In cases where an uncle makes a bequest to nephews and nieces, the rule, as laid down in *Bogie's Trustees*, is whether the testator has put himself *in loco parentis*. Now, that is a very vague expression, and it is very difficult to say what its exact meaning is. I could have understood, if it were competent to go outside the deed and examine the facts to see how the testator had provided for the legatees in his lifetime, but it is not relevant to do this, and accordingly the test laid down in *Bogie's* case is, whether the testator "in his settlement has placed himself in a position like that of a parent towards the legatees, *i.e.*, has made a settlement in their favour similar to what a parent might have been presumed to make." I confess that I see great difficulty in applying that test. Parents have various dispositions and children various characters, and it is hard to decide according to the circumstances of each case; and with reference to the special provisions here it is difficult to conclude that if Mr Waddell had been dealing with his own children he would have left such a testament, and on these grounds I find a difficulty in concurring. But the test is so vague, that as your Lordships are of opinion that this deed does fulfil its requirements, I am unwilling to differ from you, and accordingly I agree.

LORD KINNEAR—I agree with all that has been said by your Lordships as to the order in which the question should be considered by us, and also in holding that the two holograph writings are not testamentary. On the second question, as to the application of the *conditio si sine liberis*, I originally shared Lord Adam's difficulty, but on consideration I have come to concur with Lord M'Laren, for the reasons stated by him, and chiefly on the ground that I find nothing in the testament to show that the testator was moved by any other considerations in selecting his nephews and nieces as the objects of his bounty than that of their relationship to him. I cannot find in previous decisions any definite or distinct limitation of the condition which is said to qualify the application of the general rule that the testator must have placed himself *in loco parentis* to the legatees, except that the person claiming the benefit of the *conditio* must show that the testator made the bequest in consideration of relationship, and not for any more special reason applicable exclusively to the individual legatee. I agree with Lord M'Laren that we must adopt the former of these alternative views.

The LORD PRESIDENT concurred.

The Court answered the first question in the affirmative, and the second and third in the negative.

Counsel for the First Parties—Rankine—Pitman. Agent—Patrick C. Jackson, W.S.

Counsel for the Second and Third Parties—D.-F. Asher, Q.C.—W. Campbell. Agents—Carmichael & Miller, W.S.

Counsel for the Fourth Party—Craigie—A. M. Anderson. Agents—Miller & Murray, S.S.C.

Monday, July 27.

OUTER HOUSE.

[Lord Kincairney.

TURNBULL & COMPANY *v.* SCOTTISH PROVIDENT INSTITUTION.

Insurance — Life Insurance — Insurable Interest—Policy on Life of Agent.

A firm of merchants made proposals to an insurance company for a policy on the life of their agent in Iceland, through whose means, as they averred, they carried on a lucrative business. The contract of agency (which was disclosed to the company) was terminable by either party on the 1st March of each year on giving three months' notice. The proposals were accepted, and a policy was issued, containing a note that as the insured had stated that they had an insurable interest in the life of the agent "no further proof of their interest will be required when this policy becomes a claim." After the proposals were made, but before the policy was issued, the agent gave notice that he proposed to terminate his contract on 1st March of the ensuing year. This notice was not communicated to the company. On the death of the agent, the company refused payment of the policy, on two grounds (1) want of insurable interest at the date of the policy, and (2) non-disclosure of the resignation of the agent. *Held* (1) that as the contract of agency was not actually terminated at the date of the policy, the insured had an interest, the sufficiency of which the company was precluded from denying; and (2) that as the resignation of the agent in no way affected the risk, failure to disclose it did not vitiate the policy.

The facts of the case appear fully in the opinion of the Lord Ordinary.

On 27th July 1896 the following interlocutor was pronounced:—"Finds (1) that the defenders are not in a position to dispute the insurable interest of the pursuers in the life of Thorbjorn Jonasson, whose life was insured: . . . Therefore repels the defenders' pleas-in-law, and decerns against them for payment to the pursuers in terms of the conclusions of the summons: Finds the pursuers entitled to expenses," &c.

Opinion.—"In this action the pursuers George Vair Turnbull & Company, merchants in Leith, sue the Scottish Provident Institution for payment of £2000 as the sum due under a policy of insurance, dated 24th December 1894, taken out by them on the life of Thorbjorn Jonasson (a merchant in Iceland, who was their agent in the disposal of merchandise sent by them to Iceland), and which became payable on the death of Jonasson on 9th April 1895.

"The claim is resisted on two grounds—(1) want of interest in the life of Jonasson; and (2) fraudulent misstatements in the proposal and declaration on the faith of which the policy was issued.

"The objection of no interest is not a favourable one. It is a technical objection, or nearly so, seeing that the nature of the pursuers' interest does not affect the defenders' risk, and it rests on the Gambling Act (14 Geo. III. cap. 48), by which policies made by one on the life of another, in which he has no interest, are declared to be void. That was an enactment in the public interest, not in the interest of insurance companies. But no doubt the defenders are entitled to plead it. In this case the interest of the pursuers in Jonasson's life depended on their business relations with him. They had a contract with him, dated 22nd March 1894, of a somewhat special kind, which may correctly enough, for the purposes of this case, be described as a contract whereby Jonasson was constituted the pursuers' agent in Iceland. The pursuers explain that they carried on a very lucrative business by means of their connection with Jonasson, and that it was of such a character that it would be very materially affected, and their profits would be greatly diminished, by Jonasson's death. Now, the proposal for insurance was made on the 13th of November, and at that time the nature of the pursuers' interest in Jonasson's life was explained to the defenders; and the pursuer George Vair Turnbull, depones that they were informed that it was a term of the contract with Jonasson—as in fact it was—that it should be terminable on 1st March of any year by either party on three months' notice. There is some conflict of evidence as to whether this term of the contract was communicated to the defenders, or rather some difference in the recollection of Mr Steuart, the defenders' inspector, and of Mr G. V. Turnbull, on the point. I think Mr Turnbull's recollection on this point is to be preferred; and, in any case, the defenders must be held to have known this, as they saw, or at all events could, had they chosen, have seen, the contract between the pursuers and Jonasson. This interest having been explained, the defenders were satisfied that it was an insurable interest. On 10th December 1894 their secretary intimated to the pursuers that they were disposed to accept the risk to a moderate amount at the premium stated, and asked the pursuers to state the sum for which they desired a policy. Accordingly the policy bears this note—'The above-named Messrs George Vair Turnbull & Company having stated in a letter, dated 28th December 1894, that they have an insurable interest in the life of the said Thorbjorn Jonasson, no further proof of their interest will be required when this policy becomes a claim.' It is admitted that the letter of 28th December merely put in writing what had been explained verbally to the defenders' inspector when the proposal was made. Now, it is not disputed that if the pursuers' connection with Jonasson had continued to be the same as it was when the proposal was made, the defenders could not and would not have disputed the pursuers' insurable interest or the amount of it; and I think it is not for the Court to consider whether the interest would or would not have been such as to satisfy the requirements of the Act 14 Geo. III. cap. 48.

"But a material change had taken place in the pursuers' relations with Jonasson. He, by letter of 1st December 1894, which reached the pursuers on the 10th December, gave the pursuers notice that he would leave their service on the 1st March 1895. It is said that in certain proceedings between the pursuers and Jonasson's representatives, the pursuers contended (I confess I do not see on what grounds) that their contract with Jonasson was terminated at the date of that letter or earlier. But that is not what Jonasson's letter says; and I consider that I must take it that the contract endured until 1st March 1895 at all events, by which time it might have happened that Jonasson would have withdrawn his resignation.

"Now, in these circumstances, the defenders put their defence in regard to the question of interest in two ways. They say (1) there was no interest at the date of the policy; and (2) that the interest, if it existed, had materially changed since it had been explained to the defenders at first, and was materially different from what it had been explianed to be. Now, I think it cannot be said that the pursuers had no interest in Jonasson's life at the date of the policy. The interest was the same in its nature as when the proposal was made, although, it may be, less in amount, and the defenders are in my opinion precluded from denying that that was in its nature an insurable interest. If so, then the policy could not be said in a question with the pursuers to be void under the Act of Geo. III. It must be regarded as a lawful policy. But then it is said that the resignation of Jonasson should have been communicated, but I do not see how this non-communication could vitiate the policy. The defenders do not aver that they would not have granted the policy had they known that Jonasson had resigned, and that his connection with the pursuers would come to an end on 1st March. After all, the whole change was, that that event had happened which was provided for in the contract with Jonasson, and the possibility of which was always contemplated. I do not know any authority for the proposition that such a non-disclosure could vitiate the policy. It is not as if the risk of the defenders was affected. For clearly it was not. The defenders referred to the case of *Canning* v. *Farquhar*, 6th March 1886, 16 Q.B.D 727, in which it was held that an insurance company was not bound to issue a policy when between the date of the acceptance of the proposal and the tender of the premium there had been a material aleration in the health of the proposer. But that is obviously a very different case to this.

"It was not contended that the amount of the sum payable under the policy could be affected by the change of circumstances, nor is there any plea to that effect.

"On these grounds I am prepared to repel the defenders' pleas founded on want of interest."

Counsel for the Pursuers—Asher, Q.C.—Salvesen. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders — Sol.-Gen. Dickson, Q.C.—Blackburn. Agents—Simpson & Marwick, W.S.

Wednesday, October 28.

OUTER HOUSE.

[Lord Kyllachy.

MAITLAND *v.* ALLAN.

Reparation—Landlord and Tenant—Lease—Drainage—Knowledge of Landlord of Defect in Drains.

The lessor of a house who is aware of a defect in the drains, and fails to take reasonably adequate measures to remedy it, is liable for any damage that the lessee may thereby sustain.

A, who had let a house to B, obtained a report on the drains from the burgh engineer. The report stated that there was a leak in the main drain, and that the general drainage system required to be thoroughly overhauled. A employed a builder to go over the drains, but did not communicate to him the report, with the result that the builder failed to discover the leak. B entered on his tenancy on the assurance of the builder that the drains were safe, and without notice of the terms of the burgh engineer's report. One of his children died of an illness which on the evidence was held to be caused by sewage gas. *Held* that A, being aware of the defective condition of the drains, and having failed to take adequate measures to put them right, was liable in damages for the death of the child.

This was an action at the instance of Thomas Maitland, tenant and occupant of the house No. 7 Morningside Gardens, Edinburgh, against James Steel Allan, joiner, 214 Dalry Road, Edinburgh, the proprietor of the said house, concluding for £150 damages for the death of his son George Rankin Maitland, aged about four years.

A proof was taken, the result of which, together with the other material facts in the case, is stated in the opinion of the Lord Ordinary.

On 28th October 1896 the Lord Ordinary (KYLLACHY) pronounced an interlocutor finding the defender liable, and assessing the damages at £40.

Opinion.—"The pursuer in this case became the defender's tenant of a house in Morningside Gardens at Whitsunday 1895 under missives of lease dated in February of the same year. The missives expressed it as a condition that the Burgh Engineer "finds the drains in good order." The pursuer entered at Whitsunday, and after he had been some months in possession his child, a boy of four or five years old, was seized with an illness which the medical man who attended him attributed to poisoning by sewage gas. The pursuer and his wife also suffered from minor ailments, which are attributed to the same cause. The present action is brought to recover damages from the landlord for the insanitary condition of the house—a condition for which he is said to be responsible both under the terms of the missives and at common law.

"I do not, I confess, consider that the condition expressed in the missives has, except historically, much to do with the case. Until the Burgh Engineer reported that the drains were in order, the contract of lease was in suspense, and if the pursuer entered into possession without such a report, he probably did so with the result of being held to have waived the condition. In any case the expression of the condition did not amount to a warranty by the landlord that the drains were in order, or an obligation to put them in order if they were not. So far as warranty or obligation went, the missives expressed nothing, but assuming the tenancy to be duly constituted, no express warranty or obligation was necessary. The landlord was, I take it, bound by an obligation implied by law to provide the tenant with a house which, so far as he (the landlord) knew or had reason to know was in a sanitary condition. He may not be held to have warranted that the drains were in order, but he at least warranted that they were so in so far as he knew or had reason to know. And therefore the questions in this case, as it appears to me, are (1) how far the drains of the house were in fact defective; (2) how far the defender knew that they were so, and failed to take due steps to have them repaired; and (3) how far it is proved that the illness of the pursuer's child was due to the condition of the drains.

"I am of opinion that it is sufficiently proved that the main drain of the tenement of which the house in question formed the ground floor, and which drain passed from back to front beneath the kitchen and other rooms of the house, did, at the pursuer's entry, leak, so as to permit of the passage of sewage gas into the house. I need not refer to the evidence. The drains were examined by the burgh authorities in May 1895, and the smoke-test disclosed a leak in the main drain in at least one place—a leak sufficient under favourable conditions to pass sewage gas into the rooms above. Other leaks were afterwards discovered, but this leak, due to a fracture in one of the lengths of clay pipe forming the drain, was discovered early in May.

"In the next place, I think it is also proved—indeed it is admitted—that the defender saw and read the report by the Burgh Engineer's inspector, which report pointed out the existence of the leak in question and the necessity of the drain being overhauled. It is not proved that previous to seeing this report the defender had any reason to distrust the state of the drains. His parents and sister occupied the house for some time, and he had heard no complaint. But it is beyond doubt that he came to