Thursday, June 20.

FIRST DIVISION.

[Sheriff Court at Stonehaven.

VALLENTINE (LIQUIDATOR OF BRECHIN AUCTION COMPANY) *v.* REID.

Contract—Contract to Graze Cattle with Option of Purchase—Sale—Hiring—Security over Moveables.

Donald agreed to purchase nine heifers from a dealer in the mart of an auction company, but having no money to pay for the cattle he entered into an agreement with the auction company by which they undertook "to send nine heifers" to him, and he agreed "to receive the same to be grazed upon his park," on condition (1) that he was to feed the cattle and care for them as faithfully as if they "were his own property;" (2) that he was to receive from the company 1s. 3d. per week for the keep of each heifer, and 75 per cent. of the cost of any artificial food supplied to them; (3) that the agreement was to be terminable by either party on one week's notice; (4) that Donald should have the option at any time during the subsistence of the agreement of purchasing the cattle at the price paid to the vendor. Having signed this agreement Donald obtained delivery of the cattle from the vendor, who was paid their price by the company. Having obtained delivery Donald took the cattle to a field rented by him, and after grazing them for a few weeks there he sold them to Reid, a neighbouring farmer, without giving any notice to the company. In an action by the company against Reid for re-delivery of the cattle, it was proved that the company had entered into other agreements of the kind above specified both with Donald and other parties; that the payments which according to the agreements the company were to make for the keep of the cattle were quite inadequate for that purpose, and that they had in no case ever made any such payments or in any way exercised any rights of ownership over the cattle.

Held that at the date when the cattle were sold to Reid they were the property of the company; that the company had placed them in Donald's possession in order that he might fatten and sell them for his own behoof; and that accordingly the company were barred from challenging the sale by Donald to the defender, and had no claim against the latter.

On 3rd October 1893 William Donald, cattle-dealer, Montrose, bought privately at the mart of the Brechin Auction Company, Limited, eight heifers from Dan Callaghan, a cattle-dealer, at the price of £53, and on the same day he bought another from William M'Manus for £5, 5s. In order to obtain money to pay for the cattle, Donald and the vendors went to the office of the Auction Company, and the officials of the company agreed to pay for the cattle upon Donald signing the following agreement with the company—"The first parties (The Brechin Auction Company) hereby agree to send nine heifers to the second party, and the second party (William Donald) hereby agrees to receive the same to be grazed upon his park at Kirktonhill, in the parish of Marykirk, upon the following conditions—(1) The second party shall duly care for and supply good and sufficient grass and water to the said nine heifers upon the said farm, and being the produce thereof, in the ordinary way, and as faithfully as if the nine heifers were his own property; (2) the first parties shall pay to the second party at the rate of one shilling and threepence per week for the keep of each heifer, and seventy-five per cent. of the nett cost of any artificial food, supplied with the previous written consent of the first parties, shall be repaid to the second party; payments shall be monthly; (3) this agreement shall be terminable by either party upon one week's notice given to the other party; (4) it shall be in the power and option of the second party at any time during the subsistence of this agreement, and before notice under article 3, to become the purchaser of the said nine heifers at the price of £58, 5s., with interest thereon at the rate of five per centum per annum from 3rd October 1893."

This agreement having been duly signed, Donald got delivery of the cattle direct from the vendors, who were paid the agreed-on price by the company. On obtaining delivery Donald removed the cattle to a grass park rented by him on Kirktonhill estate.

On 18th November Donald removed the cattle to the farm of Broomhill, occupied by John Reid, and endeavoured to make arrangements for their keep, but failing to do so sold them to John Reid on 20th November at the price of £70.

On 28th March 1894 Mr Bell, manager of the company, wrote to Reid demanding delivery of the cattle, on the ground that they belonged to the company, and that Donald "had no right or authority from us to sell them to you."

Reid refused to give up the cattle, and the Brechin Auction Company having gone into liquidation, the liquidator, William M'Inroy Vallentine, raised an action against him in the Sheriff Court of Aberdeen, craving the Court to ordain the defender to deliver up the cattle, or pay to the pursuer the sum of £75.

The pursuer pleaded, *inter alia*—"(4) The pursuer, as liquidator aforesaid, being owner of the said nine heifers, and the said William Donald having no title to sell the same to the defender, decree ought to be granted in one or other of the alternative conclusions of the petition as craved."

The defender averred that the cattle had never been the property of the Auction Company, never having been transferred or delivered to them; that they had been purchased by and delivered to Donald, and that the company had in no way inter-

fered with Donald's treatment of them; that the agreement did not represent the true nature of the transaction between Donald and the company; that previous transactions of the same nature had taken place between the parties, and that on each occasion Donald, having signed a document the terms of which were unknown to him, but which the defender believed to have been similar to those of this agreement, had taken delivery of the cattle, had disposed of them without any interference from the company, and had merely accounted to the company from time to time for the prices advanced by them at the time of his purchase of the cattle.

He pleaded—"(1) The queys in question never having been the property of the Brechin Auction Compony, Limited, the pursuer has no title to sue. (3) The queys in question having been delivered to the said William Donald, and he having been allowed to treat them as his property, and having sold them to the defender, pursuer is not entitled to delivery. (4) The agreement founded on not setting forth the true state of the transaction anent the queys, but being a mere colourable device to endeavour to rear up a security notwithstanding delivery, the defender ought to be assoilzied. (5) The Auction Company by their own conduct, as condescended on, are precluded from denying William Donald's authority to sell to the defender."

The Sheriff-Substitute (BROWN) allowed the parties a proof of their averments.

It appeared that the officials of the company had not inspected or even seen the cattle in question before entering into the agreement with Donald.

The evidence further showed that the company had been in the habit of entering into agreements similar to that which they entered into with Donald. With regard to the payments which the company bound themselves to pay for the keep of the cattle, the manager of the company deponed—"We never paid anything for keep under any one of the agreements referred to. We were never asked to do so, because the sellers got the profit. . . . I never offered Donald payment for any keep." The secretary of the company deponed—"There is a clause in all the agreements to the effect that so much rent was to be paid for keep, but so far as I know, none of these monthly payments were ever made." It also appeared that the agreed-on rates were quite inadequate to meet the cost of keeping the cattle; that the company never exercised any supervision as to their treatment; and in fact never exercised any rights of ownership at all in regard to them.

On 26th January 1895 the Sheriff-Substitute (BROWN) pronounced this interlocutor:—"Finds in fact (1) that on 3rd October 1893, and for some time previously, the Brechin Auction Company, Limited, carried on business in the sale of cattle both by public auction and under agreements effected privately through the agency of the company, and that all the sales of both classes passed through the company's books; (2) that it was a practice of the company in some instances, as regards private sales when a customer was unable to pay the price of his purchases at the time, to advance the price on condition of the purchaser entering with them into agreements, of which Nos. 5, 12, 13, and 14 of process are examples; (3) that on 3rd October 1893 William Donald, cattle-dealer, Montrose, agreed to purchase from Daniel Callaghan, cattle-dealer, Brechin, eight queys at the price of £53, and from another cattle-dealer of the name of M'Manus one quey at the price of £5, 5s., and being unable to pay the price thereof, applied to the said company for an advance, and that that being agreed to, the company, on said 3rd October 1893, paid to the said Daniel Callaghan and the other dealer above mentioned the amount of their respective sales, and *unico contextu* therewith entered with the said William Donald into the agreement No. 5 of process; (4) that the said William Donald had on three occasions prior to said 3rd October 1893 entered into similar agreements with the said company, and was fully cognisant of their terms; (5) that delivery of the cattle was made to the said William Donald under the agreement No. 5 of process by the company, and that after grazing them for some time he sold them by private bargain to the defender at the price of £70; (6) that the said William Donald, before making said sale to the defender, had not obtained the consent or permission of the company thereto: Finds in law that under the transactions in regard to said cattle as above set forth, no right of property thereto had been acquired by the said William Donald, and that the same was in the said company: Therefore repels the defences: Decerns against the defender for the sum of £70 with interest as concluded for from this date," &c.

The defender appealed to the Court of Session, and argued—The company had no power to purchase cattle, and as a matter of fact did not do so. The real purchaser was Donald, and the relation between him and the company was only that of debtor and creditor. No possession had been given to the company, and they had in point of fact never seen the cattle. The agreement was a mere device to create a security over moveables—*Cooper & Company* v. *Donaldson*, July 8, 1880, 7 R. 1108; *Heritable Securities Company* v. *Wingate & Company's Trustees*, July 5, 1880, 7 R. 1094. *M'Bain* v. *Wallace & Company*, July 27, 1881, 8 R. (H. of L.) 106, was distinguishable from the present case. Even if the company ever had any right of ownership in the cattle, they had never acted on the agreement, but had allowed Donald to deal with the cattle exactly as if they were his own, and so had no claim against a *bona fide* purchaser such as the defender—Factors Acts 1859 (52 and 53 Vict. cap. 45), and 1890 (53 and 54 Vict. cap. 40), secs. 8 and 9, as interpreted in *Shenstone & Company* v. *Hilton*, L.R. 1894, 2 Q. B. D. 452, and *Helby* v. *Matthews*, L.R. 1894, 2 Q. B. D. 262. By clause 4 of the agreement Donald had the right to purchase the cattle. It was therefore certainly not an ordinary contract

of hiring, and by selling them he had simply elected to exercise his option of purchase.

Argued for respondent—Donald had no title to the cattle when he sold them except under the agreement. But all the articles of the agreement were on the understanding that the company was the true owner. They might at any moment have put an end to the agreement, and compelled Donald to re-deliver. He was only entitled under article 4 to purchase the cattle on payment of the price, and had no right to sell them. There was authority for the Court upholding such an agreement as this, even though its intention might be to secure advances — *M'Bain* v. *Wallace & Company*, July 27, 1881, 8 R. (H. of L.) 106; *Liddell's Trustees* v. *Warr & Company*, July 18, 1893, 20 R. 989. Donald therefore not being the owner, the defender could only claim to retain the cattle under the Factors Acts, and these did not apply here. The case of *Inglis' Trustees* v. *Macdonald, Fraser, & Company*, February 8, 1887, 3 S. L. Review, 389, decided in the Sheriff Court of Perth, was an authority for the view that Donald had never become the owner of the cattle.

At advising—

LORD PRESIDENT—The defenders bought the cattle in question from William Donald, in whose possession they then were. The present question depends upon the nature of Donald's possession, and his right to deal with the cattle.

Donald bought the cattle from one Callaghan in the mart of the company now in liquidation. He bought them for the purpose of fattening them on his farm and then selling them. He had not the money wherewith to pay the price, but he and Callaghan then and there went to the company's office in their mart, and got the money from their clerks on Donald signing the agreement on which the present question largely turns. The price being thus provided, Callaghan put it in his pocket, Donald got away the cattle, took them to his farm, fed them, and after some weeks sold them to a purchaser, to wit, the defender. The pursuer now claims the cattle in virtue of the agreement.

It has been seriously disputed by the defender whether the company ever became owners of the cattle at all. From the evidence it is perfectly plain that nobody representing the company ever so much as saw the cattle, or considered whether they were worth the price paid to Callaghan. It is also clear that the company provided the money in order that Donald might get the cattle and fatten them for sale. Still, it is possible that, this being the common purpose of the company and Donald, they may, for the better carrying it out, have made the company in law and in fact the owners of the cattle. I am disposed to think that this was the case. Of the three possible owners, Callaghan, Donald, and the company, Callaghan, having got his money, at once disappears from consideration. Then the agreement must, I think, be held to have been binding upon Donald as well as upon the company. Now, the agreement does not in so many words say that the company are owners, but it plainly implies this, for it gives Donald the right of purchasing the cattle from them. Construing the agreement then, and assuming Donald to have been, before its execution, the purchaser of the cattle, I should hold that he had given up that position, and looking to the proved facts, it seems that Donald, having bought the cattle from Callaghan, ceded his rights to the company in consideration of their paying the price to Callaghan, and took from them the rights specified in the agreement. The cattle being at the time in the company's mart, and no one being entitled to remove them without the permit of the company, no further delivery was required to vest them in the company.

Assuming, then, the cattle, when they were in the mart to have been the property, of the company, it remains to be seen what the company did with them. They handed them over to Donald, and the cattle remained in his possession without the smallest control or interference on the part of the company. What, then, was the cause or occasion of Donald's possession of the company's cattle? Was that possession due to some definite contract for a temporary purpose, such as loan, or hiring, or the like? Now, it is true that the argument sets forth that the company agreed to send nine heifers to Donald, and Donald agreed to receive them to be grazed on his farm, and provision is made that Donald is to feed the cattle, and to be paid therefor at a specified rate, and so far as the written instrument is concerned it reads as if this were the primary purpose of the agreement. If this were the fact, or could be said to be the fact, then the possession must needs be ascribed to this existing definite contract for the temporary care and feeding of the cattle for hire. But then it is admitted that this part of the contract was a dead letter; that, so far as Donald was concerned, no payment for the feeding the cattle was ever made or asked, and the secretary of the company says that so far as he knows none of those monthly payments were ever made in any of the several other cases in which the same agreement has been made in similar circumstances. He adds, it is true, that he is "only secretary, and that would fall under the officials," but then none of "the officials" are called, so that it may safely be concluded that his ignorance is as good as the knowledge of the others. But besides all this it is proved that the stipulated rate was absurdly inadequate to the pretended service rendered.

It seems to be clear, then, that the cattle were not in fact in Donald's possession for the purpose of being fed by him for the company. It is in the fourth head of the agreement that we find the measure of Donald's powers and learn the true nature of his possession. That article places it in the form and option of Donald, at any time and without any

antecedent notice, to convert himself into the owner of the cattle, he thereupon becoming liable for exactly the money which the company provided on the day of the sale by Callaghan, with interest from that date. Now, I hold that, when Donald chose to realise the cattle, by selling them to the defender, he exercised that option. He made himself liable to the company for the sum which they had—I think I may now say—advanced, to him, and was of course entitled to pocket any profit on the sale to the defender—an arrangement most reasonable in the case of a man who, on the one hand, had had the use of the company's money, and on the other hand had, at his own expense, fattened the cattle.

In the view thus taken I have regard both to the written agreement and to the actings of parties. I take it from the instrument that the company, by agreement with Donald, became owners of the cattle—after signing the agreement I do not think that he could dispute that they were. But, then, I find that, being owners, they put Donald in possession of the cattle; that this was not for a limited, definite, or temporary purpose, but in order that he might, at any time he chose, become owner, and of course act as owner. Donald having sold the cattle, I consider the pursuer as representing the company to be barred from challenging this right of a purchaser from him.

I am not sure that, in the result, this differs very much from saying that the methods adopted by the company have failed to turn the transaction into anything substantially different from what would have been its most natural form, viz., a loan to Donald, to enable him to buy these cattle. Nothing disclosed in the evidence or offered in debate furnished any argument against the reasonableness, in the interests of social conversion and honesty, *in rebus rusticis*, of Mr Bell's doctrine about possession, as delivered in section 1315 of his Principles. In the sense of that doctrine I do not think that when Donald sold these cattle he was possessing them for the owners under some definite and legitimate contract such as third parties are bound to anticipate and respect. But further I think that the owners of the cattle had in fact given Donald a licence to sell them.

I am for sustaining the appeal, recalling the interlocutor of 26th January 1895, and assoilzieing the defender.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"Find in fact (1) that at the date of the sale of the cattle to the defender they were the property of the Brechin Auction Company, Limited, and were in the possession of William Donald; (2) that the cattle had been placed by the company in the possession of Donald in order that Donald might fatten and sell them for his own behoof, he being bound only to repay to the company the sum for which the company had bought them with interest: Find in law that the pursuer as representing the company is barred from challenging the sale by Donald to the defender, and has no claim against the defender: Sustain the appeal: Recal the interlocutor of the Sheriff-Substitute dated 26th January 1895: Assoilzie the defender from the conclusions of the petition and decern."

Counsel for the Pursuer—C. S. Dickson—Dove Wilson. Agents—W. & J. Cook, W.S.

Counsel for the Defender—Ure—Craigie. Agent—Alexander Campbell, S.S.C.

Friday, June 21.

SECOND DIVISION.

[Sheriff Court at Glasgow.

GRANDISON'S TRUSTEES *v.* JARDINE.

Sale—Sale of Heritage—Retention of Price until Title Cleared—Interest—Interest from Date of Entry—Consignation.

The purchaser of a house entered into possession at Whitsunday 1893, but, owing to the seller's inability to give an unencumbered title prior to 28th March 1894, the purchase money was not paid until that date.

The seller having sued the purchaser for interest on the price at the rate of 5 per cent. for the period intervening between entry and payment, the latter stated in answer that she had arranged to borrow the greater part of the price; that owing to the seller's failure to give a good title, she had been unable to obtain payment of the loan, but that by arrangement with the lender the money had been placed in bank upon deposit-receipt in her own and the lender's names. She submitted that this deposit was equivalent to consignation, and that the delay in payment having been due to the fault of the seller, he was only entitled to the interest which the money earned on deposit-receipt.

Held that the deposit in bank made by the lender and purchaser was not equivalent to consignation in a question with the seller, as it afforded him no security for payment of the price, and that the purchaser was liable in interest at the rate sued for.

In February 1893 Mrs Jardine purchased from Mr and Mrs Grandison's marriage-contract trustees the house No. 17 Newton Place, Glasgow, at the price of £1850. The date of entry was Whitsunday 1893, and the price was to be paid at that date.

Mrs Jardine entered into possession of the house at Whitsunday 1893, but did not pay the price, the sellers being unable to