Donald to trustees was ineffectual, and the title to the property was in James Donald, the son, and he did convey it in 1861 to the pursuer, in fulfilment of an agreement to do so. It is said that that deed merely conveys the subjects as "presently possessed" by Mrs Donald. Why, a road passing through a property is very seldom *in terminis* excepted. The description plainly was meant to convey all that had belonged to old Donald. But if there were any doubt about this matter, it is altogether removed by the assignation. But, farther, it is said this compensation belonged to the father's estate. I cannot go into that view. The transaction was one with young Donald and his tutors. The offer is addressed to them as trustees and tutors, but they accept it expressly as tutors. The defender's obligation was to young Donald and them. They are the creditors in it, and young Donald has conveyed all his rights to the pursuer. I see no difficulty in regard to that matter. The mode in which the compensation was to be ascertained is described in the offer and acceptance to be "by the Commutation Road Trustees." Now, who is to accomplish that? I think it is very clearly the duty of the defender to do so. This is obvious from the nature of the transaction; but, farther, when the offer was made he had already put the machinery of the Road Trustees in motion; and, besides, his conduct following upon their minutes shows whose duty it was supposed to be. I think it was plainly part of the transaction that Mr Nicol was to carry through the matter. The parties interested were no doubt to be heard, but it was the defender's duty to take the steps to carry it through. That being the case, and being of opinion that this lady did not break through the transaction by building the wall, has she put an end to her rights by instituting this action? I think not. I see no way the pursuer had of compelling the defender to go on to get the compensation ascertained except by bringing an action claiming what she considered her due. The case, then, being before us, and that being the attitude of the parties, I think it is quite right that the compensation should still be ascertained by the trustees. I am disposed to recal this interlocutor, and stay further procedure, to give Mr Nicol an opportunity of resuming the proceedings before the trustees. There are conclusions in regard to interest and other things, but I think it will be better not to dispose of these until we see what the trustees do. They may settle the whole matter, and I think they have power to do so, and to carry out in its integrity, and according to its fair meaning, the bargain made by the parties.

Lord CURRIEHILL concurred.

Lord DEAS also concurred, and pointed out that in the original defences the only defence stated was want of title, and that although there was a statement that the pursuer had shut up the road, no plea was founded upon it. He also remarked, in regard to the question of title, that the disposition in the pursuer's favour was executed in implement of an agreement entered into previously, whereby the mother was to get the disposition, and all claims in regard to the land. There was therefore a good title anterior to the summons, altogether irrespective of the assignation.

Lord ARDMILLAN also concurred. In regard to the question of title, he thought there was a good title before the assignation; but he was also of opinion that where the substantial right to sue an action was in a person when he raised his action, it was quite legitimate to strengthen the title by an assignation obtained *pendente processu*. In support of this view he referred to the case of Welsh *v.* Rose and Robertson, 11th Feb. 1857, 19 D. 404. On the merits, he could not take the view of the Lord Ordinary. The pursuer's case had all along been that she was entitled to payment, and was not bound to give the use of the road without payment. There was no reason to doubt that this was a well-founded position for her to take; and it would be becoming, after having heard the views of the Court, that the defender should now do all in his power to give effect to them.

The case was superseded till January to give the defender an opportunity of stating what he proposed to do. The pursuer was found entitled to her expenses up to this date.

Agent for Pursuer—W. N. Fraser, S.S.C.
Agent for Defender—James C. Baxter, S.S.C.

PETITION—MACKENZIE.

Tutor-nominate—Power of Sale. Circumstances under which power to sell heritage granted to a tutor-nominate, a *curator bonis* being first appointed to receive and invest the price when realised.

This was a petition by a widow who was tutor nominate to her three pupil children for authority to sell a small house and garden in Inverness, the property of the children. The rental of the subjects was only £10 or £12. The petition also prayed the Court "to ordain the sum to be realised for the said property, after deducting expenses, to be reinvested in the name of the petitioner, or in the name or names of such other person or persons as to your Lordships shall seem proper, on such conditions as your Lordships shall think necessary for securing the interests of the said pupils, and the heirs entitled to succeed to them in the event of their dying in pupillarity."

The petitioner averred that the house required to be rebuilt, or to undergo a thorough repair, which would cost, to make it tenantable, £60. She farther averred—"The said pupils are quite unable to repair the said house without borrowing money upon the security of the same. They have no income whatever except from the rents of the said house and garden; and as the petitioner, their mother, is in poor circumstances, keeping a small toy shop, and being only enabled by strict economy to support herself and the [illegible], it will be most unfortunate if they are compelled to borrow the money required for the said repairs, and to pay the interest thereof, for which there is no prospect of any adequate return."

BIRNIE, for the petitioner, argued—The power craved is usually granted to tutors-nominate only when it is necessary to pay debts. This was the case in Bellamy, 17 D. 115; Mackenzie, 17 D. 314; and Sawers, 12 D. 905. But it has also been granted, when the exigency is of a different kind, as in Earl of Buchan and Others, 16. S., 238. In order to remove any difficulty arising from the fact that a tutor-nominate finds no caution, the petitioner here proposes that the price of the subjects when realised should be handed over to a *curator bonis* to be named by the Court, who will of course find caution. This is the course which was followed in the case of Sawers, 12 D. 905. The following cases were also referred to:—Finlayson, 22d Dec. 1810, F. C.; White, 17 D. 599; Auld, 18 D. 487; and Mathieson, 19 D. 917.

The petition had been intimated in common form and served on the persons who would succeed to the property in the event of the pupils dying in pupillarity; but no one appeared to oppose.

After deliberation,

The LORD PRESIDENT said—The Court is of opinion that a case of sufficient exigency has been made out to warrant the prayer of the petition being granted on an appointment of a *curator bonis* being obtained in the usual manner, as proposed by the petitioner.

Agents for Petitioner—G. & J. Binny, W.S.

SECOND DIVISION.

NOLAN *v.* HARTLEY'S TRUSTEES.

Trust—Vesting—Lapse of Trust—Denuding. A lady by her settlement directed the whole of her estate to be realised at her death and divided among her five grandsons on their respectively attaining majority; and by a codicil she granted the liferent of part of her estate to her daughter, and directed that at her daughter's death the subjects liferented, along with the remainder of her trust-effects, should be divided among her grandsons as directed in the trust-deed. The daughter survived all the grandsons and their issue. Held (diss. Lord Neaves), in a question betwixt the daughter and certain assignees of some of the grandsons, that nothing had vested in the grandsons, and that the daughter was entitled to call upon the trustees to denude in her favour as heir-at-law of her mother.

By her trust-deed of 26th December 1833, the deceased Mrs Hartley directed her trustees "immediately after my death, or so soon thereafter as the same can be advantageously effected, to sell and dispose of and realise my whole heritable and moveable property;" and she proceeded to declare, "I hereby direct and appoint my said trustees and their foresaids to apportion and divide my said trust-estate when so realised (after deduction of the provisions under the first condition of this trust) equally among my five grandsons," whose names and designations then follow; and the truster then goes on to say that they are to receive the property "share and share alike, upon their respectively attaining majority, or twenty-one years complete; declaring that in the event of any of my said grandsons dying without leaving lawful issue of their own bodies, such deceaser's share shall be equally divided among the survivors; but if the deceaser shall leave lawful issue of his body, such issue shall be entitled to their parents' share of my said trust-estate; declaring farther, that in the event of any of my said grandchildren, or their issue, being under age at the period of my said trustees realising and finally winding up my said trust-estate, then, and in that event, my said trustees shall set apart the share of such child or children under age until he or they shall have attained majority, my said trustees having full power either to advance or accumulate the interest during such minority as they may see expedient and proper." By an after clause she instructed her trustees "to let my dwelling-house at such rent as they may think proper, until it can be advantageously sold, dividing the free rent obtained therefor among my said grandsons and their foresaids equally, share and share alike."

But by a codicil of 18th April 1834, Mrs Hartley recalled and altered her settlement to the following effect:—"I do hereby give, grant, and dispone to my daughter all and whole my dwelling-house and pertinents situated in Stafford Street, Edinburgh, specially within described, with the whole household furniture of whatever denomination, books, plate, and bed and table linen, which may be found therein at the time of my death, in liferent, for her liferent use allenarly, and to my within-written trustees, for the special ends, uses, and purposes within mentioned, in fee; it being my wish and intention that my said daughter shall have the liferent use of my said dwelling-house and furniture, &c., if she survives me, and that at her death the whole shall be realised, along with the remainder of my trust-effects, and divided among my five grandsons within named, in manner particularly within directed; and in so far as not expressly and effectually altered by this codicil, or these presents, I do hereby ratify, approve, and confirm the within-written trust-disposition and deed of settlement in its whole heads, tenor, clauses, and contents."

All of Mrs Hartley's grandsons are now dead, only one of them (William Dick Macfarlane) having left children, who are also all now dead. Under these circumstances Mrs Nolan, the only surviving child of the testator, claims the whole estate as intestate succession, and brings the present action of declarator of trust and denuding against the trustees of her late mother. Three of the grandsons of the testator, however, had before their death assigned their shares to certain parties who now claim their cedents' shares in respect that these vested in them at the date of Mrs Hartley's death, and that the trust has not therefore lapsed.

The Lord Ordinary (Kinloch) found that according to the sound construction of the trust-disposition and settlement and codicil the right thereby given to the grandchildren of the testatrix and their issue did not vest till the death of her daughter, the pursuer, and that all the said grandchildren and their issue being dead, the right to the whole property, heritable and moveable, belonging to the testatrix, was now vested in the pursuer, her only child and heir-at-law.

The assignees reclaimed.

MONRO and GIBSON, for them, argued—The effect of the codicil was merely to give a legacy to the pursuer of the liferent of the house, and it cannot be contended that the testatrix meant to postpone the realisation of the whole trust-estate, the words "remainder of trust-effects" referring only to the balance of trust-funds that might necessarily remain in the hands of the trustees. Even although it be held that the realisation of the estate was postponed by the codicil, it does not necessarily follow that the time of vesting should be altered also. The words of the codicil are not wide enough to infer so extensive an alteration in the provisions of the original trust-deed, especially if, as was contended, the time of vesting was fixed in the trust-deed at the majority of each of the beneficiaries respectively. But supposing the time of vesting to be fixed at the expiry of the liferent, in the event of the death of all the beneficiaries before that period, the estate would not vest in the last survivor, the clause of survivorship being merely intended to regulate the rights of the beneficiaries *inter se*, and not involving a condition of survivance of the liferent—Boyle *v.* Lord Glasgow's Trustees, 20 D. 925; Maitland's Trustees, 23 D. 732; Newton, 11 D. 452 (Lord Fullerton's opinion.)

YOUNG and DUNCAN, for the pursuer, answered—The estate vested under the original trust-deed at the death of the testatrix and the consequent realisation of the trust-estate. The effect of the codicil was to postpone the realisation of the whole estate to the expiry of the liferent, and therefore