all the defenders, and remit to the Auditor to tax the same, and to report."

Counsel for Pursuers — M'Laren — Gloag. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders—Adam—Asher. Agents Pearson, Robertson, & Finlay, W.S.

Friday, November 12.

FIRST DIVISION.

[Lord Young.

AUGUSTUS TOWILL & CO. *v.* THE BRITISH AGRICULTURAL ASSOCIATION (LIMITED).

Sale—Contract, Constitution of—Principal and Agent

A sale of a quantity of bones was conducted by two firms of brokers duly authorised to bind their principals. The brokers of the sellers wrote to them on 14th November, " . . Please transmit warrant and order for delivery, at same time confirming sale," and the brokers of the buyers wrote to their constituents that confirmation by the sellers was awaited. The sale-note granted by the sellers' brokers, dated 14th November 1873, bore, "Payment cash on delivery, less 2½ % in 14 days as usual." On the 15th the sellers wrote to their brokers in answer to their letter of the 14th, "The payment clause should be cash in 14 days (before delivery, if required) less 2½ discount." The buyers refused to agree to this alteration in the terms of the contract, and on 19th November intimated that they considered the contract cancelled. In an action by the sellers against the buyers for implement of the contract and for expense incurred in storing the bones, through the defenders' delay in taking delivery, the Court (*reversing* Lord Young, and *dissenting* the Lord Probationer, Lord Rutherfurd-Clark) assoilzied the defenders in respect (1) that, owing to the actings of parties, the contract was one requiring confirmation by the principals, which was not obtained, and (2) that the terms of the sellers' letter of 15th November imported a material variation in, and therefore rescinded, the contract.

In this case Augustus Towill & Co., merchants, Liverpool, sued the British Agricultural Association (Limited), corn, seed, and manure merchants, Leith, for implement of a contract, said to have been entered into between Sollit, Hill, & Co., brokers, Hull, for the pursuers, and John Harland & Co., also brokers there, for the defenders, for the sale of a quantity of ancient bones, amounting to some 400 tons, in terms of the following sale-note:—

"36 *High Street, Hull,*
"14*th Nov.* 1873.

"Sold to the British Agricultural Association (Limited), Leith, for account of Messrs Augustus Towill & Co., merchants, Liverpool, per Messrs Sollitt. Hill, & Co., Hull,

"About 350 to 400 tons (more or less) ancient bones, now laid in Bilton's and Winter's warehouses here, at £6, 10s., say six pounds ten shillings, per ton of 20 cwt., weighed and delivered free to craft here at the respective warehouses.

"Payment cash on delivery, less 2½ per cent. in 14 days as usual.

"Should buyers require three weeks to get them away, to have this privilege, any dispute arising on this contract to be settled by arbitration as usual. "JOHN HARLAND & Co."

The summons concluded, further, that the defenders should be ordained to take delivery of the bones, and to pay the expense of their storage since the completion of the contract.

The pursuers further averred—"The defenders were bound by the contract to take delivery of the said goods at the latest in three weeks after the date of the contract, that is, by the 5th December 1873, and they were thereby bound to pay the price within a fortnight thereafter, that is, by 19th December 1873."

The following answer for the defenders to article 1 of the condescendence shows the position taken up by them:—"Denied. Explained that there were certain negotiations for a sale, but there never was any concluded contract of sale. As to the sale-note signed by Messrs John Harland & Company, dated 14th November 1873, it is explained that its terms were not agreed to by the pursuers, who, on the contrary, intimated to Harland & Company, their selling brokers, that they would not complete the contract except on a certain condition. This condition was that a certain amount must be paid in exchange for warrants — a condition which was intimated by Harland & Company to the defenders by letter dated 17th November 1873. On receiving this intimation, the defenders, by letter to Harland & Company, dated 18th November 1873, refused to agree to the conditions proposed. and thereafter by letter to Harland & Company, dated 19th November 1873, the defenders intimated their adherence to what they had written on the 18th, adding that they would be pleased to hear of any new proposals the pursuers had to make. Thereafter the pursuers made certain new proposals, as contained in the following letter, written by them to Messrs Sollet, Hill, Company, and communicated by them to Harland & Company:—

'*Liverpool, 19th November* 1873.

'We have now before us your favor of y'day, confirming your telegram received late last evening, and in reply we are rather surprised Messrs Harland & Co. should decline to make a payment to a/c the bones, p. Jno. Robinson, against the warrants. Their principals are well aware of the usage, and always act up to it. At the same time we have no desire to be as strict as they would be, and will hand over the warrants on payment of £1500 to account, or let you have the warrants—you shipping the bones in our name and to our order, and the buyer to pay an approximate amount against each B/Lading. We cannot do fairer. A. TOWILL & COY.'

"On 20th November 1873, Harland & Company communicated this letter to the defenders, who on the 21st wrote to Harland & Company saying —'We now decline having anything further to do with the parcel.' If Messrs Harland & Company pretended to conclude on behalf of the defenders a contract of sale, they did so not only without authority from the defenders, but in

direct opposition to the defenders' instructions aforesaid."

The defenders pleaded, *inter alia*—"The defenders having, before the conclusion of any contract between the pursuers on the one hand, and John Harland & Company on the other, intimated to Harland & Company that they would not conclude the contract, the defenders are not bound by any pretended consent to the contract given by Harland & Company on the defenders' behalf."

The following among other telegrams and correspondence were founded on:—

Sollitt, Hill, & Co. to Pursuers.

"14*th Nov.* 1873.

". . . . This morning we wired you thus: 'Have sold about three hundred and fifty tons ancient bones, *ex John Robinson*, at six pounds ten shillings per ton, less two and a-half, and one per cent. brokerage, delivery to be taken within a month, craft being difficult to get contract by post,' which we confirm, and herewith beg to hand said contract. Messrs Harland & Co. being the parties with whom we were in treaty, but they, it seems, were only acting for another party, we therefore got them to make out contract.

"Please transmit warrants and order for delivery, at same time confirming sale, and oblige."

Defenders to Harland & Co.

"*Leith*, 14*th Nov.* 1873.

"Yours of yesterday's date with reference to ancient bones, and confirm telegraph sent this morning, to which we have since your reply that sale is in order. We await sale note in conformity therewith."

Harland & Co. to Defenders.

"*Hull.* 14*th Nov.* 1873.

"At 11.10 A.M. we have your message, ...

"On receipt of same, we called upon the seller's agents here, and closed at £6, 10s. per ton, less 2½ per cent. ex stores herewith, three weeks to get them away, and wired you to that effect. We find that the owners are Messrs Augustus Towill & Co., Liverpool. Contract we pass to-night through their friends here. On their confirmation of same, will then hand you counterpart."

Pursuers to Sollitt, Hill, & Co.

"15*th Nov.* 1873.

"We have your favour of yesterday with contract for bones p. 'John Robinson,' which appears in order with one exception. The payment clause should be, cash in fourteen days (before delivery if required) less 2½ per cent. discount. We shall require some cash to account before we can give up warrants, which you will perhaps ask Messrs Harland & Co. to arrange, and then we will pass the warrants through our bankers, with order attached for say £2000."

Defenders to Harland & Co.

"*Leith*, 18*th Nov.* 1873.

"The proposals of your principals at this stage to have a payment in exchange for warrants is one of course which we cannot entertain, and we should like to know by wire to-morrow, definitely, whether the contract is in order, as also the exact quantity for our approval."

Sollitt, Hill, & Co. to Pursuers.

"16*th Nov.* 1873.

"We wired you to-day as follows:—'Harland Company have heard from their principals. Cannot agree seller's new stipulation, ancient bones. Will consider contract cancelled unless confirmed as originally made before four to-day. They propose to hand us bills of lading for bones, when delivered to craft, until payment is made as per contract. Contract asked to be returned if not accepted,' which we confirm, but are without reply thereto."

Defenders to Harland & Co.

"*Leith*, 19*th Nov.* 1873.

"Yours of y'day received. We can only confirm ours of equal date with reference to the bone contract, and as we cannot wait your friend's convenience in making the changes they have indicated, will consider the contract cancelled."

The Lord Ordinary allowed a parole proof, from which it was established that the brokers for both parties regarded the transaction in the light of a completed contract.

The following interlocutor was thereafter pronounced by the Lord Ordinary:—

"19*th March* 1875.—The Lord Ordinary having heard counsel for the parties, and considered the proof, record, and process, finds that the defenders are bound to fulfil the contract of sale entered into on 14th November 1873 between the pursuers and defenders through their respective brokers, duly authorised to that effect, and of which the sold note, No. 6 of process, subscribed by the broker for the defenders, is a memorandum or note made and subscribed by the broker for the defenders at the time of the sale, by taking delivery of the bones thereby sold, and paying the price thereof at the rate of £6, 10s. per ton, under deduction therefrom of 2½ per cent. discount, with interest from the 19th December 1873: Finds that the said price amounts to £2173, 11s.: Finds that the defenders are bound to pay to the pursuers the sum of £84, 3s. 4d. as the expense occasioned to the pursuers in storing the said bones since the time when the defenders ought to have taken delivery thereof: Therefore decerns against the defenders for payment to the pursuers of the said sum of £2173, 11s., with interest thereon at the rate of 5 per cent. per annum from the said 19th December 1873 until paid, and of the said sum of £84, 3s. 4d., the pursuers, on payment of the said sums, handing to the defenders the warrant for delivery of the said bones: Finds the pursuers entitled to expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The defenders reclaimed, and argued:—The sellers by their letter of 15th November, to the buyers' brokers, imported a condition which entitled the buyers to resile. There was no acceptance on the part of the pursuers. The parole evidence was incompetent, because there was no averment of usage of trade, and the contract was in writing. Cf. Calder *v.* Dickson, 9 S. 777; Peter *v.* Jerrol, 2 Murray 28; Mackenzie *v.* Dunlop, 16 D. 129. The brokers on both sides, and the defenders, dealt with the transaction as one where confirmation was necessary.

The pursuers argued.—The brokers had power

to complete the contract as shown (1) by correspondence, (2) by the parole evidence which was merely explanatory of contract. The letter of 15th November was not sent for the purpose of materially altering the contract.

The case was heard before the Lord Probationer (Lord Rutherfurd Clark) who delivered the following opinion:—

The Lord Probationer (Rutherfurd Clark) —In this case a proof has been allowed, and the proof as taken and consisting both of documentary and parole evidence is now before your Lordships. The Lord Ordinary has held that there is here a concluded contract, and that there has been no breach of it on the part of the pursuers. The case is now before your Lordships upon a reclaiming note. The first question is whether or not there is a completed contract, and that a contract entered into not between the principals but between the two brokers. These last gentlemen have been examined, and both of them say that on the 14th November 1873 there was a concluded contract between them, by which the one bought and the other sold the quantity of bones specified. I take it on their statement that there was a concluded contract. The defenders maintain (1) that they gave no authority to the sellers broker to conclude the bargain, and (2) that to make it good the contract required confirmation from the principals. The true question is whether the contract is so expressed that in order to make it binding it requires confirmation. There are passages in the evidence which suggest that it was sent for confirmation, and that it was not contemplated that it should be concluded till that was done. But both the brokers say that this was a concluded contract, which to my mind is sufficient. The next question is whether the contract, supposing we hold it to be concluded, was broken by the pursuers, as the defenders say. I approach this point with some difficulty, owing to the pursuers' explanation on record, but on the whole I prefer to consider the case apart from this mistaken averment. The contract was for the delivery of a parcel of bones which lay at two different warehouses; the manner of executing it was by depositing the bones on shipboard, or by handing over delivery warrants to the defenders. The condition of the contract is expressed in these words, "Payment cash on delivery, less 2½ p.c. in 14 days as usual." Whatever may be the real meaning to be attached to these words, it seems to me that they import that the cash is to be paid simultaneously with the delivery of the cargo. Of course there may be different ways of carrying this out, but the fair meaning is that delivery is to be given against cash—that the one is to replace the other. Arrangements between the parties themselves must fix how this is to be done. But after the contract was made the pursuers thought proper to intimate an objection they had to the clause regulating the payment, but not to the contract itself; not to the constitution of the contract, but to the execution of it. The defenders took up the position that they were entitled to delivery before they had paid the cash, and they further maintained that they had reason to ask this because it was inconsistent with the pursuers' record. But the letter, which is said to be intended to introduce a new stipulation, did not do so; and I therefore think the defenders were not justified in resiling from the contract.

At advising—

Lord President—This is an action for enforcement of a contract of sale, the commodity sold being a cargo of bones to the extent of 350 to 400 tons. The conclusions against the defenders are that they should pay the price and take immediate delivery of the bones.

The first plea stated on behalf of the defenders is that the brokers here employed were not duly authorised to enter into the transaction. I do not think this is well founded. I think it is clearly shewn that the brokers were authorised to complete the transaction in terms of the sale-note of 14th November.

But there remain two questions—(1) Did the brokers in fact so complete the transaction? and (2) the question as to the construction of contract itself, whether the seller completed it, and whether he did not first commit a breach thereof? The sale-note of 14th November was delivered to Messrs Sollitt, Hill, & Co., the brokers for the pursuers, by Messrs Harland & Co., the brokers for the defenders, and the very same day Messrs Sollitt and Co. sent a letter to their constituents, the terms of which are very important:—

"14*th November* 1873.

". . . This morning we wired you thus—'Have sold about 350 tons ancient bones ex John Robinson at £6, 10s. per ton, less 2½ and 1 per cent brokerage, delivery to be taken within a month,' craft being difficult to get contract by post, which we confirm, and herewith beg to hand said contract. Messrs Harland & Co. being the parties with whom we were in treaty, but they it seems were only acting for another party, we therefore got them to make out contract. Please transmit warrants and order for delivery, at same time confirming sale, and oblige."

The same day Harland and Co. also write to their constituents, and say—" . . . At 11.10 A.M. we have your message . . . On receipt of same we called upon the sellers' agents here and closed at £6, 10s. per ton, less 2½ per cent., ex stores, herewith, 3 weeks to get them away, and wired you to that effect. We find that the owners are Messrs A. Towill & Co., Liverpool. Contract we pass to-night through their friends here. On their confirmation of same will then hand you counterpart."

Both brokers in thus writing acted on the footing that the sale required confirmation by the seller, a perfectly consistent and intelligible view. The defenders of course did not require to confirm, because the terms of the contract emanated from them, but the pursuers had to confirm unless it could be shewn that they had given unlimited powers to their brokers. I think in the face of the letters it would be very difficult to say that the contract was completed without confirmation. And it becomes still more difficult when we go on to the 15th November. On that day the pursuers write to their brokers:—"We have your favour of yesterday with contract for bones, p. 'John Robinson' wh. appears in order with one exception. The payment clause should be, cash in 14 days (before delivery if required) less 2½ per cent. disct."

There is here quite a distinct objection raised

to one clause of the sale-note, viz., to the payment clause. At present I notice that the pursuers, the defenders, and both the sets of brokers think the contract requires confirmation. For if not, it was too late to raise this objection. But so far from that they stand on it during all the rest of the correspondence.

Now what is the meaning of the contract and the effect of the change proposed by the letter of 15th November. The sale-note states:—"Payment cash on delivery less 2½ per cent. in 14 days as usual. Should buyers require 3 weeks to get them away to have this privilege, any dispute arising on this contract to be settled by arbitation as usual."

There has been a good deal of controversy on the meaning of this payment clause. But the pursuer makes a very distinct averment in Condecendence I. He there says "the contract stipulated for payment in cash after delivery, a discount of 2½ per cent. being allowed on payment in cash within fourteen days after delivery. The contract provided that should the buyers require three weeks to get the bones away they should have that privilege." This is very distinct, and it is very difficult to see how the pursuer after having made this statement can be allowed to alter his view and say it is an error, as he has done in the argument. I cannot see how he may do so. But if we take this view the letter of 15th November is a most material alteration. For while in the condescendence we have an averment that the contract provided for payment in cash after delivery, in the letter of 15th November we have "the payment clause should be cash in fourteen days (before delivery if required)."

As the pursuers stood on this right to alter, and as the defenders refused to concur in the alteration, then either the contract was never completed, because it wanted confirmation, or else the pursuers committed a breach of it by refusing to fulfil it, in terms of their own explanation.

But I am unwilling to rest my judgment on what is a somewhat technical ground, and I am willing to consider the contract, and decide the case on its merits.

The contract, as it seems to me, stipulates cash on delivery with two and a-half discount, in fourteen days, *i.e.* the payment to be made as delivery is made, each parcel being paid for on delivery, and the whole transaction to extend over fourteen days. So there may be either one or several successive deliveries. The clause that follows extends the period of the transaction to three weeks if the buyer wishes. The contract is quite clear, and no appeal whatever is made to the usage of trade. The words "as usual" simply mean fourteen days as usual and discount as usual, but are not an appeal to usage of trade to explain the contract. If we look to the end of the note we again find "as usual" referring to the recourse to be had to arbitration. The contract is therefore one for the construction of the Court, and I am satisfied I have put the sound construction upon it,

Now, how is this affected by the letter of 15th November. It says "the payment clause should be, cash in 14 days (before delivery if required) less 2½ per cent. discount." That means that if the purchasers should spread the taking of delivery over three weeks, yet they must pay cash in fourteen days. It is not a great variation, only a week; but still in mercantile matters a week is often of the greatest importance. So I hold this is a material variation. Thus in either view as to confirmation the result is the same. If the contract required confirmation it did not get it, and was never made. If it did not, it was broken by the pursuers by a material variation in terms of letter of November 15th. I am therefore of opinion that the interlocutor of the Lord Ordinary should be reversed.

Lord Deas—I am so entirely of the opinion expressed by your Lordship that I need not add much to what has been said. I think the brokers had the power to complete a contract without confirmation—a very usual thing, the brokers taking personal responsibilities on themselves. But I think it was not what they did here, because before the contract was made—before anything was done on it having regard to the parties thereto—they seem to have come to the conclusion that in this case confirmation was required, and both parties acceded to that view.

In the second place, I agree with your Lordship that the words "as usual" merely mean that the things are usual, and import no appeal to the usage of trade. Usage might be of service if the contract were technical or ambiguous. I do not think it was either, and I think your Lordship put the right construction upon it. There is nothing here which the opinions of brokers are required to explain.

In the third place, I agree that whichever view as regards the necessity of confirmation of the contract is taken, the result is the same. The change was a most material one. The letter of 15th November contains a most palpable change. It was suggested very ingeniously that this was not a change in the construction, but only a fair change in the execution of the contract; but I cannot here distinguish between the construction and the execution of the contract. The contract must be executed according to its construction, and the execution is a material part of the construction itself. It is in fact a distinction without a difference. The pursuers proposed this change, the defenders object, and the pursuers adhere to their proposal—so that unless they were right in holding it to be no change, the pursuers must be held to have acquiesced in the termination of the contract.

Lord Ardmillan—I cannot do otherwise than say with some hesitation, and on deliberate consideration, that I differ from the Lord Ordinary and the Lord Probationer. But, after careful and repeated consideration, I have, as your Lordship has done, come to a different conclusion. I do not doubt that the brokers for the parties could have entered into a contract of sale binding on both the parties whom they represented. The question is, did they do so? Was the contract at once completed by their interchange of notes, so that no confirmation was required and no objection was allowable?

I do not think the pursuers can maintain that the contract was completed finally by the interchanged note of 14th November 1873. The conduct of the brokers and the parties does not support this plea. That was not the opinion of either of the brokers at the time, for both of them dealt with the contract as requiring con-

firmation. We have here a letter on the day of the note, said to form the complete contract, from the pursuers' brokers to the principal, asking confirmation of the sale. We have also a letter from the defenders' broker to them, saying they awaited confirmation. This seems conclusively to show that by the brokers the note was not looked on as finally constituting and completing the contract. They considered that it required confirmation. But that is not all. On the 15th of November the pursuers, through their brokers, proposed to make a change on the conditions of the contract. That proves that they did not consider the contract to be finally and conclusively settled and closed. This proposal for a change, and not an unimportant change, was made while the contract was awaiting confirmation, and made by the pursuers, who now allege that the contract was so completed as to exclude alteration. Still farther, the defenders' brokers having telegraphed to the pursuer's brokers, the following is the communication, by telegram, made by their brokers to the pursuer's:—"Harland Company have heard from their principals. Cannot agree seller's new stipulation, ancient bones. Will consider contract cancelled unless confirmed as originally made before four to-day. They propose to hand us bills of lading for bones when delivered to craft until payment is made as per contract. Contract asked to be returned if not accepted.

Now, a party who proposes an alteration on a contract made by his broker, and before him, for confirmation, cannot afterwards be permitted to plead that the contract was final and completed, not requiring confirmation nor susceptible of alteration. Such a plea by such a party is not correct in point of procedure, nor equitable on principle.

I do not think that the plea of mercantile usage or custom of trade is here applicable, nor is it stated on the record. The words "as usual" do not let in proof of general custom as affecting the construction of the contract, or the validity of it as made by the brokers. I rather think the words apply to the terms of discount.

I do not permit my opinion to be affected by the statement—I think the inaccurate statement—of the contract made by the pursuers on record. But on the sale note—the correspondence, and the ascertained facts, I have arrived at the same conclusion as your Lordship, and I think that the interlocutor complained of should be recalled.

LORD MURE—I concur in the views expressed by your Lordship. I have no difficulty in determining that whatever the ordinary rule of law as to the powers of brokers, one cannot read the correspondence and telegrams here without seeing that here they dealt on the footing of the contract requiring confirmation.

As early as 20th October, the pursuers write to their brokers—"We are in treaty with other buyers for the bones. We will not bind ourselves to accept £6, 10s., but if we were offered that figure we would entertain it." And then again, on 10th November, they write—"If we got a bid of £6, 10s., we should be disposed to sell"—not telling their brokers to sell. Then comes the letter from the brokers—"Please transmit warrants, at same time confirming the sale," distinctly showing that they held the sale was not good without confirmation. Instead of giving confirmation, the pursuers write on the 15th November proposing a change. I think it was quite in the power of the defenders to object to agree to this change.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the British Agricultural Association (Limited) against Lord Young's interlocutor of 19th March 1875, Recal the interlocutor; assoilzie the defenders from the conclusions of the summons, and decern; find the pursuers liable in expenses, and remit to the Auditor to tax the account of said expenses, and report."

Counsel for Pursuers—Solicitor-General (Watson)—Gloag. Agent—George Burn, W.S.

Counsel for Defenders—Fraser—Black. Agent—D. Curror, S.S.C.

Friday, November 12.

SECOND DIVISION.

KIRK *v.* KIRK.

Expenses—Reclaiming Note—Divorce.

A woman was divorced from her husband on the ground of infidelity, and three co-defenders were found liable in the expenses of the action. Against the interlocutor granting decree of divorce the woman reclaimed, but the Court refused the note without calling on the respondents' counsel. *Held* that the woman was not entitled to her expenses in regard to the reclaiming note, the same having been utterly without ground.

Counsel for Pursuer—Campbell. Agents—White-Millar, Allardice, Robson, & Innes, W.S.

Counsel for Defender—Mair. Agent—R. Menzies, S.S.C.

Saturday, November 13.

SECOND DIVISION.

[Lord Curriehill.

JACKSON *v.* M'KECHNIE.

Bankruptcy—Trustee—Bankrupt, Estate of—Slander—Title to Sue—Damages.

An undischarged bankrupt obtained a verdict for £400 in an action of damages for slander uttered at a date subsequent to the sequestration, but at a time when no proceedings under that sequestration were being taken, and the trustee presented a petition seeking to attach this fund for behoof of the creditors. *Held* that the bankrupt having liquidated his personal claim for damages, the sum of money thus obtained vested in the trustee as a part of the bankrupt's estate, subject to any claim which he (the bankrupt) might have for trouble and expense in recovering the fund.