clusions of the summons and defences thereto: Find that the sum aftermentioned should be applied by the defenders, the Lord Provost, Magistrates, and Council of the city of Edinburgh, as trustees, governors, and administrators of Trinity Hospital in the purchase of a site for, and in building, a church which, after reserving full accommodation for all the beneficiaries of the hospital and persons connected therewith, will afford to the inhabitants of the district within which the hospital was situated as much accommodation as was afforded by the collegiate church which has been removed; that the duty of building such church belongs to the said defenders as trustees of such charity; that they are not under any obligation to observe or follow the style or model of the old church in such new building; that such new church will be the property of the said charity, subject to its being used, and, if so used, then to its being kept in repair and maintained in like manner as the said old church was before its removal by the railway company; further, find that the funds so to be employed by the said defenders shall consist of £7000 of the sum of £17,671, 9s. 6d., which they received from the said railway company as the price of the said former church, with the interest and accumulation thereof, which have accrued, or shall hereafter accrue, to the said defenders on the said sum of £7000, under deduction of such sums as have been or shall be paid by them in the meantime, for providing accommodation for the said congregation: Further, find that it is not necessary or expedient that the defenders should rebuild the hospital which belonged to the said charity, and which also has been removed by the said railway company; and appoint the said defenders, within ten days from this date, to lodge in process a state of the foresaid fund as it is at this date, and also within six weeks from this date to lodge a minute, with a plan setting forth a site for and a plan of the church to be built as aforesaid. *Secundo*, With reference to the foresaid claim made by the University of Edinburgh: Find that the said University has not established any right to participate in the funds which belong to the said charity, in virtue either of the charter of 12th November 1567 or in any other way, and dismiss the said claim; and find no expenses due to either the university or the said defenders in reference to the said claim. *Tertio*, With reference to the states of the funds of the charity lodged by the defenders: Find that all the objections stated against the same by the pursuers, excepting the items set forth under the twelfth head thereof, have been passed from or obviated, and repel the same; and supersede *in hoc statu* the consideration of the said items in the 12th article. And *Quarto*, As to the scheme which has been lodged by the said defenders, supersede the consideration thereof until a future stage of the cause.

Agents for Pursuers—Wotherspoon & Mack, S.S.C.

Agents for Defenders—Graham & Johnston, W.S.

Agents for University—W. & J. Cook, W.S.

## SECOND DIVISION.

### RHIND'S TRUSTEES *v.* FLETCHER AND OTHERS.

*Legacy—Construction—Conditio si sine liberis decesserit.* A person left a legacy to his aunt, and directed his trustees, in the event of her predeceasing him, to convey it to her children, and the survivors or survivor of them equally. The aunt predeceased the testator, leaving several children, and also grandchildren by a daughter who had died before the date of the settlement. Held that these grandchildren were not entitled to participate in the legacy, either under the words of the destination or on the principle of the *conditio si sine liberis decesserit.*

The competition in this case relates to the fourth part of a legacy of £2000 left by the deceased Alexander Henry Rhind, who died on 3d July 1863, under his trust-disposition and settlement, dated 1st January 1861, to his aunt, Mrs Anne Rhind or Gunn; and "failing her by death before the term of payment of said legacy, and leaving lawful children," he directed his trustees to "convey and dispone to such children and survivors or survivor of them equally among them, the share which their deceased parent would have received if alive." The said Mrs Anne Rhind or Gunn predeceased the truster, she having died on 26th February 1862. Mrs Gunn had several children by her marriage with her husband, George Gunn, and among them a daughter, who was married to John Leith, but who died before her mother, and before the foresaid trust-disposition and settlement was executed, leaving children.

The competing claimants are the children of Mrs Anne Rhind or Gunn who survived her, and the children of Anne Gunn or Leith, who died in the circumstances above stated.

The Lord Ordinary (Ormidale) held that no part of the legacy of £2000 in question ever vested in Anne Gunn or Leith, the mother of the claimants, the Leiths; and that the maxim *si institutus sine liberis decesserit* was inapplicable to their position, and was not available to them. He accordingly preferred the other claimants.

The Leiths reclaimed.

SOLICITOR-GENERAL and JOHN HUNTER, for them, argued—The testator did not care for particular relations or degrees of relations. He liked them and their families all equally well. He speaks promiscuously of children, family, issue. The expression children includes grandchildren, unless there is a limitation in the context. If not, the Court will favour the extension of the meaning to grandchildren, if they are otherwise cut out. And a testament expresses intention as at the date of death. Holt *v.* Mackenzie, 2d Feb. 1701, M. 6602; Roughead *v.* Rennie, M. 6403; Christie *v.* Patersons, Fac. Col., 5th July 1822; Wishart, M. 2310; Sturrock *v.* Dunlop, 6 D. 117; Williams' Execut. vol. ii. p. 988; Roper, i. p. 68; Jarman on Wills, ii. p. 135; Magistrates of Montrose, 1738, M. 6398; Black *v.* Valentine, 6 D. 689; Smollet, 23d Nov. 1810, F. C.

YOUNG and LEE, for the other claimants, answered—The authorities are clear that the word children does not include grandchildren. The testator did not intend to include grandchildren here; he says "leaving lawful children." Mrs Leith was not left; she predeceased her mother. The condition *si sine liberis decesserit* can never receive effect in favour of children, unless it shall appear that the testator contemplated the institution of the parent. There must be an institute to allow the maxim to apply, but here the pretended institute was dead. Sturrock, 6 D. 117; Black *v.* Valentine, 6 D. 689; Aitchison, M. 1333; Sandford on Entails, p. 376.

At advising,

Lord COWAN—The trust-disposition and settle-

ment, upon the due construction of which the claims of the competing parties depend, was executed by Mr Rhind, who died in July 1863, unmarried. The date of the deed is 1st Jan. 1861. Amongst other provisions, the testator directed his trustees to pay legacies to each of four aunts and an uncle, and specially the sum of £2000 to his aunt, Mrs Gunn, "and failing any of these five by death before the term of payment of said legacies, *and leaving lawful children*, I direct my trustees to convey and dispone to such children and survivors or survivor of them equally among them the share which their deceased parent would have received if alive."

The testator was predeceased by his aunt, Mrs Gunn, who died on 26th February 1862, leaving four children, one of whom, however, died in the lifetime of the testator, unmarried. Mrs Gunn had another child who predeceased her, having died in 1855, previous to the date of the settlement, leaving four children, the issue of her marriage with John Leith. And the question is, whether these grandchildren of the testator's aunt are entitled to share in the legacy of £2000. The mother of the Leiths was a lawful child of Mrs Gunn, but having died before the date of the settlement, are her children entitled to take their mother's place in the division of the legacy, *either* under the words of the deed as included within the term "children," or on the ground of the presumed will of the testator and the application to the case of the *conditio si sine liberis decesserit?*

The Lord Ordinary has rejected the claim of the Leiths, and on a review of the authorities to which reference was made at the debate, I entertain the same opinion, being unable, with due regard to the nature and terms of the settlement, and especially of the provision in question, and to the true effect of the decisions, to find satisfactory ground for a different conclusion.

It is all important to keep in view that this is not a settlement by a father upon his children and their descendants. In such a case the *pietas paterna* and the natural duty incumbent on a parent to provide for his issue, immediate or remote, has been held to justify the application of a more enlarged and liberal interpretation of the terms he employs in his deed than would otherwise be admissible. Neither is it a settlement by one who stood *in loco parentis* to the objects of his bequest, as in the case of an uncle settling provisions upon his nephews and nieces or on the children of his brothers and sisters. To such a case, in ascertaining the will of the testator, the same principles of construction have been held applicable. The present is not a case of that description. The settlement is by a nephew leaving a legacy to his aunt, and in the event of her death to her children, his cousins. It cannot, therefore, be treated on any other principle than the settlement of a testator who has bequeathed legacies to stranger legatees. A legacy to a cousin or to cousins has never, except in the case of Christie, to be afterwards noticed, been thought open for construction on any other rule or principle than ordinary legacies are, where the relationship is more distant, or where no relationship subsists between the testator and his legatees.

The peculiarity of the present case is, that the mother of the Leiths died previous to the date of the settlement. It is not necessary to determine what effect that specialty might have had, had the testamentary provision to be construed occurred in the settlement of a parent, or of one standing *in loco parentis* to the legatees. Even in such a case the decisions referred to in the note of the Lord Ordinary would have presented an obstacle which it would have been difficult to get over. The testator in the case of Wishart *v.* Grant, where the same peculiarity occurred, stood in the relation of uncle to the children of his sisters, on whom the provision was made. And in Sturrock *v.* Binnie the same relationship subsisted as between the testator and the liferenter, whose children were called as fiars. No doubt in this last case Lord Moncreiff was in the minority, concurring in the interlocutor of the Lord Ordinary, which was altered by the then Lord Justice-Clerk and Lord Cockburn, Lord Medwyn being absent. But whatever difficulty might be felt in a similar case, it will mainly arise from the circumstance of the testator being *in loco parentis* of the legatees. The Lord Justice-Clerk, in the opinion which he delivered, explains that he held the description of the persons favoured, as "all my nephews and nieces," children of his brothers and sisters, not to be of the same comprehensive character as a provision to "all my children in liferent and their issue in fee;" and he adds, as a general principle in such cases, "When the testator stands in the relation of parent, and under a duty to provide for children and their descendants, the rule is so to construe the will if possible as to make the provision include all children, although not in existence at the date of the will." This principle he held not to be applicable so strongly, if at all, to the case of an uncle providing for his nephews and nieces, and specially not to apply to the deed then before the Court for construction. The present case, however, is not one where any duty existed on the part of the testator to provide for the objects of his bounty. Now, the established rule of law is that a legacy lapses by the predecease of the legatee when children are not called to the succession; but where a legacy is bequeathed to a class and not *nominatim*, only those falling within the description can be held included who are in existence when the legacy is bestowed. When a legacy is given to the children of A. B., the natural meaning of the term is children then in existence. They alone can take as legatees under the general description. A legacy to a person who is dead at the date it was bestowed can have no legal effect given to it. And on the same principle, one of a class who has previously died cannot take any legal interest under a legacy to the class. There can be no distinction in this respect between a *nominatim* and a class legatee. And as little can the issue of such a party claim the share their parent if alive would have received, unless there be words in the settlement conferring such an interest or room *ex presumpta voluntate testatoris* for holding such right and interest to have been conferred. In the present settlement, it is the "lawful children" left by the aunt predeceasing the testator, who are to take the share which the aunt would have received. There is not a word in the deed that can be held to confer their parent's share in express terms on the issue of children who had predeceased the date of the settlement, whatever room there might be under the condition *si sine liberis* for holding the issue of children, alive at the date of the deed, but predeceasing the testator, to have taken in the place of their parent.

As regards the application of the *conditio si sine liberis* to this case, there is no room for its application any more than there was in the case of Sturrock, or in the previous case of Wishart. There must be a legatee instituted, in the first instance,

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.