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

give her an unencumbered title at that date. The defect in the title having been removed, the price was paid on 28th March 1894. Along with the purchase money Mrs Jardine offered to pay bank-interest from the date of entry till the date of payment. Mr and Mrs Grandison's trustees declined to accept this, and claimed interest at 5 per cent. upon the purchase money from the date of entry till the date of payment. As Mrs Jardine refused to pay at this rate, the trustees delivered her a title to the property in exchange for the price and deposit-receipt interest thereon, without prejudice and under reservation of the trustees' claims as regards the balance of interest claimed by them.

Thereafter the trustees brought an action in the Sheriff Court at Glasgow against Mrs Jardine for the sum of £50, 1s., being the difference between interest at 5 per cent. and deposit-receipt interest for the period above mentioned.

The defender stated—"(Stat. 7.) . . . Of said sum of £1850 £1400 was being lent to the said Mrs Jardine, and the money could be obtained only on delivering to the bondholder the disposition in her favour, the title-deeds, and the bond and disposition in security, all of said premises. (Stat. 8.) The said sum of £1850 was lodged in bank on deposit-receipt, but the vouchers or deposit-receipts are not in the custody or possession of defender." . . .

On 4th August 1894 the Sheriff-Substitute (GUTHRIE) pronounced the following interlocutor:—"Finds that by missives dated 3rd February 1893 the defender Mrs Jardine bought the house libelled from the pursuers, with entry at Whitsunday 1893: Finds that at the date of entry stipulated the defender entered upon and has since possessed and occupied the house, although the price was not paid until 28th March 1894 owing to a certain difficulty in completing the title: Finds that the said defender in the circumstances is barred *personali exceptione* from objecting to the validity of the missives of sale, and that she is liable in payment of interest at 5 per cent. from the stipulated date of entry till the said 28th March, 1894: Repels the defences, and decerns as craved."

"*Note.*—. . . The defender having occupied the house became liable to pay interest at the legal rate during the non-payment of the price. The rule is well settled and is implied even in the case (*Rodger* v. *Brown*, 21 D.) referred to by the defenders' agent. It was in her power to guard against this by stipulation in the missive of sale or by consigning the money when it became apparent that some delay must take place in settling. The pursuers' agent said that his clients were disposed to claim only a modified rate of interest; but this offer not having been accepted when made, I have to decern for the sum in dispute, interest at the legal rate."

The defenders appealed to the Sheriff, who adhered.

"*Note.*— . . . The case is covered, as it seems to me, by the rule as stated in Ersk. iii. 3, 79. It is there said that 'in a sale of lands the purchaser is, by an Act of the law, bound to pay interest for the price from the term at which he enters into the possession, as long as he retains the price,' and that 'this obtains although the delay of payment should be owing to the seller, who had not furnished the pursuer with a connected progress of title-deeds sufficient for his security." . . .

The defender appealed, and argued—If the pursuers had given a good title the price would have been paid at entry. Owing, however, to the pursuers' inability to fulfil their part of the contract, the defender could not obtain the money which the lender had promised to advance, but by arrangement between her and the lender the amount had been deposited in bank in their joint names. This was equivalent to consignation, for the defender was deprived of all use of the money, and it was on this ground that consignation was held to relieve a purchaser of liability for interest at a higher rate than was earned on deposit. The defender was accordingly entitled to proof of her statement that the money had been placed on deposit-receipt. As the delay in payment had been due to the pursuers' fault they were not entitled to interest at a higher rate than the money was earning on deposit-receipt—*Durie's Trustees* v. *Ayton*, November 3, 1894, 22 R. 34. It would clearly be unfair that the defender should not only have to pay interest on the loan, but also interest at the rate of 5 per cent. on the price, which would have been paid but for the pursuers' failure to implement their contract.

Counsel for the pursuers were not called upon.

At advising—

LORD JUSTICE-CLERK — The defender purchased a property from the pursuers, but after the purchase a difficulty arose about the title. The defender however took possession of the house at Whitsunday 1893, and occupied it from that time although the price was not paid until 28th March 1894. The question in the present case is what is to be the rate of interest payable upon the price for that period, and it is admitted that the ordinary rate is 5 per cent.

The defender however maintains that she should not be called upon to pay interest at all upon the price. She says that not having money to pay for the house she entered into a bargain with the person who was going to lend it to her on the security of the house, that as she could not get a good title to the property at Whitsunday when she took possession of the house the lender should consign the money in bank in his own name and hers, and she says that that is equivalent to consignation of the price in a question with the pursuers.

I do not think it can be held that that is at all equal to consignation in the proper sense of the term, and I do not see what a bargain between the defender and the lender of the money has to do with a question between the pursuers as sellers, and the defender as purchaser of this pro-

perty. The money was in no way in the control of the sellers. Accordingly, the occupation of the defender for ten months was without any return to the pursuers except the interest on the unpaid price. I think the Sheriff has arrived at the right result.

LORD YOUNG—I am of the same opinion, and I should not like to think that the law on the matter is doubtful. The law is laid down by the Sheriff in his note in these words—"The case is covered, as it seems to me, by the rule as stated in Ersk. iii. 3, 79. It is there said that 'in a sale of lands the purchaser is, by an Act of the law, bound to pay interest for the price from the term at which he enters into the possession, as long as he retains the price,' and that 'this obtains although the delay of payment should be owing to the seller who had not furnished the pursuer with a connected progress of title-deeds sufficient for his security.'" The defender here was impecunious, and depended upon borrowing the price or at least a part of it as a necessary condition of paying it, and she entered into an arrangement to borrow it. She entered into possession of the house at Whitsunday, but she did not get the titles at once, and she, while having all the advantages of a possessor of the house, says that not having the security ready the lender would not advance the money. But that bargain has nothing whatever to do with a question between the seller and the purchaser of the property, and has no bearing upon the question of her liability for interest upon the contract price from the time at which she had taken possession of the house.

LORD ADAM—If the consignation averred upon record had been in the names of the seller and the purchaser of the property, the seller could not have claimed the legal rate of interest on the unpaid price after its date, but the consignation here was not of that character. The money was lodged in bank in the names of the purchaser and the person from whom she was to borrow the money. Under such a consignation as that the money could have been removed at any moment, and was no security for the payment of the price.

LORD RUTHERFURD CLARK and LORD TRAYNER were absent.

The Court dismissed the appeal.

Counsel for the Pursuers—C. S. Dickson—A. O. M. Mackenzie. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—Salvesen—Crabb Watt. Agents—Sturrock & Sturrock, S.S.C.

Saturday, June 22.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ROONEY *v.* CORMACK.

Fraud—Facility—Undue Influence—Agent and Client—Reduction—Issue.

In an action for reduction of a testamentary trust-disposition and settlement the pursuer averred that the testator was subject to fits of depression, at times gave way to drink, and was at the date of the deed, three weeks before his death, weak and facile in mind and easily imposed upon; that the defender, who prepared the deed and was the sole trustee under it, was the testator's law-agent and confidential legal adviser, and as such had a strong influence over him, and that, taking advantage of his position, and of the testator's weakness and facility and inability to resist his influence, he had induced the testator to execute a settlement bequeathing to him a legacy of £500, and leaving the bulk of his estate to a pupil beneficiary, during whose pupilarity and minority the defender would receive large business advantages from the administration of the estate.

Held (*aff.* judgment of Lord Stormonth Darling, and *following M'Callum* v. *Graham*, May 30, 1894, 21 R. 824) that the pursuer was not entitled to an issue of undue influence, but only to an issue of facility and fraud or circumvention.

James Rae, Esquire, of Newton and Kirkpatrick, Dumfriesshire, died unmarried on 17th February 1894, leaving a trust-disposition and settlement dated 27th January 1894, under which his law-agent, J. F. Cormack, solicitor, Lockerbie, was sole trustee.

By said trust-disposition he left various legacies including an annuity of £200 to his sister, Mrs Mary Rae or Rooney, and £500 to the said J. F. Cormack, who was directed to hold the remainder and residue of the truster's means and estate, amounting to about £25,000, for behoof of James Mackie, described as a natural son of the truster, nine years old at the time of his death.

In February 1895 Mrs Mary Rae or Rooney, the sole next-of-kin of the said James Rae, and Janet Rae, his niece and heir-at-law, brought an action of reduction against the said J. F. Cormack and the said James Mackie (to whom a *curator ad litem* was subsequently appointed) for the purpose of having the said trust-disposition and settlement set aside.

The pursuers averred, *inter alia*, that the late James Rae was subject to fits of depression and at times gave way to drink, that his death was accelerated by his intemperate habits, that at the date when the said pretended trust-disposition and settlement was executed he was weak and facile in mind and easily imposed upon, and that the said