der's motion being entertained to any effect whatever, on the ground that by the notice of trial the case had been transferred to the Inner House; and thereupon his Lordship suggested that the defender should enrol the case in the Inner House in the ordinary way. The defender's motion for dismissal of the cause was accordingly heard before the First Division, when the pursuer gave as his reasons for not having gone to trial that the defender had left Edinburgh, where he had lived previously, and that he was not able to ascertain his whereabouts; and, further, that the pursuer's former agent had ceased to act for him, he understanding, and being entitled to understand, that an agent was acting for him, while in reality there was none.

The defender replied that he only left Edinburgh and went to Glasgow in pursuance of his trade as a journeyman shoemaker, and that with the knowledge of the pursuer; and farther, in any view no application had been made by the pursuer to ascertain the defender's place of abode.

LORD PRESIDENT—It is evident that here we have an alternative—either the agent neglected the duty he owed to his client, or the client neglected the duty he owed to himself by having no agent.

The Court pronounced the following interlocutor:—

> "In respect that the pursuer has failed to proceed to trial within a year and a day after adjustment of issues, assoilzie the defender and grant expenses."

Counsel for Pursuer—Scott. Agent—A. Nivison, S.S.C.

Counsel for Defender—Mair. Agents—Lawson & Hogg, S.S.C.

Thursday, July 3.

FIRST DIVISION.

REV. JOHN CAIRD D.D. AND OTHERS, PETITIONERS.

Petition—Charitable Bequest—Draft Scheme—Remit—Process.

A petition having been presented to the Court for approval of a deed of trust and constitution of a school, and a draft scheme having been submitted along with it,—*held* that a remit to a reporter was the proper procedure.

This petition was presented to the Court "for approval of a deed of trust, and constitution of the school and funds connected therewith, founded by the late William Muir Esq."

Mr Muir died January 1, 1869, leaving £15,000 for endowment of schools under certain conditions by will, dated November 1865, and he nominated a body of trustees and directors, but added that "no Papist, no Puseyite, no Tractarian, no Socinian, no Arian, nor any man who by acts or speech was to defend or excuse or propagate the principles or practice of these sects, . . . should be allowed to be directors or trustees." This will was holograph, but there were a number of blanks in it, some filled up in pencil and some left entirely blank. There was also found a prior holograph will, completely written out in ink without blanks, and having four codicils, all being dated 29th April 1864.

On 3d March 1870, a Special Case was submitted to the First Division, by the executors on the first part; the legatees under the last will (other than the School trustees and directors) of the second part; and the then acting school-trustees of the third part. The questions in this special case were disposed of by interlocutor of 18th May 1870 as follows—"*Edinburgh, 18th May* 1870—The Lords having heard counsel on this Special Case as now amended, find and declare, 1*st*, that the parties of the second part are entitled to payment of the annuities and legacies bequeathed to them by the will of 30th November 1865, at the terms specified, and *primo loco* and preferably to the bequest to the parties of the third part; 2*d*, find that in the event of there not being funds sufficient, after paying the legacies and providing for the annuities to the parties of the second part, to pay the school bequest in full, the free balance of the estate is not to be retained by the parties of the first part, as executors of the deceased, until it shall amount (by the falling in of annuities or otherwise) to £15,000, but that the executors are bound to pay over said balance forthwith, additional payments being made by them from time to time to the parties of the third part, as funds become available; 3*d*, find that the succession duty in the bequest of £15,000 falls to be paid out of the balance remaining in the hands of the executors, after paying and providing for the legacies and annuities to the parties of the second part, and decern."

The petition set forth that of the £15,000, £8,500 had been paid over to the School Trustees, £5000 had been eligibly invested, and there was a good prospect of obtaining an investment for the rest. The School Trustees, petitioners, applied to the Court to approve a deed of trust and constitution as they now had sufficient income to afford a prospect of at once commencing the school, and the testator had expressed a wish that this should be done as soon as circumstances should put it in their power, without waiting until the full £15,000 was paid over. The prayer of the petition was "to approve of and authorise them to institute and put in operation the said school as at Martinmas 1873; and further, to approve of the proposed deed of trust and constitution of the said school, and of the several funds therewith connected, in terms of the draft thereof appended to this petition, or in such other terms as may be thought proper by your Lordships; and on the said draft deed being so adjusted and approved, to interpone authority thereto, and appoint the same to be extended, and thereupon to ordain and oppoint the petitioners to execute the same; or to do otherwise in the premises as to your Lordships shall seem proper."

Authorities quoted in support of the application—*Alexander Morrison*, June 30, 1863, 1 Macph. 1009; *Low*, November 17, 1865, 4 Macph. 45; *University of Aberdeen* v. *Irvine*, 6 Macph. H.L. 29.

The Court would not consider the draft scheme suggested by the Petitioners acting *ex parte*, but remitted to Mr Robert Lee, Advocate, to prepare a scheme and report.

Counsel for Petitioners—Horn. Agents—Ronald, Ritchie & Ellis, W.S.

Friday, July 4.

SECOND DIVISION.

[Lord Shand, Ordinary.

TRAILL V. SMALL & BOASE.

Master and Servant—Reparation for Bodily Injury—Fault—7 and 8 Vict. c. 15, § 21, 19 and 20 Vict. c. 38, § 4.

A boy under fourteen years of age lost his right arm in the course of such employment in a factory as made it necessary he should put his arm within two feet of several unfenced revolving wheels, part of the machine at which he was ordinarily employed.—*Held* that the machine, from its position, was accessible to women and young persons in the course of their work; that it was the duty of the employers to have fenced the gearing; and that they were liable in damages, which were assessed at £150.

The summons in this suit, at the instance of Andrew Traill, against Small & Boase, hemp-spinners, Leven, concluded for payment of £1000 in name of damages, and as *solatium* for injuries sustained by the pursuer. The facts were as follows:—

On 27th September 1871 the pursuer, Andrew Traill, entered the employment of the defenders at their works at Leven. He was engaged by Andrew Nicoll, manager of the works for the defenders, by whom his duties were pointed out to him.

In order to convert hemp bale ropes into tow, before being spun into yarn they are subjected to a process of teasing, for which purpose a "breaker" or "carding machine" or "teaser" is used. The services of a man and a boy are required to attend to the machine in thus converting the ropes into tow.

James Wallace was the man employed by the defenders to feed the machine, and the pursuer, Andrew Traill, was engaged to assist. The ropes passing through the machine are teased by the "duffer" or "worker," and the tow is delivered upon the floor in front of the machine. The duty of the pursuer, as instructed by Andrew Nicoll, was to collect the tow as it was delivered, and place it in bags. He was also instructed, in the event of the tow overlapping the "duffer" or "worker," to slip a travelling-belt at the side of the machine off a pulley, whereby the revolution of the "duffer" is stopped. On this side of the machine, and surrounding the travelling-belt, are numerous cog-wheels, termed the lesser gearing, kept in constant and rapid motion. A space of eighteen inches intervenes between this side of the machine and a wall. When the pursuer required to slip off the belt he had to exercise great caution in consequence of the dangerous proximity of the lesser gearing on that side of the machine.

On Monday, 9th October 1871, or about that date, the pursuer Andrew Traill, a boy under fourteen years of age, was engaged at the machine, and was collecting the tow, when the "duffer" or "worker" became choked, and he, in pursuance of the instructions given to him as already set forth, slipped off the belt from the pulley, cleaned out the "duffer" or "worker," and replaced the belt on the pulley. Immediately after having done this, his right hand was caught by and dragged in between, two of the wheels of the lesser gearing, and was so crushed that his arm had at once to be amputated a little below the elbow.

The statute 7th and 8th Victoria, cap. 15, sec. 21, enacts "that every fly-wheel directly connected with the steam-engine, or water-wheel, or other mechanical power, whether in the engine-house or not, and every part of a steam-engine and water-wheel, and every hoist or teagle, near to which children or young persons are liable to pass, or be employed, and all parts of the mill-gearing in a factory, shall be securely fenced; and every wheel-race not otherwise secured shall be fenced close to the edge of the wheel-race; and the said protection to each part shall not be removed while the parts required to be fenced are in motion by the action of the steam engine, water-wheel, or other mechanical power for any manufacturing process."

After the accident the defenders caused the machinery to be protected by a wooden shrouding.

The defenders in their answers explained that the pursuer at the time he met with the accident was not engaged in the discharge of any part of his duties, but had, in opposition to orders, pushed himself into the space between the machine and the wall, where he had no right to go.

The pleas in law for the pursuer were:—(1) The pursuer, Andrew Traill, having sustained serious loss, injury, and damage through the fault and negligence of the defenders, or those for whom they are responsible, he is entitled to decree against them as concluded for, with expenses. (2) The pursuer, Andrew Traill, having sustained severe and permanent bodily injury through the neglect of the defenders, or those for whom they are responsible, in not causing the lesser gearing of the machine at which the pursuer was engaged, and from which he sustained the injury, to be securely fenced, in terms of the 21st section of the statute quoted in the condescendence, he is entitled to decree against them as concluded for.

The pleas in law for the defenders were:—(1) The pursuer has not set forth facts relevant or sufficient to infer liability against the defenders, and the action should be dismissed, with expenses. (2) The pursuer's averments being untrue, the defenders should be assoilzied. (3) The accident in question not having been occasioned by any fault on the part of the defenders, and *separatim*, having been caused by the pursuer's own fault, the defenders should be assoilzied, with expenses.

The Lord Ordinary, after a proof, pronounced the following interlocutor:—

"*Edinburgh, 6th February*, 1873.—The Lord Ordinary having heard and considered the evidence, and heard counsel for the parties—Finds that the pursuers have failed to prove that the injuries sustained by the minor pursuer, Andrew Traill, on or about 9th October 1871, at the defenders' works in Leven, were caused by fault or negligence on the part of the defenders. Therefore, assoilzies the defenders from the conclusions of the summons, and decerns; Finds the pursuers liable in expenses, allows an account thereof to be given in, and when lodged, remits the same to the auditor to tax and report.

"*Note.*—The Lord Ordinary stated his views of the evidence in detail to the parties in giving judgment. He thinks it sufficient here to state (1) That he is of opinion on the evidence that, having regard to the place in the defenders' works at which the machine by which the pursuer was injured was situated, there was no obligation by statute or