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Connecting Factors

INTRODUCTION

Connecting factors are as many and varied as there are ways by which disputes may be linked to different countries. Some indication has already been given of the nature and diversity of such connections.[1] As a rule, the law of the forum determines the meaning and decides upon the application of connective factors. The exceptions are generally provided by legislation, although this is not invariably so.[2]

In most cases, application of the *lex fori* is achieved without difficulty but judicial experience has demonstrated that the interpretation of certain connecting factors can be problematic. Chief among these is domicile, with which may be compared nationality and residence. Domicile, residence, and nationality are primarily important as linkages between individuals and the laws of specific countries but these concepts also have some relevance in the context of corporate transactions. It is convenient to examine these connecting factors in the context of personal matters separate and apart from corporate dealings.

PERSONAL CONNECTING FACTORS

Personal connecting factors are concepts used in private international law to describe the relationship between individuals and a particular country's

system of law. The relationship may be important for jurisdictional purposes in the sense that the presence of the connecting factor indicates the existence of competence in the courts of that country to hear and determine a certain dispute involving the individual. Identification of the connecting factor may also be significant to the process of ascertaining the governing law for disputes in a variety of areas. The law indicated by the connecting factor is then applied regardless of where the case is heard or where the person happens to be. Finally, personal connecting factors are often crucial to decisions regarding recognition of foreign decrees relating to status.

It would be inconvenient to produce a complete list of specific issues decided by personal connecting factors. However, prominent ones include jurisdiction in divorce, judicial separation, and annulment of marriage or declaration of marital status; jurisdiction for declaration of legitimacy, legitimation, and adoption. Determination of the essential validity of a marriage and the effects of a marriage upon the respective property rights of the parties; ascertainment of the validity and effect of wills bequeathing movables and succession to intestate movables are also dependent, at least partially, upon the personal law. Issues relating to non-marriage unions will probably be decided in the same way.[3] Furthermore, personal connecting factors may be used in decisions concerning entitlements to public grants, immigration, taxation, and the right of foreigners to own real estate. Decisions on the recognition of foreign divorces and decrees of annulment and separations are usually decided on a similar basis.

Traditionally, Caribbean law followed English law in according the pre-eminent role in the determination of personal law to the domicile of the individual. As a rule the English conception of domicile was, until recently, adopted without demur notwithstanding its historically xenophobic interest in ensuring that English colonists who journeyed into the far recesses of the Empire retained their English domicile and therefore continued to have their personal affairs regulated by English rather than the colonies' laws. When social and demographic changes and the influence of the Hague Private International Law conferences led English law to 'give approximately equal importance' to an individual's habitual residence, 'and also to pay some attention to his nationality'[4] these changes were mirrored in Caribbean law.

In the process little thought appears to have been given to the legal and ideological implications. Nationality, in particular, was adopted in a nineteenth century Europe that was a continent of emigration and was

designed to ensure that expatriates who left Europe to make their fortune elsewhere were treated as still belonging to the country of origin.[5] Whether the political and economic impetus underlying modern patterns of Caribbean migration would continue to support a policy of respect for cultural ties over the contemporary movement towards cosmopolitan assimilation, must be open to question.

DOMICILE

Notion of Domicile

The essence of the notion of domicile is that it refers to the place where the law considers the propositus to have his or her home. Despite sterling pronouncements in some early English cases, domicile cannot simply be equated with the factual concept of 'home' and still less with 'permanent home'.[6] Two centuries of common law decisions have produced an overlay of rules that increasingly divorce the legal concept of domicile from what ordinary people would regard as 'home'. Sweeping legislative reform has been undertaken in several Caribbean jurisdictions[7] and more limited initiatives in others.[8] It has also been suggested that legislative changes in the United Kingdom law of domicile have been incorporated into the non-self governing territories.[9]

These developments are basically designed to prune away the artificiality produced by the common law rules and thereby return to some semblance of the popular conception of domicile as the factual home of the propositus. Even so, domicile remains 'an idea of law'[10] and a person is domiciled in that country in which he either has 'or is deemed by law to have his permanent home'.[11] Domicile is therefore best considered a creature of the law whose emergence, existence and demise (where possible) serve the purposes of the law.

General Principles of Law of Domicile

There are five foundational principles fundamental to the legal concept of domicile. Most of these may be traced back to the seminal judgment of Lord Westbury in the leading case of *Udny v Udny,*[12] which was accepted in the early West Indian cases of *Thorne v Board of Education, and Darrell*[13] and *Mohabir v Bismill*.[14]

First, it is a settled principle that no person can be without a domicile.[15] Such a vacuum would be incompatible with the necessity to connect every person with some legal system by reference to which a number of that person's legal rights and responsibilities are determined.

Second, and as a corollary to the first principle, it is not possible for a person to have more than one domicile at one time, at least for the same purpose.[16] The object of the law in establishing a definite legal system by which a person's legal relationships are regulated would be completely frustrated if more than one such system existed at the same time. However this rationale does not exclude the possibility of simultaneously having two or more domiciles if each is for a separate and unique purpose. Thus federal laws in composite states may for particular purposes create a federal as opposed to a 'country' domicile,[17] whilst in other federal states the very same matter may remain a 'state' issue.[18]

Third, there is a presumption in favour of the continuation of an existing domicile, which can only be rebutted by clear and convincing evidence proving that a new domicile has been acquired. The person alleging a change of domiciles bears the burden of proof. It has been said that the standard to be attained is that adopted in civil actions of proof on a balance of probabilities, not beyond reasonable doubt, as would be the case in criminal proceedings.[19] However the standard could vary according the type of domicile in issue. In the words of Sir Jocelyn Simon P in *Henderson v Henderson,*[20] 'to displace the domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities.' A very heavy burden is therefore imposed upon those who assert that a domicile of origin has been abandoned and a domicile of choice acquired, considerably heavier than that applicable to the allegation that a domicile of choice has been changed to another domicile of choice.

Whatever the degree of proof, it is clear that the very placement of the onus on the person asserting a change of domiciles can be decisive in circumstances where there is insufficient proof one way or the other, or where the evidence is evenly balanced. In *Lopes v Ward*[21] the plaintiffs claimed as lawful next of kin and persons entitled in the event of intestacy to share in the estate of Carl Eugene Lopes who died in 1985. They alleged that a 1979 will that had been made by the deceased had been revoked by his subsequent marriage. Under the laws of Trinidad and Tobago the marriage would revoke a prior will if the deceased had been domiciled in Trinidad and Tobago at the time of the marriage, however the will would

be valid if the deceased had then been domiciled in the state of Florida, in the United States.

It was held that the deceased was domiciled in Trinidad and Tobago at the relevant time and accordingly the will had been revoked. Sealey J found that the evidence did not suggest other than the deceased had gone to the United States of America for medical treatment. He never returned home because his medical condition did not improve before he died. The fact of American citizenship alone was not sufficient to displace his intention and when read together with the other evidence it was found that the deceased did not abandon his Trinidad and Tobago domicile of choice:

> But even if the defendants thought erroneously, that the plaintiffs had to prove the domicile, then having done so by cogent evidence, the onus would have shifted to the defendants to prove their contention that the domicile of choice had been abandoned in favour of another. The defendants have not brought any evidence in to support such a claim. In these circumstances, I find that the deceased was domiciled in Trinidad and Tobago at the time of his marriage and at the time of his death.[22]

Fourth, the Caribbean court in which the case is being tried will apply its own rules in the determination of 'domicile' subject to any relevant statutory provision to the contrary.[23] This is in keeping with the general rule that the *lex fori* normally characterises the connecting factor[24] and was the ratio of the English case of *Re Annesley*.[25] It is not at all clear that the doctrine of *renvoi* constitutes an exception to the general rule.[26]

Fifth and finally, domicile is a matter of fact to be proved by the evidence. The mere fact that a court has made a determination of domicile does not preclude another court within the same country from examining the facts and coming to a different conclusion.[27]

Categories of Domicile

Caribbean law recognises three categories of domiciles.[28] The domicile of origin is acquired at birth by operation of law. The domicile of dependency is acquired by persons under a legal disability and retained by them during the period of disability. The domicile of choice may be acquired by persons, not otherwise under a legal disability, who have attained the age of majority, or exceptionally, marry under that age.

Domicile of origin

Nature

To every person at birth the law attributes a domicile of origin. This domicile is involuntary in the sense that it is created by operation of law and is independent of the private wishes or preferences of the propositus. It may be extinguished by act of law as for example by sentence of death that puts an end to the civil status of the convict, but it cannot be destroyed by the will and act of the party.

Identification

At common law identification of the domicile of origin is dependent upon questions of status and parentage rather than place of birth. Under the rules laid down in *Udny v Udny*[29] a legitimate child takes as its domicile of origin, the domicile that the father has at the time of the birth of the child; an illegitimate child the domicile of the mother.[30] A foundling has the domicile of the country in which he or she was found. It follows that the place of birth does not determine the domicile of origin. It is therefore wrong to say that 'The respondent was born in the year 1907 in St. Lucia; his domicile of origin is therefore St. Lucia'.[31] At best there may be a presumption, in the absence of evidence of parentage and status, that a person has the domicile of origin in the country in which she was born and grew up.[32] For different reasons it is also wrong to say that since a child of English parents had a dependent domicile at birth in Barbados his domicile of origin 'was West Indian not English.'[33]

Whether the common law rules identifying the domicile of origin with the child's legitimacy can be reconciled with modern Caribbean legislative reform of family law is yet to be put squarely before the courts. Beginning in the 1970s the legislative policy has been to remove the social stigma and legal disabilities attendant upon birth outside wedlock. This kind of legislation represents a human rights approach that is reflected in international declarations asserting the equality of persons regardless of race, ethnicity, place of origin, sex, or circumstances of birth.[34]

The Status of Children Act 1976 of Jamaica[35] was enacted to remove the legal disabilities of children born out of wedlock and to provide for other matters connected therewith or incidental thereto. Section 3 of the Act reflects the intendment to make all children of legal status and to establish the relationship between child and parent by reference to paternity

rather than to the marriage of the parents. However, the section is expressly made subject to a number of exceptions one of which is 'domicile'.

Some status of children acts in other jurisdictions do not provide for this exception. In Barbados, for example, the Status of Children Reform Act 1979[36] purports to effect 'abolition of the common law concept of illegitimacy'.[37] Legislation to similar effect exists in Antigua and Barbuda,[38] Belize,[39] Guyana,[40] St. Kitts and Nevis,[41] St. Vincent and the Grenadines,[42] and Trinidad and Tobago.[43] In the latter jurisdictions, at least, there are clearly problems in accommodating the statutory language with the common law rules for identifying the domicile of origin. Nor can the matter be resolved simply by reverting to the paternal domicile at birth given the gains of the feminist movement in putting Caribbean jurisprudence on a more egalitarian and non-sexist footing. Some of these countries have legislation reforming the law of domicile, which effectively divorces the issues of domicile and status,[44] but others do not.[45]

Tenacity

The Early English Cases

Another feature of the domicile of origin is its durability and tenacity. Displacement of a domicile of origin in favour of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words. Unless the evidence of change satisfies the judicial conscience, the domicile of origin persists. Early cases gave pride of place to the idea that an Englishman who had gone to the some far-flung part of the Empire to make his fortune did not thereby intend to renounce the rights, privileges, and immunities embodied in English law, which constitute 'his birthright'.[46]

Many cases illustrate this historical attitude. *Jopp v Wood*,[47] decided in colonial times, held that John Smith, who had gone to India and resided there for 25 years, had not acquired an Indian domicile of choice because of his alleged intention to ultimately return to Scotland, the land of his birth. *Bell v Kennedy*,[48] concerned a different context but the same philosophy. A wealthy cultivator of Scottish parentage had a Jamaican domicile of origin. He was so displeased with the abolition of slavery that he left Jamaica for good in 1837 to live in the United Kingdom. A year later he was still undecided whether to settle down in Scotland or to live in England and the House of Lords held that in this state of ambivalence his Jamaican domicile of origin still clung to him.

In *Ramsay v Liverpool Royal Infirmary*[49] despite spending the last thirty-six years of his life in England, living on the generosity of relatives, the propositus was held to have retained his domicile of origin in Scotland on little more than his occasional assertions of pride in being a Glasgow man, and receiving a Glasgow weekly newspaper. Similarly, the testator in *Re Fuld (No. 3)*[50] was held to retain his German domicile of origin, notwithstanding having lived an itinerant lifestyle from age 18 until his death at age 41 years.

Caribbean Adherence

In general, Caribbean case law follows English decisions in this regard. *Munn v Munn*[51] considered a husband's domicile in the context of a petition for divorce. He had been born in Scotland and had a Scottish domicile of origin. At age 26 he had married the respondent, then 17 years old, in what was then British Guiana, now, Guyana. He then worked as overseer on a sugar plantation. Three months after the marriage he resigned his job and left for Scotland alone. Two years later he returned, not having found satisfactory employment there. At the hearing he asserted his intention of making his home in British Guiana. It was held that anyone seeking to override his domicile of origin takes upon himself a heavy burden of proof. This burden had not been discharged in the case at bar and could not be satisfied by acts showing no more than a passing intention of making the colony his permanent residence.

Similarly, in *Unwin v Unwin,*[52] the husband argued before the Supreme Court of Trinidad and Tobago that there was not sufficient evidence that he had abandoned his Canadian domicile of origin and acquired a domicile of choice in Trinidad. The parties had married in Ontario in 1943 and had four children. Although the husband's primary occupation was that of a general insurance agent in Canada, the parties at an early stage in their married life became active in buying and selling property as a secondary source of income. In 1951 the husband took his wife and children to Trinidad, leaving 'Clover Leaf', the matrimonial home in Canada, occupied by tenants. In Trinidad he carried on business as an insurance agent until 1953 when he established himself as a commercial representative. In 1954 he acquired three parcels of land, which were registered in the joint names of the parties and engaged in the business of renting out their apartments eventually occupying one.

Two of the children were sent to school in Canada sometime before 1959 and the wife followed with the other two in 1960. In Canada the

wife sold the matrimonial home and, as the parties had agreed, acquired another property, which was intended to be the new matrimonial residence. At the same time the husband was trying to sell part of the Trinidad holdings but had difficulty in obtaining a purchaser at the price they had anticipated. The husband visited Canada and spent Christmas with his family in 1960 then returned to Trinidad in January 1961. He then met and formed a romantic attachment with an American lady, Lucille Breaux, which together with his wife's refusal to register his name as joint owner of the new matrimonial home occasioned the breakdown of the marriage. On these facts Rees J held,

> I think it is enough to say that I find the evidence inadequate for me to conclude that the husband formed a definite intention to choose Trinidad as his permanent home in preference to Canada, his domicile of origin.[53]

In *Citera v Citera*[54] the rationale for presuming retention of the domicile of origin was restated in terms bordering on political incorrectness. In deciding whether a domicile of origin had been abandoned the court held that it could consider any societal or cultural differences between the domicile of origin and the alleged new domicile of choice. Accordingly, an American with a domicile of origin in New York was held to have retained that domicile and not acquired a domicile of choice in Trinidad, partly because the 'climatic, social and other considerations are greatly different from those obtaining in his home state of New York.'

Notwithstanding, in particular circumstances, Caribbean judges appeared to have been more willing than their English counterparts to find that a domicile of origin had been abandoned in favour of a domicile of choice. The nineteenth century case of *Thorne v Board of Education and Darrell*[55] concerned the question of whether the Rev James Horne Darrell, the father of the applicant for the Barbados scholarship, was domiciled in Barbados. The contention of the appellant was that as a Wesleyan minister, the father was subject to the rules and regulations under which the appointments of Wesleyan ministers were made. Such appointments were annual and capable of being terminated at the end of any year, and consequently the residence under such an appointment was not of that permanent nature as to constitute a domicile.

The Reverend had been born in Turks Island, and after having been educated for the Wesleyan Ministry, was first appointed in 1858 to the Island of San Domingo. He remained there until 1863 when he was sent to The Bahamas, where he remained several years. He was then posted to

Antigua for six years and to Montserrat for seven years, where his son, the respondent, was born. The Reverend was next dispatched to St. Martins for five years, and lastly to Barbados in 1885 where he resided at time of the proceedings. Accepting the Reverend's affirmation of an intention to settle permanently in Barbados it was held that the younger Darrell qualified as a candidate for the examination for the scholarship since his father was now domiciled in Barbados.

Mohabir v Bismill[56] involved a claim by the plaintiff to a one-half share of her deceased husband's estate on the ground that she was married to him in community of property by reason that his domicile at the time of the marriage was Guyana. The defendant contended that the domicile of the husband was India where community of property did not obtain.

In 1877, at age 35, Nicodemus had arrived in British Guiana from India. His wife died in 1882 when, also, his five-year indentureship finished. He lived at Meadow Bank, adjoining the estate where he had been indentured. In 1883, he purchased a small property there. This property he sold in 1887 and subsequently purchased another, which he kept until his death in 1921. In 1888 he met his second wife, Beatrice. He was then 46 and she 14; he was Hindu whilst she and her parents were Christians. He became a baptised Christian and they were married in 1889. The parties lived at Meadow Bank but parted after only months of marriage, eventually living with separate partners. By the time of his death the testator had spent a total of some 44 years in British Guiana. It was held that at the time of the marriage, Nicodemus had acquired a domicile in the colony of British Guiana. As his wife was married to him in community of property, she was entitled to a one-half share of the property.

Finally, *Hulford v Hulford*[57] considered a man's domicile in the following circumstances. Having been born in New Jersey, United States, in 1922, he had served in the US Army in the Second World War and then studied at Cornell University. After working in New York as an assistant manager and executive pilot, he took a vacation with his wife and some friends to the West Indies in 1958 and decided upon Antigua as a place he could make a living. He identified Curtain Buff as the site for construction of a hotel and formed a company 'Curtain Buff Limited' to provide the finances.

He stated that he, his wife, and three children, decided in 1958 to move to Antigua,

> …lock, stock and barrel. We moved to Antigua permanently, I found a home for my family. ... I made up my mind to reside permanently in Antigua in March, 1958, and this intention gained strength as time went by.

He sold all his possessions in the USA, including his three-bedroom house, except for some family heirlooms. Unhappy differences arose between the parties in 1960 and the wife went to the United States for a few months to see whether this would heal the breach but the situation did not improve. On these facts it was held that he had evinced a clear intention to abandon his domicile of origin in New Jersey and to acquire a domicile of choice in Antigua.

The revival doctrine

At common law a domicile of origin is indelible. It is never completely obliterated but is simply suspended or placed in abeyance upon the acquisition of another domicile. The domicile of origin revives on loss of a domicile of choice or dependency. In *Udny v Udny*[58] Lord Westbury considered that Colonel Udny had acquired a domicile of choice in England during his 32 years residence there. However, he lost that domicile the moment he left England for France. As he did not acquire another domicile immediately, his Scottish domicile of origin revived and he was deemed domiciled in Scotland. Similarly, in *Tee v Tee*[59] the propositus abandoned his American domicile of choice whilst residing in Germany. It was held that his English domicile of origin thereupon revived.

With this may be contrasted the American position in *Re Jones Estate,*[60] which rejects the revival doctrine in favour of the continuation of the existing domicile of choice until the acquisition of a new domicile of choice. In that case the propositus was deemed to retain his Iowa domicile of choice at his death even though he had abandoned Iowa to return to his domicile of origin in Wales. In coming to this conclusion, the Supreme Court of Iowa decided that the English courts had placed too much emphasis on the domicile of origin in retaining the cultural and legal ties to the motherland; the idea that 'once an Englishman, always an Englishman.' American law was more concerned with cultural assimilation. If a native of Iowa had done exactly what Jones had done - abandoned his domicile in Iowa with the avowed intention of securing one in Wales and had accompanied Jones on the trip and had gone down with the ship - he would have died domiciled in Iowa. There was no reason that Jones should be treated any differently.

Whether the continuation of the existing domicile is preferable to the revival doctrine is highly debatable. The truth is that both are fictions created by the law to ensure that a person always has a domicile by reference to whose laws specific aspects of his or her private affairs may be regulated. A Solomon-like splitting of the difference would be to consider the future

plans of the propositus. On the facts in *Re Jones Estate* the deceased had certainly left Iowa for good in order to return to the land of his fathers. In these circumstances, why should his native law not govern the devolution of his estate? On the other hand, had he intended to acquire a domicile in a different country, say Jamaica, why should the law of the domicile of origin be allowed to intervene?

This distinction was expressly rejected in *Re Jones Estate* and does not form part of the rationale for the decision in *Udny v Udny*. It is therefore not easily available to Caribbean courts. It is more likely that one or other of the other two legal fictions must be adopted. In some jurisdictions the legislature has intervened to express preference for the continuation of the existing domicile of choice.[61]

Domicile of dependency

At common law, married women, children, and the mentally insane possess domiciles of dependency. A domicile of dependency changes with the domicile of the person upon whom the person under the legal disability is dependent. All such changes are communicated to the dependent person throughout the period of dependency.

A wife's domicile of dependency

The rules governing a wife's domicile of dependence best exemplify the old adage that upon marriage the husband and wife became one, and the husband was that one. As was stated by Vieira J in *Citeria v Citeria*:[62]

> a woman, even if an infant, automatically acquires on marriage the domicile of her husband. So long as the marriage is subsisting the wife cannot have a different domicile from that of her husband, even if they are judicially separated and if the husband changes his domicile, the wife's domicile is also automatically changed.[63]

The wife's domicile of dependence came to be characterised as the 'last barbarous relic of a wife's servitude'[64] and severely inhibited a woman's ability to obtain matrimonial relief from the courts of the country in which she resided but in which the husband was not domiciled.

The difficulty was nowhere more graphically illustrated than in the case of *Lord Advocate v Jaffrey*.[65] A husband domiciled in Scotland deserted his wife and went to live in Australia. He acquired a domicile of choice in Queensland and there contracted a bigamous marriage with an Australian. His lawful wife remained in Scotland. At her death it was held that she had died domiciled in Queensland. The unity of the marital domicile had to

be maintained even in these circumstances. In *Attorney General for Alberta v Cook*[66] the Privy Council decided that a wife could not acquire a domicile separate from her husband even if they were judicially separated since such a separation did not destroy the subsistence of the marriage. *Unwin v Unwin*,[67] decided by the Supreme Court of Trinidad and Tobago, found that the woman petitioner who had been living on and off in Trinidad for over a decade had not acquired a domicile there because, whatever her own intentions and desires, her husband retained his Canadian domicile.

Re Scullard[68] illustrated an important clarification of the rule, which could be interpreted as a slight concession. The testatrix had left her husband and, after living in various places, went to Guernsey with the object of being near her daughter. She expressed the intention of residing there until her death. It was held that upon her husband's death, she immediately acquired a domicile of choice in Guernsey without need for further act on her part, and even though she had been blissfully ignorant of his demise.[69] *Re Wallach*[70] was distinguished on the ground that the wife there had retained her late husband's English domicile and had not reverted to her own domicile of origin because they had not parted. The couple was living together until the husband's death and there had been no overt act or other indication on her part to change her domicile. It follows that *Re Scullard* is no basis for asserting that the marital domicile is merely a sort of mantle, which is automatically discarded when the wife becomes a widow and that she then automatically reverts to her domicile of origin or acquires the domicile of the country in which she happens to be living.

It should be noted that statutory reform, although slow in coming, has now made substantive changes to the law of the wife's dependent domicile in several jurisdictions. This reform has been undertaken even outside of the general reform of the law of domicile, although the piecemeal nature of the reform here may create almost as many problems as it solves.[71]

A child's domicile of dependency

In *Citeria v Citeria* the rule governing a child's domicile of dependency was stated in the following terms: 'the domicile of a legitimate child follows that of his father whereas an illegitimate child receives that of his mother.'[72] It is also the case that the domicile of a child born illegitimate but who is subsequently legitimated changes with that of the father. Problems of

identifying the domicile of dependency with the legitimacy of the child again arise in the context of modern legislation making all children of equal status and remain in need of judicial clarification.

Serious difficulties arose from the operation of the rules at common law and the courts made inconclusive attempts at mitigation of these problems. In the Northern Ireland decision in *Hope v Hope*[73] it was held that if the parents had divorced and custody of the child was awarded to the mother, that child might thereafter take the domicile of the mother. As was asked, 'why should the court tie the domicile of the child to the will of the father who has abjured his responsibility by walking out of his child's life and by so conducting himself that his marriage was dissolved by a competent court which grants custody of the child to the mother?'[74] With this may be contrasted the decision in the Scottish case of *Shanks v Shanks.*[75] This case held that, 'the general rule that a child's domicile is derived from its father does not suffer an exception even when the child is in the custody of its mother after the parents have been divorced.' It is hoped that Caribbean jurisdictions would prefer the former decision, and the steadily increasing body of statutory reforms leans in that direction.[76]

Similarly, in *Re Beaumont*[77] the English courts made indecisive inroads into the rule that after the death of the father, the child's domicile changes with that of the mother. It was there decided that this was not automatic. A widow could deliberately refrain from changing the child's domicile in the child's own interest.

This left many unanswered questions. One such question concerns the evidence required to show the intention on the part of the widow not the change the child's domicile. On the facts, the mother had expressed no overt intention not to change the domicile of the child; the court simply read that intention into the circumstances of the widow remarrying and emigrating with her other three children and new husband to England whilst leaving the propositus in the care of an aunt in Scotland. The child had not been left 'for any temporary purpose, such as education'. But there was no clue as to whether the decision would have been different if the mother had expressly stated an intention that the child's domicile *should* be changed with hers.

Another question concerns whether the exception applies only on remarriage. To saddle the child in *Re Beaumont* with an English domicile would have meant the double operation of the rule of dependency. First the mother would have been deemed to acquire the domicile of her new husband in England; second the child would have acquired this domicile

through the mother. What is unclear is whether the decision would have been different had the mother acquired an English domicile in her own right.

This question becomes even more important after it was held in the subsequent case of *Crumpton's Judicial Factor v Finch-Noyos*[78] that the domicile that the widow acquires on remarriage is not communicated to the child. The child's domicile continues to be that of the mother before the subsequent marriage. In this case the propositus had a domicile of origin in 'Barbadoes' but then acquired a domicile of dependency in Scotland when his mother abandoned the Island as her permanent home and returned to Scotland. Seemingly, the child would necessarily remain Scottish until death or attainment of majority even where the mother subsequently acquired, say, an English domicile, whether following a remarriage or by her own volition. It is not clear whether the flexibility introduced by *Re Beaumont* survived into the post *Crumpton's Judicial Factor* era.

Finally, does the scope of *Re Beaumont* allow the child's domicile to change with that of another adult? What if the aunt had taken the propositus with her to Barbados intending to spend the rest of her retirement there? Would the child's domicile have changed to Barbados? The Supreme Court of Trinidad and Tobago suggested in *Bermudez v Bermudez*[79] that a person *in loco parentis* could not change the domicile of the child although it must be said that there was some confusion in the *dicta* between the domicile of origin and of the domicile of dependency.[80]

At common law a child's domicile of dependency existed until attainment of the age of majority, which was originally set at 21 years.[81] It may now be taken that the age of majority, for most Caribbean jurisdictions, is 18 years,[82] although exceptionally some have set the limit at 16 years.[83] A girl who marries under the age of majority takes her husband domicile in the usual way.

Domicile of the mentally insane

Although there is no West Indian authority on point it appears that the domicile of a person who becomes mentally incapable before attaining the age of majority continues to change with the domicile of the person upon whom he or she is dependent, even after attainment of majority.[84] Where the person becomes *non compos mentis* after reaching majority, it is likely that the domicile remains as at the time of the illness since that person lacks the capacity to form the intention of changing it.[85] There is some

support for the idea that such a person should be deemed domiciled in the country with which he or she is for the time being most closely connected.[86]

Domicile of choice

Acquisition of domicile of choice

A domicile of choice is only acquired if it is affirmatively shown that the propositus is resident within a country with the intention formed independently of all external pressures of residing there permanently or indefinitely. *Mohabir v Bismill*[87] put the matter in the following way:

> A person not under disability can acquire a domicile of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*); the onus of proving a change of domicile is on the party who alleges it; when a domicile of choice is acquired the domicile of origin is in abeyance; it requires stronger evidence to establish the intention to abandon a domicile of origin than the intention to abandon the domicile of choice; residence in a country is prima facie evidence of the intention to reside there permanently (*animus manendi*) and in so far as evidence of domicile save where the nature of the residence is inconsistent with or rebuts the presumption of any such intention; domicile cannot be inferred from residence *per se*, but there must be a fixed and settled purpose of making the country of residence the permanent home.

Factum of residence

Physical Residence. Establishment of residence is normally a relatively easy matter. All that is required is that the propositus be physically resident in the country. Brevity of the residence is by no means fatal to the acquisition of a domicile. In a remarkable illustration of this truth, it was held in an American case that residence for part of a day was sufficient for the acquisition of a domicile of choice.[88] But presence, however short, must have been for the purpose of permanent or indefinite residence.

Residence as 'inhabitant'. Living in a country for several months will not qualify as residence for present purposes if the propositus does not, during the period of residence, regard herself as 'an inhabitant' of the country.[89] On the other side of the ledger, lengthy residence does not by itself a domicile of choice make. This reality is evident from the long line of cases holding that a domicile of origin had not been changed by decades of residence in distant parts of the British Empire[90] or in another part of the United Kingdom.[91]

Principal residence. Where an individual has more than one residence, it may be that a domicile of choice can only be acquired in the country of the

principal residence. This was the view of Hoffmann J in the English decision of *Plummer v IRC*.[92] In *Remy v Prosphere*[93] Floissac CJ delivered the leading judgment in which Justices of Appeal Liverpool and Byron of the OECS Court of Appeal concurred. He said that 'according to article 48 of the [Saint Lucia] Civil Code, the domicile of a person, for all civil purposes, is at the place where he has his principal residence. Counsel agree that articles 49 to 51 inclusive of said Civil Code encapsulate the principles developed on parallel lines in English and Quebec jurisprudence and tacitly acknowledge the concepts of domicile of origin and domicile of choice.'[94]

Gordon v Gordon is another decision in point.[95] A divorce petition in Trinidad was dismissed for want of jurisdiction on the ground of insufficient evidence that the husband, who was the respondent, was domiciled there. The petitioner appealed contending that the judge was wrong in law and fact. At the time of the marriage in London in 1935, the petitioner was resident in England and the respondent was presumed to have his domicile of origin in St. Lucia. Shortly after the marriage the respondent returned to St. Lucia where he became an acting Magistrate for a brief period. He made several trips to Trinidad between 1938 and 1939. He applied for and obtained a post in the Civil Service in Trinidad; and after residing there for a year he informed his mother that he had definitely decided to settle there. Since making that decision he disposed of all his real property in St. Lucia and was living there in January 1946 when the petition was filed. In allowing the appeal, the West Indian Court of Appeal held that the propositus had acquired a domicile of choice in Trinidad. He had established his principal or more permanent home there with the intention of residing there permanently.

In *Gordon*, it was made clear that if the physical fact of residence was accompanied by the required state of mind, 'neither its character nor its quality is in any way material.' It may therefore be queried whether the quality of the residence goes to the factum of residence, or, as is more likely, the animus of intention. The latter is certainly consistent with logic and the important decision of *Plummer v IRC*.[96]

Legality. Whether the residence, however brief or lengthy, whether exclusive or primary, needs to have been attained lawfully, has never been finally decided at common law. Several commentators[97] and at least one foreign case[98] have stated the requirement for legality as part of the factum of residence. However others see the issue of legality as going instead to the criterion of intention in either evidencing lack of any realistic intention of

indefinite residence or showing that such an intention was not formed *bona fide*.[99] A third approach is that illegality goes neither to residence nor intention but rather to public policy.[100] This perspective enables the forum to retain power to recognise or refuse private rights ostensibly acquired under public law relating for example to immigration, social security and employment benefits according to public policy requirements.

Animus of intention

The state of mind, or *animus manendi*, which is required in order to acquire a domicile of choice, is the intention to reside permanently or for an unlimited period of time in a particular country. The individual must have a fixed and settled purpose of making his or her home in the country of residence. In the words of Lord Westbury in *Udny v Udny,* 'it must be a residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation.'[101] More modern language used in *Gordon v Gordon* referred to the requisite intention as that 'of continuing to reside there indefinitely'.[102]

Residence subject to a contingency

Given that the requirement for domicile is that of an intention to reside permanently or at least indefinitely, it follows that an intention to reside only for a fixed period, say until the end of a three-year employment contract, will not suffice. More difficult is the circumstance in which residence is dependent upon the happening of a contingency. Many West Indians migrated to England in the middle of the twentieth century intending to return 'home' when they had made their fortune; or at least could live comfortably without further gainful employment. The question of whether this state of mind debarred them from acquisition of a domicile of choice in England is critical to contemporary decisions affecting family relations and succession to property upon death.

The basic rule on contingencies was stated by Scarman J in *Re Fuld (No. 3)*[103] when he said:

> If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. at the end of his job, the intention required by the law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool) or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law.[104]

It follows from these remarks that it is necessary to distinguish between several different types of contingencies.

Vague and fanciful. A contingency that is vague and fanciful to the point of being unrealistic will not prevent acquisition of a domicile of choice. *Re Furse*[105] concerned an American who had a Rhode Island domicile of origin but who had spent the last 39 years of his life on a farm in England. He had declared an intention of remaining in England only until he was no longer capable of leading an active physical life on the farm. It was held that this altogether indefinite and imprecise contingency did not prevent his acquisition of an English domicile and it is to be hoped that earlier decisions would be reconsidered in this light.[106] *Doucet v Geohegan*[107] involved the contingency of making an improbable fortune; the intention of the propositus to return to France if he 'made his fortune' in England could not prevent him from acquiring an English domicile. In the colourful words of James LJ, this hope could be likened to a man who expects to reach the horizon; he finds it at last no nearer than it was at the beginning of his journey.

Clear but unlikely to occur. A second type of contingency is that which is clearly defined but which in fact is not likely to occur. This will also not prevent acquisition of a domicile of a choice. The propositus may have the firm intention of returning to his or her native land upon winning the national lottery, which is entered weekly. Such a contingency can scarcely be faulted for want of clarity, but the statistical likelihood of its eventuation is so remote as to be consistent with the intention of residing permanently or indefinitely.

Clear and may occur. Where the propositus intends to depart the country upon a 'wholly clear and well-defined contingency' and 'there is a substantial possibility that the contingency might occur'[108] he or she will not acquire a domicile there. Both requirements were satisfied in *IRC v Bullock*.[109] Group Captain Bullock had a domicile of origin in Nova Scotia, Canada. He went to England in 1932 to join the RAF and remained there for the next 44 years. On retiring from the Air Force he expressed the desire to return permanently to Canada but did not do so because his wife did not wish to live in Canada. It was found as a fact that he would return immediately to Canada if his wife (who was three years younger) should predecease him. The Court of Appeal held that he had never abandoned his intention of returning to Canada if he survived his wife, which was not

an unreal possibility in view of their respective ages. Accordingly, he had never abandoned his Canadian domicile.

Nature of Evaluation of Contingency

The law concerning whether, in deciding upon the clarity and definition of the contingency, as well as upon the likelihood of its realisation, the court adopts a subjective or objective approach, is unsettled. *Re Fuld (No. 3)*[110] favoured the examination of the 'contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities.'[111] This accords with first principles recognising the sanctity of party autonomy in acquisition of a domicile of choice, but it must be conceded that the propositus could entertain fantasies about his or her territorial connections that bear little or no resemblance to ordinary reality. In the latter event, ascertainment of domicile, always a matter attended by grave legal consequences, cannot be held hostage to delusion or to possibilities so remote as to be unreal.

IRC v Bullock was decided on the basis of whether the wife was in fact likely to predecease the propositus, rather than upon any subjective speculation on his part. The testator's expressed intention in *Re Furse* did not prevent his acquiring an English domicile because it 'depended entirely on his own assessment of whether an ill-defined event had occurred' and 'really amounted to no more than saying, 'I will leave England when I feel I want to leave England.'[112] In *Cramer v Cramer*[113] the hope of a woman of retaining her relationship with and marrying her paramour (who was already married), and establishing a home together in England did not suffice for the intention required. On any objective assessment, her intentions were too speculative to displace the presumption of the continuation of her French domicile.

Evidence of intention

Evidence of intention is furnished by the circumstances of the individual's life. Every act, word, circumstance, however apparently trivial, is relevant. These indicia must be voluntary in the sense that they emanate from the will of the person concerned, free of external pressures. It is impossible to give a complete list and the following are no more than illustrations.

Lengthy residence. It has been seen that short residence does not negate and that long residence does not constitute conclusive evidence regarding acquisition of a domicile. Under contemporary conditions, however, lengthy

residence, in the absence of contrary explanation, constitutes powerful evidence of an intention to acquire a domicile in the country of residence. In practice the inference becomes virtually irresistible if accompanied with marriage to a native person[114] and even more so by purchase of a burial plot.[115] Other strong clues may include purchase of a house or land,[116] the exercise of political rights,[117] the establishment of children in business or residence.[118]

Precarious or permissive residence. Residence may be precarious in the sense that the person may be turned out of the country at any time, and permissive in the sense that from time to time requests must be made for permission to stay. It may be that such evidence could suggest absence of any realistic intention of residing permanently or indefinitely but this is by no means conclusive. Thus, ordinarily, a person against whom a deportation order has been recommended would probably lack the necessary intention given the precariousness of the stay. Exceptionally, in *Cruh v Cruh*[119]Lord Denning held that a person against whom a deportation order had actually been made retained his domicile in England until the Order was carried out. In *Re James McDonald (No. 2)*[120] it was held that the mere fact that a person was a visitor who required regular grants of permit to remain in the Cayman Islands did not prevent his acquisition of a domicile of choice there.

Illegal residence. Illegal residence may constitute lack of the required evidence of intention in that a fugitive from the law may not be assumed necessarily to have any realistic intention of remaining at large permanently or indefinitely. But the issue is a complex one. Much might depend on the ingenuity of the fugitive, and whether, for example, an amnesty is reasonably anticipated.

The leading Caribbean decision on point is *Re James McDonald (No. 2).*[121] This case came twice for decision before the Court of Appeal from the Grand Court of the Cayman Islands. In the first decision Horsfall J considered an application by the appellant for a declaration that he was a person of Caymanian status as of right. The appellant, a British subject and an attorney-at-law, born in Canada in 1922, had arrived in the Cayman Islands with his wife and son in October 1960 and had made his home there since then, practising his profession. The judge rejected the application because the Immigration (Restriction) Law 1941 required the appellant 'to establish a domicile according to that Law.' He had failed to do so because by that law he must have been a visitor on his arrival, would have been granted a permit, his residence was therefore 'conditional'which under

the statute excluded the possibility of acquisition of a domicile. The Court of Appeal held that the rules governing acquisition of domicile in 1960 were the common law rules and remitted the case for consideration as to whether, under those rules, the appellant had acquired a domicile in the Cayman Islands.

At the second hearing Horsfall J again refused the application for substantially the same reasons as he had offered in the first hearing. Overturning this decision, the Court of Appeal held that the appeal would be allowed and declaration granted that the appellant was entitled to Caymanian status as of right on account of his acquisition of a domicile of choice in the Cayman Islands. The applicant had discharged the onus on him to prove his acquisition of his domicile of choice and his abandonment of his domicile of origin on the requisite standard of balance of probabilities.

In giving the leading judgment Graham-Perkins JA dissented 'most emphatically' from the proposition that the appellant was required 'to establish a domicile according to [the 1941 Law]' including proof of regularity of residence since entry into the country. Acquisition of a domicile of choice was, by its very nature, predicated on the hypothesis of the exercise of a man's will and 'not on the provisions of a statute.'

Change of nationality. The intention required to obtain a domicile of choice may be evidenced by change of nationality. The Welshman in *Re Jones Estate*[122] who had immigrated to the United States and had become a naturalised American citizen was deemed to have acquired a domicile of choice in Iowa. Similarly, in *Nicholls v Nicholls*[123] a man who had renounced citizenship of Barbados and had become registered as a citizen of Trinidad and Tobago was held to have acquired a domicile in Trinidad and Tobago.

Whilst not conclusive, this change was 'a factor to be taken into account.'[124] By contrast Group Captain Bullock's failure in *IRC v Bullock*[125] to acquire British citizenship was a factor in deciding that he had retained his Nova Scotia domicile. On the other hand, change of nationality is not by itself conclusive. So the German in *Re Fuld (No. 3)*[126] who had immigrated to Canada and had acquired Canadian citizenship was held to have retained his German domicile of origin.

Motive. As a general rule a person's motive for going to live in a country is not relevant. The essential consideration is whether, despite a good or bad motive, the person had the necessary intention. Thus a person may acquire a domicile in order to avoid creditors,[127] enjoy the benefit of lower taxation,[128] obtain a divorce,[129] or minimise exposure to payment of

maintenance[130] or property division upon divorce.[131] Indeed, less evidence of intention may be needed to prove an intention to migrate to and acquire a domicile in a warm, tax-free jurisdiction such as the Cayman Islands, than would satisfy the court in the context of some other less hospitable destination.[132]

Special considerations apply where the motivating factor is preservation of health. Where the person settles in the foreign country on medical advice in order to preserve his life, the element of volition is said to be absent and that person will therefore not acquire a domicile without more. In *Re James*[133] a man who was forced to live in South Africa upon the imperative order of his doctor in order to prolong his life (while retaining ownership of a farm in Wales) was held upon death to have kept his English domicile. Similarly, in *Lopes v Ward*[134] the deceased had gone to the United States for medical treatment and had not returned home because his medical condition did not improve before he died. It was held that he had retained his Trinidad and Tobago domicile. But in *Hoskins v Matthews*[135] the man who had left his English domicile of origin in order to live in Italy because he thought the warmer climate there would benefit his health was held to have acquired a domicile there. He was 'exercising a preference and not acting upon a necessity.'

Employment. Whether an employee acquires a domicile in the country to which he or she is sent is a matter turning on the intention of the employee. The question is whether the person intends merely to work or to settle. A similar question of fact attends questions of acquisition of domicile by diplomats and members of the disciplined forces.[136]

In the Caribbean context, the issue has most frequently arisen in relation to the posting of members of the clergy. *Thorne v Board of Education and Darrell*[137] considered the situation of a Wesleyan minister subject to the rules and regulations under which the appointments of Wesleyan ministers are made. Such appointment was annual and capable of being terminated at the end of any year. Nevertheless the residence under such an appointment was held not to be of such a transient nature as to negate acquisition of a domicile of choice in Barbados.

In *Reid v Reid*[138] the petitioner was an elder of the Seventh Day Adventist Church. He applied for a decree of dissolution of marriage and for custody of the child of the marriage. At the time of the marriage in Jamaica in 1933 the petitioner was stationed in The Bahamas. In 1938 he was transferred to Barbados, where his wife deserted him in preference for a gay night

lifestyle and behaved in a manner unbecoming the wife of an Elder of the Seventh Day Adventist Church. He was posted to Guyana in 1941 and in 1943 he filed for dissolution of the marriage. At that time he along with the only child of the marriage, had been residing in Demerara for nearly two years. Duke J found that the petitioner had formed the intention of settling permanently in the colony and that therefore the Court had jurisdiction to hear the petition. It was held that the question of domicile was not affected by the possibility that the petitioner might be transferred to a pastorate in some other territory in the Caribbean.

Unilateral declarations. The declaration of the propositus constitutes direct evidence of the state of mind and as such is admissible as probative. This evidence may be live testimony, documentary, or testamentary. However, the court views these declarations with suspicion where the propositus has an interest in the outcome of the determination. Such an interest could place the person under a bias that could influence the mind and perhaps even his or her veracity. In *Plummer v IRC*[139] the revenue commissioners asserted that the taxpayer was domiciled in England and therefore subject to English taxation. The taxpayer made declarations of his intention to live outside of the United Kingdom but the English courts held that these statements had to be taken with caution.

In *Unwin v Unwin*[140] the husband opposed the institution of matrimonial proceedings in Trinidad and gave evidence that he never formed the intention of abandoning his Canadian domicile of origin and of substituting a Trinidad domicile of choice. Whilst accepting the retention of the domicile of origin, the court did counsel itself about being wary in deciding the weight to give to these self-serving declarations. On the other hand, answers given on an official form for purposes unrelated to domicile may be disregarded, especially where contradicted by later declarations made by someone unfamiliar with the relevant law of domicile.[141]

Where the person is familiar with the law of domicile and seeks to conduct his affairs in accordance with legal requirements it might be hard to resist the inference of compliance. This interesting gloss was placed on the discussion by the case of *Re De Veaux.*[142] The propositus was born in Guyana in 1875. He left the country in 1905 and took up residence in Panama, where he remained for 30 years. In 1935 he was appointed as Panamanian Consul to British Guiana (as Guyana was then called). He took up residence in Guyana in 1935, and remained there in that capacity until 1936. During this period of time he acquired immovable property in

Guyana. He was also involved in litigation with the Inland Revenue Department, involving his domicile, and the Supreme Court of Guyana held that he had not relinquished his Guyana domicile of origin. The deceased died leaving an estate made up of property situate in Panama, Canada, and Guyana.

The Commissioner of Inland Revenue contended that the deceased was domiciled in Guyana, and that for the purpose of assessing the rate of estate duty on that property, he was entitled to take into account all the property situate outside of the country. It was held that the Commissioner was not so entitled as the deceased was domiciled in Panama at the time of his death. Van Sertima J considered that the propositus 'was no stranger to the meaning of domicile, in its legal context.' He continued:

> No one, in my opinion, looking objectively and without bias, can conclude otherwise than that De Veaux set out to put into practical effect his earlier verbal declarations - that he was domiciled in the Republic of Panama, in other words, that he had abandoned his domicile of origin and adopted a fresh domicile of choice.
>
> It may well be argued that in the same way that the earlier tribunals must have considered that his declarations on the question of domicile were self-serving, likewise, the deliberate conduct on his part to discount those findings would be equally self-serving. I hasten to point out that this contention was never mooted on behalf of the respondent before me.[143]

Abandonment of domicile of choice

Acquisition and abandonment are correlatives. A domicile of choice is acquired when there is co-existence of *animo et factum*. For it to be lost, the converse must occur. There must be the cessation of both residence *and* the intention of remaining in the domicile permanently or indefinitely.

Illustrations of abandonment

A particularly colourful illustration of this phenomenon is provided by the case of *Re Flynn.*[144] Megarry J gave a full description of the life of Errol Flynn, the film actor whose performances gave pleasure to many millions. He had lived a life that was full, lusty, restless and colourful. In his career, in his three marriages, in his friendships, in his quarrels, and in bed with the many women and men he took there, he lived with zest and irregularity. He was by all accounts a sexual athlete, of Olympian standards. Flynn had clearly acquired a domicile of choice in California by 1942 and he was settled there. There he had his home, his work in Hollywood, his new nationality, and his wife (in law though only intermittently in fact). In

1952, after a quarrel with Warner Brothers, he left California and by 1954 had formed the definite intention of not returning.

It was found that at the end of World War II Flynn had bought the yacht Zaca, which was to be his for the rest of his life. On a cruise in her in 1946 or 1947, bad weather made him put into Jamaica. At once he fell in love with the Island. This was perhaps the most enduring love of his life. Almost at once Flynn began buying property in Jamaica. He bought Navy Island, in the harbour of Port Antonio on the north-east coast of the Island, and on February 11, 1947, wrote a glowing letter to his parents about the 'dream spot' that he had bought and urged them to come to it and 'live like kings'.

He was not forgetful of the return that the Island could bring from crops, sheep, cattle and chickens, but nobody could read his letter as being dominated by economics. Later that year he bought a larger estate, the Boston Estate, and in 1947, he again wrote to his father a letter of enthusiasm, which related to a visit that his parents were to make to Jamaica. Shortly afterwards his parents in fact came to Jamaica, and for ten years they lived on his property in Boston Great House. His father helped to manage his estates in Jamaica, which included two houses and various outbuildings, and were substantial in extent. Given his clear love and affinity with the Island, it was held that he had acquired a domicile of choice in Jamaica, which he retained until his death.

Rejection of residence and intention to reside clearly coincided in *Re Flynn* to lead to the abandonment of the California domicile of choice. It is to be emphasised that mere giving up of residence does not negate a domicile of choice. In *Bradford v Young*[145] a Scotsman who had acquired a domicile of choice in England went to live in France for two years. His residence in France was not sufficient to indicate abandonment of his English domicile because of his continued intention to live permanently in England, evidenced by the fact he had left some of his furniture in Storrington, England. *In re Lloyd Evans*[146] concerned a man who had fled to England from Belgium in face of the German invasion of 1940. He never intended to remain in England but rather to return to Belgium as soon as the Germans had been evicted. It was held that he had retained his Belgium domicile of choice.

Similarly, there cannot be abandonment by intention alone. In *Re Raffenel*[147] a widow of English domicile of origin had acquired a French domicile by virtue of marriage and had lived in France with her husband. After his death she resolved to return to live permanently in England. She

boarded a cross-channel ferry at Calais, intending to sail to England. Before the ship left the harbour she was taken ill and had to return to the mainland. She died in France without recovering sufficiently to complete the voyage. It was held that she had died domicile in France. She had not lost her French domicile because her intention to lose it had never been put into effect by actual physical departure.

In *Zanelli v Zanelli*[148] an Italian who had an Italian domicile of origin who had married and lived with his wife in England, was found to have acquired a domicile of choice there by March 1935. He then deserted his wife and went straight back to Italy. It was held that at the time of the desertion he was still domiciled in England. Immediately before the desertion he had given up the intention to reside in England but he had not given up residence. Cessation of factum had not occurred and he therefore retained his English domicile of choice, even at the moment when he stepped into the train with his ticket in his pocket. Or, indeed, when he stepped on board the ship that was to carry him to the continent.

Nature of the Intention

The nature of the intention required to abandon the domicile of choice has been considered in a number of cases. *Nicholls v Nicholls*[149] considered a question of jurisdiction raised in divorce proceedings before the High Court of Trinidad and Tobago by the wife's refusal to admit that the husband was domiciled in that country. He had been born in Barbados in 1932 and the parties had become engaged whilst at Mona, Jamaica. They were married in Cambridge, England in 1955. The husband first went to Trinidad in 1957 later renouncing citizenship of Barbados and becoming registered as a citizen of Trinidad and Tobago. He became employed in the teaching service of the Government of Trinidad and Tobago and at the hearing of this action asserted his intention not to change his place of residence from Trinidad and Tobago.

It was held that the petitioner was domiciled in Trinidad and Tobago and the court was therefore entitled to hear the petition for divorce. In coming to this conclusion the court expressed itself satisfied that at some time prior to 1973 the husband had the necessary *animus manendi* to abandon his domicile of origin in Barbados and had acquired a domicile of choice in Trinidad and Tobago. It is true that he had left Trinidad in August 1973 with intention to explore possibilities in Barbados but he had not left with the intention not to return to this domicile of choice. In order to

lose his domicile of choice in Trinidad and Tobago, 'his departure would have had to be *animo non revertendi* not merely *sine animo revertendi*.'

The court concluded that departure without a fixed intention to return failed to suffice for abandonment, expressly adopted the view of Cheshire that it is only departure with a definite intention not to return which terminates a domicile of choice. However the very opposite was asserted by Megarry J in *Re Flynn.*[150] The judge found that after his quarrel with Warner Brothers in 1952, Flynn had left California without any positive intention of returning. It was found that by 1954 he had formed the definite intention of not returning, but as the issue of his domicile between 1952 and 1954 had been argued the judge felt obliged to comment upon it. The issue was judicially framed as being whether it was necessary to establish a positive intention not to return to reside in the country, or whether it would suffice if there were merely an absence of any intention to continue residing there.

Justice Megarry found that the books and the authorities spoke with divided voices. Based on the notion that abandonment was the exact converse of the process of its acquisition, some decided that since the domicile of choice is acquired *animo et facto*, so it can only be extinguished in the same manner, that is, by a removal from the country *animo non revertendi*.[151] But the judge found that it equally followed from the concept that acquisition and abandonment are correlatives that when *animus* and *factum* are each no more, domicile perished also. There is nothing to sustain it. If a man has already departed from the country, his domicile of choice there will continue so long as he has the necessary *animus*. When he no longer has this, his domicile of choice is at an end, 'for it has been abandoned; and this is so even if his intention of returning has merely withered away and he has not formed any positive intention never to return to live in the country. In short, the death of the old intention suffices, without the birth of any new intention.'[152]

Statutory Reform

After over a century of operation, the simple notion of domicile as the home of the propositus became overburdened and bedeviled by technical, complex and seemingly contradictory rules fashioned to respond to the peculiar fact situation of individual cases. In this regard the tenacity of the domicile of origin and its capacity for revival and the complexity of the rules surrounding acquisition of a domicile of choice were clearly in need of reform. Changes in the socio-political circumstances of women and

abolition of the concept of legitimacy also necessitated changes to the notion of the domicile of dependency.[153]

Statutory reform has been very uneven. Sweeping reforms have occurred in Barbados,[154] Guyana,[155] and Trinidad and Tobago.[156] Saint Vincent and the Grenadines[157] has made general changes but retained major segments of the common law; in this regard the reform there is very similar to that undertaken in the United Kingdom.[158] Statutory reform in The Bahamas[159] and Jamaica[160] has been restricted to dealing with the wife's domicile of dependency in relation to matrimonial proceedings, and are most profitably considered in the context of the discussion concerning those matrimonial proceedings.

Abolition of the doctrine of revival of the domicile of origin

The most dramatic reformation wrought has been the abolition of the common law doctrine of revival of the domicile of origin. Any new domicile acquired in accordance with the legislation continues until a further new domicile is acquired in accordance with the Act. To made doubly sure, the Acts go on to provide that 'the rule of law known as the revival of the domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is abolished.'[161]

This provision is clearly a radical departure from traditional Anglo-Caribbean law in *Udny v Udny*[162] and is a statutory canonisation of the American common law rule of persistence of the domicile of choice as expressed in *Re Jones Estate*.[163] Major differences in the interpretation of the concept of domicile emerge between Caribbean jurisdictions retaining the revival doctrine (such as The Bahamas, Jamaica and St. Vincent and the Grenadines) and those that have abolished it (such as Barbados, Guyana, and Trinidad and Tobago). Fears that this (and other differences) could lead to invocation of the *renvoi* doctrine may be unfounded[164] but the reasons given for the abolition of the revival rule are not necessarily convincing and may be 'as much of a fiction' as those supporting the continuation of the existing domicile.[165]

The question that remains is whether there is now any legal sense in speaking of a domicile of origin. Abolition of the capacity for revival has effectively emasculated the concept. The fact that all domiciles are changeable in accordance with the same standard of proof[166] means that the bias in favour of the tenacity of the domicile of origin no longer exists. That the law has no further need for the hypothesis of a domicile of origin is rather

betrayed by the fact that provisions dealing with the domicile of children at birth make no mention of it.[167]

Standard of proof

The legislation codifies the main stream of common law authorities regarding the burden of proof required to change domiciles. The standard of proof 'which immediately before' the coming into force of the statute, 'was sufficient to show the abandonment of a domicile of choice and the acquisition of another domicile of choice shall be sufficient to show the acquisition of a new domicile in accordance with' the Act.[168] At common law, this standard was always that of proof on a balance of probabilities; it was the change of a domicile of origin to one of choice that brought into question whether a higher standard was required. Proof the civil standard is certainly consistent with several Caribbean authorities suggesting that proof beyond reasonable doubt was not required.[169]

Acquisition of a domicile of choice

Under the general reformation of the law of domicile, a person acquires a new domicile in a country at a particular time if immediately before that time four conditions are fulfilled. That person is not domiciled in that particular country; is capable of having an independent domicile; is in that country; and intends to live indefinitely in that country.[170]

This provision restates rather than commits any great violence upon the common law rules regarding acquisition of a domicile of choice. It does, however, make two important clarifications. In the first place the bare fact of physical presence in the country, however brief, suffices; there is absolutely now no requirement for residence *per se*. This could be important in the context where the propositus is in the country concerned illegally.

In *Belle v Belle*,[171] Williams CJ in the High Court of Barbados noted the uncertainty at common law concerning whether residence had to be legal to satisfy the law of domicile. He then observed that the only residence requirement laid down in the law of Barbados for the acquisition of a new domicile is that the person concerned be '*in*' the country of the new domicile immediately before the particular time that is in issue. Accordingly 'it does appear that in Barbadian law a domicile in an overseas country can be acquired even though the person concerned was illegally present in the overseas country.' In other words, being present in the country refers to

the brute fact of physical presence, not any foreign legal requirement of physical presence.

The second clarification to emerge from the statutory provision relates to the requisite intention. It is now pellucidly clear that the intention to reside 'permanently' is not required. Residence for an indefinite period is enough. Where the intention to reside for an unlimited amount of time is made dependent upon leaving the country if a particular contingency occurs, such a contingency is unlikely to defeat acquisition of a domicile unless it is clear and there is a substantial likelihood of its occurrence.[172] A contingency that is vague or whose realisation is so improbable as to be reasonably discounted will not defeat acquisition of a domicile.[173] In all probability, cases such as *Ramsey v Liverpool Royal Infirmary,* and *Munn v Munn* would be decided differently under the new Caribbean legislative framework.[174]

Abolition of a wife's domicile of dependency

The legislation provides that 'Every married person is capable of having an independent domicile; and the rule of law whereby upon marriage a woman acquires her husband's domicile and is thereafter during the subsistence of the marriage incapable of having any other domicile is abolished.'[175] This provision applies to the parties 'to every marriage whenever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage.'[176]

With this provision, the much-maligned rule of a wife's domicile of dependency is finally interred. A married woman is now empowered to acquire a domicile different from that of her husband. As has been pointed out,[177] under the normal circumstances of a stable marriage the wife's domicile will be identical to the husband's. But this will no longer be so simply on the basis of her marriage; her domicile will be determined after a proper consideration of her physical location and independent intention of indefinite residence. By analogy with *Re Scullard*[178] it is irrelevant that the woman is ignorant of the legislative provision.

Abolition of the wife's domicile of dependency is not retrospective. It operates only from the coming into force of the Act. Given the wording of the statute that the domicile possessed immediately before becoming capable of having an independent domicile, 'continues' it seems arguably that the Act retains the domicile as one of dependency rather than convert it into one of choice.[179] Whatever its nature, the domicile in the country concerned continues until the wife takes steps to change it in accordance with the

statutory requirements, subject to any application of the *Re Scullard* rule. It follows that a woman who marries before the coming into force of the legislation is in a different position from one marrying after. In the latter case the husband's domicile, *qua* marital domicile, is never communicated to the wife.

The distinction was important in the case of *IRC v Duchess of Portland*.[180] The taxpayer had a domicile of origin in Quebec. She married in 1948 and thereby acquired an English domicile of dependency. The couple set up house in England but the taxpayer retained links with Quebec, visiting for several weeks each year and keeping a house there. It was agreed that when her husband retired they would both live permanently in Quebec. The question arose in English proceedings as to whether she was domiciled in England for tax purposes. Nourse J overruling the Special Commissioners held that she retained her domicile in England. He explained that while the Domicile and Matrimonial Proceedings Act 1973 had provided for the independent domicile of the married woman, it did not have retroactive effect. The Act converted the domicile of dependency into a domicile of choice but that domicile of choice was not lost by an intention to settle in Quebec on retirement. The taxpayer had not ceased to reside in England, since her yearly visits to Quebec were as a 'visitor' and not as an 'inhabitant' of that country. She could 'only free herself from the shackles of dependency by choosing to leave her husband for permanent residence in another country.'[181]

Had the Duchess married after January 1, 1974, the date when the Act entered into force, it is arguable that the decision would have been different. She would have never have abandoned her Quebec domicile given that she had not left with the intention of not returning, or even without a positive intention to return. On the contrary she had always regarded Quebec as her home.

Reform of a child's domicile of dependency

The common law rules governing a child's domicile of dependency have been significantly revamped to reflect the objective that the child's domicile should mirror the factual reality of country in which that child has his or her home. There are slight nuances and two substantive differences between the various regimes.

Under the Domicile Reform Act of Barbados, it is provided as follows:

> 6. (1) A child whose parents are living together has the domicile for the time being of its father.

(2) If a child whose parents are not living together has its home with its father, it has the domicile for the time being of its father; and after it ceases to have its home with him, it continues to have that domicile (or, if he is dead, the domicile at his death) until it has its home with its mother.

(3) Subject to subsection (2) a child whose parents are not living together has the domicile for the time being of its mother, or, if she is dead, the domicile she had at her death.

(4) Until a foundling child has its home with one of its parents, both parents shall, for the purposes of this section, be deemed to be alive and domiciled in the country in which the foundling child was found.

(5) This section has effect in place of all rules of law relating the domicile of children.

7. Subject to any rule of law relating to the domicile of insane persons, every person becomes capable of having an independent domicile upon attaining the age of majority or, being a minor, upon marriage.[182]

The Trinidad and Tobago Family Law (Guardianship of Minors, Domicile, and Maintenance) Act, 1981 deals with 'minors' in sections 38-39 as follows:

38(1) This section shall have effect with respect to the dependent domicile of a minor at any time after the coming into force of this Act.

(2) A minor whose parents are living together shall have the domicile for the time being of his father.

(3) A minor whose parents are living apart shall have the domicile of the parent with whom he resides and if he resides with neither parent then of the person who for the time being has actual custody of him; and for the purposes of this section a minor who is in the care of an institution in Trinidad and Tobago shall be deemed to be domiciled in Trinidad and Tobago.

(4) Until a minor who is a foundling has its home with one of its parents, both of his parents shall for the purpose of this section, be deemed to be alive and domiciled in the country in which the minor who is a foundling was found.

(5) This section shall have effect in place of all rules relating to the domicile of minor children.

39. Subject to any rule of law relating to the domicile of insane persons every person is capable of having an independent domicile upon attaining the age of majority or, being a minor, upon marriage.

These two regimes may be usefully compared and contrasted. First, 'child' is not defined in the Barbados Act but presumably means a person under the age of 18, which is the age of majority in Barbados.[183] In Trinidad and Tobago, the term 'minor' is expressly defined by s. 2 to mean 'a person under the age of eighteen years.' Section 2 (a) of the Guyana Act makes a similar provision. This contrasts with the age of 16 years, which is, for

purpose of the law of domicile, established as the age of majority in St. Vincent and the Grenadines,[184] which reflects the English position.[185]

Second, under both regimes, a child's domicile is no longer decided according to anachronistic notions of legitimacy, which was, in any event, difficult to reconcile with emergent legislation making all children of equal status. Under Barbados law, the distinction between children born in lawful wedlock, those born outside of it, and adopted children is swept away by the provision that the usage of the words 'father' and 'mother' have the meaning assigned to them by the Status of Children Reform Act 1979. This Act abolished illegitimacy and has defined 'father' and 'mother' as inclusive of adopted father and mother.[186] A similar result would appear to follow from a reasonable interpretation of the Status of Children Act of the Laws of Trinidad and Tobago, referred to earlier. An analogous finding is presented in St. Vincent and the Grenadines by virtue of the Status of Children Act 1980. Currently, therefore, domicile is determined according to parentage; in circumstances of uncertainty paternity will be established in accordance with relevant statutory procedures.[187]

Third, the Acts give statutory effect to the common law decision in the Irish case of *Hope v Hope*[188] in preference to the Scottish decision of *Shanks v Shanks*[189] by allowing communication of the mother's domicile to the child where the child lives with her and not the father.[190] However, having superseded all common law rules relating to the domicile of minors, the regime represented in the Barbados Act abolishes the flexibility that *Re Beaumont*[191] had sought to introduce into the law by allowing the child to have a domicile of another person and not necessarily that of either parent. Under the law of Barbados (and Guyana), the baby is thrown out with the bath water; a child cannot have the domicile of a person other than one of its parents. By contrast, under Trinidad and Tobago law, the child may, where it lives with neither parent, have the domicile of the person who has 'actual custody' of him.

Finally, s. 6 (2) and (3) of the Barbados Act could create an inconvenient result where the child is in care of an institution such as run by the Child Care Board of Barbados. Section 6(2) provides that a child who has ceased living with its father retains the father's domicile until it has a home with its mother. Section 6(3) states that the child whose parents are living apart has the domicile for the time being of the mother. Although s. 6(3) is made 'subject' to s. 6(2), this does not remove the mischief. Where the child is in the care of an institution, possibly in a country different from that of either parent, the child will have the father's domicile if the child

had its home with him before entering the institution, but of the mother in all other situations. Under the Trinidad and Tobago Act, a minor is deemed to be domiciled in the country in which the institution is established, but only if that country is Trinidad and Tobago.[192]

Transitional arrangements

Transitional arrangements are made for the phasing in of the operation of the legislation reforming the law of domicile. Although there are differences in wording, the sections in most statutes are to like effect. The Barbados Act reads as follows:

> 3. A domicile that a person had at a time before commencement of this Act shall be determined as if this Act had not been enacted.
>
> 4. A domicile that a person has at a time after the commencement of this Act shall be determined as if this Act had always been in force.[193]

A decision on the application of these sections is all out crucial because where s. 4 applies the new rules provided for in the legislation govern the determination of domicile. In particular, there is abolition of the doctrine of revival of the domicile of origin,[194] abolition of a wife's domicile of dependency upon her husband,[195] radical reformation of a child's domicile of dependency to reflect the domicile of the parent with whom the child lives,[196] and a statutory description of how a new domicile of choice is acquired.[197] By way of sharp contrast, where s. 3 applies, the domicile of the propositus is determined in accordance with common law rules, untouched by the foregoing reforms.

Moreover, although the problem was posed in relation to Barbados, an identical task awaits the interpretation of equivalent legislation in Trinidad and Tobago,[198] and Guyana.[199] These statutes contain essentially the same transitional arrangements.

It is fairly clear that the intent of the transitional provisions was that the Acts should be neither wholly retrospective nor wholly prospective. Instead, temporal application depends upon the juncture at which *determination* of domicile is to be made. In the circumstances described in s. 3 of the Barbados Act, the statutory provisions will be inapplicable; in those described in s. 4, these provisions will be applicable. But these statements camouflage one of the most difficult questions in Caribbean statutory interpretation. How do we know which section applies to a particular set of facts? Specifically, what is the meaning to be attached to

the phrase 'a domicile … *shall be determined*' as if the Act had not been enacted, or as if the Act had always been in force, as the case may be?

The temporal requirement for the determination of the domicile attracts two radically different meanings. First, the statutory language might require the determination of the domicile at the point in the space-time continuum at which the judicial determination is to be made. Secondly, the statutory language might require the determination of the domicile at the point in the space-time continuum at which the facts relevant to the determination occurred.

Mendes should be credited for recognising that one interpretation of the legislative provisions shows that the prospective and retrospective provisions may operate simultaneously between the same parties and in the same proceedings. In an insightful attempt to explicate the meaning of the provisions he gives a hypothetical example that is worth quoting in full (it must be remembered that under its original formulation, the Barbados Act was to have entered into force on August 3, 1979):[200]

> Let us suppose that a married man, whose domicile of origin was Trinidadian, acquires a domicile of choice in Barbados. In July 1979 he decides to leave Barbados and his wife never to return and flies off to Canada, but without any immediate resolve of setting up permanent residence there. If it becomes necessary to determine his domicile at that point in time, the doctrine of the revival of the domicile of origin would come into play to make his domicile in July 1979, Trinidadian. (*Re Flynn* [1968] 1 All E.R. 49).
>
> If however, it becomes necessary to determine the domicile a person has at a point in time after the commencement of the Act, such domicile is to be determined as if the Act had always been in force (s. 4). The Act is therefore retrospective in that a determination of a person's domicile at a juncture after the coming into effect of the Act would require an application of the new rules to events occurring before the Act came into operation. Let us suppose that it now becomes necessary to determine the domicile of our married man above and his wife in January 1980. Since leaving Barbados the husband has remained undecided as to the place he will make his new home. Having noted that the Act has abolished the doctrine of the revival of the domicile of origin the court will hold that on leaving Barbados in [July] 1979 the husband retained his Barbadian domicile - in contrast to the common law position where his Trinidadian domicile of origin revives - and, not having acquired a new domicile of choice, would be saddled with this domicile in January 1980.
>
> What of his wife? Before considering the new rules under s.5 the court must first of all ascertain the domicile the wife possessed on August 3, 1979 the date the Act came into force (s. 8). This would be the domicile she acquired dependently as a consequence of her marriage and would be identical to that of her husband just prior to the commencement of the Act. What was the husband's domicile just prior to the commencement of the Act? Surely not even the most careless of legal

> minds would be faulted for reasoning that the husband's domicile was at that date Barbadian; for the court has just so held. On August 3, 1979, the wife would therefore be domiciled in Barbados. Account must however be taken of the wording of s. 3 which orders that the now defunct common law rules be used to determine the domicile a person had at a point in time before the commencement of the Act. It could be therefore, that the wife's domicile on August 3, 1979 was Trinidadian, being the husband's domicile of origin revived in June 1979 according to the familiar common law doctrine. This would be the inexorable result of adherence to the message of s. 3.
>
> Again, our negligent observer could not be chided for reaching this conclusion; and he would realise that in the very same proceedings the retrospective nature of the Act has come to the fore - in determining the husband's domicile in January 1980 the new rules applied retrospectively whereas in relation to the wife the old common rules operating before the Act came into force were used to determine the husband's domicile of that date. Trinidadian or Barbadian, what is the wife's domicile on August 3, 1979? As to this dilemma (this dichotomy may also arise in a similar situation concerning the domicile of a minor), much litigation can be anticipated. It is left to our more incisive legal minds to resolve the issue.

That the anticipated flood of litigation has not materialised is not necessarily Mendes' fault. It may be that those at the bar have failed to recognise the conundrum; there is, after all, no guarantee that those who plead or preside at these proceedings are familiar with the Eureka experience. On the other hand, it could be that the problem is a storm in an academic teacup hardly worth sustained attention from practitioners.

In Mendes' example, it is clear that resolution of the dilemma of the parties' domicile is a question for statutory interpretation rather than one for mere philosophical or syllogistic reasoning. Two matters are patent from the statutory language. First, under the transitional arrangements, the domicile that a person had immediately *before* becoming capable of having an independent domicile *continues* until that person acquires a new domicile in accordance with the statute. This must mean that the domicile of dependency of the wife remains until she takes active steps to acquire a domicile in a different country, except in those cases in which the *Re Scullard*[201] principles apply. Accordingly, at the date of entry into force of the Act, the wife's dependent domicile remains. This conclusion is certainly consistent with the wording of s. 3, which speaks to determination of a domicile at a juncture *before* the commencement of the Act.

Anthony Bland takes Mendes' point that the husband's domicile of origin is not revived, but states that this is by virtue of the legislative provision abolishing the revival doctrine, and this provision is only effective *from* the moment the legislation comes into effect.[202] It will be recalled that the

statutory language of s. 4 applies to determination of a domicile *after* commencement of the Act. As Bland writes, 'the admittedly somewhat curious result would be that the husband's domicile after August 3, 1979 would be Barbadian, but that the wife's dependent Trinidadian domicile would remain, until she took steps to change it by the acquisition of a domicile of choice.'[203]

Both Mendes and Bland, then, assume that the term '*shall be determined*' refers to the point in the time-space continuum at which judicial determination of domicile is made. That is why they suggest that, if it became necessary to determine the domicile of the married man in the hypothetical example in 1980, the abolition of the doctrine of the revival of the domicile of origin results a finding that, upon his leaving Barbados in July 1979, he retained his Barbadian domicile - in contrast to the common law position where his Trinidadian domicile of origin revives. Not having attained a new domicile of choice, he 'would be saddled with this domicile in January 1980.'

Another interpretation[204] is that the point at which the determination is made relates to the point in the space-time continuum at which the factual events relevant to determination of domicile occurred. Events occurring before the commencement of the statute must be interpreted in accordance with the common law, events occurring after commencement in accord with the statutory regime. From this viewpoint, the time of judicial determination is not directly relevant; indeed, as a rule the time for judicial determination is of necessity after the coming into force of the Act. Without the legislative force of the provisions it is an oxymoron to speak of the temporal effects of the statute in the first place.

This way of looking at the statute has the advantage of allowing for equality of treatment of the domiciles of all parties, whatever their relationship with each other, and avoids the undesirable possibility that the prospective and retrospective provisions may operate simultaneously in the same proceedings between the same parties. Whether the dispute concerns the domicile of a wife upon her husband or a domicile of dependency of a child upon a parent, the rules governing determination of domicile will be the same. *Ex hypothesi*, it cannot be the case that a husband's domicile in January 1980 warrants application of the statutory regime 'retrospectively' to events in 1979; the statutory regimes applies in every case 'prospectively', that is, to facts occurring from the date of entry into force of the statute.[205]

In Barbadian proceedings, fidelity to the Domicile Reform Act requires interpretation of the wife's domicile as Trinidadian at the date of the coming into force of the Act, with the corollary that Trinidad and Tobago law governs her personal status.[206] Adherence to the Act could also require application of the common law rules, including the revival doctrine, even *after* the Trinidad and Tobago Family Law (Guardianship of Minors, Domicile, and Maintenance) Act, 1981[207] if the Barbados court considered s. 3 of the Barbados Act applicable. This follows from the fundamental rule that 'domicile' is governed by the *lex fori*.[208]

Admittedly, nice questions could arise concerning the relationship between the use of local legislation to define domicile and other statutory provisions containing exceptions to this rule. For example, in Barbados, s. 86 (4) of the Succession Act, 1975[209] embodies a complete departure from orthodoxy. In relation to testamentary dispositions affecting formal validity, it provides that, 'The determination of whether or not a testator had his domicile in a particular place shall be determined by the law of that place.' A clash of these two regimes presupposes first, that the issue in litigation comes within the scope of the Act of 1975, that is, that it concerns testamentary dispositions affecting formal validity. Second, that under the general rules governing parliamentary sovereignty, the 1975 Act was not repealed by the 1980 Act, *pro tanto*, to the extent of the inconsistency.[210] If the clash is genuine and results in triumph of the exception to the general rule according the *lex fori's* notions of domicile, the difficulty would appear dissolved by the simply expedient of applying Trinidad and Tobago law to determining whether the propositus was domiciled there. Whether the Family Law (Guardianship of Minors, Domicile, and Maintenance) Act, 1981 would be applicable depends upon the Trinidad and Tobago law governing its entry into force in that country.

More profound difficulties would arise in circumstances in which the exception to the rule of the *lex fori's* interpretation led to determination of domicile of the propositus under the laws of more than one country. For example, nothing in s. 86 (4) of the Barbados Succession Act 1975 pre-empts determination that the testator had domicile in more than one country. As a matter of fact and practice, conflicting claims as to the location of a person's domicile are commonplace, and would likely be the case if the testator died leaving movable property in several countries. Where the different jurisdictions adopt different perspectives for the definition of domicile, it must be theoretically possible that the forum could find the

propositus domiciled in more than one country, or, for that matter, in no country. Since this would violate the most fundamental principles of domicile it is obvious that the forum would strive to avoid such a result, although the means by which it may do this, are less so.[211]

NATIONALITY

Nationality[212] has been used since the foundation of Caribbean statehood to signify the political bond between the individual and the state for purposes of public international law. The state of nationality has legal standing to bring international actions on behalf of its citizens.[213] Recent legislation in matrimonial causes and succession have adopted nationality as a connecting factor for private international law, usually as an alternative to domicile. Nationality may also be important for taxation and other private law purposes. Where the propositus is a national of a federal state, problems could arise in determining which of that state's law districts should supply the governing law.[214]

There is relatively little authority on the meaning of nationality in the conflict of law sense and the presumption is that its definition for public international law purposes applies. In the latter context, international law leaves it to states not to turn themselves into claims agents by conferring their nationality on individuals who have no genuine link with them and who have sound connections with the state against whom the claim is made. This was the essential ruling of the International Court of Justice in the leading case of *Nottebohm,*[215] but the Court was careful not to suggest that the nationality of convenience was invalid for all purposes; merely that it could not be the basis for initiation of an international claim. In *M/V Saiga (St. Vincent and the Grenadines v Guinea), (No. 2)*[216] it was expressly decided that the lack of a genuine link between a state and the person to whom nationality was awarded did not of itself invalidate the grant of that nationality.

Rules governing the acquisition and loss of nationality are to be found, as would be expected, in the Constitutions. On this subject amendments to the constitutional provisions have become commonplace in the interest of ensuring gender equality. Thus, the Citizenship (Constitutional Amendment) Act[217] amended the Jamaican Constitution in 1999, and the Citizenship (Constitutional Amendment) Act[218] reformed the Barbados Constitution in 2000. The 1976 Republican Constitution of Trinidad

and Tobago was less gender biased and therefore not considered to be in need of immediate amendment.

Acquisition of Nationality

There are five bases for the acquisition of nationality or citizenship so widely accepted in the Caribbean as to justify generalised treatment. These are birth, descent, marriage, naturalisation, and adoption.

Birth. The *jus soli* principle is reflected in the rule that every person born in a Caribbean state becomes a citizen of that state.[219] If the person was born before independence citizenship is acquired at the date of independence; if born on or after independence, citizenship is acquired on the date of birth. Whether there are any circumstances in which persons born before independence, and who therefore were citizens of the United Kingdom and Colonies at birth, are legally entitled to assert British or Commonwealth citizenship has never been litigated.

A person is deemed to be born in the state if the birth is on a ship or aircraft registered in the state or belonging to the Government; or occurs where the mother is a citizen residing in a foreign country by reason of her employment in the diplomatic service. Whether or not the mother is a citizen, the child will be considered born within the state, if the mother is residing in the overseas country at the time of the birth because of her marriage to a citizen employed in the diplomatic service.[220] On the other hand, a child born in the state will not be considered a citizen if neither parent is a national and either of them possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power. Similarly, a child born in the state to a father or mother who is an enemy alien is not considered a citizen, 'if the birth occurs in a place then under occupation by the enemy.'[221]

Descent. A person born outside the state may nevertheless be a citizen of that state by reason of descent. Under the traditional law, citizenship by descent could only be transferred through the father. It was held in *Unity v Attorney General*[222] that a Citizenship Act that did not allow a woman, married to a non-national, to pass on her citizenship to her child, violated her fundamental right of protection from discrimination on the ground of sex, guaranteed under the Botswana Constitution. And it is therefore not beyond the realm of possibility that the contradiction in Caribbean Constitutions between the affirmation of the equal rights to all, whilst

discriminating against women on the question of the passing on of nationality to their children, could be resolved in the same manner.

In any event, recent progressive legislative reform allows mothers to transfer citizenship on an equal footing. The precise rules may vary however. Under the Jamaican statute,[223] the only requirement for acquisition of citizenship by descent is that one parent is a Jamaican citizen, whether by birth, descent, or marriage. Thus if a person is born to a Jamaican mother or father who acquired Jamaican citizenship by birth descent or marriage, that person becomes a citizen by descent. Further that person's grandchild born outside Jamaica is entitled to Jamaican citizenship by descent by virtue of his or her parent being a Jamaican citizen by descent. This entitlement will apply to succeeding lineal descendants.

By contrast, the laws of Barbados[224] and of Trinidad and Tobago[225] are to the effect that persons born outside those states become citizens if at the date of birth, either parent is, or was, but for that parent's death, a citizen, 'otherwise than by descent'. The latter limitation does not apply, however, if either parent is employed in the service of the Government or under authority of the Government that requires that person to reside outside the state in a diplomatic or consular capacity.[226]

Marriage. Nationality may be acquired by marriage. Under traditional law, a foreign female who married a Caribbean man was, upon making the appropriate application, automatically entitled to his nationality, but a foreign male who married a Caribbean woman did not enjoy a similar entitlement. He had to satisfy any time requirement for naturalisation in the normal way. *AG v Thomas D'Arcy Ryan*[227] confirmed that, while the Minister was compelled to give reasons for refusing such an application for citizenship, the actual decision was ultimately a matter of discretion for the Minister. This sexist approach is now being swept away in an increasing number of jurisdictions. In the language of the Jamaican statute,

> Any man or woman who … marries a person who is or becomes a citizen of Jamaica shall be entitled upon making application in such manner as may be prescribed… to be registered as a citizen of Jamaica.[228]

Caribbean jurisdictions are increasingly concerned about possible abuse of the rules granting citizenship upon marriage. This concern assumed serious proportions following a House of Lords decision that 'sham marriages', or 'marriages of convenience' entered for the sake of obtaining nationality were nevertheless to be regarded as valid marriages. [229] Legislation has therefore been enacted to address this situation. A person may be denied

registration if there is satisfactory evidence that the marriage was entered into primarily for the purpose of enabling that person to acquire citizenship; or if the parties to the marriage have not intention to live permanently with each other as spouses after the marriage.[230] The legislation is directed simply at denying citizenship to parties to a sham marriage; not the validity of the marriage itself. Sham marriages may not necessarily have been contracted for nefarious purposes; 'Auden married the daughter of the great German novelist, Thomas Mann, in order to facilitate her escape from persecution in Nazi Germany.'[231]

But even in respect of marriages with undesirable ulterior motives, public policy might dictate that their validity be upheld. In the leading case of *Vervaeke v Smith*[232] the appellant, who was of Belgium nationality and domicile, went through a ceremony of marriage at Paddington register office in 1954 with William George Smith, a British subject domiciled in England. Smith was down on his luck, out of work, and drinking. He was bribed to go through the ceremony by payment of £50 and a ticket to South Africa. The parties never intended to live together as man and wife, and they parted at the doors of the register office. The appellant's objective in going through the ceremony was to enable her to apply for British nationality and a British passport (in which she was successful) so that she could ply her trade as a prostitute in London without fear of being deported as an undesirable alien. The Court rejected her argument that the marriage was void because it was entered into for an ulterior purpose and not with any intention of cohabiting. Pubic policy required recognition of its validity. In the House, Lord Simon of Glaisdale quoted[233] with approval from Ormrod J who said the following:

> In one sense it was an unreal marriage in that it was never intended that the normal relationship of husband and wife should be established between Mr. Smith and herself. But this cannot affect *the question which I have to determine, namely, whether the marriage was, in law, a valid marriage*. Where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife.

Naturalisation. Citizenship may be acquired by naturalisation. Normally this requires residence and/or employment service in Government for a particular period of time.[234] Commonwealth citizens generally receive special treatment in this regard. The Barbadian in *Nicholls v Nicholls*[235]

renounced citizenship of Barbados and acquired Trinidad and Tobago nationality by naturalisation.

Adoption. The legal process of adoption establishes the relationship of parent and child between persons hitherto not so related. The relationship is established for all purposes, inclusive of the acquisition of citizenship through parental ties.

Loss of Nationality

Nationality may be lost by renunciation. As a rule, a person over 18 years of age, who is a citizen or national of another country or who intends to become so, may renounce his or her prior Caribbean citizenship. In order to avoid statelessness, the Caribbean nationality may be deemed to continue unless the person acquires another citizenship within 6 months of the renunciation.[236] The right to renounce citizenship is restricted in times of war. Some Caribbean states are empowered to deprive a person of citizenship if that person acquires another.[237] Whether upon renunciation a person born before independence reverts to his or her original status of being a citizen of the United Kingdom and Colonies, thus avoiding the deeming provision, has never been litigated.

Determination of Nationality

Unlike domicile, the general rule for determination of nationality is that reference is made to the law of the state of which it is alleged that the person is a national. This rule was applied by the House of Lords in *Oppenheimer v Cattermole*[238] to recognise German legislation that deprived a German Jew who had fled to England as a result of Nazi persecution, of his German nationality. Deprivation of his native nationality had occurred upon naturalisation in the United Kingdom, and his failure to apply for restoration of his German nationality.[239]

A finding that a person is a national of a federal state presents particular concerns for private international law. Only exceptionally can the federal law be regarded as governing law.[240] More usually, it becomes necessary to identify the particular country within the federal states whose laws are applicable. In these circumstances, the identification of the law applicable to the propositus becomes extremely challenging.

The unsatisfactory expedient that has been adopted is that the relevant law is that of the country within the federal or composite state to which the person 'belongs'. In *Re O'Keefe*,[241] a spinster died intestate and under

the relevant rules of private international law her estate fell to be distributed according to her national law. Her father had been born in 1835 in Ireland, but at age 22 had gone to India, and except for various stays in Europe, had lived there throughout his life and died in Calcutta in 1885. The intestate had been born in India in 1860 and lived at various places in England, France and Spain until 1890 when she settled down in Naples and resided there until her death 47 years later. Although her domicile of origin was in Southern Ireland (now Eire), she had only been there once, for a short visit in 1878. Since her birth Eire had left the British Commonwealth and had ceased to treat people in the testatrix's position as its citizens. She did, however, remain a British national.

It was held that succession to her estate was to be governed by the law of Eire. The national law meant the law of the country within the British Commonwealth to which she 'belonged' at her death, and Eire was the only such country to which she had ever 'belonged'. Whilst the facts in this case are clearly extreme, they do illustrate that locating the country to which a person belongs can be a challenging task.

RESIDENCE

Domicile as a connecting factor can lead to undesirable results, as evident in *Ramsay v Liverpool Royal Infirmary;*[242] or to fictitious decisions, as evident in cases recognising the doctrine of the revival of the domicile or origin,[243] and those affirming continuation of the existing domicile.[244] Similarly, nationality as a connecting factor can lead to bizarre results as demonstrated in *Re O'Keefe*.[245]

Dissatisfaction with domicile and nationality has caused recourse to residence as a more desirable connecting factor for the regulation of personal matters.[246] Increasingly the residence of the propositus is used to identify the legal system that regulates most of that person's rights and responsibilities earlier controlled exclusively by the domicile, and later shared with the country of nationality. Among the more obvious matters are a diverse range of issues to do with business, education, health, family, and nationality. These may all be governed by residence, but that governance is, more often than not, alternative to the laws of the country of domicile and of nationality.

It has been pointed out that it may be wrong to introduce a general substitution of residence (even as an alternative only) for, say, domicile.

Cheshire[247] gives the example of expatriates working abroad, in countries such as Saudi Arabia, under employment contracts, say of five years. Saudi law as the law of residence, may properly govern matters such as immigration, liability to taxation, and rights to social security. But their fundamental personal affairs, such as their capacity to enter a marriage, should probably be determined by the law of their domicile, not by the law of Saudi Arabia. This assumes that domicile better represents the 'home' of the propositus than does the country of residence; an assumption that is generally but clearly not invariably, true.

Ordinary Residence

Ordinary residence is not a term of art; although the meaning of the words is a question of fact, the meaning to be attributed to the concept is a question of law, being a creature of statutory enactment. The meaning could therefore vary according to the statutory context in which the term is used. A core idea, however, is that ordinary residence 'connotes residence in a place with some degree of continuity and apart from accidental or temporary absences'.[248] Another way of looking at this is to suggest that converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'.[249] Lord Scarman said in *Shah v Barnet London Borough Council*,[250] that he 'unhesitatingly subscribed to the view' that in its ordinary and natural meaning:

> 'ordinary residence' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of long or short duration.[251]

There are therefore, normally, the triple requirements of physical presence, voluntary residence and settled purpose. Physical presence means just that, although it has been suggested that that presence should have a sufficient degree of continuity to be properly described as settled. Four months residence has been argued as a kind of minimum,[252] and does not appear unreasonable by reference to the cases, although affirmation of any specific time requirement would clearly be an outstanding act of academic bravery. In *Re Eskine*[253] a single visit for five months was held not to amount to ordinary residence since the propositus remained a mere visitor without any strong business or family ties. Compare *IRC v Lysaght*[254] the taxpayer who spent three to three and a half months each year in England was held to be ordinarily resident there, albeit with some judicial reservations.[255]

Residence must be adopted voluntarily and not by virtue of external factors such as imprisonment or kidnapping. A person who has been arrested and given bail on condition of not leaving the country is not there voluntarily.[256] The law also requires a settled purpose. This is not to say that the propositus intends to stay indefinitely; there is no requirement akin to that in the law of domicile for it to be shown that the country of residence is the 'real home'.[257] The purpose may be and often is to stay for a limited time. Common reasons for acquisition of a new residence include obtaining an education, taking up an employment contract, living with family for a particular time; but may include others such as mere love of the country. In one case residence in England for eight months for purposes of litigation amounted to ordinary residence.[258]

It follows from these criteria that a person may be ordinarily resident in more than one country at the same time. Thus in *Re Norris*[259] a debtor against whom a bankruptcy notice had been served in respect of a judgment debt of £1,000 resisted the notice on the ground that he was not, as required by the Bankruptcy Act 1883, domiciled or ordinarily resident in England. It appeared that the debtor, who was a financial agent, was an American citizen, and his wife and family resided in Brussels. In 1886 he took a room at the Hotel Metropole, Charring-cross, London, which he kept regularly and from which he addressed various business letters. Admittedly, he was not domiciled in England, but it was decided that he was ordinarily resident there because he regarded the hotel as his 'lodgings'. As the Lord Chancellor pointed out, however, the debtor's ordinary place of residence for general purposes probably continued to be Belgium. Some federal states may create a federal residence for particular purposes but retain 'provincial' residences for other purposes.[260]

Another clear implication of the definition of residence is that temporary absence will not, by itself, terminate ordinary residence. Thus in *Shah* Lord Scarman was forceful in stating that 'temporary or occasional absences of long or short duration'[261] would not bring ordinary residence to an end, unless of course, the absence was pursuant to an intention to reside permanently elsewhere. However, prolonged absence will terminate ordinary residence, even though an intention is retained to return to the country of residence. So in *R v Lancashire CC, ex p. Huddleston*[262] the propositus left England to work in Hong Kong always intending to return to England. After 13 years abroad it was held that he was not ordinarily resident in England, even though he had taken annual regular leave in England.

Caribbean case law on ordinary residence has frequently discussed the concept in the context of immigration. It has been held, repeatedly, that a person may be ordinarily resident notwithstanding that his or her stay depends on permissions or conditions, that an entrance permit is revocable by the authorities, or that the residence was not continuous or lawful for the entire period. In *Seymour v Chief Immigration Officer*[263] the appellant, a citizen of the United Kingdom, entered Barbados in 1964 to take up a managerial position in the hotel industry. On arrival, and on several occasions thereafter, his passport was stamped to permit him to remain for varying periods on business or visit. Some nine years later, on January 25, 1973 he was served with a notice in accordance with s. 23 of the Immigration Act, 1952 declaring him to be a prohibited immigrant on account of his failure to leave the Island on or before the expiration of his permit on July 15, 1972. He appealed, unsuccessfully, to the Magistrates' Court. On appeal to the Supreme Court it was held that as the appellant had not been dealt with as a prohibited person during the seven years subsequent to his arrival in the island he came within the scope of s. 5 (3) of the Immigration Act 1952 which protected Commonwealth citizens who had been ordinarily resident in the Island continuously for a period of seven years or more and could not therefore now be treated as a prohibited person.

In *Re James McDonald (No. 2)*[264] one issue was whether illegal presence *ab initio* would defeat a claim of residence. The lower courts denied the propositus' application that he was a person of Caymanian status as of right. Having found no evidence of the applicant having arrived lawfully in the Islands and, in the absence of an explanation from the applicant (who was an attorney-at-law) the court assumed that he had entered clandestinely or in breach of the immigration laws. Although his stay may have been long enough to make him immune from prosecution and deportation for the offence it nevertheless meant that his presence was in breach of the immigration laws and he could not therefore be treated as being 'ordinarily resident in the Cayman Islands'. The Court of Appeal by majority found the applicant to have fulfilled the ordinary residence requirement, albeit, apparently on the narrow ground that illegal residence had not been established.

Habitual Residence

Habitual residence has been made fashionable by the Hague conference in Private International Law and appears in many Hague Conventions. The

term has not been defined in the conventions and there is some doubt whether it has a meaning different from ordinary residence. Lord Scarman in *Shah* held that there was no difference in principle between the two concepts[265] and at the very least it is widely agreed that they share 'a common core of meaning'.[266] Certainly, habitual residence could be nuanced as requiring a particular quality of ordinary residence. Habitual residence connotes that the person has taken up residence and lived in the relevant country for a period of time that shows that the residence has become habitual. Sir Christopher Staughton put it rather graphically in *Nessa v Adjudication Officer*:[267]

> Left to myself and guided only by the ordinary English meaning of words, I would say that a person is not habitually resident here on the day when she arrives, even if she takes up residence voluntarily and for settled purposes. 'Habitually', to my mind, describes residence which has already achieved a degree of continuity. I can illustrate that by this imaginary conversation: *Q*. Do you habitually go to church on Sunday? *A*. Yes, I went for the first time yesterday. That does not make sense to me.[268]

The determination of habitual residence remains a question of fact dependent upon the surrounding circumstances. In the case of a child, the habitual residence will be that of the parents; if they do not live together, the child's habitual residence will be that of whichever parent has custody. In order to negate any advantage that might otherwise accrue from international conventions on custody of children, the courts have held that a child's habitual residence cannot be changed merely by the unilateral act of one of the parents.[269] This matter has become increasingly important in the context of international child abduction.

CORPORATE CONNECTING FACTORS

As with a natural person, it may become necessary for the law to locate a connection between a corporation (or a company)[270] and some system of law by reference to which a number of its legal rights and responsibilities are regulated. The place of incorporation has an obvious resonance with the corporate entity. Connecting factors for natural persons are used in the context of corporations but can only be applied with feelings of incongruity and artificiality. Still, gallant efforts have been made to create an analogy between the lives of natural and artificial persons. In the words of Morris: 'A corporation is not born (though it is incorporated); it cannot marry (though it can be amalgamated with or taken over by another corporation);

it cannot have children (though it can have subsidiaries); it does not die (though it can be dissolved or wound up).'[271] In this way, the laws of the domicile, nationality and residence have all assumed a significant, if unequal, influence in governance of different aspects of the affairs of the corporation.

Place of Incorporation

In Caribbean private international law, the basic rule is that the law of the place of incorporation governs the affairs of the corporation. Use of other connecting factors, such as domicile, residence or nationality, is supplementary. Moreover, they are generally identified with, or are exceptions to, the place of incorporation.

The decision of the High Court of Barbados in *The Sanitary Laundry Company Limited v Heal*[272] expressly adopted the rule in Dicey & Morris, that the law of the place of incorporation governed all matters concerning the constitution of a corporation. A dispute had emerged among the parties as to the true officers of a company incorporated in Panama. The Court decided, first, that proceedings in the Canadian courts in respect of ownership of shares in the company did not 'have much relevance' not least of all because those proceedings gave no consideration to the by-law regulating voting in so far as it related to the shares. There was no attempt to construe the by-law relating to voting of officers as permitted under the law of Panama.

By contrast, the Barbados Court gave precedence to the strictures of the law of the place of incorporation. Elections and appointments of officers had been made under a Panama court order, and these could not 'be treated casually'. On the facts they were allowed to determine the issues, since it was inconceivable that the law of Panama would recognise as officers of the company, persons other than those appointed pursuant to the order of the Panamanian Court. More generally, the Court adopted, as its own best approach the fact that:

> English courts are reluctant to intervene in domestic issues between members of a foreign corporation. In particular they will not seek to control the exercise of discretionary powers which are given to officers of a foreign corporation by its constitution. The reluctance of the courts to intervene is perhaps responsible for the dearth of authority on the subject… but nonetheless it is submitted that the Rule is soundly based in that reference to any other legal system would be absurd. The place of incorporation determines who are the corporation's officers authorised to act on its behalf.[273]

A similar finding was made in the Bahamian case of *Bacardi Corporation v San Salvador Trading Company Limited.*[274] The Court refused to grant declarations concerning the permissibility of actions of shareholders a local company in attempting to frustrate the reverse stock split of a Delaware company in which the local company owned shares. This was because the local suit concerned issues of interpretation of the memorandum of association of the local company, which would have to be decided by applicable Bahamian law. The suit in Delaware concerned the permissibility of the reverse split and this would have to be decided in accordance with Delaware law. The suit in Delaware should proceed, and proof of Bahamian law offered there through expert witnesses in the usual way.

Domicile

Common law and legislation often refer governance of many of the affairs of a corporation to the law of its domicile. That law has been held to govern such fundamental questions as the status and attributes of legal personality of the corporation.[275] Specifically, questions relating to the constitution of the company;[276] whether it has properly been dissolved;[277] whether it can get leave to alter its memorandum or its share capital;[278] its powers and those of persons serving as its organs or officers;[279] are all governed by the domicile. Similarly, the rights and obligations of shareholders as set out in the constitution[280] have been determined by this system of law.

A striking illustration of the influence of the domicile in respect of the existence or non-existence of a corporation is provided by the case of *Lazard Brothers & Co. v Midland Bank, Ltd.*[281] In garnishee proceedings between two English banks, an English court was asked to determine the effect of certain Soviet decrees on the Banque Industrielle de Moscow, a Russian Bank. The Russian Bank was indebted to the appellants in large sums but was, at the same time, also a creditor of the respondents in sums exceeding its debt to the appellants. Both debts were English debts, payable in England and governed by English law. The Russian bank was, however, a corporation incorporated and carrying on business in Russia, and the Soviet decree issued at the Bolshevist Revolution in 1917 purported to dissolve the Bank. It was held that the Bank had thereby ceased to exist with the result that the judgment in default of appearance obtained against it in 1930 and the resultant garnishee order against the respondent bank were null and void and had to be set aside. English courts had long since recognised that

corporations, as juristic persons, are created and therefore could be destroyed by the law of their domicile.

In determining the corporation's domicile, the law has had to contend with the fact that the law of domicile was originally designed to apply to individuals and was fully developed before the notion of a separate legal personality of a company was established.[282] Nevertheless the domicile of corporations has been determined by analogy with the domicile of individuals. As with the individual, the corporation has a domicile of origin. This is unquestionably the country in which it was incorporated, that is, born. After birth, however, the analogy breaks down. Unlike its construction of the rules affecting the individual, the law takes the view that the domicile of the corporation cannot be changed.

In *Gasque v Commissioners of Inland Revenue*[283] the core question concerned the residence or domicile of a limited liability company. The company had been incorporated in Guernsey in 1920 and in 1936 the appellant had acquired the beneficial interest in all the issued shares. A resident of Guernsey and a resident of the United Kingdom were appointed directors. Meetings of directors were initially held in Guernsey but from 1936 were generally held in London, and the main business of the Company conducted from that location. It was held that the Company had retained its domicile of birth in Guernsey. MacNaghten J said the following:

> It is quite true that a body corporate cannot have a domicile in the same sense as an individual any more than it can have a residence in the same way as an individual. But by analogy with a natural person the attributes of residence, domicile and nationality can be given, and are, I think, given by the law of England to a body corporate. It is not disputed that a Company formed under the Companies Acts, has British nationality, though unlike a natural person, it cannot change its nationality. So, too, I think, such as company has a domicile - an English domicile if registered in England, and a Scottish domicile if registered in Scotland. The domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence.[284]

The reason given for the indelibility of the domicile of origin is the allegation that the corporation is unable to form an intention to change its domicile. Exercise of volition by the individual cannot be equated with decisions concerning the country with or in which to carry on business, since such decisions are ultimately subordinate to the articles of association agreed at the time (and place) of incorporation. However, if the articles empower the officers to transfer the seat of the corporation to a different country (assuming this power is consistent with the law of the place of

incorporation) interesting questions could arise concerning whether the exercise of that power may not amount to a change of domiciles. At all events, it is probably the case that the law of domicile may, if the internal rules of the corporation allow, refer a particular issue to the law of another country. This possibility was openly acknowledged in *Zeiss Stiftung v Rayner & Keeler (No. 3),*[285] although it was said to exist only 'theoretically'.

Prohibition of multiple domiciles is another area in which the analogy with the domicile of the individual holds. In the old case of *Carron Iron Co. v Maclaren*[286] the judge did speak of a foreign corporation having two domiciles. However this was repudiated by Farwell LJ in the case of *Saccharin Corporation Ltd. v Chemische Fabrik von Heyden Aktiengesellschaft*[287] who regarded the earlier remark as 'unfortunate'. The Judge restated the rule that it was not possible for the corporation to have more than one domicile.

Nationality

In peacetime, the nationality of a corporation will seldom be relevant to a question in Caribbean private international law. However, in time of war, nationality may become important in order to identify an enemy alien. It is widely agreed that the test for nationality is the country of incorporation. So, in *Janson v Driefontein Consolidated Mines Ltd.*,[288] a company registered under the law of the South African Republic was considered an enemy alien at the outbreak of war between that country and the United Kingdom. It did not matter that the company had a London office and that the bulk of its shareholders were of European nationality and were subjects of the United Kingdom. Indeed, even 'If all of its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien.'[289]

Residence

The residence of a corporation is of primary importance in the field of taxation. Subject to any special rules regarding double taxation agreements, and to concessions granted in order to attract foreign investment, a corporation is liable to be taxed in the Caribbean jurisdiction in which it is resident. The residence of a corporation may also be of significance in relation to recognition and enforcement of judgments made against it.[290]

For purposes of residence, Caribbean law differentiates between a company incorporated locally, and one incorporated in a foreign country. A company incorporated locally will be considered resident in the forum by virtue of the fact of incorporation. It does not matter that the centre of

control of the company is someplace else, or that its transactions of business takes place primarily in another country. Legislation designed to encourage the development of Caribbean jurisdictions as responsible international financial centres and to provide fiscal and other incentives to this end expressly provide that an international business company is deemed resident in the jurisdiction if it is incorporated there or registered there. It does not matter where the control and management of its business is.[291]

A company incorporated in a foreign country is resident in the country where it is 'managed and controlled'[292] or in the modern vernacular, where the 'centre of its control' is located. It follows that a foreign company may be resident in a Caribbean jurisdiction but a Caribbean company cannot be resident in a foreign country, again subject to any specific legislative exceptions.

Ascertaining the place where control resides is an evidentiary matter that turns upon the location of the directing mind of the corporation. The leading case to equate residence with centre of control is *Cesena Sulphur Co. v Nicholson.*[293] A sulphur manufacturing company had been incorporated in England under the Companies Acts 1862 and 1867 (before adoption of legislation introducing the residence rule to companies incorporated locally). The Company's objective was to take over and work sulphur mines at Cesena in Italy. All the mining operations were conducted in Italy, and none of the products were ever sent to England. The books of accounts were kept in Italy and the Company was registered there as a foreign company. However the memorandum of association provided that the board of directors should meet in London. The shareholders' meetings took place in London, and that was the place where decisions on dividends were made. It was held that the Company should be assessed for income tax on the basis that it 'resided' in England. This was because England was the 'central point' where the governing body met and controlled the management of the business.

The test of control was expressly reaffirmed in the House of Lords decision in *De Beers Consolidated Mines Ltd. v Howe.*[294] A company was incorporated in South Africa where it made the whole of its profits from the mining of diamonds. The Company had a board of directors in South Africa. That board handled matters of day-to-day administration. Another board met in London where the majority of directors and life governors lived, and it was at these meetings that major policy decisions were taken affecting the company's affairs. It was decided that the Company resided

in England and its profits, although arising entirely from activities in South Africa, were liable to English Income Tax. Lord Loreburn, the Lord Chancellor, said:

> In applying the conception of residence to a company we ought, I think, to proceed as nearly as we can upon the analogy of an individual. A company cannot eat or sleep, but it can keep house and do business. We ought, therefore to see where it really keeps house and does business. An individual may be of foreign nationality, and yet reside in the United Kingdom. So may a company. Otherwise it might have its chief seat of management and its centre of trading in England under the protection of English law and yet escape appropriate taxation by the simple expedient of being registered abroad and distributing its dividends abroad.[295]

By way of contrast, *Egyptian Delta Land and Investment Co. Ltd. v Todd*[296] dealt with a Company incorporated in England (before adoption of legislation introducing the residence rule to companies incorporated locally), that maintained the barest connection with England necessary to satisfy the requirements under the Companies Act 1908. It employed an individual who carried on the business of secretary of public companies, to keep the necessary documents and to post the name of the company on his door. In all other respects the business was conducted and controlled in Egypt. Delivering the leading judgment, Viscount Sumner decided that the Company was resident in Egypt and not in England.

Viscount Sumner refused to dissent from the earlier decision in *Swedish Central Ry. Co. v Thompson*[297] that a Company could have two residences. His Lordship did, however, distinguish the two cases on the ground that the business done in London in the *Swedish Central* case was not much less important than that done in Sweden, hence justifying a finding of residence in both countries. By contrast, virtually no business at all was done in England in *Egyptian Delta*, thus negating any possibility of an English residence in addition to the Egyptian residence. It has been noted that this way of reconciling the two cases is a virtual repudiation of the principle of central control,[298] and it must be admitted that the idea of two residences is, as a matter of language at least, incongruous with the notion of *central* control.

However, it has to be borne in mind that the intensity of business transactions only becomes relevant to defining residence in the exceptional circumstances where 'central management and control of a company' is more or less divided equally between the countries concerned. In these instances the company may be said to 'keep house and do business' in more than one place.[299]

NOTES

1. *Supra*, Chap 1.
2. At common law 'nationality' is decided in terms of the laws of the state of which it is alleged that the propositus is a national.
3. See Winston Anderson, 'The Non-Marriage Union in Private International Law', (1996) 6 *Carib. L. R.* 366.
4. P. Stone, *The Conflict of Laws*, (Longman Law Series, 1995), at 9.
5. *Ibid*., at 12.
6. In *Whicker v Hume* (1858) 7 HLC 124 at 160, Lord Cranworth stated:

   > By domicile we mean home, the permanent home and if you do not understand your permanent home, I'm afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it.

7. Domicile Reform Act 1980, (Cap. 213) (Barbados); Domicile Reform Act 1988, (Act No. 8 of 1988), Guyana; The Domicile Act 1989 (1989-35), (St. Vincent and the Grenadines); Family Law (Guardianship of Minors, Domicile, and Maintenance) Act 1981 (15/1981), (Trinidad and Tobago).
8. Matrimonial Causes Act 1989 (Act 2 of 1989), (Jamaica), s. 34; Matrimonial Causes Act 1983, (Ch. 111) (Bahamas), s. 42.
9. Namely Anguilla, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands: see Norma Forde, *Women and the Law*, (1981, ISER), at 90.
10. Lord Westbury in *Bell v Kennedy* (1868) LR 1 Sc. & Div 307 at 320.
11. *Hinds v Hinds* (1960) 2 WIR 284.
12. (1869) LR 1 Sc & Div 441.
13. [1866-1904] *Windward Islands Court of Appeal Reports*, 148.
14. [1922] *Reports of Decisions in the Supreme Court of British Guiana*, 54.
15. (1869) LR 1 Sc & Div 441 at 457; *Bell v Kennedy* (1868) LR 1 Sc & Div 307 at 320.
16. *Ibid*., at 448; *Garthwaite v Garthwaite* [1964] P. 356 at 378-379, 393-394. The latter case held that a *de facto* domicile cannot be acquired independent of a *de jure* domicile; indeed, a '*de facto* domicile' is a contradiction in terms, since domicile is acquired by operation of law. (*Id*., at 378).
17. For example, s. 39 (3) (b) of the Family Law Act 1975 (No. 53 of 1975), of the Commonwealth of Australia, allows for the institution of applications for a decree of dissolution of a marriage if either party to the marriage 'is domiciled in Australia'. The effect is to create an Australian domicile for the purposes of this provision, and this domicile is distinct and separate from the 'state' domicile that continues to exist for other purposes, such as succession, for example.

18. As was illustrated in *Belle v Belle*, (1987) 22 Barb. LR 46, divorce remains a 'state' issue in the United States.

19. Scarman J in *In The Estate of Fuld (No. 3)* [1968] P. 675, at 685-686.

20. [1967] P. 77 at 80.

21. Unreported, No. 609A of 1991, dated June 11, 1993 (High Court of Trinidad and Tobago).

22. *Ibid.*, at 11 per Sealey J. See also, *Westerhold v Westerhold*, Unreported, No. 1 of 1982, dated March 5, 1982, (Court of Appeal of Belize).

23. A notable exception is to be found in s. 86 (4) of the Succession Act (Cap. 249), (Barbados), which provides that in respect of questions concerning the formal validity of testamentary dispositions, 'The determination of whether or not the testator had his domicile in a particular place shall be governed by the law of that place.'

24. *The 'T.S. Havprins'* (1983) Vol. 2 QB (Com. Court) 356 at 358.

25. *Re Annesley* [1926] 1 Ch 692 at 703-706.

26. J.D. McClean, *Morris: The Conflict of Laws*, (5th edn., 2000), at 27; but see Winston Anderson, 'Double *Renvoi* and the *Circulus Inextricabilis*,*Commonwealth Caribbean Legal Studies*, (Butterworths, 1992), at 313-332.

27. *Re De Veaux* (1967) 11 WIR 365; *Re James McDonald* (1975) 13 JLR 12.

28. See *Citeria v Citeria* [1967] *Law Reports of Guyana* 170 at 175-176; *Mohabir v Bismill & Anr* [1922] *Reports of Decisions in the Supreme Court of British Guiana*, 54 at 55. Whether these three categories continue to apply under the most sweeping of the legislation on the subject is a matter for conjecture.

29. (1869) LR 1 SC & Div 441.

30. Where at the date of birth, the relevant parent was domiciled in Scotland but by the time of the child's majority was domiciled in England it was held that the child's domicile of origin was Scotland, whereas its domicile of dependency was England: *Henderson v Henderson* [1967] P. 77.

31. Per the West Indian Court of Appeal on appeal from the Supreme Court of Trinidad and Tobago in *Gordon v Gordon*, Unreported, No. 4 of 1946, Trinidad and Tobago, 180, at 181.

32. *Lambert v Lambert,* Unreported , No. 119 of 1973:

> The Petitioner was born in Haiti approximately 70 years ago. There is nothing to show what the domicile of the Petitioner's father was or had been; but this case has been argued on the assumption that the child's domicile of origin was Haitian and I accordingly believe this case can be decided on that basis.

Similarly in *Nicholls v Nicholls,* Unreported, Supreme Court, Trinidad and Tobago, No. M111 of 1979, dated October 6, 1978, (at 3):

> Strictly a man's domicile of origin is the place where his parents were domiciled at the time of his birth. In the absence of direct evidence, I would hold that the Petitioner having been born in Barbados that place was his domicile of origin.

Also, *Martin v Williams,* Unreported Judgment of High Court of Trinidad and Tobago, No. 784 of 1983, dated January 18, 1983 (at 3):

> There is a presumption that any person who was born, lived, worked and died here was domiciled in the country and since there is no evidence to rebut that presumption I was of the view that the deceased was at her death domiciled in this Country.

Finally, Williams CJ said in*Belle v Belle,* (1987) Vol. 22 Barb. LR 46 at 49:

> On the evidence [of the parties birth and upbringing in Barbados] I have to proceed on the basis that Barbados was the domicile of origin of both the applicant and the respondent.

33. Sir James Hannen P in *Firebrace v Firebrace* (1878) 4 PD 63 at 66. Barbados is not synonymous with the West Indies and there is no West Indian legal system for the purposes of private international law.
34. The United Nations Universal Declaration of Human Rights, 1948 (GA Resolution 217A (III), reproduced in D.J Harris, *Harris: Cases and Materials on International Law,* (Sweet & Maxwell, 1998), at 631-636; The Convention on the Rights of the Child, 1989, (1989) 28 *ILM* 1448.
35. No. 36 of 1976, s. 3. 1979-32.
36. 1979-32.
37. *Ibid.*, s 3.
38. Status of Children Act 1986 (Cap. 414).
39. Families and Children Act 1998 (17/1998).
40. Children Born Out of Wedlock (Removal of Discrimination) Act 1983 (No 12 of 1983). See also s. 30 of the Constitution of Guyana (No. 2 of 1980) which provides,

    > Children born out of wedlock are entitled to the same legal rights and legal status as are enjoyed by children born in wedlock. All forms of discrimination against children on the basis of their being born out of wedlock are illegal.

41. Status of Children Act 1983 (Act No. 19 of 1983).
42. Status of Children Act 1980 (Cap. 180).
43. Status of Children Act 1981 (Chap. 46:07).
44. Such as Barbados, Guyana, and Trinidad and Tobago.
45. Such as Antigua and Barbuda, Belize, St. Kitts and Nevis, St. Vincent and the Grenadines.
46. *Re James* (1908) 98 LT 438.
47. (1865) 4 De GJ & Sm 616.
48. (1868) LR 1 Sc & Div 307, 5 SLR 566.
49. [1930] AC 588.
50. [1968] P 675.
51. (1931-1937) LRBG 186; followed in *Spratt v Spratt* [1943] LRBG, 280.

52. (1966) 11 WIR 10.

53. *Ibid*., at 15.

54. [1967] Law Reports of Guyana, 170 at 181. Compare the sentiments expressed by Seaton J in *Lambert v Lambert* (Unreported, Supreme Court of Bermuda, No. 119 of 1973; dated August 9, 1974. He rejected the allegation that the propositus had abandoned his American domicile for a domicile in Bermuda:

> Whereas the proximity between these Islands and the United States mainland, the similarity of language, the absence of any but minimal immigration formalities, the excellent communications and close commercial ties may combine to attenuate the sense of alienation which a citizen of these Islands might ordinarily feel on living in a foreign country. For the petitioner the advantage of living in the United States is the respite he gains from emotional troubles. The accompanying peace of mind and better mental and physical health appear to him at the present time to more worthwhile than what these Isles of Rest can offer. I am not satisfied that those who assert a change of domicile have taken place have proved it.

55. [1866-1904] *Windward Islands Court of Appeal Reports*, 148.

56. [1922] Reports of Decisions in the Supreme Court of British Guiana, 54. To similar effect see *Branker v Branker* [1942] *R*eports of Decisions in the Supreme Court of British Guiana and in the West Indian Court of Appeal 365 (abandonment of domicile of origin in Barbados and acquisition of a domicile of choice in Guyana, then British Guiana.

57. (1961) 4 WIR 51.

58. (1869) LR 1 Sc & Div 441.

59. [1973] 3 All ER 1105; [1974] 1 WLR 213.

60. 182 NW 227, 192 Iowa 78 (1921).

61. See e.g., the position in Barbados, Guyana, and Trinidad and Tobago, as discussed in relation to statutory reform, *infra*.

62. [1967] *Law Reports of Guyana*, 170 at 176.

63. [1967] LRG 170 at 176.

64. *Per* Lord Denning MR in *Gray v Formosa* [1963] P 259 at 267.

65. [1921] 1 AC 146.

66. [1926] AC 444.

67. (1960) 11 WIR 10.

68. [1957] 1 Ch. 107. To similar effect see *Re Cooke's Trusts* (1887) Vol. LVI LT 737.

69. Presumably the same general rule would apply to cases of divorce, although it would be more difficult here for the wife to remain ignorant of the termination of the marriage.

70. (1950) 66 TLR (Pt. 1) 132; [1950] 1 All ER 199.

71. Reference is here being made particularly to the legislative provisions in The Bahamas (Matrimonial Causes Act 1983, (Ch. 111) s. 42) and Jamaica (Matrimonial Causes Act 1989 (Act 2 of 1989), (Jamaica), s. 34) that abolish the wife's domicile of

dependency but only for the purposes of the particular legislation dealing with certain matrimonial causes.

72. [1967] *Law Reports of Guyana*, 170 at 176.
73. [1968] NI 1.
74. *Ibid.*, at 5.
75. [1965] SLT 330.
76. *Infra,* this point is discussed below.
77. [1863] 3 Ch. 490; 62 LJ Ch 923; 37 Sol. Jo. 731.
78. (1918) SC 378.
79. (1933-39) Vol. 7 *Trinidad and Tobago Law Reports*, 32.
80. *Ibid.,* at 33:

> there is no evidence as to the domicile of origin of Mr. Bermudez, who apparently stood for many years to the respondent in *loco parentis* ... I do not think this is of much importance, as I should shrink from deciding that he had at any time the power to change the domicile of origin of the respondent ... The question then is, has the respondent since he attained majority exercised a domicile of choice with respect to Trinidad?).

81. *Harrison v Harrison* [1953] 1 WLR 865, [1953] Vol. 97 Sol. Jo. 456; *Henderson v Henderson* [1967] P. 77.
82. See e.g., Age of Majority Act (Chap. 46:06), Trinidad and Tobago, sect. 2, Minors Act 1974 (1974-18), (Barbados), s. 3 [now consolidated in the Minors Act (Chap 215)].
83. See e.g., Domicile Reform Act 1989 (Act No 35 of 1989), (St. Vincent and the Grenadines), s. 3 specifies 16 years as the age at which an independent domicile might be obtained. This repeats the English position legislated in the Domicile and Matrimonial Proceedings Act 1973 (6 Statutes 210, 27 Statutes 585, 27 Statutes 802), s. 3 (1).
84. *Sharpe v Crispin* (1869) LR 1 P&D 611; 20 LT 41.
85. *Ibid*.
86. *Cheshire and North's Private International Law* (13th edn. by PM North and JJ Fawcett, 1999), at 157.
87. [1922] *Reports of Decisions in the Supreme Court of British Guiana*, 54 at 55.
88. *White v Tennant* [1888] 31 W.Va. 790; 8 SE 590.
89. *IRC v Duchess of Portland* [1982] Ch 314; [1982] 1 All ER 784.
90. *Jopp v Wood* (1865) 4 De GJ & SM 616; 34 LJ Ch 212.
91. *Ramsey v Liverpool Royal Infirmary* [1930] AC 588.
92. [1988] 1 WLR 292.
93. (1992) 44 WIR 173.
94. *Ibid.* at 176.

95. [1947] Reports of Decisions in the Supreme Court of British Guiana and in the West Indian Court of Appeal, 180.

96. [1988] 1 WLR 292. This case both holds and interprets *IRC v Duchess of Portland* [1982] Ch. 314 as holding that in cases of multiple residences, it must be established that the propositus had his 'chief' residence in the country where he is alleged to be domiciled.

97. See e.g., *Halsbury's Laws of England*, (4th edn.) Vol. 8, para 482; Dicey and Morris, *The Conflict of Laws*, (10th edn.), at 112.

98. *Smith v Smith* (1962) 2 SA 930.

99. See e.g., *Rayden on Divorce* (14th edn. 1985), at 62; *Solomon v Solomon* (1912) WN (NSW) 68. Certainly, the mere issuance of a deportation order does not of itself terminates a domicile there: *Cruh v Cruh* [1945] 2 All ER 545.

100. Pilkington, 'Illegal Residence and the Acquisition of a domicile of Choice'(1984) Vol. 33 *ICLQ* 885 at 911.

101. (1869) LR 1 Sc. & Div 441 at 458.

102. [1947] Reports of Decisions in the Supreme Court of British Guiana and in the West Indian Court of Appeal, 180 at 181.

103. [1965] P. 675 at 684-85.

104. *Ibid.*

105. [1980] 3 All ER 838.

106. *Ramsey v Liverpool Royal Infirmary* [1930] AC 588; *Winans v AG* (1901) 65 JP 819; 85 LT 508.

107. (1878) 9 Ch D 441; 26 WR 825.

108. *Re Furse* [1980] 3 All ER 838 at 846.

109. [1976] 3 All ER 353; [1976] 1 WLR 1178.

110. [1968] P 675; [1965] 3 All ER 776.

111. [1968] P 675 at 685.

112. [1980] 3 All ER 838 at 846 per Fox J who went on to say: 'That was substantially the same as Buckley LJ's example of the man who says he will leave "when I've had enough of it.'" *Id.*

113. [1987] 1 FLR 116.

114. *Re Jones Estates* 182 NW 227, 192 Iowa 78 (1921).

115. *Re De Veaux* (1967) 11 WIR 365.

116. *Pierson v Pierson* [1965-70] 2 *Law Reports of Bahamas* 542.

117. *Re De Veaux* (1967) 11 WIR 365.

118. *Nicholls v Nicholls* Unreported, No. M111 of 1979, dated October 6, 1978 (Supreme Court of Trinidad and Tobago).

119. [1945] 2 All ER 545. See also *May v May* [1943] All ER 146.

120. (1975) 13 JLR 12.
121. *Ibid*.
122. 182 NW 227, 192 Iowa 78 (1921).
123. No. M111 of 1979; In the High Court of Trinidad and Tobago.
124. *Ibid*., at 5.
125. [1976] 1 WLR 1178.
126. [1968] P 675.
127. *Udny v Udny* (1869) LR 1 Sc & Div 441.
128. *Re De Veaux* (1967) 11 WIR 365.
129. *Firebrace v Firebrace* (1876) 4 PD 63.
130. *Drexel v Drexel* [1916] 1 Ch. 251.
131. *Cf. Unwin v Unwin* [(1967) 11 WIR 10.
132. *Hawkes v Hawkes* [1996] CILR 317.
133. (1908) 98 LT 438.
134. Unreported, No. 609A of 1991, dated June 11, 1993 (High Court of Trinidad and Tobago).
135. (1856) 25 LJ Ch 689.
136. See *Cruickshanks v Cruickshanks* [1957] 1 All ER 889 (a Scottish soldier posted to England did not acquire an English domicile). Compare *Donaldson v Donaldson* [1949] P 363, (a British soldier posted to Florida acquired a domicile of choice there because of his intention, formed independently of being there on duty, to remain permanently in Florida).
137. [1866-1904] *Windward Islands Court of Appeal Reports*, 148.
138. (1943) *Law Reports of British Guiana*, 282.
139. [1988] 1 All ER 97.
140. (1966) 11 WIR 10.
141. *Buswell v IRC* [1974] 2 All ER 520. (The taxpayer answered 'Yes' to question 'Do you propose to remain permanently in the United Kingdom?' the question was not intended to ascertain his domicile but rather his entitlement to certain income tax allowances which depended upon residence in the UK. Subsequently he expressed his intention to return to South Africa, his domicile of origin. Held he had retained his domicile of origin).
142. (1967) 11 WIR 365.
143. Compare the statement of Fox J in *Re Furse* [1980] 3 All ER 838 at 844-45 that the propositus 'appears to have been aware of the doctrine of domicile in relationship to revenue matters, but what if anything, he knew in 1913 is a matter on which I have no evidence.'
144. [1968] 1 All ER 49, [1968] 1 WLR 103.

145. (1885) 29 Ch D 617.

146. [1947] 1 Ch 695.

147. (1863) 164 ER 1190; 3 Sw. & Tr. 49.

148. (1948) WN 381; 92 Sol Jo 646; 64 TLR 556.

149. Unreported, Supreme Court, Trinidad and Tobago, No. M111 of 1979, dated October 6, 1978.

150. [1968] 1 All ER 49 at 57.

151. *Ibid.* Megarry J quoted from *Re Marrett, Chalmers v Wingfield* where Cotton LJ said that '…. In order to loose the domicile of choice once acquired, it is not only necessary that a man should be dissatisfied with his domicile of choice, and form an intention to leave it, but he must have left it, with the intention of leaving it permanently.'

152. *Ibid*., at 58.

153. See P.B Carter, 'Domicile: The Case for Radical Reform in the United Kingdom' (1987) 36 *ICLQ* 713.

154. Domicile Reform Act 1980 (Cap. 213).

155. Domicile Reform Act 1988 (Act No. 8 of 1988).

156. Family Law (Guardianship of Minors, Domicile, and Maintenance) Act, 1981 (15/1981).

157. The Domicile Act 1989 (1989-35).

158. Domicile and Matrimonial Proceedings Act 1973 (6 Statutes 210, 27 Statutes 585, 27 Statutes 802).

159. Matrimonial Causes Act 1983, (Ch. 111) (Bahamas), s. 42.

160. Matrimonial Causes Act 1989 (Act 2 of 1989), (Jamaica), s. 34.

161. See e.g., s. 10 (Barbados); s. 9 (Guyana); s. 42 (Trinidad & Tobago). Note that there is no abolition of the doctrine of the revival of the domicile of origin in St. Vincent and the Grenadines. Note also that the domicile of origin may revive upon the abandonment of a domicile of dependency: *Harrison v Harrison* [1953] 1 WLR 865, a point seemingly lost on the draftsman.

162. (1869) LR 1 Sc & Div 441.

163. 182 NW 227, 192 Iowa 78 (1921).

164. See Winston Anderson, 'Double *Renvoi* and the *Circulus Inextricabilis*', *Commonwealth Caribbean Legal Studies*, (1992, Butterworths), at 313-332.

165. *Morris: The Conflict of Laws* (5th edn. by David McClean, Sweet & Maxwell, 2000), at 39.

166. *Infra*. This point is discussed further below.

167. *Infra*. This point is discussed further below.

168. Section 11 (Barbados); s. 10 (Guyana); s. 43 (Trinidad & Tobago). There is no statutory provision on the requisite standard of proof under the Act of St. Vincent and the Grenadines.

169. See commentary by Anthony Bland, 'The Reform of the Law of Domicile' (1982) 6 *WILJ* 150 at 159 that: 'The standard of proof of balance of probabilities has been accepted in the West Indian cases of *Hulford v Hulford* [(1961) 4 WIR 51], *Unwin v Unwin* [(1967) 11 WIR 10], and *Re De Veaux* (1967) 11 WIR 365... Section 11 of the Barbados Act and section 43 of the Trinidad and Tobago Act provide that [this standard] ... shall be sufficient.'

170. See e.g., s. 9 (Barbados); s. 8 (Guyana); s. 41 (Trinidad and Tobago).

171. (1987) 22 Barb. LR 46.

172. By analogy with *Re Furse* [1980] 3 All ER 838, which also adopted the test of indefinite intention.

173. *Cf.* D. L. Mendes, 'Notes on the Barbados Domicile Reform Act 1979' *UWI Stud LR* Vol. 4 May 1981, 34 at 35.

174. There are no statutory provisions on the acquisition of a domicile of choice under the Act in St. Vincent and the Grenadines.

175. Section 5 (1), (Barbados); s 4 (1), (Guyana); s. 2 (1), (St. Vincent and the Grenadines); s. 43 (Trinidad and Tobago).

176. Section 5 (2), (Barbados); s 4 (2), (Guyana); s. 37 (2) (Trinidad and Tobago). The matter is left as one of statutory interpretation in St. Vincent and the Grenadines.

177. D. L. Mendes, 'Notes on the Barbados Domicile Reform Act 1979' *UWI Stud LR* Vol. 4 May 1981, 34 at 36.

178. [1957] 1 Ch. 107.

179. With this may be contrasted the English position which is reproduced in s. 2 (2) (a) of the Act of St. Vincent and the Grenadines.

180. [1982] Ch 314. See J.A. Wade, 'Domicile: A Re-Examination of Certain Rules' (1983) vol. 32 *ICLQ* 1.

181. *Ibid.*, at 350.

182. Section 5 of the Act in Guyana is to similar effect. Section 4 of the Act in St. Vincent and the Grenadines makes a general presumption that the dependent domicile of the child is that of the father but then provides for exceptions where the child is not living with the father.

183. Minors Act 1974 (1974 - Cap. 215), Barbados), s. 3, [now consolidated in the Minors Act (Chap 215)].

184. Section 3.

185. Section 4 (5) of the Domicile and Matrimonial Proceedings Act, 1973, repealed in its application to adopted children by the Children Act, 1975, schedule 4, Part 1.

186. Mendes at p. 36 notes the following:

> ... W.R. Atkins has argued [[1977] 2 NZULR 286 at 288] that it is unclear whether a child who has had a home with its mother and subsequently returns into the 'custody' of its father retains the domicile of his mother or follows the domicile of his father. This may not be crystal clear, but it would not be stretching the words of the section too much, it is respectfully submitted, to encompass such a situation and to hold that the child thereafter acquires his father's domicile. S. 6 (2) provides that where a child's parents are living apart, the child follows that father's domicile if it has its home with him. Mr. Atkins's words of caution would be heeded if it could be said that the section only envisaged a situation where the child's 'first home' was with its father; for then it could be said that the Act is unclear as to the consequence of the child later returned to his 'custody'. But no reference is made to the home that the child may have had before going to live with its father, whether it was with both parents, with its mother alone, or with neither parent. On the contrary, the section appears to use the situation where the child has its home with its father merely as the starting point of a highly conceivable sequence of events whereby the child is passed from hand to hand. In each case, the domicile of the child would be same as that of the parent into whose 'custody' he is entrusted.

187. This could mean, however, a return to the language of status. In *Re Carter and McCree*, Unreported, Civil Suit No. 43 of 2000, dated November 3, 2000 (St. Vincent and the Grenadines High Court of Justice), Mitchell J granted an application for declaration of status under the Status of Children Act. The Applicant had not been registered in the alleged father's name but the application was supported by sworn affidavit of the widow of the deceased father. The Judge spoke in terms of legitimacy and illegitimacy, noting that the purpose of the Act was to 'remove the legal disabilities of children born out of wedlock' (rather than, it appears, the status of illegitimacy itself). He noted (p. 7) that the relevant Minister had made no regulations under the Act despite the passage some 20 years since the Act had passed into law. He lamented that this omission caused to court to fall back on general principles of construction and interpretation, which may in certain instances have the unfortunate consequences of being viewed by some as not carrying into effect the undoubted enlightened intention of the Legislature in pass this Act.'
188. [1968] N.I. 1.
189. [1965] SLT 330.
190. Barbados, s. 6 (2) and (3); Trinidad and Tobago, s. 38 (3).
191. [1893] 3 Ch 490, 42 WR 142, 37 Sol Jo 731.
192. Section 38 (3).
193. To similar effect see s. 3 (1), (Guyana); s. 36, (Trinidad and Tobago). There are no equivalent provisions in the Act of St. Vincent and the Grenadines.
194. *Udny v Udny* (1869) LR 1 Sc. & Div. 441.
195. Characterised by Lord Denning MR in *Gray v Formosa* [1963] P. 259 at 267 as the 'last barbarous relic of a wife's servitude'.
196. *Cf. Re Beaumont* [1893] 3 Ch. 490; 62 LJ 923; 42 WR 142.
197. *Re Flynn* [1968] 3 All ER 1 All ER 49; [1968] 1 WLR 103; 112 Sol Jo. 93.

198. Family law (Guardianship of Minors, Domicile, and Maintenance) Act, 1981 (15/1981).

199. Domicile Reform Act 1988 (Act No. 8 of 1988).

200. In fact the Act entered into force on January 1, 1980.

201. [1957] 1 Ch 107. To similar effect see *Re Cooke's Trusts* (1887) Vol. LVI LT 737.

202. Anthony Bland, 'The Reform of the Law of Domicile' (1982) 6 *WILJ* 150 at 170. Bland taught private international law to both Mendes and the present author.

203. *Ibid*., at 170.

204. Winston Anderson, 'Conflict of Laws Points Arising From *Belle v Belle*' (1991) Vol. 17 No. 3 *CLB,* 1079-1085.

205. In *Belle v Belle* [1987] 22 Barb. LR 46, Williams CJ examined the biographies of the parties dating from their birth through their cohabitation in 1973 to their marriage and divorce in the 1980s and therefore the reference to s. 4 might be seen as supporting the position of Bland and Mendes. However, the attention of the Court was not drawn to the point in question, there was no ruling on the validity of the rival views here presented, and in any event it was clear that all of the relevant facts upon which any new domicile of the parties could have been based occurred after the commencement of the Domicile Reform Act. This means that s. 4 was clearly the applicable provision. An authoritative decision is therefore required to settle this question.

206. Anthony Bland, 'The Reform of the Law of Domicile' (1982) 6 *WILJ* 150 at 170.

207. 15/1981.

208. *Re Annesley* [1926] 1 Ch. 692.

209. Cap. 249.

210. *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590.

211. Paraphrasing the words of Anthony Bland, 'The Reform of the Law of Domicile' (1982) 6 *WILJ* 150, 'Fortunately, the answers to these hypothetical questions need not be ventured on by a contributor to a … [Review], but West Indian judges may well be faced with such questions in the future. If so, one can at least cite Lord Denning, in a different context, himself citing Holt, CJ "have stirred these points, which wiser heads in time may settle"'. *Ibid*, at 172.

212. See generally, Kurt H. Nadelman, 'Mancini's Nationality Rule and Non-Unified Legal Systems: Nationality Versus Domicile' (1969) Vol. 17 *AJIL* 418; Thomas M. Franck, 'Clan and Superclan: Loyalty, Identity, and Community in Law and Practice', (1996) Vol. 90 *AJIL* 359.

213. *Panevezys-Saldutiskis Case (Estonia v Lithuania)* (1939) PCIJ Rep. Series A/B, No. 76; D.J Harris, *Harris: Cases and Materials on International Law,* (Sweet & Maxwell, 1998), at 586; *Barcelona Traction Light and power Co., case (Belgium v Spain)* (1970) ICJ Rep. 3; D.J Harris, *Harris: Cases and Materials on International Law,* (Sweet & Maxwell, 1998), at 604.

214. *Re O'Keefe* [1940] Ch. 124; [1940] 1 All ER 216.

215. *Liechtenstein v Guatemala*, (1955) ICJ Rep. 953, 111-25 (Jurisdiction); (1955) ICJ Rep. 4-65.

216. (1998) 117 ILR 111 (International Law of the Sea Tribunal). See also *'Grand Prince' (Belize v France)* Case No. 8, International Law of the Sea Tribunal, dated 20th April 2001.

217. Act No. 18 of 1999.

218. Act No. 18 of 2000.

219. Constitution, s. 4 (Barbados); Act of 1999 of Jamaica s. 2 (inserting s. 3 (1) (a) into the Constitution); Constitution, s. 17 (1), (Trinidad and Tobago).

220. Act of 2000 of Barbados, s. 3 (inserting s. 4A into the Constitution); Act of 1999 of Jamaica, s. 3 (inserting s. 3B (2); Constitution of 1976, s. 17 (3), (Trinidad and Tobago).

221. Constitution, s. 4 (Barbados); Act of 1999 of Jamaica, s. 3 (inserting s. 3B (3); Constitution, s. 17 (2), (Trinidad and Tobago).

222. [1992] LRC (Const.) 623.

223. Act of 1999 of Jamaica, s. 3 (inserting s. 3C into the Constitution).

224. Constitution, s. 5, as amended by s. 4 of the Act of 2000.

225. Constitution, s. 17 (3).

226. This appears to be the true intendment of the section in Trinidad and Tobago, despite the confusing use of the word 'person' within it which could be construed to refer to the propositus rather than the parent.

227. Unreported, Supreme Court, The Bahamas, No. 826 of 1979, dated, April 4, 1980. Unreported, Court of Appeal, The Bahamas, Nos. 1 and 5 of 1980, dated November 19, 1980. This decision went on appeal to the Privy Council.

228. Section 7 of Constitution, inserted by 6/1993. See also, s. 2 of the Act of 2000 of Barbados, (inserting s. 3A (1) (b).

229. *Vervaeke v Smith* [1983] AC 145, [1982] 2 All ER 144 (House of Lords).

230. Act of 1999 of Jamaica, s. 5. See also, s. 2 of the Act of 2000 of Barbados, (inserting s. 3A (1) (b), (4).

231. Lord Simon in *Vervaeke v Smith* [1982] 2 ll ER 144 at 158. See also *Szechter v Szechter* [1971] P 286, [1970] 3 All ER 905.

232. [1983] AC 145, [1982] 2 All ER 144.

233. [1982] 2 All ER 144 at 158.

234. Generally speaking, on average about 5 years: see e.g., Barbados Citizenship Act (cap. 186) Second Schedule.

235. Unreported, No. M111 of 1979, dated October 6, 1978 (Supreme Court of Trinidad and Tobago),

236. See e.g. Constitution, s. 7 (Barbados); contrast Constitution, s. 8 (Jamaica).

237. Constitution, s. 8 (Jamaica), which gives power to the Governor General to deprive of Jamaican Citizenship in specific circumstances.

238. [1976] AC 249.

239. It follows that regardless of Caribbean acceptance that persons born before independence are citizens of the UK and Colonies, that the law that makes the ultimate decision would be the law of the UK and Colonies, whatever that may mean today.

240. As under the Family Law Act 1975 (Cap. 249) of Australia, which provides that an application for a divorce may be made if either party to the marriage is an Australian citizen.

241. [1940] 1 All ER 216.

242. *Ramsey v Liverpool Royal Infirmary* [1930] AC 588.

243. *Harrison v Harrison* [1953] 1 WLR 865, [1953] Vol. 97 Sol. Jo. 456;

244. *Re Jones Estates* 182 NW 227, 192 Iowa 78 (1921).

245. *Re O'Keefe* [1940] Ch. 124; [1940] 1 All ER 216.

246. See generally, J.D. McClean, 'The Meaning of Residence' (1962) Vol. 11 *ICLQ* 1153.

247. *Cheshire and North's Private International Law* (13th edn. by PM North and JJ Fawcett, 1999), at 162.

248. Viscount Cave LC in *Levene v Inland Revenue Commissioners* [1928] AC 217 at 225.

249. Viscount Sumner in *Inland Revenue Commissioners v Lysaght*, [928] AC 234 at 243.

250. [1983] 2 A.C. 309. This case was followed in the Cayman Islands decision of *W v W* [1994-95] CILR 319.

251. *Ibid.*, at 343.

252. P. St. J Smart, 'Ordinary Resident: Temporary presence and Prolonged absence' (1989) Vol. 38 *ICLQ* 175, at 178.

253. (1893) 10 TLR 32.

254. [1928] AC 234.

255. See e.g., Lord Warrington of Clyffe at 251: 'I cannot say there was evidence on which the commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view.' And Lord Buckmaster, at 249 used the word 'reluctantly' in relation to the conclusion he reached.

256. *Petrotrade Inc. v Smith* [1998] 2 All ER 346 at 350-351.

257. Lord Scarman in *Shah v Barnet London Borough Council*, [1983] 2 AC 309 at 343.

258. *Re Bright* (1903) 19 TLR 203 at Sir Henn Collins MR stating at 204: 'A long sojourn must not therefore be taken as a *sine qua non*. There must of course be some duration, though not necessarily a long one. Two or three days would not be sufficient.'

259. (1888) 4 TLR 452.

260. See e.g., Family Law Act 1975 (Australia), s. 39 (3) (b) where jurisdiction in proceedings for divorce may be instituted if either party to the marriage is 'ordinarily resident in Australia and has been so for one year immediately proceeding that date'.

261. [1983] 2 AC 309, at 342.

262. [1986] 2 All ER 941.

263. (1973) 8 Barb.LR 30.

264. (1975) 13 JLR 12.

265. *Cheshire and North's Private International Law* (13th edn. by PM North and JJ Fawcett, 1999), at 164.

266. *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677 at 681.

267. [1998] 2 All ER 728.

268. *Ibid.*, at 731.

269. See e.g., *Re A (A Minor) (Wardship: Jurisdiction)* [1995] 1 F.L.R. 767.

270. For present purposes the expressions are treated synonymously as representing a corporate entity having separate legal personality from it shareholders: *Salomon v Salomon & Co.,* [1897] AC 22; 66 LJ Ch. 35.

271. David McClean, *Morris: Conflict of Laws*, (5th edn., Sweet & Maxwell, 2000), at 43. See generally, Thomas C. Drucker, 'Companies in Private International Law' [1968] Vol. 17 *ICLQ* 28.

272. Unreported , High Court of Barbados, No. 227 of 1982; dated March 31, 1982.

273. *Ibid.*, at 5, quoting from Dicey & Morris, *The Conflict of Laws*, (10th edn., vol 2), at 730, Rule 139 (2).

274. Unreported , Supreme Court of The Bahamas, No. 1111 of 1987; dated May 26, 1988.

275. See e.g., Companies Act, 1982 (1982-54), (Barbados), ss. 2, 4, 5, 17, 24.

276. *The Sanitary Laundry Company Limited v Heal,* Unreported , High Court of Barbados, No. 227 of 1982; dated March 31, 1982.

277. *Lazard Brothers & Co. v Midland Bank Ltd* [1933] AC 289; [1932] All ER Rep 571.

278. *Egyptian Delta Land and Investment Co Ltd v Todd* [1929] AC 1.

279. *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No. 2)* [1967] 1 AC 853.

280. *A. G. de Manufacturers I.A. Woronin Leutschig and Cheshire v Frederick Huth & Co.* (1928) 79 Ll.L.R. 262 at 267; *Spiller v Turner* (1897) 1 Ch 911.

281. [1933] AC 289.

282. *Udny v Udny* (1869) LR 1 Sc & Div 441 was decided almost 30 years before *Salomon v Salomon & Co.,* [1897] AC 22; 66 LJ Ch. 35.

283. [1940] 2 KB 80.

284. *Ibid.*, at 84.

285. Buckley J [1970] 1 Ch. 506, at 544.

286. (1855) 5 HLC 416.

287. [1911] 2 KB 516 at 527.

288. [1902] AC 484, [1900-3] All ER Rep 426.

289. *Ibid*., at 497, per Lord MacNaghten.

290. *Adams v Cape Industries Plc,* [1991] 1 All ER 929.

291. See e.g. International Business Companies Act (cap. 77), (Barbados). This provision was discussed in *Copeman financial Corporation v C. Brian Barnes Ltd,* (2000, Civil Appeal No, 6 of 1999, dated April 4, 2000. Unreported.) It was held that notwithstanding its statutory residence locally, the foreign company could be required to provide security for cost in respect of local litigation.

292. Income Tax Act (Chap 67:01), (Dominica), s. 2 (1). In most jurisdictions this rule is derived from the common law.

293. (1876) 1 Ex D. 428.

294. [1906] AC 455; [1906] KBD 858. See K. Lipstein, (1989) LMCLQ 385 at 386. See also *In re Little Olympian Each Ways Ltd.* [1995] 1 WLR 560.

295. *Ibid*., at 458.

296. [1929] AC 1.

297. [1925] AC 495.

298. *Cheshire and North's Private International Law* (13th edn. PM North and JJ Fawcett, 1999), at 174.

299. *Egyptian Delta Land and Investment Co Ltd v Todd* [1929] AC 1 at 17 per Viscount Sumner.