duces the desired expansion. No expansion could take place if the "tapering plug" or "mandril" were so much less than the tube as to have no "bite." The first insertion of the expanding instrument must take effect in producing a "bite," but however that mere insertion is accomplished, it is only introductory to the "expansion by rolling," which is the invention, and which is promoted and introduced by the invention which secures a "bite."

The third objection taken is that the complainer's instrument is falsely described, because the instrument is represented as wrought, or capable of being wrought, by the hand, and as dispensing with the use of "mauls or sledges," and the inconveniences that attend their employment. Now, I think that the specification is not very happily expressed. But reading and construing it fairly, I am of opinion that we should not sustain the objection. It is proved that the complainer's instrument can be wrought by the hand, and has been sometimes so wrought. But it is, I think, also proved that "mauls," by which I understand heavy wooden hammers, and "sledges," by which I understand fore-hammers, or smith's hammers, are no longer used or required, but small mallets or light hammers are found to be practically useful, and are generally used. In consequence of the inaccurate expression used in the specification, a difficulty has here arisen. But, bearing in mind that the heavy hammers, "mauls and sledges," with the attendant inconvenience arising from their weight and power, are really dispensed with, and that expansion by rolling—possible by hand, and yet more effectively accomplished by the aid of light mallets—is within the intelligence and the power of a workman of ordinary skill, I think that we should not do justice to the complainer if we refused to acknowledge and to support his letters-patent.

Lord Jerviswoode—During the progress of this cause I had at first considerable difficulty in coming to a conclusion upon the matter; but after hearing the whole discussion, and considering all that has been brought before us, I have come to the same conclusion as your Lordships.

The Court accordingly adhered to the interlocutor of the Lord Ordinary.

Counsel for the Complainer—Balfour and Hunter. Agents—Ronald, Ritchie, & Ellis, W.S.

Counsel for the Respondent—Solicitor-General (Clark), Watson, and Asher. Agents—Macnaughton & Finlay, W.S.

Wednesday, July 9.

SECOND DIVISION.

SPECIAL CASE — THE REVEREND ALEXANDER IRVINE AND JOHN IRVINE.

Settlement—Construction—Conditio si sine liberis.

Where a share of succession was appointed by a testator to be invested by his executors for behoof of C, one of his nieces, and her husband in liferent and her children in fee, and, failing children, the share was directed "to go to the survivors of my nephews and nieces, or the families of such as may have predeceased on the death of C without issue"—*Held* that descendants of nephews and nieces predeceasing C were included in the terms of the settlement, and entitled to participate in the succession.

The facts of this case, as stated on record, were as follows:—The late Mr Alexander Irvine, merchant in Aberdeen, died on the 19th day of December 1849, leaving five holograph testamentary writings, of dates the 8th October 1842, 10th December 1844, 1st April 1846, 24th December 1847, and 7th November 1849, all recorded as probative writs in the Sheriff-court books of Aberdeenshire, 12th December 1849. Some of the executors named in the earlier writings having died, others were substituted by the testator in their place, and the Reverend Alexander Irvine, minister of the parish of Crimond, Aberdeenshire, the first party, is now the sole surviving executor. By the testamentary writing dated 8th October 1842, along with tha dated 10th December 1844, the testator, after leaving some annuities and a legacy, all of which lapsed by the predecease of the annuitants and legatees, disposed of the residue of his means and estate. After the testator's death a state of his affairs was made up, showing the value of his estate, and the amount of debts due by him; and the executors thereafter gave up an inventory of the estate. The estate consisted entirely of moveable property. Shortly after the testator's death the executors drew up a scheme of division of the estate according to the terms of the will, and proceeded to realise the estate, and to pay the proceeds as realised to the residuary legatees, in terms of the directions to that effect contained in the will, with the exception of the shares falling to the testator's nephew, Thomas, and nieces, Margaret and Ann, all of whom survived the testator. The Reverend Alexander Irvine, the first party, and his co-executors, retained those shares falling to Thomas, Margaret, and Ann, in virtue of the powers to that effect given by the testator, and the same were invested by the executors, as realised, in heritable securities and otherwise, in their own names, as executors of the testator; the interest or income thereof, and also portions of the principal, being paid over to those residuary legatees, who were made aware from time to time, by the executor's agent, of the nature of the investments from which the interest remitted to them was derived. The amount of the funds now in the hands of the first party, as executor foresaid, is £2181, 11s. 11d., or thereby. Thomas Irvine died on the 12th February 1862, leaving no children, but survived by his wife, when the portion of his share left in the hands of the executors came to be divided, in terms of the said Alexander Irvine's will. In consequence of a claim by the said Thomas Irvine's executors on the funds in the hands of the said Alexander Irvine's executors, they raised an action of multiplepoinding, in which action the Lord Ordinary (Barcaple) pronounced an interlocutor which is now final. The persons preferred to the fund were, with one exception, either the testator's nephews and nieces, or the families of such as predeceased. The exception was the case of the executors of a child of one of the families who had predeceased; but as said child was unmarried and left no will, the other members of the family participated equally in the share preferred to said child, it being thus the same whether said child's executors claimed or the survivors of the

family had claimed for the full share, and there was no discussion on this matter before the Court. Ann Irvine (Mrs Garrow) died shortly afterwards, and her share was divided in terms of the decision above referred to regarding Thomas Irvine's share. Margaret Irvine (Mrs Smith) has also now died, leaving no husband nor family, and intestate; and the parties now desire the opinion and judgment of the Court in regard to the division of her share. Since the division of the shares held in trust for Thomas Irvine and Ann (Mrs Garrow), several changes have taken place in the families of the testator's nephews and nieces. There were originally four nephews and two nieces of the testator, besides Mrs Smith. Of these the Reverend Alexander Irvine, the first party, alone survived Mrs Smith. Janet Irvine or Drimmie, one of the nieces, left three children who survived Mrs Smith; and Ann Irvine or Garrow, the other niece, left seven children, four of whom survived Mrs Smith, and three predeceased her, two of them leaving issue. Francis Irvine, one of the nephews, left three sons and two daughters, who also survived Mrs Smith. Thomas Irvine, another of the nephews, died on the 12th February 1862, as previously mentioned, and left a widow, Mrs Margaret Colter or Irvine, but no family. He also left a testament appointing executors. Having predeceased Mrs Smith without leaving family, no part of Mrs Smith's share of the residue of the truster belongs to him or his representatives. The remaining nephew of the testator, James Irvine, had three sons and two daughters. Of these, John Irvine, the second party, alone survived Mrs Smith. Louisa Irvine, one of the said James Irvine's daughters, married her cousin, William Garrow, Liverpool, and died on 23d February 1872, leaving a family of four daughters, viz.:—Louisa Ann Garrow, Edith Barbara Garrow, Meta Norrie Garrow, and Alexandrina Maude Garrow, who are in minority, and for whom the said John Irvine, the second party, is administrator. Alexander Irvine, another son of the said James Irvine, who died at the Fiji Islands in the year 1870, is believed to have left a widow and child, also a settlement bequeathing the whole of his estate to his wife. The other two children of the said James Irvine died unmarried. The parties hereto are agreed that Mrs Smith's share of the residue of the testator falls to be divided into five equal parts, one-fifth thereof being payable to the Reverend Alexander Irvine, the first party, the sole survivor after Mrs Smith of the nephews and nieces of the testator; another fifth thereof being payable to the children of the said deceased Mrs Janet Irvine or Drimmie, who survived Mrs Smith; and another fifth to the children of the said deceased Francis Irvine, who survived Mrs Smith. But, as regards the one-fifth thereof payable to the family of the said deceased James Irvine, a question has arisen as to the right of the children of those members of that family, who predeceased Mrs Smith, to participate therein in place of their parents respectively. The parties interested in this question are John Irvine, the second party hereto, on the one hand, and the above named four daughters of the said deceased Louisa Irvine or Garrow, and the child of the said deceased Alexander Irvine, on the other hand. As regards the one-fifth part payable to the family of the said deceased Mrs Ann Irvine or Garrow, the position of that family, with reference to this matter, is exactly the same as that of the said deceased James Irvine's family, two members of the family having predeceased Mrs Smith, leaving issue.

The questions of law presented for the opinion of the Court were as follows:—"(1) Whether the second party is entitled, as the sole survivor of James Irvine's family at the date of Mrs Smith's death, to receive the whole share payable to that family on Mrs Smith's death? or (2) Whether the first party hereto is bound to reserve out of the said share, for behoof of the children of the said deceased Louisa Irvine or Garrow, and of the child of the said deceased Alexander Irvine, the proportions thereof which would have been payable to the said Louisa Irvine or Garrow and Alexander Irvine respectively, if they had survived Mrs Smith?"

At advising—

Lord Cowan—This Special Case relates to the share of the deceased's estate effeiring to his niece Margaret Irvine or Smith, appointed by his will to be invested by his executors for behoof of herself and husband in liferent, and of her children (if she had any) in fee; and failing children, the share is directed "to go to the survivors of my nephews and nieces or the families of such as may have predeceased." It is admitted by the parties that the share did not vest in Margaret, and that, as she died a widow without children, the succession to it falls to be regulated by this clause. Only one of the nephews and nieces of the testator, the Rev. Alexander Irvine, survives, but there are families of predeceasing nephews and nieces; and, as regards the immediate descendants of these parties, it is not disputed that they are entitled to participate in Margaret's share along with the surviving nephew of the testator. But as regards the share payable to the family of the deceased James Irvine, one of the predeceasing nephews, it is to be decided whether his immediate descendants alone are to be preferred, or those more remote to be conjoined with them in the succession. These parties are (1) John Irvine, the second party hereto, the son of James, who alone survived Mrs Smith; and (2) the children of Louisa and Alexander, son and daughter of the said James Irvine, who predeceased Mrs Smith, the former leaving a family of four daughters, and the latter one child. It is to regulate the respective interests of these parties that the questions of law are presented for the opinion of the Court.

The construction of the words of the deed, fixing the destination of the testator's residuary estate, seems to me to be attended with little or no difficulty. Her share, as appointed by the deed, falls to be taken by surviving nephews and nieces, and (for the disjunctive "or" must plainly be read as conjunctive) by the families of predeceasing nephews or nieces *per stirpes;* and, as regards the family of James, the testator's grandnephew, who predeceased Mrs Smith, and whose share is in question, they take as his descendants that equal share which he would have taken had he survived. There is no room for holding that they take on any other footing than as in right of James. It is *per stirps* not *per capita*, that the succession is to be regulated. The family are to take the share, and I think it must necessarily be held that when immediate descendants fail leaving issue, that issue takes their parents' place. The word "family" is of large significancy

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-