DOMICIL IN THE KENYA CONFLICT OF LAWS

A dissertation submitted in partial fulfillment of the requirements for LL.B, University of Nairobi.

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Nairobi, Kenya.
July, 1977.

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PREFACE

In writing this paper I was aware of the difficult task I was undertaking. Firstly, there is very little local literature on the subject either because the marjority of the africans are confined to their original countries or because both the court and the parties to a suit avoid the issue altogether due to all the technicalities involved in its ascertainment.

Secondly, the field is a wide one and not much research has been undertaken in it. Even then or indeed because of that, there were numerous problems I encountered. The area is unknown to most laymen and hence I was at pains to explain to them what the concept of domicil is all about, before submitting any questions to them. Due to these problems, this has resulted in reliance on English cases, articles and textbooks. And therefore, I cannot say that the research is exhaustive but it could act as a basis for more local research for those who have a keen interest in the subject.

Lastly, I must thank my supevisor Prof. U.U. Uche for his badly needed assistance in the writing of this paper. In addition, I am most grateful to those members of the bench, the bar and others who spared their most precious time to discuss various issues with me, as these have contributed a lot to the success of this paper.

DOMICIL IN THE KENYA CONFLICT OF LAWS

CHAPTER 1

I N T R O D U C T I O N

It is generally accepted that law does not operate in a vacuum, but in a socio-economic and political context. And hence laws should take into consideration needs of the life of the people in which it operates. Unfortunately, Kenya faces the problem of imported laws, that is laws which have no roots amongst the indegenous people. To put it crudely, most of her laws were imposed on her during the colonial days and since the superstructure has not changed on independence, we have continuity of laws and the law of domicil is one of them.

Kenya law of domicil is the same as the English law, as this was part of the common law received on the 12th August, 1897. However, certain modifications were introduced when the Kenya Legislature enacted the Law of Domicil Act (Cap 37) Laws of Kenya, in 1970.

This paper is an attempt to set out the rules of Private International Law for ascertaining a person's domicil. In the course of the discussion, problems encountered in establishing a persons domicil, retention and loss are highlighted, ~~so~~ as this is one of the areas that pose lots of problems in the Kenya conflict of laws. Firstly, even though the concept of domicil is basically a sound one, the rules of ascertaining it have become in some respects so artificial and unrealistic as to make its application very difficult. Secondly, the legal domicil of a man is sometimes out of touch with reality for the

exeggerated importance attributed to the domicil of origin coupled with the technical doctrine of its revival may well ascribe to a man a domicil in a strange country. Lastly, ascertainment of domicil of choice depends on proof of the propositus, intention and this cannot be ascertained without recourse to the court. A man's intention is very difficult to ascertain, and the outcome normally leads to a lot of injustices.

Hence, I felt that domicil is one of the areas in need of research. In so doing I have suggested suitable reform measures to make the present law adequate and certain.

CHAPTER II

THE CONCEPT OF DOMICIL

The idea that lies at the root of the concept of domicil is that of a permanent home. A person is said to be domiciled in the country in which the law considers to be his permanent home.

Lord Cronworth said[1]

> "By domicil, we mean home, the permanent home, and if you do not understand your permanent home I am afraid that no illustration drawn from foreign writers will very much help you to it"

One of the best definitions put forward is that by the Private International Law Committee:

> ".....domicil is the place where the person habitually resides, unless the domicil of such a person depends on the domicil of another person or on the seat of a public body".

And in the East African case of George Benard Gordon V. Martha Nyamate Gordon[2], Reide J. said:

> "Domicil has never been exhaustively defined and it has indeed been said that an absolute definition is impossible."

In other words the concept of domicil is not uniform throughout the world. To a civil lawyer, it means habitual residence, but at common law it is regarded as the equivalent of a persons permanent home. This paper's main concern is the second meaning.

The object of determining a person's domicil is to connect him for the purpose of a particular enquiry with some system or rule of law. To establish this connection it is sufficient to

fix the person's domicil in a "country",[3] that is a territory under one body law. It is not necessary to show in what part of the country he had his permanent home.

Hence, to fulfill this objective, it is a settled principle of Private International Law that nobody shall be without a domicil. In order to make this effective, the law assigns what is called a domicil of origin to every person at his birth[4]. To a legitimate child the domicil of the father, to an illegitimate child the domicil of the mother and to a foundling the place where he is found. [5]This domicil of origin prevails until a new domicil is acquired.

The second important rule is that a person cannot have two domiciles at the same time. This is in keeping with the first rule, since for any given enquiry a person cannot have more than one domicil. If a person has two homes in different countries, he is domiciled in the country in which he has his principal home. However, there is a growing support for the view that a person may have different domicils for different purposes.

Some of the most important matters governed by the personal law include essential validity of marriage; the mutual rights and obligations of husband and wife, parent and child, guardian and ward; the effect of marriage on the proprietary rights of husband and wife; divorce; the annulment of marriage; legimimation and adoption; and wills of movables and intestate succession to movables. In order to cope with these matters, the law recognises three types of domicil. Firstly, there is the domicil of origin which the law atributes to every person at birth[6]. Secondly,

there is domicil of choice which every person of full age and capacity[7] is free to acquire in substitution for that which he at present possesses. Lastly, there is the domicil of dependency which is the same as and changes with the domicil of another person.

DOMICIL OF ORIGIN

A domicil of origin is attributed to every person at birth by the operation of law.[8] If a child is born legitimate, he acquires the domicil his father or if he is born post-humously the domicil of his father at the date of his death. If the child is born illegitimate, the domicil of his mother and if he is legitimated by the marriage of his parents, he shall acquire the domicil of his father at the date of legitimation. An infant who is a foundling shall be deemed to have acquired a domicil in the country where he is found[9].

One problem which has not been authoritatively decided upon is what domicil an infant acquires if he is born after the divorce or a decree of nullity has been pronounced on his parents marriage. This is not just an academic issue as some people might think, but is very practical in todays Kenya where marriages are breaking down at a very early stage. One of the theories advanced is that such a child should take his mothers' domicil. This theory is sound since the affairs of the new-born will be regulated by his mother, but the prime consideration should be the child's welfare.

DOMICIL OF CHOICE.

A domicil of choice is acquired when a person of full age and capacity takes up residence in another country

with the intention of making that country his permanent home. The person must establish his residence in a certain country with the intention of remaining there permanently[10]. The two elements of "factum et animus", must concur, but there need not be unity of time in their concurrence.

Residence

Residence per se does not constitute domicil, it has to be accompanied by intention. Residence is satisfied by mere physical presence so that problems normally centres on the intention of the propositus. It is not necessary that the residence should be long in point of time. Residence for a short period so long as it is accompanied by the accessory intention is enough[11]. In addition, a person need-not own land or other forms of property; he can be resident in a country although he lives in hotels. Motive in relation to residence is irrelevant, for one may be domiciled in a country even though he is staying there for a particular purpose such as conducting business or taking part in legal proceedings.

The residence however must be lawful and the Kenya courts would hold that a person illegally resident would-not acquire domicil here, even though he has the necessary intention. However, a Kenya court could hold that a domicil had been acquired by residence illegal under foreign laws. This is however open to criticism as there is no authority both in Kenya and in England.

Lastly, a person may be resident or ordinarily resident in more than one country for various purposes. In I.R.C.V. Lysaght[12] a person who lived in the Irish Free State spent a total of three months each year in England for business purposes. It was held that he was for tax purposes resident in the United Kingdom

and no doubt in the Irish Free State.

Intention

Intention denotes the state of mind of the propositus, and hence one of the most problematic issues in the conflict of laws. The intention that is necessary for the acquisition of a domicil is the intention to reside permanently or for an unlimited period of time in a country. This intention must directly and exclusively be towards one country. The time at which intention is relevant will depend on the nature of the inquiry. It might be past or present. For example, if the enquiry relates to one already dead, it must be ascertained whether at some period before he died, he had formed and retained a fixed and settled intention of residing in a given country. If on the other hand the issue in question is the essential validity of a proposed marriage, the propositus immediate intention must be examined.

Unfortunately, marjority of the cases involving determination of a persons' domicil, concern deceased persons. Hence the element of intention becomes very difficult to ascertain. Hence every conceivable event and incident in a man's life is a relevant and admissible indicate of his state of mind. His life history is scrupulously examined as in the case of Winaus V. Attorney General[13] and Ramsay V. Liverpool Royal Infirmary[14]. In the former case Winaus who had resided in England for the last thirty seven years of his life was held domiciled in the United States of America because of two very important activities in his life. Firstly, the construction of a large fleet of spindee-shaped vessels, which being proof against pitching and rolling would restore to American the carrying trade of the world and superiority

at sea. Secondly, to construct wharves and docks for the spindle-shaped vessels to harbour in. In addition, he led a secluded life and mixed little with English people and hence L'Macuaghten concluded that the domicil of origin of New Jersey had not been lost. He said[15]:

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

In the latter case, George Bowie lived in England for the last thirty six years of his life, and left the country only twice. However, the court examined his life and concluded that if his source of living in England had failed he would have gone back to Glasgow. Hence the House of Lords unanimously held that George died domiciled in Scotland. They denied that his prolonged residence in England disclosed an intention to choose England as his permanent home.

A mans life is closely examined and hearsay evidence is admissible[16] where the domicil concerns a deceased. No act however trivial is left out, for it might possibly be of more weight with regard to the issue in question than an act which was more important to a man in his lifetime. This is the reason why evidence adduced in a disputed domicil case is both voluminous and difficult to access. Investigating a man's state of mind instead of being content with long-continued residence is equivalent to "setting sail on unchartered vessel".

Nothing must be neglected that can possibly indicate the resident's mind. His aspirations, whims, armours, prejudices,

health, religion are all considered. In Hoskins V. Mathew[17] L. J. Turner said:

> "To determine Mathews domicil, we must examine his movement, his acts, his motives, his family, his fortune and his health, for all these considerations enter into or may enter into the question of his domicil".

Some of the relevant criteria of intention decided upon by the English courts include naturalization, purchase of a house or burial ground, the exercise of political rights, establishment of children in business, place where a man's wife and family reside just to mention a few. More reliance is placed upon conduct than upon declarations, especially if they are in favour of the declarant[18].

The courts also take into consideration a persons motive as this may throw light upon the question whether removal to another country was intended to be permanent or not. It may also provide a means of testing the sincerity of a declaration of intension. For example if an only son testifies that at the time of his parents death, they regarded Tanzania as their permanent home, the fact that by Tanzanian law he is entitled to one-half of his parents property may make his testimony a little suspect[19].

Lastly, to constitute domicil, residence must be voluntary. However in these cases the exercise of the propositus will, to reside in a particular place is doubtful. These range from prisoners; refugees and fugitives; invalids; persons liable to deportation; members of the armed forces; servants and diplomats. In all these cases, a person is said to lack the

animus manendi because his presence in a country is due to necessity or some physical or legal compulsion or because his residence though freely chosen is liable to be terminated against his will.

1) Prisoners

A prisoner normally retains during imprisonment the domicil he had at its commencement. Such a person clearly lacks freedom of choice, until after his confinement period.

2) Refugees and fugitives

Refugees and fugitives have a special motive for leaving a certain country, but none for entering another. The most difficult question is to decide whether the fugitive intends to abandon his domicil in the first country. If he does, acquisition of domicil in the new country will be assumed. If the person intends to return to his original state when the reason or reasons for fleeing are over, then he retains his original domicil. Thus, each case depends on its own peculiar facts.

3) Invalids

The question of invalids has not been conclusively decided upon. One view is that such a person can acquire domicil of choice, while the other view is that he cannot. The stronger view is that an invalid who settles in a foreign country for the sake of his health acquires a domicil of choice in that state. This was the holding in the case of Hoskins V. Wathew.[20] In this case a testator was held domiciled in Italy after settling there on health grounds. The house-keeper contended that the testators object in going to Florence and residing there was to benefit his health, for he never treated Florence

as being his permanent place of residence. The court took the view that in settling in Florence, "he was exercising a preference and not acting upon necessity."

4) Persons liable to deportation

A person who resides in a country in which he is liable to be deported, lacks capacity to establish a residence to acquire a domicil of choice. He can however acquire a domicil of choice, if he has the necessary intention. He does not loose it until he is actually deported, and if he intended to return legally to his country after deportation, he does not loose his domicil of choice.

5) Members of the armed forces

It is now settled that a person can acquire a domicil of choice in a country in which he may have to leave on being recalled to active service. During service, he can also acquire domicil of choice in the country of service or elsewhere so long as he has the necessary residence and intention. However in most cases, they prefer to retain the domicil they had on entering service, for this is temporary in nature.

6) Servants

The question of a person who goes to a country on a contract of service depends on each case. If one resides in a country purely for employment purposes, then he does not acquire a domicil of choice. But if he has the intention to settle down permanently, then he acquires a domicil of choice.

7) Diplomats.

These are simply a special category of servants and their

domicil is governed by the same principles.

In practice these special cases rarely come up in courts and hence they pose more of academic problems than practical. Thus, generally a person looses his domicil of choice in a country by ceasing to reside there and loosing the intention as well. In such cases his domicil of origin revives unless he has acquired another domicil of choice.

DOMICIL OF DEPENDENCY

The three classes of dependent persons are infants, married women and lunatics. Their domicil is the same as and changes with the domicil of the person on whom they are legally dependant. An infants domicil depends on and changes according to his father, or mother, guardian or the adoptive parents domicil, depending on the circumstances of each case.

Under the Kenya Domicil Act, a woman shall on marriage acquire the domicil of her husband. As will be seen later when the topic will be discussed in details, she retains this dependency during the marriage, with the exceptions provided for in the Kenya Domicil Act[21].

Lastly, the lunatic retains the domicil he had when he became insane. This is because he lacks capacity to form the necessary intention to reside in a particular country.

It has been suggested that the domicil of dependency is the same as the domicil of choice, but the two differ in three respects. Firstly, the domicil of choice can, while the of dependency cannot be abandoned. Secondly, a domicil of dependency is imposed; whereas domicil of choice is always acquired. Thirdly, it is easier to prove loss of domicil of dependency than abandonment of a domicil of choice.

On ceasing to be dependent, a person often continues to be domiciled in the country of his last domicil of dependency, but this becomes domicil of choice.

PROCESS OF CHANGE FROM ONE DOMICIL TO ANOTHER

There is a strong presumption in favour of the continuation of an existing domicil, hence the burden of proving a change in all cases rests on those who allege that a change has occured. This presumption is very important, especially if the evidence does not show with certainty what the residents intention is, as the courts will declare in favour of an existing domicil.

The standard of proof necessary to rebuilt the presumption is that adopted inccivil actions, that is intention of the propositus to be proved on a balance of probabilities. But where the allegation is a change of domicil of origin to that of choice, the standard of proof goes beyond a mere balance of probabilities[22]. Decided cases appear to regard the intention in favour of retaining the domicil of origin as an almost irrebutable presumption. Thus in order to change one's domicil of origin to that of choice, there must be clear proof to rebut this presumption. This is because as L. Macnaghten said:

> "Its character is more enduring, its hold stronger and less easily shaken off."

And in the East African case of Santhumayor N. Santhumayor Ferris and another[23], Sir Andley Mckisack C. J. held that the burden of proving a change of domicil of origin to a domicil of choice is not light. The petitioner in this case had failed to prove that he had acquired a Ugandan domicil with that "perfect clearness" which English cares prescribe as necessary before the court can accept that the domicil has been lost[24].

If domicil of origin is effectively displaced as a result of acquisition of domicil of choice, it is merely placed in obeyance for the time being. It remains in the background ready to revive as soon as the propositus abandons his domicil of choice. This doctrine of revival of domicil of origin sometimes leads to a lot of absurdities, for a man might be domiciled in a country he has never visited and one which he feels a repuguance for. Due to this enduring nature, domicil of origin retains its capacity for revival to the end of a man's life and the leading authority is the case of Bell V. Kennedy[25] where Bell was said to be domiciled in Jamaica even though he had abandoned it in 1837 and was residing in Scotland.

As far as the domicil of dependency is concerned, there is no problem concerning the process of change. On ceasing to be dependent, a person often continues to be domiciled in the country of his last domicil, until a domicil of choice is acquired.

In this chapter, I have attempted to define what the concept of domicil is and since it is impossible to define it in simple words I attempted to explain it by showing its purpose, the various types of domicil, and the process of change from one type to another. Problems associated with a particular domicil will be highlighted when I discuss each one of them in details in the next chapters. These problems call for need of a detailed study especially in a country like Kenya whose laws are "imported from England, and yet she does not keep pace with reform measures effected there.

CHAPTER III

DOMICIL OF INFANTS AND FOUNDLINGS

Infacts[26] and foundlings in the Kenya Conflict of laws fall in the class of people whose domicil is said to be dependent. The domicil of a dependent person is the same as and changes (if at all) with the domicil of the person on whom he is, as regards his domicil legally dependent[27]. This means that no dependent person can acquire a domicil of choice by his or her own act. As a general rule, the domicil of such a person is the same as and changes with the domicil of the person on whom he or she is legally dependent. Thus, even if an infant has a home separate from that of his parents, he cannot acquire a domicil of choice. This chapter concentrates on rules governing an infant's domicil and the problems associated with it in the Kenya social and economic context.

Domicil of a legitimate infant

As a general rule, the domicil of a legitimate infant is, during the lifetime of his father, the same as and changes with the domicil of his father[28]. This is true even though the infant has a home separate from that of his father[29]. One questions the wisdom of such a rigid rule, in a situation such as Kenyas where some infants become economically and socially independent at a very early age. One can imagine a situation where a child leaves home at a very early age. This child has no "connection" at all with his parents and has to feed and clothe himself. Application of this rule to such an infant causes a lot of hardships if such an infant wished to leave Kenya for a neighbouring state.

Unfortunately, there is no English or Kenya authority for the view accepted in some American jurisdictions that an infant can gain capacity to acquire a domicil of his own, if he is married or if he is "emancipated" or abandoned his parents. This proposition would be favourable in Kenya, because there is no logic in trying down infants who have no parent-child relationship to their parents domicil. This is unnecessary and cumbersome and reform of the law would achieve much better results than presently.

This is one of the areas problems arise as a result of importing whole-meal English law into Kenya, disregarding the local differences. One only understands this statement if the rationale of this English rule is examined. In England children's activities-socially, economically and educationally are very much influenced by their parents. In Kenya, this is only true as far as the elite are concerned. Traditionally, Africans looked after their childrens welfare, but today with the encroachment of many western values and laissez faire economy, the family bond has been considerably broken and in some cases children are very much left on their own at quite an early age.

However, there are two exceptions to this general rule, firstly when a female infant marries, she takes her husbands domicil in place of her fathers[30]. The only problem that could arise is if the female infant gets married to a male infant. This is because under the present law, a male infant even if married lacks capacity[31] to acquire a domicil of choice and hence the female infant would take her father in law's domicil

which is the same as that of her infant husband. As already mentioned, this state of affairs is most undesirable since the young couple are entirely on their own and hence should be enabled to choose a domicil of their own.

The second and very important exception to the general rule is where the parents are divorced, by a court of competent jurisdiction. The domicil of their infant children will follow that of their mother if she is awarded their custody. This is very logical since the infants affairs will be regulated by his mother.

Domicil of a legitimated infant

When a child is born illegitimate, his domicil is the same as and changes with the domicil of his mother[32]. When legitimation[33] takes place (by the marriage of the parents), the infant shall acquire the domicil of his father at the date of legitimation This rule is good and practical since it is in keeping with reality. In other words, it is natural that the domicil of an infant under his mothers care should be the same with hers, until the putative father takes over the whole responsibility by marrying the infants mother.

Domicil of illegitimate and fatherless infants

The general rule is that the domicil of an illegitimate or fatherless infant depends on that of his mother. The leading authority is the case of Potinger V. Wightman[34] which held that an infant acquires the domicil of his mother on the death of his father and changes with her domicil so long as he continues to live with her.

"The facts of the case are that Thoman Pottinger an Englishman died in Guernsey intestate, leaving a widow

and seven children. The widow was appointed guardian of the children and she sold some property, invested the produce in English funds. She went to England and became domiciled there. On the death of some of children the question arose as to whether their shares of the property have become distributable according to English or guernsey law. It was held that English law is to govern succession since the domicil of the children being the same as the surviving mother, and since no fraudulent intention can be imputed."

However, unlike domicil dependent on the infants father, one dependent on the mother does not change automatically. In other words, the rule is not as strict as the one which applies to legitimate infants in their father's lifetime. In the case of Re Beaumont[35] where a widow, domiciled in Scotland with her infant children remarried and went to live with her second husband in England, taking all but one of the children with her, living this one in the care of her aunt, it was held that the domicil of this child continued to be Scottish.

Stirling J. Said:

"It is not to be regarded as a necessary consequence of a change of the mother's domicil but as the result of an exercise by her of a power vested in her for the welfare of the infants, which in their interests she may abstain from exercising, even when she changes her own domicil."

That is if a mother of an infant got married again, the domicil she acquires by her second marriage would not be transmitte

to her child, whose domicil would continue to be that which the mother possessed prior to her second marriage. The same rule would presumably apply on the marriage of an unmarried mother of an illegitimate child, unless the mother married the putative father for this would have the effect of legitimating the infant.

The first problem one can point out in connection with illegitimate children is where the mother dies before or soon after birth. A legitimate child's domicil would be unaffected by his mother's death if at that time his parents were living together, since it would continue to depend on that of his father. Since the Kenya Law of Domicil ~~set~~ act is silent over this issue, we fall back on the Common law recommendations. The first view is that the mother's last domicil is the child's domicil at birth. The other view is that if the putative father accepts the patternity of the child, the his domicil can be imputed on the child. This recommendation would be applicable in a situation where the putative father and mother intended to get married, but death prevents this. It is just logical that the infants natural father should determine his domicil.

The second problem that could arise in connection with the domicil of an illegitimate infant is where before, but subject to the birth of such a child, guardianship has been awarded by an order of court to a person other than the mother. This is normally the case when an unmarried mother wants her child adopted immediately after birth. In such cases, it is submitted that the child's domicil of origin is the domicil which the mother had when the child was born. If the child is adopted by a foreigner, he acquires the adopters domicil as that of dependency.

Domicil of an infant without living parents

The Kenya Law of Domicil Act is silent on the domicil of infants whose parents are dead. This state of affairs comes about every day through traffic accidents in which both parents die simultaneously. In such cases, the most favourable theory is that advocated by some writers that the domicil of such a child should follow that of his guardian. The guardian should have power to change the infants domicil if it is for the latter's benefit. One South African writer commented:

"If domicil means the legal centre of a persons contracts and activities, could there be any better domicil in the case of a minor without parents, than that of his guardian?"

However, there are some writers' who hold the opinion that the domicil of minors cannot be changed by their guardians. Basis of this argument is that wards do not belong to the family of their guardians but stay in the latter's house as if it were the home of a stranger and this is only so long as the guardianship lasts. I do not agree with this opinion because if a child grows up in the home of a guardian, it is hardly fitting to call it the house of a stranger. On the other hand, a child with parents may in fact never grow up in the home of his parents, and yet follow their domicil. Since the guardian steps in the shoes of the parents, logically he should be able to change the childs domicil when he changes his. This presumption should only be rebutted by cogent evidence showing bad motive on the guardian's part. For example, if he wanted to change the infants domicil so as to change some succession rights accruing to the ward.

Domicil of Adopted infants

Sir Alfred Hopkinson has defined the status of adoption as that status created by "the act of a person taking upon himself the position of a parent to another who is in fact treated by law as his child, and the person so acting is recognised by law as having the right and duties of a parent by nature". Under the Kenya Adoption Act, the same idea is reinforced for the infant adoptor relationship ~~to take~~ that of a natural parent and child[37]. Hence when a child has been legally adopted, the legal consequences of the natural relationship between parent and child are extinguished and re-established as between adopter and the child.

Under the Kenya Domicil Act[38] an infant whose adoption has never been authorized by a court of competent jurisdiction or by a decree, as from the date of order or decree, acquires the domicil of the adopter. Where he is adopted by two spouses his domicil follows that of the husband. This effects only domicil of choice since the adopted infant still retains his domicil of origin.

Domicil of a foundling.

A foundling is a child the whereabouts of whose parents is unknown. His domicil of origin is said to be the place where he is found.[39] The place where he is found is the only evidence available and presence in a place is prima facie evidence of domicil. Such evidence is however rebuttable by proof of the domicil of the parent who could have determined the childs domicil of origin. The changes that follow as regards such a child's

domicil depends on whether he is adopted or a guardian is appointed to look after him as his domicil will depend and change according to that of his guardian or adopter.

In all these cases the domicil that a child acquires by reason of his father, mother, guardian or adoptor's move to another country is a domicil of choice or better perhaps of quasi-choice. His domicil of origin continues to be that imposed upon him at birth. Hence it is not this domicil but the one which he acquired at birth which will revive later if he abandons it without acquiring another.

After an infant comes of age he is of course free to acquire a domicil of choice, and until he does so he usually but not necessarily retains the domicil he had immediately before he attained his marjority. One of the leading authorities is the care of Harrison V. Harrison[40]:

> "In this case Harrison was born in England in 1930 with an English domicil of origin. In 1948 his parents emigrated to South Australia, leaving him in England. In 1950 he emigrated to New Zealand married there and decided to live there permanently. Three months before he attained his marjority he and his wife went to England and two years later the wife petitioned for divorce. The question was where he was domiciled and it was held that he was domiciled in South Australia until he attained his marjority. After attaining his marjority his English domicil of origin revived on the authority of Udny V. Udny[41]"

However, such an infant only acquires a domicil of choice on the attainment of marjority provided that sufficient evidence

existed of his intention and fact of residence. Hence in Harrison V. Harrison, he would have acquired a domicil of choice in New Zealand if he had resided there when he attained his marjority.

In this chapter, I have examined the various categories of infants and how their domicil is dependent on somebody's domicil. Since an infant lacks capacity to change his domicil, it persists until he attains his marjority and a change can then be effected if there is the requisite residence and intention or such a change may result from acts done during dependency.

CHAPTER IV

DOMICIL OF MARRIED WOMEN

A woman on marriage assumes the domcil of her husband. In the words of Stair, "her abode and domicil follows his". Thus, even though she exercises an act of choice in marrying, the legal consequences of her marriage, viz the acquisition of her husbands domicil is the result not of choice but of a rigid rule of law which may for legal purposes counteract the effect of a wife's choice of a home.

This rule of a wife's dependency is historically based on the ancient maxim of common law that a husband and wife are one person in law. The Report of the Commission on Law of Marriage and Divorce[42] states:

> "The principle that a married woman's domicil must be the same as that of her husband is another relic of the old idea of husband and wife as one person".

The Commission goes on to give the rationale for this dependency by saying that in the ordinary course of things, since people marry with the intention of living together, it is reasonable that their domicil should be the same.

This dependent, consequential or relative domicil which a woman receives on marriage is not only designed to give effect in law to what is in most cases situation of fact but also to establish a single personal law for all members of a family, so long as the marriage lasts and until the children reach the age of marjority. Although a womans domicil of choice is lost on marriage, her domicil of origin only ceases to operate

during the period of marriage and for so long afterwards as she retains the domicil of her late or former husband. This is so until she acquires a domicil of choice or a new domicil of dependency or reverts to her domicil of origin.

In Re Wallach[43]

> "A wife committed suicide five days after her husband's death in England and over the issue of her domicil, Hodson J said: The deceased having been a married woman until five days before her death and being then a widow, according to the accepted principles of English Law retains her late husband's domicil until she changes it".

This unity of domicil of husband (deceased) and wife showed an illogical confusion of thought, since at the material date there was no husband or wife, the former having died and the latter having become a widown and a "feme sole".

However, due to some changes effected in 1970, the domicil of a married woman will be discussed under two headings the law before 1970 and present law.

Domicil of a married woman before 1970

Before 1970 the law in Kenya was that the domicil of a married woman followed that of her bhusband during the subsistence of the marriage, irrespective of her own volition. If the marriage was void, the putative wife could not acquire her husband's domicil as domicil of dependency, although in some circumstances, she may be held to have acquired a domicil of choice in her putative husbands country.

If the marriage was voidable, it is thought that the wife could acquire her husbands domicil in the usual way. In the case

of De Reneville N. De Reneville[45]

"This was an application by the husband to determine whether the court had jurisdiction to entertain a suit brought by the wife for nullity of the marriage on the ground of the incapacity or wilful refusal of the husband to consumate it. Jones J held that since the marriage was merely voidable and not void and the wife was not domiciled within the jurisdiction of the court that is she shared her husbands French domicil.

After her marriage was dissolved, or on the death of her husband a widow or divorced woman retained her fofmer husbands domicil until she leaves his country with the intention of abandoning it. Her domicil of origin revived until she acquired a domicil of choice or another domicil of dependency by marriage.

If she was not living in her derivative domicil, the court may impute a domicil of choice in the country of her residence if the evidence is clear that she intended to make that country her permanent home. In the English case of Re Scullard[46]

"An English domiciled wife left her husband in 1946 and settled in Guernsey. She made it her permanent home and often stated that she intended to remain there until her death. Her husband died in 1955 and she died shortly afterwards unaware of his death. No evidence was available as to her intentions in the period between her husbands death and her own. Dankwert J. concluded that she died domiciled in Guernsey. He said: "The intention which the testatrix had in fact formed during her lifetime was only prevented by a rule of law relating to the domicil of a wife from being effective on law. I do not see why it should not be assumed that her intentions

continued after the death of her husband and why one should come to the conclusion that some new overt act was required when all previous evidence is consistent with there having been no different intention during their life".

It followed that a widow who took some overt act to abandon the country of her derivative domicil will be held according to the circumstances either to have reverted to her domicil of origin or to have acquired a new domicil of choice.

Lastly, even if a wife entertained a bona fide belief that her husband was dead, and married another man and followed him to the country of his choice, if her first husband turned out to be still living she was regarded as sharing the same domicil with him.

In the case of Re Cooks Trust[47]

"A testatrix having a domicil of origin in England, had first married a domiciled Frenchman and then separated from him. Later, believing her husband to be dead, she went through a form of marriage with an Englishman, with whom he settled in New South Wales. Unknown to her, her French husband died only 1877 and she died in 1879. The court held that her domicil at her death was New South Wales and that no new act on her part was required after her husbands death to reiterate the intention she had already formed during his lifetime."

If however, she had died during the lifetime of her first husband, but after marrying her second husband her domicil could have been the same as her first husbands since

she lacked capacity to acquire a separate domicil. In other words, a wife could not become capable of acquiring an independent domicil by simply entertaining a bona fide belief in her husband's death or by a mere agreement for separation[48] or through his misconduct[49].

The effect of this rule of survival after marriage of the woman's domicil of dependence was that a woman of full age and capacity remained dependent in respect of domicil to a person who was either a stranger in law (in case of divorce) or completely non-existent (in case of death). Not even the exaggerated attachment of English law to the principle of unity of domicil of husband and wife could explain it, for there no longer was a husband and in case of annulment legally there never was one.

This state of the law was most unsatisfactory and subjected the wife to a lot of injustices, especially in cases of desertion, since she could not obtain divorce as the court of her country of residence, lacked jurisdiction. In Gray (Formosa) V. Formosa[50], L. Dencing M.R. noted that if a husband leaves his wife and goes to another country and settles there permanently, the wife is still bound by his domicil as was stated by the house of Lords in L. Advocate V. Jaffrey[51]. He went on to give the reason for this rule as:

> "The notion that in English law a husband and wife are one, and the husband is that one. It has been swept away in nearly all branches of the law, and one relic that remains is the rule that a wife takes her husbands domicil is the last barbarous relic of a wife's servitude".

Realization of these hardships imposed on the wife, made the English courts relax its former rigid application of the rule. In 1969 in the case of Iudyka V. Indyka[52], a Czechoslavakian divorce decree was recognised in England, even though the respondent had not acquired an English domicil before the petition. In L. Dennings words:

"This was to enable the deserted wife to lead a normal life, and it was felt that on the grounds of morals, humanity and convenience, she should be able to obtain divorce in the country where she genuinely lived so there was granted to wives who had resided there for three years a right, regardless of domicil, to seek divorce in our courts".

In the same case L. Pearce said:

"In the last century, if a wife was deserted by her husband, whether domiciled here or not, she was tied to him until she died. But now society in this and many other countries was no long content with such a situation."

Since these words were spoken, an important step was taken which recognised the wife's separate domicil, but only in respect of the area of matrimonial causes jurisdiction and the recognition of divorces.

In England, it was not until 1974 that this barbarons rule was abolished by the Domicil and Matrimonial Proceedings Act, 1973[53]. This means that for all practical purposes, a married woman is capable of acquiring a separate domicil.

Present Kenya Law on Domicil of a married woman

Until 1970 the law of domicil of a married woman was the same as the English Law. However, the Kenya Legislature changed the Law after the recommendations put forward by the Commission appointed to look into the Law of Marriage and Divorce. The Committee recommended changes because of the absurdities this principle lead to in such cases as desertion. The Committee saw no reason why in the appropriate circumstances, husband and wife should not have different domicils. In its recommendation[54] it stated thus:

> "We recommend that the law of Kenya be changed so as to recognise that husband and wife have separate domicils. We suggest that a woman should on marriage take the domicil of her husband but that if he subsequently adopts a new domicil of choice, her domicil should not necessarily change. We suggest also that a married woman who is living apart from her husband should be capable of changing her domicil".

There recommendations gave birth to the Law of Domicil Act[55], which gave a married woman of full age and capacity to acquire an independent domicil as a "feme sole", but in most cases, the spouses will independently acquire the same domicil if they are to maintain a matrimonial home. The Act[56] goes on to state that if a wife is living together with her husband, she is presumed to have the same domicil as his.

There is an academic (and in future a practical) problem raised by this Act, and this is the domicil of infants if a

wife acquires a separate domicil ffom that of her husband prior to judicial separation or divorce. Suggestions put forward include, firstly the children should have the same domicil as the parent they are residing with. If they are away in school, then their domicil will be that of origin.

The second suggestion is that the children should retain their fathers domicil, since they are legitimate. I view the first suggestion more favourably because it is more practical. The second suggestion implies that even a child living with his mother is subjected to his fathers domicil, yet in reality there may be very little connection between the two. This however, is not a real problem at the moment because marjority of the Kenya women have not yet started making use of this provision.

In conclusion, the law as it stood before 1970 was an example of female subjection to make domination even in personal matters. Hence its abolition was considered as the last relic of wifes servitude. The changes effected giving a married woman full capacity to acquire an independent domicil were most welcome, even though it will be sometime before the provision is fully exploited. However, in considering the domicil of a married woman at any time before 5th June 1970, the old law will apply since the law of Domicil Act has no retrospective application.

CHAPTER IV

THE DOMICIL OF LUNATICS

Ballentines Law Dictionary defines a lunatic as "an insane person, one incapable from unsoundness of mind to control himself or his affairs." He goes on to define the state of lunacy as a misguided or erroneously directed condition of the mind. An impairment of one or more of the mental faculties sufficient to cause instability of mental powers and want of full capacity to reason."

The Mental Treatment Act[58] of Kenya does not define who a lunatic is nor does it make any reference to a lunatic's domicil so we fall back on the common law rules with regard to the domicil of a lunatic. The general rule is that a lunatic cannot acquire a domicil of choice and retains during his lunacy the domicil which he had when he became insane.

In Re Mackenzie[59]

> "An unmarried Australian woman of full age then domiciled in Victoria had gone on a Voluntary visit to England and a few months later became insane. She never left England and died fifty four years later, but was held to be domiciled in Victoria".

This was also the holding in the case of Crumptons Judicial Factor V. Finch Noyes[60] where the deceased who had become insane in 1882 was held to be domiciled in Scotland at his death in 1916, since he never recovered his sanity.

An independent person who becomes insane looses the capacity of acquiring or loosing his domicil since he is unable

to exercise any will. In the case of Urguhart N. Butterfield[61] a testator who had capacity to acquire a Scottish domicil was said to be domiciled in England since he had lost his capacity as a result of lunacy.

There are various theories put forward as to the consequences of lunacy on an adult lunatic. One view is that since acquisition as well as abandonment involves the exercise of the person's will, such a person retains the domicil which he had when he began to be legally treated as insane. The other view is that the existing domicil can be changed by his guardian or committee (court incharge of the lunatics affair). In the second case, the paramount consideration should be the interest of the lunatic. This in my opinion is the better view because it is logical that the court of protection should be entitled to change the lunatics domicil if it is for the latter's benefit.

Those who advocate the view that a lunatic's domicil is unchangeable are not realistic, because practical necessities in the administration of the lunatics personal matters occasions such a need. However, such an exercise should be vigorously controlled so as to make sure that a lunatic's domicil is not changed to his detriment. For example, if he has made a will valid in state A, his domicil should not be changed if the will would be lendered invalid in country B, unless proper arrangements are made to effect another will.

The most important problem associated with an adult's lunacy is the effect this state has on his dependents and especially the children. One view adduced is that the lunacy of the propositus would not in itself effect the domiciliary

position of his dependents. Others hold the view that a father's lunacy should constitute one of the grounds on which his dependents could with a courts consent acquire independent domicils. It follows as general rule of law that any change in the lunatic's domicil however caused, would automatically change the domicil of his dependents. It is unreasonable that the authority in charge of the lunatic should by changing the lunatic's domicil, be empowered to effect the same changes on the lunatics dependents. A measure of safeguard is provided by the requirement of approval of the court to the primary change. I suggest that such dependents domicil should depend on their mother, unless she is not alive in which case it should depend on the person looking after the infants welfare -"guardian".

Where the lunatic has been of unsound mind continuously from a date prior to his attaining marjority, his domicil will continue to depend on that of his father, if alive. In the case of Sharpe N. Crispin[62] it was held that if a man at the time he attains his marjority is of unsound mind and remains in that state continuously up to the time of his death, the incapacity of minority never having been followed by adult capacity, it will continue to confer upon the father the right of choice in the matter of domicil of his son. A change of domicil by the father will usually produce a similar change of domicil as regards the lunatic son.

In other words the domicil of one born insane or who becomes insane during his minority is determined so long as he remains insane as if he continued to be a minor[63].

Lastly, the domicil of a married woman who becomes insane is not affected by her insanity. The rationale is that even though a married woman can acquire a domicil of choice, her domicil is normally the same as that of her husband, and so long as she is with her husband, she is presumed to have the same domicil as his.

Thus, due to the lunatics inability to exercise his will, he cannot acquire or loose his domicil. However, it is strongly suggested that as from the moment of recovery, persons of unsound mind should be treated as would normal persons of the same age, sex and status.

CHAPTER V

THE DOMICIL OF A CORPORATION

A Corporation is defined as a body of persons legally authorised to act as an individual[64]. Under the Kenya Law[65] if more than twenty people wish to go into business together, they must incorporate themselves[66]. A corporation is a legal entity distinct from its members[67]. This legal personality is often described as an artificial person in contrast with human or natural persons.

A connexion with a particular country must be assigned to a corporation so that the differenterights and obligations may be determinable. And this is the law of the country to which it claims to owe its existence incorporation[68]. This country of incorporation constitutes the domicil of a corporation, since in the English conflict of law rules a corporation is domiciled in the country of its incorporation. The first article of Institute of International Law[69] adopted on September 10, 1965 states:

"A Company is governed by the Law under which it has been incorporated"

These rules have been adopted by many states and are intended to apply to Companies formed under municipal laws and not to International Companies.

In developing rules to determine the domicil and residence of corporations, English courts have proceeded on the analogy of treating juristic persons as far as possible like human beings.

This analogy was drawn by Viscount Summer in Egyptian Delter and Investment Co. Ltd. V. Todd[70].

> "The first effect of the incorporation is to make the new company amenable to English Law and to give it the status of an English Company, but these things place it in the same position as an English subject born or domiciled here or as a natural person, who "resident" or not is within reach of English legal process. Then the company is to be wound up or to get leave to alter its memorandum or to alter its capital in English court of law. The domiciled Englishman is similarly under this personal law as to marriage and divorce, intestate administration and bankruptcy."

Thus, the domicil of a corporation is in the country under whose law it is incorporated. In the leading case of Attorney General V. Jewish Colonization Association[71] where an English registered company was held domiciled in England and hence English Law applied to enforce the trusts of the dead.

There are two conflicting theories put forward as to a corporations capacity to change its domicil. The first view is that the domicil of a corporation cannot be changed since it has no capacity to do so. This is true even when it carries on business elsewhere, as was held in the case of Gasque N. Inland Revenue Commissioner[72], where Macnaghten J. said:

> "The domicil of origin or domicil of birth, using with regard to a company a familiar metaphor clings to a corporation throughout its existence."

The other view is that put forward by Dicey and Morris[73] which states that theoretically it is possible for a corporation to change its domicil if the change is permitted by and is achieved under and in accordance with the law of the existing domicil. In other words, its internal rules admit it to refer the particular issue to another system of law. In the case of Zeiss Stiftung V. Rayner and Keeler (No.3)[74], Buckley J. held that it is theoretically possible that by operation of the proper law for the time being of a corporation, another system of law may be substituted as the proper law of the corporation. An interesting problem would arise if the change was not required by the law of the alleged new domicil. On the face of it, it would appear as though there is a conflict between the two views, but in reality there is none since the second view merely refers a particular issue to another system of law and this can only be done if the corporation's proper law of domicil so permit.

Thus, as J.H.C. Morris[75] put its "a corporation is not born (though it is incorporated); it cannot marry (though it can be amalgamated); it cannot have children (though it can have subsidiaries); it does not die (though it can be dissolved or wound up); most matters of status determined by its domicil include not only its creation and dissolution, but also all those matters that are regulated by its instrument incorporation. A Farnsworth[76] summarised the position as follows:

> "All the incidents of domicil, which in the case of an individual would be determined by the lex domicil are in the case of a corporation determined once and for all by the conditions under which it was incorporated."

The rationale for this rule of English conflict of laws include firstly, it is logical that the system of law which has created a company should also govern the form and substance of the constitution of that company. Secondly, the system of law under which a company has been incorporated is normally clear and disputes as to that system rarely arise in practice. This is in comparison with residence whose determination is not as straight forward as the former. Lastly, domicil has already been adopted in most Anglo-American systems of law and hence uniformity as recommended by the institute of International Law.

A corporation's other connecting factors which include residence[77], nationality and presence will not be discussed in this paper and my main interest is in domicil. Each requires separate treatment since the country whose law governs the various matters concerning a corporation varies with the character of the question requiring determination.

Thus under the Kenya Conflict of law rules, the law of the state of incorporation determines the domicil of a corporation. This results in the same system of law governing the most important topics relating to a corporation such as its incorporation, the powers of its organs and its dissolution.

CHAPTER VI

PROPOSALS FOR REFORM

In this paper, I have sought to outline briefly the law relating to acquisition, retention and loss of the various domiciles. The law as already pointed out is very unsatisfactory and hence this concluding chapter will discuss the problems further and make recommendations for reform.

The present state of affairs is summarised by L. Cooper[78] in these words:

> "The classic doctrines of domicil and change of domicil, elaborated against the static background of the mid-nineteenth century have come near an aspect of painful unreality".

Thus, the Kenya Law of domicil is at present discreditable in a number of respects and this has resulted in widespread criticism. The main problem areas are, firstly the excessive importance accorded to the domicil of origin. Secondly, the excessive concentration on the element of intention as a factor in the qcquisition of a domicil of choice. Thirdly, certain miscellaneous rules concerning the domicil of infants, lunatics and married women.

Firstly, it has been pointed out that a lot of importance is attached to the domicil of origin, in particular the rule that it revives to fill the gap between abandonment of one domicil and the acquisition of another, and the heavy burden of proof resting on those who assert that it has been changed. This makes it very difficult to ascertain an individual's domicil, especially because of presumptions in favour of pre-existing

domicils. Secondly, to establish a man's domicil of origin the proof may have to traverse his family history through more than one generation. This results in a lot of injustices in the sense that a man's affairs may be governed by the law of a country he has never visited and one with which his only connection with is the fact that his father or his Great Grand father was once domiciled there.

Secondly, a mans own intentions play a dominant role in the acquisition of a domicil of choice. This creates a lot of obstacles in ascertaining a man's domicil because of the inherent problem of proving a man's intention. This problem becomes worse when the propositus is already dead and all the court has to go by is his ideas, attitude, habits, aspirations while alive. This is a very tedious exercise for the court and often the uncertainties surrounding the whole exercise culinates in outrageous and unjust decisions[79]. In addition the test of intention in practice becomes unrealistic because a man's intentions are prone to changes as time and social-economic and political factors change. For example, a man may come to Kenya intending to settle permanently, but because of political changes, he decides to go back to his original country. Under the present law, such a man would be held domiciled in Kenya, if he dies before he actually goes back to his original country.

Thirdly, the dependency nature of infants domicil poses a few problems, both in Britain and in Kenya. In the first place, it is felt that an infant who is independent of his parents both economically and socially should have the liberty to acquire a domicil of choice. Hardships would seem to be inflicted on such an infant since he cannot manage his own affairs efficiently

A good example is an infant who is married or the so called "Parking Boys" - whose connections with parents or relatives is non-existent. Secondly, under section 3(a) of the law of Domicil Act an infant born posthumously takes after his father's domicil at his death. The rationale as explained to me by one of the members of the Committee was to stress the patternalism of African family set up and hence the child should be identified with his dead father or the latter's family instead of the mothers. This will not be a problem if the custody of the child is entrusted to the mother since as the lawful guardian she has the capacity to change[80] his domicil as the need arises.

Fourthly, the amendments introduced by section 8(3) enabling a married woman to acquire an independent domicil brings with it some academic and possibly practical problems. One of these problems is, whose domicil should the children acquire if their mother has an independent domicil? A number of solutions have been suggested and these will be examined later. Secondly, an infant wife cannot acquire an independent domicil under this section due to her minority, what would be her fate in case of desertion? In other words, even though this section removes the relic of a wife's subjection to her husband, it created certain problems which the legislature never focussed their mind to. The first problem had been anticipated by law reformers, since a child's domicil is dependent upon the unity of the parents domicil.

Fifthly, the domicil of a lunatic and all the uncertainities surrounding it is another problem area. This is particularly true of the lunacy of an adult, because as I have already mentioned

its effect on his infant children is not clear at all.

Lastly, there are some miscellaneous problems such as the effect change of territories or change of frontier has on the domicil of the propositus.

Thus, even though the concept of domicil is basically a sound one, the rules of ascertaining it have become so artificial and unrealistic that courts now rely more on other connecting and jurisdictional factors such as residence, habitual residence and ordinary residence.

Pearson L. J. in P (G - E) (An infant)[81] summarised the position as follows:

> "The test of ordinary residence is to be preferred to that of domicil for the tests of domicil are archaic and artificial".

And this state of the law has led to proposals for reform, which will be dealt with shortly.

As early as 1952 the Lord Chancellor asked the Private International law Committee[82] to consider inter alia -" what amendments are desirable in the law relating to domicil", with particular reference to the excessive importance attached to the domicil of origin and secondly the difficulties involved in proof of intention to change a domicil.

The Committee recommended that the defects should be cured by legislation abolishing the revival of domicil of origin and establishing certain rebuttable presumptions as to a persons domicil. Its most important recommendations was that:

> "Where a person has home in a country he shall be presumed to intend to live there permanently."

The two recommendations are sound because the first one would remove the archaic rule of revival of domicil of origin. The Kenya Commission on the law of marriage and Divorce made the same recommendation. The latter thought that the doctrine is illogical and should not be followed in Kenya. One wonders why the Kenya legislature never took this recommendation into consideration when enacting the Kenya Domicil Act.

The practical effects of the proposal according to Michael Mann[83] would be to transfer the burden of proof. That is those asserting a change of domicil would no longer have to show an intention never to leave the country in which a home has been established. It would shift to those resisting the change.

However, there was no implementation of these recommendations until 1958 when L. Meston introduced the Domicil Bill in the House of Lords which contained these recommendations. These unfortunately were debated against on behalf of foreign business community who feared that the enactment might make them liable to pay United Kingdom Income Tax and estate duty on their property situated abroad. In Kenya a number of interviews reviewed more of less the same selfish outlook. That is, most lawyers and non-lawyers felt that introduction of such presumptions into the law would jeorpadise the interests of foreigners who come to Kenya on temporary basis. Some even expressed the fears that this would discourage the badly needed man-power, for development of Kenya's economy. My view is that this would not really discourage those with a keen interest,

since in the end they benefit much more than the country benefits from their presence. Thus, good law was and is still being sacrificed for the sake of a minority.

The Committee also recommended that a court of competent jurisdiction should have power to vary an infants domicil and that the person in-charge of a lunatic should have power to change his domicil. These two recommendations did not fall on deaf ears for they have been implemeted and are now part of the common law.

The question often asked is whether these recommendations are good law for Kenya. My view is that the first recommendation would be suitable and practical in the Kenya conflict of laws. It would mean that a domicil whether of origin or of choice would continue until another domicil is acquired. This would considerably solve the problem of trying to ascertain ones domicil at any one time. The second recommendation may raise problems of rebutting the presumptions, which in the long run might outweigh any advantages that may accrue in implementing the recommendation.

However, if exceptions were provided for so that the presumptions do not apply where a home is established for business or other temporary purposes, then this would remove the fears expressed earlier. This was one of the Committee's Recommendations in their seventh report. Their second recommendation was to make the presumptions inapplicable in the field of taxation. In my opinion, this alternative is unattractive because it is discriminatory in nature, since it would only safeguard the tax position of overseas business-man.

As far as that problem of intention is concerned, amongst the suggestions put forward I consider the radical recommendation of statutory control as the most effective. By this, I mean that domicil should be controlled by a statute laying down details of the procedure of acquiring, loosing or changing domicil. One can draw an anology with nationality, that is acquisition of domicil becomes a formal act which one declares on entering Kenya. Such an act would have to be carefully drafted so as to remove ambiguities and achieve clarity.

In addition, the 1954 committees report recommended that a male who works should be able to acquire a domicil of his own choice. In England this recommendation was effected in the 1973 Domicil and Matfimonial Proceedings Act [84] which confers capacity for an independent domicil at the age of sixteen or marriage under that age. In the result, any validity maried child can acquire an independent domicil of choice, and hence Kenya should likewise effect similar changes to solve the problems mentioned earlier on.

However some people felt that the infants domicil of dependency does not pose any practical problem because firstly, it is very rare that a court is called upon to decide issues involving an infants domicil and hence this is more of an academic problem than real. The main areas under which courts are called upon to decide a persons domicil are in divorce and succession cases and these rarely involve children. Secondly due to the extended family system, an infant can rarely claim to be all alone, since there is a relative somewhere for whom the infant can domiciliary be connected with. Lastly, the very

fact they are minors legally incapacitates them from changing their domicil. However, there is a small percentage that felt that an independent infant should have the capacity to change and acquire a domicil of his own choice in case of need.

Over the problem of an infant born post-humously most people felt that a child's domicil of origin should be the same as his deceased fathers. They however felt that the infants guardian should be able to change the infants domicil according to need. This is good law, but complications may arise later in life for the infant may be held domiciled in a strange country by virtue of his father having been domiciled there. This problem can only be solved by abolishing the doctrine of revival of domicil of origin, as suggested earlier.

The Private International law Committee's seventh Report summarised their attitude on the granting a married woman capacity to acquire an independent domicil as follows:

> "To confer on a married woman who is not separated from her husband by an order of a court of competent jurisdiction a right to acquire a separate domicil for all purposes would involve legal complications outweighing any advantages that might accrue if it should be decided to confer upon a married woman a separate domicil for all purposes or a right to acquire such a separate domicil."

The Committee went on to recommend that a married woman will be presumed (in the absence of evidence to the contrary) to intend to retain her husband's domicil.

Secondly, in case of any conflict the personal law of one of them should prevail. This second recommendation can be used to solve the problems I mentioned earlier. That is whenever there is an issue of childrens domicil the domicil of one of them is disregarded (preferably that of the wife).

However, some people felt that this provision of granting a married woman an independent domicil does not constitute a practical problem because parents will normally have one matrimonial home and hence one domicil. And if a case comes up for determination, most people felt that the infants interest should be paramount.

Lastly, miscellaneous problems such as those relating to effect of domicil on change of frontiers or when territories are divided have never been anybody's concern. This is because they have never come up in the English or Kenya courts and hence remain largely as academic problems. My views that since domicil connects one with a territory governed by a district legal system, whenever there is a change of frontier, the propositus becomes domiciled in the state in which he is geographically situated. This as already mentioned will not be a practical problem, in most parts of the world, because frontiers are clearly defined and unless the present political stability changes, there is likely to be no boundary changes in the near future.

Due to these problems resulting from the use of domicil to govern personal matters, nationality has been suggested as the other alternative. Nationality represents a man's political status, by virtue of which he owes allegiance to some particular country. Change from domicil to nationality in the European continental started in France with the codes

of Napoleon in 1804. Provisions of the French Code were adopted in Belgium, Luxemborg, Austria and the Netherlands. This was accelerated by Pasque Stanislao Mancinis[85] famous lecture delivered at the Turin University in 1851, so much so that today only two countries[86] retain the principle of domicil.

The advantages attributed to nationality include firstly it is more stable than domicil. This is because nationality cannot be changed without some formal consent of the state of new nationality. This is very true, but some people argue that the English concept of domicil of origin is in one respect more stable than nationality because it can never be destroyed. However this is not a good argument because the latter has numerous problems which have already been dealt with.

Secondly, nationality is said to be easier to ascertain than domicil because it involves a formal act of naturalization and does not depend on the subjective intentions of the propositus.

Thirdly, under the continental system a person may have more than one domicil, because domicil is defined differently in the various European laws. Cohn[87] states that it is no exaggeration to say that there are hardly any two laws where the definitions of domicil is identical hence nationality is preferred.

Even though nationality has these three advantages over domicil, it is objected to on these grounds. Firstly, a man may have multiple or no nationality at all. This is because of the different methods[88] for its acquisition by various states. Secondly it is not suitable if one sovereignty includes

several legal systems. For example, the United States of America where the law varies with provinces. In such states, after nationality has connected an individual with a particular political unit, a further anciliary test is required to connect him with a definite system of internal law. Lastly, nationality may be a country in which a person has lost all connection or one has never been connected with[89].

Hence, unless the law relating to nationality were modified so as to remove these problems, then it would not in any way serve as an alternative to domicil, one is bound to agree with. Chesires conclusions that nationality yields a predictable but frequently inappropriate law while domicil yields an appropriate but frequently unpredictable law.

From this discussion one is lead to conclude that the domicil test is preferred in the Kenya conflict of laws. But the archaic rules of ascertaining it are so artificial and unrealistic that there is need for reform. The most effective reform measure would be to enact a statute regulating all issues of acquisition, retention, and loss of domicil. Alternatively the present law should be amended to abolish revival of domicil of origin and the excessive concentration put on the element of intention should be replaced with presumptions subjected to the exceptions already discussed. Such reform measures would be in keeping with realities of life and removing the potholes placed by the present law on a propositus endeavours in ascertaining his domicil.

FOOTNOTES

1. In Whicker v. Hume [1958] 7 H.L. Cas. 124 at p.160.
2. [1965] E.A. 87
3. In cases such as United States of America where there are federal states, a person is said to be domiciled in one of the states e.g. California.
4. The Law of Domicil Act, cap. 37: Laws of Kenya.
5. Ibid. Section 4
6. Supra
7. The Age of Majority Act: Cap. 33 Laws of Kenya, section 4.
8. The Law of Domicil Act
9. This rule applies to a child who is not strictly speaking a foundling but about the domicil of whose parents nothing is known.
10. Section 7(2) - ibid, person can make a permanent home even though he contemplates leaving it should circumstances change.
11. In White V. Tenant (1883) 31 W. Va 790: a man died after abandoning state x with his family for state Y. He was said to be domiciled in state Y even though he died in x where he had returned to spend the night.
12. [1928] A.C. 234.
13. [1904] A.C. 287.
14. [1930] A.C. 588.
15. Ibid at p. 298.
16. Under the Kenya Evidence Act, section 63, hearsay evidence is not admissable, but in cases of this nature, this rule is waived.
17. (1866) 8 De. G. M&G 13.
18. The common law rule incoporated into the Kenya Evidence

Act, Section 63 that expressions of intention by a living person cannot be received in evidence unless made against the makers own interest is not applicable to an issue of domicil.

19. In Re Craigish 1892 3 ch. 180: in which case the English court took the widower was claiming to be domiciled in Scotland because by Scottish law he was entitled to one half of his wife's property.
20. Ibid.
21. Section 8(3) (4)
22. Deductions made from decision of cases such as Winams VI Attorney General, Ramsay V. Liverpool Royal Infirmary ibid.
23. [1954] EIA. 204.
24. Other cases in support of this view include that of Gordon v Gordon, Winams V. Attorney General; and Ramsay V. Liverpool Royal Informary - ibid.
25. (1868) L.R. I Sc. & Div. 307.
26. Age of majority Act Cap. 33 Laws of Kenya section 4.
27. Rule II in Dicey and Morris. The conflict of Laws.
28. Section 3(a) Ibid. "Every person shall acquire at the date of his birth, (as if he is born legitimate or deemed to be legitimate, the domicil of his father, or if he is born post humousfy the domicil which his father had at the date of his death".
29. This is particularly true in Kenya where there are numerous "Parking/Dustibin boys" who are entirely and completely independent of their parents.
30. Section 9(2) ibid provided that "the domicil of an infant female who is married shall change with that of her husband.

31. Harrison v. Harrison [1953] I W.L.R. 865, Hope v. Hope (1868) N. Ir.I, it was held or as assumed that a married male infant could acquire a domicil of choice.
32. Ibid. Section 3(b).
33. Ibid. section 5. This is in accordance with the Legitimacy Act (Cap. 145) Section 3(1)
34. (1817) 3 Mer. 67.
35. (1893) 3 ch. 490.
36. Christianaens, Bouhier and Pothier.
37. Adoption Act (Cap. 143) which states that upon adoption all rights, duties obligations and liabilities shall rest in the adopter.
38. Ibid. section 6.
39. Ibid. section 4.
40. [1953] I W.L.E. 865 and Patten 1860 24 Jip 150
41. (1869) L.R. Sc. & Div. 441.
42. Appointed in April 1976 to consider the existing law relating to marriage, divorce and status of women.
43. [1956] I All E.R. 199.
44. In England changes were effected in 1974 with the enchanment of Domicil and matrimonial proceedings Act 1973.
45. [1948] I All E.R. 56.
46. [1957] ch. 107.
47. (1887) 56 L.T. 737.
48. Warrander v. Warrander (1835) 2 C&F 488 - where the wife was held to have the same domicil as her husband (Scotland) even though there was a separation agreement before the divorce proceedings were instituted.

49. Yelverton v. Yelveton (1859) Sw & Jr 574 where it was held that the domicil of the husband was that of the wife even though the formers conduct constituted a matrimonial wrong. See also L. Advocate v. Jaffrey where the holding was the same.

50. [1963] p. 259 at p. 267.

51. Supra

52. [1969] IA - C. 33.

53. Section 1. The domicil of a married woman at any time on or after January 1st 1974: "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 other individuals capable of having an independent domicil".

54. Recommendations - 89

55. Section 8(3), "An adult married woman shall not by reason of being married, be incapable of acquiring an independent domicil of choice.

56. Section 8(40) states: "The acquisition of domicil of choice of a married man shall not of itself change the domicil of his adult wife or wives but the fact that a wife is present with her husband in the country of his domicil of choice at the time when he acquires that domicil or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicil".

57. 3rd Edition, Edited by Williams S. Anderson.

58. Cap. 248 Laws of Kenya.

59. [1940] ch. 69.

60. 1918 S.C. 373.

61.

62. (1887) 37 ch. 357.

63. (1869 L.R. 1p &d 611.

64. Dicey and Morris - Supra.

65. Collins New Dictionary.

66. The Companies Act. (Cap. 288) section 338.

67. In the case of Fort Hall Bakery v. Wangoe [1959] E.A. 474, it was held that no action could be maintained by a purported company of forty five people as these were not incorporated and hence not recognised as a valid company.

68. Hence capable of enjoying rights and being subject to duties which are not the same as those enjoyed or borne by its members.

69. As Gower - Principles of modern company law: 3rd Edition points out this principle may be abused by promoters incorporating their company in the country with the laxest corporation laws and then operate in the harsher climate of other laws, shielded by the cloak of their personal law - a protection denied to domestic concerns with which they complete.

70. From the article "companies in Private International law" by Thomas C. Drucker: 17 1 C.L.G. 28.

71. [1929] A.C. 1 at p.13.

72. [1900] 2 Q.B. 556.

73. [1940] 2 K.B. 80

74 Supra.

75. [1970] ch. 506 at p. 544.

76. Conflict of laws.

77. The Residence and Domicil of corporations - 1st Edition at p. 212.

78. Under the Kenya Income Tax Act, 1973 (Act No.16) section 2, residence not domicil is the basis of liability for income Tax. A person (includes corporations) resident in Kenya though domiciled abroad is liable to Income Tax in respcet of local and foreign sources. Hence if a company incorporated in Kenya, but trades abroad, it is necessary to determine whether it is resident in Kenya or not. The main determining factor of residence is where the centre of control of the corporation exists.

79. Prawdzik - Lazarska v. Prawdzic - Lazarzki [1954] S.C. 98 at p.101.

80. A good example is the case of Hoskins v. Mathews 1855 8 De GM & G.13 where inspite of protests from deceased's house-keeper that he never intended to establish a permanent domicil in Italy, the court insisted that he was so domiciled, yet his only purpose in residing in Italy was for health reasons.

81. But the childs domicil of origin remains the same as that of his deceased father. Section 9 (i) (a) provided for the subsequent change of domicil.

82. [1965] ch. 568.

83. The Committee under its first report in 1954.

84. Domicil Bills 1959 8 1. C.L.Q. 457.

85. Section 3(i)

86. (1817 - 1888.)

87. Norway and Denmark.

88. Domicil convention and Committee 71. L.Q.R. 562.

89. The practice of states show that nationality may be acquired in the following principle ways:-

(1) By birth either according to "jus soli" the territory of birth or by "jus sanguis" the nationality of the parents at birth or according to both.

(2) By naturalization, either by marriage or legitimation or by official grant of nationality or application to the state authorities.

(3) The inhabitants of a subjugated or conquered or ceded territory may assume the nationality of the conquering state or of the state to which the territory is ceded.

90. cf. with revival of domicil of origin.

91. Private International law - 9th edition.

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6. M. Mann, "The Domicile Bill" (1959) 8 I.C.L. Q. 457; (1963) 11 I.C.L.Q. 1326.

7. Chesire (1945) 61 L.Q.R. 352.

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10. Cowen and Mendes da Costa (1962), 78 L.Q.R. 62.

11. J.H.C. Morris (1962) 11 I.C.L.Q. 641.

12. Nadelmann, "Nationality versus Domicil (1969) 17 American Journal of Comparative Law, 418.

13. Stone, (1954) 17 M.L.R. 244.

14. (1958) 7 I.C.L.Q. 753.

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