

LEX DOMICILII IN CONTEMPORARY NIGERIA:

A FUNCTIONAL ANALYSIS¹

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Until the beginning of the nineteenth century, domicile was universally recognised as the basis for the application of

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¹ See generally Atilade, "Is there one Nigerian Domicile or different Regional domiciles in regard to Divorce cases?" (1964) 5 Nig. Bar Journal 56; Beale, J. H., "Developments in the law" (1936-37) 50 Harv. L. R. 1119, "Residence and Domicile" (1918) 4 Iowa Law Bulletin 3, "Domicile of an Infant" (1922-23) 8 Cornell L. Q. 103; Cohn, "Domicile - convention and committee" (1955) 71 L.Q.R. 562; Condert, "Some considerations in the law of Domicile" (1926-27) 36 Yale L.J. 949; Cowen and Mendes Costa, "The Unity of Domicile" (1962) 78 L.Q.R. 62; Farage, "Multiple Domiciles and Multiple Inheritance - A possible solution" (1941) 9 Geo. Wash. L. Rev. 375; Forster, "Some defects in the English rules of Conflict of Laws" (1935) 16 Br. Y.B.I.L. 84; Goodrich, "Matrimonial Domicile" (1917) 27 Yale L.J. 49; Graveson, "Capacity to Acquire Domicile" (1950) 3 I.L.Q. 149, "Domicile on the ending of Dependence" (1957) 6 I.C.L.Q. 1, "The Law of Domicile in the Twentieth Century" Five Sheffield Jubilee Lectures (1960) p. 85; "Comparative Aspects of the General Principles of private International Law" (1963) 2 Recueil des cours vol. 11 Ch. 5; Guterman, "Avoidance of Double Death Taxation of Estates and Trusts" (1946-47) 95 U. Pa. L. R. 701; Heilman, "Domicile and Specific Intent" (1929) 35 W. Va. L. Q. Rev. 262; Herchenroder, "The French Law of Domicile in relation to foreigners" (1937) 19 Journal Comp. Leg. 239; Karibi-Whyte, "Nigerian Divorce Domicile: Federal or Regional" 1 Nig. Lawyers' Quarterly 1; Kasunmu, A. B. and Salacuse, J. W., Nigerian Family Law (Butterworths) (1966); Mann, S., "The Seventh Report of the Private International Law Committee on Domicile" (1963) 12 I.C.L.Q. 1326; Obi, S. N., Modern Family Law in Southern Nigeria (Sweet & Maxwell) (1966); Raeburn, "Dispensing with the personal law" (1963) 12 I.C.L.Q. 125; Reese, "Does Domicile

personal law.² However, as a result of the rise of national feelings³ and particularly the influence of Mancini⁴ in the mid-nineteenth century, some of the continental European countries adopted nationality in preference to domicile as the

Bear a single Meaning?" (1955) 55 Col. L. Rev. 589; Restatement Second (1967) Conflict of Laws (Tentative Draft) Ch. 2; Spiro, "Resulting change of Legitimate Minor's Domicile" (1956) 4 I. L. Q. 192, "Domicile of Minor without Parents" (1956) 5 I. C. L. Q. 192; Stansbury, "Custody and Maintenance Across State Lines" (1944) 10 Law & Contemp. Problems 819; Steinberg, "The status of Children in the Conflict of Laws" (1940) 8 U. of Chi. L. Rev. 42; Tweed and Sergent, "Death and Taxes are certain, but what of Domicile" (1939) 53 Harv. L. Rev. 68.

² According to G. C. Cheshire, Private International Law (Oxford Clarendon Press) (7th Ed. 1965), p. 180, the principle of domicile had no rival for over five hundred years. The principle was first developed in the Middle Ages by the Italian School of postglossators.

³ The French Civil Code (Code Napoleon) 1803 was the first to adopt nationality as the basis for the ascertainment of personal law. According to Graveson, the problem faced by the compiler of the Code was one of unification of the various provincial laws and customs of France. See Graveson, Hague Recueil, op. cit, p. 64.

⁴ Especially as a result of his famous lecture delivered in Turin in 1851. See Annuaire de l'Institut de Droit International (1877) Vol. 1 pp. 123 et seq. Graveson has pointed out that in advocating nationality as the basis of personal law, Mancini was concerned with the achievement of political objectives in a context of an emigrating society and a movement towards the unification of his country. See Graveson, Hague Recueil, p. 64. For further comments on Mancini's view see Rodolfo de Nova, "Historical and Comparative Introduction to Conflict of Laws" (1966) 11 Recueil des cours Ch. 2 pp. 464-468.

connecting factor for the ascertainment of personal laws.⁵ Since then several countries have combined the two criteria.⁶ For the common law countries, however, domicile appears to have been generally accepted.⁷ In Nigeria the adoption of domicile is rather a matter of practical necessity as "Nigerian nationality" covers a number of independent legal systems.⁸ The aim of this paper is to discuss the rules of domicile as contained in the received (English) law and to show how these rules have been, or ought to be, modified in order to suit Nigeria local conditions.

The idea of basing the ascertainment of personal law on domicile is basically a sound one. It seems to have 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 allegiance.

Nonetheless, the particular application of the concept of domicile under the English law is becoming increasingly unrealistic and artificial on account of its unpredictability and multiformity. Most of the rules of this concept are no more than lawyers' elaborated technicalities quite unrelated to social needs and convenience. The last three decades have witnessed a coherent and almost unanimous expression of dis-

⁵These include, to mention a few, France, Italy, Germany, Greece and Portugal. Non-European countries include Syria, Egypt, China, Japan, Iran, Mexico, Ecuador and Venezuela.

⁶Poland, Sweden, Austria, Costa Rica, Peru are examples of such countries.

⁷Non-common law countries adopting domicile include, to mention a few, Denmark, Norway, Iceland, Argentina, Brazil, Guatemala, Nicaragua and Paraguay.

⁸Decree No. 14 of 1967 divided the country into twelve autonomous states having legislative power over "residual matters". The country was, from 1954, a federation of four constituent states (including the federal territory of Lagos but excluding the southern Cameroon). The Mid-Western state was created in 1964.

satisfaction by legal writers with these rules.⁹ The defects of the rules have received the attention of two Parliamentary committees¹⁰ but in spite of continued criticism the law still remains the same.¹¹

Is it surprising that parts of the British Commonwealth should have found the rigid concepts of English domicile irksome and unsuitable to their own special and very different social and geographical condition?¹²

What is surprising is the loyalty with which most of the Nigerian judges have adhered to the rules of domicile laid down by the English and Scottish courts to fit a situation almost as different from their own as it is possible to imagine.¹³

⁹According to E. Rabel, The Conflict of Laws: A Comparative Study (Arbor: University of Michigan Law School) (1958), p. 150, English writers "are frankly unhappy with the artificial character of their doctrine [of domicile] and its arbitrary result". For these writers' views see supra note 1.

¹⁰The first assignment of the Lord Chancellor Private International Law Committee was the reform of the law of domicile. This committee considered this issue on two occasions (see (1954) Command paper No. 9068 and (1963) Command paper No. 1955; (1963) 12 I.C.L.Q. 1326). Two bills (one in 1958 and the other in 1959) based on the recommendations of this committee came before Parliament but failed to be passed as a result of opposition from certain foreign business interests. See correspondence in "The Times" June 23, 28 (1958); March 7, 9, 13, 16, 18, 23, 31; April 2, 6, 13, 15, 16 and June 3, 4 (1959).

¹¹"Domicile" it is said "has become a mechanical formula misleading the court to an arbitrary conclusion". See Rabel, The Conflict of Law: A Comparative Study (2nd Ed. 1958), p. 147.

¹²Graveson, Five Sheffield Jubilee Lectures, supra note 1 at 92.

¹³See infra for the Nigerian relevant cases.

We may now proceed to discuss the various aspects of the English concept of domicile as they obtain under the Nigerian law.¹⁴

1. Analysis of the Concept of Domicile

(A) Meaning of Domicile

The term "domicile" is, according to Sir GEORGE JESSEL, "impossible of definition".¹⁵ Nevertheless, it is clear from decided cases that to acquire a domicile in a territory, according to the received (English) law, it is necessary to establish residence and an intention to remain there permanently (or indefinitely).¹⁶ A domicile can only be acquired by the concurrence of these two factors. However, an intention of indefinite residence is not equivalent to permanent residence if it is contingent upon uncertain event.

Thus, in Moorhouse v. Lords it was held that

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

¹⁴Our discussion is limited to those areas where the English rules of domicile require some modifications.

¹⁵Doucet v. Geoghegan (1878) L. R. 9 Ch.D 441 at p. 456.

¹⁶In Cheshire's view, the present state of the law requires an intention to reside permanently. See Cheshire, Private International Law (8th Ed. 1970), p. 154. But Dicey and Morris, The Conflict of Laws (8th Ed. 1967)(Rule 7), seem to use the terms "permanently" and "indefinitely" interchangeably.

rary home, though for a period indefinite and contingent.¹⁷

This rule of domicile might have worked well during its formative (Mid-Victorian England) era¹⁸ of comparative "certainty, simplicity and legalism"¹⁹ but in the contemporary world of tension and increased mobility, few things in human affairs can be certain, least of all one's intention. As stated by Cheshire, "Singular indeed would be the man who could unreservedly warrant that whatever good or evil might befall him he would never return whence he came".²⁰ In Graveson's view, this definition "no longer fits the complexity, movement and sophistication of modern life in which many of our best intentions become temporary through frustrating circumstances".²¹

Rather curiously, this unsatisfactory definition of the English concept of domicile has been adopted in Nigeria without qualification. For example, in Fonseca v. Passman, THOMAS J. held that

To establish a domicile of choice in Nigeria the mere factum of residence here is not sufficient.

¹⁷(1863) 10 H. L. Cas 272 at 285-286 (per Lord CRANWORTH). This definition was adopted by the House of Lords in Winans v. Att.-Gen. [1904] A.C. 287, and also in Ramsay v. Liverpool Royal Infirmary [1930] A.C. 588. Cf dictum of SCARMAN J. In the Estate of Fuld (No. 3)[1968] 675 at 684.

¹⁸Most of the current English rules of domicile appear to have been developed within the period 1858 to 1869 through the decisions in Bell v. Kennedy (1868) L.R.1 SC & Div. 307; Udny v. Udny (1869) L.R.1 SC & Div. 441; Whicker v. Hume (1858) 7 H.L.C. 124; Moorhouse v. Lords (1863) 10 H.L.C. 272.

¹⁹See Graveson, Conflict of Laws (1969) 206.

²⁰Private International Law (7th Ed.), supra note 2 at 145.

²¹Graveson, Conflict of Laws, supra note 19 at 207.

There must be unequivocal evidence of animus manendi or intention to remain permanently.²²

More curiously, however, is the failure of the Nigerian judges to distinguish between inter-state and international situations.²³ For instance, in Udom v. Udom, COKER J. who was concerned with an inter-state conflict problem, blissfully stated that

The subject must not only change his residence to that of a new domicile, but also must have settled or resided in the new territory cum animo manendi. The residence in the new territory must be with the intention of remaining there permanently. The animus is the fixed and settled intention permanently to reside. The factum is the actual residence.²⁴

This dictum appears to ignore the warning of Beale that the circumstances of life in a country must have great weight with the judges in determining the meaning of domicile.²⁵

In U.S.A. there is a habit of moving from place to place; in England the habit is to remain indefinitely in one place. The rule of English law will leave many Americans without a domicile of choice.²⁶

American judges are equally conscious of the inconvenience

²²(1858) W.R.N.L.R. 41 at 42.

²³Indeed ONYEAMA J. actually recited, in Adeyemi v. Adeyemi (1962) L.L.R. 70, the dictum of Lord WESTBURY in Udny v. Udny (1869) L.R. 1 SC & Div. 441, which drew this distinction but the learned judge did not appear to have addressed his mind to this distinction in coming to his actual decision.

²⁴(1962) L.L.R. 112 at 117.

²⁵1 Beale, J. H. A., Treatise on the Conflict of Laws (New York, Baker Vorrhis & Co.)(1935), p. 106.

²⁶Ibid. at 146.

that will result from adopting the English rigid definition of domicile. Thus, PARKER J. held in Putman v. Johnson.²⁷

In this new and enterprising country it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it would suit their view of business and advancement in life, and with an intention of removing to some more advantageous position, if they should be disappointed. Nevertheless they have their home in their chosen abode while they remain.

Where, in accordance with COKER J's dictum, shall we locate the domicile of the nomadic cattle Fulanis? It is common knowledge that an Ibo man, for example, who was born in a Northern state, who has been living in the North all his life and who has no fixed intention as to when he would leave there, would nonetheless entertain a hope, however remote, of returning to the East "dead or alive".²⁸ Has he no domicile in the North while he remains there?

It may be appropriate to recall, at this juncture, the recent decision in the English case of Henderson v. Henderson²⁹ where it was held that a person who intended to reside in a country indefinitely might be domiciled there although he envisaged the possibility of returning one day to his domicile of origin.

²⁷Mass 488, 501 (1813).

²⁸The desire of a person to be buried in a particular country was treated as an important factor (by the English courts) in ascertaining domicile in Heath v. Sampson (1851) 14 Beav. 441; Re de Almeda (1902) 18 T.L.R. 414. But the same desire was ignored in Platt v. Att.-Gen. for New South Wales (1878) 3 App. Cas 336 (P.C.) Re Garder (1895) 11 T.L.R. 167.

²⁹[1967] P. 77. See also In the Estate of Fuld No. 3 [1966] 2 W.L.R. 7171 where SCARMAN J. adopted a similar flexible approach.

In Graveson's view, we must not deny local domicile to a man who has settled in a place without intending to remain there for ever but simply intending to make his life there as long as circumstances allow him to do so.³⁰

In view of the limited function of domicile in matters of inter-state conflict problems in Nigeria³¹ it is submitted that habitual residence in any constituent state should be sufficient to found a domicile in such a state.

This suggestion appears more practical and more consonant with the social conditions in Nigeria than the dictum in Udom v. Udom. In a union where inter-state movements are unrestricted, it will be difficult, if not impossible, to find people who will wish to reside in a particular state "for better for worse". Moreover, it is in the best interest of the Nigerian people to discourage tribal cohesion and to minimize its attendant evils. Such a social policy ought to influence judicial decisions. But the decision in Udom v. Udom does not appear to take account of this policy.

As for the necessary requirements for establishing a domicile in Nigeria at the international level, it would be better, one imagines, to impute an intention to be domiciled in Nigeria to persons who are habitually resident in Nigeria. This suggestion is designed to aid the courts in ascertaining a person's domicile. Therefore, if there is evidence convincingly showing that a propositus has no such intention, he should be denied a local domicile.

(B) Characterisation

The meaning as well as the function of domicile varies widely as between different systems of law.

Take, for example, X who has a Nigerian domicile of origin but who is habitually resident in Dahomey without any intention of residing there permanently. Under the Dahomean

³⁰Graveson, Five Sheffield Jubilee Lectures, supra note 1 at 97.

³¹See pp. 16-19 below.

(French) law, he is domiciled in Dahomey whereas under the received (English) law in Nigeria, he is domiciled in Nigeria. Should a Nigerian court localise X's domicile in Dahomey or in Nigeria?

The judicial practice under the received law is based on characterising or defining domicile in accordance with the lex fori. This approach is not only logically sound, it is also convenient in practice. If the issue had been submitted to the lex causae it would have been impossible to ascertain the personal laws of people who have established their homes in countries which adopt nationality as the basis of personal law. Besides, to define domicile according to the legal system that has yet to be ascertained involves a logical fallacy. It is hoped therefore that the Nigerian courts will preserve the judicial practice under the received law.

(C) Capacity

There are no reported English or Nigerian cases which have decided the choice of law problem as regards capacity to acquire domicile. The problem has however been mentioned in a few cases.³² The usual judicial practice under the received law treats this problem as an aspect of the general problem of characterisation. Consequently it has always been determined under the lex fori.³³

Graveson has however come out vigorously against this settled practice with the criticism that it was a product of "rigid conceptualism".³⁴ In Graveson's view, the desirable approach is to determine capacity to acquire domicile under

³² Urguhart v. Butterfield (1887) 37 CH. D. 357 at 354. Hague v. Hague (1963) 108 C.L.R. 230 at 240 (Australia). No decision was taken in these cases on the problem of choice of law.

³³ See for example Robinson-Scott v. Robinson-Scott [1958] P. 71. Re Martin [1900] P. 211, *supra*, Re Annesley [1926] Ch. 692, *supra*, Fleming v. Horniman (1928) 44 T.L.R. 315, Re Beaumont [1893] 3 Ch. 490 *infra*.

³⁴ Graveson, Capacity to Acquire Domicile (1950) 3 I.L.Q. 149.

the law of the existing domicile.³⁵

Graveson's suggestion is not favoured by some English writers.³⁶ Cheshire, for example, castigates it as a "fundamental misconception".³⁷ In Cheshire's view, domicile is no more than a connecting factor.

Its acquisition is not itself a problem for the solution of which a rule for the choice of law is required. Connecting factors must always be interpreted according to the English law.³⁸

One or two illustrations will show the desirability of deciding the question of capacity under the lex fori or under the law of the existing domicile.

Suppose a Nigerian couple, H and W, aged 17 and 16 respectively, emigrate from Nigeria and settle in Scotland with the intention of residing there permanently. Assume that H's father is domiciled in Nigeria. Under the Scots law, H and W will be deemed domiciled in Scotland³⁹ whereas under the Nigerian (received) law, they will be deemed domiciled in

³⁵ Ibid. at 160 et seq.

³⁶ It has been criticised by Dicey and Morris (i.e., Treitel), The Conflict of Laws (8th Ed. 1967) p. 107. But see Clive, "The Domicile of Minors" (1966) Juridical Review 1 at pp. 11-12.

³⁷ Cheshire, Private International Law (7th Ed.), supra note 2 at 168.

³⁸ Ibid.

³⁹ Because a domicile of choice can be acquired in Scotland by a girl at 12 and by a boy at 14. See Clive, "The Domicile of Minors" (1966) Juridical Review 1 at pp. 11-12. In the hypothetical case, W's domicile will depend on that of H.

Nigeria.⁴⁰ Furthermore, if H or W dies intestate his or her movables, wherever situated, would be distributed by Nigerian courts in accordance with the Nigerian law whereas the Scottish courts would distribute the same under the Scots law.

Let us reverse the facts and assume that H and W are Scottish and that they emigrate from Scotland and settle in Nigeria. Suppose H wants to divorce his wife after three years' residence in Nigeria. Nigerian courts would decline jurisdiction as H is domiciled in Scotland under the Nigerian (received) law. The Scottish courts would, in turn, decline jurisdiction had the suit been brought in Scotland, as H is domiciled in Nigeria under the Scots law.

These are the kinds of problems that Graveson attempts to resolve. Graveson has criticised the lex fori approach on various grounds amongst which are:⁴¹

- (i) that the identity of the lex fori is always unknown until litigation is instituted
- (ii) that the lex fori may be unconnected with the present or past domicile
- (iii) that the lex fori does not govern capacity in most other issues and
- (iv) that the lex fori approach is a retrograde step.

Clearly, the lex fori approach is bound to frustrate the expectation of ordinary people who will, in most cases, regulate matters affecting their personal status in accordance with the law of the territory in which they have established their home.

⁴⁰An infant below the age of twenty-one cannot acquire a domicile of choice. Therefore the domicile of H and W will depend on the domicile of H's father because W takes H's domicile and H, in turn, takes his father's domicile.

⁴¹See Graveson, Capacity to Acquire Domicile (1950) 3 I.L.Q. 149.

However, Graveson's suggestion⁴² is confusing if not illogical. For, the "existing domicile" must, of necessity, be determined by the lex fori with the consequence that the forum court may never take account of the existing de facto domicile. For instance, in the first hypothetical case stated above, the "existing domicile" of H and W in the eyes of Nigerian courts is, at all times, Nigeria. Whereas in the second hypothetical case Nigerian courts will localise H and W's domicile at all material times, in Scotland. Should Scots law decide whether H is capable of acquiring a domicile in Nigeria? It seems absurd that the Nigerian courts should assign such an authority to Scots law.⁴³

It would however be even more absurd if the Nigerian rule of capacity should govern a de cuius capacity to acquire domicile in any other country as envisaged by the lex fori approach.⁴⁴ Consequently neither the lex fori nor the "existing domicile" approach is entirely satisfactory.

A desirable approach for the Nigerian courts is tentatively put forward as follows:

First, the court should ascertain the country where a propositus has established his home or principal home.

Secondly, the court should investigate whether the doctrine of domicile is recognised in the particular country and whether the propositus is capable of acquiring a domicile under its law. If the court is satisfied that the propositus has such a capacity under that law, it should localise his

⁴²That is, that capacity to acquire domicile must be governed by the existing domicile.

⁴³It should be noted, however, that once capacity to acquire a domicile has been achieved, it is not lost by a change of domicile under the laws of Argentina, Guatemala, Nicaragua and W. German. See Rabel, The Conflict of Laws: A comparative Study (2nd Ed. 1958) Vol. 1, p. 160.

⁴⁴Under this approach the law of the country where a person is domiciled is not relevant to the question of capacity -- an obviously unsatisfactory situation.

domicile in such a country notwithstanding that the propositus does not possess such a capacity under the forum law. In all other cases, the court should rely on its own conception of domicile.

This suggestion, it is hoped, will avoid the needless sacrifice of people's reasonable expectation while it will, at the same time, guide against determining the question of capacity to acquire a domicile under a legal system which knows nothing of domicile.⁴⁵

Perhaps, an alternative approach to the one suggested above would be to reduce the age of capacity from twenty-one to sixteen for this purpose and therefore dispense with choice of law problems.⁴⁶

It should be added that the problem of choice of law as regards capacity to acquire domicile does not exist at the inter-state level as there is uniformity of law in this context.⁴⁷

(D) Ascertainment of Domicile

The question as to whether a person has established factual residence in a particular country raises little or no problem in practice. However, the over-scrupulous manner in which the English courts attempt to discover the necessary intention has produced absurd results.

These courts have found it necessary to consider such imponderables as a person's "taste, habits, conduct, actions,

⁴⁵ Graveson's suggestion would lead to such a result.

⁴⁶ The 1958 Domicile Bill (British) contained a clause which would have given capacity to every person of sixteen or over, male or female. But see now Family Law Reform Act 1969 Part 1 (British) under which age of majority has been reduced to 18 in England.

⁴⁷ All the relevant state laws are based on the received English common law.

ambitions, health, hopes, projects"⁴⁸ and so on. "There is no act, no circumstances in a man's life however trivial it may be in itself, which ought to be left out of consideration"⁴⁹ But these factors are, one imagines, hardly suitable for judicial enquiry. What is rather absurd in the whole exercise is that circumstances which are treated as decisive in one case may be disregarded in another or even relied upon in support of a different conclusion.⁵⁰ No circumstances or group of circumstances appear to furnish a definite criterion of the existence of the necessary intention.⁵¹

The latitude of discretion which the courts reserve to themselves make their decisions appear arbitrary and very often inconsistent. The result is that a person's domicile may remain uncertain throughout his life. "Must our domicil" asks Graveson "continue to be kept a legal secret from us until we either invoke divorce jurisdiction or die?"⁵²

A desirable approach for the Nigerian courts in this regard is to tackle this problem with the presumption that a person intends to reside indefinitely in a country where he is habitually resident.⁵³

This presumption which should be rebuttable will, it is hoped, obviate the intricate problems involved in discovering

⁴⁸ Casdagli v. Casdagli [1919] A.C. 145 at 178 per Lord ATKINSON.

⁴⁹ Drevon v. Drevon (1864) 34 L.J. Ch. 129, 133.

⁵⁰ See Dicey and Morris, The Conflict of Laws (8th Ed. 1967) pp. 93-94 for instances of cases in which different conclusions have been drawn from similar facts in the ascertainment of domicile.

⁵¹ See ibid.

⁵² Graveson, Five Sheffield Jubilee Lectures, supra note 1 at 110.

⁵³ See Art. 2(2) of the Code of Domicile (Cmd. 9068) for similar recommendation.

a person's exact intention when he is absent from jurisdiction or when (as is usually the case) he is already dead.

(E) Scope of Domicile

(i) Inter-state situations: Under the received law, the lex domicilii governs most matters of family relations and family property. These include essential validity of a marriage, jurisdiction to grant a divorce or (to a limited extent) a nullity decree;⁵⁴ mutual rights and obligations of husband and wife, parent and child, guardian and ward; legitimacy and legitimation; effect of marriage on property rights of husband and wife; certain aspects of capacity to engage in legal transaction; validity of wills of movables and succession to movables. Furthermore, domicile is the basis for liability to certain personal taxes.⁵⁵

One of the main objections against the functions of the English doctrine of domicile is that it is utilised for a multitude of varied and widely differing purposes. What, if one may ask, has liability for income tax got to do with testamentary capacity or divorce jurisdiction?

The determined effort on the part of English judges and some jurists to apply the same meaning of domicile for all these varied purposes has done the concept much disservice. As rightly pointed out by a learned writer

It is a common phenomenon in English law for a word to have different meanings in different contexts. The habit is ... unobjectionable so long as the area within which a particular meaning is operative is defined.⁵⁶

⁵⁴ Jurisdiction to grant matrimonial relief is now based solely on domicile under the Matrimonial Causes Decree 1970.

⁵⁵ Cheshire, Private International Law (7th Ed.), supra note 2 at 143.

⁵⁶ Mann, "The Seventh Report of the Private International Law Committee on Domicile" (1963) 12 I.C.L.Q. 1326.

The learned writer went on to add that

There should be no difficulty in defining the area of revenue law within which a new concept of domicile would not operate.⁵⁷

Words, after all, are merely "the skin of a living thought" ready to be filled with the thoughts of their user. If domicile must serve the needs of the society, its meaning should take account of these varied purposes for which it is being employed. While it may be necessary to show an unequivocal intention to abandon an existing domicile before another may be deemed acquired for succession purposes, it seems to us unnecessary to establish similar intention for purpose of instituting a divorce suit.⁵⁸ Cook has suggested that

The meaning given to the symbol 'domicil' has varied with the nature of the problem presented: taxation, divorce, intestate succession etc. In short what was being decided in any particular case presented for a decision was: do the facts of this case show a connection of this person with the state in question of such a character as to make it reasonable to do the particular thing asked?⁵⁹

It may be objected that this approach is bound to produce a situation where a person will be held domiciled in different countries for different purposes.⁶⁰ But is there anything

⁵⁷ Ibid. at 1330.

⁵⁸ To hold that a person is domiciled in a country other than that of his kinsmen may defeat the reasonable expectation of his relations in succession issues whereas to hold that a person is domiciled in a country of his habitual residence for divorce jurisdiction will be to his advantage.

⁵⁹ Cook, W. W., Logical and Legal Bases of the Conflict of Laws, Cambridge: (Harvard University Press)(1942), p. 196.

⁶⁰ This view has been rejected in England. See (1953) Command Paper No. 1955, para. 12.

wrong in holding that a person is domiciled in Nigeria for purposes of divorce jurisdiction but domiciled in Ghana for succession purposes provided such a holding fulfils the reasonable expectation of the parties concerned? Domicile must justify itself in its practical utility if it is not to stand "condemned as an empty fiction".⁶¹ The adoption of Cook's suggestion, one hopes, will be an improvement on the present judicial practice in Nigeria whereby the same meaning of domicile has been adopted for a number of unrelated purposes.⁶²

What is more important, however, is the fact that the scope of domicile is not as wide, under the Nigerian law, as it is under the English law. In the first place, domicile is irrelevant in Nigeria, particularly at the inter-state level, for purpose of taxation.⁶³ Secondly, all natives of Nigeria who have not contracted monogamous marriages are governed, with regard to most matters of their personal relations, by their appropriate customary laws or (with regard to those who profess Islam) by the Islamic law.⁶⁴

The problem of ascertaining personal law becomes complex, however, in cases where "natives" have contracted monogamous marriages. An illustration will reveal the nature of the problem.

Take, for example, X, a Muslim of Northern Nigeria origin,

⁶¹Raeburn, "Dispensing with the Personal Law" (1963) 12 I.C.L. Q. 125 at 129, *supra* note 1 at 129.

⁶²The practice of English court has been adopted in Nigeria (in this regard) without modification.

⁶³The English Finance Act, 1894 [Estate Duty Statute], though a pre-1900 statute, has hitherto not been held to be in force in Nigeria. "Residence" is generally the basis for liability for income tax. The Ghana Estate Duty Act (Act 271) 1965 Sec. 4(f) speaks of "permanent home" instead of "domicile" as the basis for liability.

⁶⁴See however the writer's "Legal Pluralism and the problem of Ascertaining personal law: A Consideration of Yinusa v. Adebusokan" (1971) Nig. B. J. 69.

marries under the Marriage Ordinance and acquires a domicile of choice in the Western state. Questions of dissolution of his marriage will be governed by the Federal law. If he makes a Muslim will, his capacity to make such a will as well as the material validity of the will will be governed by the Islamic law of his Northern origin. If he dies intestate, succession to his movables wherever situated will be governed by the Administration of Estate Law⁶⁵ of Western state. On the other hand, succession to his immovables will depend on the law governing his interests and the situs of the property. His real property located in the Western state will devolve in accordance with the customary law of the situs whereas the Administration of Estate Law will govern any such property held under non-customary tenure. Consequently, those matters normally regulated by a single system of law under the English law, may be cumulatively regulated by four or more systems of law in Nigeria.⁶⁶

(ii) International Situations: The scope of domicile at the international level, under the Nigerian law, does not appear to be identical with its scope under the English law. This is because the courts take no account of domicile in determining most matters governed by foreign customary laws. For example, a Ghanaian who is domiciled in Nigeria will still be governed by his particular Ghanaian customary law as regards those matters normally regulated under the customary laws in Nigeria.⁶⁷

2. Forms and Rules of Domicile

(A) Domicile of Origin

As domicile is the only means of ascertaining a person's personal law under the English law, it is inevitable that English law should require that everybody must have a domi-

⁶⁵Cap. 1 L.W.R.N. 1959.

⁶⁶See 1971 Nig. B. J. 69. I. O. Agbede, "Legal Pluralism and the problem of Ascertaining personal law: A consideration of Yinusa v. Adebusokan", supra note 64.

⁶⁷See ibid.

cile.

In order to make this rule work, the law assigns to every person a domicile at birth which is known as the domicile of origin. According to this rule, a legitimate child takes the domicile of its father. An illegitimate or posthumous child takes the domicile of its mother. A foundling takes the domicile of the country where it is found.⁶⁸

There are as yet no Nigerian cases on most of these issues but one may make the following comments with regard to the operation of this rule in Nigeria.

Unlike England, where the husband and the wife (together with their infant children) constitute the unit of the family, a Nigerian "family" often includes collaterals of the third or fourth degree of relationship.⁶⁹ The death of the father does not invariably transmit to the mother the responsibility for the care and maintenance of the child. The father's brother or other male relation often steps into his shoes. It will be absurd, if nothing else, if the responsibility for the maintenance of a child rests on his uncle, for example, whilst his personal law depends on that of the mother.

Take, for example, H, a Yoruba-man, temporarily stationed in the Mid-Western state, marries W, an Itsekiri girl, during this period. Assume that H dies in the Mid-Western state six months before a child, K, of the marriage is born. Assume also that H's brother, Y, takes W, shortly after the death of

⁶⁸ See Dicey and Morris, The Conflict of Laws (8th Ed. 1967) Rule 6(3).

⁶⁹ "Immediate family" is defined, for example, under the Eastern states' Fatal Accident Law as including (a) wife or wives (b) husband (c) parent (which includes father, mother, grandfather, grandmother, stepfather and stepmother) (d) child (which includes son, daughter, grandson, granddaughter, stepson and step-daughter) (e) brother and sister (which includes half-brother and half-sister) (f) nephew and niece (below the age of 16 who are maintained by the deceased person). See Sec. 2 Fatal Accident Law Cap. 52 Laws of Eastern Nigeria (1963 Ed.).

H, to H's home-town and that he looks after her until the child is born and weaned. W, thereafter returns to her home-town.

Under the received English law, W reverts to her Mid-Western domicile of origin on the death of H and retains this domicile during her temporary stay in H's home-town.⁷⁰ Consequently K acquires a Mid-Western domicile at birth as his domicile of origin. Whereas K, in most cases, will remain attached to the family of H throughout his life. Nonetheless, he will never be able to rid himself of the Mid-Western domicile until his death although it may remain in abeyance under certain conditions.⁷¹ The position remains the same even if K does not know his mother's whereabouts and notwithstanding that he has no other connection with the mid-Western state. It is no exaggeration to say that this rule is unreal, within the inter-state context, to the point of absurdity.

It is suggested therefore that a posthumous child should be presumed to take the domicile of the head of its family. It should be stressed however that this rule is by no means absolute. It is merely a presumption so that in those cases where a child is virtually reared and maintained by the mother or her "family", this presumption may be rebutted. This suggestion has no other basis than the welfare of the child. It is therefore the child's welfare that must be given overriding consideration in this regard.

It is however the exaggerated importance attached to the domicile of origin under the English law that stands in need of radical modification in Nigeria. According to this law, almost overwhelming evidence is required to shake off the domicile of origin. "Its character is more enduring, its hold stronger and less easily shaken off."⁷² As put by Lord

⁷⁰ Provided she had the intention of residing there permanently at the time of H's death. See In the Goods of Raffanel (1863) 3 SW & Tr. 49.

⁷¹ For example during the currency of a domicile of choice.

⁷² Winans v. Att.-Gen. [1904] A.C. 287 at 290 per Lord MACNAGHTEN.

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... the domicile of origin is the creature of law and independent of the will of the party, it would be inconsistent with the principle on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile and it does not require to be reacquired or reconstituted animo et facto in a manner which is necessary for the acquisition of a domicile of choice.⁷³

Cheshire has suggested that these rules evolved in the nineteenth century when England was a nation of enterprising pioneers, most of whom regarded their ultimate return home as a foregone conclusion.⁷⁴

The "revival" doctrine as well as the enduring character of domicile of origin appear to rest on the assumption that a man belongs to his country of origin much more than to the country of his choice. But this assumption has been dismissed as archaic and meaningless in an age of migratory population.⁷⁵

Perhaps a better explanation for the development of the rules of domicile of origin in its rigid form is the view of Rabel who wrote that

The doctrine of domicile of origin was maintained and developed to satisfy the natural desire of a

⁷³ Udny v. Udny (1869) L. R. 1 SC & Div. 441 (H.L.).

⁷⁴ Cheshire, Private International Law (7th Ed.), supra note 2 at 164. "Domicile" writes Graveson "had grown up in the nineteenth century in the context of an expanding Empire, in which the civil servant spent his working years away always with the hope and intention of returning home on his retirement." Five Sheffield Jubilee Lectures, supra note 1 at 85-86.

⁷⁵ Wolff, M., Private International Law (2nd Ed. 1950) p. 109.

home country from which innumerable colonizers have gone out into the world.⁷⁶

It was of particular importance whenever there were assets for distribution or taxes to be assessed in the home country.⁷⁷ Should there be any surprise therefore that this domicile should always remain in abeyance with its tentacles, like an octopus, ready to grip the unfortunate emigrant as soon as he has abandoned his domicile of choice. While a person may easily sever his connection with the country of his nationality (where that is the connecting factor) he remains, for all times, a miserable prey of his domicile of origin.⁷⁸ Undoubtedly the "revival" doctrine of domicile of origin runs counter to the fundamental principle of domicile as it may locate a person's domicile in a country which cannot be regarded as his home by any stretch of the imagination.

The rules of domicile of origin might have been good law in an era when families were born and when they lived and died in the same community and "when the ties, both material and sentimental, which bind one to his birth place, are strong".⁷⁹ But under the present political arrangement in Nigeria where state boundaries bear little relation to tribal grouping⁸⁰ and where the policy is to discourage ethnic or tribal loyalty to

⁷⁶Rabel, E., The Conflict of Laws: A comparative Study (2nd Ed. 1958) vol. 1, p. 165. This suggestion is supported by the practice of other "emigration countries" which favour nationality as the connecting factor.

⁷⁷Ibid.

⁷⁸According to Cheshire, Private International Law (7th Ed.) at 165, the domicile of origin transcends even nationality in stability and permanence.

⁷⁹Goodrich and Scoles, Conflict of Laws (1964) 39.

⁸⁰The Yorubas constitute the majority of the population of Lagos, Western and Kwara states. The Ibos constitute a substantial proportion of the population of the three Eastern states and the Mid-Western state while the Hausas and Fulanis constitute the majority of the population of about four Northern states.

adopt such rules will be socially undesirable if not legally embarrassing. Moreover, the mobility of modern society generally has provoked, even in England, an almost unanimous criticism of this rule and recommendation for its change.⁸¹ Indeed the English rules of domicile of origin have found no place in American law.

As Beale has rightly pointed out:

In America the British loyalty to one's place of birth is little felt. The immigrant who identifies himself with his new country or the Easterner who goes West and identifies himself with the new part of the country, is a common figure. To refer such a man in course of moving from one place in his new country to another, to a forgotten or half-forgotten domicile of origin would be absurdly unreal.⁸²

Judicial pronouncements to this end are equally illuminating. It was held in Succession of Steers that

... the domicile of birth, as recognised in England, has been given too much weight in estimating the value of the floating intention to return to first domicile. The conditions which control the destinies of family in the two countries are materially different. In one it is a rule to keep families together. They grow up for generations on the same spot. Local conditions control them and there is not entirely obliterated some influences of the feudal period. Here, the customs, the habits of the people, their ceaseless energies, their continuous change from locality to locality, the sudden and dense population of new places, the desertion and abandonment of old ones, will show that the people are migratory and not much influenced by birth, locality or the local history of families.⁸³

⁸¹ See Cmnd 9068 (Code of Domicile) Appendix A., Art. 1, Sec. 5.

⁸² 1 Beale, Treatise on the Conflict of Laws (1935) at pp. 184-185.

⁸³ 47 La. Ann. 1551, 1553, 18 S. 503 (1895).

The Court therefore concluded that it would require the same fact to show abandonment of domicile of origin as would be required for abandonment of domicile of choice.

With all these facts in mind one feels rather exasperated to hear a Nigerian judge (who was concerned with an inter-state conflict problem) saying:

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, especially when I compare the facts proved with those proved in Wahl v. Attorney-General (1947) 147 L.T. 382 in which it was decided by the House of Lords (reversing the Court of Appeal) that a naturalised British subject of German origin who had declared by signing a printed form that he had permanently resided in the United Kingdom for the preceding five years and intended permanently to reside therein in the future was not domiciled in England. The facts in that case were much stronger than the facts in the case under consideration. I am therefore of the opinion that 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 Lagos⁸⁴

The facts of this case are briefly as follows. The respondent was an employee of the Nigerian Railway Corporation. He was born in Ijebu-Ode around 1913. He came to Lagos in 1941 where he remained resident until 1962 except for a period 1950-58 when he was temporarily transferred to Zaria by his employer. He was still resident in Lagos at the time of the present (divorce) proceedings.

It may be informative to point out that Ijebu-Ode is a neighbouring town to Lagos and that many "Ijebus" have their

⁸⁴ Adeyemi v. Adeyemi (1962) L.L.R. 70 at p. 72. (per ONYEAMA J.) See also Omogbemi v. Omogbemi (unreported) suit No. WD/36/66. (KAZEEM Ag. J.).

homes or principal homes (in practice) 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. How such a change should require the sort of overwhelming evidence necessary for establishing a change of German domicile of origin to that of English domicile of choice (during the period of hostilities between the two countries) obviously demands an excursion out of the realm of law into that of metaphysics. It would be hard to find a more striking example of mechanical jurisprudence.⁸⁵

Furthermore, it should be borne in mind that the acquisition of domicile in any state in Nigeria has no greater effect than to subject the propositus to the general law of the state and not to its customary or religious laws.⁸⁶ Moreover, insofar as matters governed by the lex domicilii are concerned, the state laws are broadly similar.⁸⁷ Again, by virtue of Section 28 of the Republican Constitution, no rule of law which discriminates against a citizen on the ground of his racial or tribal origin can have the force of law within the federation.

It follows therefore that a change of domicile whether of origin or of choice from one state to another does not entail

⁸⁵ Other cases adopting the "tenacious rule" of domicile of origin include James v. James (unreported), Suit No. W/32/63; Ofodile v. Ofodile (unreported), Suit No. WD/6/1965; Uchendu v. Uchendu (1962) L.L.R. 101; Udom v. Udom (1962) L.L.R. 112; Omogbemi v. Omogbemi (unreported) WD/36/66; Cole v. Cole 1 N.L.R. 15; Att.-Gen. v. Egbuna 18 N.L.R. 1.

⁸⁶ See however (1971) Nig. B. J. 69. Agbede, "Legal Pluralism and the problem of Ascertaining personal law: A consideration of Yinusa v. Adebusokan", supra note 64.

⁸⁷ For example, intestate succession under the general laws of the states is based on the rule in Cole v. Cole (supra). See Att.-Gen. v. Egbuna (supra) and Administration of Estate Law Cap. 1 L.W.R.H. (1959) for the equivalent rule in Western, Mid-Western and the Eastern states. (The authority of the cases is however now suspect.)

"serious" or "far-reaching" consequences as to require very strong evidence as claimed by the court in the case under discussion.

It is submitted therefore that an existing domicile (whether of choice or of origin) should continue until another is acquired and that the same evidence required for the abandonment of domicile of choice should be sufficient for the abandonment of domicile of origin.

This suggested approach can also be adopted, to an advantage, at the international level.

(A) Domicile of Dependence

Either because of non-age, their physical dependence on others or for lack of mental capacity, certain persons are deemed by the received (English) law to be incapable of acquiring a domicile of choice. This category of persons includes infants, married women and persons of unsound minds.

I. Infants' Domicile: An infant's domicile is dependent on that of its father until the infant attains the age of twenty-one.⁸⁹ A change of the father's domicile correspond-

⁸⁸"So heavy" said the learned judge (adopting the dictum of Lord WESTBURY in Udny v. Udny (1869) L.R. 1 SC. & Div. 441 (H.L.)) "is the burden cast upon those who seek to show that the domicile of origin has been superseded by a domicile of choice . . . a change of domicile is a serious matter -- serious enough when the competition is between two domiciles within the ambit of one and the same kingdom or country -- more serious still when one of the two is altogether foreign. The change of domicile involves far-reaching consequences in regard to succession and distribution and other things which depend on domicile". Supra at 72. See also Omogbemi v. Omogbemi (unreported), Suit No. WD/36/66 for similar view.

⁸⁹This rule does not apply to illegitimate infants. But as a child can be legitimated by acknowledgment in Nigeria, the status of illegitimacy is rare. In any event, the English rule which assigns the mother's domicile to an illegitimate child is fairly satisfactory.

ingly changes that of the infant even if the father has deserted the infant (and even if his whereabouts is unknown) and notwithstanding that the marriage has been dissolved and that the custody of the infant has been awarded to the mother. The fact that a male infant has himself got married does not affect the position. However a female infant takes, on marriage, the domicile of her husband. Upon the death of the father, the infant acquires, subject to a certain exception,⁹⁰ the mother's domicile.

In the majority of cases in Nigeria, infants live in the family home and still do so even after being married. Therefore a rule which makes the domicile of an infant dependent on that of its parents is consistent with the social realities of Nigerian society. Nevertheless, the termination of infancy at twenty-one is somewhat arbitrary in relation to the Nigerian situation.⁹¹ In our view if an infant who has attained the age of discretion is compelled, or if he voluntarily chooses to find a home for himself, the law should take cognisance of this social fact. The need for according the infant a separate domicile is greater where the infant is lawfully married.

Must it remain the law that an infant should, for example, find out the country where his disaffected father has chosen to establish himself in order that the infant may sue for the dissolution of his own marriage?

The rule which automatically transmits the father's domicile to the child even where the father has deserted both the infant and its mother (and notwithstanding that the custody of the child has been awarded to the mother) is, to say the least, absurd.

These are the reasons why the American rules of domicile in this regard are more suitable to the Nigerian situation. The general rule in the United States appears to be based on deriving an infant's domicile from the domicile of the parent

⁹⁰ The rule in Re Beaumont [1893] 3 Ch. 490, under which the mother cannot alter the infant's domicile to its detriment.

⁹¹ Cf. Family Law Reform Act, 1969 [British].

with whom he lives.⁹² In any case, the domicile of the father ceases to regulate that of an infant (son or daughter) under most systems in the United States if:

- (1) the father has abandoned the child or
- (2) the infant has been "emancipated"⁹³ by the father or
- (3) the infant is validly married.⁹⁴

Neither logic nor social convenience demands the subjection of the domicile of an abandoned child to that of its parents even if their domicile is known or reasonably ascertainable. The welfare of the child should be the overriding consideration in the determination of its domicile in this context.

We think that an infant who is completely independent of its parents should be able to determine its own domicile.⁹⁵ Whether a child is emancipated should depend on the particular circumstances of individual cases but we think that it should be generally recognised that an infant (according to the personal law of its parents) who has established a home in a state where he is sui juris must be considered emancipated.

Furthermore, we think that it is incontestably anomalous that a married infant who is saddled with the responsibility of maintaining a family should have no power to determine the

⁹² See the Restatement Second, supra note 1, Section 22.

⁹³ That is, entirely free of parental control.

⁹⁴ Restatement Second, supra note 1, Section 22.

⁹⁵ It should be recalled that the 1958 Domicile Bill would have given capacity to acquire domicile to every person at the age of 16 and also that a girl can acquire domicile at 12 and a boy can do so at 14 under the Scots law.

family's home.⁹⁶

In our view, the rules in the United States as stated above should be adopted in Nigeria not only for inter-state situations but also for international conflict problems.

II. Domicile of Married Women: The position of married women under the English rule of domicile is perhaps the most intolerable aspect of this concept. The statement of Blackstone, in a paraphrase, that by marriage, the husband and wife are one person in law, that the very being or legal existence of the wife is superseded during the marriage or at least incorporated and consolidated into that of the husband,⁹⁷ has no relevance to Nigerian social situation and has become, in our age, a "vanishing fiction" in various departments of English law. But it is still being rigorously adhered to under the English rule of domicile.

According to this rule, a wife takes the domicile of her husband on marriage and continues to do so until the marriage is terminated by death or divorce. Moreover, a widow retains her late husband's domicile until she changes it.⁹⁸ Neither desertion by the husband nor an order of judicial separation affects this rule.⁹⁹

The hardship of the rule is nowhere more strikingly shown than in cases where the deserted wife seeks a divorce. As divorce jurisdiction can only be exercised by the court of the husband's domicile, the wife is reduced to following the husband all over the world, should the husband decide to change

⁹⁶ Marriage ends period of infancy in many American states as well as in many European countries such as Netherlands, Switzerland, Hungary and Turkey. The Code of Domicile (Cmd 9068) describes an infant as a person who has not attained the age of 21 and who has not married. See Art. 4(4).

⁹⁷ Blackstone, Sir W., Commentaries on the law of England (1865-69) p. 442.

⁹⁸ In the Goods of Raffeneil (1863) 3 Sw & Tr. 49.

⁹⁹ Att.-Gen. for Alberta v. Cook [1926] A.C. 444.

his home from place to place and by establishing himself in a state where the wife's ground for divorce is not recognised he could deprive her of her action.¹⁰⁰ It is hardly any wonder then that our legislature had to intervene in order to provide for divorce jurisdiction on other bases in addition to the husband's domicile.¹⁰¹

The need for a new approach to the problem of divorce jurisdiction in modern times was emphasized by Lord PEARSON when his Lordship said,

In the last century, if a wife was deserted by her husband whether domiciled here or not, she was tied to him until he died. But now society in this and many other countries was no longer content with that situation. She must be free to live a normal life; and it was felt that on the grounds of morals, humanity and convenience she should be able to obtain a divorce in the country where she genuinely lived.¹⁰²

Again, in making her will, the deserted or separated wife has to comply with the lex domicilii of the husband which, in most cases, she is not likely to know. Upon such an unknown law depends succession to her movable (intestate) estate.

Is it not gratifying that the conception of unity of matrimonial domicile finds no place under a number of legal systems?¹⁰³ Is it surprising that this rule has been castigated by a renowned British judge as the "last barbarous relic of a wife's servitude?"¹⁰⁴ According to Graveson, the result of

¹⁰⁰ See Goodrich, Hand Book on Conflict of Laws (1949) 56.

¹⁰¹ A deserted wife and any wife who has resided in Nigeria for three years are assigned separate domiciles under Sec. 7 of the M.C.D. 1970.

¹⁰² Indyka v. Indyka [1967] 3 W.L.R. 510 at p. 540.

¹⁰³ Under the laws of Norway, Denmark, and Russia, for example, the wife does not share the husband's domicile.

¹⁰⁴ Per Lord DENNING M.R. in Gray v. Formosa, P. 259 at p. 267.

the unity of matrimonial domicile is that "the married woman may dispose of her own property, make her own contracts, commit her own torts but never acquire her own domicile".¹⁰⁵ To say the least, this rule is repugnant to modern conception of justice and runs counter to contemporary ideas of sex equality.

It certainly must be disappointing to hear a Nigerian judge saying:

. . . it is trite law that the domicile of the wife follows that of the husband and . . . the wife cannot have a domicile different from that of the husband while the marriage lasts.¹⁰⁶

The dependent domicile of a wife no doubt springs from the recognition of the husband as the head of the household. But such a proposition becomes irrelevant when the spouses no longer share a single household. To subject the wife to the law of the state where the husband has chosen to establish himself under this condition is to perpetuate social injustices. Moreover, such an approach is out of accord with the practice under our customary law.

In our view, it will be good law and good sense under the Nigeria local circumstances to make the wife's domicile depend on that of the husband only for as long as they live

¹⁰⁵ Graveson, "Capacity to Acquire Domicile" (1950 3 I.L.Q. 149 at p. 159).

¹⁰⁶ Per De LESTANG C.J. in Machi v. Machi (1960) L.L.R. 103 at 104. See also Adeyemi v. Adeyemi (1962) L.L.R. 70 where ONYEAMA J. said at 70 that "The domicile of a married woman is that of her husband while the marriage subsists and indeed a divorced woman retains her former husband's domicile until she changes it" (adopting the dictum in Udny v. Udny (1869) L.R. 1 SC & Div. 441 (H.L.)). Such is the general approach in all the relevant cases.

together.¹⁰⁷

It must be borne in mind that domicile is not a privilege. Even if it were, we are doing no more than extending to the wife a privilege hitherto enjoyed exclusively by the husband. Such a result, in our view, is consonant with the social values of our age. The idea of a woman belonging to the "family" of the husband or sharing his personal law is not in accordance with the ordinary facts of life of Nigerian society. The union brought about by birth has always been considered to be stronger and more precious than that brought about by marriage.

We believe that this suggested approach can be conveniently adopted for international situations.

UNITY OF DOMICILE

The rule here is that a person cannot have more than one domicile at the same time.¹⁰⁸ If the rule were otherwise, the concept of domicile would probably not be adequate for selecting a particular legal system for the determination of personal rights. Therefore a person can only be domiciled in England or Scotland, not in both.

The application of this rule in Nigeria has provoked a good deal of controversy which found expression in a number of irreconcilable decisions. It has produced two schools of thought: one in favour of a Regional (now state's) domi-

¹⁰⁷Such is the general approach in a majority of states in the United States. See Restatement Second, *supra* note 1 at 21. See also Goodrich and Scoles, *Conflict of Laws*, *supra* note 79 at 50-51, 1 Beale, *Treatise on the Conflict of Laws*, *supra* note 25 at 208-210. In *Blair v. Blair* (1952) 199 Md. 9, 85, A 2d it was held that a wife did not take the husband's domicile where she was the bread-winner. The 1958 (English) Domicile Bill would have abolished altogether the "unity of matrimonial domicile" rule.

¹⁰⁸Under the German, Austrian, Swiss, Brazilian, and Chilean laws, for example, a person can have more than one domicile.

cile,¹⁰⁹ the other in favour of a Federal domicile.¹¹⁰ The disagreement arises from the failure on the part of some Nigerian lawyers and judges to appreciate that the English rules of domicile were developed under a situation vastly different from ours and that it would require substantial modifications to make them work justice under the Nigerian special circumstances.

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Referred to hereafter as the "Regional School" for purpose of convenience though the constituent states are now referred to as "states". Decisions in support of regional domicile are far too many but the following may be mentioned: Udom v. Udom (1962) L.L.R. 112 (COKER J.); Okonko v. Eze (1960) N.N.L.R. 80 (HURLEY J.); Machi v. Machi (1960) L.L.R. 103 (De LESTANG C.J.); Adeoye v. Adeoye (1962) N.N.L.R. 63 (SKINNER J.); Adeyemi v. Adeyemi (1962) L.L.R. 70 (ONYEAMA J.); James v. James (unreported) Suit No. W/32/63 (RHODES J.). See also Atilade "Is there one Nigerian Domicile or different Regional domiciles in regard to divorce cases" (1964) 5 Nig. Bar Journal 56 for a writer's view in support of this approach.

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Hereafter referred to as the "Federal School". The following decisions were based on Federal domicile for divorce jurisdiction: Nwokedi v. Nwokedi (1958) L.L.R. 94 (ONYEAMA); Udom v. Udom (1962) L.L.R. 112 (COKER J.: obiter); Ettarh v. Ettarh (unreported) (ADEFARASIN J.); Odunjo v. Odunjo (1964) L.L.R. 43 (ADEFARASIN J.); Odiase v. Odiase (1965) N.M.L.R. 196 (FATAYI-WILLIAMS J.); Efijunti v. Efijunti (unreported) Suit No. 1/124/65; Ishioye v. Ishioye (unreported) Suit No. WD/355/64; Effiong v. Effiong (unreported) Suit No. WD/6/69; Akemu v. Akemu Suit No. WD/51/66; Akigbe v. Akigbe (unreported) Suit No. U/1/67; Ekprikpo v. Ekprikpo (unreported) Suit No. WD/59/65; Omogbemi v. Omogbemi (unreported) Suit No. WD/36/66. Legal writers in support of this approach include (1) Kasunmu and Salacuse, in their Nigerian Family Law, *supra* note 1 at 112-119; (2) Obi, S. N., Modern Family Law in Southern Nigeria (1966) pp. 205-212, appears to take a rather curious view that Regional domicile is functionless in Nigeria; (3) Karibi-Whyte, "Nigerian Divorce Domicile: Federal or Regional" Nig. Lawyers Quarterly vol. 1 (No. 1) p. 1. See also Graveson, Five Sheffield Jubilee Lectures, *supra* note 1 at 85-111, who impliedly supports this approach.

The facts quite briefly are: matters which depend on the application of domicile are shared between the Federal and "Regional" Governments. Since domicile in the Federation, as such, will not be adequate to connect a person with the law of a particular "Region" and since the rule of English law as claimed prescribes that a person cannot have more than one domicile, the "Regional School" argued that only a "Regional" domicile was feasible. The "Federal School", on the other hand, argued that at least for purposes of those matters within the jurisdiction of the Federal legislature "domicile" should be based on residence anywhere in Nigeria with an intention to remain in Nigeria permanently.

Of course, the "Regional School" was quick to point out that in Canada and in U.S.A. which are federations like Nigeria, it was not sufficient to establish a Canadian or United States domicile.¹¹¹

One basic fact which the "Regional School" fails to appreciate is that by the very definition of English concept of domicile, a person can be domiciled in Australia,¹¹² Canada,¹¹³ U.S.A. or in the United Kingdom.¹¹⁴ The fact is that there was no system of law, until lately, covering the whole of each of these countries for which domicile was relevant. That is the only acceptable reason why United States, United Kingdom or Canadian domicile was not known.

Lord Merrivale made that clear in the Canadian case of

¹¹¹ But see the Canadian case of Voghall v. Voghall and Pratt (1960) 22 D.L.R. 577 where the decision of the Privy Council in Att.-Gen of Alberta v. Cook was not followed.

¹¹² "An Australian domicile" said BARRY J. in Lloyd v. Lloyd (1962) Victoria Report 70 "is a juristically acceptable concept."

¹¹³ There is now a national domicile for purpose of divorce jurisdiction in Canada by virtue of the Divorce Act 1966.

¹¹⁴ According to Dicey and Morris, The Conflict of Laws (8th Ed. 1967) p. 83, a person may be domiciled in United Kingdom for some purposes.

Att.-Gen. of Alberta v. Cook¹¹⁵ when he said:

Unity of law in respect of the matters which depend on domicile does not at present extend to the Dominion.

Domicile, as previously stated, is a means to an end. It is the chain of connection between a person and a particular legal system which is relevant for the determination of his personal rights. Why, one must ask, is it not sufficient to be domiciled simply in Nigeria (which was the rule prior to 1954) for purposes of attracting the Federal law to oneself?

To postulate that just because a person cannot be domiciled in the United Kingdom (as such) where there is no system of law common to the whole of that Kingdom for which domicile is relevant, therefore a person cannot be domiciled in Nigeria (but in a "Region") may be to state a rule of logic but hardly a rule of law. For such a proposition is opposed to common sense as it is contradicted by social circumstances in Nigeria where there is unity of marriage law for the entire Federation for which domicile is the only connecting factor. We conceive, that law has no purpose other than to serve the needs of society either as a body or as individuals. Therefore, to enforce a rule of law which seeks its justification in logical symmetry and which takes no account of social convenience is, it is submitted, to stultify the fundamental purpose of law. Rules of law must operate on facts of life, not on abstract logical propositions. As rightly pointed out by Holmes:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed.¹¹⁶

¹¹⁵(1926) A. C. 444. This decision, insofar as it denies the possibility of a Federal domicile in Canada for founding divorce jurisdiction, has been frequently criticised and was not followed in the recent case of Voghall v. Voghall and Pratt (1960) 22 D.L.R. 579.

¹¹⁶Holmes, O. W., Jr., The Common Law (1881), p. 1.

Moreover, the adoption of a Federal domicile for matrimonial causes, is not so much a denial of the English doctrine of unity of domicile as it is the direct consequence of the division of legislative powers in Nigeria. Indeed, when the English judges first formulated the rule that a person can only have one domicile at one time, they were conscious, as pointed out by Neuner,¹¹⁷ of the fictitious character of their proceedings and took pain to qualify it with the phrase "for purpose of succession".¹¹⁸ It was only later that this rule acquired the petrified form which it has under the English law today.

It is relieving that this controversy has now been conclusively settled under the Matrimonial Causes Decree, 1970 which provides for a federal domicile as the basis for granting matrimonial reliefs under the Decree.¹¹⁹ Married women are also assigned special domiciles for purposes of seeking matrimonial reliefs under certain conditions.¹²⁰ The result is that a Nigerian woman married to a foreigner, for example, may have a Nigerian domicile for these purposes while retaining her husband's foreign domicile for other purposes. Therefore, the English rule (if in fact it is the rule)¹²¹ that no person can have more than one domicile at the same time becomes in Nigeria: no person can have more than one domicile at the same time for the same purpose.¹²²

A summary of our suggested modifications of the English

¹¹⁷Neuner, "Policy Consideration in the Conflict of Laws" 20 Can. Bar. Rev. 479.

¹¹⁸Somerville v. Somerville 5 E. R. 155.

¹¹⁹See Sec. 2(2) M.C.D. 1970.

¹²⁰Ibid. Sec. 7.

¹²¹See Dicey and Morris, op. cit., p. 85, Rule 5.

¹²²This is the view adopted in the American Second Restatement of Conflict of Laws. "Dicey & Morris" (i.e., Treitel) shares this view which is also favoured by Graveson and Cheshire.

rules of domicile may be stated as follows:

1. (i) A domicile should be acquired in a state by the concurrence of residence and an intention to reside there otherwise than for a temporary purpose.
 (ii) A person should be presumed to intend to be domiciled in a state where he is habitually resident.¹²³
2. Domicile whether of choice or of origin, once acquired, should continue until another is acquired.
3. A wife not living with the husband should have capacity to acquire a separate domicile.
4. (i) An infant should take the domicile of the parent with whom he lives.
 (ii) The infant domicile should cease to depend on that of the parents if he is
 - (a) abandoned
 - (b) validly married or
 - (c) not dependent on the parents.
 (iii) A guardian should be able, with the approval of a court of competent jurisdiction, to change a ward's domicile.
5. Jurisdiction to grant matrimonial reliefs should be based on habitual residence.

¹²³This presumption may be rebutted if it is established inter alia that the person concerned is entitled to diplomatic immunity or is in military, naval, air force or civil service of another country or in the service of an international organisation, or that his connection with the state is of a transitory nature.