On the question of fact rebutting the presumption the defenders Chalmers & Butchart maintained that the uncontradicted evidence of Ashe, Glover, and Neville, who were scarcely, if at all, cross-examined on this point, established that the lorry-driver had not altered the course of his horse or of his lorry after he drew in towards the pavement on hearing the car bell. Suppose these witnesses do depone to that effect, that does not seem to me sufficient to rebut the presumption of negligence. I think Chalmers & Butchart were bound to prove that the cause of the accident was something beyond their control, and in order to do so they must first prove what the cause of the accident was, such as the condition of the roadway or the horse being suddenly startled. They attempted an explanation, namely, oscillation, by way of inference rather than evidence, and this, their only suggestion, has been negatived. But suppose I am wrong in this, and that it was not necessary for them to prove a specific cause, they were at least bound to prove that they took all reasonable and ordinary precautions. They admit that adherence to a line continuous with that occupied by the lorry when the car first began to pass the lorry was a reasonable and ordinary precaution. This continuance on the part of the lorry horse and the lorry they sought to establish by the evidence of Ashe, Glover, and Neville. It was open to the Lord Ordinary, who heard these witnesses, to reject their evidence, either because he disbelieved it or because he thought it inadequate to establish the point in question. He has evidently done either the one or the other, and I see no sufficient reason to doubt that he has done so correctly. I therefore agree with your Lordships that the Lord Ordinary's interlocutor should be affirmed.

The Court adhered.

Counsel for the Pursuer—Morton, K.C.—D. R. Scott. Agents—Ross & Ross, S.S.C.

Counsel for Defenders the Corporation of Glasgow—Wilson, K.C.—M. P. Fraser. Agents—Campbell & Smith, S.S.C.

Counsel for Defenders Chalmers & Butchart—Sandeman, K.C.—Wilton. Agents—Laing & Motherwell, W.S.

Saturday, October 26.

SECOND DIVISION.

[Exchequer Cause.

THOMSON *v.* INLAND REVENUE.

Revenue—Income Tax—"Residing in the United Kingdom"—Income Tax Act 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D.*

The Income Tax Act 1853 (16 and 17 Vict. cap. 34) enacts (section 2, Schedule D) that income tax is to be payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere. . . ."

A contract of employment between a trading company and its agent provided that the latter should continue in West Africa during his term of service, that he should not leave Africa or the service of the company without six months' previous notice, and that his remuneration should cease on the day he left Africa. During the year of assessment the agent maintained his wife and family in a house at Hawick, of which he was the rated owner, and he lived there himself for four months. *Held* that he was assessable to income tax under section 2, Schedule D, of the Income Tax Act 1853, in respect that he was residing in the United Kingdom during the year of assessment, on any salary remitted to his wife or himself in the United Kingdom.

The Income Tax Act 1853 (16 and 17 Vict. cap. 34), section 2, Schedule D, is quoted *supra in rubric.*

Robert Thomson, Hawick, *appellant*, being dissatisfied with a decision of the Commissioners for the General Purposes of the Income Tax Acts at Jedburgh confirming an assessment made upon him for the year 1911-12 on the sum of £300 in respect of his income as a mercantile agent, took a Case in which the Surveyor of Taxes was *respondent.*

The assessment was made under Case 2, or alternatively Case 6, Schedule D, section 100, of the Income Tax Act 1842 (5 and 6 Vict. cap. 35), and section 2, Schedule D, of the Income Tax Act 1853 (16 and 17 Vict. cap. 34).

The Case set forth—"The following *facts* were admitted or proved:—1. The appellant was and is employed by Miller Bros. (Liverpool) Limited as agent in Southern Nigeria. 2. In the year in question he was serving under a separate agreement with that company in respect of each journey to that country. A copy of said agreement, signed by the Commissioners, forms part of the case. 3. On the expiry of each agreement the appellant returned to this country. During the periods of his stay in this country he was not in the service of Messrs Miller Bros. and earned no income, the whole of his income whether by salary or commission being earned abroad. It was a condition of the appellant's earning salary or commission that he should remain in West Africa during the period of his agreement. 4. During the year in question he was the rated owner of a residence in Hawick, in which his wife and family resided, and he was personally present, there, and in this country during a portion of such year, *i.e.*, four months from 6th April 1911 until August 1911, when he left for Southern Nigeria. 5. Since then he has been in this country during a portion of each successive revenue year, and he owned the residence in question at the date of the hearing, 1st February 1916. 6. Sums of money were paid by his instructions to his wife in this country by the company during his absence abroad. 7. The balances of his earnings, less some small

amounts expended by him whilst abroad, were also received by him in this country."

The *agreement* referred to, after providing that the appellant should "become, be, and continue for two years, or until the date of his giving up charge, in the service and employment of the first party as agent for them at Abonnema or elsewhere on the West Coast of Africa or the rivers thereof," stated — "The outward passage shall be paid by the first party, but the passage homewards shall be charged to the agent's account should the said agent from any cause but unavoidable sickness return before the expiration of the two years. Should the agent remain and complete the full terms and conditions of this agreement, his passage homewards to Liverpool shall be paid by the first party. . . . The said agent shall not leave the coast of Africa, or the service of the said company, without giving them six months' previous notice of his intention so to do . . . and in case of breach of these stipulations, or any of them, he shall for every breach as and for liquidated damages, and not as a penalty, be absolutely debarred from all claim for any salary or commission which but for this clause would have then or thereafter accrued due to him from the said company, and he shall also render himself liable to instant dismissal. . . . In consideration of his faithful service and due performance of all the conditions hereof, the first party agree to pay the agent a fixed salary at the rate of Three hundred pounds per annum, commencing from the date of his sailing for Africa, as hereinafter mentioned, and terminating on the day he shall from any cause give up charge of their agency on the African coast. In the event of unavoidable sickness necessitating (in the opinion of the medical officer of the first party) the return of the agent to England, the first party shall defray the cost of his homeward passage, but on his recovery it shall be at the option of the first party to require the said agent to return to the coast and complete the term of this agreement."

The Commissioners *found* that "(*a*) The appellant was resident in this country for the year in question, and was therefore correctly chargeable with income tax under Case 2, or alternatively Case 6. (*b*) The assessment was properly made at his place of residence, and it was accordingly remitted to parties to agree as to the amounts of such liability."

Argued for the appellant—(1) The appellant was not resident in the United Kingdom in the sense of the statute. (2) Even if he was, no income accrued to him while he was so resident, and therefore there was nothing that could be taxed—The Income Tax Act 1853 (16 and 17 Vict. c. 34), section 2, Schedule (D). What distinguished the present from all previous cases was that here if there was residence it was residence only and not residence plus earnings. West Africa was appellant's ordinary and permanent residence. His agreement terminated when he left West Africa, and his salary ceased. The mere fact that his wife and children occupied a house in this country would not bring him within the ambit of the section—*Turnbull* v. *Inland Revenue*, 1904, 7 F. 1, 42 S.L.R. 15. In *Inland Revenue* v. *Cadwalader*, 1904, 7 F. 146, 42 S.L.R. 117, the respondent was only assessed on the sums remitted to this country. In *Lloyd* v. *Solicitor of Inland Revenue*, 1884, 11 R. 687, 21 S.L.R. 482, the appellant managed his Italian business while resident in this country, and the income therefrom was always accruing. The word "residing" did not mean simply "having a residence." In the present case the first four months of the financial year were spent in this country, and during that time the appellant could have no income. The test of residence in income tax cases was not the same as in poor law cases—*Young* v. *Commissioners of Inland Revenue*, 1875, 2 R. 925, *per* Lord President Inglis at p. 926, 12 S.L.R. 602. In the case of *Pickles* v. *Foster*, [1913] 1 K.B. 174, where the circumstances were similar to the present case, the Crown had attempted unsuccessfully to assess the subject under rule 3 of sec. 146, Sched. E, of the Income Tax Act 1842 (5 and 6 Vict. c. 35) as holding a public appointment in the United Kingdom. Revenue Acts should be construed fairly and not against the subject—*Gilbertson* v. *Ferguson*, 7 Q.B.D. 562, *per* Cotton, L.J., pp. 572-573.

Argued for the respondent—To render appellant subject to income tax under the statutes it was only necessary that he should satisfy two conditions—(1) that he was a person residing in the United Kingdom during the financial year, (2) that income accrued to him during the year of assessment. Appellant satisfied both conditions. Under Schedule D, section 2, of the Income Tax Act 1853 a person residing in the United Kingdom and engaged in a trade carried on entirely abroad was chargeable to income tax in respect of profits or gains remitted to or received in this country during the financial year—*Inland Revenue* v. *Cadwalader* (*cit. sup.*); *Young* v. *Commissioners of Inland Revenue* (*cit. sup.*); *Rogers* v. *Solicitor of Inland Revenue*, 1879, 6 R. 1109, 16 S.L.R. 682. The test was the period during which the money was received and not the period during which it was earned—*Scottish Provident Institution* v. *Inland Revenue*, 1912 S.C. 452, 49 S.L.R. 435. What was subject to tax was only what appellant sent or brought home. Appellant would still have been liable to tax even if he had not returned home during the financial year. It was immaterial that appellant's agreement bound him to stay in West Africa. The case of *Turnbull* v. *Inland Revenue* (*cit. sup.*) was different, because in that case the subject was never in the country during the year of assessment, and because his principal, actual residence, and his sole physical one was in Madras, the title to the house in this country was in his wife's name, and she herself had contributed substantially to its purchase, [The LORD JUSTICE-CLERK referred to *Brown* v. *Burt*, 1911, 5 Tax Cas. 667, 81 L.J., K.B. 17.]

At advising—

LORD JUSTICE-CLERK—The Crown main-

tain that the appellant's income so far as paid direct to his wife or received by him after his return home as explained in the Stated Case is liable to assessment. In my opinion the contention of the Crown is right.

During the year of assessment the appellant was owner of a house in this country in which during that year his wife and children resided. The appellant himself also resided in that house during four months of the said year. For the other eight months of the year he was in Africa serving under his agreement.

I think in the sense of the Income-Tax Acts a man may reside in more than one place at the same time. That was in my opinion expressly decided in, or necessarily follows from, the cases of *Lloyd*, 1884, 11 R. 687, 21 S.L.R. 482, and *Cadwalader*, 1904, 7 F. 146, 42 S.L.R. 117. Even therefore if it were conceded that for eight months of the year in question the appellant resided in West Africa, where he actually was, and which was the place of his employment under the agreement so long as the agreement was in force, that would not preclude him from being also held to reside during these eight months where his wife and family lived in the house which he had provided for them as a place of residence. In my opinion the appellant did reside during the whole year in the sense of the said Acts where that house was. I think it makes no difference that he might also be held to have resided for these eight months in Africa. So far as this part of the section is concerned I do not find any distinction taken between the ordinary or principal residence and any other place of residence. But on this Stated Case I am of opinion that, assuming that the appellant had for part of the year two residences, his ordinary or principal residence was all the time where his wife and family were.

It was contended for the appellant that to make income assessable it must be earned during the time when the appellant resided in this country. I find no such provision expressed in the statute, and I can find no justification for implying any such provision. It is therefore in my opinion irrelevant to say that the appellant could only earn income while he was in Africa. The whole income in respect of which the appellant is sought to be assessed was paid by his employers in this country either to himself or to his wife in accordance with his instructions, and is in my opinion liable to assessment.

LORD DUNDAS—I think the determination of the Commissioners is right. It appears that during the major part of the year of assessment the appellant was in Africa doing business in terms of the agreement appended to the Case, by which he was taken bound, while it subsisted, to "become, be, and continue" in the service of his employers there, but that for four months of the said year, after he had brought the agreement to an end by leaving Africa, he resided at Hawick, in a house of which he was during the whole of the year the rated owner, and in which his wife and family had their home. Counsel for the Crown were at pains to argue that there is nothing in the stated facts to show that during the year in question the appellant resided in Africa at all, and that his only residence, in the sense of the Income Tax Acts, during that period was in Hawick.

I do not think it is necessary for the Crown's success to state their case so high. Even if it be assumed that the appellant resided in Africa during the major part of the year, that would not in my judgment prevent us from holding that he resided in Hawick during the whole year. It is, I think, settled that a man may be held to have his residence and to reside at one time in more than one place within the meaning of section 2, Schedule D, of 16 and 17 Vict. cap. 34. In *Lloyd's* case, (1884) 11 R. 687, 21 S.L.R. 482, Lord President Inglis said—the italics are mine—"*there is no mention in this taxing clause of the character of the residence* as being ordinary residence, or temporary residence, or residence for any particular part of the year or proportion of it; '*residing in the United Kingdom' are the only words we have to guide us.* Now if a man could only be resident in one place in any particular year there might be a great difficulty, but surely *there is nothing more familiar to one's mind than that a man has during a particular year* or during a course of years *residences in different places existing at the same time. A man* cannot have two domiciles at the same time, but he *certainly can have two residences.* He can have a residence in the country and a residence in town; he can have a residence in Scotland and another in England; or he may have three or more residences. . . . That is a place of residence, and *if he occupies that place of residence for a portion of a year he then is within the meaning of this clause, as I read it, residing there in the course of that year.*"

In *Cadwalader's* case, (1904) 7 F. 146, 42 S.L.R. 117, an American barrister, whose ordinary residence was in New York, was held to be a "person residing within the United Kingdom" within the meaning of the section, because he leased a shooting in Scotland and resided there for two months in the year. In *Turnbull's* case, (1904) 7 F. 1, 42 S.L.R. 15, which was strongly founded on by the appellant's counsel, the subject was successful. I am not sure whether one can satisfactorily bring this case, decided by the Second Division, into perfect line in all respects and as regards all its dicta with the decisions of the First Division to which I have just referred, one of which preceded and the other followed it. But assuming the judgment in *Turnbull's* case to be sound, the facts were I think sufficiently different to prevent it from in any way embarrassing us here. Mr Turnbull's residence in which he "usually resides" was in Madras. The house in Edinburgh had been purchased, partly with her own money, by his wife, and the title to it taken in her name. During the year of assessment Mr Turnbull had not been in the

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