Lord Wensleydale.—But the second Appellant is the person who ought to bear the burden of that.

Lord St. Leonards.—We cannot enter into their respective merits. I think the better way will be to say that there shall be no costs; it is hardly possible to do justice otherwise.

The Attorney-General.—Our appeal was first. I do not desire to ask anything, but what is in conformity with what I understood fell from your Lordships with regard to the Appellant's costs, that he would be entitled to his costs out of the residue.

Lord St. Leonards.—Your appeal was against the intention of the testator, and after the decision in favour of that intention.

Lord Wensleydale.—Certainly the Appeal was brought upon very fair grounds. The arguments which have been now used in support of the decree are not those which were used in support of it when it was made.

The Attorney-General.—If one set of costs should be given, of course the Respondents will take their costs out of the estate.

Lord St. Leonards.—No costs are given.

Lord Wensleydale.—I should rather have thought that it would be right to give one set of costs, to be divided between the two parties. ...

Sir Richard Bethell.—If your Lordships give one set of costs to the Appellants, you must dismiss the second Appeal with costs.

[124] The Lord Chancellor (after consultation with the other Lords): It is the opinion of their Lordships that there should be no costs.

Decree affirmed without costs. Lords' Journals, 15 July.

WALTER G. WHICKER—*Appellant;* JOSEPH HUME and others,—*Respondents* [July 1, 8, 12, 13, 16, 1858].

[Mews' Dig. i. 108; iii. 304, 326, 391, 452, 443, 462, 506; viii. 233, 247, 273; xv. 249, 563, 661, 1221, 1227, 1234. S.C. 28 L.J. Ch. 396; 4 Jur. N.S. 933; and, below, 1 De G. M. and G. 506; 21 L.J. Ch. 406; 16 Jur. 391; 14 Beav. 509. On point (i.) as to effect of grant of probate, adopted in *Bradford* v. *Young*, 1884, 26 Ch. D. 667; *De Mora* v. *Concha*, 1885-86, 29 Ch. D. 300; 11 A.C. 551 (*Concha* v. *Concha*), and *In re Patience*, 1885, 29 Ch. D. 981; (ii.) as to Mortmain Act, approved in *Jex* v. *M'Kinney*, 1889, 14 A.C. 77; and *Canterbury* (*Mayor, etc., of*) v. *Wyburn* (1895), A.C. 89; (iii.) as to charitable bequest, cited in *Beaumont* v. *Oliveira*, 1868-69 L.R. 6 Eq. 537; L.R. 4 Ch. 314; (iv.) as to change of domicile, see *Moorhouse* v. *Lord* 1863, 10 H.L.C. 283; and *Douglas* v. *Douglas*, 1871, L.R. 12 Eq. 617.]

Domicile—Probate—Mortmain Act—New South Wales—Practice—"Advancement and Propagation of Education."

A will must be executed according to the law of the country where the testator was domiciled at the time of his death.

The grant of probate not appealed against, conclusively established that it was so executed.

A. was born in Scotland: when a young man he went to the East Indies, where he remained above 20 years in the Company's service: he then returned to Scotland and lived in Edinburgh, where he put his name on the books of the municipality, married, took a house, entered into business as a partner in a banking-house, and became a member of various societies there established. At the end of a few years he left Edinburgh in anger, the banking business had come to an end, and he took off his name from the books of the municipality and of the various societies, and declared his intention never to return to "Auld Reekie": he lived in London, first in lodgings, and then in houses hired for different periods, lectured on Oriental literature, and endeavoured thereby to increase the sale of some books which he had written on the Hindostanee language. At the end of some years he went to Paris to avoid

some annoyances in London, but never made any such declarations with respect to London that he had made with respect to Edinburgh, and he left his works in London, and likewise some ornamental furniture which he desired a friend to keep for him till his "return." He died in Paris, having just before made a will in the English form:

Held, that he had lost his Scotch, and obtained an English domicile.

[125] The Mortmain Act, 9 Geo. 2, 36, does not extend to New South Wales.

The 9 Geo. 4, c. 83, s. 24, refers to the laws regulating the administration of justice in the courts of New South Wales, and not to the general law of the colony.

A testator gave to trustees funds to be applied by them "according to their discretion for the advancement and propagation of education *and* learning all over the world:"

Held, that this was a valid charitable bequest, and was not void for uncertainty.

John Hay Gilchrist, was born in Edinburgh, in June 1759. In 1775 he went to the West Indies, remained there two years, and then returned to Edinburgh. In 1782 he went to the East Indies and entered into the Company's service. He acted at first as a surgeon; but afterwards devoted himself to the study of the Hindostanee and Persian languages, and was appointed to give lessons in them to the junior civil servants of the Company. On the establishment of the College of Fort William in Calcutta, he was appointed Professor of Hindostanee there, and held that appointment till 1804, when he resigned it and came to England, his then intention being merely to recruit his health. He never returned to India. He received a pension from the Company for past services. In 1804 he presented to George Heriot's Hospital, Edinburgh, the sum of £100 "as a small testimony of gratitude for his education there." He got himself admitted a burgess and guild brother of the city, had his armorial bearings recorded in the office of Lyon King of Arms, obtained a diploma of the Company of James VI., and in 1804 embarked in the wholesale linen trade at Edinburgh. During all this time, however, his principal actual residence was in the neighbourhood of London. He busied himself about literature, and on the 22nd February 1806, was appointed Professor of Oriental Languages at Haileybury, but resigned that appointment a few **[126]** months afterwards. Claiming to be connected with the noble Scotch family of Borthwick, he obtained a licence under the sign manual to use the name of Borthwick, in addition to his own, and procured a grant of arms from the Heralds' College, in which he was described as "John Borthwick Gilchrist, of Camberwell, in the county of Surrey, Doctor of Laws, Late Professor of the Hindostanee language in the College of Fort William, at Calcutta." In the latter end of 1806 he went to Edinburgh, enrolled his name on the books of the municipality, and entered into business as a banker, with James Inglis, for 14 years, to commence from 1 January 1807, with a proviso, that either party might dissolve the partnership at the end of the seventh year. In 1808 he married a Scotch lady, and had a residence in Nicholson-square, and became a member of several societies established in Edinburgh. In 1815 the banking partnership, which was not successful, was dissolved, as from the 30th June of that year. In June 1817, on account of some real or supposed affront, he quitted Edinburgh and came to London. In 1818 he again obtained from the East India Company the appointment of professor and lecturer in Hindostanee. These labours in teaching Oriental languages had for their chief object to sell his books on that subject, which had always remained in London. This continued till the 20th June 1825, during the course of which time he wrote letters declaring his intention never to see "Auld Reekie again," and, speaking on occasion of a particular matter which had occurred in Edinburgh, he described it as "a blow which dissolution cannot efface from a conscious retrospective mind, wherever it may wing its flight, and one that impels me to disown and deny my country as a tyrannical stepmother, to whom, since my return after a long absence, I owe nought save the deepest disgust." He sold his house at Edinburgh, and most of his furniture; but brought the rest to London; he likewise removed his **[127]** name from the books of the municipality and from the various societies of which he had previously become a member. He visited Edinburgh once or twice afterwards during the

life of his mother, and memorialised the sheriff depute and the inhabitants of Nicholson-square to have the name changed into Borthwick-square, but he was unsuccessful in this object, and he never expressed any intention of returning to reside in Edinburgh. In 1826 he took part in establishing the University of London, became a proprietor of shares therein, and accepted the office of professor of Hindostanee to the University, but resigned that office in 1828, and became a private lecturer on Oriental language. In 1833 he set up in London a newspaper, which failed; and in January 1834 he executed in London, a will according to the English forms. He had in the meantime paid some short visits to the continent, but in May 1834 he went to reside near Paris; and before going, wrote a letter, in which he said his reason for going to the continent was, that he was unwilling prematurely to expose either his wife or himself to those annoyances in the metropolis, where for six months they had both suffered severely in body and mind, also to say nothing of his purse, which his arch enemy was determined to sink to the lowest ebb, to torment him while labouring under a complication of evils, and one of them a dangerous disease, " when he was very far from having yet escaped, and that to flee from similar visitations in future, was the grand object of his wish, and he had requested his kind helpmate to cross the Channel once more in search of that tranquillity which he could not expect in his own country, while beset as he had been by needy and greedy blood relations, all sighing for his death."

In July 1837 he took a residence, with coach-house and stables, at Paris, on lease for three, six, or nine years, **[128]** determinable on six months' notice given before the expiration of the three or the six years. The lease also contained the following proviso, not to assign " in whole or in part without the consent, in writing, of the lessor. Only in the case of unforeseen events which shall force the lessee to quit Paris, or in another case also unforeseen, the interests of his family, the house may be let conjointly by the lessor and the lessee, the latter remaining responsible for the rent; or even the present lease may be cancelled at the end of six months' notice after one year of holding; and provided that the hiring shall only cease in the month of January." In 1840, being in London, he instructed his solicitor to prepare a will for him, which was accordingly done in the common form, and sent to Paris, but before its arrival there, Mr. Lawson, an English solicitor, practising at Paris, had prepared another. On the arrival of the English will, a codicil was added by Mr. Lawson, and the will and codicil were both executed on the 8th December 1840. The description of the testator inserted in the will was, " J. B. Gilchrist, of the city of Edinburgh, but now residing at 10, Rue Mategnon, in the city of Paris." At the time of making his will, he was possessed of the following property:—A freehold estate at Sydney, New South Wales; a freehold flat, or floor, in Hunter-street, Edinburgh; 100 shares in the Commercial Bank of Scotland, valued at £17,450; and £2000 capital stock of the Bank of England; household furniture in Paris; and 5842 copies of his Oriental works, and some ornamental furniture, which were in London, the last having been expressly left with friends to keep till his " return " to London.

The will gave to his wife his household goods, furniture and plate, linen, glass, china, carriage, horses, jewels, trinkets, wines, etc., and money in his house for her abso-**[129]**-lute use and benefit. And his estate at Sydney and in Edinburgh, and all his residuary, real and personal estate, he gave to Joseph Hume, Esq., M.P.; Charles Holland, Esq., M.D.; John Macgregor, Esq., one of the Secretaries of the Board of Trade; and John Bowring, Esq., LL.D. (all of London); and Robert Veritz, Esq., M.D., of Paris, physician to the British embassy there, on trust to convert the same into money, and to invest the produce (but so that it might be disposed of to charitable purposes), on trust to pay certain annuities, and then on such trusts as by any codicil he might direct. By the codicil he directed and appointed " that the trustees or trustee for the time being, shall stand possessed of, and interested in, the residue or surplus of the trust monies, stocks, funds, and securities thereby to them bequeathed in trust. Upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrolled discretion think proper and expedient, *for the benefit, and advancement, and propagation of education and learning in every part of the world,* as far as circumstances will permit."

The testator died at Paris on the 8th January 1841, and on the 13th January the will and codicil were proved by all the executors except Dr. Veritz in the Prerogative Court of Canterbury. In August 1841 they were duly registered and confirmed in Scotland.

On the 30th July 1841 the Appellant, as heir-at-law and one of the next of kin of the testator, filed his bill (which was afterwards amended) in Chancery against the executors (and other necessary parties), and the Attorney-General, alleging that, by the law of Scotland, the real estate of the testator did not pass by the will and codicil, that the real estate at New South Wales did not pass **[130]** thereby, but that all the real estate, after satisfying lawful charges thereon, belonged to the heir-at-law; that the trusts thereof were inoperative and void; that the residuary estate was undisposed of, and that, subject to the debts of the testator, the same by the law of the testator's domicile, belonged to his next of kin (exclusive of the widow's interest) and he prayed for a declaration accordingly, and for an account.

In November 1842, the executors filed their bill, praying that it might be declared that the will was well proved, and that the trusts thereof ought to be carried into effect.

By an order of the Court made in both causes, in January 1843, it was referred to Master Richards to inquire where the testator was domiciled at the time of his death, and who were his heir-at-law and next of kin. In December 1844, the Master reported, that the Appellant was his heir-at-law, and that certain other persons were his next of kin; and in November 1849 he made a farther report, by which he found that the testator was domiciled in London.

The Appellant excepted to this report, insisting that it ought to have been found, that the domicile was either Scotch or French. The exceptions were overruled by Lord Langdale (January 1851) (13 Beav. 366). The cause was heard before Sir John Romilly, who (April 30, 1851) declared the will to contain a good charitable bequest, and decreed accordingly (14 Beav. 509). The case was taken on appeal before the Lords Justices, and the decree of the Master of the Rolls affirmed (1 De G. Macn. and Gord. 506). The present appeal was then brought against both these decrees.

[131] Mr. Rolt and Mr. Greene (Mr. Morris and Mr. Springall Thompson were with them) for the Appellant.—There is not in this case, as in *Forbes* v. *Forbes* (1 Kaye, 341), any difficulty upon the question of domicile arising from two residences having been occupied at the same time by the testator. Here his domicile was French by virtue of residence at the time of his death, or it was Scotch as his domicile of origin. The Appellant contends that it was Scotch. That domicile of origin was not changed *facto et animo*, both of which must be conjoined to produce such a result: *Dalhousie* v. *M'Douall* (7 Clark and Fin. 817), *Munro* v. *Munro* (*id.* 842); and a man cannot be said to have lost one domicile till he has adopted another, *Somerville* v. *Somerville* (5 Ves. 750). This is the result of the cases collected on this subject in "Phillimore on Domicile" (p. 100, *et seq.*).

[Lord Wensleydale: Is it open to you to argue the question of domicile in this case after the grant of probate?]

It is. The first order made in this case by the Master of the Rolls was a direction for an inquiry what was the domicile of the testator at the time of his death. That order was never appealed against, but the inquiry was entered upon and a report made, and the confirmation of that report, on the Master's finding, is the first subject of this appeal.

[Lord Wensleydale: But is not the grant of probate conclusive *in rem* upon the question of domicile?]

It is not. The grant of probate is conclusive as to nothing except that a particular person is entitled to bear the **[132]** character of executor, *Thornton* v. *Curling* (8 Sim. 310), where Lord Eldon considered himself at liberty to examine into the question of the domicile. There may be a power created, giving A. authority to make a will. A. executes some paper; the Ecclesiastical Court admits that paper to probate; so far it appears to be a will; but a court of construction may afterwards say, that there has not been a due execution of the power, and that the paper is not, in law, a will at all. Again: a married woman may make a will, and the person named as executor may obtain probate in the Ecclesiastical Court, but in the Court

of Chancery, a court of construction, it may be shown that the will is the will of a married woman who had no special power reserved to her to make it, and then the executor, who has obtained the probate and the property in virtue of that probate, will hold it as a trustee for the person lawfully entitled. The decision of the Court of Probate and that of a court of construction may be the same, but they may also be opposed to each other. The former is not binding on the latter.

[Lord Wensleydale: Do you find any authority for that except the *dicta* of Lord Eldon in *Thornton* v. *Curling*? Can you question the validity of this instrument anywhere except in the Ecclesiastical Court? The question of domicile was open to you there. Probate would not have been granted, unless the will was in the form required by the law of the domicile: *Stanley* v. *Bernes* (3 Hag. Ecc. Rep. 373).]

That was a case which arose where there were two residences and it was doubtful which was the testator's domicile, and where he had executed a will and codicils both in the Portuguese and the English forms.

[The Lord Chancellor: The case of *Bremer* v. *Free*-**[133]**-*man* (10 Moo. P. C. C. 306) decided that the maxim, *Mobilia sequuntur personam*, is part of the *jus gentium*, and, therefore, that the post mortuary distribution of the effects of a deceased person must be made according to the law of his domicile at the time of his death; and, consequently, if the law of the country allowed the deceased to make a will, that will must be made as that law required.]

But there is no legal title conferred by such a document which can prevail everywhere and for all purposes. Here the executors had to go to Scotland to get a confirmation of their title with respect to the property there. The Ecclesiastical Court may decide who is entitled to administer the estate, but other courts will have to decide in what way the property is to be dealt with. Where a probate is granted by one court, as on a single domicile, the grant cannot conclude all other courts for all purposes whatever.

[Lord Wensleydale: For any other purpose with respect to a claim under the will.]

Then, as to the construction of the will; first, the will and codicil, supposing them to be unimpeachable in all other respects, did not have the effect of passing the freehold lands. By the will the testator directed his lands to be sold, and the produce to be invested and disposed of as he should direct by his codicil. Now, the codicil contains no words which affect freehold lands, the testator speaks only of the "trust monies, stocks, funds, and securities bequeathed" by his will; he never mentions lands. Yet he well knew the meaning of the words he employed, for, in his will, when speaking of his lands and his personal property, he uses the words properly applicable to these two things, and says, "devise and bequeath." **[134]** He has himself, therefore, made a marked distinction between these two sorts of property, and the Court cannot by mere implication attribute to him an intention which the words he has used negative. The lands, therefore, have not been disposed of, *Roe* v. *Walker*, where this point was, in fact, thus decided, though, from the erroneous omission of the word "not" from the marginal note it appears to be decided the other way (3 Bos. and Pul. 375. The mistake exists in the 8vo. Ed. 1826, but not in the folio Ed. 1804).

[Lord Wensleydale: The trustees are to sell the land and invest the produce for the purposes of the trust; and then the codicil directs that they shall dispose of the "trust monies, stocks, funds, and securities."]

The land at New South Wales cannot pass by this will. Assuming that the land is disposed of by the words used in the will and codicil, then the devise as to the land there is void, for it is a devise of land to charity, and is void under the Mortmain Act (9 Geo. 2, c. 36). It is a settled principle of colonial law, that in a country peopled from England, the law of England is in force there: Blackstone (1 Bl. Com. 107. See this subject considered, Clark's Summary of Colonial Law, p. 7, *et seq.* and 53, 54). It will be said that the Mortmain Act is not in force in New South Wales, first, as a matter of fact, because it has not been adopted by the local legislature there, as stated in an affidavit of Mr. Robert Lowe, formerly a barrister, practising in the colony; and next, as a matter of law, because it is not applicable to the condition of things in the colony; and the case of the *Attorney-General* v. *Stewart* (2 Mer. 143) decided by Sir W. Grant, will be relied on to show that, under

such circumstances, a statutory law of England does not apply to a colony. It is desired to bring the authority of that case under the review of this House. In that case **[135]** Sir W. Grant founds his judgment on this reasoning, that the Mortmain Act was passed in this country on account of circumstances of a peculiar character; that those circumstances did not exist in the colony of Grenada, as to which he was then adjudicating, and consequently the ground for the applicability of the statute did not exist. That reasoning is fallacious.

The actual mischief which occasioned the Act in this country might not yet have come into activity, but the same causes which gave rise to it really exist in the colony as they did exist in England, and the reason for having such a statute is the same in both places. If a case of this kind arose, the Courts in New South Wales would, no doubt, therefore at once declare its applicability as they have the power to do under the 9 Geo. 4, c. 83.* Besides the case of *Attorney-General* v. *Stewart* applies only to colonies governed by foreign laws; it relates to Grenada, which was governed by the French law, having been conquered from the French in 1763, but it cannot apply to New South Wales, which is a colony planted by **[136]** Englishmen, and in all such colonies the English laws are immediately in force.

[The Lord Chancellor: Grenada was formerly a French island, but after its conquest the English laws were introduced there.]

The will is void for uncertainty. The Crown has nothing to do with the matter, for here is a distinct trust, to be carried into effect by known trustees. Where there are conjunctive words, denoting several matters which may or may not be properly described as trusts, the words must be disjoined, in order to test what would be the power of the trustees in execution of the supposed trust. If that is done here, there will not be found any trust that the law can recognise as of a charitable nature. The funds are placed in the absolute discretion of the executors, to be employed "for the benefit, advancement, and propagation of education and learning in every part of the world as far as circumstances will permit." This cannot be called a gift in charity. In *Williams* v. *Kershaw* (5 Clark and F. 111 *n*) the words were, "for such benevolent, charitable, and religious purposes" as the trustees should think fit. The Master of the Rolls thought he could not construe all these terms conjointly, and so held the residue to be undisposed of. So in *Ellis* v. *Selby* (1 Myl. and Cr. 286), the words "to and for such charitable or other purposes," were held to create a trust, but a trust of so indefinite a nature that it could not be carried into effect. Here the words are: "Education and learning." Though the former may be within the statute of Elizabeth (43 Eliz. c. 4), the latter is not, for it may apply to rewards to be given to the successful exhibitors of matured science, which certainly were not within the intention of that statute. **[137]** *Morice* v. *The Bishop of Durham* (9 Ves. 399; 10 Ves. 521) was a case where the words were "objects of benevolence and liberality," and they were held to be inoperative to create a valid charity. And in *James* v. *Allen* (3 Mer. 17) the words "benevolent purposes," were held invalid. So in *Ommaney* v. *Butcher* (Turn. and Russ. 260), "to be given in private charity," were held insufficient.

[Lord Cranworth: You say that learning may receive a limited signification from being connected with other words?] Certainly. A trust to be valid, as a charitable trust, must be one that not merely may be, but must be capable of execu-

* S. 11, invests the courts of New South Wales and Van Diemen's Land with the powers of courts of equity, and s. 24, enacts "that all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith or with any charter, etc. issued in pursuance hereof) shall be applied in the administration of justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies; and as often as any doubt shall arise as to the application of any such laws or statutes in the said colonies respectively, it shall be lawful for the Governors and Legislative Councils, etc.," to establish them, together with any necessary modifications. "Provided that in the meantime it shall be the duty of the supreme courts, as often as any such doubts shall arise upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

tion. In *Morice* v. *The Bishop of Durham* the previous case of *Browne* v. *Yeall* (7 Ves. 50 *n.* See also 10 Ves. 27, per Lord Eldon) is referred to. There the words were: "In the purchasing of such books as, by a proper disposition of them under the following directions, may have a tendency to promote the interests of virtue and religion, and the happiness of mankind;" and this changeable sort of discretion was to be exercised under the directions of the Court of Chancery. That was held to be too indefinite. in *Vezey* v. *Jamson* (1 Si. and St. 69) the gift was "to charitable or public purposes, or to any person or persons in such shares, etc." as the trustees should think fit, and that was held to be too indefinite for the Court to execute the trust, the Vice-Chancellor there adopting the principle stated in *Morice* v. *The Bishop of Durham.* That principle is directly applicable here, for this testator might have desired the money to be laid out in printing the works of Confucius, and certainly would have deemed the publishing of his own works within the words of the charity.* **[138]** But the law would not give any such effect to the words. If there is one purpose in the bequest which the law does not treat as charitable, the whole bequest fails.

Mr. R. Palmer (Mr. Anderson and Mr. Bagshawe were with him) for the Respondents.—The decision of the Ecclesiastical Court is conclusive as to the question of domicile. That Court could not have proceeded without reference to the domicile, in declaring that the will was to be admitted to proof, and that question of domicile was distinctly raised, for it was alleged that the testator was domiciled in England, and that the will was to be determined by English law. The Appellant therefore cannot deny that the validity of the will itself was a question depending in the Ecclesiastical Court. If so, the decision of that Court is conclusive in the present appeal. *Thornton* v. *Curling* (8 Sim. 310) is not an authority the other way, for, on reference to the report of that case when it was in the Ecclesiastical Court (*Curling* v. *Thornton*, 2 Adams, 6), it appears that Sir J. Nicholl treated the question of domicile as irrelevant **[139]** with reference to the factum of the will, as he thought Colonel Thornton incapable of creating a French domicile, or as having had an English domicile, at the time of making the will, being then in London, and he threw on the Court of Chancery the necessity to examine into and to decide the question of domicile. But that mode of treating the question was completely overthrown by the decision in *Stanley* v. *Bernes* (3 Hag. Ecc. Rep. 373).

As to the fact—the testator here acquired an Indian domicile; then re-acquired his Scotch domicile of origin; then lost it, and acquired an English domicile, and never acquired any other.

[The Lord Chancellor.—Their Lordships are of opinion that the Scotch domicile is entirely out of the question. The contest is between an English and a French domicile.] The French domicile was a mere afterthought, and the opinion of their Lordships, in effect, puts an end to the question. For here there was no evidence of that acting *animo et facto*, by which alone a domicile can be acquired. The case of *De Bonneval* v. *De Bonneval* (1 Curteis, 856), shows that though length of time is an ingredient in domicile, it is of little value if not united to intention, and is nothing if contradicted by intention.

The Lord Chancellor intimated that their Lordships were of opinion that the

---

* The idea which the testator himself appeared to attach to the words of his will was in some measure indicated by the following paper found after his decease:—

"It having been for a long time my intention, after discharging the various claims as specified in my aforesaid will, and such farther annuities, grants, or bequests, as I, by this amendment, or codicil, thereto, give to the several persons named therein, to devote the remainder of my fortune for the encouragement of moral education, on the most benevolent principle, connected, nevertheless, with my system of a universal language, as set forth by me in a work,* the greatest part of which is already in print, as remainder of the whole residue of my property, after discharging the several claims as enumerated in my said will, and this my amendment, or codicil thereto, may be applied to the purposes aforesaid.

(Signed) J. B. GILCHRIST."

* "The Tuitionary Pioneer."

learned counsel need not trouble himself upon this point, nor as to the applicability of the Mortmain Act to New South Wales.

The property here is validly given for a charitable purpose. The "benefit of learning" must mean the advancement of learning. Now a devise for the maintenance of a school is good. A gift for the advancement of "education *and* of learning" cannot be bad; for they are, if **[140]** not actually synonymous, at least not opposed to each other.

The cases cited on the other side do not affect the present. In *Morice* v. *The Bishop of Durham* (9 Ves. 399; 10 Ves. 522), it was determined that benevolence did not necessarily, and liberality did not at all, signify charity. That cannot apply to education and learning. So in *Vezy* v. *Jamson* (1 Si. and St. 69), the bequest was to charitable or public purposes, or to such private persons as the executors might think fit; which left it entirely doubtful whether anything charitable was intended. So in *Nash* v. *Morley* (5 Beav. 177), where the devise was for the benefit of "poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families of good character," and the doubt was, whether the word "poor" ran through the whole sentence, the devise was held good. In *Ommanney* v. *Butcher* (Turn. and Russ. 260), the devise of the residue was held void because it was "to be given in private charity," which was held to be an object too indefinite to give the Crown jurisdiction, or to enable the Court to execute the trust; and in *Kendall* v. *Granger* (5 Beav. 300), where the words were "for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility," Lord Langdale held the gift void, for the words "general utility" would comprehend many things that were not at all in the nature of charity. But such cases as these do not touch the present, where the gift is for the propagation of education, a purpose that the Legislature has recognised as legal.

It may be doubted whether *Browne* v. *Yeall* (7 Ves. 50 *n;* 9 Ves. 406; 10 Ves. 27) would receive the same decision if now, for the first time, pre-**[141]**-sented to the Court, as indeed Lord Eldon more than once intimated. These and many other cases were collected in that very useful work, Shelford on Mortmain (p. 68, *et seq.*). In *Townsend* v. *Carus* (3 Hare, 257), the trust was for such purposes having regard to the glory of God in the spiritual welfare of his creatures, as the trustees, should, in their discretion, think fit; the gift was held to be good for religious purposes, but was restrained to them. In *Powerscourt* v. *Powerscourt* (1 Moll. 616), the trust was to lay out "£2000 per annum till my son comes of age, in the service of my Lord and Master, and, I trust, Redeemer;" and it was held good as a charitable devise, because, as Lord Manners said, it could not be distinguished from a bequest to pious uses, which was good. *Nightingale* v. *Goulburn* (5 Hare, 484; 2 Phill. 594) following *Moggridge* v. *Thackwell* (7 Ves. 36), shows that it is no criterion of a charitable bequest that it is not capable of being administered by the Court of Chancery, for that that must be the case with every charitable gift which was to be administered under the sign manual. There the bequest was of residue to "the Queen's Chancellor of the Exchequer for the time being, to be by him appropriated to the benefit and advantage of my beloved country, Great Britain," and it was held to be good. So in *Loscombe* v. *Wintringham* (13 Beav. 87; see the note to this case, p. 89) a gift to the society for the increase and encouragement of good servants, was held valid. And in *The President of the United States* v. *Drummond* (at the Rolls, 12 May 1838, M.S.), a gift of residue to found at Washington, under the name of the Smithsonean Institution, an establishment for the increase and diffusion of knowledge among men, was sustained, **[142]** on the ground that knowledge must mean sound and useful knowledge, and anything for the benefit, advancement and propagation of that, was for the advantage of mankind.

Extent of purpose in the bequest, and largeness of discertion vested in the trustees, do not constitute an objection, of which the strongest possible instance is furnished by *Horde* v. *Lord Suffolk* (2 Myl. and K. 59), where the gift was of £180, to be paid annually to a lady for her life, to be by her distributed, in her discretion, to private individuals or public institutions, without limitation or control; and after her death, to be paid to another person, and the survivor, etc., and "to be given away in charity in the same manner as the rest of the money as I have directed my executors, etc." This was held a good charitable gift, and being left to the absolute

discretion of the legatees, rendered a scheme unnecessary. The general result of the cases is that where the bequest clearly points to what the law considers to be a charity, effect is to be given to it. That is so here.

The Solicitor-General (Sir H. Cairns), with whom was Mr. Wilkins, was heard in support of the validity of the will.

Mr. Rolt replied.—The very large and indefinite words of this will would be satisfied by the trustees founding scholarships in Turkey and Persia, for the acquirement there of the languages of those countries, which certainly could not be called a charitable purpose in an English will. The bequest in *Nightingale* v. *Goulburn* was good, because it was for English purposes only.

[143] The Lord Chancellor (Lord Chelmsford) after stating the terms of the will and codicil, said.—Upon the argument at the Bar three main questions were raised: first, upon the domicile of the testator; Secondly, whether the Statute of Mortmain, 9 Geo. 2, c. 36, applied to a devise of lands, situated in New South Wales, and rendered the devise for charitable uses void; and, thirdly, whether the trust upon which the residue was given, constituted a valid charitable bequest. Upon the point of domicile, an objection was made on the part of the Respondents, that it was not competent to the Appellant to enter into that question, inasmuch as it was concluded by the probate of the will which had been granted by the Prerogative Court. And it is necessary, therefore, very shortly to consider what is the effect of a grant of probate upon a question of this kind.

Now, there is no doubt that it is the province and the duty of the Ecclesiastical Court to ascertain what was the domicile of the party whose will is offered for probate, in order to ascertain whether that is a valid will, the testator having complied with all the requisites of the law of the country in which he was domiciled. But if probate is granted of a will, then that conclusively establishes in all courts that the will was executed according to the law of the country where the testator was domiciled. Supposing the fact to be, that the testator was domiciled in a foreign country, and the will was not executed according to the law of that country, still, if it had been admitted to probate by the proper Ecclesiastical Court here, no other Court could go back upon the factum and raise any question with respect to the validity of the will.

That seems to be exemplified and established by the case of *Douglas* v. *Cooper* (3 Mylne and K. 378). There a married woman, under **[144]** the power of appointment in a marriage settlement, which was to be exercised by a will, to be executed with certain formalities, made an instrument, which was admitted to probate by the Ecclesiastical Court, and the Master of the Rolls held that he was concluded by the judgment of the Ecclesiastical Court granting probate, from considering the question, whether it was a will; namely, whether it was such an instrument as was required by the power, and that the office and duty of the Court were confined to the consideration of the question, whether that instrument was executed with the formalities which were required by the powers.

Therefore, I apprehend, that this will having been admitted to probate, it must be taken to be a valid will wherever it shall turn out that the testator was residing at the time of his death, but that the place of domicile is still open for consideration, and also the validity of the bequest contained in the will, and the effect of it according to the law of the domicile of the testator. The question, therefore, being open for consideration as to where the testator was domiciled at the time of his death, it will be necessary to enter shortly into the consideration of the evidence upon that subject, upon which I apprehend that your Lordships will feel no very great difficulty.

The testator was a native of Scotland, born there in the year 1759. In the year 1782, being then of the age of 23, he went to India, and shortly afterwards entered into the service of the East India Company as a medical officer. He continued in the service of the East India Company in India till the year 1804, and by his services with the East India Company, he acquired what has been called in several cases an Anglo-Indian domicile. He returned to his native country in the year 1804, married there in 1808, and shortly after his return he retired from the service of **[145]** the East India Company upon a pension which he enjoyed down to the time of his death, which was in the month of January 1841.

There is no doubt that his domicile of origin, revived by his return to, and

residence in, his native country. But it is unnecessary to pursue the circumstances of that residence, because your Lordships have already intimated a very strong opinion that in the year 1817, and in subsequent years the circumstances showed that he had relinquished that domicile of origin, and that the real contest was between two alleged subsequently acquired domiciles. In the year 1817, as I have already stated, he quitted Scotland, never permanently to return, and established himself in London. He was a person well skilled in Oriental languages and literature; he was the author of several Oriental works, and, at the time he came to London, he had a large stock of those works on hand at his booksellers. And it was alleged that the reason of his coming to London was to promote the sale of those works. He seemed to have considered that the best mode of advancing his object was to give public lectures on Oriental literature; and about the year 1821 he obtained employment from the Directors of the East India Company, as professor of the Hindostanee language, for three years, which was renewed at the expiration of that time for a farther term of three years, and, afterwards, for one year, which brings us down to the year 1828. At the expiration of his employment under the East India Company, he lectured gratuitously, as it is said, for the purpose of facilitating the same object which he had in view, and which brought him to London.

Upon his first arrival in London with his wife, he went into furnished lodgings, and continued to reside with his wife in furnished lodgings down to the year 1822. He then took a furnished house in Clarges-street at a rent of **[146]** £400 a year, and he lived in that house for five years, at the end of which time he removed to another house, No. 38, in the same street, which he occupied for another year. That again brings us down to the year 1828. During the time he was residing in Clarges-street, in the years 1825, 1826, and 1827, he made excursions to the continent, but kept on his house in London, and returned from time to time to his residence. In the year 1828 he went abroad and lived in various parts of the continent for three years, down to the year 1831. He then again returned to London. He appears to have remained a very short time in London in that year, 1831. He went abroad in the same year, whether for pleasure or for health is wholly immaterial; but he remained abroad upon that last occasion from the year 1831 down to the year 1833, and again he returned to London. In the month of May 1833 he proposed to establish a newspaper, and for that purpose he took a house in the Strand, and he continued to hold that house, having employed persons to assist him in this undertaking or speculation, of a newspaper. He held that house for a year, but the speculation entirely failed. In the year 1834 he abandoned it, and in that year, 1834, he quitted England for Paris, and he only returned to England occasionally from the year 1834 down to the period of his death in 1841, namely, in the years 1839 and 1840.

Now, my Lords, the question is, whether, during the long period which I have mentioned, from the year 1817 down to the year 1834, the testator having clearly abandoned his domicile of origin, he had not acquired a new domicile in England. And I think your Lordships will entertain very little doubt that such a domicile was, in point of fact, acquired. It seems to me, that the nature of his residence and his constant returns from the continent, bring that residence completely within the definition **[147]** of domicile which is given in the Digest (Bk. 50, tit. 16, s. 203): "*Unde cum profectus est, peregrinari videtur; quod si rediit peregrinari jam destitit.*"

If, then, he had acquired a domicile in England, the question is, whether he ever lost that domicile by the acquisition of another. And that will depend upon whether the former domicile had been abandoned by the acquisition of a new one, intentionally and actually, *animo et facto*. And it will be necessary, therefore, to consider what were the circumstances under which it was alleged that the French domicile was acquired. I have stated, that he went abroad in the year 1834. In the year 1837, he took a second floor in the Rue Martignan, in Paris, for a period of three, six, or nine years, determinable, after the first year's occupation, upon a six months' notice, at a rent of 3500 francs, amounting to £140 a year, and with a stipulation that he should place in the apartments sufficient furniture to be a security for the rent. But the question, first of all, arises, did he manifest any intention of abandoning the English domicile which he had acquired?

Now, let us observe what happens with reference to the English domicile. At the

time he went abroad, in the year 1834, he left with his solicitor a number of private papers and his library of books. There was a large stock of books still remaining on hand at his booksellers. I do not lay much stress upon that circumstance. There was an insurance upon the books to the extent of £3000, but, of course, he could not remove them, it would not have answered his object. He also left several trunks and boxes and packages and a bookcase at Holland's warerooms in Great Pulteney-street, it appears, where they had been warehoused occasionally from the year 1827, and they were left there down to the year 1840, he paying ware-**[148]**-house rent for them during the time. And in the year 1840, nine of those packages were removed to Tilbury's, I think, in High-street, Marylebone, where they remained till after the death of the testator, when, a year or two afterwards, they were removed by the widow, and warehouse rent paid for them.

Now, the circumstance of his leaving this property in England appears to me very strongly to indicate an intention to return to this country when circumstances rendered it desirable for him to do so. He was very far advanced in life at that time, and he died at the age of 82, and if he had intended to make France his permanent residence, he would of course have removed all his property, and would never have been at the expense of having to pay warehouse rent for it. And there is one circumstance upon this subject which appears to me to be almost conclusive with respect to the fact of his domicile, in the evidence of Mr. Allen, the bookseller, in which he says, "that on the occasion of the testator's going abroad in or about the year 1839, he deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his return to London, and that the same remained in my possession at the time of the decease of the said testator." Therefore, I think it is quite clear that there is no evidence whatever of an intention to abandon the domicile which he had clearly acquired in England.

Then, was there any intention to reside permanently in France, so as to acquire a domicile there? Now, I leave out of consideration the expressions which may be scattered here and there through letters which are to be found in the voluminous correspondence printed in the Appendix, because I believe your Lordships will find expressions with respect to each country of an intention to reside perma-**[149]**-nently there. I think it is rather more important to consider what is the actual evidence upon this subject, upon which it appears to me to be extremely difficult for the Appellant now to contend that the domicile was French. For what was the course which he took? When the case was before the Master of the Rolls, the Appellant does not appear at that time to have ever dreamt of the testator having acquired a French domicile, for the whole of the evidence, from the beginning to the end, is presented for the purpose of establishing that his heart clung to Scotland, that he had no other views in life but returning there, and dying at home at last.

Now, my Lords, I intimated my opinion, or rather threw out a suggestion in the course of the argument, that the evidence which was given by the Appellant in this respect completely destroyed any evidence in favour of French domicile; that every expression, every indication of a wish and intention to return to Scotland, and end his days there, loosened the idea of his intention to acquire a French domicile. And if your Lordships look through the whole of the evidence upon this subject, I think it will be found, that with the exception of some of the casual expressions, which I have adverted to in the letters, the only evidence which can be rested upon for proof that he then intended to acquire a French domicile, is the arrangement for taking the apartments in Paris, for three, six, or nine years, upon which, at all events, he hung with sufficient looseness to enable him to detach himself from them at a very short notice after the first year of occupation.

What, then, is the result? The domicile of origin was abandoned, and a new domicile was acquired by his residence in England; that new domicile was never relinquished, no fresh domicile was obtained in France; consequently, the English domicile remained undisturbed, and **[150]** that was the domicile of the testator at the time of his death.

That brings me to the second question, which is, as to the effect of the Statute of Mortmain upon a devise of lands in New South Wales. In the course of the argument, your Lordships intimated a strong opinion that the Mortmain Act did not

apply to the colonies, at all events not to the colony of New South Wales. It will, therefore, be necessary for me to address your Lordships only very shortly upon that subject. I consider that this question is almost determined by the opinion of the Master of the Rolls, Sir William Grant, in the case of the *Attorney-General* v. *Stewart* (2 Mer. 143), because, although a distinction was sought to be established between that case and the present by reason of the island of Grenada, which was the colony in that case, being a conquered country, and this being a settled colony, yet I apprehend it will be found, that unless the Act of 9 Geo. 4, c. 83, applies to this particular case, the principle involved in the decision of Sir William Grant would be completely conclusive on the present question. It is true that the inhabitants of a conquered country have those laws only which are established by the Sovereign of the conquering country, and that the colonists of a planted colony, as it is said, carry with them such laws of the mother country as are adapted to their new situation. But the opinion of Sir William Grant related generally, I think, to the Statute of Mortmain, as applicable to all colonies, for he says, "Whether the Statute of Mortmain be in force in the island of Grenada will, as it seems to me, depend on this consideration, whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to **[151]** any country in which it is by the rules of English law that property is governed. I conceive that the object of the Statute of Mortmain was wholly political; that it grew out of local circumstances, and was meant to have merely a local operation. It was passed to prevent what was deemed a public mischief, and not to regulate as between ancestor and heir the power of devising, or to prescribe as between grantor and grantee the forms of alienation. It is incidentally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged."

Now, I think, upon general principles, if the question were without reference to any act of the Legislature, whether the Mortmain Act was applicable to the situation of New South Wales, I should most decidedly, without any hesitation, come to the conclusion that it was not; and therefore, I think it would be necessary for the Appellants to show that under some Act of Parliament that particular law was transplanted to the colony, and was ingrafted upon the law and institutions there. Now, the Act which they apply to this case appears to me to have been entirely misunderstood. I do not think that the 24th section of the 9 Geo. 4, c. 83, applies to this particular case of a law of policy being applicable to the colony.

What is the Act of 9 Geo. 4? It is an Act "To make farther provision for the administration of justice," and for that purpose a Court is established. The greater part of the Act consists of regulations and rules for the government of that Court, and then the 24th section provides, "That all laws and statutes in force within the realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any charter or letters patent, or Order in Council, which may be issued in pursuance hereof), shall be applied in the administration of justice in **[152]** the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies;" and then it provides for ordinances being made in doubtful cases, to say whether the law shall extend to the colony or not: "Provided always, that in the mean time, and before any such ordinances shall be actually made, it shall be the duty of the said Supreme Courts, as often as any such doubts shall arise, upon the trial of any information or action, or upon any other proceeding before them, to adjudge and decide as to the application of any such laws or statutes in the said colonies respectively."

Now it would be a most extraordinary thing that this provision should apply to those general laws to which the argument of the Appellant seeks to apply it, and that the colonists of New South Wales should not at all know under what law they were living, until they had brought an action, and until in the course of that action they had ascertained by the determination of the Judges, that the particular law about which they were ignorant, was really applicable to the colony. I consider that there is a limitation with regard to the particular laws, which are referred to by this Act of Parliament; and that it applies to laws for the administration of justice in the Courts of New South Wales, that if any question arises as to the laws which are applicable to the modes of proceeding in the Courts there, the Judges are to

decide upon that question, incidentally arising in the course of the trial of any information or action brought before them, whether the law is or is not applicable to the colony.

Then that being so, it being necessary for the Appellant to show that there is some Act of Parliament which applies the Mortmain Act to the colony of New South Wales, and this Act being referred to as the only authority upon the subject, I apprehend that it really has no application to **[153]** this case; that it has been misunderstood, and that neither by common law nor by Act of Parliament, is the Mortmain Act applicable to a devise of lands in New South Wales.

My Lords, the only remaining question that arises upon the words of the bequest in the codicil is, as to whether this is a good charitable bequest of the testator, by which these stocks, funds, and securities, are given to trustees "upon trust to apply and appropriate the same in such manner as the said trustees or trustee shall, in their absolute and uncontrolled discretion, think proper and expedient, for the benefit, advancement, and propagation of education and learning in every part of the world." And it appeared to be conceded in the course of the argument, that if the bequest had stopped short at the word "education," the gift would have been good. But it is said that the word "learning" is a word of very extensive signification, and that you may benefit learning in various ways, which would not be charitable. And in the course of the argument, an illustration was borrowed from the argument of counsel before the Master of the Rolls in this case (14 Beavan, 509). It was suggested in the course of the argument there, that if you could suppose any one instance in which learning might be benefited by applying the funds in a way that would not come within the description of a charitable object, that would make the bequest invalid and void. Now it appeared to me, when that argument was put forward, that that was rather begging the question; because it was first of all putting a construction, and a very extensive construction, upon the word "learning," which possibly it may be found not necessarily to bear; and it was only by putting that wide construction upon it, that you could suppose **[154]** that there were purposes to which the fund might be applied, which would not come within the description of a charitable object. The word "learning" is a word which is susceptible of various meanings. It is rather extraordinary that in Archbishop Whateley's work upon logic, it is placed among the equivocal words, that is words which have two significations. He says, "'learning' signifies either the act of acquiring knowledge, or the knowledge itself. *Exempli gratia*, he neglects his learning; Johnson was a man of learning." Now the question is, in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select that meaning of the word which will carry out the intention and objects of the testator; and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression), to the word "learning" which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word "learning" the word "education," I think that from the society itself in which you find the word, your Lordships may gather the meaning which it is necessary to put upon it, and that he means the word "learning" in the sense of imparting knowledge by instruction or teaching. Well, if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word "education," although not precisely synonymous with it, and it is admitted in the argument that if the word "education" had stood alone, the bequest would have been valid.

But then it is said, that the bequest is of such an extensive nature, that it is impossible that it can be carried into effect; that it extends over the whole habitable world. **[155]** But, I apprehend, my Lords, that there is no difficulty whatever with regard to the extensive character of this gift, because of the trust, for the subject upon which the discretion of the trustees is to be exercised is specific and limited. It is for "education" and for "learning" in the sense of teaching and instruction. And, in that sense, it appears to me, that the case which was cited by the Respondents, and which is printed in the Respondent's case of *The President of the United States of America* v. *Drummond* (at the Rolls, 12 May 1838), may be applicable, where Lord Langdale decided, that a gift to the United States of America, to found, at Washington, under the name of the "Smithsonian Institution, an establishment for the in-

crease of knowledge among men," was a valid charity. There the area was as spacious and extensive as in the present case. The particular mode in which the object of the testator was to be carried out was described, namely, by founding an institution for the increase of knowledge among men. Here it is to instruct, to teach, and to educate throughout the world. Then the mere circumstance of this spacious area being open to the discretion of the trustees, would not prevent the gift from being available as a good charitable bequest, the discretion being sufficiently pointed and specific to make it definite and certain.

Under these circumstances, my Lords, without going into the different authorities that have been cited, because I do not think it is at all necessary, it appears to me, that giving that interpretation to the word " learning," which, I think, we are entitled to give to it, and to which its association with the word "education," seems to me necessarily to point, this, according to all the authorities, is a valid charitable bequest. And, therefore, upon the whole **[156]** of the case, I submit to your Lordships that the decrees of the Court below ought to be affirmed, and affirmed with costs.

Lord Cranworth.—My Lords, my noble and learned friend has gone through this case so very fully, that it seems to me I shall be best discharging my duty by adding very little to what he has already said. I will, therefore, only allude very briefly to all the different points.

The first question made is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicile. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else. That may be illustrated in this way. Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question, how is the court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for, by the law of that country, the property must be administered. Therefore, if the testator, in the case I have supposed, had given away all his property, consisting of £10,000, it would be the duty of the Court that had to construe the will to say **[157]** £5000 only can go according to the direction in the will, the other £5000 must go in some other channel. Therefore, I think it is clear, that that proposition is one that cannot be maintained. In truth, however, in the present case, in my opinion, it is utterly unimportant with reference to the result, because, from the first moment when I understood this case, and saw my way into the very great mass of letters and papers and evidence in it, I could not entertain a moment's doubt that there is nothing here to lead to the notion of anything but an English domicile.

I will not go into the circumstances prior to 1817, and only very few of them afterwards; but in 1817, I think the evidence is conclusive, that this gentleman quitted Scotland, intending to quit it for ever. I do not mean that he did not contemplate at some time or other going back again to visit Scotland, but that he never meant to be otherwise than a non-Scotchman, an Englishman, in truth, because he came and settled himself in London. It is said that he was only in lodgings. That is not true; for five or six of the last years he was in England, he was in a house in Clarges-street, first in one, and then in another. I am not prepared to say that it would make any difference if he had been in lodgings only, or, to use a common expression, only lying at single anchor, so that he could easily go away. That may be a circumstance making it less probable that he meant to establish a residence in that place. It is, however, only a circumstance. Why, how many people are there who have lived all their lives in Chambers, in Inns of Courts. Nobody can doubt that they are domiciled there, although that may not be the sort of place in which persons marrying or settling are in the habit of being found. This gentleman, however, in 1817, came to London; he was here for four or five years, **[158]** at different lodgings, in Arlington-street, and afterwards in two successive houses in Clarges-street, all this time prosecuting his avocations in life, endeavouring to make the knowledge which

he had acquired, and the works which he had printed, available for profit, and endeavouring to get an increase of income by pensions from the East India Company; in short, conducting himself to all intents and purposes as being at home. After that, undoubtedly, he passed a considerable portion of the remaining years of his life abroad. I think he first went abroad for a short time, and then returned again, and was in London up to 1833. And he then endeavoured, as my noble and learned friend has pointed out, to establish a newspaper in London, another indication of this being his place of residence. That did not answer, and from that year, 1833 or 1834, he was principally in Paris, where he died in January, 1841; principally in Paris, but continually coming to London. And I think the circumstance which has been pointed out by my noble and learned friend proves to demonstration that he never abandoned the intention of coming back to this country. He was a person above 80 years of age, and when one sees a man of that age providing for what shall come after a lease of three or six years, one cannot help feeling that the great probability is that he would be in his grave before that time has expired. But that was not this gentleman's view of the case, because he left his library here in the custody of his solicitor, Mr. Braikenridge, to be taken care of till he returned; and in the most marked manner, in the year 1839, Mr. Allen, the bookseller, says, "He deposited with me a handsome ornamental clock and some pictures, in order that I might keep the same for the said testator during his absence, and until his *return* to London." How can you doubt that he looked to London as the place to which, as it were, he belonged?

[159] That being so, I might leave that part of the case; but I think it is not inexpedient on questions of this sort to say, that I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. You may much more easily suppose, that a person having originally been living in Scotland, a Scotchman, means permanently to quit it and come to England, or *vice versa*, than that he is quitting the United Kingdom, in order to make his permanent home, where he must for ever be a foreigner, and in a country where there must always be those difficulties which arise from the complication that exists, and the conflict between the duties that you owe to one country, and the duties which you owe to the other. Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam.* But that is not a presumption at which we ought easily to arrive, more especially in modern times, when the facilities for travelling, and the various inducements for pleasure, for curiosity, or for economy, so frequently lead persons to make temporary residences out of their native country. It appears to me, therefore, preposterous to suppose that this gentleman did not look to return to this country.

Upon the subject of the domicile, my noble and learned friend has alluded to one definition which he said came from the Digest. It is also to be found in the Codes (Bk. 10, tit. 39, s. 7), and was a principle of Roman law. There have been many others, but I never saw any of them that appeared to me to assist us at all in arriving at a conclusion. In fact, none of them is, properly speaking, a definition. They are all illustrations in which those who have made them have sought to rival one another **[160]** by endeavouring, as far as they can, by some epigrammatic neatness or elegance of expression to gloss over the fact that, after all they are endeavouring to explain something *clarum per obscurum.* By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it. I think the best I have ever heard is one which describes the home as the place (I believe there is one definition in which the "*lares*" are alluded to), the place "*unde non sit discessurus si nihil avocet; unde cum profectus est, preregrinari videtur.*" I think that is the best *illustration*, and I use that word rather than *definition*, to describe what I mean. It is perfectly clear that, in this case, it was competent to those who questioned this will, to go into this matter, and to ask where he was domiciled, with a view to see how the property was to be distributed. But having done so, they have failed to show that he was domiciled anywhere else than in this country, where, therefore, the property would have to be administered.

Then comes the other question, that of the Mortmain Act, which is new to me, because there was no appeal upon that subject when I had the honour of being one of

the Lords Justices (1 De G. Macn. and Gord. 506). The other two points were before us, and therefore are not new to me; although I did not express my opinion at length upon that occasion, because I entirely concurred with my learned colleague in the view he took of the case. And nothing that has happened in this argument has at all tended to shake me in the opinion that the conclusion at which we arrived is a perfectly correct one.

With regard to the question of the application of the **[161]** statute of Geo. 2 to the colonies, I think the decision of Sir William Grant upon that subject is perfectly conclusive. Nothing is more difficult than to know which of our laws is to be regarded as imported into our colonies. But there, again, like the definition of domicile, we are always driven to explain by something that itself wants explanation just as much as the subject we are endeavouring to explain. The Act says, "All the laws adapted to the situation of the colony." Who is to decide whether they are adapted or not? That is a very difficult question. But with regard to this Statute of Mortmain, ordinarily so called, I cannot have the least doubt that that cannot be regarded as applicable to the colonies. One thing that the Act requires is, that the deed is to be enrolled in Chancery within six months. When that statute was passed, I believe people would have thought it very chimerical to imagine that they could get from the antipodes to this country, and back again to the antipodes in six months. It might possibly have been done, but it would have been thought a remarkably good voyage; and to suppose that an Act of Parliament is to be held to be in force which requires something so difficult to be performed, as applied to those distant colonies, seems to me very chimerical. But, besides that, there is the exception in favour of the Universities and the Colleges of Eton and Winchester. It is absurd to suppose that any enactment of this sort could be meant to apply to those distant possessions of the Crown. And more particularly there is no evidence whatever that the evil which that statute was meant to remedy, namely, the increase of the disherison of heirs, by giving property to charitable uses, was at all an evil which was felt or likely to be felt in the colonies. I think it therefore quite clear that that statute does not apply to New South Wales.

Then, with regard to the charitable gift for education **[162]** and learning, it is said that "benefit of learning" would not be charity; but what is the meaning of "education" and "learning"? If I remember rightly, Lord Justice Knight Bruce said, I think it means just the same as if he had said, "education in learning." It was objected, you cannot say that, because that would alter the words. Now, you are not to alter the words of a will if by doing so you give a different meaning to it. But where you have expressions so very vague as these used, "for the benefit, advancement, and propagation of education and learning," you must see what the words mean, looking at them in their context, and there I think, *noscitur a sociis*, learning there is the correlative of teaching; it is the being taught. It is for the benefit of educating and teaching only, that, instead of "teaching," the correlative verb is used, namely, the being taught. The meaning is exactly the same. My noble and learned friend has pointed out that "learning" is a word of very equivocal meaning. You talk of having had a "learned education." Strictly, that is nonsense; still less is there any sense in talking about "the learned languages." What is the meaning of that? It means the languages that are learned by people of high education. But, coupling the word "learning" with "education" here, it is evidence that it means education, and education for the benefit of those who are to be taught; and I think that, impliedly, it means this, that they are to be taught that which commonly passes in the world under the name of learning; that is, they are not to be taught how to tame horses, or (I was going to say) how to guide ships, but perhaps that is something which might be taught. But it is for education, as connected with learning, that this charity was meant to be established.

Well, then it is objected that it is extended all over the world. I can only say that I think that was a silly pro-**[163]**-vision; but I cannot say that it creates a fatal objection to the validity of the will, because the testator has said not that it shall be applied all over the world, that would be absurd; but that it shall be for the benefit of mankind in general, in every part of the world, as far as circumstances will permit. In settling the scheme for this charity, it will be the duty of the Court to see that the

trustees make it as extensive as the nature of the income will permit. Therefore, in conclusion, I cannot have any doubt whatever that it is a perfectly valid charity.

Lord Wensleydale.—My Lords, in this case I agree entirely with my noble and learned friends who have preceded me, and I really wish to offer very little in addition to what they have said. The main and principal question in this case is one of fact, and it has been very properly determined by the Master of the Rolls upon the facts in evidence, that the deceased at the time of his death was domiciled in England. It is perfectly clear that he had lost his Scotch domicile and acquired an English one; and therefore the only remaining question was, whether, after having acquired an English domicile, he lost it by acquiring a French domicile. It is perfectly clear to me, that it is as distinctly proved as it can be, that when the testator began to reside at Paris, in the year 1837, he did so without the intention of making that city his permanent place of residence. The very terms in which he took the lease for three, six, or nine years, with the option of quitting at any time upon giving six months' notice, or of quitting it before, the apartments being let jointly by the lessee or lessor, shows that he had at that time no intention of fixing his permanent residence there. And there is other evidence, concluding with that of Mr. Lawson, who made his will, showing distinctly that he never went **[164]** to France with the intention of permanently residing there.

I think it is quite unnecessary to enter into the question of domicile, though I do not quite agree in the difficulty presented by my noble and learned friend who last spoke as to the definition of "domicile." There are several definitions of domicile, which appear to me pretty nearly to approach correctness. One very good definition is this: Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter his intention; I also take the definition from the Code, which is epigrammatically stated, and which I think will be found perfectly correct, that domicile is "in eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit." I think that definition, if examined in all its parts, will be found to be tolerably correct, and that, if well applied in this case, it will lead to a proper conclusion as to where the testator's domicile was at the time of his death. I perfectly agree with my noble and learned friend that in these times of visiting abroad, transferring oneself even for years abroad, you must look very narrowly into the nature of the residence abroad before you deprive an Englishman living abroad of his English domicile. In this case, I apprehend it to be perfectly clear, and the evidence alluded to leaves no doubt upon my mind that he went over to Paris for a temporary purpose; that he never meant to reside there permanently; that his domicile, his establishment, his principal residence, was meant to be in this country; and he never abandoned it. Therefore I think that conclusion to which the Master of the Rolls came, with respect to his domicile, was perfectly right.

[165] Then it becomes quite unnecessary to discuss the proposition as to the effect of the probate of the will in the Court of Canterbury. I do not know whether I should not agree with my noble and learned friend opposite, with a little explanation I have to give upon that subject, though I do not entirely agree with the proposition as laid down by him. I take it, that probate of a will in common form is conclusive evidence of the title of the executors to all personal property of which the testator was capable of disposing; it is also conclusive evidence that it was executed in due form according to the law of the country where he was domiciled at the time of the death, because it is beyond all question that the principle of *mobilia sequuntur personam* is completely and entirely established. I take it to be a perfectly clearly established proposition at this day, confirmed by the case of *Stanley* v. *Bernes* (3 Hag. Ecc. Rep. 373), that the succession must be regulated according to the law of that country where he was domiciled at the time of his death, and that to make a valid will it must be executed according to the forms of the law of that country. Therefore, a probate given in Canterbury, until revoked, must be considered as proof of the will being the will of a fully capable testator, and that it was executed according to the forms of the country in which he was domiciled at the time of his death. That I apprehend to be perfectly clear. If the will is proved in solemn form, as this was,

the probate is incapable of being revoked, and the law of the domicile must be taken to be the law regulating the succession. At the same time, supposing it should turn out that in some particular country (which is, indeed, the case in France under certain circumstances, and in Scotland) that the testator had not the power of disposing of the whole of **[166]** his personal property, then I agree with my noble and learned friend, that this instrument will only convey such property as, by the law of the country, he was entitled to dispose of by will. But it is conclusive evidence for that purpose. If it could be shown that there was a part that belonged to the widow and children by the law of that country where he was domiciled, the will would have no effect upon that part. It would be a nice question, what would be the effect of the probate if he died domiciled in a country where there was no power to make a will at all. My impression is still, that, until the probate was revoked in solemn form, it would still pass, as far as England was concerned, all the property to which the English law applied, and that the objection that he could not make any will at all ought to be set up in opposition to the will in the ecclesiastical court; and that it could not be set up in any way afterwards. I apprehend that my noble and learned friend will hardly dispute the qualification which I have added to the proposition which he has stated.

There remain, therefore, to be considered only two questions upon the construction of this will; and the reasons which have been given by both my noble and learned friends are so very clear and satisfactory, that it is really unnecessary for me to add anything. With respect to the property in New South Wales being liable to the Act of the 9th Geo. 2, it seems to me to be quite out of the question, for the reasons given by both my noble and learned friends, and in the Court below, which I think are perfectly satisfactory.

With respect to the construction to be given to the words in question in the will, I agree entirely in the opinion that the testator did not mean any part of his property to be devoted to the purposes of learning, unconnected with education, but that he meant it for education and **[167]** learning connected with education, it being part of the office of education to teach. The word "learning" is an equivocal word, not merely to the extent stated by my noble and learned friend on the woolsack, but to a much greater extent, for it means not only to learn in the ordinary sense, but also to teach. In the translation of the Scriptures, in the Psalms, for example, there are many instances of that sort. "Learning," therefore, I consider, in this case, equivalent to teaching; learning, as part of education. No portion of this charitable fund can be devoted by the trustees for the purpose of rewarding learned men, unconnected with education. It seems to me, therefore, that the conclusion which has been arrived at by the Master of the Rolls is perfectly right, and I agree entirely in the advice which has been given to your Lordships by my two noble and learned friends, both with respect to the construction of the will and with respect to the will not being subject to the Statute of Mortmain.

Mr. Greene.—Will your Lordships permit me to make an observation with regard to costs? The original Appellant sued *in formâ pauperis*, that continued down to the time of his death; therefore, I presume, your Lordships' order as to costs will begin from the time when the cause was revived.

The Orders and Decree appealed from were affirmed, and "the Appellant ordered to pay to the Respondents, who have answered the said appeal, the costs incurred by them in respect of the said appeal since the 24th August 1857, the date of the Order of this House, reviving the appeal in the name of the Appellant."—Lords' Journals, July 16, 1858.

---

[168] PHILIP R. CONRON,—*Appellant;* CHRISTOPHER R. CONRON and Others, *Respondents* [July 26, 27, 30, 1858].

[Mews' Dig. xv. 1646, 1659, 1660. Distinguished in *Cornwall* v. *Saurin*, 1886, 17 L.R. Ir. 595; and see *Robertson* v. *Broadbent*, 1883, 8 A.C. 812; *Bank of Ireland* v. *M'Carthy* (1898), A.C. 181.]