If there was inability to perform—if the contractual act had become impossible—then upon the second ground above stated the contract would, no doubt, determine by the operation of the implied term that if the act proved to be impossible the contracting parties were not bound. But the point is not open upon the facts of the present case. The contractual act had not become impossible, and the cargo owner when he acted knew that it had not become impossible. The shipowner's letter of the 8th October was not, I think, an expression of intention at all, but assuming that it was, it results only in this. The shipowner, I will assume, says—"My contract has become impossible; I am not going to perform it." The cargo owner replies—"Your expression of intention not to perform is made in ignorance of the real facts; the contract has not become impossible, but I will accept your expression of intention and will elect to determine the contract." To say that that is a *consensus* to determine the contract seems to me impossible.

In my view abandonment at sea is not an operative cause but only evidence, although it may no doubt be strong evidence, of intention. If the owner voluntarily abandons at sea it may well be that the *onus* is on him to show the *animus revertendi*. If he abandons only in the sense that he is compulsorily dispossessed by violence, the abandonment, or as I prefer to call it, the dispossession, does not in itself effect anything in affecting the contract. If the owner having been dispossessed by violence does by words or by conduct express an intention not to seek to regain possession, no doubt the option arises in the cargo owner to treat the contract at an end. Nothing of that kind arose here. The owner did not abandon in any way as an act of volition; having been dispossessed by violence he did no act to express an intention not to seek to regain possession. He did in fact seek to regain possession, and subject to the prior rights of the salvors I think he was entitled to take it. For these reasons I think that the appeal must be allowed and judgment entered for the appellants upon the claim for £14,050, 2s. 9d. and upon the counterclaim, with costs of both claim and counterclaim.

Their Lordships allowed the appeal with expenses.

Counsel for the Appellants—Mackinnon, K.C.—L. Noad. Agents—Downing, Handcock, Middleton, & Lewis, Solicitors.

Counsel for the Respondents—Leck, K.C.—R. A. Wright, K.C.—Lequesne. Agents—William A. Crump & Sons, Solicitors.

HOUSE OF LORDS.

Monday, October 28, 1918.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lords Dunedin Atkinson, and Phillimore).

CASDAGLI *v.* CASDAGLI.

(On Appeal from the Court of Appeal in England).

Foreign—Domicile—Extra-territoriality—Acquisition of Egyptian Domicile of Choice by a British Subject—Jurisdiction.

The appellant pleaded as a bar to divorce proceedings before the English Courts that he had acquired an Egyptian domicile of choice. The Courts below decided it was impossible for a British subject to acquire an Egyptian domicile.

Held that a British subject may acquire an Egyptian domicile, and the appellant had in fact done so; therefore the English Courts had no jurisdiction to dissolve the appellant's marriage.

Re Tootal's Trusts, 23 Ch. D. 532, and dicta of Lord Watson in *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, *overruled*.

Decision of the Court of Appeal (1918, P. 89) *reversed*.

The *facts* fully appear from the considered address of the Lord Chancellor:—

Lord Chancellor (Finlay)—This appeal arises out of proceedings for divorce taken in the Divorce Court in England by the wife (the respondent in this appeal) against her husband (the appellant). The husband by act on petition alleged that he had acquired a domicile of choice in Egypt, that there was no English domicile, and that the English Court had no jurisdiction to entertain a suit against him for dissolution of marriage. The wife by her answer set up that the husband had never abandoned his domicile of origin, which was English, and that the Court therefore had jurisdiction.

Evidence was taken orally and upon affidavit. The case was tried before Horridge, J. He held that he was bound by authority to decide that a British subject registered as such at the British Consulate could not in point of law acquire a domicile in Egypt, and his decision was affirmed by the majority of the Court of Appeal (Swinfen Eady, L.J., and Warrington, L.J.), while Scrutton, L.J., dissented, holding that there was no rule of law against the acquisition of a domicile in Egypt by a British subject.

From the decision of the Court of Appeal the present appeal is now brought to your Lordships' House. The facts are not in dispute, and the only question is whether it is in point of law impossible for a registered British subject to acquire a domicile in Egypt. It was contended for the respondent that this point had been decided in her favour by Chitty, J., *in re Tootal's Trusts*, 23 Ch. D. 532, and by the Judicial Committee in *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, and that these cases had been correctly decided and ought to be followed by your Lordships' House.

It is admitted that the appellant is and always has been a British subject. He was born in England in 1872, his father being a naturalised British subject residing in England and carrying on business there and in Egypt. The appellant was taken to Egypt in 1879 on account of his health, and remained there until 1882, when he returned to England. He was educated in England and in France, and returned to Egypt in 1895, when he was twenty-three years of age. He resided in Alexandria from 1895 to 1900, and was engaged in his father's business there. In 1900 he went to Cairo to manage the business in Cairo, and has resided in Cairo from that time until the present. He always has been and is a member of the Greek Orthodox Church, and the respondent, who was born in Egypt, is a member of the same Church. They were married according to the rites of their Church in Alexandria on the 1st July 1905, and on the 5th of the same month the civil marriage took place at the British Consulate at Alexandria. The appellant was taken into partnership by his father, together with the appellant's four brothers, in 1910. The father died in 1911, and since his death the appellant has carried on the Egyptian branch of the business along with two of his brothers. The appellant has been and is registered as a British subject at the British Consulate at Cairo.

Horridge, J., found that the appellant had fixed his residence in Egypt with the intention of residing there for an unlimited time. He decided against the husband on the question of jurisdiction, not at all upon the facts as to residence, but simply on the ground that in point of law it was impossible for a British subject to acquire a domicile in Egypt on account of the extra-territorial rights which British subjects there enjoy. The same view was taken by the majority of the Court of Appeal.

Until December 1914 Egypt was in the contemplation of law a part of the Ottoman dominions, but in that month the suzerainty of the Sultan of Turkey was terminated and Egypt became a Sultanate under the protection of Great Britain. The Capitulations which had long governed the position in Egypt of the subjects of Great Britain and other European Powers remain in force at the present time. These Capitulations are a series of treaties with the several European Powers. The Capitulations between Great Britain and the Sultan of Turkey were confirmed by the Treaty of the Dardanelles in 1809, and by sec. 16 of that Treaty it was provided that disputes amongst the English themselves should be decided by their own magistrate or consul according to their customs, without interference by the Turkish authorities. Consular Courts were accordingly established for the decision of such disputes between English subjects, not relating to land, and such courts are now regulated in Egypt by the Egypt Order in Council of His Majesty dated the 16th February 1915. By that order the jurisdiction of the Consular Courts which had been established by His Majesty in Egypt under the Capitulations was continued. These courts deal with disputes, not relating to land, the parties to which are all British subjects, and all questions affecting the personal status of a British subject must be determined in the Consular Courts. There are also in Egypt what are termed Mixed Courts for the purpose of dealing with disputes between foreigners of different nationalities, or between foreigners and natives of Egypt. These Mixed Courts were established by the Khedive in 1875 after negotiations with the European Powers. They are Egyptian courts which administer the law promulgated formerly by the Khedive and since December 1914 by the Sultan of Egypt. The courts of first instance consist of seven judges—four foreigners and three Egyptian; while the Court of Appeal consists of eleven judges—seven foreigners and four Egyptian. The judges are appointed by the Egyptian Government after communication, in the case of foreigners, with the Government of the country to which they belong. These courts have criminal jurisdiction over foreigners in the matters enumerated in the *Règlement d'Organisation Judiciaire pour les procès mixtes*, and have civil jurisdiction over all civil and commercial disputes between Egyptians and foreigners and between foreigners of different nationalities not relating to the law of personal status. They have also exclusive jurisdiction in actions relating to immoveable property to which foreigners are parties. The jurisdiction of the Mixed Courts in these matters is defined by Art. 9 of Titre I of the *Règlement*—"Ces tribunax connaîtront seuls des contestations en matière civile et commerciale entre indigènes et étrangers et entre étrangers de nationalités différentes, en dehors du statut personnel. Ils connaîtront seulement des actions réelles immobilières entre indigènes et étrangers ou entre étrangers de même nationalité ou de nationalités différentes."

It is therefore clear that foreigners residing in Egypt are subject to the law of Egypt and to Egyptian courts, with exceptions in the case of disputes, all the parties to which are of the same nationality or which relate to the law of personal status.

The Turkish Government had been in the habit of exacting tribute in the form of capitation tax from Unbelievers permitted to reside in Ottoman territory. By the Capitulations British subjects were exempted from this tribute. During the argument your Lordships were referred to Mr J. H. Scott's work on the Law Affecting Foreigners in Egypt (revised edition), in which at p. 171 and the following pages the question of taxation as affecting foreigners in Egypt is discussed. The learned author in summing up the law on this point says (at p. 172)—"As a matter of fact, no tax of any inportance exists at the present time in Egypt which is not paid by foreigners as much as by natives." The land tax is payable by foreigners under the law of 1867, and would appear to have been payable by custom before that date, and the house tax is also payable by foreigners—(pp. 173, 174). Custom dues are payable by foreigners—(p. 173). All these matters have formed the

subject of agreement between the various Powers and the Government of Egypt, and it has been held by the mixed tribunals that no tax can be imposed upon foreigners without the consent of their own Government.

The Consular jurisdiction over British subjects in Egypt is exercised under the Order in Council of the 7th November 1910, modified as regards Egypt by the Egypt Order in Council of the 6th February 1915, which was made after the renunciation of allegiance to Turkey and the constitution of Egypt as a separate Sultanate under British protection. There is a Supreme Consular Court sitting at Alexandria, and Provincial Courts are provided for by art. 17 of the Order in Council.

The Court has jurisdiction over British subjects in Egypt and any property there of any British subject, as also in respect of British ships within its limits. It has also jurisdiction in certain special cases with regard to Ottoman subjects and foreigners with the consent of their Government. Its jurisdiction is in matters criminal and matters civil. The article which is most directly relevant to the present proceeding is article 103 of the Order in Council of 1910, which runs as follows—"The Supreme Court shall, as far as circumstances admit, have for and within the Ottoman dominions with respect to British subjects all such jurisdiction in matrimonial cases, except the jurisdiction relative to dissolution or nullity or jactitation of marriage as for the time being belongs to the High Court in England."

It follows that the marriage between the appellant and the respondent could not be dissolved by the Consular Court. It was urged upon us that this pointed to the inference that the Divorce Court in England must have jurisdiction, as otherwise the wife would be unable to obtain anywhere the relief to which she alleges she is entitled. It is, however, well settled that the jurisdiction of the Divorce Court depends upon domicile. If the husband's domicile be English, he or his wife may sue for a divorce in the English Court. If the domicile is not English, jurisdiction will not be conferred by the fact that the relief cannot be obtained in the Consular Court. The fact that the acquisition by a British subject of an Egyptian domicile would make it impossible to get relief by way of divorce has no bearing on the question of law whether such a domicile can be obtained by him in point of law; it might conceivably in some cases form an element for consideration in inquiring whether he had the intention to acquire a domicile in Egypt.

The present case therefore depends upon the question whether the husband has an Egyptian domicile. Upon the evidence and according to the findings of the Courts below, the husband has done everything possible to acquire an Egyptian domicile, and this he had acquired unless as a matter of law it be impossible for a British subject in his position to acquire such a domicile.

It was argued that British subjects in Egypt enjoy extra-territoriality, and that this prevents the acquisition of Egyptian domicile. This argument appears to me to rest upon a misconception as to the position of a British subject in Egypt. His position is in no respect analogous to that of an ambassador and his staff in a foreign country. He is subject to the law of Egypt as administered by the mixed tribunals, and pays taxes. It is true that on a criminal charge, not being one of those enumerated in the law as to mixed tribunals, he must be tried in His Majesty's Consular Court, and civil disputes between him and other British subjects and questions as to his personal status and succession must be there determined. The jurisdiction exercised by His Majesty in Egypt is indeed extra-territorial, but it is exercised with the consent of the Egyptian Government, and its jurisdiction is therefore for this purpose really part of the law of Egypt affecting foreigners there resident. The position of a British subject in Egypt is not extra-territorial; if resident there he is subject to the law applicable to persons of his nationality. Whether that law owes its existence simply to the decree of the Government of Egypt or to the exercise by His Majesty of the powers conferred on him by treaty is immaterial.

It has often been pointed out that there is a presumption against the acquisition by a British subject of a domicile in such countries as China and the Ottoman dominions owing to the difference of law, usages, and manners. Before special provision was made in the case of foreigners resident in such countries for the application to their property of their own law of succession, for their trial on criminal charges by courts which will command their confidence, and for the settlement of disputes between them and others of the same nationality by such courts, the presumption against the acquisition of a domicile in such a country might be regarded as overwhelming unless under very special circumstances. But since special provision for the protection of foreigners in such countries has been made the strength of the presumption against the acquisition of a domicile there is very much diminished. Egypt affords a very good illustration of this. What presumption is there against the acquisition of an Egyptian domicile by a British subject when the country is under British protection, and when the British subject is safeguarded in all his rights in the manner which I have described?

The question is one to be tried on the ordinary principles applicable to such questions of fact. The view that it is impossible in point of law could be supported only on the assumption that the doctrine of extra-territoriality applies to all British subjects, so that though actually in Egypt they are in contemplation of law still in their own country, and that for this reason there is not and cannot be the residence in the particular locality necessary for the acquisition of domicile. Any such view as to impossibility appears to be erroneous in principle, and inconsistent with the evidence in this case as to the position of a foreigner resident in Egypt.

It is, however, necessary to examine the

authorities which were strongly pressed upon us as showing that the point should be treated by this House as no longer open to discussion.

In the case of "*The Indian Chief*," 1800, 3 Ch. Rob. 12, the question arose whether the owner of cargo, being an American citizen resident at Calcutta, should be treated as a British subject so as to render illegal his trading with the enemy. All that was decided in the case was that the nominal sovereignty of the Great Mogul might be for this purpose disregarded, and that the cargo owner, as he resided and traded in Calcutta under the Government of the East India Company, must be treated as a British subject, and as he had traded with the enemy the cargo was condemned. The case was cited merely on account of the passage in Sir W. Scott's judgment at pp. 28 to 30, in which he explains with even more than his wonted charm of expression the position of foreign traders in Eastern countries. The passage illustrates the presumption against the acquisition of a domicile of choice in such Eastern countries, but is not otherwise relevant to the present discussion.

In 1844 the case of *Maltass* v. *Maltass*, 1 Rob. Ecc. 67, came before Dr Lushington, sitting for Sir H. Jenner Fust in the Prerogative Court of Canterbury. The question was as to the law which should govern the will of a British subject who for many years had resided in Smyrna. Dr Lushington found that the deceased was a British subject, and then proceeded to inquire whether he was domiciled in Smyrna, but pointed out that this inquiry would be superfluous if with respect to his succession the law of England and the law applicable in Turkey were the same. Referring to the provisions of the Capitulations that the property of British subjects dying in Turkey should be disposed of according to English law, he held that this applied even in cases in which the deceased has become domiciled in Turkey, and that it was immaterial whether he had acquired a domicile in Smyrna or retained his English domicile, as in either case the English law would apply. He concluded with the following observations—"I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicile. But this I must say—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects originally Mussulmans, as in the East Indies, the same reasoning does not apply to them as Lord Stowell has said does apply in cases of a total and entire difference of religion, customs, and habits."

The language of Dr Lushington in this judgment lends no countenance to the idea that it is impossible for an English subject to acquire a domicile of choice in a country like Turkey. So far as he touches upon the question at all, he treats it not as a matter of law but as a question of fact.

In 1882 the case of *re Tootal's Trusts* was decided by Chitty, J. In that case a petition was presented by residuary legatees asking for a declaration that the testator was domiciled at Shanghai at the time of his death, and consequently that no legacy duty was payable. The testator was a British subject who resided at Shanghai and died there. If the domicile was English the duty was payable, while if the deceased had acquired a domicile in China the duty was not payable. The testator had for some years before his death determined to reside permanently at Shanghai, and had formed and expressed the intention of never returning to England. It was admitted that it could not be contended that the domicile was Chinese. It is clear that what was meant by this admission was that it could not be contended that the testator had become domiciled in China so as to attract to his estate the law applicable in China to natives of that country, and Chitty, J., said—"This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his judgment in '*The Indian Chief*,' and by Dr Lushington in *Maltass* v. *Maltass*." Both of these great Judges had treated the question as one of fact, and had pointed out the improbability of the acquisition of such a domicile. It is obvious that the admission that there was no Chinese domicile in that sense was rightly made. What the petitioners contended for *in re Tootal's Trusts* was what is there called an Anglo-Chinese domicile. Some criticism has been bestowed upon this and analogous expressions, but it appears to me that the expression "Anglo-Chinese domicile" is apt to denote compendiously a domicile in China acquired by a British subject and carrying with it the privileges conferred by treaty upon British subjects there residing. These privileges appear to have been analogous to those enjoyed by British subjects residing in Egypt—see 23 Ch. D. 535, 536.

At p. 536 Chitty, J., says that the exception from the jurisdiction of His Majesty's Supreme Court at Shanghai as a matrimonial court in regard to dissolution, nullity, or jactitation of marriage, apparently left Englishmen subject to the jurisdiction of the court for matrimonial causes in England in respect of such matters. This statement requires qualification. The absence of provision for divorce in Shanghai cannot of itself confer jurisdiction upon the English Court; it depends upon the question whether the domicile has remained English. If the English domicile has been replaced by an Anglo-Chinese one, the jurisdiction of the English Courts would be gone.

Chitty, J., went on to consider whether on principle an Anglo-Chinese domicile can be established. He came to the conclusion that "there is no such thing known to the law as an Anglo-Chinese domicile" (p. 542). The reasoning by which he arrived at this conclusion is as follows (pp. 538-9)—"On principle then can an Anglo-Chinese domicile be established? The British community at Shanghai, such as it is, resides on foreign territory; it is not a British colony, nor even a Crown colony, although by the statutes

above referred to the Crown has, as between itself and its own subjects there, a jurisdiction similar to that exercised in conquered or ceded territory. Residence in a territory or country is an essential part of the legal idea of domicile. Domicile of choice, says Lord Westbury in *Udny* v. *Udny*, L.R., 1 H.L. Sc. 441, is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell* v. *Kennedy*, L.R., 1 H.L. Sc. 307, he uses similar expressions. Domicile is an idea of the law; 'it is the relation which the law creates between an individual and a particular locality or country.' He refers to locality or country and not to a particular society subsisting in the locality or country. The difference of law, religion, habits, and customs of the governing community may, as I have already pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country; but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power. There may be and indeed are numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment; they are merely parts of the law of the governing community or supreme power. It may well be that a Hindu or Mussulman settling in British India and attaching himself to his own religious sect there would acquire an Anglo-Indian domicile, and by virtue of such domicile would enjoy the civil status as to marriage, inheritance, and the like accorded by the laws of British India to Hindus or Mussulmans, and such civil status would differ materially from that of a European settling there and attaching himself to the British community. But the civil status of the Hindu, the Mussulman, and the European would in each case be regulated by the law of the supreme territorial power. In the case before me the contention is for a domicile which may not improperly be termed extra-territorial. The sovereignty over the soil at Shanghai remains vested in the Emperor of China with this exception, that he had by treaty bound himself to permit British subjects to reside at the place for the purpose of commerce only without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons."

The view of Chitty, J., was that the domicile alleged is in nature extra-territorial. I cannot agree. The position of British subjects in such a country is not extra-territorial. The domicile is acquired, and can be acquired only by residence in Egypt. The law applicable to the foreigner so residing is by the consent of the Egyptian Government partly Egyptian and partly English. This is the result of the convention between the two Governments. Though the domicile is Egyptian, the law applicable to persons who have acquired such a domicile varies according to the nationality of the person. The foreigner does not become domiciled as a member of the English community in Egypt, but he acquires an Egyptian domicile because he by his own choice has made Egypt his permanent home, and you have then to consider by what code of law he and his estate are governed according to the law in force in Egypt. This domicile is purely territorial, and you go to the law in force in the territory to see what system of law it treats as applicable to resident foreigners and to what courts they are subject.

Chitty, J., refers to the case of British India, where there are many particular sects governed by particular laws applicable to them specially, and distinguishes it on the ground that these special laws are not laws of their own enactment, but are merely parts of the law of the governing community or supreme power. The supposed distinction does not exist. In Egypt it is part of the law of the governing community or supreme power. In other words, it is part of the law of Egypt that English residents are governed by English law, and that they are amenable in certain cases only to certain English courts established by the King of England with the consent of the Egyptian Government. Chitty, J. (at p. 539) puts the case of a citizen of the United States who attaches himself to the British community at Shanghai, and says that according to the petitioner's argument he would acquire an Anglo-Chinese domicile, and this he treats as a *reductio ad absurdum* of the petitioner's contention. A citizen of the United States resident permanently in Shanghai would be subject to the law which attaches to citizens of the United States so settling in China according to the law of China. His domicile and the law applicable would not arise from attaching himself to any particular community but from his personal residence in Shanghai coupled with his nationality. His having attached himself (whatever that may denote) to the English community would be immaterial unless he had acquired English nationality.

I think that the respondent's counsel were entitled to treat *re Tootal's Trusts* as a decision in their favour of the point now in dispute, and indeed I do not think that this was contested by Mr Wallace. But the decision is of course not binding upon this House, and it is in my opinion erroneous.

There has been no such general acquiescence in the correctness of the decision *in re Tootal's Trusts*, 23 Ch. D. 532, and change of position in reliance upon that decision, as to render it improper that this House should act upon its own view of the law.

The case of *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, came before the Judicial Committee of the Privy Council in 1887 on an appeal from the Supreme Consular Court at Constantinople. The question related to

the succession to a person who had died in Egypt. The deceased was born at Baghdad, in the Ottoman dominions, of Ottoman parents, and in early life went to India, whence after a considerable period he went to Jeddah, which was also in the dominions of the Porte. In 1858 he went to Cairo, where he remained until his death under the protection of the British Government.

Proceedings were taken in the Consular Court by his widow to obtain probate of his will, which was in the English form. The Judge found that the testator died domiciled in the Ottoman Empire, that his domicile of origin was there, and that he was a member of the Chaldean catholic community, and decreed that the law of Turkey governing the succession to a member of the Chaldean catholic community in Ottoman dominions should be followed in distributing the effects of the deceased. From this order an appeal was brought by the widow to His Majesty in Council.

In support of the appeal two arguments were put forward (pp. 432–434). First, that English law should apply to the succession of the deceased as a British protected person; and secondly, that the deceased was affiliated to the community of persons under English jurisdiction at Cairo who formed as it were an extra-territorial colony of the Crown, and that subjection to the jurisdiction of the Consular Court is equivalent to residence in the country to which these courts belong so as to establish a domicile in that country. The nature of these contentions must be borne in mind in order to appreciate the terms of the judgment.

What the Judicial Committee decided was that the testator was not a British subject, and that the fact that he was a person under British protection resident in Egypt did not render English law applicable to his succession.

The judgment was delivered by Lord Watson, who points out at p. 439 that the idea of domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicile to be found in the books. He goes on to say (pp. 440, 441)—"Their Lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society, and not from connection with a locality. *Re Tootal's Trusts* is an authority directly in point, and their Lordships entirely concur in the reasoning by which Chitty, J., supported his decision in that case."

I concur with the proposition that there is no such thing as domicile independent of locality. Residence in a particular locality is of the very essence of domicile, and the contention put forward by the appellant in *Abd-ul-Messih's* case (pp. 433, 434) that subjection to the jurisdiction of the Consular Courts is equivalent to residence in the country to which these courts belong, so as to establish domicile in that country, was preposterous. On the assumption that the deceased Abd-ul-Messih was domiciled in Egypt in virtue of permanent residence there, then, if he had become in fact a British subject, the law applicable to British subjects resident in Egypt would have applied in his case. Mere association with the British in Egypt could not have that effect. If Chitty, J., *in re Tootal's Trusts* had merely decided that there is no such thing as domicile arising from society and not from connection with a locality, the decision would have been beyond criticism. It went, I think, a great deal further, and I find myself unable to agree with the judgment of Chitty, J., in that case or with Lord Watson's approval of his reasoning, an approval which was in no way necessary for the decision of the case before the Judicial Committee.

Lord Watson gives a statement as to the position of foreigners in Egypt in the following terms:—"Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the register kept for that purpose at the British Consulate. They are amenable only to the jurisdiction of our Consular courts in matters civil and criminal, and they enjoy immunity from territorial rule and taxation. They constitute a privileged society, living under English law on Egyptian soil, and independent of Egyptian courts and tax-gatherers."

This description is not in accordance with the evidence in the case now before your Lordships, and I cannot help thinking that it is due to some misconception of the evidence in the *Abd-ul-Messih* case. Foreigners residing in Egypt have since 1875 been subject to the jurisdiction of Mixed Courts, which are Egyptian tribunals administering Egyptian law, and in certain cases to their own Consular Courts, and they are subject to Egyptian taxation. If the facts as to the position of foreigners in Egypt had been correctly appreciated, it would have been impossible for the appellant to put forward the contention which Lord Watson summarises as follows:—"The appellant maintained that a community of that description ought, for all purposes of domicile, to be regarded as an ex-territorial colony of the Crown, and that permanent membership ought to carry with it the same civil consequences as permanent residence in England, or in one of the colonial possessions of Great Britain where English law prevails."

The appellant in Abd-ul-Messih appears also to have argued that the effect of the Order in Council was that English law is the sole criterion by which in the case not only of British subjects but also of persons under British protection resident in Egypt at the time of their decease the capacity to make a will and its validity when made must be determined. This argument was dismissed and rightly dismissed by Lord Watson as wholly unsustainable on the construction of the Order in Council.

A further and alternative contention was advanced by the appellant's counsel in that case to the effect that the deceased had lost his Turkish nationality and had become a subject of the Queen. At p. 443 it is pointed out in the judgment that it was clear that

the deceased was not in the sense of English law a subject of Her Majesty, and that he did not possess that status within the meaning of the Order, which expressly enacts that it must be attained either by birth or naturalisation.

With reference to a contention that, by an order not appealed against, the jurisdiction of the Consular Court had been sustained in respect of the "deceased having acquired the status of a protected British subject," and that this was decisive that the deceased had acquired that status of a protected British subject, Lord Watson pointed out that this expression does not occur in the Order and has no technical meaning, and that it must be understood as meaning merely that the deceased had *de facto* enjoyed the same measure of protection as that which is accorded by treaty to British subjects in the dominions of the Porte. This of course is very different from his having become a British subject.

The appellant, however, argued that in point of Turkish law the deceased would be regarded as a British subject in virtue of the protection which he enjoyed. There was a conflict of evidence between the legal experts on this point, and the Judicial Committee did not think it necessary to decide what was the position of the deceased in this respect by the law of Turkey, for the reason stated in the following sentence of the judgment:—"If it be assumed that in consequence of his having placed himself under foreign protection the Porte resigned the deceased both civilly and politically to the law of the protecting power, that would merely give him the same rights as if his nationality had been English, and the territorial law of his domicile would still be applicable to his capacity to make a will and to the distribution of his estate." It may be observed, however, that if his nationality had been in fact English and his domicile was in Egypt, the English law would, for the same reasons I have given in the earlier part of this judgment, have applied to his capacity to make a will and to the distribution of his estate. The true justification for the course taken by the Judicial Committee in treating the opinion of the legal experts as to Turkish law as irrelevant is that the deceased was not in point of English law a British subject, and that it was quite immaterial whether the Porte had resigned the deceased to the protecting Power unless that Power had accepted the resignation and treated the deceased as a British subject.

Having failed in the attempt to establish that the deceased was a British subject, the appellant asked to have a further proof for the purpose of showing that the Turkish Courts in administering the estate of a protected person in the position of the deceased would have been guided not by their own municipal law but by the rules followed by English Courts in the case of domiciled Englishmen. Lord Watson points out that there was no suggestion on the record that there was any special law in Turkey as to the succession of a protected person, and that no further proof upon this point could be allowed.

The last argument advanced by the appellant in the *Abd-ul-Messih* case was that the deceased's residence in Cairo had conferred upon him an Egyptian, as distinct from a Turkish, domicile, but it is there pointed out that it had not been shown that a domicile in Egypt, so far as regards its civil consequences, differs in any respect from a domicile in other parts of the Ottoman dominions. It is indeed obvious that the questions arising on an Egyptian domicile in 1880 would have been substantially the same as those arising upon a domicile say in Baghdad, where the deceased was born. Lord Watson added that residence in a foreign state as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice. This proposition is a restatement of what was said in the earlier part of the judgment, and for the reasons which I have given in dealing with that passage I am unable to assent to it.

The decision in the *Abd-ul-Messih* case was clearly right on the broad ground that the deceased was not a British subject, but I must with all respect express my dissent from some of the dicta which occur in the course of the judgment, for the reasons which I have given in referring to them. The correctness of the decision is in no way dependent upon these dicta.

The decision in the case of *re Tootal's Trusts* has been a good deal canvassed. Sir Samuel Evans, that very distinguished judge whose untimely death we all deplore, sitting in the Prize Court, made some observations with regard to *re Tootal's Trusts* which are worth noting. In giving judgment in the case of "*The Eumaeus*," 1915 B. & C. (P.C.) 605, he said—"In this case I am not called upon to express any opinion upon the question whether at the present day a British subject can acquire a civil domicile in an oriental country like China. *Re Tootal's Trusts* may or may not be good law. It has been much criticised by jurists and has been recently dissented from in a judgment of the Supreme Judicial Court of Maine in *Mather* v. *Cunningham*, 105 Maine R. 326, 74 Atlantic R. 809. The decision in the case now before the Court does not involve that question."

In the case to which Sir Samuel Evans refers—*Mather* v. *Cunningham* (as appears from the report in 74 Atlantic R., the only report which I have seen) — the Supreme Court of Maine, sitting as the Supreme Court of Probate, allowed an appeal from an order of the Probate Court in Waldo County appointing an administrator. The Court on the appeal consisted of Emery, C.J., and five other judges. The deceased had made his home and carried on his business at Shanghai, his domicile of origin having been in Waldo County, Maine, and the question on which the case turned was whether an American can as a matter of law acquire a domicile in the province of Shanghai, where by treaty

American law is substituted for the Chinese local laws. The Supreme Court made an elaborate examination of the case of *re Tootal's Trusts* and of the many criticisms and comments which had been made on that decision, and arrived at the conclusion that its doctrine could not be supported. It was pointed out that domicile depends upon locality, and that the law of the locality attaches to the person who has acquired a domicile there, whether that law be decreed by the supreme power of the foreign country or is the result of treaty. They say that the "whole trend of modern authority is in opposition to the dictum advanced *in re Tootal's Trusts*." The Court went on to refer to a case which had been decided at Shanghai in 1907, and said—"Judge Wiltley, the United States Court for China, sitting at Shanghai in 1907, *in re Probate of the Will of Young J. Allen*, pronounced a strong opinion in which he rejected the dictum of *re Tootal's Trusts*, and came to a directly opposite conclusion."

The Court in *Mather* v. *Cunningham* gave its decision in the following terms:—"The Court is of the opinion that Henry J. Cunningham, the decedent, at the time of his decease had abandoned his domicile of origin in Waldo County and had acquired a domicile of choice in Shanghai," and the appeal was sustained.

The case of *Allen's Will* is also cited by Mr Westlake in his Private International Law (5th ed., p. 349). Mr Westlake says—"The testator's domicile of origin was in Georgia, and the question was whether the law of Georgia was to be applied in the administration of his estate or 'the law which Congress had extended to Americans in China, which is the common law.' Judge Wiltley decided for the latter, saying that 'We can see no good reason for holding that a citizen of the United States cannot be domiciled in China.'" I have made endeavours to get the pamphlet report of this case but without success.

In March 1916, in His Majesty's Court of Prize for Egypt sitting at Alexandria, Cator, P., made the following observations in the case of '*The Derfflinger*,' No. 1 B. & C. P.C. 389:—"From time to time questions as to the status of British subjects in China and the Ottoman dominions have come before our courts, and it has been settled that no British subject can change his legal domicile by residence in any place where the Crown has extra-territorial authority. That, as we know to our cost, owing to the great inconvenience which it has entailed upon the British community, is, I think, the effect of *re Tootal's Trusts*, approved of by the Privy Council in *Abd-ul-Messih* v. *Farra*. These decisions, it is true, relate only to the subtle and artificial doctrine of personal domicile which has been evolved by our civil courts for the purpose of determining questions relating principally to probate and administration, and a legal domicile for the purpose of a Court of Probate is, I need hardly say, a very different thing from a commercial domicile for the purpose of a Prize Court. But *re Tootal's Trusts* emphasises the fact that there still exist countries where owing to fundamental differences in race and religion Europeans do not merge in the general life of the native inhabitants, but keep themselves apart in separate communities; and where such separation is sanctioned by the exercise of ex-territorial authority I am of opinion that it is impossible for any individual to acquire a trade domicile other than that of the country to which he owes allegiance."

The fact that inconvenience has resulted from a particular decision would, of course, be no reason for disturbing it if sound in law. But as in my opinion *Tootal's* case and the dicta approving it are erroneous, I think that the British community in Egypt should be relieved from the inconvenience which President Cator says has been thereby caused.

I entirely agree with the conclusion arrived at by Scrutton, L.J., in his admirably reasoned judgment, and for those reasons I think the appeal should be allowed.

VISCOUNT HALDANE—I agree, and will not recapitulate the facts in the case. For it is quite clear that while the appellant had an English domicile of origin, he had migrated to Egypt in 1895, and had made his permanent home in Cairo with no intention of returning to England. Under these circumstances he must have acquired an Egyptian domicile if Egypt were a country where a domicile could be acquired, and he had done nothing to prevent its acquisition. But he remained a British subject, and he registered himself at the British Consulate at Cairo as a member of the Society of British subjects resident there. The question is whether such registration with its consequences prevented him from losing his English domicile of origin. Persons so registered undoubtedly acquire certain privileges, among which is that their litigations, disputes, and differences, if among themselves, are settled by the British Consular Courts, and if between themselves and Egyptians or other foreigners are settled by the mixed tribunals established for the purpose. This was so for long before the war, and since the war the Sultan of Egypt has continued this privilege.

But Egypt is a civilised country in which I have no doubt that a domicile could, apart from special obstacles, be acquired, and what we have to determine is whether membership of the society of British subjects who possess these privileges was an obstacle to the presumption of an Egyptian domicile of choice receiving effect.

I do not think that Chitty, J., intended in *re Tootal's Trusts*, 25 Ch. D. 532, to decide, as has been suggested to us, that it was impossible to acquire a domicile in the Chinese Empire. What I think he did intend to decide was that the institutions of that country were so radically divergent from those of this country as to raise a very strong presumption of fact against any intention to acquire such a domicile. Not only towards the foot of p. 534, but again at the foot of p. 538, of the report of his judg-

ment he used words which indicate that he considered the point to be one of presumption of intention, and therefore a question of evidence and not of substantive law.

Nor does it appear to me that the judgment of the Judicial Committee of the Privy Council in *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, delivered by Lord Watson in 1888, on an appeal from the Supreme Consular Court of Constantinople, carries the matter any further in favour of the present respondent. There a testator whose domicile of origin was Turkish, and who was a member of the Chaldean Catholic community, fixed his permanent residence at Cairo, which was then part of the dominions of the Sultan of Turkey. He got himself registered as a member of the British community in Egypt, but only in the capacity of a protected person who enjoyed the measure of protection accorded primarily to British subjects, but granted to all those who can obtain the inscription of their names in the register kept at the British Consulate in Egypt. It was held that he was not in the sense of English law a British subject. It was also held that he had not lost his Turkish domicile of origin, and that his residence as a privileged member of the community, although it might have been effectual to destroy a previous residential domicile elsewhere acquired by choice, was ineffectual to create a new domicile of choice. It was said, approving the decision in *re Tootal's Trusts*, that there cannot be created a domicile arising merely from membership of such a community if there be not also such connection with the locality where the community is established as will attract the municipal law of the territory where the member of the community has settled, so that it becomes the measure of his personal capacity. The result was that the succession to the testator was treated as depending on the Turkish law applicable to the Chaldean Catholic community to which he belonged—a law which could apply in Egypt, which was then part of the Turkish dominions.

All that these two cases decided was that mere membership of a protected British society in a foreign country is not enough to establish a domicile which would attract the British municipal law governing succession, unless it was accompanied by other essentials required in order to establish a British domicile. These essentials comprise settlement in a home on the territory that is actually British, along with intention to make that home permanent. It is said to be difficult to find an adequate definition of domicile, and no doubt it is difficult. The reason is to be looked for in the older decisions in which the fundamental principle has been obscured by qualifications made in the earlier cases in order to provide for residence occasioned by considerations of health, or of the anomalous conditions of service in India under the East India Company. Some obscurity existed at one time as to whether a change of allegiance was not also required in order to establish the acquisition of a new domicile, an obscurity which has now been removed. The effort to reconcile expressions used in numerous cases decided in these connections, cases which have never been overruled in terms, has embarrassed those who have attempted to find words which would cover everything of apparent authority which appears in the books. But it is clear to-day that there is no reason for hesitating to hold that a man who has shaken the dust of England from off his shoes, and has gone to reside in a civilised foreign country with the intention of making a new and permanent home there, gets rid of his English domicile of origin. Of course, the condition of that foreign country may be so barbarous as to make it so unlikely that he should have intended to make it his home to the full sense of accepting its institutions as his own that he may not have the intention to do so imputed to him. That happened in *re Tootal's Trusts*. But between China, at all events as it was when Chitty, J., gave the decision, and Egypt as it is to-day, there is a vast difference. At the time when the respondent's Egyptian domicile was challenged Cairo had become a modern and civilised city situated in the country of a friendly Sultan. I do not think that even before the war there was anything short of a great divergence between the conditions in China at the period I have referred to and Cairo as it has been for many years. The divergence was quite enough to obviate the difficulty which Chitty, J., encountered in ascribing intention. And I am therefore of opinion that there is no room for drawing in the present case the inference which Chitty, J., made. The thing needful is not lacking in the facts with which we have to deal, and the appeal ought to succeed.

LORD DUNEDIN—The practical question here is whether the Courts of England have or have not jurisdiction to dissolve the marriage of the appellant and respondent at the suit of the respondent. The appellant disputes the jurisdiction. Admittedly such jurisdiction is founded on the domicile of the husband. The appellant had an English domicile of origin, and is therefore subject to the jurisdiction, unless he has abandoned that domicile, which he can only do by the acquisition of another domicile not English. Now the acquisition of another domicile depends on intention and the carrying into effect of that intention by residence. Intention may be, and in most cases is, gathered from what a person does, not merely from what he says. But it has been conceded throughout the argument that if the country here in question were any of the States of Western Europe or the United States of America instead of Egypt, the appellant has discharged the burden upon him—that is to say, has shown intention and the carrying into effect of that intention by residence. The sole reason against the usual result following is that it is urged that in the case of Egypt, inasmuch as the appellant is registered at the British Consulate as a British subject, and in consequence is in the enjoyment of certain privileges as to his subjection to local tribunals, it is impossible

for him to acquire an Egyptian domicile. I think that proposition is neither laid down by authority nor sound on principle.

As to authority, the matter is reduced to two cases—*Re Tootal's Trusts*, 23 Ch. D. 532, and *Abd-ul-Messih*, 13 A.C. 431. Neither of those cases are technically binding on your Lordships, but I will for the moment treat them as if they were so. I do not set forth the facts as that has already been done by the noble Lords who preceded me. *Re Tootal's Trusts* can be no authority for the proposition contended for, because all that it actually decided was that mere enrolment as a member of a British community in China, to which community certain privileges were by treaty conceded, did not *per se* create for the person so enrolled an Anglo-Chinese domicile. The fact that in that case Tootal had no Chinese domicile was based on admission, and therefore that possibility had not to be considered. Apart from the actual decision, I cannot say that I approve of the remarks of Chitty, J., or am I able to follow the noble Viscount in thinking that all that he meant was that a Chinese domicile was such an improbable domicile for an Englishman to adopt that he would not easily be brought to think that it had been adopted. I think the American Court in *Mather's* case was right upon the facts to refuse to follow what would seemingly have been Chitty, J.'s, opinion. Further, I am quite clear that the head-note in *Abd-ul-Messih* goes too far in saying "*Re Tootal's Trusts* approved." The approval given by the Judicial Committee was, as I read the judgment, limited to the proposition—which indeed I think no one now disputes—that mere membership of a privileged community will not *per se* constitute domicile.

I turn to *Abd-ul-Messih*. The first part of the judgment deals with the forlorn hope of showing that the proposition settled by *Tootal's* case was wrong; and that was all that had been dealt with in the Court below. The *de quo* was the displacement of a Turkish domicile. It was said in the Court below, and it was all that was said, that this was effected by the acquisition of an English domicile. As Egypt, where the residence took place, was not England, this could only be if it were possible to acquire such a domicile by registration in the English community. Judgment on that point really disposed of the appeal. But at the last moment an argument seems to have occurred to counsel, namely, to say that the Turkish domicile was displaced by an Egyptian domicile, and no doubt Lord Watson deals with that in his judgment. He says that the argument only made its appearance at the end of the case, and that there are two answers to it, either of which would be sufficient—first, that there was no averment that in the matter of succession (which was the practical point of the case) the law of an Egyptian domicile was different from that of a Turkish domicile. I agree that that was a sufficient answer. But he then goes on to say—"Residence in a foreign state as a privileged member of an extra-territorial community, though it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice."

This dictum, which was unnecessary for the decision of the case and was therefore *obiter*, is really the sheet-anchor of the respondent's argument. Doubtless any dictum of Lord Watson is entitled to great respect. But there have been cases before this where the *obiter dicta* of the most learned judges have on fuller consideration given to them been abandoned. The dictum, however, remains, and I am not able to explain it away. I am bound to say, as I do, that I think it unsound. Lord Watson gives no reasons for it. If his reasons are to be inferred from the prior passages in the judgment where he is describing the position of the privileged English community it is not unfair to point out that that description, even if accurate when given, is certainly not accurate as at the date of this case.

Is there, then, any principle on which such a proposition can rest? I can see none. I respectfully adopt on this branch of the subject what has just been said by the noble Viscount, whose opinion I had the advantage of reading before I wrote my own. The fallacy of the opposing argument seems to me to rest on the idea of extra-territoriality. That is a conception which, having its legitimate application in such things as the position of an ambassador or of a British ship in foreign territorial waters, has no application to the matter in hand. It seems to me that the whole privileges which were conceded by the Capitulations, or are now continued by the order of the present ruler of Egypt, are privileges which are made good by Egyptian law and not by English law. Can there be any inconsistency in the fact of an Egyptian domicile with the existence of a privilege given by Egyptian law to a certain class of persons simply because that privilege sometimes consists in a law being applied which is not Egyptian law? The opposite view seems to postulate the idea that you cannot be domiciled unless there is no possible difference between the law applicable to you and that applicable to every other native of the country in which the domicile is said to be acquired. On such a theory how could we explain the position of matters in India? No one denies that a person may acquire an Indian domicile. Yet after he has done so the law to be applied to him will vary according as he is a Hindu, a Mussulman, or a person not professing either of those religions.

I think the appeal should be allowed. I agree with the opinion of Scrutton, L.J., and I think it clear that Horridge, J., would have come to the same result had he not felt himself disentitled to go in the teeth of a dictum of Lord Watson which was so directly in point.

LORD ATKINSON—I concur. The facts have been already stated and I do not repeat them. Horridge, J., found that it was abundantly proved that the appellant had voluntarily fixed his sole or chief residence in Egypt with the intention of continuing to reside there for an unlimited time, and the

correctness of this finding of fact upon the evidence has not been questioned either by the respondent's counsel in the Court of Appeal or in this House. Nor is it questioned by either of the Lords Justices who constituted the majority in the Court of Appeal. The ordinary consequence of such a finding if it stood alone would, according to well-established authority, be that the appellant would be held to have acquired a domicile of choice in Egypt. But it is contended that it cannot have that result in this case owing to two matters—first, the registration of the appellant as a British subject; and secondly, the so-called extra-territorial jurisdiction alleged to be exercised in Egypt by His Majesty the King of England through his Consular Courts, under the Capitulations confirmed in 1809 by the Treaty of the Dardanelles entered into between the Sultan of Turkey and Great Britain, conjoined with the English Order in Council of the 7th November 1910. It is contended that, the appellant being so registered, his residence in Egypt must, upon the authorities, be treated not as the residence of an ordinary inhabitant there, but as that of a privileged member of an ex-territorial community, unconnected with locality and therefore incapable of conferring a domicile.

It is plain that Horridge, J., would have held, against this contention, that the appellant had acquired a domicile of choice in Egypt but for the decisions in two cases by which he considered he was bound. He decided accordingly that the appellant's objection to the wife's petition failed. These two cases are *re Tootal's Trusts*, 23 Ch. D. 532, decided by Chitty, J., and *Abd-ul-Messih* v. *Farra*, 13 A.C. 431. The majority of the Court of Appeal followed these cases and applied what they considered to be the principle laid down in them. Scrutton, L.J., in a most able judgment dealing exhaustively with all the authorities, showed conclusively I think that the principles said to have been laid down by these authorities, if they were such as was contended for, were unsound, and held, as Horridge, J., would have held had he considered himself free to do so, that the appellant had acquired an Egyptian domicile of choice. In this conflict of judicial opinion it becomes necessary, I think, to examine carefully the decisions in these two comparatively modern cases, as well as the decision of Dr Lushington in *Maltass* v. *Maltass*, 1 Rob. Ecc. 67, and that of Lord Stowell in "*The Indian Chief*," 3 Ch. Rob. 12, on which the decisions in the two former cases purport to be based, with a view of distinguishing the points of actual decision from the *obiter dicta* in which those most distinguished Judges indulged, made to ascertain if possible what precisely were the principles upon which these decisions rested, and in this connection I may say it would appear to me to be quite illegitimate to assume that the laws, habits, manners, and customs of Eastern countries are stable, and have remained as repellant to English subjects as they might have been a century ago. An assumption which applied to Japan, if not indeed to Egypt, would be unjust and inaccurate. About the general law touching the acquisition of a domicile of choice in European countries, the United States of America, or the self-governing colonies of the British Empire, there was no dispute. It is laid down as shortly and as neatly by Lord Lindley in his judgment in *Winans v. Attorney-General*, 1904 A.C. 287, at p. 299, as could well be desired. He said—"I take it to be clearly settled by the *Lauderdale Peerage Case*, 10 A.C. 392, *Udny* v. *Udny*, L.R., 1 H.L. Sc. 441, *Bell* v. *Kennedy*, L.R., 1 H.L. Sc. 307, that the burden of proof in all inquiries of this nature (*i.e.* as to domicile) lies upon those who assert that a domicile of origin has been lost and some other domicile has been acquired. Further, I take it to be clearly settled that no person who is *sui juris* can change his domicile without a physical change of place coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression be preferred. If a change of residence is proved, the intention necessary to establish a change of domicile is an intention to adopt the second residence as a home, or in other words an intention to remain without any intention of further change except possibly for a temporary purpose—see Storey's Conflict of Laws, s. 43; *re Craignish*, 1892, 3 Ch. 180; *Attorney-General* v. *Pottinger*, 6 H. & N. 733; and *Douglas* v. *Douglas*, L.R. 12 Eq. 617, at p. 643. . . . An intention to change nationality was in *Moorhouse* v. *Lord*, 10 H.L.C. 272, said to be necessary, but that view was in *Udny* v. *Udny* decided to be incorrect. Intention may be inferred from conduct, and there are cases in which domicile has been changed notwithstanding a clear statement that no change of domicile was intended—*Re Steer*, 3 H. & N. 599, and *per* Wickens, V.C., in *Douglas* v. *Douglas*." In *Winans*' case the tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr Winans, deceased, were all considered as keys to his intention to make a home in England. Lords Halsbury and Macnaghten laid down the law in words to the same effect as those used by Lord Lindley. They differed from him on the inference of fact to be drawn from all the matters I have mentioned as to Mr Winans' intention to make a home in England. It was contended, however, on the authority of the case of "*The Indian Chief*," decided by Lord Stowell, and the cases which have followed it, and upon which rest the decisions by which Horridge, J., considered himself bound, "that the rules of law so laid down by Lord Lindley are entirely inapplicable to the acquisition by a British subject on the ground of the supposed 'immiscibility' of such a subject with the native population."

The Master of the Rolls in the following passage of his judgment indicates what he apparently considers a British citizen must accomplish before he can acquire a domicile in one of those Eastern countries, no matter how long he may have lived there voluntarily, or how ardent he may desire and deliberately intend to make his home there. He said—"No question is raised on this appeal with regard to the domicile of a

person who voluntarily fixes his place of residence in a foreign country, whether Christian or not, intending to make it his permanent home, intending to make himself a member of the civil society of that country, and manifesting this intention by adopting its manner of life and identifying himself with its customs—not living in a community separate and apart, but merging in the general life of the native inhabitants. The appellant has done nothing of the kind here, but has always been careful to preserve his status and position as a member of a privileged community, living separate and apart from the native inhabitants of Egypt."

The voluntary residence there, the deliberate intention to make a home there, are apparently not enough. The British subject must adopt the manner of life—make himself a member of the civil society of that country. He must identify himself with its customs; he must merge in the general life of the inhabitants, but upon what rational principle? These are conditions which could not be fulfilled by a Hindu Brahmin, faithful to his religion and bound by all the rigid rules of his caste, coming to reside in London; and they would be preposterous as applied to British India, where the population is not homogeneous, but composed of different races living side by side and mingling together, but professing different religions, observing different customs, obeying different laws. For instance, is the English resident in India to obey the laws binding on a Hindu and regulating the enjoyment and descent of his property, or the laws touching these matters observed by the Mahomedans? And if the former, are they to be laws of Milakshara or the laws of Dayabhaya? and if the latter, is he to adopt the laws and customs of the Shiah or Sunnis? How is it possible for a British subject "to adopt the manner of life of a population" where caste holds the majority of that population in its iron and unchanging grasp? In England by the common law aliens could not hold landed property even under lease. By 32 Hen. VII, c. 16, sec. 83, it is enacted that leases of dwelling-houses made to alien artificers should be void, and a penalty of £100, a large sum in those days, was imposed upon the lessor or lessee who violated the statute. By the 7 and 8 Vict. c. 66, aliens were empowered to hold land or houses for the purpose of residence or business, but they did not by this ownership acquire either the Parliamentary or municipal franchise. They were disqualified to fill all offices or places of trust, civil or military. They could not inherit landed estate nor, till the passing of the 11 and 12 Vict. c. 6, transmit it by descent. Things are now, of course, quite different, but despite all these disabilities, this narrow, starved, and restricted citizenship, if such it could be called, which was all they could enjoy, they could acquire a domicile of choice in England.

It is quite natural that the laws of an Eastern country, at least a century ago, might appear to a British citizen to be so arbitrary and oppressive, and the religion, customs, and habits of the natives so repellent that he would not be likely voluntarily to make his permanent home amongst them. The fact that the laws and customs were of that character would therefore be strong evidence on the issue of fact to disprove an existence in the testator's mind of an intention to make his home there. But if, despite the character of these laws and these habits and customs, it be clearly established that the British subject who has voluntarily gone to reside in this foreign State desires to make his home there, and deliberately intends, if permitted, so to do, it is difficult to see upon what principle he should be debarred from acquiring a domicile there.

I do not think the authorities so much relied upon by the respondent when examined closely lay down any such principle as this. Before considering these cases it is desirable to point out that a very anomalous kind of domicile may be acquired in Eastern countries by resident merchants, owners of factories, or those engaged in trading associations. It is wholly different from civil domicile, so different, indeed, that a merchant may at the same moment have a commercial domicile in each of several different and unconnected Eastern States, in each of which he has established factories or trading associations—See *The Joong Klassena*, 5 Ch. Rob. 297, 302. In the case of *The Indian Chief*, Sir William Scott, as he then was, laid it down that it was a rule of the law of nations that whenever a factory is founded in an Eastern part of the world European persons trading under their shelter and protection take their national character from the associations under which they live and carry on their commerce. I think it will be found that judicial observations made in reference to this commercial domicile have been treated as applicable to civil domicile, a most misleading error. The second kind of anomalous domicile is the Anglo-Indian domicile. The nature of this domicile is explained by Lord Hatherley in *Forbes* v. *Forbes*, 1 Kay 341, 356. He said—"I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law from such circumstances presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India." Turner, L.J., in *Jepp* v. *Wood*, 4 De G. J. & S. 623, referring to these cases, said—"At the time when these cases were decided the East India Company was in a great degree, if not wholly, a separate and independent Government, foreign to the Government of this country, and it may well have been thought that persons who had contracted obligations with such a Government for service abroad could not reasonably be considered to have intended to retain their domicile here. They in fact became as much estranged from this country as if they had become servants of a foreign Government." When the officer left the service of the company his domicile of origin revived

—*Ex parte Cunningham*; *Re Mitchell*, 13 Q.B.D. 418.

In "*The Indian Chief*" the ship in the year 1775 left the port of London on a voyage from that port to Madeira, thence to Madras, Saquabar, Batavia, and back to Hamburg. In the course of the last trip on this round voyage she called at Cowes for orders, where she was seized as being a ship belonging to an English subject trading with the enemy. A Mr Johnson, who claimed the ship as owner, asserted that he was an American, not a British subject. A Mr Miller, likewise asserting that he was an American subject, claimed the cargo as owner of it. The question in controversy in the case was the national character of these respective claimants. In the case of "*The Angelique*," 3 Ch. Rob., App. B, p. 7, it had been decided by the Court of Appeal in England that by the general law all foreigners resident within the British dominions incurred all the obligations of British subjects, that as the Crown alone had power to make war so it alone had power to dispense with the observance of these laws, that the East India Company had no power to license a trade carried on with the general public enemy of the Crown of Great Britain, and that therefore a ship belonging to an Armenian merchant resident in Madras, taken on a voyage from Madras to Manilla, was properly condemned as the property of a British subject taken in trade with the enemy.

The events in Johnson's history affecting his national character were stated to be these —He was born in America. In the year 1773 he came to England and settled in London as a merchant. During the American war of 1778 he left England and settled in France as one of a firm engaged in trade, reserving to himself by the articles of partnership the liberty of returning to America should he desire to do so. In 1785 he returned to England, established himself as a merchant, and remained there till September 1797, when he left two months before the capture of the ship. In the latter part of 1790 he acted as American Consul in London. That was, however, considered by Sir W. Scott as an immaterial circumstance. Had he remained till the capture of the ship it was held that the whole transaction must be considered as a British transaction, and therefore a criminal transaction on the principle that it is illegal in any person owing allegiance to the British Crown, as he did as a merchant resident in England, even though that allegiance were temporary, to trade with the public enemy, but that inasmuch as he had quitted England for America before that date, *sine animo revertendi*, he was in the act of resuming his original character and was to be considered to be an American, the character he gained by residence ceasing with that residence, and that he was therefore entitled to have his ship restored to him. Now these were the only matters in issue in *Johnson's* case, and the only matters decided in that case. In the case of *Miller* it was held that if he had in fact engaged in trade in Calcutta he became a resident merchant, his mercantile character not taking the benefit of his official character. A point was made that the trading was not direct to Batavia, the enemy port, but that circumstance was held to be immaterial. A third point was urged, namely, that Miller had not been resident in British territory, since the English Sovereign was not in possession of Bengal with the same imperial rights as belong to the Mogul, that the King of Great Britain did not hold British possessions in the East Indies in right of sovereignty, and therefore that the character of British merchants did not necessarily attach on British residents there. It was held that, even assuming, as was contended, that Great Britain could not be deemed to possess sovereign rights in Bengal, still it was a rule of the law of nations that wherever a new factory is founded in an Eastern part of the world European persons trading under the shelter and protection of that establishment take their national character from an association under which they live and carry on their commerce; that the sovereignty of the Mogul only existed as a phantom and did not in any way effect such establishments as these, that a foreign merchant resident at Bombay was just in the same position as a British merchant resident there, that he was subject to the same duties and amenable to the same common authority, and that therefore Miller should be considered as a British merchant, and his property be treated as that of a British merchant taken in trade with the enemy, and therefore liable to condemnation. These were the only issues properly raised and decided in the case. They referred exclusively to what is not very happily styled commercial domicile, The general observations made by Sir William Scott in this case of "*The Indian Chief*" so far as they applied to civil domicile, dealt with matters wholly different in kind and nature from the subject-matter of the suits, and though they are of high authority in one sense owing to the eminence of the distinguished judge who made them, still they are, after all, only *obiter dicta*, and do not in any sense amount to decisions of the Court of Admiralty. In addition, the particular passage so much relied upon begins and ends with reference to commercial transactions, and is based upon assumptions of fact which, at the present day at all events, are of questionable accuracy. The passage begins thus— "In the western part of the world alien merchants mix in the society of natives, access and intermixture are permitted, and they become incorporated to almost the full extent." Sir W. Scott then proceeds— "But in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers were. *Doris amara suam non intermiscitur undam*, not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that association or factory under whose pro-

tection they live and carry on their trade." It will be observed that no reference is made in this passage to the so-called extra-territorial jurisdiction of Consular tribunals. It is the immiscible character of the foreigner on which the rule of law is based. However well that character may have clung to English immigrants into Eastern States in the year 1800 I take leave to doubt very much if to-day British residents in Cairo or Alexandria do not mix more in the society of natives and are not more completely incorporated into native society than they were over a century ago.

In the other case to which Chitty, J., refers —namely, *Maltass* v. *Maltass* (1 Rob. Ecc. pp. 67, 80, 81)—the son of a deceased testator propounded the latter's will in the year 1844 in the Prerogative Court of Canterbury. The deceased himself was born at Smyrna of British parents who were British subjects. After being educated in England he joined his father at Smyrna, was occupied in commercial pursuits there for many years, and was a member of a trading firm established there. This firm was dissolved a considerable time before the death of the deceased. In his will the deceased described himself as a British merchant, but the learned judge Dr Lushington was unable to discover any evidence that he was engaged in trade at the time of his death. The commercial domicile principle was therefore questioned. He married at Smyrna, was constantly resident there, and died leaving a widow and several children. The question to be decided was what law governed the succession to his property. It was held that the law of his domicile must in some shape govern the succession. The inquiry as to domicile would be unnecessary if it should turn out that the law of Turkey applied to this individual succession was the same as the law of Great Britain. Dr Lushington held that by the treaty of the Dardanelles the law of Great Britain operates on property left by a British merchant in the situation of the deceased, no distinction having been drawn in the case of the deceased having ceased to carry on trade. He studiously abstains, however, from expressing any opinion upon any question not necessary to be decided in the case. He gave no opinion as to whether a British subject can or cannot acquire a Turkish domicile, and added a sentence which in my judgment furnishes a key to this whole matter. He said—"But this I say, that every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte." Precisely so, since residence in a particular country plus an intention to make that residence a home for an indefinite period are the elements necessary to create a civil domicile there. The existence of such an intention is an inference of facts to be drawn from the conduct and action of the resident and all the circumstances of the case. The observations already made apply as to the proof of that intention.

The error, in my view, consists in treating the existence of these native laws, habits, and customs not as a fact from which the absence of the necessary intention may be inferred, but as an absolute bar to the acquisition by an English resident in an Eastern country of a domicile of choice there under any circumstances.

I do not think the decision of *Tootal's* case was in conflict with this view. The struggle in that case was to show that the testator's domicile of choice was an Anglo-Chinese domicile, a term invented in analogy to the term Anglo-Indian domicile, already explained, and therefore to get rid of his English domicile of origin, which if it had continued to exist would make his personal estate subject to legacy duty. The facts were these—The testator went to reside at Shanghai in 1862. With the exception of two short visits to England in 1864 and 1865 for health and business, he continued to reside in Shanghai till his death in 1878. He was the manager and part proprietor of two newspapers published there. Uncontradicted evidence was given to the effect that for many years before his death he had determined to reside permanently at Shanghai, had relinquished all intention of returning to England, and on several occasions expressed his determination to that effect. Counsel for the petitioner, thinking apparently again that their client's best chance of escaping the payment of duty was by establishing for the deceased this fanciful thing, an Anglo-Chinese domicile, admitted that they could not contend that his domicile was Chinese. In giving judgment Chitty, J., alluding to this admission, said—"This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in '*The Indian Chief*,' and by Dr Lushington in *Maltass* v. *Maltass*, but it is contended on the part of the petitioners that the testator's domicile was what their counsel terms Anglo-Chinese, a term egregiously invented in analogy to the term Anglo-Indian." It will be observed that the existence of those Chinese laws, manners, habits, religion, and customs is not treated as establishing an absolute bar to the acquisition of a domicile of choice in China, but merely as raising a strong presumption against its acquisition, which can only have meant that in that particular case the existence was a fact leading one to infer that he, the testator, had no intention of making his permanent home in a place where he had so long resided. If the bar was absolute, the term presumption was misapplied.

The learned Judge at an earlier part of his judgment dealt with the extra-territorial jurisdiction set up at Shanghai under the treaties made between the then Queen of England and the Emperor of China in the years 1842, 1843, and 1858, the Statutes 6 and 7 Vict. cap. 80 and cap. 94, and the Order in Council of the 9th March 1865 which constituted a Supreme Court at Shanghai. These treaties did not contain any cession of territory so

far as related to Shanghai, but they very closely resembled those existing in Egypt. As in the present case, they conferred upon British subjects special exemption from the ordinary territorial jurisdiction of the Emperor of China, and permitted such subjects to enjoy their own laws at specified places. He then said that upon these facts the petitioners had contended that the testator had become a member of an organised British society independent of Chinese laws and not amenable to the ordinary tribunals of the country but bound together by the laws of England, and had therefore acquired an Anglo-Chinese domicile. He then at p. 538 repeats what he had already said about the presumption arising from habits, customs, &c., of the natives, and adds—"But there is no authority that I am aware of in English law that an individual can become domiciled as a member of a particular community which is not the community possessing the supreme or sovereign power. There may be, and there indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. British India is a familiar illustration of the proposition. But the special laws applicable to sects or communities are not laws of their own enactment; they are merely parts of the law of the governing community or supreme power. And at p. 542 he winds up by saying that there is no such thing known to the law as an Anglo-Chinese domicile, that the testator's domicile remained English, and that therefore his personal property was liable to legacy duty. These were the only matters decided. Incidentally it was said that native manners, customs, &c., may have effect as evidence of the absence of intention to make a home amongst them. That is all.

In *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, the appellant instituted a suit in Her then Majesty's Supreme Consular Court of Constantinople for the probate of the will of her husband Antonis Youssof Abdul Messih, who died at Cairo in February 1885 leaving large personal estate, having previously acquired the position of a protected British subject. The widow's application was opposed by the next-of-kin of the deceased on its merits, and also on the ground that the Court had no jurisdiction in the matter. Two issues were ultimately framed by or with the consent of the parties—(1) "Is the English law to be followed in distributing the assets of the deceased?" and (2) "If the Court is of opinion that the English law is not applicable, is Turkish law or what other law?"

The Consular Court by the Order appealed from, dated the 28th May 1886, found that the testator died domiciled in the Ottoman Empire, his domicile of origin, and a member of the Chaldean catholic community, and decreed accordingly that the law of Turkey governing the succession to a member of the Chaldean catholic community domiciled in Turkey should be followed in considering the deceased's power of testacy and in distributing his effects. But for the fact that he had enjoyed British protection it would have been clear that at the time of his death he had his domicile in the dominions of the Porte. If he had ever acquired a domicile of choice in India he had lost that domicile when he left India and came to live in Cairo, his domicile of origin then reviving. But it was contended by the appellant that by reason of his living at Cairo under the enjoyment of British protection he had acquired this fanciful thing, an Anglo-Egyptian domicile not based upon connection with English soil.

The testator's history was, as far as it was relevant, shortly this—He was born at Baghdad of Ottoman parents resident there. He then went to India and remained there for a considerable time. He then returned to the Ottoman dominions, going to reside in Jeddah. He left Jeddah in 1858 and went to live in Cairo, Egypt not being then independent, and registered himself so as to become a British protected subject. In 1876 he married the appellant, the ceremony being performed in the manner prescribed by 12 and 13 Vict. cap. 68, a statute enacted to facilitate the marriages of Her then Majesty's subjects resident abroad.

Lord Watson in delivering judgment said (p. 438)—"The idea of domicile not depending upon locality and arising simply from membership of a privileged society is not reconcilable with any of the numerous definitions to be found in the books. In most if not all of these, from the Roman Code (10,37,7) to Storey's Conflict (sec. 41), domicile is defined as locality, as the place where a man had his establishment and true home." He then cited the well-known passages from the judgments of Lord Westbury in *Bell* v. *Kennedy*, L.R., 1 H.L. Sc. 320, and *Udny* v. *Udny*, L.R., 1 H.L. Sc. 458, and having conclusively shown that the testator could not acquire an Anglo-Egyptian domicile, said (p. 444)—"The appellant lastly endeavoured to maintain that the deceased's residence in Cairo had at least the effect of giving him an Egyptian as distinguished from a Turkish domicile. That argument was not addressed to the Court below, but there appears to be two sufficient answers to it. The one is that the appellant has not shown that a domicile in Egypt, so far as regards its civil consequences, differs in any respect from his domicile in other parts of the Ottoman dominions and the other that residence in a foreign state as a privileged member of an extra-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice." It is, I think, quite plain that what Lord Watson meant was this, that though the testator's residence in Cairo could not under the circumstances create this so-called Anglo-Egyptian domicile, his residence there might be effectual to destroy any domicile of choice which he might have previously acquired in India, and that having thus been left without any domicile of choice his domicile of origin would revive. So that really the only points raised in the case and actually decided were that there can be no such thing as the so-called Anglo-Egyptian domicile, since it is not

connected with locality as all domicile must be, and that consequently the testator did not acquire such a domicile; that the testator's domicile of origin had revived; and that therefore the order of the Consular Court appealed from was right. Two passages in Lord Watson's judgment have, however, given occasion to much argument on this appeal. Both are to be found on p. 439 of the report. In dealing with the question of the Anglo-Egyptian domicile of choice claimed for the testator, after alluding to the fact that Cairo was not a British possession governed by English law, and was not British soil, but the possession of a foreign Government, and subject to the sovereignty of the Porte, he proceeded to say—"Certain privileges have been conceded by treaty to residents in Egypt, whether subjects of the Queen or foreigners, whose names are duly inscribed in the registry kept for that purpose. *They are amenable only to the jurisdiction of the Consular Court in civil and criminal matters, and they enjoy immunity from territorial rule and taxation. They constitute a privileged society living under English law on Egyptian soil, and independent of Egyptian Courts and tax-gatherers.* The appellant maintained that a community of that description ought, for all purposes of domicile, to be regarded as an extra-territorial colony of the Crown, and that permanent membership of it ought to carry the same consequences as permanent residence in England, or in one of the colonial possessions of Great Britain where English law prevails." He then proceeds to show that domicile cannot be independent of locality.

The second passage, which follows immediately after the quotation from the judgment of Lord Westbury in *Udny* v. *Udny*, runs as follows:—"According to English law, the conclusion or inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled, so that it becomes the measure of his personal capacity upon which his majority or minority, his succession, testacy or intestacy, must depend. But the law which thus regulates his personal status must be that of the governing body in whose dominion he resides, and residence in a foreign country without subjection to the municipal laws and customs is therefore ineffectual to create a domicile."

The italics are mine. The passage in italics gives a very incorrect description of the true position of this privileged community in Egypt. It is not true that its members are only amenable to the jurisdiction of the Consular Courts in matters civil and criminal. They are in many matters, as I shall presently show, subject to the jurisdiction of the mixed tribunals, which are Egyptian Courts established by an Egyptian statute, and even in the case of the Consular Courts its degrees and orders are enforced and carried out not by Consular but by Egyptian officers. Neither is it true that they enjoy immunity from territorial rule or taxation, or that they are independent of Egyptian Courts and tax-gatherers. They pay such taxes as the English Sovereign has by arrangement with the Khedive consented that they should pay. The only point decided in the case was that the testator, a subject of the Porte by birth and parentage, had not and could not acquire an Anglo-Egyptian domicile. The *obiter dicta* observations made by Lord Watson were made in reply to the extravagant contention that for the purpose of acquiring such a domicile, Cairo was to be taken as a possession of the British Crown, where English law prevailed; but it will be observed that he says nothing about the necessity of a person voluntarily residing in a particular place with the intention of making it his home, in addition manifesting a desire to adopt the manners of life of native society, or identifying himself with its customs, upon which the learned Master of the Rolls so much insisted.

I cannot think that by the words "attracted to himself the municipal law of the territory in which he has voluntarily settled so that it becomes the measure of his personal capacity," Lord Watson ever meant to lay down that the foreign resident must be bound by all the laws that bind natives, and by no other laws, and must observe all the lawful customs that natives observe, else the existence of the slightest exemption from the operation of the ordinary municipal law conferred upon a foreign resident as a privilege would make the acquisition of a domicile of choice by him impossible, especially in India, where different systems of law touching the majority and minority, succession to property, testacy and intestacy of the Hindu and Mahomedan races, differ substantially. Indeed, during the argument of Mr Hume Williams I asked him if the extra-territorial jurisdiction of the Consular Courts only extended to actions of libel and slander between British subjects or protected persons, would it still make the acquisition of an Egyptian domicile of choice impossible? And I did not get a very positive answer. I cannot but think a fallacy lurks in the phrase "municipal law." Surely if by a special law of the sovereign power of a State some section of society is relieved from a duty or burden imposed upon the general community by a general municipal law, the municipal law, the *lex domicilii*, which that section should "attract to themselves" in order to acquire a domicile would be the general municipal law as modified by the special law passed in their favour. For instance, if after this war an Act of Parliament were passed in England that every French citizen coming to reside in England would be relieved of 75 per cent. of the income tax payable by English residents with equal incomes, the municipal income tax laws which he would be bound to obey would be the Income Tax Acts so modified. He would not have to pay up the extra 25 per cent. of income tax to acquire in England a domicile of choice, and the fact, if it were a fact, that this special Act was passed in pursuance of a

treaty made between England and France would not alter matters in the slightest degree. During the argument these Consular Courts were treated as if they were set up and the jurisdiction they exercised was conferred upon them by an Act of the British Crown *proprio vigore* altogether independent of the Sultan of Turkey or the Khedive of Egypt. In my opinion that is not the correct view. They are set up and jurisdiction is conferred upon them by the consent and in the exercise of the power of the legislative governing authority of Egypt. The *lex domicilii* for these English residents is the general law of Egypt applicable to native Egyptians modified by the provisions of the Capitulations and the statute dealing with the mixed tribunals. It matters nothing in my view that these courts were set up and jurisdiction conferred upon them in pursuance of a treaty.

By Article 9 of the Statute of Judicial Organisation for Mixed Courts in Egypt 1892, an Egyptian statute establishing Egyptian Courts, exclusive jurisdiction is conferred upon these Courts over all civil and commercial causes (not coming within the law of personal status) between Egyptians and foreigners and between foreigners of different nationalities. Jurisdiction (though not apparently exclusive) is also conferred in all actions relating to real rights over immoveable property between all persons, even those belonging to the same nationality. By Article 13 it is provided that the bare fact of the creation of a mortgage of immoveable property in favour of a foreigner, whoever be the possessor and owner of the property, shall render these Courts (*i.e.*, the Mixed Courts) competent to adjudicate upon the validity of the mortgage and upon all its consequences up to and including the forced sale of such property as well as the distribution of the proceeds.

By Articles 6, 7, and 8 of Title 2 of the statute, prosecutions for petty offences, in addition to the trial of persons as principals or accomplices for any one of a vast number of felonies and misdemeanours, including wounding and homicide, are made subject to the jurisdiction of the Egyptian Courts whoever the accused may be, whether native or foreigner. By Article 4 of the preliminary provision it is enacted that questions relating to legal status and capacity of persons, and to the law of marriage, to the rights of natural and testamentary succession, and to guardianship and curatorship, remain in the jurisdiction of the Personal Status Judge.

The fifteenth of the Articles of Capitulation and Peace of 1676, confirmed by the Treaty of 1809, provided for litigation between Englishmen and others being dealt with in the Egyptian Courts. The Twenty-fourth Article did the same; a safeguard is provided; the ambassador, consul, or interpreter must be present. The Fifty-second Article is to the same effect. By the Sixteenth Article the foundation was laid upon which the so-called extra-territorial jurisdiction was erected. It provided that if there happened to be any suit or other difference or dispute amongst the English themselves the decision thereof shall be left to their own ambassador or consul, according to their custom, without the judge or other governors (our slaves) interfering with them.

The Order in Council of the 7th November, which merely prescribes the mode in which any jurisdiction belonging to the Sovereign of Great Britain shall be exercised, does not carry the matter any further. In the face of these enactments it cannot, I think, be said with the faintest approach to accuracy that British subjects, properly so called, and British protected persons, "constitute a privileged society living under English law on Egyptian soil and independent of Egyptian Courts and tax-gatherers." The main, indeed the only, contention of the respondent in this appeal that the existence of the extra-territorial jurisdiction renders impossible the acquisition by a British subject of a domicile of choice in Egypt is in my view unsupported by authority and wholly fails. I concur with Scrutton, L.J., in thinking that there is no test which must be satisfied for the acquisition of a domicile of choice in Egypt other than and in addition to those by which a similar domicile is acquired in a European country—namely, voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period. On the whole, therefore, I am of opinion that the order appealed from was wrong and should be reversed, and this appeal should be allowed with costs here and below.

LORD PHILLIMORE—The jurisdiction of the High Court of Justice in its matrimonial division is founded upon domicile. The domicile must be English.

In this case the husband who has been sued by his wife had, no doubt, his domicile of origin in England, and the burden lies upon him, as he disputes the jurisdiction, to show that he has acquired another domicile. But Horridge, J., has found, and it is not disputed that he has rightly found, that if it be possible for the husband to have changed his domicile of origin into an Egyptian domicile he has done so. I think also that if Horridge, J., had not felt himself fettered by authority he would have held there was no impossibility in the husband's acquiring an Egyptian domicile.

The authorities on which the counsel for the wife rely are apparently cited for two different purposes. The one is to show the impossibility of an European Christian intending to change his domicile for one of an Oriental and un-Christian country, and they certainly show that this improbability is considerable. Domicile being acquired *animo et facto*, the tribunal which determines the facts will take this improbability into very serious consideration; but it is only an improbability, and, as Dr Lushington observed in *Maltass* v. *Maltass*, 1 Rob. Ecc. 67, this improbability diminishes if the habits or religion of a person are not inconsistent with those of the country to which he has migrated. Here the husband is of

Greek extraction; his wife apparently is an Egyptian. He married her in Egypt, and the branch of the Christian Church to which he is attached is one that has a considerable footing throughout the Levant and in Egypt.

In "*The Indian Chief*," 3 Ch. Rob. 12, Sir William Scott had to consider whether a merchant of American nationality resident in the English factory at Calcutta could be allowed to trade as a neutral with the enemy, or whether he should be considered as a temporary British subject by reason of his residence under British protection. It was suggested on behalf of the claimant that Calcutta was to be considered as part of the dominions of the Great Mogul; on behalf of the Crown that it was an *imperium in imperio*, and upon this latter principle and in conformity with some other decisions as to residence in Dutch and English factories in the East Indies the claimant was deemed to be in the position of a British subject trading with the enemy and his goods were condemned.

In the course of his judgment and in support of his conclusions Sir William Scott dwelt upon the peculiar and isolated position of Europeans gathered together in factories in the East, and the immiscibility of the European with the Oriental.

In *re Tootal's Trusts*, 23 Ch. D. 532, an Englishman living and dying in China, and the evidence being that he had determined to reside permanently in China, made a will in English form which, according to the peculiar privileges granted to Europeans in China, was proved in the British Consular Court. The question was whether legacy duty should be paid on his bequests. If he was domiciled in England it had to be paid. If he was domiciled anywhere else it had not to be paid. The first line of defence might have been that he was domiciled in China. Counsel for the legatees gave up the contention for a Chinese domicile, and did this with the approbation of the judge, who thought that, having regard to the difference of Chinese habits, manners, and religion, more was required to establish a change of domicile than would be required if the change was to a country of Western civilisation, and that this *more* had not been established. Whether their admission was right or wrong was not a matter of judicial determination, and the approbation was given by a judge who was apparently unassisted by argument.

The first line of defence having been given up, counsel argued that there was such a thing as an Anglo-Chinese domicile arising out of the existence of the peculiar privileges of Englishmen and other Europeans in China, and the establishment of Consular Courts, which was neither English nor Chinese, but a *tertium quid*. This contention Chitty, J., rejected, holding, and certainly rightly holding, that domicile is not acquired by membership of a community, but by residence in a locality, and that if the testator had not a Chinese domicile he retained his English domicile. This decision of Chitty, J.—and it is the only point which he decided—so far from supporting the decision in the present case, is, as will be hereafter seen, rather opposed to it. As to the bearing of dissimilarity of habits upon the probability of a change of domicile, I adopt the opinion of Horridge, J., that this dissimilarity is an element to be considered but nothing more.

The second and more important purpose for which the counsel for the wife relied upon the authorities was to establish, if they could, the proposition that British subjects having a domicile of origin somewhere in the British Empire could not acquire a domicile of choice (or that no evidence which could be given would prove a choice) in any Oriental country subject to the regime established by the Capitulations in Turkey or by analogous treaties with China and other Oriental countries. It was said that the effect of these arrangements was to put a British subject in a position of extra-territoriality not dissimilar to that of an ambassador, and that his residence as one of a privileged and protected community was a mere prolongation of his previous residence under direct British sovereignty. For this purpose *re Tootal's Trusts* and the cases of *Abd-ul-Messih* v. *Farra*, 13 A.C. 431, and *Abdallah* v. *Rickards*, 4 T.L.R. 622, are those upon which the principal reliance was placed.

Upon a careful examination of *re Tootal's Trusts* it will be seen that it lends no support to this proposition. Chitty, J., in stating his reasons for approving the concession of counsel, does not rely upon the privileges of Englishmen in China as affording any reason against a change to a Chinese domicile. Indeed, if Tootal could by preserving his English nationality have kept his privileges though he acquired a Chinese domicile, it would rather seem that one motive for abstaining from change was thereby removed. When the existence of these privileges was relied upon to support the peculiar Anglo-Chinese domicile for which counsel contended, Chitty, J., apparently attached no weight to the argument.

If Tootal instead of having an English domicile of origin had been a British subject of Chinese race and habits with a domicile of origin at Hong Kong or Singapore, there is no reason to suppose that Chitty, J., would have found any difficulty in accepting a change of domicile to China, or that the existence of the British Consular Court with its jurisdiction over all British subjects would have been considered as a reason against a change of domicile.

In *Abd-ul-Messih* v. *Farra* the testator was a Turkish subject professing the Mahommedan faith. Under the Mahommedan law, which applies to Turkey, at any rate to all persons of that religion, the liberty of testacy is restricted, and such part of the estate as cannot be disposed of by will descends in a particular manner. It did not suit the interests of the widow that the Mahommedan law should prevail, and therefore she set up a case for an English or Anglo-Egyptian domicile.

The testator was born at Baghdad, and after some time spent in India took up his

residence at Jeddah, and finally went to Egypt, where he died, all these places being in the Ottoman dominions.

When he went to Egypt he registered himself as a protected British person, and it was upon this slender foundation and his temporary residence in India that counsel for the widow argued for an English domicile.

When that failed, her counsel took up a second point, the nature of which the late James, L.J., used to call a *tabula in naufragio*, that the deceased had acquired an Anglo-Egyptian domicile (why an Anglo-Egyptian rather than an Indo-Egyptian or indeed a Scoto-Egyptian did not appear) which would attract to itself the English law of succession, and this contention was also rejected by the Privy Council. So far as the decision went, it tended in the same direction as that *in re Tootal's Trusts* towards the disregard of the existence of special privileges for Europeans and the establishment of Consular Courts as an element of any importance in considering the question of domicile.

The two points actually decided were, as stated in the judgment of Swinfen Eady, L.J., that the community of British subjects and persons having the status of protected British persons in Egypt was not an ex-territorial colony of the Crown, and that permanent membership of it did not carry with it the same civil consequences as permanent residence in England. It was, no doubt, further stated, that supposing it to be an ex-territorial community, residence in it would not create a domicile of choice. But this was stated in respect of a Turkish subject moving from one part of the Ottoman dominions to another and supposed to be thereby seeking to acquire, not a domicile in the new part, if that would make any difference, but a domicile which would be given by residence as a member of the supposed extra-territorial community. Scrutton, L.J., drew, I think, the right conclusion from this judgment. But his colleagues were led away by attaching too much importance to certain dicta in the judgment as stating the law of England and, what is even more doubtful, the law of Egypt. Speaking with all respect, I must say that the passage which states the position of British subjects in Egypt according to Egyptian law (a point which was immaterial, because the testator was held not to be a British subject) states that law to some extent incorrectly. It is open to me to say this because the position in Egypt is a matter of Egyptian law, and foreign law according to our jurisprudence is treated as fact not law.

The judgment ignored the existence of the mixed tribunals in Egypt, and treated British subjects as amenable only to the British Consular Courts. It also spoke of them as immune from all local taxation. This last fact may or may not have been so in 1888, when the judgment was delivered. It is not the case now. As to the mixed tribunals, they were established in 1876 by a decree of the Khedive, made no doubt with the consent of the principal European Powers, but by virtue of his delegated authority under the Ottoman Porte. The tribunals consist partly of foreigners and partly of Egyptians. There is no special requirement that the foreign judge in any particular case should be of the nationality of the European whose case is before the tribunal, and they are given jurisdiction "over all civil and commercial causes not coming within the law of personal status between Egyptians and foreigners and between foreigners of different nationalities. They shall also have jurisdiction in all actions relating to real rights over immoveable property between any persons, even persons belonging to the same nationality." They have also in several matters criminal jurisdiction over foreigners, even in some capital cases. If, therefore, it is a principle of law (as to which I should desire to reserve my opinion) that "residence in a foreign country without subjection to its municipal laws and customs is . . . ineffectual to create a new domicile," the principle does not affect a British subject resident in Egypt so as to make it impossible for him to acquire an Egyptian domicile.

The other passage which is relied upon in support of the judgments in the Courts below runs as follow—"Residence in a foreign state, as a privileged member of an ex-territorial community, although it may be effectual to destroy a residential domicile elsewhere, is ineffectual to create a new domicile of choice."

This passage professes to be an answer to the argument that the deceased had at least acquired an Egyptian instead of a Turkish domicile. Whether an Egyptian or an Anglo-Egyptian domicile is meant is not clear. I have not found any trace in the report of the suggestion that the law of Egypt differs as to succession from that of other parts of the Ottoman dominions. Be this as it may, let me apply the general statement to the concrete facts. Residence at Cairo as a British protected person may suffice to destroy any domicile acquired in India or at Jeddah, but it is not sufficient to destroy the domicile of origin at Baghdad and give a new domicile of choice, either an Egyptian or an Anglo-Egyptian one. If an Egyptian domicile proper is intended, this passage does give weight to the connection with a privileged community; but then there was no importance in an Egyptian domicile. If an Anglo-Egyptian domicile is meant, the passage shows what little weight their Lordships attached to the privileged community.

In *Abdallah* v. *Rickards*, Chitty, J., took this last passage in *Abd-ul-Messih* v. *Farra* as stating the law. But all that he decided was that a testator who had a domicile of origin in England, went to the Turkish dominions, married a Mahommedan, returned to England and married a Christian, went again to the East (Syria) and lived and died there, keeping up his English *habits* and registering himself as a British subject, could not be held to have intended to change from his British domicile. This may or may not have been a right decision upon the facts, but whatever its weight or its applicability it is not binding upon this House.

These decisions, or at any rate the principles supposed to be extracted from them, have been commented upon and been dissented from in an important decision of the Supreme Court of Maine—*Mather* v. *Cunningham*, 105 Maine R. 326, 74 Atlantic R. 809. It is true that in two cases in the Egyptian Prize Court the learned judges have given their adhesion to them. But on the other hand, in the "*Eumaeus*," 1915 B. & C.P.C. 605, the President expressly reserved his opinion upon the principle supposed to be extracted from *re Tootal's Trusts*.

In this very case Swinfen Eady, L.J., as I read his judgment, and certainly Warrington, L.J., thought that if the husband had segregated himself from the European community he could have acquired an Egyptian domicile. If by imposing this condition they meant that he must have renounced his British nationality, they make nationality the criterion of domicile, which is contrary to all authority. If they did not mean that, non-segregation is only a factor to be considered as a piece of evidence of the person's intention.

It does not appear to me that the position of Europeans in the Ottoman dominions under the regime of the Capitulations, or under any modification of them of which we have cognisance in the now independent State of Egypt, is rightly described as extra-territorial.

It is possible that this description might have been applied to the ancient Dutch and English factories in the East Indies, and it may be that in the case of *Abd-ul-Messih* v. *Farra* it was assumed, upon the imperfect materials before the Privy Council, that the position in Egypt was like that of a factory.

Under the Capitulations and the subsequent treaties and arrangements with Turkey, with Egypt under the Khedive as still a part of the Ottoman dominions, with Egypt now as a protected State, and under the analogous arrangements which exist in China, and at one time existed in Japan and Zanzibar, Europeans of many nations, including the British, have peculiar privileges and some immunities, the measure of which is to be found in the expressed terms of the several grants. In so far as it may be said that the effect of them is to constitute separate little national communities, this is immaterial on the question of domicile.

The result is that while there is authority for saying that there is improbability in the change of domicile to an Oriental country, even so highly a civilised one as Egypt, there is no legal impossibility.

I think that the trend of Horridge, J.'s mind was in the right direction, and that the decision of Scrutton, L.J., which has been of great assistance to your Lordships, was right, and that the judgment of the other learned Lords Justices has not sufficiently analysed the actual points decided, and has attached too much weight to the dicta in the cases which have so often been quoted.

It is established, I think, that the husband had a domicile in Egypt, and was therefore not subject to the High Court of Justice in England in its matrimonial jurisdiction.

I am of opinion that the appeal should be allowed.

Their Lordships sustained the appeal.

Counsel for the Appellant—Wallace, K.C. — Murphy. Agents — Hatchett-Jones, Bisgood, Marshall, & Thomas, Solicitors.

Counsel for the Respondents — Sir W. Hume Williams, K.C.—Hastings. Agents —Treherne, Higgins, & Company, Solicitors.

PRIVY COUNCIL.

Thursday, October 17, 1918.

(Before the Lord Chancellor (Finlay), Lords Buckmaster, Dunedin, and Atkinson).

DOMINION TRUST COMPANY *v.* NEW YORK LIFE INSURANCE COMPANY.

(On Appeal from the Court of Appeal of British Columbia).

Process — Review — Evidence—Findings of Fact—Admission of Truth of Evidence—Right of the Appellate Tribunal to Draw its Own Inferences from the Facts.

This action turned, *inter alia*, upon whether the respondent insurance companies were liable to pay to the appellant company as executor of A sums under policies of insurance. Their defence was that A's death was self-inflicted. The trial judge held that the evidence did not support this contention. It was argued that the Appellate Court could not go behind this finding of fact.

Held that as there was no question as to the truthfulness of the witnesses, the Court of Appeal was in as good a position as the trial judge to draw inferences from the evidence, and that his inferences were wrong.

Montgomerie & Company, Limited v. *Wallace-James*, 1904 A.C. 73, *considered* and *applied*.

Appeal on this point *dismissed*.

The *facts* are fully stated in the considered judgment of their Lordships, which was delivered by

Lord Dunedin — These actions were raised in the Supreme Court of British Columbia by the Dominion Trust Company in liquidation and its liquidator as executors of the deceased W. R. Arnold against three insurance companies with whom Arnold had effectuated policies on his life. The first action against the New York Life Insurance Company was in respect of two policies, one term and one life, for 50,000 dollars each, the policies having been taken out in September 1916, just about a fortnight before the death occurred. The second action was against the Mutual Life Assurance Company of Canada, in respect of a life policy for 50,000 dollars of date the 27th November 1912, and the third against the Sovereign Life Assurance Company of Canada, in respect of a policy for 10,000 dollars dated the 23rd October 1912.