Wm. Wilson, James and David Wemyss, as trustees for the following purposes:—1. To pay off all his lawful debts, and his legacies, and death bed and funeral expenses. 2. To invest the surplus for the purpose of yielding an annuity to his wife; and 3. After his death to divide the capital, if there should be no children of their marriage; one half to his sister Janet, and her children after her decease; the other half to the children of his sister Ann, wife of Thomas Gardner. These latter children are the respondents in the present suit.

Dr. Dalrymple died of this date, without leaving any issue April 1770. of the marriage. His surviving widow being then only 21 years of age, and the residuary legatees seeing that their interest could not open until her death, were anxious to prevail upon her to purchase their reversionary interest.

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With this view Mrs. Dalrymple intrusted the negotiation of such a transaction to Bailie Stewart of Cupar, the appellant's brother. And after various procedure, a meeting was held between the several parties interested, namely, John Stewart and David Sym on behalf of Mrs. Dalrymple, on the one part; Janet Dalrymple, the Doctor's eldest sister, and her husband William Anderson, of the second part; and Thomas Gardner, the husband of Ann, as administrator at law for his children. A contract was drawn up and signed on the spot, the general terms of which were, that each of the sister's families should have £650 for their residuary interest in the succession; and by the contract the said sisters, in consideration thereof, assigned and made over to and in favour of the said John Stewart and David Sym, their heirs and executors. There was an obligation on them to make up titles by service or otherwise to the heritable subjects and property possessed by the deceased, either at home or abroad, and that for the purpose of vesting the same in the said John Stewart and David Sym, and that the same "shall be concerned in such manner and in such form as their different natures require, and according as a man versant in business shall direct." "For which causes, and upon the other part, the said Bailie John Stewart and David Sym hereby bind and oblige them, their heirs, executors, and intromitters with their goods and gear, so soon as the said deeds shall be made and delivered to them, to content and pay to the said Janet Dalrymple and her children the sum of £650 Sterling, and to the said John, James, Margaret, Ann and Mary Gardners, the sum of £650 Sterling, and also to pay all the just and lawful debts that were due by the said deceased David Dalrymple at the time of his decease."

Thereafter John Stewart and David Sym assigned this contract to their constituent Mrs. Dalrymple. It appears that Stewart and Sym merely interposed as the friends of Mrs. Dalrymple, and neither were trustees under the deceased Dr. Dalrymple's settlement.

Janet, in terms of this agreement, assigned her interest over, in terms of the agreement, was paid the £650, and granted a discharge.

The respondent Gardner, however, on after consideration, thought the sum too little, and wanted £100 more. Mrs. Dalrymple yielded to the demand, and Bailie Stewart was again applied to, that he might interpose as in the former

agreement. This was agreed to, and a new agreement drawn out, narrating the deceased's settlement, and the above contracts; and binding Thomas Gardner to make up titles to one half of the estate of Lindisferran in Fife, and so soon as the same is done, to cause his children to convey the same to the said John Stewart; and setting forth, "For which causes, and, on the other part, the said John Stewart binds and obliges him, and his heirs and executors and successors, to make payment to the said Thomas Gardner, and his heirs, executors or assignees, for the use and behoof of his said children, of the sum of £750 sterling, and that at and against the term of Martinmas next to come, and with the sum of £100 sterling of liquidate penalty in case of failure."

Some disputes arose afterwards, and Gardner, wishing further security, in particular, a bond and bill, Stewart finally came to the resolution of having nothing further to do with the matter, and wrote Gardner, "I have therefore made over my right to Mrs. Dalrymple, as you know it was upon her account that I made the agreement with you; and expecting that you will settle matters with her amicably, I remain," &c. No amicable settlement took place. Gardner charged upon the contract, and a suspension being brought, the appellant contended, 1st, That the respondent, Thomas Gardner, had no legal right in his person to the lands of Lindisferran, and therefore could not convey to another any such right. 2d, The estate was vested in trustees. 3d, The children of Thomas Gardner, who had the real beneficial interest, were all minors. 4th, The sale by Thomas Gardner, as administrator at law for his children, was invalid, because he assumed a power which, by law, that office did not entitle him to exercise; and, 5th, That the respondent therefore, not being in a condition to implement his part of the contract, Bailie Stewart could not be compelled to pay the agreed on price. The Lord Ordinary found, "that as the suspender's (Bailie Stewart) view or interest with the contract, was to secure himself a purchase of the charging children's share of the deceased Doctor Dalrymple's estates; and that it appears the charger has no title effectually to make the sums over to the suspender, suspends the letters, and decerns." A reclaiming note was presented to the Inner House, but the respondent proceeded no further.

After two of the children had accepted of their shares,

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1780. the three remaining children transacted of new with Mrs. Dalrymple herself, who granted to them the following bond :
 STEWART, &c. —“ I by these presents bind and oblige me, my heirs and
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 “ John, Ann, and Mary Gardners, of the foresaid remaining
 “ sum of £450 Sterling, with interest thereof from the said
 “ term of Martinmas 1772, amounting when accumulated at
 “ the date hereof, to £488. 19s. 1d., by three equal portions,
 “ as they arrive respectively at the age of 21 years com-
 “ plete, or upon the marriage of the said Ann or Mary Gard-
 “ ners, which of them shall first happen ; and failing any of
 “ them by decease, before they arrive at the age of 21 years
 “ complete, or marriage of the females, to the child or chil-
 “ dren then alive.”

July 25, 1779 From this date Bailie Stewart considered himself as to-
 tally relieved from all obligation. After his death, how-
 ever, the present action was raised against the appellant, his
 sister, and against Mrs. Dalrymple, the latter in the interval
 having fallen into poverty. The Lord Ordinary pronounced
 this interlocutor :—“ In respect it appears that Bailie Stew-
 “ art acted only as trustee for Mrs. Dalrymple, the widow,
 “ and that it is not alleged he had any intromissions with
 “ the effects or estate of Dr. Dalrymple ; on the contrary,
 “ that £300, and a bond for £450 were accepted from the
 “ widow herself, sustains the defence for the sister of Bailie
 “ Stewart, and assoilzies them, and decerns.” On repre-
 sentation, the Lord Ordinary reported the case, on memo-
 rials to the Court.

It was maintained by the appellant, that her brother acted
 merely as trustee for Mrs. Dalrymple throughout, and did not
 enter into the transaction for his own behoof. Even if he had,
 it was clear, according to the law of Scotland, that the con-
 tract fell to the ground, by one of the parties becoming un-
 able to perform the part of the contract. Gardner, in this
 case, could not perform his part, he had no right to assign,
 to make up titles, or to transact as to the sale of his *chil-*
dren's right of succession ; and, 2d, Besides, by the new
 transaction with Mrs. Dalrymple herself, and the three chil-
 dren who have now raised this action, the contract 1772 was
 virtually passed from as against Bailie Stewart. The Court
 Jan. 12, 1780. pronounced this interlocutor :—“ Repel the defences for
 “ Marjory Stewart and husband, and decern against them,
 “ in terms of the libel ; find expenses due by them, and ap-

“ point an account thereof to be given into Court.” On re-claiming petition the Court adhered. 1780.

Against these interlocutors the present appeal was brought. STEWART, &c.
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Pleaded for the Appellants.—It is established, and appears to be admitted by the respondent in the former suit, in the suspension, that Mr. Stewart was merely a trustee for Mrs. Dalrymple, deriving no advantage from the transaction, and only interposing to bring about a compromise between the parties. They had a regard therefore to Mrs. Dalrymple, and relied on her faith for completing and fulfilling the agreement which her trustee, Mr. Stewart, had made on her behalf. 2. The agreement entered into by the respondent with Mrs. Dalrymple made essential alterations in the original contract, and such as in equity must relieve the appellant from the legal consequences thereof. The respondent treats with Mrs. Dalrymple DIRECTLY—takes from her the shares stipulated by the former contract to two of his children; agrees to new covenants for payment of the shares of the three children, and gives a delay or indulgence to the widow, as to the term of payment, thereby cutting off every relief which the appellant might have had against Mrs. Dalrymple, when she had the whole deceased’s estate entire and in her possession, and before she had fallen into poverty. In these circumstances, the appellants maintain they are liberated in law from all obligation. Jan. 27, 1780.

Pleaded for the Respondents.—By the contract 1772 entered into by John Stewart and Gardner, Stewart bound himself, his heirs, executors, and successors, to pay the respondent the sum of £750, and this absolutely, without any condition or reservation whatever; and such being the nature of his obligation, it does not affect the question in the slightest degree, whether he acted as trustee for Mrs. Dalrymple or not, since, on the face of that obligation, he does not bind himself in that capacity, but absolutely and directly to the respondent. No doubt Bailie Stewart had conveyed to Mrs. Dalrymple all his interest in this contract, but he could not thereby divest himself of the obligation come under to pay the £750 to the respondent; and he remained bound under that obligation until he was with the respondent’s consent released therefrom. The bond taken by Mrs. Dalrymple is expressly in corroboration of and without derogation from the contract, and so could not discharge and release Bailie Stewart from the obligation.

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After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Henry Dundas, Edw. M' Cormick.*

For Respondents, *Al. Wedderburn, Al. Wight.*

NOTE.—This case not reported in Court of Session.

(M. 14519.)

Colonel JAMES ST. CLAIR of St. Clair, *Appellant* ;
The MAGISTRATES and TOWN COUNCIL of the } *Respondents.*
Burgh of Dysart, - - -

House of Lords, 8th March 1780.

SERVITUDES—OF BLEACHING—OF FOOT ROAD—OF TAKING WATER—PRESCRIPTION—USE AND POSSESSION.—A servitude of bleaching linen sustained; also a servitude in favour of the inhabitants of a burgh, of taking water from the wells in a neighbouring heritor's property for family use, as well as a servitude acquired by immemorial use of a right to a foot road to these wells. Also that the burgh, as a corporate body, by the charter of the burgh, had a sufficient title to acquire such servitudes, by prescription and immemorial use and possession of its inhabitants.

Delarator was raised by the appellant, stating that “ it ought and should be found and declared, that he had the only good and undoubted and exclusive property of the wells and enclosures, called the Lethem Wells and Ashlerhead Parks, and to the rock called the Ashlerhead Rock, situated within his barony, and that free of any servitude in favour of the magistrates, town council, community, burgesses, and inhabitants of Dysart, of taking water from the said wells, or washing, bleaching and drying their clothes and linens at the same, or upon the grounds adjacent thereto; or occupying or possessing any part of the said enclosures; and that the said magistrates, town council, and community, burgesses and inhabitants of the said burgh, have no right or title to any roads, ways, or passages to and from the said wells through the said enclosures, or any part thereof, and that they should desist and cease from all further troubling and molesting the said pursuer in taking water from the said wells, or by washing, bleaching or drying their clothes and linens thereat or upon the grounds adjacent thereto.” In de-