Thursday, November 20.

FIRST DIVISION.

ELDER, PETITIONER.

Minor and Pupil—Guardianship—Powers—Guardianship Under Law of New Zealand—Discharge for Capital—Payment of Capital to Guardian—Succession—Trust—Payment.

Certain pupil children were entitled to a share in the residue of a Scottish trust estate. Their mother, who had been appointed guardian in accordance with the law of New Zealand, in which country both she and the children were domiciled, presented a petition for herself and as sole guardian for her children craving the Court to ordain the testamentary trustees to make payment to her for behoof of her children of the amount of their share of the trust estate. The trustees had refused payment to the mother upon the ground that it was doubtful whether she as guardian under the law of New Zealand could give a valid discharge for the capital. The Court, after a remit to a reporter, having intimated that they would have been willing, as at present advised, to grant decree as craved if the trustees had appeared, but that they could not do so in absence, the trustees lodged a minute consenting to decree, and the Court thereupon *granted* the order craved.

Austin Alison Elder died in 1896, domiciled in New Zealand and survived by his widow Mrs Josephine Elder and six children who were all in pupilarity. His will, dated 8th August 1890, was proved in the New Zealand Courts on 18th March 1896, and by it Mrs Elder was appointed the guardian of such of his children as should for the time being be under the age of twenty-one years, or in the case of daughters be under that age and unmarried. In 1897 his children became entitled, in accordance with the terms of a trust-disposition and settlement and relative codicils executed by George Elder, of Knock Castle, to a share in the residue of the estate of the said George Elder, to which their father would have been entitled if he had survived the said George Elder.

George Elder's trustees refused to make payment to Mrs Elder, as guardian of her children, of the sums to which her children were entitled, on the ground that they were doubtful whether under the law of New Zealand she could grant a valid discharge for the same. Accordingly, on 6th June 1902, Mrs Elder, before the whole of George Elder's estate had been ingathered, and when her children's share of the ingathered portion amounted to £3000, on behalf of herself and as the sole guardian of her children, presented a petition craving the Court to ordain the trustees of the said George Elder to make payment to her, for behoof of her said children, of "the said capital sum of £3000, and all interest accrued thereon, and of any further share when ascertained of the residue of the estate of the said George Elder to which the late Austin Alison Elder would have been entitled had he survived; or alternatively to ordain the said trustees to make payment to the petitioner of the interest already accrued on the said sum of £3000, and also of the free yearly interest or other annual produce of said sum of £3000, and any further share of the said residue as aforesaid."

This petition was served on the trustees of George Elder, and no answers were lodged by them.

On 2nd July the Court remitted to Mr G. F. Dalziel, W.S., to inquire and report as to the regularity of the procedure, and on the facts and circumstances as set forth in the petition.

On 25th September Mr Dalziel reported, *inter alia*, that the trustees were satisfied that the children were the parties beneficially interested in the share of residue which would have fallen to their father, but were in doubt as to whether the petitioner was in a position to give them a valid discharge, and that the answer to that question appeared to depend upon the powers inherent in the petitioner as her children's guardian according to the law of the New Zealand, in which country the trustees were satisfied the children were domiciled. He further reported that the petitioner founded upon the case of *Seddon*, reported *ante*, 29 S.L.R. 100, and 30 S.L.R. 526, and 19 R. 101, and 20 R. 675, the English Act of 12 Charles II. c. 24, the Infants Guardianship and Contracts Act 1887 of New Zealand, and the case of *Sime* v. *Hume and Another*, New Zealand Law Reports, vol. xx. 191. He pointed out that in the case of *Seddon* payment of income only had been asked, and with regard to the case of *Sime* v. *Hume* stated that the attention of the New Zealand Courts did not appear to have been drawn to the English Statute 44 and 45 Vict. c. 41, sec. 43, which appeared to him to limit the power conferred on such a guardian as the petitioner to the receipt of income. On the whole matter he respectfully directed the attention of the Court to the question as to whether the petitioner was entitled to receive payment of the capital, and in the event of their deciding that she was not, was of opinion that the alternative crave of the petition might be granted.

Argued for the petitioner—The case of *Seddon* was an authority in favour of the petitioner, and the other cases and Acts mentioned in the report were sufficient to show that by the law of New Zealand she was entitled to receive and administer the capital of the fund to which her children were entitled.

The Court indicated that if the trustees had appeared in the process they would have been willing, as at present advised, to grant decree in terms of the first branch of the prayer of the petition, but that if the petitioner was entitled under the law of New Zealand as of right to payment of

the capital, it was incompetent in a summary application of this nature to grant decree against the trustees in absence, and that in the event of their failing to appear it would be necessary for the petitioner, if she desired to press her claim, to raise an ordinary action against them. Without pronouncing any interlocutor, the Court continued the case, in order that it might be ascertained whether the trustees were willing to appear.

On 18th November a minute was lodged by the trustees stating that they consented to decree being pronounced against them in terms of the first branch of the prayer of the petition.

On 20th November the Court, the Lord President being absent, pronounced the following interlocutor:—

"Ordain the respondents, the trustees of the late George Elder, Esq., of Knock Castle, Wemyss Bay, to make payment to the petitioner, for behoof of her children mentioned in the petition, of the capital sum of £3000 mentioned in the petition, and the interest accrued thereon, and of any further sum when ascertained of the residue of the estate of the said George Elder, to which the late Austin Alison Elder mentioned in the petition would have been entitled had he survived the said George Elder, and decern."

Counsel for the Petitioner—Cowan. For George Elder's Trustees—Orr. Agents—Cowan & Dalmahoy, W.S.

Friday, December 5.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

KIRKINTILLOCH PARISH COUNCIL *v.* EASTWOOD PARISH COUNCIL.

Poor — Settlement—Residential Settlement —Capacity to Acquire Residential Settlement — Pauper not an Idiot although Weak-Minded — Hydrocephalus — Residence in Charitable Institution Supported at Expense of Charity—Poor Law (Scotland) Act 1898 (61 *and* 62 *Vict. cap.* 21), *sec.* 1.

In an action by the parish of K. against the parish of E. as to liability for a pauper, it was proved that the pauper was born in 1880, and in his third year contracted hydrocephalus, which became chronic and resulted in total blindness, paralysis in both legs, and partial loss of power in the right hand, besides the characteristic enlargement and motion of the head. He was totally unable to do anything to support himself. His father died in 1887, having a settlement in E, and in that year he was admitted to a home for incurables in the parish of K. He remained there entirely supported by the funds of the institution till 1899, when he was taken to the poorhouse on a medical certificate, which certified that he was neither "lunatic, insane, idiot, or of unsound mind." While in the poorhouse he was treated as an ordinary hospital patient, and was never removed to the lunatic ward. The Court found as the result of the evidence that although weak-minded he was neither a lunatic nor an idiot.

Held (*diss.* Lord Young) (1) that the pauper having a weak but not a disordered mind, and not being an idiot, was capable of acquiring a settlement by residence, and (2) that the pauper not having during his residence in K. had recourse to common begging or received or applied for parochial relief, he was not prevented from acquiring a residential settlement in that parish by the fact that throughout the period of his residence he had lived in a charitable institution and had been entirely supported at its expense.

The Poor Law (Scotland) Act 1898 (61 and 62 Vict. c. 21), sec. 1, enacts as follows;—"From and after the passing of this Act no person shall be held to have acquired a settlement in any parish in Scotland by residence therein, unless such person shall, either before or after or partly before and partly after the commencement of this Act, have resided for three years continuously in such parish, and shall have maintained himself without having recourse to common begging either by himself or his family, and without having received or applied for parochial relief."

In February 1901 the Parish Council of Kirkintilloch raised an action against the Parish Council of Eastwood to have it declared that on 28th September 1899, when Peter M'Parlane M'Cann, then an inmate of the Dumbarton Poorhouse, became a proper object of parochial relief, the parish of Eastwood was the parish of his settlement, and as such was liable to relieve the pursuers of all sums incurred on account of him; and to have the defenders ordained to pay the pursuers £27, 2s., being the amount of advances made on behalf of M'Cann, and all further sums that the pursuers might thereafter pay on his behalf.

The pursuers pleaded—"(2) The parish of Eastwood is liable as concluded for, in respect that (1st) it is the parish of the pauper's birth; (2nd) it was the residential settlement of his father; (3rd) the pauper has all along been mentally and physically incapable of losing his settlement in said parish of Eastwood, and of acquiring a settlement by residence in the parish of Kirkintilloch, and has not acquired a settle- in Kirkintilloch; (4th) he has never during the whole period of his residence in said parish maintained himself, but has been entirely supported by charity; (5th) he has never, since October 1887, when his mother was a pauper chargeable to Eastwood parish, resided with, been dependent on, or received any support from his mother.