

DOMICILE AS A DETERMINANT OF PERSONAL LAW: A CASE FOR THE ABANDONMENT OF THE REVIVAL DOCTRINE IN NIGERIA

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Introduction

Differences, which exist between two or more legal systems, provide the theoretical foundation for the subject known as conflict of laws. Every legal system has rules, which tend to distinguish it from others. With particular regards to matters considered as bothering on an individual's civil status different legal systems have established rules as to the laws, which ought to govern in those cases. These matters usually involve those aspects of the individual's personal interests for which resort can be had to a single system of law, in making a decision as to the appropriate law that ought to govern.

In order to identify the specific system of law that should govern these issues with regards to a particular individual the laws of different countries have established diverse criteria. While in England domicile is the rule, in Italy and some other European countries it is nationality. Some other systems tend to combine both criteria¹. As part of our received English law domicile is the criterion recognised by Nigerian law.

In this article we shall examine the adequacy of the English conception of domicile, as received in Nigeria with particular reference to the doctrine of rival of the domicile of origin. It is, however, the position of this paper that the common law conception of domicile vis-a-vis the revival doctrine cannot adequately fit into the realities of contemporary society and, therefore, the law must be reformed to reflect this fact.

What Is Personal Law?

In the determination of person's rights in matters of civil status, capacity to marry, succession (testate or intestate) legitimacy, adoption, jurisdiction in divorce proceedings and some other (incidental) matters, as well as matters involving taxation, it has been found necessary in every legal system to identify a link between the relevant person (or propositus) and a particular law district.² Inherent in the idea of personal law is that a person must belong to a particular country, state or community the rules of which determine his civil status even when he or she is not physically present in that country, state or community.

The factor which determines the applicable personal law, is therefore whatever that particular system of law deems sufficient to link the person with the *lex causae*. Thus in discussing personal law there is always a reference to some "connecting" factor which represents the link between an individual and a particular legal system, thereby making the laws of that legal system applicable

¹ See I. O Agbede, *Themes in Conflict of Laws*, Ibadan, Shanenson, 1989 p. 49.

² See J G Collier, *Conflict of Laws*, 2nd ed, Cambridge, C. U. P. 1994, p 41

to him. The application of personal law, is therefore, not dependent upon where the individual happens to be located at the material time; rather, it is a function of the existing link between the person and the legal system. Once it exists the laws of that system must be applied.

The Concept Of Domicile

Morris has asserted that “domicile is easier to illustrate than it is to define”³. This is probably due to the fact that the traditional definitions have become rather obsolete as a result of judicial modifications, which have attended the concept over time. Lord Cranworth⁴ attempted a definition almost a century and half ago to the effect that “by domicile we mean home, the permanent home, and if you do not understand your permanent home I am afraid that no illustration drawn from foreign writers or foreign language will very much help you to it”. That this definition has become extremely simplistic is obvious from the subsequent judicial developments on this issue. In fact Collier’s opinion is that Lord Cranworth’s definition is “far too simplistic, and indeed, somewhat misleading.”⁵ He goes on to declare that even where a person’s permanent home coincides with his domicile, such a situation is legally coincidental, for the reason that domicile is a legal concept and a person’s basic “domicile is his domicile of origin which is ascribed to him at his birth, and is not necessarily the country of his family’s permanent home at that time.”⁶ Morris also objects to Lord Cranworth’s definition on the ground that a person’s domicile may not always be his permanent home. In fact according to him “a person may be domiciled in a country which is not and never has been his home; a person may have two homes but he can only have one domicile; he may be homeless, but he must have a domicile.”⁷ He concludes that there is often a wide gulf between the English concept of domicile and the popular notion of a home.

Perhaps one way of avoiding the pitfall created by Lord Cranworth’s definition is to describe rather than attempt to define with so much precision.^{7a} This is because the conception of domicile as an idea of law has become “so overloaded by a multitude of cases that it has been transmuted into something further and further removed from the practical realities of life.”⁸ In describing, it would be proper to examine the general principles inherent in the English idea of domicile.

General Principles

- a) No person can be without a domicile. To this end, English law recognizes three types of domicile, viz domicile of origin, domicile of choice and

³ Morris: *The Conflict of Laws*, 4th ed by J D McClean, London, Sweet and Maxwell, 1993, p. 12.

⁴ *Whicker v. Hume* (1858) 7 HLC 124.

⁵ *Supra* note 2, p 40.

⁶ *Ibid*, pp. 40–41.

⁷ *Supra* note 3.

^{7a} Sir George Jessel stated many years ago in *Doucet v Geoghegan* (1878) LR 9 Ch .D 441 that “domicile is impossible of definition.”

⁸ *Ibid*.

- domicile of dependence. The last category (that is, domicile of dependence) has however, been rejected by the Court of Appeal in Nigeria in the case of *Bhojwani v Bhojwani*^{8a} where it was declared: “there are strictly two types of domicile, viz: domicile of origin and domicile of choice. There is no separate domicile known as domicile of dependence.”
- b) No person can at the same time have more than one domicile for the same purpose. A person can, however, have more than one residence or nationality.
 - c) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired. Thus, the burden of proving a change in domicile lies on the party who asserts such a change.^{8b}
 - d) In the Nigerian court, the domicile of a person is determined according to the characterization of the *lex fori* and not according to any foreign concept of domicile.

Domicile Of Origin And The Revival Doctrine

According to Lord Westbury:

The domicile of origin is the creature of law and independent of the will of the party, it would be inconsistent with the principle on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicile and it does not require to be reacquired or reconstituted, *animo et facto* in a manner which is necessary for the acquisition of a domicile of choice.^{8c}

At birth the law ascribes a domicile to every person. While still an infant, the domicile of an individual is dependent upon that of his parent or some other person upon whom he is legally dependent. Any domicile ascribed in any of these two situations is retained unless he acquires another by his own choice when eligible. He then continues with that domicile of choice until he abandons it. When this happens, his domicile of origin revives.

In the case of *Udny v Udny*⁹ (the *locus classicus* for the revival rule) Colonel Udny was originally domiciled in Scotland. He later acquired a domicile of choice in England. After a few years, he left England for France in order to escape from his creditors. The House of Lords held that from the facts, it was clear that he had not acquired a French domicile and that since he had abandoned his English domicile of choice, his Scottish domicile of origin revived.

According to Lord Westbury,

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

^{8a} [1995] 7 NWLR (part 407) 349.

^{8b} See *Bhojwani v. Bhojwani*, *ibid*, *Fonseca v. Passman* (1958) WRNLR 41.

^{8c} *Udny v. Udny* (1869) L.R. 1 Sc. & Div. 441.

⁹ Above

the mother if illegitimate. This has been called the domicile of origin and is involuntary.¹⁰

Implicit in the idea of domicile of origin is the fact that in many cases it is transmitted through several generations even to include those who have never lived in the country in question. This is possible since the ascription of a domicile of origin is by operation of law and has nothing to do with the actions or intentions of the *propositus*.

Under English law, the domicile of origin can never be lost. During the subsistence of a domicile of choice acquired by the *propositus*, the domicile of origin may be in abeyance but it revives the moment the domicile of choice is lost by abandonment.

This rule of revival is, however, rejected by American law as was revealed in the case of *Re Jones Estate*.¹¹ In that case, Jones had an English domicile of origin. In order to escape the responsibility for an illegitimate daughter he had sired he went to the United States in 1883. He married there, and prospered financially and became an American citizen. His wife died in 1914 and he decided to return to Wales (where he was born) to live with his sister. On the first day of May 1915 he sailed in the *Lusitania* from New York but it was sunk by a German Sub-marine in the high Seas, off the Irish Coast. Under Iowa law, his illegitimate daughter succeeded to his estate, but by English law, his brothers and sisters were entitled. The Supreme Court of Iowa held that since his Iowa domicile of choice continued until he acquired another he was still domiciled in Iowa at the time of death since he had not reached England. Reacting to this decision Collier declares that:

This is hardly satisfactory in that it frustrated Jones' intentions which were to reacquire his connection with English law and to avoid having responsibility for his illegitimate daughter. It is also just as artificial as the revival of the domicile of origin, since it makes the devolution of a person's estate depend on the law of a country which he had left, wishing never to return to it.¹²

The case of *Bell v Kennedy*¹³, on the other hand illustrates the tenacity of the domicile of origin. In that case Bell was born in Jamaica of Scottish parents domiciled in Jamaica. At the age of 35, he left Jamaica for Scotland with an intention never to return. However, between 1837 when he left Jamaica and 1839 when he finally found an estate to dwell in, he lived with his mother-in-law. Also, during that period he was undecided as to whether to settle in Scotland or in England or elsewhere. He hated the weather in Scotland. It was clear that from 1839 when he settled in his house in Scotland he became domiciled there; but the question before the Court was as to where he was domiciled in 1838 when his wife died. The House of Lords held that he had not lost his Jamaican domicile of origin at that time.

¹⁰ Ibid at p. 457.

¹¹ 192 Iowa 78.

¹² J. G. Collier, *Supra*, p. 57.

¹³ (1868) L.R Sc. & Div 307.

The rule of revival, being a necessary corollary of the tenacity of the domicile of origin, does not apply to the domicile of choice. Once that place is abandoned, it is lost and if the *propositus* does not immediately acquire a new domicile of choice, his domicile of origin revives. Herein lies one of the areas in which the practical utility of the English concept of domicile has been severely criticised. Cheshire, for instance, has queried:

Is it so absurd to prefer the law under which the man has recently been living, perhaps for a prolonged period? Are the claims of the law, which is imposed upon him at birth, independently of his own volition, superior to that which he has voluntarily chosen and long retained?¹⁴

The absurdity of the revival doctrine cannot be divorced from the English doctrine of the tenacity of the domicile of origin, which on its part has become incongruous by reason of modern realities. With globalisation and the ease in communication and transportation, movement of persons between different parts of the world has become so common that it is no longer realistic to hold that a person's domicile of origin holds tenaciously to that person until death. The tenacity doctrine as revealed in the cases is no longer realistic in the light of contemporary realities. *Ramsey v. Liverpool Royal Infirmary*¹⁵ as well as *Winans v. Attorney General*¹⁶ clearly illustrate the tenacity concept of the domicile of origin.

In *Ramsey*, George Bowie was born in Scotland with a Scottish domicile of origin. He went to Liverpool at the age of forty-six to live with some members of his family. He died there at the age of eighty-seven. All through the period he only left Liverpool on two occasions and he refused to return to Glasgow, even for his mother's funeral. Yet he always bought a Glasgow newspaper and kept referring to himself as a Glasgow man, even in his will which was formally invalid under English law but valid under Scots law.

The House of Lords held, applying the tenacity idea, that he had died domiciled in Scotland. Their Lordships' position was that since his long stay in England was not due to any attachment to the country but due to his attachment to a family member, he never acquired a domicile there. His will was, thus, valid.

Again, in *Winans*, an American, whose domicile of origin was New Jersey left the United States in 1850. He spent some time in Russia, after which he resided in England for a considerable part of every year until 1893 when he stayed fully in England until he died in 1897. He never acquired a permanent residence but he took tenancies of furnished houses in Brighton. At the time of his death he had been away from the United States for thirty-seven years during which he also spent parts of the year in Germany, Scotland and Russia. His two major passions had been taking care of his health and working on an idea of building spindle shaped vessels for sale to the United States in order to wrest the carrying trade from the British. He had actually acquired land in Baltimore, in

¹⁴ P. M. North and J.J. Fawcett, *Cheshire and North's Private International Law*, 13th ed. London, Butterworths, 1999, p. 153.

¹⁵ [1930] AC 588.

¹⁶ [1904] AC 287.

furtherance of this scheme. He talked about returning to the United States for this purpose. He disliked the English and never mixed with them.

The House of Lords held that he had died domiciled in New Jersey, his domicile of origin. While not arguing that the House of Lords should have held Winans to have been domiciled in England, it is submitted that it was equally not very convenient to have held him domiciled in New Jersey, a place he had not set his foot upon in thirty-seven years. This same argument holds true for *Ramsey*, a case in which the *propositus* did not even go home for his mother's funeral. In these two cases, the length of stay had no effect in convincing the court as to the acquisition of an English domicile of choice. But this rule has certainly become a slightly attenuated due to contemporary realities. These cases decided in the early twentieth century can no longer be proper guides in today's world of extraordinary fluidity in business and social interests.

*Brown v. Brown*¹⁷ illustrates what could be termed as the contemporary attitude to the concept of domicile of origin. In that case, Brown was an American Citizen. He was employed by an American company and sent to work in England in 1966. He married there in 1969 and in the same year he was transferred to Rome for three years, but he kept his membership of London clubs. The couple had a child in 1971. In 1977, he was again posted to Rome for three years and he rented his flat to a friend so as to be able to get it back when he wanted it. His wife refused to return with him to England in 1980 and he petitioned for divorce. The Respondent challenged a statement in the petition that he was domiciled in England. It was held by the English Court of Appeal that although he was still an American citizen, his long absence from the United States as well as his uncontroverted evidence made it clear that he had acquired a domicile of choice in England.

While it may be convenient to follow the principles laid down in by-gone years, it sometimes defeats the aims of justice and could work undue hardship on persons who had acted upon a set of facts expecting a particular result only for the court to hold something entirely different. The old principles, if not modified in line with modern realities, have the tendency of defeating the legitimate expectation of persons. This is the basis for Agbede's criticism of the revival doctrine. According to him, the doctrine "runs counter to the fundamental principle of domicile as it may locate a person's domicile in the country which can not be regarded as his home by any stretch of the imagination."¹⁸

Also criticizing the revival doctrine Morris regards this rule as artificial. According to him:

If for instance, an English man emigrates to New York at the age of twenty-five, remains there for the next forty years and then decides to retire to California, but is killed in an air crash en route, it does not make much sense to say that he died domiciled in England especially as an American Court would undoubtedly hold that he died domiciled in New York.¹⁹

¹⁷ (1982) 3 F.L.R. 212.

¹⁸ Supra note 1, p. 59.

¹⁹ Supra note 3 p. 15.

Although, he expressed this view with regards to the revival doctrine, Morris nonetheless criticized the rejection of the rule by the Iowa Supreme Court as represented in *Re Jones' Estate*.²⁰ He pointed out that the decision is unsatisfactory. He even contends that the American rule sometimes produces equally bizarre results “as the English (revival) rule”. For him, “the American rule is as much a fiction as the English one.”²¹ The problem may, therefore, be stated thus: if these two rules are unsatisfactory with the likelihood of producing bizarre results, wherein lie their attractions?

The justification for the differences in the approach seems to be based on the facts of history and not necessarily logic. The English attachment to their homeland as well as the myth of their superiority provides a socio-historical explanation for the tenacity of the domicile of origin (with its consequential revival doctrine), while the multi – racial and plural nature of the American society would definitely not permit such a rigid doctrine of domicile of origin to hold sway in the United States.^{21a} In fact it has been declared, with regards to the revival rule that “this rule is most unnatural in America and has nothing of public policy here to recommend it. The weight of authority in this country is contrary.”²² The historical and sociological facts of these two countries thus provide the foundation upon which their positions on the doctrine are based. However, Nigerian history can definitely not fit into any of these two categories, yet by reason of her colonial experience she is subjected to a doctrine, which we submit cannot withstand the realities and exigencies of the twenty-first century with its emphasis on the world as a global village.

Reforming The Nigerian Position

Nigeria having been tutored along the lines of the common law acquired the revival doctrine as part of her colonial legal heritage.²³ However, the socio-political structure of Nigeria greatly differs from that of England and thus, the concept of domicile as received from English law cannot adequately meet the needs of our legal system. The federal principle as operated in Nigeria provides a fundamental departure from the English legal system – so fundamental that the rules of English conflict of laws can only operate based on the recognition of this fundamental difference and an adaptation of the rules to local circumstances.²⁴ With regards to the issue of domicile, the applicable rules in Nigeria must be broken down to two different levels and in examining the adequacy and sustainability of the revival doctrine, these two levels need to be examined separately as follows:

(i) Inter–State Situations:

²⁰ 192 Iowa 78.

²¹ Supra note 3, *Ibid*.

^{21a} Beale declared: “In America, the British loyalty to one’s place of birth is little felt. The immigrant who identifies himself with his new country or the Easterner who goes West and identifies himself with the new part of the country, is a common figure. To refer such a man in course of moving from one place in his new country to another to a forgotten domicile of origin would be absurdly unreal.” Cited from I.O. Agbede, supra note 1, p.59.

²² *In re Gilbert's* 18 N.J. Misc. 540.

²³ See Section 32 of the Interpretation Act, cap 192, L.F.N., 1990.

²⁴ *Ibid*.

Nigeria being a federal state, every constituent unit is a law district within the federation. The implication of this is that with the exception of matters arising under the Matrimonial Causes Act,²⁵ all other issues of personal law are determined with reference to the law of a constituent State. Thus, it is possible, for instance, for a person to change his domicile of origin from Edo State to a domicile of choice in Lagos State or to that of any other State of the Federation. The rules as we received them from England also make it possible for such a person's domicile of origin to revive the moment he abandons his residence in Lagos (with the relevant *animus manendi*) until he acquires a new one.

Thus, even if he has no intention of ever staying in Edo State for any part of his remaining period on earth, he is nevertheless, held to have reverted to his domicile of origin by the simple fact that he abandoned his domicile of choice for residence in a third state. It is submitted that this is not a satisfactory situation for the following reasons:

- (a) The needs of national integration presently demand that Nigerians should feel at home anywhere they choose to make their permanent abode. There should be a judicial acknowledgement of this imperative.^{25a} Doing otherwise would be tantamount to a strengthening of the primordial sentiments that tend to divide rather than unite. Thus, the rigidity of the revival doctrine must be tempered in order to make room for situations in which the *propositus* has a clear intention never to return to his domicile of origin, and allow him to be domiciled in the State with which he is most closely connected.
- (b) At independence, Nigeria had a three-region structure. This was increased to four in 1963 and further broken down into twelve States in 1967. Between 1976 and 1995, a thirty-six State structure (as well as a Federal capital territory) emerged. This instability in the geopolitical configuration of Nigeria certainly has implications for the conflict of laws, especially with regards to the law of domicile and its attendant doctrine of revival. We can illustrate a likely problem that arises thus:

X was born in 1960 of parents domiciled in the Western Region of Nigeria. As at the time of his death in 1999, the old Western Region had been divided into six states. How do we locate his domicile of origin? If in the course of his life he had acquired a domicile of choice in some other part of the country but had abandoned it to settle elsewhere, how do we locate his domicile of origin in order for the revival doctrine to apply?

The problem of locating X's domicile in these circumstances is borne out of the fact that domicile relates to countries and States and not to localities within countries and States.

As a result of this kind of problem and the hardship it will produce, it is suggested herein that the element of intention (*animus manendi*), which is relevant for the acquisition of a domicile of choice, should also be made relevant for the revival doctrine to be effected. Where the *propositus* has abandoned his domicile of choice but does not have the intention of reverting to his domicile of

²⁵ See Section 2 (3), cap 220, L.F.N. 1990.

^{25a} See I.O. Agbede's comment on *Udom v. Udom* (1962) L.L.R. 112 in *Supra* note 1, p. 52.

origin, the rule in *Udny v. Udny*²⁶ should not be applied to hold that his domicile of origin revives. The fluidity in settlements that existed in the time of Lord Westbury (the nineteenth century) is certainly nothing compared to that of today. This should be a guiding consideration.

(ii) *International Situations:*

The problems associated with the revival doctrine are even more serious in international situations than in inter-state situation. This is because in many subjects, the laws of many States in Nigeria are quite similar if not identical and so the result of ascribing the 'wrong' doctrine to a person may not be as problematic as what mostly obtains in international situations where the diversity is much more manifest. The need, therefore, arises to ensure that a person is not ascribed a personal law with which he has no factual connection whatsoever. Criticising the revival doctrine, the *Commonwealth Law Bulletin*²⁷ declares,

Another unsatisfactory feature is the technical rule that a person's doctrine of origin automatically revives whenever he abandons his domicile of choice without immediately acquiring another one. This rule ("the revival rule") can produce absurd results when a person has never had any connection with the country of his domicile of origin. For example, a person born in England to parents domiciled in India would acquire an Indian doctrine of origin although he may never in the course of his life set foot in that country. If when he died, he had abandoned his current domicile, his Indian domicile of origin would revive and his moveable estate would be distributed according to Indian Law, though he had never been there."²⁸

In recognition of this problem, the English and Scottish Law commissions have recommended the abolition of the revival doctrine.²⁹ Furthermore, they have suggested that a new rule to the effect that an established doctrine continues until the acquisition of a new one should replace the former rule as enunciated in *Udny v. Udny*³⁰ and the other cases on the point.

It is submitted that the Law Commission's suggestion is the right way forward in the twenty-first century and Nigerian courts should adopt it especially in international situations.

²⁶ (1869) L.R. 1 Sc. & Div. 441

²⁷ January 1988, p. 341; see also July 1985, pp. 951 – 952.

²⁸ Ibid.

²⁹ Ibid.

³⁰ (1869) L.R. Sc & Div. 441.

Conclusion

The essence of law is the existence of rules of conduct recognized by the society it purports to regulate and enforced by the institutions established to ensure compliance in that society. It is therefore, imperative that law must be relevant to the needs of contemporary society, if it is to retain its essential character. The rules of domicile as they exist today are now face to face with the realities of the twenty-first century world of globalization. It is obvious that like it is for most rules and ideas that have been hallowed in yesteryears change is now inevitable. A nineteenth century rule made for the exigencies of that age can no longer survive the realities of this age. It must be abandoned for the new rules dictated by the forces of change. Our Law Reform commissions as well as our courts must therefore, embrace the new rules as suggested above while jettisoning the revival doctrine.