otherwise there can be no conditional institute either under the express terms of the deed or under the implied condition. In all the cases which have occurred there were parties called capable, at the date of the deed, of taking the legacy or provision on whose failure antecedent to the vesting or the opening of the succession the conditional institution was held to come into operation, and the substitution provided for by the deed (if there was such) held to be evacuated. But, in such circumstances as those in which this competition occurs, there being no institute, it is a misuse of terms to, hold the *conditio si sine liberis* to have any application. This being so, it is not necessary to notice the numerous decisions which were referred to farther than to say that in none of them did there occur the specialty of the child having predeceased the date of the settlement. And the case of Christie, in particular, so much dwelt on in the argument as being the only decision on record where the *conditio* was recognised in a bequest to children, as a class, being cousins of the testator, presented no such specialty.

The *voluntas testatoris*, however, is appealed to, to the effect of having it inferred that when the testator called the "lawful children" left by his aunt, he must have intended to include all her children, whether then alive or previously dead; and it is contended that, the will of the testator being the ruling element, it can be of no materiality in ascertaining that will, whether one of the children had died before the date of his deed, or whether the child, being alive at that date, should die before it came into operation. To this consideration Lord Moncreiff was inclined to give great weight in the case of Sturrock; but it is obvious that in that case the observation could be made with more force than in the present, for the testator then stood *in loco parentis* to the children. No doubt it is the will of the testator to which in all such cases we must give effect; but care must be taken, when general words are for construction, that we do not give effect, by straining the terms of the deed, to mere conjectural intention as to what we may imagine the testator might probably have intended. It is the *enixa voluntas*—the intention clearly and palpably coming out on the face of the deed—that may be taken, where the words admit of it, as of primary moment in considering their construction; and in this view I do not think there is room for giving the effect contended for by the Leiths to presumed intention on the part of the testator to include in the term "children" left by his aunt on her predecease and the "survivor or survivors of them," a child who had predeceased the date of the settlement and her issue. The implied condition being inapplicable to the case, so far as the Leiths are concerned, the fair meaning of the terms points solely to children then in existence and the survivors or survivor of them.

In a certain class of cases the term "children" has sometimes been construed to include grandchildren; but this has never been held in circumstances similar or analagous to the present. Under the presumed condition, when applicable, grandchildren have taken as coming in place of their parents; but there is no instance of the term "children" being construed to embrace grandchildren as well as the immediate issue. They may have been held entitled to take as coming in place of their parents *ex presumpta voluntate*, but not as direct legatees; and I think it clear that the grandchildren of Mrs Gunn were not called along with her immediate issue. Were this held, they must all be entitled to take *per capita*, which cannot be inferred with any reason to have been intended by the testator on the face of this deed. The principle on which, in the entail cases which were referred to at the debate, powers to provide children out of the rents of the estate were held to support provisions to grandchildren, is quite inapplicable to the construction of such deeds as the present.

The other Judges concurred; and the reclaiming note was therefore refused.

Agents for Reclaimers—Morton, Whitehead, & Greig, W.S.

Agent for Respondent—H. W. Cornillon, S.S.C.

OUTER HOUSE.

(Before Lord Jerviswoode.)

ALLANS *v.* WILSON AND SON.

Master and Servant—Culpa—Unfenced Machinery. Circumstances in which held by Lord Jerviswoode (and acquiesced in) that millowners were liable in damages, in respect of injuries sustained by one of their workers in consequence of machinery being unfenced.

This was an action for damages on account of injuries received by the pursuer (who sued with concurrence of her father) while employed as a "piecer" in the defenders' mill, in consequence, as was alleged, of the machinery not being duly fenced. At the time of the accident the pursuer, a girl of fourteen years of age, was employed in the defenders' service, and she was injured by being caught in a part of the machinery, while it was in motion for manufacturing purposes. The machinery in which the pursuer was caught consisted of two small cogwheels, working at right angles to one another, and driving part of the machine, the machine being a doubling or twining machine, and one of the wheels being affixed, to a small perpendicular shaft. A proof was led, the import of which the defenders contended was to show that the pursuer had been injured through her own fault, she having attempted to do something in the course of her work, against which she had been warned, and that it happened at a part of the machinery where the pursuer had no occasion to be under her employment while at her work, and where no persons had any occasion to be except on passing and repassing to their work, at which time the machinery was not in motion.

The Sheriff-Substitute (Russell) on advising the proof, held that it established the cause of the accident to be the unfenced state of the machinery, for which he held that the defenders were responsible. His Lordship found the pursuer entitled to £100 of damages, and in the note appended to his interlocutor, made the following observations:—

"By the Factory Act, 7 Vict., c. 15, sec. 21 (as interpreted by sec. 73, and as qualified by the Act 19 and 20 Vict., c. 38, sec. 4), the Sheriff-Substitute understands that such machinery as caused injuries to the pursuer is required to be securely fenced, if so situate that children and young persons and women are liable to come in contact with it, either in passing or in their ordinary occupation in the factory.

"There can be no doubt that, in this instance, the machinery was so situate — the pursuer's dress having become entangled with it while she was engaged in her ordinary occupation, and she having to pass it when going to and returning from her work, as well as on other occasions.

"If this view be correct, it seems decisive of the question as to the liability of the defenders, unless the pursuer wilfully, or with utter recklessness, exposed herself to injury—a supposition quite unsupported by the evidence. It is unnecessary to inquire whether or not the machinery which caused the injuries unreasonably exposed to danger the persons working in the factory. In the words of Lord Campbell, Chief-Justice, 'the Act does not merely provide that machinery in factories is to be fenced when it is dangerous. All mill gearing while in motion for a manufacturing purpose is to be fenced. The Legislature did not intend to leave it to be decided upon the circumstances of each case whether the machinery was dangerous and required fencing.'

"As to the extent of the injuries received by the pursuer, by which the amount of damages must be determined, the evidence is not so specific as might be desired.

"It is certain that the pursuer has lost part of one finger, has had another much hurt, that she was injured on the left side, and that her whole system has received a severe shock from which she has not yet wholly recovered, although she is recovering. The statements of the defenders on this part of the case seem wide of the truth. On the whole, it is thought that the amount found due will meet the justice of the case."

The defenders appealed, and the Sheriff adhered to the interlocutor of his Substitute on the merits, but reduced the damages to £50.

The defenders advocated.

W. A. BROWN (with him GIFFORD) for the defenders, argued—1. In respect that the proof establishes that the respondent's injuries were caused by her own fault solely, the advocators are not liable in damages. 2. They are not liable in damages if the respondent's injuries were to any extent caused by her own fault. 3. Under her employment the respondent had no occasion to be at that part of the machinery where she received her injuries, and she was therefore not *in titulo* to object that the machinery was unfenced. 4. It being proved in evidence that no complaint was made by the inspector authorised by the Factories' Acts to inspect the works, that the machinery in question was not properly fenced, there was a presumption that it was so, which could only be set aside by direct proof to the contrary. Further, the damages awarded both by the Sheriff-Substitute and the Sheriff were excessive. O'Neill *v.* Wilson, Jan. 21, 1858, 20 D. 427; M'Naughton *v.* Caledonian Railway Company, Dec. 17, 1858, 21 D. 160; 7 and 8 Vict., c. 15, sec. 21; 19 and 20 Vict., c. 38, sec. 4.

J. C. SMITH, for the respondent, answered—The allegation of fault on the part of the pursuer herself was irrelevant in respect of her youth; and, further, the proof established that she was not injured by her fault at all, but by the fault of the advocators in not having their machinery fenced. The obligation of the advocators was absolute to have the machinery fenced, and their liability follows necessarily on proof of its not being so. 7 and 8 Vict., c. 15, sec. 21; Doel *v.* Sheppard, Jan. 18, 1856, 5 Ellis and Blackburn, p. 859.

The Lord Ordinary (Jerviswoode) pronounced the following interlocutor, in which parties have acquiesced :—

"*Edinburgh, 3d July* 1866.—The Lord Ordinary having heard counsel, and made avizandum, and considered the record, with the proof led in the inferior court, additional pleas in law for the parties respectively, and whole process: Finds, 1st, as matter of fact, that the respondent Ann Allan received the injury of which she complained by being caught in the machinery within the mill of the advocators through the fault of the advocators in failing to fence sufficiently the machinery at or near to which the pursuer was employed within the said mill of the advocators; and 2d, with reference to the foregoing finding, refuses the note of advocation, remits *simpliciter* to the Sheriff, and decerns: Finds the advocators liable to the respondents in the expenses incurred by them in this Court, allows an account of such expenses to be lodged, and remits the same to the auditor to tax and to report.

"CHARLES BAILLIE.

"*Note.*—The Lord Ordinary understood, and he does not doubt the fact from the tone of the debate which here took place before him, that the present advocation was brought by the defenders in the original action rather with the view of obtaining a judgment on the question as to their obligation in law to fence their machinery to the extent maintained on the part of the pursuer, so as to render them responsible in respect of their failure to do so, than from any indisposition on their part to make pecuniary compensation to the pursuer.

"But the Lord Ordinary has been unable to find elements in the proof which would here warrant him in altering the judgment pronounced by the Sheriff. Looking to the evidence as it stands, it appears to the Lord Ordinary to be proved that the direct cause of the accident was the act of the pursuer in reaching for a ring which was lying on the top of the machine at which she was employed, and towards one end of it. While taking down the ring the pursuer's dress was caught by the machinery, and she was injured as described in the evidence.

"Before the Lord Ordinary could decide here that no liability whatever was attachable in respect of this misfortune to the defenders, he would have required more distinct evidence than any which has been adduced to show the absence of necessity for fencing the machinery at the particular place. The Inspector of Factories has not been called as a witness here. His evidence might have been important on one side or the other, but there was no proposal for further inquiry, so far as the Lord Ordinary understands, and he has consequently disposed of the case on the evidence on which the original judgments were pronounced.

"C. B."

Agents for Advocators—Ronald & Ritchie, S.S.C.
Agent for Respondents—J. Somerville, S.S.C.

Saturday Dec. 8.

FIRST DIVISION.

MORISON AND MILNE *v.* BARTOLOMEO AND MASSA.

Ship — Collision — Arrestment jurisdictionis fundandae causa—Reconvention. A British and a foreign ship having come into collision, the owners of the British ship arrested the foreign ship to found jurisdiction, and raised an action of damages against the master of it who was a foreigner, the owners being unknown to him. The master and owners of the foreign ship next day raised an action of damages against the owners of the British ship in respect of the same collision. The master of the foreign ship thereafter declined jurisdiction in the ac-