in a question of this kind, and includes all descendants, so that all may participate in the succession according to the order of law, children representing their parents in their several generations.

Assuming, however, that the case should be regulated by the application, or not, of the *conditio si sine liberis*, as contended for in the argument, I have no hesitation in holding that, on principle as well as on authority, that condition does apply to a case of succession like the present. The testator was admittedly in *loco parentis*. Had the destination been merely to "nephews and nieces," that would have led to the descendants of predeceasers being included, so as to take their parents' share, whether they were of the first or second generation of descendants. This was not disputed in the argument for the second party. But it was ingeniously contended that because the families of predeceasing nephews and nieces are expressly named, this indicated an intention on the part of the testator that the first generation of descendants only was to be included,—a construction of the words which, though there might be living descendants of a remote degree, would in a certain state of the family at the time of distribution have led to intestacy, as *e.g.* had all the nephews and nieces and their immediate issue predeceased, and only great grand-nephews and nieces been alive. But this view is to mistake the effect of the condition *si sine liberis*, which, when applicable, embraces all the descendants of the parties called to the succession towards whom the testator stands *in loco parentis;* and it is also to narrow the true effect and meaning of the very words of this deed in calling the families of predeceasers to the succession.

For these reasons, I am of opinion that the first question should be answered in the negative, and the second in the affirmative.

The other Judges concurred.

Counsel for the First Party—J. Kerr. Agent—Andrew Wilson, W.S.

Counsel for the Second Party—M. T. S. Darling. Agents—Morton, Neilson, & Smart, W.S.

Friday July 11.

SECOND DIVISION.

[Lord Ormidale, Ordinary.

BURNS *v.* SMITH.

Agent and Principal—Sale—Horse—Warranty—Mora.

Where A, acting as agent for B, sold a horse under a written warranty, and where the horse, after being tried and found disconform to warranty, was retained for some time by the purchaser under instructions from A, and was ultimately returned to A, who received him without instructions from B, and repaid the price.—In an action by A against B for repayment,—*Held* that, in respect A had no authority from B to direct the horse to be kept on after having been found disconform to warranty, or to receive him back and refund the price, B was not liable in repayment of the price.

This was an action brought for repayment of the price of a horse sold by the pursuer, acting as agent of the defender, and which was returned to the pursuer as being disconform to warranty. The facts are sufficiently explained in the interlocutor of the Lord Ordinary, which was as follows:—

"*Edinburgh*, 18*th March* 1873.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings, including the proof: Finds it proved that the horse in question was, on the 31st of January 1872, sold by the pursuer, acting as the defender's agent, to, and taken delivery of by, Mr William Curror, acting for Mrs Baird of Elie, at the price of £105, under a written warranty that he was sound and quiet to ride and drive in single and double harness, and that the horse, if he did not suit the lady, would be taken back and the money refunded: Finds it also proved that, although the horse was within a week thereafter tried by Mr Curror and Mr Jamieson, the factor on the estate of Elie, and found by them not to be conform to the warranty, inasmuch as he was not quiet to drive in double harness; upon this being communicated by Mr Curror to the pursuer, he was told by the pursuer, without reference to or authority by the defender, on two several occasions in the course of the month of February 1872, to keep the horse and continue to try him, as he would ultimately turn out to be satisfactory: Finds that, accordingly, the horse was retained by Mr Curror in his possession till on or about the 1st of March 1872, when he was sent by him from Fifeshire to Rosemount in Ayrshire, where Mrs Baird then resided, and that the horse, having been there tried, was again found not to be quiet to drive in double harness, and was returned by Mrs Baird to the pursuer on the 15th day of the said month of March: Finds it also proved that the horse was then received back in bad condition into the stables of the pursuer, and kept by him without objection: Finds it proved that the return of the horse to the pursuer, as now referred to, or that any objection had been made to him either by Mr Curror or Mrs Baird, was not intimated by the pursuer to the defender until on or about the 10th of April 1872, being nearly two months and a-half after the horse had been sold and delivered to Mr Curror: Finds that the pursuer has failed to prove that he had any authority from the defender to receive back the horse as before stated: Finds that the pursuer, on or about the 29th of May last repaid to Mr Curror the price of the horse; without the consent or authority of the defender, and without being judicially ordained to do so; Finds, in the foregoing circumstances, that the defender is not liable to the pursuer in the conclusions of this action; therefore assoilzies him from the same, and decerns: Finds the defender entitled to expenses; allows an account thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—The evidence in the present, as in most disputes about horses, is conflicting and unsatisfactory in many respects. But it appears to the Lord Ordinary that the findings of fact in the interlocutor he has now pronounced are sufficiently supported, and, if so, that the defender has been rightly assoilzied.

"The horse in question was originally purchased in 1871 by the pursuer, in Ireland, as sound and quiet to drive in single and double harness, and he was afterwards sold by the pursuer to the de-

fender on that understanding. This is admitted by the pursuer himself in the course of his testimony; and he also admits that when the horse was again sold by him as acting for the defender, on 31st January 1872, to Mr Curror, the defender explained, in his as well as Mr Curror's presence, that he had not himself tried the horse in harness. It is obvious, therefore, that although the defender must be held on proof to have warranted the horse to Mr Curror as sound and quiet to drive in single and double harness, he did so entirely on the information and warranty he had previously himself received from the pursuer. This may, the Lord Ordinary thinks, go far to account for what could not be otherwise well accounted for in the subsequent conduct of the pursuer in reference to the horse. Be that, however, as it may, the Lord Ordinary cannot doubt that the pursuer, by his own unauthorised acts and conduct, has barred himself from maintaining his present claim against the defender. It is a well-established principle in regard to the sale of a horse that the buyer must without any unnecessary delay return him on discovering that he is faulty and disconform to warranty. Now here, although the horse in question was sold and delivered by the pursuer, as acting for the defender, to Mr Curror, on the 31st of January 1872, he was not returned to the pursuer till the 15th of March following—that is to say, till after the lapse of between six and seven weeks—and it was not till the 10th of April thereafter, between three and four weeks more, that the pursuer made any intimation on the subject to the defender, when he, of that date, wrote the letter, No. 33 of process, stating:—'Your horse has been returned here. The gentleman called to-day. We will have to do something at once about it. I am very sorry about anything having gone wrong with the horse, but the sooner we get settled the better. You will see what you think of him when you come in.' The pursuer does not in this letter state that the horse had been returned on the 10th of March; he leaves it rather to be inferred that he had just been returned when he wrote. Nor does he refer to any communications he had received from Mr Curror on the subject of the horse in the previous month of March, and as little does he explain in what condition the horse was when he was returned.

"In point of fact, however, it turns out, as is clearly shown on the proof, that Mr Curror had tried the horse in double harness within a week after obtaining delivery of him, and had then found he was not quiet to drive in double harness, or conform to warranty in that respect. It further appears very clearly that the horse was not only so tried by Mr Curror, but that it was also tried by Mr Jamieson, Mrs Baird's factor, along with Mr Curror, and about the same time, and with a similar result. Mr Jamieson accordingly depones that 'he kicked and broke one of the traces.' And on being asked what opinion he formed of the horse, he says, 'I never liked the horse. I did not think it was a match for the other horse at all. (Q.) Did you think, as the result of the second day's trial, that he would suit Mrs Baird or not?—(A.) I never thought he would suit. (Q.) In short, after the second day's trial, you had no doubt he would not do?—(A.) I would not have had the horse at all. (Q.) Did you tell Mr Curror that?—(A.) No. (Q.) Did Mr Curror know what your opinion of the horse was?—(A.) I have no doubt he knew perfectly well what my opinion was from the way in which I looked, although I did not express it. I was not at any other trial of the horse. I was satisfied from what I had seen that he would not do, and I wanted to have nothing more to do with him.'

"Having regard to the evidence, it cannot be questioned that it was the duty of Mr Curror to have at once returned the horse, or that if he did not do so he would be barred from thereafter returning him and reclaiming the price. But it appears from the pursuer's own testimony that Mr Curror did, without loss of time, on two several occasions in February 1872, inform the pursuer of the result of his trials of the horse, and that he would require to return him. It may also, the Lord Ordinary thinks, be fairly enough held that the horse would have then been returned, had it not been that the pursuer, without any authority from or even the knowledge of the defender, desired Mr Curror 'to keep him on.' On this point the pursuer expressly says that he told Mr Curror 'that if he kept him on for some time the 'freshness might disappear, and he agreed to do so.' But this was an entirely new bargain or arrangement made by the pursuer with Mr Curror, to which the defender was not a party in any form, which was not authorised by him, of which he had no notice at the time, and of which he does not appear to have been made aware of till it transpired in the course of the proof in the present litigation.

"The pursuer, however, having entered into that new arrangement with Mr Curror, may have felt himself bound to take back the horse, when ultimately returned to him, after the lapse of between six and seven weeks, on the 15th of March, and also to refund the price, as he afterwards did, in the course of the month of May. But the Lord Ordinary is unable to see on what ground the defender is bound to relieve the pursuer, as he is asked to do in this action, from the consequences of these, his own unauthorised acts. It may well be doubted, indeed, whether, even if the horse had been returned to the pursuer in February, immediately on his having been tried and found disconform to the warranty, he had any right to receive him back without further authority from the defender; but certainly he had no right or authority, as acting for the defender, to instruct Mr Curror to keep on the horse till the 15th of March, and then to receive him back without inquiry or objection, and afterwards to refund the price—the more especially was the pursuer not entitled thus to act, so as to bind the defender, seeing that the horse, when returned in March, is proved to have been in a greatly worse condition than he was in when sold and delivered to Mr Curror on the 31st of January.

"The pursuer at the debate seemed to maintain that he was entitled to act as he did for two reasons—1st, that it was part of the original bargain with Mr Curror that he might keep the horse for a couple of months before sending him to Mrs Baird for her approval or rejection; and, secondly, that, at any rate, Mr Curror's objections to the horse, and the return of him on the 15th of March, were all timeously made known to the defender through Mr Rorison, by whose instructions, as authorised by the defender, he, the pursuer, acted throughout as he did. But these grounds of excuse for his conduct do not appear to the Lord Ordinary to have any sufficient support in the proof. There is

nothing in the warranty which was given to Mr Curror with the horse entitling him to keep it for a couple of months or any other given time. There appears at most to have been only some loose conversation on the subject; and what is very important on this point is the fact stated by Mrs Baird, that she never authorised Mr Curror to keep the horse, in place of at once sending him to her for her approval or rejection. And at any rate it cannot, in any view of this matter, be held that Curror was entitled without fresh authority to keep the horse, after trying him and finding that he was not conform to the warranty. Accordingly, the proof shows that he would have been timeously returned in February after trial had it not been for the unauthorised instructions of the pursuer to Curror 'to keep him on.' In regard, again, to the pursuer's other statement or plea, that his conduct was authorised by the defender through Rorison, it is enough to say that he is entirely contradicted in this by that individual, who expressly says that he never had any authority from the defender to act for him in the matter, and never was instructed by the pursuer to make any communication or give any notice to the defender on the subject of the horse.

"In the circumstances of this case as now explained, the Lord Ordinary apprehends that Curror, as the buyer of the horse, was in *mora* in returning him, supposing he had not been directed by the pursuer 'to keep him on,' and, if so, that the defender, as the seller of the horse, would not have been bound to take him back and refund the price —Bell's Prin. sec. 129 (4), and cases there cited. And if the Lord Ordinary be right in this, it follows that the defender is not liable to the pursuer in the relief sought by him in the present action, in respect the latter had no authority from the defender to direct Curror to keep on the horse after he had tried and found him to be disconform to warranty, or to receive him back on the 15th of March, and thereafter to refund the price."

The pursuer reclaimed.

The Court adhered.

Counsel for Pursuer — Macdonald and Rhind. Agent—H. Martin, S.S.C.

Counsel for Defenders—Lindsay, Paterson, & Hall, W. S. Agents—Asher and Robertson.

Friday, July 11.

TEIND COURT.

[Lord Gifford, Ordinary.

LORD ADVOCATE *v.* EARL OF GALLOWAY AND FLETCHER HATHORN.

Teinds—Locality—Bishop's Teind.

In a case where the Lord Advocate objected to a locality on the ground that the Crown teinds localled on were Bishop's teind, and as such exempt, and this having been proved,—*held* that these teinds were entitled to the privilege claimed.

This was an action at the instance of the Lord Advocate on behalf of the Crown. He objected to the locality of Whithorn as at present adjusted, on the ground that the stipend had been localled on the teinds in the hands of the Crown, to the effect of relieving the teinds of Lord Galloway and Mr Fletcher Hathorn, who held on heritable right. He founded his contention on the plea that the teinds in the hands of the Crown were bishop's teinds, and, as such, entitled to exemption. His Lordship pleaded—(1) The whole teinds of the parish, except those held on heritable right, being bishop's teinds in the hands of the Crown, the augmentations ought to be laid *primo loco* on teinds held on heritable right. (2) The said schemes of locality being erroneous, ought to be rectified, in the manner and to the effect craved.

The respondents pleaded *inter alia*—(2) The objector has no right or title to maintain that the augmentations should have been allocated *primo loco* on the teinds held on heritable rights, in respect that it has not been shown that the teinds upon which the augmentations have been localled are bishops' teinds in the hands of the Crown, and the objections ought therefore to be repelled. (3) The objections are excluded—1, By *mora* and acquiescence; and 2, by prescription.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d June* 1871.—The Lord Ordinary having heard parties in the question between the Lord Advocate, on behalf of Her Majesty and the Commissioner of Woods and Forests, objector, on the one part, and the Right Honourable the Earl of Galloway and Mr Hathorn of Castlewigg on the other part, respondents, and having considered the closed record, documents, and title-deeds adduced, and whole process—Finds that the teinds of the parish of Whithorn in the hands of the Crown are bishop's teinds, or at all events are church tiends, entitled to all the privileges in allocation of bishop's teinds in the hands of the Crown: Finds that in allocating the stipend in the present conjoined processes of locality the augmentations ought to be laid *primo loco* upon teinds held on heritable right, or at all events the same should be laid on teinds held on heritable right before any part thereof is laid upon the teinds in the hands of the Crown, and to this extent sustains the objections for the Lord Advocate, and remits to the teind clerk to rectify the locality accordingly Finds the Lord Advocate, as representing the Crown and the Commissioners of Woods and Forests, entitled to expenses as against the respondents in this question, and remits the account, when lodged, to the auditor of Court to tax the same, and to report, and decerns.

"*Note.*—The questions raised in the present record are—(1) Whether the teinds of the parish of Whithorn are bishop's teinds; (2) Whether, at all events, they are prior's teinds, entitled in questions of allocation to the same privileges as bishop's teinds; and (3) Whether, in the present conjoined processes of locality, the said teinds in the hands of the Crown ought to be postponed in allocation to the teinds held on heritable rights. In substance, the Lord Ordinary has answered these questions in the affirmative, and the result is that he has sustained the objections stated by the Crown, and appointed the locality to be rectified.

"A proof was allowed, but it consisted entirely of an extensive recovery of old title-deeds, rentals, and other documents, no oral proof being necessary or even possible. The documents raise several important questions both of fact and of law. The Lord Ordinary will shortly notice the questions