cabbages, whereas the contract was the seed of early cabbages. The difficulty in the way of the pursuer's case arises from the facts relating to a later stage of events. The defence that the goods were not timeously rejected is plainly inappropriate. The question is therefore really as to the amount of damage; but although the tendency of the Court is to support a Sheriff's award of damages, we cannot evade the decision of such definite questions as the defender has raised under this appeal, although the amount involved is not large.

The seed was sown in July 1891 in the pursuer's own market garden, and the plants came up. The evidence of the pursuer himself seems to show quite clearly (indeed he says so in so many words) that by the month of September any skilled gardener can tell the difference between early and late cabbage plants. Unfortunately the difference was not noticed, the reason apparently being that the pursuer's son had not had much experience at that time, and the pursuer personally was not about. But not the less is it the case that in the ordinary course of events the difference would have been noticed. Well, then, from September onwards sales were made of the plants as early cabbage plants, and the two first heads of damage arise (1) from claims of damages by the purchasers of those plants, and (2) loss of business arising from the disappointment of customers leading them to give up dealing with the pursuer. I have come to the opinion that the pursuer cannot recover on those grounds. The proximate cause of the mistake of the customers getting late instead of early plants was the omission of the pursuer or his son to notice that the plants which he sold to his customers were late cabbages, and this was not a natural consequence of the defenders' breach of contract.

The next head of damage relates to certain of the plants which were transplanted about the middle of May, and dealt with by the pursuer as early cabbages for retail sale. But unfortunately here the same answer applies. It was only after the transplanting that the discovery was made, which in ordinary course should have been made the September before, and if the discovery had been made the transplanting would never have taken place.

The disallowance of the three heads of damage which I have now gone over would strike £60 off the sum which the Sheriff has awarded. The remaining £20 was mainly supported in argument by a theory about "ploughing down" in May, which comes perilously near the objection which wrecks the other claims. I think, however, that an award of damages to the amount of £20 may be justified upon somewhat broader grounds. It was directly due to the breach of contract that the pursuer's nursery ground was to a considerable extent and for a considerable time occupied with seed which, on the evidence, was not remunerative. Even if the pursuer had made the discovery in September, the general facts of the case warrant the inference that he had already to a certain extent irretrievably lost the profitable occupation of his ground and a certain amount of labour. It is to be regretted that the pursuer has not in evidence made this aspect of his case clearer—his attention having been too much given to claims which are unsound in law. But the evidence seems to me adequately to support an award of £20.

I am for recalling the last interlocutor of the Sheriff, finding in fact that the seeds supplied were disconform to contract and that the pursuer has suffered damage to the amount of £20. On these two findings in fact, and the appropriate and obvious finding in law, I would give the pursuer decree for £20.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court found that the seeds supplied were disconform to contract, and that the pursuer had suffered damage to the amount of £20.

Counsel for the Appellants—Dickson—Cook. Agents—Pringle, Dallas, & Company, W.S.

Counsel for the Respondent—MacWatt—Watt. Agents—Winchester & Nicolson, S.S.C.

Tuesday, March 20.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MACRAE *v.* LORD ADVOCATE.

Revenue — Legacy Duty — Legacy Compounded for Less than the Amount thereof.

The Act 36 Geo. III. cap. 52, sec. 23, provides that where any legacy shall be released for consideration or compounded for less than the amount or value thereof, the duty shall be paid in respect of such legacy according to the amount taken in satisfaction thereof, and by section 37 provides that if a will has been avoided, any excess of legacy-duty paid before avoidance shall be returned to the person who has paid the same.

After a multiplepoinding had been brought, and claims lodged to determine the right to money left to strangers in blood, but claimed by the next-of-kin as being an invalid bequest, an arrangement was entered into, to which the Court interponed authority, by which each set of claimants took one-half.

Held that under the 23rd section of the above Act the strangers in blood having released the legacy for consideration and compounded for one-

half, 10 per cent. legacy-duty fell to be paid only on that half, and not upon the whole sum as bequeathed.

Opinions expressed that the same result would follow looking to the provisions of the 37th section.

John MacLearn died on 9th July 1836, leaving a trust-disposition and settlement dated 27th August 1834 and recorded 17th August 1836, by which he, *inter alia*, left a bequest for the education of the negroes working on the plantation of Gourie, State of Georgia, or their offspring, to be applied as soon as the laws of said State permitted such education. After certain litigation a sum amounting to £262 was deposited in bank, and no claim with regard to it was made until 1890, when the sum amounted to £734. In 1890 Archibald Macrae, accountant, 75 Buchanan Street, Glasgow, was appointed judicial factor on the estate of the said John MacLearn, and in 1892 raised a multiplepoinding to have the distribution of said estate determined.

The claimants were, *inter alios*, S. D. Bradwell, State School Commissioner for the State of Georgia, in which ever since the conclusion of the Civil War the education of negroes has been permitted, and the judicial factor for Mr MacLearn's next-of-kin, both of whom claimed the whole fund *in medio*. An agreement was subsequently made, to which the Court interponed authority, under which each of these claimants received one-half of the fund, and the other claims were repelled.

Thereafter the Lord Advocate, for and on behalf of the Inland Revenue, lodged a claim for payment, before division of the fund, of legacy-duty at the rate of £10 per cent. on the whole fund *in medio*.

He averred—"Under the said arrangement there is an agreement to share the amount of the said bequest. The parties concerned have not submitted their competing claims to the decision of the Court, and have preferred to enter into a compromise whereby the amount of the bequest falls to be divided. The bequest itself remains operative and unrevoked. In the case of bequests in favour of legatees who are strangers in blood to the testator, legacy-duty is payable at the rate of £10 per centum. The bequest here, the amount of which forms the fund in question, was a provision coming under that category. The claim of the Revenue is not affected or modified by the transaction of parties as to the distribution of the fund."

He pleaded—"(1) The fund *in medio* being the subject of bequest to strangers in blood to the testator, is liable to legacy-duty at the rate of £10 per cent."

The factor for the next-of-kin submitted that only £3 per cent. fell to be paid on the half payable to said next-of-kin.

The Act 36 Geo. III. cap. 52, by section 23 provides—"That where any legacy or part of any legacy, or residue or part of residue, whereon any duty shall be chargeable by this Act shall be satisfied otherwise than by payment of money or application of specific effects for that purpose, or shall be released for consideration, or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy or part of legacy, or residue or part of residue, according to the amount or value of the property taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same." . . . And by section 37 it provides—"That if the authority under or by colour of which any person shall have administered the estate or effects of any person deceased, or any part thereof, shall be void, or be repealed, or declared void, and such person shall before the avoidance, repeal, or declaration of avoidance, have paid any duty hereby imposed, or any duty imposed by any of the said former Acts, which shall not be allowed to such person out of the estate or effects of such deceased person, by reason that the same duty was not really due or payable, the money paid for such duty shall, on proof thereof, to the satisfaction of the said Commissioners of Stamp Duties, be repaid to the person or persons who shall have paid the same, or his, her, or their representatives, by the said commissioners out of any moneys in their hands arising from the duties imposed by this Act or the said former Acts; but in case such duty ought to have been paid by the rightful executor or executors, administrator or administrators, of such deceased person, then and in such case the payment of such duty shall be valid and effectual notwithstanding such avoidance, repeal, or declaration of avoidance as aforesaid." . . .

Upon 31st January 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Having considered the debate on the claim for the Lord Advocate, Sustains the said claim, but only to the extent of legacy-duty at the rate of 10 per centum in respect of the one-half of the fund *in medio* falling to S. D. Bradwell, State School Commissioner for the State of Georgia, and to the extent of legacy-duty at the rate of 3 per centum in respect of the other half of said fund falling to David Murray, the judicial factor: *Quoad ultra* repels the said claim, and decerns, &c.

"*Opinion.*—The Crown claims duty at the rate of 10 per cent. on the whole fund *in medio*, on the ground that the bequest is in terms a bequest to strangers in blood; that it has never been set aside or declared inoperative; and that it is immaterial that one-half of it only has been paid to the strangers in blood. The Crown founds on the decision in *Stracey's* case—*The Queen* v. *Commissioners of Stamps and Taxes*, 1844, 6 A. & E. (Q.B.) 657. In that case, after probate had been obtained by the executors named in the will who were strangers in blood to the testator, and duty paid at the rate of 10 per cent., the will was of consent declared to be null, it being arranged that the executors named should retain about one-half of the personal estate. The Commissioners of Taxes having been asked for a return of duty on the footing that in respect of the will being annulled only 3 per cent. was due on

the whole of the personalty, proposed only to return so much as represented 10 per cent. on the money paid by the original executors to the next-of-kin. But it was held that the case fell under the 37th section of 36 Geo. III. c. 52, and that the will having been avoided, only 3 per cent. was due upon the whole sum, and that it was immaterial that the will was avoided by consent, and that the strangers in blood had retained one-half. That judgment told against the Crown's claim. It is now appealed to by the Crown as an authority that if a will is not set aside the duty chargeable must be regulated according to its terms, whatever arrangement may be privately made as to the disposal of the estate. Assuming that case to be well decided, it is not against the argument for the residuary legatee. Not only in point of fact, but as a matter of form and by decree of the Court, the bequest has been refused effect to the extent of one-half. No doubt this was done by arrangement, and not *causa cognita*, but according to *Stracey's* case you cannot inquire into the grounds on which the Court proceeds; the result alone is regarded. Here no reduction was required. If the case had been fought out, and I had decided in favour of the residuary legatee and next-of-kin, I should have ranked and preferred him to the whole of the legacy without necessarily stating the grounds on which I proceeded. It would not have been necessary to expressly declare that the legacy had lapsed or become inoperative, although that would really have been the ground of judgment. As matters stand, I have ranked and preferred him to one-half, and that decree constitutes his right to so much of the legacy.

"The Crown assumes that here the strangers in blood have given up half of their legacy to the representatives of the residuary legatee and next-of-kin for the sake of compromise. It may as well be said that the latter has given up half of the legacy falling to the residuary legatee and next-of-kin to the strangers in blood. According to the formal decree, the Court has given each of the parties one-half.

"Apart from this, I think that the 23rd section of 36 Geo. III. c. 52, applies. The 23rd section provides, *inter alia*, that where a legacy is released for a consideration or compounded for less than the amount or value thereof, the duty shall be charged and paid in respect of such legacy according to the consideration for release thereof or composition for the same. Here it may be said that the strangers in blood have compounded for half of the legacy left to them in favour of the next-of-kin and residuary legatee, and therefore while admittedly 10 per cent. must be paid on what the strangers in blood receive, only 3 per cent. will be charged on the remainder, a result in accordance with equity, and not, I think, against the law.

"I need scarcely add that in the present case there is no suggestion that the arrangement was fraudulent or collusive."

The Lord Advocate reclaimed, and argued—The legacy here was still operative and unrevoked—it was under it that the State Commissioner acquired his rights; that legacy was to persons strangers in blood to the testator, and therefore 10 per cent. was payable. In *Stracey's* case, 1844, 6 A. & E. (Q.B.) 657, the will was, although by consent, set aside, and the persons paying legacy-duty took under the laws of intestate succession. To give effect to the claim of the next-of-kin would be to encourage arrangements which would defeat the Revenue—strangers in blood putting forward the next-of-kin for the purpose of saving payment of the higher rate of duty. Here had an arrangement not been come to, the State Commissioner might have got the whole fund *in medio*.

Argued for respondent—There was no suggestion here of collusion. By arrangement sanctioned by the Court, only half the amount of the bequest went to strangers in blood, and therefore only half should pay 10 per cent. legacy-duty. He did not impugn *Stracey's* case, but it was scarcely in point. So far as it had a bearing, the present case was *a fortiori*, because there the will had by consent been set aside. The fallacy underlying the argument of the Inland Revenue was that if this case had not been arranged the strangers in blood would have got the whole sum claimed. It might quite well have been that the next-of-kin got it all. The 23rd section of the Act of Geo. III. applied. The strangers in blood had compounded for less than the legacy, and were only liable to pay upon the amount they had taken in satisfaction.

At advising—

LORD ADAM—The late John M'Learn, who died so long ago as July 1836, left a trust-disposition and settlement dated 27th August 1834, by which he conveyed his whole estates to trustees for certain purposes.

One of these purposes was contained in a direction to his trustees to apply one-half of whatever right and interest he might be found to have in the property which belonged to his deceased brother Archibald M'Learn, or his deceased son James Henry M'Learn, situated in the county of Chatham and State of Georgia, United States, America, for the education of the negro or slave population who were upon the plantation of Gourie, on the banks of the Savannah river, at the time of the death of his brother, and their offspring, and for the education of the slaves or negroes upon the plantation in general.

He further directed his trustees to deposit a sum, equal to one-half of his share and interest in the said property, in a bank in Savannah in the names of certain persons, to be applied by them in the education of the said negro or slave population, so soon as the laws of the State of Georgia should permit their education.

These gentlemen declined the trust as being in violation of the laws of the State of Georgia.

The sum realised by the trustees as the amount of the said one-half share and interest was £355, 14s. 6d.

Thereafter in 1838 the trustees raised an action of multiplepoinding and exoneration for the distribution of this sum, in which claims were lodged by the residuary legatees and next-of-kin of the testator.

The Lord Ordinary in that case, on 4th July 1838, repelled *in hoc statu* the claim of the residuary legatees, and appointed the case to be called for the purpose of determining how the legacy might be most conveniently invested in order to await the contingency the testator contemplated. Thereafter his Lordship, in respect that the fund *in medio* had been consigned, found it unnecessary to give any further order in regard to it, exonered and discharged the trustees, and found them and the claimants entitled to their expenses out of the fund *in medio*.

The balance of the fund after payment of these expenses amounted to £262, 3s. 2d.

Nothing whatever was done with regard to this fund until the month of September 1890, when the pursuer was appointed judicial factor thereon at the instance of the next-of-kin and residuary legatees of the truster. He has uplifted the fund, which amounts to £734, 18s. 11d., under deduction of expenses, and has now raised this action of multiplepoinding for its distribution.

Condescendences and claims have been lodged for Mr Bradwell, State School Commissioner for the State of Georgia, as coming in place of the persons named by the truster, who declined to accept the trust, and he claims on the ground that the laws of the State now permit the education of the negroes; and also for the representatives of the next-of-kin, and of the residuary legatees of the truster.

It appears that these claimants entered into an agreement with reference to the disposal of the fund, which they embodied in a joint minute to which the Lord Ordinary by interlocutor dated 18th October 1893 interponed authority, and in terms thereof, *inter alia*, ranked and preferred the claimant S. D. Bradwell to one-half of the fund *in medio*, the claimant David Murray, who claimed as representing the next-of-kin, to the other half of the fund, and repelled the claims of John Kinloch and others, who claimed as representing the residuary legatees. He further ordained the pursuer to make payment to the claimants David Murray and D. S. Bradwell of the sums above mentioned, but under "deduction always of the expenses necessarily incurred by the pursuer and the real raiser, including the whole Government duties payable in respect of the succession of the respective claimants to the fund *in medio*."

Thereafter the Crown, on behalf of the Board of Inland Revenue, lodged a condescendence and claim in which they claim that legacy-duty at the rate of 10 per cent. shall be paid out of the fund before its division.

The ground on which this claim is made is that the legacy is in terms a bequest to strangers in blood, and that the claim of the Crown to duties cannot be affected by any agreement or transaction between the parties.

The Lord Ordinary by the interlocutor under review has repelled this claim, and found the Crown entitled to duty at the rate of 10 per cent., only on the half of the fund *in medio* falling to Mr Bradwell, and at the rate of 3 per cent. on the half of the fund falling to Mr Murray.

In my opinion the Lord Ordinary is right. I think this case falls within the 23rd section of 36 George III. c. 52. That section enacts that where any legacy, whereon any duty shall be chargeable, shall be released for consideration or compounded for less than the amount or value thereof, then and in such case the duty shall be charged and paid in respect of such legacy, according to the amount taken in satisfaction thereof, or as the consideration for release thereof, or composition for the same.

It appears to me that Mr Bradwell has released this legacy and compounded for less than the amount thereof, and that therefore the duty to be charged and paid thereon must be according to the amount taken as the consideration for the release, or composition for the same, which in this case is one-half of the amount.

I think this ground of judgment is sufficient for the decision of the case, and that it is unnecessary to consider the first ground on which the Lord Ordinary has rested his judgment, but I must not be held as at all dissenting from his Lordship's opinion in that respect.

Had there been any reason to suppose that the agreement between the parties was not a *bona fide* agreement, but was entered into merely for the purpose of evading the duties payable to the Crown, the result might be different, but no such suggestion was made, or apparently could be made in this case.

I am therefore of opinion that the Crown is not entitled to 10 per cent. on the whole amount of the legacy in question. That was the only question argued to us, and I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

LORD M'LAREN—The statutes which impose duties on legacies and successions are, I think, in every case statutes applicable to the whole United Kingdom, and although the laws both of intestate succession and of the transmission of rights of succession by deed necessarily vary in different parts of the Kingdom, yet the statutes imposing the duties are expressed in such terms as to be applicable to those various legal systems, and that is because in the imposition of a tax—at all events of a tax relating to succession—it is understood that the substance of the right is what is dealt with, and that the duty cannot be evaded by merely altering the form of the deed whereby the succession is created, or by going through any form after that succession has accrued. It is plain enough, for example, that where

duty at the higher rate has accrued in respect of the succession given to a distant relative, he cannot evade the duty by putting forward a nearer heir who shall make a claim and pay the duty, and then re-convey to the one who is really entitled. If this were competent, the Crown would never obtain duty at any rate higher than the minimum. But on the other hand, where, in consequence either of intrinsic defects applicable to a will as a whole, or objections to a particular clause in the will in respect of the uncertainty or failure of objects, the rights of the next-of-kin are let in, the persons truly entitled are only to pay the duty at the rate which is properly applicable to such rights. Now, the rights of next-of-kin, I think, are safeguarded by the 23rd and the 37th clauses. The 37th clause deals with the case of a will being set aside as a whole, the 23rd deals with objections to legacies which have led to transaction or compromise of the claim, and in each case duty is to be paid at the rate which is applicable to the person in whose favour the compromise has been made, and only upon the benefit which he has received. It is noticeable that while under the 37th section the statute only treats of the case of a will being set aside by a court of law, it was held in the case quoted by the Lord Ordinary that it is immaterial whether the decree setting aside the will has been obtained by consent in respect that the will could not be defended, or after a contested litigation, and that principle will evidently support us in the conclusion which your Lordships have reached—that in the construction of the 23rd section, although what the Legislature immediately contemplates is an extrajudicial compromise of the legacy, yet the statute is equally applicable when the compromise has taken place with reference to a succession that has been the subject of a multiplepoinding or distribution decree, and where it takes the shape of a decree giving only partial effect to the claim of the legatee. In order that duty may be payable either at a lower rate or upon a lesser sum than appears from the face of the will the case must be brought within one of these sections, but I agree with Lord Adam that this is a case falling in substance and effect under the 23rd section, that it is truly a release of the legacy for a sum which in the present case is one half of the claim, and the duty should accordingly be paid only upon the sum actually received. It follows, of course, that as regards the benefit which has resulted to the next-of-kin from this arrangement, they shall only pay duty upon the other half of the provision at the rate properly applicable to their relationship.

LORD KINNEAR—I am of the same opinion. I cannot say that I think *Stracey's* case, which was founded upon by the respondent, is directly in point. There is no judgment for or against the validity of this legacy. All that we know is that the party claiming to represent the legatee has claimed payment of the legacy in full, and has been content to accept half of the amount of the legacy in satisfaction of his demand. I agree with your Lordships that that is a case which falls directly under the provisions of the 23rd section of the Act 36 Geo. III. c. 52, because the legatee has compounded his legacy for less than the amount or value thereof. The duty therefore must be paid upon the consideration for composition. The practical result is, as the Lord Ordinary has found, that the legatee must pay 10 per cent., and that the residuary legatee is liable to pay the duty chargeable to residuary legatees.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Reclaimer — Young. Agent—Solicitor of Inland Revenue.

Counsel for Respondent — Dundas — M'Nair. Agents—J. & J. Ross. W.S.