Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Mayor, Aldermen, and Citizens of Canterbury v. Wyburn and others and The Melbourne Hospital, from the Supreme Court of Victoria; delivered 10*th November* 1894.

Present:

THE EARL OF SELBORNE.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

On the 13th June 1891 J. G. Beaney, an inhabitant of Melbourne and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the Appellants in the following terms:—

"I direct my said trustee to pay to the Mayor and Corporation of the said city of Canterbury for the time being the sum of ten thousand pounds, for the purpose of their buying a suitable piece of ground at Canterbury aforesaid and erecting thereon with as little delay as possible a free library and reading-room for the working classes; such building when erected to be called 'The Beaney Institute for the Education of Working Men.' And I also bequeath to the said Mayor and Corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid."

By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain Charitable Institutions in Melbourne, of whom the Respondents,

the Melbourne Hospital, have been selected to defend the interests of all. They contend here that the gift of 10,000*l*. to the Appellants must fail by reason of the English Statute law which restricts gifts to charitable uses.

The case was argued before Mr. Justice A'Beckett upon certain questions propounded for the Court to answer; and by his answers that learned Judge maintained the validity of the gifts and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to forbid such a testamentary gift. He adds:—

"If it had been shown that under the law as it stands in "England the Corporation of Canterbury could not lawfully "spend 10,000*l*. in buying land and erecting a building as "contemplated by the testator, and therefore that the object of "the testator could not lawfully be accomplished, I should not "direct the executors to pay the legacy to the Corporation. "This has not been shown. It appears that the Corporation "could lawfully have expended 10,000*l*. in this manner if the "testator had sent the money to them in his lifetime, and that "they will have the right to spend it in this manner if sent "them by his executors as directed by his will."

The residuary legatees appealed, and the Full Court varied the decision of the First Court by holding that the bequest of money was invalid, and, the residuary legatees consenting, that the bequests of chattels were valid. The reasons of the three learned Judges are in substance identical. They consider that as the 10,000*l*. is given for the purchase of land in England the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land.

From their order, holding the bequest of money invalid, the present appeal is brought; and their Lordships have to consider whether it is right. Of course there is no doubt of the competency of the English legislature to forbid such gifts. The question is whether it

has done so. It would seem that this is the first occasion on which such a question has come into Court for decision.

It appears to their Lordships that the arguments relied on by the Full Court, and by the Respondents' Counsel at this bar, err in exaggerating the amount of prohibition imposed by the English statutes, and in ascribing to it a more absolute effect than it really has. The Attorney-General indeed, in his argument for the residuary legatees, insisted on the title of the Act of 9 Geo. II., cap. 36, passed in the year 1736 :—"An Act to restrain the disposition of lands, whereby the same become unalienable." That title correctly expresses the object of the Act; but it is manifest from the preamble and the operative parts of the Act that it does not purport to restrain every such disposition, nor does the title say that it does. If there were an absolute prohibition of all gifts of land for charitable uses, Mr. Beaney's gift could not take effect. But as in fact the English statutes leave all persons as free as they were by Common Law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one.

The statute which now governs this question was passed in the year 1888 (51 & 52 Vict. cap. 42), and, according to a recent practice, it has no preamble to give the key to its policy. But it is mainly an Act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the Statute 9 Geo. II. cap. 36.

The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts in mortmain. Then it proceeds :—" Never-

" theless this publick mischief has of late greatly
" increased by many large and improvident
" alienations or dispositions made by languishing
" or dying persons, or by other persons, to uses
" called charitable uses, to take place after their
" deaths, to the disherison of their lawful heirs ;
" for remedy whereof be it enacted." This then was the mischief which the legislature desired to abate ; the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed death-bed gifts. The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class, at that date a much larger relative class than now, of personal estate ; and it declares that the prohibited gifts shall be absolutely null and void. Therefore in all cases of wills to which the statute applies such gifts are prohibited by its express terms.

It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the Colonies, and that question was settled in the negative in the case of *The Attorney-General v. Stewart*, decided by Sir Wm. Grant in the year 1817 (2 Merivale 143). He considered that both the mischief struck at by the Act, and the methods prescribed for lawful gifts, were of a local character, peculiar to England. Therefore he held that the Act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and

again when recovered in 1784. That opinion has ever since prevailed, and in the case of the *Gilchrist* foundation (*Whicker* v. *Hume*, 7 H.L. Rep. 124) it was applied to a gift of land in New South Wales.

In that state of the law the present Act of 1888 was passed. By Section 4, sub-section 1 it is enacted thus :—

> "Subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void."

The requirements of the Act are substantially those of the Act of 1736. If the assurance is of personal estate not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and, if it is not made for full valuable consideration, executed 12 months before the death of the assurors. By the interpretation clause the term "assurance" includes a will. This Act therefore, subject to some special exemptions, prohibits "death-bed" gifts as strictly as does the earlier Act. But it is impossible to suppose that the English Legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the Act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England, may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing indeed that the repealed and consolidated Statutes did not apply to the Colonies, and that Scotland and Ireland are expressly

excepted from the new Statute, it is impossible without express words to suppose that there was any intention of affecting the Colonies by the new Statute. Moreover Sir Wm. Grant's other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant Colony, or if not, that the gift should be invalid.

Indeed the case for the residuary legatees is not rested on any such broad ground as this. The Courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word "assurance" in the Act must receive the qualification that it means something which is governed by English law.

Of course it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail; not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the Act. They have reached the conclusion that this will is not invalidated by sub-section (1). At what point then of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a

purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees; by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will binding on his executors; and a Victorian Court of Justice should direct them to perform their obligation.

It has been contended very earnestly that the point is settled by the decision in *Attorney-General* v. *Mill* (2 Dow and Clark 393). In that case the testator was a native of Montrose. He spent many years in the island of Cariacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England, and resided first in London and afterwards in Bath, up to his death in 1805, fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in the purchase of land, ordering the income to be paid to certain Scotch trustees for the benefit of indigent ladies in Montrose. His will, with four codicils, all in English form, was proved in England. In his will and contemporaneous deed he described himself as of the island of Cariacou now residing in Marylebone. His codicils, it was stated at the bar, contained similar descriptions. His foreign assets were transmitted to England and were administered under the direction of the Court of Chancery and were the subject of a decree which paid no regard to the charitable

gift. Subsequently an Information was filed by the Attorney-General for the establishment of the charity by purchase of land in Scotland. It was held by Lord Lyndhurst, first in Chancery and afterwards in the House of Lords, that the testator must be taken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void.

It is now argued that the testator was a domiciled Scotchman, and that the case decides that a bequest of money in a Scotch will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scotch domicile is not warranted by anything to be found in the reports. In the meagre history of his life there is much to suggest arguments for an English domicile, and the Counsel for the Attorney-General who was contending for the validity of the gift did not suggest any other domicile. The word "domicile" occurs only twice in the reports of the case. In one of them (2 Dow and Clark 394) the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicile in Montrose; an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scotch origin of the testator, and his connection with Montrose, were only used as arguments to show that he contemplated the purchase of land in Scotland, a conclusion which one of the reasons appended to the Appellant's case urged the House to adopt "even if he "were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments, that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships.

It is true that Mr. Justice Story (Conflict of Laws Sec. 446) and Mr. Westlake (Private International Law Sec. 165) both treat the decision as covering the case of a foreign will. But on examining the case that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority.

The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that any one would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into Court, the experience of a century and a half tends to prove the futility of any such alarm. But however that may be, their Lordships must construe the words of the Statute according to their plain meaning, and leave it to the Legislature to enact further prohibitions, if found expedient.

The result is that their Lordships will humbly advise Her Majesty to discharge the order of the Full Court, except so far as it deals with the specific chattels and with costs. This will in effect restore the judgment of Mr. Justice A'Beckett. It has seemed right to both the Courts below that the costs of all parties to the litigation should be paid out of the testator's estate; those of the Plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships have been asked to follow the same course in disposing of the costs of this appeal; and the residuary legatees raise no objection. Their Lordships will order accordingly.