broker, who was employed by a merchant to find purchasers and make offers to them, and communicate the same to his principal, to whose approval the sales were subject, *held* liable for loss on a sale, because he had failed to inform his principal of a material part of his communing with the purchaser, the communication of which would probably have induced the principal to decline the transaction.

This was an advocation from the Sheriff-court of Glasgow. The respondent Baird, corn-factor in Glasgow, acted for some time as agent and broker in Glasgow for Wright, a grain merchant at Boston, in England, and sold for him large quantities of grain. In 1864 Baird brought an action against Wright for £123 of commission. Wright defended, and raised a counter action against Baird for £1272 as loss sustained by reason of culpable negligence and breach of instructions on Baird's part in carrying through a certain sale to Bedgar, Neilson, & Co., who had failed shortly after the sale, and who, Wright alleged, were previously known to Baird to be of notoriously bad credit, and on the eve of bankruptcy.

After a proof, the Sheriff-substitute (MURRAY) held that Baird ought to have communicated to Wright certain material circumstances of which he was aware unfavourable to the credit of Bedgar, Neilson, & Co., and, not having done so, had committed a breach of his duty as agent, and was liable for the sum sued for by Wright, under deduction of the amount of the charges sued for by Baird, as to which there was substantially no dispute.

The Sheriff (BELL) reversed, and found in favour of Baird.

Wright advocated.

Lord Advocate (GORDON) and SCOTT for advocator.

MACKENZIE and CRICHTON for respondent.

At advising—

LORD BARCAPLE thought, with others of the Court, that this case ought to have been sent to a jury. He then, after narrating the facts of the agency and sale, said that the course of business between Baird and his employer was peculiar. It was not left to the broker in the present case to carry through the sales in the usual way; for Baird's duty was to find purchasers, and make an offer, and inform Wright of the offer, the sale being subject to Wright's approval. Looking to the general course of transactions, there was no evidence that Bedgar, Neilson, & Co. were in such bad repute as to prevent a broker from dealing with them. Baird was certainly not liable simply because he dealt with Bedgar, Neilson, & Co. The action against him was rested on various other grounds, on some of which Wright had been quite unsuccessful. It was said that Baird had entered into a corrupt and collusive contract with Bedgar, Neilson, & Co. There was no evidence of that at all, nor was there any ground for holding that Baird had been guilty of negligence in looking to the credit of persons with whom he dealt. He knew very well, perhaps better than most persons, the true position of Bedgar, Neilson, & Co. That position did not put them out of the market, although no doubt they were not a strong or wealthy house. But Baird, in his correspondence, rather stepped out of his province to inform Wright that Bedgar, Neilson, & Co. were a first-class house, paying ready money. Now, there were two classes of people who paid ready money—one class who had so great a command of capital that they declined to accept credit, and another class who found cash the only terms upon which they could deal in the market; and Bedgar, Neilson, & Co. seemed rather to be of the latter class. In that state of matters Baird undertook a responsibility he was not called on to undertake. If he made a representation calculated to produce in Wright a confidence in Bedgar, Neilson, & Co. for which there was not ground, then he did what took him out of that protection which belonged to a broker acting under a *del credere* commission. But the great point to look to was what took place in reference to the last transaction. It came to this, that when he had created this confidence in Bedgar, Neilson, & Co., he intimated to Wright, on 21st March 1864, that Bedgar, Neilson, & Co. had made an offer for 600 quarters of wheat—cash at fourteen days. Wright accepted by telegram, and plainly did so on the footing that he had got a full and sufficient account of what passed. A broker must not withhold anything that passes, if his constituent is to judge of the transaction. Now, Mr Neilson's evidence is that he told Mr Baird at this time that his firm could not pay at the same time that they were paying some bills granted to Wright for previous transactions, and that he fully expected from what Mr Baird said to get additional credit beyond the fourteen days, otherwise he would not have made the bargain. Now that was very important. And that being a material part of the communing, and not communicated to the principal, the broker thereby made himself responsible. The case might have been different if nothing had previously been said as to the house. No doubt Wright had before taken bills of this house, but in this new transaction he was entitled to know the whole facts. It was plain that he was at this time a little more scrupulous in his transactions than usual, as the times were bad, and probably he would not have assented to the transaction if he had been informed that additional time was required besides the fourteen days.

The other Judges substantially concurred.

The judgment of the Sheriff was therefore recalled.

Agents for Advocator — M'Gregor & Barclay, S.S.C.

Agents for Respondent—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, November 14.

FIRST DIVISION.

M'LAY *v.* THORNTON AND OTHERS.

Parent and Child—Guardian—Nearest Male Agnate —Poor. A grandfather *held* entitled to the custody of his grandchildren, both of whose parents were dead, although he was in poor circumstances, and might not be able to maintain the children without parochial assistance.

John M'Lay, weaver at Kirkfieldbank, in the parish of Lesmahagow and county of Lanark, presented this petition to the Court, asking for the custody of his four grandchildren in the following circumstances:—The petitioner's son, Wm. M'Lay, weaver, died in 1863, leaving a widow, Mary Cunningham or M'Lay, and four children, all of whom, the petitioner alleged, were still under puberty William M'Lay did not appoint any guardian to

his children. He had been in bad health for some time before his death, and had been in receipt of parochial relief. After his death parochial relief was continued to his widow until her death, in June 1867. William M'Lay was a Protestant. His wife, the petitioner alleged, was also a Protestant, and had been entered as such in the poor's roll. The petitioner went on to state that Mrs M'Lay, some time before her death, was removed by certain Roman Catholic priests to the house of a Roman Catholic in Lanark, and the children were also taken from their home at Linnvale, and placed in St Mary's Roman Catholic Orphanage at Smyllum, near Lanark. This removal of the children, the petitioner stated, was unauthorised by him or by the Parochial Board of Lesmahagow. He then applied to the board to have the children removed from the Orphanage. The inspector of poor, on the instructions of the Board, applied to the Lady Superior of the Orphanage to deliver up the children; but she refused to do so, and withdrew a claim of aliment which she had made against the board, alleging that the mother of the children had appointed guardians to them prior to her death. The petitioner then called at the Orphanage, and demanded that the children should be given up to him. His demand was refused, whereupon he wrote to the Lady Superior pressing his demand. To this letter the Lady Superior returned an answer consenting to give up the children. The petitioner called on a day fixed, but did not see the Lady Superior, but only Mr Bowie, who told him that the children would not be given up. The Lady Superior wrote to him that she had handed over the children to their guardians, Capt. Thornton, Baronald House, and Thomas Bowie, Esq., Lanark. This claim of guardianship was founded on a document in the following terms:—

"April 24, 1867.—I, Mary M'Lay (formerly Cunningham), hereby appoint Captain Thornton and Mr Thomas Bowie as the guardians of my children; and wish, as the expression of my last will, that the said children be brought up in the Roman Catholic religion.

"MARY M'LAY + (her mark).

"Witnesses—James M'Ginty, John Stein."

The petitioner stated that he had applied to the gentlemen named in this document, but could neither get the children handed over to him nor any information as to where the children were. He therefore presented this petition on the ground that he, as the nearest male agnate of the children, was entitled to be served tutor-at-law to them; that their mother had no right to make any appointment of guardians; and that the guardians, being Roman Catholics, would educate the children in the Roman Catholic instead of in the Protestant religion.

Answers were given in for the guardians, in which they stated that the petitioner was unable from poverty to educate and maintain the children; that Mrs M'Lay had been a Roman Catholic, and had requested that the children should be received into the Orphanage; that before her death she had stated her wish that the children should be educated as Catholics, and that the petitioner who, she said, had treated her and her children unkindly, should have nothing to do with them. A maternal uncle, the nearest agnate, was satisfied with the present position of the children.

The Court, after hearing counsel, remitted to the Sheriff-substitute at Lanark to inquire into the facts of the case subsequent to the death of Mary M'Lay; the communications which had passed between the different parties interested; and the circumstances of the petitioner, with special regard to his fitness to become the custodier of the children.

The Sheriff-substitute reported. The last head and the conclusion of his report were as follows:—"The petitioner is by trade a hand-loom weaver, and keeps three journeymen. His family consists of himself, his wife, and one boy of six years of age, and his average weekly earnings from all sources he states at 14s. 3d. after deductions, but out of which amount he has to provide for rent at the rate of £5 per annum, gas, &c. He is confident that if he succeeds in obtaining the custody of his said grandchildren that the said parochial board would consent to make an allowance towards the maintenance of the two youngest of the children, and that said addition to his average income would enable him comfortably to maintain himself, wife, son, and four grandchildren, and also to provide for the latter suitable education. In this strong belief his wife concurs. He purposes, in that event, to bring up the eldest boy as a weaver. The hand-loom trade, however, has for some time back been in a retrogressive state, and still continues in a very depressed condition indeed, with little if any prospect of improvement. The petitioner's character appears to be irreproachable, and he seems to be a person of considerable intelligence. The reporter would, on this part of the case, humbly observe that the circumstances and condition of the petitioner and his family are identical with those of a host of honest and industrious men, both of the present and preceding generations, who, on very limited means, have brought up and creditably maintained large families, while at the same time it must be admitted that the present fluctuating condition of the hand-loom weavers is suggestive of the very gravest consideration. On the whole matter, then, remitted to him for inquiry the Sheriff-substitute has to report:—That the children in question were transferred from Kirkfieldbank to the Orphanage at Smyllum wholly without the knowledge, sanction, or concurrence of the petitioner or the parochial board, and that Mary M'Lay was at that very period in actual receipt of a regular weekly allowance from the said board on behalf of herself and her children; that the demand preferred against the parochial board for payment of said allowance from the period of the children's admission into the Orphanage was deliberately and definitively withdrawn by the respondent Farrel; that delivery of the children to the petitioner was eventually refused by the respondents Thornton and Bowie, on the ground of their alleged nomination as their guardians by Mary M'Lay; that the inquiry instituted does not establish or confirm the averment of the respondents that Mary M'Lay was, prior to or at the time of her decease, a Roman Catholic; while, on the other hand, the extract from the Registered Book of Marriages for the district of Bridgeton, in the burgh of Glasgow, shows that she and her husband were married in a Presbyterian church and by a Presbyterian minister, and that the married pair are therein described as being professed Presbyterians; that the petitioner and the children's uncle Michael Cunningham object to their being brought up as Roman Catholics—the former most distinctly from strong religious convictions; that the established respectability and integrity of the petitioner unquestionably qualify

him for the custody of his grandchildren; and that while the reporter is fully aware that the Court, in questions regarding the custody of children, are in the use of freely exercising their *nobile officium*, he feels it to be his present duty to remark that, if the religious element—which seems to be inseparable from the present question—is not to be absolutely disregarded, the fact of the union of morality with fervent religious convictions in the person of the said children's nearest agnate indicates the petitioner as possessed of superior qualifications for their custody and control, although he is not blessed with a superabundance of this world's goods."

BALFOUR for petitioner.

MACKENZIE for respondents.

The Court ordered that the children should be delivered by the respondents to the petitioner, holding that although the petitioner was a poor man, and might not be able without assistance from the parish—which assistance might in the circumstances competently and reasonably be given—to fulfil his intention of maintaining and educating the children, he was entitled to have the custody of them. He had not only stated his case very fairly, but, looking to the report of the Sheriff, it was evident that he deserved great credit for the course he had taken. The respondents might be very well meaning and benevolent persons, and entitled to credit for their kind intentions, but they had no right to retain the children when the grandfather was willing and anxious to take them, and the case would have been exactly the same if the present custodiers of the children had been Protestants. The question of religion did not enter the case, which had to be decided simply on grounds of legal right and expediency.

Agents for Petitioner—Macnaughton & Finlay, W.S.

Agents for Respondents—Maconochie & Hare, W.S.

REGISTRATION COURT.

(Before Lords Benholme, Ardmillan, and Manor.)

APPEALS FROM WIGTOWN BURGHS.

JOHNSTONE *v.* M'MULDROW.

Act. Shand and Guthrie.
Alt. Solicitor-General and Scott.

Burgh Voters' Act, sec. 48—*Town-Clerk.* A person appointed temporarily to the office of town-clerk *held* to fall under the provisions of the 48th section (Interpretation Clause) of the Burgh Voters Act, and as town-clerk disqualified from voting, and therefore without a qualification to be put on the Register of Voters. *Observed*, where there is an incapacity to vote, there is want of a title to be registered.

The following special case was stated in this appeal:—"At a Registration Court for the burgh of New Galloway, held by me at New Galloway on the 3d day of October 1868, under and in virtue of the Act of Parliament 31 and 32 Vict., cap. 48, intituled 'The Representation of the People (Scotland) Act 1868,' and the other Statutes therein recited, William Johnstone, joiner, New Galloway, claimed to be enrolled on the Register of Voters for the said burgh, as inhabitant occupier, as tenant of dwelling-house, High Street.

"The following facts were proved:—The town-clerk of New Galloway having recently died, I, as Sheriff of Wigtown and Kirkcudbright, appointed the claimant to be town-clerk of said burgh, and a copy of the appointment is appended hereto. He accepted, and has acted since 19th September last, and is still acting under the said appointment. It was admitted that the claimant has for the requisite period occupied a dwelling-house of less than £4 rent, which has not been rated. James M'Muldrow, residing in New Galloway, a voter on the roll, objected to the said claim, on the ground that the claimant being town-clerk of this burgh in terms of the above-mentioned appointment, he is incapacitated from being registered as a voter.

"I rejected the claim:—Whereupon the said William Johnstone required from me a special case for the Court of Appeal, and in compliance therewith I have granted this case.

"The question of law for the decision of the Court of Appeal is—Whether the appointment of the claimant as town-clerk, under the Act 19 and 20 Vict., cap. 58, section 48, is sufficient to exclude him from being registered as a voter."

GUTHRIE argued that the privilege of being registered was not impaired by the Burgh Voters Act. This appointment was made in terms of an authority conferred on the Sheriff by the Burgh Voters Act; and there was nothing disqualifying a person from being registered. The case turned on the question whether a disqualification to vote under the Reform Act of 1832 implied disqualification to be put on the register now. He submitted that there was no disqualification for being registered, and that the Sheriff's judgment should be altered, and the claimant admitted to the roll.

SHAND, on the same side, argued that in this case neither the reason nor the letter of the Statute applied. The appointment was merely temporary. He admitted that the claimant could not vote, but there was no disqualification from being registered.

SCOTT argued, that in the terms of the Act registration and voting were allied, and that the claimant was of course disqualified from voting.

SOLICITOR-GENERAL, on the same side, said that the disqualification with reference to town-clerks was to be found in 2d and 3d Will. IV. The disqualification was not based on the Reform Act of 1832, but on the Burgh Voters Act of 1856; and the only disqualification he saw imposed there was in regard to assessors—no assessor under section 8 being qualified to be put on the register or to vote, or to take part in municipal elections. He was not aware of any other disqualification by the Burgh Voters Act. By that Act assessors were disqualified either to vote or to be put on the register; and if the reading of the Act by his learned friends was true, then the result would be that they were entitled to be put on the register, but not to vote. The thing to decide was, whether this claimant came under that Act when the Sheriff made up his roll.

LORD BENHOLME said the objection in the case was that the claimant was town-clerk—temporary town-clerk—but still subject to the disqualification, if it were so, at the time of the claim. It was argued by Mr Guthrie that there was a Statute passed in 1856 which seemed to do a very anomalous thing—allowing parties who were disqualified to exercise the elective franchise to be put on the roll. He (Lord Benholme) had always understood that whenever there was a disqualification to vote there could be no registering; and the fact