

Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Ellen Abd-ul-Messih (Widow) v. Chukri Farra and Angela Farra (in the matter of the Estate of Antoun Youssef Abd-ul-Messih, deceased), from the Supreme Court of Constantinople; delivered 17th March 1888.

Present :

LORD WATSON.

LORD HOBHOUSE.

SIR BARNES PEACOCK.

SIR JAMES HANNEN.

[*Delivered by Lord Watson.*]

The Appellant, in October 1885, instituted the present suit, before Her Majesty's Supreme Consular Court at Constantinople, for probate of the will of her husband Antoun Youssef Abd-ul-Messih, who died at Cairo in February 1885, leaving a large personal estate. Her application was opposed on its merits by the Respondents, two of the next of kin of the deceased, who also pleaded that the Court had no jurisdiction. The Judge of the Consular Court, by a decree of the 24th February 1886, sustained his own jurisdiction, in respect of "the deceased having acquired the status of a protected British subject;" and in that finding both parties have acquiesced. Issues were then adjusted, the first being,— "Is English law to be followed in distributing the assets?" and the second,— "If

“ the Court is of opinion that English law is not applicable, is Turkish, or what other law ?” Evidence, both oral and documentary, bearing upon these issues was adduced; and thereafter, on the 28th May 1886, the learned Judge pronounced the order now appealed from, whereby he found that the testator “ died domiciled in the Ottoman Empire, his domicile of origin, and a member of the Chaldean Catholic community;” and, in respect of these findings, decreed “ that the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey be followed in considering the power of testacy of the said deceased, and in distributing the deceased’s effects.”

It is therefore *res judicata* that the Consular Court has jurisdiction to entertain the present suit, and to administer the estate of the deceased, in accordance with the provisions of Her Majesty’s Order in Council, dated the 12th December 1873. Section 5 of the Order enacts that Her Majesty’s civil jurisdiction in the Ottoman dominions shall be exercised under and according to the provisions of the Order, “ and not otherwise;” and Section 6 prescribes that (subject to the other provisions of the Order) the civil jurisdiction thereby established shall, as far as circumstances admit, “ be exercised on the principles of and in conformity with the common law, the doctrines of equity, the statute law, and other law *for the time being in force in and for England.*” By Section 91 it is enacted that the Supreme Consular Court at Constantinople shall be a Court of Probate, and shall, as far as circumstances admit, have “ for and within the Ottoman dominions, with respect to the property of deceased resident subjects or protected persons, all such jurisdiction as for the time being belongs to Her Majesty’s Court of

“ Probate in England.” According to the interpretation clause (Section 4) the word “ subject ” means a subject of Her Majesty by birth or by naturalization ; and the expression “ a protected “ person ” means a person enjoying Her Majesty’s protection. These are the only classes of persons whose estates, on their decease, are made subject to the probate jurisdiction of the Consular Court.

Having regard to the enactments of Sections 5 and 6 of the Order, their Lordships are of opinion that it was the duty of the Consular Court to follow, in the present case, the same principles which would have been observed by an English Court of Probate. It is a settled rule of English law that civil status, with its attendant rights and disabilities, depends, not upon nationality, but upon domicile alone ; and, consequently, that the law of the testator’s domicile must govern in all questions arising as to his testacy or intestacy, or as to the rights of persons who claim his succession *ab intestato*. That doctrine was clearly explained by Lord Cranworth in *Enokin v. Wylie* (10 H. L. Ca., 19). Accordingly, the tribunal in which the estate of a deceased is to be administered, if it be not itself the forum of the domicile, must defer on all these points to the law of the domicile, and accept that law as its only guide.

The late Antoun Youssef Abd-ul-Messih, who was born at Bagdad of Ottoman parents resident there, went in early life to India, where he remained for a considerable period, and then transferred his abode to Jeddah, in the dominions of the Porte. In the year 1858 he left Jeddah for Cairo, where he continued to reside until the time of his death, and he does not appear to have entertained any intention of changing his residence. During the whole period of his stay in Cairo he was *de facto* under the protection of the British

Government. In 1876 he was married to the Appellant, the ceremony being performed in the manner prescribed by 12 & 13 Vict., cap. 68, which was enacted for the purpose of affording facilities for the marriages of Her Majesty's subjects resident abroad. On the 9th June 1882 he executed in English form the will now sought to be admitted to probate, by which he constituted the Appellant his residuary legatee and representative. These are the whole facts in evidence which have any material bearing upon the question of domicile; and (apart from the fact of his having enjoyed British protection in Cairo) they establish, beyond doubt, that the testator, at the time of his death, had his domicile in the dominions of the Porte. If he did gain a domicile in India (of which there is no satisfactory proof), he ceased to retain it when he left that country for Jeddah without the intention of returning. His domicile of origin then revived and continued to adhere to him until the acquisition of a new domicile.

It was argued for the Appellant that her husband's selection of a permanent abode, in Cairo, under British protection, attracted to him an English, or as it was termed, an Anglo-Egyptian domicile. That result would, doubtless, have followed if Cairo had been a British possession governed by English law; but Cairo is in no sense British soil; it is the possession of a foreign Government, and subject to the sovereignty of the Porte. 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. 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 idea of a domicile, independent of locality, and arising simply from membership of a privileged society, is not reconcileable with any of the numerous definitions of domicile to be found in the books. In most, if not all of these, from the Roman Code (10, 39, 7) to Story's Conflict (§ 41), domicile is defined as a locality,—as the place where a man has his principal establishment and true home. Probably Lord Westbury was more precisely accurate, when he stated, in *Bell v. Kennedy* (1 Sc. and Div. Ap., 320), that domicile is not mere residence, "it is the relation which the law creates between an individual and a particular locality or country." The same learned Lord, in *Udny v. Udny* (1 Sc. and Div., 458), speaking of the acquisition of a residential domicile, said, "Domicile of choice 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 an intention of continuing to reside there for an unlimited time." 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, and testacy or intestacy must depend.

But the law which thus regulates his personal *status* must be that of the governing power in whose dominions he resides; and residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicile.

No authority was cited which gives the least support to the Appellant's contention, except perhaps a single passage in Mr. Westlake's Treatise (2nd edition, p. 262), in which the learned author mentions "Anglo-Indian, or Anglo-Turkish domicile" as affording apt illustrations of the principle that "in the East every person is a member of that civil society existing in the country in which he is domiciled which his race, political nationality, or religion determine." If by "Anglo-Turkish," the same kind of domicile is meant as that which the Appellant seeks to establish, it has no analogy whatever to an "Anglo Indian" domicile. The latter is altogether independent of political *status*; it arises from residence in India, and has always been held to carry with it the territorial law of that country, whether under the Empire of the Queen, or under the previous rule of the East India Company, which the Courts of England treated (in questions of domicile) as an independent Government. By the law established in India, the members of certain castes and creeds are, in many important respects, governed by their own peculiar rules and customs, so that an Indian domicile of succession may involve the application of Hindu or Mohammedan law; but these rules and customs are an integral part of the municipal law administered by the territorial tribunals. The legal condition of foreigners resident in Turkey, who are exempted by treaty from the jurisdiction of its local Courts, is very well described by Feraud Girand (*Jurisdiction Francaise*, Vol. II., p. 58),

one of the authorities referred to by the Appellant's Counsel. They form, according to the view of that learned writer, an anomalous ex-territorial colony of persons of different nationalities, having unity in relation to the Turkish Government, but altogether devoid of such unity when examined by itself; the consequence being that its members continue to preserve their nationality, and their civil and political rights, just as if they had never ceased to have their residence and domicile in their own country. But it is needless to pursue this topic farther. 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. "*In re Tootal's Trusts*" (23 Ch. Div., 532) is an authority directly in point; and their Lordships entirely concur in the reasoning by which Mr. Justice Chitty supported his decision in that case.

It was next argued that the Order not only permits subjects and protected persons, who at the time of their decease are resident in the Ottoman dominions, to test according to English law, but prescribes that they shall make their wills in English form, and in no other. It was represented to be the effect of the Order that, in the case of such persons, English law is the sole criterion by which their capacity to make a will, and its validity when made, must be determined. If that were the true construction of the Order it might lead to very singular consequences. All that is required, in order to give complete probate jurisdiction to the Consular Court, is that the testator shall have been resident in the Ottoman dominions at the time of his decease; it is not requisite that he should have had his only or his principal residence there. If a Scotchman went to reside

in Egypt for the purposes of his business, leaving his family at home, and happened to die there, his testament, sufficiently executed according to the law of Scotland, might be invalidated by the Statute of Wills; and he, having acquired the testamentary capacity of a domiciled Englishman, could gratuitously defeat the legal rights of his widow and children, according to the law of his and their domicile. The same or similar results would follow in the case of British subjects coming to Turkey from any part of Her Majesty's dominions where the law of testate succession differs from that of England.

The professed object of the Order of 12th December 1873 is, throughout, to confer jurisdiction upon the Consular Courts as thereby regulated, and to lay down rules for their procedure; and it is hardly conceivable that enactments framed for these purposes only, and not affecting to deal with substantive law, should have been intended to introduce such great and important alterations of the personal status and civil rights of Her Majesty's subjects. The enactments, which not only confer jurisdiction but specify the law to be administered by these Courts, give no indication that any such changes were contemplated. According to Section 6, they are to administer the law for the time being in force "in and for England," an expression which simply denotes the law for the time being administered in the Courts of England; and, according to Section 91, they are to have the same jurisdiction in probate as belongs to the English Court of Probate. If this suit had been brought in the Court of Probate here, there can be no doubt that the law applicable would have been that of the testator's domicile; but it was suggested for the Appellant that the words "in and for England," must be read as if they had been

“in England and for Englishmen.” That construction would not avail her, because the testate succession of an Englishman is regulated by his domicile, which may be in France or elsewhere abroad. In order to support the argument, it would be necessary to make the gloss run thus, “in England and for Englishmen domiciled there.” The suggestion has hardly the merit of plausibility, seeing that it involves the necessity of adding to the otherwise plain language of the enactment words which have the effect of giving it a totally different meaning.

The only part of the Order which lends some colour to this branch of the Appellant's argument is Section 229, which relates to proceedings in the case of probate or administration with the will annexed. It provides that the Court shall ascertain whether the will propounded was signed by the testator, or some other person in his presence or by his direction, and subscribed by two witnesses, “according to the enactments relative thereto,” and shall refuse probate if satisfied that it was not, in fact, executed in accordance with these enactments. The framers of Section 229, which is, in terms, a rule of procedure, and nothing more, had obviously in view the English Statute of Wills, and they do not seem to have made provision for proceedings to prove a will executed in any other form, but that does not establish that a will executed in English form must necessarily be valid. There is no section of the Order which enacts that the Court shall grant probate without reference to the capacity of the testator, and it does not follow from the terms of the 229th section that it was intended to override the general provisions of Section 6, and to enact by implication that the capacity or incapacity of testators are not to be determined by the laws which ordinarily govern their personal status. The directions of the Order,

with respect to procedure in cases of intestacy, leave untouched the provisions of Section 6, so that the property of subjects and protected persons dying intestate must be administered by the Consular Courts in accordance with the law of their domicile. It can hardly have been contemplated that a man's personal status should be dependent upon the circumstance of his having made a will, and that subjects of the Queen, not being domiciled Englishmen, are to retain the status which they carried with them to Egypt if they die intestate, and must lose it if they leave a will which complies with the provisions of the English statute, as well as with the requirements of their domiciliary law. There can be no presumption that the provisions of the Order with respect to procedure were intended to produce such anomalies; and, in the absence either of express enacting words, or of plain implication necessitating the inference, their Lordships cannot hold that the enactments of Section 229 qualify the provisions of Section 6, or in anywise affect the civil status of those residents in Egypt whose persons and estates are subject to the jurisdiction of Her Majesty's Consular Courts.

The next alternative presented by the Appellant's Counsel was this, that her husband had *de facto*, or at all events according to Ottoman law, lost his Turkish nationality, and had become a subject of the Queen. That change in his political status was said to be attended with one or other of these consequences, viz., either that his civil status became that of a domiciled Englishman; or, assuming his domicile to have been in Bagdad, that a Turkish tribunal would, in administering his estate, defer to the law of England, as the law of his nationality.

It is clear that the deceased was not, in the sense of English law, a subject of Her Majesty. Neither did he possess that status, within the

meaning of the Order, which expressly enacts that it must be attained either by birth or naturalization. But the Appellant relied upon its having been determined, for the purposes of this litigation, in the final decree of 24th February 1886, that he had "acquired the status of a protected British subject." The phrase "protected British subject" does not occur in the Order; it has no technical significance; and it must therefore be taken to express that which the learned Judge unquestionably meant to affirm, viz., that the deceased had *de facto* enjoyed the same measure of protection which is accorded by treaty to British subjects in the dominions of the Porte.

It was argued, however, that it is the law of Turkey, and not the law of England, which must determine, for the purposes of this case, whether the deceased ought to be regarded simply as a protected alien, or as a British subject who had cast off his allegiance to the Porte. Upon this point evidence was led on both sides. Four legal experts were examined for the Appellant, who asserted that he had, and six for the Respondents who asserted that he had not, become, in the eye of Ottoman law, a subject as well as a protégé of Great Britain. All of these learned gentlemen were agreed that there is no Turkish text or judicial decision having any bearing upon the question; and they merely expressed their individual opinions as to the inference which an Ottoman tribunal ought to derive, and would probably derive, from the tenor of existing treaties, and the law on the subject of Ottoman nationality promulgated by the Porte on the 19th January 1869. Their Lordships do not consider it necessary to decide between these conflicting opinions, because a decision in her favour would not assist the Appellant's case. 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.

There is no evidence whatever tending to show that the Courts of Turkey, in administering the estate of a person in the position of the deceased, would be guided, not by their own municipal law, but by the rules followed by English Courts, in the case of domiciled Englishmen. But it was submitted that the Appellant ought now to be allowed to lead proof for the purpose of establishing that proposition. The record contains no allegation, not even a suggestion, that there is any special law in Turkey with respect to the succession of a protected person; and the Appellant has already had ample opportunity of bringing forward such evidence as she thought fit, bearing upon the issues settled for the trial of the cause. In these circumstances, their Lordships do not think she is entitled to any further allowance of proof. There must still be some evidence taken, but it must be confined to the single point specified in the judgement appealed from.

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 appear 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 a domicile in other parts of the Ottoman dominions; and the other, that residence in a foreign State, as a privileged member of an

ex-territorial community, although it may be effectual to destroy a residential domicile acquired elsewhere, is ineffectual to create a new domicile of choice.

Their Lordships are accordingly of opinion that no cause has been shown for disturbing the judgement of the Consular Court; and they will humbly advise Her Majesty to that effect. The Appellant must bear the costs of this appeal; but their Lordships will humbly advise Her Majesty that the costs of all parties in the Court below ought to come out of the estate.

