55 Vict. cap. 3), by section 2, provides that "if at the time of the application for a writ or order for the production of the child, the child is being brought up by another person, or is boarded out by the guardians of a poor law union, or by a parochial board in Scotland, the court may, in its discretion, if it orders the child to be given up to the parent, further order that the parent shall pay to such person, or to the guardian of such poor law union, or to such parochial board, the whole of the costs properly incurred in bringing up the child, or such portion thereof as shall seem to the court to be just and reasonable having regard to all the circumstances of the case."

Charles Soutar, 2 Dundee Street, Edinburgh, was married on 8th April 1887 to Anne Carrie, who died in childbed on 27th January 1888, leaving a daughter, who continued to reside with her grandparents, James Carrie and his wife, as her father was not in a position to take care of her. In December 1893 Soutar married again and wished to have the child to live with him. In July 1894, upon the grandfather's declining to hand over the child, he presented a petition to the Court for its custody. Carrie lodged answers, in which he stated that he did not wish to part with the child; further, that it was delicate; that it had required exceptional care, necessitating considerable outlay; that he had expended more than £85 in its maintenance; and that the petitioner had only contributed in all £5, 4s. 6d. in small sums at different times. He submitted that the petition should not be granted until payment of £85 had been made, or at least only conditionally upon that sum being paid. He was, however, unable to furnish details of the expenditure of the money claimed. Soutar explained that he was a bootclicker with very limited means, but he offered to pay £15 in monthly instalments of 5s. if the petition were granted.

At advising—

LORD PRESIDENT—The section assumes that where an order is made for payment, an order for delivery of the child to its natural guardian is being pronounced at the same time.

The respondent asks us to order payment of £85, and he is met by an offer of £15 to be paid in instalments of 5s. a month.

We have not got the material here, and the respondent is unable to give us material enabling us to arrive at a decision of what larger sum would be reasonable.

We are entitled to take into account the position and income of the person who is called upon to make payment, and in the circumstances I think we should pronounce an order for payment of £15—not because that is the sum offered, but because the respondent has not supplied us with anything tangible or definite leading us to arrive at a different conclusion.

LORD ADAM concurred.

LORD M'LAREN—I do not read the section of the Act as providing that the whole sum expended in aliment must necessarily be given, but that a sum should be awarded as compensation to the person deprived of the custody of the child.

The circumstances and position of the person liable to make payment should be taken into account, and I agree with your Lordship as to the amount, and on the same ground, namely, that nothing has been said showing that a larger sum ought to be awarded than the sum offered.

LORD KINNEAR—I agree.

The Court pronounced this interlocutor:—

"Grant the prayer of the petition: Find that the petitioner is entitled to the custody of Annie Carrie Soutar, the child of the marriage between him and Annie Carrie mentioned in the petition; and decern and ordain James Carrie, dairyman, 66 Abbey Park, Arbroath, forthwith to deliver up the said child to the petitioner, or to those having his authority; and further, decern and ordain the petitioner to pay to the respondent the said James Carrie the sum of £15 sterling, at the rate of 5s. per month until the sum of £15 shall have been paid."

Counsel for the Petitioner—Strachan. Agents—T. F. Weir & Robertson, S.S.C.

Counsel for the Respondent—Findlay. Agents—Duncan Smith & Maclaren, S.S.C.

Thursday, July 19.

FIRST DIVISION.

MORRISON *v.* QUARRIER.

(*Ante, p.* 718.)

Custody of Children—Petition of Brother—Religion of Deceased Father.

A boy and girl—twins—aged twelve, whose father and mother were dead, were placed by their brother, a Roman Catholic, in an institution where the religious instruction was Protestant. He subsequently presented a petition to have them restored to his custody in order that they might be brought up as Roman Catholics, that having been, as he alleged, the religion of their father. The Court appointed a curator *ad litem* to the children, who, after making full inquiries, reported that the children were being well cared for, that they seemed very happy, and that they wished to remain where they were. Upon the question of religion the report stated that the children were baptised as Roman Catholics, but not until they were nine years of age, that from 1888-93 they attended irregularly Board Schools and irregularly Roman Catholic Schools in 1891-92, that the father who died in October 1893, although nominally a Roman Catholic had never

taken them to a Roman Catholic Church, but pretty frequently to a Congregational place of worship, and that to the parochial authorities he had sometimes represented himself as a Roman Catholic, and sometimes—as late as May 1893—as a Protestant. The Court *refused* the petition.

Mr Bremner P. Lee, the curator, reported "that since his appointment he had visited the Orphan Homes of Scotland, founded and managed by the respondent, and that he had there seen his wards. The wards were both healthy and happy-looking children, and were evidently well fed and cared for. Both the wards are intelligent children, quite willing to talk frankly about themselves and their position and prospects.

"The curator visited the Homes without giving any notice of his intention to do so, and had an opportunity of talking with the wards, both alone and in the presence of the respondent, who personally manages the institution and takes an individual interest in every child under his care.

"The ward Margaret, who spoke with great freedom and in a manner that convinced the curator of her ingenuousness, stated that the respondent and all in charge of the Homes are very kind to her, that she is more comfortable and better fed than she ever was before, that she is very happy, and would like to stay where she is. On being asked if she would like to go back to Dundee, or to go to live with the Browns, whom she has never seen, she unhesitatingly said that she would rather stay where she is, and added that when she last saw the petitioner, five weeks before, he did not wish that she should return to him.

"The ward Margaret further stated that while in Dundee she had never attended any church execept the Hilltown Mission. When she was nearly nine years of age, a lady, who visited her mother on her deathbed, recommended that the children should go there, and from that time they were taken there regularly, or at least frequently, by their father until the time of his death; since the father's death they had never been to church. She also stated that her father had sent them to a Protestant school, which she described as 'Mr Dickson's school,' and that after his death, when they were living with the petitioner, they remained at this school until the petitioner got out of work and sent them to the Homes. She could not remember that her father ever went to church before they began to go to the Hilltown Mission, nor could she remember that the petitioner or his wife ever went to any church for long before she left Dundee. She knew, however, that the petitioner's wife was a Roman Catholic, and that his children attended a Roman Catholic school, and sometimes went to chapel.

"The ward Alexander confirmed his sister's statements, and expressed substantially the same views as she did. He looked and professed himself to be very happy in his new home.

"The wards seemed to have a great affection for each other, and desired that in any event they should not be separated. Their education has evidently been much neglected, but since their admission to the Homes they have already made considerable progress.

"The curator made a careful inspection of the Homes. The extent of the institution, which shelters eleven hundred destitute or orphan children, and the rapidity of its growth, are an indication of the estimation in which it is held by the public. The Homes are situated about two miles from Bridge of Weir, and consist of forty-six houses, including chapel, school, and boys' and girls' sick houses, erected at a total cost of nearly £150,000. The amount necessary for the support of the institution is between £14,000 and £15,000 per annum, and this, together with the cost of building, has been met in whole by the voluntary contributions of the public from year to year. The children are well cared for, and well fed; they are efficiently and practically trained for service or for trade, and are kept until they are able to support themselves by their work, either in the Homes at Bridge of Weir or at the Branch Homes in Glasgow and in Canada, where children already working for themselves are housed. The respondent admits no child without its own consent and the written consent of its guardians; each child has a free choice of the employment for which it shall be trained; and no child is ever sent out of the country until it has been fitted for work, and has expressed its own desire to go. In Canada there are Branch Homes to which the immigrants may go in case of sickness or want of work. The respondent finds it necessary for the success of his enterprise that his hand should be left free from the interference of relatives, though he states that on good cause shown he is always willing to restore a child to relatives who seem able and willing to keep it. The moderation with which the respondent exercises his authority is manifest from the fact that though so many children pass through his hands he has never before had to defend a case of this nature.

"The curator also visited Main Street, Bridgeton, Glasgow, and saw Mrs Brown, who stated that she has never seen the wards, and is in no way related to them, though she is an aunt of the petitioner's wife. She knows nothing of the petitioner or his family, and showed no anxiety to have the wards with her, though she professed her willingness to take them rather than that they should be homeless or unhappy. The Browns are Roman Catholics, in a very humble rank of life, living in a house of two small rooms, or, more acurately, of one double room. The curator did not learn the exact ages of Mr and Mrs Brown, but they are persons so well up in years as to diminish the probabilities of their being able to give a perma nent home to the children.

"The curator has satisfied himself, from the statements of his wards and from other reliable and more detailed information laid before him, that it would not be to the moral or physical advantage of the children

that they should return to the custody of the petitioner.

"A third alternative was suggested by the petitioner, *videlicet*, that the wards should be removed to a Roman Catholic institution at Smyllum, Lanark. The curator has not considered it necessary to visit this institution, but he has seen its prospectus and its annual report. Forty-five parochial boards in Scotland, including that of Dundee, send the Roman Catholic children under their care to this institution, and the curator cannot doubt that were there any evidence to suggest that his wards had been brought up as Roman Catholics, or that their severance from that religion would in any way alienate them from their relatives, this would be a highly suitable place for their upbringing. There is a charge of £10 per annum for each child.

"Since the curator's interview with his wards there have been laid before him by the petitioner statements by many members of the Morrison family, and certificates by Roman Catholic clergyman and schoolmasters, all directed to prove that the wards have been brought up and educated in the Roman Catholic faith. The curator has considered it his duty to make very careful inquiry into this matter.

"The curator does not doubt that the parents of his wards were married as Roman Catholics, and the wards themselves were baptised by the Reverend Patrick Crotty, Roman Catholic clergyman, on March 7, 1891, when they were nine years old. Both parents before their death received the last rites of the Roman Catholic Church. The curator, however, has been unable to find any evidence that they were ever regular attendants at the services of any Roman Catholic church, or that their children Margaret and Alexander ever attended a Roman Catholic church at all. On the other hand, the curator has seen several persons connected with the Hilltown Mission, which is carried on in connection with Panmure Street Congregational Church, and has by their evidence verified the statement of the wards. The father of the children attended with considerable regularity for a period of fully two years immediately prior to his death the evening services at this mission, being frequently accompanied by his children Margaret and Alexander, who also attended the children's forenoon service. The father also occasionally attended the Panmure Street Congregational Church. When applying for assistance from the Parochial Board on 14th November 1892, and also in prison so late as 1st May 1893, the father represented himself as being a Protestant, though on other similar occasions he had stated that he was a Roman Catholic.

"The curator has, with the assistance of the defaulting officer of the Dundee School Board, got detailed information as to the education of the wards. From September 1888 till September 1893 both children attended, though irregularly, one or other of the board schools in the district, with the exception of the session 1891-92, when both irregularly attended Roman Catholic schools. In 1887 Alexander attended for twenty-three days at St Mary's Roman Catholic School, and was there again for a few days in the beginning of 1894. The curator received a certificate from the schoolmistress of St Mary's Roman Catholic School to the effect that the ward Margaret attended that school in 1893, but from the books of the School Board it is evident that this refers to a cousin of the same name, who at that time was living in the same house as the wards.

"The curator, while he believes that the wards' family is Roman Catholic, has been unable to find any indication that the wards were ever truly brought up in that faith; on the contrary, after careful consideration of all the information he has been able to obtain, he is convinced that any religious instruction the children ever had was from Protestant sources, deliberately chosen and acquiesced in by their father. The ward Margaret has freely and distinctly chosen to remain in the Orphan Homes rather than adopt any of the residences suggested by the petitioner. As the curator thinks that her choice is a wise one, prompted by a just appreciation of her present circumstances and of her future prospects, he cannot suggest that her brother Alexander should be separated from her solely for the purpose of restoring him to the influence of a faith of which he knows nothing, and from which his own family have allowed him to drift.

"In the whole circumstances the curator concurs with the respondent in submitting that the petition ought to be refused."

Argued for the petitioner—The children should be brought up in the form of religion professed by the father. In the English cases the wishes of the father were regarded as paramount—*In re Austin*, 1865, 34 L.J., Ch. 499; *Hawksworth*, 1871, L.R., 6 Ch. App. 539; *in re Agar-Ellis*, 1878, L.R. 10 Ch. Div. 49; *in re Scanlan*, 1888, L.R., 40 Ch. Div. 200; *The Queen* v. *Barnardo*, 1891, L.R., 1 Q.B. 194. A father's authority was as much or more regarded in Scotland. The curator had reported that they would be well taken care of in Smyllum Orphanage, and arrangements had been made for their admission there if the petition were granted.

Argued for the respondent—The report was conclusive as to the children's wishes; the girl being a minor was entitled to have her wishes given effect to, and there was no reason for separating the children. There was no authority for saying that the wish of a dead father as to the child's religion must overrule all other considerations. Even the English cases, which had gone further in recognising the father's wishes in this respect than had ever been done in Scotland, did not go so far as that, and since the case of *Hawksworth* the Court had taken a less extreme view of a deceased father's rights—*In re Violet Nevin*, L.R., 1891, 2 Ch. 299; and expressly the recent case of *M'Grath*, 1893, L.R., 1

Ch. Div. 143, which was very similar to the present, and should be followed. There L.J. Lindley, on pp. 148-149, summarised the result of the previous cases, and recognised that the welfare of the child was the ultimate guide. Here, too, there was nothing to show that the father wished them brought up as Roman Catholics, his conduct pointed to his preferring a Protestant education for them. Smyllum Orphanage was really the only serious alternative, but payment was required there, and nothing definite had been said as to how that was to be made. It was only said that arrangements had been made.

At advising—

LORD PRESIDENT—In this case the children are orphans, the mother having died in 1891 and the father in October 1893. They are at present in an establishment called the Orphan Homes of Scotland, and from the report of the curator it appears that they are living in comfort and content, and are getting suitable instruction so far as secular education is concerned. Now, the sole ground of this application is that the children are not being brought up in the Roman Catholic faith. The father survived the mother, but died, as I have said, last year. Now, it would be necessary for the petitioner, on his own view of the law, to make out that it was the wish of the father that the children should be brought up in the Roman Catholic faith, and that there were means available for their being so brought up without any detriment to their general interests. As regards the last point, I am willing to assume what the reporter seems to be satisfied of, and that is, that the Roman Catholic establishment, called the Smyllum Orphanage, is an establishment in which the children would be attended to and properly taken care of. I am willing to assume that, and I think the case must be considered on that footing. But then the proposition which has to be made out is that it would be according to the wish of the father that the children should be taken from this place in which they were well cared for at present and sent elsewhere, solely in order that they might be brought up in the Roman Catholic faith. I am quite willing to agree that, if there were nothing to the contrary, the fact that the father and mother were Roman Catholics and members of the Roman Catholic Church would raise a strong presumption that the wish of the father was that the children should be brought up in his own faith. I agree with what was said in the case of *M'Grath*, that "the wish of the father, if not clearly expressed by him, must be inferred from his conduct. If the father is dead it will be naturally inferred that, in the absence of evidence to the contrary, his wish was that the children should be brought up in his own religion — that is, the religion which he professed." Now, the question here is whether there is not sufficient evidence to rebut the presumption arising from that fact—whether, in place of our having to depend on inference from the father's choice of religion so far as for himself, we have not sufficient evidence of his choice of religion for his children. The facts stand thus. It is true the children are baptised members of the Roman Catholic Church, but then it is impossible to throw out of account the fact that they were not baptised until, I think, 1891, and accordingly these children were not from their birth brought up members of the Roman Catholic Church, but seem to have been baptised at an unusually late age, and under circumstances which may be left to conjecture. But then what is the evidence of the father taking the children to any religious ordinances at all? There is none, as Mr Gunn quite properly admitted, of his having taken them to a Roman Catholic Church himself, and there is evidence quite clear that, being a somewhat lax Roman Catholic in the way of observing the religion of that church, he took them to a Congregational Church regularly—or at least frequently — going with them himself. But what we are concerned with is this — Is there not evidence of his having brought up his children in the Protestant faith—or at least been tolerant of the Protestant faith—and conduced to the bringing up of his children in that faith? It seems to me that when we are called to remove the children from where they are being brought up well otherwise, the petitioner's case totally fails, as he has to establish, first, that there is reasonable evidence from which to conclude that the father would have wished the children to be placed in a purely Roman Catholic establishment. Now, the inference naturally arising from the father's own religion is entirely displaced by the way in which he arranged for the instruction of his children so far as religion was concerned, and the various circumstances mentioned in the curator's report lend an air of probability to the conjecture that the father, not being a firmly attached member of the Roman Catholic Church himself, or at least a lax member of the Roman Catholic Church, thought it more to the children's advantage that they should be brought up as Protestants. Such, at least, is the inference I draw from his own conduct.

But what I have said would apply directly only to the case of the boy, because he is a pupil. When we turn to the case of the girl, Mr Gunn is confronted with a difficulty to which he frankly admitted he did not see an answer, and that is, what right has the Court of Session on grounds such as are here put forward, to remove a girl in minority, when there is evidence that she prefers to remain where she is? That itself, apart from other considerations, forms an extreme difficulty in the way of granting the petition, and, like Mr Gunn, I have not seen an answer to it. But when, along with that the basis of the petitioner's case in point of fact is negatived by the evidence, the evidence rather showing that the father preferred a Protestant education for his children rather than a Roman Catholic education, I think there

is no difficulty in disposing of the petition so far as the girl is concerned. As to the boy, the one ground of failure of evidence of the father's wish is sufficient for the disposal of the case, but it is also to be noted that the children are attached to one another and desire to be together, and that it is impossible to suggest that the interest of either would be subserved by the one being taken and the other left. I am therefore for refusing the petition.

LORD ADAM—I am of the same opinion. We thought on the previous occasion that we had not sufficient facts before us to enable us to dispose of this petition, and accordingly took means for obtaining additional information by appointing a curator *ad litem*, who should make further inquiries, and report.

We have now got a very careful and lucid report from Mr Lee, which satisfies me that we have now got sufficient material for disposing of the case. I agree that the wish of the father is perhaps the predominant consideration in such cases as the present, but I may be allowed to say that I do not know that by the law of Scotland the same paramount weight is given to his wishes as seems to be attached to them by the law of England, which seems to ignore altogether those of the mother although still alive. But we have not got any express desire on the father's part, but only an argument as to what would have been his desire. If there were no other facts to which to refer, we might draw the inference from both parents being Roman Catholics, that they wished their children brought up in their own faith. But this is not so. We know how the father during his lifetime treated those children, never taking them to a Roman Catholic church, but accompanying them to a Protestant place of worship. Could he have been asked whether he wished them not brought up as Protestants, I think he would have said yes, but at least I am very clear that we cannot draw the inference that he had any strong desire they should be brought up Roman Catholics.

Then are we to say that the wishes of the girl, who, although of the same age as her brother, is a minor, are to be overruled? I do not know how far the law of England would be different on this point, because by it a girl is an infant until 21. It is plain, however, that there is a manifold difference in the laws of the two countries on this subject, making the application of English cases by no means clear. We have, I think, no right to disregard the girl's wishes, and I see no reason for separating these children.

LORD M'LAREN—I quite agree with your Lordship in the chair, and I also desire, like Lord Adam, in case the question may hereafter arise, to reserve my opinion as to the supposed exclusive preference of the father's opinion in regard to the education of the children, which have been left under the care of the mother, because under the Guardians Act greater authority is now given to the mother than could formerly be claimed for her, and that is an indication which I should not wish to overlook in dealing with any question such as this. I can conceive that there are cases where it would be very much to the advantage of the children that they should be in the care of the mother even where her opinions happen to differ from those of a deceased father. Probably this does not arise, because very often there is an understanding between parents on such subjects, but I should not wish to be understood as assenting to the doctrine that under all circumstances the wish of a deceased father should prevail in regard to the education of his children, under circumstances which he could not see, and which are entirely different from what were contemplated.

LORD KINNEAR—I agree with your Lordship, and have nothing to add.

The Court refused the petition with expenses.

Counsel for the Petitioner—Young—Gunn. Agent—John Mackay, S.S.C.

Counsel for the Respondent—Ure—Clyde. Agents—Dove & Lockhart, S.S.C.

Thursday, July 19.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

A B *v.* C D.

Process—Auditor's Report—Time within which Objections must be Lodged—Date from which Time Runs—A.S., February 6, 1806.

The A.S. of February 6, 1806, provides that "in case either party means to object to the report of the Auditor he shall immediately lodge with the clerk a note of his objections."

Held that objections should be lodged within 48 hours of the issuing of the Auditor's report, and not merely of the returning of the process to the clerk, but where objections were lodged on the same day as the process was returned, and on the 8th day after the signing of the report, they were allowed to be received.

Expenses—Fees to Skilled Witnesses.

A B brought an action of declarator of nullity of marriage against her husband C D, alleging that the defender was impotent, and that the marriage had "never been consummated, no carnal copulation having followed thereupon." The defender denied these allegations. Proof was fixed for 24th May, but upon 22nd May the pursuer lodged a minute of abandonment and the defender's account of expenses was remitted to the Auditor in the usual way. The Auditor's report was signed on 3rd July. On 4th July the defender's