conclusively, that it was not intended that any man should have the power of providing for younger children unless he had a son, or one of his children who could take under the entail. It was intended as a provision for younger children standing in reference to the estate as younger children. The object of the provision is this, that when a man succeeds to an estate, and thus becomes the head of the family, he shall not find himself burthened with a parcel of poor indigent relations, but that there shall be some provision for the younger children, irrespective of the aid they might expect from the head of the family. But I should have gone a great deal further; and unless authority can be produced to the contrary, I should myself have said, that I have no doubt, under the Aberdeen Act, that no man, in the situation of Captain Archibald, as a mere liferenter, could, under this settlement, make a charge in favour of his younger children. Independently of the words of the settlement itself, I apprehend that the intention of the Aberdeen Act was to enable persons, taking regularly under the Entail Act, in the common way of limitation, to make such provision as is there pointed out for their younger children, and that it never could have been in contemplation to give to a mere liferenter, where there was no limitation to his heirs, the power given to him by this act of parliament. If it were so I should be glad to know where it would stop. Suppose that, instead of giving the property generally, (which would be the gift of a life-interest,) it had been given for ten or five years, or any certain number of years, where is the distinction? The Aberdeen Act speaks generally of the heir of entail, but it means in the common ordinary way in which such a limitation takes place. My own opinion, therefore, is, that this case does not fall within the Aberdeen Act, and therefore no question, as it appears to me, arises with regard to whether the power supposed to be vested in Archibald Dickson by the Aberdeen Act, could be considered as exercised or not by the instrument in question.

Upon the whole case, my Lords, I agree with my noble and learned friends that the appeal ought to be dismissed, and the decree of the Court below affirmed.

Interlocutors affirmed, with costs.

Kempson and Fletcher, *Appellants' Solicitors.* — Maitland and Graham, *Respondent's Solicitors.*

JUNE 15, 1854.

HER MAJESTY'S ADVOCATE, *Plaintiff in error, Appellant, v.* DAVID SMITH, *Defendant in error, Respondent.*

Legacy Duty—Change of Investment—*A testatrix left £4000 of personal property, and £16,000 on heritable bond. She directed her trustees to pay debts and legacies, and dispose of the residue thus:—"I direct my trustees to pay the whole residue of the said trust estate and effects to W. D., whom I hereby appoint my residuary legatee." The debts and legacies amounted to £13,500, so that it was impossible to discharge them without encroaching on the £16,000 bond. The trust deed contained power to uplift and change existing investments, and to convert the estate into money, in whole or in part. By virtue of this power the trustees uplifted the £16,000 bond, and having taken so much of the money as was required to satisfy the trust purposes, they reinvested upon heritage the residue, amounting to £6000, and claimable by W. D.*

HELD (affirming judgment), *that the residue was not liable in legacy duty,—the change of investment being simply in ordinary management, and for better preservation, and not a permanent change for distribution, so as to alter the conditional into an absolute direction to realize the estate.*[1]

The judgment of the Exchequer Court in Scotland was appealed against and sought to be reversed, for the following reasons:—"1. Because, on the true construction of the testamentary instruments of the testatrix, it was in her contemplation that the heritable bond for £16,000 be realized by her trustees, and the proceeds applied to the satisfaction of the specific purposes of the trust, and that the residue should be paid by them to the party named as residuary legatee. —*Angus* v. *Angus*, Dec. 6, 1825; *Burrel* v. *Burrel*, Dec. 14, 1825; *Advocate-General* v. *Ramsay's Trustees*, 2 C. M. & R. 224; *Do.* v. *Williamson*, 2 Bell's App. 89; 10 Cl. & F. 16. 2. Because the trustees were empowered to realize the heritable bond left by the testatrix, and they, in point of fact, exercised their power to do so. *Attorney-General* v. *Mangles*, 1839, 5 M. & W. 120; *Do.* v. *Simcox*, Jan. 18, 1848; 1 Exch. 749."

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[1] See previous report 14 D. 585; 24 Sc. Jur. 285. S. C. 1 Macq. Ap. 760: 26 Sc. Jur. 533.

The defendant supported the judgment on the following grounds:—"1. The residue, in respect of which the claim of the Crown was made, did not arise from the sale, mortgage, or other disposition of real estate, directed by the testamentary disposition of the late Miss Watson to be sold, mortgaged, or otherwise disposed of. 2. The judgment of the Court of Exchequer is in perfect accordance with the authorities.—*L. Adv.* v. *Blackburn's trustees*, 10 D. 166. Note to *in re Evans*, 2 C. M. & R. 224; *Mangles*, 5 M. & W. 120."

Sir F. Kelly, and *Pigott*, for plaintiff in error; *Rolt* Q.C., and *Willes*, for defendant in error. [As this department of the law is now altered by the Succession Duty Act, it is unnecessary to state the arguments. The cases cited were—*Attorney-General* v. *Simcox*, 1 Exch. 749; *In re Evans*, 2 Cr. M. & R. 206; *Advocate-General* v. *Williamson*, 2 Bell's Ap. 89; *Advocate-General* v. *Ramsay's Trustees*, 2 Cr. M. & R. 224; *Hobson* v. *Neale*, 8 Exch. 368; *Attorney-General* v. *Metcalfe*, 6 Exch. 26; *Cathcart* v. *Cathcart's Creditors*, 8 S. 803; *Mules* v. *Jennings*, 8 Exch. 830.]

LORD CHANCELLOR CRANWORTH.—My Lords, I confess that it appears to me that this is a case upon which, when correctly understood, there cannot be any reasonable doubt. I think that the Court below came to a perfectly correct conclusion, and that there is nothing in the act of parliament, and nothing in the authorities, which is at all calculated to raise any doubt. By the statute, the legacy duty is payable upon the clear residue of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument. The object of that is plain, namely, that the legacy duty being chargeable on the clear residue of the personal estate, if a testator having real estate chooses to direct that estate to be sold, and the money to be distributed, as if it had been so much money which the testator had possessed at the time of his death, the legislature thought fit to treat that as chargeable, and to impose the same duty upon it as if it had been in the shape of money at the time of his death. That is the plain meaning of the statute. Therefore, if a testator, seised of real estates, directs these estates to be sold, and the money to be distributed, it comes within the meaning of the statute, and the duty attaches.

Then there arose that class of cases, to only one of which I will allude, viz., the *Attorney-General* v. *Simcox*, in which the testator devises his estates to trustees, with a direction to apportion them among a particular class of persons in certain proportions. Supposing he had said,—"I direct my trustees to sell as much of my real estates as cannot conveniently be apportioned, and then to divide the money to arise from the sale,"—there is no doubt that would have been a direction to sell all or such portion of the estate as that direction would be applicable to, and in that case no question could have been raised. But then arose the case of the *Attorney-General* v. *Simcox*, in which the testator, not imposing it as an absolute duty on his trustees to sell the real estates, but contemplating it as possible that it may be necessary, or that it may be convenient to sell a portion of those estates, in order to make the distribution equal between the parties, says,—"In that case, I authorize them to sell." What the Court of Exchequer decided in that case was, that when the trustees, in the exercise of their duty, had come to the conclusion that it was convenient to sell, or that it was their duty, or that the power to sell was a power which they were bound to exercise, it amounted to a direction. The Court of Exchequer said, that it was just the same thing as if the testator had said, under such circumstances—"I direct you to sell." But in that case the sale was to be the end of the transaction; it was to be a conversion of land into money, and that money was to be divided just as if it had been money which the testator had possessed at the time of his death.

That case was decided by the Court of Exchequer, and I understand that it has been followed in succeeding cases; and I confess that that decision appears to me to be founded on perfect good sense. But how does that apply to the present case? Here the testatrix had, what I may call for this purpose, real estate, and she had also personal estate. By her will she left legacies to a large amount. At the same time, when she makes her will, her personal estate was not nearly enough for the payment of those legacies. Whether she was aware of that at the time, and contemplated that it would be necessary to sell the real estate to make up the deficiency, does not appear. Very likely she was not. But she directs those legacies to be paid, and she gives full power to the trustees, at their discretion, to sell and dispose of all or any part of the said trust estate and effects, as well the real estate as the personalty. Then she gives the residue to this gentleman, the Rev. W. Duthy. Now, what is the meaning of saying that the trustees shall have power to sell? It may be that it only means, that they shall have the power to sell, so far as may be necessary to enable them to execute the trusts of her will,—that is, to pay her debts and legacies. The test of the correctness of this view is this, that Mr. Duthy might at any moment have said,—"You shall not sell the heritable bond. I will pay those legacies, and I will take the heritable bond to myself." He might have interposed at any moment of time, and have so said. It appears to me that that exhausts the subject. When it is said that there is a power of sale in this case, and there was a power of sale in the *Attorney-General* v. *Simcox*, that therefore the two cases are alike, that is falling into a fallacy, by using words which have a different meaning in the different cases. In the one case it was a power, in certain circumstances, to con-

vert the real estate into personalty, and to distribute it as personalty among particular persons. In this case it is a power to sell, so far as may be necessary for the purpose of enabling the trusts to be performed, which were trusts prior to the interests taken by Mr. Duthy.

My Lords, that appears to me to be a very short way of putting the case. I confess it appears to me to exhaust the subject. I shall therefore say no more, but shall simply move that the judgment of the Court below be affirmed.

LORD BROUGHAM.—My Lords, I am of the same opinion with my noble and learned friend, that this judgment ought to be affirmed. He has stated the distinction between the cases which have been referred to upon this subject, particularly that case of the *Attorney-General* v. *Simcox* and this case. I will only advert for one moment to another case,—also a case from Scotland,—because it came before this House, and was decided here, viz., that of *Williamson's trustees* v. *The Lord Advocate*. In that case, taking the two instruments together, there is no doubt that there was more than a power to the trustees to sell,—there was clearly a direction; for the truster, in the second instrument, said, "whereas I have required my trustees to sell;" and in that case the purpose of the sale was not merely in order to pay all the debts and legacies contained in the will, but it was a sale for the purpose of distributing the proceeds of the sale. So that it was clearly a sale out and out. It was for the purpose of distributing the proceeds among a particular class of persons, viz., the next of kin. It was therefore clearly a case in which the trustees were not merely empowered for a particular purpose, but were directed, for a general purpose, to convert that very large—I may say very magnificent—estate into money, namely, for the purpose of distributing it among the next of kin, who were, I think, chiefly nieces. It is clear, therefore, that in that case the land was to be dealt with as money, and to be applied to the payment of the legacies.

LORD ST. LEONARDS.—My Lords, I am also of opinion that this judgment ought to be affirmed. And I must own that I am a little surprised, that the Crown should have been advised to bring such a case by appeal before this House. The law upon this subject, as has been observed at the bar, is now altered. By the Succession Duty Act, all real estate is chargeable, equally with personalty, with legacy duty, so that it was no longer worth while to bring the case before this House merely to have a rule laid down which would govern future cases. And under the circumstances, especially after the consideration which was given to the case by the learned Judges below, and the elaborate judgment they pronounced, I think it was very undesirable that it should be brought, at a heavy expense to the parties, before this House.

My Lords, I do not entertain any doubt as to the true construction of the act of parliament. I think the legacy duty is in no respect whatever chargeable upon this property. The act of parliament does not charge real estate, but only "the clear residue of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate, directed to be sold, mortgaged, or otherwise disposed of, by any will or testamentary instrument." So that the duty plainly attaches only upon the clear residue of the monies to arise from the sale of any real estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument, by which the monies so arising are given to particular parties. Upon the face of this will, without reference to the codicils, your Lordships will find that there is no such gift; because the only gift on the face of the will is a gift of the residue. There is in the will this direction to the trustees:—"Lastly, I direct my said trustees to pay the whole residue of the said trust estate and effects, heritable and moveable, to the said Rev. W. Duthy, one of their number, whom I hereby appoint my residuary legatee, or to his heirs;" and so on. That is the only gift on the face of the will. So that the gift really is a gift of the trust estate and effects, heritable and moveable, to this party. It therefore clearly does not fall within the terms of the act of parliament, which is applicable to cases in which there is a gift of monies to arise from the sale, mortgage, or other disposition of any real estate, directed to be sold, mortgaged, or otherwise disposed of.

Then, my Lords, as this case does not come within the terms of the act, the next question is as to intention—the intention of the act of parliament and the intention of the testatrix,—the one operating upon the other. It is said that the words of the will are, "to pay." I think that is perfectly indifferent; because the gift in this testamentary instrument is clearly of the heritable estate itself.

There is a case, I think, in the 5th Term Reports, (I am quoting from recollection,) in which,[1] with reference to a devise of real estate, it was held to be unimportant whether the direction to the trustee was to "pay" or to "transfer." In this case, what is to be paid is the trust estate and effects, both heritable and moveable. Therefore the word "pay" is used in the sense of "transfer." The estate is to become the property of the legatee. The gift expressly includes the heritable as well as the moveable property. The property is given to this party absolutely. There is no previous trust to sell, and the powers which follow shew that no absolute trust was intended. The trust is,—to "realize such part of my estate and effects as may be unsecured,

[1] Perhaps *Hardacre* v. *Nash*, 5 Term Rep. 716.

and lay out the same in such investments as to them shall be most advisable and consistent with the instructions after specified, and that either on heritable or personal security, as to them shall seem most expedient." Now, the part of the estate which the trustees call in is not the heritable property, but such part of the property as does not consist of securities of that nature. Therefore it was intended that part of the property should remain as heritable.

Then there is a power to alter or vary the securities. Now, under the act of parliament, where there is a power simply to vary the securities, and the securities are varied for the benefit of the parties, that would not be such a conversion as would make it a gift of monies arising from the sale of real estate directed to be sold or mortgaged, so as to bring it within the provisions of the act of parliament. The act of parliament had no such object. So, in the last case cited, nothing could be more clear than this, that if real estate be devised and settled with a power of sale for the benefit of the parties taking under the will, and part of the estate is sold under that power, and the parties take partly in real estate and partly in money, that is not within the act of parliament. They did not take it as money under the will, but they took it as real estate under the will, with a power to convert the real estate into money for the benefit of the parties. Therefore it was not a conversion for the purpose of a distribution.

Now, in this case the sale was evidently for the purpose of the will. The trustees are "to sell and dispose of all or any part of the said trust estate and effects as to them shall seem proper." That is not with a view of distribution of the monies to arise from the sale. The gift is not in any manner to be affected by it, except that it is subject to the payment of the debts and legacies which have not already been provided for by the will. Well, then, according to the facts as they appear upon the special verdict, the trustees did not require £6,000 out of the £16,000, the amount of the heritable bond, for the purposes of the will,—there is only a power to sell, and even if the cases had gone to the extent which has been supposed, viz., that the act was to operate when the power is exercised, it could not affect the question, for in this case the power cannot be said to be exercised, because it was not required to be exercised beyond the amount of £10,000. It was not necessary that the power should be exercised upon the whole estate, and by reinvesting the £6000 in another heritable security, the trustees shew that they did not intend to exercise their discretionary power beyond the amount that was required for the payment of the debts. The surplus was invested in another heritable security. It is a change, therefore, of the security, not an actual sale of the existing security for the purposes of the will.

Now, my Lords, although this point may never again arise, one would be very unwilling to overrule any of the authorities on the subject in the Courts of Law, and therefore I am rather anxious to shew, that in coming to this decision the House will not, as it appears to me, in any manner overrule what has already been decided upon this point. One case, which was before a noble and learned lord who is not present, but who, I am happy to say, is still one of the ornaments of this House, (LORD LYNDHURST,) appears to me to have been treated rather too lightly, I mean the case *in re Evans*. In that case part of the estates were sold for the benefit of the parties, and part of the estates were sold under the direction of a Court of Equity, and the Court of Exchequer decided (I think very properly) that in both those cases the sales were not sales that could at all affect the rights of the devisees under the will. The only point that could have admitted of a doubt was, whether the sales that had been made, as the Court held, for the benefit of the parties, were not sales that would amount to an exercise of the power, so as to bring it within the act of parliament. It was rather difficult, no doubt, in that case to come to a determination on that point; but the Court came to a clear determination upon it, and held that the money arising from neither sale (neither the sale made for the benefit of the parties, nor the sale made under the direction of the Court) was liable to legacy duty. In the case itself the devise was to trustees for the benefit of the parties, and then the will contained a power by which the testator directed that "it shall be lawful for my trustees to sell my freehold and copyhold estates, or any part thereof, by public sale or private contract, either together or in parcels; or make or agree to any exchange or partition thereof, either together or in parcels, or of any part thereof, as shall appear most expedient to my trustees or trustee for the time being, towards effecting re-arrangements of my property and affairs." They certainly did execute that power to a certain extent. But, as I said before, it was held to have been exercised for the benefit of the parties, and not for the purpose of conversion of real estate into personalty, and consequently the act was held not to apply.

Now, in the late case of the *Attorney-General* v. *Simcox*, the Court of Exchequer seemed nclined to overrule that previous case. At p. 768 the Lord Chief Baron makes this observation, —"The only difficulty we have felt has arisen from the decision in *in re Evans*, where, certainly, the Court seems to have decided, that a sale under a power to trustees to sell, is not a sale of property directed to be sold within the meaning of the act. The precise grounds on which the Court formed this opinion do not clearly appear. The decision may possibly have turned on the mode in which the proceeds of the sale were in that case disposed of. The statute does not impose duty in every case of a sale directed by a will, but where the proceeds are by the will given to legatees. Now, in the case *in re Evans*, "the trustees were not directed to distribute

the proceeds, but to invest them in securities upon the same trusts as attached on the lands sold. Possibly the Court might have thought that this left the character of real estate still attaching on the money produced by the sale, and so that the statute did not apply." Now, that is one of the facts in this case. In the case now before your Lordships' House, the trustees have the power to reinvest the proceeds. Therefore in this case there can be no conflict with the previous authorities, and, without overruling any of the subsequent cases, your Lordships may come to the determination which the Court of Exchequer came to in the case *in re Evans*, viz., that the act does not apply.

In the case of the *Attorney-General* v. *Mangles*, which, in the *Attorney-General* v. *Simcox*, is rather supposed to have overruled the case *in re Evans*, your Lordships will find that there was a clear and express trust—"to sell, convey, or otherwise convert into money the residue of the estate, real and personal;" and although there was a power there to retain the shares of the estate as real estate for the benefit of the parties entitled, the shares of the estate so retained were to be treated as personal estate. It was very difficult, therefore, to say that they could take those shares of the real estate in a manner to be free and discharged from liability to duty under the act of parliament, because there was a direct trust to sell the estate, and although the shares under discussion were not to be sold, but retained, still they were to be treated as personal estate. The Court there decided, that the duty attached upon the amount of the part which was actually sold, and I think they came to a right decision. Indeed it was impossible they could decide otherwise. But they also decided that the duty did not attach upon the part which was unsold, and therefore they did not hold that the will contained a direction which was imperative, although it would be contingent. And in some of the cases it was so put, that it was not a conversion out and out, although, when the parties were allowed under the will to retain the real estate, it was to be treated as personal estate. I think, therefore, that goes a very long way to shew, that the decisions have not gone to the extent which has been supposed.

Then in the *Attorney-General* v. *Simcox*, it was supposed that the case of the *Attorney-General* v. *Mangles* had overruled the case *in re Evans*, though the Court made a distinction between the cases. I cannot say I think that to be the case; and therefore I think that, consistently with all the authorities upon the subject, your Lordships may hold the true construction of the will and of the act of parliament to be, that the duty does not attach in this case. I am clearly of opinion, that, without overruling any of the authorities, we may uphold the judgment of the Court below; and I must add, that this is a case in which I regret we are unable to give costs. The parties have been brought here at a great expense, and considering the nature of the case, and the fact that this appeal is made from the unanimous opinion of the Judges in Scotland, I very much regret that we cannot give costs.

Judgment affirmed.

For plaintiff in error, J. Timm, Solicitor of Inland Revenue. *Solicitors for defendant in error*, Maitland and Graham.

JUNE 22, 1854.

MRS. ISMENE MAGDALENA GLENDONWYN or SCOTT, *Appellant*, v. MRS. CLEMENTINA HERRIES MAXWELL, *Respondent*.

Fee and Liferent—Husband and Wife—Conveyance—Clause—Construction—*Lands belonging to a married woman were settled by her upon herself and her husband, and the survivor, whom failing, in favour of A (their eldest son) and his heirs whatsoever. The deed reserved a power of revocation and alteration in favour of the spouses, and the survivor. In a second deed they altered the destination by calling the heirs of A's body, and certain other heirs, in place of his heirs whatsoever. The second deed did not contain a renewal of the power of alteration, but confirmed the former deed, except in so far as altered.*

HELD (affirming judgment)—1. *That the surviving husband was absolute fiar.* 2. *That the power of alteration contained in the first deed was not exhausted by its exercise in the second.* 3. *That a disposition of the estate by the surviving husband, in favour of himself and his heirs whatsoever, was within the powers conferred upon him by the two deeds, and was therefore not reducible at the instance of an heir called under the second destination.*

Quære,—*How far the House can overturn a previous decision of its own: per* Lord St. Leonards.[1]

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[1] See previous report 12 D. 932; 22 Sc. Jur. 408. S. C. 26 Sc. Jur. 535.