

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 Will consider contract cancelled unless confirmed as originally made before four to-day.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, Recall 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.

This was a petition presented by Thomas Jackson, the trustee on the sequestrated estate of Archibald M'Kechnie, who was sequestrated in 1870, when the petitioner was appointed trustee. After realising the estate the petitioner was discharged from the office of trustee in 1873. In 1875 the bankrupt, who had not obtained his discharge, raised an action of damages for slander against W. & J. Mutter, former employers of his, and on 18th March of that year he obtained a verdict of a jury awarding damages to the amount of £400. M'Kechnie's creditors thereupon presented a petition for the appointment of a new trustee, and the petitioner was re-elected on 15th June 1875.

This petition was accordingly brought to have it declared, that the £400 of damages obtained by M'Kechnie was transferred to and vested in the petitioner as trustee foresaid. The trustee's claim was opposed by M'Kechnie.

The Lord Ordinary pronounced the following interlocutor:—

“9th July 1875.—The Lord Ordinary having heard the counsel for the petitioner and for the bankrupt Archibald M'Kechnie, and considered the petition and whole proceedings, declares all right and interest in the sum of £400 sterling or thereby mentioned in the petition, to which the said Archibald M'Kechnie has become entitled under the verdict of a jury, returned and applied as set forth in the petition, to be vested in the petitioner as trustee on the sequestrated estate of the said Archibald M'Kechnie, as at the date when the said verdict was applied, in terms of the ‘Bankruptcy (Scotland) Act, 1856,’ and decerns. Finds no expenses due to or by either party.

“*Note.*—The estates of Archibald M'Kechnie were sequestrated in terms of the ‘Bankruptcy (Scotland) Act, 1856,’ on 17th December 1870, and the petitioner was elected and confirmed trustee on said sequestrated estates on 29th December 1870. The bankrupt has never been discharged, and the sequestration still subsists.

“It appears that the petitioner, as trustee, realised the bankrupt's estates so far as then known to him, and was discharged from the office of trustee on 2d May 1873. Certain of the creditors, however, having recently discovered the existence of funds which they believed to be available to the bankrupt's creditors, they, on 12th May 1875, presented a petition to the Court for the appointment of a new trustee, and, after opposition by the bankrupt and sundry procedure, the petitioner was, on 15th June 1875, re-elected to the office of trustee, and he was on the following day duly confirmed by the Sheriff of Lanarkshire.

“The funds which the creditors conceived to be available for the purposes of the sequestration consist mainly, if not entirely, of the sum of £400, which was awarded to the bankrupt by the verdict of a jury returned on 18th March 1875, in an action of damages for slander at his instance against Messrs W. & J. Mutter, distillers at Bowmore, in the Island of Isla, and in Glasgow. The verdict was applied by the Court on 2d June 1875, and the sum of £400 then became due and payable to the bankrupt.

“The petitioner, as trustee, has now applied, under the 103d section of the ‘Bankruptcy (Scotland) Act, 1856,’ for a vesting order as re-

gards that sum. By that section of the Act—which is quoted at length in the petition—it is, *inter alia*, enacted, ‘that if any estate, wherever situated, shall, after the date of the sequestration, and before the bankrupt has obtained his discharge, be acquired by him, or descend or revert or come to him, the same shall, *ipso jure*, fall under the sequestration, and the full right and interest accruing thereon to the bankrupt shall be held as transferred to and vested in the trustee as at the date of the acquisition thereof or succession for the purposes of this Act.’

“The petitioner claims the money as being estate acquired or coming to the bankrupt after the date of the sequestration, and before his discharge. The bankrupt, on the other hand, maintains that as the money has been awarded to him as *solatium* for defamation, his claim therefor against the defenders of the action was so entirely personal to himself as to exclude all claim upon the fund at the instance of the creditors of the bankrupt. And he relies in support of his contention partly upon a passing observation regarding actions of damages for defamation at the instance of a bankrupt under sequestration, made by the Lord Justice-Clerk (Hope) in deciding the case of *Thom v. Bridges and M'Queen*, 19 D. 721, but chiefly upon certain English cases, in which it seems to have been held that the assignee in bankruptcy is not entitled to institute in his own name an action for recovery of damages for injury to the character of the bankrupt.—See *Beckham v. Gray*, 26th July 1847, 2 Clark and Finally, p. 579, and *Roger v. Spens*, 15 L. J. Exch. p. 69. The principle, however, upon which all these cases was decided appears to be this, that as personal actions of the kind in question frequently involve matters of great delicacy, affecting the feelings, comfort, and reputation, not only of the bankrupt, but of his relatives and connections, it should be left very much to the bankrupt's own discretion whether any action should be raised for the vindication of his character. But that reason ceases to operate as soon as the bankrupt exercises that discretion by voluntarily raising the action, and still more, where, by insisting in the action until he obtains a verdict for damages, he shows his determination to make the whole matter public. It appears to me that a bankrupt who raises such an action before obtaining his discharge does so in the knowledge, if not with the expectation, that in the event of his obtaining a verdict clearing his character and awarding substantial damages, the pecuniary part of the award would be claimed by his creditors. I am unable to see on what intelligible principle money which has been awarded to a bankrupt by the verdict of a jury—no matter on what grounds—and for which he is in a position to charge the defenders against whom he has obtained the verdict to make immediate payment, should not be regarded as estate acquired by or coming to him within the sense and meaning of the statute.

“It was indeed admitted at the Bar by the counsel for the bankrupt that the money in the present case must be regarded as if it had been already actually paid to the bankrupt, and had been deposited in bank. But while making that admission, he maintained that the Court is entitled and bound to inquire from what source the money has come, and to refuse to make the vest-