CONFLICT OF LAWS—JURISDICTION—DOMICILE—ORDINARY RESIDENCE—ALLEGIANCE—INFANT—WARD OF COURT.

The law is to be found in the breasts of the judges. This remark often appears in earlier cases where judges reached a conclusion unsupported by any existing case law or statute. The same technique is employed in a recent case, *In re P. (G. E.) (an Infant)*,[1] decided in 1964 by the Court of Chancery in England. This case involved the jurisdiction of the court over an infant.

The infant was born in Egypt of Jewish parents on February 15, 1956. The parents had been married in Egypt. At that time the father was stateless and the mother Egyptian. In February, 1957, as a result of the Suez crisis, the father and mother left Egypt with the infant and went to England where the mother had relatives living. In order to obtain an exit visa the mother gave up her Egyptian nationality and became stateless. In January, 1962, they set up a matrimonial home in Brighton. In April of that year each signed an application for naturalization, stating that each intended to live in the United Kingdom. However, the applications were never brought to a conclusion and neither parent became a British subject. In August, 1962, as a result of quarrels, the mother left the matrimonial home and went to live with her own mother in Hendon. It was arranged that the infant would live with his mother and go to school there during the week and spend the weekends with his father in Brighton. On Friday, November 9, 1962, the father collected the infant for the weekend in the usual way. On the following day he flew with the infant to Israel; and on November 11, when the mother was expecting the son's return, she received a cable from the father informing her that they were both in Jerusalem. They had remained there ever since. The evidence before the court showed that the father and the infant had left England under the aegis of a travel document issued to stateless persons by the Home Office, the document in form affording no diplomatic or consular protection to the holder while abroad but entitling him (unless the contrary was stated) to return to the United Kingdom within three months. The father also had a tourist visa for three months from the Israeli government; but in his own affidavit he stated that when he went to Israel with the infant he did so with the intention of making his permanent home there. At the date of the hearing of his summons he and the infant had acquired Israeli nationality.

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1 [1965] Ch. 568.

On January 4, 1963, the mother issued a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, and the Guardianship of Infants Acts, 1886 and 1925, seeking, *inter alia,* to make the infant a ward of the court; but as she did not make the necessary appointment, the infant was not made a ward of the court. The mother having obtained leave to serve the father out of the jurisdiction, he entered appearance under protest, and on October 2, 1963, took out a summons seeking to have the mother's summons set aside for lack of jurisdiction.

Plowman, J. held that the court had no jurisdiction in wardship proceedings over an alien infant not physically present in England, and set aside the mother's summons. The mother appealed.

On appeal the court noted that the Court of Chancery would have had jurisdiction on either of two grounds: (1) that the infant was a British subject, or (2) that the infant was physically present in England. But in this case the infant was neither a British subject nor physically present in England. There was no established authority to give the court jurisdiction.

It was submitted on behalf of the mother that the Court of Chancery would have jurisdiction through the authority of the Crown as *parens patria.* This jurisdiction had two bases: (1) domicile, or (2) ordinary residence. In order to succeed in this case it would be necessary to show that the concept of ordinary residence should replace that of domicile as the determining factor in questioning the court's jurisdiction. It was argued that it was time to do away with domicile as the sole test of jurisdiction. Counsel for the mother said that the major defect of the doctrine of domicile is that it depends on the intention of the person to establish a permanent home and that domicile cases have been greatly criticized because of their artificial results. The contention was that the court had jurisdiction on the ground that the child was ordinarily resident in England and, therefore, owed allegiance to and had a corresponding right to protection by the Crown.

The judges were faced with a difficult task. It seems obvious that they wanted to find some ground on which to base a decision that the court had jurisdiction over the infant. Convinced that the father was guilty of a moral wrong, they strove to find a way to avoid such injustice.

The only available basis for a favourable decision was ordinary residence. But no case had been decided in which the concept

of ordinary residence had been used by the court as the basis of its decision. This did not deter the court. Lord Denning M.R. said:[2]

> When we come upon a situation which has not arisen before, we must say what we believe the law to be upon the matter. We are not to be deterred by the absence of authority on the books. Our forefathers always held that the law was locked in the breasts of the judges, ready to be unlocked whenever the need arose.

The need had arisen. The court decided that the test of ordinary residence was to be preferred to that of domicile, for the tests of domicile are archaic and artificial and would produce strange results if applied in the context of a jurisdiction which historically is closely connected with allegiance. Lord Denning M.R. said:[2]

> The tests of domicile are far too unsatisfactory. In order to find out a person's domicile, you have to apply a lot of archaic rules. They ought to have been done away with long ago.

Once again we have evidence of the willingness of Lord Denning to make new law where other judges would hesitate to do so. But in this case the other members of the court agreed. Pearson L.J. said:[3]

> The rules for ascertaining domicile are, in some respects, artificial and unrealistic and would produce strange results if domicile were taken as the basis of jurisdiction to make a wardship order.

Russell L.J. said:[4]

> The whole trend of English authority on the parental jurisdiction of the Crown over infants bases the jurisdiction on protection as a corollary of allegiance in some shape or form. Domicile is an artificial conception which may well involve no possible connection with allegiance.

Having done away with the doctrine of domicile, the court next looked to the concept of ordinary residence and proceded to find there a basis of jurisdiction. The court held that an alien infant ordinarily resident in the country owes an allegiance to the Crown, and, as a corollary to that allegiance, has a right to protection from the Crown, and, therefore, to the parental jurisdiction of the Crown exercised through the High Court.

Where did the court get its support for introducing the test of ordinary residence?—from the law of treason. It was pointed out by the House of Lords in *Joyce v. Director of Public Prosecu-*

2 *Ibid.*, 583.
3 *Ibid.*, 589.
4 *Ibid.*, 592.

tions[5] that allegiance continues if the person himself goes out of the country but leaves his family and effects there. He cannot throw off his allegiance simply by departing from the country. So long as he is in the country, or is ordinarily resident there, he owes allegiance to the Crown and correspondingly comes under its protection. Here lay the foundation of the court's decision.

At first glance it would seem odd that a case on treason should have affected the decision of a custody case. But this is really not that surprising. What the courts are really concerned with in each case is the extent to which they are willing to extend their jurisdiction beyond the borders of the country. There is a growing need for expanding the jurisdiction of the courts to deal with new problems created by the increasing mobility of people. A by-product of this mobility is statelessness. Years ago there was no need for the courts to exercise jurisdiction over stateless persons. But today statelessness is fairly common. In the ordering of society it has become necessary that national courts reach out and respond to the pressures of what is fast becoming a world community.

Having decided that ordinary residence would give the court jurisdiction, the court easily found that the infant was in fact ordinarily resident in England. As indicating the feeling of the court it was held that where an infant, ordinarily resident in the country, had been taken out of the country in circumstances where some element of force, deception or secrecy is involved, justice, convenience and the trend of authority require that the wronged parent or parents should be able to obtain relief in the English High Court of Justice.

Although the court had established jurisdiction over the infant, the question whether the jurisdiction should as a matter of discretion be exercised to make the child a ward of the court must be determined in other proceedings, when all the circumstances were before the court, and in the light of what was best for the infant.

This is another example of the willingness of judges to move with the times. By virtually throwing the doctrine of domicile out the window, and finding a new basis for jurisdiction they have opened new roads for the future.

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5 [1946] A.C. 347; 62 T.L.R. 208; [1946] 1 All E.R. 186.

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