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

her creditors." The trustees did not purchase the annuity, A having died two days after the testator.

Held that there being no provision for a continuing trust the annuity could not, effectually, have been rendered alimentary, and that A's representative was therefore entitled to payment of the half of the residue.

Hutchison's Trustees v. *Young*, 1903, 6 F. 26, 41 S.L.R. 14, *distinguished* and *commented on.*

John Scotland and others, testamentary trustees of the late Colin Brown, sometime solicitor, Airdrie, who died unmarried on 14th January 1914, acting under his trust-disposition and settlement dated 3rd October 1912 and relative codicil dated 3rd September 1913, *of the first part;* William Brown and John Dochard Brown, brothers of the deceased, and James Dunn Russell as their attorney, *of the second part;* and Daniel Thom, universal legatary and sole executor of his wife Mrs Isabella Forrester Brown or Thom, sister of the deceased, *of the third part*, presented for the opinion and judgment of the Court a Special Case dealing with a bequest in favour of the late Mrs Thom.

The *trust-disposition and settlement* provided—"And with regard to the remaining half of the residue of my estate I direct my trustees to purchase therewith from some well-established insurance company an annuity on the life of and payable to my sister Isabella Forrester Brown or Thom, 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 Isabella Forrester Brown or Thom in any manner of way or affectable by her debts or deeds or attachable by the diligence of her creditors; and in the event of the said Isabella Forrester Brown or Thom predeceasing me I direct my trustees to pay and convey to the said William Brown or his lawful issue the share of his estate which would have been invested in the purchase of an annuity as aforesaid for the said Isabella Forrester Brown or Thom had she survived me. . . . And in general I empower my trustees to do everything which in their discretion they may conceive to be for the interest of my estate. . . . ."

The Case stated—"5. The truster was survived by his brothers, the said William Brown and John Dochard Brown, and by his sister Isabella Forrester Brown or Thom. He left no other brothers or sisters, and no issue of predeceasing brothers or sisters. The said Isabella Forrester Brown or Thom died two days after the date of the death of the truster, viz., on 16th January 1914, survived by her husband Daniel Thom (the third party), but without issue. By her disposition and settlement, dated 28th September 1903, the said Isabella Forrester Brown or Thom, *inter alia*, assigned and disponed in favour of her husband, the said Daniel Thom, for his own absolute use and behoof, her whole estate, heritable and moveable, and appointed him to be her sole executor. The said Daniel Thom was duly confirmed as executor of his said wife conform to confirmation in his favour dated at Glasgow 2nd October 1914.

"6. The trustees of the truster entered on the possession and administration of the trust estate, which consisted entirely of moveable estate, and were duly confirmed as executors, conform to confirmation in their favour dated 29th July 1914. Owing to the shortness of the time (two days) which elapsed between the death of the truster and the death of the said Isabella Forrester Brown or Thom, the trustees were unable to give effect to the truster's said direction to purchase with the remaining half of the residue of his estate an alimentary annuity on the life of the said Isabella Forrester Brown or Thom, and no such annuity was purchased. No demand was made by the said Isabella Forrester Brown or Thom for payment by the trustees to her of the amount of said remaining half of said residue. The exact amount of said one-half of the residue of the estate which would have been available for the purchase of said annuity has not yet been definitely ascertained, but the parties estimate that it will amount to the sum of £450 or thereby. . . .

"12. The second parties *maintain* that the said Mrs Isabella Forrester Brown or Thom was not entitled on her survivance of the truster to demand and receive payment of the remaining one-half of the residue directed to be expended in purchasing an alimentary annuity for her; that in any case no right to demand and receive payment thereof passed to the third party; that in the events which have happened the said remaining half of said residue must be regarded and dealt with as intestate estate of the truster; and that the second parties, William Brown and John Dochard Brown, as two of the next-of-kin of the truster, are entitled to two-thirds thereof, the third party as representing the only other next-of-kin of the truster being entitled to the remaining one-third thereof.

"13. The third party maintains that on a sound construction of the said trust-disposition and settlement the said Mrs Isabella Forrester Brown or Thom became entitled on her survivance of the truster to demand and receive payment from the said trustees of the one-half share of the residue of the said estate directed to be expended in purchasing an annuity for her; that whether or not she had actually made the demand for payment of the said one-half share of residue prior to her death, her whole right therein was on her death transferred to the third party; that her right to demand and receive the capital of the said one-half share is not affected by the declaration that the annuity was to be alimentary; and that the right so vested in her to make the said demand, and whether or not the said demand had been made by her, the right to receive the said capital validly passed to the third party as executor and universal legatary of his wife, and that he is now entitled to payment of the said one-half share of the residue." . . .

The *questions of law* were—"1. In the events which have happened, does the said remaining half of the residue of the trust-estate which the truster directed his trustees to apply in purchasing an alimentary annuity for his sister Isabella Forrester Brown or Thom fall to be divided, as intestate estate of the truster, equally among the second parties William Brown and John Dochard Brown, and the third party as executor of the said Isabella Forrester Brown or Thom? or (2) is the third party, as executor and universal legatary of the said Isabella Forrester Brown or Thom, entitled to unconditional payment of the whole of said remaining half of said residue?"

Argued for the third parties—Mrs Thom's executor was entitled to the money directed to be applied for the purchase of the annuity. The trust deed did not provide for a continuing trust, and an alimentary annuity could only be secured by a continuing trust—*Kennedy's Trustees* v. *Warren*, 1901, 3 F. 1087, 38 S.L.R. 827; *Murray* v. *Macfarlane's Trustees*, 1895, 22 R. 927, 32 S.L.R. 715; *White's Trustees* v. *Whyte*, 1897, 4 R. 786, *per* Lord President (Inglis) at 790, 14 S.L.R. 499, at 500; *Tod* v. *Tod's Trustees*, 1871, 9 Macph. 728, 8 S.L.R. 445; *Brunning, In re, Gammon* v. *Dale*, [1909] 1 Ch. 276; *Robbins, In re, Robbins* v. *Legge*, [1907] 2 Ch. 8, *per* Cozens-Hardy, M.R., at 11. *Hutchinson's Trustees* v. *Young*, 1903, 6 F. 26, 41 S.L.R. 14, was distinguishable. There the direction was to purchase a Government annuity. That form of security had a certain statutory protection which supplied the place of a continuing trust, for the statute was binding on all the lieges. Moreover, in the subsequent case of *Turner's Trustees* v. *Fernie*, 1908 S.C. 883, 45 S.L.R. 708, opinions were reserved as to the effect of a statutory provision of that sort. Since the truster had not provided in the trust-deed for a continuing trust, the Court could not create one—*Clouston's Trustees* v. *Bulloch*, 1889, 16 R. 937, 26 S.L.R. 644.

Argued for the second party—(1) There was an intention to make the annuity alimentary, and that implied the creation of a continuing trust. In the cases relied on by the third party there was no intention to create a continuing trust. In *Kennedy's Trustees* v. *Warren* (*cit.*) there was an express direction to take the annuity in name of the parties themselves. In the present case the annuity could be purchased in name of the trustees, although payable to the annuitant—*Dow* v. *Kilgour's Trustees*, 1877, 4 R. 403, 14 S.L.R. 285, was referred to. (2) The bond of annuity could be taken in terms so as to create the insurance company trustees, and thus its alimentary character would be duly protected—*Hutchinson's Trustees* v. *Young* (*cit.*); *Turner's Trustees* v. *Fernie* (*cit*), *per* Lord President (Dunedin) and Lord M'Laren.

Lord Justice-Clerk—The question involved in this case is one which has been the subject of consideration in many authorities. Apart from the case of *Hutchinson* v. *Young*, I do not think there would have been any difficulty, nor do I think that that decision, when carefully examined, makes any real difficulty. So far back as the case of *White's Trustees* v. *Whyte*, Lord President Inglis—no doubt in observations which were perhaps *obiter*—laid down the rule that you cannot protect an annuity or liferent interest or effectually render it alimentary unless you continue the existence of the trust. That case has been followed in many subsequent cases—for instance, in the case of *Kennedy's Trustees* v. *Warren*, and *Murray* v. *Macfarlane's Trustees*, and apparently, though I do not know that it is of much importance here, the same rule applies in England—see *Robbins*, [1907] 2 Ch. 8, and *Brunning*, [1909] 1 Ch. 276.

Accordingly I am prepared to say that the principles laid down in the decisions in these cases apply here, and that the truster has not effectually imposed any sufficient protection of the annuity which was to be purchased for his sister, and that the money which was necessary to purchase the annuity—the half of the residue of the estate—vested in Mrs Thom at the truster's death and passed to her husband on her decease.

The only case really founded on by the second party was that of *Hutchinson's Trustees* v. *Young*. I do not need to say anything against the decision in that case, but I think it is sufficiently explained by Lord Dunedin in the case of *Turner's Trustees* v. *Fernie*, where he points out that in *Hntchinson* there were two considerations. In the first place, there was a specific direction on the part of the truster that the annuities were to be strictly alimentary, and, secondly, the purchase of the annuities was restricted to Government annuities, and it was conceded that the purchase of Government annuities would afford some protection although it might not be exhaustive protection. That really was made the ground of judgment, both by the Lord Justice-Clerk and by Lord Young I think, and certainly by Lord Trayner, who quite distinctly says that if the direction of the truster had "been simply a direction to her trustees to purchase annuities subject to the conditions expressed in her will, I should have found it difficult not to agree with the second parties that they are entitled to immediate payment of the capital sums required to purchase their respective annuities," and then his Lordship proceeds to say that his judgment is solely determined by the fact that there is a specific direction to purchase Government annuities.

In *Turner's* case Lord Dunedin points out that these two considerations were not present in that case, and his judgment, in my opinion, comes to this, that they must both be present in order to take a case out of the current of decisions to which I have already referred. In the present case, while no doubt the annuity is declared to be alimentary, the second condition—namely, the specific direction to purchase only a Government annuity—does not exist. Whether the decision in *Hutchinson's* case can be completely defended upon that ground I do not consider at this moment. It is suffi-

cient to say that the observations in *Turner's* case show that the decision in *Hutchinson* does not apply to a case such as we are here considering.

Accordingly I am for adhering to the rule followed in *White*, *Kennedy*, and *Tod*, and for answering the first question in the negative and the second in the affirmative.

LORD DUNDAS—I agree. I do not think the question raised in this case involves any serious difficulty. But for the presence of the clause declaring the annuity to be purely alimentary there would—and this I think is conceded—be no difficulty at all. If that clause had been absent the beneficiary, the sister who survived the testator, would undoubtedly have been entitled to claim the capital sum. But one must consider whether the presence of this clause makes any material difference. I agree with your Lordship that in the existing state of the authorities the answer to that question must be in the negative. It is sufficient to refer to the cases of *Kennedy* and *Murray*, and the opinion of Lord President Inglis in *White*.

If there be here no direction for a continuing trust, I think the third party must succeed, for it is well settled that the Court cannot supply the machinery of a trust—if that be lacking—however clear the intention and desire of the testator may be. It was suggested that as a matter of construction the words of this instrument might be so read as to import a continuing trust to this extent at least, that they contain a direction, or at all events a power, to the trustees to take out an annuity in their own names and pay the money to the annuitant. I do not think that construction is admissible where the direction is to purchase an annuity "on the life of and payable to my sister." Nor, in my opinion, can the second party get any assistance from the clause ingeniously referred to by Mr Wilson, which says—"In general I empower my trustees to do everything which in their discretion they may conceive to be for the interest of my estate."

With regard to the case of *Hutchinson*, it has been suggested that that case is not altogether consistent with the main body of authority. But it does not profess to differ from the previous authorities, and I am not at all sure that it is inconsistent with them. It may be that the case of *Hutchinson* might, if occasion arose, be reconsidered, as seems to have been the view of Lord President Dunedin in the case of *Turner*. But it is sufficient to say that *Hutchinson's* was a very special case, and has no direct bearing on the one now before us.

I agree that the question should be answered as proposed by your Lordship.

LORD SALVESEN— I am of the same opinion. I think this case is ruled by the authorities to which your Lordship in the chair has referred, and I do not think that the decision in *Hutchinson*, has any application to the circumstances of this case. At present I see no reason to think that that decision may not stand along with the other cases to which we were referred, because of the specialty that the trustees there were directed to purchase a Government annuity, which by statute is declared to be non-assignable. It is true that the purchase of such an annuity will not afford complete protection, for it will not protect an annuitant in the case of insolvency; but short of that it effectually prevents the assignation of the annuity to a third party, and so affords a very large measure of protection to any person who is not entirely reckless with regard to his financial future.

LORD GUTHRIE—I am of the same opinion. It is clear enough that the result, owing to the testator's failure to provide the machinery necessary to give effect to his intention, is unfortunately inconsistent with his obvious wishes. He was a solicitor, and his will was executed after the date of the cases on which your Lordships proceed. There appears to be complete ignorance not only among the public, but to a certain extent in the profession, as to what is necessary if it is desired to provide that a beneficiary shall have an absolutely certain income for his necessities during his lifetime. Whether the benefit is conferred *inter vivos* or *mortis causa* I am afraid that the public believe that the purpose can be effected simply by purchasing an annuity or ordering an annuity to be purchased in the beneficiary's name in ordinary terms. That of course is not so; nor will it be so even if the bond of annuity granted by the insurance company is declared to be subject to the condition that the annuity shall be alimentary and not assignable or alienable. I agree with your Lordships that there must be either a continuing trust or a direction to constitute a separate trust, and I agree that neither is to be found in this will.

The Court answered the first question of law in the negative and the second question in the affirmative.

Counsel for the First and Second Parties—Chree, K.C.—D. M. Wilson. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Counsel for the Third Party—Moncreiff, K.C.—Cooper. Agents—Wylie, Robertson, & Scott, S.S.C.

Wednesday, November 10.

SECOND DIVISION.

[Sheriff Court at Glasgow.

STEWART *v.* M'INTYRE.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *sec.* 1—*"Arising out of and in the Course of the Employment"—Dock Labourer after being Told to Stop Work Found Drowned at Quayside.*

A dock labourer engaged with others in unloading a ship was seen by the clerk in charge to be the worse of drink, and told to leave the work and wait in the shed till his pay was brought him. Within half an hour he was found