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REFORM OF THE LAW OF DOMICILE

Memorandum by the Commonwealth Secretariat
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Continuing work in the field of private international law, and in response to the invitation so to do made by Law Ministers in Barbados in 1980, Professor David McClean has prepared the annexed paper on reform in the law of domicile.

2. It is not anticipated that Ministers will wish to deal with the paper in detail when they discuss the activities of the Secretariat in the legal field. However, the paper suggests a lack of co-ordination in the piece-meal reform which has begun in the field of domicile. Not only may Ministers consider that this seems undesirable, particularly in a topic already labelled as "conflict of laws", but that it is all the more surprising when it is taking place in an area of the law which would appear to be devoid of policy considerations and to fall clearly within the category of "lawyers law", and so be avoidable. The subject is one, too, in which a degree of harmonisation would appear to be desirable.

3. The paper points to steps taken in a number of jurisdictions on various aspects of the law of domicile (e.g. domicile of origin; domicile of choice; domicile of dependence for married women and for children: and domicile of children whose parents live apart) and discusses the emergence of "habitual residence" to challenge the concept of domicile. It notes that Nauru, one of the Commonwealth's smallest jurisdictions, has legislated to replace domicile by habitual residence in all conflict of laws matters.

4. The paper appends legislation from Australia, New Zealand and the United Kingdom. It points to the New Zealand model as being perhaps the most appropriate for consideration by other Commonwealth jurisdictions considering reform, and the Meeting may be interested in learning from the Austalian delegation the reasons which lay behind their own jurisdiction's variation on the New Zealand model.

5. The Commonwealth Secretariat has for some time been recognised as a force for harmonisation and in this matter, in particular, we would value the guidance of Ministers as to any further action we should undertake.

REFORM OF THE LAW OF DOMICILE

A paper prepared
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INTRODUCTION

Domicile has an important role in the conflict of laws rules of Commonwealth countries particularly in the field of family law. The great majority of Commonwealth jurisdictions share a common corpus of law as to domicile, the main features of which were established in the middle years of the nineteenth century. Over the last twenty years or so, this traditional pattern has been disturbed, most radically by the proposal, aired in a few jurisdictions but acted upon in only one, that domicile should be replaced in toto by a different connecting factor such as 'habitual residence'.

2. More insidious have been the actions of the legislatures of a number of jurisdictions in reforming the law of domicile, either generally or in its application in particular contexts, to remedy what are widely seen as unsatisfactory features of the traditional concept. There is of course no reason why the rules as to domicile should be uniform in all jurisdictions and in all contexts, but equally it is possible to foresee difficulties ahead if what appears to be the same concept begins to be governed by different rules in neighbouring jurisdictions as a result of unco-ordinated law reform. It is therefore for consideration whether common principles for a modernised law of domicile could be agreed upon, if indeed it is to be retained as a significant connecting factor.

3. This paper reviews the traditional concept of domicile and the legislation of Commonwealth jurisdictions codifying or reforming it. It also considers the alternative of habitual residence.[1] It first reviews the principal features of the law of domicile, indicating the extent to which case-law or statutory formulations have produced variants within what can be regarded as the traditional rules, and then examines the reforms contemplated or achieved in the last few decades.

THE COMMON LAW RULES

4. The function of domicile. 'Domicile' is a legal concept which links a person, including in some contexts a corporation or other legal person, to a particular country. It identifies 'his' country, the law of which is in some sense proper to him.

5. Individuals are increasingly mobile. They often spend periods of time travelling to different countries. They may own property in several countries, and have family or business links with many more. It is, however, a rare individual who does not have a country which he regards as his 'home' country. Of course there will be individuals who have divided loyalties, whose current way of life points to one country as home, but whose upbringing, family tradition and sentimental attachments are focussed on another; the Commonwealth, better than any other group of countries, knows well the expatriate and his love-hate relationship with his host country. For most people, however, the notion of 'a home country' is a real one, and the law recognises this; the law of domicile

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[1]The paper is drawn in large part from Professor McClean's forthcoming book The Recognition of Family Judgments in the Commonwealth but omits the comprehensive citation of authority which will be there included.

provides a framework of rules to guide the courts in the identification of an individual's 'home country'.

6. It is not possible to read off from these general statements of the function of domicile any absolute requirements as to its content. Like nationality, a concept serving similar legal purposes, domicile may be differently understood in different countries, though in practice Commonwealth countries do share a common body of domicile law.[2]

7. Within one particular country, domicile may be given different meanings in different contexts. It is common to find it used, with a special definition, in immigration legislation and domicile for fiscal purposes may well differ from that applying to the same person for the purposes of matrimonial jurisdiction. For most purposes, a person has only one domicile, but some uses of the term domicile do not require it to be exclusive, not precluding double or even multiple domiciles.[3]

8. The traditional use of domicile is to identify an individual's 'personal law'. It is so used in most common law countries, although religious persuasion is used for the same purpose in the Indian subcontinent and nationality has traditionally been the corresponding connecting factor in civil-law jurisdictions. Roman-Dutch law makes great use of domicile, though on some points the content of the concept may differ from that traditionally adopted in common law countries. Despite the effects of legislation in many Commonwealth jurisdictions, it remains central to the conflict of laws rules relating to the family, in jurisdictional and choice of law contexts and in respect of the recognition of foreign decrees.

9. A basic definition. The facts of a Malawi case, Gray v Gray,[4] illustrate the factual complexities with which a definition of domicile must cope.

> Mr. Gray was born in South Africa in 1906. His father was Scottish. His mother was English and at the time of his birth was actually en route for Malawi (then Nyasaland). After attending schools in both Nyasaland and Rhodesia, Mr. Gray spent the years (1924-1930) in Scotland where he qualified as a veterinary surgeon. In 1930 he took a post in the Sudan, moving to New Zealand in 1934. During his stay in New Zealand he was visited by his mother and decided that he ought to live in Nyasaland to be near her. He applied to join the Colonial Service and after a short spell in Tanganyika was posted to Nyasaland in 1940. At the time of the case he had been in that country for some eight years and hoped to remain there, so far as he was able to refuse transfers within the Colonial Service.

10. It is by no means obvious what was his 'home country',[5] and the facts certainly demonstrate that an individual's current home can change from country to country quite frequently, too frequently for that notion to be very suitable for the purposes for which domicile is used. For this reason the courts have adopted as the basic content of domicile the idea of a permanent home.

11. This notion of the permanent home involves looking beyond the established facts of a person's residence to his intentions for the future pattern of his life. That in turn requires special rules to govern cases in which the propositus through infancy or mental disorder is unable, or, not being sui iuris, is regarded as not entitled, to have

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[2]See generally Dicey and Morris, The Conflict of Laws (10th edn, 1980), chapter 7.

[3]Eg Civil Jurisdiction and Judgments Act 1982 (UK) giving effect to the EEC Convention on Jurisdiction and the Execution of Judgments in Civil and Commercial Matters 1968.

[4]1923-60 ALR Mal 160 (Nyasaland H Ct, 1948).

[5]He was in fact held to have acquired a domicile of choice in Nyasaland.

views on the matter. These operate to make it impossible to equate domicile with 'permanent home' in every case, and that equation is further hindered by the special rules as to the domicile of origin, the domicile acquired at birth, which is given special importance.

12. The country identified by domicile. Domicile is used to identify a country possessing a distinct legal system. One implication of this is that it is usually unnecessary to identify a particular place (town, country, province) within the country as the place where the propositus is domiciled. There can be exceptions in particular statutory contexts, and in the special cases presented by boundary changes.

13. An example of the latter is Evans v Evans,[6] concerning the reconstitution of the Colony of the Leeward Islands in 1940 when one of its five presidencies, Dominica, became a separate Colony. Mr. Evans was born in Dominica before 1940 and claimed to have a domicile of origin in the Colony of the Leeward Islands. The court rejected this argument, holding in effect that his domicile of origin was in Dominica despite its being at the relevant date merely one area of a country; but Mr. Evans' residence in Antigua, a continuing presidency, was the basis of the decision that he had acquired a domicile of choice in the post-1940 Colony of the Leeward Islands.

14. Federal states. Where a federal state is concerned, each component unit having a separate body of law, the unit is the 'country' for the purposes of the conflict of laws. To an immigrant in particular, the boundaries between the various units may be of little significance; he plans to live in Britain, Australia, Malaysia or Nigeria, and may have no attachment to any one unit, and no awareness of whether the legal structure of the federation gives significant legislative power to its component units. He must nonetheless be domiciled in such a unit; to acquire such a domicile as a domicile of choice requires more than the establishment of the necessary links with the federation as a whole. This feature of the law of domicile has been much criticised and has been the subject of legislation in some jurisdictions; the reforming statutes are considered below.[7]

15. This statement of the position in federal states needs to be qualified to take account of the exercise (in the family law area the apparently increasing exercise) of legislative power by federal legislatures, whose Acts supersede the previous legislation of the various units on the same topic.[8] Until 1967, the relevant Rule in Dicey's treatise read that 'no person can at the same time have more than one domicile'.[9] Fatayi-Williams J of the Western Nigeria High Court observed in Odiase v Odiase,[10] 'I doubt whether Dicey's proposition...can fit into the modern concept of the exercise of legislative power in a federation'. His view, now widely accepted, was that where the subject-matter is governed by federal legislation, it is proper to speak of domicile in the Federation as a whole; where the relevant law is that of the federal unit, we must still speak only of domicile in the unit. It is a difficult question whether this approach is possible in Kenya, where statutory force has been given to the rule that 'no person may have more than one domicil at any time'.[11]

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[6](1960) 2 WIR 246 (Sup Ct of Windward Is and Leeward Is).

[7]See para 68, below.

[8]Eg, the Family Law Act 1975 of the Commonwealth of Australia, superseding the legislation of the Australian States, mainland Territories and Norfolk Island on the same subject-matter.

[9]It is now qualified by the insertion of the words 'for the same purpose': Dicey and Morris, The Conflict of Laws (10th edn, 1980), p 104.

[10][1965] NMLR 196 at 198.

[11]Law of Domicil Act 1970, No 6, s 10(1).

16. The position that a 'federal domicile' can exist has been reached, not without some controversy, in Nigeria,[12] Australia[13] and Canada.[14] Although the determination of domicile is a matter for the lex fori, it is believed that in appropriate contexts a court sitting outside one of these federal states would accept the reality of the 'federal domicile' so introduced, despite a dictum to the contrary in the Zimbabwe case of Smith v Smith.[15]

17. Domicile of origin. The common law traditionally ascribes to every person a domicile of origin from the moment of his birth. In the standard case of the legitimate child born during his father's lifetime, his domicile of origin will be the country in which the father was then domiciled. Although much else about the domicile of origin is controversial, that much is well established in case law and is reproduced in statutory codes of domicile in Cyprus,[16] India[17] and Kenya.[18] In Barbados and New Zealand, the statutory reform of the law of domicile has effectively abolished the domicile of origin; the reforming legislation is examined below.[19]

18. Outside the standard case, the position is less clear cut. A legitimate but posthumous child is usually declared by the text-writers to take the domicile of his mother, but no authority is given for there appears to be none. To the same effect is legislation in Cyprus,[20] but both the Indian Succession Act 1925[21] and the Kenyan Law of Domicil Act 1979[22] prefer the law which the father had at the time of his death.

19. The rule that the domicile of origin of an illegitimate child is that of his mother at the date of his birth is universally accepted.[23] In some jurisdictions the status of illegitimacy has been abolished, all children enjoying equal status.[24] The effect on the law of domicile is not always clear. The English Law Commission in their examination of a proposal for similar action considered that there was an open choice between (a) applying to all children the principles which now operate in relation to legitimate children and (b) introducing in relation to all children a new rule, namely that a child's domicile should be governed by that of the mother; the Commission preferred the second alternative.[25]

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[12]As a result of the Matrimonial Causes Decree 1970.

[13]By the Matrimonial Causes Act 1959 and the Family Law Act 1975 (both of the Commonwealth Parliament).

[14]Divorce Act 1968 (now RSC 1970, cap D-8).

[15]1970 (1) SA 146 (Rhodesia H Ct).

[16]Wills and Succession Act, RL cap 195, ss 6(a), 7.

[17]Indian Succession Act 1925, Act 39 of 1925, ss 7.

[18]Law of Domicil Act 1970, No 6 of 1970, s 3(a).

[19]See paras 59-61.

[20]Wills and Succession Act, RL cap 195, s 8.

[21]s 7.

[22]s 3(a).

[23]For legislative expressions of this rule, see Wills and Succession Act (Cyprus), RL cap 195, s 8; Indian Succession Act 1925, No 39, s 8; Law of Domicil Act 1970 (Kenya), No 6, s 3(b).

[24]Eg Status of Children Act 1969 (New Zealand) No 18; comparable provisions exist in most Australian jurisdictions.

[25]Working Paper No 74 (1979), paras 8.3-8.5.

20. The position as to the domicile of origin of a child conceived in wedlock but born after the dissolution of his parents' marriage is unclear. A foundling is regarded as having a domicile of origin in the country in which he is found[26] but where this rule is expressed in legislation the domicile attributed to a foundling is not expressly declared to be one of origin.[27]

21. At common law it would seem that no subsequent event can alter the domicile of origin ascribed to a child at his birth. The child's adoption will only have this effect if statutory provision is made, either in the legislation as to adoption[28] or in that on domicile.[29]

22. Domicile of choice. The acquisition of a domicile of choice is in issue in the overwhelming majority of reported cases, which are very numerous. There is general agreement that two elements must be proved, the factum of residence and the animus manendi, an intention to remain. Perhaps the use of Latin is significant, suggesting a precision which is lacking. Certainly the courts have experienced much difficulty in applying the criteria to the astonishingly varied facts of the cases before them.

23. The factum of residence. It is clear that the propositus must become 'resident' in the country, but this appears to mean nothing more than physical presence other than casually or as an itinerant traveller. Ramaswami J of the Supreme Court of India stated the position in these terms: 'For this purpose, residence is a mere physical fact, and means no more than personal presence in a locality, regarded apart from any of the circumstances attending it. If this physical fact is accompanied by the required state of mind, neither its character nor its duration is in any way material'.[30] Residence even for a few hours may be sufficient, but must be proved: an intending immigrant deterred from disembarking from his ship by reports of an epidemic will not acquire a domicile of choice.[31] If the period of physical presence in a country was intended as a short visit, eg a holiday, it may be disregarded even if the visitor intends ultimately to return to settle in that country.[32]

24. It appears that a rather different rule as to the acquisition of a domicile of choice applies in Cyprus. Although the relevant provisions of the Wills and Succession Act[33] appear to be designed to codify the common law, section 9 provides:

> 'A person acquires a domicile of choice by establishing his home at any place in [Cyprus] with the intention of permanent or indefinite residence therein, but not otherwise...'[34]

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[26]See Re McKenzie (1951) 51 SR (NSW) 293 (NSW Sup Ct).

[27]This is the case in Kenya (Law of Domicil Act 1970, No 6, s 4) and also in Barbados and New Zealand where the domicile of origin is effectively abolished; see para 67.

[28]As in the United Kingdom: Children Act 1975, s 8 and Sched 1, para 3(1) and in most of the Australian jurisdictions (but see now next note).

[29]See the uniform Domicile Act of the Australian States, s 8(3) and, for the effect of rescission of an adoption, s 8(6).

[30]Kedar Pandey v Narain Bikram Sah AIR 1966 SC 160 at 163.

[31]The facts are those of Clayton v Clayton 1922 CPD 125 (influenza in Cape Town).

[32]IRC v Duchess of Portland [1982] 1 All ER 784.

[33]RL cap 195, ss 6-13, applying to regulate succession only (s 5).

[34]Italics added; for a Proviso to this section, see para 35, below.

Although 'home'is often used as a convenient and readily-understood synonym for domicile, it is not, in normal usage, the same as 'residence'. Arguable a man setting foot on Cyprus intending to remain there permanently, and clearly acquiring a domicile of choice there under the traditional rules, would not do so immediately for the purposes of the Wills and Succession Act; it would have to be proved that he had done something which constituted 'establishing his home'. No authority on the point has been found.

25. Illegal residence. There is Canadian authority for the proposition that a domicile of choice can be acquired even by an illegal immigrant.[35] The weight of Commonwealth authority is to the contrary, with reported decisions from two Australian States, England and Zimbabwe.

26. The animus manendi. The element of intention is very much more difficult both to state with precision and to establish in a disputed case. Dicey and Morris's treatise speaks of 'an intention of permanent or indefinite residence' (words reproduced in the Cypriot Act cited above). A South African writer has commented that at least four types of intention can be distinguished:

(1) An intention to reside in the country for a definite period, eg for the next six months, and then to leave;

(2) An intention to reside in the country until a definite purpose is achieved, eg until a particular piece of work is completed, and then to leave;

(3) An intention to reside in the country for an indefinite period, ie until and unless something, the happening of which is uncertain, occurs to induce the person to leave;

(4) An intention to reside forever'[36]

An intention falling into classes (1) or (2) will not suffice; that in class (4) is sufficient for the acquisition of a domicile of choice; the problem cases are in class (3).

27. Some judicial formulations. This can be illustrated by presenting a selection of the formulae used by judges, in many different parts of the Commonwealth, to describe the necessary intention. This is not, of course, other than highly selective, and in some cases nothing will have turned on the words used; but it serves to reveal some of the shades of meaning behind a supposedly common concept:

"the intention of residing there for a period not limited as to time";[37]
"an intention of continuing to reside there for an unlimited time";[38]
"an intention to remain so firm and positive as to exclude any intention to make an ultimate home in another jurisdiction";[39]
"a deliberate intention to settle there";[40]

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[35]Jablonski v Jablonski [1972] 3 OR 410.

[36]W. Pollak, 'Domicile' (1933) 50 SALJ 449 at p 465. For a full discussion of South African law using this typology see C.F. Forsyth, Private International Law (1981), pp 103-107.

[37]King v Foxwell (1876) 3 ChD 518 at 520 per Jessel MR.

[38]Udny v Udny (1869) LR 1 Sc and Div 441 at 458 per Lord Westbury.

[39]Marshall v Marshall (1956) 22 MLJ 122 (Singapore) per Taylor J.

[40]Kedar Pandey v Narain Bikram Sah AIR 1966 SC 160 at 163 per Romaswami J.

"a present intention to reside for ever";[41]
"an intention of remaining [there] permanently";[42]
"an intention never to leave";[43]
"the intention of permanently settling there: of remaining there, that is to say, as Lord Cairns says, 'for the rest of his natural life', in the sense of making that place his principal residence indefinitely";[44]
"the establishment of a home in a place where a man intends to reside for an indefinite time is, of itself, of no great importance [for] residence and domicil are two perfectly distinct things";[45]
"make up his mind to live and die [there]";[46]
"an intention of living and dying in this country".[47]

28. The grey area. There are a number of factors which contribute to the creation of a 'grey area', identified in part by this range of dicta. The first is the simple observation that a person's attitude and plans can change slowly and imperceptably. The testimony of a Singapore judge could have been given, mutatis mutandis, in very many jurisdictions: 'The vast majority of both officials and businessmen of non-Malayan origin still contemplate ultimate retirement to some other country and therefore do not become domiciled here, however long their residence, but there is a noticeable tendency to remain longer, to return after provisional retirement for further periods of residence and, in a few instances, to settle finally'.[48]

29. The second is the phenomenon of the uncertain future event.[49] A robust Scottish statement is that of Lord Fullerton in IRC v Gordon's Executors:[50]

> 'If in order to constitute a domicile there were required an animus remanendi so permanent and so absolute, as to be independent of any possible change of circumstances, I do not understand how, in the constant uncertainty and transition of all sublunary events, a domicile ever could be established.'

On the other hand a much harder line was taken in the South African case of Eilon v Eilon.[51]

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[41]Central Bank of India v Ram Narain AIR 1955 SC 36 at 39; Malkiat Singh v State of Punjab AIR 1966 Pun & Har 250 at 254 per Sandhwalla J.

[42]Sanders v Sanders (1953) 4 Fiji LR 73.

[43]In re Mrs. Aga Begum 1971 1 Mad LJ 18; Gordon v Gordon [1965] EA 87 at 89 per Reide J (Tanzania H Ct).

[44]Trottier v Rajotte [1940] 1 DLR 433 at 436 per Duff CJC. The reference to Lord Cairns is semble to his judgment in Bell v Kennedy (1868) LR 1 Sc and Div 441 but the precise phrase is not used there. Its 'interpretation' by Duff CJC highlights the contrast between 'permanently' and 'indefinitely'.

[45]Donald v Donald [1922] NZLR 237 at 240 per Stringer J.

[46]Linton v Guderian AIR 1929 Cal 599 at 602 per Rankin CJ.

[47]Coombe v Coombe 1923-60 Mal 115 at 119 per Mathew Ag CJ (Nyasaland H Ct, 1945.

[48]Taylor J in Marshall v Marshall (1956) 22 MLJ 122 at 123.

[49]As in class (3) in para 26, above.

[50](1850) 12 D 657 at 662, cited by Anton in his Private International Law at p 178 as deserving to be better known.

[51]1965 (1) SA 703 (AD) at 721.

30. The third is a semantic, but nonetheless important, point, the uncertainty inherent in the use of the word 'permanently' in this context. This was fully analysed by Asprey JA in the New South Wales Court of Appeal in Hyland v Hyland, in a passage which also touches upon the other factors mentioned above and which deserves to be set out in full (omitting the citation of authorities).[52]

> 'The contrast in this context between the words "permanent" and "indefinite" was discussed by Langton J. In Gulbenkian v. Gulbenkian where Dicey's use of "indefinite" was held to be justified. There are many shades of "permanence" which are too obvious and well-understood to need detailed discussion here. The Shorter Oxford Dictionary defines "permanent" as "lasting or designed to last indefinitely without change; enduring; persistent; opposite to temporary". It is not synonymous with "everlasting". A very usual sense is that of indefinitely continuing. ... In the context of the principles applicable to a domicile of choice I am of the opinion that the use of the word "permanent" means nothing more than Lord Westbury's phrase "general and indefinite" which, as I understand it, produces the result that the person's intention is one which, when formed, is to remain as a resident of the country of choice for a period then regarded by him as unlimited in point of time and without having addressed himself to the question of giving up such residence and leaving the country of his choice upon the happening of some particular and definite event in the foreseeable future notwithstanding that he may entertain in the phraseology which appears to have been coined by Story a floating intention to return at some future period to his native country. Firstly, it appears to me to be quite unreal to ask the average person who has arrived to settle in a particular place to determine whether his intention is to reside there forever for his answer well might be that he proposes to remain so long as the political climate continues as it is or the economy remains stable or his own financial position or health permits him to do so - and there might be a dozen or more other remote contingencies which, if suggested to him, would place a qualification on the word "permanent" if it were otherwise to mean the duration of that person's life. Secondly, the intention which is necessary to the acquisition of a domicile of choice may be formed without the individual being conscious of having taken any deliberate decision at any particular point of time. Whilst undoubtedly there are many learned judges who have expressed themselves on this subject in terms of a "permanent home", there are others who have preferred a phraseology connoting a term of indefinite residence.'

31. No analysis of the case-law, however exhaustive, can resolve these difficulties. There is clearly a case for a statutory definition of the required intention, to produce at least a common starting point, and some of the reforming statutes considered below include such a provision. It remains to note the provisions of those Commonwealth statutes which aimed to restate rather than reform the common law rules. That in force in Cyprus has already been cited;[53] India and Kenya have more elaborate provisions.

32. The Indian Succession Act contains two relevant sections. One introduces a concept of domicile quite different from that existing under the usual common law rules, acquired by the deposit of a written notice to that effect in a government office, subject only to residence for the past twelve months.[54] A provision much more in line with the common law principles is also included. Section 10 provides that 'a man acquires a new domicile by taking up a fixed habitation in a country which is not

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[52]See also Re Furse [1980] 3 All ER 838 (residence for 39 years; intended to leave if health prevented enjoyment of present way of life; domicile established as this intention too vague and uncertain).

[53]Para 24 , above.

[54]Indian Succession Act 1925, Act 39, s 11.

that of his domicile of origin'. This seems to lack the requirement of permanence, certainly if that is equated with an intention of life-long residence.[55]

33. The Kenyan Law of Domicil Act 1970 appears to reflect the common law position but with an unusual extra provision. The basic test for acquiring a domicile of choice is 'Where a person... takes up residence in a country... with the intention of making that country his permanent home...'.[56] It is then further provided:

> 'A person may intend or decide to make a country his permanent home even though he contemplates leaving it should circumstances change.'[57]

It seems likely that this provision was prompted by the decision of the East African Court of Appeal in Thornhill v Thornhill[58] where an immigrant from Sri Lanka who had set up in Uganda as a manufacturer of instant tea was held in all the circumstances to have acquired a domicile of choice in Uganda despite 'the hypothetical opinion that if things do not go the way he hopes they will, he might have to leave the country in which he has decided to establish himself and make his home'.[59] This seems to accord with the generally-accepted position at common law.

34. Particular cases. Even if Commonwealth jurisdictions were more clearly of one mind in identifying the required animus manendi, their courts would still have to apply those criteria. This involves the courts in an examination of an individual's life-story, and often of his family history; the material is utterly fascinating in its endless variety, but, equally, cannot be made the subject of easy formulae. A very large number of cases from the major Commonwealth jurisdictions are analysed to demonstrate relevant considerations in standard treatises such as Dicey and Morris[60] and there would be little value in a repetition of that exercise, but it may be observed that similar factors have been relied upon in cases reported in other Commonwealth jurisdictions. So the purchase of land, especially the purchase of a retirement home and grave-plot, marriage to a local girl or other local family connections, and a change of religion are factors which have been regarded as evidence of the acquisition of a new domicile. The question of naturalization has been treated as of less importance, though where such cases concern residence in pre-independence times they must be interpreted with caution. Prolonged residence is evidence of domicile and is given more weight than a man's statements as to his own domicile.

35. Statutory provisions in a few jurisdictions draw attention to certain special cases. In Cyprus it is provided that 'no person shall be held to have acquired a domicile of choice in [Cyprus] by reason only of his residing there in Her Majesty's naval, military, air or civil service',[61] a provision remaining on the republican statute book but arguably of little or no current effect. The Indian Succession Act 1925 contains a similar but more extensive provision:

> 'A man is not to be deemed to have taken up his fixed habitation in India merely by reason of his residing there in the civil, military

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[55]For the Exception and Illustrations to s 10, see paras 35-36, below.

[56]Law of Domicil Act 1970, No 6, s 8(1).

[57]s 8(2).

[58][1965] EA 268.

[59]Per de-Lestang VP at 277.

[60]The Conflict of Laws (10th edn, 1980), pp 115-120.

[61]Wills and Succession Act, RL cap 195, s 9 Proviso.

or air force service of the Government, or in the exercise of any profession or calling.'[62]

It will be seen that this applies only to domicile in India, and not to cases in the Indian courts in which it is argued that a person has lost an Indian domicile of origin and acquired a domicile in, say, Bangladesh. Nor would it apply were it a relevant issue whether the propositus was domiciled in a particular part of India. Despite this limitation the reference to 'profession or calling' is of some general importance.

36. Both provisions use the phrase 'merely by reason...'; they do not preclude soldiers, businessmen and others from acquiring a domicile of choice in appropriate circumstances, but do require a positive decision to settle in the country, a decision not governed by the exigencies of service or profession.[63] So understood, these legislative provisions are wholly in accord with the position in Commonwealth jurisdictions generally, where what were once seen as 'special cases' are now treated merely as special illustrations of the general rules in operation. This is true in respect of diplomats, other government officials (in the older cases typically colonial officers), members of the armed forces, and members of religious orders. A modern legislative code would accordingly make no special provision for cases of this sort.

37. Loss of domicile of choice and its results. It is well established that a domicile of choice is only lost when the propositus both ceases to reside in the country and ceases to have the animus manendi. Both are required: the fact that the propositus may intend to leave the country, and may even have made travel arrangements and obtained accommodation and employment in another country, is not in itself sufficient to deprive him of his domicile of choice.[64] Equally a change of residence is insufficient without proof of an unequivocal intention to abandon the domicile of choice, although the evidence required has been said to be less strong than that required to establish the acquisition of such a domicile;[65] but it has also been held that where it is clearly proved that the propositus has lost the intention to return that suffices, without proof of a positive intention not to return.[66]

38. If one domicile of choice is lost without at the same time another being acquired, the domicile of origin 'revives' and becomes the effective domicile so as to prevent there being a 'gap'. This rule, known from its source as the Rule in Udny v Udny,[67] applies however remote the links between the propositus and his domicile of origin.[68] It is accepted in many Commonwealth jurisdictions but, as will be seen below has attracted much attention from law reform agencies.

39. Domicile of dependence. Certain categories of persons are for the purposes of the law of domicile alieni iuris. That is, they are not capable of acquiring an independent domicile of their own and are instead

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[62] s 10, Exception.

[63] See the Illustrations to s 10 of the Indian Act: Illustrations (iv) and (v) concern a man travelling to India solely to attend to the affairs of a dissolved partnership and planning to leave having dealt with that business (no domicile acquired), then changing his intention and deciding to take up a 'fixed habitation' in India (domicile acquired).

[64] The facts are those of Foo v Foo (1956) 40 HKLR 112 (refugee placement in the United States accepted just prior to case).

[65] Re Eu Keng Chee (1961) 27 MLJ 210 (Singapore).

[66] Re Flynn [1968] 1 WLR 103 at 113-115 per Megarry J.

[67] (1869) LR 1 Sc and Div 441.

[68] Eg that of Mr. Gray (semble Scottish) in the case stated in para 9, above.

deemed to share the domicile of some other person, their domicile changing as his changes. There is general (though not always wholly unqualified) acceptance of this proposition in Commonwealth jurisdictions, but legislatures and law reform agencies have been active in considering two aspects of the matter, the scope of the rule in terms of the categories of persons properly regarded as dependent, and the selection of the person on whom the domicile is to depend; these points are considered in the context of reforming statutes below.[69]

40. At common law, the categories of dependent persons comprise

(a) children below the age of majority;
(b) married women; and
(c) the mentally disordered.

A minor child's domicile follows that of his father, if the child is legitimate, of his mother if he is illegitimate or fatherless. A married woman (even if she is below the age of majority[70]), takes the domicile of her husband or if he is a minor that of her father-in-law; a woman widowed while still under age becomes again dependent upon her father.

41. Although these rules are almost always stated as absolute, there is a trickle of authority from a number of Commonwealth jurisdictions which suggests the existence of exceptions to or a discretionary element within the rules, and (quite apart from the major reforms reviewed below) some adjustments have been made by statute.[71] One possible exception arises in the case of children whose parents have been divorced, custody of the children being awarded to one parent or the other (and, arguably, this could be extended to any other situation in which one parent is given exclusive custody). This view was advanced in Manitoba and adopted in Northern Ireland, but rejected in Scotland. It has been expressly adopted by statute in Kenya.[72] It has been held in India that a child may retain its domicile of origin in India despite the emigration of its father if the father is in desertion, without any decree of divorce or custody award.

42. The Indian Succession Act 1925 contains a more extensive exception. Section 14 reads:

> 'The domicile of a minor follows the domicile of the parent from whom he derived his domicile or origin.
> Exception. The domicile of a minor does not change with that of his parent, if the minor is married or holds any office or employment in the service of the Government, or has set up, with the consent of the parent, in a distinct business.'

There is virtually no support for an exception in these terms in other Commonwealth common law jurisdictions, although there is occasional discussion of the proposition that a minor may acquire the capacity to select his own domicile on marriage or on 'engaging in trade'.[73] There is

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[69] See paras 63-66

[70] See Law of Domicil Act 1970 (Kenya), No 6, s 9(2) for a statutory statement of this rule.

[71] In Cyprus, the Wills and Succession Act RL cap 195 which contains provisions generally re-stating the law of domicile is wholly silent on the domicile of dependence; semble the common law rules are left wholly intact.

[72] Law of Domicil Act 1970, No 6, s 9(1) Proviso.

[73] See Costie v Costie [1947] 3 DLR 541, 542 (Ont) (revsd on the merits [1947] 4 DLR 472.

however a similar approach in the United States, where the influential Restatement of the Conflict of Laws[74] states

> 'An emancipated child may acquire a domicile of choice. ... Some states require actual court proceedings [for emancipation], but the majority insist upon no more than that the minor, having attained years of discretion, maintain a separate way of life, either with his parents' consent or because they are dead or have abandoned him. It is frequently held that the contraction of a valid marriage emancipates a minor.'

In Scotland, a minor (ie in Scots law a boy over 14 or a girl over 12) may have legal capacity to choose his own domicile in circumstances very similar to those described in the Restatement as emancipation. Roman-Dutch law as developed in South Africa appears also to regard an emancipated minor as having this capacity.

43. A related question which has arisen in the jurisdictions following the common law is whether the parent has a discretion, whether he can determine the child's domicile independently of any change in his own domicile. It has been held that a widow changing her domicile on re-marriage, or as a result of a change in the domicile of her new husband subsequent to the date of the re-marriage, can decide whether or not the domicile of her children should also change;[75] Scots law is to the same effect.[76] In New Zealand it has been held that the mother has this power even in cases where her own domicile is unchanged, Wilson J advancing a general proposition that

> 'a dependent person's domicile changes when his parent intends it to change and the change is for his benefit, irrespective of whether the domicile of the parent also changes.'[77]

In terms that proposition applies to all parents, whatever the family circumstances, but there appear to be no Commonwealth cases in which such a generous rule has been put into effect.

44. Domicile of married women. There is a clear trend in the law of Commonwealth jurisdictions to abolish or limit the scope of the rule that a married woman takes the domicile of her husband as a domicile of dependence throughout the existence of the marriage. Reforming statutes to this effect are considered below.[78] Here it is necessary to notice two variants in the Indian and Kenyan legislation.

45. The Indian Succession Act 1925 provides as follows:

> '15. By marriage, a woman acquires the domicile of her husband, if she had not the same domicile before.
> 16. A wife's domicile during her marriage follows the domicile of her husband.
> Exception. The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent court, or if the husband is undergoing a sentence of transportation.'

The Exception to section 16 is clearly inconsistent with the common law position expanded by the Judicial Committee of the Privy Council in AG for Alberta v Cook.[79]

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[74] Second edn, 1971, s 22, comment (f).

[75] Re Beaumont [1893] 3 Ch 490.

[76] Crumpton's Judicial Factor v Finch-Noyes 1918 SC 378, 386.

[77] Re G [1966] NZLR 1028.

[78] See paras 63-64.

[79] [1926] AC 444, PC.

46. The Kenyan Law of Domicil Act 1970 contains provisions of some subtlety:

> '7. A woman shall, on marriage, acquire the domicil of her husband.
>
> 8. (3) An adult married woman shall not, by reason only of being married, be incapable of acquiring an independent domicil of choice.
> (4) The acquisition of a domicil of choice by a married man shall not, of itself, change the domicil of his adult wife or wives, but the fact that a wife is present with her husband in the country of his domicil of choice at the time when he acquires that domicil or subsequently joins him in that country shall raise a rebuttable presumption that the wife has also acquired that domicil.
>
> 9. (2) The domicil of an infant female who is married shall change with that of her husband.'

47. The apparent simplicity and elegance of these provisions conceals some points of real difficulty.

(a) An adult woman domiciled in Kenya marries a man domiciled in England. They live together in Nairobi. It is clear that she becomes domiciled in England, even if she would herself regard Kenya as her permanent home notwithstanding the marriage. It is not clear how, or even whether, she can resume a Kenyan domicile.

(b) The facts are as in (a), except that the man has a domicile of choice in Kenya. He later returns to England and resumes his domicile of origin there. What is the effect of section 8(4) which is in terms of a domicile of choice? Semble it is intended to apply to any deliberate change of domicile by the husband, but the point is unclear.

(c) An infant wife's domicile changes with that of her husband. It is not clear precisely what is the position on her reaching the age of majority. Would her de facto domicile of choice in another country take effect immediately?[80]

REFORM: PROPOSALS AND ACTION

48. Reform of the law of domicile. A considerable number of Commonwealth jurisdictions have taken action in the last twenty years to reform their law of domicile.[81] In some cases the reforms have been limited in scope, often focussing on a single issue (the domicile of married women) and sometimes on that issue as it arises in a particular context (jurisdiction in matrimonial causes). A number of initiatives by law reform agencies have contributed to this process.

49. Britain 1954-63. One of the earliest, and in the event least fruitful, initiative took place in England. The First Report of the Private International Law Committee[82] was concerned with the Draft Convention to Regulate Conflicts between the Law of the Nationality and the Law of the Domicile negotiated at The Hague Conference. It advised

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[80] Cf Re Scullard [1957] Ch 107.

[81] The Domicile Ordinance 1948, No 18 (Seychelles) (now RL cap 92) repealed arts 13 and 102-111 of the Seychelles Civil Code and provided (s 2) that the law of domicile should be the law of England for the time being. Similarly, s 2(1) of the Matrimonial Causes Law 1976, No 9 (Cayman Islands) gives 'domicil' for the purposes of that Law the meaning ascribed to it from time to time in English law.

[82] Cmd 9068 (1954).

that the law both of England and Scotland should be reformed, and produce a Code of the Law of Domicile as the basis for legislation. The Code largely restated the existing law but would have effected a number of reforms:

(a) it would have abolished the rule in Udny v Udny as to the revival in certain circumstances of the domicile of origin;

(b) it would have defined a domicile of choice and provided rules for its ascertainment in Article 2 of the Code:

> (1) Subject to the provisions of this Code, the domicile of a person shall be in the country in which he has his home and intends to live permanently.
>
> (2) Unless a different intention appears, the following are rules for ascertaining a person's intention to live permanently in a country:-
>
> Rule 1: Where a person has his home in a country, he shall be presumed to intend to live there permanently.
>
> Rule 2: Where a person has more than one home, he shall be presumed to intend to live permanently in the country in which he has his principal home.
>
> Rule 3: Where a person is stationed in a country for the principal purpose of carrying on a business, profession or occupation and his wife and children (if any) have their home in another country, he shall be presumed to intend to live permanently in the latter country.
>
> (3) Paragraph (2) shall not apply to persons entitled to diplomatic immunity or in the military, naval, air force or civil service of any country, or in the service of an international organisation.

(c) it would, while preserving the general rule as to the domicile of a married woman have entitled a woman separated from her husband by a competent court to acquire an independent domicile; and

(d) it would have enabled a court to vary in certain cases the domicile of an infant or of a lunatic.[83]

50. A Bill to implement the Report's recommendations on domicile failed in 1958, principally as a result of fears expressed on behalf of the expatriate business community in England as to the possible consequences upon their liability to tax of the shift in the burden of proof brought about by Article 2 of the Code. A less ambitious Bill in the following session also failed, and the Private International Law Committee was invited to reconsider the matter.[84] Its Seventh Report[85] contained a 'businessman's formula' designed to meet the earlier fears but concluded that such a formula would make reform of the law hardly worth while. The Committee also reviewed the whole question of the domicile of married women, reaching the pessimistic conclusion that action on that score would involve legal complications outweighing any advantages that might accrue. Not surprisingly, no legislative action followed.

51. Canada 1961. The Committee did not refer to the work of the Canadian Uniform Law Commissioners undertaken between the dates of the two British

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[83]For discussion see B Wortley 'Proposed Changes in the Law of Domicile' (1954) 40 Grotius Society Transactions 121; R H Graveson, 'Reform of the Law of Domicile' (1954) 70 LQR 492.

[84]For the background, in which the correspondence columns of The Times played an important part, see M Mann, 'The Domicile Bills' (1959) 8 ICLQ 457.

[85]Cmnd 1955 (1963).

reports. If the British initiative erred on the side of caution, the Canadian Commissioners were ahead of their time. They produced a draft model Act, the Domicile Code, which in effect abolished the domicile of origin and the domicile of dependence, and introduced a new definition of domicile with presumptions to aid its ascertainment. Children and married women were to be treated in the same way as adults generally; so were mental incompetents, except for a power vested in the courts to approve a change in their domicile made by their guardian.[86] The principal provisions of the proposed Act were as follows:

> 4. (1) Every person has a domicile.
> (2) No person has more than one domicile at the same time.
> (3) The domicile of a person shall be determined under the law of the province.
> (4) The domicile of a person continues until he acquires another domicile.
>
> 5. (1) Subject to section 6, a person acquires and has a domicile in the state and in the subdivision thereof in which he has his principal home and in which he intends to reside indefinitely.
> (2) Unless a contrary intention appears,
> (a) a person shall be presumed to intend to reside indefinitely in the state and subdivisions where his principal home is situate, and
> (b) a person shall be presumed to have his principal home in the state and subdivision where the principal home of his spouse and children (if any) is situate.
> (3) Subsection (2) does not apply to a person entitled to diplomatic immunity or in the military, naval or air force of any country or in the service of an international organization.
>
> 6. The person or authority in charge of a mentally incompetent person may change the domicile of the mentally incompetent person with the approval of a court of competent jurisdiction in the state and subdivision thereof in which the mentally incompetent person is resident.

No Province has adopted the model Act.

52. Australia and New Zealand 1970-82. Almost ten years later another initiative got under way, this time in Australia. The Standing Committee of Federal and State Attorneys-General (a body which has close links with officers in neighbouring jurisdictions such as Papua New Guinea and, especially relevant in this context, New Zealand) considered the reform of the law of domicile at its 1970 meeting. The matter was considered within the several jurisdictions,[87] and by a further meeting of Ministers and Law Officers in 1974, which approved a draft Bill prepared in New Zealand. A revised version of this Bill was enacted in New Zealand as the Domicile Act 1976, though its coming into effect was postponed in the expectation of parallel action in the Australian jurisdictions; it eventually came into force on 1 January 1981. In Australia there was a very limited reform in the context of the Family Law Act 1975 but it was only in 1982 that uniform legislation was brought into force for a general reform, and that legislation is not identical with the New Zealand model.

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[86] See the Commissioners' Proceedings for 1957 (p 153), 1959 (pp 24, 91), 1960 (pp 29, 104), 1961 (pp 23, 139) and 1964 (p 92) and, for commentary, W S Tarnopolsky 'The Draft Domicile Act - Reform or Confusion' (1964) 29 Sask BR 161.

[87] See, eg, the published report of the (Victorian) Chief Justice's Law Reform Committee on the Reform of the Law of Domicil (dated 25 October 1972).

53. The New Zealand Domicile Act 1976,[88] which has been adopted, save for two provisions,[89] in Barbados,[90] effects a comprehensive reform of the law. It is reproduced in Appendix A. The Act

(a) abolishes, in effect, the concept of a domicile of origin and, expressly, the rule in Udny v Udny as to the revival of that domicile;[91]

(b) abolishes the dependent domicile of married women;[92]

(c) enables a child to acquire an independent domicile on attaining the age of 16 or on marrying below that age;[93]

(d) makes provision as to the domicile of children below that age, including provision for cases in which the child's parents are living apart;[94]

(e) restates the rules for the acquisition of a new domicile (ie, in traditional terminology, a domicile of choice), so that, in essence, the propositus must be 'in' the country and intend 'to live indefinitely in that country';[95]

(f) applies to cases concerning the acquisition of a new domicile the standard of proof formerly appropriate for the abandonment of a domicile of choice and the acquisition of another domicile of choice (ie, a lower standard than is required where the domicile being lost is one of origin);[96] and

(g) deals with the special problems of domiciles in federal or composite states (called 'unions' in the Act) by ensuring that a person domiciled in the union as a whole is always domiciled in a country forming part of the union (and providing rules to identify which is that country),[97] and that a person domiciled in such a country is also domiciled in the union as a whole.[98]

No provision is made concerning the domicile of insane persons, the law on that topic being expressly saved in section 7.

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[88] No 17 of 1976.

[89] Those concerning the age at which a child can acquire an independent domicile and domicile in 'unions'.

[90] Domicile Reform Act 1979, No 31.

[91] Domicile Act 1976 (New Zealand), s.11.

[92] s 5.

[93] s 7.

[94] For the case of children whose parents are living apart, see further para 66 , below.

[95] s 9(c)(d).

[96] s 12.

[97] s 10.

[98] s 13. Sections 10 and 13 are not reproduced in the Barbados Domicile Reform Act 1979, although cases involving domiciles in the United Kingdom or the United States must present themselves in Barbados. For these 'federal' provisions, see further para 68, below.

54. The Australian uniform Domicile. Act[99] is now in force in all Australian jurisdictions.[100] It is slightly less radical than its New Zealand counterpart. It is reproduced in Appendix B. The Act

(a) abolishes the rule in Udny v Udny as to the revival of the domicile of origin,[101] without however abolishing the domicile of origin itself;

(b) abolishes the dependent domicile of married women;[102]

(c) enables a child to acquire an independent domicile on attaining the age of 18 or on marrying below that age;[103]

(d) makes provision as to the domicile of children below that age, including provision for cases in which the child's parents are living apart and for children the subject of adoption orders or whose adoption has been rescinded;[104]

(e) redefines the intention needed to acquire a domicile of choice,[105] but without establishing any presumptions to guide the ascertainment of such a domicile;

(f) contains a rule as to the evidence required to establish a domicile of choice similar in its effect to that in the New Zealand Act;[106]

(g) contains a provision affecting domicile in a federal 'union', so that a person domiciled in the union is domiciled in one country forming part of the union,[107] but with no provision dealing expressly with the reverse case.[108]

No provision is made concerning those lacking mental capacity; the law on this topic is expressly saved in section 7(2).

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[99]Or almost uniform: s 8 of the Victorian Act uses a different drafting technique from the other Acts, and the Commonwealth Act, because of some additional material (mainly concerning application to Territories) and further differences in drafting has a variant numbering of the principal sections.

[100]Domicile Act 1982, No 1 (Commonwealth), Domicile Act 1978, No 9231 (Victoria), Domicile Act 1979, No 118 (New South Wales), Domicile Act 1979, No 78 (Northern Territory), Domicile Act 1980, No 81 (South Australia), Domicile Act 1980, No 38 (Tasmania), Domicile Act 1981, No 51 (Queensland), Domicile Act 1981, No 91 (Western Australia). For commentary see M Pryles, 'Reform of the Law of Domicile in Victoria', (1979) 5 Monash LR 236.

[101]s 6.

[102]s 5.

[103]s 7(1).

[104]s 8. For the cases of children whose parents live apart, see further para 66 , below.

[105]s 9.

[106]Australian Uniform Act, s 11.

[107]s 10. See further para 68 , below.

[108]A provision which is technically unnecessary but was included in the New Zealand Act because that Act replaces and does not merely amend the common law rules.

55. Britain 1973. As part of its work on family law, the English Law Commission examined questions of jurisdiction in matrimonial causes, reporting on the matter in 1972.[109] It recommended the abolition of the dependent domicile of married women, but for the purposes of jurisdiction in matrimonial causes only. Just before the publication of this Report, a private member's Bill had been introduced to abolish that domicile for all purposes, but it was not given a second reading, the issue being considered by a special Working Party set up by the Lord Chancellor. The outcome was the Domicile and Matrimonial Proceedings Act 1973,[110] Part 1 of which introduced reforms in the law of domicile, effective for all purposes. The relevant provisions are reproduced in Appendix C; sections 1 and 4 are in force throughout the United Kingdom, but section 3 is not applicable in Scotland. The Act deals with three matters only; it

(a) abolishes the dependent domicile of married women;[111]

(b) enables a child to acquire an independent domicile on obtaining the age of 16 or on marrying under that age;[112]

(c) makes provision as to the domicile of children under that age whose parents are living apart.[113]

56. Ontario and Prince Edward Island. The Family Law Reform Act 1978[114] of Ontario made a large number of amendments to the relevant common law, including that of domicile. It provides that 'the same rules shall be applied to determine the domicile of a married woman as for a married man',[115] and makes fresh provision for the domicile of minors in section 68, which is in these terms:

> '(1) Subject to subsection (2), a child who is a minor,
> (a) takes the domicile of his or her parents, where both parents have a common domicile;
> (b) takes the domicile of the parent with whom the child habitually resides, where the child resides with one parent only;
> (c) takes the domicile of the father, where the domicile of the child cannot be determined under clause (a) or (b); or
> (d) takes the domicile of the mother, where the domicile of the child cannot be determined under clause (c).
>
> (2) The domicile of a minor who is or has been a spouse shall be determined in the same manner as if the minor were of full age.'

The Family Law Reform Act 1978[116] of Prince Edward Island contains identical provisions.[117]

57. Irish proposals 1981. The Law Reform Commission of Ireland published in 1981 a Working Paper on 'Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws'. It takes serious account of the

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[109] Law Com No 48. Parallel work was undertaken by the Scottish Law Commission.

[110] Cap 45.

[111] s 1.

[112] s 3.

[113] s 4. See further para 66 , below.

[114] Cap 2.

[115] s 65(3)(c).

[116] Cap 6.

[117] ss 60(3)(c) (married women), 61 (minors).

possible replacement of domicile by habitual residence,[118] but also makes detailed proposals for the reform of domicile on the assumption that it will be retained. The proposals are comprehensive, and would

(a) abolish the rule in Udny v Udny as to the revival of the domicile of origin, without abolishing the concept of a domicile of origin;

(b) abolish the dependent domicile of married women;

(c) enable a child to acquire an independent domicile at the age of 16 (or possibly 18) or on marrying below that age;

(d) make detailed provision as to the domicile of children below that age, both in terms of domicile of origin and of dependence, including provision for cases in which the parents are living apart,[119] adopted children and foundlings, and would give a court power to change the domicile of a child on the application of any interested person in certain prescribed circumstances;[120]

(e) restate the rules for the acquisition of a new domicile in precisely the same terms as are used in the New Zealand Act;

(f) deal with the problems of domicile in federal states, in terms closely following the New Zealand model;[121]

(g) codify the law as to the domicile of the mentally ill.

The Commission's Paper[122] proposes that legislation should abolish the rule that a domicile of origin is more difficult to abandon than a domicile of choice; but no provision to this effect is included in their Scheme for a Bill.

REFORM: THE COMMONWEALTH POSITION

58. The great majority of Commonwealth jurisdictions have made no legislative reforms in the field of domicile, and the common law (or Roman-Dutch law) principles remain fully operative. A few jurisdictions have received the effect of United Kingdom legislation by virtue of applying for this purpose 'the law of England for the time being'.[123] In the paragraphs which follow an account is given of the changes which have been made, or officially proposed, on particular issues.

59. (a) Domicile of origin. Note has already been taken of the minor variations in the rules as to the domicile of origin of particular groups, principally posthumous children.[124] The numbers affected are tiny. The principal objection taken to the common law rules concerns the Rule in Udny v Udny as to the revival of the domicile of origin should any 'gap' be threatened in a person's effective domicile. This rule has been abolished in Australia, Barbados and New Zealand,[125] and the Kenyan Law of

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[118] See para 70, below.

[119] See further for these cases, para 66, below.

[120] Cf W Binchy (a counsellor of the Commission), 'Reform of the Law Relating to the Domicile of Children: a Proposed Statute' (1979) 11 Ottawa LR 279.

[121] See further para 68, below.

[122] Para 122.

[123] See para 48, above.

[124] See para 18, above.

[125] Uniform Australian Domicile Acts, s 6; Domicile Act 1976 (NZ), s 11; Domicile Reform Act 1971 (Barbados), s 10.

Domicil Act 1970 appears to achieve the same result by providing[126] that 'notwithstanding that he may have left the country of his domicil with the intention of never returning, a person shall retain such domicil until he acquires a new domicil in accordance with the provisions of [the] Act'.

60. Although the Udny v Udny rule was to be abolished under the proposal of the English Private International Law Committee in 1954, re-iterated in 1963, no action has been taken in the United Kingdom. Similarly the Canadian Uniform Law Commissioners proposed its abolition in 1961 but no Province has responded. The Irish Law Reform Commission have provisionally made the same proposal, though it also refers to a possible new approach. The Commission sees the disadvantages both in the Udny rule and in the usual alternative which continues the domicile of choice recently de facto abandoned, and considers a new possibility, that during any threatened 'gap' in domicile as a result of the application of the usual rules, a person should be held to be domiciled in the country with which he is most closely connected.[127]

61. Once the Rule in Udny v Udny is abolished, the significance of the domicile of origin is considerably reduced. The traditional rules make the domicile of origin harder to lose than one of choice, but this position is abandoned in Australia, Barbados and New Zealand.[128] The Barbados and New Zealand Acts go further and cease to make any use of the concept of a domicile of origin, a child's first domicile being one of dependence. There appears to be no disadvantage in this approach which was also taken by the Canadian Commissioners, but it is not adopted in Australia, nor was it proposed by the Irish Law Reform Commission.

62. (b) Domicile of choice. The traditional definition in terms of the factum of residence and the animus manendi is wholly or partially replaced in a number of jurisdictions. In Barbados and New Zealand, the requirements for the acquisition of a new domicile are restated (inter alia) as being that the propositus "is in that country" and "intends to live indefinitely in that country".[129] The Irish Law Reform Commission propose the same text, merely substituting 'State' for 'country'. The Uniform Australian legislation addresses itself only to the element of intention: the propositus must have 'the intention to make his home indefinitely in that country'.[130] It remains to be seen whether 'to make his home' acquires shades of meaning different from 'to live'; it is unfortunate that the two models differ at this point where no principle is involved.

63. (c) Domicile of dependence - married women. Although many commentators object on general grounds of sexual equality, to the rule that a married woman cannot have an independent domicile, it has been recognised for many years that there are particular difficulties in respect of jurisdiction in matrimonial causes. Where domicile is the sole basis of jurisdiction, a wife whose husband has always been domiciled abroad, or who acquires such a domicile after deserting her, may be unable to petition. Various techniques have been used to deal with that problem:

(a) In some jurisdictions, the bases for divorce jurisdiction have been extended to cover at least the second of these cases, without altering the rules as to domicile. This was done, for example, in

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[126] s 10(2).

[127] Working Paper No 10 (1981), para 122.

[128] Uniform Australian Domicile Acts, s 11; Domicile Act 1976 (NZ), s 12; Domicile Reform Act 1979 (Barbaods), s 11.

[129] Domicile Act 1976 (NZ), s 9; Domicile Reform Act 1979 (Barbados), s 9.

[130] Uniform Australian Domicile Acts, s 9.

England in section 13 of the Matrimonial Causes Act 1937, which was adopted in many other jurisdictions;

(b) In other jurisdictions, the rules as to domicile have been altered to provide for the wife to be deemed to be domiciled in the jurisdiction in such cases. An early example was section 3 of the Divorce Act 1898 of New Zealand. This technique is used in Nigeria,[131] both in respect of deserted wives and other wives who have been resident in Nigeria for three years, and (in almost identical words) in Papua New Guinea.[132]

(c) A third technique is to allow a married woman a separate domicile, as if she were an adult single person, for all purposes of the law of matrimonial causes. This was formerly the position in the Australian jurisdictions[133] and New Zealand,[134] and is the current technique in Bermuda,[135] Canada,[136] and Ghana.[137]

64. The final step is of course to abolish the married woman's domicile of dependence for all purposes. This has been done in all the Australian jurisdictions,[138] Barbados,[139] Gibraltar,[140] New Zealand,[141] Ontario,[142] Prince Edward Island,[143] Singapore,[144] and in the United Kingdom.[145] Legislation on the Australian and New Zealand models provides that the domicile of a married woman at any time after the commencement of the legislation is to be determined as if the legislation had always been in force;[146] the United Kingdom model provides however that the wife's domicile immediately before the commencement of the Act is retained as a domicile of choice 'unless and until it is changed by acquisition or revival of another

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[131] Matrimonial Causes Decree 1970, No 18, s 7.

[132] Matrimonial Causes Ordinance 1963, No 18 of 1964 (sic).

[133] Family Law Act 1975, (Commonwealth) s 4(3)(b).

[134] Matrimonial Proceedings Act 1963, (NZ) a 3.

[135] Matrimonial Causes Act 1974, No 74, (Bermuda) s 3.

[136] Divorce Act 1968 (new RSC 1970, c D-8), s 6(1), in force throughout the Dominion.

[137] Matrimonial Causes Act 1971, Act 367 (Ghana), s 32.

[138] Uniform Australian Domicile Acts, s 5.

[139] Domicile Reform Act 1979, No 31 (Barbados), s 5.

[140] Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, No 23 (Gibraltar), s 3 (in the same terms as the UK Act, below).

[141] Domicile Act 1976, No 17 (NZ), s 5.

[142] Family Law Reform Act 1978, c 2 (Ontario), s 65(3)(c).

[143] Family Law Reform Act 1978, c 6 (PEI), s 60(3)(c).

[144] Women's Charter, RL cap 47 (Singapore), s 45A inserted by the Women's Charter (Amendment) Act 1980, No 26 (in similar terms to the UK Act, below).

[145] Domicile and Matrimonial Proceedings Act 1973, c 45 (UK), s 1. Reference has already been made to the modification but not total abolition of the special rules for married women in the Law of Domicil Act 1970, No 6 (Kenya): see paras 46-47, above.

[146] This appears to be the intention of the Irish proposals of 1981, but they are not clear on the point.

domicile either on or after' the commencement date.[147] It has been pointed out that the effect is to treat women who were married before the commencement date somewhat less favourably than those who marry after that date,[148] a result which was probably not intended.

65. (d) Domicile of dependence - children. Rather less attention has been paid to the rules as to the domicile of dependence of children. The age at which a person first becomes capable of acquiring a domicile of choice (twenty-one at common law) is expressly lowered to eighteen in the Australian jurisdictions[149] and to sixteen in Gibraltar,[150] New Zealand,[151] and the United Kingdom.[152] In some other jurisdictions, the age may have been affected by more general legislation as to the age of majority (though domicile is commonly expressly excluded from such legislation); in Barbados the Domicile Reform Act 1979, while following the New Zealand model in other relevant respects, omits the definition of 'child' which fixes the age at sixteen. All the statutes referred to also provide that a child who is (or has been) married while under the prescribed age can acquire an independent domicile.

66. Children whose parents live apart. A common criticism of the traditional common law rules was that they produced unsatisfactory results where a child's parents were living apart; this is particularly important where married women are able to acquire an independent domicile. Special rules have been introduced by statute in several jurisdictions to deal with this type of case, but unfortunately the approaches adopted are not identical. Most jurisdictions can be considered together, Ontario and Prince Edward Island being the exceptions. Within the major group three different forms of words are used, though in most cases the effect is the same.[153] If the parents are alive but living apart, a child whose home is with his father (or who had a home with his father and has not since had a home with his mother) takes his father's domicile; a child whose home is with his mother (or who had a home with his mother and has not since had a home with his father) takes his mother's domicile (and on her death retains her last domicile). In Australia, Barbados and New Zealand a child who formerly had a home with his father, who is now dead, and has not since had a home with his mother keeps the last domicile of his father; in Gibraltar and the United Kingdom the common law rules will apply in this situation, and the mother's domicile will be taken. In Barbados and New Zealand, the position of the child whose parents are living apart but who may be held to have a home with both of them is obscure; it is dealt with in the Australian Acts (which use the phrase 'principal home') and in Gibraltar and the United Kingdom (where the father's domicile prevails in such a case). The Ontario and Prince Edward Island statutes, already quoted[154] adopt a rather different approach, not using 'home' and providing

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[147] Domicile and Matrimonial Proceedings Act 1973, c 45 (UK), s 1(2).

[148] IRC v Duchess of Portland [1982] 1 All ER 784, 789.

[149] Uniform Australian Domicile Acts, s 7.

[150] Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, s 4.

[151] Domicile Act 1976, s 6(2).

[152] Domicile and Matrimonial Proceedings Act 1973, s 3.

[153] One is the New Zealand model (Domicile Act 1976 s 6(4)(5)) also used in Barbados (Divorce Reform Act 1979, s 6(2)(3)); the second the Australian (uniform Domicile Acts, s 8, but with a further variant form in Victoria); the third is the British (Domicile and Matrimonial Proceedings Act 1973, s 4) also used in Gibraltar (Domicile, Matrimonial Proceedings and Recognition of Divorces and Legal Separations Ordinance 1974, s 5).

[154] Ie, Family Law Reform Act 1968 (Ontario), c 2, s 68, and the Family Law Reform Act 1978 (PEI), c 6, s 61; see para 56, above.

directly only for the cases where the parents have a common domicile or where the child habitually resides with only one parent. In other cases the father's domicile prevails, the mother's domicile being applied only if the father's cannot be determined (eg, because he had died).

67. Other points. Legislation which is designed wholly to replace the common law rules as to the domicile of children must deal with the special cases of posthumous children and foundlings, as does that in Barbados and New Zealand. The Australian uniform Act does not cover the whole field, though it caters for posthumous children; it does, however, include full provision in respect of the domicile of adopted children which in other jurisdictions is commonly covered by general provisions in the adoption legislation. The Gibraltar and United Kingdom provisions are limited to children whose parents are alive but living apart; but within that area apply to adoptive as well as natural parents.

68. (e) Domicile in federal or composite states ('unions'). The legislation in Australia and New Zealand deals with this problem, but in different ways. The Australian approach uses the notion of the 'closest connexion', New Zealand that of 'ordinary residence'.[155] So, section 10 of the uniform Australian Acts provides:

> 'A person who is, in accordance with the rules of the common law as modified by this Act, domiciled in a union but is not, apart from this section, domiciled in any particular one of the countries that together form the union is domiciled in that one of those countries with which he has for the time being the closest connexion.'

The New Zealand provision, section 10 of the Domicile Act 1976, provides:

> 'A person who ordinarily resides and intends to live indefinitely in a union[156] but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely-
>
> (a) In that country forming part of the union in which he ordinarily resides; or
>
> (b) If he does not ordinarily reside in any such country, in whichever such country he is in; or
>
> (c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.'

The disadvantage of the latter approach is that in certain cases, where the propositus is for example outside the union for a period of months, his domicile may turn on the identity of the port or airport by which he found it convenient to leave.

69. (f) Domicile of the mentally disordered. There appears to be no legislation on this topic. The common law position is not well established, and cases can arise in which considerable amounts of property are at stake, so the inclusion of provisions on the point in a code of domicile seems very desirable. The Irish Law Commission has proposed[157] statutory provisions modifying what is generally supposed to be the common law position in one respect, to provide that where a mentally disordered minor reaches the age of majority his then domicile remains fixed. The Commission would also give the courts power to alter the

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[155]The Irish proposals of 1981 are based on the New Zealand text, but use both 'habitual residence' and 'ordinary residence'.

[156]Note that this is a stricter test than would be required for domicile in the union, for domicile is acquired when a person is 'in' a country, ordinary residence not being essential: see Domicile Act 1976 (NZ), s 9(c).

[157]Working Paper No 10 (1981), paras 123-4 and pp 92-3.

domicile of a mentally disordered person, a similar proposal having been made in 1954 by the English Private International Law Committee.[158]

THE REPLACEMENT OF DOMICILE BY HABITUAL RESIDENCE

70. The emergence of 'habitual residence'. Sir Otto Kahn-Freund, the distinguished comparative and conflicts lawyer, described domicile in 1964 as being 'a superannuated concept',[159] but it must be said that domicile is enjoying a very active retirement. Arguably the reforms undertaken since 1964 in several leading common law jurisdictions will have established the concept on a firmer footing. Even a reformed domicile faces determined criticism. Some comes from within the common law tradition but the most persistent critics are those concerned with the negotiation of international conventions, to whom 'domicile' is unsatisfactory on account both of its technical nature and of the variation in its meaning as between the legal systems which make use of it. Recent international legal instruments, especially the conventions produced by the Hague Conference on Private International Law have made use of a different concept, 'habitual residence', and one commentator has claimed that domicile has been 'practically ousted ... in modern Private International Law' as a result.[160]

71. The first use of habitual residence, in its French version 'résidence habituelle' appears to have been as a translation of a technical concept of German law, 'gewöhnliche Aufenthalt', in a France-Prussian treaty of 1880. It was first used in a Hague Convention, that on Civil Procedure, in 1895, and has since been used frequently both in Hague Conventions and in draft texts produced by the International Law Association, and in those contexts has repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts. This has not prevented judges and commentators from attempting to analyse and define the scope of the new concept.

72. Towards a definition. It has sometimes been suggested that habitual residence is in essence the same as domicile; it has been interpreted as meaning the 'life-centre' or the 'social domicile' of an individual. German courts, considering the Hague Convention on the Protection of Minors 1961, have interpreted a child's habitual residence as the 'centre of gravity of its life' and a Dutch decision is to the same effect. The English Law Commission, considering the phrase 'habitual residence' in the context of the Hague Convention on Recognition of Divorces and Legal Separations, commented as follows:

> '[Habitual residence] is clearly distinguishable from domicile, a necessary element of which is a particular intention as to the future. Such an intention is not needed to establish habitual residence; it can be proved by evidence of a course of conduct which tends to show substantial links between a person and his country of residence. ... To be habitual, a residence must be more than transient or casual; once established, however, it is not necessarily broken by a temporary absence.'[161]

73. Other official bodies have proposed partial definitions of 'habitual residence', while seeking to preserve its status as a 'notion of fact'. The Council of Europe's Committee of Ministers, responding to proposals

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[158] First Report (Cmd 9068).

[159] (1964) 27 MLR 55, 57.

[160] de Winter, (1969) Hague Recueil des Cours III 349 at p 423.

[161] Report on Jurisdiction in Matrimonial Causes, Law Com No 48, para 16. A footnote adds, 'This does not mean that evidence of intention is irrelevant; it may throw light on particular facts and emphasise a person's degree of connection with a country'.

of CCJ (the European Committee on Legal Cooperation), adopted a Resolution on the Standardisation of the Legal Concepts of 'Domicile' and of 'Residence' on 18 January 1972.[162] The Resolution recommended certain Rules, including the following:

> '7. The residence of a person is determined solely by factual criteria; it does not depend upon the legal entitlement to reside.
>
> 9. In determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence.
>
> 10. The voluntary establishment of a residence and a person's intention to maintain it are not conditions of the existence of a residence or an habitual residence, but a person's intentions may be taken into account in determining whether he possesses a residence or the character of that residence.
>
> 11. A person's residence or habitual residence does not depend upon that of another person.'

74. The Irish Law Reform Commission has gone further, and proposed a set of guidelines and presumptions which would be given statutory effect were domicile to be replaced by habitual residence in Irish law. These included a provision that the habitual residence of a person should be determined 'having regard to the centre of his personal, social and economic interests', including the duration of those interests and the intentions of the propositus. In the case of a married person, the habitual residence of the other spouse might be taken into account, and if the spouses were living together there would be a rebuttable presumption that they shared a common habitual residence. There would similarly be a rebuttable presumption that an unmarried child has the habitual residence of his parents, or of the parent with whom he has his home.[163] 'Habitual residence' is already used in Irish law without definition,[164] but the Commission felt that its more widespread use would create a need for a general indication of its meaning; the risk is that a statutory formulation, even in the form of commonsense presumptions, could lead to the development of technical rules.

75. Reference may be made to two English cases in which the meaning of 'habitual residence' has been considered. In Cruse v Chittum[165] Lane J accepted a number of propositions advanced by counsel in an undefended case:

(a) Habitual residence requires an element of intention, an intention to reside in that country;

(b) 'Habitual' indicates a quality of residence rather than a period of residence;

(c) Habitual residence denotes a regular physical presence, not temporary or secondary in nature, which must endure for some time;

(d) Habitual residence is something more than 'ordinary residence';

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[162]Resolution (72) 1, reproduced in the Council of Europe publication European Committee on Legal Cooperation 1963-1973, p 72.

[163]Working Paper No 10 (1981) on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws, chapter 12 and pp 102-3.

[164]Succession Act 1965, No 27 (Ireland), Part VIII.

[165][1974] 2 All ER 940. See C Hall, 'Cruse v Chittum, Habitual Residence Judicially Explored', (1975) 24 ICLQ.

(e) Habitual residence is similar to the residence normally required as part of domicile, without the element of animus necessary in domicile.

The relationship between propositions (a) and (e) is far from clear, and proposition (e) seems mistaken given that residence as an element of domicile is little more than presence, and in some cases presence for a very brief period indeed.[166] In Oundjian v Oundjian,[167] French J rejected an argument that continual physical presence, subject to de minimis absences, was required, noting the Oxford English Dictionary's definition of 'habitual' as 'in the way of habit or settled practice, constantly, usually, customarily'.

76. Domicile and habitual residence: the relative merits. The merits of habitual residence as a connecting factor have sometimes been overstated. It is not a self-defining concept, and the literature already contains ominous references to 'subjective' and 'objective' tests. On the other hand it has several major advantages over the traditional, or even the reformed, concept of domicile. The main advantage is that there is nothing equivalent to either a domicile of origin or a domicile of dependence, so that the technical rules which surround those concepts, and which have troubled law reform agencies, are swept away. Because the element of intention is of much less importance to habitual residence than to domicile, the uncertainties as to the best formulation of the animus manendi and the practical difficulties in applying any test are both removed.

77. It may be argued that the thorough reform of the law of domicile already achieved in Barbados and New Zealand and proposed in Ireland secures these same advantages while retaining the traditional connecting factor of domicile. The result of such reforms is, however, to produce considerable variety, even as between Commonwealth jurisdictions, in the meaning of domicile. 'Domicile' is not a term readily understood by laymen; lawyers are familiar with the word, but may well be troubled by the variant meanings attached to it. The case for 'starting again' with the concept of habitual residence is a strong one. The Irish Law Reform Commission has indicated its view that, on balance, habitual residence constitutes a more satisfactory connecting factor than domicile; and experience with the new concept in the jurisdictions which use it, notably in connection with the recognition of foreign divorces, suggests that it presents few difficulties.

78. Legislative action. It is to Nauru, one of the smallest Commonwealth jurisdictions, that one must look for a pioneering reform in this field. The Conflict of Laws Act 1974[168] applies the rules of private international law in force in England on 31 January 1968 to cases coming before the courts of Nauru.[169] However this is subject to section 3:

> 'Where the proper law to which effect would have to be given under the provisions of section 2 [which states the general rule] for the purpose of deciding any question would be the law of the country of any person's domicile, the proper law to which effect is to be given for the purpose of deciding that question is the law of the country in which that person habitually resides.'[170]

It remains to be seen whether other jurisdictions will follow the lead set by Nauru.

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[166] Cf para 23, above.

[167] (1979) 1 FLR 198.

[168] No 14 of 1974.

[169] S 2.

[170] Sadly, no explanatory report as to the origins of this Act is available.

ANALYSIS

1976, No. 17

An Act to abolish the dependent domicile of married women and otherwise to reform the law relating to domicile

[*31 August 1976*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Domicile Act 1976.

(2) This Act shall come into force on a date to be appointed by the Governor-General by Order in Council.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Country" means a territory of a type in which, immediately before the commencement of this Act, a person could have been domiciled:

"Union" means a nation comprising 2 or more countries.

3. Domicile before commencement—The domicile that a person had at a time before the commencement of this Act shall be determined as if this Act had not been passed.

Public—17

4. Domicile after commencement—The 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.

5. Wife's dependent domicile abolished—(1) 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 hereby abolished.

(2) This section applies to the parties to every marriage, wherever and pursuant to whatever law solemnised, and whatever the domicile of the parties at the time of the marriage.

6. Children—(1) This section shall have effect in place of all rules of law relating to the domicile of children.

(2) In this section "child" means a person under the age of 16 years who has not married.

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

(4) 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 he had at his death) until it has its home with its mother.

(5) Subject to subsection (4) of this section, 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).

(6) Until a foundling child has its home with one of its parents, both its 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.

7. Attainment of independent domicile—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 16 years or sooner marrying, and thereafter continues so to be capable.

8. Domicile to continue—The domicile a person has immediately before becoming capable of having an independent domicile continues until he acquires a new domicile in accordance with section 9 of this Act, and then ceases.

9. Acquisition of new domicile—A person acquires a new domicile in a country at a particular time if, immediately before that time,—

(a) He is not domiciled in that country; and

(b) He is capable of having an independent domicile; and

(c) He is in that country; and

(d) He intends to live indefinitely in that country.

10. Deemed intention—A person who ordinarily resides and intends to live indefinitely in a union but has not formed an intention to live indefinitely in any one country forming part of the union shall be deemed to intend to live indefinitely—

(a) In that country forming part of the union in which he ordinarily resides; or

(b) If he does not ordinarily reside in any such country, in whichever such country he is in; or

(c) If he neither ordinarily resides nor is in any such country, in whichever such country he was last in.

11. Domicile of origin not to revive—A new domicile acquired in accordance with section 9 of this Act continues until a further new domicile is acquired in accordance with that section; and the rule of law known as the revival of domicile of origin whereby a person's domicile of origin revives upon his abandoning a domicile of choice is hereby abolished.

12. Standard of proof—The standard of proof which, immediately before the commencement of this Act, 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 section 9 of this Act.

13. Domicile in unions—A person domiciled in a country forming part of a union is also domiciled in that union.

14. Consequential amendments and repeals—(1) Section 62 of the Administration Act 1969 is hereby amended by inserting, after subsection (2), the following subsection:

"(2A) This section shall not apply to any person who dies after the commencement of the Domicile Act 1976."

(2) Section 16 (2) of the Adoption Act 1955 is hereby amended by repealing paragraph (g) and the proviso to paragraph (f).

(3) The following enactments are hereby repealed:

(a) Section 3 of the Matrimonial Proceedings Act 1963:

(b) Section 6 of the Domestic Proceedings Act 1968:

(c) Section 22 of the Guardianship Act 1968.

This Act is administered in the Department of Justice.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:—

1. **Short title.** This Act may be cited as the *Domicile Act* 1981.

2. **Commencement.** (1) Section 1 and this section shall commence on the day on which it is assented to for and on behalf of Her Majesty.

(2) Except as provided in subsection (1), this Act shall commence on a day to be appointed by Proclamation.

3. **Interpretation.** In this Act, save where a contrary intention appears—

" Commonwealth of Australia " means the territory comprising the States and the Australian Capital Territory, the Jervis Bay Territory and the Northern Territory of Australia;

" country " includes any state, province or other territory—

(a) that is one of two or more territories that together form a country; and

(b) domicile in which can be material for any purpose of the laws of Queensland;

" union " means any country that is a union or federation or other aggregation of two or more countries and includes the Commonwealth of Australia.

4. **Operation of Act.** (1) The domicile of a person at a time before the commencement of this section shall be determined as if this Act had not been enacted.

(2) The domicile of a person at a time after the commencement of this section shall be determined as if this Act had always been in force.

(3) Nothing in this Act affects the jurisdiction of any court in any proceedings commenced before the commencement of this section.

(4) This Act has effect to the exclusion of the application of the laws of any other country relating to any matter dealt with by this Act.

5. **Abolition of rule of dependent domicile of married woman.** The rule of law whereby a married woman has at all times the domicile of her husband is abolished.

6. **Abolition of rule of revival of domicile of origin.** The rule of law whereby the domicile of origin revives upon the abandonment of a domicile of choice without the acquisition of a new domicile of choice is abolished and the domicile a person has at any time continues until he acquires a different domicile.

7. Capacity to have independent domicile. (1) A person is capable of having an independent domicile if—

(a) he has attained the age of 18 years; or

(b) he is, or has at any time been, married,

and not otherwise.

(2) Subsection (1) does not apply to a person who, under the rules of law relating to domicile, is incapable of acquiring a domicile by reason of mental incapacity.

8. Domicile of certain children. (1) In this section—

(a) " child " means a person under the age of 18 years who is not, and has not at any time been, married; and

(b) references to the parents of a child include references to parents who are not married to each other.

(2) Where, at any time, a child has his principal home with one of his parents but his parents are living separately and apart or the child does not have another living parent, the domicile of the child at that time is the domicile that that parent has at that time and thereafter the child has the domicile that that parent has from time to time or, if that parent has died, the domicile that that parent had at the time of death.

(3) Where a child is adopted, his domicile—

(a) if, upon his adoption, he has two parents—is, at the time of the adoption and thereafter, the domicile he would have if he were a child born in wedlock to those parents; and

(b) if, upon his adoption, he has one parent only—is, at the time of the adoption, the domicile of that parent and thereafter is the domicile that that parent has from time to time or, if that parent has died, the domicile that that parent had at the time of death.

(4) A child ceases to have, by virtue of subsection (2), the domicile or last domicile of one of his parents if—

(a) he commences to have his principal home with his other parent; or

(b) his parents resume or commence living together.

(5) Where a child has a domicile by virtue of subsection (2) or (3) immediately before he ceases to be a child, he retains that domicile until he acquires a domicile of choice.

(6) Where the adoption of a child is rescinded, the domicile of the child shall thereafter be determined in accordance with any provisions with respect to that domicile that are included in the order rescinding the adoption and, so far as no such provision is applicable, as if the adoption had not taken place.

9. Intention for domicile of choice. The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his home indefinitely in that country.

10. Domicile in union. A person who is, in accordance with the rules of the common law as modified by this Act, domiciled in a union but is not, apart from this section, domiciled in any particular one of the countries that together form the union is domiciled in that one of those countries with which he has for the time being the closest connexion.

11. Evidence of acquisition of domicile of choice. The acquisition of a domicile of choice in place of a domicile of origin may be established by evidence that would be sufficient to establish the domicile of choice if the previous domicile had also been a domicile of choice.

8983—By Authority: S. R. HAMPSON, Government Printer, Queensland—1981

DOMICILE AND MATRIMONIAL PROCEEDINGS ACT 1973
(United Kingdom)

PART I

DOMICILE

1. (1) Subject to subsection (2) below, the domicile of a married woman as at any time after the coming into force of this section shall, instead of being the same as her husband's by virtue only of marriage, be ascertained by reference to the same factors as in the case of any other individual capable of having an independent domicile.

(2) Where immediately before this section came into force a woman was married and then had her husband's domicile by dependence, she is to be treated as retaining that domicile (as a domicile of choice, if it is not also her domicile of origin) unless and until it is changed by acquisition or revival of another domicile either on or after the coming into force of this section.

3. (1) The time at which a person first becomes capable of having an independent domicile shall be when he attains the age of sixteen or marries under that age; and in the case of a person who immediately before 1st January 1974 was incapable of having an independent domicile, but had then attained the age of sixteen or been married, it shall be that date.

4. (1) Subsection (2) of this section shall have effect with respect to the dependent domicile of a child as at any time after the coming into force of this section when his father and mother are alive but living apart.

(2) The child's domicile as at that time shall be that of his mother if -

(a) he then has his home with her and has no home with his father; or

(b) he has at any time had her domicile by virtue of paragraph (a) above and has not since had a home with his father.

(3) As at any time after the coming into force of this section, the domicile of a child whose mother is dead shall be that which she last had before she died if at her death he had her domicile by virtue of subsection (2) above and he has not since had a home with his father.

(4) Nothing in this section prejudices any existing rule of law as to the cases in which a child's domicile is regarded as being, by dependence, that of his mother.

(5) In this section, "child" means a person incapable of having an independent domicile; and in its application to a child who has been adopted, references to his father and his mother shall be construed as references to his adoptive father and mother.