Corporation ought to have regarded the use of this door as dangerous to the public, and consequently that the Corporation failed in its duty by not interdicting its use.

I am accordingly of opinion that the first plea-in-law for each set of defenders should be sustained and that the action should be dismissed.

LORD CULLEN — I do not think it practicable to lay down any absolute proposition of common law on the question when a door or gate opening outwards across a roadway which the public are entitled to traverse falls to be regarded as a dangerous thing in respect of which its owner is to be held liable in damages if, by the opening of it by him or with his authority, an accident happens to a member of the public traversing the roadway. The question must, I think, always be one depending on the circumstances of the particular case. In the present case the very meagre averments made by the pursuer, on which your Lordships have commented, do not seem to me sufficient to bring home liability to the defenders, who are the owners of the premises. They are, I think, consistent with the view that the injury which the pursuer alleges he sustained from having collided with the door in question arose from such an unlikely combination of circumstances as makes what is commonly called a case of pure accident.

As regards the case sought to be made against the Magistrates, I concur in the views which your Lordships have expressed, to which I have nothing to add.

LORD JOHNSTON and LORD MACKENZIE were absent.

The Court recalled the interlocutor of the Lord Ordinary and dismissed the action.

Counsel for Pursuer and Respondent — Watt, K.C. — Ingram. Agent — Malcolm Graham Yool, S.S.C.

Counsel for Defenders and Reclaimers the Corporation of Edinburgh — Cooper, K.C. — W. J. Robertson. Agent — Sir Thomas Hunter, W.S.

Counsel for Defenders and Reclaimers Binnie and Russell — Watson, K.C. — Macquisten. Agents — Hossack & Hamilton, W.S.

Saturday, June 19.

SECOND DIVISION.

[Lord Hunter, Ordinary.

ALSTON *v.* NELLFIELD MANURE AND CHEMICAL COMPANY, LIMITED.

Right in Security—Superior and Vassal—Bond and Disposition in Security—Conveyance of the dominium utile of Lands Feued without Security—Holder's Consent by the Security Holder's Assignee—Validity.

A third bondholder on an estate who had not consented to the creation of a feu to which prior bondholders had consented, assigned his disposition in security which conferred power to sell or to feu. His assignee granted a conveyance of the land which had been feued, "but to the extent of the *dominium utile* thereof only." In a competition between the grantee and a singular successor of the original feuar, *held* that the conveyance was inept and ineffectual and the singular successor of the original feuar *preferred.*

Opinion per Lord Dundas that the use of the words "to the extent of the *dominium utile* thereof only" in a conveyance would not *per se* render the deed ineffectual as a conveyance of lands.

Right in Security—Bond and Disposition in Security—Validity—Omission of Rate of Interest and Term from which Interest to Run.

A disposition in security for a principal sum "with interest thereon" did not set forth the rate of interest nor the term from which it was to run.

Opinion per Lord Dundas and Lord Salvesen (*approving judgment* of Lord Ordinary (HUNTER), that the disposition in security constituted a valid security for the principal sum, but an invalid security as regards any interest, in respect that the interest was an indeterminate sum.

Andrew Alston, solicitor, Glasgow, *pursuer*, brought an action against the Nellfield Manure and Chemical Company, Limited, Moorfields, London, *defenders*, for declarator that certain heritable subjects, part of the lands of Nellfield, in the county of Lanark, and the buildings thereon, belonged heritably in property to the pursuer in virtue of his rights and title, and for a decree ordaining the defenders to cede to the pursuer possession of the subjects, and to flit and remove therefrom.

The pursuer pleaded, *inter alia*—"(1) In respect that the subjects and others described in the summons belong heritably in property to the pursuer in virtue of the titles founded on by him, decree of declarator should be granted as craved. (2) The sale and disposition in favour of the defenders are invalid in respect (*a*) that the disposition in security under which the sale purported to be made was invalid and ineffectual, (*b*) that said sale and disposition were not a competent exercise of any power of sale vested in the defenders' author, (*c*) that said disposition is inept and ineffectual. (3) The defenders, the Nellfield Manure and Chemical Company, Limited, having no right or title to the subjects in question, decree of removal should be pronounced against them as concluded for. (4) The defenders' author not being entitled at once to approbate and reprobate the granting of the feu-charter the disposition granted in favour of the defenders is invalid and ineffectual."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 26th February 1915 assoilzied the defenders.

Opinion.—"In this action Mr Alston, a

solicitor in Glasgow, seeks to have it found and declared that part of the estate of Nellfield, in the county of Lanark, belongs to him heritably in property. He also asks for a decree of removing against the defenders the Nellfield Manure and Chemical Company, Limited, a company registered in London, who are in possession of and claim right to the property. A case of competition of title thus arises.

"The estate of Nellfield was acquired by a Mr Lawson in the year 1886. In 1909 he disponed the property to a Mr Agnew. The purchase appears to have been really made by Mr Agnew's sister-in-law, a Miss Scott, who is the present proprietrix. This appears from the disposition, dated 29th April 1912 and recorded 22nd May 1912, made in her favour by her brother-in-law.

"On 29th August 1910 Mr Lawson, with the consent of Mr Agnew, disponed the estate of Nellfield to Messrs Howard & Cope, a firm of money-lenders in London, in security of two sums of £1000 and £500 contained in two bills and interest thereon. The first bill had been drawn by Mr Agnew and accepted by Mr Lawson. The second bill was a promissory-note in favour of Messrs Howard & Cope granted by Mr Agnew, Mr Lawson, and Miss Scott. On 5th December 1911 Messrs Howard & Cope obtained decree in the Court of Session against Mr Agnew and Mr Lawson for payment of the £1000, and against these gentlemen and Miss Scott for payment of the £500. On 17th July 1913 Messrs Howard & Cope assigned the decree in their favour and the disposition of Nellfield in security of the above sums to a Mr Krall for the sum of £600. On 5th August 1913 Mr Krall disponed to the defenders for £700 that portion of the estate of Nellfield now claimed by the pursuer.

"By feu-charter, dated 18th May 1911, Mr Agnew feued the portion of the estate of Nellfield now in dispute to the Nellfield Estate Company, Limited, which was incorporated about Martinmas 1910. At the time when this feu-charter was granted the estate of Nellfield was burdened with bonds prior to Howard & Cope's to the extent of £7000. These prior bondholders appear to have consented to restrict their security to the superiority, but it is not said that Messrs Howard & Cope restricted their security or assented to the feu in favour of the Nellfield Estate Company. That company went into liquidation about the month of October 1911, and a Mr Mackenzie, an accountant in Glasgow, was appointed liquidator. Subsequently, by order of the High Court of Justice in England dated 20th September 1912, George Bird, chartered accountant, 17 Duke Street, Edinburgh, was appointed to act as joint-liquidator along with the said Mr Mackenzie.

"By disposition and assignation, dated 4th and 5th and recorded in the Division of the General Register of Sasines applicable to the county of Lanark 20th, all days of November 1914, the said the Nellfield Estate Company, Limited (in liquidation), and the said Mr Mackenzie and George Bird as liquidators thereof, sold and disponed, assigned, conveyed, and made over to the pursuer and his heirs and assignees whomsoever the said subjects feued to the said company as aforesaid and described in the summons, together with the whole buildings and other erections, and the whole fittings and fixed plant and machinery thereon, and their whole claims and rights of action with regard to the subjects conveyed and whole right, title, and interest therein, with entry as at the term of Whitsunday 1911, notwithstanding the date of the said disposition and assignation.

The first plea maintained by the pursuer was that the disposition in security in favour of Howard & Cope was invalid and ineffectual as it did not specify the sum or sums in security of which it was granted, and that therefore Mr Krall had no power to sell. The security deed is not in the ordinary terms of a bond and disposition in security. It gives the creditors very exceptional powers, but its validity or invalidity must be determined by the rules referable to an ordinary heritable security. The amount of the indebtedness secured is the amount contained in two bills with interest. The dates of the bills are not given. The amount of the interest intended to be secured is therefore uncertain and indeterminate. The pursuer contends that principal and interest being constituent parts of the same debt the whole security is bad, as it strikes against the well-recognised doctrine that no effectual security can be created over land for an indefinite sum of money. I am not prepared to give effect to this view. It appears to me that from the point of view of the security the principal sum ought to be treated separately from the interest. This is in accordance with Lord Low's opinion as expressed in *Forbes* v. *Welsh and Forbes*, 1897, 21 R. 630. I therefore uphold the security so far as the principal sum is concerned. On the other hand, I reject the defenders' view that the security was good for interest at the legal rate of 5 per cent. from the date of the bond. The intention of the deed is to give security for the interest from the dates of the bills, and as the amount of this is uncertain I consider the security bad so far as any interest on the principal sum is concerned.

"The second objection taken by the pursuer to the defenders' title is not so clearly set forth on record. It appears to be founded upon an argument as to the effect of Krall's disposition looking to the existence of the feu-charter in favour of the Nellfield Estate Company. The pursuer contends that on the assumption that Mr Krall had power to sell he ought, before granting the disposition challenged, to have had the feu-charter in favour of the Nellfield Estate Company set aside, or at all events that he was not entitled to dispone recognising the validity of the feu-charter. A learned argument was submitted to me upon the feudal system and the impossibility of interjecting a new vassal between superior and an existing vassal without the consent of the latter. I do not think that I have anything to do with questions as to what might have been the situation under the law as it existed before modern statutory legislation.

"The case of *Soues* v. *Mill and Others*, 1903, 11 S.L.T. 98, decided by Lord Kyllachy, appears to me to be a direct authority for holding that Howard & Cope's security was not affected by the feu created by the proprietor without their consent. They and their assignee had therefore power to sell the property in virtue of the powers conferred upon them by their deed of security. In exercising this power Mr Krall could not disregard the feu, as the prior bondholders had restricted their security to the superiority. I am not able to hold that there is any practical defect in the title acquired by the defenders.

"It might have been open to the liquidators to challenge the sale by Howard & Cope on the ground that the power of sale was not *bona fide* exercised by Krall or that the price was inadequate. Assuming, though I do not decide, that this ground of challenge was validly assigned to the pursuer, I do not think that a relevant case for reducing the sale to the defenders has been averred on record. I therefore assoilzie the defenders."

The pursuer reclaimed, and argued — (1) The feu-charter in favour of the pursuer's author was valid, the consent of bondholders being unnecessary to the granting of a feu. (2) Krall was prevented by the principle *approbans non reprobat* from reprobating the feu-charter by displacing the vassal thereunder and at the same time approbating the feu-charter by drawing the feu-duty by way of an action of maills and duties—*Dow* v. *Beith*, March 11, 1856, 18 D. 820, *per* Lord Wood at 828; *Crum Ewing's Trustees* v. *Bayly's Trustees*, 1911 S.C. (H.L.) 18, *per* Lord Shaw at 27, 48 S.L.R. 401, at 404. (3) The sale of the *dominium utile* by Messrs Howard & Cope was invalid. It had never vested in Mr Lawson, because he was never vested in the *dominium utile* as distinguished from the *dominium plenum*. The superior had never lost the *dominium utile*, because although a beneficial right could be lost by contract, a right of property could only be lost by a new completed title — *Colvile's Trustees* v. *Marindin*, 1908 S.C. 911, 45 S.L.R. 746. Accordingly the disposition by Mr Krall was useless, because no title could ever be made up upon it. Under the old law, in order to enable the vassal to enforce an entry the disposition in his favour had to contain a procuratory of resignation and a precept of sasine—Duff's Feudal Conveyancing, pp. 228 and 230, note q; Act 20 George II., cap. 50, sec. 12; Transference of Lands (Scotland) Act 1847 (10 and 11 Vict. cap. 48), sec. 6. Theoretically this was still a necessity, but the disposition by Krall did not contain either. Moreover, the use of the words "to the extent of the *dominium utile* thereof only" rendered the disposition ineffectual—*Hay* v. *Corporation of Aberdeen*, 1909 S.C. 554, *per* Lord President (Dunedin) at 558, 46 S.L.R. 367, at 368. *Soues* v. *Mill and Others*, June 5, 1903, 11 S.L.T. 98, was distinguishable. It merely showed that the creation by the owner of land of a feu without the consent of the owner's creditors did not affect their security. (4) The sale by Messrs Howard & Cope was invalid also, because the disposition in security on which the sale proceeded was itself invalid, inasmuch as, the dates of the bills not having been given, the amount of the interest, and therefore the amount of the debt itself, was not specified — *Forbes* v. *Welsh & Forbes*, March 8, 1894, 21 R. 630, *per* Lord Ordinary (Low) at 631, 31 S.L.R. 520, at 521. If there had been two bonds, one for a determinate and the other for an indeterminate sum, the bond for the determinate sum would be good, but there was only one bond here, and since part of the sum secured was indeterminate the whole was indeterminate.

Argued for the respondent—(1) At common law the granter of a disposition in security was bound to assist the seller to render the sale effectual. The Titles to Land Consolidation (Scotland) Act 1868 (31 and 32 Vict. cap. 101), sec. 121, imported into itself that common law obligation on the granter. If a disposition in security gave to the disponee valid powers of sale, the title of a purchaser did not depend on the title of the security holder, and it was not open to the granter of the disposition in security to challenge the title of a purchaser—*Beveridge* v. *Wilson*, January 17, 1829, 7 S. 279, *per* consulted Judges at 281; *Campbell* v. *Deans*, March 14, 1890, 17 R. 661, 27 S.L.R. 521; *Soues* v. *Mill and Others* (*cit.*); Bell's Comms., 7th ed., vol. ii, p. 270. *Brown* v. *Storie*, 1790, M. 14,125, was also referred to. A prior bondholder could discharge any part of his security without affecting the security of subsequent bondholders—*Edie* v. *Robertson*, June 29, 1793, M. 3403; *Morton* (*Liddell's Curator*) *and Another*, December 23, 1871, 10 Macph. 292; *Mackirdy* v. *Webster's Trustees*, February 1, 1895, 22 R. 340, *per* Lord Kinnear at 344, 32 S.L.R. 252, at 256; *Soues* v. *Mill and Others* (*cit.*), *per* Lord Kyllachy, at 99; Bell's Comms., 7th ed., vol ii., p. 419. (2) The defender was not prevented by the principle *approbans non reprobat* from challenging the validity of the feu-charter. The principle did not apply, because the defender's author took no benefit from the feu-charter — Bell's Principles, section 1938; Green's Encyclopædia, 2nd ed., vol. v, p. 5; *Magistrates of Arbroath* v. *Dickson*, March 19, 1872, 10 Macph. 630, 9 S.L.R. 389; *Morier* v. *Brownlie & Watson*, November 1, 1895, 25 R. 67, 33 S.L.R. 47; Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 4 (2); and Duff's Feudal Conveyancing were also referred to.

At advising—

LORD DUNDAS—In this action the pursuer Alston seeks declarator of his right to 18 acres of ground, part of the estate of Nellfield, contained in a feu-charter granted by one Agnew, a former proprietor of that estate, to the Nellfield Estate Company, and for decree of removing against the Nellfield Manure Company, who are in possession of the feu.

The pursuer and defenders both claim title from a common author, Lawson. Lawson sold the estate of Nellfield to Agnew, who was infeft in 1911, and who in the same

year granted the feu-charter above mentioned to the Estate Company, who were infeft. That company and its liquidators sold the property of the feu in 1914 to the pursuer, who was infeft.

Prior to the disposition by Lawson to Agnew these two gentlemen had in 1910 granted to Howard & Cope, Limited, a disposition of the estate of Nellfield in security of a debt of £1500. In 1913 the debt, to the extent of £1324, being the balance of it then due, and the disposition in security of it, were assigned for value by Howard & Cope to one Krall, who was duly infeft; and in the same year Krall, in exercise or professed exercise of the power of sale contained in the disposition in security, sold the property or *dominium utile* of the 18 acres to the compearing defenders the Nellfield Manure Company, who were duly infeft.

The pursuer's challenge of the defenders' title is mainly directed against the disposition by Krall to the defenders, which the pursuer contends was not granted in exercise of the powers conferred on Krall by the disposition in security. This disposition bears that Krall is "heritably vested in" and has "power to sell the subjects" disponed, being the *dominium utile* of the feu under the feu-charter of 1911, "under and by virtue of" the disposition in security to Howard & Cope, and disposition and assignation thereof by them to him, already referred to; and after acknowledging £700 as the price paid by the defenders to Krall, proceeds to sell and dispone to them, "heritably and irredeemably, but to the extent of the *dominium utile* thereof only, all and whole" the 18 acres contained in the feu-charter, "but always with and under the reservations and burdens specified in said feu-charter," and in particular "under burden of payment to the superior of the feu-duty of £274, 4s. 4d."

The terms of the disposition in security are peculiar, and contain powers to sell publicly or privately with or without notice to the debtor, power to feu, and other powers much wider than I have ever seen in a deed of the kind. But though there are on the record some suggestions to the effect that the action of the creditor in carrying out the sale was nimious and oppressive and that by acting in some other way he might have done as well for himself with less injury to the interests of others, these were definitely abandoned by the pursuer's counsel at our bar.

The pursuer's objection to the disposition is directed altogether to the question of its competency as a matter of feudal conveyancing. He says that, granting Krall's power to have sold "in whole or in lots" the subject which was conveyed to him in security, or to have feued it to be held of himself, if he so pleased, he could only do so in one or other of two ways—either to be held of and under himself (or his author) in feu, or of and under his own (or his author's) immediate superior; and that he had no power to sell the *dominium utile* held of and under Agnew by virtue of the feu-charter. He urges that no one could possibly acquire right to the *dominium utile* under that charter as a distinct estate except by disposition from the vassal under that charter; and he founded on the well-known Statute 20 Geo. II., cap. 50, sec. 12, as showing that, under the old law as it stood before the modern Conveyancing Acts, the defenders could not have forced the superior to enter them in the *dominium utile* in respect that the disposition in their favour did not and could not contain a procuratory of resignation "from the former proprietor or vassal who was duly vested and seised therein," namely, the vassal under the feu-charter.

I think the pursuer's argument is well founded. Mr Krall's right, as in place of Howard & Cope under the disposition in security, was one of charge or incumbrance on the radical right of his author Lawson to the estate of Nellfield, including the 18 acres afterwards feued. Under the disposition in security Krall had power to sell the estate or to feu any part of it. In other words, he had power either, by way of out-and-out sale, to substitute a purchaser in place of Lawson as vassal of the Crown or other superior in the investiture on which Nellfield was held by Lawson, or he might, by granting a feu-right, create a new investiture whereby his disponee would hold base of Lawson as vassal under the feu-right. But he has not done either of these things. What he has attempted to do is to substitute his own disponee for the pursuer as vassal under the feu-charter granted by Agnew in 1911. He does not pretend to create a new investiture by way of feu; nor does he propose to substitute his disponee as vassal in place of himself or Lawson in the investiture under which Lawson held the estate of Nellfield; but he attempts to make his disponee vassal of another superior altogether, under a quite different investiture—that, namely, which was constituted by Agnew's feu-charter of 1911. If we consider the older forms of deeds the inconsistency becomes apparent. The charter of resignation by which Krall's disponee would naturally complete his title would flow from the superior under the charter of 1911. It would have to set forth that the lands in question had formerly belonged to so-and-so—the last vassal under that feu-charter—and had by him been resigned into the superior's hands, and so forth. But neither Krall nor his author Lawson were ever vassals under the feu-charter, and they had no power to resign the lands into the hands of the superior in that investiture. The Lord Ordinary seems to me to have too lightly brushed aside this argument in saying that he has nothing "to do with questions as to what might have been the situation under the law as it existed before modern statutory legislation." It is true we must apply the law as it now stands to the facts and circumstances of the present case. But it is not possible to judge of the meaning and effect of our modern conveyancing deeds without regard to the feudal principles which underlie them, and to which they merely give a shorter form of expression. So viewing the matter, I think that what Krall

here attempted was incompetent, and that the title of the pursuer as vassal under the feu-charter of 1911 must prevail. There is no occasion to speculate as to the reasons which may have led Krall to adopt the course he did—he may probably have had in view the existence of securities preferable to his own, the holders of which had released from their securities the *dominium utile* or vassal's right under the feu-charter of 1911; but we are here dealing with questions not of motive or policy but of feudal investiture and methods of conveyance.

If the view I have expressed is correct, it seems to me to settle the question. But it may be right to notice very shortly some arguments which were addressed to us on points which I think of minor moment.

The pursuer presented an argument based on the law of approbate and reprobate. His counsel contended, as I understood, that a bondholder in the position of Krall would not be entitled on the one hand to "reprobate" the feu-charter by seeking to place his disponee in the *dominium utile* of the 18 acres in substitution for the vassal, and at the same time to "approbate" it to the effect of drawing the feu-duty by way of an action of maills and duties. I am not clear that any question of approbate and reprobate truly arises in this case. But it is unnecessary to say more, as my opinion upon the point already dealt with affords, if well founded, a sufficient ground of judgment.

The pursuer also suggested that the words "to the extent of the *dominium utile* thereof only," occurring In the disposition by Krall to the defenders, rendered that deed ineffectual as a conveyance of the lands, and reference was made to Lord President Dunedin's remarks in the case of *Hay* v. *Corporation of Aberdeen*, 1909 S.C. 554. I do not think that case is at all in point. It is true that the correct way to describe either property or superiority is by reference to the lands only. But it is not incompetent, and may sometimes tend to clearness, to introduce such words as occur here —Mont. Bell, Conv. (3rd ed.) p. 755.

Objection was also stated by the pursuer to the disposition in security to Howard & Cope, which he said failed to constitute a valid real security in respect of the uncertainty of the sum. It bears to be granted "in real security of the said sums of £1000 sterling and £500 sterling with interest thereon." The Lord Ordinary held the security to be good for the principal sum but not good as regards any interest thereon. I agree with the first branch of that determination for the reasons stated by the Lord Ordinary. The respondents took no exception to his Lordship's view in regard to interest; it is therefore sufficient to say that I see no reason to think that it is otherwise than sound.

Upon the whole matter I am of opinion that the interlocutor reclaimed against should be recalled, and that the pursuer is entitled to decree in terms of the conclusions of his summons.

LORD SALVESEN — Two legal questions have been raised in this case on the facts set forth in the Lord Ordinary's note. The first is, whether the disposition in security by John Lawson in favour of Howard & Cope, Limited, was wholly invalid as a real security in respect that the amount intended to be secured is not definite. It is precise enough with regard to the principal sum, but with regard to the interest it cannot be said to be so, for the term from which the interest is to run and the rate of interest is not mentioned. On this head I adopt the statement of the law contained in Lord Low's opinion in *Forbes* v. *Welsh & Forbes*, 21 R. 630. The reason why an indeterminate sum does not form a good charge upon heritage is that a purchaser cannot ascertain the full amount of the charge by a mere inspection of the records. Applying this principle to the bond in question, a purchaser in the lands disponed in security would ascertain from the bond itself, which was duly recorded, the amount of principal which formed a charge on the estate, but he could not ascertain the amount of interest for which the borrower was liable. I therefore agree with the Lord Ordinary in holding that the security is good for the principal sum but bad *quoad* the interest.

The other and more important question relates to the validity of the defenders' title. That title is granted by the assignee of Howard & Cope's disposition under the power of sale, which was thereby conferred by the borrower, who was when he granted it the owner of the *plenum dominium* of the estate of Nellfield. Subsequent to the granting of the bond the proprietor, Mr Agnew, granted a feu-charter of eighteen acres of the estate in favour of the Nellfield Estate Company in respect of an annual feu-duty of £275. It is common ground that Howard & Cope were not bound by this feu-charter. If the law were otherwise a security might be defeated by the proprietor granting feu-charters at nominal feu-duties, and so destroying the security-holder's rights except to the extent of the value of the superiority which remained in the proprietor. The holder of the security may therefore disregard the feu-charter altogether, and if he has power to feu, as in this case, may grant a good feu of any portion of the lands, or he may exercise his power of sale and may sell the whole lands. It is, however, to my mind quite obvious that he cannot recognise the feu-contract granted by the proprietor of the lands by retaining his security over the superiority created by the feu-charter and under the same power also dispone the *dominium utile* of the subjects vested in the vassal. The two estates of superiority and *dominium utile* which are created by the feu-charter cannot be at the same moment vested in a person who derives his whole title from the owner of the *plenum dominium*. It is a condition of the feu-right that it remains in the vassal so long as he pays the stipulated feu-duty. The vassal may sell it or burden it as he pleases, but so long as the feu-right itself remains no one can derive a good title to it except through him. The reverse, however, is what the defenders' case postulates

as a condition of success. It is, to my mind, quite immaterial from the point of view of title that there were two bondholders who had securities over the estate of Nellfield prior to the security constituted by the disposition in favour of Howard & Cope, and that these prior bondholders consented to restrict their right to the *dominium directum*. Their consent could not in any way bind the third security holder who refused to recognise the feu-charter. It had the effect, however, if the defenders' contention is sound, of setting free for the benefit of Messrs Howard & Cope a part of the original estate of Nellfield and of enabling the defenders to carry through the novel conveyancing transaction on which they rely as their title. The Lord Ordinary thinks it unnecessary to consider how infeftment could have been taken under such a title under the old law, and that we are not now concerned with anything but the modern statutory legislation. I entirely disagree with that view, The main object of the modern legislation was to simplify titles to land, but not to alter the principles of feudal law; and it is always legitimate, and in most cases necessary, to consider, where a question of title is raised, whether a good title could have been obtained under the older forms of conveyancing by means of the disposition challenged to the land which it purports to convey. Now I think it clear that the only person who could have given a good precept of infeftment to the estate which was vested in the Nellfield Estate Company by virtue of the feu-contract was that company—the original vassal or someone deriving right from them. The proprietor who had granted the feu-charter could not have given a conveyance of the *dominium utile* so long as the feu had not been irritated; and although the security-holder, whose consent had never been asked to the constitution of the feu-right, was not bound by the feu-charter, he could not convey an estate which owed its existence to that charter. He may treat the charter as a nullity if he pleases; but he cannot at the same time draw the feu-duty or take benefit from it and dispossess the vassal in favour of some other purchaser of the feu-right, whom he thereby substitutes in place of the original vassal. Great reliance was placed by the defenders on the decision of Lord Kyllachy in the case of *Soues* v. *Mill*, 11 S.L.T. 98; but that case is only an illustration of the proposition that a feu-charter is not binding on a bondholder who had obtained his bond over the whole lands before the feu was created. It did not involve the state of facts here, under which the prior bondholders are entitled to draw the feu-duties along with the other rents of the estate in payment of the interest on their bonds, leaving any balance available for meeting the interest on the third bond. But for the existence of the feu-duties there would be no balance of revenue from the lands which could be applied towards payment of the interest on the third bond. We know from another action in which the assignee of Howard & Cope's bond is seeking to attach the rents of Nellfield under a decree of maills and duties, that such a balance exists, but whether that be so or not, so long as the prior bondholders are being paid their interest wholly or partly out of the feu-duty of the eighteen acres which are here in question, the third bondholder is deriving benefit to the extent to which that feu-duty goes to pay the interest on these bonds which would otherwise accumulate as a preferable charge on the estate as a whole. It appears to me that the doctrine of approbate and reprobate applies here, and that the third bondholder, from whom the defenders derive their right, cannot at the same time recognise the feu-charter to the effect of deriving benefit from the feu-duty which it created, and refuse to recognise any interest in the vassal. There is admittedly no case in which this has ever been previously attempted; and as it would involve an absolute sacrifice of the rights of the original vassal, to whose expenditure the whole value of the feu is due, I think it would have been regrettable if we should have felt ourselves constrained to arrive at a different result.

If the title of the defenders is bad, there is no question of the right of the pursuer to obtain declarator in terms of the conclusions of his action. His title flows from the Nellfield Estate Company, who were the original vassals in the feu. Whether he may be dispossessed by some other method in virtue of the power of sale or the power of feu contained in Messrs Howard & Cope's disposition in security it is not necessary to consider. Obviously there exist practical difficulties in the way of a third bondholder carrying through a sale of the lands as a whole or granting a new feu-right, for he would have to sell or feu under burden of the rights of the prior bondholders. The latter cannot disregard the feu-charter, for they have consented to its being granted; and therefore a new feu could not be constituted without setting aside the feu-right already in existence. What the right of the bondholders may be who granted the defenders their title we need not inquire. The effect of the decree in this action is simply to put the pursuer in possession of the feu in place of the liquidators from whom he derived his title. It may be that he will obtain no ultimate benefit from this, although that is by no means clear; for if the estates as a whole were to be put up for sale he would at least be entitled to bid for them; whereas, if the defenders' title had been sustained the pursuers and his authors would have had no opportunity of recovering possession of their property.

In case it might have been thought to have been overlooked, I proceed to notice an argument which was based on the case of *Morton*, 10 Macph. 292, in which it was decided that a prior bondholder may in certain cases discharge part of his security with the effect of prejudicing the subsequent bondholders without being accountable to the latter for so doing. Thus a creditor who holds two estates A and B in security of his debt may if he pleases discharge his security over the estate of B, although he thereby affects the reversion

which a second bondholder over the estate of A would have got but for the discharge. I have failed to follow the application of these cases to the present case. The prior bondholders have accepted the *dominium directum* as the security for their bond in place of the *dominium plenum* of the particular area feued. By so doing they necessarily released the *dominium utile* from the burden of their bonds. That, however, was not a voluntary discharge of any portion of their security; for they could not at the same time have recognised the feu-charter and taken benefit from the rights thereby acquired by the superior and also have repudiated the rights constituted in favour of the vassal by the same charter. On the whole matter I have no doubt that we must sustain this reclaiming note, recal the interlocutor reclaimed from, and decern in terms of the conclusions of the summons.

LORD GUTHRIE — Many questions were argued to us with ample citation of authority, which it is not necessary in my opinion to determine. It is clear that the pursuer is entitled to decree if the disposition granted to the defenders by Charles Cristof Krall, dated 5th and recorded 6th August 1913, is inept. I am of opinion that Krall, not being the vassal infeft in the lands as a separate estate, had no power to grant that disposition, and, if so, it follows, contrary to the Lord Ordinary's judgment, that the defenders have no answer to the pursuer's demand.

Under the titles in his favour Krall was vested in the *plenum dominium* of an estate which included the subjects in question, and a title was expressly conferred upon him to sell or feu in whole or in part. It is true that in 1911 Agnew, the author of his authors, Howard & Cope, granted a feu to the Nellfield Estate Company which professed to confer on that company the *dominium utile* of the subjects in question. But the prior title of Krall's authors granted in 1910 was not affected by that feu. With that transaction neither he nor his authors had any relation. Krall could not be prejudiced by it, nor, unless by an arrangement under which the rights of all parties interested would be conserved, could he take benefit by it.

But the deed now in question is in terms based on that transaction, and, while founding on it in so far as it professes to dispose of a new estate, namely, the *dominium directum* which was carved out from the *plenum dominium*, and was brought into separate existence under it, it repudiates the effect of the deed as conferring a valid right of property in the Nellfield Estate Company. It seems to me that, if a valid disposition was competent in the terms of the dispositive clause of the defenders' title, it could only be granted by the Nellfield Estate Company, the vassal infeft in the land.

Whether Krall, under his unexhausted power to sell or feu, may still be able with the aid of ingenious conveyancers to vest the defenders with rights in the estate in question so as to defeat the feu granted to the Nellfield Estate Company, and also to avoid the rights of the prior bondholders on the estate of Nellfield, is a question which does not arise for consideration in this case.

I therefore agree that the interlocutor of the Lord Ordinary must be recalled and the pursuer found entitled to decree.

LORD JUSTICE-CLERK — I concur in the opinion of Lord Dundas.

The Court recalled the interlocutor and granted the decree concluded for.

Counsel for the Reclaimer (Pursuer) — Chree, K.C.—Wark. Agents—Steedman & Richardson, S.S.C.

Counsel for the Respondents (Defenders)— Maclennan, K.C.—Ingram. Agent—John Robertson, Solicitor.

Saturday, June 19.

SECOND DIVISION.

[Lord Hunter, Ordinary.

DAVIDSON *v.* SCOTT.

(*See* also *ante Scott* v. *Davidson*, June 11, 1914, 51 S.L.R. 708, and *Alston* v. *Nellfield Manure and Chemical Company, Limited, supra.*)

Right in Security—Sale—Res inter alios acta—Security over Two Estates—Right of Proprietrix of One Estate to Challenge Sale of Other by Creditor.

A, the proprietor of a heritable estate, granted to B a disposition of the estate in security of two sums of money, subsequently feued a part of the estate, and then sold the estate to C. B having assigned his rights under the disposition in security to D, D sold to a company in which he himself was largely interested, for an inadequate price, the *dominium utile* of the feu, and assigned the debt and the remaining security rights to E. In an action at the instance of E against C to recover as much of the maills and duties of C's property as would satisfy the balance of the debt, *held* that C was entitled to challenge the sale made by D of part of the security subjects, and to resist the attachment of rents by E for the balance of the debt.

Right in Security — Sale — Bona Fides — Onus of Proof—Exercise of Power of Sale by Heritable Creditor for Ulterior Purpose at Inadequate Price.

A disposition in security of a debt empowered the creditor to sell the subjects disponed "at any time or times in whole or in lots by public roup or private bargain, without any notice to us or our respective heirs, executors, or representatives, and without any advertisement, and at such price or prices as" the creditors "shall in their uncontrolled discretion think fit." An assignee of the creditors sold part of the subjects to a company in which he was largely