studied, meets with my full concurrence. I am therefore in favour of adhering to the Lord Ordinary's judgment.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Clyde, K.C.—W. H. Stevenson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Defenders and Respondents — Mitchell. Agent — Thomas J. G. Hunter, W.S.

Thursday, June 11.

EXTRA DIVISION.

(Before Lord Dundas, Lord Mackenzie, and Lord Cullen.)

SCOTT *v.* DAVIDSON.

Right in Security—Bill of Exchange—Disposition in Security—Promissory-Note——Sale of Security Subjects by Creditor—Title of Co-obligant in Promissory-Note to Challenge Sale—Price.

Where an obligant under a promissory-note subsequently conveyed heritable property in security of the debt, *held* that a co-obligant in the promissory-note, who was not a cautioner, had no title to challenge the sale of the security subjects on the ground that the price was inadequate, and by this means to avoid liability for the debt.

Miss Jessie Scott, Nellfield Lodge, Braidwood, Lanarkshire, *complainer*, brought a note of suspension against Donald Davidson, Grantown-on-Spey, *respondent*.

The following *narrative* is taken from the opinion of the Lord Ordinary (HUNTER):—"In this action the complainer seeks to set aside a charge proceeding upon a decree obtained against her and others for payment of a sum due upon a promissory-note dated in March 1910. The other granters of the promissory-note were a Mr Lawson and a Mr Agnew, the latter being a brother-in-law of the complainer. The promissory-note was granted in favour of Messrs Howard & Cope, and the charge proceeded at the instance of a Mr Davidson, as assignee of a Mr Krall, who in turn was the assignee of Messrs Howard & Cope. At the time when the complainer and the two gentlemen I have named gave to Messrs Howard & Cope a promissory-note for £500, Mr Lawson and Mr Agnew also granted a promissory-note for £1000. In security of these two promissory-notes for £1000 and £500 respectively, Mr Lawson conveyed to Messrs Howard & Cope the estate of Nellfield, by disposition dated in August 1910. Subsequent to granting that conveyance, Mr Lawson in June 1911 conveyed Nellfield estate to Mr Agnew, who in turn gave a feu-charter of 18 acres of that estate to a company known as the Nellfield Estate Company. That company erected plant upon the estate and went into liquidation. They attempted apparently to sell the heritable subjects, or rather the plant, but without success. There are other bonds upon the estate. To some extent these complicate the different questions raised before me, but I do not think they materially affect what, in my opinion, are very clearly the only material points that are raised in this action. Howard & Cope did not get payment of what was due to them by Messrs Lawson & Agnew, and they took decree against Messrs Lawson & Agnew for the £1000, and against Lawson, Agnew, and the complainer for the £500. The decree was not satisfied, and Messrs Howard & Cope assigned the decree, and at the same time assigned the disposition and security for sums due under the promissory-note to Mr Krall on 17th July 1913. After Mr Krall was thus in possession of the decrees and the security subjects, he exercised a right which had been conferred upon the holders of the security, namely, Howard & Cope, and disponed to another company—which, for brevity, I will call the chemical company — the subjects on 5th August 1913, the deed being registered on 6th August 1913. The price received by Mr Krall was £700. When Mr Krall had received that price for the subjects, he assigned the decrees to the present respondent for a sum of £100. The challenge now made by the complainer is this—She says that the price which Mr Krall received from the chemical company, £700, was a totally inadequate price; that he should have received a much larger price; and that if an adequate price had been received the total indebtedness upon the bills would have been wiped out."

The complainer pleaded, *inter alia*—"(2) The complainer *is* entitled to have the note passed and the charge complained of suspended, in respect—(*a*) That the respondent's cedents being bound to account to the complainer for the price of the heritable subjects sold, the same should be applied *pro rata* to meet the indebtedness of the complainer on the said promissory-note. (*b*) That on a just accounting no sum is due by the complainer to the respondent. (*c*) That the amount of the charge is in any view excessive, and falls to be restricted."

Proof was allowed and led, and on 28th April the Lord Ordinary repelled the reasons of suspension, and found the warrants and charge orderly proceeded.

Opinion.—[*After giving the narrative already set forth*]—"I heard a discussion in the procedure roll in this case, and in the note appended to my interlocutor of 23rd January 1914 the reasons for my allowing a proof will be found. I may say this, that it appeared to me then that the vital point for the complainer was that she should establish, as she undertook to do, that she was merely a cautioner under the £500 bill. I considered that was a point upon which parole proof was competent, and I allowed it. Her other averment of consequence was to the effect that by the inadequate price that had been unjustifiably received by Mr Krall she was continued liable under the bill, whereas had a sufficient price been received she would not have been under any liability. The averment which the com-

plainer makes upon the question of her being a cautioner is as follows—'The complainer signed said bill p. £500 at the request and for the accommodation of the said John Lawson; she did not receive any part of the said sum, and as was well known to the said Howard & Cope, Limited, and the said John Robertson she was merely a cautioner for the said sum.' As regards the latter part of this averment, it is to my mind not only clear that the complainer has failed to establish what she avers, but I think neither Howard & Cope nor Mr Robertson knew at the time when the complainer signed the promissory-note that she was merely a cautioner and not a principal. With reference to the question as to whether she was a principal or a cautioner the matter stands thus. On the face of the bill, which is in the complainer's own writing, she appears to be a principal. Against that there is merely her own testimony. Neither Mr Agnew nor Mr Lawson has been adduced as a witness in this case. I think that however clear and above all possible challenge the testimony given by the party to a bill may be, it is more than doubtful whether a judge could accept such evidence as sufficient. In the present case, without making any severe comment on Miss Scott's evidence, I am bound to say I could not accept it as in itself sufficient to justify me relying upon it as accurate in detail. In my judgment the complainer has failed to establish that she was merely a cautioner and not a principal.

"The only question remaining is what is the effect of that failure. It, of course, makes it unnecessary for me to consider whether, on the assumption that the complainer was a cautioner, and the price received adequate, there ought to have been a *pro rata* apportionment by the creditor between the £1000 indebtedness and the £500 indebtedness. The complainer argued that although she had not established that she was a cautioner, she was still entitled to take up this position—that as an insufficient price had been received for the security subjects, she had suffered, for if a fair adequate price had been got she would not have been liable at all, or to the extent she is sought to be made liable. I am bound to say I cannot accept that position as sound in law. I do not think that on the footing that the complainer is not a cautioner she can challenge in the present proceedings the price received for the subjects. Neither Mr Agnew nor Mr Lawson is a party to the present case. So far as I know, Mr Lawson, who was granter of the disposition, is satisfied with the price that was received, and I cannot tell as in a question between the complainer and the co-obligants of the bond what the state of indebtedness between them is. I think therefore that the complainer having failed to establish that she was a cautioner, cannot succeed upon the ground that the price received was insufficient. But I may say with reference to the latter part of the case that I was not satisfied with the complainer's evidence as establishing clearly that Mr Krall in effecting the sale which he did sacrificed the property and took an inadequate price. No doubt, if the position is looked at from the point of view of what was got for the property as compared with what was spent on the property, the amount received was small; and I cannot help thinking that the witnesses who gave evidence for the complainer applied their minds to the question as to what was what I may describe as the intrinsic value of the subjects rather than to what was the market value, on the footing that the subjects were put up for sale. I am not going into detail in connection with this matter. All I need say is, that looking to the troubled state of the title to the property and the want of success of the different enterprises carried on, I am not satisfied that the price actually paid to Mr Krall was other than what might fairly and reasonably be described as the fair value of the subjects. Therefore on the whole matter I am of opinion that the complainer has failed in her case, and I refuse the note."

The complainer reclaimed, and argued—The complainer here was a cautioner; but even if that were held not proved the complainer was entitled to challenge the sale of the security subjects. It had been held that a security holder was to a certain extent a trustee for the common debtor and his representatives—*Beveridge* v. *Wilson*, January 17, 1828, 7 S. 279. In *Stewart* v. *Brown*, November 17, 1882, 10 R. 192, 20 S.L.R. 131, the security-holder's obligations were applied to a larger class, which included a cautioner. Accordingly the security-holder here or his assignee was bound to exercise his rights in a way beneficial and not hurtful to the complainer. The respondent was in no better position than his author, and accordingly the *onus* was on him to justify the sale—Menzies on Trustees (2nd ed.), sec. 282; Bell's Principles, sec. 62; *Hodgson* v. *Deans*, [1903] 2 Ch. 647; *Farrar* v. *Farrars Limited*, 1889, 40 Ch. Div. 395, at p. 400; *Thomson* v. *Eastwood*, 1877, 2 A.C. 215, at 236. The complainer was entitled to have the charge suspended. The sale was not a *bona fide* one, but was for an entirely inadequate consideration, and if the proper price had been obtained the debt would have been extinguished. Further, as a co-obligant, the complainer was entitled to relief against the other obligants, and to an assignation of the security held. Accordingly by selling the security subjects for an inadequate price the obligee had prejudiced the complainer, and she was accordingly released from her obligations—*Mackirdy's Trustees* v. *Webster's Trustees*, February 1, 1895, 22 R. 340, 32 S.L.R. 252.

Argued for the respondent—The complainer here had no title, because even if she was a cautioner she was not entitled to any different treatment from an ordinary co-obligant unless the creditor was aware that she was a cautioner, and this had not been proved—*Duncan Fox & Company* v. *North and South Wales Bank*, 1880, 6 A.C. 1, *per* Selborne, L.C., at p. 11; *Newton* v. *Chorlton*, 1853, 10 Hare 646. Even if she had a title, she had no grounds for objecting to the sale. The duty of the bondholder was merely to act in good faith—*Kennedy* v. *De Trafford*,

[1897] A.C. 180. The mere fact that Krall, the vendor, was largely interested in the buying company did not affect the *bona fides* of the sale—*Salomon* v. *Salomon & Company*, [1897] A.C. 22. In any event, the disposition in security was not granted for some months after the bill debt was incurred, and accordingly the complainer had no interest in it. Further, the value received for the subjects was quite adequate.

LORD CULLEN — When this case was formerly before us on the relevancy of the complainer's allegations contained in the closed record, the complainer's argument was based on an assumption of the truth of her averment that she was a cautioner for the bill debt in question, and that the fact of her being a cautioner was known to Howard & Cope, the creditors who took the bill. On this assumption, the truth of which the complainer offered to prove, she contended that she was entitled to the equities of a cautioner both in a question with Howard & Cope and with their assignees, including Mr Krall, and that under one of these equities the holder of the bill debt was bound to communicate to her the security given for that debt by Lawson in return for the full payment exacted from her; that this obligation could not be implemented in respect that Krall, the author of the respondent, had relinquished without consideration almost the whole value of the security, having sold to the Nellfield Manure and Chemical Company, Limited, for £700 subjects that were worth £10,000.

Affirming the Lord Ordinary's interlocutor, which was then under review, we allowed a proof.

On the evidence adduced the Lord Ordinary holds that the complainer has failed to prove that she was a cautioner. I entirely agree with the Lord Ordinary for the reasons which he has stated. The Lord Ordinary's view, indeed, has hardly been questioned, and no attempt was made to prove that Howard & Cope knew that the complainer was, as she alleges, the cautioner—a matter as essential to her case as the fact of her being a cautioner.

But the complainer, on the footing that she falls to be regarded as a co-obligant for the debt who was not a cautioner, still insists on her right to suspension of the charge. She says in the first instance that she is not bound to pay the debt in so far as it has already been paid *aliunde*. The respondent concedes this to the extent and effect of bringing into account the £700 of money received by Krall under the sale made by him to the Nellfield Manure and Chemical Company, Limited. The mode in which the £700 is brought into account as between this particular bill debt and another bill debt is not questioned by the complainer on the assumption that she was not to be treated as a cautioner; but her case is (first) that Krall sold for £700 what was worth a great deal more; (second) that the buyers were the Nellfield Company Limited; (third) that this company was promoted by Krall for the purpose of making the purchase; and (fourth) that Krall became the principal shareholder of the company. On the footing of these alleged facts the complainer contends that Krall was benefited by the transaction beyond the price of £700 which he received, and that he is bound to bring into account with her such excess of benefit over the £700.

Now I think it is clear that Krall did not sell to himself, although that view permeated Mr Macphail's argument to a considerable extent. He sold to a limited company, which is a separate *persona*. He did not through the sale become, as the complainer suggested, part owner of the property. The property passed in exclusive ownership to the company which bought it. What Krall derived in benefit, if the price was inadequate, was not a part of the property but a share holding in a company which he had allowed to buy too cheaply. If Krall did sell the security subjects in question at an inadequate price he may have to answer for that to Lawson, who gave him the security. The complainer did not give him security and it was not created for her benefit. Indeed, it has been pointed out by Mr M'Lennan to-day that whereas the bill which she signed was dated in March 1910, the security was not created by Lawson until August 1910, and there is not any evidence nor any allegation directed to showing that when the security was created in August 1910 Miss Scott was any party to its creation or knew of its being created, or that it was intended in any way to be a security for her behoof. Krall, the creditor, I think, might have handed back the security to Lawson at any time without the complainer's consent and without her having any right to object or without any effect upon her indebtedness under the bill.

Again, I think the sale by Krall to the Nellfield Manure and Chemical Company, Limited for £700 might be ratified by Lawson or by his trustee without the complainer's consent. If that is so I am quite unable to follow the argument by which it is sought to be made out that the complainer, in addition to having brought into account the price which Krall actually received, is entitled to call Krall to account for the way in which he dealt with the property in connection with the sale, and for not having procured a large enough price, if it be the case that the price of £700 was less than the value of the property. That seems to me to be a matter for the owner of the subjects who granted a security.

It was mentioned by Mr Macphail in his speech that Miss Scott is now said to be the owner of the subjects. There is no information as to when she became owner or what precisely she owns, the only reference to the matter being a remark in a parenthesis at the bottom of page 7 of the record, where the estate of Nellfield is referred to and the words "(now belonging to the complainer)" are added. Whether she was the owner of Nellfield at the time when Krall sold to the Manure and Chemical Company there is nothing to show. It is not said that she was in any way the assignee of Lawson under the disposition granted to Howard

& Cope, and I confess I am unable to gather from the brief statement of the parenthesis which I have read that Miss Scott has *qua* owner any right to insist in the suspension.

I think, therefore, her case must be considered upon the grounds which were submitted to us, and very clearly submitted to us, by Mr Dykes in his opening speech, and these I have stated and dealt with.

As I have said, Krall has brought into account all the money which he received by way of price, and I do not think the complainer can demand any more. In stating these views I have not adverted to the question of the adequacy of the price in point of fact. If the views which I have expressed are right, it is unnecessary to go into that question, and therefore I shall not do so.

I am of opinion that the Lord Ordinary's judgment is right and that we should affirm it.

LORD MACKENZIE—I am of the same opinion and upon the same ground. I do not think it necessary to express any opinion upon the merits of the case—that is to say, whether the price at which Mr Krall sold was or was not an adequate price, because in my opinion the present complainer has no title to raise that question.

She brings this suspension of a charge upon a decree obtained against her ordaining her and John Agnew and John Lawson to make payment jointly and severally of the sum of £500. It is as a debtor that she seeks to have the charge suspended, and no question is raised in the present proceedings at her instance arising out of any right of property which she may now have in the subjects which are in question.

It appears parenthetically as an averment on record that she is the owner of Nellfield, and there is a reference in the proof to that effect; but I wish to emphasise that no question is raised as between the owner of the security subjects and the respondent in the present case, and that nothing that we may say in giving judgment upon the present point can in any way affect any right that the owner of the property has, and may hereafter seek to vindicate by an action in the appropriate form, to set aside the transaction by which Krall has come in place of Howard & Cope and realised the security subjects, as being in violation of the duty that he owed to the owner of the subjects. That there is such a duty is made clear by cases to which we were referred and does not admit of dispute.

But dealing with the question as raised in the present proceedings, the first point is that the complainer has entirely failed to prove what in my opinion is the necessary foundation of her case, viz., that she is in the position of a cautioner. There is no sufficient evidence to that effect, the only testimony being that of the complainer herself, and it is the more remarkable that she should be the only witness upon this point, because it appears that she granted this promissory-note in order to oblige her brother-in-law Mr Agnew, and Mr Agnew is not a witness in the case. Moreover, even if she established that she was a cautioner it would not have availed unless she brought home to Messrs Howard & Cope that they knew she was a cautioner. In regard to that the proof seems to be entirely silent.

But it is said that even if there is no evidence upon those, which seem to me to be vital points, yet as a co-obligant she is entitled to a certain equity in regard to the security over Nellfield. Now it is important to observe in this connection that she granted this promissory-note for £500 along with Messrs Lawson & Agnew to Howard & Cope on the 31st March 1910. There had been on 22nd November 1909 a prior bill for £1000 by John Agnew which came into Howard & Cope's hands. Miss Scott was no party to that bill. It was not until 29th August 1910 that Lawson with Agnew's consent disponed the Nellfield subjects to Howard & Cope in security, not only of the £500 for which Miss Scott was bound, but also in security of the £1000 for which Agnew was bound. There is no warrant for saying that the promissory-note was granted by Miss Scott on the faith of any security being granted, and in my opinion it is a fallacy to say that in dealing with that security the creditor was in any true sense a trustee for Miss Scott. She had no *jus quæsitum* in the security at all. She was not in the position of an owner who when a creditor realises a heritable security has the right to see that as large a sum is realised as possible—a right which is also possessed by a postponed billholder in analogous circumstances.

But in the present case there was nothing to prevent Mr Lawson, the owner of the property, from transacting with Messrs Howard & Cope the day after he granted the disposition of the security on 29th March 1910 and bargaining on any terms he pleased as regards the security subject. He could, so far as Miss Scott was concerned, have loaded that security with any amount of debt so as to make it rank preferably to her £500. He could have done that because Miss Scott had no interest in the security, and would have had no right to prevent his so dealing with it. He might have accepted a reconveyance, or he might have consented to the selling at any price he pleased.

I think all those considerations are sufficient to indicate that when Miss Scott fails to establish that she is a cautioner she also fails to show she has any equities as in a question with the holder of the subjects. That being my opinion, it follows that she has no title to raise the question which has been very fully argued.

LORD DUNDAS—I concur.

The Court adhered.

Counsel for the Complainer and Reclaimer—Macphail, K.C.—Dykes. Agent—James Scott, S.S.C.

Counsel for the Respondent—M'Lennan, K.C.—Maclaren. Agent—John Robertson, Solicitor.