Anglo-Indian, Anglo-Turkish, Anglo-Chinese?: The making and unmaking of the hyphenated domicile in private international law

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Abstract

In the late eighteenth century, courts developed the concept of an 'Anglo-Indian domicile' to categorise individuals of European descent who resided in India; although domiciled in India such persons were subject to English law as members of a broader community. Other forms of 'hyphenated' domicile were articulated in the late nineteenth century in places where Britain exercised extraterritorial jurisdiction; these included the 'Anglo-Turkish domicile' in the Ottoman empire and the 'Anglo-Chinese domicile' in China. In this article, I explore how the balance between physical residence in territory and membership of a broader community in the concept of the hyphenated domicile was critical to the project of imperial ordering.

A. Introduction

On 18 June 1831, Peter Cochrane left his apartment in Paris intending to make his way to London; however, on account of his ill health, he never completed the journey, dying later that day in the French town of Beauvais.[1] Cochrane had spent the last few years of his life moving

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[1] *Moorhouse v Lord*, 11 ER 1030, 1032.

between Scotland, Switzerland, and France.[2] The key question in the long succession battle after his death revolved around his domicile, a term that, at common law, is 'regarded as the equivalent of a person's permanent home'; changing one's domicile requires a combination of the fact of 'residence in a territory subject to a distinctive legal system' and 'an intention … to remain there permanently'.[3] Determining Cochrane's domicile was important since questions of family relations and estates had long been considered to be subject to the law of the domicile.[4] After reviewing the evidence, the House of Lords concluded that Cochrane had not abandoned his Scottish domicile in favour of a French one; per Scots law, the validity of his last will was upheld.[5]

Lord Cranworth's judgment, however, mentioned a curious term: 'Anglo-Indian domicile'.[6] Cochrane was born in Scotland but had spent much of his life in British India, employed as a surgeon by the East India Company (the 'Company' or 'EIC'); he returned to Scotland only after his retirement, whereupon he reacquired his Scottish domicile of origin.[7] However, in Lord Cranworth's view, when Cochrane had gone to British India, 'he acquired what we must,

[2] *Moorhouse* (n 1) 1031–1032.

[3] Paul Torremans et al, *Cheshire, North and Fawcett: Private International Law* (15th edn, Oxford University Press 2017) 146.

[4] Torremans et al (n 3) 145. This position can be contrasted with the approach in civil law systems, where matters of personal status are resolved by reference to the law of the nationality. For a discussion of the conceptual divide between common and civil law systems when it came to domicile and nationality, see William Cornish, Michael Lobban, and Keith Smith, 'Private International Law' in William Cornish et al (eds) *The Oxford History of the Laws of England*, vol 11, *1820–1914: English Legal System* (Oxford University Press 2010) 285–288.

[5] *Moorhouse* (n 1) 1035.

[6] *Moorhouse* (n 1) 1034.

[7] *Moorhouse* (n 1) 1031.

on the authorities, admit to be a different domicile from that which he had when he went there, namely, an Anglo-Indian or a Scoto-Indian domicile'; accordingly, 'if he had died there, or had died before he had established himself anywhere else, his property would have been administered according to the law of England'.[8]

Although succession to Cochrane's estate turned on whether he had acquired a French domicile, the brief, almost throwaway reference to an Anglo-Indian domicile raised a host of questions. What, precisely, was an Anglo-Indian domicile? Did it differ from a regular Indian domicile in any way? How exactly had Cochrane managed to acquire an Anglo-Indian domicile despite the evidence that he had always intended to return to Scotland after his retirement, thereby puncturing the requirement of an intention to stay in British India permanently? Why would Cochrane's estate have been governed by English rather than Scots law if he had died in British India or had retained his Anglo-Indian domicile?

As I elucidate in this article, courts developed the concept of an Anglo-Indian domicile while hearing cases involving succession to the estates of European British subjects, that is, those British subjects who traced their ancestry to the British Isles rather than 'native' British subjects.[9] Although domiciled in British India, the law applicable to such individuals depended not just their on their physical residence in a given territory but also on their membership of a

[8] *Moorhouse* (n 1) 1034.

[9] The term 'European British subjects' was later defined in section 71 of the Indian Code of Criminal Procedure 1872 as '(1) All subjects of Her Majesty, born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland or in any European, American, or Australian Colonies or possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal. (2) The children or grandchildren of any such person by legitimate consent'.

broader European British community that was subject to English law. Consequently, both Englishmen and Scotsmen domiciled in British India were subject to English law regardless of their domicile of origin. As Norman Bentwich argued, 'the domicile which a British subject acquires is not a purely Indian domicile, but a domicile in the local English society which subjects him to the special code of laws governing that society'.[10]

This emphasis on community membership muddies the generally accepted view of the centrality of territoriality in English private international law.[11] The common law was applied throughout the territory of the realm by powerful central courts, with cross-border commercial and maritime disputes being adjudicated by specialised courts that applied a common European *lex mercatoria*.[12] Once *lex mercatoria* was absorbed into the common law at the turn of the eighteenth century, English courts imported continental approaches to resolving choice of law questions, which, at the time, were strongly influenced by the development of the concept of territorial sovereignty.[13] The seventeenth-century Dutch jurist Ulrik Huber argued that the acceptance of territorial sovereignty necessarily implied that the laws of a sovereign were effective against all persons within its own territory, including those present temporarily, but

[10] Norman Bentwich, *Law of Domicile in its Relation to Succession and the Doctrine of Renvoi* (Sweet & Maxwell 1911) 47.

[11] See, for instance, PE Nygh, 'The Territorial Origin of English Private International Law' (1964) 2 *University of Tasmania Law Review* 28.

[12] Alexander N Sack, 'Conflict of Laws in the History of English Law' in *Law: A Century of Progress, 1835–1935*, vol 3 (New York University Press 1937) 343–345, 350–352.

[13] Friedrich Juenger, *Choice of Law and Multistate Justice* (Transnational Publishers 2005) 24–26.

did not extend beyond the territory.[14] Huber's approach went on to shape the views of nineteenth-century British scholars, including TE Holland, John Westlake, and AV Dicey.[15]

Despite the centrality of territoriality, the issue of the law applicable to questions of personal status, including familial relationships and property, remained complex, particularly in light of the increasing movement of peoples across the world with the spread of European empires and the desire of such peoples to often remain subject to their 'own' law even in new realms. Mediaeval scholars had attempted to resolve this issue by classifying all laws into different categories, with real statutes applying territorially and personal statutes applying to persons regardless of where they were physically located.[16] Beginning with the Napoleonic Code of 1804 and furthered by the ideas of the Italian jurist Pasquale Stanislao Mancini, nationality soon became the dominant connecting factor in private international law across most of continental Europe, Latin America, and Japan, with private law primarily being seen as personal rather than territorial.[17] Reliance on nationality, however, was a difficult proposition in the expanding British empire, where different imperial territories often retained separate legal systems, as demonstrated by the Acts of Union 1707 that united England and Scotland

[14] Hessel E Yntema, 'The Historic Bases of Private International Law' (1953) 2 *American Journal of Comparative Law* 297, 306.

[15] Juenger (n 13) 26–27.

[16] Juenger (n 13) 14–15.

[17] Ernest G Lorenzen, 'Story's Commentaries on the Conflict of Laws – One Hundred Years After' (1934) 48 *Harvard Law Review* 15, 32–33; Kurt H Nadelmann, 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality versus Domicile' (1969) 17 *American Journal of Comparative Law* 418, 420–421; and Jessica M Marglin, 'Nationality on Trial: International Private Law across the Mediterranean' (2018) 73 *Annales HSS (English Edition)* 81, 92–93.

but provided for the continued application of Scots law.[18] Given these complexities, English courts instead moved towards the adoption of domicile as a connecting factor when it came to matters of personal status in the late eighteenth century.[19]

As Alex Mills notes, the concept of domicile has a complicated relationship with territory; although it is 'not based on the location of an event of relationship, … [it] may nevertheless reflect a personal attachment to a territorial location, including a subjective intention for that connection to be enduring'.[20] Consequently, the objective factual element of domicile involves a connection between an individual and territory that is 'a combination of ideas of personality and territory, reflecting a personal connection *with* a territory', while the subjective element of intention is related 'to ideas of party autonomy'.[21] Given this emphasis on the actions of a person to change their domicile, it is often considered to be 'an individualistic and liberal system'.[22] As a result, scholars such as Karen Knop and Harald Bauder have advocated for

[18] Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press 2009) 251; and Cornish, Lobban, and Smith (n 4) 287.

[19] PE Nygh, 'The Reception of Domicil into English Private International Law' (1961) 1 *Tasmanian University Law Review* 555.

[20] Alex Mills, 'Justifying and Challenging Territoriality in Private International Law' in Roxana Banu, Michael S Green, and Ralf Michaels (eds), *Philosophical Foundations of Private International Law* (Oxford University Press 2024) 178–179.

[21] Mills (n 18) 251–252.

[22] Martin Wolff, *Private International Law* (2nd edn, Clarendon Press 1950) 103. For the argument that domicile's focus on the will on the individual was in line with British ideas on the freedom of movement and commerce, see Wm Galbraith Miller, 'Nationality, Domicil, and the Personal Statute' (1903) 15 *Juridical Review* 113.

viewing domicile as a concept that can expand individual rights such as citizenship and access to courts.[23]

As the idea of Anglo-Indian domicile demonstrates, the definition of domicile in the British empire was not only focused on a personal, individual connection with territory but also on the membership of a broader community that enabled the application of specific laws. Domicile was, therefore, a mechanism through which individuals could claim their 'legal belonging', a term that Jessica Marglin describes as 'involv[ing] both the formal bonds that tie people to a state, as well as forms of membership that stray beyond the strict boundaries imposed by words like "citizen" and "national"'.[24] As Marglin contends in the context of the nineteenth century Mediterranean, legal belonging was 'highly fragmented' and 'encourages us to visualize different types of bonds with a state as existing along a spectrum'.[25] While 'Christian men of European descent' were often extended the full measure of a state's legal protection and jurisdiction, the bonds between states and other individuals such as 'women, religious others, and colonial subjects' were much more circumspect.[26] By accentuating real or imagined relations between individuals and communities, the Anglo-Indian and other such 'hyphenated' domiciles were much stickier than domicile in other parts of the world. As I explain in this article, individuals were often pulled into communities based on loose ties or were unable to

[23] Karen Knop, 'Citizenship, Public and Private' (2008) 71 *Law and Contemporary Problems* 309; and Harald Bauder, 'Domicile citizenship, human mobility and territoriality' (2014) 38 *Progress in Human Geography* 91.

[24] Jessica M Marglin, *The Shamama Case: Contesting Citizenship Across the Modern Mediterranean* (Princeton University Press 2022) 1.

[25] Jessica M Marglin, 'Extraterritoriality and Legal Belonging in the Nineteenth-Century Mediterranean' (2021) 39 *Law and History Review* 679, 686.

[26] Marglin (n 24) 2.

leave communities despite their best efforts or were deemed incapable of joining the communities that they wished. Imperial interests were key in shaping private international law concepts such as domicile, whose scope and definition then played a significant role in imperial ordering.

In recent years, scholars have placed colonialism at the heart of the re-examination of key international law concepts. Historians of public international law, for instance, have scrutinised the distinctions that nineteenth-century jurists drew between 'civilised' Europe and the 'uncivilised' non-European 'other' to argue that this often-stark divide structured the doctrine of sovereignty.[27] As Jessica Marglin argues, much of this literature remains relentlessly state-based, leaving out questions of private international law,[28] even though the 'civilised/uncivilised' division was also key to private international law.[29] In fact, as Will Hanley describes, international law treatises published prior to the First World War focused on individuals and questions of jurisdiction and choice of law (involving marriage and inheritance)

[27] See, for instance, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005); and Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press 2010).

[28] Marglin (n 17) 84–85.

[29] Geoffrey Wilson Bartholomew, 'Dicey and the Development of English Private International Law' (1959) 1 *Tasmanian University Law Review* 240, 247–248. For instance, John Westlake claimed that 'there are nations, like the Turks or the Chinese, whose views and ways are so different from ours that we could not establish at all between them and us a system of private international law, by which effect might as a general rule be given in Christian states to their laws and judgments'. See John Westlake, *A Treatise on Private International Law* (2nd edn, William Maxwell & Son 1880) 40. AV Dicey made a similar argument, noting that '[r]ules of private international law can exist only among nations which have reached a similar stage of civilisation'. See AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (Stevens and Sons 1896) 29.

as much as issues relating to states.[30] Despite the significance of private law questions to the international legal order, Roxana Banu notes that '[w]e know virtually nothing about the role that private international law played in constructing the legal infrastructure of empires'.[31]

In this article, I examine how the changing emphasis on 'territory' and 'community' in the hyphenated domicile was a mechanism for imperial ordering.[32] As the concept of Anglo-Indian domicile travelled from its birthplace of British India to the Ottoman empire and China (and was transformed in the process), it was used to construct the relationship of individuals to legal orders and to each other. This role was particularly important within the legally plural British empire, which consisted of a range of polities over which the Crown exerted different levels of sovereign authority; by the early twentieth century, these included dominions, colonies, protectorates, protected states, mandates, and regions in which Britain exercised extraterritorial

[30] Will Hanley, *Identifying with Nationality: Europeans, Ottomans, and Egyptians in Alexandria* (Columbia University Press 2017) 54–55.

[31] Roxana Banu, 'Private International Law's Ambivalent Humanism' (2024) 74 *University of Toronto Law Journal* 28, 36.

[32] Other scholars have also examined some of the hyphenated domicile cases albeit in different contexts. David Bederman examines the Anglo-Indian domicile cases to trace the history of what he refers to as 'extraterritorial domicile' and make an argument about the law applicable in regions in which the United States of America exercised extraterritorial jurisdiction (such as Berlin). See David J Bederman, 'Extraterritorial Domicile and the Constitution' (1988) 28 *Virginia Journal of International Law* 451. Will Hanley is focused on the overlapping legal authorities of colonial Alexandria while briefly examining the Antoun Youssef Abd-ul-Messih case. See Will Hanley, 'When Did Egyptians Stop Being Ottomans? An Imperial Citizenship Case Study' in Willem Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press 2013) 102–104. Sarah Stein is more focused on the British imperial context but primarily examines the Silas Hardoon case. See Sarah Abrevaya Stein, 'Protected Persons? The Baghdadi Jewish Diaspora, the British State, and the Persistence of Empire' (2011) 116 *American Historical Review* 80.

jurisdiction.[33] Individuals could and did, therefore, have affiliations with multiple legal orders, as Will Hanley ably demonstrates in his work on colonial Alexandria.[34] Imperial ordering, however, did not only operate from the perspective of the colonial state. A variety of individuals also attempted to offer their own interpretations of the relative significance of territory and community in the hyphenated domicile, often in an attempt to claim the legal protection of states to which they had flimsy connections or to be able to approach forums that they considered would be advantageous to them.[35] Examining these efforts of multiple actors to define the hyphenated domicile can help us to make sense of the legal category of domicile more generally and demonstrate how private international law rules are, just like public international law approaches, deeply engaged in the construction of an international order.[36] It can also demonstrate the material impact of allegedly technical choices of private international law: for instance, decisions on domicile play a critical role in succession disputes, often determining who is able to inherit. As Roxana Banu contends, locating private international

[33] For an overview of the differences in the legal positions of these entities, see AB Keith, *The Governments of the British Empire* (Macmillan and Co. 1935).

[34] Hanley (n 30).

[35] There is extensive literature on how individuals moved across political and religious boundaries to engage in forum shopping in imperial contexts. See, for instance, Lauren Benton, 'Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State' (1999) 41 *Comparative Studies in Society and History* 563; Rohit De, 'The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India' (2010) 28 *Law and History Review* 1011; Mitra Sharafi, 'The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda' (2010) 28 *Law and History Review* 979; and Nandini Chatterjee, 'Muslim or Christian?: Family Quarrels and Religious Diagnosis in a Colonial Court' (2012) 117 *The American Historical Review* 1101.

[36] Alex Mills, 'The Private History of International Law' (2006) 55 *International and Comparative Law Quarterly* 1, 4.

law concepts in the colonial context can reveal historical continuities as well as the significance of the choice of connecting factors 'for the distribution of wealth, power and resources across borders'.[37]

This article is divided into three parts. I first trace the development of the concept of Anglo-Indian domicile by courts in the late eighteenth and early nineteenth centuries and how its emphasis on community membership enabled its export to the Ottoman empire in the form of an Anglo-Turkish domicile. I then analyse Anglo-Turkish and Anglo-Chinese domicile cases to trace some of the consequences of this attention to community. While courts began to decide that European British subjects could not obtain a domicile in 'uncivilised' regions since they were not part of the majority community, some individuals tried to use the idea of community membership to claim an English domicile despite never setting foot in England. I then trace the resurgence of the idea of territory in case law on the hyphenated domicile, which ultimately recognised the existence of a community as one that was protected by a territorial sovereign. In the conclusion, I reflect on how this account of the hyphenated domicile can help to inform our understanding of domicile more generally, both historically and in the present day.

[37] Roxana Banu, 'Teaching by historicising private international law' (2022) 18 *International Journal of Law in Context* 383, 390. Focusing on the private can also enable scholars to recover the significance of relatively neglected issues such as gender in international law. See, for instance, Karen Knop, 'Gender and the Lost Private Side of International Law' in Annabel Brett, Megan Donaldson, and Martti Koskenniemi (eds), *History, Politics, Law: Thinking Through the International* (Cambridge University Press 2021); Anne-Charlotte Martineau, 'The Private as a Core Part of International Law: The School of Salamanca, Slavery and Marriage (Sixteenth Century)' (2024) 118 *AJIL Unbound* 7; and Miriam Bak McKenna and Matilda Arvidsson, 'Gendering Public and Private International Law: Transversal Legal Histories of the State, Market, and the Family through Women's Private Property Rights' (2024) 118 *AJIL Unbound* 12.

B. The rise of the hyphenated domicile

The roots of the hyphenated domicile can be traced to eighteenth-century South Asia, a legally and politically complex region that was increasingly, but not entirely, under British control. During this period, there were complicated manoeuvrings between the EIC, the Crown, Parliament, the Mughal empire, and other South Asian rulers for sovereign authority over the area.[38] After a series of military victories, the EIC gained territorial control over large parts of South Asia; it also entered into relationships with local rulers through a series of treaties and declared itself to be the 'paramount power' of the region by 1820.[39] Despite this assertion, it remained difficult to point to a singular territorial sovereign that exercised absolute control over the region. In Britain, Parliament launched several attempts to regulate EIC authority, often claiming sovereignty over British Indian territories for the Crown.[40] The Company also

[38] See Sudipta Sen, *A Distant Sovereignty: National Imperialism and the Origins of British India* (Routledge 2002); and Robert Travers, *Ideology and Empire in Eighteenth-Century India: The British in Bengal* (Cambridge University Press 2007).

[39] For an account of the rise of the Company, see William Dalrymple, *The Anarchy: The Relentless Rise of the East India Company* (Bloomsbury 2019). On the use of the language of paramountcy, see Edward Thompson, *The Making of the Indian Princes* (Oxford University Press 1943) 283–284.

[40] Philip Stern, 'Company, state, and empire: Governance and regulatory frameworks in Asia' in HV Bowen, Elizabeth Mancke, and John G Reid (eds), *Britain's Oceanic Empire: Atlantic and Indian Ocean Worlds, c. 1550-1850* (Cambridge University Press 2012) 147–148; and Swati Srivastava, 'Corporate sovereign awakening and the making of modern state sovereignty: New archival evidence from the English East India Company' (2022) 76 *International Organization* 690.

continued to acknowledge the nominal sovereignty of the Mughal emperor till 1848,[41] and had a complex relationship with the so-called princely states.[42]

Even in areas over which the EIC claimed sovereign authority, law did not operate territorially.[43] In 1772, the governor-general Warren Hastings developed a judicial plan that recognised the application of Hindu law to Hindus and Islamic law to Muslims in matters of 'marriage, caste and other religious usages and institutions'.[44] Other communities, such as Parsis and Indian Christians, lobbied for the recognition of their own personal laws,[45] and

[41] CA Bayly, *Indian Society and the Making of the British Empire* (Cambridge University Press 1990) 7–26.

[42] For an exploration of debates over the legal status of the princely states and their relationship with the government of British India and with the Crown, see Priyasha Saksena, *Sovereignty, International Law, and the Princely States of Colonial South Asia* (Oxford University Press 2023).

[43] For the argument that the British conceived of non-European legal systems as personal and therefore limited in scope, see Julia Stephens, 'An Uncertain Inheritance: The Imperial Travels of Legal Migrants, from British India to Ottoman Iraq' (2014) 32 *Law and History Review* 749, 753–759.

[44] See 'A Plan for the Administration of Justice, extracted from the Proceedings of the Committee of Circuit, 15 August 1772' in SV Desika Char (ed), *Readings in the Constitutional History of India*, *1757–1947* (Oxford University Press 1983) 106. The colonial state was, however, heavily influential in the recognition and operation of such laws leading to the creation of what scholars often call 'Anglo-Hindu' or 'Anglo-Muhammadan' law. See Scott Alan Kugle, 'Framed, Blamed and Renamed: A Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35 *Modern Asian Studies* 257; and Rosanne Rocher, 'The creation of Anglo-Hindu law' in Timothy Lubin, Donald R Davis Jr, and Jayanth K Krishnan (eds), *Hinduism and Law: An Introduction* (Cambridge University Press 2010) 78–88. For additional details of the operation of the Hastings plan, see Bernard S Cohn, 'Law and the Colonial State in India' in June Starr and Jane F Collier (eds) *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press 1989).

[45] Nandini Chatterjee, 'Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India' (201) 44 *Modern Asian Studies* 1147; and Mitra Sharafi, *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947* (Cambridge University Press 2014).

customary law was also acknowledged in certain parts of the country.[46] Given this legal diversity, John Westlake compared British India with early mediaeval Europe, where 'even in the same city, Roman and Lombard, Frank, Burgundian, and Goth might all be found, each living under his own personal law, very much as the Englishman, Hindoo and Mahometan now live together in India under their respective laws'.[47]

Since the application of law depended on a person's religious or community affiliation, courts spent considerable time reviewing ancestry to ascertain the community to which an individual belonged, often a difficult task when it came to those of indeterminate or mixed lineage. An excellent example comes from the long legal dispute over succession to the estate of Colonel James Skinner, who had served in both the Maratha army and the EIC's Bengal army, and was rewarded with land grants for his role in the Pindari wars.[48] After considering a mass of evidence, Lord Westbury concluded that 'he was illegitimate, being probably the child of a native woman by a European Father', with 'nothing to indicate the religious belief or profession of the Colonel or of his family, or what were their habits or usages'.[49] Given the lack of information, it was 'impossible … to affirm that any particular law is applicable to the construction of the Colonel's Will or the regulation of his succession'; as a result, the Privy Council decided to interpret the will based on 'the principles of natural justice'.[50] Skinner's

[46] David Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (IB Tauris 1988) 13–18.

[47] Westlake (n 29) 11.

[48] Stephen Wheeler, 'Skinner, James (1778-1841)' rev Ainslee T Embree in David Cannadine (ed), *Oxford Dictionary of National Biography* (online edn, Oxford University Press 2004) <https://doi.org/10.1093/ref:odnb/25676> accessed 24 February 2025.

[49] *Barlow v Orde*, (1869–71) LR 3 PC 164, 186–187.

[50] *Barlow* (n 49) 187.

case reveals the critical significance of community membership in British India, a fact that ultimately led to the development of the hyphenated domicile.

In his classic treatise on the conflict of laws, Joseph Story defined domicile as the place where an individual 'has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning, (*animus revertendi*)'.[51] This definition was also crystallised later in English law through the House of Lords decision in *Udny v Udny*.[52] Although *Udny* was decided in 1867, its emphasis on residence and intention as the sole requirements for determination of domicile[53] negated the more complex history of domicile in the colonies. When it came to British India, for instance, domicile was framed to indicate not just an individual's physical residence in territory and their intention to remain there but also the specific community of which they were a member. Thus was born the Anglo-Indian domicile, a concept that can be traced to the House of Lords decision in *Bruce v Bruce*.[54] The case involved the estate of William Bruce, a Scottish EIC official who died in British India, although there was evidence that he had intended to return to Britain.[55] Bruce's sisters asserted that he had been domiciled in Scotland since he 'was born in Scotland, and all Scotsmen abroad, who have no intention permanently to remain there, but who have a constant intention of returning to their native country, are domiciled Scotsmen'.[56] Lord Chancellor Thurlow, however, noted that although Bruce 'meant to return to his native country, it is said, and let it

[51] Joseph Story, *Commentaries on the Conflict of Laws* (Hilliard, Gray, and Company 1834) 39.

[52] (1866–69) LR 1 Sc 441.

[53] *Udny* (n 52) 449.

[54] (1790) 3 Paton 163.

[55] *Bruce* (n 54) 163–164.

[56] *Bruce* (n 54) 166.

be granted: he then meant to change his domicile, but he died before actually changing it'.[57] In his view, '[a] person being at a place is *prima facie* evidence that he is domiciled at that place'.[58] Given his physical residence, Bruce was domiciled in British India, with his estate becoming subject to English law as applied in the Company's Indian territories rather than Scots law based on his domicile of origin; consequently, his half-brother was also entitled to a share of the estate.[59]

Although the *Bruce* judgment did not use the phrase 'Anglo-Indian domicile',[60] courts soon began to rely on its analysis while determining the law applicable to the estates of EIC officials. A series of early nineteenth-century cases emphasised that physical residence in British India was sufficient for European British subjects to acquire a domicile there. For some judges, 'a resident [sic] in India, for the purposes of following a profession there, in the service of the East India Company, creates a new domicil',[61] with Company officials maintaining their Anglo-Indian domicile until they 'retained [their] commission in the East India Company's service'.[62] Since EIC service required residence in British India, physical location was even enough to presume the intention of an individual to remain there. Some courts concluded that it was not just '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

[57] *Bruce* (n 54) 168.

[58] *Bruce* (n 54) 168.

[59] *Bruce* (n 54) 167–168.

[60] Nineteenth-century private international law treatises cited the *Bruce* as the foundation of the concept of Anglo-Indian domicile despite the phrase being absent from the text. See, for instance, the discussion in AV Dicey, *The Law of Domicil* (Stevens and Sons 1879) 140–143.

[61] *Munroe v Douglas*, 56 ER 940, 949.

[62] *Craigie v Lewin*, 163 ER 782, 786.

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'.[63] As Robert Phillimore argued, the Anglo-Indian domicile cases were 'clearly founded upon the peculiar nature of the East India Company's service' in terms of which '[a]s long as a person was engaged in it, he held an irrevocable office, binding him to residence in a certain country'.[64] He therefore concluded that '[i]f the office be conferred for the life of the holder and irrevocable, the law fixes his domicil in the places where its functions are discharged, and admits of no proof to the contrary' since 'the law … will not presume an intention contrary to an indispensable duty'.[65] Similarly, John Westlake contended that '[a]n office which requires residence confers a domicile in that place where its holder is bound to reside. … Thus a service with the East India Company, or other Indian government, which requires residence in India, creates an Indian domicile'.[66]

Once courts concluded that EIC officials acquired a domicile in British India based on their physical residence, they also had to determine the specific law that was applicable to such individuals since, as described above, law in Company territories did not operate territorially. Most Anglo-Indian domicile cases related to Scotsmen who had gone to British India in service of the Company: in each instance, courts concluded that English law would apply to their estates, clubbing them together with their English counterparts.[67] The effect of these decisions

[63] *Forbes v Forbes*, 69 ER 145, 151.

[64] Robert Phillimore, *The Law of Domicil* (William Benning & Co. 1847) 76.

[65] Phillimore (n 64) 61–62.

[66] John Westlake, *A Treatise on Private International Law* (C Roward and Sons 1858) 42.

[67] See *Bruce* (n 54); *Munroe* (n 61); *Craigie* (n 62).

was, therefore, to create a community of European British subjects that were distinct from the locals and to whom separate laws applied. As Norman Bentwich argued, '[i]mmiscibility of character with the general population excluded the foreign resident from subjection to the personal law of the natives, and he was regarded as a member of a special group subject, by the consent of the local sovereign, to his own legal system'.[68] Physical residence was therefore combined with community membership to create the Anglo-Indian domicile, 'in which "Indian" expresses the territory and "Anglo" the law'.[69]

The idea of the hyphenated domicile was soon exported to other parts of the British empire where multiple laws and legal systems co-existed. One such region was the allegedly 'semi-civilised' Ottoman empire, where Britain and other European nations obtained the right to exercise extraterritorial jurisdiction over their own subjects through a class of instruments known as the capitulations.[70] The grant of consular jurisdiction had initially provided a mechanism for *sultans* to cement political alliances and commercial relationships and thereby project Ottoman power.[71] However, by the nineteenth century, extraterritorial jurisdiction was largely seen as an anomaly; while Ottoman officials claimed that it was rooted in unilateral grants of privilege through imperial decrees, European and American jurists argued that it was

[68] Bentwich (n 10) 46.

[69] John Westlake, *A Treatise on Private International Law* (3rd edn, Sweet and Maxwell 1890) 290.

[70] For details of the scope and operation of extraterritoriality, see Francis Piggott, *Extraterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (Butterworth & Co. 1907); and Umut Özsu, 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2016).

[71] Feroz Ahmad, 'Ottoman Perceptions of the Capitulations, 1800–1914' (2000) 11 *Journal of Islamic Studies* 1.

a right drawn from binding treaties.[72] In this system, European states established consular courts to exercise jurisdiction over their subjects while Ottoman courts retained jurisdiction over mixed Ottoman–European cases although Europeans could obtain the assistance of a consular *dragoman* (interpreter) and had the right of appeal to the Sublime Porte in Constantinople.[73] Consular courts followed the law of the relevant nation, resulting in a maze of applicable laws depending on nationality rather than territory.[74] Given the lack of a uniform law that applied territorially, jurists repeatedly raised the question of whether Europeans could acquire a domicile in regions where extraterritorial jurisdiction was exercised,[75] with the hyphenated domicile providing one solution.

The foundation of the concept of Anglo-Turkish domicile was laid down in *Maltass v Maltass*,[76] although the judgment itself did not use the phrase.[77] The case involved the estate of John Maltass, a British subject who lived for the majority of his life in Smyrna on the

[72] Umut Özsu, 'The Ottoman Empire', in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012).

[73] David Todd, 'Beneath Sovereignty: Extraterritoriality and Imperial Internationalism in Nineteenth-Century Egypt' (2018) 36 *Law and History Review* 105, 115.

[74] CR Pennell, 'The origins of the Foreign Jurisdiction Act and the extension of British sovereignty' (2010) 83 *Historical Research* 465, 471–472.

[75] See Charles Henry Huberich, 'Domicile in Countries Granting Exterritorial Privileges to Foreigners' (1908) 24 *Law Quarterly Review* 440; WLM, 'Domicile as Affected by Treaties of Extraterritoriality' (1909) 58 *University of Pennsylvania Law Review and American Law Register* 543; Charles Henry Huberich, 'Domicile in Countries Granting Ex-territorial Privileges' (1915) 31 *Law Quarterly Review* 447; and Edwin D Dickinson, 'The Domicil of Persons Residing Abroad under Consular Jurisdiction' (1919) 17 *Michigan Law Review* 437.

[76] 163 ER 967.

[77] See, for instance, Westlake (n 69) 293. The position of *Maltass* is akin to *Bruce*, which is also considered by later scholarship to be the foundation of Anglo-Indian domicile although the phrase is missing from the judgment.

Anatolian coast (Izmir in modern Turkey); at issue was the validity of his will.[78] In his judgment, Stephen Lushington noted that Maltass had been a member of a commercial firm in Smyrna, had married there, was 'constantly resident there, and died there, leaving a widow and several children'.[79] Given this physical presence in Smyrna and relying on Story's definition of domicile, Lushington first assumed that Maltass had died domiciled in Turkey.[80] However, given the existence of multiple legal instruments that often provided for Europeans to be subjected to their own laws, such a domicile in itself was insufficient to determine the law applicable to Maltass's estate. It was, therefore, important to determine the community to which Maltass had belonged at his death. Since Maltass was 'born at Smyrna, of English parents, who must … be presumed to have been born British subjects', he 'although born abroad, would be a British subject, and would owe allegiance to the Crown of Great Britain'.[81]

Once Maltass was determined to belong to the British community settled in Smyrna, Lushington went on to analyse the law that would apply to the estate of such a person. He noted that Ottoman law did not permit individuals to bequeath their property by will but an 1809 treaty allowed the use of wills to dispose of 'the property of any Englishman or other person subject to that nation, or navigating under its flag, who should happen to die within the Turkish dominions'.[82] Lushington concluded that the treaty applied to British subjects resident and/or domiciled in the Ottoman empire to ensure that they did not 'find themselves suddenly, and contrary to their intention, … subject to a code of laws wholly contrary to their religious

[78] *Maltass* (n 76) 968.

[79] *Maltass* (n 76) 968.

[80] *Maltass* (n 76) 969.

[81] *Maltass* (n 76) 968.

[82] *Maltass* (n 76) 967.

persuasions, their feelings, customs, and contemplation'.[83] According to the provisions of the treaty, 'what is to be done in the case of succession to personal estate … is to follow the law of England'.[84] Consequently, British subjects domiciled in the Ottoman empire were permitted to make a will 'according to the law of England'.[85] Much like the Anglo-Indian cases described above, the decision in *Maltass* implied that both physical residence and community membership were significant in determining the hyphenated domicile. On account of this emphasis on community membership, the concept of domicile was defined differently in 'uncivilised non-European territories. In the words of John Westlake, although 'every person is a member of that civil society in the territory of which he is domiciled', this territorial idea of domicile was limited to Christian countries; in the so-called east, 'every person is a member of that civil society, existing in the territory in which he is domiciled, which his race, political nationality or religion determines'.[86]

The decision in *Maltass* gained even more significance for a different approach offered by Stephen Lushington in the text of the judgment. Although he had initially assumed that Maltass acquired a domicile in Smyrna, he then made an abrupt turn, stating that he 'consider[ed] the deceased was domiciled in England, and not in Scotland or in a colony; for great difficulty would have arisen had the deceased been domiciled in Scotland, and a new question if he had been domiciled in British Guiana'.[87] This statement had little connection with Lushington's previous analysis, with John Westlake blaming '[t]he wretched punctuation of the report' for

[83] *Maltass* (n 76) 969.

[84] *Maltass* (n 76) 971.

[85] *Maltass* (n 76) 970.

[86] Westlake (n 29) 263.

[87] *Maltass* (n 76) 971.

the resulting confusion.[88] He construed Lushington's analysis to mean the following: 'if [Maltass] was domiciled in Turkey his will was good by the doctrine which has come to be called that of Anglo-Turkish domicile, while if he was domiciled in England it was good by English law *proprio vigore*'.[89] Since English law would be applicable to Maltass's will in either situation, Lushington did not feel the need to decide where he was domiciled. However, if Maltass's father had originated from Scotland or British Guiana rather than from England, then he could have been governed by a law different from English law; in that situation 'a choice between those views would have been necessary'.[90] Since that was not the case, Lushington simply stated that his judgment 'does not affect the question of domicil'.[91] He also maintained that he did not have a definitive opinion on 'whether a British subject can or cannot acquire a Turkish domicil', but did consider that 'every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte'.[92] Devoid of the broader context around Lushington's refusal to reach any definitive conclusions on domicile, it was this final statement that courts began to cite as the legal basis for concluding that British subjects could not be domiciled in 'uncivilised' or 'semi-civilised' places despite their physical residence. As I demonstrate in the next section, this decentring of physical presence both forced individuals to remain in communities that they had attempted to leave and enabled individuals to try to become part of communities to which they had only loose links.

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[88] Westlake (n 69) 295.

[89] Westlake (n 69) 294.

[90] Westlake (n 69) 294.

[91] *Maltass* (n 76) 971. Both John Westlake and Norman Bentwich concluded that *Maltass* had not reached any conclusions on domicile. See Westlake (n 69) 294; and Bentwich (n 10) 47.

[92] *Maltass* (n 76) 971.

C. The personalisation of domicile

With the expansion of the British empire, the nature and extent of British migration across the world also changed. Although many European British subjects moved to South Asia, only some individuals made British India their permanent home while many returned to Britain after a few decades of service; this was unlike the position in the settler colonies. Dane Kennedy describes how official opinion 'held that a European population could not be sustained on a permanent basis in the tropical climate of lowland India; colonists would degenerate and die out by the third generation'.[93] Given the temporariness of British settlement in British India, questions began to be raised over the nature and scope of Anglo-Indian domicile once physical residence began to be displaced from definitions of domicile in cases like *Maltass*.

As described in the previous section, when developing a rationale for the Anglo-Indian domicile, courts had inferred the intention to permanently remain in a place from long physical residence, often tied explicitly to the nature of EIC service. However, by the middle of the nineteenth century, there were questions about this underlying logic. Once physical residence in territory itself became less important, it was unclear whether intention to stay ought to or could be presumed from it. For instance, although Richard Torin Kindersley considered himself bound by precedent to hold that EIC medical officials acquired Anglo-Indian domicile, he was also sceptical of the concept altogether, observing: 'yet ninety-nine out of every hundred servants of the Company when they go out to India, and while they remain there, entertain and

[93] Dane Kennedy, *The Magic Mountains: Hill Stations and the British Raj* (University of California Press 1996) 32.

are continually declaring a settled and abiding purpose and intention to return home as soon as they can accumulate a sufficient fortune'.[94]

Matters were even more complicated on account of the increase in 'non-official' migration to British India,[95] as a result of which British traders, planters, lawyers, merchants, missionaries, factory workers, doctors, midwives, teachers, domestic servants, and persons of all stripes moved to South Asia to make their fortune, joining EIC civil and military officials in the region.[96] The idea of an Anglo-Indian domicile for such migrants could not be justified through reference to any peculiarities of EIC service. In two cases decided in the mid-nineteenth century, Richard Torin Kindersley determined that Europeans who moved to British India to act as tradespersons[97] and coffee planters[98] had acquired Anglo-Indian domicile. However, treatise authors were split on this extension of the concept of Anglo-Indian domicile. While John Westlake admitted that 'a residence in India for mercantile purposes, not having a prefixed duration, still produces an Anglo-Indian domicile, although the intention in such cases

[94] *Lord v Colvin*, 62 ER 141, 145.

[95] For the argument that the Company rarely exercised its powers to control British immigration to South Asia, see PJ Marshall, 'The Whites of British India, 1780–1830: A Failed Colonial Society?' (1990) 12 *The International History Review* 26.

[96] For a discussion of the migration and activities of the European community in British India, see David Arnold, 'European Orphans and Vagrants in India in the nineteenth century' (1979) 7 *The Journal of Imperial and Commonwealth History* 104; and Raymond K Renford, *The Non-Official British in India* (Oxford University Press 1987).

[97] *Attorney-General v Fitzgerald*, 61 ER 1036. The case turned on whether the merchant in question had abandoned his Anglo-Indian domicile, which Kindersley concluded that he had since he had left India with no intention of returning.

[98] *Allardice v Onslow*, 10 Jur N S 352.

is almost always to remain only till a fortune is made and then return to Europe',[99] AV Dicey did not consider merchants to fulfil the requirements of Anglo-Indian domicile.[100] Given the heterogeneity of British subjects in British India and the temporary nature of their residence, it seemed unclear whether and to what extent a European British community could exist in the region.

The diminished significance of physical residence in territory and the uncertainty over the membership of the European British community in British India soon led to doubts about the concept of the Anglo-Indian domicile itself. A good example can be seen in a case involving the estate of John Smith, a Scotsman who died in Calcutta after working there for decades as a bank clerk, an indigo planter, and a partner in a mercantile firm; however, the master of the rolls, John Romilly, concluded that he had never abandoned his Scottish domicile despite his long residence in British India.[101] The Court of Appeal agreed; consequently, legacy duty was payable on the distribution of his estate to his children, which would not have been the case had he obtained Anglo-Indian domicile.[102] Lord Justice Knight-Bruce pointed out that Smith had only resided in British India 'for the mere purpose of his private business' while also appearing 'to have retained the wish and intention of finally returning to Scotland'.[103] Further, Lord Justice Turner raised doubts about the significance of physical residence in British India that had underwritten the concept of Anglo-Indian domicile. Although he thought it was

[99] Westlake (n 29) 277–278.

[100] Dicey (n 60) 143.

[101] *Jopp v Wood (No 3)*, 55 ER 566, 569.

[102] *Jopp v Wood*, 46 ER 1057, 1058.

[103] *Jopp* (n 102) 1059.

'unnecessary to decide' whether intention could be 'inferred from a long and continuous residence alone', he did note that '[s]uch a case can very rarely, if ever, occur'.[104]

In fact, the case revised the entire intellectual basis of Anglo-Indian domicile by moving away from the significance of physical residence in British India. In the view of Lord Justice Turner, the political circumstances of the Anglo-Indian domicile cases were essential to their justification. As the cases had been decided when 'the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the Government of this country', individuals engaged in EIC service 'could not reasonably be considered to have intended to retain their [English or Scottish] domicile' since they 'became as much estranged from this country as if they had become servants of a foreign Government'.[105] Since the Company had been forced to cede direct control over its Indian territories to the Crown after the 1857 rebellion, they were no longer under the control of a foreign government.[106] Given the change in circumstances, the earlier Anglo-Indian domicile cases were, in Turner's view, irrelevant.[107]

[104] *Jopp* (n 102) 1060.

[105] *Jopp* (n 102) 1060.

[106] On 2 August 1858, Parliament passed the Government of India Act, which transferred the Company's territories to the Crown, after which the viceroy and governor-general, the executive head of the government of India, became subject to parliamentary control through the secretary of state for India, a member of the British cabinet. See Barbara Metcalf and Thomas Metcalf, *A Concise History of Modern India* (2nd edn, Cambridge University Press 2006) 104. For more on the causes and consequences of the revolt, see Thomas Metcalf, *The Aftermath of Revolt: India, 1857–1870* (Princeton University Press 1964) 219–227.

[107] *Jopp* (n 102) 1060.

Although both John Westlake[108] and judges in a later case[109] questioned whether the transfer from Company to Crown rule had affected the basis of Anglo-Indian domicile, the above decision essentially marked the end of the widespread use of the concept. In his enormously influential treatise on domicile, AV Dicey effectively deemed physical residence in this specific context to be irrelevant, noting that '[a] servant of the Company gained an Anglo-Indian domicil, not because he was stationed in India, but because he entered into the service of what may be termed an Anglo-Indian power'.[110] Given the change in political sovereignty over British Indian territories, Dicey claimed that '[t]he rules established with reference to the domicil of persons in the service of the East India Company were peculiar, and are now admitted to have been anomalous'.[111] Similar language began to be used by the courts, with Lord Justice Lindley noting that the Anglo-Indian domicile cases were 'anomalous and exceptional, and the theory of them is not very clear'.[112] Lord Justice Baggallay also termed the Anglo-Indian domicile cases 'anomalous' and argued that '[s]uch cases can hardly arise now, because the separate government of the East India Company is at an end' while they had 'depended on the notion that the officer had entered into the service of a quasi foreign

[108] Westlake argued that '[t]he notion that the question, whether India is governed directly by the highest British political authority or indirectly through the East India Company, could have anything to do with Anglo-Indian domicile is incompatible with any clear conception of domicile'. See John Westlake and Alfred Frank Topham, *A Treatise on Private International Law* (5th edn, Sweet and Maxwell 1912) 367.

[109] *Wauchope v Wauchope*, (1877) 4 R 945.

[110] Dicey (n 60) 143.

[111] Dicey (n 60) 140–141.

[112] *In re Mitchell*, (1884) 13 QBD 418, 425.

power'.[113] A few decades later, Lord Clyde termed the concept of Anglo-Indian domicile to be 'unfounded in principle' and a 'discredited and obsolete doctrine'.[114]

The minimisation of the significance of physical residence in territory for domicile was accompanied by the increasing importance of community membership, on account of which the erstwhile balance between territory and community in the definition of the hyphenated domicile began to change. By the late nineteenth century, there was increasing resistance to the idea that British subjects of European descent could be domiciled in British India altogether.[115] For instance, while deciding a divorce suit involving a Scotsman who spent much of his working life in Rangoon in British India,[116] Lord Glencorse decided that he had never lost his Scottish domicile of origin.[117] More emphatically, he claimed that '[n]obody goes to Burmah to remain' and concluded that 'any domiciled Scotchman in his senses should come to a determination to live the rest of his life in Burmah is an idea that I cannot bring myself to

[113] *Mitchell* (n 112) 422.

[114] *Grant v Grant*, 1931 SLT 180, 186–187.

[115] Richard Fentiman argues that the refusal of courts to presume intention from long residence alone was linked to the idea that 'someone's Englishness should not be sacrificed lightly' in light of the movement of British subjects across the empire. See Richard Fentiman, 'Domicile Revisited' (1991) 50 *The Cambridge Law Journal* 445, 457.

[116] Rangoon was the capital of the province of Burma, which remained part of British India till 1 April 1937. Burma was organised into a separate imperial territory through section 46(2) of the Government of India Act 1935. For further details of the complicated background and politics of this partition, see Thant Myint-U, *The Hidden History of Burma: Race, Capitalism, and the Crisis of Democracy in the 21st Century* (WW Norton 2019) 7–31.

[117] *Steel v Steel*, [1888] ScotLR 25 675, 682.

entertain at all'.[118] Many European British subjects began to claim that they retained their domicile of origin by arguing that they were in British India only 'temporarily', thereby demarcating themselves from the so-called 'domiciled Europeans' who resided permanently in the region.[119] As Elizabeth Buettner argues, '[l]eaving India for a metropolitan education became a rite of passage that positioned an individual within the transient, sojourner, better-off community marked as "European", whereas schooling in the subcontinent indicated a domiciled, poorer, and racially ambiguous status'.[120] The broader European British community in South Asia was, therefore, demarcated into different categories largely through the ability to travel to and maintain social and educational links with the metropole. With the decline in significance of actual physical residence in British India, it was community membership that became critical for the determination of domicile: while those who belonged to an elite community of European travellers could claim that they retained their English or Scottish domiciles, less financially fortunate Europeans were relegated to possessing an Indian domicile. The proposition that many Europeans were somehow incapable of acquiring a domicile in British India was the conclusion of the long campaign to minimise the importance of physical residence that had its roots in *Maltass*.

One of the first cases to specifically rely on *Maltass* to cement the legal inability of Europeans to obtain a domicile in non-European territories was *In re Tootal's Trusts*,[121] which focused on

[118] *Steel* (n 117) 681.

[119] For more details on the construction the domiciled European community, see Satoshi Mizutani, *The Meaning of White: Race, Class, and the 'Domiciled Community' in British India, 1858–1930* (Oxford University Press 2011).

[120] Elizabeth Buettner, *Empire Families: Britons and Late Imperial India* (Oxford University Press 2004) 80.

[121] (1883) 23 Ch D 532.

China, another region in which Britain and several other western nations exercised extraterritorial jurisdiction.[122] The English Settlement at Shanghai was established in 1843; after a merger with the American Concession, it became the International Settlement of Shanghai in 1863.[123] The governance of the Settlement was both complicated and legally shaky; it was run by the Shanghai Municipal Council, which was elected by ratepayers who owned property or paid sufficient rent; individuals residing in the Settlement, however, 'remained subject to the consul of their nationality or, for Chinese and nationals not represented by a treaty power, to the Chinese state'.[124] Cases in which foreigners were either plaintiffs or prosecutors with a Chinese defendant were usually within the jurisdiction of the mixed court.[125]

Within this complicated legal background, Joseph Chitty had to decide whether legacy duty was payable on the estate of John Broadhurst Tootal, a British businessman who died in

[122] For details of the scope and operation of extraterritorial jurisdiction in China, see Teemu Ruskola, 'Canton is Not Boston: The Invention of American Imperial Sovereignty' (2005) 57 *American Quarterly* 859; Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford University Press 2012) 39–84; and Douglas Clark, *Gunboat Justice: British and American Law Courts in China and Japan, 1842–1943*, 3 vols (Earnshaw Books 2015).

[123] Robert Bickers, 'Shanghailanders: The Formation and Identity of the British Settler Community in Shanghai 1843–1937' (1998) *Past & Present* 161, 165.

[124] Isabella Jackson, 'Who ran the treaty ports? A study of the Shanghai Municipal Council' in Robert Bickers and Isabella Jackson (eds) *Treaty Ports in Modern China: Law, Land and Power* (Routledge 2016), 44. For a discussion of the complicated relationship between the Shanghai Municipal Council, Chinese authorities, and the various treaty powers, see Wanshu Cong and Frédéric Mégret, '"International Shanghai" (1863–1931): Imperialism and Private Authority in the Global City' (2021) 34 *Leiden Journal of International Law* 915.

[125] Manley O Hudson, 'The Rendition of the International Mixed Court at Shanghai' (1927) 21 *American Journal of International Law* 451.

Shanghai.[126] The answer depended on Tootal's domicile at the time of his death; if he was domiciled somewhere in Britain, then duty was payable, but not if he was domiciled elsewhere.[127] Tootal had been born in England but had moved to Shanghai where he became a part owner of several newspapers; he owned no property in Britain and had only visited England twice in the sixteen years prior to his death.[128] The court was also presented with unchallenged evidence that Tootal had intended to reside permanently in Shanghai.[129] Despite confirmation of both physical residence and an intention to remain in Shanghai, the petitioners' counsel admitted that 'they could not contend that the testator's domicil was Chinese'.[130] In his judgment, Joseph Chitty noted that '[t]his admission was rightly made' and cited Lushington's decision in *Maltass* to note that '[t]he 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 domicil'.[131]

Since differences in character between Europeans and locals were enough to negate the importance of long physical residence in China, the case also muddied the idea of community membership that courts had considered necessary to determine the law applicable to Europeans in hyphenated domicile cases. The residuary legatees under Tootal's will contended that 'there exists at the foreign port of Shanghai an organised community of British subjects independent of Chinese law and exempt from Chinese jurisdiction, and not amenable to the ordinary

[126] *Tootal's Trusts* (n 121) 534.

[127] *Tootal's Trusts* (n 121) 533.

[128] *Tootal's Trusts* (n 121) 533–534.

[129] *Tootal's Trusts* (n 121) 534.

[130] *Tootal's Trusts* (n 121) 534.

[131] *Tootal's Trusts* (n 121) 534.

tribunals of this country, but bound together by law which is English law, no doubt, but English law with this difference, that the English revenue laws do not form part of it, and that by residence and choice the testator became a member of this community, and as such acquired an Anglo-Chinese domicil'.[132] While rejecting this contention, Chitty initially appeared to rely on a territorial idea of domicile, arguing that '[r]esidence in a territory or country is an essential part of the legal idea of domicil' rather than 'a man attaching himself to a particular community resident in the place'.[133] However, he then emphasised civilisational differences between Britain and China to claim that 'there is no authority … 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'.[134] This conclusion was at serious odds with the existing understanding of the hyphenated domicile. As described in the previous section, the hyphenated domicile was conceptualised as a mechanism to determine the applicable law in regions where multiple legal systems operated. The Anglo-Indian domicile, for instance, recognised that European British subjects could be domiciled in British India but the law that applied to them was based on their membership of a broader European community. However, following on from Lushington's decision in *Maltass*, Chitty's judgment in *Tootal's Trusts* ignored the background of legal pluralism to imply that Europeans could not obtain a domicile in allegedly 'uncivilised' places since they were not part of the majority community.[135]

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[132] *Tootal's Trusts* (n 121) 536–537.

[133] *Tootal's Trusts* (n 121) 538.

[134] *Tootal's Trusts* (n 121) 538–539.

[135] Just a few paragraphs later, however, Chitty contended that a Hindu or a Muslim acquired an Anglo-Indian domicile by 'settling in British India, and attaching himself to his own religious sect there' as a result of which he would be subject to special laws, which were 'not laws of [his] own enactment, they are merely parts of the law of the governing community or supreme power'. See *Tootal's Trusts* (n 121) 539. It was left to John Westlake to

Once physical residence became largely irrelevant, domicile became more and more 'personalised', ie attached to a person rather than retaining the ability to be changed based on physical residence and intention. As a result of the decisions in *Maltass* and *Tootal's Trusts*, domicile in non-European territories became increasingly sticky, with individuals being legally confined to communities in their countries of origin and being unable to claim membership of a new community in an allegedly 'uncivilised' place despite long physical residence. These moves towards altering the balance between the requirements of physical residence and community membership in the hyphenated domicile and changing the idea of community membership altogether drew a stream of scholarly critiques.[136] John Westlake, for instance, dismissed Chitty's decision to be 'partly grounded … on reasoning which to me is

point out the inconsistency in Chitty's analysis: if an Englishman could not be domiciled in Shanghai since the Chinese community possessed sovereign power there, then a Hindu or a Muslim could also not acquire Anglo-Indian domicile by settling in British India since neither Hindus nor Muslims possessed sovereign territorial power in British India. See John Westlake, 'Domicile at a Chinese Treaty Port (Re Tootal's Trusts)' (1884) 9 *Law Magazine and Law Review* 363, 378.

[136] American courts also critiqued the decision in *Tootal's Trusts*, instead concluding that Americans were able to acquire a domicile in China although American law continued to apply to such individuals. See *In Re Young John Allen's Will* (1907) as reported in Charles Sumner Lobingier (ed), *Extraterritorial Cases*, vol 1 (Bureau of Printing 1920) 92–104; and *Mather v Cunningham*, 105 Me 326. For additional discussion of these cases, see Bederman (n 32) 464–467. The question of what constituted the 'American' law to apply to such individuals, however, was a complicated affair that did not result in any firm conclusions. See Anonymous, 'Extraterritoriality and the United States Court for China' (1907) 1 *American Journal of International Law* 469; Crawford M Bishop, 'American Extraterritorial Jurisdiction in China' (1926) 20 *American Journal of International Law* 281; and Teemu Ruskola, 'Colonialism without Colonies: On the Extraterritorial Jurisprudence of the U.S. Court for China' (2008) 71 *Law and Contemporary Problems* 217.

unintelligible'.[137] Instead, he noted that '[a]t Shanghai, then, a Chinese community, an American, a British, and various other European communities, live on the same soil under different laws and jurisdictions'; following the reasoning of the Anglo-Indian domicile cases, 'the effect would have been that [Tootal] and his property would have been governed by the law of England as administered, possibly with some modification, in the case of British subjects domiciled at Shanghai'.[138] Norman Bentwich also concluded that the rejection of the extension of Anglo-Indian domicile to countries in which Britain exercised extraterritorial privileges was 'erroneous in principle'.[139] William Edward Hall argued that there was a 'natural place' for 'Anglo-Oriental domicil' in the legal landscape of empire since it allowed for the application of English law 'to all of European blood'.[140] Francis Piggott agreed, noting that the hyphenated domicile enabled the application of laws that were 'recognised and established by [the] governing Power as to be in fact the law of the land', which, in the case of an 'exterritorial community' such as the British in the Ottoman empire or China were the laws guaranteed to them under treaty.[141] As these critiques indicate, the hyphenated domicile was seen as a practical necessity in the imperial context and a mechanism to balance the significance of territory and community in determining the applicable law, something that became progressively difficult with the personalisation of domicile. However, the increasing emphasis on community membership also created the space for creative legal argumentation, enabling individuals to claim English domicile through community membership rather than a physical

[137] Westlake (n 69) 295.

[138] Westlake (n 135) 368, 371.

[139] Bentwich (n 10) 50.

[140] William Edward Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon Press 1894) 184–185.

[141] Piggott (n 70) 232–233.

presence in England or English territory abroad. As I demonstrate in the next section, such attempts ultimately led to the re-assertion of the significance of territory in the definition of domicile.

D. Rebalancing 'territory' and 'community' in the hyphenated domicile

Debates over the hyphenated domicile grew more intense as British extraterritorial jurisdiction acquired additional complexity over time. For instance, as Ottoman Egypt became increasingly autonomous over the course of the nineteenth century, the *khedive* agreed to the creation of a new system of mixed courts in addition to existing consular courts.[142] This system continued even after Britain occupied Egypt in 1882 and posted an agent and consul-general who worked with the Egyptian council of ministers that remained responsible to the *khedive*; British 'advice' was, however, expected to be followed even as Egypt was not formally annexed and legally remained a province of the Ottoman empire.[143] In general, 'civil jurisdiction in cases between Europeans and natives, or between Europeans of different nationality, [was] exercised by the Mixed tribunals, while criminal jurisdiction over Europeans and jurisdiction in civil cases between Europeans of the same nationality [was] exercised by the consular courts,

[142] For more details on the political negotiations for the establishment of the mixed courts, see Nathan J Brown, 'The Precarious Life and Slow Death of the Mixed Courts of Egypt' (1993) 25 *International Journal of Middle East Studies* 33. For the argument that Egyptian subjects and protégés (and not just government officials) played a role in debates over the establishment of the mixed courts, see Omar Youssef Cheta and Kathryn A Schwartz, 'A Printer's Odd Plea to Reform Legal Pluralism in Khedival Egypt' (2021) *Past & Present* 179.

[143] MW Daly, 'The British occupation, 1882–1922' in MW Daly (ed), *The Cambridge History of Egypt*, vol 2, *Modern Egypt, from 1517 to the End of the Twentieth Century* (Cambridge University Press 1998) 240–241, 245.

applying the laws of their own countries'.[144] Questions involving issues of personal status (such as marriage, divorce, succession etc.) were left either to religious courts (in the case of Ottoman subjects) or to consular courts (in the case of foreigners).[145] Given the significance of nationality for determining jurisdiction, questions over who was a native and who was a foreigner were the subject of repeated litigation.[146] The issue was particularly complex since privileges under the capitulations were not limited only to foreign nationals but extended to everyone who obtained protection, with several Ottoman subjects 'acquir[ing] legal protection from multiple consulates, shifting their legal identities in order to maximize their immediate social and economic interests'.[147]

In this background, the long-drawn legal battle over the estate of Antoun Youssef Abd-ul-Messih provides an excellent example of the manner in which some individuals attempted to use the idea of community membership in the hyphenated domicile to gain the benefit of English law despite having only tenuous connections with Britain. Antoun was an elite Chaldean Catholic businessman who spent his life moving between various regions in which

[144] Alexander Wood Renton, 'The Revolt Against the Capitulatory System' (1933) 15 *Journal of Comparative Legislation and International Law* 212, 217.

[145] Jasper Yeates Brinton, *The Mixed Courts of Egypt* (Yale University Press 1931) 279–289.

[146] Mark Hoyle, *Mixed Courts of Egypt* (Graham & Trotman 1991) 40–43. The position of non-Ottoman Muslims residing in European imperial territory or under European protection was particularly complex. See Faiz Ahmed, 'Contested Subjects: Ottoman and British Jurisdictional Quarrels in re Afghans and Indian Muslims' (2016) 3 *Journal of the Ottoman and Turkish Studies Association* 325; and Lâle Can, 'The Protection Question: Central Asians and Extraterritoriality in the Late Ottoman Empire' (2016) 48 *International Journal of Middle East Studies* 679.

[147] Ziah Fahmy, 'Jurisdictional Borderlands: Extraterritoriality and "Legal Chameleons" in Precolonial Alexandria, 1840–1870' (2013) 55 *Comparative Studies in Society and History* 305, 306.

the British exercised influence: he had been born in Baghdad to Ottoman parents after which he moved to British India; he then moved to Jeddah and finally Cairo in Ottoman Egypt.[148] Antoun's will left the bulk of his estate (valued at approximately £500,000) to his widow, Ellen,[149] who petitioned the British consular court at Constantinople for probate.[150] The key question was the validity of the will, which had been executed per the provisions of English law; consequently, it would only be valid if Antoun had an English domicile or an Anglo-Turkish domicile that enabled the application of English law to issues of testacy despite Antoun's residence in Ottoman territory.[151]

Antoun had been registered as a British protected person in Cairo.[152] During his lifetime, he had also regularly travelled on a British passport and he sued in the mixed courts as well as in British consular courts where he was subject to English law.[153] He had also been married in the British consulate under the Consular Marriages Act,[154] which applied only to British

[148] *Abd-ul-Messih v Farra*, (1888) LR 13 App Cas 431, 438.

[149] Ellen is sometimes referred to as Helen or Elena in court documents. Certified copies of the will in both French and Arabic can be found in FO/780/204, The National Archives (TNA), Kew. A certified copy of the English translation can be found in FO/780/206, TNA. The valuation of the estate is referred to in Hanley (n 32) 102.

[150] Petition of Ellen Abdul Messih, Plaintiff, 27 October 1885, Record of Proceedings, 1–2, *Abd-ul-Messih v Farra*, Judicial Committee of the Privy Council: Printed Cases in Indian and Colonial Appeals and Printed Papers in Appeals (hereinafter JCPC Case Papers), Lincoln's Inn Archives.

[151] *Abd-ul-Messih* (n 148) 438.

- [152] *Abd-ul-Messih* (n 148) 438.

[153] Shorthand Notes of Proceedings on Hearing, 4 February 1886, Record of Proceedings, 145, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[154] Antoun and Ellen had been married in the British consulate on 17 March 1876. See Extract from the Register of Marriages in the British Consul's District of Cairo, FO/780/205, TNA.

subjects.[155] Given these links, Ellen claimed that Antoun had acquired an English domicile by attaching himself to local British community through the mechanism of protection and argued that '[a] man may be domiciled if he is a member of a civil community which is in the territory of another State'.[156] In her view, membership of the British community as a person who was extended protection by the British consulate was sufficient to acquire an English domicile regardless of actual physical residence in British territory.[157] On the other hand, Antoun's nephew, Chuki Farra, and his sister, Angela Farra, contended that he could not have acquired an English domicile while remaining in Ottoman territory since a change in domicile required 'a change of country'.[158] In a judgment delivered in February 1886, Henry Fawcett upheld the jurisdiction of the consular court over Antoun's estate since the Order-in-Council of 1878, which governed British jurisdiction in the Ottoman empire, provided that the consular court was 'a Court of Probate … with respect to the property of deceased resident subjects or protected persons'.[159] Although the court had jurisdiction over Antoun as a British protected

[155] Section 1 of the Consular Marriages Act 1849 provided that 'all Marriages (both or One of the Parties thereto being Subjects or a Subject of this Realm) which from and after the passing of this Act shall be solemnized in the Manner in this Act provided in any Foreign Country or Place where there shall be a British Consul duly authorized to act in such Foreign Country or Place under this Act shall be deemed and held to be as valid in the Law as if the same had been solemnized within Her Majesty's Dominions with a due Observance of all Forms required by Law'.

[156] Shorthand Notes of Proceedings on Hearing, 5 February 1886, Record of Proceedings, 167, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[157] Shorthand Notes of Proceedings on Hearing, 5 February 1886, Record of Proceedings, 168–169, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[158] Shorthand Notes of Proceedings on Hearing, 10 February 1886, Record of Proceedings, 198, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[159] Judgment as to Jurisdiction, 24 February 1886, Record of Proceedings, 62, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

person, this did not imply that Antoun had acquired an English domicile. Fawcett dismissed the claim that Antoun had acquired 'a domicile in the civil society of British subjects established in the Ottoman dominions at Cairo',[160] implying that physical residence in British territory was an essential component of acquiring an English domicile.

Fawcett's judgment was confined to the issue of jurisdiction and left open the issue of the law applicable to Antoun's estate.[161] In a second hearing, Ellen maintained that 'in this part of the world the idea of domicile … is independent of territory … [and] is attachment to the law, and … this man [Antoun], when he attached himself to the English community at Cairo, became amenable to English law for the acts of his life, did acquire a domicile, therefore, not in the sense that he changed territory, but the change of community'.[162] Since he was domiciled 'in England, then English law prevails, *proprio vigore*'.[163] However, given's Antoun's status as a British protected person who could benefit from British treaties with the Ottoman empire, even if he 'was domiciled in Turkey, … then the law of Turkey *plus* the treaty says that English law is to prevail'.[164] The Farras, on the other hand, contended that treaty provisions only enabled the British to extend protection to certain individuals but did not permit the application of

[160] Judgment as to Jurisdiction, 24 February 1886, Record of Proceedings, 54, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[161] Order or Decree of Court, 24 February 1886, Record of Proceedings, 64, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[162] Shorthand Notes of Proceedings on Motion for Amendment of Answer, 12 April 1886, Record of Proceedings, 281, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[163] Shorthand Notes of Proceedings on Motion for Amendment of Answer, 13 April 1886, Record of Proceedings, 300, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[164] Shorthand Notes of Proceedings on Motion for Amendment of Answer, 13 April 1886, Record of Proceedings, 300, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

English law to the succession of their estates.[165] In a judgment delivered in May 1886, Henry Fawcett reaffirmed his earlier opinion emphasising the importance of physical residence and rejected the idea that Antoun 'acquired an English domicile by joining the English community at Cairo, and submitting to English law'.[166] He also dismissed the argument that the treaty required English law to apply to those under British protection (as opposed to British subjects).[167] As a result, the law applicable to Antoun's estate was 'the law of Turkey governing the succession to a member of the Chaldean Catholic community domiciled in Turkey'.[168]

Ellen then appealed to the Judicial Committee of the Privy Council (JCPC), continuing to insist that Antoun had acquired 'an Anglo-Turkish, or Anglo-Egyptian, or English domicil of choice, by affiliation to the community of persons under English jurisdiction at Cairo' but that English law would be applicable even if he were domiciled in Turkey since he was a British protected person and thereby had rights under treaty.[169] The Farras maintained that Antoun's estate was 'to be governed by the law of his domicile (that is to say) Ottoman Law'.[170] Delivering the judgment for the JCPC, Lord Watson held that domicile required residence in a territory and an intention to remain there permanently rather than being 'independent of locality, and arising

[165] Shorthand Notes of Proceedings, 20 April 1886, Record of Proceedings, 387, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[166] Judgment, 28 May 1886, Record of Proceedings, 97, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[167] Judgment, 28 May 1886, Record of Proceedings, 98, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[168] Order of Court, 28 May 1886, Record of Proceedings, 100–101, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[169] Case of the Appellant, 8, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

[170] Case of the Respondents, 3, *Abd-ul-Messih v Farra*, JCPC Case Papers, Lincoln's Inn Archives.

simply from membership of a privileged society'.[171] Therefore, he rejected the contention that Antoun's 'selection of a permanent abode, in Cairo, under British protection, attracted to him an English, or, as it was termed, an Anglo-Egyptian domicil' since 'Cairo is in no sense British soil' and concluded that Antoun was domiciled in the Ottoman empire.[172] Although Lord Watson's judgment highlighted the significance of physical residence for the acquisition of domicile for non-Europeans such as Antoun, community remained significant for Europeans in the Ottoman empire as they formed 'an anomalous ex-territorial colony of persons of different nationalities' and 'continue to preserve their nationality, and their civil and political rights, just as if they had never ceased to have their residence and domicil in their own country'.[173] Relying on *Tootal's Trusts*, Lord Watson concluded that Europeans could not acquire a domicile in the Ottoman dominions since they were exempt from local laws and 'residence in a foreign country, without subjection to its municipal laws and customs, is therefore ineffectual to create a new domicil'.[174] In this view, residence in non-European countries as a 'privileged' member of an 'extraterritorial community', was insufficient to create a domicile of choice 'because there is no sufficient relationship between the individual and the locality where such community is established'.[175] The judgment of the consular court was, therefore, upheld.[176]

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[171] *Abd-ul-Messih* (n 148) 439.

[172] *Abd-ul-Messih* (n 148) 438.

[173] *Abd-ul-Messih* (n 148) 440.

[174] *Abd-ul-Messih* (n 148) 439–440.

[175] Malcolm McIlwraith, 'Domicile in Egypt' (1918) 34 *Law Quarterly Review* 196, 205.

[176] *Abd-ul-Messih* (n 148) 445. Ellen and the Farras continued their legal battle after the JCPC decision, disagreeing over whether the 'law of the domicile' was the *sharia* or specialised legal provisions applicable to Chaldean Catholics. They appointed Henry Fawcett to deliver a binding arbitral award, wherein he decided that

As the above description of legal arguments in the *Abd-ul-Messih* case demonstrates, the relative significance of territory and community was a theme that repeatedly came up before several judges in courts in both Constantinople and London. Ellen's insistence that Antoun had acquired an English domicile through an attachment with the local British community at Cairo carried the decentring of territory in the determination of domicile to its logical conclusion. For British protected persons like Antoun in particular, this argument appeared to make sense: since they were virtually treated as British subjects who were subject to English law for most of their lives when it came to civil and commercial matters, it appeared natural to also be governed by English law in death. This rather creative argument, however, proved to be a step too far for courts, which had till then been open to the idea that community membership could sometimes overcome physical residence in determining domicile: although membership of a 'privileged' community remained important for Europeans so that they could retain their domicile of origin, it was insufficient for non-Europeans to gain a European domicile for which physical residence in European territory was necessary.

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the *sharia* was applicable. See Award made by Sir Henry Fawcett in the matter of the arbitration between Ellen Abdul-Messih and Angela Farra and Cecilia Serpos, FO 97/617, TNA. The award drew condemnation from the Chaldean Catholic Patriarchate, which accused Fawcett of usurping jurisdiction. The Foreign Office took a dim view of Fawcett's decision to accept a £4000 fee in his capacity as arbitrator and ultimately forced him to resign his position at the consular court in Constantinople. See Note of His Beatitude Elias XII Abolionan, Chaldean Patriarch of Babylon re Abdul Messih, 21 November 1890, FO 97/617, TNA; Letter from William A White to the Marquess of Salisbury, 20 April 1891, FO 97/617, TNA; Letter from the Foreign Office to F Clare Ford, Ambassador to the Ottoman Empire, 8 December 1892, FO 97/617, TNA; Letter from Henry Fawcett to Lord Rosebery, 30 December 1892, FO 97/617, TNA; Letter from the Foreign Office to Henry Fawcett, 17 January 1893, FO 97/617, TNA.

The re-emergence of the importance of territory in *Abd-ul Messih* soon led to the reorientation of the entire definition of domicile in the British empire. On 4 March 1916, Jeanne Casdagli filed a petition seeking to dissolve her marriage with Demetrius Emmanuel Casdagli.[177] The couple resided in Egypt, which had formally been declared a British protectorate in December 1914 alongside the installation of a new *sultan*.[178] Although the precise implications of this protectorate status remained unclear, British and other European subjects continued to enjoy existing privileges when it came to consular jurisdiction.[179] Demetrius had been born in England but moved to Egypt where he became involved in several businesses and remained there almost continuously in the 21 years prior to the divorce petition being filed; he was registered as a British subject at the consulate for the entire period.[180] Jeanne had been born in Egypt; she married Demetrius in Alexandria, with a religious ceremony at the Greek Orthodox Church and a civil ceremony at the British consulate.[181] Since domicile was the basis for divorce jurisdiction in English law,[182] the consular court would have jurisdiction if Demetrius had acquired an Egyptian domicile but jurisdiction would lie with English courts if Demetrius retained his English domicile of origin. However, the facts posed an additional complication: the applicable Order-in-Council explicitly excluded divorce from the scope of the consular

[177] *Casdagli v Casdagli*, [1918] P 89.

[178] Daly (n 143) 246.

[179] *Casdagli* (n 177) 91.

[180] *Casdagli* (n 177) 91–92.

[181] *Casdagli v Casdagli*, [1919] AC 145, 152.

[182] *Le Mesurier v Le Mesurier*, [1895] AC 517. The rule wasn't necessarily uniform across the British empire since British Indian courts continued to grant divorce decrees based on residence, resulting in serious problems relating to the cross-border recognition of such decrees. See Priyasha Saksena, 'Limping Marriages: Race, Class, and the Rise of Domicile-Based Divorce Jurisdiction in the British Empire' (2023) 63 *American Journal of Legal History* 36.

court's jurisdiction so Jeanne would not be able to petition to dissolve her marriage at all if Demetrius was held to have an Egyptian domicile.[183] Jeanne therefore filed for divorce in the English divorce court, contending that Demetrius had retained his English domicile of origin; Demetrius, however, claimed that he had acquired a domicile of choice in Egypt.[184] The presiding judge, Thomas Gardner Horridge, relied on *Tootal's Trusts* to conclude that Demetrius could not acquire a domicile of choice in Egypt,[185]

Before the Court of Appeal, Demetrius argued that '[t]here [was] not principle or rule of convenience against an Englishman becoming completely domiciled in Egypt'.[186] Jeanne, on the other hand, contended that Demetrius was immune from local jurisdiction and '[r]esidence in a foreign country, without subjection to its municipal laws and customs, is ineffective to create a new domicil'.[187] Lord Justice Warrington noted that domicile 'is clearly something more than the mere fact of physical residence coupled with the animus manendi' and required 'a legal relation to the laws of the country of residence by which questions relating to the personal status of the individual are determined'.[188] However, as Lord Justice Swinfen Eady observed, Demetrius had not 'created any relation whatsoever between himself and the locality' through his residence in Egypt.[189] Lord Justice Scrutton, however, dissented, noting that pointing out that there was no reason 'why the fact that the sovereign of a country has

[183] *Casdagli* (n 181) 155.

[184] *Casdagli* (n 177) 90.

[185] *Casdagli* (n 177) 92.

[186] *Casdagli* (n 177) 95.

[187] *Casdagli* (n 177) 96.

[188] *Casdagli* (n 177) 101–102.

[189] *Casdagli* (n 177) 97.

granted to another country the privilege of exercising jurisdiction over its subjects within his dominions according to its own law should prevent a subject of the latter country who resides and intends permanently to reside in the former country from acquiring a domicil there'.[190] This, to him, 'appear[ed] also to be an attempt to make domicil depend on membership of a community subject to so-called ex-territorial jurisdiction, not on residence in a locality'.[191] Despite this dissent, the majority of the Court of Appeal continued to emphasise the importance of community membership for Europeans in allegedly 'uncivilised' territories: since Europeans were exempt from Egyptian laws, they formed no part of the local community and could not, therefore, acquire a domicile despite their physical residence in the region. Consequently, Demetrius retained his English domicile of origin and English courts had the jurisdiction to dissolve his marriage with Jeanne.[192]

Demetrius appealed to the House of Lords, arguing that '[d]omicil depends on locality and not upon society; it is not affected by the fact that a man has joined any particular society'.[193] Jeanne continued to argued that '[i]f a man carries with him into the country where he intends to reside part of the laws of his own country, and enjoys immunity from the laws of the new country, he cannot, by permanent residence, acquire a domicil of choice in that country'.[194] The House of Lords reversed the decision of the Court of Appeal, with the reasoning in both *Tootal's Trusts* and *Abd-ul-Messih* being effectively overruled.[195] First, the House of Lords

[190] *Casdagli* (n 177) 111.

[191] *Casdagli* (n 177) 112.

[192] *Casdagli* (n 177) 92, 105.

[193] *Casdagli* (n 181) 149.

[194] *Casdagli* (n 181) 151.

[195] For a discussion of the influence of American cases on the judges in *Casdagli*, see Bederman (n 32) 468–470.

dismissed the idea set out in *Tootal's Trusts* that European British subjects needed to be part of the majority community of a territory in order to acquire a domicile there. As Lord Atkinson argued, there was no 'rational principle' to justify that the acquisition of domicile required a British subject to 'adopt the manner of life there, make himself a member of the civil society of that country … identify himself with its customs, … merge in the general life of the inhabitants'.[196] Then the House of Lords extended the emphasis on territoriality that had started with *Abd-ul Messih*, concluding that European British subjects were not a 'privileged' community but simply individuals who had certain privileges guaranteed to them by local Egyptian and therefore territorial law. Lord Finlay noted that '[t]he jurisdiction exercised by His Majesty in Egypt is indeed ex-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'.[197] As Lord Dunedin observed, the proposition that 'it is impossible for [a British subject] to acquire an Egyptian domicil' since he was 'in the enjoyment of certain privileges as to his subjection to local tribunals' was 'neither laid down by authority nor sound on principle'.[198] As a result of the move to overrule both *Tootal's Trusts and Abd-ul Messih*, Lord Atkinson concluded that 'there is no test which must be satisfied for the acquisition of a domicil of choice in Egypt other than, or in addition to, those which must be satisfied to acquire a similar domicil in a European country – namely, voluntary residence there plus a deliberate intention to make that residence a permanent home for an unlimited period'.[199]

[196] *Casdagli* (n 181) 179.

[197] *Casdagli* (n 181) 156.

[198] *Casdagli* (n 181) 173.

[199] *Casdagli* (n 181) 194.

Despite the repeated to references to a 'territorial' idea of domicile throughout the opinions of the various law lords in *Casdagli*, the significance of community membership remained for determining the law that was applicable to European British subjects. Outlining a situation similar to the earliest Anglo-Indian domicile cases, Lord Finlay explained that for foreigners in Egypt, '[t]hough the domicil is Egyptian, the law applicable to persons who have acquired such a domicil varies according to the nationality of the person' and depended on provisions in the capitulatory treaties.[200] The very existence of these special laws, in fact, enabled the House of Lords to overrule earlier case law and conclude that it was possible for European British subjects to obtain a domicile in allegedly 'uncivilised' or 'semi-civilised' countries. Lord Finlay, for instance, declared that the strength of the 'presumption against the acquisition by a British subject of a domicil in such countries as China and the Ottoman dominions, owing to the difference of law, usages, and manners' had been 'very much diminished' owing to the 'special provision … 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'.[201]

With the decision in *Casdagli*, English courts began to emphasise the role of the territorial sovereign for mediating the relationship between territory and community in the definition of domicile in the British empire. Since it was the consent of the territorial sovereign that enabled the creation of separate legal regimes for different communities (for instance, Europeans in British India or in Ottoman Egypt), the various laws applicable to individuals belonging to these communities were all territorial. This new emphasis on the consent of the territorial

[200] *Casdagli* (n 181) 160.

[201] *Casdagli* (n 181) 156–157.

sovereign ultimately enabled some British protected persons to succeed where Ellen Abd-ul Messih had failed, ie to claim the protection of English law despite never having set foot on British territory. The best example of such success came from Shanghai in China. As a commercial hub, Shanghai was home to a small but affluent Baghdadi Jewish community, which was also present in other Asian outposts of the British empire such as Bombay, Calcutta, Rangoon, and Singapore.[202] Foreign protection provided advantages to this largely mercantile community, with Baghdadi Jews employed by David Sassoon and Company and other British firms in South, Southeast, and East Asia being routinely extended British protection.[203]

In 1931, Silas Aaron Hardoon died in Shanghai, triggering a long and protracted litigation over his considerable estate. Silas had been born in Baghdad but moved to British India and later to Shanghai where he was registered as a British subject in 1896 on the basis that his father had been naturalised in India a few years earlier.[204] As Sarah Stein notes, Baghdadi Jews under British protection were often registered as British subjects 'despite the fact that technically British Protected Persons were not British subjects'.[205] In 1907, the Foreign Office concluded

[202] Chiara Betta, 'The land system of the Shanghai International Settlement: The rise and fall of the Hardoon family, 1874–1956' in Robert Bickers and Isabella Jackson (eds), *Treaty Ports in Modern China: Law, Land and Power* (Routledge 2016) 62.

[203] Stein (n 32) 88–89. For a discussion of the efforts of Baghdadi Jews to acquire British protection, see Maisie J Meyer, 'The Sephardi Jewish Community of Shanghai 1845–1939 and the Question of Identity' (PhD thesis, The London School of Economics and Political Science 1994) 210–245.

[204] Letter from John F Brenan, Consul-General, Shanghai, to Miles Lampson, Ambassador to China, 26 October 1931, FO 369/2190, TNA.

[205] Stein (n 32) 90. British protected persons were usually 'regarded as aliens in the United Kingdom' although international law treated both British subjects and protected persons as 'British nationals enjoying abroad the

that Silas and his brother Elias were 'not British subjects, and ought not in the first instance to have been registered as such', but his registration was continued as 'an act of grace and favour in the circumstances'.[206] Silas, therefore, married his wife, Liza,[207] in the British consulate in 1928 under the provisions of the Foreign Marriages Act 1892,[208] which required at least one of the parties to be a British subject.[209]

The scope of Silas's British registration was key in the legal dispute over his will, in which he declared that he was 'domiciled in Shanghai' and left his estate (reported to be worth $150 million) to Liza.[210] Unhappy at being excluded, Silas's cousin, Ezra Abdullah Hardoon, and another relation, Isaac Silas Jacob Hardoon, contested the will.[211] Ezra emphasised that Silas's birth in Baghdad indicated that he was a Turkish (later Iraqi) subject who had obtained British protection on his move to Shanghai; consequently, he was not a British subject.[212] Ezra contended that Silas 'was never domiciled in China, and that he could never be domiciled in

protection of the Crown'. See J Mervyn Jones, 'Who are British Protected Persons' (1945) 22 *British Year Book of International Law* 122, 127.

[206] Despatch from Foreign Office to Pelham Warren, Consul-General, Shanghai, 5 March 1907, FO 369/2190, TNA.

[207] Although referred to as Liza in court documents and newspapers, she was usually referred to by her Buddhist name Luo Jialing in the community. See Betta (n 202) 63.

[208] 'The Hardoon Will Case Heard in British Supreme Court' *Israel's Messenger* (1 July 1932) 8.

[209] Section 1, Foreign Marriages Act 1892.

[210] A copy of the will, dated 10 February 1931, can be found in FO 917/3107, TNA. The valuation of the estate is from 'H. M. Supreme Court: Claim on Hardoon Estate' *North-China Herald and Supreme Court & Consular Gazette* (13 October 1931) 64.

[211] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 6.

[212] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 7.

Shanghai'; in fact, by registering with the British consulate for protection, Silas had 'proved that the last intention he had was to get a domicile in China'.[213] Isaac agreed, arguing that '[i]t was impossible in English law to shake off a domicile of origin by residing for long years in a country which was an extra-territorial region and where there was no real sovereignty'.[214] Consequently, Silas 'could not have shaken off his domicile of origin … [and] was a native of Irak and that the law of Irak must apply'.[215] Liza, on the other hand, argued that Silas 'by virtue of the protection afforded him, was legally a British subject, and he had established a domicile of choice in Shanghai'.[216] The law applicable to Silas was 'the law of China applicable to British subjects domiciled in China, namely, the law which the sovereign of the country allowed to be applied by courts which China had allowed to exist here … [ie] the laws of England'.[217]

In July 1932, the judge of the British Supreme Court of Shanghai, Peter Grain, ruled in favour of Liza Hardoon.[218] He dismissed claims that Silas could not acquire a Chinese domicile, noting that he 'had made and intended to make Shanghai his permanent home and that is the essence of the acquisition of a domicile'.[219] Given that Silas had acquired a Chinese domicile, the question then arose as to what the law of his domicile was. Half a century prior, Ellen Abd-ul Messih had attempted to argue that Antoun's membership of the local English community in

[213] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 13–14.

[214] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 10.

[215] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 11.

[216] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 13.

[217] 'The Hardoon Will Case Heard in British Supreme Court' (n 208) 13.

[218] 'H. M. Supreme Court: Hardoon Will Case' *North-China Herald and Supreme Court & Consular Gazette* (20 July 1932) 107–108.

[219] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 107.

Cairo entitled him the protection of English law but her contention has been rejected by English courts. In Silas's case too, Grain noted that he had been extended protection by the British consulate during his time in Shanghai; Silas had sued in and been sued in British consular courts and he had even sat as a British representative on the Shanghai Municipal Council.[220] However, the protection of English law was not extended on account of this association with the local British community but rather on the scope of the consent of the local territorial sovereign, ie the Chinese emperor, who had entered into treaties exempting British subjects from regular Chinese jurisdiction. Grain relied on Article 3 of the China Order-in-Council of 1925, which governed British jurisdiction in China and defined 'British subjects' as including 'British protected persons', to conclude that Silas would be considered to be a British subject 'so far as the jurisdiction and the laws applied to this Court are concerned'.[221] In a later case involving Silas's estate, additional evidence indicated that 'the Chinese authorities were fully cognisant of the deceased's political status and never sought to challenge it', thereby demonstrating 'their indisputable acquiescence during the earlier years of foreign intercourse in the absorption of the strangers into any community that would assume effective control over them'.[222] Given this explicit merger of the classes of British subjects and British protected persons, Grain distinguished Silas's position from that of Antoun Youssef Abd-ul-Messih, where the Ottoman Order-in-Council had differentiated between British subjects and protected

[220] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 107.

[221] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 107.

[222] This statement was made by Penhryn Grant Jones when the case was effectively relitigated five years later, after another of Silas's cousins, KB Ezra Hardoon challenged the will. Although this Ezra conceded that Silas was domiciled in China, he challenged the application of English law to Silas as a British protected person. The later case was also decided in favour of Liza. See 'H. M. Supreme Court: Hardoon Will Case' *North-China Herald and Supreme Court & Consular Gazette* (24 February 1937) 336.

persons and thereby permitted Antoun to be treated differently since he was a British protected person and not a British subject.[223] Grain then relied on *Casdagli* to argue that English law became a part of local Chinese law since the territorial sovereign had consented to its application to certain foreigners and protected persons.[224] Grain therefore concluded that for a man like Silas Hardoon, a British subject who was domiciled in China, the law of the domicile was 'the law of the British Court', ie English law, since 'the law of China as regards the British Courts in China is British law which the sovereignty of China by grant allows the British Courts to administer'.[225] Under English law, Silas's will was 'good and valid'.[226] The consent of the territorial sovereign, therefore, enabled both the expansion of the British community to include both British subjects and British protected persons and the application of English law to members of this community.

Although the decision to subject Silas's will to English law attracted some scholarly criticism,[227] Liza Hardoon succeeded in claiming the protection of English law where Ellen

[223] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 107.

[224] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 107–108.

[225] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 108.

[226] 'H. M. Supreme Court: Hardoon Will Case' (n 218) 108.

[227] Norman Bentwich, for instance, argued that the application of English law to members of non-Christian communities simply because they were British subjects was 'not suitable' since many of them had the right to 'enjoy their own law of personal status in the East under British rule'. Instead, he argued that 'reason and convenience' demanded that 'the personal law of such persons should still be regarded as the religious law prescribed by their domicile of origin'. See Norman Bentwich, 'Domicile in the International Settlement of Shanghai' (1932) 74 *The Law Journal* 401–402. The Foreign Office, therefore, considered amending the Order-in-Council to include a proviso on the law relating to non-Christian communities, but opted against it after JWO Davidson, the acting consul-general at Shanghai, argued that any amendment requiring British courts in China 'to

Abd-ul-Messih had failed. Both Antoun Youssef Abd-ul-Messih and Silas Hardoon were British protected persons who had been domiciled in places where Britain exercised extraterritorial jurisdiction. In Antoun's case, multiple judges sharply distinguished between the local territorial law rather and the law applied under treaty to British subjects, concluding that Antoun was subject to local Ottoman law. Silas, on the other hand, was considered to be a British subject to whom English law applied under the terms of the China Order-in-Council. Owing to the re-emphasis of territoriality after *Casdagli*, the consent of the territorial sovereign became ever more significant; in Silas's case, it was sufficient to expand the scope of the community to which the protection of English law would and could be extended, with English law effectively becoming part of local law. After a century and a half of debate over the scope and nature of the hyphenated domicile, courts reached virtually the same conclusions: European British subjects could be domiciled in far-flung colonies through long physical residence but the law applicable to them depended on their community membership, the scope of which now depended on the consent of the territorial sovereign.

E. Conclusion

References to the concept of the hyphenated domicile declined with decolonisation and the withdrawal of British extraterritorial jurisdiction across the globe. For instance, in the 1932 edition of Dicey's textbook on private international law, the editor, AB Keith termed Anglo-

administer Hindu, Mohamedan, Sikh, Parsee and perhaps Jewish religious law and custom' would be hampered by the lack of legal experts. Further, the Jewish Community Association of Shanghai itself stated that 'in all matters appertaining to marriage, dissolution of marriage, inheritance, wills, etc. they would like the law of England to apply to them'. See Note by William Eric Beckett, 11 January 1933, FO 369/2304, TNA; and Despatch from JWO Davidson, Acting Consul-General, to the British Legation, Peking, 2 June 1933, FO 369/2304, TNA.

Indian domicile as an 'outworn doctrine' that had been discarded by courts through 'an excellent application of commonsense', and limited analysis of the concept to a single sentence in the main text, although more detailed attention was paid to the position in places where Britain exercised extraterritorial jurisdiction.[228] This discussion was further trimmed in later decades. For instance, Martin Wolff did not include a separate section on the hyphenated domicile in his 1950 textbook on private international law. Instead, he only cited *Jopp v Wood* as a case that held that the intention to stay in a place 'until one has made a fortune' was insufficient to demonstrate intention of permanent residence, while relegating the cases of *Maltass*, *Tootal's Trusts*, and *Casdagli* to a single footnote on the need to clearly demonstrate the intention of Europeans to reside permanently in a territory 'with a wholly different way of living'.[229] This trend continues with contemporary private international law scholars who argue that that 'the fact that domicile signifies connection with a single system of territorial law does not necessarily connote a system that prescribes identical rules for all classes of persons', with India being an example of a system where 'different legal rules apply to different classes of the population according to their religion, race or caste, but nonetheless it is the territorial law of India that governs each person domiciled there, notwithstanding that Hindu law may apply to one case, Muslim to another'.[230] Since all law is considered to be territorial, akin to the position taken by the House of Lords in *Casdagli*, the explicit identification of community is no longer necessary to determine applicable law, with the concept of domicile itself being apparently flexible enough to account for the desires of individuals when it comes to the legal system to which they wish to belong.

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[228] AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, AB Keith (ed) (5th edn, Stevens and Sons 1932) vii, 62–64, 70, 78.

[229] Wolff (n 22) 111, 124n3.

[230] Torremans et al (n 2) 147–148.

As this history of the hyphenated domicile has demonstrated, however, rather than being an 'individualistic' or 'liberal' concept, changing interpretations of territory and community made domicile a sticky concept across the British empire. The emphasis on community membership in the concept of the hyphenated domicile played a specific role in imperial ordering and hierarchisation by determining which individuals could get the benefit of the protection of English law, with such privileges being primarily reserved to those of European descent. Although British protected persons of non-European origin did attempt to advocate for their own understanding of domicile and community membership, these efforts remained largely unsuccessful.

This history of imperial ordering and its interplay with individual aspiration for legal belonging can shed light on the continued significance of the concept of domicile in English private international law. Scholars have long lamented the defects in the definition of domicile, particularly regarding the difficulty of changing one's domicile, and have documented the rise of other connecting factors such as 'habitual residence' as a basis for jurisdiction.[231] However, attempts to reform the concept of domicile itself have fallen short. The recommendations of the Private International Law Committee in 1954 were torpedoed by claims that the economy would be harmed if foreign business persons would become domiciled in the United Kingdom, thereby becoming subject to taxation.[232] The government also rejected the reforms proposed in

[231] Peter North, *Private International Law Problems in Common Law Jurisdiction* (Martinus Nijhoff Publications 1993) 6–9.

[232] Michael Mann, 'The Domicile Bills' (1959) 8 *International and Comparative Law Quarterly* 457.

the 1987 report of the Law Commission,[233] thereby ensuring that domicile often remains onerous for individuals to change. In fact, even the Law Commission's proposals for reform included a strong endorsement of the need to retain the concept of domicile rather than habitual residence as the basis for applicable law. The report included the example of an English-domiciled person employed on a long-term contract in Saudi Arabia to argue that a move away from domicile would 'cut the links between many temporary expatriates and their homeland, isolating them and their dependents from its law and courts despite their remaining closely connected with that country', with results being 'particularly dramatic when the cultural background of the country of habitual residence, as reflected in its law, was very different or even alien in the culture of the person's own country'.[234] The rationale for choosing domicile as a connecting factor, therefore, contains echoes of earlier arguments for the need for the hyphenated domicile or for the argument that it was somehow impossible for Europeans to be domiciled in 'uncivilised' regions of the world. The history of the making and unmaking of the hyphenated domicile is, more generally, a history of the resilience of the concept of domicile itself.

Data access statement

All data underlying the results are available as part of the article and no additional source data are required.

[233] The Law Commission, *Thirtieth Annual Report 1995*, 10n24 <https://www.gov.uk/government/publications/the-law-commission-thirtieth-annual-report-1995> accessed 24 February 2025.

[234] The Law Commission and Scottish Law Commission, *Private International Law: The Law of Domicile*, 1987, 10 <https://lawcom.gov.uk/project/private-international-law-law-of-domicile/> accessed 24 February 2025.