the parish of Eastwood, maintaining that his settlement is in that parish, which as I have already said it admittedly is, unless the facts show the acquisition of a residential settlement in Kirkintilloch.

The defenders do not maintain that the pauper could begin to acquire a settlement in Kirkintilloch before the year 1894, when he emerged from pupilarity. So that the question is reduced to this—whether on attaining the age of fourteen he chose the Home for Incurables as his residence, and in pursuance of that choice he resided there, and maintained himself therein until he was removed to the poorhouse. I am of opinion that he was incapable of choosing a place of residence, and there is nothing proved in the case to suggest the idea that by motion, of which indeed he was incapable, or by language, or in any possible way, he ever indicated any choice of residence. I cannot indeed conceive the idea that in the condition in which he has been from his infancy he could and did choose a place of residence. Of course, if he was incapable it follows that he never did choose a home, but if it could be assumed that he was capable there is nothing whatever to indicate that he did.

It does not appear to me that the language of section 1 of the Poor Law Act is applicable to a blind paralytic imbecile who is charitably maintained in a home for incurables; clearly it is inapplicable to pupil children, and that because, and only because, they are assumed to be incapable of choice in the matter of residence, and must go and remain where those who maintain them desire. It is also admittedly inapplicable to prisoners in jails or penal settlements. Compulsion or force which excludes the exercise of choice or free will is not stronger in these cases than it is in cases of infirmities, bodily and mental, and the destitution of such a patient as the pauper here when maintained in a home for incurables.

Then to say that the pauper here maintained himself in the charity home is, I think, extravagant. He had food put before him, and possibly into his mouth daily, and was lifted into bed every night, and lifted out again every morning, but to call that self-maintenance is, I think, absurd. It was argued that the important words of section 1 of the Poor Law Act are not the words "maintained himself," but the words "without having recourse to common begging, and without having received or applied for parochial relief." I am not of that opinion. I think the important words are "maintained himself," and that self-maintenance is essential to the acquisition of a residential settlement. I do not, of course, mean that the resident must have a fortune sufficient for his maintenance, or acquires the means which he uses for his maintenance by his own industry. The means may be furnished by an allowance or allowances of moderate or very large amount supplied by relatives or friends. In my opinion, however, the recipient of the means must have capacity to employ them, and in fact employ them, in maintaining himself during the three years of residence required by the statute. A common and familiar case is that of a man who can by his own exertions acquire the means of maintaining himself to some extent, although probably and even certainly receiving kindly help from relatives or friends or even strangers, but without having recourse to common begging or making application for parochial relief.

LORD TRAYNER was absent.

LORD MONCREIFF, who had been absent at the hearing, gave no opinion.

The Court adhered.

Counsel for the Pursuers and Reclaimers — Watt, K.C. — M'Lennan. Agents — Donaldson & Nisbet, S.S.C.

Counsel for the Defenders and Respondents—Orr Deas—Mercer. Agents—Macandrew, Wright, & Murray, W.S.

Saturday, December 6.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BANNATYNE *v.* THOMSON (BANNATYNE'S TRUSTEE).

Bankruptcy — Sequestration — Summary Decree Ordaining Bankrupt to Hand over Sums of Money—Competency—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 81—*Debtors (Scotland) Act* 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 12.

A trustee on a sequestrated estate presented a petition craving that the bankrupt should be ordained, under penalty of imprisonment, to hand over to him certain sums of money which he alleged that the bankrupt had in his possession in loose cash. *Held* that the petition, being for a summary decree ordaining the payment of money, was not authorised either by section 81 of the Bankruptcy Act 1856, or section 12 of the Debtors Act 1880, or otherwise, that an interlocutor pronounced thereon, ordaining the bankrupt within forty-eight hours to hand over the sums of money referred to, was incompetent.

Bankruptcy — Sequestration — Appeal — Review of Prior Interlocutors Declared Final by Statute—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 71.

In the Sheriff Court the Sheriff-Substitute by interlocutor confirmed the appointment of a trustee on a sequestrated estate. Thereafter on a petition presented by the trustee the Sheriff pronounced an interlocutor against which the bankrupt appealed. *Held* that while the appeal was competent as an appeal against the last mentioned interlocutor, it did not competently

also submit to review the interlocutor confirming the appointment of the trustee, which is declared final by the Bankruptcy (Scotland) Act 1856, sec. 71.

The estates of James L. Bannatyne were sequestrated in the Sheriff Court at Glasgow on 16th September 1902, and William Garth Thomson, Chartered Accountant in Glasgow, was confirmed trustee thereon by interlocutor dated 20th October 1902.

No petition under section 31 of the Bankruptcy (Scotland) Act 1856 was presented for recal of the sequestration.

On 3rd November the trustee presented a petition to the Sheriff, which narrated that part of the bankrupt's sequestrated estates consisted of the sum of £19, 1s. 3d., and of the sum of £10, 7s.—which the bankrupt had in his possession in loose cash, but refused to hand over. The petitioner prayed the Sheriff "to ordain the said James L. Bannatyne to hand over the said sums to the petitioner, and failing his so doing within such period as your Lordship shall appoint, to grant warrant to officers of Court to apprehend the said James L. Bannatyne and commit him to the prison of Glasgow, there to be detained till he hand over the said sums of money, or till the further orders of the Court, and to find that he has forfeited the benefits of the Acts above mentioned" (*i.e.*, the Bankruptcy Acts).

The Sheriff-Substitute (GUTHRIE) on 7th November pronounced an interlocutor in the following terms—"Having considered the petition, and heard the agent for the trustee, and the bankrupt personally, ordain the bankrupt within forty-eight hours to hand over to the petitioner the sums of money referred to in the petition."

On 8th November the bankrupt lodged a note of appeal bringing this deliverance under review. The grounds of review stated by him were as follows—"(1) That the alleged trustee, the respondent, was irregularly appointed at an alleged meeting of creditors, which, although duly convened, was attended by one person only, to wit, the mandatory of the firm upon whose petition the estates of the appellant were sequestrated. (2) That no other creditors were present or represented at such alleged meeting, yet such mandatory purported to elect himself preses, to elect a trustee on the appellant's sequestrated estates, and to elect himself as a commissioner thereon, and further signed, as preses, the 'minutes' of the alleged meeting. (3) That the confirmation of the election of the respondent as trustee aforesaid, and the act and warrant in his favour, were obtained through misrepresentation, to wit, that a meeting of the appellant's creditors had been held. (4) That even if regularly elected and confirmed the petition should have been dismissed—(*a*) As incompetent under section 81 of the Bankruptcy (Scotland) Act 1856; (*b*) as unauthorised by the creditors assembled at any meeting; and (*c*) as being unsupported by oral or written evidence that the moneys referred to in the petition were part of the bankrupt's (the appellant's) estate within the meaning of the Act, or held by bankrupt *qua* bankrupt, and not, as alleged by him, and as entered in his books of account, as trustee or agent for others."

Section 31 of the Bankruptcy (Scotland) Act 1856 (19 and 20 Vict. c. 79) makes provision for the bankrupt presenting a petition for recal of the sequestration within forty days after the date of the deliverance awarding it, and provides that otherwise the deliverance is not subject to review.

Section 71 enacts—"The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay, and such judgment shall be final, and in no case subject to review in any court, or in any manner whatever."

Section 81 is in these terms— . . . "And the bankrupt shall at all times give every information and assistance necessary to enable the trustee to execute his duty, and if the bankrupt fail to do so or to grant any deed which may be requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff to compel him to give full information and assistance, and to grant such deeds, under the penalty of imprisonment and of forfeiture of the benefit of this Act, and unless cause be shown to the contrary the sheriff shall issue a warrant of imprisonment accordingly."

Section 12 of the Debtors (Scotland) Act 1880 (43 and 44 Vict. c. 34) is quoted in the Lord President's opinion.

The appellant argued—(1) This interlocutor of the Sheriff should be recalled, for there was no authority for it either in the statutes or in practice. (2) But further, the appeal on this judgment opened up for review all prior judgments of which it was the natural sequence (*Cross & Sons* v. *Bordes*, May 22, 1879, 6 R. 934), and that enabled the Court to consider the deliverance confirming the appointment of the trustee and his appointment. That deliverance should also be recalled on the grounds stated in the note of appeal. The Act of Parliament was not intended for the benefit of a single creditor. It presumed creditors, and spoke of a meeting which was impossible when there was only one creditor present as here.

Counsel for the trustee argued—(1)—This interlocutor was covered by section 81 of the Bankruptcy (Scotland) Act 1856, the terms of which were very wide, but if that were not so, then the Debtors (Scotland) Act 1880, section 12, was sufficient to justify it. (2) The only question which could be considered here was the interlocutor brought under review. There was authority to that effect—*Alison* v. *Robertson's Trustees*, December 9, 1890, 18 R. 212. The judgment confirming the appointment of the trustee was by the statute declared final and not subject to review.

LORD PRESIDENT—Two points are raised for our decision in this appeal. The first is, whether the appointment of the trustee in the sequestration is valid, and the second is, whether it was com-

petent for the Sheriff-Substitute under this petition to make the order which he has made. In regard to the first question, no ground has been stated for invalidating the sequestration. Sec. 71 of the Bankruptcy (Scotland) Act of 1856 is a remarkably strong clause, and it provides, *inter alia*, that the judgment of the Sheriff declaring the person or persons elected trustee or trustees "shall be final and in no case subject to review in any court or in any manner whatever." That is a very strong clause of protection, and it is very desirable that there should be such provision in order that preferences may be cut down, and that preferences may not be allowed by the sequestration being invalidated. Therefore on this short ground I am of opinion that the objection to the appointment of the trustee is not well founded.

The other question is in a different position, and it requires careful consideration. The petition proceeds upon an allegation that the bankrupt is in possession of two sums of money mentioned, and that he refuses to hand them over to his trustee, and the prayer of the petition is to the effect that the bankrupt should be ordained to hand over these sums to the trustee on pain of imprisonment. This prayer seems to me to ask for an ordinary decree for payment of money. It is not a petition to have the bankrupt ordained to deliver corporeal moveables, to wit, particular cash. Unless the order can be brought under section 12 of the Debtors Act 1880 (43 and 44 Vict. c. 34), no authority has been suggested to warrant or sustain it, and I am clearly of opinion that that section does not apply. It provides—"The Sheriff shall have power upon cause shown by any creditor, or without an application if he shall think fit, at any time after the presentation of a petition for sequestration under the Bankruptcy Act 1856, or for cessio, to grant warrant to take possession of and put under safe custody any bank-notes, money, bonds, bills, cheques or drafts, or other moveable property belonging to or in the possession of the debtor, and if necessary for that purpose to open lockfast places, and to search the dwelling-house and person of the debtor." In other words, the section authorises the granting of a warrant to take possession of corporeal moveables, some of which are coin or notes, and it is not a provision to compel payment of money. It is evident that the prayer of this petition cannot be brought under that section, because what is asked is not a warrant to take possession of specific things, but an order requiring the bankrupt to hand over money, an order which would be satisfied by the bankrupt handing over any money not the particular coin or notes. The interlocutor does not contain an order to hand over corporeal moveables, but even if it had, the order here given would not be warranted by section 12 of the Act of 1880, nor by any other statutory provision of of which I am cognisant. For these reasons I think the Sheriff-Substitute has erred in making this order, and that his judgment should be recalled.

LORD ADAM — The proceedings in this sequestration have been somewhat singular —I do not say irregular. The sequestration was at the instance of a stockbroker in London. The petition for sequestration was presented on and the interlocutor awarding sequestration was pronounced on 16th September 1902. A meeting of creditors was held on . The only creditor who appeared was represented at the meeting, according to the minute, by the law-agents in the sequestration—that was, in other words, by the law-agent of the creditor who petitioned for sequestration. In that state of circumstances it appears that this law-agent, Mr Fleming, appoints himself preses of the meeting, and having done that he proceeded to appoint the respondent in this appeal trustee in the sequestration. Then he fixes the amount of caution, approves of the cautioner proposed, and then goes on to appoint himself sole commissioner. I do not say that all this was incompetent, but it is certainly not usual in a proper sequestration, which is a process for the distribution of a bankrupt's estate among creditors. Thereafter the Sheriff in ordinary course pronounced an interlocutor declaring the trustee nominated by Fleming to have been duly elected in terms of the Bankruptcy Acts. I agree that under the 71st section of the 1856 Act we cannot touch that interlocutor, which is final and conclusive on the matter of the trustee's appointment. I do not say what might have been the result if a petition for recall had been presented within the statutory period. No such petition was in fact presented, and accordingly we must treat the sequestration as an existing sequestration and the petitioner as a duly elected trustee. Now, no doubt, as Lord M'Laren remarked in the course of the debate, although only one creditor appears at the election of the trustee, it does not follow that other creditors may not appear later on, but still, so far in this sequestration only one creditor has in fact appeared. I do not say that there is or has been any irregularity of procedure or in form, but at the moment the sequestration, which is really a process of distribution, has been converted into a process for the sole benefit of one creditor, and we must therefore scrutinise very carefully all the steps that are proposed to be taken. Well, then, this trustee, about the 3rd November 1902, presents a petition in which he states that part of the sequestrated estates consists of the sum of £19, 1s. 3d. and the sum of £10, 7s., "which the bankrupt has in his possession in loose cash but refuses to hand over the same," and then he prays for an order on the bankrupt to hand over the sums, and failing his so doing for a warrant to have him imprisoned. That is just a summary petition without any condescendence or pleas-in-law, asking decree for payment of money, and on that petition the Sheriff-Substitute has pronounced the

order appealed against. It is all very well to say that that order is a decree *ad factum præstandum*. It is nothing more nor less than an order to pay a sum of money—an order that could be satisfied by payment with any money which the bankrupt was able to produce to the requisite amount. Now, what authority is there for a trustee on a sequestrated estate ordering the bankrupt in this summary manner to pay over sums of money. Section 12 of the Debtors Act 1880 has no application at all. It provides a remedy of a different kind before the appointment of a trustee on the sequestrated estate, and affords no warrant for an order on the alleged debtor *de plano* to hand over money. It might not be incompetent if the trustee had set forth the grounds on which he asked for the order, and if the Sheriff had only acted after due consideration of these grounds, but I can see no authority for the summary order which he has pronounced. Accordingly I think that the interlocutor appealed against should be recalled.

LORD M'LAREN—It may be kept in view that in the Bankruptcy Act of 1856 the element of plurality of creditors, or singularity if I may coin a word, is not altogether overlooked, for it is provided that three creditors whose debts amount to £100 may apply for sequestration, but if there is one creditor whose debt amounts to £50 he may make the application alone. In the latter case I should not suppose that the creditor had any duty to inquire whether there were any other creditors. It might very well be that if an averment of abuse of the process by a single creditor were made in an application for recall within forty days of the award of sequestration the sequestration might be recalled, but if such an application is not presented within forty days then the sequestration is final and must be followed to its legitimate conclusion, viz., the distribution of the sequestrated estate and the discharge, at the proper time, of the bankrupt. Therefore I am not disposed to attach any weight to the criticism made of the conduct of the sequestration merely on the ground that one creditor only attended the meeting and appointed the trustee.

The real question of importance here is altogether different. It is whether an order made by the Sheriff-Substitute on the bankrupt to hand over certain moneys has any statutory authority. The prayer of the petition is "to ordain the said James L. Bannatyne to hand over the said sums to the petitioner, and failing his so doing within such period as your Lordship shall appoint, to grant warrant to officers of Court to apprehend the said James L. Bannatyne, and to commit him to the prison of Glasgow." Now, I think it is impossible to represent that petition as falling under sec. 12 of the Debtors Act 1880, because if it had been under that section the conclusion of the prayer should have been "and, if necessary for that purpose, to open lockfast places and to search the dwelling-house and person of the debtor."

But it is said that the application can also be supported under sec. 81 of the Bankruptcy Act of 1856. Under that section the bankrupt is to give every information and assistance necessary to enable the trustee to execute his duty, and to grant any deeds requisite for the recovery of his estate, and no doubt he may be coerced into fulfilling that duty in the ordinary way, but I am not disposed to hold that under the general words here used a summary decree for payment of money is included. I agree that the Sheriff Substitute had no power under that statute or any other for making the order which is the subject of the appeal.

LORD KINNEAR—I agree. I express no opinion as to the regularity of the sequestration or of the meeting at which the trustee was appointed, because no question on either point is properly before the Court. If the sequestration were complained of as an abuse of process the proper course would have been to petition for recall within the statutory time. As that has not been done we must assume that there is no sound objection to the regularity of the sequestration, and we cannot consider the merits of the question whether the trustee was properly confirmed, because the decision of the Sheriff is final and not subject to review. Nevertheless we are entitled to look at the proceedings for the purpose of seeing whether they have any bearing upon the question before us, and whether the Sheriff-Substitute's order for payment can stand. I think it is not without bearing that one creditor only appeared at the meeting. We must assume that there was at that time no other creditor, and no other creditor has put in any claim since. If the sequestration goes on others may come forward, but as far as we know there is only one creditor. At the meeting the mandatory for the only creditor elected himself preses, appointed an accountant trustee, and appointed himself to be the sole commissioner. All that I assume may have been valid and regular. But still it presents a somewhat singular condition of things in a process of sequestration, which is not intended for the the recovery of a single debt but for the distribution of an insolvent estate among a number of competing creditors. The trustee being so appointed, presented this petition in which he obtained an order which is nothing but a summary decree for payment of money. The grounds of the decree are not set forth so as to enable us to review it, and therefore we must take it for nothing more than what it purports to be, and that is a summary order for payment. It is practically conceded that such an order can only be supported by some special provision in the Bankruptcy Acts. I agree with all that has been said about the sections which were relied on as supporting the decree. Section 81 of the Act of 1856 gives no warrant for the order. That section is really to compel the bankrupt to give information and grant deeds, and the suggestion that it authorises the granting of a summary decree for the pay-

ment of money is untenable. I am also of opinion that section 12 of the Act of 1880 is entirely outside this question. That section provides means for putting the property of the bankrupt into safe custody, and the necessity for its operation will in general arise only before a trustee has been appointed. But assuming that it may be put in force by a trustee after confirmation, this is not an application for custody but for payment of money. In considering whether the decree should stand, it must be kept in mind that unless other creditors come forward this is, as I have already said, practically a decree for payment of one creditor, and for such a decree no precedent has been shown to us.

The Court recalled the Sheriff-Substitute's interlocutor dated 3rd November 1902.

Counsel for the Appellant—Party.

Counsel for the Respondent — S. P. Fleming. Agents—H. B. & F. J. Dewar, W.S.

Wednesday, December 10.

SECOND DIVISION.

[Dean of Guild Court, Dunbar.

KERRIDGE *v.* GRAY AND OTHERS.

Superior and Vassal—Building Restrictions — Restriction not to be Departed from without Consent of Superiors — Evidence of Superiors' Consent — Right of Co-Feuars to Enforce Restrictions inter se in Absence of Written Consent by the Superiors.

Certain lands were held under a feu-charter which provided that the feuar should be bound to erect upon the ground feued buildings of a specified description "of stone and lime, and covered with asphalt, . . . provided always that no buildings of any other description shall be built on the ground hereby disponed without the consent of us" (the superiors), the ground unbuilt upon to be used exclusively for specified purposes, "unless a deviation shall be specially authorised in writing by us" (the superiors). The vassal applied in the Dean of Guild Court for authority to erect an annex, not of stone and lime, to existing buildings. The proprietors of adjoining feus held under the same superiors on the same conditions objected to the proposed erection. The superiors did not intimate any objection. The Dean of Guild refused the application, in respect that the superiors' consent in writing was necessary, and had not been obtained.

Held, on the construction of the feu-charter, that the superiors' consent in writing was not necessary.

Held further (*per* the Lord Justice-Clerk) that the co-feuars had no title to enforce the restrictions.

Opinion (*per* Lord Trayner) that assuming the superiors' consent to be necessary, it was sufficiently evidenced to the Dean of Guild for the purposes of procedure in the Dean of Guild Court by the fact that they did not appear to object.

This was an appeal from a decision of the Dean of Guild Court at Dunbar, whereby that Court refused an application by Mrs Jane Kerridge, Kerridge's Hotel, Dunbar, for warrant to erect certain buildings on a piece of ground situated in Bayswell Park, Dunbar, being the ground occupied by Kerridge's Hotel, to be used as a hotel annex for kitchen and other purposes.

The lands upon which Kerridge's Hotel stood, and upon which the petitioner proposed to build, were conveyed to her predecessor, by Thomas Moncrieff Williamson and two others as trustees of the Bayswell Park Company, by a feu-charter, which provided, *inter alia*, as follows:—"*Second*, that our said disponee shall be bound within one year from the date of these presents to erect and complete, so far as not already done, upon the piece of ground hereby disponed, a dwelling-house and offices, all of stone and lime and covered with asphalt, the plans for which have been exhibited to and approved of by us as trustees foresaid, provided always that no buildings of any other description shall be built on the ground hereby disponed without the consent of us as trustees foresaid or our foresaids, and the ground unbuilt upon shall be used exclusively as gardens or for planting, or as pleasure grounds, unless a deviation shall be specially authorised by us or our foresaids as after-mentioned, and our said disponee and his foresaids shall be bound and obliged to uphold and maintain the said buildings and offices in good and complete repair in all time thereafter, and not to use the same for any other purpose than that for which they were erected as hereinafter specified, or for similar purposes, except with the consent in writing first had and obtained of us as trustees foresaid or our foresaids."

The building for which the petitioner sought the sanction of the Dean of Guild was a wooden structure.

Objections were lodged by Eliza Gray and Catherine Gray, 9 Bayswell Park, Dunbar, and others, the prorietors of feus in Bayswell Park, all holding under the same superiors and subject practically to the same conditions as the petitioner.

The objectors averred—"The proposed erection is in direct contravention of the terms of the feu-charter under which the ground is held. In particular, the proposed building was never sanctioned by the superiors, and it is not of stone and lime and covered with asphalt as stipulated in the feu-charter, but it is an old wooden hut which is believed to have been formerly used for the temporary accommodation of railway or other labourers."

The petitioner averred in answer—"The erection in question, which is of a temporary nature, is being put up with the