that the question must be answered in the negative.

LORD CULLEN—I concur.

LORD JOHNSTON was absent.

The Court answered the question of law in the negative, and remitted the case to the arbitrator to proceed.

Counsel for Appellant—Moncrieff, K.C.—Burnet. Agents — Simpson & Marwick, W.S.

Counsel for Respondent—Horne, K.C.—Carmont. Agents—W. & J. Burness, W.S.

Thursday, November 4.

FIRST DIVISION.

GLASGOW SCHOOL BOARD *v.* GLASGOW PARISH COUNCIL.

Poor—School—Pauper—Children—"Feeble-minded Persons"—Maintenance—Mental Deficiency and Lunacy (Scotland) Act 1913 (3 *and* 4 *Geo. V, c.* 38), *sec.* 2 (1).

The Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, c. 38), enacts—Section 1—"The following classes of persons who are mentally defective shall be deemed defectives within the meaning of this Act. . . . (*c*) Feeble-minded persons, that is to say, persons in whose case there exists from birth or from an early age mental defectiveness not amounting to imbecility, yet so pronounced that they require care, supervision, and control for their own protection or for the protection of others, or in the case of children, that they by reason of such defectiveness appear to be permanently incapable of receiving proper benefit from the instruction in ordinary schools. . . ." Section 2 (1)—"It shall be the duty of the parents or guardians of children between five and sixteen years of age who are defectives within the meaning of this Act, to make provision for the education or for the proper care and supervision of such children as the case may require, and where the parent or guardian of a defective child is, by reason of the attendant expense, unable to make suitable provision as aforesaid, it shall be the duty of the school board (except as hereinafter in this section provided) to make such provision either in virtue of their powers under the Education of Defective Children (Scotland) Act 1906, as read with the Education (Scotland) Act 1908, or in terms of this Act, as the local authority concerned."

Held that the duty to make provision for the food, clothing, and lodging of defective children in the sense of section 1 (*c*), above quoted, who were paupers, was upon the parish council, and was not transferred by section 2 (1), above quoted, to the school board.

The School Board of Glasgow, *first parties*, the Parish Council of the Parish of Glasgow, *second parties*, and the Parish Council of the Parish of Glasgow as the Glasgow District Board of Control acting under the Lunacy (Scotland) Acts, and particularly the Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, c. 38), *third parties*, brought a Special Case in the Court of Session.

The Case stated, *inter alia* — "2. The Mental Deficiency and Lunacy (Scotland) Act 1913 came into operation on the 15th day of May 1914. 3. At the time when said Act came into operation there were chargeable to the second party as proper objects of parochial relief certain children, more particularly after described, between the ages of five and sixteen, who are defectives and fall within the meaning of section 1, sub-section (*c*), ... of the said Mental Deficiency Act, and some of the same character have since become chargeable. 4. The parochial relief to some of said children consisted in the second party boarding them in the Waverley Park Home for defective children at Kirkintilloch, which was conducted by a philanthropic association for the care and education of feeble-minded children, and since the passing of the said Act of 1913 has been licensed as a certified institution for the reception of defective children; and the parochial relief to others was given in a ward of the second party's Eastern District Hospital, Glasgow. 5. Said children are educable, that is, they are not incapable by reason of their mental defects of receiving benefit or further benefit from instruction in the special schools, of which there are seven, or in the special classes which are provided in sixteen ordinary public schools by the first party for defective children under the Education of Defective Children (Scotland) Act 1906, or in certified institutions under the said Act, nor would their presence prove detrimental to the interests of the other defective children attending such special schools or classes. The first party have offered and are still willing to receive and educate these children in one or more of their special schools or classes, but such children are without homes, and this offer does not include the provision of clothing, board, and lodging for these children . . . 7. None of the said defective children have means of their own, nor have they parents or guardians (unless the first and second parties or either be held to be included under that designation) able by reason of the attendant expense to make provision for their education, proper care and supervision and maintenance, including food, clothing, and lodging. For the purposes of this case all reside within the School Board area of the first party in the parish of Glasgow. 8. The particulars of the children referred to are as follows:—(1) *Educable Defectives between Five and Sixteen*, under section 1, sub-section (*c*). — *A.* Catherine Rankine (13), boarded Waverley Park Home by Second Party—an orphan. Date of chargeability to second party, 10th November 1907. *B.* Mary Ann Docherty (11),

boarded Waverley Park Home by second party — father dead; mother alive, but whereabouts unknown. Date of chargeability to second party, 17th April 1913. *C.* Margaret Kelly (15½), boarded Waverley Park Home—mother dead; father alive, but in desertion. Date of chargeability to second party, 28th July 1913. *D.* Arthur Watson (12), Eastern District Hospital of second party—both parents alive, but in desertion. Date of chargeability to second party, 24th December 1914. *E.* Joseph MacFarlane (12), Eastern District Hospital of second party—father dead; mother alive, but not *sui juris*, being in Woodilee Asylum belonging to second party. Date of chargeability to second party, 2nd March 1915. (2) *Educable Defective between Five and Sixteen*, under section 1, sub-section (*d*). Catherine M'Quillan (15), Eastern District Hospital of second party—parents alive, non-supporting. Date of chargeability to second party, 9th November 1914. 9. On the said Mental Deficiency Act coming into operation, and as said other children became chargeable at later dates, the second party called upon the first party to provide for 'the education' and for the entire food, clothing, and lodging, as being the essentials of 'proper care and supervision' of said defective children. The first party have refused to go beyond their offer merely to receive and educate the children in a special school or class. A question has thus arisen between the first party and the second party as to whose duty it is, within the meaning of the said Mental Deficiency and Lunacy (Scotland) Act 1913, the Education of Defective Children (Scotland) Act 1906 as read with the Education (Scotland) Act 1908, and the Poor Law Acts, to make provision for maintenance, including food, clothing, and lodging of all the said defective children. . . . 11. The first party *contend* that they are not bound to do more than receive and educate said children in a special class or school, and in particular that they are not liable to make provision for the feeding, clothing, and housing of said children. . . . The second party contend that on a sound construction of the Mental Deficiency and Lunacy (Scotland) Act 1913 they are under no obligation to make provision for the education or care and supervision or maintenance, including food, clothing, and lodging, of children between the ages of five and sixteen years who are 'defective' within the meaning of section 1, subsection (*c*), of the said Act, and have not been notified as incapable of receiving benefit from instruction in special classes and schools in terms of section 2, sub-section (2) (*b*), thereof. They further contend that the obligation to make suitable provision as aforesaid rests solely upon the first party. . . ."

The *questions of law* were—"(1) Does the duty to make provision for the food, clothing, and lodging of all the said defective children referred to in art. 8, or any of them, rest upon (*a*) the first party, or (*b*) the second party?" (2) Is there a duty to educate such a moral defective as Catherine M'Quillan? If so, does it rest upon (*a*) the first party, or (*b*) the second party? (3) Whether on a sound construction of the Mental Deficiency and Lunacy (Scotland) Act 1913 and Acts therein referred to the duty of providing suitable and sufficient accommodation for the defective children referred to in article 10 is imposed on (*a*) the first party, or (*b*) the third party?" [(2) *and* (3) *given up.*]

Argued for the first parties — (1) The Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 38), sec. 2 (1), did not impose a duty of maintenance on the first parties. Their only duty was to make provision for the education or the care and supervision of educable mental defectives. Care and supervision did not include maintenance. Section 4 of the Act, if it referred to maintenance, was merely permissive and did not impose any duty. An obligation to maintain was foreign to the functions of a school board, and if intended to be imposed on them must be expressly imposed. Where the Act referred to maintenance it did so expressly —section 14. The Education of Defective Children (Scotland) Act 1906 (6 Edw. VII, cap. 10) related solely to education. The Education (Scotland) Act 1908 (8 Edw. VII, cap. 63) conferred a power but not a duty to maintain such children in homes or other institutions. (2) If there was a duty on the first parties to maintain educable defectives it did not apply to such of them as were paupers, for the second parties were the parents or guardians of such paupers in the sense of section 76 of the Mental Deficiency and Lunacy Act. They were not unable to make suitable provision for the said children, and consequently no duty was transferred to the first parties under section 2 (1) of the said Act.

Argued for the second and third parties— (1) The powers of the first parties under the said Education of Defective Children (Scotland) Act 1906 and the said Education (Scotland) Act 1908 had become duties under section 2 (1) of the Mental Deficiency and Lunacy (Scotland) Act 1913. If this were not so, the first and second parties would both owe duties to these children. (2) The parents or guardians referred to in said section 2 (1) were natural persons, and did not include the first parties.

LORD PRESIDENT—It appears to me that this clause of the statute which has been so fully canvassed is not open to construction.

The question we have to decide is whether the School Board of Glasgow or the Parish Council of Glasgow is liable to provide food, clothing, and lodging for six unfortunate children who are defective in mind, and each one of whom is at this moment chargeable, we are informed, to the Parish Council of Glasgow; and the solution of that question depends upon the view we take of section 2 (1) of the Mental Deficiency and Lunacy (Scotland) Act 1913 (3 and 4 Geo. V, cap. 38). Does that section transfer the burden of maintenance of defective children from the shoulders of parents and guardians to the shoulders of the School Board? When I put the question thus I am assuming — and I think I must assume — that "parent and

guardian" as used in this statute and in this clause of the Act means parent and guardian in the sense of the Act, and "parent and guardian" in the sense of the Act means the person who undertakes and performs towards the defective child the duty of a parent or guardian. Now that is the duty precisely which the Parish Council assume towards these six children, and if that is so, it is conceded that this clause does not transfer the burden of maintenance from the shoulders of the Parish Council to the shoulders of the School Board of Glasgow.

The meaning of the clause, it seems to me, is singularly clear. It has no relation whatever to maintenance—the provision of food or clothing or lodging. It applies exclusively to the education and care and supervision of defective children, and at the outset throws upon all parents and guardians of defective children the duty of providing for them suitable education and proper care and supervision. When I say "all parents and guardians" I of course include parish councils who have assumed in the performance of their duty the care and supervision of defective children, as the Parish Council of Glasgow did in the present case.

But the statute provides an exception—an exception not to the burden of maintenance, but to the burden of education and care and supervision; and in order to bring themselves within that exception parents and guardians must show that whilst they are quite able to bear the expense of maintaining the child, they are unable to bear the added expense, due to their unfortunate mental condition, of seeing to their education, care, and supervision. If they can bring themselves within that exception, then they are relieved of the burden thrown upon them by the first part of the section of seeing to the education, care, and supervision of their children, but they are not relieved of the burden of providing food, clothing, and lodging for them.

Now if that phrase "parent and guardian" includes parish councils, as I hold it does, then it is conceded that the Parish Council of Glasgow cannot bring themselves within the exception at all, and that whether, as they contend, "care and supervision" includes maintenance or does not they can take no benefit whatever from this clause of the Act. But upon the short ground that this clause of the statute does not transfer the burden of maintenance, using that word with the meaning expressed in the first question put, from the shoulders of parents and guardians, I am prepared to answer the first question put to us in this sense, that it is upon the second party and not upon the first party that the duty of making provision for the food, clothing, and lodging of these defective children falls.

We were informed by counsel for the parties that it was unnecessary for us to consider the second and third questions.

LORD JOHNSTON—The case is, I think, so clear that a judgment of the Court was hardly required to warrant the two public bodies concerned agreeing on what is manifest. There can be no doubt that the Parish Council has undertaken, and presumably is performing towards the defectives in question, the duty of a parent or guardian. If that is so, then a duty is imposed upon the Parish Council by section 2 (1) of the Act, cap. 38, of 1913 in perfectly plain language. From that duty they cannot escape, for they cannot say that they are unable to make suitable provision for the education, where they are educable, of the children in question, or for proper care and supervision, where they are not educable, by reason of the attendant expense. I can see nothing in the context to prevent the statutory definition of the term "parents and guardians" applying in section 2 (1).

If the Parish Council as guardians cannot escape from the parent's obligation relating to education, no question arises as to whether they can get rid of all obligation for such children by a strained interpretation of the words "proper care and supervision" used in the sub-section. Whatever they may cover they certainly do not include "maintenance."

LORD MACKENZIE — I am of the same opinion for the reason stated by your Lordship in the chair. It is impossible, in my opinion, to bring this case within the exception in section 2 (1) of the Act of 1913, and therefore it must fall within the rule.

LORD SKERRINGTON concurred.

The Court found in answer to the first question of law that the duty to make provision for the food, clothing, and lodging of all the defective children referred to in article 8 rested upon the second parties, and that it was unnecessary to answer the second and third questions, and decerned.

Counsel for the First Parties—Constable, K.C.—Crawford. Agents—Laing & Motherwell, W.S.

Counsel for the Second and Third Parties—Watson, K.C.—Lippe. Agents—Mackenzie, Innes, & Logan, W.S.

Saturday, November 6.

SECOND DIVISION.

BROWN'S TRUSTEES *v.* THOM.

Succession—Trust—Direction to Purchase Alimentary Annuity—Absence of Provision for Continuing Trust — Right of Beneficiary to Payment of Capital.

A testator by his trust-disposition and settlement directed his trustees (with one-half of the residue of his estate) "to purchase from some well-established insurance company an annuity on the life of and payable to my sister A, for her own absolute use and behoof and exclusive of the *jus mariti* and right of administration of her husband: Declaring that the said annuity shall be purely alimentary, and shall not be assignable or alienable by the said A in any manner of way or affectable by her debts or deeds or attachable by the diligence of