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

interested for an inadequate price. In an action by his assignee to recover the balance of the debt out of the remaining security subjects, *held* that the seller was bound to exercise his power of sale however wide, to secure repayment of the debt and not for any ulterior purpose, that a sale for an ulterior purpose of his own at an inadequate price was therefore challengeable, and that in the circumstances the *onus* was on him to show that the sale was a fair one.

Donald Davidson, High Street, Grantown-on-Spey, *pursuer*, brought an action against Miss Jessie Scott, residing at Nellfield Lodge, Braidwood, Lanarkshire, *defender*, for declarator that he was entitled to the maills and duties of certain subjects specified in a disposition in security for the sums of £1000 and £500, or at least so much of the same as should satisfy the principal sum of £481, 18s. 11d., being the balance of the £1000 resting owing.

The *disposition in security*, dated 29th August 1910, contained the following power of sale, viz.—"And we hereby grant power to the said Howard & Cope, Limited, and their foresaids (*first*) to sell the said subjects above disponed and assigned 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 said Howard & Cope, Limited, or their foresaids shall in their uncontrolled discretion think fit." It provided further—"Reserving power to me, the said John Lawson, or to my successors, to redeem said subjects while unsold on payment of said sums of £1000 and £500 and interest and expenses, and to demand an accounting should my said disponees sell said subjects or any of them or intromit with the rents, feu-duties, or other income arising therefrom."

The *facts* of the case appear from the *opinions* of the Lord Ordinary (HUNTER), who on 28th October 1914 allowed a proof.

Opinion. — "This is an action of maills and duties brought against the proprietrix of the estate of Nellfield by an assignee of a disposition in security over that estate. The circumstances are peculiar. All the averments have already appeared on the record in another action brought by the same pursuer against the same defender. It might be sufficient that I should merely refer to the opinions I expressed in that case, but it is perhaps better that I should recapitulate the main facts in the situation.

"A Mr Lawson appears to have borrowed two sums, one of £1000 and the other of £500, from a firm of Howard & Cope, who, in security of the advances, received from Mr Lawson, with consent of Mr Agnew, the pursuer's brother-in-law, the disposition in security now assigned to the pursuer. At that time the defender did not have a title to the property, and she did not appear as granter of the bond. She was, however, liable along with Mr Lawson and Mr Agnew for repayment of the £500.

"Howard & Cope took a decree for the £1000 against Mr Lawson and Mr Agnew, and for the £500 against Mr Lawson, Mr Agnew, and the defender. These decrees, along with the disposition in security over the estate of Nellfield, were assigned to a Mr Krall for £600. Mr Krall sold part of the estate at an alleged price of £700, and thereafter on 13th August 1913 assigned the decrees and the bond to the pursuer for the sum of £100.

"The £700 received by Mr Krall for sale of a portion of the estate was applied entirely in extinction of the £1000 decree.

"The pursuer, as assignee of Howard & Cope, charged the defender under the decree for £500 obtained against her. The defender brought a suspension of the charge and a record was made up. The grounds upon which the charge was sought to be suspended were briefly these. The defender alleged that she was merely a cautioner for the £500; that her rights had been prejudiced in respect that the sale by Mr Krall had been effected for a totally inadequate price to a company in which he had a controlling interest; and that in any event as cautioner for the £500 she was entitled to have the sum received from the sale by Krall apportioned between the £1000 and the £500. It was denied by the pursuer that the defender was merely a cautioner. I allowed a proof both upon the point that the defender was a cautioner, and also upon the averment that the price obtained from Krall was inadequate. The ground upon which a proof upon the latter point was allowed appears to have been that the pursuer as Krall's assignee in the debt could not take a better right to it than his cedent, and that but for Krall's improper acting there would have been no debt to assign. The pursuer reclaimed, but the Inner House affirmed my allowance of proof under both heads.

"Proof was led before me. In the result I found that the present pursuer had failed to establish that she was merely a cautioner. I therefore refused the suspension. Although I indicated my impression upon the case so far as based on the alleged inadequacy of price obtained by Mr Krall, I did not find it necessary to deal fully with the question. On a reclaiming note the Inner House adhered without expressing any opinion about the sale by Mr Krall.

"In the present case the defence is practically founded upon averments as to the sale by Mr Krall. I confess that I was reluctant to allow a proof. On considering the matter, however, I do not think that I am entitled to deprive the defender of an opportunity of persuading me to take a more favourable view of her defence than I was inclined to take, or of taking her case further. Nothing that happened in the former case can be founded on as settling anything in this action. I think therefore that there must be inquiry. It is, however, probably right that intimation should be made to Mr Krall so that he may intervene if he thinks fit."

After the proof the Lord Ordinary on 28th February 1915 assoilzied the defender from the conclusions of the action.

Opinion.—"For a general statement of the circumstances under which the present action is brought I refer to the note which I issued at the time when I allowed proof, and to the notes issued by me in the previous action between the same parties which raised the point insisted in by the defender as to the insufficiency of the price obtained by Mr Krall from a sale to the Nellfield Manure and Chemical Company, Limited, though that was not made a ground of judgment.

"There is much in the present case that calls for comment and criticism. Mr Krall appears to have bought the decrees obtained by Howard & Cope against the defender, her brother-in-law Mr Agnew, and Mr Lawson, and the assignation to the bond in security, for a sum of £600. In reality £100 of the purchase price was not provided by Mr Krall but by his agent Mr Robertson, who is also agent for, and brother-in-law of, the pursuer. The pursuer, after Mr Krall had effected the sale of part of the security subjects for £700, got an assignation in his favour, and a deed of indemnity was granted by Mr Robertson in favour of Mr Krall, protecting him against any claims that might be made against him in connection with the transaction. I think it impossible to treat the pursuer as though he were a *bona fide* assignee for value of Mr Krall's rights. Any plea maintainable against Mr Krall appears to me equally good against the pursuer. I consider the pursuer and Mr Robertson as being in reality jointly interested along with Mr Krall in a speculation which has already turned out very profitable to the pursuer. He has recovered the £500 on the promissory-note, and interest thereon at the rate of 5 per cent., for which the defender was liable. He is now seeking to recover an additional £481, with interest at 5 per cent., out of the subjects over which he maintains that he holds a security. The pursuer was enabled to make this fortunate purchase through Mr Robertson. That gentleman had acted at one time as agent for the defender Miss Scott and her brother-in-law Mr Agnew. He acted for Mr Agnew at the time when the feu was granted to the Nellfield Estate Company, Limited. As Messrs Howard & Cope appear not to have assented to, or known of, the feu-charter, their rights as security holders were not affected by the feu. Other holders of securities prior to Messrs Howard & Cope's deed, amounting to £7000, assented to their security being restricted to the superiority. Had Messrs Howard & Cope consented to a similar restriction the sale by Mr Krall could not have taken place, and what was sold by him would have been the property of the Nellfield Estate Company in liquidation.

"Originally Mr Robertson, who became interested along with Mr Krall, Dr Heuschkel, and others, as promoters of the Nellfield Manure Company, in purchasing the property proposed to make the purchase from the liquidators of the Nellfield Estate Company. Mr Robertson was also interested as a shareholder in that company, and presented an application in proceedings in the English Court to have Mr Mackenzie, the liquidator appointed by the company, removed. In the course of an affidavit sworn by him he complained that the liquidator had greatly underestimated the value of the assets of the company. He was successful in getting an additional liquidator appointed. Nothing has been recovered by the company in liquidation.

"For some time Mr Robertson negotiated with the liquidators of the Nellfield Estate Company for the purchase of their property. Mr Agnew and others interested with him also approached the liquidators with a view to purchase. Mr Robertson, as acting on behalf of the promoters of the Nellfield Manure Company, was anxious to prevent a sale being effected to Mr Agnew or his friends. He seems to have become aware that a title taken through the liquidators would, or might, render the purchaser liable to meet Messrs Howard & Cope's claim. Accordingly he resolved to effect a purchase for Mr Krall from that firm. On being approached, Messrs Howard & Cope refused to transact except on the footing of selling the decrees which they held along with the security. Hence the transaction to which I have referred in which Mr Krall appeared as purchaser.

"On acquiring right to the security subjects Mr Krall sold the eighteen acres with the heritable subjects thereon to the Nellfield Manure and Chemical Company, Limited, conform to disposition dated 5th August 1913. Mr Krall was himself largely interested in the purchasing company. A sale by a mortgagee to himself is invalid, but a sale to a company in which the mortgagee is a shareholder is not liable to be set aside on this ground as the company is in law a different *persona* from its shareholders.

"In effecting a sale, however, a mortgagee or security holder must act fairly. I think that Mr Justice Chitty in *Farrar* v. *Farrars, Limited*, 1888, L.R., 40 Ch. D. 395, at p. 398, correctly states the position of a mortgagee when he says 'A mortgagee exercising a power of sale is not a trustee of the power. The power arises by contract with the mortgagor, and forms part of the mortgagee's security. He is bound to sell fairly, and to take reasonable steps to obtain a proper price, but he may proceed to a forced sale for the purpose of paying the mortgage debt.' Under the powers contained in Messrs Howard & Cope's bond, they, and therefore their assignee, were entitled to sell 'without any notice to the debtor and without any advertisement and at such price or prices as Howard & Cope or their foresaids shall in their uncontrolled discretion think fit.' In my opinion this clause did not relieve Mr Krall from all obligations towards the mortgagor, though I think that those advising him misinterpreted it as doing so. Mr Krall obtained no valuation of the subjects before selling. He made no effort to receive any competitive offer. He should have known that from at least one quarter such an offer might be expected. The liquidators received on 12th August 1913, from a Mr Jacobs, an offer of £1200 for the subjects. This offer

included the moveables on the property which had not been the subject of sale on 5th August by Mr Krall. There is no evidence as to the value of these moveables, which the liquidators have now sold along with the other subjects to a Mr Alston—a sale to which I shall have subsequently to refer. They are spoken of in the evidence as being of the value of £500 to £700. On the other hand, the offerer agreed to accept the title *tantum et tale* as it stood in the company, and the liquidators were to grant warrandice from their own facts and deeds only. The sixth term of this offer sets forth that the proposed purchaser knew of the difficulties in which the liquidators were placed because of inability to deliver the deed of consent by the prior bondholders to the feu by Mr Agnew in favour of the Nellfield Estate Company, and also as to the claim made by Messrs Howard & Cope. The liquidators accepted the offer. It was, however, subsequent to the sale by Mr Krall, and nothing has come of it. It was, of course, much more favourable to the company in liquidation than Mr Krall's sale, under which the liquidators receive nothing. It left the purchaser to settle with Howard & Cope.

"On 3rd July 1912 Mr Mackenzie, the liquidator of the Nellfield Estate Company, had offered the subjects — including the moveable property to which I have referred —for sale at the upset price of £5500. Mr Robertson, who was a shareholder in the company, complained that the price was too low. In the affidavit sworn by him in connection with the summons for the removal of Mr Mackenzie from his office as liquidator, he attacked the liquidator for the low estimate of value which he was putting upon the assets of the company.

"On 9th April 1913 the liquidators exposed the subjects in Glasgow at the upset price of £3500. On 22nd April 1913 there was a re-exposure at the reduced upset price of £2500, but there was no offer. From the eighth and ninth conditions of the articles of roup it is clear that the sellers were not proposing to give a clear title. Mr Mackenzie had certain private offers to which he speaks in his evidence. Mr Krall and Mr Robertson both knew that Mr Agnew was anxious to acquire the property. I think that they must also have known that Mr Agnew, through friends, was in a position to get funds to complete a purchase. Their anxiety throughout was to prevent him and his gang—to use an expression of Mr Robertson—from getting the property, which they were determined to procure for the new company. I do not think that anything in Messrs Howard & Cope's deed relieved them or their assignee, in the event of their selling, of the duty to obtain a fair price. A substantial price, in Mr Krall's knowledge, had been offered on behalf of Mr Agnew for the property at a time when it was known that the title from the liquidator was doubtful owing to Messrs Howard & Cope's claims. A larger price might have been expected for a clear title, which Mr Krall was apparently able to give. The different figures mentioned include moveables as explained with reference to the £1200 offer.

"Mr Robertson, in view of the purchase by the Nellfield Manure and Chemical Company, Limited, of the subjects, proposed to insure them for £2000 with the Century Insurance Company. The same day he increased the amount to £5000. The increase was apparently made on the suggestion of Dr Heuschkel, who is said to have the sole right to use certain apparatus and inventions of a foreign firm by whom machinery had been supplied to the Nellfield Estate Company, Limited. He was, along with Mr Krall, primarily interested in the formation of the new company. I quite appreciate that the insurance might be effected with reference to reinstatement value rather than market value. At the same time, the great discrepancy between the price paid for the subjects, and the amount for which they were insured is very significant. From the evidence given by Mr Fisher, a surveyor from the Insurance Company who visited the premises along with Dr Heuschkel, it would appear that the intrinsic value of the subjects was put at a very much higher figure than the insured value.

"I reach the conclusion that in the circumstances of the case, and at the time when he sold, Mr Krall cannot be held to have received a fair price for the subjects sold by him. In reaching this conclusion I have not been influenced to any material extent by the evidence of the skilled witnesses. At the time when that evidence was led, in the former case, I commented upon it as being directed to proof of intrinsic rather than market value. That evidence has by consent of parties been made part of the proof in the present case; but I see no reason for altering the view which I then expressed. My decision in the case, however proceeded upon the ground that Miss Scott had failed to prove that she was merely a cautioner for payment of the £500 promissory-note granted by Mr Lawson, Mr Agnew, and herself, and not upon the point that the price was inadequate and unfair. The Inner House took the same view, and no opinion was expressed as to the fairness of the sale. There was no evidence that Miss Scott had in reality been proprietrix of the estate, the title to which was in Mr Agnew. This appears from the report of the case, 1914 S.C. 791.

"The argument based upon the doctrine that a mortgagee or security holder selling the subjects held by him owes a duty to the mortgagor to obtain a fair price was not developed before me in that case. It was not open on the pleadings. I proceed now on a consideration of that doctrine in the circumstances to which I have already referred.

"What then is the effect of my holding that the sale by Mr Krall was not effected for a fair price? The real sufferer was not Miss Scott. After the feu granted by Mr Agnew to the Nellfield Estate Company, Limited, she was the proprietrix merely of the superiority. The sale by Krall has not

affected that estate. Howard & Cope's assignee was enabled to sell the estate not merely of the superior but also of the feuar, because their assent had not been given to the creation of the feu (*see* Lord Kyllachy's opinion in the case of *Soues* v. *Mill and Others*, 1903, 11 S.L.T. 98).

"After the proof had been taken in this case I found that I would have to hear a discussion in the procedure roll in an action raised at the instance of a Mr Alston, as purchaser from the liquidators of the Nellfield Estate Company, to have the property declared to belong to him and the Nellfield Manure and Chemical Company, Limited, the defenders in the action, removed from the ground. The pursuer in that action maintained that he had the preferable title to the ground. Had I given effect to that contention the defence of Miss Scott in the present case would necessarily have failed. I have taken a view adverse to Mr Alston, and I think that I must now decide this case upon the assumption that that view is well founded. It may be noted that Mr Alston did not raise the question of reducing the sale to the Nellfield Manure and Chemical Company, Limited, on the ground that the price was unfair. The liquidators, however, could only have got the price upon the footing of settling with Howard & Cope. At one time that company would probably have taken less than the £600 which they received from Mr Krall. They did not desire to be involved in difficulties as regards the feu or as to their liability for the feu-duty if they entered into possession. On the sale being effected by them to Mr Krall and Mr Davidson, through Mr Robertson, the liquidators had to settle with the assignees who were prepared to claim any price obtained in payment of the full amount for which Howard & Cope held the security. In this view reduction of the sale would only benefit the liquidators if they could expect to realise a sum in excess of this amount.

"As, however, Mr Krall sold in virtue of the powers conferred upon Howard & Cope by Mr Agnew, I think that he must show, as in a question with the mortgagor or his representative, that the price was fair, independent of the speciality to which I have just referred, or of any question that may afterwards arise between the superior and the feuar.

"Looking at the case from this standpoint I have found the practical question as to the relief to be given to the owner of the mortgaged property attended with great difficulty. On the evidence led before me I should find it almost impossible to fix with confidence any sum as the proper price which should have been received for the subjects sold. It appears to me, however, probable that if Mr Krall had taken reasonable means to procure a fair price, he would have received either from the Nellfield Manure and Chemical Company, Limited, or the other party who was anxious to purchase, such a price as, taken along with the other sums already received in satisfaction of the decrees assigned by Howard & Cope, would have relieved the property of Nellfield from the burden imposed upon it by the bond. I propose to act upon this basis, and to assoilzie the defender with expenses.

"I may add that if I am wrong in the view which I have taken, but right in the view which I expressed in the case of *Alston* as to Howard & Cope's bond not being an effectual security for the interest on the principal sum, the amount in respect of which the pursuer claims right to recover from the estate of Nellfield would in any event require substantial modification."

The pursuer reclaimed, and argued—The defence was irrelevant. The defenders were asking the Court to reform the contract between Krall and the Manure Company, and that was incompetent—*Steuart's Trustees* v. *Hart*, December 2, 1875, 3 R. 192, 13 S.L.R. 105; *Baillie* v. *Drew*, December 2, 1884, 12 R. 199, 22 S.L.R. 154. Further, the contract in question, being the foundation of the pursuer's case, could not be set aside *ope exceptionis*—*Donald* v. *Donald*, 1913 S.C. 274, *per* L.J.-C. Macdonald at p. 278, 50 S.L.R. 155. The defender's remedy was either an action of reduction or an action of damages. There was no *onus* on the pursuer to show that the sale was a fair one, and the case of *Farrar* v. *Farrars, Limited*, 1888, 40 C.D. 395, founded on by the defenders, did not apply, (1) because it was an action of reduction, and (2) because the mortgage deed in that case did not contain the very wide power of sale to be found in the disposition in security in the present case. If, however, the *onus* was on the pursuer, it had been discharged, and the sale had been carried through fairly and in the lawful exercise of the powers contained in the disposition in security—*Kennedy* v. *De Trafford*, [1896] 1 Ch. 762, [1897] A.C. 180. There was no authority for the proposition that where a heritable security extended over two estates, A and B, the proprietor of A could insist on B being realised at a certain price under the bond—see *Stewart* v. *Brown*, November 17, 1882, 10 R. 192, 20 S.L.R. 131. In any event the defender could not insist as against the pursuer on any right she might have against the pursuer's author, (1) because this was a transmission of heritable estate to which the maxim *assignatus utitur jure auctoris* did not apply—*Scottish Widows' Fund* v. *Buist*, July 14, 1876, 3 R. 1078, *per* L.P. Inglis at p. 1082, 13 S.L.R. 659—and (2) because the defender was neither the original debtor nor the representative of the original debtor in the personal obligation, and there was no transmission of the personal obligation to repay against her—*Ritchie & Sturrock* v. *The Dullatur Feuing Company, Limited*, December 16, 1881, 9 R. 358, *per* Lord Young at p. 362, 19 S.L.R. 247.

Argued for the defender — The defence was relevant. The defence was the appropriate form in which the defender should challenge the transaction between Krall and the Manure Company, for the defender had no interest or title to reduce the sale until the pursuer tried to get payment out of her estate, and she had suffered no injury from the transaction which would entitle

her to raise an action of damages. As proprietrix, however, of part of the security subjects she had an interest to see that the security-holder should exercise his power of sale in *bona fide*, and for an adequate price — Stair, ii, 3, 48; Erskine, ii, 8, 35; Bell's Comm. (M'Laren's ed.) ii, 417; *Rose* v. *Rose*, January 17, 1786, M. 5229; *Gisborne* v. *Gisborne*, 1877, 2 A.C. 300, *per* Earl Cairns, L.C., at p. 305; *Robertson* v. *Norris*, 1858, 1 Giff. 421; Kerr on Fraud (4th ed.), p. 312; Farwell on Powers (2nd ed.), p. 550. The pursuer could have no higher rights than his author. But his author, Krall, had utilised his power of sale, not for the legitimate purpose of paying his debt, but for the purpose of getting the security subject into the hands of his own company. He had thus put himself into such a position of double interest as to throw on his assignee, the pursuer, the *onus* of proving that the subjects were sold at an adequate price—*Farrar* v. *Farrars, Limited* (*cit. sup.*); *Simson* v. *M'Millan*, 1770, 2 Pat. App. 227; *Park* v. *Alliance Heritable Security Company*, January 24, 1880, 7 R. 546, 17 S.L.R. 339; *Winans* v. *Attorney-General*, [1904] A.C. 287, *per* Lord Halsbury, L.C., at p. 289. This *onus* he had failed to discharge.

At advising—

LORD SALVESEN—This case is brought on the assumption that the disposition of the *dominium utile* of the 18 acres of the estate of Nellfield, on which extensive works have been erected, was validly conveyed by Mr Krall to the Nellfield Manufacturing Company, which he promoted, under the power of sale contained in the disposition in security in favour of Howard & Cope, Limited, which had been assigned by them to him. On that assumption the Lord Ordinary has held that Mr Krall has not discharged the *onus* laid upon him of showing that the price he received for the *dominium utile* in question, namely, £700, was a fair one, and he has in effect held that a sum ought to have been received in addition sufficient to discharge the unpaid balance of the debt in right of which the pursuer now is. We have had a long and able argument which divides itself into two heads—the first being that the defender, who is now the owner of the estate of Nellfield, but is not liable in the personal obligations undertaken by her author to Howard & Cope, has no title to defend the action. I was very much impressed by that argument at first, because as the *dominium utile* of the feu on which the works are erected does not belong to the proprietor of the estate of Nellfield, any sum received by the pursuer's cedent from its sale was so far as she was concerned a mere windfall, and it would seem at first sight that she has no title to challenge the terms on which this subject was sold. On fuller consideration, however, I am satisfied that this is not so. It is a condition of the pursuer's right to attach the rents of the estate belonging to the defender that his debt shall not have been satisfied, and if on a proper realisation of part of the subjects over which his security extended his cedent did not realise the fair value of that part, I think he must be dealt with on the same footing as if he had realised it. Stair says (ii, 3, 48)—"Infeftments for satisfaction of sums imply this condition, that the sums being satisfied, they are extinct, and the author's infeftment revives and stands valid, without necessity of renovation." So Mr Bell in his Commentaries (vi, 4, 3) lays it down that if two estates of the same debtor are covered by a security for the debt and a separation of interest in the two estates takes place, the debt must be paid rateably in proportion to the value of the estates, and of course by this must be understood the true value. In such a case the creditor could not gratuitously discharge his claim against the one estate, leaving the other to bear the whole burden. It seems to follow, therefore, that if he sells it at a much lower price than he could have obtained for it the same rule must apply. On this ground I think the title of the defender to resist the attachment of the rents due to her must be sustained, and her interest in maintaining her defence is clear. Indeed she is the only person so far as one can see who has an interest in maintaining her present pleas.

The next question is whether the Lord Ordinary is right in holding that the price received by Krall was not the fair or market value of the subjects sold. If Krall had sold to a stranger in terms of the powers conferred upon him by the disposition in security to which he had acquired right, and if his sole object in selling had been to obtain repayment of the debt, the transaction might in my opinion have been supported, even although it could be shown that the price received was inadequate. The powers conferred by the disposition were of an unusual kind, for the lender was empowered to sell by private bargain as well as by public roup, and without notice to the owner of the estate. These powers, nevertheless, having been conferred by the owner of the estate, if exercised *bona fide* and for the sole benefit of the creditor, could not easily have been challenged. The case here, however, is very different. Krall sold to a company which he was in process of forming, and of which he became one of the largest shareholders. The money with which he acquired the disposition in security from Howard & Cope was provided by two of his co-promoters, and their avowed object was for Krall to acquire the disposition from Howard & Cope on the cheapest possible terms, and having so acquired it, for him to dispone to the company at substantially the sum at which he had bought Howard & Cope's rights. The interests of the debtor or the owner of the estate which was pledged in security were not for one moment considered. The one object to which regard was paid was to acquire the feu for the new company at the lowest possible price. Under these circumstances I agree with the Lord Ordinary in holding that the price actually paid by the company affords no criterion of what could have been realised for it by a person who was exercising his power of sale *bona fide*, and with the sole intention of realising as much as he could for this portion of his secu-

rity. It was, however, strenuously maintained for the pursuer that the price actually paid was as much as anybody else would have paid in the open market. In the first place, it was said that Howard & Cope were shrewd men of business, and would not assign their security writ for anything less than its market value. I have no doubt that they got as much for it as they believed it to be worth; but it was not they who exercised the power of sale, and they were not aware of the circumstances which were in Krall's knowledge, namely, that the works were the subject of other competing offers, and were essential to the formation of the company which Krall was promoting. It is quite obvious from the correspondence that Krall at first contemplated, on behalf of his company, paying a much larger sum so as to get possession of the whole estate by having it exposed for sale at the instance of a prior bondholder. This scheme was abandoned when the ingenious device occurred to Mr Krall's agent of disposing only of the *dominium utile* of the feu, by which scheme, if it were successful, the liquidators' rights would be wholly defeated. The object of adopting this method of securing the property for the new company was avowedly to prevent the feu being acquired by any purchaser from the liquidators. There was thus no effort to obtain a fair price, nor was the sale a *bona fide* one in a question with the owner of the other security subjects, nor did Mr Krall concern himself at all with the amount of the purchase price except that it should reimburse him and his friends for the sum paid to Howard & Cope. I therefore agree with the Lord Ordinary in holding that at least the sum sued for, which represents the balance of the debt with interest, could have been got on a sale of the subjects, assuming that the creditor had no other interests than his own to consider.

LORD GUTHRIE—The pursuer has undertaken to prove that the price obtained by Mr Krall in 1913 for the subjects in question from the Nellfield Manure Company was, as in a question with a bondholder or his representative, inadequate to the extent of at least £480. It seems to me that the *onus* thus undertaken was shifted, on proof by the respondent that Krall was interested, through his connection with the Nellfield Manure Company, not to sell to the best advantage, or even to obtain a fair price, but to make the best bargain he could for and in the interests of that company. If so, I agree with Lord Salvesen that the *onus* thus shifted has not been discharged by the reclaimer. On the other points dealt with by him I concur in his opinion, and in the course proposed by him in reference to the present position of the action.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS, who was present at the advising, gave no opinion, not having heard the case.

The Court indicated that in view of the judgment just pronounced in the case of *Alston* v. *The Nellfield Manure and Chemical Company* (*supra*) the question would remain for discussion whether the Court should dismiss the present action or allow the pursuer to utilise it by way of amendment. Counsel for the defender having moved the Court to dismiss the action with expenses, counsel for the pursuer objected that if the action were dismissed his diligence which, in view of the judgment in *Alston* v. *The Nellfield Manure and Chemical Company, Limited* (*supra*), was good, would fall. The defender thereupon undertook, if the present action were dismissed, to consign the money to await the decision of the Court in any subsequent action which the pursuer might bring.

The Court pronounced this interlocutor—

"In respect of the undertaking given at the Bar by counsel for the defender to consign within seven days from this date in one of the Scottish chartered banks, in the joint names of the parties to this action, the full amount of rents recoverable under the action, in view of the judgment this day pronounced in the action *Alston* v. *The Nellfield Manure and Chemical Company, Limited*, recal the said interlocutor, dismiss the action, and decern."

Counsel for the Pursuer and Reclaimer—MacLennan, K.G. — Maclaren. Agent — John Robertson, S.S.C.

Counsel for the Defender and Respondent —Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

HIGH COURT OF JUSTICIARY.

Friday, June 18.

(Before Lord Justice-General and a Jury.)

H. M. ADVOCATE *v.*
HETHERINGTON AND WILSON.

Justiciary Cases—War—Trading with the Enemy—Supplying or Agreeing to Supply Goods to an Enemy—Trading with the Enemy Act 1914 (4 *and* 5 *Geo. V, cap.* 87), *sec.* 1—*Trading with the Enemy Amendment Act* 1914 (5 *Geo. V, cap.* 2), *sec.* 10.

Supplying, and offering or proposing or agreeing to supply, goods to an enemy are separate and distinct offences which may be separately charged.

To constitute an offence it is of no moment where the parties or the goods were at the time when the acts founded on were committed; nor to whom the goods belonged; nor through whom the transaction was carried on; nor what the payment, recompense, or conditions may have been; nor how the goods, short of royal licence, came to be available. It is sufficient that the accused was "resident, carrying on business, or being" in the British Dominions, and that the goods were supplied or attempted to be supplied to an enemy.

It is not necessary, therefore, in order