United Kingdom at all. I think, then, upon the authorities that the appellant must be held to have resided at Hawick during the whole of the year in question, even assuming that he was also resident in Africa during the greater part of it; and that he has been properly assessed to income tax as a "person residing in the United Kingdom" in respect of the annual profits or gains accruing from his employment, though carried on outside the United Kingdom, so far as remitted or received in this country during the year of assessment. It was maintained by his counsel that the appellant is not liable because during the part of the year when he was resident in Hawick he in fact earned no money from his employment, which was terminated on his departure from Africa. This point is, I think, a peculiar and a novel one. It seems to constitute a distinction in fact between the present case and any former one, but it does not, in my judgment, make any material difference. I find nothing in the statutes to indicate as a condition of liability to assessment the necessity of coincidence in point of time between residence and earnings, and I see no good reason why such should be implied or inferred.

For these reasons I think that we should find that the determination of the Commissioners is right, and remit the case to them for the ascertainment of the sum due by the appellant to the Crown.

LORD SALVESEN—The question in this case is whether the appellant was a person residing in the United Kingdom during the year of assessment within the meaning of Schedule D, section 2, of 16 and 17 Vict. cap. 34. If the question were open I confess I should have had difficulty in deciding it in the same way as your Lordships propose to do. I agree with Lord Trayner in the case of *Turnbull*, (1904) 7 F. 1, at p. 3, 42 S.L.R. 15, where he says—"The test of liability is not having a residence in the United Kingdom; it is residing in the United Kingdom." Now whether a man resides in the United Kingdom is primarily a question of fact. Here it is admitted that for eight months of the year of assessment the appellant not merely resided, but under his contract of employment, from which his whole income was derived, was taken bound to reside, in West Africa. Any residence in Hawick with his wife and children during the subsistence of this agreement was *prima facie* in breach of it. In construing the word "residing" I should have thought it relevant to inquire whether the residence in this country was during a limited period only, and whether the dominant residence was not elsewhere. If the income tax laws were the same in West Africa as in this country I cannot see how the appellant could have escaped assessment in West Africa, and so would have been liable to a double assessment in respect of the same income; although no doubt the hardship arising from such a construction was partly mitigated by the decision of the House of Lords in the case of *Colquhoun* v. *Brooks*, 1889, 14 A.C. 493. It is, however, unnecessary to pursue this line of reasoning further, because it seems to me the matter was decided in the case of *Cadwalader*, (1904) 7 F. 146, 42 S.L.R. 117. If, as was held in that case, an American citizen who made all his income in America and resided there for ten months in the year, notwithstanding resides in this country within the meaning of the section founded on, because he had a shooting lodge in Scotland, which he occupied for two months during the shooting season, it seems to me to follow that the appellant's contention cannot be squared with that decision; for I agree with your Lordships that there is nothing in the section which differentiates this case because of the circumstance that while resident here he was in fact drawing no income from his employer. I hold myself therefore precluded by authority from reaching any other result than that which commends itself to both your Lordships.

LORD GUTHRIE was absent.

The Court affirmed the determination of the Commissioners, and remitted to them to determine the amount of the appellant's liability.

Counsel for the Appellant—Sandeman, K.C.—M'Quisten. Agents—Rusk & Miller, W.S.

Counsel for the Respondent—Solicitor-General (Morison, K.C.)—R. C. Henderson. Agent—Sir Philip J. Hamilton Grierson, Solicitor of Inland Revenue.

Tuesday, October 29.

FIRST DIVISION.

O'DONNELL AND OTHERS *v.* O'DONNELL.

Minor and Pupil—Parent and Child—Custody of Orphan Pupils—Custodier Appointed by Father Thwarting Father's Wishes as to Religious Upbringing.

Pupil children of Roman Catholic parents, of Roman Catholic antecedents, baptised in the Roman Catholic Church and brought up by their parents as Roman Catholics, whose mother had died, were left by their father, when he was setting out on military service, with his second wife, with instructions that she should "stick to the children." The father was killed on military service. The stepmother, who was a Protestant, had previous to her marriage undertaken not to interfere with her husband's liberty to fulfil all his duties as a Roman Catholic. After the death of her husband she attempted to alter the religion of the children. *Held*, in a petition at the instance of the nearest male agnate of the children and others, craving delivery of the children to their maternal grandmother, a Roman Catholic, and for decree that she was entitled to the custody of them, that, all other considerations touching the interests of the children

being equal, the expressed wishes of the father as to the religious upbringing of his children must prevail, and prayer of petition *granted.*

Daniel O'Donnell, John O'Donnell, and Mrs Catherine Coogan or M'Laughlin, brother, half-brother, and mother-in-law respectively of the deceased William O'Donnell, *petitioners*, brought a petition craving the Court, *inter alia*, to ordain Mrs Esther Lorimer Ferguson or O'Donnell, the second wife of William O'Donnell, to deliver to Mrs M'Laughlin the two pupil children of William O'Donnell, and to declare that those children should remain in her custody, and to find her entitled to their custody. Answers were lodged for Mrs Esther O'Donnell, *respondent.*

The petition set forth—"William O'Donnell, miner, who resided at 21 Newhouse, by Stirling, was killed while on active military service in the present war, on or about 13th August 1915, domiciled in Scotland. The parents of the said William O'Donnell were Roman Catholics. He was baptised and brought up in the Catholic faith, and he lived and died a Catholic. On or about 8th November 1902 the said William O'Donnell married Elizabeth M'Laughlin, who had also been brought up as, and lived and died, a Roman Catholic. She died on or about 10th January 1912. There were three children of the marriage—John, born on 8th November 1902; William, born on 11th February 1909; and Elizabeth, born on 3rd February 1911. Upon 28th September 1914 the said William O'Donnell married the [respondent], a Protestant, in St Mary's Catholic Church, Stirling. After her marriage, and until December 1915, she attended the Roman Catholic Church in Stirling. She, however, never became a Catholic, and since taking up residence at Pathhead, New Cumnock (where she still resides), in January 1916, she has not attended service in the Catholic Church. No child was born of the marriage last mentioned. All three children of the first marriage were baptised in the Roman Catholic Church. They regularly attended service in that Church with their parents, and were educated in Catholic schools. Shortly before her marriage the [respondent] subscribed a declaration whereby she solemnly promised and engaged (1) that all the children of both sexes of her marriage should be baptised in the Catholic Church, and should be carefully brought up in the knowledge and practice of the Catholic religion, and (2) that she would not interfere with the religious belief of the said William O'Donnell 'nor with his full and perfect liberty to fulfil all his duties as a Catholic.' In her knowledge one of his duties as a Catholic was the bringing-up of the said children in his religious faith, and until she left Stirling in January 1916 she accompanied the said children to the Catholic Church and sent them to the Catholic School there. The petitioner Mrs M'Laughlin, who is a Catholic, is the maternal grandmother of the said children. Since January 1916 the eldest child John has resided with her. He is and always has been a Catholic. William and Elizabeth, his younger brother and sister, have resided at Pathhead aforesaid with their stepmother since January 1916. For some time thereafter she sent William to the Catholic School at New Cumnock. From that school she withdrew him, and she is now sending him and the said youngest child to a non-Catholic school. Notwithstanding the protests of the petitioners she has recently been taking the said two children last named to a Protestant church, and has ceased to bring them up in the Catholic faith, although she admits—and it is the fact—that the said deceased William O'Donnell desired that his children should be brought up in that faith. Before her marriage the [respondent] was a servant in Stirling Poorhouse. Her house consists of a single apartment, the yearly rent of which is about £5, sparsely furnished, and containing one bed in which she sleeps with the said two children. As the widow of the said deceased William O'Donnell she receives an army allowance of 13s. 9d. weekly. Occasionally she earns 2s. or 3s. per week by sewing or knitting. She has no other source of income apart from the army allowances of 5s. weekly for the said boy William and 4s. 2d. for the said girl Elizabeth, which two allowances are payable to the custodier of the said children . . . No person has been appointed or nominated to act as guardian or tutor of the said children William and Elizabeth O'Donnell by their parents, who both died intestate. The petitioners believe and aver that the [respondent] intends to bring up the said two children as Protestants. To this the petitioners object, and they desire the said children to be brought up in the Roman Catholic faith. With the consent and concurrence of the other petitioners, the petitioner Mrs M'Laughlin is willing to take the said two children into her home, which is a comfortable house of two apartments, the yearly rental of which is about £9, 2s., and has adequate accommodation for them and their said brother John as well as her daughter Mrs M'Ateer (whose husband was killed on active military service in 1916) and Mrs M'Ateer's baby. In addition to a pension of 10s. weekly in respect of her son George (who was also killed on military service), Mrs M'Laughlin receives for the upkeep of the household the earnings and pension, amounting together to £2, 7s. 4d. or thereby, of the said Mrs M'Ateer and the wages of John O'Donnell last mentioned, amounting to £1 weekly—in all about £3, 17s. 4d. weekly. Mrs M'Laughlin is prepared to maintain the said children William and Elizabeth O'Donnell and to see to their proper education and upbringing in the Catholic Church in accordance with their parents' wishes. In the circumstances above set forth the petitioners submit that it is in the interests of the said two children that they should be in the care and custody of their said grandmother (who is 54 years of age) and not living separately from their said brother."

The *answers* set forth—". . . The respondent admits that she signed a form of declaration before her marriage in regard to religious matters, but she understood that all that it meant was that she was not

to interfere with the religious belief of her husband or introduce any strife into the family over religious matters. With regard to the two youngest children, William attended the Roman Catholic School in Stirling from September 1914 till January 1916, and thereafter went to the Catholic School at New Cumnock for a few weeks. When Elizabeth first went to school in the beginning of 1916 she was sent to the Public School at New Cumnock, and William was sent with her. The respondent sent these children to the Protestant School because she thought that they would be better taught there. In that school there is a teacher for every class, while there is only one teacher in the Catholic School. The Public School at New Cumnock is one of the best elementary schools in Ayrshire. The said William O'Donnell was not a particularly strong Catholic, and never at any time asked the respondent to change her religion. When he was on leave shortly before going to France his last request was that if anything should happen to him respondent was "to stick to the children" and look after them, and she promised to do so. Nothing was then said about their religion, and the deceased well knew that respondent was a Protestant. . . . The income of the respondent's household as at the date when the petition was presented is correctly stated in the petition with the exception that respondent gets her rent and taxes paid and also receives an allowance for boots from a relief fund and coals from the church. The room the respondent occupies is large, is adequately furnished, and is quite sufficient for the accommodation of herself and the children. It would be very much against the wishes of the children if they were taken from the respondent, by whom they are well cared for. The children look upon the respondent as their mother, and they are all very happy together. . . . The respondent respectfully submits that she is entitled to the custody of the children and is bound to look after them especially in view of her husband's expressed last request that she should retain the custody of and look after them, and that she should be left at liberty to have them educated and religiously instructed in the way she thinks most suited to their best interests."

Argued for the petitioners—The respondent had no title to object. She was merely the stepmother of the children; the petitioners were the nearest relatives of the children, and included their nearest male agnate. If, however, the respondent had a title, her answers were irrelevant, and the father having expressed his wishes as to the religious upbringing of the children, the respondent could not defeat his wishes—*Reilly* v. *Quarrier*, 1895, 22 R. 879, 32 S.L.R. 664; *in re Scanlan*, 1888, 40 Ch. D. 200, *per* Stirling, J., at p. 207.

Argued for the respondent—There was no question of the respondent's title; she was acting for the interests of the children; the father had bequeathed them to her and she was maintaining them at a loss. If any suggestion as regards her suitability was made, there should be a remit for inquiry. A stepmother had been regarded as a suitable custodier—*Black* v. *Ferguson*, 1866, 4 Macph. 807, 2 S.L.R. 79. The father had chosen the respondent to replace the mother of those children. The condition to which the respondent had agreed only applied to her own children and only *stante matrimonio*, and in any event the father had thereafter left the children to the respondent without any stipulation as to religious upbringing. He might well have changed his views. In any event the father's wishes were not conclusive—*Morrison* v. *Quarrier*, 1894, 21 R. 889, and 1071, 31 S.L.R. 718 and 844. In leaving the children to the respondent the father had given her power over them *quoad omnia*.

LORD PRESIDENT—The question raised by this case is this—Whether, other things being equal, the father's right to have his children brought up in his own religious faith, even after he has departed this life, ought to be decisive in a question of the custody of his children. In my opinion it ought to be.

I do not seriously differ from the way in which Lord Adam and Lord M'Laren laid down the law in the cases which were cited to us—*Morrison* v. *Quarrier*, 1894, 21 R. 1071, 31 S.L.R. 844, and *Reilly* v. *Quarrier*, 1895, 22 R. 879, 32 S.L.R. 664—but for my own part I am quite ready to adopt the expression of the law from the lips of Mellish, L.J., in the case of *Andrews* v. *Salt*, 1873, 8 Ch. 622, to the effect that "the law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the Court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented and possibly be better provided for elsewhere."

I agree with the view which we all entertain that the interest and welfare of the children is the paramount consideration in questions of this kind. If in the present case I were to have regard to that principle alone and to nothing else, then I should certainly refuse the prayer of this petition, because the respondent offers, as I think, a perfectly suitable home for the two children, who are at present living with her, and she avers—I assume with accuracy—that the father before he went to the front expressed a clear desire that she, his second wife, should retain the custody of the children. But then she says distinctly that she desires to retain the custody of the children in order that she may be "left at liberty to have them educated and religiously instructed in the way she thinks most suited to their best interests;" and in her view the way in which they ought to be educated is by being sent to a board school—in other words, a Protestant school.

Now that seems to me to be entirely con-

trary to the father's wishes. I do not think that we are left here to inference or conjecture. The family history makes the question plain beyond dispute. The three children were children of parents who were both Roman Catholics. We were told—and it was not disputed—that all three were baptised in the Roman Catholic Church, that they regularly attended services with their parents in that Church, and that they were educated in Roman Catholic schools. That the father was seriously desirous of having that education continued is plain from the declaration which his second wife made on the eve of her marriage to him, to the effect that she would not interfere with the religious belief of the said William O'Donnell, "nor with his full and perfect liberty to fulfil all his duties as a Catholic." I assume that one of the duties which the Roman Catholic faith imposed upon him is that he should have his children brought up in his own religion.

Under these circumstances it appears to me that the petitioners here are entitled to succeed, because they offer a home which undeniably is quite suitable. The income that comes in every week—£3, 17s. 4d., and probably something more when these two children are placed in the maternal grandmother's custody—is ample to maintain them and to have them decently brought up. The challenge of the grandmother's character I discard as being entirely irrelevant and insufficient to support the plea to the effect that she is an unsuitable guardian for these children. It is made very late in the day, and is so vague that I think we are entitled to disregard it altogether. She herself is a Roman Catholic, and she undertakes that the children will be brought up in the Roman Catholic faith. It is undeniable that such a small family as this is—these three children—should live together under one roof and be brought up in one home. The home is suitable, and the maternal grandmother, I think, is a suitable person to have charge of the children.

In these circumstances I see no reason why the prayer of the petition should not be given effect to, and I move your Lordships accordingly.

LORD MACKENZIE—I come to the same conclusion, and in doing so I am influenced by the position taken up by the respondent in the answer which has been put in, because it is plain from that answer, and also from the position taken up by her counsel at the bar, that she interprets the request of her husband "to stick to the children" as conferring upon her full authority to choose the religious denomination in which the children shall be brought up.

If she had come into Court stating that she was prepared to carry out the good faith of the undertaking to which she set her hand before her marriage, and that the children would be continued in the Roman Catholic Church, into which they were baptised, I think the case would have been entirely different. But in the concluding paragraph of her answer the respondent makes it quite clear that she is to be entitled, if her position is vindicated, to look after the children and be left at liberty to have them educated and instructed in the way she thinks most suited to their best interests.

Now the whole history of the case shows that this is a Roman Catholic family. The grandparents are described as having been Roman Catholic, the father as having been baptised and brought up in the Roman Catholic Church, and the mother was in the same position. The children were baptised in the Roman Catholic Church, and they regularly attended services in that Church with their parents, and it is stated that they were educated at a Roman Catholic school. Now I think that giving a fair construction to the undertaking which was signed by the respondent in this case, that meant that the education of these children should be continued to be given by that denomination. And accordingly upon that ground I take the view that the position of the respondent is not justified.

I think the case really turns upon that, and had it not been for the attitude adopted by the respondent I can see nothing which would necessitate the removal of the children from her care. As to the other features of the case—that it is desirable that the children should live in family together—I do not think that would have been sufficient to induce the Court to remove the children from their present custodian. The averments in regard to the character of the female petitioner Mrs M'Laughlin are in my opinion altogether wanting in sufficient specification to induce one to pay any attention to them.

With regard to the offer made by the Solicitor-General that he was prepared to give guarantees that the children should be educated in a proper manner, I am unable to see that that would really advance their interests, or how the guarantee could be so framed as to give a sufficient title to the respondent to enforce it.

I assume, of course, that if the respondent desires to have access to the children, that would be a matter for separate motion in the petition, which remains in Court.

LORD SKERRINGTON—The sole question in this case is whether the respondent shall be allowed to change the religion of these children from that in which their deceased father caused them to be baptised and educated. Needless to say, the ruling consideration for us is the welfare of the children. As a Court we cannot show preference for one form of Christianity over another. It is, however, desirable that there should be some general rule in dealing with these cases. The view which has been taken by the Courts both in this country and in England is I think both just and expedient, viz., that *prima facie* it is in the interests of a child that he should be educated in the religion of his parents, or if there be a difference between the religion of the father and of the mother, in the religion of the father. This rule is very far from being a universal one, and in certain familiar classes of circumstances it has to yield to other considerations. In the present case, how-

ever, nothing has been suggested which would justify us in authorising the respondent to arrogate to herself a power which the Court does not entrust even to a formally appointed guardian.

I therefore think that the prayer of the petition ought to be granted, because it is plain that the respondent desires to use the custody for the purpose of changing the religion of these children. In other respects I do not doubt that she is a suitable custodier.

LORD CULLEN—I am of the same opinion.

The Court decerned and ordained the respondent to deliver the pupil children to the petitioner Mrs Catherine Coogan or M'Laughlin.

Counsel for the Petitioners—The Solicitor-General (Morison, K.C.)—Scott. Agent—Charles George, S.S.C.

Counsel for the Respondent—Macquisten. Agent—Francis Chalmers, W.S.

Wednesday, January 23.

BILL CHAMBER.

[Lord Sands, Ordinary on Bills.

EARL OF KINTORE, PETITIONER.

Entail — Disentail — Value of Interests — Basis of Actuarial Calculations — Discount to Find Present Value of Heir's Expectancy.

Opinion per Lord Sands, Ordinary on the Bills, that in calculating the present value of the expectancy or interest in an entailed estate, which is being disentailed, of an heir whose consent is required, discount should be based on the rate of interest likely to be yielded for some years by money invested on good security, and not on the yield of the particular estate to the heir of entail in possession, which is irrelevant.

The Earl of Kintore, heir of entail in possession of certain entailed estates, presented a petition for authority to disentail. James Ian Baird, one of the three nearest heirs, being in pupilarity, had a *curator ad litem* appointed to him; and it was remitted to Charles F. Scott, W.S., to report on the petition, and to R. Hill Stewart, F.F.A., to ascertain the value of Baird's expectancy or interest in the entailed estates. Stewart valued the interest at £5050. The curator accepted the valuation. Scott lodged his second report, in which he recommended an interlocutor finding, *inter alia*, that the value of the expectancy or interest of James Ian Baird in the entailed estates was £5050, approving this sum being secured in the manner proposed in the petition, and on its being so secured dispensing with the consent of Baird and his *curator ad litem*.

On 19th December 1917 the Lord Ordinary on the Bills (SANDS) remitted to Scott to report of new after considering the following note :—

LORD SANDS—"I was extremely puzzled by the reference to rent and interest upon bonds in the actuary's report. The heir in question is entitled to a succession of—in round figures—say £100,000 upon the occurrence of certain events which may never happen, and which in any case are likely to be long postponed. So far as this heir is concerned, rent and interest in the meantime are of no importance. The case is precisely the same, so far as he is concerned, as if the Bank of England had undertaken to pay him £100,000 if and when these events occurred. I think, however, I now understand the use the actuary has made of the factors to which I have referred. The interest of the heir is subject to many contingencies. If his right were a vested one and the chance of the birth of an intervening heir were excluded, the problem would be comparatively simple. The expectancy of life of the last survivor of the three persons before him could be ascertained by tables, and the question would then be, What is the value now of £100,000 payable at the date of the death of the last survivor? In the present case a number of other contingencies come in which greatly diminish the value of the heir's expectancy. How these are allowed for it is unnecessary to inquire. It does not affect the principle, which is to ascertain the present value of a future payment. In order to do this it is necessary to ascertain what sum invested now would produce a certain sum at a certain date—in other words, the ordinary rule of discount must be applied. But in order to apply this rule it is necessary to postulate some rate of interest. The way in which the actuary gets this rate is as follows—he takes the present rent of the estate, he deducts therefrom the interest upon the bonds—not the actual interest but the interest at the rate he thinks reasonable—and certain public burdens and other charges. In that way he ascertains the net income of the estate. Then he proceeds to inquire what is the rate of interest this would represent upon the capital value of this estate less the amount of the bonds. He ascertains this to be £5, 9s. 1d., and accordingly he takes 5½ per cent. as the rate of interest at which he is to discount the heir's expectancy.

"I confess that I do not appreciate the logic of this process. Anybody coming into the market to buy this heir's expectancy would, no doubt, make a discount calculation, and for this purpose postulate a certain rate of interest. But if the capital value were secure he would not concern himself with the rate of interest on the bonds, the present rent, or the present net return to the proprietor. It may be that it is the actuarial practice in such a case as this to take, not a general market rate, but the rate yielded by the class of investment, viz., land, but even in that view the yield for the moment on this particular estate, which may depend upon fortuitous circumstances, appears to me to be an inadequate criterion. In a certain event the heir would get the whole of this estate subject to the present bonds, but he is not going to be compensated