THE ADVOCATE-GENERAL, . PLAINTIFF IN ERROR (*a*).

DAVID SMITH, ... DEFENDANT IN ERROR.

1854.
13*th*, 15*th*, *June*.

Legacy Duty.—Prior to the alteration of the law by Mr. Gladstone's Act, legacy duty was not chargeable upon real estate except where its conversion into personalty took place under some imperative trust or direction to that effect.

Hence where the conversion was a thing done at discretion, for the convenience or benefit of the parties, the claim of the Crown did not arise.

In such cases the words "to pay" did not necessarily denote conversion. They might be taken for "to transfer."

The case *In Re Evans*, before Lord Chief Baron Lyndhurst, *held* by Lord St. Leonards not to have been overruled either by the *Attorney-General* v. *Simcox* or by the *Attorney-General* v. *Mangles*.

BY certain instruments of a testamentary character, the testatrix conveyed her heritable and moveable estate to trustees upon trust, after payment of debts and legacies, "to pay the whole residue of the said trust estate and effects, heritable and moveable, to the Reverend William Duthy, whom I hereby appoint my residuary *legatee*; or to his heirs and *executors* whomsoever." She also conferred on the trustees power to vary securities.

The testatrix's property at her death consisted of an heritable bond for 16,000*l*. (in Scotland deemed real estate), and of 4000*l*. personalty. The trustees applied 10,000*l*. of the 16,000*l*. to pay debts and

(*a*) Reported in the Court below, Sec. Ser. xiv. 585.

legacies. They then invested the remaining 6000*l.* in their own names on real security by heritable bond; and on this sum the Crown, by its officers, claimed legacy duty under the 55 Geo. III., c. 84, Schedule part 3; and 8 & 9 Vict. c. 76, sect. 4.

The Court of Exchequer in Scotland held that legacy duty was *not* demandable. Against this judgment a writ of error was sued out in Parliament; and errors having been duly assigned, the same came on for argument in the House of Lords.

Sir *Fitzroy Kelly* and Mr. *Piggot*, for the Plaintiff in Error, cited *Attorney-General* v. *Simcox* (*a*), *Attorney-General* v. *Mangles* (*b*), *Ex parte Evans* (*c*), *Attorney-General* v. *Holford* (*d*), *Williamson* v. *The Advocate-General* (*e*), *Attorney-General* v. *Metcalfe* (*f*), *Hobson* v. *Neale* (*g*).

Mr. *Rolt* and Mr. *Willes*, for the Defendant in Error, cited *Cathcart* v. *Cathcart* (*h*), *Mules* v. *Jennings* (*i*).

The LORD CHANCELLOR (*k*):

Lord Chancellor's opinion.

My Lords, I am of opinion that the Court below came to a right conclusion in this case; and that there is nothing in the statutes, and nothing in the authorities, at all calculated to raise any reasonable doubt.

By the statutes, 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 is plain; namely, that the legacy duty being chargeable on the clear residue of the personal estate—

(*a*) 1 Exch. Rep. 749.
(*b*) 5 Mee. & Wel. 120.
(*c*) 2 Cromp. Mee. & Ros. 206.
(*d*) 1 Price, 426.
(*e*) 10 Cla. & Fin. 1; 2 Bell, 89.
(*f*) 6 Exch. Rep. 26.
(*g*) 8 Exch. Rep. 368.
(*h*) 8 Shaw & Dun. 803.
(*i*) 8 Exch. Rep. 830.
(*k*) Lord Cranworth.

THE ADVOCATE-GENERAL v. DAVID SMITH.

Lord Chancellor's opinion.

if a testator having real estate choose to direct that it shall be sold and the proceeds distributed, the Legislature has thought fit to treat real estate so circumstanced as chargeable, and to impose the same duty upon it as if it had been money in the possession of the testator at the time of his death. In the *Attorney-General* v. *Simcox* the testator, contemplating it as possible that it might be necessary, or convenient, to sell a portion of his real estates in order to equalise distribution, said,—"In that event I authorise the trustees to sell;" and the Court of Exchequer decided, 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 to sell, or that the power to sell was one which they were bound to exercise, the language of the will in such a state of circumstances amounted to a direction to sell. The Court held, in short, that it was just the same thing as if the testator had said, "Under such circumstances I *direct* you to sell." But 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 decision is founded in good sense, and has been followed in succeeding cases.

The testatrix in the present case had real estate; and had also personal property. By her will she gave legacies to a large amount. At the time, however, when she made it, her personalty was not nearly enough for the payment of those legacies. Whether she knew of that circumstance, and contemplated the necessity of selling the real estate to make up the deficiency, is uncertain: very likely she did not. But she directed those legacies to be paid, and gave 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

THE ADVOCATE-GENERAL v. DAVID SMITH.

well the real estate as the personalty. Then she gives the residue to the Reverend William Duthy. Now what is the meaning of saying that the trustees shall have power to sell? It may only mean 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, that Mr. Duthy might, at any moment, have interposed and said, "You shall not sell this heritable bond. I will pay those legacies, and take the heritable bond to myself." The case, therefore, is plainly distinguishable from *The Attorney-General* v. *Simcox*, where the direction, in a given state of circumstances, became absolute, to convert the real estate into personalty, and to distribute it as such.

Lord Chancellor's opinion.

I apprehend, my Lords, that this short way of putting the case exhausts it. I shall, therefore, say no more, but simply move that the judgment of the Court below be affirmed.

The Lord BROUGHAM: I quite agree.

Lord Brougham's opinion.

The Lord St. LEONARDS:

By the Succession Duty Act (*a*) all real estate, equally with personalty, is now liable to legacy duty; so that, in my opinion, it was no longer worth while, merely for the sake of making a rule in future cases, to insist on having this appeal decided by your Lordships; especially considering the very great care bestowed upon the question in the Court below.

Lord St. Leonards' opinion.

I apprehend that no legacy duty is chargeable upon this property.

It is said that the words of the will are "to pay." I think that is immaterial; because the gift is of the

(*a*) Mr. Gladstone's Act, the 16 & 17 Vict. c. 51, passed on the 4th August 1853.

THE ADVOCATE-GENERAL v. DAVID SMITH.

Lord St. Leonards' opinion.

heritable estate itself. The word "pay" is used in the same sense as "transfer." As to the power of varying the securities, I must observe, that where such a power is not imperative on the trustees, but is to be exercised for the convenience and benefit of the parties, conversion, in the sense meant by the statute, does not take place. Although this point may never arise again, I am anxious to show, that, in coming to the present decision, the House will not in any manner overrule what has already been decided. A case which was before a noble and learned Lord (*a*), who is not present, but who, I am happy to say, is still one of the ornaments of this House, appears to me to have been treated rather too lightly. I mean the case *In re Evans*. There, one part of the estates was sold for the benefit of the parties, and another part was sold under the direction of a Court of Equity. The Court of Exchequer decided (I think, very properly), that neither of these sales worked a conversion in the sense of the Act. But in the *Attorney-General* v. *Simcox*, the Lord Chief Baron makes this observation: "The only difficulty we have felt has arisen from the decision *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 sale directed by a will, but only 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 land sold. Possibly the Court might

(*a*) Lord Lyndhurst, then Chief Baron.

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." That, my Lords, is one of the circumstances in the very case now before your Lordships. The trustees have the power to re-invest the proceeds. But the Court of Exchequer affirm that the case *In re Evans* was overruled by the later case of *Attorney-General* v. *Mangles*, where, however, 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 to retain shares of the estate as real estate for the benefit of the parties entitled, yet those shares were to be treated as personalty. It was, therefore, difficult to say that they could take those shares in such a manner as to be free from duty; but the Court also decided that it did not attach upon the part which was unsold; and therefore they did not hold the direction to be imperative as to the whole of the property. I am of opinion that the *Attorney-General* v. *Mangles* did not overrule *In re Evans*; so that my conclusion is that, consistently with all the prior decisions, your Lordships may hold the true construction of this will and of the Act of Parliament to be that the duty does not, in the present case, attach; and I must add, that considering the nature of the question, and adverting to the fact that the appeal is from the unanimous opinion of the Judges in Scotland, I very much regret, that in affirming their decision, we cannot give costs (*a*).

Judgment affirmed.

(*a*) See *suprà*, p. 55, note, as to the rule against fixing the Crown with costs.

TIMM—MAITLAND & GRAHAM.