[16th March, 1843.]

[In error from the Court of Exchequer in Scotland.]

WILLIAM BOYD ROBERTSON WILLIAMSON, *Plaintiff in Error*,

Her Majestys' ADVOCATE GENERAL, *Defendant in Error*.

Legacy Duty — Real or personal — Terms of a will held to import an express direction to sell lands, so as to subject their value in payment of legacy duty, as on personal estate.

King — Costs — If, in a suit for legacy duty, the Crown takes a verdict for more than it is entitled, upon an appeal on this and other grounds, the Crown will not be allowed costs.

ON the 29th November, 1799, Alexander Robertson conveyed to trustees his whole heritable and moveable estate, chattels and effects, goods and gear, debts and sums of money; "as also all "lands, messuages, tenements, and hereditaments presently per- "taining to me, or that may pertain or belong to me at the time "of my decease, and particularly, without prejudice to the afore- "said generality, all and whole the lands of Forden, now called "Lawers," which were specially described. Then followed a conveyance of several heritable bonds, and the lands over which they were security — "but always with and under the conditions, pro- "visions, and reservations after specified and in trust always for "the uses, ends, and purposes, after mentioned, viz. Declaring, as "it is hereby expressly provided, that these presents are granted "by me, the said Archibald Robertson, with full power to my "said trustees before named, and to such other person or persons "as I shall appoint by a writing under my hand, at any time in "my life, and even on death-bed, or the survivors or acceptors of "them, and their quorum foresaid, and such other person or "persons, as my said trustees should think proper to assume in

" the event after mentioned, so soon after my decease as may be " judged expedient, to call for, uplift, and discharge, or convey, " the principal sums contained in the several heritable bonds " before assigned, or such parts thereof as shall then be remain- " ing due, penalties, and interest that may be due thereon, " if incurred; and also to call and sue for, receive, discharge, or " convey, or in any other manner and way to dispose, upon all and " every sum and sums of money that may pertain and belong to " me, whether vested in any of the public funds of Great Britain, " or secured on mortgage in England, or in whatever other way " the said sum or sums of money be vested or secured, and also " all other debts and sums of money due and addebted to me, by " whatever person or persons; and also to sell and dispose of the " lands, mills, teinds, woods, fishings, messuages, tenements, and " hereditaments, and others, hereby generally and particularly " disponed to them in trust, and that either by private sale, or " public voluntary roup, and by wholesale, or by parcels, on such " conditions, and at such prices, as they shall think fit. And for " rendering effectual such sale or sales, I hereby grant full power " to my said trustees, or their quorum foresaid, to grant dispo- " sitions," &c. " to the purchasers, with full power also to " my said trustees, or their quorum foresaid, to output and " input tenants, and to grant tacks for such rents and such " spaces as they shall think fit, the same not exceeding the " space of two years: and also to enter and receive vassals " in all such lands as are holden under me; and for that " purpose to grant charters and precepts of *clare constat*, and all " other writs necessary; as also to nominate and appoint, change, " output, and input factors from time to time, with such powers, " and liable to such diligence, as shall be thought proper for " receiving the rents," &c. " and annual-rents becoming due on " said heritable bonds hereby disponed, and prices of the said " lands and others when sold; with power also to input and out- " put a cashier or receiver-general, for receiving the rents from

" the factors, and for applying the same to the purposes of this " trust, in manner particularly after mentioned: Declaring " always, as it is hereby expressly provided and declared, that " my said trustees shall, by their acceptance thereof, be bound " and obliged, after the sale of the said lands, teinds, and others " before disponed, which I recommend to them to be done " as soon as convenient after this trust opens to them, to satisfy " and pay all my just and lawful debts," [then followed a direction to satisfy the provisions to his widow, in the maker's contract of marriage, and then to pay to such persons as he should appoint, such sums as he might direct;] " and after making pay- " ments of these sums, I hereby appoint my said trustees, or " their quorum foresaid, to make up, or cause to be made up, " a stated account of their intromissions and payments made in " virtue of this trust, and to denude themselves of the trust " hereby committed to them, by assigning, making over, or " paying the residue of my means and effects hereby disponed " to them in trust, including the right of fee of the sum to be " liferented by said spouse, in case she shall survive me, in so " far as the same shall not have been disposed of by me, to and " in favour of any person or persons I may think proper to ap- " point, by any writing under my hand, at any time of my " life, and even on death-bed; whom failing, to Rachel and " Ann Robertson, my sisters german, equally betwixt them, " share and share alike, or to the survivor of them, and the heirs " and assignees of such survivors; and on my said trustees " obtaining discharges of the sums I shall think proper to dispone " and bequeath as aforesaid, and on receiving a discharge or " discharges from my said sisters, or survivor of them, or the " heirs and assignees of the survivor, for the residue of the " moneys arising from the funds hereby conveyed in trust, if any " residue shall remain, or from the heirs or representatives of " such of my said legatees, and residuary legatees, as may have

" survived me, but died either before the sale of my said lands " and estate, or before the conveyance or payment is made to " them by my said trustees, I hereby declare, that such discharge " to my said trustees shall be full and complete exoneration to " them, of their whole intromissions had with the whole before " mentioned means and estate, heritable and personal, in virtue " of this trust-right: and father, as it will require time after this " trust opens to my said trustees, before they can turn my heri- " table subjects into cash, and uplift and receive payment of " the heritable and moveable debts due to me," [then followed a direction as to what was to be done in the case supposed.]

Upon the 1st of June, 1812, Archibald Robertson made another testamentary instrument, which recited, that he had executed the deed of 1799 in favour of the parties therein named, for certain purposes, and continued thus: — " amongst others, my said trustees are required to turn " my means " and effects thereby conveyed in trust into money, and to " content and pay, or assign and make over, to such per- " son or persons as I shall name and appoint, by a writing " under my hand, at any time of my life, and even on death- " bed, such sum or sums of money, or proportion or proportions " of the moneys arising from the subjects thereby conveyed and " disponed in trust to my said trustees: Therefore, in terms " of my trust-deed, and in the event of a child or children, " whether male or female, being procreate of my body of my " present, or any subsequent marriage, and existing at the time " of my death, then and in that case, I hereby direct and ap- " point my said trustees, and the quorum of them, to bestow " and employ the profits and produce of my said trust-funds, " remaining after the payments of debts and expenses, for the " use and behoof of the heirs of my body; declaring, that " as soon as my heir shall be married, or attain majority, " then my said trustees shall be obliged to denude of my whole

" trust-estate and funds, in favour of the heirs of my body, but " to return to my said trustees for the uses, ends, and purposes " mentioned in the said trust-right, in case of the failure of heirs " of my body, without otherwise disposing thereof after they " shall have attained majority. But in the event of my decease " without lawful issue of my body, of my present, or any sub- " sequent marriage, or in case of the failure of heirs of my body, " without otherwise disposing of my trust-estate and funds, then, " and in either of these cases, I hereby direct my said trustees, " or quorum of them, to pay the sums of money after men- " tioned to the persons after named, out of my means and effects " disponed and conveyed to them in trust." [Then followed a number of bequests of sums of money, one of them being a bequest of £4000 to the maker's widow, for the purchase of a jointure-house, and of the furniture in the house of Lawers, as far as she might choose, to complete the furnishing of her jointure-house.] The deed then continued thus: — " The residue of my " means and effects, including the right of the fee to the sums " vested and secured for the payment of the said annuities, so far " as not otherwise disposed of by me, I hereby direct my said " trustees to pay and make over to my two nieces, Archibald " Boyd Robertson, and William Boyd Robertson, as my residu- " ary legatees, share and share alike, or to the heirs or assignees " of my said neices who may happen to survive me, and who " may die before my said trustees may finally settle and wind " up my said trust-affairs: Declaring also, that the share of " such of my residuary legatees as may die before me shall fall " to the survivor of them, if not otherwise disposed of by me; " which legacies to the persons before named, I direct my " trustees to pay; and the same shall bear interest from the first " term of Whitsunday or Martinmas after my decease, or at " the first term of Whitsunday or Martinmas after the failure " of heirs of my body, without otherwise disposing of my trust-

" funds as before mentioned, or so soon thereafter, in either case, " as my funds conveyed in trust can be converted into money; " and the annuities to commence and run from the said term, " with the interest on the above legacies; but always with and " under the provision and declaration as to the payment of " interest on the legacies aforementioned, as is particularly con- " tained in my said trust-deed, before my funds are turned into " money: But declaring always, and it is hereby provided and " declared, that in case my means and effects disposed in trust, " shall not, when turned into money, be equal or sufficient for " the payment of the sums hereby appointed to be paid, then, " and in that case, each of the legacies to the persons above " named, (the legacies to my wife, Mrs Robertson, excepted,) " shall suffer a proportionable diminution or abatement, but " not the annuities."

On the 12th of February, 1813, Archibald Robertson died, without having left any heir of his body, or revoked the before recited testamentary instruments, the trusts of which were accepted by the parties therein named, who procured themselves to be infeft in the lands. At the time of his death, Archibald Robertson possessed the sum of L.30,000 in money, and L.20,300 secured by heritable bond. He was also possessed of the estate of Lawers, the free yearly rental of which, at the time of his death, amounted to the sum of L.2166, 0s. 11d. and its value to L.52,446.

The personal debts, funeral expenses, and expenses of trust, amounted to L.12,500, and the legacies, payable under the testamentary instruments, to L.20,700. The life-annuities given by the testamentary instruments, together with the jointure of the widow who survived him, amounted to the yearly sum of L.2045, and the value of the annuities, calculated according to the statute, was L.21,175, exclusive of the L.4000 to be applied in purchasing a house for the widow.

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The trustees realized the money secured upon heritable bond, and with it and the personal estate, discharged the debts, funeral expenses, and legacies of the testator; and out of the income of the surplus, and the rents of the real estate, they paid the annuities bequeathed. In this way a sale of the real estate did not become necessary, and accordingly no sale was ever effected.

Archibald Robertson was survived by his two nieces, Archibald Boyd Robertson and William Boyd Robertson. These parties, on the 22d of April, 1813, conveyed to the same persons as were trustees under the testamentary deeds of Archibald Robertson, their whole means and estate, real and personal, and "more "particularly, whatsoever sum or sums of money, or means or "effects, heritable or moveable, they or either of them might be "found entitled to, and to which they or either of them might "succeed, as the nieces and residuary legatees of the said deceased "Lieutenant-General Archibald Robertson, in virtue of his "trust-disposition and supplementary trust-deed, or deeds of "distribution," upon certain trusts.

Archibald Boyd Robertson died, and left William Boyd Robertson surviving her.

On the 25th of July, 1814, the trustees, under the deed of Archibald Boyd Robertson and William Boyd Robertson, of 22d April, 1813, in implement of one of the purposes of the trust to that effect, conveyed to William Boyd Robertson, as the survivor, the land of Lawers which had yet remained unsold under the trusts of Archibald Robertson's testamentary deeds, and, at the same time, they obtained from William Boyd Robertson an indemnity against the consequences of this conveyance, and an obligation to pay any of the debts, legacies, or annuities, of Archibald Robertson, then remaining payable. William Boyd Robertson then entered into the absolute enjoyment of the lands of Lawers.

In 1837, Her Majesty's Advocate-General filed an informa-

tion in the Court of Exchequer in Scotland, against William Boyd Robertson, claiming legacy duty on one moiety of the lands of Lawers, as being real estate directed to be sold. William Boyd Robertson pleaded *nil debet*, on which issue was joined, and thereafter the jury returned a special verdict, stating the matters which have been detailed. On this record, judgment was entered up for her Majesty for the whole instead of a moiety of the duty.

The plaintiff then brought her writ of error returnable in Parliament, which now came on to be argued.

Mr Simpkinson and Mr Gordon for the plaintiff in error. — The deeds do not contain any express direction that in any, and at all events, the lands should be sold; at most they suggest an apprehension in the mind of the maker, that a sale might be necessary in order to effectuate the purposes of the trust, and they contain simply a power given by him for that purpose, and that only; but the amount of the personal estate made it unnecessary for the trustees to effect a sale of the real estate, and therefore, as little from the purposes of the deeds, as from their expressions, can it be inferred that there was any direction to sell.

The terms of the clause of return, in the event of there being an heir of the granter's body, are quite inapplicable to the case of the whole estate being converted into money, as the money, on being paid to the heir, would instantly be mixed with his other funds, so as to make it impossible to ascertain whether he had, in the words of the deed, "otherwise disposed of the estate." This shews that there was no absolute direction to sell.

With regard to the other event contemplated, of there not being any heir of the granter's body, the event which happened, the circumstances made any sale unnecessary, and, as if the maker of the deeds had the possibility of this in his view, he does not simply direct the residue of his estate to be paid, as he had

done, in regard to the money provisions, but he directs it to be "paid" and "made over," — the first of these expressions being applicable to the case of a pecuniary residue, and the second to the existence of the estate *in specie*.

No doubt the testator has, in the second deed, recited, that he had "required" his trustees to turn his estate into money, but that recital will not affect the meaning of the terms used in the deed recited; but moreover, this recital is immediately followed by the provision for the event of there being an heir of the body, expressed in terms inapplicable to the case of the estate having been converted into money, shewing thereby that the requisition to turn into money was applicable only to the case of such an operation being necessary for the payment of debts and legacies.

In Attorney *v.* Halford, 1 *Price*, 426, though no sale had been effected, there was indubitably an express direction to sell. The Court, therefore, proceeded on the principle, that what was directed to be done should be considered as having been done. And in Advocate *v.* Ramsay's Trustees, 2 *Cro. Mee.* and *Roscoe*, 224, not only was there an express direction to sell, but the direction had been complied with, and a sale effected. But in the subsequent case of Attorney *v.* Evans, 2 *Cro. Mee.* and *Roscoe* 215, although sales of the real estate had actually been made, yet, inasmuch as they were not expressly directed, and had only been made as beneficial to the parties interested, it was held that legacy duty was not exigible.

LORD BROUGHAM. — My Lords, in this case I entertain no doubt whatever, and therefore I should suggest to your Lordships that the proper course to take will be at once to give judgment for the defendant in error, that is, for the Crown. The question in this case arises upon the event which has happened, of General Robertson leaving no heirs of his body. Their Lordships below, as I understand from those of your Lordships who

have read their opinions, consider that had he left heirs, the question could not have arisen. But however, we are relieved from all difficulty upon that, by his having left no heirs. He intended probably, that if he left heirs, there should not be a sale of his estate, except of such part as might be necessary to pay his debts, which would have been more than satisfied by the heritable bond, and by personalty which he had, and that the great estate of Lawers, should not be brought to sale in that event, but the trustees should denude themselves in favour of the heir; but if there should be no heir of the body, in that case there should be a sale. The whole question arises upon this, whether or not the will, or the two instruments in the nature of a will, taken together, amount to a direction to sell. If it amounts to a direction to sell the estate at the death of the testator, it was money, and to be dealt with as money, and the legacy duty attaches. In every respect it was money. In respect of its succession, it would go, not to the heir, but to the next of kin. It was money in respect of revenue, and was liable to the payment of the duty; and nothing that took place after that could alter the rights, either of the heir, unless he had precluded himself by contract, or of the crown. The state of the property, whether land or money, at the time of the death of the testator, is the only question, and by that state at that time must be determined, both the rights of private parties, with which we have nothing to do, except by way of argument and illustration, and the rights of the Crown, with which alone we have now any concern. My Lords, I think, taking the whole of these instruments together, I can entertain no doubt whatever that the intention of the testator was, and that he contemplated nothing else, than that in the event of his death, and without an heir of his body, the land should be brought to sale. It is a very remarkable expression to which I called the attention of the learned counsel, that where he is speaking of a sale, he says,

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" After such sale, *which* I recommend to be made as speedily as possible after my decease." In the stress of the argument, the counsel for the plaintiff in error, made an extraordinary perversion of the grammatical construction, and said, that " which" here, contrary to all the rules of grammar, is to be taken, not as applying to that immediately preceding, which forms the immediate antecedent.

My Lords, the only pretence for saying that, is the use of the word " done." I can see no one shadow of reason for so perverting and torturing the sense as to make the word " which" apply to the words which follow, rather than to the words which precede, except the use of the word " done." It may certainly be said critically, that the word " done" applies more to the act of payment than to the act of sale. You do not say to " *do* " a sale," so readily as you say, " to *make* a sale," or that the sale should take place. Nevertheless, it would still be a very great violence to its meaning to put any such construction.

Then, my Lords, I cannot leave out of view the way in which it is dealt with as residue; he says, " let the whole of my means " and effects," including the produce from the sale of the land which he has appointed to take place, " be divided between my " two neices, Miss Archibald Boyd Robertson, and Miss " William Boyd Robertson, share and share alike, as residuary " legatees." I go a good deal upon that. I think it leaves very little doubt of what he assumed to be the case, and what he intended should be the case; and I go upon it, not merely on account of the use of the words " residuary legatees," although clearly the expression " residuary legatees," applies much more to persons to whom a pecuniary residence is bequeathed, than to persons to whom an estate of inheritance is devised. Yet I agree that " legatee" is sometimes used for " devisee," as the expression " devise" is sometimes used for " legacy." But it is the dealing with the property that I look to. In this

clause it is dealt with as residue. "Let it be divided between "Miss Archibald Boyd Robertson, and Miss William Boyd "Robertson, share and share alike," as persons taking the residue of chattels personal.

Well, then, my Lords, last of all, I come to consider the way in which he deals with what he has done before, in the recital to his subsequent deed. Observe, that recital in the subsequent deed, expressly uses the word "required,"—"Whereas, amongst "others, my said trustees are *required* to turn my means and "effects thereby conveyed in trust, into money." It is a very good mode of construing an instrument, to take a man's own words when the meaning hangs doubtful upon the instrument, if it does hang doubtful, which I am disposed here to deny; but it is also a good mode of getting at the meaning, to see what he himself thought he had done. It is clear, that he thought he had not given a power, but an order, for it is a stronger word than "direction;" the word "required" is the strongest word he could use.

My Lords, these being the points upon which, running shortly over them, it appears to me that their Lordships in the Court below have come to a right conclusion, I hold, that it is for your Lordships, without hearing the respondent, to affirm it, and to give judgment for the defendant in error, the Crown. I will only advert in one word to the cases which have been cited. Evans *v.* Evans is a totally different case from the present; for in that case this expression was used, "sell such "part of the estate as may be wanted for the purpose of paying "the debts," and deal so and so with the residue. That is not this case. This is "sell the whole," whether it may be wanted or not, and deal with the residue in a totally different manner; give it not to the heir-at-law, but give it to the next of kin. It was not an estate of personalty at all; it was a charge upon the realty.

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Then as to the other case which has been cited, of Durie *v.* Cooles, the words there are, — to which I called the learned counsel's attention during his argument,—"if he shall think fit;" words empowering and giving a discretion. The author of the deed would never in that case have said, "Whereas I have "*required* my trustees to sell;" he would have said, "Whereas "I have empowered my trustees to sell." It was a mere power to sell.

Then the case of Cathcart is a totally different case; the remarkable difference is, that the person to whom the estate was made over was the heir-at-law.

My Lords, I am therefore clearly of opinion, if it should so appear to your Lordships, that in this case we have nothing to do but to give judgment for the defendant in error, with the variation by consent.

Lord Cottenham. — My Lords, I am entirely of the same opinion. It was alleged by the learned counsel for the appellant, that this case turned upon that which is a common question in the courts in this country, — whether this amounted to a conversion of the property, out and out, into personalty? or whether it was to be considered as a direction only to sell, for the purpose of paying off certain charges, debts, and so on? That is the criterion by which questions of this sort are determined. The decision turns upon the opinion formed, (varying, of course, in the different cases, with the different expressions used,) upon the question, whether it falls under one denomination or another. Now, my Lords, looking at these instruments, it does not appear to me that they raise a doubt upon this matter. It is not necessary that the words of the power should contain an absolute direction to the trustees to sell. The intention of the testator must be gathered from all the provisions of the deed, and I cannot find any provision in that deed which raises any question as to the intention of the author of the instrument, that the

estate should be sold in the event of the two nieces being entitled to take the property. In that power, he says, it shall be executed as soon as convenient. And then he proceeds to give the surplus of the property, and he describes it in terms indicative of money, the produce of the sale of the lands *in specie;* and then he provides, in terms which are very significant, for the interim management of the property. He says, "and farther, as it will require "time, after this trust opens to my said trustees, before they "can turn my heritable subjects into cash." He then provides for the interim management of the property.

And then, my Lords, comes the second deed. Taking all these expressions together, upon the construction of the first deed, I apprehend no real doubt can be raised; but in the second deed, he puts his construction upon what he has done; he says that he had required the trustees to turn the estate into money. Now, if this had been a case in an English Court of Equity, and the question was, whether it was a power out and out, there is no case within my recollection which would throw a doubt upon that subject; and cases have occurred in Scotland which shew that the rule of decision there has been founded upon the same principle as in this country, and therefore, that the law is the same in the two countries. It appears to me, my Lords, quite clear, that the two instruments, taken together, give a direction to sell, and convert the estate from land into money; and therefore the gift, which is the subject of the present appeal, is for the purpose of the legacy duty to be considered as a gift of money, and not a gift of land.

Lord Cambpell.—My Lords, it is quite sufficient for me to say, that looking at these deeds, I am thoroughly convinced, that by them General Robertson intended, that if he died without leaving a son, the estate of Lawers should be sold. He died without leaving a son, leaving no discretion to the trustees. Under these deeds they were bound to sell, therefore this is to be considered as liable to the duty.

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It is entirely distinguishable from those cases which have been cited, where there was merely a discretionary power which the trustees might exercise or not, that merely amounting to an equitable charge upon the real estate, and not converting the real estate into personalty.

My Lords, I have had the advantage of reading the very able and luminous judgments of Lord Jeffrey and Lord Cunningham, who gave judgment in the Court below. They seem to me to have reasoned it with great ability, and I entirely concur in the views that they took of this case.

Mr Twiss. — The judgment will be with costs. The crown, under the statute, is entitled to costs.

Lord Brougham. — No. There can be no costs. The judgment below is erroneous in giving the whole duty.

Mr Twiss. — The verdict was merely arranged, and the error crept in by mistake.

Lord Brougham. — The sum is expressly stated in the judgment. You might have saved the expense of the hearing by consenting beforehand to its rectification.

Ordered and Adjudged, that the judgment given in the Court of Exchequer, in Scotland, be affirmed, but with this variation, that her said Majesty may have execution against the said William, or Wilhelmina Boyd Robertson Williamson, for the sum of one thousand two hundred and forty-nine pounds, two shillings, and one half-penny, being the amount of duty payable by the said William, or Wilhelmina Boyd Robertson Williamson, by consent of parties, instead of for the sum of two thousand five hundred pounds in the said judgment mentioned; and that the record be remitted to the end such proceeding may be had thereupon, as to law and justice shall appertain.

RICHARDSON and CONNELL. — SOLICITOR FOR STAMPS AND TAXES, Agents.