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

necessarily to postpone the period of vesting. Until that period none of the beneficiaries acquired any indefeasible right, and consequently by their predecease Mrs Hartley's trust resulted in favour of the heir *ab intestato*.

SKELTON appeared for the trustees.

The Court, by a majority, adhered to the interlocutor of the Lord Ordinary. They were of opinion that the effect of the codicil was to remove the *punctum temporis* at which vesting took place in the grandsons to the death of the liferentrix. The settlement was framed first on the footing that a realisation and division indicated the time of vesting. No doubt the testatrix did not contemplate that her grandsons would all die in the interval, but that could not affect the meaning of the terms employed.

Lord NEAVES differed. He thought the majority were giving an effect and importance to the codicil, as overruling the principal deed, which was never contemplated by the testatrix, and was not fairly deducible from its own terms.

Agent for Pursuer—John Walker, W.S.

Agent for Assignees—William Mitchell, S.S.C.

Agents for Trustees—Tods, Murray, & Jamieson, W.S.

Friday, Dec. 14.

SECOND DIVISION.

UDNY *v.* UDNY.

Domicile—Succession—Legitimation per subsequens matrimonium. Circumstances in which held that a grandfather, not having lost his Scotch domicile of origin, transmitted the same to his son, who, not having lost the same, legitimated his son born out of wedlock *per subsequens matrimonium*. Held unnecessary to consider whether a Scotch domicile at the date of the marriage sufficient for legitimation *per subsequens matrimonium*.

This is a declarator of bastardy, at the instance of Mr George Udny, barrister in London, against John Henry Udny, who, upon the assumption of his legitimacy, is the heir entitled to succeed to the entailed estate of Udny in Aberdeenshire. The pursuer is son of a younger brother of the defender's grandfather. The defender was born at Boulogne in 1853, and his parents, Colonel John Robert Udny and Mrs Ann Allat, were married in Scotland in January 1854. The questions of fact involved, as to which a long proof was led, were—Whether the domicile of Colonel Udny was English or Scotch at the date of his marriage with Ann Allat in 1854, and at the date of the defender's birth in 1853? The pursuer contended that it was English at both dates, and maintained, in point of law, that, if it were so either at the time of the defender's birth or of the subsequent marriage of his parents, he was not made legitimate by that marriage. The Lord Ordinary (Jerviswoode) pronounced an interlocutor, finding—*Primo*—1st, That John Udny, grandfather of the defender (Consul Udny), was born in Scotland in 1727, of Scottish parents, and that his domicile of origin was in Scotland; 2d, That he went, early in life, to Italy, and for several years prior to 1760 lived at Venice with Mr Smith, British Consul there, succeeded to his house and business, and was, in the said year or early in 1761, appointed British Consul at Venice in his place; 3d, That he continued to act as Consul at Venice until 1777, when he was appointed Consul at Leghorn, which office he held until his death at London, while there on leave in 1800; 4th, That he was married at Leghorn in 1777 to Miss S. S. Cleveland, and that of the said marriage John Robert Udny, father of the defender, was born there in 1779; and, 5th, That the said Consul John Udny, during his employment in Italy, retained his domicile of origin in Scotland. *Secundo*—That his son, John Robert Udny, took, through his father, a domicile of origin in Scotland, and retained it prior to and at his marriage to the mother of the defender at Ormiston, in Scotland, on 2d January 1854. *Tertio et separatim*—That from and after the 13th November 1853, or thereby, when the said John Robert Udny returned to Scotland from Boulogne, he had, and continued until his death to have, his domicile in Scotland. With reference to these findings, his Lordship sustained the defences, and assoilzied the defender from the conclusions of the action, with expenses.

His Lordship appended to his interlocutor a long note, in which he stated the grounds on which his opinion was founded. These were substantially similar to those upon which the judgment of the Inner House proceeded.

The pursuer reclaimed, and after hearing parties at great length, the Court adhered.

The following is the opinion of Lord Neaves, from which the whole facts and pleas of parties sufficiently appear:—

Lord NEAVES said—The interests at stake in this case are considerable, and the materials for deciding it are voluminous and multifarious. But the questions at issue are not complicated, and they do not appear to me to be attended with much real difficulty. The action is one of declarator of bastardy brought by the pursuer, a substitute heir of entail to the estates of Udny and others, to have it found that the defender, who would otherwise be a nearer heir, is illegitimate, and so not entitled to succeed to those estates.

The defender was born in England of parents who were not then married. His parents were afterwards married in Scotland, and the question is whether he was thereby legitimated. The locality of the birth and of the marriage is on both sides admitted to be immaterial. The important inquiry is as to the domicile of the defender's parents, or rather of the defender's father, at the date of these two events.

The point has at the same time been raised whether, if the domicile was not the same both at the birth and at the marriage, the father's domicile in Scotland at the time of the marriage would of itself be sufficient to support the legitimation, though at the date of the birth the domicile was in England. But upon the facts of the case I am of opinion that no such question arises.

The defender's father is known in this discussion as Colonel Udny, having held the rank of lieutenant-colonel in the British army. His domicile at the two periods referred to is the immediate matter to be determined, but this can only be done by taking a review of his whole history, including the circumstances which regulate his domicile of origin, and that makes it necessary to go back on the history of his father, the defender's grandfather, who was British consul at Leghorn when his son was born there, and who had previously been British consul at Venice.

John Udny, the consul, was born in Scotland about the year 1725, and was the son of an Aberdeen advocate. His domicile of origin was thus