LORD ORMIDALE—I agree entirely with your Lordship and have very little if anything to add. It seems to me that Mr Stevenson admitted that if there was here provided by the truster a continuing trust, then he could not maintain that the annuitant was entitled to demand from the trustees the capital sum from the estate with which the annuity is to be purchased. For the reasons stated by your Lordship I do not think that the discretionary power in the deed in any way modified the situation. The trustees are not bound to exercise that power and they may never exercise it. As the annuity is directed to be purchased in their names and not in the name of the annuitant, it seems to me impossible to say that a trust has not been set up by the truster herself to protect this beneficiary against his own acts and deeds. Accordingly I think the questions should be answered as your Lordship has suggested.

I agree entirely with your Lordship that the English case cited to us cannot be regarded as an authority in our Court; the decision itself runs counter to all decisions in this Court. I do not see how the truster here could more effectually have created a continuing trust than she has done.

LORD HUNTER—I concur.

LORD ANDERSON—I agree. Mr Stevenson commenced his argument by submitting three propositions with the soundness of which I have no quarrel. He said in the first place that in order to make a bequest of an alimentary annuity effective there must be the protection of a continuing trust; next, he said the mere statement that an annuity is to be alimentary does not imply either that a trust is to be created by the Court or that an existing trust is to continue in existence; in the third place he said there must be, outside the alimentary clause, directions for a continuing trust. It seems to me that his difficulties began when he attempted to apply these propositions to the facts of this case. He suggested that the truster had left it to the discretion of the trustees to bring the trust to an end during the currency of the annuity, and that the discretionary power conferred by the trust deed had this effect. I do not so interpret the clause, and I therefore find in this deed that the machinery of a continuing trust has been effectively provided.

The Court answered question 1 (*a*) in the negative, and question 2 in the affirmative, and found it unnecessary to deal with the other questions.

Counsel for the First and Third Parties—D. O. Dykes. Agents—Mackenzie & Kermack, W.S.

Counsel for the Second Party—W. H. Stevenson. Agents—J. & J. Jack, W.S.

Saturday, February 23.

SECOND DIVISION.

SHEARER (SHEARER'S TUTOR), PETITIONER.

Trust—Tutor-at-Law—Power to Sell Heritage—Trusts (Scotland) Act 1921 (11 *and* 12 *Geo. V, cap.* 58), *sec.* 4 (1).

The Trusts (Scotland) Act 1921, which provides (section 4 (1)) that in all trusts the trustees shall have power, *inter alia*, to sell heritage, also provides—Section 2—"'Trust shall mean and include . . . (*b*) the appointment of any tutor . . . by deed, decree, or otherwise. 'Trust deed' shall mean and include . . . (*b*) any decree, deed, or other writing appointing a tutor. . . . 'Trustee' shall mean and include . . . any tutor. . . ." *Held* that the Trusts (Scotland) Act 1921 does not include within its ambit the case of a "tutor-at-law," in respect that he owes his position to the operation of the common law and not to any appointment.

George Alexander Shearer, wine and spirit merchant, Greenock, tutor and administrator-in-law of his pupil daughter Winifred Alexander Shearer, who resides with him, *petitioner*, with the consent and concurrence of (1) Dorothy Grace Hunter Shearer and Mary Steel Shearer, the minor daughters of the petitioner, both residing with him, and the petitioner as curator and administrator-in-law of his said minor daughters, and (2) Mrs Grace Hunter or Steel, widow of John Scott Steel, sometime builder in Greenock, the maternal grandmother of the said Winifred Alexander Shearer, Dorothy Grace Hunter Shearer, and Mary Steel Shearer, presented a petition in which he prayed the Court "to grant warrant to and authorise the petitioner, as tutor and administrator-in-law of his pupil child Winifred Alexander Shearer, to sell the said Winifred Alexander Shearer's one-third *pro indiviso* share of the heritable subjects to which she and her sisters have completed title by service as heirs-portioners of their grandfather, the late George Alexander Shearer, wine and spirit merchant, . . . and that either by public roup or private bargain."

The petition set forth, *inter alia*—"That the petitioner is the tutor and administrator-in-law of his pupil child Winifred Alexander Shearer, who was born on 23rd March 1913. He is also curator and administrator-in-law of his two minor daughters Dorothy Grace Hunter Shearer and Mary Steel Shearer, who are fifteen and fourteen years of age respectively. The said three daughters are the whole family of the petitioner. That the said John Scott Steel, the maternal grandfather of the petitioner's daughters, died intestate at Greenock on 14th May 1918. He was survived by his widow, the said Mrs Grace Hunter or Steel, but left no lawful issue, his only child Mrs Mary Gibson Steel or Shearer (the petitioner's wife) having predeceased him. His grandchildren,

the said three daughters of the petitioner, were accordingly his nearest heirs. That on 21st November 1919 the said Dorothy Grace Hunter Shearer, Mary Steel Shearer, and Winifred Alexander Shearer were served nearest and lawful heirs-portioners in special of the said John Scott Steel to the following heritable subjects:—(1) The tenement of dwelling-houses forming No. 2 Adam Street, Gourock; (2) the said dwelling-house known as 'Ardmay,' and forming No. 91 Newark Street, Greenock; and (3) the tenement of dwelling-houses forming No. 72 Dempster Street, Greenock. . . . That the said heritable properties formed the whole heritable estate of the said John Scott Steel. His only moveable estate consisted of household furniture and plenishing, valued at £73, 12s. 6d., which was exhausted in payment of his debts and funeral expenses. That, following the procedure prescribed by the Intestate Husband's Estate (Scotland) Acts 1911 and 1919, the said Mrs Grace Hunter or Steel raised an action in the Sheriff Court of the sheriffdom of Renfrew and Bute at Greenock against the petitioner's said daughters and against himself as their tutor and administrator-in-law, and on 31st October 1919 obtained decree in absence finding and declaring that she was entitled to £500 sterling, part of the estate of the said John Scott Steel, absolutely and exclusively, in terms of section 2 of the said first-mentioned statute, with interest thereon from 14th May 1918 at 4 per centum per annum until payment. . . . That in addition to the said £500 the said Mrs Grace Hunter or Steel is entitled by virtue of her right of terce to receive one-third of the free rental of the said heritable subjects. That at the time when the said action was raised by the said Mrs Grace Hunter or Steel the subjects referred to were valued as follows:—

1. Tenement, 2 Adam Street, Gourock	£1200 0 0	
Less bonds	800 0 0	
		£400 0 0
2. Dwelling-house, 'Ardmay,' 91 Newark Street, Greenock	£ 830 0 0	
Less bond	600 0 0	
		230 0 0
3. Tenement, 72 Dempster Street, Greenock	£1450 0 0	
Less bond	850 0 0	
		600 0 0
		£1230 0 0

That the said Mrs Grace Hunter or Steel desires payment of the said £500 and interest, and in view of the existing bonds over the properties the requisite money can only be obtained by the sale of one or more of the said subjects. That the present is a suitable time to sell the said properties. Should their sale be delayed for any considerable time loss is almost certain to be sustained, not only by the petitioner's pupil child, the said Winifred Alexander Shearer, but also by his two minor children who are owners of *pro indiviso* shares along with their sister. An offer of £1200 has recently been received for the dwelling-house 'Ardmay,' and such a favourable offer is not likely to be received again. That the free net income derived from the said properties is so small that it would be greatly to the advantage of the petitioner's said pupil child and of her sisters that the properties should be sold and the proceeds invested in some trust security."

Argued for the petitioner—It was doubtful whether the Trusts (Scotland) Act 1921 conferred power upon a tutor-at-law to sell his ward's heritage — *Forbes*, 1922 S.L.T. 294; *Robertson*, 1865, 3 Macph. 1077, *per* Lord Justice-Clerk (Inglis) at 1079. If the Act did not confer power to sell the Court ought to confer the power in exercise of its *nobile officium*. The Court would grant the power where it was necessary or where great loss would otherwise be caused — *Logan*, 1897, 25 R. 51, 35 S.L.R. 51; *Campbell*, 1880, 7 R. 1032, 17 S.L.R. 706; *Lord Clinton*, 1875, 3 R. 62, 13 S.L.R. 31; *Mackenzie*, 1855, 17 D. 314. In the circumstances of the present case it was expedient that the Court should grant the power.

At advising—

LORD JUSTICE-CLERK (ALNESS)—In this petition a father, as tutor-at-law of his pupil daughter, with certain consents, seeks the authority of the Court to sell heritage to which the pupil has a joint right. The other parties interested in the heritage are prepared, on the power sought being granted, to concur in the sale. The petition is presented to the *nobile officium* of the Court and alternatively under the Trusts (Scotland) Act 1921.

It may be convenient to examine the last alternative first. If the Trusts Act has conferred on the petitioner a right to sell heritage then the petition is inappropriate and falls to be refused. If on the other hand the Trusts Act has not conferred that power on the petitioner, the petition, in so far as the Act is invoked, is incompetent and equally falls to be refused. But in either event the legal position of the petitioner will be clarified and a certain advantage thus secured to him. The only way in which the petitioner can bring himself within the ambit of the Act in question is as follows:—He points to section 4 (1) which provides that "in all trusts the trustees shall have power . . . (*a*) to sell the trust estate or any part thereof, heritable as well as moveable." Now there are two words in that provision which require definition—"trust" and "trustees." Turning then to the interpretation clause, section 2 (*b*), I find that "trust" means and includes, *inter alia*, "the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise." Trustee by the same section includes "any . . . tutor." Now a difficulty—and I own that on consideration I regard it as a formidable one—with which the petitioner is at once confronted is that as tutor-at-law he does not owe his position to any *appointment*. He owes it to the operation of the common law and to that alone. As the Lord Justice-Clerk (Inglis) said in the case of *Robertson* (3 Macph. 1077, at p. 1079) when dealing with the curatorial relationship between parent and child —

"There appears to me to be no room for removing him (the curator) from the office of administrator-in-law to his son, for there is no such office in the proper sense of the term. It is a position inseparable from the relationship of parent and child and recognised by the municipal law of the country, and all therefore that the Court can do is to supersede him in the exercise of the powers derived from that relation but not to deprive him of any office." These words apply equally to the relationship of a tutor-at-law to his pupil. It would accordingly appear that the language employed in the statute does not cover this case. I am confirmed in that view when I look at the definition of a "trust deed" as given in section 2 of the Act, viz. — "Any decree, deed, or other writing appointing a tutor, curator, and judicial factor." The words plainly suggest an appointment which has its origin in writing. Here there is no appointment and there is no writing. I therefore think that the Act does not empower the petitioner in this case to sell his pupil's heritage. Let me add that I have not failed to notice and to weigh the words "or otherwise" at the end of section 2 (*b*). But if I am right in thinking that there must in the first place be an appointment these words have no relevance to the problem with which we are concerned. Moreover, in any event they fall to be construed *ejusdem generis* with the words which precede them. They would accordingly be satisfied by a writing which while plain in its terms is also informal in its character and so would not fall within the categories of "deed" or "decree."

I will only add two further observations on this part of the case—(1) That the process whereby tutors of certain types are spatchcocked into a Trusts Act is highly artificial and must not in my opinion be widened beyond the express injunctions of the statute, and (2) that if it be asked why tutors-at-law should be excluded from the beneficial operation of the Act of Parliament while tutors-nominate and dative are included, the answer may probably be found in an observation made by Lord Anderson in the course of the argument to the effect that in the former case the truster or the Court exercises a power of selection, whereas the appointment of a tutor-at-law depends on the mere accident of blood relationship, and may not always prove an appropriate one.

Mr Chree very properly cited to us the case of *Forbes* (1922 S.L.T. 294) in which Lord Ashmore held that the tutrix of a pupil child had power to sell heritage in virtue of the combined operation of the Guardianship of Infants Act 1886 and the Trusts (Scotland) Act 1921. It follows from what I have said that, with great respect to the Lord Ordinary, I am unable to concur in that view. In so far therefore as this petition invokes the aid of the Trusts Act 1921 I think it fails.

The appeal to the *nobile officium* of the Court, however, may succeed. The petitioner has presented a strong *ex parte* case in favour of a sale of the property in which his ward is interested, and in particular of one of the houses comprised in it. But after all the statement is an *ex parte* one and I think that it would be in accordance with good practice that we should be furnished with a report from a man of business upon the petitioner's averments before being invited to grant the prayer of the petition. That course was followed in each of the cases cited to us by Mr Chree, viz.—*Mackenzie*, 17 D. 314; *Lord Clinton*, 3 R. 62; *Campbell*, 7 R. 1032; and *Logan*, 25 R. 51. It must be remembered that the Court is invited to exercise a delicate jurisdiction in authorising a tutor to alienate the estate of his ward—so delicate, it has been said judicially, as that mere prospective advantage to the estate will not justify the exercise of the jurisdiction. To that end the sale must be shown to be necessary in order to avoid loss. And I may add that on his averments the petitioner need not shrink from the application of this test. I agree therefore that we should in the first place make a remit to a man of business to report upon the petition. Should that report be favourable it may then be possible in the exercise of the *nobile officium* to grant the prayer of the petition.

LORD ORMIDALE—I concur.

LORD ANDERSON—John Scott Steel, the maternal grandfather of the petitioner's three daughters, died intestate on the 14th May 1918 leaving estate which consisted almost entirely of heritage. This heritable estate comprised the two tenements and the dwelling-house "Ardmay" described in the petition. John Scott Steel was survived by his widow Mrs Grace Hunter or Steel, but left no lawful issue, his only child Mrs Mary Gibson Steel or Shearer (the petitioner's wife) having predeceased him. The intestate's said three grandchildren being his nearest heirs were on 21st November 1919 served nearest and lawful heirs-portioners in special of the said John Scott Steel in the said heritable subjects. The value of said heritable estate, less the amounts contained in bonds, is said to be £1230. On 31st October 1919 the said Mrs Grace Hunter or Steel, as widow of the intestate, obtained a decree in the Sheriff Court against the said heirs-portioners and the petitioner as their tutor and administrator-in-law, in virtue of the provisions of the Intestate Husband's Estate (Scotland) Acts 1911 and 1919. The said decree found and declared that Mrs Steel was entitled to £500 sterling, part of the estate of the said John Scott Steel, absolutely and exclusively, in terms of section 2 of the first-mentioned statute, with interest thereon from 14th May 1918 at 4 per centum per annum until payment.

The petition is at the instance of George Alexander Shearer, the father of the said heirs-portioners. He sues as tutor and administrator-in-law of his youngest daughter Winifred, who is eleven years of age. The petition is brought with the concurrence of (1) Dorothy and Mary Shearer, the minor daughters of the petitioner, and of the petitioner as their curator and adminis-

trator-in-law, and (2) of the said Mrs Grace Hunter or Steel. All those who are interested in the estate of the said John Scott Steel are thus parties to the petition. The petitioner avers that it is necessary to sell the whole of the said heritable estate, that an advantageous offer of £1200 has been made for "Ardmay," and that he desires power as tutor-at-law of his youngest daughter, to sell her *pro indiviso* share of said heritable estate. The petitioner further avers that by section 4 (1) (*a*) of the Trusts (Scotland) Act 1921, power to sell heritage is conferred (subject to certain conditions) on the trustees "in all trusts," and by section 2 of the same statute, "trust" is defined as including "the appointment of any tutor by deed, decree, or otherwise." He further avers that he is advised that it is doubtful whether power to sell is conferred on a tutor-at-law by the said statute. The petitioner's counsel accordingly presented an alternative argument and stated that it was a matter of indifference which alternative was favoured by the Court. The petitioner requires authority to sell, and he seeks it either in the statute or craves it from the Court by an exercise of the *nobile officium*.

The provisions of the Trusts (Scotland) Act 1921, which have to be considered are sections 4 (1) (*a*) and the definitions in section 2 of "trust," "trust-deed," and "trustee." Section 4 (1) (*a*) is in these terms—[*His Lordship quoted the section*]. It is to be noted (1) that the section assumes the existence of a trust containing "terms" or "purposes." *Prima facie* this would exclude a tutor-at-law whose fiduciary duties are prescribed, not by the particular terms of a specific trust-deed, but by the general principles of the common law. (2) By implication the section applies only to those "trusts" and "trustees" defined in the statute. This involves consideration of section 2—the definition clause—in order to ascertain what is the statutory meaning of those terms. The term "trustee" is defined as meaning and including "any trustee under any trust whether nominated, appointed, judicially or otherwise, or assumed, whether sole or joint, and whether entitled or not to receive any benefit under the trust or any remuneration as trustee for his services, and shall include any trustee *ex officio*, executor-nominate, tutor, curator, and judicial factor." It is to be observed that in the general enumeration of offices at the end of the definition while "executor-nominate" is included, "executor-dative" is not. The reason is probably this, that while an executor-nominate may have on occasion to act as a trustee, an executor-dative can never have to do so, being appointed for the sole purpose of administering and distributing the moveable estate of an intestate. The term "tutor" occurring in this definition, while habile, standing by itself, to include "tutor-at-law," does not, in the context, seem to do so. The last clause of the definition is controlled and qualified by the earlier part of the definition, which suggests that the offices referred to in the last clause shall have been created by nomination, appointment, judicial or otherwise, or assumption. None of these modes of creation is applicable to the office of "tutor-at-law," which arises *ipso jure* by the joint operation of the common law and the fact of blood relationship. This conclusion is confirmed by a reference to the definitions of "trust" and "trust-deed." "Trust" is defined as meaning and including "(*a*) any trust constituted by any deed or other writing, or by private or local Act of Parliament, or by royal charter, or by resolution of any corporation or public or ecclesiastical body, and (*b*) the appointment of any tutor, curator, or judicial factor by deed, decree, or otherwise." The definition of "trust-deed" is made to correlate exactly with the definition of "trust." "Trust-deed" is defined as meaning and including "(*a*) any deed or other writing, private or local Act of Parliament, royal charter, or resolution of any corporation or ecclesiastical body constituting any trust, and (*b*) any decree, deed, or other writing appointing a tutor, curator, or other judicial factor." It is plain from these definitions that the "trust" referred to in section 4 (1) (*a*) is one either (*a*) constituted by deed, &c., or (*b*) the appointment of a tutor, &c., by deed, decree, or otherwise. Now, there is no constituted trust which the petitioner as tutor-at-law has to carry out, nor has he been "appointed" to his office either "by deed, decree, or otherwise." It is plain that by the rule of *ejusdem generis* the term "otherwise" means something of the nature of a deed or decree. The term would be satisfied by appointment under an informal writing or, say, by trustees at a meeting of trustees, the evidence of appointment being a minute of meeting. It is, in my view, a misuse of the term to suggest that the petitioner was "appointed" to his office by the common law. We were referred to a case of *Forbes* (1922 S.L.T. 294) in which Lord Ashmore had decided that a mother, as tutrix of her pupil son under the Guardianship of Infants Act 1886, had power by virtue of the Trusts (Scotland) Act 1921 to sell the heritage of her ward. In view of the opinion I have expressed, that decision is unsound. A mother as tutrix under the Act of 1886 is in the same position as regards the provisions of the Trusts Act 1921 as a father or any other tutor-at-law. She is not "appointed" to her office; she takes it *vi statuti* by the provisions of an Act which confer the privilege of legal tutory in appropriate circumstances on any Scottish mother.

If a reason be sought for the exclusion of tutors-at-law from the ambit of the Trusts Act 1921, it is not hard to find. When a trustee is appointed by deed or decree there is opportunity for selection, by the truster or the Court, of a fit and proper person for the office, and the Legislature may well have thought it right to confer on a person so chosen the statutory powers and privileges. But in the case of a tutor-at-law there is presented no such opportunity of selection; the office may fall to one who is not a fit and proper person for its discharge. It is therefore not surprising that the Legis-

lature did not consider it appropriate that the statutory powers and privileges should be conferred on those by whom they might be improperly exercised.

If then, as I think, the petitioner is not empowered to sell by virtue of the provisions of the Act of 1921, it remains to be considered whether he has made out a case for authority being granted under the prayer of the petition, in virtue of the *nobile officium* of the Court. Such authority is granted only where a sale is necessary, where there is "urgency to avoid loss," or where there is "the highest possible expediency" in granting the power craved—*Lord Clinton*, 3 R. 62; see also *Mackenzie*, 17 D. 314; *Campbell*, 7 R. 1032; *Logan*, 25 R. 51. It is the almost invariable practice of the Court in cases of this nature to remit to a reporter before deciding whether or not authority should be granted. In the present case it is true that the petitioner, by the production of an extract of the foresaid decree in favour of the intestate's widow, has made out, *prima facie* at all events, that it is necessary to sell some part of the heritage. As, however, there ought to be a report as to the two tenements, I suggest to your Lordships that the reporter should be invited to report on all three properties.

LORD HUNTER did not hear the case.

The Court pronounced this interlocutor—

"... *In hoc statu* remit to Mr John Cameron, solicitor in Greenock, to inquire as to the value of the three heritable properties mentioned in the petition and to report thereon, and also to report as to the expediency and desirability of the sale thereof."

Counsel for the Petitioner—Chree, K.C. — King Murray. Agent — D. Maclean, Solicitor.

Saturday, March 1.

SECOND DIVISION.

[Sheriff Court at Hamilton.

M'COMBE *v.* BENT COLLIERY COMPANY, LIMITED.

Workmen's Compensation — Partial Incapacity—Change of Grade of Employment — Reduction of Compensation Due to General Rise in Wages—Standing Agreement—Subsequent General Fall in Wages — Right to Increase of Compensation — Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58), *First Schedule* (1) (*b*), 3, *and* (16).

A pony driver in a pit, who had sustained an injury by accident, having become fit for light work and obtained employment with his old employers at the picking tables, was paid compensation for partial incapacity. Thereafter for a short period payment of the compensation was suspended in respect that the workman's wages exceeded those earned by him before his accident, but wages having fallen, the workman and his employers agreed that compensation was again payable, and fixed the rate of payment at 4s. 7d. per week. Thereafter owing to a general fall in wages the workman was able to earn only 13s. 4d. per week as a picker. Before the accident he was earning £2, 5s. per week. In an application by the workman for an increase of the compensation, *held* that the arbitrator was entitled to review the compensation and bound to determine to what extent the workman's diminished wage was due to his injury and to what extent to economic causes.

Fallens v. *William Dixon, Limited*, 1923 S.C. 951, 61 S.L.R. 8, and *Quinn* v. *John Watson, Limited*, 1923 S.C. (H.L.) 62, 60 S.L.R. 615, *followed.*

Black v. *Merry & Cuninghame, Limited*, 1909 S.C. 1150, 46 S.L.R. 812, and *Quilter* v. *Kepplehill Coal Company*, 1921 S.C. 905, 58 S.L.R. 588, *distinguished.*

James M'Combe, miner, Bothwellhaugh, *appellant*, being dissatisfied with a decision of the Sheriff-Substitute at Hamilton (SHENNAN) in an arbitration under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58) between him and Bent Colliery Company, Limited, coalmasters, Hamilton Palace Colliery, Bothwell, *respondents*, appealed by Stated Case.

The Case stated—"This is an arbitration in an application presented by the appellant on 18th April 1922, for an increase of the compensation payable to him in respect of partial incapacity. The case was called in Court on 2nd May 1922, when process was sisted of consent to await the issue of certain appeals taken in cognate cases. The sist having been recalled, I heard parties on 16th October 1923, when the following facts were admitted:—1. On 26th September 1916 the appellant, who is a pony driver, was seriously injured by accident arising out of and in the course of his employment with the respondents in their Hamilton Palace Colliery. He was totally incapacitated for work. The respondents admitted liability and paid him compensation in respect of total incapacity to 30th September 1917. 2. The appellant shortly thereafter commenced light work with the respondents at the picking tables and is still so employed, this being work suitable to his partially incapacitated condition. The appellant based his claim for review on the following averments:—'Prior to pursuer's accident he was earning £2, 5s. per week. At the work at which he is presently employed he is being paid on an average about 13s. 4d. per week, which is the sum he is able to earn in his injured condition. Pursuer was paid partial compensation at the rate of 13s. 9d. per week from the 30th day of September 1917 until May 1920 (except for a short period of total incapacity between said dates during which he was paid full compensation). His partial compensation was then reduced to 9s. 2d. per week until December 1920, when it was stopped in respect that the abnormal wages paid to workers in or about coal mines