THE CONCEPT OF DOMICILE IN NIGERIA

BY

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D E D I C A T I O N

Dedicated to the so called illegal aliens.

DECLARATION

I declare that the materials contained in this dissertation are a product of my personal research. All materials quoted or reproduced from other sources are duly acknowledged.

P R E F A C E

Domicile is an important concept in the determination of the personal affairs of an individual. Issues of legitimacy, legitimation, adoption, marriage and divorce, to mention a few, are all determined in accordance with the law of the domicile.

Important as this concept is, Nigerian principles of domicile like other Nigerian rules of the conflict of laws, have continued to develop along the lines of the English conflict of laws. Although no legal system can develop independently without external influence, the need to de-emphasise such influence is paramount. It is the aim of this dissertation therefore to discuss the concept of domicile in the Nigerian conflict of Laws and make suggestions for the reform of those areas of the law of domicile which have remained tied to the English concept of domicile.

It must be noted however that the need to depart from the English conception not only of domicile but of other areas of the Conflict of Laws cannot be over-emphasised in Nigeria today.

A. S. H.

Ahrnadu Bello University Zaria,
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LIST OF ABBREVIATIONS

A.C - - - - -	Appeal Cases
ALL E.R - - - - -	All England Law Reports
ALL N.L.R - - - -	All Nigeria Law Reports
APP. Cas - - - -	Appeal Cases
C. A. - - - - -	Court of Appeal
Ch. - - - - -	Chancery
CMD - - - - -	Command paper
Exch. D. - - - -	Exchequer Division
F.S.C. - - - - -	Federal Supreme Court
Harv. L.R. - - - -	Hrvard Law Review
H. L. - - - - -	House of Lords
H.L.C. - - - -	House of Lords Cases
I.C.L.Q. - - - -	International and comparative Law Quarterly
K. B. - - - -	Kings Bench
L.J.Ch. - - - - -	Law Journal chancery
L.L.R - - - - -	Lagos Law Report (Reports of the Highcourt of the Federal Territory of Lagos.
L. T. - - - - -	Law Times Reports
Mass. - - - - -	Massachusettes Law Reports
M.L.R - - - - -	Modern Law Review
N.L.R - - - - -	Nigeria Law Reports
N.M.L.R. - - - -	Nigeria Monthly Law Reports
N.N.L.R - - - - -	Northern Nigeria Law Reports
N.R.N.L.R. - - - -	Northern Region of Nigeria Law Reports
N. Y. - - - - -	New York Law Reports
P. - - - - -	Probate
P.C. - - - - -	Privy council
P & D. - - - - -	Probate and Divorce

Q. B. - - - - - -	Queens Bench
S. A. - - - - - -	South Africa Law Report
S. C. - - - - - -	Supreme Court
Sc & Div. - - - - -	Scotch and Divorce Cases
U Pa. L.R - - - - -	University of Pennsylvania Law Review
V. R. - - - - - -	Victoria Law Report
W.L.R. - - - - - -	Weekly Law Reports
W N L R. - - - - -	Western Nigeria Law Reports
W.R.N.L.R - - - - -	Western Region of Nigeria Law Reports
Yale L.J. - - - - -	Yale Law Journal.

CHAPTER ONE

1. INTROLUCTION

A. Nature of the Conflict of Laws.

As a result of social and commercial intercourse between persons living in different parts of the world due to greater facilities of travel and communications, this branch of Private law has developed and is developing to determine whether the court of a particular country has jurisdiction to try a case which has a foreign element and if it has jurisdiction what system of law would it apply to determine the issue or issues in the dispute before it. It is important to note that the world has become interdependent.

As Cheschi re stated, in Private law, it isimportant to develop this branch of law

> in the interests of the social and commercial well being of society. The growing contraction of the world is a phenomenon that has its effect in the realm of law. The daily increase in the rapidity and facility of travel, the constant search of the business man for foreign markets, the tendency to use the international telephone for the completion of legal transactions, which has already led to reprehensible practice ofsolemnising marriages over the Trans-Atlantic telephone, the armies of occupation that will remain a feature of life for perhaps a generation, the urge of a war-weary world to abandon the fetish and folly of isolation — all those factors must inevitably tend to increase the number of foreign element cases that come before the courts.[1]

Therefore there can be no doubt that there is a need for the Conflict of Laws

Furthermore, the late Morris has defined "the Conflict of Laws"as "that part of the private law

1. Cheschire ,Plea for a wider study of Private International Law" (1947) I I.CLC14 at pp 14-15

of a country which deals with cases having a foreign element. By a "foreign element" is meant simply a contact with some system of law other than English Law".[2] Such a contact may exist as a result of a contract being made abroad, a tort committed in a country other than Nigeria, a marriage celebrated between a Nigerian man and a woman whose nationality isFrench, in Brazil.

Hence in Nigeria, the conflict of laws, largely based on the English conflict of laws, has to determine when the courts will apply a foreign legal system to provide the rule to determine the issue. Among the connecting factors used for the purpose, is domicile for various purposes.

However, in Nigeria there are three situations in which reference has to be made tothis branch of the law. It is convenient to use the term "law district" which refers to a legal system operating within a territory. Generally, the first instance is where the Nigerian court has to decide whether it will apply a legal system of another state, for example Ghana, or its own law. The second situation arises from the fact that there are different laws operating in the different states since Nigeria is a Federal State[3], just as in the case of the United States of America. This does not involve a foreign legal system. An example for this can arise if a tort is committed in Kano and action is brought in Oyo State, the Court in Oyo state will have to decide whether it

2. Morris J.H.C, Conflict of Laws (1984) P.1

3. see Section 4(7) of the partially suspended Constitution of the Federal Republic of Nigeria, 1979 and particularly Part II of the second Schedule of the Constitution.

has jurisdiction to try the case and then if it decides to exercise jurisdiction whether it will apply the law of Kano State or of Oyo State if the laws are different.

The third class of cases arise as a result of the existence of personal laws in Nigeria. Due to different customary laws and Islamic law, it may benecessary for a court to decide where parties are governed by different laws, what law to apply. This type seems to have been incorrectly termed "internal conflicts." These different problems would fall under the umbrella of the Nigerian Conflicts of Law.

It would not be irrelevant to mention that two legal systems could exist side by side within an area of territory without giving rise to "legal chaos"[4] as described by Anderson. The use of the term "Conflict of Laws" by Anderson is inaccurate and inept. He refers to the existence in Northern Nigeria before independence of English Law and Islamic law as regards civil and criminal litigation. This does not give rise to a situation where conflict of laws as it is generally understood will be applied. There need not be any chaos or confusion provided the areas within which they apply are clearly stated. It is also possible for the litigants to be given the choice as to which system they would want applied to the dispute.

4. Anderson, J.N.D, Conflict of Laws in Northern Nigeria: A New Start", (1959) 8 I.C.L.Q 442

"Private international law" according to Graveson, "is that branch of law which deals with cases in which some relevant fact has a connection with another system of law on either territorial or personal grounds, and may on that account, raise a question as to the application of one's own or the appropriate alternative (usually foreign) law to the determination of the issue....."[5].

Cases of the nature anticipated by Graveson, primarily arise as a result of the development of mercantile and social intercourse amongst nations. Since every state in the modern world has its own system of laws which are essentially territorial in application, the need for a system of law to resolve conflicts arising as a result of such commercial and social intercourse on the international plane is paramount.

Since the essence of every law is to safeguard the interests of the individual and to see that justice is done to everyone without any discrimination based on sex, religion, tribe or other ethnic affiliation, Private International Law has developed "as a result of the universal awareness of the need to do justice to all manner of people regardless of race, creed or the arbitrariness that is often involved in the choice of the court"[6].

The purpose of Private International Law is to ensure the continuity of social and commercial intercourse among

5. R.H.Graveson, Con flict of Laws (1974) p.3

6. Agbede, Essays on Conflict of Laws (1985) p.2

individuals and nations despite the existence of different laws in multiple territorial jurisdictions. It would be too hard on the individual and rather absurd if he had to consider whether his legal rights or interests were subject to a new law each time he entered a different country or state.

In most jurisdictions, Conflict of Laws or Private International Law is of recent origin. In England the common law courts had neither the need nor desire to deal with matters which were foreign. According to Ehrenzweig "the law of the international community was available in Merchant and admiralty courts in which it functioned as the law of the forum.[7] It was after the decline of both the lawmerchant and the law of admiralty that common law courts began to recognise foreign matters and this gave rise to the problems of conflicts law.

In one sense, Private International Law isnot strictly speaking a separate branch of law butis one which cuts across the whole law. It is "a sort of outgrowth" on the various branches ofmunicipal law. The rule that liability for a tort is governed by the law of the place of commission is as much a rule of Private International Law as it isof the Law of Torts.

It may however be regarded as a distinct branch of

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7. Ehrenzweig, Conflicts in a Nutshell (1974) pp 19-20

the law when questions with which it is concerned are considered. Thus accordingto Graveson, the English Conflict of Laws has developed around three principal questions namely the choice ofjurisdiction, the choice of law and the recognition and enforcement of foreign judg ments.[8] A consideration of these three questions is beyond the scope of this work.

With this background in mind, it now seems appropriate to consider the term "Conflicts of Law", which approximates to "legal chaos". It is this situation which is of particular interest in the Nigerian situation. Internal conflicts of laws or Interstate conflicts in Nigeria are of historical signifance. For a better understanding of this problem therefore, the evolution of the laws from the inception of the Protectorate to the period of independence and beyond would benecessary and would form the subject of later discussion.

b. Use of Connecting Factors.

A connecting factor is the determinant of the applicable law in a given factual situation. There may exist in a given situation certain elements which are determinable by the forum only through the application of connecting factors or points of contact.

In the Conflict of Laws generally, it has been established that Domicile and Nationality are the two

8. Graveson, opcit p.12

fundamental principles which determine the applicable law in a given transaction between private individuals. From timeimmemorial, domicile has been the chief determinant of the personal rights and status of a person. With the introduction of the Napoleonic code in 1804, countries adopting that code, such as France, went for nationality as the connecting factor to determine status and rights of individuals.

In English Law, and by virtue of the various reception statutes in Nigerian law, the following are some of the established connecting factors in these rules of the Conflict of Laws.

i. Succession to movables is governed by the law ofthe domicile of the deceased at the time of his death.

ii. The formal validity of a marriage is governed by the law of the place of celebration and the essential validity by the law of domicile.

iii. Succession to immovables is governed by the lex situs or thelaw of the place where theimmovables are situate .

iv. Capacity to marry is governed by the law of the domicile of the parties.

v. The validity of a will is determined by the law of the domicile of thetestator at thetime of his death.

It could be seen therefore that domicile plays an important role in determining status andthe personal transactions or relations of an individual. In a given case however, one or more of these connecting factors

may comeintoplay. Thus if a Nigerian domiciled in Chad dies in Ghana leaving properties in Benin Republic under a will made in Gabon, the connecting factors in determining the applicable law in such a case may depend on either the nationality of the deceased, his domicile, the place where the property is situate or the country in which the will was made.

In Nigeria and most other African countries, the connecting factor that determines the application of a particular system of customary law is often a personal ouality. This personal factor may either be religion or member ship of a particular ethnic group.

c. Role of Connecting Factors in determining the Applicable Law.

Once a court of the forum has decided that a particular connecting factor e.g. domicile, is relevant to the facts as classified by the court, it proceeds to apply the relevant law indicated by the connecting factor. In other words if a court of the forum decides that the case before it is that of intestate succession to movables, and that this is governed by the law of the domicile of the intestate, it proceeds to interpret the concept of domicile in its own sense and apply the law accordingly.

Similarly, if an issue of validity of a marriage purportedly celebrated in a monogamous form by a moslem who is already polygamously married falls to be determined, itis his religious affiliation that determines whether or not he is competent to

enter into such a contract. The connecting factor in this case therefore is religion.

Connecting factors may either be static or variable. They are static when their mode does not change no matter in what circumstance they are employed. In other words, the issue of time factor does not affect their character. Thus the fact that the validity of a marriage is determined by the law of the place of contracting is a static rule and remains so no matter the time of its application. Time in this case does not change the connecting factor which is the place of celebration.

Conversely, a connecting factor is variable when it is subject to change, so that it may need to be defined further. Thus domicile as a connecting factor is variable because it is subject to change. So also is nationality and the situs of a movable.

The selection of the proper law to govern a particular factual situation is dependent upon the connecting factor which is appropriately selected to govern the factual situation. Talking about the role of the connecting factor in determining the selection of the proper law, Falconbridge[9] said:

> "Private International Law is a system of connecting factors. A factual situation is to be connected with a particular system of law. Rules of Conflict of Laws

9. Falconbridge, Conflict of Laws (1954) p. 129

> are bridges and the legislator who lays down the rules is the 'Pontifex'. Some element in the factual situation must be used as a bridge, and thiselement may be a person, a thing, or an act done or to be done. A distinction must, however, bemade. The thing or the act is necessarily localised (the thing where it is situated, and the act where it is done or to be done), and therefore a thing or an act serves not only as a point of commencement, but also as the bridge, connecting the situation with a particular country by his nationality, by his domicile, by his residence or by his mere presence, and the person serves only as a point of commencement, and a further element must be used to complete the span of the bridge"

This, according to Falconbridge, is necessarily so because whereas the situs of a thing or the place where an act is done may be sufficient connecting factors, a person's connecting factor must be either his nationality, his domicile, residence or presence.

It must however be pointed out that the categorisation of the factual situation, the determination of the connecting factor and the selection of the applicable law do not resolve the problem of the foreign element involved in the case. This is because conflicts might again arise in respect of the interpretation of the connecting factor by the lex fori and the foreign legal system. For instance the forum and the foreign law may all characterise or categorise the factual situation as a case of succession to movables and might all agree that this is governed by the law of domicile of the deceased. They may nevertheless differ in their interpretation of the concept of domicile. Thus it has been suggested by some writers such as Falconbridge that "the connecting factor specified should bear the meaning

assigned to it by the lex fori and not the meaning assigned to it by some foreign law".[10] This is necessary if effect is to be given to the conflict rule of the forum. Thus it has seen held in RE ANNESLEY[11] by RUSELL, J that:

> the question whether a person is or isnot domiciled in a foreign country is to be determined in accordance with the requirements of English law as to domicile, irrespective of the question whether the person in question has or has not acquired a domicile in the foreign country in the eyes of the law of that country.

Falconbridge contends that this insistence by the English courts to define domicile in the English sense may be frustrated by their use of the doctrine of renvoi.

Other connecting factors which are frequently employed in the English conflict of laws such as the place of making a contract or the situs of a thing, may also give rise to conflict of conflict rules as a result of the differences in the definition of the factors themselves. This type of conflict of conflicts rules is latent. If the conflict rules of two countries agree that a given question be referred to the law of the place of commission, they may nevertheless differ as to their interpretation or definition of the place of commission. Onecountry may consider the place of commission as the place where the act constituting the wrong complained of occurred, whereas the other may consider the place of commission as the place where the initial events leading to the commission of the act occurred.

10. Falconbridge, op cit pg 131.
11. (1926) ch. 692 at 705

Generally however, the situs of a tangible thing is a question of fact and its use as a connecting factor presents no difficulty in any country. However, problems similar to those experiencedin respect of the place of commission illustrated above, may arise as regards the situs of intangibles such as choses in action and the goodwill of a business.

2. An Examination of the heterogeneity of Nigeria and the existence of a multiplicity of personal laws.

The Nigerian Society is a highly complex one. It is not only the size of the country which covers some 923,768 square kilometres[12] or the nearly 250 ethnic groups[13] that live within it that account for the complexity, but rather the diversity in the customary laws of these 250 ethnic groups. The problems created by the divergence are however gradually disappearing particularly in the Northern States where Islamic law has to a large extent replaced most local customs. Even in areas where Islamic law does not apply, customs of smaller ethnic groups are being overshadowed by those of larger ethnic groups as a result of intermarriage and urbanisation.

This multiplicity of laws resulted in multidimensional conflicts and as indicated at page 6 above, the reason for these internal conflicts of laws is purely historical.

Prior to the introduction of the substantive code of criminal law by the Lugard Administration into the Protectorate of Northern Nigeria in 1904 there existed a

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12. The Europa Year Book 1984 Vol. II P. 2167

13. Worldmark Encyclopedia of the Nations Vol.2 P.236

system of Islamic law which applied throughout the Protectorate. Customary or tribal laws however, existed side by side with Islamic law in this area.

The introduction of Islamic law into the Protectorate of Northern Nigeria dates back to the period of the Fulani Jihad of Othman Dan Fodio in the 19th Century and is also partly a result of the influence of the Arabs through the Trans-Saharan Trade routes. In the Southern Protectorate on the other hand customary law was generally applied by the customary courts until the amalgamation of the Northern and Southern Protectorates in 1914 and the subsequent extension of the criminal code to the Southern Protectorate in 1916.

The introduction of the criminal code in the Protectorates did not however lead to the immediate disregard or extinction of customary law. In fact in the Northern Protectorate the introduction of the code was very much opposed by the elites on the basis that the code did not meet the wishes of a moslem society".[14] Customary criminal law was therefore not abrogated by the Criminal code and the two operated side by side. The situation led to many problems particularly in respect of the recognition of the defence of provocation for murder cases by the criminal code. Since provocation under the criminal code operated to reduce murder to manslaughter, it did not gain the favour of the muslims because under strict Islamic criminal law, provocation made no difference to the

14. E.H.Ofori - Amankwah, The Penal Code and the Criminal Code — their origins and differences Journal of Islamic and Comparative Law Vol.7 1978 p.52.

offence of murder and killing under any circumstance was punishable with death.

Similarly, certain offences which were recognised by Islamic Law were not codified in the criminal code. These included such offences as adultery, incest, drinking of alcohol by a muslim etc. It is therefore not hard to see why the code met with stiff opposition.

At the dawn of independence, the North felt that there was a need to opt out and have a separate code.[15] This led to the introduction of the Penal code in the Region in 1960. This code is by no means a codification of Islamic law as is generally held in some quarters. Some offences codified therein, though recognised in Islamic Law as offences, are nevertheless given modified punishments contrary to the requirements of strict Islamic law. For example under section 286 of the code theft is an offence and is punishable with five years imprisonment under section 287 of the code. In strict Islamic law however, the punishment for theft is amputation of the hand. Similar differences exist throughout the penal code and it would be outside the scope of this work to proceed on their analysis.

In the South on the other hand, it would seem that the introduction of the criminal code in 1916 did not very much affect the existing customary practices of the people. For instance, acts such as adultery, incest, drinking of alcohol by Moslems which were not codified still remain 'lawful' to a large extent with only a nominal fee payable

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15. K. S. Chukkol, the Penal Code; Its genesis and standing.

as compensation to the husband when adultery has been committed with his wife.

It must however be pointed our that even at the present moment, the existence of the Criminal code and the penal code in the south and North respectively, has not altogether succeeded in wiping out customary law which still very much regulates civil matters in most areas. It was infact the realisation of the people's need for their various customs that led to the establishment of customary courts in Lagos, Oyo, Ondo, Imo, Bendel and Anambra states to mention just a few. In fact the constitution gives power to any state wishing to establish a Customary Court of Appeal to do so.[16] It is in pursuance of this provision that states such as Plateau and Bendel have each established a Customary Court of Appeal.

One feature of any customary law is that it attaches to the individual no matter where he goes. In other words as pointed out above, it is personal in nature, such that the connecting factor which always determines the application of a particular customary law to the personal affairs of an individual is either his religion or his tribal or ethnic affiliation. Thus Yoruba Customary Law would always be applied to a Yoruba man no matter his place of residence if an issue falls to be determined in accordance with customary law. Similarly, a Hausa man domiciled in Warri in Bendel State would always wish his affairs to be determined in accordance with Islamic law since that law is now recognised as "native

16. Section 245(1) of the Constitution of the Federal Republic of Nigeria, 1979.

law and custom" in the North by virtue of the Native Courts Law.[17]

However it should be pointed out that Islamic Law has been erroneously called 'Native law and custom'. It is a legal system comparable to Roman Law as wellas English Law.

It has also been contended by K.S Chukkol[18] that the various reforms in 1967 which led to the enactment of Area Courts Edicts and the subsequent provision in the suspended Constitution of the Federal Republic of Nigeria, 1979, for the establishment of Sharia Courts of Appeal would tend to give rise to an irresistible view that "Islamic law is a system of law somewhat quite different from 'native law and custom'.

If this view is correct, and there is a strong ground for believing that it is, this wouldtend to raise a situation where for example, a muslim from a Yoruba community in Sokoto might say that though a moslem his'native law and custom' does not recognise adultery as a crime and that he sees nothing wrong in it.

If one proceeds on this basis therefore, it would be safe to say that Islamic law is applied to a party only when he submits to its application inspite of his religion. This view tends to whittle down the efficacy of religion as a connecting factor in determining the status of an individual. Thus a moslem who opts for the application of English Law instead of Islamic Law/or his own customary law where he has one cannot be seen to have done any wrong.

17. S.2 NativeCourts Law, 1967.
18. K.S.Chukkol, op cit p.14

As indicated earlier, the complexity of the Nigerian society lies principally in the diversity of tribes and tribal laws. The Ibos of Eastern Nigeria (consisting of Anambra, Imo, Cross River and Rivers States) have quite a different custom from the Ibos who inhabit Asaba area of Bendel State when one considers issues of substance. Similarly, the Hausas and Fulanis who inhabit the Northern States have two distinct cultures. These distinctions are however gradually being marred by the influence of Islam and intermarriage. The Idomas of Benue state, the Igbirras of Kwara state, the Birom of Plateau state and other smaller ethnic groups within these areas, all have different customary laws. The intercourse of these various tribes as a result of urbanisation and the resultant contact necessitated by trade is bound to raise issues of conflicts.

Since it is the personal quality, that is, either religion or membership of a particular ethnic group that determines the application of a particular customary law to the personal affairs or transactions of an individual, it is hard to see how any of these can be easily shaken off. They are qualities which attach permanently to an individual . Thus although it is possible for an individual to change his religion, it is a very rare occurrence. But even where the change does occur this ultimately leads to the adoption of yet another religion. It would be an exercise in futility however

to talk of changing one's ethnic group or tribal affiliation.

With this analysis of the complex nature of the Nigerian society, it is not therefore hard to see why conflicts abound as between the application on the one hand, of one form of customary law or the other, and of customary law and English Common Law on the other. The origins and development of these sources of conflicts and how they have been tackled would form the basis of the next discussion.

3. CONFLICT OF LAWS IN NIGERIA — its sources and the development of interpersonal and interstate conflicts.

The sources of the Nigerian rules of conflict of laws can be classified into four heads for reasons of convenience.[19] These are:

a. English law

b. Decisions of Courts outside Nigeria

c. Nigerian (local) legislation and case law

d. Public International Law.

The rules of Private International Law like all other rules of Private and Public law received into Nigeria are principally rules of English Private international law. It is therefore necessary to state the mode of reception of such rules of English law into Nigeria.

19. I.O.Agbede, op cit p.12

English Law was first introduced into the colony of Lagos in 1863[20] and as we have seen above, a criminal code based on English law was first introduced in the North by the Lugard administration in 1904 before it was subsequently extended to the South. It is however clear that subsequent statutory provisions such as the Interpretation Act[21] extended the whole body of English law into other parts of Nigeria in 1900. The adoption of the English law by the Western, Northern and Eastern Regions followed its adoption by the Federal Territory in 1945.

Section 45 of the Interpretation Act states thus:

> "Subject to the provisions of this section, and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall be in force in Lagos and, in so far as they relate to any other matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.

On the other hand, Section 28 of the High Court Law of Northern Nigeria[22] provides as follows:

> subject to the provisions of any written law and in particular of this section and sections 26, 33 and 35 of this Law;
> a) the common law
> b) the doctrines of equity and
> c) the statutes of general application which were in force in England on the 1st day of January, 1900, shall in so far as they relate to any matter with respect to which the legislature of Northern Nigeria is for the time being competent to make laws, be in force within the jurisdiction of the Court.

20. Ordinance No.3 of 1863
21. Cap 89, Laws of the Federation ofNigeria and Lagos, 1958 now cited as Law (Miscellaneous Provisions) Act, 1964
22. Cap 49, Laws of Northern Nigeria,1963.

Similarly, section 15(1) of the High Court Law of Eastern Nigeria[23] states:

> subject to the provisions of this section and except in so far as other provision is made by any law in force in the region, the common law of England, the doctrines of equity and the statutes of general application that were in force in England on the first of January, 1900, shall in so far as they relate to any matter for which the legislature of the Region is for the time being competent to make laws be in force within the jurisdiction of the Court

In Western Nigeria however, section 3 of the Law of England (Application) Law[24] is couched in the following terms:

> From and after the commencement of this Law and subject to the Provisions of any written law, the Common law of England and the doctrines of Equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region.

The Western Nigeria provision made nomention of statutes of general application and has saved itself from the yet unresolved arguments in respect of the limitation date by omitting the same from its provisions. Nevertheless, the controversy as to the nature of the imported common law which was received into Nigeria still remains.

Some writers such as Park and Nwabueze contend that it is not the English law that has been received in Nigeria by the various reception statutes. Park in his 'Sources of Nigerian Law'[25] contends that the older enactments receiving English Law "did not add the words 'of England'

23. Cap 61, Laws of Eastern Nigeria, 1963
24. Cap 60, Laws of Western Nigeria, 1959
25. A.E.W. Park, The Sources of Nigerian Law, 1963 p.19

to qualify the common law but that it was the practice of the judges at the time who were virtually all British and trained in English law to consider only English common law. He seems to be of the view that had the recent receiving statutes not incorporated the words "of England", this would have encouraged the development of a Nigerian common law and equity, although he admits that the phrase "of England" is in consonance with the common practice of the judges.

In his 'The Machinery of Justice in Nigeria'[26] Nwabueze examines the question whether "the common law which our courts are required to apply is the common law in its exclusively English context", He provides the answer thus:

> "As applied to the common law countries, 'the expression "Common Law" is used to mean the legal system and habits of legal thought that English men have evolved. In this sense it is contrasted with systems of law derived from Roman Law' (quoting from R. M. Jackson's Machinery of Justice in England, 3rd edn p. 15). It is in this sense that the common law is applied in some of the older commonwealth countries and in America, and it is submitted, should be applied in Ni eria. It is wrong to suggest that our courts are absolutely bound by the specifically English text or version of the common law.

In expressing this opinion, Nwabueze was thinking of an ideal situation and one would not fail to share this opinion with him. But in as much as one would have wished that the English version of the common law is not absolutely binding on our courts, the general practice of our courts do suggest that this wish is not attainable. Both the Interpretation Act and the Western Nigerian Law of England (Application) Law lay down in unambiguous terms that "the common law of England" is applicable. In fact it is only the Northern Nigerian Provision that has avoided the use of such a phrase and one could conclude on that ground that Nwabueze's opinion is only true as far as Northern Nigeria is concerned.

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26. B. O. Nwabueze, The Machinery of Justice in Nigeria, 1963 P.21

While disagreeing with the views expressed by these writers Antony Allot in his 'New Essays in African Law'[27] contends that it was "the common law and statute of England that was imported into West Africa ....." and other areas in tropical Africa under British rule and that "legal scholarship must recognise this fact". He goes on to suggest that legislation is the only remedy to any' inconvenient consequences' that might have arisen as a result of this fact.

The learned writer went on to say that where there is an express reference to the law of England, that reference must not be overlooked and that where a recent legislation further re-echoes or re-enacts a previous legislation, it is only reasonable to presume that the legal system does not intend to effect any basic change.

> Hence, 'common law' in a later enactment may be taken to refer to the Common law as therefore administered and defined by courts applying the 'common law' under an earlier statute (unless a substantial change, e.g. a variation of date, has been introduced by the later Act)[28].

He concludes that since the evolution of, say, Nigerian Common law would, to a large extent, be tied to its English parent, such evolution would not be of anyforce and that:

> One can, however, argue that from the moment when English law was received as the basis of an African country's legal system, then the unenacted part of it became the common law of that territory. Thus Nigerian Common law starts (if we ignore the Preliminary reception for Lagos) with the English law as it was on January 1, 1900, with necessary adaptations and

27. A.N.Allot, New Essays in African Law, 1970 p.34.
28. Ibid

> modifications. The status of the common law once received as the common law of an African country, is quite different from that of a foreign law in Private International Law. It is part of the Law of the court of which the court may take judicial notice.

From the foregoing therefore, one would tend to agree with Allot that the English law imported into Nigeria is the common law and statute law of England and that any inconveniences caused thereby can only be rectified by means of legislation.

So far, we have been talking about the reception of the English common law into Nigeria but the reception statutes also talk about the "doctrines of equity". The doctrines of equity are essentially the body of principles developed by the court of Chancery in England as a gloss upon the common law. These principle of equity existed from medieval times, although the principles of equity that existed during the medieval times were less rigid than the modern rules of equity which are complicated, technical and are certain. According to some writers it is this rigid or technical equity which, under the reception formula, has been imported into common law Africa and judges in these countries have considered equitable maxims as part of the general law that has been received in their countries.

The statutes that have been 'received' or imported into Nigeria are "statutes of general application in England". As to what statutes are "statutes of general application" there has not been any consensus amongst writers and judges, and different propositions have been put forward at various times.

One view is that for its general applicability, the statute must apply throughout the United Kingdom, that is in Scotland, Ireland, and England. Park is of the opinion that this view is untenable because all the reception statutes talk of general application in England only. Thus in Re Sholu[29] Mr. Justice Webber who had earlier held in Dede V. Africa Association[30] that the Land Transfer Act 1897 was a statute of general application took a contrary view and held that the Land Transfer Act was not a statute of general application because it was not in force in Scotland and Ireland. But his decision was over ruled in Young V. Abina[31] by the West African Court of Appeal which held that the Land Transfer Act of 1897 was in force in Nigeria. The Court while disagreeing with Webber's J' decision in Re Sholu's case said:

> "The Land Transfer Act of 1897 applied quite generally to all estates in England of persons dying after 1st January 1898. It is difficult to see how a statute could be of more "general application" in England than that, and it was in force in England on 1st January 1900. We find ourselves unable to follow the reasoning of Webber J. in holding that the Land Transfer Act was "even more restricted tha. others.....and does not apply to Nigeria". It would appear that the basis of this reasoning was that the Land Transfer Act applied to England only and not to Scotland or Ireland. We are unable to agree with this view. It seems to us that the words "of general application" are used with reference to the matter of the statutes and not only geographically. Also it seems to us that under section 14 England is the test of geograhical generality."

Yet another view put forward is that "of general application" means "generally applied in the colonies".[32]

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29. (1932) 11 N.LR.R. 37
30. (1910) 1 N.L.R. 130
31. (1940) 6 WACA 180 at 183-184
32. Park, op cit P. 25

This view is also rejected on the basis that it would result in a vicious circle because the courts of each colony would look at the practice of those of every other colony and where an English Act is not applied in any of them, this would result in its non application by the others.

Perhaps one can say that the decision of Osborne C.J. in Att-General V. John Holt and Co[33] is most illuminating as far as the criteria for determining a statute of general application are concerned. He said:

> No definition has been attempted of what is a statute of general application ..... and each case has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however be put by way of a rough, but not infallible test, viz (i) by what courts is the statute applied in England? and (b) to what classes of the community in England does it apply ? If, on January 1, 1900, an Act of Parliament were applied by all civil or criminal Courts as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand it were applied only by certain courts(e.g. a statute regulating procedure), or only to certain classes of the community (e.g. an Act regulating a particular trade), the probability is that it would not be held to be locally applicable.

It has been contended that this statement of the learned judge is restrictive and would leave out a number of Acts which ought to have qualified as statutes of general application.[34]

It is however important to note that it is only the statutes of general application that were in force on the 1st of January 1900 in England that are in for ce in Nigeria. Where an English Act has been repealed in England

33. (1910) 2 N.L.R 1 at 21
34. see generally the criticisms of this statement in Park, op cit at pp 26-28.

by an English statute after 1900 this does not divest it of its general application in Nigeria. Thus the Wills Act, 1861 has been repealed by the Wills Act 1963 in England but the repealed Act still remains in force in Nigeria.

Although all the reception statutes favour the application of the "imperial laws ..... so far only as the limits of the local jurisdiction and local circumstances permit" and subject to any existing or future local or federal legislation, our courts have never theless disregarded this requirement and have sometimes handed down judgments which are not only shocking to commonsense but are also unrealistic. For instance our courts following the English Common Law position as codified under Section 25 of the Criminal Code[35] have held that a mistake of fact in order to afford a defence to a criminal charge must not only be honest but also reasonable. The test of reasonableness however, is held to be what would appear reasonable to a 'reasonableman' which is literally interpretedto mean an enlightened man.

In R.V.Gadam[36] in a conviction for murder the defendant relied upom section 25 of the Criminal codewhich affords a defence for a mistake which is both honest and reasonable. The case for the Prosecution was that the defendant believed his wife had been bewitched by the deceased whom he killed as a result.

While conceding that witchcraft belief was common

35. Cap 42, Laws of the Federation of Nigeria and Lagos 1958.
36. (1954) 14 W.A.C.A 442 at 443.

among ordinary members of the accused's community the court nevertheless said that it would be:

> a dangerous precedent to recognise that because a superstition, which may lead to such a terrible result as is disclosed by the facts of this case, is generally prevalent among the community, it is therefore reasonable. The courts must, I think, regard the holding of such beliefs as unreasonable.

One would have expected the court to regard the belief as reasonable and still go ahead to convict the accused on the ground that it is unlawful to kill witches, after all witches are human beings.

It could therefore be concluded that the English law received into Nigeria is the English Common Law and doctrines of equity as well as statutes which were in force as at 1st January, 1900. Although one may tend to agree with Nwabueze that our courts are not absolutely bound by the specifically English text or version of the common law, the general practice of the courts does seem to suggest that the English text or version is binding. It is therefore hoped that very soon the courts would take or adopt a bold stand and come out with their own version of the common law distinct and separate from the English version. It is only then too, that the courts can come out with a set of rules of conflict of laws totally independent of the rules now in operation by virtue of the various reception statutes.

b. <u>Decisions of Courts outside Nigeria</u>

Another source of the Nigerian rules of the conflict

of laws is decisions of courts outside Nigeria. Such decisions must be those of superior courts of the foreign countries and are not absolutely binding but are merely of persuasive authority only.

Park[37] suggests that the only English decisions binding in Nigeria are those of the House of Lords, and he bases this suggestion on the premise that Nigerian courts are directed by the reception statutes to apply the common law and equity "of England". With the development of the Nigerian legal system since independence and the rapid rise in the number of lawyers trained in Nigerian law in Nigeria, coupled with the growing awareness for the need to develop a truly Nigerian case law devoid of any foreign influence, one would tend to put forward the view that English decisions, be they of the House of Lords or any other High court, are now of persuasive authority only, at least in practice.

c. Nigerian Legislation and Case Law.

With the rapid erosion of English law as a source of Nigerian law, Nigerian legislation and case law have become two important sources of Nigerian rules of the conflict of laws. One would have expected that the basis for the reception of the English law into Nigeria was to look at it as a model upon which to develop Nigerian Law.

With independence and the creation of various regions

37. Park, op cit pp.62-63

in Nigeria with separate legislatures, and the existence of a central Federal legislature, the impact of Nigerian legislation as a source of law began to be felt. It is the interpretation of these various legislations by the Nigerian courts in appropriate circumstances that has given rise to the development of Nigerian case law.

The recognition of the doctrine of Precedent by the Nigerian courts has led to the incorporation of English rules of the conflict of laws into NigerianLaw. This process of development of the Nigerian rules of the conflict of laws is still continuing and as at now, there is a dearth of materials in the field of Private International Law. It is only necessary to pay less attention to English cases if the need to develop truly Nigerian rules of the conflict of laws is to be realised. Park has expressed the pessimism that " as long as the courts are directed to apply the common law 'of England', it will never be possible to ignore English cases entirely!' It is therefore suggested that the time has now come for Nigeria to do away with the various reception statutes and create new rules making it obligatory for counsel in court to cite only relevant Nigerian authorities. It is only when such authorities do not exist on a given subject matter that the freedom to seek guidance from other sources should be recognised.

d. Public International Law

This is yet another source of Nigerian rules of the conflict of laws. The importance of this branch of the

law as a source of the rules of the conflict of laws lies principally in the relationship between Private International Law and Public International Law. The two branches of the law although interrelated are different, but nevertheless the underlying basis of both branches is the achievement of justice.

As stated by Graveson,[38] the relationship between these branches of law can be seen in the fact that there exist certain cases which are on the "border-line between public and Private International Law". He went on to say:

> For between those two systems lies an ill-defined region in which principles of both sometimes claim to be applied. Such cases may arise, for example, when a sovereign state is a party to a contract of Private law .....

The Principle of the Comity of Nations which is the fundamental basis of Public International Law and which rests on the idea of reciprocity is not limited to this branch of the law alone. In fact some writers argue that decisions in Private cases have sometimes been rested on the Principle of comity and on that basis therefore comity cannot necessarily be said to involve reciprocity when applied to those private cases. Therefore while recognising the relationship between these two branches of the law, Graveson contends that "the doctrine of comity provides an inadequate and unsatisfactory basis of the modern conflict of law". But the paramount duty of every court to do justice to all manner of people necessitates the

38. Graveson, op cit p.11

application of the doctrine of comity and in this respect therefore its importance even in Private International Law cannot be over emphasised.

The Development of Interpersonal and Interstate Conflicts.

As noted earlier, interpersonal conflicts of laws develop as a result of the existence of a multiplicity of tribes and tribal or customary laws; and the resultant interaction between persons as a result of mercantile and social intercourse.

The issues of interpersonal conflicts have sometimes been regarded as issues of internal conflicts and such issues can only arise in respect of civil matters in Nigeria today. This is because the bulk of the criminal law is now codified in either the Criminal code or the Penal code.

Internal or interpersonal conflicts of laws can either be conflicts between natives, that is, conflicts between different systems of customary or tribal laws, or conflicts between natives and non-natives; that is, conflicts between English law and customary or tribal law. Interestingly however, conflicts between customary law and English law have been taken care of by statutes and such statutes refer expressly to "English law" as the alternative to local custom. Such statutes are to a large extent comprehensive except that under the rules ofPrivate International Law there have to be some modifications, such

that the alternative to local custom may be taken to mean some system other than English law. This would include for example, Kenyan law, Ugandan Law, Australian Law and so on.

Statutes regulating conflicts between various customary laws on the one hand, and customary law and English Law on the other could be found inthe various High Court Laws. Thus while enjoining the court to apply native law and custom, sub-section (2) of section 27 of the High Court of LagosAct[39] states thus:

> Any such law or custom shall be deemed applicable in causes and matters where the parties thereto are natives and also in causes and matters between natives and non-natives, where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to any rules of law which would otherwise be applicable.

The Act, however, does not define who a "native" is and guidance could therefore be sought fromSection 3 of the Interpretation Act which defines the word thus:

> "native" includes a native of Nigeria and a native foreigner
> "native of Nigeria" means any person whose parents were members of a tribe or tribes indigenous to Nigeria and the descendants of such persons; and includes any person one of whose parents was a member of such a tribe.
> "native foreigner" means any person (not being a native of Nigeria) whose parents weremembers of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe.

This by necessary implication would mean that an African from Uganda, Kenya, Niger or any part of the

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39. Cap 80 Laws of the Federation of Nigeria and Lagos,1958

continent is a "native". He need not be from Nigeria. Persons who may be called "half-castes" also fall within this definition.

Section 34(2) of the High Court Law of Northern Nigeria[40] while making a similar provision provides that where it may appear that substantial injustice would be done if rules of English Law (emphasis mine) are applied the court shall apply native law and custom.

Cases of inheritance and succession have not been catered for by all the provisions. It would seem therefore that these have to be decided in accordance with the Principles of English Law.

Whereas the Lagos Act and the Northern Nigeria provision talk of injustice arising as a result of adherence to "any rules of law which would otherwise be applicable" and "adherence to the rules of English law" respectively, the Eastern Nigeria High Court Law[41] talks of "adherence to the rules of any law or laws other than local custom". The Western Nigeria High Court Law[42] is similar to the Lagos and Northern Nigeria provisions.

In practice, it seems that all these phrases do not actually introduce any difference in the law as such, and they all operate in the same way. Also, whereas all the provisions recognise instances when native law and custom

40. cap. 49, Laws of Northern Nigeria, 1963
41. cap 61, Laws of Eastern Nigeria, 1963
42. cap 60, Laws of Western Nigeria, 1959

would be applicable, they nevertheless give exceptions to the rules stated above.

Therefore where the transaction or agreement between the parties is unknown to customary law, English law is deemed to apply.

The Northern Nigeria High Court Law however goes further than the provisions of the Federal enactment and those of the Eastern and Western Nigeria to provide that:

> In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience.

All the provisions do not however state when English law could be applied. But one can infer from the exception created by all the sections that English law is applicable in situations not covered by the said sections. For instance in cases between two non-natives the presumption is that English law is tobe applied even though the statutes do not say so in veryclear terms. But where the two non-natives agree to be governed by another system of law, then the presumption as to the applicability of English law would be rebutted.

The above provisions deal mainly with the conflicts that arise between various customary laws and between customary law and English law. However, there is the further conflict which arises between systems of customary law. In other words when the court agrees that

customary law is to be applied to the issue before it, which customary law is applicable? As indicated above, this conflict is a conflict between persons who pass the test of "native" but who, although invariably are governed by customary law in their various transactions, face the problem of determining which rules of customary law are to be applied to the transaction in question. This conflict is regarded by Park as conflict between local and personal law.

According to Park[43] this type of conflict "is one that has been produced largely by the disappearance of rigid geographical divisions between tribes and the corresponding growth of mobility among the Population" These conflicts however, arise mainly in Area and Customary Courts and there are statutory provisions that also takecare of such conflicts. It has however been suggested that it is these rules rather than the rules of Private InternationalLaw that should be applied by even Magistrates' and High Courts when confronted with such a problem.

An area which provides a great deal of difficulty for judges is that of interstate conflicts. These arise mainly as a result of the wide legislative powers given to states by the constitution. The conflicts become more noticeable when the courts of one state are faced with the issue of applying the laws of another state. For example the conflict may arise when courts in Sokoto are faced with a factual situation requiring the consideration and application of the laws of Kano and Anambra States. There is no clear statutory

43. Park, op cit p. 116

guidance in relation to such conflicts although it is the general practice for courts to apply laws that operate within their jurisdiction. They apply foreign laws or laws of another jurisdiction only when such are pleaded. The lack or absence of such statutory guidance as obtains in respect of interpersonal conflicts has led courts to apply their discretion in resolving interstate conflicts. This has however led to some unsatisfactory results. Thus in Amanambu V. Okafor[44] an action for damages against the defendants was originally commenced in the Highcourt of Onitsha under Fatal Accidents Law Northern Region 1956 because the accident for which the plaintiff was suing occurred in the Northern Region. When the defendants raised the question of jurisdiction of the Highcourt of Onitsha"in respect of an accident that happened in the Northern Region which was brought under the Fatal Accident Law Northern Region 1956", the plaintiff amended his claim and sought to substitute Fatal Accident Law 1956 of Eastern Nigeria for the Northern Region Fatal Accident Law. Both parties were resident outside Northern Nigeria. The trial judge held that the order granting leave to the plaintiff to amend his statement of claim was a nullity and that he had no jurisdiction to hear the suit.

The Supreme Court while stating that the learned trial judge erred in holding that the order granting leave to amend was a nullity said that "the case must be looked at as a claim for compensation founded on the Fatal Accidents

44. (Unreported) SC. 278/1965 delivered on July 1, 1966.

Law of Eastern Nigeria, in accordance with that amendment, in respect of an accident which occurred in Northern Nigeria.'

In holding that the claim based on the Fatal Accidents Law, Eastern Nigeria cannot stand, the Supreme Court said:

> Had the claim as originally based on the Fatal Accidents Law, Northern Nigeria, been left unamended, then we would have had an opportunity of considering whether it could have been brought in the Highcourt of Eastern Nigeria, and of going into questions of Private International Law and the possibility of enforcing in Eastern Nigeria a claim founded on a fatal accident in Northern Nigeria in respect of which compensation was being claimed under the Fatal Accidents Law, Northern Nigeria. But we cannot do that in the present case: for here the plaintiff insists that he can found his claim on the Fatal Accidents Law, Eastern Nigeria, and with that we cannot agree.

A year later, the Supreme Court in Ashiru V. Benson & anor [45] while considering a case concerning an automobile accident which occurred in Western Nigeria but an action was commenced in Lagos Highcourt under the Federal Fatal Accident Act, dismissed the defendants/appellants contention that an action could not lie under the Federal Statute since the automobile accident took place in Western Nigeria. The court held that there was no need to amend the statement of claim so as to base the action on the Western Nigeria Fatal Accidents Law because:

> As a general rule, foreign law is a question of fact and must be pleaded ..... but section 73(i) (a) of the Evidence Act requires the Highcourt of Lagos to take judicial notice of 'all laws and enactments and

45. (1967) N.M.L.R.363 at 366

> any subsidiary legislation made thereunder having the force of law or heretofore in force or, hereafter to be in force in any part of Nigeria' and it is unnecessary to plead matters of which the court take judicial notice .....

Surprisingly though, the Supreme Court did not over rule or distinguish its previous decision in Amanambu's case where a claim was dismissed simply because it was not based on the Northern Nigerian Fatal Accident Law when the accident occurred in Northern Nigeria.

It would appear from the two decisions of the Supreme Court that the court was more concerned with the issues of jurisdiction and choice of law. The court did not therefore find it expedient in Amanambu's case to go "into questions of Private International law and the possibility of enforcing in Eastern Nigeria a claim founded on a fatal accident in Northern Nigeria" when the very basis of the claim for compensation itself was to be founded on the Fatal Accidents Law of Northern Nigeria.

Amanambu's case could therefore be distinguished from Ashiru's case on the ground that in Ashiru the claim was not sought to be founded on the Fatal Accidents Law of Western Nigeria. The claimants simply based their claim in Lagos Highcourt on the Federal Fatal Accidents Act. Had the claim been based on the Western Nigeria Fatal Accidents Law perhaps the Supreme court would have found it necessary to uphold its earlier decision in Amanambu's case.

The two decisions are therefore authoritative as far as the doctrine of binding precedent is concerned. It is only hoped that the Supreme court would come out with a clear pronouncement to resolve this conflict.

4. Laws of Territorial Application — The Matrimonial Causes Decree, 1970.

The bulk of the laws of any country are territorial in application. That is to say their application is limited to the boundary of the country or state within which they are enacted. Thus the criminal code and the penal code are all territorial in their application in the sense that they operate only within certain geographical areas in the country.

However, it is with the territorialityof the matrimonial causes Decree 1970[46] that we are concerned with here.

Our interest in this law lies mainly in its recognition of the concept of domicile as the basisupon which jurisdiction on matrimonial causes is founded. Thus under Section 2 of the Decree, it is provided as follows:

> 2(i)" subject to this Decree, a person may institute a matrimonial cause under this Decree in the Highcourt of any state of the Federation, and for that purpose the High Court of each state of the Federation shall have jurisdiction to hear and determine.....

46. No.18 of 1970.

(2) Proceedings for a decree —
(a) of dissolution of marriage; or
(b) of nullity of a voidable marriage; or
(c) of nullity of a void marriage; or
(d) of judicial separation; or
(e) of restitution of conjugal rights; or
(f) of jactitation of marriage,
may be instituted under this Decree only by a person domiciled in Nigeria.

This section goes on to provide under sub-section (3) that :

> for the avoidance of doubt it is hereby declared that a person domiciled in any state of the Federation is domiciled in Nigeria for the purposes of this Decree and may institute proceedings under this Decree in the Highcourt of any state whether or not he is domiciled in that particular state.

The emergence of the Decree and its contributions or shortcomings in relation to the concept of domicile will form the basis of the discussion in chapter 4.

5. Federal and State Domicile

The concepts of Federal and state Domicile have generated a lot of controversy in Nigeria and this has led to the question of whether the old unitary concept of domicile could truly be applied in Nigeria.

Recognising the difficulty that would arise in a Federation with regard to the operation of the unitary concept of domicile, Graveson said[47]

> Important developments have taken place in the British Commonwealth since the era of domicile in the 1860s. First in Canada, then in Australia South Africa, the West Indies and Nigeria, as well as in other parts of the commonwealth, the legal duality of Federation has sought to operate on the old unitary concept of domicile .....

47. Graveson, op cit p.186

> Although domicile is traditionally based on a single territorial system of law, yet the citizen of a Federation is subject to two legal systems, State and Federal, in both of which domicile may be relevant. Surely this common situation calls for a new and two dimensional concept of domicile, so that a citizen may have Federal or national domicile as a basis for application of the law of the Federation to which he belongs and a state or provincial domicile as a basis for applying the law of that legal unit of the Federation in which he habitually lives.

In respect of matrimonial causes in Nigeria, this controversy has now been resolved by section 2 sub-section 2 of the Matrimonial Causes Decree which recognises one Nigerian domicile for proceedings under the Decree. Those who favour the view that there is a state domicile contend that since matters like legitimacy and succession are principally determined by the state and"there were state domiciles as regards those matters, to subscribe to Federal domicile as regards Federal matters would infringe the rule that a person cannot have more than one domicile at one time"[48]

Thus in Okonkwo V. Eze[49], in a petition for dissolution of a marriage brought by a wife against her husband for an alleged adultery, the petitioner averred that both parties were domiciled in Nigeria. There was neither an allegation nor evidence that they were domiciled in Northern Region even though the petitioner has been resident there for two years prior to the petition.

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48. A.S.Adensanya, Laws of MatrimonialCauses, 1973 p.17
49. (1960) NNLR 80 at 81-82

In striking out the petition for want of jurisdiction, Hurley, Ag. CJ said:

> The person whose domicile is material in any dispute concerning legitimacy or concerning the succession to movables willnecessarily have a domicile in one of the Regions or in the Federal Territory of Lagos, not in Nigeria as a whole. When he comes to court to petition for a dissolution of marriage, he cannot have more than one domicile at the same time; he must have the same domicile as he has for all other purposes, and that will be a Regional domicile or a domicile in the Federal Territory. I conclude that in order to give this court jurisdiction in a suit for the dissolution of marriage the petitioner must show that he or she is domiciled in the Northern Region..... and it is not sufficient to show domicile in Nigeria as a whole."

In Machi V. Machi[50] the Petitioner and her husband both originated from the Eastern Region and were merely resident in Lagos where the petition was filed. It was held that since each Region has a separate jurisdiction from the point of view of International Law, a person can only be domiciled in a region and not in Nigeria generally.

The decision in Nwokedi V. Nwokedi[51] seems to be in favour of a Federal domicile and Onyeama J said:

> There is only one domicile in this country for matrimonial cause and that is the Nigerian domicile.

The learned judge seems to have based his decision on the promise that there is only one system of law in Nigeria relating to matrimonial causes (other than Matrimonial causes arising underNative law and custom or

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50. (1960) LLR 103
51. (1958) LLR 94 at 95

Moslem law) and that such law is enacted by the Federal legislature. Had the regional legislatures been given such power to legislate on matrimonial causes it seems the learned judge's ruling would have been different.

In Odiase V. Odiase[52] Fatayi-Williams J, (as he then was) was in favour of a Nigerian or Federal domicile in Matrimonial causes. He stated thus:

> It is, in my view, possible in a Federation like Nigeria for a person to acquire a Nigerian domicile for the purpose of the operation of the Matrimonial Causes Act even though for other purposes his domicile or residence may be connected only with a Region or the Federal territory ..... As lines of communication are opened throughout the country it is easy to conceive of a person, such as a naturalised Nigerian citizen, ...as having become a permanent member of the Nigerian community without having identified himself with any Region... Having regard to all these factors and particularly those bearing on the unity of the law and jurisdiction applicable I am of the view that for the purpose of matrimonial relief, a person can only be domiciled in Nigeria, not in a Region or in the Federal territory.

The learned judge although considering issues of matrimonial relief, nevertheless recognised the fact that for other purposes there could be a regional or Federal domicile.

There is also a persuasive authority in Australia, a federation like Nigeria, for the view that for purposes other than Matrimonial relief, Federal and state domiciles can exist at the same time. Thus in Lloyd V. Lloyd[53] Barry,J

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52. (1965) 2 All N.LR 91 at 94
53. (1962) V.R. 70 at 71

said:

> "The Proposition that a person cannot have more than one domicile at a given time..... seems designed to avoid conflicts and inconsistencies in respect of personal law, and in a constitutional framework such as exists in Australia it probably requires qualification ..... I see no reason inherent in the common law concept of domicile why the Parliament of the Commonwealth is not competent to create or recognise the existence of an Australian domicile for the purposes of its law with respect to matrimonial causes, even though for other purposes the domicile of an Australian citizen may be connected only with a state or territory".

Section 2 subsection (3) of the Nigerian Matrimonial Causes Decree seems to be in line with the decision of Fatai-Williams, J in Odiase V. Odiase and also of Barry, J in Lloyd V. Lloyd. The section provides that

> a person domiciled in any state of the federation is domiciled in Nigeria for the purposes of this Decree. (emphasis mine)

It could therefore be concluded that the Matrimonial Causes Decree recognises the existence of a dual domicile in Nigeria.

CHAPTER TWO

CONNECTING FACTORS FOR THE ASCERTAINMENT OF PERSONAL LAW

The very idea behind personal law is that every person has the right to enjoy the laws of his own people or the laws of the group into which he was born. The theory of the personal law also recognises that for reasons of business efficacy and social intercourse, everyone should be free to select or choose the communityto which he wishes to belong. Thus a Nigerian who leaves Nigeria and settles among the Kikuyu in Kenya and marries a Kikuyu woman under Kikuyu customary law can be said to have freely chosen Kikuyu customary law as his personal law.

But the very basis for the existence of personal law has been questioned and its continued retention has been condemned by Walter Raeburn on the ground of "want of a connecting factor by which it can satisfactorily be chosen and for lack of any appropriate subject matter on which it can consistently operate to the advantage either of individual persons or of jurisdictional communities"[1]. He contends that "the efforts made in the past and especially during the last one and a half centuries" to find a satisfactory connecting factor or criterion for the choice of the personal law have yielded nothing but disagreements, uncertainty and the renvoi"[2].

1. Walter Raeburn, Dispensing with personal Law, (1962) ICLQ Vol. 12 p.125
2. op, cit at pp 146-147

The importance of the personal law in the field of Private International law cannot however be overlooked inspite of the various criticisms levelleo against it by Raeburn. Infact while recognising the fact that "the personal law has developed empirically and differently in different societies, adapting itself to local needs, to reach a result today in which considerable diversity is found", Graveson[3] nevertheless contends that "in the sense that the concept of the personal law stands in opposition to the application of the lex fori under certain circumstances, the concept is consistent with the broad theme of Private International Law as a system".

It is the need to evolve a common acceptable standard in domestic relations in different societies in which the parties have chosen to live that has led to the evolution of the personal law, and the concept today is determined either on the basis of nationality or domicile. The existence of other connecting factors that determine the personal law cannot also be overlooked.It is therefore necessary to consider the role played by factors such as nationality, domicile, habitual residence, tribe, religion and citizenship in determining the personal law.

a. NATIONALITY

Nationality denotes attachment to a particular legal territory or state. This concept "arose out of the feudal

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3. Graveson, Comparative aspects of the General Principles of Private International Law, 2 Recueil des Cours (1963) p.60

doctrine of allegiance"[4]. The concept became more prominent in French law after the French Revolution and it replaced domicile as the connecting factor for determining personal law.

According to Morris, [5]

> the change from domicile to nationality on the continent of Europe was accellerated by Mancini's famous lecture delivered at the University of Turin in 1851. Under Mancini's influence, article 6 of the Italian Civil Code (1865) provided that "the status and capacity of persons and family relations are governed by the laws of the nation to which they belong." Mancini's ideas proved extremely influential outside Italy too, and in the second half of the nineteenth century the Principle of Nationality replaced that of domicile in code after code in continental Europe.....

Today, the concept of nationality is recognised as a sound legal principle in most continental countries although its retention as a connecting factor for determining an individual's personal relations has been much criticised. According to Raeburn[6]

> "Reasons, it is true, are never lacking for its retention, at any rate in certaincountries, as a sound legal principle, provided that it is thoroughly understood not to mean what its name implies. It is to mean "State Membership"; and seeing that no individual has the last word in a choice of state -membership, and many have no word in it at all, to adopt such membership as the criterion of the Personal law — the law of that district in which the individual is assumed to have the roots and ties of his preference, where he is among his 'own folk' — borders on mockery"

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4. Raeburn, supra note 1 p.126
5. Dicey and Morris, The Conflict of Laws (1973) p.128
6. Raeburn, supra note 1 p.128

Nationality is a subject of international law and according to the common law it is the place of birth which determines nationality. It is, for example, for Nigeria as a nation to determine who its nationals or citizens are . It is not for the Law of England or of Ghana to determine this fact. The recognition of this fact has led the Hague Convention on conflict of Nationality Laws of 1930 to provide in articles 1 - 2 that it is the duty of each state to determine who its own nationals are under its own laws and "questions as to whether a person possesses the nationality of a particular state must be determined in accordance with the law of that state."[7]

Since nationality refers to the "global legal order" of a state, its sufficiency to tie an individual to a particular legal system or law district within that state is very much in doubt.

Cheschire[8] contends that nationality is "objectionable as a criterion of the personal law on at least three grounds". First, on the ground that the propositus may have lost contact with the country of nationality or may never have been connected with it at all because he has chosen to establish his home elsewhere.

Secondly, a man may either be stateless or may

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7. Lennart Palsson, Marriage and Divorce in comparative conflict of Laws (1974) p.81
8. Cheshire , Private International Law,(1979)p.185

have more than one nationality. For example in Federations and countries with multiple legal systems or law districts, it is difficult to state with any certainty which of the laws is the law of the nationality; and when this is coupled with the fact that the individual has a dual nationality, a court faced with such problems would have to fall back to another connecting factor in order to ascertain the personal law. For instance the court may adopt other connectingfactors like residence, domicile or where the individual has his roots / or where his ancestors originated in order to ascertain the personal law. In some cases the court may disregard any of these connecting factors and apply the law which it thinks best suits the circumstance. Nationality cannot therefore "determine the internal law to which a man is subject".

Fortunately however, these problems have been realised by the framers of the English Adoption Act, 1968 and the Act provides considerable detail for the problems of either ascertaining a person's nationality or the difficulty of dealing with persons with dual nationalities.

Section 9(4) of the Act provides that where a person has no nationality or his nationality is not ascertainable for the purposes of proceedings under the Act he is to be treated as a national of a country where he is habitually resident, or if that country is part of a multi-jurisdictional nation, as a national of that nation.

b. DOMICILE

According to Cheshire[9] domicile indicates a man's civil status and provides the laws for determining his personal rights and obligations. It is constituted by residence in a place or country with the requisite intention to remain there .

However, the concept of domicile in its true English characteristics is different from the French concept of domicile. Thus whereas the French concept of domicile has"a dual meaning in French Private International Law", denoting either habitual residence which is residence at a certain address, or " a more general meaning as a substitute for nationality" in cases of succession inheritance or divorce jurisdiction,[10] the English concept of domicile is much more than habitual residence because the intention required for the residence is stronger.

The purpose for using domicile as a connecting factor is to secure an acceptable standard upon which the relationship of individuals living within a particular legal unit could be determined. The Permanent and voluntary living in a particular legal unit which are the two basic ingredients of the English concept of domicile determines the individual's capacity to contract, to acquire legitimacy or to make a valid will.

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9. op.cit. p.183
10. Graveson, supra note 3, p.64

Since there is a freedom to change a domicile, an individual could determine his personal law by simply changing his domicile anytime he feels like doing so. Thus domicile as a connecting factor is an "individualistic and liberal system".[11]

Graveson[12] while emphasising the importance of domicile in determining personal law states that:

> "the operation of the personal law, by virtue of a permanent and voluntary living in a particular country, represents both the theory and practice of English private international Law, which bases the personal law on the domicile of the individual and thus enables him by a simple change of domicile, to live under whatever system of personal law he chooses"

Those who favour domicile over nationality argue that since domicile means the country in which a man has established his permanent home, it is more natural and more appropriate to subject him to this home law instead of subjecting him to the laws of a country in which he is a citizen and which he may have abandoned. But Cheshire is of the view that if the country which adopts the principle of nationality also recognises and accepts the doctrine of renvoi, the law of the domicile would, in practice, be substituted for the law of nationality.

But although nationality as a connecting factor is rather harsh on the individual in the sense that it subjects him to the laws of a state or country from which he has

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11. Martin Wolff, Private International Law, (1950) P.103

12. Op cit, note 3 supra P.61

chosen to run away, it is much easier to determine than domicile. Since the ascertainment of domicile depends largely upon the existence of intention which may sometimes be hard to prove, nationality is easily ascertainable and a change of nationality, which must have official backing, can often be verified by reference to documents.

These advantages and disadvantages of either connecting factor not withstanding one could conclude that whereas the concept of domicile is capable of raising a great deal of controversy in determining the personal law, the employment of nationality will not produce any better result. The employment of either factor and its suitability to the parties concerned depends largely on the circumstances, as the two have been used at various times without causing much hardship to the parties concerned.

The two factors of domicile and nationality seemed to be the only factors recognised by the Royal Commission on Marriage and Divorce as the bases of Personal law. After sitting from 1951 to 1955 the commission submitted its Report in 1956[13] and in respect of jurisdiction in matrimonial causes the commission reported as follows:[14]

> 9 (i) For the purpose of this code, the Personal law of a party shall be:

13. Cmd 9678 (1956)
14. Cmd 9678, Appendix IV, p.396

(a) the domestic law of the country in which that party is domiciled, if under the rules of Private Internationallaw of that country, questions of personal status are governed by the law of the country in which a person is domiciled; failing which

(b) the domestic law of the country of which that party is a national, if under the rules of private international law of that country, questions of personal status are governed by the law of the country of which a person is a national; failing which

(c) the domestic law of the country in which that party is domiciled

(2) Where the court is required under subsection (1) (b) above to look to the law of the party's nationality and he has more than one nationality he shall be taken to be a national of that country in which he is also domiciled, or, failing that, a national of that country of which he last became a national."

Cheschire[15] has decried this division of the world into those countries that adopt the Principle of Nationality and those that adopt domicile. This division has been the stumbling block in the movement towards the unification of the rules of private international law, and he suggests a reconciliation of these opposing views.

C. RELIGION AS A CONNECTING FACTOR.

A person's relationships are also determinable by the religion which he professes. The RoyalCommission on marriage and Divorce while observing that "the personal law of a man is the law of the country with which

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15. op, cit. p.185

he is most intimately connected"[16] also realised the fact that personal law might depend on other connecting factors such as religion. The commission at paragraph 839 noted:

> "In some countries divorce can be obtained without recourse to the court. In ascertaining the personal law of a spouse it may, therefore, be necessary for the English or Scottish court to look to some religious or legislative or executive procedure whereby divorce may be effected in the country in which the spouse is domiciled or of which he is a national".

Thus a moslem's family and property matters such as legitimacy, legitimation, adoption,marriage and divorce and matters of succession, are governed by Islamic law. Since religion sanctions both his conduct and behaviour, it is the connecting factor for determining his status or personal law.

However, religion, like domicile, is an individualistic concept and can also be changed at will although it is very rare indeed for a man to change his religion. In fact, for a great majority of people, religion attaches to the individual at birth. A person is thus either a Christian, a Hindu or a Moslem by virtue of his birth in any of these families. Thus law is identified with religion, and if for instance a Nigerian court has to

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16. supra, note 13 para. 836

determine the validity of a marriage celebrated by a moslem domiciled in Saudi Arabia, the court has to consider first whether the person is domiciled in Saudi Arabia in the Nigerian sense, and then determine the limits of Islamic law on his capacity to enter into the contract. However in states in which Islamic Law is applied it seems that the concept of domicile is irrelevant. In any event according to the practice of Islamic courts, they would only apply the particular sect or school of jurisprudence which is applied within that state. It appears that Islamic law did not develop a system of conflict of laws.

Although it is the fundamental right of every person to adopt any religion which he chooses, or change his religion when he deems it necessary, such a change or adoption would consequently change his personal law.

According to Graveson[17] .....

> for the recognition of divorce decrees of persons domiciled outside England and professing a religion which exercises or permits its own jurisdiction in matters of divorce, a dual test must be applied, being first that of domicile in the English sense and secondly that of religion according to the law of the domicile as ascertained by the first test".

Unlike domicile which recognises unity in respect of husband and wife in Nigerian law, there is no such thing as unity of religion of husband and wife. The wife by agreeing to marry the husband does not thereby embrace his

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17. Graveson, The Recognition ofForeign Divorce Decrees, (1952) Transactions of the Grotius Society Vol.37. p.149

own religion. Thus, each party maintains his or her own religion except where the religious law is the law of the domicile. This is, however, not to say that a wife cannot embrace the religion of her husband if she wishes to do so. Islamic law even emphasises the need for a muslim husband to strive to make his christian wife a moslem but not vice-versa.

d. HABITUAL RESIDENCE

"Residence" says Graveson[18] "may be described as habitual physical presence in a place during a period of either limited or unlimited duration". But Graveson was describing ordinary residence which is somewhat different from the concept of 'habitual residence'. He sees 'habitual residence' as"lying midway between domicile and residence" and differing "from ordinary residence in its quality of continuity for a substantial period and from domicile in its lack of the need for permanence" .

The concept of habitual residence has been employed in the areas of divorce and legal separations, as well as in adoption, contracts and succession.

The term "Habitual residence" was first employed by the Hague Convention on Guardianship of June 12, 1902.[19]

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18. Graveson, Conflict of Laws, (1974) p194
19. Clifford Hall, Cruse V. Chittum: Habitual Residence judicially explored, (1975) 24 I.C.L.Q. 1

It has since then become increasingly popular and the possibility of adopting it as a basis of the Personal law to replace the concepts of nationality and domicile was considered in 1955 at the Hague Convention to Regulate conflicts between the Law of Nationality and the Law of domicile. Article 5 of the Draft Convention states:[20]

> "For the purpose of the present convention, domicile is the place where the person habitually resides unless the domicile of such person depends on the domicile of another person or on the seat of some public body." (Underlining mine)

Although the Private International Law committee in its seventh Report[21] has rejected the Hague Conception of domicile on the grounds that it may lead to various interpretations being given to "habitual residence" in various countries accepting the convention and create additional conflicts instead of regulating them, it has at the same time expressed the feeling of "pity that, in a convention which is designed to eliminate conflicts with the common law countries "domicile" should be defined as habitual residence, since that is not at all the conception of the common law countries. The Committee also expressed the view that "habitual residence" is not a conception which is free from difficulty.

But inspite of this rejection, the concept of habitual residence has featured considerably in later English statutes and judicial decisions. It has been used in

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20. see Appendix B. First Report of the Private International Law Committee (1954) cmd 9068.
21. Cmd 1955 para 16

section 4 of the Administration of Justice Act 1956, section 1 of the Wills Act, 1963 and section 3(1) (a) of the Recognition of Divorces and legal Separations Act, 1971. But in none of these Acts is the term defined.

Morris[22] however, hazards the "guess" that habitual residence "will be held to mean much the same as domicile, minus the artificial elements in that concept (e.g. the revival of the domicile of origin, and a wife's domicile of dependency), and minus the stress now placed on the element of intention in domicile". The writer seems to be of the view that a certain degree of permanent residence is necessary to establish habitual residence. In this respect therefore, habitual residence is different from residence simpliciter.

Blom[23] is of the view that "habitual residence" ought to be defined along the lines of a man's principal home infact, or the one country where he can be said to have his settled headquarters at this moment"

The learned writer also seems to be in favour of some permanence before residence could be regarded as habitual. In none of these two definitions, as could be seen, is any reason given as to why a temporary residence should not qualify as habitual. It is

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22. op cit, supra note 5 p. 97
23. Blom J. The Adoption Act 1968 and the Conflict of Laws, (1973) 22 I.C.L.Q 109 at 136.

suggested that if the residence is only temporary and it presents a further manifestation of an unbroken habit, it should be considered as enough to constitute habitual residence. Therefore in defining "habitual residence", regular physical presence does not necessarily have to be actual residence at a particular time. Thus a person who leaves Nigeria where he is resident as a habit to say, Ghana where he spends two years and consequently returns to Nigeria should still be counted habitually resident in Nigeria if his return is an indication of his habit to reside there. Residence need not be long in time for it to be habitual.

In CRUSE V. CHITTY[24] an elaborate consideration of the concept of habitual residence as used in Section 3(i) (a) of the Recognition of Divorces and LegalSeparations Act 1971 was made. The section provides thus:

> The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained —
> (a) either spouse was habitually resident in that country .....(underlining mine)

In the instant case the parties got married in September 1950. In 1961 the wife deserted the husband and left for Mississippi, with a sergeant in the American forces. Three years later the husband received a letter from her addressed from Mississippi informing him that a year previously, she had obtained a divorce from him there and that he was a free man. When the husband

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24. (1974) 2 All E.R. 940

expressed his intention to remarry in 1971, the Registrar of Marriages required a proof that his former marriage had been validly dissolved. Fortunately for him, his former wife was in England at the time with her new sergeant husband and the former husband's solicitors were able to obtain the relevant documents relating to the divorce from a Mississippi court after getting necessary assistance from the former wife. One of the documents titled "Final Decree" was duly authenticated and stated that the wife "is an actual bonafide resident citizen of Harrison County, Mississippi, and has been formore than one year next immediately preceding the filing" of the bill.

The husband sought a declaration that the validity of the Mississippi Decree should be recognised under Section 3(1) (a) of the Recognition of Divorces and legal separations Act 1971 since at the date when the wife had instituted proceedings in the state she was habitually resident there.

The Court held the husband was entitled to the declaration sought because:

a. The expression "habitually resident" indicated the quality of the residence rather than its duration and required an element of intention to reside in the country in question. It was necessary that the residence should not be temporary or of a secondary nature. The word "habitually" denoted a regular physical presence which had to endure for some time. Habitual residence was to be distinguished from Ordinary residence and was equivalent to the residence required to establish domicile without the element of animus necessary for the purpose of domicile.

b. The finding of fact that at the date when the wife's proceedings were instituted that she had been an actual bonafide resident of Mississippi for a period of one year was equivalent to a finding that at that date she was "habitually resident" in that state and in the absence of evidence to the contrary was to be treated as sufficient proof of that fact by virtue of S.5 of the 1971 Act.

It therefore seems well settled that the residence should not be temporary. But does it mean that it should be permanent? It would seem that this is not the intention of the court.

Habitual residence is purely a question of fact. It is a factual test and therefore avoids the legal connotations found in the concept of domicile and which has given rise to a wide range of definitions being given to the concept of domicile. In that respect therefore, it is a better connecting factor than domicile and should be preferred.

According to Graveson[25] if we are to search for a common basis of determining personal law in the systems of private international law of the world, "the idea of habitual residence would have a very high claim" in this respect "despite its rejection by the Private International Law Committee"

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25. Op. cit, supra note 3 p.70

His argument in favour of the concept of habitual residence lies in the fact that:

> "It has the authority of a dominant concept in a Hague Convention, with the agreement of many leading countries which lies behind it; it has the territorial quality of domicile which would make transition to a religious personal law as easy as changing trains; it avoids most of the difficulties which have been found in the existing rigid concept of English domicile..... Even German Private International Law, obsessed as it is with the dominance of nationality as the personal law, would allow the application of the habitual residence in the absence of nationality."

Graveson is of the view that habitual residence as a connecting factor for determining personal law would gain universal acceptance because "not only is it workable in practice, not only has it the backing of all those countries of a national law represented at the Seventh Hague Conference as well as important countries who base their personal law on domicile," but he believes that the concept would be acceptable in the United States of America "where the personal law is based on domicile in the American sense". The American concept of domicile is very close to the continental concept of habitual residence than to the English concept of domicile as far as duration is concerned.

But he himself admits that:

> ".....before habitual residence could be accepted as a basis of personal law, it would require to be considered in relation to its attribution in fact or by law to all members of the family and would need to be looked at in the light of the scope and subject matter to which it could be applied.

On the whole however, it seems that the decision in CRUSE V. CHITTUM represents the present day position on habitual residence, and the concept as a basis of the personal law is gradually edging out domicile as a connecting factor.

e. Tribe as a connecting factor.

Tribal affiliation as a connecting factor for determining the applicable law is a feature of most countries in Africa. It is this "belonging" that determines the application of customary or tribal law to an individual's transaction or personal affairs. This "belonging" is not strictly speaking a question of choice although every individual is free to choose the community in which he wishes to live. That does not however make a Hausaman, for example, who lives in a Yoruba community a Yoruba man. This choice is therefore of theoretical value only. But the question of "belonging" is one of fact. An Iboman cannot, for example, transform himself into a Kanuri no matter how much he wishes to do so. He may learn the Kanuri language, speak it fluently, dress like a Kanuri, adopt the Kanuri customs and usages but that does not and cannot make him a Kanuri.

In Nigeria, the general belief is that every individual would wish his native law and custom to be applied to his personal affairs in the absence of anything to the contrary. When faced with a choice of which system of customary law to apply to the personal affairs of an individual therefore, the party concerned would invariably choose the customary law of his own tribe even if he is not livingwithin that tribe at the relevant time.

When the British arrived into Nigeria and introduced

English law, customary and tribal laws were left intact to operate side by side with English law. It was only when such customary laws were repugnant to 'natural justice, equity and good conscience' that they were considered inapplicable and in their place English law was substituted.

Today, the importance of tribal laws in criminal and some civil matters is being gradually eroded by the influence of English law and the constant increase in social and commercial intercourse conducted in English forms. Less emphasis, for example, is being given tocustomary law in contractual matters as most parties now prefer to reach a compromise by adopting a system of law which is foreign, even when the transaction is one which is known to customary law.

However matters of personal status such as marriage, divorce, legitimacy and legitimation, guardianship and adoption are still influenced by principles of customary law in most jurisdictions in Nigeria despite the influence of English law.

It must be pointed out that tribal affiliation as a connecting factor may lead to certain divisive tendencies especially in a country like Nigeria. To a large extent it is more preferable to fashion out rules that would be universally applicable instead of relying upon and applying rules that are fashioned along tribal lines. Section 39(1) of the constitution of the Federal Republic of Nigeria, 1979

specifically provides that no citizen of Nigeria should suffer any form of disability or restriction in the application of any law or any executive or administrative action of the government on the basis of ethnic affiliation, sex, religion or political opinions. This need to eliminate intertribal legal variations is therefore a necessary goal that must be pursued with vigour not only in Nigeria but in most African countries.

f. CITIZENSHIP as a factor:

Citizenship denotes attachment to a particular state or Nation. By virtue of this attachment, the laws of that particular nation apply to the individual concerned. This attachment however, comes either as a result of birth in that particular state or nation or as a result of choice which has to be backed by some legal considerations.

Prior to independence in October 1960, citizenship in Nigeria was regulated by British Nationality laws and a person who became a citizen of Nigeria by virtue of section 1(3) of the British Nationality Act, 1948, was conferred with the status of "commonwealth citizen". Today, citizenship in Nigeria is regulated by the provisions of the suspended constitution of the Federal Republic of Nigeria, 1979. The various types of citizenship recognised in Nigeria are citizenship by birth, by registration and by naturalisation. The acquisition of each is as specified under Chapter III of the Constitution. Of particular interest however, is the fact that under section 24(1) (b) a person can acquire citizenship

by registration 'if the President is satisfied that he has shown a clear intention of his desire to be domiciled in Nigeria'. The type of "clear intention" of desire to be domiciled required by the constitution is not stated anywhere and one can only venture to suggest that this is a question of fact which is to be determined by the circumstances of each particular case.

It must be mentioned that the acquisition of citizenship implies the acceptance of the laws of the country conferring such citizenship to govern the personal affairs of the citizen. The various connecting factors recognised and employed by the country or state for the purposes of determining personal law therefore apply to all citizens in any relevant case.

B. DOMICILE AND CITIZENSHIP IN NIGERIA.

Whereas by section 24(1) (b) of the constitution a person can acquire Nigerian citizenship by registration if he shows a clear intention of establishing a domicile in Nigeria, the nature and scope of the intention required is not defined by the constitution. We are therefore left to fall back to the Principles of English law in determining whether or not a person has the intention of being domiciledin Nigeria. It is these Principles of English law as applied in Nigeria, that determine the issue of domicile as distinct from citizenship which is determined by Nigerian legislation.

The concept of domicile as applied in Nigeria will be considered in Chapter III. The issue of matrimonial domicile has however been considered in Chapter I above.

CHAPTER THREE

EXAMINATION OF THE CONCEPT OF DOMICILE

a. EVOLUTION OF THE CONCEPT OF DOMICILE IN ENGLISH LAW

English principles of Private International Law could be traced back to the Roman Empire. An understanding of the early development of Roman Principles of Private International Law therefore would serve as a basis for a clear understanding of English Principles.

In the ancient Roman Empire, various inhabitants lived side by side. There were those who were considered Roman Citizens to whom the civil law of Rome applied, whereas other inhabitants of the Provinces of the Roman Empire were governed by the Provincial Laws. In all cases involving a Roman citizen no other law but the civil law of Rome was considered. Disputes between "Foreigners" or Citizens of Provincial towns were settled in accordance with a body of rules which had no connection with the Provincial law of either party. This body of rules was called the Law of Nations.

Gradually however this law of nations was replaced by the Civil Law of Rome which was made applicable to everyone living within the Roman Empire. This was the period of territoriality which started in 212 A.D. This territorial basis of law gained strength with the spread of feudalism in England and other Countries of Europe.

It was however the writings of Ulrich Huber that had great influence on the development of Private International Law in England, Scotland and the United States of America. What he essentially advocated was that the force of the laws of every empire are limited only to the units of the empire and bind all subjects living therein; and that persons found within the empire whether permanently or temporarily resident there are to be governed by its laws.[1] In otherwords residence per se is enough to confer jurisdiction over persons in an empire. Personal qualities conferred on the individual by the laws of a place were deemed to follow him wherever he went to. In cases of succession therefore, the Principles that governed was '<u>mobilia sequuntur personam</u>', that is , movable goods have no separate domicile and follow the domicile of the owner. Thus started the connection of personal status to the law of the domicile which has become a distinct feature of English confict of laws. The concept of domicile itself was first used in English law in the latter part of the seventeenth century. It has been described as "an aspect of a broader principle" of personal law[2] and is employed to determine the legal system that best governs the relationship of an individual.

The concept of domicile was the only recognised concept until the nineteenth century when some continental countries adopted the hitherto unknown concept of nationality as a basis of the personal law. It was indeed the promulgation of the French civil code in 1803 which sparked off the present day controversy over the domicile and nationality principles.

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1. de winter, 'Nationality or domicile'. The present state of Affairs' Recueil des cours, 1969 vol.3 p. 365.
2. Graveson, Conflict of laws, (1974) p.p 187-188

Section 3 paragraph 3 which provides that "the laws relating to the status and capacity of persons are binding upon French subjects even when residing abroad" is considered to be the root of this controversy which has hindered all attempts at unifying the rules of the conflict of laws in the world.

There have been two stages in the development of the concept of domicile in English law. The first stage or era started from about 1858 when the main Principles of domicile were propounded in Whicker V. Hume [3] where Lord Cranworth defined domicile as involving the notion of "Permanent home".

The second stage of the evolution of this concept started from the period of the Hague Convention of 1955 on the need to eliminate the conflicts between the law of the domicile and the law of nationality and the two works of the Lord Chancellor's Private International Law Committee of 1954 and 1963. Since these works however, there have been strong calls for reforms of the concept of domicile from various academic writers. It was in response to such calls that the British Parliament in 1973 passed the Domicile and Matrimonial proceedings Act. The reforms introduced by this Act would be considered in more detail later in the chapter.

b. Definition of Domicile:- Requirements of Intention and residence

Domicile is a concept which has been differently interpreted by writers in different countries. The meaning of the concept on the continent differs from its meaning under English and American Jurisdictions.

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3. (1858) 7 H.L.C. 124, 28 L.J. Ch. 396

To a civil lawyer on the continent it means habitual residence. For a common law lawyer, it is regarded as equivalent to a person's permanent home. This common law definition has led Cheschire [4] to conclude that "to construct a formula which describes the precise meaning of domicile as understood by English law is an impossibility....."

It is generally accepted however, that the notion which lies behind the concept of domicile is that of home, and the essence of establishing this home is to use the laws of such home to answer certain questions arising out of the individual transactions of the domiciliary. The home therefore must be permanet, for according to Lord Cranworth in Whicker V. Hume[5] "by domicile we mean home, the permanent home; and if you do not understand your permanent home I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it".

This idea of permanent home can easily be explained away because a man may have his permanent home in a place even though he may not at that point in time be resident there. In otherwords the absence of residence does not divest a home of its permanence. Domicile however, is a legal concept and the requirements for the establishment of a domicile go far beyond those of a permanent home. This is because whereas there need not be any intention to reside permanently or indefinitely in a place in order to establish a home, this requirement must be fulfilled if a domicile is to be established. Physical presence is therefore not a pre requisite for the establishment of a home.

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4. Cheschire, Private International Law, (1979) p. 157
5. Opcit, supra note 3 at p. 160

Similarly, a person can be said to be domiciled in a place even though he has no permanent home there. A man who is a wanderer can hardly be said to have his home in a particular place. If he keeps shifting and living in hotels, he can nevertheless be said to be domiciled in a country if the intention to so reside is there.

A person can also have this permanent home in one country but be domiciled in another because the country in which he has his permanent home denies him the capacity to acquire a domicile.[6]

Domicile has been defined by Graveson[7] as "a conception of law employed for the purpose of establishing a connection for certain legal purposes between an individual and the legal system of the territory with which he either has the closest connection infact or is considered by law so to have because of his dependence on some other person".

It has also been defined as that place in which a person has

> ".....voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home".[8]

The Private International Law Committee in its First Report[9] in 1954 defined domicile as follows:

> "A person's domicile may be defined as meaning the country (in the sense of a territorial unit possessing its own system of law) in which he has his home and intends to live permanently....."

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6. Dicey and Morris, The conflict of Laws (1973) P. 86
7. Opcit, supra note 2, P.185
8. Per Kindersley V.C. in Lord V.Colvin (1859)4 Drew 366 at 376
9. cmd 9068 P. 6.

The American Law Institute also defines domicile as:

> "The place, usually a person's home, to which the rules of conflict of laws sometimes accord determinative significance because of the person's identification with that place".10

The requirement of permanence does not feature in the American definition of the concept of domicile - mere identification with a particular place is enough to establish domicile. It would seem that this identification is to be judged from the circumstances of each particular case. "Home" is defined under section 12 of the Restatement as "the place where a person dwells and which is the centre of his domestic, social and civil life".

However, inspite of these varying definitions of the concept of domicile, Cook [11] has said that English law takes the view that the tests for determining a man's domicile must be constant for all purposes. This is what Cook calls the "single conception theory".

Kahn Freund [12] has attacked this "single conception theory" saying that it does not hold good in all cases because it may, and does happen that while using the same connecting factor for different purposes, the courts introduce some variations into the meaning of the connecting factor depending on the circumstance. This is what Freund calls "functional diversification".

Cook himself had initially protested against the definition of "domicile" for all the different purposes for which it is employed in America.

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10. Restatement, Second, Conflict of Laws (1971) Vol.1 Chapter 2 section11(2)
11. Cook, The Logical and Legal bases of the conflict of Laws, (1942) P.194
12. Freund, General Problems of Private International Law (1974). II Recueil des cours 139 at 404

While stating his objections before the American Law institute, Cook said:

> "I do not believe you can determine the exact scope of any legal concept unless you know what you are trying to do with it, because..... it is a tool which we use in order to make up our mind what we ought to do under the circumstances"13

Cook's views were rejected in the First Restatement but have been reflected in the second Restatement by the American Law Institute. Section 11(2) states:

> "Every person has a domicile at all times and, at least for the same purpose, no person has more than one domicile at a time".

The recognition of the fact that it is only in respect of the same purpose that a person cannot have more than one domicile at the same time reflects the American Law Institute's acceptance of the "functional diversification" of the concept of domicile. Thus, the concept of domicile could be used with such modifications as the circumstances require. For example, for the purpose of divorce jurisdiction the requirements of domicile may be less stringent than for the purpose of taxation or succession.

English law however, seems to be against Kahn Freund's "functional diversification" in its conceptualisation of domicile. This is reflected in the Private International Law Committee's Seventh Report of 1962.[14] Under paragraph 12, the Committee while rejecting the Board of Inland Revenue's proposal that for the purposes of income tax mere establishment of a home is enough to constitute domicile, went on to say:

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13. Proceedings of the American Law Institute, Vol.3 (1925) at P.226 reproduced in Cheatham, Griswold, Reese, Rosemberg, Conflict of Laws, (1904) P.52

14. Cmd 1955

> ".....the fact that domicile has so much importance in revenue law makes it in practice very difficult, to say the least, to make any general change in the mode of ascertaining where a man is domiciled, even if the change appears on other grounds....on the other hand, quite apart from the objection to the same word having different meanings in different contexts, it is somewhat difficult to see how, at any rate in the field of estate duty, domicile could reasonably be given a meaning different from that which it bears in the field of settlement, wills and succession to property. We have not come, or indeed tried to come, to any conclusion on the desirability or feasibility of separating fiscal from other domicile".

However, as we have seen above, the concept of habitual residence is gradually gaining ground in English law and it would be safe to assume that "functional diversification" of the concept of domicile clearly obtains in the courts even though the courts do not clearly come out to say so.

The requirement of intention to reside permanently which is a cardinal element in the English concept of domicile is not very much emphasised under the American Law. Thus whereas the intention under English law must be permanent intention to reside, in America mere "intention to make a home for the time at least" is enough to confer a domicile of choice.

> "There must be a present intention to make a home. One must be able to say, "This is now my home", and not, "This is to be my home". If there is an intention to make a home at present, the intention is sufficient although the person whose domicile is in question intends to change his home upon the happening of some future event. 15

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15. Restatement, supra note 10, comment on section 18 P.70

In English Law however,

> "If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law is lacking".[16]

and;

> "The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there without looking forward to any event, certain or uncertain, which might induce him to change his residence, If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home..."[17]

The requirement of "intention to reside permanently or indefinitely" before a domicile of choice can be acquired under English law has led to decisions which are unsatisfactory to say the least. It is in realisation of this that Scarman J. in Re Fuld (NO.3) said:[18]

> "*Domicile cases require for their decision* a detailed analysis and assessment of facts arising within that most subjective of all fields of legal enquiry - a man's mind. Each case takes its tone from the individual propositus whose intentions are being analysed: anglophobia, mental inertia, extravagant habits, vacillation of will - to take four instances at random - have been factors of great weight in the judicial assessment and determination of four leading cases. Naturally enough in so subjective a field different judicial minds concerned with different factual situations have chosen different language to describe the law.

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16. Per Scarman J. in In the Estate of Fuld (NO.3) 1968 P.675 at 684 - 685
17. Per Lord Chelmsford in Moorhouse V. Lord (1863) 10 H.L. cas. 272 at 285 - 286
18. Op Cit, Supra note 16 at PP 682 - 683

> For the law is not an abstraction: it lives only in its application, and its concepts derive colour and shape from the facts of the particular case in which they are studied, and to which they are applied. Thus the relationship of law and fact is a two-way one; each affects the other".

What emerges from a consideration of all the definitions above is that domicile, though a legal concept, places too much emphasis on intention and permanent residence under English law, and therefore Nigerian Law. This is not so in the American context.

The various types of domicile and the rules governing each will be considered shortly. It is however necessary to first consider the underlying principles of the concept of domicile.

According to Graveson [19] there are four major principles that underlie the English theory of domicile. The first is that no person shall be without a domicile. This principle was enunciated as early as 1869 in the case of Udny V. Udny [20] when Lord Westbury said:

> "It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual as soon as he is born the domicile of his father, if the child be legitimate, and the domicile of the mother if illegitimate".

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19. Op. cit, supra note 2 at P. 190

20. (1869) L.R. I SC & Div. 441 at 457

The reason why the law attributes a domicile to every person is because of the difficulty of ascertaining the domiciles of persons who cannot decide matters for themselves or who are incapacitated by age or other factors. Such domicile could either be a domicile of origin or a domicile of dependency.

Secondly, no person can have more than one operative domicile at the same time for the same purpose. The idea behind this principle is simply the need to eliminate the confusion that is likely to arise if every person was allowed to have several domiciles. This would be difficult for the law to cope with especially where domicile is the only connecting factor for determining personal law. This is not however to say that a man may not have two domiciles at the same time for various purposes. For example in Nigeria it is now settled that a person can have only one Nigerian domicile for the purpose of jurisdiction in matrimonial causes, whereas for other purposes he may have a domicile in a state.

Thirdly, whether or not certain facts constitute or do not constitute domicile is to be determined in accordance with the rules of the particular country concerned. Thus English rules determine what constitutes domicile under English law and by the same token, Nigerian courts decide according to Nigerian rules which facts constitute or do not constitute domicile. However, in certain instances it would be necessary for Nigerian or English courts to recognise certain factors recognised by the lex fori as

constituting domicile by the laws of the lex fori, as constituting domicile under Nigerian or English Law. This situation arises particularly in cases of renvoi in which domicile is a connecting factor.

Fourthly, the law governing capacity to acquire a domicile or to change a domicile is the law of the existing operative domicile. Graveson has suggested that English courts have not yet considered the choice of law problem of which law governs capacity to acquire a domicile. The American Law Institute has treated capacity as one of the conditions for acquiring a domicile of choice and this capacity is governed by the domiciliary law.

Cheschire [21] however adds a fifth rule to the effect that domicile signifies a connection with a particular legal unit or "law district", that is, a territory subject to a single system of law. In the case of a Federation he contends that the law district is represented by the state in which the propositus has established his home. This statement does seem to be in conflict with the decision in the Nigerian case of Odiase V. Odiase considered in chapter two above. Cheschire however suggests that the concept of 'one man, one domicile' may be modified to suit Federal conditions. The Matrimonial causes Decree 1970 has resolved this issue of state and Federal domicile.

An existing domicile is generally presumed to continue to exist until there is a proof of change by the person who alleges such a change.

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21. Op. cit, supra note 4 at P. 163.

i. Proof or ascertainment of Domicile

The evidence required to prove the existence of a domicile has been a subject of great practical significance. All the substantive rules for regulating domicile leave it as a matter of fact such that in the final analysis every domicile must rest on evidence.

Generally, courts rely on evidence consisting of the individual's acts rather than the direct evidence of intent. It is this intent that is quite difficult to establish.[22] It has been suggested therefore that the mental element should be defined in terms of disposition towards permanence rather than conscious intention.[23]

The emphasis on intention for the ascertainment of domicile which is a personal quality and therefore subjective, has led the English courts to arrive at very unreasonable results in the determination of cases. It is common to see different conclusions being drawn from similar facts in the ascertainment of domicile. For instance in some cases residence in a country for a long period has been held to be sufficient evidence of intention to reside in that country whereas in others the same residence has been held not to amount to sufficient evidence of intention.[24]

It has been held in Drevon V. Drevon [25] that:

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22. Beale, Proof of Domic (1925-26) 74 U.pa.L.R.552
23. Evidentiary factors in the Determination of Domicile, (1948) 61 Har. L.R 1232 at 1234.
24. Dicey, op cit, supra note 6 at p. 102
25. (1864) 34 L.J. ch.129 at 133

> "There is no act, no circumstance in a man's life, however trivial it may be in itself, which ought to be left out of consideration in trying the question whether there was an intention to change the domicile. A trivial act might possibly be of more weight with regard to determining this question than an act which was of more importance to a man in his life time".

Every factor must therefore be taken into consideration in determining whether a man has formed the necessary intention to be domiciled in a particular place. A man's "tastes, habits, conduct, actions, ambitions, health hopes, projects" must all be considered "as keys to his intention to make a home....."26

In ascertaining domicile, lawyers are often aided by the rebuttable presumption that a domicile once shown to exist continues until a new one is proved to have come into existence. This proof has to be by sufficient evidence and the burden is upon the person who alleges that such a change has occurred.

Beale is of the view that this presumption of continuance of domicile may not obtain in all cases. For instance if the continuance of domicile would upon the breaking out of war impose upon a citizen of a country an enemy character which is determined by his domicile, it would be improper to impose upon him the stigma of an enemy merely because of the presumption. When a decree of separation has been made, the presumption that a wife's domicile remains that of her husband also ceases to operate.

A change of domicile can be proved by circumstantial evidence. It has been held that less evidence is required for a change of domicile from one state to another than that required for a change from one nation to another.[27]

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26. Per Lord Atkinson in Gasdagli V.Casdagli (1919) A.C 145 at 178.

27. Matter of New comb, 192 N.Y. 238

In America, various factors have been taken into account to ascertain domicile. Although generally declarations as to intention of the party whose domicile is sought to be proved are relevant, this evidence may be hearsay and the question of what weight to attach to it therefore arises. The intention might have been ill-considered and hasty or made under passion and prejudice. Such declarations therefore have to be considered in relation to the circumstances under which they are made, and it is these circumstances that control the weight to be attached to such evidence.

Declarations of a deceased as to his intention to reside at a place are admissible evidence of his domicile there. This may not however be conclusive for other purposes such as the validity of his will or administration of his estate.

The courts have also considered recital in a will as to domicile of the testator, a recital of domicile in a passport issued on the application of the party and a recital in an insurance policy, a bond or a bill of sale as evidence of domicile.[28]

ii TYPES OF DOMICILE AND RULES GOVERNING EACH

In Nigerian Law, three kinds of domicile of natural persons are recognised. These are domicile of origin, domicile of choice and domicile of dependence. Each of these would now be considered in a broader perspective. The position of corporations in relation to domicile would be considered at a later stage in this work.

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28. See Beale, opcit, note 22 supra at PP.558-559

a. Domicile of Origin

At birth, the law imposes upon every individual a domicile. It is this domicile, imposed without the consent of the individual, that is called domicile of origin. Since domicile is the basis of personal law in common law countries, the domicile of origin ties an individual to a particular legal system until he either acquires a domicile of choice or a dependent domicile. According to the principles of the domicile of origin, a legitimate child takes the domicile of its father at the time of birth while an illegitimate child takes the domicile of the mother. A posthumous child also takes the domicile of its mother.

A foundling has his domicile of origin in the country which he was found.[29] In respect of domicile of infants therefore, parentage is the only consideration except in the last case of a foundling. The place of birth of the child is therefore irrelevant.

Graveson [30] has suggested that the effect of legitimation on an illegitimate child's domicile of origin is uncertain and may depend on whether the legitimation is retrospective to the child's birth or at some later date. If it depends on the latter, then legitimation does not affect the domicile of origin of the child and such domicile of origin would remain that of the mother. If however, the legitimation operates retrospectively to the time of birth, then the domicile of origin of the child becomes that of the father.

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29. Dicey, op cit supra not 6 at P.93
30. Op. cit, supra note 2 P. 196

This conception of the domicile of origin according to Cheshire,[31] became "firmly established in the middle of the nineteenth century when England was a nation of enterprising pioneers, most of whom regarded their ultimate return home as a foregone conclusion".

One of the characteristics of the domicile of origin is that it cannot be extinguished by any act of the person concerned. In Udny V. Udny [32] Lord Westbury said:

> "When another domicile is put on, the domicile of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicile of choice; but as the domicile of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the Principles on which it is by law created and ascribed to suppose that it is capable of being by the act of the party entirely obliterated and extinguished".

Being a concept conferred by law without any individual choice or will, the notion of intent is irrelevant as far as domicile of origin is concerned. It continues to operate until the acquisition of a different domicile by the person either as a result of dependence or by a choice voluntarily made. But even upon the acquisition of another domicile, the domicile of origin does not completely leave the individual. It remains with him and resurfaces anytime he abandons one domicile of choice without acquiring another. Before its revival however, there must be a voluntry abandonment or loss of a domicile of choice which is subsisting.

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31. Op. cit, supra note 4 p. 178

32. Op cit, supra note 20 at p. 458

In Re Lloyd Evans, deceased [33] a testator born in Wales and therefore having an English domicile of origin, went to Java and married a Dutch woman. He subsequently went to Belgium and settled in Brussels with his wife and son, purchased a house there and carried on business. Upon the death of his wife he tried to sell his house but could not do so before the Germans invaded Belgium and he was forced to leave the country. He returned to England and made a will in English form before his death. The evidence showed that he had no intention of remaining in England longer than he was obliged, and that he made conflicting statements during his last years as regards his intentions as to residence.

The court held that the onus of proving that the testator had abandoned his domicile of choice lay upon those who asserted that this had occurred and that although it requires less evidence to establish abandonment of a domicile of choice than it does to establish its acquisition, both the intention and the act must be unequivocal and that in this case the onus that the testator had abandoned his Belgian domicile of choice had not been discharged because his act in leaving Belgium was dictated by force of circumstances and was not a result of a free choice.

Advantageous though the domicile of origin may be in assigning every individual to a particular system of personal law from birth, it has a defect inherent in its automatic revival. That automatic revival has the effect of producing results which are not easily anticipated.

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33. (1947) Ch. 695

It is for this reason that Sir Simon in Henderson V. Henderson [34] is against the tenacity of the domicile of origin for:

> "it tends to produce some anomalies in contemporary conditions - for example, procuring that a man's fortune is taxed in accordance with the fiscal code of a society with which he may for long have ceased to identify himself, to the detriment of the society the benefits of which he may have enjoyed for many years, merely because his severance from the old and his cleavage to the new cannot be demonstrated to the high standard of proof which the law demands of a change from a domicile of origin to a domicile of choice."

An illustration would make for a proper appreciation of the seriousness of this tenacity: Take Hassan, a Nigerian whose domicile of origin is Nigeria. He leaves Nigeria at the age of 21 and settles in Ghana where he acquires a domicile of choice. He subsequently leaves Ghana after twenty-seven years' stay for the Cameroons. On his final departure from Ghana to Cameroon he dies on the way before acquiring a new domicile in Cameroon.

Under the received English law, Hassan at the time of his death is domiciled in Nigeria because his domicile of origin is deemed to have revived between the loss of his Ghanaian domicile of choice and the acquisition of a new domicile of choice in Cameroon. This result is capable of thwarting the settled expectations of the relatives because the deceased might never have wished to have any connection whatsoever with his domicile of origin.

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34. (1967) P.77 at 82

It is in realisation of this fact that the American Law Institute in its Restatement of the Law [35] provided in section 19 that "a domicile once established continues until it is superseded by a new domicile." The rule is equally applicable whether the last domicile is a domicile of origin, a domicile of choice or a domicile assigned by operation of law.

Under the American Law, if a domicile of choice is lost or abandoned and a new domicile of choice is not acquired, the domicile of origin does not revive and the last domicile of choice continues to operate.

The English Private International Law Committee in its First Report [36] drew up a code of the law of domicile and recommended under Articile I(5) that "a domicile, whether of origin or of choice, shall continue until another domicile is acquired". This indicates a preference for the American principle and it has already received judicial recognition in England in the case of Leon V. Leon [37]. In that case the husband had his domicile of origin in British Guiana (now Guyana) and he contracted a marriage there in 1955. He went to England in 1956 leaving the wife in Guiana although they both had the understanding that they would eventually settle together permanently in England. The husband petitioned for divorce in England in 1962 and the wife filed an answer denying his allegations and cross-prayer for divorce on grounds of desertion.

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35. Op. cit supra note 10 at p. 78
36. Op. cit, supra note 9 at Appendix A
37. (1967) P. 275

Husband then returned to Guiana in 1964 and instituted divorce proceedings contending that he had reverted to his original domicile. On the question whether if the husband had reverted to his domicile of origin the court was deprived of jurisdiction to entertain the wife's prayer for relief;

Held, that the husband could not by changing his domicile dissociate himself from his obligations under his former domicile, and that the husband had acquired an English domicile which he had kept until his arrival in British Guiana in 1964.

Baker J. said:[38]

> "I am satisfied and find that the husband abandoned his domicile of origin and acquired an English domicile when he came here in 1956; he deserted his wife in 1959, if not earlier, and continued in desertion to April 4, 1963.....he kept his English domicile until he reverted to his domicile of origin on his arrival in British Guiana in August 1964".

Graveson [39] is of the opinion that the weight of judicial authority would favour the revival of the domicile of origin in British Guiana on leaving the shores of England.

It has been held in Tee V. Tee[40] that a man who was born in England but acquired a domicile of choice in the United States which he abandoned after making up his mind to live permanently in England and not to return to the United States, had abandoned his domicile of choice and automatically revived his domicile of origin on that intention being formed, even though he had not at the time physically returned to reside in the country of the domicile of origin.

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38. Ibid at P. 282
39. Op. cit supra note 2 at P. 198
40. (1974) I WLR 213

Physical presence in the country of the domicile of origin is not therefore necessary for its revival. The decision in Tee V. Tee would therefore seem to have overruled Leon V. Leon, because it is a later decision.

It is generally believed in English law that domicile of origin is hard to displace. Early American judges like Story believed that the domicile of origin was somewhat similar to nationality. But Lord Westbury in Udny V. Udny[41] has strongly objected to this view contending that "that would be to confound the political and civil states of an individual and to destroy the difference between Patria and domicilium."

English courts are therefore generally reluctant to hold that a domicile of origin has been displaced easily. Cheshire [42] has even said that the English conception of the domicile of origin is:

> "more akin to nationality than to domicile in the continental sense. Infact it transcends even nationality in stability and permanence, for though it may be placed in abeyance it can never be destroyed. To the end of his life a man's domicile of origin retains its capacity for revival"

In Winans V. Att. General [43] the question was whether Mr. Winans at the time of his death still retained his domicile of origin or whether he had acquired a domicile of choice in England on the following facts:

Mr. Winans was born in 1823 in the United States and he remained there until 1850.

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41. Op cit, supra note 20 at P. 460
42. Op. cit. supra note 4 at p. 178
43. (1904) A.C 287

From 1850 to 1859 he worked in Russia and in 1859 he was advised on health grounds to go to England. He took a lease of property in Brighton and from 1860 to 1870 his practice was to spend four months of the winter at Brighton and the remainder of the year in Russia. From 1870 to 1883 he spent more than half of each year in England, the remainder of his time being divided between Russia and Germany. He subsequently ceased to visit Russia and spent his entire life in England from 1893 until his death in 1897. His residence for 37 years in England no doubt raised a strong presumption in favour of an English domicile, but there was no direct evidence of his intentions. After analysing his hopes, projects and mode of living, Lord MACNAGHTEN concluded that MR. Winans had two objects in life in addition to the one of his health; and that all the objects were anti British. He therefore held that Mr. Winans had not lost his American domicile of origin. He said:[44]

> "On the whole, I am unable to come to the conclusion that Mr. Winans ever formed a fixed and settled purpose of abandoning his American domicile and settling finally in England. I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated".

It is important to note that this case involved the payment of estate duty.

The view expressed in Winans' case prevailed in the later case of Ramsey V. Liverpool Royal Infirmary[45]. One George Bowie was born in Glasgow in 1845 and at the age of 37 he gave up his employment as a Commercial traveller. He did no further work during his life.

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44. Ibid at p. 298
45. (1930) A.C 558

He went to Liverpool and lived on his brother's bounty. He subsequently moved into his brother's house upon the brother's death and never returned to Scotland. Although he had always described himself as a Glasgow man, Bowie lived in England for 36 years and during his life he said he never wished to set foot in Glasgow again. He arranged for his burial in Liverpool.

On these facts the House of Lords held that Bowie had not acquired a domicile of choice in England and that he must accordingly be regarded as having died domiciled in Scotland. Probably the judges were influenced by the fact that they wanted to uphold the formal validity of the will and thus give effect to wishes of the testator as to who should succeed to his property.

This excessive attachment of importance to the domicile of origin has led to the irresistible inference that residence no matter for how long, is not enough to displace a domicile of origin and confer a domicile of choice. This, to say the least is unreasonable especially when the above two cases are considered in the light of the surrounding circumstances.

Domicile of origin can only be extinguished by act of law such as a sentence of death or exile for life which in effect put an end to the civil status of the criminal, otherwise no act of the individual can destroy it.

b. Domicile of Choice

Domicile of choice has been described as "a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time".[46] This type of domicile can only be acquired by a person who is legally capable of changing his domicile.

The requirements for the acquisition of a domicile of choice are residence and intention. It must be proved that the person making the choice has established a home or residence in a country with an intention to remain there permanently. But mere intention on its own is not enough to establish a domicile of choice. The intention must be existing at the time of the actual residence. Subsequent change of mind after the acquisition of the domicile of choice is irrelevant. Thus "permanent" describes the residence and not the "intention". The standard of proof of such intention required is the civil standard, that is, on the balance of probabilities.

According to Scarman J. in Re Estate of Fuld (NO.3) [47] a domicile of choice is acquired "when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time". It has been contended that the requirement of "unlimited" is far more in consonance with modern life than the requirement of "permanence".

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46. Per Lord Westbury in Udny V. Udny, supra note 20 at P.458
47. Supra note 16 at P. 680

The requisite intention is also a "simple factual intention to reside permanently or perhaps indefinitely, or continuously, and not an intention to acquire a domicile".[48]

In Aikman V. Aikman [49] Lord Campbell L. C. said:

> "If a man is settled in a foreign country, engaged in some permanent pursuit requiring his residence there, a mere intention to return to his native country on a doubtful contingency will not prevent such a residence in a foreign country from putting an end to his domicile of origin".

The requirement of residence does not necessarily mean that the person concerned must live in the same house or in the same place for a short period but accompanied with the necessary intention. Without the requisite intention, residence for whatever length of time does not confer domicile. In Ramsay V. Liverpool Royal Infirmary Lord MacMillan stated thus:[50]

> "Prolonged actual residence is an important item of evidence of such volition, but it must be supplemented by other facts and circumstances indicative of intention. The residence must answer a qualitative as well as a quantitative test".

Long residence is therefore of evidentiary value only.

In Bell. V. Kennedy [51] Lord Chelmsford said:

> "It may be conceded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile".

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48. Graveson op cit, supra note 2, p. 202
49. (1861) 3 Macq 854 H.L. at 858
50. Supra note 45 at p. 598
51. (1868) L.R. I. Sc & Div 307 at p. 319

This requirement of permanence has been condemned by some writers on the ground that "permanence" is a finite term which is relative to the individual's life expectation. Graveson questions the soundness of requiring an intention to live permanently in a place. He said [52] that the requirement of permanence:

> "is a feature of the first era of evolution of domicile between 1860 and 1870, when the whole pattern of life was far different from our own. The settled intention, born in a context of certainty, simplicity and legalism, no longer fits the complexity, movement and sophistication of modern life, in which many of our best intentions become temporary through frustrating circumstances".

Graveson therefore suggests that a man who has settled in a place without being capable of the intention to stay for ever, but only for as long as circumstances permit, should not be denied the acquisition of a domicile of choice.

These English Principles with all their inherent shortcomings and overemphasis on intention have been adopted in Nigeria without any modifications as reflected in various decisions of our courts. For instance in the case of Fonseca V. Passman[53] Thomas, J. held that for the establishment of a Nigerian domicile of choice, "the mere factum of residence here is not sufficient. There must be unequivocal evidence of animus manendi or intention to remain permanently".

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52. Opcit. supra note 2 at p. 203
53. (1958) W R NLR 41 at 42

Similarly in the case of Adeyemi V. Adeyemi[54] the petitioner sought for a dissolution of her marriage with the respondent stating that both were domiciled in Lagos. The respondent was a native of Ijebu Ode in Western Nigeria and all his parents were from Ijebu-Ode. He had lived in Lagos for about 12 years at the time the petition was filed.

In holding that the court had no jurisdiction to grant the decree sought because of the petitioner's failure to discharge the burden of proving that the husband had abandoned his domicile of origin, ONYEAMA, J. said:

> "The degree of proof required to establish that domicile of origin had been abandoned and a domicile of choice acquired is set out in Winans V. Attorney General (1904) A. C. 287....."

After analysing the statement of Lord Mac Naghten in Winan's case the learned judge came to the appalling conclusion that the petitioner had failed to render strong evidence to convince his Lordship that "the respondent had ever formed a fixed and settled purpose of abandoning his Western Nigerian domicile and settling finally in Lagos".

One would have thought that after all the circumstances described, viz that the respondent had expressed his intention never to go back to Ijebu-Ode. that the wife represented him at his father's funeral in Ijebu-Ode, that he had bought a plot in Lagos coupled with the fact that all his parents in Ijebu-Ode had died, the learned judge would have concluded that he had acquired a domicile of choice in Lagos.

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54. (1962) LLR 70

It is respectfully submitted that the learned judge in quoting and approving the decision of the House of Lords in WAHL V. ATT-GENERAL [55] that a naturalised British subject of German origin who had declared by signing a printed form that he had permanently resided in the United Kingdom for the preceding five years and had the intention of permanently residing there in the future was domiciled in England, failed to distinguish between local and international situations; even after he had analysed Lord MacNaghten's statement in Winans V. Att.Gen. that a change of domicile within the same country is less serious than a change involving a foreign country.

The decision of Coker, J. in Udom V. Udom [56] seems to be more preferable. But the learned judge himself laid too much emphasis on permanence when this should not actually have been so, considering the local circumstances and our modern conditions. In that case the petitioner was born in Lagos where all his parents were domiciled. The respondent's father was from Eastern Nigeria and his mother, though domiciled in Lagos, was from Western Nigeria. There was evidence that when the respondent's father died, he moved to Lagos and lived with his mother. In a petition for divorce, the petitioner alleged that the husband had changed his domicile of birth to Lagos and that Lagos was therefore the domicile of the parties.

In holding that the respondent had acquired a domicile of choice in Lagos, Coker, J. said:

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55. (1947) 147 L.T 383

56. (1962) LLR 112 at 117

> "At birth, as I indicated, on the evidence of the respondent, he acquired the domicile of his father, but the evidence which I accept is to the effect that as far back as 1947 he has lived with his mother in Lagos. The evidence is also to the effect that his mother is a Lagos woman. What then constitutes evidence by which it may be said that a change of domicile has been effected?..... The subject must not only change his residence to that of the new domicile, but also must have settled or resided in the new territory cum animo manendi. The residence in the new territory must be with the intention of remaining there permanently. The animus is the fixed and settled intention permanently to reside. The factum is the actual residence".

It is therefore suggested that the requirement of permanence should be overlooked in the Nigerian situation in considering whether or not a person has acquired a domicile of choice. If this is done, it would be much easier for the courts to locate the domicile of persons who are constantly on the move such as seasonal farmers and hunters. The need to de-emphasise permanence is even better seen when one bears in mind that these English features of the concept of domicile evolved at a time when conditions of life prevailing, were very much different from what obtains in practice today.

The American position in respect of acquisition of a domicile of choice is very much different from its English counterpart. Under American law, all that is required for the acquisition of a domicile of choice is physical presence coupled with the intention of the person to make a place "his home for the time at least". There is no need for the establishment of a permanent home. The requirements for the acquisition of an English domicile have been condemned by American judges.

Infact in Putnam V. Johnson[57] Justice Parker while disapproving of the strict conception of domicile as obtains in English law said:

> "The definition of domicile, as cited from Vattel by the counsel for the defendants, is too strict, if taken literally, to govern in a question of this sort; and, if adopted here, might deprive a large portion of the citizens of their right of suffrage. He describes a person's domicile as the habitation fixed in any place, with an intention of always staying there. In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of Vattel is that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country"

As noted above, domicile of origin does not also revive automatically upon the loss of a domicile of choice in America. It is suggested that the courts in Nigeria should follow the American position as enunciated in Putnam V. Johnson.

Loss of Domicile of choice

A domicile of choice is lost when a person ceases to reside in a country and at the same time ceases to intend to reside there permanently or indefinitely.[58] In other words, both the intention and the residence must cease to exist at the same time.

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57. (1813) 10 Mass. 488 at 501
58. Dicey, Opcit. Supra note 6 P. 114

When only the residence is given up a domicile of choice is not lost. Similarly, if the intention to reside is abandoned without also abandoning the residence a domicile of choice is not lost.

In In the Goods of Raffenel[59], the deceased, who was the widow of a French Naval Officer, had her domicile of origin in England. She lived with her husband in France until his death when she decided to live in England with her children. She left Dunkerque where she had an acquired domicile and got on board a steamer with the intention of leaving France for good. Before the steamer left the harbour, she was obliged to land as a result of illness and never sufficiently recovered to leave France.

The court held that she had not lost her French domicile since there was no abandonment of residence even though the intention was there. According to Sir C. Cresswell; "I cannot think that the French domicile was abandoned so long as the deceased remained in the territory of France. It must be admitted that she never left France, and that intention alone is not sufficient."

It would seem therefore that in order to abandon residence, a person must have left the territory of the country concerned. But Dicey[60] submits that residence can simply be given up without necessarily leaving the country concerned or taking up residence in another. According to him, "the view that residence in one country can only be given up by arriving in another seems to be a relic of the discarded doctrine that a domicile of choice cannot be lost by mere abandonment."

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59. (1863) 8 L.T. 211
60. Opcit, supra note 6 at P. 114 - 115

Dicey's statement is a re-iteration of what the Lord Chancellor said in Udny V. Udny[61] while laying down the requirements for a change of domicile:

> ".....It seems to me consonant both to convenience and the accuracy of the whole law of domicile to hold that the man born with a domicile may shift and vary it as often as he pleases, indicating each change by intention and act, whether in its acquisition or abandonment, and further, to hold that every acquired domicile is capable of simple abandonment animo et facto the process by which it was acquired, whout it being necessary that a new one should be at the same time chosen, otherwise one is driven to the absurdity of asserting a person to be domiciled in a country which he has resolutely foresaken and cast off, simply because he may (perhaps for years) be deliberating before he settles himself elsewhere. Why should not the domicile of origin cast on him by no choice of his own, and changed for a time, be the state to which he naturally falls back when his first choice has been abandoned animo et facto, and whilst he is deliberating before he makes a second choice."

When a domicile of choice is abandoned, a person may either acquire another domicile of choice or may revert to his domicile of origin. However, the domicile of origin which is always in abeyance operates between the period of abandonment of one domicile of choice and the acquisition of another. This is true under English and not American law.

Domicile of choice and the position of prisoners, Refugees, fugitives, invalids and other Miscellaneous cases.

Since before the acquisition of a domicile there must be a residence freely chosen with the intention to reside, circumstances may exist where such freedom may be doubtful or non-existent, or even where such freedom exists, it cannot be competently exercised.

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61. Opcit; Supra note 20 at P. 450

Cases that fall within this category are those of fugitives, prisoners, refugees, diplomats etc. The position of each would therefore be examined more closely.

a. Refugees and Fugitives

The position of political refugees and fugitives from justice seems to be quite a simple one as far as the acquisition of a domicile is concerned. In the first place if a political fugitive leaves his country with the intention of returning to it when the political set up changes, he does not lose his domicile in that country. But if he leaves the country with the intention of not returning under any circumstance, he would be deemed to have acquired a domicile of choice in his country of refuge. This is because his stay there is voluntary and he has no special motive for entering the country though his motive for leaving his country of origin is to avoid being prosecuted.

Similarly a fugitive from justice has a special motive for leaving his country and his intention to abandon his domicile in the country which he has left is presumed. But if the punishment ordinarily imposed for his crime is a trivial one, or where the punishment is extinguished after a long period by the laws of the country from which he has fled, he may resume his domicile there.

Freedom of choice is also affected when a fugitive debtor leaves his country in order to free himself from the clutches of his creditors. In this case however the circumstances must be taken into account before a change of domicile could be imputed. If the debtor intends to return to his country upon settlement of the debt, he may retain his domicile there.

b. Invalids.

Opinions seem divided as to whether an invalid who resides in a country for health reasons could acquire a domicile of choice there. In Udny V. Udny [62] it has been held that an invalid could not acquire a domicile of choice because for the acquisition of domicile, "there must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

In Moorhouse V. Lord [63] however, it has been held that an invalid could acquire a domicile of choice if he leaves his country on grounds of health to reside in another. But this decision was earlier than that in Udny V. Udny and it would seem that the position in Udny V. Udny now represents the law.

Dicey [64] has also indicated that "a person who is temporarily detained in a country because he is for the time being too ill to be moved, or who goes to a country for the temporary purpose of undergoing a course of medical treatment, clearly does not acquire a domicile of choice there."

However, if a person settles in a new country where he hopes to enjoy better health, he may form the intention of residing there permanently and indefinitely and may therefore acquire a domicile of choice there.

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62. Opcit, supra note 20 at P. 458
63. (1863) 10 H.L.C 272 at 283
64. Opcit, supra note 6 at P.109

But if he goes to a foreign country for the sole reason of avoiding an immediate danger, with the hope of returning to his own country when the threat of such danger has elapsed, his domicile there is not affected.

c. Prisoners.

A prisoner is generally believed to retain the domicile which he had prior to the commencement of the prison term. A prisoner is not likely to intend to reside in his place of imprisonment permanently or indefinitely even though he may be said to have his residence there.

d. Servants and Ambassadors

A servant is subject to posting from one country to another for the purpose of his work. He cannot therefore form the necessary intention to reside permanently in his place of posting. But this statement is true only to the extent that the servant goes to his place of posting only with the sole intention of carrying out his contractual duties. If he chooses to reside there permanently and not only for purposes of work, he may acquire a domicile of choice there.

Similarly, ambassadors or diplomats are "a special category of servants" who also move from one country to another according to the dictates of their office. If an ambassador intends to reside permanently in a place and not merely for the purpose of carrying out his ambassadorial functions, he may acquire a domicile of choice.

This is however a question of fact to be determined by looking at the circumstances. According to Dicey [65] "the extra-territoriality of embassies does not apply for the purpose of ascertaining the domicile of a person of this class.

In Sharpe V. Crispin [66] Sir J.P WILDE said:

> "Residence in a foreign country as a consular officer gives rise to no inference of a domicile in that country. But if already there domiciled and resident, the acceptance of an office in the consular service of another country does nothing to destroy the domicile."

Thus if a Nigerian is domiciled in Ghana and he is subsequently appointed to serve as a consular officer in Gabon, this does not change his Ghanaian domicile.

e. Illegal Immigrants.

The residence of such people is dependent on chance and is uncertain. It is not safe therefore to hold that they have the necessary intention to reside in a place permanently. They may however acquire a domicile of choice where it is proved that the necessary intention is present. It has been held in Boldrini V. Boldrini [67] that mere liability to be deported did not make it impossible to acquire a domicile of choice. He loses such domicile of choice only when he is deported.

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65. Supra note 6 at P. 112
66. (1869) L.R I P & D 611 at 616
67. (1932) P. 9

It is also true under English law that even where the illegal immigrant has acquired an English domicile, he does not thereby lose it upon deportation if he has the intention of returning to England in a legal manner.[68]

In the South African case of Smith V. Smith [69] the plaintiff sued her husband for a declaration that their marriage was null and void. She contended, without any contradiction, that her husband's domicile was in Rhodesia and Nyasaland. The plaintiff offered only short and formal evidence of domicile and a declaration of nullity was made. The husband appealed on the merits and did not raise the question of domicile. The husband's domicile of origin was England. The court raised the point whether there was sufficient evidence that the husband was domiciled within the jurisdiction of the court. It was admitted that the original entry of the husband into the Federation and his residence there were unlawful in terms of the Immigration Act, 1954. He entered the Federation under a false name with a British passport in that false name. and succeeded in obtaining a temporary residence permit.

It was held that the husband had not in the circumstances acquired a domicile of choice in the Federation. The court therefore set aside the judgment of nullity for want of jurisdiction in that the wife's domicile depended on that of her husband, and she was therefore domiciled in any part of the Federation also. The judgment of BRIGGS A CJ is worth reproducing for a better understanding of this subject.

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68. Thiele V. Thiele (1920) 150 L.T. Jo. 387
69. (1962) 3 S.A 930 (F.C)

He said:[70]

"My conclusion is that it is not possible under our law for a person sui juris to acquire a domicile of choice in this country if his initial entry and his residence at all times there-after have both always been unlawful in terms of the Immigration Act 1954. The condonation cases may appear to provide an exception to this principle, but on the view I take they do not. Nor do the precarious residence and service cases. I think such authority as is in point supports my view; but, if there were none, I should unhesitatingly express the same opinion. I should formulate the proposition in this way. Acquisition of a domicile of choice requires both residence and animus manendi. Not every kind of defacto residence will suffice. It must usually be residence of one's free will or, at least, if it is not the residence can be of no value as evidence of an animus manendi. The animus manendi must be both genuine and honest. An intention to persist indefinitely in a course of unlawful conduct may be genuine; but cannot be honest. Fears that the worst may happen do not necessarily preclude a sufficient animus. But knowledge that one is residing only indefinitely, makes it impossible to have an animus manendi of the requisite quality. I think also that the matter may properly be put another way. The animus manendi, though it does not require an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period. It would not be enough if a chronic invalid were to come to this country and say, "I will settle here if the climate suits my health", if he died a few days later. There would at least have to be a trial period, after which the unconditional intention might come into existence. In this case the intention of the appellant, putting it at the highest, can only have been, "I will stay in Rhodesia if I can escape the attention of the authorities, whose statutory duty is to deport me." I think a conditional or provisional intention of this kind cannot in law amount to the animus manendi necessary to establish a domicile of choice. If these propositions have not yet been held to be part of our law, they should, I think, be so held now."

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70. At P. 936

f. Members of the Armed Forces

Early English authorities have expressed the view that a member of the armed forces who merely resides in a place in pursuance of his duties, cannot acquire a domicile of choice because the residence there is not intended to be permanent. Therefore the officer retains his domicile of origin at all times. Thus in Re Mitchell, ex parte Cunningham[71] the petitioning creditor presented a petition against the debtor who was a Lieutenant Colonel in the British Armed Forces and had his residence in Guernsey by virtue of his official post there as Commander of the Royal Engineers. Solicitor for the petitioner alleged in an affidavit that to the best of his knowledge and belief the debtor was domiciled in England and that section 6(1)(d) of the Bankruptcy Act, 1883 which required the debtor to be domiciled in England before a bankruptcy petition could be presented had been complied with. He based his allegation on the fact that although the debtor was commanding the Royal Engineers in Guernsey and was residing there in his official residence, the Headquarters of the Royal Engineers were in Chatham, England.

The debtor made an affidavit in which he said that from the date he commenced his official duties in Guernsey to the date of his affidavit he had resided at his official residence in Guernsey and had had no other residence, and that the Headquarters of the Royal Engineers as to the Guernsey district were in Guernsey. The Registrar dismissed the petition on the ground that the debtor was not domiciled in England.

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71. (1884) 13 Q B.D 418

The petitioning creditor appealed. In dismissing the appeal, it was held that the mere fact that the debtor bears an English name, and is an officer in the British army does not raise a presumption of an English domicile in as much as his domicile might have been either Scotch or Irish, and in either of these cases he would not by entering into the British army have lost his domicile of origin.

The position in England has however been changed in recent cases. A member of the armed forces may now acquire a domicile of choice where circumstances exist which point directly to such inference. It is now settled therefore that a domicile of choice could be acquired by a member of the armed forces either in a country where he is stationed or somewhere else if he is able to fulfil the requirements of residence and intention.[72]

iii. Domicile of origin and domicile of choice distinguished

It could be seen from the discussion above that domicile of origin and domicile of choice differ both in character and conditions necessary for abandonment. The capacity for revival is also another feature which differentiates a domicile of origin from a domicile of choice.

In Udny V. Udny, Lord Westbury said:[73]

> "The domicile of origin may be extinguished by act of law, as, for example, by sentence of death or exile for life, which puts an end to the status civilis of the criminal; but it cannot be destroyed by the will and act of the party.

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72. Donaldson V. Donaldson (1949) P. 363
73. Op cit, supra note 20 at P. 458

> Domicile of choice, as it is governed animo et facto, so it may be put an end to in the same manner. Expressions are found in some books, and in one or two cases, that the first or existing domicile remains until another is acquired. This is true if applied to the domicile of origin, but cannot be true if such general words were intended (which is not probable) to convey the conclusion that a domicile of choice, though unequivocally relinquished and abandoned, clings, in despite of his will and acts, to the party until another domicile has animo et facto been acquired."

The above quotation in a way sums up the fundamental distinction between a domicile of origin and a domicile of choice. Lord Mac Naghten while talking about the difference between a domicile of origin and a domicile of choice in Winans V. Attorney - General reiterated this stand when he said:[74]

> "Domicile of origin, or as it is sometimes called, perhaps less accurately, "domicile of birth", differs from domicile of choice mainly in this - that its character is more enduring, its hold stronger, and less easily shaken off."

When a domicile of choice is lost and another domicile is not acquired, the domicile of origin revives to fill in this gap. It is this doctrine of revival of the domicile of origin that has been described as one of the greatest defects of the English concept of domicile. Under the American Law, the doctrine of revival of the domicile of origin is not recognised.

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74. Op cit supra note 43 at P. 290

Thus, "if a domicile of choice is abandoned without acquiring a new domicile of choice, the domicile of origin is not thereby revived, but the last domicile of choice continues to be the domicile."[75]

A domicile of origin cannot be lost by mere abandonment. This is because it is not a matter of free will and therefore endures until replaced by a domicile of choice.

In Bell V. Kennedy [76] the domicile of origin of the appellant was in Jamaica where his parents, both Scottish, were domiciled at the time of his birth. He had his education in Scotland but returned to Jamaica after reaching majority. He subsequently left Jamaica without any intention of returning. He resided in Scotland with his mother-in-law, while he occupied himself looking for an estate on which to settle down. He was unable to acquire an estate until after the death of his wife one year after he had left Jamaica. It was admitted that at the time of the trial he had acquired a Scottish domicile. The question for decision was what his domicile was at the time of his wife's death.

It was held that his domicile at that moment was in Jamaica for although he had abandoned the Island, and was resident in Scotland, he hadn't made up his mind whether he was going to establish a permanent home there. At the time of his wife's death his mind was still undecided as to where to make his permanent home. He therefore retained his domicile of origin.

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75. Restatement, supra note 10, comment (b) P. 78

76. Op cit, supra note 51.

The difficulty in shaking off the domicile of origin could therefore glaringly be seen from the discussion above. It is much easier to change a domicile of choice, and although this can be abandoned completely, a domicile of origin cannot.

c. Domicile of Dependence

Domicile of dependence is established or conferred by law on certain persons who either because of an incapacity arising from age, marriage or lunacy or unsoundness of the mind are incapable of acquiring a domicile on their own.

In all legal systems, domicile of dependence is recognised and persons who fall within this category are lunatics, infants or minors, and until 1973 in England, married women also. In Nigeria however, women still fall within the category of persons who have a dependence domicile.

The principles of dependence domicile were expounded in the case of Henderson V. Henderson [77] where, in a petition for divorce by a wife against her husband the issue fell to be determined whether the domicile of origin of the husband was his father's domicile at the time of his birth which was Scottish, or the Father's English domicile which the father had acquired after the husband had attained his majority.

In holding that the domicile of origin was the domicile of dependence at the time of birth and not at the date of majority, and that, therefore the husband's domicile of origin was Scottish, Sir JOCELYN SIMON, P. said:

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77. Op cit note 34 supra at P. 79

> "Domicile is that legal relationship between a person (called the propositus) and a territory subject to a distinctive legal system which invokes the system as the personal law of the propositus and involves the courts of that territorial area in having primary jurisdiction to dissolve his marriage..... The relationship arises either, on the one hand, from the propositus being or having been resident in such territorial area with the intention of making it his permanent home or, on the other, from there being or having been such a relationship on the part of some other person on whom the propositus is for this purpose legally dependent. Thus a wife is for this purpose legally dependent on her husband, and a legitimate child on his father. This type of domicile of the child and the wife is termed a domicile of dependence. The domicile that the child derives from the father is also known as his domicile of origin."

It is interesting to note that although a domicile of dependence arises from lack of capacity to acquire a separate domicile,once that incapacity is removed the person is free to acquire an independent domicile. But he nevertheless retains his dependent domicile upon acquiring such capacity, and may abandon it at anytime thereafter by exercising his capacity.

i. Domicile of Minors

Since an infant's domicile of origin at birth depends on that of the parent on whom he is dependent, any changes in the parent's domicile during the continuance of that dependency will also affect the child's domicile. As noted above, at birth an illegitimate child has the domicile of its mother and a legitimate child has the domicile of the father. Therefore, if any of these parents acquires a domicile of choice, the child's dependent domicile becomes that of the newly acquired domicile of choice of the parent.

Upon reaching majority however, the infant or minor is capable of forming the necessary intention to change his domicile. He may therefore change his domicile by manifesting the necessary intention and residence.

It is worth noting that whereas it has long been settled that a female minor who marries gets her husband's domicile, the position was not clear in respect of a male minor who gets married until when the Domicile and Matrimonial Proceedings Act came into operation in England in 1974. The position now seems settled because section 3(1) of the Domicile and Matrimonial Proceedings Act 1973, specifically provides that a child has the capacity to acquire an independent domicile at the age of sixteen or upon marriage under that age. But the problem is just partially solved because the Act has not provided for the recognition of a marriage by a child who is under sixteen. Such a marriage is prohibited by English Law.[77a]

When the parents of a child had lived together and separated, the inference is that the child's domicile is the same as that of the father. If however the child is neither living with the father nor with the mother, his position is now determined by section 4(2) of the Act. Under that section, the child takes the domicile of the mother if he either has his home with her alone and not with the father or if he has continued his domicile with the mother and has not at anytime had a domicile with his father. The position is not affected when the child is illegitimate because then the domicile remains that of the mother.

77a. S. 2 Marriage Act 1949

If the child's father is dead, the child acquires the mother's domicile and changes with it. The only difference here is that such a change is not automatic as in the case of the father's change of domicile. The reason behind this is perhaps because the mother's domicile is also liable to change upon re-marriage, and such domicile which she acquires upon re-marriage may not be in the best interest of the child, and the domicile of the infant in such a case can only be changed for his benefit. In Re Beaumont[78] STIRLING, J. observed:

> "..... the better view is that the change in the domicile of an infant which, as is shown by the decision in potinger V. Wightman, may follow from a change of domicile on the part of the mother, is not to be regarded as the necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infants, which in their interest she may abstain from exercising even when she changes her own domicile."

Upon the death of the mother, if both parents were living together a legitimate child's domicile remains that of the father and is not affected by the mother's death. But the child retains the mother's last domicile if the parents were living apart before her death. This however depends on two conditions being fulfilled by virtue of section 4(3) of the Domicile and Matrimonial Proceedings Act. First the child must have had the mother's domicile by virtue of having his home with her and not with the father and must have retained that domicile at all material times without at any time having been domiciled with the father.

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78. (1893) 3 Ch. 490 at 496

The American law [79] has provided for a situation where both parents of the child are dead. In such a situation, the domicile of the child at the time of such death continues to be his domicile until it is changed either through guardianship or emancipation.

In England the Domicile and Matrimonial Proceedings Act does not seem to cater for this type of situation. But Graveson[80] contends that as a general rule the domicile of the child would continue to be that of the parent whose domicile it had at the time of death.

The domicile of an adopted minor child is that of the adoptive parent. The effect of an adoption is to bring into existence a new parent - child relationship to replace that which formerly existed between the child and its natural parents. Section 4(5) of the Act of 1973 specifically provides that reference to the father and mother of an adopted child should be taken as references to his adoptive father and mother.

The domicile of the adopted child follows that of the adoptive parent and changes with it. If adopted by a husband and wife, the domicile of such adoptive parents becomes that of the child also, and upon divorce or separation of the adoptive parents, the principles which determine the domicile of a natural legitimate child applies. If the adoptive parent dies, the domicile of the adopted child at the time of such death continues to operate until subsequently changed. The view has been expressed that adoption does not change the domicile of origin of the adopted child.[81]

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79. Restatement, Supra note 10, section 22 comment (b)
80. Opcit. supra note 2 at P. 210
81. See Graveson, Opcit.supra note 2 at P.211.

Where the court grants the power of custody of a child to a guardian, it is the court rather than the guardian who determines the domicile of the child. The child cannot therefore acquire a domicile in a place not approved by the court. The guardian can only alter the domicile of the child if he has authority of the appointing court to do so. Where the guardian and the ward live in one place, that is the place of the appointing court, the ward takes the domicile of the guardian. But if the ward and the guardian live in different places, the ward does not take the domicile of the guardian.

Under the American rules of domicile[82], when both parents of the child are dead or when the child has been abandoned by both parents or by a surviving parent and no guardian has been appointed, the child acquires the domicile of the "person who stands in Locus parentis to him" and with whom he lives, even though such person is not his blood relative, or in the home of a grand parent. His domicile in this case however, does not follow that of either the grand parent or the person with whom he lives. It is only when the child actually lives with the person in his home that he acquires the person's domicile.

If the grand parent or other person having Custody of the child dies or abandons the child, or even acquires a new domicile, the domicile of the child does not change. Similarly, if the child ceases to live in the home of the grand parent or some other person, his domicile remains in that home until he acquires a new domicile.

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82. Restatement, Opcit. supra note 10 section 22 comment (i)

It is also generally agreed in America that owing to the social conditions of the country, an infant may acquire a domicle of choice if such infant is self supporting and independent. If an infant of either sex is married, he can also acquire a domicile of choice.

ii. Domicile of Lunatics or mentally disordered persons.

There does not seem to be any direct authority in English law on whether the domicile of a lunatic can be changed by himself or by the person having control over him The consensus of opinion however favours the fact that such domicile cannot be changed by either the lunatic himself or by the person having control over him. This is because the lunatic has no capacity of acquiring a domicile due to the absence of ability to exercise free will.

If the lunatic became insane only after he had come of age and had already chosen a domicile for himself, he continues to retain that domicile during the lunacy, and not even the father can change such domicile. The court, however may change the lunatic's domicile if that would be in his best interest. The consequences which might follow if the lunatic was married before he subsequently became insane were also unfolded by Sir J.P. WILDE in Sharpe V. Crispin.[83]

He said:

> "I can find no authority which defines the effect of a change of domicile in the father upon a lunatic son. It would probably depend upon circumstances. If a man had grown up, married and established himself in business in the country of his original domicile, and had afterwards become a lunatic, and in that state had been taken charge of by his father,

83. Supra note 66 at P. 618

> the emigration of his father to a foreign country with a view of becoming domiciled there, taking his son with him, might fail to work a change in the domicile of that son."

Similarly, if a child is of unsound mind during his childhood and the unsoundness continues after he reaches the age of majority, he retains the domicile of the father and any change in the father's domicile also has an effect on his own domicile. This is because according to Sir J. P. Wilde, "the incapacity of minority never having in this case been followed by adult capacity, continued to confer upon the father the right of choice in the matter of domicile for his son."

Graveson[84] has considered two other questions in relation to lunatics which have hitherto not received any judicial or academic attention.

The first question is what effect the lunacy of a propositus has on the domicile of his infant children whose domiciles are derived from his own. He suggests that the lunacy would not affect the domicile of the dependants and the courts should consider whether the lunacy of a head of the family should be sufficient to result in the conferment by the court of independent domiciles on the dependants.

The second question posed is what would be the resultant effect of the exercise, by the person in charge of the lunatic of the power conferred on him to change the domicile of the lunatic on the domiciles of his dependants?

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84. Opcit, supra note 2 at P. 214

If the lunatic be the head of the family, the effect is that the domiciles of the dependants also automatically change. This being so therefore, it is safer to always get the consent of the court before such person charged with the welfare of the lunatic exercises his power to change the lunatic's domicile.

Under the American law, "if a person, who was at one time mentally incapable of acquiring a domicile of choice regains this capacity, he may, if he is of full age, thereafter acquire a domicile of choice not withstanding the fact that a guardian of his person has been appointed.[85]" A similar position has been suggested in England.

iii. Domicile of Married Women

In England, a married woman's domicile was considered as a domicile of dependence until the end of 1973. The Domicile and Matrimonial Proceedings Act which came into effect in January 1974 has now made the former position of a married Woman obsolete.

Unfortunately however, the Nigerian married Woman is not yet free from the clutches of this "last barbarous relic of a wife's servitude.[86]" What obtained under the former English position is therefore very much prevalent in Nigeria of today.

Prior to 1974 in England, a married woman took the domicile of her husband for as long as the marriage lasted.

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85. Restatement, Opcit supra note 10, section 23 comment (e)

86. Per Lord Denning in Gray V. Formosa (1963) P.259 at 267.

At the moment of marriage, the wife lost her domicile of origin and any other domicile of choice she might have had before the marriage. This statement is true if the marriage is valid or voidable. If it is void or a nullity by reason of its being bigamous, the wife retains her own domicile. As long as the wife retains the domicile of her husband, her domicile of origin remains in abeyance. It is not lost and she could revert to it by operation of law. She may however by her own act acquire a new domicile of choice or another domicile of dependence upon remarriage.

In Re Cooke's Trusts [87] the testatrix was an infant domiciled in England when she got married to a domiciled Frenchman. After a few years of marriage, the wife separated from her husband and after she believed he had died, married an English man and lived in New South Wales with him. She remained in New South Wales from the date of the marriage until her death twenty-six years later. Unknown to her, the French husband had died only two years before her death. A year before her death she made a will disposing of her property "as if she were an English woman." On her death her children filed a petition claiming legitimate portions of her property according to French law. The question was whether the English or French law governed the rights to her property and whether the children were entitled to the property. To answer the question as to the essential validity of the will the court had to determine where the testatrix was domiciled at the date of her death. It was held that she died domiciled in New South Wales.

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87. (1887) 56 L.T 737

While admitting that the wife's domicile depended on that of her husband and that "so long as the husband..... lived she could not acquire any other", STIRLING, J. was of the view that since the testatrix had gone to New South Wales with the intention of making it her permanent home:

> "there is no reason to doubt that, that intention continued during the period which elapsed between the death of the viscount in 1877 and her own death in 1879. There existed, therefore, during that period, the two elements necessary for the acquisition of a domicile of choice, namely, actual residence and intention permanently to reside."88

It was not considered necessary for the testatrix to "elect" a domicile in New South Wales, for as contended by the children, she went there "and lived there because she believed herself to be the petitioner's wife and exercised no choice in the matter." But while agreeing with this contention that her motive in going to New South Wales was doubtless to live with a man she believed to be her husband, STIRLING J. believed that "the existence of any particular motive is immaterial except so far as it throws light on the intention of the person as regards residence."

The possibility of the revival of the domicile of origin of a widow was also considered in this case by the judge. He said:[89]

> "Her French domicile was an acquired one, and consequently capable of being abandoned without the necessity of acquiring a new domicile of choice. The viscountess from 1846 or earlier ceased to reside in France and went to reside permanently elsewhere, and consequently she had during the last two years of her life,

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88. at P. 738
89. at P. 739

> animo et facto, put an end to her French domicile, and if she did not acquire a domicile in New South Wales, her domicile of origin, which was English, would revive according to the decision in Udny V. Udny."

In Re Wallach[90] however, the court rejected the argument that a widow, whose husband had acquired a domicile of choice in England at the time of his death, was no longer subject to his domicile and upon his death her domicile of dependence was extinguished and her domicile of origin revived. The court held that the domicile of the married widow who was of French origin was one of choice to be changed by some positive act on her part.

The decision in Re Wallach has been criticised by Graveson [91] who contends that since at the time of the death of the husband it is his domicile that controls that of the wife, and upon his death the relationship of husband and wife is extinguished and the husband loses his domicile of origin and choice and "leaves his widow in the position of a feme sole", the woman could:

> ".....in most cases.....acquire a domicile of choice of her own, on the authority of Re Cooke's Trusts, corresponding to her former domicile of dependence for she will have resided with her husband with the intention of making that residence her permanent home. But this is not so in every possible case, and certainly not on the facts of Re Wallach. To invoke the domicile of origin in such a case is not merely to act in accordance with the highest judicial authority on the ending of a domicile of choice (of the husband) or the domicile of dependence of the wife, but to do so in accordance with the requirements of justice."

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90. (1950) I All E.R 199

91. Graveson, Domicile on the ending of dependence, (1957) 6 I.C.L.Q.I.

In Re Scullard[92], the testatrix left her husband, a domiciled English man, in 1908 and never lived with him again until his death in England in 1955. She settled in Guernsey in 1946 with the object of being near her daughter and expressed an intention of residing there until her death. When her husband died, she had no knowledge of his death and she died about a month after the husband's death. Between the time of his death and her own, she expressed no further intention of continuing to live permanently in Guersey. On the question whether at the date of her death she was domiciled in Guernsey or elsewhere;

It was held that she had acquired a domicile of choice in Guernsey as no other act on her part was required after her husband's death to indicate her intention since this had been previously expressed and should be presumed to have continued until her death. DANKWERTS, J. said:[93]

> "I have come to the conclusion in the present case that the intention which the testatrix had infact formed during her life time was only prevented by a rule of law relating to the domicile of a wife from being effective in law; and I do not see why it should not be assumed that her intention continued after the death of her husband and why one should come to the conclusion that some new overt act was required when all previous evidence is consistent with there having been no different intention during her life."

If the husband and wife are living apart, American law recognises the wife's right to acquire a separate domicile of choice.[94]

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92. (1957) Ch. 107

93. at P. 117

94. Restatement, Supra note 10 at P.83

In Enland before the 1973 Act, the position was that a deserted wife could bring a suit for divorce only in a state where her husband had chosen to establish his new home regardless of how distant the state might be. This common law rule has been modified, and for divorce jurisdiction once a husband has given his wife a cause to seek for divorce, he no longer had the right to change her domicile. Her domicile therefore remained in the place where the parties had lived together prior to the desertion. The wife was also given the freedom to acquire a domicile in any place she chose to go.

It would also seem now that where the wife and the husband are living apart voluntarily, and their relationship is a-micable, the wife could acquire a separate domicile of choice. In this respect therefore, the Domicile and Matrimonial Proceedings Act, 1973 has brought about alot of welcome changes in the law of domicile in England. Whether or not to adopt these changes completely in Nigeria or modify them to suit local conditions would be considered in chapter six.

CHAPTER FOUR

THE CONCEPT OF DOMICILE UNDER THE MATRIMONIAL CAUSES DECREE 1970.

It must be pointed out from the outset that the Nigerian Matrimonial Causes Decree, 1970, is not a legislation on domicile. It does not therefore seek to lay out in details all the general principles of domicile. Its scope is limited to the application of the concept only as a basis of jurisdiction in matrimonial causes.

The discussion in this chapter would, therefore, be limited to the consideration only of those areas of the Decree where the concept of domicile is relevant. Before that however it is first necessary to consider the history or development of the Decree.

Prior to the commencement of the Decree on 17th March, 1970, English law on Matrimonial Causes applied throughout Nigeria by virtue of Section 4, of the State Courts (Federal Jurisdiction) Act 1958[1] which provides thus:

> The jurisdiction of the Highcourt of a state in relation to marriages, and the annulment and dissolution of marriages and in relation to other matrimonial causes shall, subject to the provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the court in conformity with the law and practice for the time being in force in England".

By virtue of this provision therefore, any change which

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1. Cap.177, Laws of the Federation and Lagos, 1958.

took place in England in relation to matrimonial causes also applied to Nigeria. This is rather ridiculous since the circumstances which might have necessitated a change in England may not have existed in Nigeria at all.

Upon its coming into force, the Decree did not make Nigerian law on Matrimonial causes independent. This is because under section 98 (1) of the Decree:

> the law to be applied, and the practice and procedure to be followed, in and in relation to pending proceedings being proceedings for a Decree of dissolution or nullity of marriage or of judicial separation, shall be the same as if this Decree had not been made.

The Provision could be justified on the basis of the need to ensure continuance and not upset the settled expectations of the parties to the pending proceedings before the coming into force of the Decree.

One must also appreciate the fact that under Section 112(1) of the Decree, until the Chief Justice of Nigeria after consultation with the Chief Justices of the States and the Presidents of any of the Courts of Appeal therein, make any rules for practice and Procedure of the Courts having jurisdiction under the Decree, the rules of Practice and procedure for the time being in force in England continue to apply with necessary modifications until revoked by the rules of court to be made by the Chief Justice (underlining mine). This is an improvement upon the hitherto existing provisions of section 4 of State Courts (Federal Jurisdiction) Act which made English rules of Practice and procedure subject to any rules of practice and procedure that might have been

made by the Courts of a state.

It has also been suggested that English commonlaw rules and the doctrines of equity and statutes of general application still apply "as residual laws in filling the gaps existing in the Decree..... Thus on the question whether a domicile of choice has been acquired or whether the petitioner's conduct amounts to condonation or connivance, the common law rules still apply".[2]

The Matrimonial Causes Decree is based on the Australian Matrimonial Causes Act, 1959 which also provides uniform grounds for divorce, nullity and other matrimonial causes throughout the Federation of Australia, and the Divorce Reform Act, 1969 of England. However, Adesanya contends that the way the Nigerian Matrimonial Causes Decree was enacted "left much to be desired" because there was too much secrecy in its enactment. The Decree was neither debated upon nor discussed in public before its formal enactment.[3]

In relation to the concept of domicile, the Decree creates a Nigerian domicile for purposes of matrimonial causes, thereby bringing to an end the judicial confusion which had clogged Nigerian law before the commencement of the Decree.[4] The Decree provides under Section 2(2) that proceedings for a decree of dissolution or for a decree of

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2. Adesanya, S.A. Laws of Matrimonial Causes (1973) p.2
3. Ibid
4. see chapter 2 above.

nullity of a voidable marriage shall be instituted only by a person domiciled in Nigeria. Subsection (3) states that a person domiciled in any state of the Federation is domiciled in Nigeria for the purposes of the Decree.

Section 7 of the Decree contains special provisions for removing hardships hitherto experienced by wives. It provides that a wife who has been deserted by her husband and was domiciled in Nigeria either before her marriage or immediately before the desertion shall be deemed to be domiciled in Nigeria. It also recognises three years' residence as enough to confer domicile for purposes of proceedings under the Decree.

Realising the difficulties inherent in the application of the traditional conception of domicile in matrimonial causes by Nigerian Courts and the confused legal picture it has given rise to, the Decree provides that a person domiciled in any part of the Federation is to be considered as domiciled in Nigeria and could institute proceedings for dissolution of marriage, nullity of a voidable marriage, nullity of a void marriage, judicial separation and restitution of conjugal rights in any state of the Federation. Thus an Iboman domiciled in Anambra state could go to Gusau in Sokoto state and institute proceedings for a decree of dissolution of his marriage in the Gusau Highcourt.

Prior to the commencement of the Decree as noted above, considerable amount of confusion and uncertainty had prevailed in Nigerianlaw and this was a result of two decisions on Nwokedi V. Nwokedi [5] by the High Court of the Federal Territory of Lagos

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5. (1958) L.L.R.94

, and the other Okonkwo V. Eze [6] by the Northern Nigeria Highcourt. It was held in Nwokedi V. Nwokedi that there was only one domicile for the purposes of matrimonial causes and that was the Nigerian domicile. But in Okonkwo V. Eze it was held on the analogy in relation to jurisdiction of the Highcourt in England in relation to dissolution of marriages where the domicile of the husband has to be England, that the jurisdiction of the Northern Region Highcourt is also confined to cases where the husband is domiciled in Northern Region. In other words the court recognised that a person can only be domiciled in one of the Regions and not in Nigeria as a whole for purposes of matrimonial causes.

To the extent that the Matrimonial Causes Decree has removed the confusion and uncertainty in the Nigerian Law of Matrimonial causes, it has made a unique and timely contribution.

It has also relieved a deserted wife from the hardship inherent in the concept of the unity of domicile of husband and wife by allowing her to retain the domicile she had before the marriage or prior to the desertion instead of her domicile following that of the deserting husband wherever he might be. This concept of the unity of domicile has received various criticisms and has been described by a Nigerian writer as "a fiction to maintain conjugal felicity and marital unity. The stringent application of this principle in order to sustain an already broken marriage

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6. (1960) NRNLR 80

strikes at the very root of the theory which over the years has suffered considerable attenuation."[7]

Similarly, to the extent that section 8 of the Decree ousts the application of current English rules of practice and procedure in relation to matrimonial causes, it has gone a long way towards evolving a truly Nigerian Matrimonial Causes Law. In spite of section 8 however, Professor Adesanya[8] has contended that:

> those rules of English law including the rules of Private International law which have been incorporated into Nigerian Law, continue to apply in the appropriate cases and in so far as they have not been altered or affected by the Decree or other relevant legislation. They apply not because they are English law as such but because they are now part of Nigerian Law. That being so the common law classification and meaning of domicile continue to apply".

With due respect to the learned author it is suggested that it would be incorrect to talk about"Principles of English Law" since, according to the learned author, they apply not because they are English law but because they have become part of the Nigerian Law. It is therefore better to simply refer to them as Nigerian Principles which have not been expressly mentioned in the Decree.

Domicile is also recognised as a basis for according recognition to foreign divorce or nullity Decrees. Section 81 of the Decree deals with the recognition of foreign

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7. Karibi-Whyte, A.G., Nigerian Divorce domicile — Federal or Regional? (1964) Nigeria Lawyers' Quarterly 7 at p.18

8. Op.cit, supra note 2 at pp 14-15

decrees. Sub section (2) of the Section states:

> A dissolution or annulment of a marriage effected in accordance with the law of a foreign country shall be recognised as valid in Nigeria where, at the date of the institution of the proceedings that resulted in the dissolution or annulment, the party at whose instance the dissolution or annulment was effected (or if it was effected at the instance of both parties, either of those parties):
>
> (a) in the case of the dissolution of a marriage or annulment of a voidable marriage, was domiciled in that foreign country; or
>
> (b) in the case of the annulment of a void marriage, was domiciled or resident in that foreign country".

This provision is logical in the sense that since all matters of personal status are determined by the law of the domicile, it is only necessary to recognise as valid any status or decree created and recognised by the country of the domicile. This recognition is also necessary on the basis of reciprocity since Nigerian courts would wish a divorce or nullity decree granted by them on the basis of domicile to be recognised in all other states.

Under paragraph (b) of the subsection, a decree of nullity of a void marriage granted by a court of the petitioner's place of residence would be recognised in Nigeria. Since residence is not a basis of jurisdiction in any of the courts in Nigeria having jurisdiction over matrimonial causes, a decree of divorce or nullity cannot be granted by a court in Nigeria. But a similar decree granted by a foreign country using residence as a jurisdictional basis would be recognised in Nigeria.

Section 81 (3) states as follows:

> For the purposes of subsection (2) above —
> (a) where a dissolution of a marriage was effected in accordance with the law of a foreign country at the instance of a deserted wife who was domiciled in that foreign country either immediately before her marriage or immediately before the desertion, she shall be deemed to have been domiciled in that foreign country at the date of the institution of the proceedings that resulted in the dissolution; and
> (b) a wife who, at the date of the institution of the proceedings that resulted in a dissolution or annulment of her marriage in accordance with the law of a foreign country, was resident in that foreign country and had been so resident for a period of three years immediately preceding that date shall be deemed to have been domiciled in that foreign country at that date.

What follows from this provision is that a decree granted by a foreign court as a result of a jurisdiction founded on the basis of a "deemed domicile" of a deserted wife shall be recognised as valid in Nigeria. This is because by virtue of section 7 (a) and (b) such " deemed domicile" is also a basis upon which Nigerian courts can exercise jurisdiction and grant a decree to a deserted wife. This is an extension to Nigeria of the English rule in Travers V. Holley[9] where it was held that a foreign divorce obtained by a wife would be recognised in England if the English court would, with necessary changes, have had jurisdiction to grant her a divorce under section 40(1) (a) and (b) of the Matrimonial Causes Act, 1965.

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9. (1950) p.246

In England, section 2 of the Recognition of Divorces and Legal separations Act 1971 provides for the recognition of foreign divorces obtained either by means of judicial or other proceedings and are effective under the law of the foreign country. The Section has therefore abolished the Rule in Travers V. Holley.

By section 3(1) of the Act, foreign Divorces are now recognised in England if at the date of the institution of the proceedings (a) either spouse was habitually resident in the foreign country or (b) either spouse was a national of that country. Section 3 (2) of the Act provides that in relation to a country which uses the concept of domicile as a ground of divorce jurisdiction, section 3 (1) (a) shall have effect as if the reference to habitual residence included a reference to domicile within the meaning of that law. It therefore follows that if a Nigerian court grants a divorce decree on the jurisdictional basis of domicile, such a decree would be recognised in England. Similarly, by section 81(3) (b) of the Matrimonial Causes Decree, a divorce decree obtained in England on the basis of habitual residence would be recognised in Nigeria.

Under section 81(4) of the Decree, a foreign divorce or nullity decree would be recognised even though the decree was not granted in the petitioner's country of domicile but is recognised in the country where it was obtained. This is an extended application of the English rule in Armitage V. Attorney-General[10] where it was held that a foreign divorce

10. (1906) p.135

would be recognised in England if it would be accorded recognition by the courts of the country in which the parties were domiciled. The justificaton for the rule was that if the status of the parties is changed or is regarded as changed in the country of their domicile, such a change of status should also be recognised as changed in England.[11]

The Nigerian rule could be justified on the ground that it is not the business of our courts to inquire into how a decree was obtained provided it is valid by the laws of the country where it was obtained. Thus for instance, if Hassan who is domiciled in Gabon obtains a decree of dissolution of his marriage in Ghana on the basis of three months' residence there, such a decree would be accorded recognition in Nigeria so long as it is recognised in Gabon, which is Hassan's country of domicile.

It would be seen from the above discussion therefore that only three sections, viz. 2(3), 7 and 81 of the Matrimonial Causes Decree deal directly with the concept of domicile; this is however limited only to the extent that the concept is relevant in matrimonial causes. The need to evolve a Domicile Act as has been done in NewZealand cannot therefore be over-emphasised in Nigeria today.

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11. Morris, J.H.C, The conflict of laws (1984) P.194

CHAPTER FIVE

DOMICILE OF CORPORATIONS

It has been contended that "the term domicile is inapplicable to a corporation, or, if used at all, it must have a substantially different meaning than when used in connection with an ordinary person. If the term is to be used at all, it will be found that a corporation has not only a domicile but many domiciles."[1]

The English law of domicile treats corporations or legal persons like human beings as far as the rules for determining the domicile and residence of such juristic persons are concerned. Although the domicile concept was evolved with human beings in mind, its application to corporations has become increasingly important even though with certain modifications.

According to Morris, [2]

> A corporation is not born (though it is incorporated); it cannot marry(though it can be amalgamated with or taken over by another corporation); it cannot have children (though it can have subsidiaries); it does not die (though it can be dissolved or wound up) Hence most of the occasions for determining the domicile of an individual do not arise in the case of corporations"

The concept of domicile is relevant to corporations because of the need to ascertain whether or not they have corporate personality, whether they are existing or dissolved

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1. Francis, J.F, The Domicile of a corporation (1929)38 Yale L.J 335 at 340
2. Morris, J,H.C, The Conflict of Laws, (1984) p.31.

or whether they have been merged or taken over. It is the law of the domicile of a corporation that determines these issues.

Factors that connect a corporation with a particular country may be presence, domicile, nationality and residence. The definition attached to each of these factors varies from one country to another and the law relating to corporations in various countries therefore differs. It is these differences brought about by diverse interpretations of the personal law of a corporation that have led to the emergence of three doctrines to determine this. These doctrines are:

a. The doctrine of the centre of administration or siège Social

This doctrine envisages the application to a company of the law prevailing in its area of commercial transactions. Where no commercial transactions are carried on, the law of the place where the functions of the corporation are discharged is to be applied. Usually, the memorandum or statute bringing into effect a corporation designates a particular place as its seat. Where the seat could not be found in either the memorandum or the statute or where the place designated as the seat is fraudulent or fictitious, the real seat of the corporation is to be determined by where the centre of management is. This doctrine prevails in France and most other civil law countries. Wolff[3] has described this doctrine as "sound and satisfactory" because the criteria

3. Wolff, M, Private International Law (1952) p.297

chosen for determining the real seat can be cross-checked by anyone who carries on business with the corporation.

b. Doctrine of the "exploitation centre".

This doctrine, which has been proposed to replace the centre of management doctrine, states that it is the work that a corporation carries on that matters and the determining place should be where the corporation "executes its purpose, carries on its principal physical labours, exploits its coal mine, runs its saw mill or its factory"and not where the board of directors meet and decide the way the work should be carried out or where the share holders hold their meetings.[4]

This doctrine has not received much support either in the common law countries or on the continent. It has been criticised for overlooking the fact that "the commercial part of the business such as the buying of raw materials, the selling of products, the conclusion of contracts with banks ..... is carried on neither at the mine or factory but at the place of management" and that companies in most cases possess more than one central point of exploitation. PHILLIMORE, J in De Beers Consolidated Mines Ltd., V. Howe[5] has stated that the residence of a corporation is "where its business of control is carried on, even though its physical labours are abroad".

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4. Ibid at p.298
5. (1905) 2 K.B, 612 at 631

c. Doctrine of the place of incorporation.

This doctrine is "rooted in the achaic conception that the grant of legal personality to an inanimate being is as it were an exceptional act of grace and that it is the granting state that imposes the law under which the artificial person shal live".[6] This doctrine has no validity today since corporations come into existence by the promoters simply complying with the requirements of the law. It does not always follow that because a company is established under the laws of Nigeria it must have its seat here.

Of the three doctrines, the doctrine of the real seat prevailing in France seems to be more practical and therefore preferable. It is therefore necessary to consider the judicial opinions that have been expressed in this field of the law with a view to suggesting which of the doctrines Nigeria should adopt. A detailed consideration of the connecting factors that have been employed by English law in determining the personal law of a corporation would also be made. Some general principles of domicile in relation to corporations is therefore necessary at this stage.

One of the fundamental distinctions between a corporation and a natural person in relation to domicile is that the corporation cannot change its domicile out of its own free will. It has been stated in Gasque V.Inland Revenue Commissioners[7] by Lord MacNaghten that:

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6. Wolff, op.cit. supra note 3 at p.299
7. (1940) 2 K.B.80 at 84

> ..... a body corporate cannot have domicil in the same sense as an individual any more than it can have a residence in the same sense as an individual. But by analogy with a natural person the attributes of residence, domicile and nationality can be given..... to a body corporate. It is not disputed that a company formed under the Companies Acts, has British Nationality though, unlike a natural person, it cannot change its nationality. So too, I think, such a company has domicile ——— an English domicile if registered in England, and a Scottish domicile if registered in Scotland. The domicile of origin, or the domicile of birth, using with respect to a company a familar metaphor, clings to it throughout its existence".

In a later case of Carl Zeiss Stiftung V. Rayner and Keeler Ltd (No.3)[8] BUCKLEY, J stated thus:

> The word "domicile" is sometimes used by English lawyers in respect of a corporation aggregate, and such use is, I think, by way of analogy to the use of the word in respect of a natural person. I doubt if this analogy is altogether satisfactory. As I understand the law, the word "domicile" in respect of a corporation aggregate must refer to that country the law of which is the proper law of the corporation, that is, the law governing its constitution and powers. A corporation cannot, I think, of its own volition, and apart from its proper law, abandon one domicile and adopt another, as a natural person can. Its primary domicile must be under that law under which it was incorporated. It must, however, I think, be at least theoretically possible that by operation of the proper law for the time being of a corporation, another system of law may be substituted as the proper law of the corporation".

The above confirms that in theory a corporation can change its domicile if such a change is authorised by the law of the existing domicile. But such a change has to also be recognised by the law of the new domicile.

The domicile of the persons making up the corporation have no bearing whatsoever on the domicile of the corporation itself. Thus for example, the United Africa Company (U.A.C.) of

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8. (1970) ch.506 at 544

Nigeria Ltd has its domicile in Nigeria by virtue of its incorporation under the Companies' Act, 1968. Its shareholders however include foreigners who are domiciled in France, America or England. The following factors are therefore relevant to corporations:

a. Domicile.

It is generally agreed that a corporation has its domicile in a country under whose law it is incorporated.[9] Thus questions concerning the status of the corporation and its corporate personality must be determined by the law of the domicile. This domicile cannot be changed and it is independent of any choice of either juristic entity or the persons constituting it.

Unincorporated associations take their domiciles in their place of creation or registration.

b. Nationality.

The nationality of a corporation depends on the country of its registration or incorporation. It does not in any way depend on the nationality of the members constituting it.

An opinion has however been expressed in Daimler Tyre Company V. Continental Tyre Co.[10] that whether or not a corporation would assume an enemy character would depend on its agents or the persons de facto in control of its affairs.

> The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and conduct

9. Dicey, The Conflict of Laws (1973) p.702 Rule 139
10. (1916) 2 A.C307 at 308

> may be material on the question whether the company's agents or the persons defacto in control of its affairs are in fact adhering to, taking instructions from or acting under the control of enemies.

However, the separate legal entity of the corporation is the sole factor to be considered in determining whether or not its property are liable to seizure as enemy property. In the continental legal system, the nationality of the corporation is the country where its centre of management exists.

For purposes of jurisdiction a company registered in an enemy or enemy-occupied country is an alien enemy unless the control of its affairs is shifted to a country not occupied by the enemy. However a company registered in Nigeria and carrying on business here may acquire enemy character by reason of hostile residence or activities of its agents or other persons in de facto control of its affairs.

c. Residence.

For the purposes of income tax, the residence of a corporation is the basic connecting factor between the corporation and the taxing state or legal system. However in determining the residence of a corporation, the place of incorporation is relevant, but it is not the sole consideration and is not conclusive. Thus Dicey has stated that "a corporation is resident in the country where its central management and control is exercised.

If the exercise of central management and control is divided between two or more countries, then the corporation is resident in each of those countries"[11].

In Cesena Sulphur Co. V. Nicholson[12] a company was incorporated in England for the purpose of carrying on business in Cesena, Italy. The managing director and other staff of the company were Italian and permanently resident in Cesena, Italy. The company was registered in Italy and all the books of account were in Italy and majority of the shareholders were Italians resident in Italy. However, the memorandum of association set up a Board of Directors in London which controlled the general business of the company. Shareholders' meeting were also held in London where dividends were declared. It was held that the residence of the company was in England since the main place of business of the company was in London. It was therefore liable to pay tax on profits wherever earned.

In De Beers Consolidated Mines Ltd. V. Howe[13] a company was incorporated and registered in South Africa but had an office in London. The essential part of its business was the sale of Diamonds from its mines in South Africa to Merchants in London. The contract of sale were executed in London, the general meetings of the company were held in South Africa and the directors met weekly in South Africa and London with an interchange of minutes between the two places. The majority of the directors was always in London and all majority decisions relating to the operations of the company had come from London, and the chief control of the company's affairs resided in London.

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11. Op. cit, supra note 9 Rule 40 at PP. 703-704
12. (1870) 1 Ex.D 428
13. (1906) A.C 455

It was held that the conclusion to be drawn from the facts was that the company was residing in the United Kingdom and was therefore subject to income tax even though the profits were arising solely from the sale of diamonds in South Africa.

Lord Loreburn while disagreeing with the contention that a company resides where it is registered said.[14]

> "In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can upon the analogy of an individual. ACompany cannot eat or sleep, but it can keep house and do business. We ought, therefore, to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law, and yet escape the appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad. The decision of Kelly C.B. and Huddleston B. in the Calcutta Jute Mills V. Nicholson now thirty years ago, involved the principle that a company resides for purposes of income tax where its real business is carried on. Those decisions have been acted upon ever since. I regard that as the true rule, and the real business is carried on where the central management and control abide.

What could be deduced from an analysis of these decisions is that it is the country where the management of a corporation is controlled in fact, and not where it ought to be controlled, that is the residence. Thus for example, the Union Carbide Nigeria Ltd has its own Board of Directors in Nigeria and is registered here. But in reality it is dependent on its parent company resident in America and is therefore controlled by it in practice. Going by the above decisions therefore, Union Carbide Nigeria is itself resident

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14. Ibid at p. 458

in America not withstanding the fact that its memorandum and articles of association may have provided for an independent legal entity in Nigeria freefrom external control. It could also be regarded as resident inNigeria for purposes of taxation.

According to Cheshire[15] the inference to be drawn from the decisions in Cesena and De Beers is that "for taxation purposes it is impossible for a company to have simultaneous residences in two or more countries".

In Swedish Central Rail Co. Ltd V.Thompson[16] Lord ATKINSON said:

> If the true rule be, as Lord Loreburn said, that the residence is where 'the central management and control abide', then, unless a thing can have two or three different and separate centres, it would appear to me to be quite impossible, according to the ordinary use of language, that 'the central control and management of a company' can at the same time abide in two or more different and separate places.

In that case a company was incorporated in 1870 in England with the object of constructing and working a railway in Sweden. It had the registered office in London In 1900 it leased its railway to a traffic company for fifty years at an annual rent to be paid in England. The company's articles were later altered for the purpose of removing the control and management of the company's business from England to Sweden and all meetings of the company from

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15. Cheshire, Private International Law (1979) p.190
16. (1925) A.C. 495 at 508

that date were held in Sweden where dividends were also declared. No profits were transmitted to the United Kingdom except in payment of dividends to the United Kingdom shareholders. The payment of the annual rent under the lease to the traffic company was also transferred to Sweden.

On appeal by the company against an assessment to income tax in respect of the rent of the railway, it was held by the special commissioners that eventhough the business of the company was controlled and managed from Sweden it was a person residing in the United Kingdom and therefore liable to the assessment. The decision of the special commissioners was affirmed by the House of Lords who held that the company might have a residence in England as well as abroad and that on that assumption, there was evidence to support the conclusion of the commissioners.

Four years later in Egyptian Delta Land and Investment Co. V. Todd,[17] the appellant company was incorporated in 1904 in England but had all its minutes books, meetings of directors, the seal of the company and all books of accounts in Egypt. It was assessed in England for income tax in respect of interest accruing from Mortgages and leases of land made in Egypt. The House of Lords affirmed the finding of the commissioners that the company was not resident in England but only in Egypt, and discharged the assessments.

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17. (1929) A.C. 1

Cheshire[18] has contended that "these two decisions confuse rather than enlighten the law". The decision in the Egyptian case is a departure from the House of Lords' ruling in the Swedish case that a company could be resident in two places. The Swedish case cannot be reconciled with the decision of the House of Lords in De Beers Consolidated Mines Ltd. V. Howe[19] that a company resides where its real business is carried on and that the real business is where the central control and management abide. Cheshire however concludes that the joint effect of the decisions in the Swedish and Egyptian cases seems to be that where control is evenly divided between two or more countries and it is not possible to identify any one country as the place of central control, then the company ought to be regarded as resident in each country in which control is exercised to a substantial degree.

Thus in Unit Construction Co. Ltd. V. Bullok (Inspector of Taxes[20] three subsidiary companies which were wholly owned by a company resident in the United Kingdom were registered in Kenya. The Boards of the three subsidiaries situate in Kenya, were entirely distinct from the boards of the parent company but none of those boards ever either took any decision as a board or were summoned to meet as a board, and the real control and management was exercised by the board of the parent company. That arrangement was not authorised by the articles or memoranda of the subsidiaries. The appellant company, also a subsidiary

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18. Op. cit, supra note 15 at P.191
19. supra, note 13
20. (1960) A.C. 351

of the parent company, made certain payments to the Kenya subsidiaries which it claimed to deduct in computing its profits for the purposes of its assessments to income tax. It was admitted that if the Kenya subsidiaries were resident in the United Kingdom, then the payments in question were subvention payments which the appellant company was entitled to deduct.

It was held that it was the actual place of management of the company and not the place where it ought to be managed which fixed the residence of a company and by that test the company was resident in the United Kingdom. Viscount Simonds said[21] " it must now be regarded as clear law that an artificial person may, like a natural person, have more than one residence" But Lord RADCLIFFE[22] was of the view that the decision in Swedish Central Railway Co. case led to the

> novel idea that there were some circimstances that could establish residence for a company, even though its central management and control were being concurrently exercised elsewhere. Unfortunately it is impossible to discover from the decision what exactly those circumstances are, because, as so often arises under income tax procedure when judgement is given on cases stated by commissioners, the conclusion of the House involved nothing more positive than that the commissioners who heard the case had facts before them upon which it was open to them in law to find that there was English residence. Conversely, when the case of Egyptian Delta Land and Investment Co. Ltd. V. Todd reached this House in 1928, it was held that upon the facts not markedly dissimilar from those of the earlier case, the commissioners were entitled to find that there was no residence in England. With these two decisions of ecual authority to be reckoned with I think that it is impossible for anyone today to declare

21. Ibid at p. 361
22. Ibid at pp. 367-368

> with any conviction what are the circumstances , or what is the combination of circumstances, that constitute residence for a company in one taxing jurisdiction at a time when the central management and control of the affairs are being actively conducted in another .

He therefore expressed the view that the decision in the Swedish case was unfortunate.

In the American legal system, the domicile of a corporation is in the state where it is incorporated or created. It is believed that since all natural persons must have a domicile, a corporation, being a 'person' must have a domicile also.

According to Beale,[23]

> A corporation must come into being in the state by which it is created and there it must first be located and have its domicile, and since it can have no legal existence outside of the incorporating state, it would seem clear, that it can never acquire any other domicile although the principal part of its business is done in another state, and this is theprevailing view.

It has been explained in the Restatement of the conflict of Laws[24] that domicile is used in more senses than the one used therein. For Example:

> 'Commercial domicile' appears in at least two contexts. In the field of taxation, it is sometimes used to indicate the state where a corporation, which has been incorporated elsewhere, maintains its main office and principal place of business. In the law of War 'Commercial domicil' or 'enemy domicil' is an expression frequently employed by the courts in determining whether

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23. Beale, The Law of Foreign Corporations (1904) at p.21 quoted in Francis, op. cit , supra note 1 at p.345
24. Restatement, second, Conflict of laws (1971) Vol.1 section 11 comment (i)

> enemy status should be attributed to a natural person or corporation. Here the term means actual and voluntary residence or the carrying on of business, in a hostile country or in territory occupied by the enemy..... Domicile in these different senses should be distinguished from domicile in the common law conflict of laws sense, which is the only meaning of domicile used in the Restatement of this subject"

Although the American law recognises the application of the concept of domicile to corporations, this recognition has whittled down considerably and the general view now seems to be that:

> "no useful purpose is served by assigning a domicile to a corporation. Most of the uses which the concept of domicile serves for individuals are inapplicable to corporations, which do not, for example, vote, become divorced, beget or bear children and bequeath property. Certain problems, as judicial jurisdiction and the power to tax and to regulate, are common both to individuals and corporations. But unlike an individual, a corporation has a state of incorporation..... "Attribution of a domicile to a corporation may lead to complications and confusion and should be avoided. There is danger that the word 'resident' in a statute will be construed to mean domiciliary as applied to coorporations for no other reason than that it has previously been given that meaning in the case of natural persons..... Results as this may be avoided by determining without regard to the concept of domicile what meaning such terms as'resident' and 'non-resident' should bear as applied to corporations in order best to effectuate the purpose of the statute in which they appear.25

Objecting to the application of the domicile concept to corporations, Francis[26] wrote thus:

> "the social interest of certainty does not require (make desirable) the rule that a corporation is domiciled in the state of its charter. Different purposes demand different rules, and it is submitted that the purposes for which domicile is considered are sufficiently different to warrant different treatment... It is submitted that it would be a step forward to abandon the concept of the domicile of a corporation entirely and substitute words and phrases that have some popular meaning when it is felt necessary to speak of the domicile of a corporation.

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25. Restatement section 11 comment (1)
26. Francis, op cit supra note 1 at P.357 - 358

> The rule that "the domicile of a corporation is in the state of i s creation expressed neither what the law is nor what it should be. If these conclusions are sound, further repitition of the rule must be charged to mental laziness, inertia, or complacent ignorance of the cases.
>
> The legal theories of corporations and the conflict of laws are badly cluttered up in outworn generalisation, reflective of earlier ages and earlier theories and different social struggles. What is most urgently needed in a clarification of these subjects is a drastic pruning of dead concepts and a sharpening of those retained....."

What Francis has suggested for America is also worthy of adoption in Nigeria whose present law on domicile of corporations is based on the English concepts.

It is suggested therefore that instead of wallowing in confusion as regards the true nature of domicile of corporations, the Nigerian courts should discard altogether the concept of domicile in its application to corporations and consider such circumstances as the domicile of the promoters, directors or shareholders in determining the law applicable to corporations.

In England, the French doctrine of 'real seat' has gained acceptance as far as domicile of corporations is concerned. The concept has been adopted by all the member countries of the European Economic Community (EEC). At a convention on jurisdiction and enforcement of judgments in civil and commercial matters in 1968, the six original member countries of the EEC (Belgium, France, Germany, Italy, Luxembourg and the Netherlands) adopted this concept of the 'seat' of corporation. Article 53 (1) of the convention provides that the 'seat' of a corporation or legal person is to be treated as the domicile.

When the United Kingdom acceded to the EEC in 1972 it enacted the Civil Jurisdiction and judgements Act in 1982 to implement the convention. Since the 'seat' of a corporation was a term unknown to English law therefore, section 42(3) and (4) of the Act laid out guidelines for determining the 'seat'. Thus a corporation has its 'seat' in the United Kingdom if (a) it was incorporated or formed under the law of a part of the United Kingdom and has a registered office or other official address in the United Kingdom or (b) its central management and control is exercised in the United Kingdom. It has its seat in a particular place in the United Kingdom if it has its seat in the United Kingdom and it has its registered office in that part, its central management and control is exercised in that part or it has a place of business in that part.[27]

It is suggested that the Economic Community of West African States(ECOWAS) should consider a similar convention along the same lines with a view to making it possible for member countries to carry out smooth social and commercial interactions.

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27. Morris, Op. cit, supra note 2 at P.81

CHAPTER SIX

A. THE REFORMS SUGGESTED IN THE ENGLISH LAW OF DOMICILE

The English conception of domicile has received a great deal of criticisms both in England and on the continent, the commonest of which is that it has hindered every attempt towards resolving the conflicts between the law of the nationality and the law of the domicile. It is these conflicts that have made it impossible to unify the rules of private international law in the world today. Regretably however, the English parliament, inspite of these criticisms, has not shown much enthusiasm towards reforming this area of the law. With the exception of the domicile of dependence of the married woman which was altered by the Domicile and Matrimonial Proceedings act, 1973, other areas of the law of the domicile which have received so much criticism have still remained intact. What infact led to the recognition of a separate domicile for a married woman was "the compromise between reluctance to contemplate a general change of the law of domicile and the simultaneous need to do justice to the deserted wife". [1]

It is the aim in this chapter, to discuss such areas of the law of domicile that have been subjected to serious criticisms in English law and to examine steps that have so far been taken towards reform. The suitability or otherwise, of adopting such suggested reforms or reforms to the Nigerian situtation would also be considered.

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1. Graveson, Conflict of Laws (1974)p. 220

One area that has received constant criticisms in the English concept of domicile is the excessive importance attached to the domicile of origin, especially its ability to revive to fill the vacuum between the loss of one domicile of choice and the acquisition of another. The difficulty of discharging the burden cast upon those who assert that a domicile of origin has been changed is also one of the criticisms associated with this doctrine of the domicile of origin.

Another is the intention which is unduly over - emphasised in the acquisition of a domicile of choice. The concept has also been criticised on the grounds that it is very difficult to ascertain and "it frequently departs from the ordinary man's conception of home"[2].

In September 1952 therefore, the Lord Chancellor in England appointed the Private International Law Committee with the general terms of reference to consider:

> "What amendments are desirable in the law relating to domicile, in view especially of the decision in Winans V. Attorney General (1904) A.C.287 and Ramsey V. Liverpool Royal Infirmary (1930) A.C.588 and whether in the light of any alterations which the committee may recommend, in that law, it appears desirable that Her Majesty's Government should become a party to the draft convention to regulate conflicts between the law of the nationality and the law of the domicile"[3].

In pursuance of these terms of reference the committee presented its Report in February 1954 in which they considered the questions of the revival of the domicile of origin and the nature of the domicile of choice. The committee realised that "the present law suffers from two serious defects which are illustrated by the cases mentioned in the question referred to us.

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2. Morris, J.H.C. The Conflict of Laws (1984) p. 32
3. First Report of the Private International Law Committee (1954) cmd 9068 paragraph 2.

These are (1) the excessive importance attached to the domicile of origin and (2) the difficulties involved in proof of intention to change a domicile"[4]. The committee admitted that in respect of proof of intention it may be:

> "extremely difficult to ascertain a person's true intention about his permanent residence, where this involves, as it often does, an investigation of the state of mind of a deceased person..... The undesirable results of this are obvious. Trials are apt to be long and expensive; for since a man's state of mind must be investigated, evidence even of the smallest matters is relevant. Besides, the difficulty of reaching certainty in matters of domicile in the absence of any decision by a competent court is a serious inconvenience to numerous people when they come to make a will or in the many other circumstances in which it is necessary to know which legal system is applicable. The practitioner may find it impossible to advise his client with confidence, since he cannot prophesy what impact the facts will have upon the judge's mind."[5]

The committee further stated that these defects in the English and Scottish law of domicile are not easily defensible and inspite of the modern tendency of the courts to disregard the strict application of the rules as laid down in "Winans and Ramsey's cases, the law on these points is in need of amendment."

Under paragraph 11 of the Report therefore, the committee resolved that "since our terms of reference invite us to suggest what amendments are desirable in the law of domicile generally, we have thought it convenient to set out in the form of a code our view of what that law should be". The code itself has been criticised by English writers and its inherent defects have been pointed out. It is however necessary to first consider the committee's recomendations before dealing with the criticisms.

As noted above, the committee's recommendations on the law of domicile or their" view of what that law should be" is contained in a code which has five Articles.

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4. Report, Paragraph 8
5. Report, Paragraph 9

These Articles and the criticisms levelled against them would now be considered.

Article 1 of the Code of the Law of domicile[6] provides as follows:

> (1) Every person shall have a domicile but no person shall have more than one domicile at the same time.
> (2) A domicile is either a domicile of origin or a domicile of choice.
> (3) A domicile of origin is the domicile assigned to every person at his birth in accordance with the provisions of article 4(1) of this code.
> (4) A domicile of choice is the domicile acquired through the exercise of his own free will by a person who is legally capable of changing his domicile, or a domicile acquired by virtue of an order or with the approval of a court of competent jurisdiction in accordance with article 4(3) or article 5 of this code.
> (5) A domicile, whether of origin or of choice, shall continue until another domicile is acquired".

The shortcoming in this recommendation is that it does not deal with the domicile of dependent persons. This is because since according to the third limb of the Article a domicile of origin is assigned at birth and a domicile of choice is "acquired through the exercise of his own will by a person who is legally capable of changing his domicile,"[7] the adoption of this recommendation would mean the non-recognition of domicile of dependence. For instance the Article does not seem to cater for the illustration below:

Sulaiman who is domiciled in Lagos marries Hadiza domiciled in Ghana. Sulaiman leaves Hadiza three years after their marriage and acquires a domicile of choice in Niger Republic. Under the existing law and the proposed code, the domicile of Hadiza during the marriage would be Lagos and then Niger Republic. In the case of the husband's new domicile of choice in Niger Republic which he acquired after deserting Hadiza, we can safely say that she had no choice in this new domicile upon which her own domicile is also dependent.

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6. Report, Appendix A.
7. Ibid Article 1(4)

The committee is against the acquisition by a wife of a separate domicile except when she is separated from her husband.[8] The domicile of a single woman therefore is not the same as that of the married woman.

Graveson [9] has therefore suggested that:

> "the married woman's domicile is misdescribed as one of choice simply because no element of choice on her part enters into its acquisition. Her domicile differs no less from a domicile of choice in her complete lack of power to effect or control the change or abandonment of domicile. The classic formulation of domicile into domicile of origin and domicile of choice was no more complete when it was first propounded than it is now".

In the above example therefore, we are dealing with a domicile neither of origin nor of choice but one arising out of a marital relationship. It arises by operation of law and there is no element of choice involved.

This Article has also been criticised on the ground that apart from using only two kinds of domicile instead of three, the code failed to consider domicile of corporations which is also another type of domicile.

Section 5 of Article 1 is however a welcome innovation in English law which is worth adopting in Nigeria. It is an acceptance of the now existing law in America and Newzealand that a domicile whether of origin or of choice shall continue to operate until the acquisition of another domicile. This recommendation of the committee would remove the tenacity of the domicile of origin which has hitherto been one of the greatest shortcomings of the English concept of domicile. What would emerge from the acceptance of this recommendation however is the fact that a domicile of choice would not now be lost by mere abandonment.

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8. Report, paragraph 18
9. Reform of the Law of Domicile (1954) 70 L.Q.R. 495 at 497

To lose a domicile of choice in the circumstance, one would have to acquire a new domicile. Whether or not this is a better position than that of the revival of the domicile of origin is for countries adopting the recommendation to decide.

Article 2(2) of the code lays down three rules for ascertaining a man's intention to live in a country.

> "Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.
> Rule 2: Where a person has morethan one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.
> Rule 3: Where a person is stationed in a country for the purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country".

Graveson [10] has suggested that although taking out the issue of renvoi no problem would arise as to the meaning of "country" under the general existing law of domicile in the committee's recommendation, it would have been much better if the committee had reiterated that "a country for the purpose of this subject is a territory subject to a single system of law". The committee has not expressed its view on the territorial basis of domicile. Although it is well known that the Western European conception of domicile is that of a country or territory covered exclusively by one legal system, the committee would have rendered a great service to the law generally by expressing an opinion on the domicile in a federation but it could not be incorporated in a code providing for domicile in English law.

In framing the rules above, the committee failed to advert its mind to the already existing presumptions in the law of domicile, viz, the presumption that a person is domiciled in the country

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10. op. cit at p. 499

in which he has residence, that an existing domicile continues until it is shown to have been changed and that a domicile of origin continues until the express acquisition of a domicile of choice is shown. The committee's presumptive rules and the already existing presumptions therefore give a picture of conflict of presumptions. For instance this conflict could be seen in a situation where a propositus with a Nigerian domicile of origin acquires a domicile of choice in Ghana and after spending fifty years in Kenya dies there. In such a situation which of the three existing presumptions is to govern?

Although the committee did not take cognisance of these presumptions, the conflicts they have given rise to have been reduced greatly by the proposed code in the sense that since there is now a rule of continuance of either the domicile of origin or the domicile of choice until another domicile is acquired, the original separate presumptions as to the continuance of a domicile of origin and a domicile of choice are now one. The conflicts are therefore reduced.

Article 3 of the code retains the dependent domicile of a married woman except when the married woman has been separated from her husband by an order of a court. She is thereafter to be regarded as a single woman and may acquire a domicile of her own. Before arriving at this conclusion however, the committee in its report had observed thus:[11]

> "The position of married women is perhaps the most difficult in this branch of the law, for it involves consideration of questions of social policy of some importance, many of which fall within the terms of reference of the Royal Commission on Marriage and Divorce"

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11. Report, paragraph 17

This area of the law has since been modified following the Report of the Law Commission on Jurisdiction in Matrimonial Causes (Law Com. NO.48), and the Domicile and Matrimonial Proceedings Act 1973 which came into force on 1 January 1974, has abolished the dependent domicile of a married woman.

Section 1 of the Act provides thus:

" 1(1) Subject to subsection (2) below the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section."

A further discussion of this area of the law is not therefore necessary.

Article 4 of the proposed code treats the domicile of infants and changes in the existing law of domicile that have been brought about by this recommendation are as follows:

(i) The domicile of an infant follows that of the person having lawful or legal custody over him when the parents have been divorced.

(ii) An infant who has been lawfully adopted takes the domicile of the adopter and where two spouses jointly adopt a child it is to be treated as a legitimate child of the marriage. Such adoption would change the domicile of origin of the child retrospectively.

(iii) No automatic change of the infant's domicile takes place when one of the parents changes his domicile. This recommendation covers not only mothers as has hitherto been the case but also fathers and adopters. The position, as enunciated in Re Beaumont[12] had been that the change of domicile of an infant "is not to be regarded as a necessary consequence of a change of the mother's domicile, but as the result of the exercise by her of a power vested in her for the welfare of the infant, which in their interest she may abstain from exercising even when she changes her own domicile." At that time it was only the father's domiciliary change that automatically affected that of the child. Under the new recommendation however, the father or adopter must not only change his domicile, but must also intend to change the infant's domicile.

It is suggested that this requirement of intent to change the domicile of the infant is difficult to determine and that the current law existing on this subject should be left intact.

(iv) A person who has attained the age of 21 years or who has married is excluded from the definition of "infant" by the committee. However, Graveson has criticised this recommendation saying that "marriage alone is an arbitrary test of capacity to acquire a domicile of choice. By it capacity may be conferred at sixteen on the married and denied until full majority to the single".[13]

12. (1893) 3 Ch. 490
13. op cit, supra note 9 at p. 509

He suggests that the age at which male infants are liable to perform military service should be the approximate age at which capacity to acquire an independent domicile of choice should be recognised for both males and females whether married or single. As for Nigeria, it is suggested that the age at which individuals are qualified to vote should be the age at which capacity to acquire a domicile of choice should be recognised for both sexes.

The shortcoming of the committee's proposed code on this topic is that the domicile of infant foundlings is not considered. It is interesting to note however that whereas the code did not consider the dependent domicile of a child not living with his father, the Domicile and Matrimonial Proceedings Act 1973 deals with this matter under section 4 where it is stated as follows:

"4(1) Subsection 2 of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.

(2) The child's domicile as at that time shall be that of his mother if -

(a) he then has his home with her and has no home with his father; or

(b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

(3) As at any time after the coming into force of this section, the domicile of a child whose mother is dead shall be that which she last had before she died if at her death he had her domicile by virtue of subsection(2) above and he has not since had a home with his father.

(4) Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being by dependence, that of his mother.

(5) In this section "child" means a person incapable of having an independent domicile; and in its application to a child who has been adopted, references to his father and his mother shall be construed as references to his adoptive father and mother."

The committee considered the domicile of lunatics under Article 5 of the code where it specifically stated that a lunatic shall retain the domicile he had prior to his lunacy and the person or authority incharge of such lunatic shall have power upon the approval of a court, to change the lunatic's domicile. The court granting such power must however be in the country where the lunatic is domiciled. Prior to this proposal the existing law had been that the domicile of the lunatic cannot be changed during his lunacy even when it would be in his interest to do so. The committee's recommendation in this respect therefore is a step in the right direction.

While commending the Private International Law committee for its brilliant work on the concept of domicile, Graveson has expressed the view that a general revision of the committee's recommendations is necessary before any legislative action could be carried out.[14]

Although the terms of reference of the committee included a consideration of the desirability of the United Kingdom becoming "a party to the draft convention to regulate conflicts between the law of the nationality and the law of the domicile", it nevertheless refused to adopt Article 5 of the draft convention which defines domicile as" the place where the person habitually resides unless the domicile of such person depends on the domicile of another or on the seat of some public body." The committee was of the opinion that its presumptive rules under the code of domicile and other recommendations contained in the code have narrowed down the differences existing between the continental conception of domicile and the English and Scottish law of domicile. The committee recommended that while the United Kingdom should not adopt Article 5 of the convention, it should have stated reasons for not doing so as follows:[15]

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14. opcit, p. 513
15. Report,paragraph 30

"In ratifying the present convention, Her Majesty's Government wish to state with reference to Article 5 that, while under the law of the United Kingdom habitual residence is not the absolute test of domicile, recent legislation has brought the two conceptions sufficiently close to serve all the practical purposes of the convention".

Nothing was done towards implementing the committee's Report until in May 1958 when Lord Meston introduced in the House of Lords a Bill which contained most of the committee's recommendations, such as the abolition of the revival of the domicile of origin and on the establishment of presumptive rules for ascertaining a domicile. Since the committee in its report never thought of evolving two concepts of domicile to apply to taxation and personal status, the Bill also made no such provision for tax purposes and it was on this basis that the Domicile Bill was attacked in the House of Lords at its third Reading. Although it managed to sail through the House, this first Bill lapsed before it was considered by the House of commons.

Lord Meston introduced the second Domicile Bill in 1959. The presumptions in the First Bill were not included in this second Bill. The Lord chancellor gave the justification for omitting these presumptions during the second Reading of the Bill as "reasons that have nothing to do with law reform" but that "the hard facts of the economic position of this country should be given greater weight" because if this is not done, the operation of these presumptions in revenue matters would discourage overseas businessmen from coming to England and this would consequently lead

to losing "their services and the business and capital that goes with them".[16]

The Bill was dropped by its sponsors before it could be forwarded to the House of commons for consideration. The reason for this abandonment was simply because of the inability of the sponsors to find a compromise "between the fears of overseas businessmen and the recommendations of the committee, each of which apparently had potential supporters in the commons".[17]

Why a provision was not included in the Bill to take care of overseas businessmen or to reduce the anticipated difficulties that were likely to arise from the presumptive rules cannot easily be explained. No substantial result could therefore be derived from the two domicile Bills.

In November 1959 therefore, the Private International Law committee was again invited by the Lord High Chancellor, Lord DILHOURNE to:

> "(1) reconsider the recommendations for the reform of the law of domicile contained in the committee's First Report in the light of the objections taken to the two Domicile Bills recently before parliament, and
> (2) recommend what provisions are required to avoid any legal difficulties which may be expected from an alteration of the law placing a married woman in the same position as any other person of full age and capacity for the purposes of the law of domicile".[18]

The committee submitted its Report to the Lord Chancellor in March 1963.[18] While reconsidering the First Report and the issue of overseas businessmen, the committee came up with a redefinition of the concept of domicile itself. In a draft, it provided thus: 19

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16. House of Lords, official Report Vol.214 cols.240-242 (February 12,1959) quoted in Mann, M. The Domicile Bill (1959) 8 I. C.L.Q 457 at 461.
17. Mann, The Domicile Bills (1959)8 ICLQ 457 at 463
18. Seventh Report of the Private International Law committee, cmd 1955
19. Report, Appendix A

" 2. A person's domicile is in the country where he ordinarily resides and where he intends to live permanently.

3. Except in the cases mentioned in section 4 of this Act, a person who ordinarily resides in a country is presumed to intend to live there permanently, but the presumption may be displaced by evidence of a different intention.

4. Where a person either -

(a) performs the duties of an office or employment or carries on a trade, profession or vocation in a country in which he did not ordinarily reside immediately before doing so, or

(b) ordinarily resides in a country as a member of the household of such a person as is mentioned in paragraph (a) of this section, his ordinary residence in that country does not raise the presumption that he intends to live there permanently.

Why the committee decided to alter the definition of domicile from "the country in which (a person) has his home and intends to live permanently"[20] to the country "where he ordinarily resides and where he intends to live permanently"[21] cannot easily be explained, but this change brought a serious objection from the Board of Inland Revenue on the ground that the use of "ordinary residence" for taxation purposes may lead to a presumption of domicile arising too easily thereby resulting in "injustice to the individual in question when a person with a foreign domicile became "ordinarily resident" here and a corresponding injustice to the Revenue when a person with a United Kingdom domicile became "ordinarily resident" abroad "[22]

One may hazard a guess that what led to the redefinition of the concept of domicile was the fear expressed by overseas businessmen as a result of the presumption included in the First Report.

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20. cmd 9068 Appendix A
21. cmd 1955 Appendix A
22. Seventh Report, paragraph 11

After asking themselves whether there was any substance in these apprehensions, some members of the committee admitted that if the "proposed reversal of the burden of proof would be likely to have important consequences in individual cases, then it is hard to see how the fears can be dismissed as groundless"23

It is true that the reversal of the burden of proof would have some effect in individual cases. The committee therefore expressed the view that "the fears, whether exaggerated or not are undoubtedly genuine and widespread"[24]

In considering how these difficulties could be over come, the committee suggested three options:

(a) Abandon the presumptions altogether.

(b) Provide an exception to the presumptions making it impossible for them to apply in cases where home is established for business purposes.

(c) make the presumptions in applicable in taxation cases.

The committee refused to abandon the presumptions, and the second option, unattractive though it was on the basis that "there can be no equitable justification for an exception which safe-guarded the tax position of overseas businessmen" but which did not at the same time preserve the tax position of other classes of the community"[25] gained acceptance of the committee and a revised code was drawn which included the "businessman's formular"

The revised code itself did not cover all cases and the committee did not for example, consider the position of

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23. Report Paragraph 8
24. Ibid paragraph 9
25. Mann, The Seventh Report of the Private International Law committee on Domicile (1963) 12 I.CLQ 1326 at 1328.

persons who change their employment from one country to another or who take up jobs in a place after residing there for reasons either of education or Marriage. This is because to fall within the exception a "businessman" would have to show that he was ordinarily resident elsewhere before he took up his present post or residence.

The committee acknowledged these short comings which it felt could be rectified by amendments but pointed out that it may not be possible for any words to be used or devised "which could satisfy the critics and not at the same time so extend the exceptions from the presumption as to make it not worth while introducing it at all."[26]

The third option which the committee considered was that of separating fiscal from other domiciles. In this regard the committee said.[27]

> "apart from the objection to the same word having different meanings in different contexts, it is some what difficult to see how, at any rate in the field of estate duty, domicile could reasonably be given a meaning different from that which it bears in the field of settlements, wills and succession to property. We have not come, or indeed tried to come, to any conclusion on the desirability or feasibility of separating fiscal from other domicile. It would in any case be impossible to do so without detailed discussions with the Board of Inland Revenue"

As it stands presently, there has yet been no final conclusion on this issue and English law still sticks to the unitary concept of domicile.

Under paragraph 18 of its Report, the committee stated thus:

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26. Report, paragraph 10
27. Ibid, paragraph 12

"It is perhaps desirable that we should at this stage summarise the conclusions arrived at in this part of our Report; they are as follows:

(1) Our law of domicile would be improved if its approach to the problem were changed in the way recommended in the committee's First Report.

(2) Any such change which was not accompanied by a provision maintaining the status quo in the case of commonwealth and foreign'businessmen' resident here (at all events so far as their liability to tax and estate duty is concerned) would again be strongly opposed.

(3) A formula excepting 'businessmen', whether from overseas or not, could be devised which would cover most cases, but its introduction would make the change itself hardly worth while and would probably not allay all hostility to it.

(4) The alternative of separating 'fiscal domicile' from domicile for other purposes raises issues of great difficulty".

The committee further contended that any action to be taken towards altering the law would simply be a matter of policy upon which the committee could not make any recommendation.28

In this, like in the First Report, the domicile of corporations was not considered and the committee made it clear that it is not 'intended that any recommendation should apply to the domicile of corporations which is outside its terms of reference.

The committee in part two of its report considered the domicile of married women. Since this branch of the law has already been modified as noted above, it is only relevant to mention that the committee was against a separate domicile for a married woman.

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28. Report, paragraph 18

In conclusion, it must be pointed out that despite the recommendations of the Private International Law committee in two separate Reports, the law of domicile in England has remained relatively the same. It is unfortunate that such recommendations by eminent English lawyers were not given any legislative backing in England. It does seem that economic considerations in England have out weighed law reform measures.

Interestingly however, some common law countries have benefitted from some of the recommendations of the English Private International law committee and have effected necessary reforms in their field of domicile. One of such countries is Newzealand which enacted a Domicile Act in 1976. The reforms introduced by the Domicile Act are worth adopting in Nigeria. A consideration of some of them is therefore necessary.

Section 5(1) of the Act reads as follows:

> "Every married person is capable of having an independent domicile, and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is hereby abolished"

Subsection (2) of the section states that the section "applies to every marriage wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage"

The cases of Lord advocate V. Jaffrey 29, Attorney General for Alberta V. Cook 30 and De Reneville V. De Reneville 31 which

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29. (1921) A.C 146 (H.L)
30. (1926) A.C 444 (P.C)
31. (1948) P. 100 (C.A)

have all held that the essential validity of a marriage is a matter for the lex domicilii of the husband are no longer good law in Newzealand.

In respect of the domicile of origin of an adopted child which was recognised by the proviso to section 16 (2) (f) of the Newzealand Adoption Act 1955, section 14 (2) of the Domicile Act 1976 has repealed the proviso and has therefore done away with an adopted infant's domicile of origin. The infant shall now acquire the domicile of his adoptive parents (if adopted) and his domicile shall subsequently be determined as if he had been born in lawful wedlock to the said adoptive parent or parents.

Section 7 of the Act provides for the acquisition of an independent domicile. It states:

> "Subject to any rule of law relating to the domicile of insane persons, every person becomes capable of having an independent domicile upon attaining the age of 16 years or sooner marrying, and there after continues so to be capable"

This reform is astep in the right direction as an unmarried minor of sound mind can claim an independent domicile before attaining the age of 20 which is the age of majority in Newzealand.32.

The domicile of unmarried children under 16 years is dealt with under section 6 of the Act. Subsection (3) states that if the child's parents are living together, the child has the domicile of the father.

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32. S.4(1) Age of Majority Act 1970.

This domicile of the father may not be the same as that of the mother as section 5 would seem to indicate. However, it is usually the case for their domicile to be the same.

Subsection (4) of section 6 provides that if the child has its home with its father when the parents are not living together, it has the father's domicile, and after it ceases to have its home with him, it continues to have that domicile, (or if he is dead the domicile he had at his death) until it has its home with its mother. If the child has its domicile with the mother when the parents are not living together, it has the domicile of the mother (or if she is dead the domicile she had at her death)

In respect of foundlings, section 6 provides that until a foundling has its home with one of its parents both its parents are for the purpose of the section to be deemed to be alive and domiciled in the country where the foundling child was found.

The provisions of this section are a reproduction of the provisions of section 4(1)-(3) of the Domicile and Matrimonial Proceedings Act, 1973 considered in chapter 3 above.

By section 8 of the 1976 Act, "the domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile in accordance with section 9 of this Act and then ceases."

Section 9 lays down conditions for acquiring a new domicile:

> "A person acquires a new domicile in a Country at a particular time if, immediately before that time -

(a) He is not domiciled in that Country; and
(b) He is capable of having an independent domicile; and
(c) He is in that Country; and
(d) He intends to live indefinitely in that Country.

There is no such requirement of intention to reside "Permanently" as in English law. Infact the Newzealand Act even provides for what is called a "deemed intention" under section 10:

> "A person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live in any one Country forming part of the Union shall be deemed to intend to live indefinitely -
> (a) In that Country forming part of the Union in which he ordinarily resides, or
> (b) If he does not ordinarily reside in any such Country, in whichever such Country he is in; or
> (c) If he neither ordinarily resides nor is in any such Country, in whichever such Country he was last in."

This provision would work like this in Nigeria: Suppose Waisu is ordinarily resident in Kaduna State without any intention of living indefinitely in any of the Nigerian States but nevertheless intends to live indefinitely in Nigeria, he will be deemed to intend to live indefinitely in Kaduna State.

The doctrine of the revival of the domicile of origin has been abolished in Newzealand. According to section 11 of the Act a domicile acquired under section 9 continues until another domicile is acquired within that section. The section provides that "the rule of law known as the revival of domicile of origin whereby a person's domicile of origin revives upon his abondoning a domicile of choice is hereby abolished."

Hitherto, before a change of the domicile of origin is deemed to have taken place, there must be proof of such a change beyond reasonable doubt. The change from one domicile of choice to another domicile of choice required only proof on the balance of probabilities. The 1976 Act however has now provided that the standard of proof which was sufficient to show abandonment of a domicile of choice and the acquisition of another domicile of choice before the coming into force of the Act shall be enough to show the acquisition of a new domicile. The Australian Family Law Act 1975 has also recognised the continuance of an existing domicile until a new domicile is acquired. This is an acceptance of the prevailing law in America and the recommendation of the English Private International Law committee.

Webb [33] has suggested that the acceptance by the Newzealand Domicile Act 1976, that the standard of proof required, before the coming into force of the Act, to show a change from one domicile of choice to a new domicile, would appear to show that "the standard of proof is the balance of probabilities" and that it is a change for the better.

Section 13 of the Act provides that a person domiciled in a Country forming part of the Union is also domiciled in that union. Thus, for example, a person domiciled in Sokoto is also domiciled in Nigeria. This provision already exists under Nigerian Matrimonial Causes Decree 1970 but for purposes of matrimonial Causes only. It is therefore necessary to adopt the provision for other purposes also.

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33. The Newzealand Domicile Act 1976 (1977) 26 I.C.L.Q 194 at 201.

The Newzealand Domicile Act is a model upon which most other common-wealth Coun ries could develop upon. It has however been pointed out that inspite of its overwhelming contributions in the field of domicile the Act -

> "contains no express provisions concerning , for instance; Prisoners, those liable to be deported, fugitives or refugees, those who suffer from ill health or insanity, servicemen or those present in a particular country pursuant to a contract of service or in some diplomatic or consular capacity, or those affected by a boundary change. Nor is anything expressly stated about the domicile of a widow. The Act is silent on the burden of proof of a change of domicile as opposed to the standard of proof. Nevertheless it must definitely be regarded as a firm step in the right direction"34

Recent developments in Europe have shown that the concept of domicile has continued to play a vital role in the economic and social fields. The concept has been employed particularly by the European Economic Community (EEC) as a basis of Jurisdiction and enforcement of judgments in civil and commercial matters.

When the United Kingdom acceded to the EEC in 1972 and signed the Accession convention in October 1978, it accepted in principle the provision of Article 63 of the convention on jurisdiction and the enforcement of judgments in civil and commercial matters which was signed by the six original member States of the EEC as noted in Chapter five. The Article declared that any state which became a member of the EEC must accept the convention (with or without adjustments). The concepts and principles or attitudes of the original convention were purely of civil law out look as the United Kingdom took no part in drafting it.

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34. Opcit at paragraph 202

The Accession convention introduced some modifications along common law lines.

This led to the enactment of the Civil jurisdiction and Judgments Act 1982 in England to implement the EEC convention on jurisdiction and enforcement of judgments in civil and commercial matters of 1968 as amended by the Accession convention of 1978.[35]

Section 3(1) and (2) of the 1982 Act gives the European court the power to interpret and give effect to the terms of the convention and any question relating thereto. The convention makes domicile of the defendant within the contracting state the primary basis of jurisdiction. The domicile of the plaintiff is not very relevant. A defendant could now be sued in any of the contracting states where he is domiciled.

An interesting feature of the convention is that whereas it made no effort to define domicile, it nevertheless avoided the traditional English conception which differs from the concept of domicile as understood in the six original contracting states where it means something akin to habitual residence.

Article 52(1) of the convention gives the courts of a contracting state the power to determine whether or not a party in a given case is domiciled in the contracting State by using its internal law.

Section 41 of the 1982 Act defines domicile for the purpose of the convention and the Act to the following effect: an individual is domiciled in the United Kingdom (or a part of it) if he is resident in and has a substantial connection with the United Kingdom (or that part); if he is

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35. Morris, Opcit, Supra note 2 p. 77

resident in the United Kingdom but has no substantial connection with any part of the United Kingdom he is domiciled in that part in which he is resident.
Three months' residence or more is enough to raise a rebuttable presumption of substantial connection.

By section 41 (4) an individual is domiciled in a particular place in the United Kingdom if he is domiciled in the part of the United Kingdom in which that place is situated and is resident in that place.[36]

Where the defendant is not domiciled in the United Kingdom the court would have to determine if he is domiciled in any of the contracting states. Where he is found to be domiciled in some contracting state, the English court applies the law of such contracting state. On the other hand, if by the law of the contracting state the individual is not domiciled in that state but in some other non-contracting state, English law, as the lexfori, will determine his domicile in that state. By section 41(7) he would be domiciled in that non-contracting state if he is resident in, and has a substantial connection with that state. Length of residence raises no presumption of domicile in this case.

The position of corporations under this Act has been examined in Chapter five and it is worth adding here that where a corporation does not have a seat in the United Kingdom its seat is in that state where it was incorporated or formed under the law of that state and has its registered office or other official address or where its central management and control is exercised.

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36. Opcit at PP 80 - 81

Where the courts of a contracting state would not regard a corporation as having its seat in that state, it would not be considered as having its seat there.[37]

The domicile of a trust is to be determined by the Private International Law rules of the contracting state. By section 45 of the Act, that part of the United Kingdom is the domicile of a trust if the system of law of that part is the system with which the trust has its closest and most real connection.

In respect of immovable property, proceedings for right in rem or proceedings for the validity of the constitution of corporations or the nullity or dissolution of companies or associations, the courts of the contracting state in which the property is situated or the company or corporation has its seat have exclusive jurisdiction. Domicile of the defendant in a contracting state is irrelevant in such cases.[38]

Morris[39] has suggested that it would have been more preferable to have defined domicile for the purposes of the convention and the Act simply as habitual residence. That would have avoided the complicated definitions of domicile under section 41 of the Act. "It would also have avoided adding one more jurisdictional factor to those already used by English law, i.e. domicile in the traditional sense, ordinary residence and habitual residence.

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37. Ibid
38. Section 42(6) and (7)
39. Opcit, Supra note 2 at P. 80

One may however suggest that the definition of domicile for the purposes of the Act and the convention in terms of "residence and substantial connection" is a step in the right direction. It seems easier to prove than habitual residence although it is difficult to draw any line of demarcation between the two concepts.

However, if it is true that it is the traditional conception of domicile in English law that has hindered every attempt at uniformity of the Private International legal system, then the time seems ripe for the English legal system to expressly adopt the concept of habitual residence as the test of domicile.

It would however seem that English law would not likely adopt this concept in the near future. Infact had it not been that the convention gave individual contracting states the power to determine whether or not an individual is domiciled in a contracting state, the United Kingdom would not likely have acceded to it.

CONCLUSION AND SUGGESTED REFORMS OF THE CONCEPT OF DOMICILE IN NIGERIA

The concept of domicile in Nigeria has remained an ally of the traditional English conception. What is regrettable however is the fact that Nigeria has firmly retained these English concepts even where reforms have been introduced in them under English law. One should not however be understood to be advocating for an automatic adoption of all reforms introduced in English law, as these ...

may not be fully operative in Nigeria due to certain social and economic variations. It is nevertheless necessary for us to examine those areas of the law of domicile in Nigeria which are in need of urgent reform and suggest necessary improvements either in line with or away from the recommendations of the English Private International Law committee.

It had been argued prior to 1973 in England that it was inconsistent with modern age and rate of development for a wife to remain subservient to her husband. This dependent domicile of wife was found to have given rise to incidents of limping marriages and a considerable hardship to wives. It was in response to these arguments and criticisms that the English parliament enacted the Domicile and Matrimonial proceedings Act in 1973. This enactment ended what was described as "the last barbarous relic of a wife's servitude."[40]

In Nigeria, the husband's domicile still determines that of the wife and it is recommended that a reform based on the Newzealand Domicile Act 1976, making it possible for a wife to have an independent domicile for all purposes is necessary. The present position under section 7 of the Matrimonial Causes Decree where a deserted wife is accorded a separate domicile or is accorded domicile on the basis of three years' residence is not enough as it is relevant only to Matrimonial Causes. It is necessary to allow the wife whether deserted or living with her husband to have an independent domicile.

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40. Per Lord Denning in Gray V. Formosa (1963) P. 259 at 267.

Critics of an independent domicile for the married woman may argue that the time is yet ripe for such change since generally the woman in the social and economic set up in Nigeria occupies a dependent status.

Another area of the law of domicile which requires reform is that which fixes capacity to acquire a separate domicile at 21 years. It is therefore recommended that while enacting a Domicile law, capacity to acquire an independent domicile should be fixed at 16 years or any such lesser age recognised under any native Law and Custom.

Professor Agbede has also suggested that English rules of domicile should be modified to suit Nigeria, such that "a domicile should be acquired in a state by the concurrence of residence and an intention to reside there otherwise than for a temporary purpose."41 It is respectfully submitted that residence "otherwise than for a temporary purpose" can mean nothing more than residence for a permanent or indefinite period of time. While this is merely a restoration of the status quo rather than a suggestion, the learned writer seems to have concieved residence in terms of its purpose. It is submitted that the purpose of the residence is irrelevant once it is accompanied by the necessary animus. It is therefore suggested that the purpose of the residence should not be an over riding consideration in the acquisition of a domicile. Residence coupled with the intention to reside whether for a temporary or for a permanent purpose should be considered sufficient to confer domicile.

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41. Lex Domicilii in contemporary Nigeria: A functional analysis, (1973) African Law studies NO.9 P.61 at 98

It is also suggested that the doctrine of the revival of the domicile of origin should be abolished in Nigeria. The position in America where an existing domicile whether of origin or of choice continues until another is acquired and the categorical abolition of this concept of revival by the Newzealand Domicile Act 1976 are two examples Nigeria could borrow from.

In respect of domicile of infants, Agbede 42 has suggested that the rule which makes an infant's domicile dependent on that of its parents "is consistent with the social realities of Nigerian society" since infants, in a large majority of cases live in the family home. He nevertheless suggests that "if an infant who has attained the age of discretion is compelled, or if he voluntarily chooses to find a home for himself, the law should take cognisance of this social fact."

He favours the American rules of domicile in this respect where the infant's domicile is that of the parent with whom he lives. His suggestion along this line is therefore that:

"(1) An infant should take the domicile of the parent with whom he lives.

(ii) The infant's domicile should cease to depend on that of the parents if he is

(a) abandoned
(b) validly married or
(c) not dependent on the parents.

(iii) A guardian should be able, with the approval of a court of competent jurisdiction to change a ward's domicile."43

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42. Ibid at P. 88

43. Opcit, supra note 38 at P.98

In his recommendations however, the learned professor did not consider the domicile of lunatics. The Newzealand Domicile Act also failed to consider this aspect. It is therefore suggested that a lunatic in Nigeria should retain the domicile which he had before he became insane and the person in charge of the lunatic should be given the power, subject to court's approval, to change the lunatic's domicile. Such a change in the lunatic's domicile should not however be allowed to affect the domiciles of his dependent family. The infant children of the lunatic should be given the right to apply to the court to vary their domicile if they so wish.

Ambassadors, Diplomats, Soldiers as well as public servants although ordinarily not capable of acquiring a domicile of choice due to the presumed absence of the requisite animus, should be permitted to acquire a domicile in a country where it could be established that the necessary intention is present.

The standard of proof required for a change from a domicile of origin to a domicile of choice should be the same as the standard required for a change from one domicile of choice to another, that is, proof on the balance of probabilities. The present requirement of proof beyond reasonable doubt is a product of the rigid doctrine of the revival of the domicile of origin which should be discarded. The burden of proof of a change of domicile should be made to lie on the person who asserts that the change has not occurred.

As for corporations, it is suggested that the test of determining domicile on the basis of registration should be discarded. The doctrine of the seat of a corporation should be the over riding consideration. Such seat should be where the Central Management and control of the affairs of the corporation lied and this should determine the corporation's liability to income tax and other purposes.

The provision of the English Civil Jurisdiction and Judgments Act 1982 which implemented the EEC convention are also worthy of adoption by the Economic Community of West African States (ECOWAS).

The ECOWAS treaty was signed on 27 May 1975 by fifteen West African Countries. They include Dahomey, Guinea, Ghana, Guinea Bissau, Ivory Coast, Liberia, Mali, Nigeria, Mauritania, Senegal, Sierra-Leone, The Gambia and Togo. According to Article 2 of the Draft convention of the ECOWAS, the aims of the Community include:

> "the promotion of "co-operation and development in all fields of economic activity particularly in the fields of industry, transport, telecommunications, energy, agriculture, natural resources, commerce, monetary and financial questions and social and cultural matters for the purpose of raising the standard of living of its peoples; of increasing and maintaining economic stability, of fostering closer relations among its members and of contributing to (the) progress and development of the African continent."

The community's objectives included, among others, the abolition of quantitative and administrative restrictions

on trade among the member states" and "such other activities calculated to further aims of the community as the member states may from time to time undertake in common."44

Going through the names of member states, one realises that majority of them are in the civil law camp whose legal systems vary from those of the common law member states. To achieve any meaningful results therefore, the Community requries a uniform legal base.

It is therefore suggested that one of the fundamental steps towards the achievement of the community's diverse aims is the adoption of a uniform basis of jurisdiction and enforcement of judgments in civil and commercial matters since the community is essentially an economic institution.

The community should also evolve a common court and vest it with the power of interpreting any terms of the convention and such other matters that might be agreed to by the member states.

It is recommended that the community should adopt domicile as the basis of jurisdiction but in doing so the community should avoid the traditional English conception of domicile and should adopt habitual residence as the test of domicile. Individual member states should however retain the right to determine whether or not an individual is domiciled therein by using their own internal law .

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44. Jordan, R.S; Government and power in West Africa (1978) P. 261

It is also suggested that in order to avoid delay in the administration of justice, a citizen of a member state should be amenable to the jurisdiction of the court of any member state having jurisdiction under the terms to be agreed upon by member states.

However, the writer would suggest that the English concept of domicile interpreted liberally may be adopted as a connecting factor to determine personal and family matters taking into consideration and removing the defects that exist at present. Furthermore, it is of utmost importance that the Nigerian Legislature should enact a Domicile Act on similar lines to that of the Newzealand Act which has removed the defects which exist in the English concept of domicile.

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