AN APPRAISAL OF THE APPLICATION OF THE LAW RELATING TO DOMICILE IN NIGERIA

BY

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DEDICATION

This research work is dedicated to my Parents, Mr. and Mrs.Edet and Ekaette Ita Akpan.

DECLARATION

I declare that the work in this research project entitled 'An Appraisal Of The Application Of The Law Relating To Domicile In Nigeria' has been carried out by me in the Faculty of Law. The information derived from the literature has been acknowledged in the text and a list of references provided. No part of this project was previously presented for another degree or diploma at this or any other institution.

Isaac Edet ITA _____ _____

Signature Date

CERTIFICATION

This Research project entitled AN APPRAISAL OF THE APPLICATION OF THE LAW RELATING TO DOMICILE IN NIGERIA, by Isaac Edet ITA meets the regulations governing the award of Masters of Arts in Law (M.A.L) of the Ahmadu Bello University, Zaria, and is approved for its contribution to knowledge and literary presentation.

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ABSTRACT

This research project entitled 'AN APPRAISAL OF THE APPLICATION OF THE LAW RELATING TO DOMICILE IN NIGERIA', is aimed at examining the legal framework of the law relating to the concept of Domicile in Nigeria. However, in the course of this research, the finding of the researcher is that there is a gaping hole in the application of the rules of Domicile especially that of Domicile of Choice in inter-state situation like Nigeria. For instance, according to the traditional concept, the rule of Domicile is to the effect that, to acquire a Domicile of choice, a person must satisfy, amongst others, a principal condition that he must have an intention of remaining in a country or place permanently or at least, indefinitely. This is not practically possible or feasible in Nigeria. Nigeria is a country made up of many States with various ethnic flavors where there is a high mobility of persons as a result of inter-marriages, work and search for 'greener pastures'. The need to address this unsuitable circumstance constitutes the justification for this research. In the light of this, therefore, the objective of this research is to identify the challenges of the present practice to make viable recommendation as a way forward to addressing the challenges identified. In the final analysis, this research work is concluded by recommending, amongst others, that there should be a consideration of habitual residence as a requirement for acquisition of Domicile of choice rather than intention to reside permanently in a place. The research methodology relied upon will be doctrinaland the sources of information include relevant text materials, statutes, judicial decisions, journals and internet sources.

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AC … … … …	Appeal Case
A.E.R. … … … …	All England Report
Am. Jo.Comp. Law … …	American Journal of Contemporary Law
Ch … … …	Chancery
Ch. D … … … …	Chancery Division
F.C.A … … … …	Federal Court of Appeal
H.L. Cas … … …	House of Lord Cases
L.L.R. … … … …	Lagos Law Report
L.Q.R. … … … …	Law Quarterly Review
N.R.N.L.R. … … …	Northern Region of Nigerian Law Report
Mass … … … …	Massachusetts Report
N.R.N.L.R … … …	Northern Region of Nigerian Law Report
N.L.R … … …	Nigerian Law Report
N.W.L.R … … …	Nigeria weekly Law Report
P … … …	Probate
P.D … … …	Probate Division
U.I.L.R. … … …	University of Ife Law Report
W.R.N.L.R … … …	Western Region of Nigeria Law Report
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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction

The concept of Domicile had its evolution from the 13th Century Italy as a result of the teachings and commentaries of a group of jurists known as the Post-glossators. The Post-glossators were distinguished jurists attached to the Law schools of Bologna, Padua, Peruggia and Pavia in Italy. Pre-eminent amongst these jurists was Bartolus Sassoferato, successive Professor of Law at Bologna, Pisa and Peruggia who may aptly be described as the 'Father of Private International Law' or what is usually referred to as Conflicts of Law.[1]

The Post-glossators originated a theory called 'Statute theory' and by this theory, they interpreted each statute in any local territory in order to ascertain its object and thus, its rightful sphere of application. To this end, they classified each law that concerns a person or thing, into three categories namely, real, personal or mixed law. A real statute is one whose principal object is to regulate things; a personal statute is one that chiefly concerns persons whereas a mixed statute concerns acts such as the formation of contract. According to the Post-glossators, real statutes are essentially territorial. Their application is restricted to the territory of the enacting sovereign. Personal statutes, on the otherhand, applies only to persons domiciled within the territorial jurisdiction of the enacting Sovereign, but

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1. Ehrenweiz, A. A. A (1962) Treatise on the Conflict of Laws. *American Journal of Comparative Law, 2,* 267

they remain so applicable even within the jurisdiction of another Sovereign's territory.[2]

The distinction drawn by the Post-glossators between real and personal statutes led to the universal recognition that question affecting the status of a person should be govern constantly by one and the same law, irrespective of where he may happen to be or where the facts giving rise to the questions affecting him may have occurred.[3] This indeed set the stage for the questions affecting status of a person to be determined by the law of the domicile of the person involved.

Until the turn of the 19th Century, Domicile was universally recognized as the basis for the determination of the personal law. According to Cheshire, the principles of domicile had no rival for over five Hundred years.[4] However, beginning from 1804 when the French Civil Code first adopted the test of Nationality as the basis for the determination of the personal law, the pride of place that domicile had hitherto enjoyed began to be considerably weakened. In present times, it has fallen out of favour with many legal systems.[5] Despite this, in England and a great number of the commonwealth countries including Nigeria, Domicile have continued to be the basis for the determination of the personal law. For instance, in *Molekwu Vs Molekwu,*[6] the Court of Appeal defined personal law as "the law of the

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2. Cheshire, C. G., North, P. (1979) *Private International Law.* (10th ed.) London: Butterworths. 20
3. Rabel, E. (1958) *The Conflicts of Law: A Comparative Study.* (2nd ed.) Michigan:University of Michigan Law School. 109
4. Cheshire, C. G. (1970) *Private International Law.* (7th ed.) London: Butterworths. 180
5. Agbede, I. (1989) *Essays on Conflicts of Laws.* Ibadan: Shaneson C.I. Ltd. 56
6. (1997) 7 NWLR (Pt. 512) 263

deceased that was prevailing or predominant in the area or locality of the deceased." Indeed, over the years, Domicile has become strictly a common law concept.

The concept of domicile as applicable in Nigeria is derived from many sources but principally from the Received English Law. The concept was first introduced into Nigeria by Ordinance No. 3 of 1863. In *Attorney-General Vs John Holt Co.,*[7] Osborne C. J. stated:

> By Ordinance No. 3 of 1863, it has been enacted that all laws and statutes which were in force within the realm of England on the first day of January, 1863, not being inconsistent with any such Ordinance, should be deemed and taken to be in force in the Colony and should be applied in the administration of Justice so far as local circumstances would permit.[8]

After the Ordinance, subsequent Nigerian Legislations also provided for the reception of English laws into Nigeria but elevated the cut-off date to 1st January, 1900.

However, the following issues which constitutes the Statement of problems of this research which generated the interest of the researcher to delve into this area of study, viz:

Within Nigerian law, where is the domicile of a child born after the death of the father? Under the traditional concept of domicile received into Nigerian law, a legitimate child not born during the life time of his father is

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7. (1910) 2 NLR 1; (1915) AC 599
8. *Ibid,* at p.9, 601 respectively.

deemed to have his or her domicile of origin in the country in which his or her mother was domiciled at the time of his birth. This position clearly would not go uncontested, having in mind, especially the customary laws of the people of Nigeria.

Where is a deserted or separated wife's domicile especially with respect to her Will and succession to such Will?

To what extent can the English doctrine of domicile be applicable under the Nigerian customary law?

By virtue of the foregoing, the objective of the research is to examine the rules of application of the concept of Domicile; to identify its weakness with particular reference to the Nigerian local circumstances, and finally to make viable suggestions on how best to adapt the concept of Domicile in Nigeria.

1.2. Statement Of The Problem

The research Project will vigorously identify and expound the following problems, thereby showing a need for readjustment in the application of the concept of domicile in Nigeria. These problems are:

i. The problem of definition and application of the concept of domicile in inter-state situations in Nigeria. Indeed, there is a gaping hole in the application of the rules of domicile of choice in inter-state situations like Nigeria. The traditional concept of the rules of domicile is to the effect that, to acquire a domicile of choice, a person must satisfy three conditions, namely

a. He must have capacity to choose a domicile by his own act;

b. He must be physically present and resident where he seeks to establish his domicile; and

c. He must have an intention of remaining in that country permanently or at least, indefinitely.

This unsatisfactory rule of domicile has been adopted in Nigeria without qualification. For example, in *Fonseca Vs. Passman*,[9] Thomas, J., held that "to establish a domicile in Nigeria, the mere datum of residence is not sufficient… There must be unequivocal evidence of *animus manendi* or intention to remain permanently." The problem here is that, there has been a deep failure of Nigerian Judges to draw a strict line of distinction between international and inter-state Conflict of Laws situation. Indeed, whereas a horde of the cases in which the problem of domicile has arisen in England were cases of Conflicts of Law with international flavor, the few cases in which the cases has arisen in Nigeria were more of inter-state situations involving Conflicts of Law. Nigeria is a country made of many States with various ethnic flavors where there is a high mobility of persons as a result of inter-marriages, work and search for 'greener pastures'. To this extent, it is a misconception to think that the above rule can apply without qualification in Nigeria.

ii. The problem of change of origin under customary law. The general belief is that no Nigerian can legally change his ethnic group. The prevailing attitude is that 'once an Igbo, always an Igbo; once a Yoruba,

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9. (1958) W. R. N. L. R. 41 at 42

always a Yoruba; once a Hausa, always a Hausa' irrespective of the fact that the family of the *propositus* had settled amongst other ethnic groups generations previously. The fact is that this phenomenon has far reaching important legal consequences in the realm of domicile. For example, the settler continues to carry his personal law with him, which could be vastly different and indeed in contradiction to the personal laws applicable to the area in which he is now resident. Consequently, the personal rights of his descendants continue to be governed with this 'transported' personal law eventhough they might never visit their ancestor's place of origin or speak the language of the people of that area.

iii. The problem of a married woman's domicile. The common law position with respect to the domicile of a married woman is that a wife takes the domicile of her husband on marriage and continues to do so until the marriage is terminated by death or divorce. There is no gainsaying the fact that the Matrimonial Causes Act, 1970 has obviated to some extent the hardship on the deserted wife but the problem is that its effects can simply be described as a drop of respite in an ocean of legal problems. For instance, with respect to making a Will, a deserted wife's capacity to make such Will and the material or essential validity of such Will must comply in many cases with the *lex domicilii* of the husband, which in many cases may be unknown. Again, there is a problem of succession to the movables of an intestate deserted wife as this is governed by the husband's domicile at the time of her death.

1.3 Scope Of The Research

This research work has as its area of coverage an analytical appraisal of the concept of Domicile. Specifically, the research will consider the development of the traditional concept of Domicile and its introduction into Nigerian law. Particular attention will be paid to the various forms and rules of Domicile as well as the problems inherent in their application in Nigeria. The research will also develop the subjects of Nationality and habitual residence as alternatives to the concept of Domicile, bringing the merits and demerits of such alternatives. A concerted effort will be made to discuss present judicial and legislative approaches to the problems associated with application of the concept of domicile. Finally, the research will seek to provide recommendations and suggestions on how to best adapt the concept to suit Nigerian local circumstances.

1.4 Research Methodology

The doctrinal method of research shall be adopted in the analysis of the concept of domicile and its application in Nigerian law. This will be achieved through a detailed consultation and examination of local and foreign statutes, case laws, text books and journals dealing with the subject matter and any other relevant material that will be useful for credible research.

1.5 Literature Review

Within the ambits of this research work, relevant literature, judicial

authorities and statutes shall be examined. Thus, credence shall be given to several authors in the field of Conflict of Laws whose works have in no small measure contributed immensely to Private International Law on the whole and the concept of domicile in particular.

Morris in his book, *'The Conflict of Laws'*[10] provides a comprehensive and authoritative coverage of the concept of domicile but offers little in terms of exposition of the problems arising in its application.

Graveson , '*Conflict of Laws'*[11] on the other hand, did not only comment on the definition of domicile but also posited that the concept no longer fits the complexity, movement and sophistication of modern life in which many of our best intentions become temporary through frustrating circumstances. But he failed to point out a working definition and application in view of prevailing circumstances in modern life.

A foremost Nigerian author on the concept of domicile, Agbede, in his work, *'Themes On Conflict of Laws'*[12] discusses in great detail the need to establish residence and intention to remain in a place permanently (or indefinitely). He also went further to provide a comprehensive coverage of the spectrum of the law of domicile as it applies in Nigeria but did little in expatiating on this requisites of acquiring a domicile of choice.

Cheshire and North in their book, *'Private International Law'*[13] gave a good insight to the fact that domicile as a concept is better described than defined.

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10. Morris, J.H.C. (1993) *The Conflict of Laws.* London: Sweet and Maxwell.
11. Graveson, R.H. (1969) *Conflict of Laws.* (5th ed.) London: Sweet and Maxwell.
12. Agbede, I.O. (2001) *Themes on Conflict of Laws.* Ibadan: Shaneson C.I. Ltd.
13. *Ibid.*

Omoruyi in is Article[14] *'Domicile as a determinant of personal law: A case for the abandonment of the revival doctrine in Nigeria',* gave a well-rounded insight to the concept and posited that the common law concept of domicile vis-à-vis the revival doctrine cannot adequately fit into the realities of the contemporary society and therefore the law must be reformed to reflect this fact.

1.6 Justification Of The Research

This research work will be useful and beneficial to students of law, Academics, Legal Practitioners, Judges, Legislators and Human right activists, etc.

1.7 Organizational Layout

The research is organized into chapters and sub-topics discussing key issues relevant to the concept of Domicile.

Chapter One is a general introduction to the research. Amongst other issues, it focuses on Statement of the problem to be resolve in body of the research, scope of the research, the research methodology, justification for the research and literature review.

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14. http://www.nigerianlawguru.com/articles. accessed 11th August, 2014

Chapter Two deals with conceptual clarifications and the development of Domicile. It focuses on the development of the concept of domicile from its traditional root to its introduction into Nigerian law and clarifies some concept related to Domicile such as its definitions, forms and rules.

Chapter Three deals with issue of alternatives to Domicile as a connecting factor to determining the personal law of an individual. The chapter analyzes the merits and demerits of Nationality and Habitual residence as alternatives to Domicile.

Chapter Four considers the peculiar problems associated with the application of the concept of Domicile. The areas covered include the problem of defining Domicile in inter-state situation as occur in Nigeria, the problem of change of Domicile under Nigerian customary law and the problem of married woman's domicile.

Chapter Five is the summary and conclusion of the Research. It also proffer recommendations based on the findings of the research.

CHAPTER TWO

CONCEPTUAL CLARIFICATION AND THE DEVELOPMENT OF DOMICILE IN NIGERIA

2.1. Introduction

This Chapter will focus on key concepts about Domicile as a connecting factor to an individual personal law. To this extent, therefore, the chapter will consider the definition, form and rules of domicile. In addition, the chapter will look at the historical development of the concept of Domicile to its introduction into Nigerian Law.

2.2. Conceptual Clarification

The attempted definitions of domicile had been so inconsistent that one can only cite a correct definition within the context of a particular legal system. To this extent, the term varies in meaning from one country to another, from one age to another and indeed from the individuals who have attempted to define it.

The meaning ascribed to the term 'Domicile' by the layman is a place of residence or ordinary habitation; a house or home.[1] However, in the Roman law from which the term was originally taken, the roman word *'domicilium'* translated in English as 'domicile' indicated permanent residence so as to

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1. Omidire, K. *Domicile: A comparative analysis.* A Seminar paper presented at the Faculty of Law, University of Lagos. 1987. p. 1.

become liable to the municipal obligation of that particular district or city.[2] At Common Law, the concept is defined in terms of permanent home. Hence in *Whicker Vs Hume*,[3] Lord Cranworth stated thus: "By domicile, we mean home, the permanent home, and if you do not understand your home, I am afraid that no illustration drawn from foreign writers of foreign languages will very much help you to it."

There is indeed a problem with this definition. While the notion of permanent home can be explained largely in the light of common sense principles, the same is certainly not true of domicile. Domicile is "an idea of Law"[4] which diverges from the notion of permanent home in two principal respects.

In the first place, the elements which are required for the acquisition of a domicile go beyond those required for the acquisition of a permanent home. In order to acquire a domicile of choice in a country, a person must intend to reside in a country for a number of years. Again, a person cannot acquire a domicile of choice in a country in which he has never been physically present but a person may have a permanent home in a country if he had established his family there and yet has not acquired a domicile there.

Secondly, domicile differs from permanent home in that, the law in some cases say that a person is domiciled in a country whether or not he has

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2. Odusanya, O. *Domicile and Nationality as connecting factors.* A Seminar paper presented at the Faculty of Law, University of Lagos. p. 1
3. (1858) 7 H.L. Cas 124 at 160
4. *Bell Vs Kennedy* (1880) L. R. I. SC and Div 307, 320

abandoned one home either because he is permanently vagrant or because he has abandoned one home and has not yet acquired another, but the law nonetheless attributes a domicile to him. Again, a person may in fact have a permanent home in one country but be domiciled in another because the law deprives him or her of the capacity of acquiring domicile in the present home. Thus children under 16 years in England and mentally disordered persons may be domiciled in countries in which they do not have their permanent home.[5]

Furthermore, according to Kolapo Omidire, the English definition of domicile has failed to take into account the fact that the concept of domicile is not uniform throughout the world. Even at the time Lord Cranworth gave his definition of domicile, what constitutes domicile of choice could not be pointed out without variation.[6]

It may well be that to construct a formula which describes the precise meaning of domicile as understood by English Law is an impossibility. No wonder then that Sir George Jessel stated in *Doucet Vs Geoghegan,* that "the term domicile is impossible of definition."[7] As pointed out by W.W. Cook,[8] the English conception of domicile is "a single conception theory" and by this English Law takes the view that the

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5. Collins, L. (1987) *Dicey & Morris Conflicts of Law* (11th Ed.) London: Sweet and Maxwell Ltd. p. 117.
6. Omidire, *Op. Cit.* p. 2.
7. (1878) L.R. Ch.D 441 at 456.
8. Cheshire, C. G. & North, P. *Op. Cit.* p. 162.

test which determines the place of a man's domicile must remain constant no matter what the nature of the issue may be before the court. Cook, however, denied that this was true in practice. He regarded "domicile" as a relative term which varies in meaning according to the different situations to which it is applicable.

One cannot help but agree with Cook on the basis that to hold out one definition of domicile for all purposes will surely wrought injustice and end up not fulfilling the reasonable expectations of the parties involved in the litigation.

In the view of the present writer, Domicile is a conception of the 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 in fact or is considered by law so to have because of his dependence on some other person. This is the definition cited with approval by Awogu, J.C.A in the Court of Appeal case *Osimabowo Vs Osimabowo*[9] which to date is the only case that any Superior Court of record in Nigeria have attempted the definition of domicile. It remains to be seen whether the Supreme Court, if and when seized of the opportunity will adopt the afore-mentioned definition.

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9. (1991) 3 NWLR (Pt. 177) 85 at 87

2.3. Development Of Domicile in Nigeria

The concept of domicile had its evolution from the 13th Century Italy as a result of the teachings and commentaries of a group of jurists known as the Post-glossators. The post-glossators were distinguished jurists attached to the Law schools of Bologna, Padua, Peruggia and Pavia in Italy. Pre-eminent among these Jurists was Bartolus of Sassoferato, successive Professor of law at Bologna, Pisa and Perugia who may aptly be described as the Father of Private International Law or what is usually referred to as Conflicts of Law.[10]

The Post-glossators originated a theory call 'statute theory' and by this theory, they interpreted each statute in any local territory in order to ascertain its object and thus for its rightful sphere of application. To this end, they classified each law as it concerned a person or a thing, into three categories namely real, personal or mixed law. A real statute is one whose principal object is to regulate things, a personal statute is one that chiefly concern persons, while a mixed statute is one that concern acts such as the formation of a contract. According to the Post-glossators, real statute is essentially territorial. Their application is restricted to the territory of the enacting Sovereign. Personal statute, on the other hand, applies only to persons domiciled within the territorial jurisdiction of the enacting Sovereign; but they remain so applicable even within the jurisdiction of another territorial Sovereign.[11]

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10. Ehzrenweiz, A. A. *Op. cit.* at p 67.
11. Cheshire, C. G., North, P. *Op. cit. at* p.20

The distinction drawn by the Post-glossators between real and personal statutes had led to the universal recognition that questions affecting the status of a person should be governed constantly by one and the same law, irrespective of where he may happen to be or where the facts giving rise to the questions relating to him may have occurred.[12] This indeed set the stage for the birth of the concept of Domicile and it became settled in many jurisdictions that matters or questions affecting a person's status should be determined by the law of the domicile of the person involved.

Until the turn of the 19th century, the concept of Domicile was universally recognized as the basis for the application of the personal law. According to Cheshire, the principles of domicile had no rival for over five Hundred years.[13] However, beginning from 1804 when the French Civil Code first adopted the test of Nationality as the basis for the determination of the personal law, the pride of place which domicile had hitherto enjoyed began to be considerably weakened. In the present times, it has fallen out of favour with many legal systems. In spite of this, in England and a great number of the commonwealth countries including Nigeria, domicile has continued to be the basis for the determination of the personal law.[14] In fact, in recent history, domicile has become strictly a common law concept.

The concept of domicile as applicable in Nigeria is derived from many sources but principally from the Received English Law. The concept was

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12. Rabel, E. *Op. Cit.* at p.109.
13. Cheshire, C. G. *Op. Cit. at* p.180.
14. In *Mojekwu Vs Mojekwu* (1997) 7 NWLR (Pt. 512) 263**,** the Court of Appeal defined personal law as 'the law prevailing or predominant in the area or locality of the deceased'.

first introduced into Nigeria by Ordinance No.3 of 1863. In *Attorney General Vs. John Holt Co,*[15] Osborne, C.J. stated:

> By Ordinance No. 3 of 1863, it has been enacted that all laws and statutes which were in force within the realm of England on the first day of January, 1863, not being inconsistent with any such ordinance, should be deemed and taken to be in force in the colony and should be applied in the administration of Justice so far as local circumstance would permit.

After Ordinance No. 3, subsequent Nigerian legislations also provided for the reception of English Law into Nigeria but elevated the cut-off date to 1st January 1900.[16]

2.4 Forms Of Domicile

There is no unanimity as to how many forms of domicile there are. Basically, many Jurists and Judges who have written or decided on the subject are divided on the question whether domicile of dependence is a separate form of domicile on its own or subsumed under domicile of origin. Wittingly or unwittingly, two schools of thought has arisen on the subject- one favouring domicile of dependence as a separate domicile and the other arguing that there is no separate form of domicile called domicile of dependence.

The arrowhead on the first school of thought, to the mind of the present writer, is Graveson who in his book[17] classified forms of domicile into three groups, viz: domicile of origin, choice and dependence. Other writers that

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15. (1910) 2 NLR 1; (1915) AC 599 at p. 601
16. Essien, E. (2001) *General Principles of Nigerian Law.* (2nd ed.) p.79, 80
17. Graveson, *Op. Cit.* p. 194, 195.

favour this classification include Agbede[18] and Ekwere[19] who was of the view that due to certain considerations or factors, certain persons in law are deemed not capable of acquiring a domicile of choice in their home. According to him though it is not contestable that such persons must of necessity and in law, have a domicile of origin which is acquired at birth but as the domicile of origin remains in abeyance they cannot stay without a domicile. Consequently the law imposed another kind of domicile on such persons being domicile of dependence.[20]

However, writers in the anti-dependence camp do not accept the above position. Cheshire was of the view that there are two main classes of domicile: the domicile of origin which is communicated by operation of law to each person at birth *i.e.* the domicile of his father or of his mother, according to whether he is legitimate or illegitimate and the domicile of choice which every person of full age is free to acquire in substitution for that which he at present possesses.[21] This position was approved by Omidire who wrote:

> Domicile has generally been classified as appearing in three forms viz domicile of origin, domicile of choice and domicile acquired by operation of law otherwise called 'domicile of dependence' person. It is however my contention that there can only be two classifications: that which a person chooses, which is regarded as his domicile of choice; and that which the law imposes upon him. This second category includes the domicile of origin and domicile of dependent persons. [22]

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18. Agbede, *op. cit.* p. 58
19. Ekwere, F. N. (2000) Is there a domicile of dependence in Nigerian Conflicts of Law. *R.A.D.I.C. 12,* p. 616
20. *Ibid,* at p. 617.
21. Cheshire & North, *Op. Cit.* p. 156, 157
22. Omidire, *op. cit.* at p. 4.

This contentious issue has only reached the second apex court in Nigeria and two decisions of the Court of Appeal in this respect are not in tandem. In *Osimabowo Vs Osimabowo,*[23] Awogu, J.C.A after defining domicile as found in Graveson went on to state that domicile may be domicile of origin, domicile of choice or domicile of dependence.

The above decision above was not followed in the issue of forms of domicile in the subsequent Court of Appeal's case *Bhojwani Vs. Bhojwani.*[24] The court stated thus:

> There are strictly two types of domicile, viz (a) domicile of origin, and (b) domicile of choice. There is no separate domicile known as domicile of dependence. The true position is that domicile of origin always depends on circumstances of birth or adoption. Hence in Nigeria a child generally takes the domicile of the father at the time of his birth. An adopted child takes the domicile of whoever is adopting it, probably retrospectively. It is this dependence associated with domicile of origin that may have been erroneously thought to be a separate domicile, named domicile of dependence.[25]

The question that now arises for discussion is: which of these two conflicting Court of Appeal decisions will stand as the law with respect to the issue of domicile of dependence? A trite answer to this question is the judgment delivered also by the Court of Appeal in the case *Co-operative and Commerce Bank (Nig) Plc Vs Prince Richard O. Ozobu.*[26] On the question whether the Court of Appeal is bound by its earlier decisions, Achike J.C.A stated:

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23. *Op. Cit,* at p. 88.
24. (1995) 7 NWLR (Pt. 407) 349
25. *Ibid,* at p. 364
26. (1998) 3 NWLR (Pt. 541) 290

> By the doctrine of stare decisions, this court is bound by its previous decisions on a matter on all fours in a subsequent case, so long as the afore-said early decision
> a. Were not given *per incuriam*; or
> b. The decision in the one case is not in conflict with another decision of the court on the same legal issue; or
> c. That the previous decision of this court has not been overruled by the decision of the Supreme Court.
> d. Its said decision has not been neutralized by legislation.
> To differ from a well reasoned judgment of this court for the sake of being radical or merely being different or pedantic is to wreck havoc to the time-honored doctrine of judicial precedent. It is an act of judicial rascality which must be roundly condemned.[27]

In view of the oft-quoted dictum of Achike J.C.A above, it can be safety stated that the Court of Appeals decision in Osimabowo's case with regard to forms of domicile remain good law in Nigeria until and when overruled by the Supreme Court or neutralized by legislation.

Therefore, the present writer will proceed on the basis that there are basically three classes of domicile, namely domicile of origin, choice and dependence.

2.4.1 Domicile of origin

A domicile of origin is attributed to every person at birth by operation of law. This domicile does not depend on the place where the parent decides, but on the domicile of the Parent at the time of birth. As a result of this rule, a domicile may be transmitted through several generations no member of which has ever resided for any length of time in the country of the domicile of origin.[28]

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27. *Ibid*, at p. 306, 307.
28. Dicey & Morris, *Op. Cit.* p. 126

By the rules of domicile of origin,

i. A legitimate child during the lifetime of his father has his domicile of origin in the country in which his father was domiciled at time of his birth.

ii. A legitimate child not born during the life time of his father, or an illegitimate child has his domicile of origin in the country in which his mother was domiciled at the time of his birth

iii. A foundling has his domicile of origin in the country in which he was found.

iv. Furthermore, a domicile of origin may be changed to another domicile of origin as a result of adoption but not otherwise.

The rules of domicile of origin above are indeed the traditional prevailing rules in England and other countries of the Western World. The question that arises is whether or not these rules could stand in Nigeria as acceptable and relevant to determine a Nigerian's domicile in view of the prevailing socio-cultural system.

Firstly, the rule that a post-humous child takes the domicile of his mother at the time of birth cannot stand incontestable in Nigeria. Unlike in England where a family consists of a man his wife and children, in Nigeria a family unit often includes collaterals of the third or fourth degree of relationship. For instance, the Nigerian *Fatal Accident Act*[29] defines 'immediate family' in relation to a deceased person not subject to a system of customary law to include the widow or widows, as the case may be, the widower, a parent, and

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29. Cap … Laws of the Federation of Nigeria, 2004

a child.[30] With regard to a person who was subject to a system of customary law not being Islamic law, immediate family means in addition to any of the person specified above, surviving brothers and sisters of a deceased person, which expression includes step brothers and sisters.[31]

Furthermore, in all the customary laws of Nigeria, the child and the mother are regarded as the property of the deceased Father and husband. This position is supported by a court of no less repute than the Supreme Court in the case *Akinubi Vs Akinnubi*[32] where Onuh, J.S.C. stated quite categorically that:

> It is well settled law of native law and custom of the Yoruba Customary Law that a wife could not inherit her husband property. Indeed, under Yoruba Customary Law, a widow under an intestacy is regarded as part of the Estate of her deceased husband to be administered, or inherited by the deceased family…[33]

Therefore from the moment of the deceased demise, a member of his family (in most cases) would have stepped into his shoes ready to satisfy all his previous obligations and to take care of his family and his children including any post-humous child by the deceased's wife after his demise.[34] If this is the case where therein lies the justification in Nigeria that the legitimate post humous child should take the domicile of his mother as his domicile of origin?

Agbede is of the view that it should be presumed that post humous child take

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30. *Ibid*, at S. 2(a)
31. *Ibid*, at S. 2(b)
32. *Ibid*
33. (1997) 2 NWLR (Pt. 486) 144.
34. *Ibid*, at p. 149

the domicile of the head of his father's family, a presumption which may be rebutted where the child is virtually reared and maintained by the mother or her family.[35] The present writer subscribes to the this well reasoned opinion and further submit that in cases where the paternity is unknown the child as a matter of law be deemed domiciled in the domicile of the mother.

Secondly, in English law, a child is illegitimate because he is born of parents not married to each other. In Nigeria, the parents may not necessarily be married. The overriding factor is the acknowledgement of the child's paternity by its father or the family of the father. Hence in *Awobodu Vs Awobodu,*[36] although the court had held that the children of the plaintiff were illegitimates, it went on to decide that since the deceased had accepted them as his own, they would be taken care of by deceased's estate. Therefore, while one could accept the fact that a child born to both parents during the continuance of their marriage takes the domicile of his father, the concept of illegitimacy in Nigeria is very much different from what it is under English Law.

Thirdly, under the received English Law, the domicile of origin is regarded as more durable and tenacious than domicile of choice in the sense that it is more difficult to establish a change of domicile of origin.[37] No wonder then that Lord McNaugten stated that "its character is more enduring, its hold stronger and less easily shaken off."[38] Lord Westbury further contended that since it was acquired independently of the will of the party, "it would be

35. Agbede, *Op. Cit.* at p.58
36. (1979) 2 L.R.N. 339
37. Hailsham, *Op. Cit.* at p. 45
38. *Winans Vs A.G*. (1904) A.C. 287 at 290.

inconsistent with the principles on which it is by law created and inscribed, to suppose that is capable of being by the act of the party entirely obliterated and extinguished."[39]

It is important to understand that the above view of the English Courts about domicile of origin was maintained and developed to satisfy the natural desire of a home country from which innumerable colonizers have gone out into the world.[40] In the event of death, while absent, they desired that their property should descend in accordance with the laws of the land of their birth.[41] There is then no better illustration than the metaphor given by Professor Agbede that one should not be surprised that this domicile of origin "should always remain in abeyance with its tentacles, like an octopus, ready to grip the unfortunate emigrant as soon as he abandons his domicile of choice."[42]

Unfortunately the tenacity of the domicile of origin has rubbed off on the states of the Commonwealth which inherited the English legal system. In Australia, Canada and Nigeria, the English position has been adopted. If as it has been submitted that this system wrought much injustice in England,[43] it does even worse in Nigeria and other commonwealth countries with a Federal System.

Although Nigeria has been arbitrarily divided into many component units of a Federal State, the fact remains that Nigeria is a multinational State. A person is deemed to be domiciled either in his domicile of origin or of choice

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39. *Udny Vs Udny* (1869) L.R.I.S.C & Div 441 (H.L).
40. Rabel, *Op. Cit.* at p. 165
41. *In Re Estate of Jones* (1921) 192 IOWA 78
42. Agbede, *Op. Cit.* at p. 58, 59.
43. Re O'Keefe (1940) Ch. 124

which is always in a State of the Federation. It must however, be realized that many States make up what is referred to as 'nation' in political science. For example, Oyo, Ogun, Ondo, Osun, Lagos and Ekiti States form substantially the Yoruba nation. For purpose of commerce, adventure, ambition to improve one's social status and inter-marriages, these States have been interacting and their citizen have regarded one or the other of these States as their permanent homes. One is then surprised why many decisions of Nigerian Courts tend to emphasize the tenacity of the English concept of domicile of Origin in relation of Nigeria. This obnoxious juxtaposition of the law was exhibited in the case *Adeyemi Vs Adeyemi*[44] where the respondent, having a domicile of origin in Ijebu-ode (having been born there around 1913) came to Lagos in 1941 where he remained until 1962. The learned trial Judge stated:

> I have carefully considered the evidence of the petitioner but do not find it sufficiently strong to persuade me that the respondent had ever formed a fixed and settled purpose of abandoning his western Nigeria domicile and settling finally in Lagos… the petitioner has failed to discharge the onus on her to prove that the respondent had abandoned his domicile of origin and acquired a domicile of choice in Lagos.[45]

It may be informative to point out that Ijebu-ode is a neighbouring town to Lagos and that many Ijebus have their homes in Lagos. Indeed, the change of domicile envisaged in this case is like a change of home from one part of the Home Counties in England to the other.[46] If one accept this decision as the law, then it is most respectfully submitted that it will have the effect of making it virtually impossible for any Nigerian to acquire any domicile apart from his domicile of origin.

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44. (1962) L.R. 70
45. *Ibid,* at p. 61
46. Agbede, *Op. Cit.* at p. 72

Having exhaustively discussed the rules of domicile of origin and the problem inherent in its application in Nigeria, focus now turns to another form of domicile- the domicile of choice.

2.4.2 Domicile of choice

Domicile of choice was defined by Lord Westbury as

> A connection of 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… it must be residence not for a limited period or particular purpose but general and indefinite in its future contemplation.[47]

A more modern statement to the same effect is that of Scarman J. who stated that *"*a domicile of choice is acquired only if it is affirmatively shown that the proposition is resident within a territory subject to a distinctive legal system with the intention, formed independently of external pressures of residing there indefinitely."[48]

It can be gathered from the above-quoted expository definitions that a domicile of origin is displaced when a man acquires a domicile of choice. Furthermore in order to acquire a domicile of choice, a person must satisfy three conditions:

(1) The first is that he must have capacity to choose a domicile by his own act. Thus, he must not be dependent on any person. To this extent therefore a mentally disordered person or married woman cannot acquire

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47. *Udny Vs Udny, (op. cit),* at p. 458
48. *In the Estate of Fuld (No. 3)* (1968) AC 675 at 684

a domicile of choice since both persons are dependent on others.

(2) Secondly, he or she must be physically present and resident where he seeks to establish his domicile and lastly.

(3) He must have an intention of remaining in that country permanently or at least, indefinitely.

It should be pointed out that in all the jurisdictions that regard domicile as the basis of personal law, these three elements must be present before a domicile of choice can be acquired.

As a factor to be shown in other to prove the acquisition of a domicile of choice, residence rarely causes much difficulty. It is best to regard residence simply as some evidence of the intention to reside or *animus manendi*. As such evidence, it increases with the length of the residence, although on its own, it is not decisive. In *Bell Vs Kinnedy,*[49] it was held that it may be concluded that if the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile. In the American case of *White Vs Tenant,*[50] the deceased had sold his farm in West Virginia, packed his belongings, with his wife, to Pennsylvania "with the declared intention of making the Pennsylvanian house his home that evening". They arrived in Pennsylvania but it was soon discovered that his wife had typhoid fever. He paused long enough to offload his household goods in the Pennsylvanian house and to loose his livestock. White never returned to the Pennsylvanian house to live though there was evidence that he went there daily to take care of his livestock for about two

49. (1868) L. R. I. S.C & Div 308 at 319
50. (1888) 31 W.Va 790, 8 S.E 596

weeks, then suffered an attack of typhoid fever and died in West Virginia. The Court held that White had arrived at the Pennsylvania house with the intention of making it his home for an indefinite time. Therefore the new home became his domicile. However, in the recent Nigerian case *Bhojwani Vs. Bhojwani* both the Court of Appeal[51] and the Supreme Court[52] overturned the decision of the trial court that the long residence of the Appellant/Petitioner in Nigeria since 1978 was evidence of residence and intention to reside permanently in Nigeria on the overwhelming evidence that the Appellant had in an earlier suit in London sworn an affidavit and deposed to the effect that he hope to make Singapore, his home country, his permanent residence.

A person does not acquire a domicile of choice by his residence in a place under physical or legal compulsion. Therefore, for the residence to be effective, it must be lawful. In *Ah Yin Vs Christie,*[53] Griffin, C.J. stated that "the acquisition of a domicile by a person coming from abroad to any country depends… upon the permission given by that country to enter it and make his home." Therefore, where an immigrant remains in Nigeria illegally without permissions, he may be deemed in law not to be resident in Nigeria for the purpose of acquiring a domicile of choice.

There is no other area of disarray in the concept of domicile as the attempt to establish the kind of intention which a person must possess before he can be domiciled in a forum. This is borne out of the simple fact that intention is so

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51. (1995) 7 NWLR (Pt. 407) 349
52. (1996) 6 NWLR (Pt. 457) 661
53. (1907) 4 C. L. R. 1428 at 1431

subjective in nature that, metaphorically, "even the devil knows not the thoughts of man…' For instance, under English Law, a person must have formed the intention independently of external pressures and it must be to reside in the place indefinitely. At a time, English Law required that the intention must be permanently to reside in the country in question. However in *Udny Vs Udny*[54] *(Supra)* the opinion was expressed that 'permanent' means no more than "general and indefinite in its future contemplation." Furthermore, according to Cheshire, it is no part of the Law that the intention should be irrevocable, for such a requirement would virtually exclude the acquisition of a domicile of choice.[55] On the nature of the intention, perhaps the most satisfactory exposition is that of Kindersley, V.C., in *Lord Vs Colvin.*[56] He regarded the nature of intention to be "...the 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."

In determining whether a person has acquired a new domicile, every conceivable event and incident in a man's life is a relevant and admissible evidence of his state of mind. In *Winans Vs A.G. (Supra)* the deceased spent the last 37 years of his life in England. He arrived in England upon heeding medical advice but while there he held aloof from English people, whom he continued to dislike. His passion was to make America a supreme Naval power and he had a grandiose dream of constructing a boat building yard in the U.S. The House of Lords after considering all the evidence, held that he

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54. at p. 717
55. Cheshire, *Op. Cit.* at p. 166, 167
56. (1859) 4 Drew 366 at 376

never lost his domicile of origin in America. Lord McNaughten even stated that "when he came to this country, he was a Sojourner and a Stranger, and he was I think a sojourner and a stranger in it when he died."

In a subsequent case, Lord Atkinson whilst observing the considerations in Winan's case said 'the tastes, habits, conduct, actions, ambitions, health, hopes, and projects of Mr. Winan deceased, were all considered as keys to his intention to make a home in England."[57]

Therefore it is obvious that no one fact is of constant value since each case varies according it circumstances. This makes it virtually impossible to fashion out rules by which the intention could be determined.

The motive for acquiring a domicile of choice makes no difference but the fact that the motive was dictated by an ulterior motive or purpose which will result in taking some special advantages such as a divorce, or tax evasion may show that the person has no bona fide intention to change his home.[58]

The question has been asked whether declarations of intentions made by the person could aid in the determination of such intentions in *McMullen Vs Wadsworth*,[59] it was held that it is not by naked assertion, but by deeds and acts that a domicile is established. The Court held:

> Declarations as to intention; said Lord Buchmaster, 'are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which and the circumstances in which they are made, and they must further be fortified and carried into effect by

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57. *Casdagli Vs Casdagli* (1919) AC 145 at 178
58. Omidire, *Op. Cit.* at p. 15
59. (1889) 14 AC 631

> conduct and action consistent with the declared expression. [60]

The onus of proving that domicile has been chosen lies upon those who assert that fact. As said by Lord McNaughten in Winan's Case,

> So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice: and rightly, I think. A change of domicile is serious enough when the competition is between two domiciles both within the ambit of one and same Kingdom or Country-more serious still when one of the two is altogether foreign.[61]

This presumption that the acquisition of domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words has influenced Nigerian Law. Hence in *Bhojwani Vs Bhojwani (Supra),* on the burden of proving a domicile of choice, the Court of Appeal held that the onus of proving that domicile has been chosen in substitution for the domicile of origin lies upon the party who asserts that fact and this must be shown with perfect clearness and it depends on the facts. Thus, a decision on the question of domicile of choice requires a detailed analysis and assessment of available facts to discover the mind of the party concerned, and for this purpose it should be realized that residence and domicile are two distinct things, although residence may be some prima facie proof of domicile. It is by no means to be inferred from the fact of residence that domicile results, even though the party does not have any other residence in existence or in contemplation.[62]

The rules of domicile of choice have not escaped the criticism of Jurists and

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60. *Ibid,* at p. 636
61. *Ibid,* at p. 291
62. *Ibid,* at p. 367

Judges alike. The English Courts concentration on a man's actual state of mind to determine his exact intention has been described by Cheshire as "to set sail on an uncharted sea" and "a roving commission imposed upon the court."[63] It is not surprising that their decisions exhibit a multiplicity of different factors that have been regarded as indices of intention.

It is hereby submitted that instead of the tendency to investigate a man's actual state of mind, the court should rest itself with considering the natural inference of his long-continued residence in a given territory or country.

2.4.3 Domicile of dependence

In English Law, there are two classes of dependent persons, namely: children and mentally disordered person.[64] In other common law jurisdictions like Australia and in Nigeria, the married woman is still regarded as being dependent on the husband and thus assumed his domicile except under certain circumstances.

The present writer has already discussed the acquisition of domicile of origin by an infant, under the sub-heading, domicile of origin. However, it must be pointed out that if the child has not attained the age of capacity he cannot acquire by his own act an independent domicile of choice. That age in English Law is 16 years and the child, unless he is validly married, is powerless to alter his civil status.[65] In Australia, India and Nigeria that age is arbitrarily fixed at 21 years. This age of majority was introduced into Nigeria

63. Cheshire, C. G. & North, P. *Op. Cit.* at p. 167
64. *Ibid*, at p. 178
65. *Ibid.*

through the Infant Relief Act of 1874 which Section 1 provided for the age of 21 as the contractual age. The application of this Act was further confirmed in the case *Labinjoh Vs Abake*[66] where the Full Court held that the age of majority in Nigeria is 21 years, at least, for contractual purposes.

Furthermore, it is important to note that the inability of the infant to acquire a domicile of choice is confined to him, and there is nothing to prevent the acquisition of a domicile of choice for him by the act of person on whom he is dependent. Therefore, a Father who previously had Nigeria as his domicile of origin may by his own act acquire a domicile of choice in England. Such change of domicile will also means a change in the domicile of the child.

The fact that a child no longer lives with his Father do not affect the rule that his domicile changes with that of the person on whom he is dependent.

Some comments must be made about the rules above. Agbede is of the view that fixing the age of capacity at 21 is arbitrary.[67] If an infant has attained the age of discretion and can make decision pertaining to his life, there is no reason why he should unnecessarily be tied to the domicile of his Father. This is in reality with the present day position where, before attaining the age of 21, some children either completed their education, left the family houses or may in fact be employed thousands of kilometers away from their parents. Furthermore, it is absurd to say that the child still carries the domicile of his father even when the father being an irresponsible person has abandoned the child and mother. The absurdity of the English rule applied in Nigeria is

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66. (1924) 5 N.L.R. 33
67. Agbede, *Op. Cit.* p.62

further shown in the fact that even if the child is married, he still carries the domicile of his Father. This rule is preposterous. It denies a full-grown married person the right to change his domicile at will and surrendering his domicile to that of his parent, which may continue to change or is unknown.[68]

In England, by virtue of The Domicile and Matrimonial Proceeding Act, 1973, the domicile of a married women shall instead of being the same as her husband by virtue only of marriage, be ascertained by reference to the same factors as in the case of any individual capable of having an independent domicile. The effect of this provision is that a married woman is to be treated as capable of acquiring a separate domicile, though in the vast majority of cases, she and her husband will independently acquire the same domicile. In the United States, as in England, by virtue of Section 22 of The American Reinstatement, the power of a married woman to choose a domicile is not restricted to the bringing of marital actions. If she could acquire a domicile of choice for one purpose, she could do so for any other purposes.

However, in Nigeria, the old common law rule which can no longer stand in present day reality has been retained. Under this rule, the wife takes the domicile of the husband and continued to do so until the marriage is terminated by death of divorce. One of the reasons for this unity of domicile has been expressed by Blackstone that "the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of her husband."[69] As opined by Omidire, this view is

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68. Omidire, *Op. Cit.* p.9
69. Blackstone, W. (1865-1869) *Commentaries on the Laws of England Vol. 1*. London: Blackstone Press.

now obsolete. He submitted that "we have gone past the circumstance of Adam and Eve in the Garden of Eden."[70]

At this juncture, it must be stated categorically that the Blackstone concept of incorporation will hit a brick wall in view of the system of customary marriage practiced in Nigeria. In the case *Owners M/V Baco Liners 3. Vs Adeniji,*[71] Niki-Tobi, JSC after quoting the above passage from Blackstone stated succinctly:

> So far so good and so beautifully put. But does the above apply to all types of marriage in Nigeria? S. 2 of the Evidence Act Cap 112 LFN, 1990 defines wife and Husband as wife and marriage. In my view, Blackstone's concept of marriage anticipates the above S. 2 definition of wife and husband and no other type of association… Certainly, customary law does not recognize the incorporation concept of Blackstone.[72]

The second reason that had been given for the retention of this rule is the desirability of having the interests of each member of the family regulated by the same law and in order to achieve this goal, it is necessary that husband and wife have the same domicile. Agbede considered this reason 'a vanishing fiction' in our age.[73] Considering the fact that this rule has been modified in England, that it is no longer applied in the United States, and under the laws of Norway, Denmark and Russia, the wife does not share the husband's domicile, its continued retention and application in Nigeria cannot be justified.

With respect to the dependence as a result of mental disorder, the rule is that

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70. Omidire, *Op. Cit.* at p.10
71. (1993) 2 NWLR (Pt. 274) 195
72. *Ibid*, at p.203, 204
73. Agbede, *Op. Cit.* at p. 63

if a person by reason of unsoundness of mind is incapable of forming that required intent to settle in a country permanently, then his domicile remains unchanged as long as his incapacity persists. Thus, his domicile will be that which he had, immediately prior to his becoming insane although if he has continuously been insane both during childhood and after the age of 21, it is said that his domicile will continue to change with that of his Father.[74]

74. Omidire, *Op. Cit.* at p.12

CHAPTER THREE

LEGAL FRAMEWORK OF THE LAW ON DOMICILE IN NIGERIA

3.1 Introduction

The concept of domicile as applicable in Nigeria is derived from many sources but principally from the Received English Law. The concept, amongst others, was first introduced into Nigeria by Ordinance No.3 of 1863. In *Attorney General Vs. John Holt Co,*[1] Osborne, C.J. stated:

> By Ordinance No. 3 of 1863, it has been enacted that all laws and statutes which were in force within the realm of England on the first day of January, 1863, not being inconsistent with any such ordinance, should be deemed and taken to be in force in the colony and should be applied in the administration of Justice so far as local circumstance would permit.

After Ordinance No. 3, subsequent Nigerian legislations also provided for the reception of English Law into Nigeria but elevated the cut-off date to 1st January 1900.[2]

It is instructive to note that the rules determining domicile in common law jurisdictions such as Nigeria are based on case law in origin. Most jurisdictions have altered some aspects of the common law rules by statute, the details of which vary from one jurisdiction to another. For instance, in Nigeria, the Matrimonial Causes Act of 1970 abolished the rule that a married woman had the domicile of her husband for commencement of matrimonial causes. However, the general framework of the common law rules has survived in most jurisdictions including in Nigeria. Therefore, the

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1. (1910) 2 NLR 1; (1915) AC 599 at 601
2. Essien, E. *General Principles of Nigerian Law.* Golden Publications, Uyo. 2nd Edition (2001) P. 79, 80.

traditional rules of Domicile form the legal framework of the law relating to domicile in Nigeria. This chapter shall therefore critically analyse the legal framework of the law of Domicile in Nigeria, bringing out the strengths and weaknesses in the five various rules of Domicile herein outlined.

3.2 Rule 1: Nobody shall be without a domicile

This means that every person must have a permanent home. In the words of Lord Westbury in the leading case of *Udny Vs Udny (Supra)*

> "…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 his mother if illegitimate.[3] This has been called the domicile of origin and is involuntary."

One only needs to add that in respect of a foundling the law attributes to him the law of the place where he is found.

This domicile of origin continues and prevails until a new domicile has been acquired. It is not extinguished by mere removal *animo non revertendi.*[4] It cannot be lost by mere abandonment. It endures until supplanted by a fresh domicile of choice. Even then, it is only kept in abeyance in such a case and revives to fill the gap between the abandonment of one domicile of choice and the acquisition of another.

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3. It is important to note that the concept of illegitimacy in Nigeria is different from the concept as applied in England. Section 42 (2) of the 1999 Constitution states clearly that 'no citizen of Nigeria shall be subjected to any disability or deprivation by reason or circumstances of his birth'. Furthermore, an illegitimate child in Nigeria may be legitimated by subsequent marriage of the parents or by acknowledgement by the Father.

4. Cheshire, C. G., North, P. *Op. Cit.* p.176

3.3 Rule 2: The rule prohibiting two domiciles

The logic behind this rule is that since the purpose of determining a person's domicile is to connect him with some system of law, it follows that such a person must not have more than one such system of laws. Be that as it may, Graveson contended that although domicile is based on single system of law yet the system of a federation is subject to two legal systems, State and Federal, in both of which domicile may seem relevant'.[5] This contention is very much in which line with that of a researcher into the concept of domicile in Nigeria who aptly concluded that in Federal systems of government like Nigeria, Canada, Australia, etc., a person can have more than one domicile for different purposes.[6] For instance, in each of these three countries, statutory provisions have been made for one to have a Federal domicile for Matrimonial Causes while maintaining a State for other purposes. In Nigeria, this is provided for in Section 2 (3) of *the Matrimonial Causes Act, 1970* which declares that any person domiciled in any State is domiciled in Nigeria. Thus, the effect within a limited field is to create a Nigerian Domicile as distinct from a State domicile and indeed one that is different from domicile in a State for other purposes, e.g. succession. To this extent therefore, the rule - no person can have two domiciles, means in Nigeria, no person can have two domicile at the same time and for the same purpose.

3.4 Rule 3: Domicile connotes connection with a territorial system of law

This rule presupposes that domicile signified a connection with a territory subject to a single system of laws. Therefore in Nigeria, the legal system that

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5. Graveson, *op. cit.*
6. Ogbonna, G. (1986) *Lex Domicilii under the Nigerian Conflict of Laws. (*Unpublished LL.B Project). University of Calabar, Cross River State. p. 17

applies in domicile cases is the Nigerian legal system comprising of customary law, Nigerian enactment, Received English Law and of course Case Law.

3.5 Rule 4: The presumption of continuance of existing domicile

This rule is to the effect that an existing domicile is presumed to continue until it is proved that a new domicile has been acquired. Therefore the burden of proving a change lies in all cases upon those who allege that a change has occurred. In England as well as in Nigeria, the presumption of continuance is in favour of the domicile of origin. Therefore the kind of domicile alleged to continue determines the strength of the presumption.[7] This principle can best be illustrated with two Nigerian cases decided by the Court of Appeal. First, in *Osimabowo Vs Osimabowo (Supra),* where the issue for determination by the Court was whether or not the Petitioner/Respondent sufficiently disclosed his domicile in Nigeria in order to be able to sue and thereby confer jurisdiction on the High Court of Lagos. The Petitioner/Respondent contended that he was domiciled in Nigeria, Nigeria being his domicile of origin. This contention was upheld by the Court of Appeal. Awogu J.C.A stated thus: "Looking at the petition as it stands for the moment, the facts supplied by respondent clearly showed his closest connections infact with Nigeria as his domicile of origin by virtue of his birth and said so in paragraph 4 of the petition."[8]

Here, it may be observed lucidly that the court presumed quite strongly the continuance of the existing domicile of origin though as the facts of the case

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7. Odusanya, *Op. Cit.* p. 7, 8.
8. *Op. Cit.* at p. 88

law revealed, the Petitioner had lived outside Nigeria for a while. However, Osimabowo's Case may be compared and contrasted with *Bhojwani Vs Bhojwani (Supra)* where the issue was whether, on the evidence, the Petitioner/Respondent unequivocally showed that Nigeria has become his domicile of choice. It was argued on behalf of the Respondent that he has acquired a domicile of choice in Nigeria having remained in Nigeria since 1979 for both his livelihood and residence without interruption and has no intention for his ordinary right of residence to cease. It was held that he had not acquired a domicile of choice in Nigeria despite his long residence in Nigeria. The court of Appeal expounded the position of the law thus:

> "The onus of proving that a domicile has been chosen in substitution for the domicile of origin lies upon those who assert that fact. It must be shown with perfect clearness and as said by Lord McNaughten in Winans V. AG (1904) AC 287 at 291: 'So heavy is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice…'
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> In Udny V. Udny (1869) L.R.I.H.S.C. 441 at 455 Lord Chelmsford observed that in a competition between a domicile of origin and an alleged subsequently acquired domicile, there may be circumstances to show that however long a residence may have continued, no intention of acquiring a domicile may have existed at any one time during the whole of the continuance of such residence. The question in such a case is not whether there is evidence of an intention to retain the domicile of origin but whether it is proved that there is evidence of an intention to acquire another domicile. While in Bell V. Kennedy (1868)L.R.I. H.C/S/C/ 307 at p. 321, Lord Westbury said: 'Although residence and domicile are prima facie proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find the party had any other residence in existence or in contemplation.'
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> The question of domicile of choice must ultimately depend one the facts. A decision on it requires a detailed analysis and assessment of available facts to discover the mind of the party concerned. In Anderson V. Laneuville (1854) 9. Moo. P. C 334 strong facts, were required for that purposes. Lord Chelmsford said in Moorhouse V. Lord (1863) 10 H.L.Cas 276; 11 ER 1030 at 1036 that the necessary intention must be clearly and unequivocally proved. In Re Flynn at P. 58 Megarry J. said: 'Many acts and declarations are indeed equivocal, and evidence which establishes that a man was or

> might have been in two minds does not show an unequivocal intention".
> It must therefore be a genuine intention. Thus, though a man has left the territory of his domicile of origin with the intent of never returning and is resident in a new territory yet if his mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres. But when the evidence is abundantly clear that a party has chosen a new domicile, the *animus manendi* is established."[9]

3.6 Rule 5: Determination of domicile according to Nigerian law

Though domicile, as a connecting factor governing a certain situation, may well be common to several legal systems, but it occasionally happens that it is not subject to a common interpretation. It may bear a different meaning in different countries.[10] For instance, both French and Nigerian Law may agree that a person's movable must be distributed in accordance with the law of his domicile at death, but the apparent harmony is disrupted by the fact that the concept of domicile is not understood in precisely the same sense by Nigerian and French Law. Where such a conflict of views arise it is essential to decide which of the various meanings that have been attributed to domicile must be applied. That is exactly where rule No 5 comes into picture. Therefore the domicile of a person must be determined according to the Nigerian Law and not the foreign concept of domicile. Comparatively, in England, it is well settled that English Court must ignore all foreign views and tests when required to ascertain the place of a person's domicile. In the words of Lindley, M.R., "the domicile of the testatrix must be determined by the English Court of probate according to those legal principles applicable to domicile which are recognized in this country and are part of its laws."[11]

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9. *Op. Cit.* at p. 364-365
10. Cheshire C.G., North, P. *Op. Cit.* at p. 46
11. *Re Martins* (1900) Probate 211 at p. 227.

It should be noted that by the general reception of the English Common Law into the Nigerian Legal Systems, the English Common Law rules of Private International Laws especially in the area of domicile forms part of the Corpus juris of Nigeria.

CHAPTER FOUR

ALTERNATIVES TO DOMICILE AS A CONNECTING FACTOR

4.1 Introduction

According to Agbede, the adoption of domicile as the sole determinant of the personal law has been predicated on the freedom of an individual to determine for himself the specific legal system which should constitute his personal law without the necessity of changing his political alliance.[1] In the same vein, according to Cheshire, the English preference for domicile is based on one main ground. According to him, domicile means the country in which a man had established his permanent home, and it would therefore be difficult that the person should be excommunicated from that law merely because technically, he is a citizen of some State that he may have abandoned years ago.[2] This argument is justifiable commonsensically. To tie a person to the apron-string of any other system of law other than that of his domicile may deprive him of the freedom of choice as to which legal system shall govern his relations. Attractive though this arguments may seem, domicile as a connecting factor is beset with many difficulties.

4.2 Demerits Of Domicile As A Connecting Factor

4.2.1 Uncertainty

One of such difficulty is uncertainty. It is not always easy to locate at any given time, a person's domicile. Indeed, except perhaps for the domicile of origin, it would appear that one cannot with utmost certainty locate the domicile of a person until the matter has been judicially determined. The

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1. Agbede, *op. cit.* at p.49
2. Cheshire, *op.cit.* at p.161

attitude of the Courts in this respect is unpredictable. This uncertainty has become a characteristic of domicile. Courts use the same criteria to come to different conclusions. The unnecessary importance attached to the domicile of origin has often resulted in bizarre results. The requirement of intention for the acquisition of domicile of choice has often led courts to render judgments that were repugnant to common sense.

Beckett in two separate lectures delivered at Cambridge University (July 1938) and at Oxford (October 1938) observed that a critical study on the question of what law should be chosen for application in matters of personal status is desirable. As the second Legal Adviser to the Foreign Office in England, he stated that he had to consider three to four cases a day of disputed Nationality and Domicile, and that he was in doubt about one case in twenty of Nationality and one case in four of domicile.[3] So inconsistent were the decisions of the courts on the ascertainment of domicile that Dr. Graveson was prompted to ask rhetorically:"Must our domicile continue to be kept a legal secret from us until we either invoke divorce jurisdiction or we die?[4]

Therefore whatever merits there may be inherent in the adoption of domicile, judicial uncertainty has robbed it of its suitability as a connecting factor.

4.2.2 Technicality

Another argument against domicile in this connection is its technicality. It is so technical that it often happens that the legal domicile of a man is out of

3. Beckett, W. E. (1939) International Law in England. *Law Quarterly Report*. p.270
4. Graveson, R. H. *Five Sheffield Jubilee Lectures*. University of Sheffield Press, UK. (1960) p 110

touch with reality, for the exaggerated importance attached to the domicile of origin, coupled with the technical doctrine of revival may well ascribe to a man a domicile in a country which by no stretch of the imagination can be called his home. As Beckett further observed,

> It is a concept quite different from domicile under other systems of law. It is so artificial that it is possible for a person to be held to be domiciled in a country in which he has never been, and so subjective that in any complicated case it is really impossible to foresee what views a court will take.[5]

4.2.3 Proof of intention to change domicile

Another demerit of domicile lies in the fact that the ascertainment of a man's domicile depends to a great extent upon proof of his intention, the most elusive and subjective of all factors, that only too often it will be impossible certainly without recourse to the courts.

As a result of these demerits ascribed to domicile as a connecting factor, recourse has been had to other connecting factors as alternative to domicile. These alternatives are Nationality and habitual residence.

4.4 Nationality As A Connecting Factor

The word Nationality may be defined as "the status of membership of the collectivity of individual whose acts, decisions and policy are vouchsafed through the legal conception of the state representing those individuals."[6]

Fenwick gives a more explicit definition when he stated that "Nationality may be defined as the bond which unites a person to a given State which

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5. Beckett, *Op. Cit.* at p. 270
6. Starke, J. G. *An Introduction to International Law* (8th Edition) London: Butterworths. 367.

constitutes his membership in the particular state, which gives him a claim to the protection of that State and which subjects him to the obligation created by the laws of that State."[7]

From the definition above, the basis of nationality is the membership of an independent community or State. Thus it is generally recognized that Nationality is determined exclusively by the law of the State concerned. In Nigeria, therefore the acquisition and loss of Nigerian Nationality is regulated by chapter three of the 1999 Constitution of the Federal Republic of Nigeria dealing with citizenship.

The rule that Nationality shall be determined by the law of State concerned is a settled rule of International Law confirmed by the convention On Conflict of Nationality Laws (1930) which provides in Article 2 that "any question as to whether a person possesses the Nationality of a particular state shall be determined in accordance with the law of that State."

The word 'Nationality' can be distinguished from Domicile in two basic respects. First of all, as aforementioned, the basis of Nationality is the membership of a person with an independent community. On the other hand, domicile denotes the home, the permanent home of a person as determined by the rules of Conflict of Laws.[8] There is no necessary correlation between the nationality of a person and his domicile as both may be entirely unrelated, though in some cases it may be same where there is no migration.

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7. Fenwick, C. G. (1948) *International Law* (3rd Edn.) New York: Appleton, Century, Crofts Inc. 301-302
8. Odusanya, *Op. Cit.* at p. 15

Secondly, Nationality and Domicile represent two conceptions. Nationality has reference to the political status of a person, and domicile to his civil rights. By nationality, he owes allegiance to a particular country whereas by domicile, his personal rights i.e. his majority or minority, marriage, succession, testacy or intestacy is determined.[9]

The adoption of Nationality as the personal law for purpose of Conflicts of Laws started in France with the promulgation of the French Civil Code (The Code Napoleon) in 1804. One of the principal objects of the codification was to establish a uniform law throughout the whole of France for the different customs of the French provinces. Article 3(1) of the Code provided that: "That law governing the status and capacity of persons govern Frenchmen even though they are residing in foreign countries." Article 3 (3) prescribed the National law as personal law. In the converse case of a foreigner residing in France, the Code was silent, but French courts, after some hesitation and initial doubts generally by way of renvoi doctrine applied the law of the country of which the person is a national.[10]

In quick succession, the provisions of the French Code were adopted in Belgium and Luxembourg and similar provisions were contained in the Austrian Code of 1811 and the Dutch Code of 1829. As a result of the rise of national feelings and particularly through the influence of Mancini especially as a result of his inaugural lectures delivered in 1851 during the mid-nineteenth century, the principles of Nationality replaced that of domicile in Code after Code within continental Europe. Today, the *Lex Patriae* or

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9. Observation of Lord Westbury in *Udny Vs Udny* **(***Op.Cit***)** at 457.
10. Odusanya, *Op. Cit.* at p. 16

national law of a person is now applied exclusively in the following states: France, Italy, Belgium, Luxemburg, the Netherlands, Romania, Bulgaria, Czechoslovakia, Finland, Germany, Greece, Hungary, Liechtenstein, Poland, Portugal, Spain, Turkey, Yugoslavia, Syria, Israel, Egypt, Iran, Siam, China, Japan, Costa Rica, Cuba, Dominican Republic, and Venezuela.[11] The Nationality principle was also adopted by The Hague Conventions 1902 and 1905 and formed the basis of the Treaty of Lima 1878.[12]

A pivotal question that arises for determination is: What are the advantages of Nationality over Domicile as a connecting factor"? The most potent argument in its favour is the fact that it is easily ascertainable. It is ascertained by reference to the law of the State concerned. To this extent, Nationality would appear to be incontestably preferable to domicile as its ascertainment is comparatively easier.

Nevertheless, it is objectionable as a sole criterion of the personal law in at least three grounds. First, it may be a country with which the person has lost all connection, or with which perhaps he has never been connected. This is true especially today when one may be a national of one country, Nigeria for instance, but is born in, say, Sudan and have lived there all his life without establishing any links with Nigeria whatsoever. However, following the application of Nationality as his connecting factor, Nigerian Law as his national law will apply to him in the devolution of his intestate movable property, etc. This situation is akin to the case *Re O'Keefe (Supra)***.** The facts of this case are that Mary O' Keefe, a British subject, had died a spinster and

11. Rabel, *op. cit.* p. 123; Odusanya, *op. cit.* p. 16
12. Odusanya, *op.cit.* p. 16

intestate in Naples, Italy where she had lived for her last 47 years. The question before the Court was the mode of distribution of her moveable estate. English law looks to the last domicile, including its rules on Conflicts of Laws. The Court endeavored to decide as an Italian Court would. Italian law refers to the national law of the deceased. 'British Law' has no rules to govern succession, nor does "British Law" state which law in U.K or Commonwealth should apply. The Judge applied the law of the domicile of origin which he found to be the law of Eiro in Ireland because the Father of Mary, who lived in Calcutta, India had come from Southern Ireland originally.

Secondly, Nationality is sometimes a more gullible criterion than domicile. In the eyes of the common law, no man can be without a domicile, no man can have more than one domicile at the same time and for the same purpose. On the other hand, he may be Stateless or may simultaneously be a citizen of two of more countries. Such situations are bound to cause more confusion than the technicalities involved in domicile.[13]

Thirdly, Nationality cannot always determine the internal law to which a man is subject. While it may be appropriate for a unitary system like France and Italy, it will break down completely when applied to a Federal, concentric or composite State like the U.S or Nigeria which is made up of different federating units, each with their different laws markedly dissimilar in most respects. Therefore where for instance in a litigation, recourse had to be made

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13. Odusanya, *op. cit.* p. 17

to the national Law of a person who had died abroad and his country of origin embraces different units with different laws the question will certainly arise which of the law shall be applicable where there is no national or central law applicable in all the unit with respect to the legal issue.

Furthermore, a close problem also associated with the adoption of nationality as sole connecting factor is the difficulty likely to arise where the country of nationality of a person though unitary, nevertheless have separate personal laws for its nationals based upon e.g. caste system as applied in India and formerly in southeastern Nigeria among the Igbos, or Islamic religion as the case in most of Northern Nigeria.

As Nadelman[14] has rightly pointed out, Mancini had anticipated exceptions to the Nationality rule. His original proposition which he presented to the Institut de Droit International[15] had been that,

> Status and capacity of a person, the family relations, and the rights and obligations dependents thereon shall be governed by application of the Laws of his Fatherland, that is, the nation to which he belongs; and only subsidiarily by application of laws of his actual domicile when civil legislation co-exist in one state or when persons without nationality, or persons with double nationality are involved…[16]

In other words, Mancini favoured Nationality rule as that overwhelming connecting factor but also provided that for persons from a country on whose territory several legal systems co-exists, recourse should be had to the actual domicile of that person. However when the Institute approved this proposal at the Oxford session in 1882, some amendments were made which distorted

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14. Nadelman, R. H. (1969) Mancini's Nationality Rule and Non Unified Legal System: Nationality V. Domicile. *American Journal of Comparative Law.* 418 at p. 443
15. Founded in August, 1873 of which Mancini himself was the first President.
16. Nadelman, *Op.Cit.* at p.424

the original proposition and has ever since brought confusion into what otherwise would have been a clear-cut approach. The result as pointed out by Nadelman, is that, "the Nationality school's zenith has long passed and, in most of the countries, the partial breakdown of the doctrine is admitted."[17]

4.5 Habitual Residence As A Connecting Factor

Dissatisfaction with Nationality as a connecting factor has led to the realization of the defects of Domicile also. This has had several consequences. One has been attempts in England and Nigeria to reform the concept of Domicile, [18] but these have been successful only in relation to the dependent domicile of children and married women, especially in England. Failure to reform Domicile has led, in its turn, to an increasing tendency to reject it as a connecting factor in favour of residence. One of the main forces in this direction has been the fact that the Hague Conventions have relied on 'habitual Residence' as a connecting factor.[19]

It is worthy of note that in Nigeria, residence has been known as a connecting factor for some time. It forms the basis for service of a Writ out of the jurisdiction.[20] It is a basis of jurisdiction in matrimonial causes in the case of a petitioning wife.[21] Perhaps most importantly, it is an important connecting factor in taxation statutes.[22] Also, in *Kitchen Equipment (W/A) Ltd Vs Staines Catering Equipment Int. Ltd*[23] the Nigeria Court of Appeal held that a company incorporated outside Nigeria is a foreign person in Nigeria

17. *Ibid*, at p. 448
18. Matrimonial Causes Act, 1970, cap. M7, Laws of the Federation of Nigeria, 2004.
19. Cheshire, C. G. and North, P. *Op. cit.* at p. 186.
20. Section 2 (1), (2) Sheriff and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004.
21. Section 2 (1), (3) Matrimonial Causes Act, 1970, *op. cit.*
22. S. 2 (2), (3) Personal Income Tax Act, Cap P.8, LFN, 2004.
23. (Unreported) Suit No. FCA/L/17/82.

and that it can only institute an action here if it is herein resident. In the well reasoned view of the Court, the assumption of jurisdiction by the Courts over a person is based on the presence of such persons within its territory.

There is as yet, little authority on the meaning of 'Habitual residence.' However, one decision where the meaning of the concept and its inter-relation with domicile was considered is *Cruse Vs Chittum*[24] where habitual residence was defined as "a regular physical presence which must endure for some time."[25] This appears to be different from domicile in that the element of animus or intention required is weaker. No more than a present intention to reside is necessary for habitual residence. It is far more a question of fact and one without the various legal artificialities of domicile such as the doctrine of revival.[26]

According to Omidire, some scholars argued that since the arguments against the concept of domicile centers around the *animus Manendi* or intention required, this could be sidetracked by requiring that a person's domicile should be the country in which he is in fact living for a given period, say one to ten years.[28] Rabel has lent his support to this view. He stated that "…the existence of a voluntary domicile can better be ascertained, if a period of factual residence is added to the ordinary requisites.'[29]

The proposition above unfortunately will not solve the problem unless all the countries of the world agree on a specific number of years of residence and

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24. (1974) 2 All E.R. 940
25. *Ibid.* at p. 943
26. Cheshire, C. G., North, P. *Op. cit.* at p. 187
27. Omidire, *op. cit.* at p.20
28. Rabel, *op. cit.* at p. 172.

this seems very unlikely. The preceding arguments for and against domicile, Nationality and Habitual residence as connecting factors have shown that one cannot find a basis of personal law which is all-time perfect. One thing is however obvious. The fact that the world is divided into different classes on the basis of which concept of personal law the countries adopt is very unfortunate. It obstructs the movement for the unification of the rules of Private International Law. If this distinction disappears, many Conflicts of Law situations will be drastically reduced, and problems, which at present seems practically unsolvable would varnish as if by a touch of a magic wand.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

In the course of this research, the writer has sought to appraise the application of the law relating to domicile in Nigeria. In Chapter Two, this appraisal had included the consideration of the development of the concept of domicile from its traditional root to its introduction into Nigerian law and clarifies some concept related to Domicile such as its definitions, forms and rules.

In Chapter Three, the research had examined the merits and demerits of the concepts of Nationality and habitual residence as alternatives to Domicile as a connecting factor to determining the personal law of an individual.

Chapter Four considered the peculiar problems associated with the application of the concept of Domicile. The areas covered include the problem of defining Domicile in inter-state situation as occur in Nigeria, the problem of change of Domicile under Nigerian customary law and the problem of married woman's domicile.

5.2. Findings

At the end of the above appraisal, the following findings came to fore, thus:

1. That there is a serious difficulty in applying the traditional definition

of domicile as a permanent home in Nigeria. Another related problem lies in the application of the rules of acquiring domicile of choice in Nigeria. The most vexatious of the rules is the requirement of unequivocal evidence of intention to remain in a place of choice permanently or indefinitely before there could be a change of domicile in law. This rule is difficult, if not impossible to apply in inter-state situation like Nigeria where there is high mobility of people as a result of inter-marriages, work and search for 'greener pastures'. If the traditional concept of domicile of choice were to be applied in Nigeria without qualification, most Nigerians will be left without a domicile of choice.

2. There is a detrimental legal effect in the unbridled application of the law of domicile of origin as the personal law of an individual even where there is copious evidence that a person may not have any link to the place of origin and may have been habitually resident in another place. For instance, the various Customary Court rules in all the States of the Federation provides for the application of customary laws of a person's origin in almost all the cases. This failure to explore and apply the principle of habitually residence has fostered a menacing situation of tribalism and prevents unity in nation building.
3. There is no gainsaying the fact that the Matrimonial Causes Act, 1970 has obviated to some extent the hardship on the deserted wife but the problem is that its effects can simply be described as a drop of respite in an ocean of legal problems. For instance, with respect to making a Will, a deserted wife's capacity to make such Will and the material or essential validity of such Will must comply in many cases with the *lex domicilii* of

the husband, which in many cases may be unknown. Again, there is a problem of succession to the movables of an intestate deserted wife as this is governed by the husband's domicile at the time of her death.

5.3. Conclusion

This research project has been a worthy attempt at an analytical explanation of the concept of domicile and its application in Nigeria. To this extent, the researcher has presented a meticulous history of the evolution of the concept from the 12th century period of the Post-glossators in the Law schools of Italy to the 19th century during which time the concept was introduced into the Nigerian Legal system.

The research work has done more than give the definition of domicile but it has analytically discussed the traditional definition of the concept bringing out its weaknesses and inappropriateness in the 21st century. The research has done a painstaking explication of the various forms of the concept and their rules as they apply in Nigeria.

In view of the fact that domicile is not a perfect concept and its rules have widely been criticized by jurists and text writers alike, the research has presented the different alternatives adopted in some jurisdictions instead of domicile and discussed their relative merits and demerits as connecting factors.

Furthermore, having in mind the fact that a major prong of this project must deal with the problems encountered with the application of the concept of Domicile in Nigeria, the present writer has clearly identified three major problems which are the definition of the concept in Nigeria, the application of the concept under Nigerian Customary Law and of course the vexatious issue of the married women's domicile.

From the foregoing, it can be observed that the concept of domicile as a connecting factor attempts to resolve conflict issues in the area of personal law. However its application in Nigeria has entail far reaching legal and social difficulties. According to Cheshire, it is perhaps fair, speaking generally, to say that, as determinant of the personal law, domicile yields an appropriate but frequently an unpredictable law."[1]

Be that as it may, there is no better argument then the fact that a person who has been habitually domiciled in a legal district will be willing to submit the administration of his affairs to the law of that locality. Furthermore, it is in the best interest of the locality in question, that persons, who are living within it and benefit from it, should be made subject to its laws in their affairs when they are living, and even at death. This is a matter of law as much as it has even stronger social and economic considerations. As afore-said, it forms the fulcrum of the recommendations in this research work

5.4. Recommendations

To ensure that justice is done in the application of the concept of domicile in

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1. Cheshire, C. G., North, P. *Op. Cit.* at p. 185

Nigeria, the present writer proffers the following recommendations:

1. A redefinition of domicile in Nigeria: It is hereby recommended that the Nigerian Courts should shirk itself off the slavish application of the traditional but stale definition of Domicile as offered by the English Judges centuries ago. A Briton once wrote that "in the camp of the domicile Law test, United Kingdom still struggles with the notion of the domicile of origin developed by the courts for the benefit of conditions long past."[2] What this statement portends is that the definition of Domicile has been subjected to severe criticism even in England. The injustice inherent in the English definition has been extemporaneously dealt with in Chapter 4 under the sub-heading –the problem of definition in inter-state stuation.

   The new definition should take cognizance of economic and social situation of the peoples of Nigeria. This recommendation arises from the fact that laws are a reflection of people's social milieu. Nigerians are widely known to be in constant mobility for 'greener pastures' and in most cases form a bond with the locality of their chosen residence. This does not seem to be the case of the typical Englishman. To that extent, an imposition of a foreign law quite unattuned to a people's morality and way of life would work hardships and injustice. The application of the English definition of domicile as part of our legal system has already worked injustice and more are perceived, hence, must be redefined to reflect the Nigerian situation.

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2. Nadelman, *Op.Cit.* at p. 449

2. Enactment of a Domicile Act in Nigeria: One major contribution of the Matrimonial Causes Act is that it has relieved a deserted wife from the hardship inherent in the English concept of the unity of domicile of husband and wife. A deserted wife continues to retain the domicile she had before the marriage or that immediately preceding the desertion. No doubt, this is more humane than the position under English Law which was aptly described by Karibi-Whyte as "a fiction to maintain conjugal felicity and marital unity. The stringent application of this principle in order to sustain an already broken marriage strikes at the very root of the theory which over the years has suffered considerable attenuation."[4]

In spite of the contribution of the Matrimonial Causes Act 1970 in mitigating the hardship of domicile in the case of a deserted wife, its major shortcoming, with respect to domicile, is that it is only relevant for the purpose of matrimonial proceeding initiated pursuant to the provisions of the Act. Against this background, it is therefore, humbly submitted that there is need for the National Assembly to enact a Domicile Act in Nigeria. Such Act should define the application of the doctrine in Nigeria to the issues herein mentioned amongst others with a Nigerian flavor, viz:

(i) A wife's domicile most especially with respect to a separated or deserted wife's Will and succession to such Will.

(ii) The domicile of origin of a post-humous child.

(iii) Application of domicile under Customary Law.

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3. Karibi-Whyte, A.G. (1964) Nigerian Divorce Domicile-Federal or Regional. *Nigerian Law Quarterly.* 18

The enactment of such Act will go a long way in streamlining the utility of the concept of domicile and also make our law on the subject accord with current trends in other jurisdictions. An example worthy of note is New Zealand which has its Domicile Act[4] and of course England which has enacted a Domicile and Matrimonial Causes Act.

3. A consideration of habitual residence as a requirement for Domicile rather than intention to reside permanently: The major problem associated with domicile is the intention required from a person to be considered domiciled in a place. Intention as we all know is subjective and may be difficult to ascertained, but it is made worse still where it is an intention to reside permanently in one place. Therefore, it is hereby submitted and recommended that the requirement of habitual residence should be made the ordinary requisite of domicile.

   Habitual residence would work more justice than permanent residence especially in world of our time aptly described as 'a global village' where languages, ethnic boundaries etc, between nations and people are becoming more and more insignificant and there is frequent movement of people from place to place. The application of habitual residence will work well in Nigeria where people are migratory but still entertain a link with their places of origin. This point seems to have been considered by the Supreme Court with implied approval in its unanimous decision in the case *Olowu Vs Olowu (Supra).*

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4. Omotesho, O. A. (1992) A Functional Analysis of the Concept of Domicile under the Nigerian Matrimonial Causes Act. *Justice: Journal of Contemporary Legal Problems. 3, No.* 4 & 5. 19 at p. 25

The application of the law of the place where one is habitually resident will for a large extent contribute to unity and national integration and the prohibition of discrimination on the ground of place of origin or ethnic ties, in the spirit of S.15 (2) of the 1999 Constitution of Nigeria.

To this extent, it is commendable that the Joint Committee of the National Assembly on the review of the 1999 Constitution has recommended that one of the criteria for citizen in any place in the Federation shall be habitual residence in a place for an unbroken period of 10 years. One only hopes that this recommendation will be accepted by majority of the State Houses of Assembly.

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