CAYMAN ISLANDS

CIVIL APPEAL No. 7 of 1973

BEFORE: The Hon. Mr. Justice Edun, J.A. (Presiding).
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Swaby, J.A.

Re Petition. James David McDonald (No.2)

Mr. R.N.A. Henriques for the appellant.

Mr. G.E. Waddington Q.C. (Attorney General) and
Mr. Seymour Panton, as amici curiae.

27th June, 1974
17th January, 1975

EDUN, J.A.:

In Boldrini v. Boldrini and Martini (1932) P. p.9 the wife objected in the husband's suit for dissolution of marriage to the jurisdiction on the ground that the domicil of the husband was not English. The husband was a waiter of Italian nationality and was registered as an alien in England, and as such was subjected to the restrictions and liabilities by the Aliens Restriction Act, 1914, and the Aliens Order 1920.

The petition was heard by Lord Merrivale P. and the only questions before him were as to the domicil of the petitioner and the amount of the damages as adultery was admitted. He held that the petitioner had discharged the onus of proving that he had acquired an English domicil and assessed the damages to be paid by the co-respondent at £200. The respondent and co-respondent appealed against the finding as to domicil.

It was submitted that an alien in the position of the petitioner whose stay in England was, by virtue of the Aliens Restriction (Amendment) Act 1919 and the orders made thereunder, liable to be terminated at the pleasure of the Home Secretary, could not acquire a legal domicil in England. As an alien he was admittedly liable to be deported against his will.

The Court of Appeal held that the provisions of the Act of 1914 and the Order of 1920 did not preclude the petitioner from acquiring an English domicil of choice. Lord Harnworth M.R. at p.15, said:

> "It is beside the point, therefore, that the petitioner is an alien subject to restrictions imposed by the Aliens Order, 1920, and that does not prevent his acquisition of an English domicil. The possible danger of being deported if he misbehaves himself does not militate against the acquisition of a domicil of choice animo et facto. It is impossible, therefore, to hold that, though subject to restrictions imposed by the Aliens Order, the petitioner could not comply with the Court's requirement as to acquiring a new domicil. He can still be master of his own destiny, and it may even be that he will become naturalized."

The opinion of Slesser L.J., at pp. 17 & 18 is in my opinion most helpful because it explains the basis of the decision of the Court of Appeal. I cite the whole of his judgment, thus:-

> "I agree. I propose to confine my observations to the argument that, owing to the Aliens Restriction Act 1914, and the Aliens Order, 1920, it is impossible for any alien, subject to the peril of being deported in certain circumstances and of suffering certain restrictions before being deported, to acquire a domicil of choice in this country. Mr. Latey did not put the argument quite so high, but contended that sufficient weight had not been given to these circumstances. I do not think that those advancing the argument have fully considered the history of the matter in question. It appears that at common law the King as custos regni had the right to expel aliens. It is so stated by Blackstone (Bl. Com., Vol.1., p. 259). Speaking of aliens he said: 'For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection; though liable to be sent home whenever the King sees occasion.' The next step in the history was that owing to the excesses of the French Revolution a number of persons sought refuge here, and Lord Grenville's Aliens Act (33 Geo. 3, C. 4) was passed in 1793 to control the entry of aliens and put restrictions upon them. A number of Acts dealing with aliens restrictively were subsequently passed, such as 7 Geo. 4, C. 54, and 6 & 7 Will. 4, C. 11. These Acts were finally repealed by the Statute Law Revision Acts, 1871 and 1874.

In 1838, while Acts imposing restrictions on aliens were in force, the case of De Bonneval v De Bonneval /1838 1 Curt. 856/ came before the Court. That case dealt with the domicil of the Marquis de Bonneval, who died in Fitzroy Square on September 22, 1836 and was a French Marquis who fled from France in 1792, and lived in England until 1814, when he returned to France, and from that time only resided occasionally in this country. The Court considered his actual residence here as an exile, and whether such residence indicated an intention animo et facto of changing his domicil, and decided on the facts that it was not established that he was domiciled in this country; but what is interesting to observe is that the Court indicates that if it had come to a different conclusion on the facts, it would have decided in favour of an English domicil, no suggestion being made by the Court or in argument that the existence of the Aliens Act of that time altered the position. It is not conclusive as the point was not argued, but it is an indication to justify the view that my Lord has taken, and which I share, that the fact of there being a danger of deportation hanging over the alien does not affect the question of his domicil."

In the same case Lawrence L.J., said at p.17:-

"... In my opinion the provisions of the Aliens Restriction Act 1914, and the Aliens Order, 1920, did not preclude the petitioner from acquiring a domicil of choice in England, and I have no doubt that the learned President, in arriving at his conclusion, gave due weight to the fact that the petitioner was an alien to whom those provisions were applicable."

From that decision it seems quite clear to me that the acquisition of a domicil of choice in England was then still a matter to be considered as at common law; there must be an animus manendi accompanied by acts showing that it was more than a passing intention. Though the provisions of the Aliens Act did not preclude anyone from acquiring an English domicil of choice, the circumstances of residence thereunder should be taken into account to ascertain an intention animo et facto.

The case of Boldrini v Boldrini (supra) was considered in May v May and Lehman (1943) 2 AER 146. The principle of an English domicil of choice remained the same and that the two requirements necessary to the acquisition of a domicil of choice are actual residence and the intention to settle permanently in the new country of residence. That then was the law in England.

In the appeal before us, we are concerned with the acquisition of Caymanian status as of right under the laws of the Cayman Islands. For the first time in all the relevant legislation, "domicil" as a common law concept has been defined in The Caymanian Protection Law, No. 23 of 1971, which came into operation on March 27, 1972. In his petition, under section 16 of the said Law 23 of 1971, James David MacDonald "prays for a declaration that he is a British subject who was domiciled in the Cayman Islands on 27th March A.D. 1972, and is of, and is qualified for, Caymanian status as of right." The relevant portions of Section 16 of Law 23 of 1971 provide as follows:-

> " (1) Any British subject claiming to be of Caymanian status by virtue of paragraphs (a) or (e) of Section 15 or claiming to be ordinarily resident or domiciled in the Cayman Islands for any purposes of this law may at any time apply to the Grand Court for a declaration to that effect and the declaration of the Grand Court in that behalf shall be final and binding for all purposes of this law." (Underlining mine).

The relevant portions of Section 15 of Law 23 of 1971, provide thus:-

> "Every British subject who
>
> (a) .....
>
> (b) was domiciled in the Cayman Islands at the time of the coming into effect of this law and has been declared to be so domiciled under subsection (1) of Section 16; or
>
> (c) has been ordinarily resident in the Cayman Islands for a total period of five years out of the seven years immediately prior to the coming into effect of this law; or
>
> (d) (e) (f) ....." (Underlining mine)
>
> is a person of Caymanian status as of right.

Because of those provisions, I am of the view, that before Law 23 of 1971 came into operation on 27th March 1972 domicil in the Cayman Islands could not be chosen on the common law concept as was the case in England. Therefore, to determine the issues raised in Mr. MacDonald's petition, I will consider the matter under three heads and the relevant laws of the Cayman Islands.

A. British subject.

B. Domicil in the petitioner before 27th March 1972,

and C. Ordinarily resident.

A. British Subject.

The petitioner was born at Calgary, Alberta, Canada on 15th March, 1922, at a time when Canada was regarded as a "colony" and as such the petitioner was born a British subject. In statutes passed before the Statute of Westminster 1931, the term "colony" was used to include any part of Her Majesty's Dominions, except, the United Kingdom, Channel Islands and the Isle of Man (Interpretation Act 1889: 52 & 53 Victoria C. 63). After the enactment of separate citizenship legislation by Canada in 1946: Canada Citizenship Act 1946, it was agreed [Cmd 7326 (1948) p.3] to abandon the common code in favour of separate citizenship laws enacted by individual self-governing countries of the Commonwealth.

At the meeting of Commonwealth Ministers 1949, it was formally recorded, that "the designation of the Head of the Commonwealth does not connote any change in the constitutional relations existing between the members of the Commonwealth, and in particular does not imply that the King discharges any constitutional functions by virtue of that Headship." In the United Kingdom law, citizens of the United Kingdom and Colonies and citizens of other Commonwealth countries (as defined by their citizenship laws) are British subjects and Commonwealth Citizens: British Nationality Act 1948 (11 & 12 Geo. 6 C. 56); but the status of British subject derived from local legislation, not from common allegiance, and legislative pattern is characterised by an emphasis upon allegiance to the head of a national executive rather than to a common crown. Before October 1960, when the petitioner arrived in the

Cayman Islands he was a "British Subject" by virtue of his Canadian citizenship but unless he was registered as a citizen of the United Kingdom and Colonies, under the British Nationality Act 1948, I maintain as I have done before in my previous judgment on this same subject, he could not have entered the British Dependency of the Cayman Islands as of right - and so it must have been with permission or illegally.

With his petition, Mr. MacDonald appended Ex B, a certificate of his registration as a citizen of the United Kingdom and Colonies. That certificate is dated February 26, 1969 and is the result of an application by the petitioner for such registration under s.6(1) of the British Nationality Act 1948. In that application, Mr. MacDonald stated that he was a citizen of Canada and he was ordinarily resident in the Cayman Islands from October 1960 to the date of his application 25th February 1969. In my previous judgment, I have cited the case of Thornton v The Police (1962) A.C. 339 and the judgment of Hammett J., which was not disturbed in the subsequent appeal to the Privy Council. Hammett J., in that case, said:-

> "It is submitted that all citizens of the United Kingdom and Colonies have, by virtue of the British Nationality Act 1948, the free and unfettered right to enter and to reside in any place in the United Kingdom and Colonies ... This statute merely governs the status of persons and does not lay down what rights of movement or residence are granted by or are attached to that status ..... I know of no provision in the British Nationality Act, 1948, which precludes either the United Kingdom or any of the colonies from enacting such legislation they chose to regulate and control the entry into their territory or residence therein of persons whatever their status may be. I cannot accept the contention that the parts of the Immigration Ordinance 1947 +[of Fiji] referred to are repugnant to the British Nationality Act 1948."

The facts, therefore, that the petitioner in the instant case (1) was originally a British subject under Canadian citizenship, and (2) registered on February 26, 1969 as a citizen of the United Kingdom and Colonies, do not give him any status or right to enter the Cayman Islands without complying with the laws of the Cayman Islands then in force and affecting him.

B. Domicil of the petitioner before March 27, 1972.

The petitioner claims that he entered the Cayman Islands in October 1960. The laws then in force and affecting him were

1. The Immigration (Restriction) Law No. 9 of 1941, and
2. Deportation (British Subjects) (Cayman Islands) Law Ch 37 enacted in 1941.

Under section 7 of the Immigration Law (supra) "no person shall enter the Dependency" and if arriving by sea "he shall not disembark without the consent of the Immigration officer" and if arriving by air "he shall forthwith present himself in person to the nearest immigration officer". He committed a summary conviction offence if he contravened any of those provisions.

By section 2 (1) "Immigrant" means a person who enters the Dependency from a place outside the Dependency whether for the first or any subsequent time.

By section 2 (2) of the said Immigration Law a person shall be deemed to belong to the Dependency if he is a British subject and (1) domiciled therein; or (2) ordinarily resident therein continuously for a period of seven years or more.

For the purposes of the Deportation (British Subjects) (Cayman Islands) Law Ch. 37 a person shall be deemed to belong to the Islands if he is a British subject and (1) is domiciled therein or (2) has ordinarily been resident therein continuously for a period of seven years or more. Under both laws "domicile" means the place in which a person has his present home or in which he resides or to which he returns as his place of permanent abode and not for a mere special or temporary purpose; and a person shall not be deemed to have a domicile within the Dependency (Cayman Islands) for the purposes of this Law unless he has resided therein for at least two years otherwise than under terms of conditional or temporary residence permitted by this Law or any other law in force in the Dependency .... (Underlining mine). There is here a definition of the law as to domicil; no alteration of any law expressly or impliedly was ever intended by the "deeming" provisions. In the context, the word "deemed" simply means "held:" See St Aubyn V.A.G. (1953) 2 AER 498.

By section 8 of the said Immigration Law, "any person entering the Dependency shall truthfully answer all proper questions put to him by the immigration officer for the purposes of this Law, shall also if required by the immigration officer -

(a) make and sign the prescribed declaration; and
(b) submit to be examined by a medical officer;

Any person who refuses to make or sign the prescribed declaration or to submit to be examined by a Medical Officer shall be deemed to be a prohibited immigrant and may be dealt with as such."

The petitioner is the one applying for Caymanian status as of right. The only bits of evidence we have in his petition and papers accompanying it, are -

(1) paragraph 3. "The petitioner is and was on the 27th day of March 1972 domiciled in the Cayman Islands", and
(2) Ex B "I am ordinarily resident in the Cayman Islands ..." para 6 (a)(1).
(3) In para. 6 (a)(ii): "I have been so ordinarily resident for the past five years" as from October 1960.

Nowhere, has he stated the circumstances under which he entered the Cayman Islands. I would assume he did not enter clandestinely. If he entered without making or signing the prescribed declaration or without being examined by an immigration officer, he was a prohibited immigrant and was liable to be dealt with as such. I would assume that he entered the Cayman Islands in accordance with the laws of the Cayman Islands; therefore the only conclusion I can arrive at, is that in October 1960, he entered the Cayman Islands with permission upon terms of conditional or temporary residence. In October 1960, when he entered the Cayman Islands, he certainly was not a person belonging to the Cayman Islands. Nor has the petitioner produced with his papers, a certificate that he was not a prohibited immigrant: see section 14 of the Immigration (Restriction) Law No. 9 of 1941. As a visitor or passenger in transit, the immigration officer had authority to grant the petitioner a permit to remain in the Dependency for a period not exceeding twelve months. If he desired to remain after the expiration of that permit, he must present himself in person before an immigration

officer and he could be dealt with as if he were an immigrant entering the Dependency for the first time. In other words, he could be given a further extension of time not exceeding twelve months to remain in the Dependency. If he failed to leave the Dependency on or before the expiration of the permit without having to present himself to secure an extension, he was to be deemed a prohibited immigrant and liable to be dealt with as such: see section 13 of the Immigration (Restriction) Law, No. 9 of 1941.

Assuming that the petitioner gained two permissions as from October 1960 to remain in the Cayman Islands, those periods would take him to October 1962. On March 1, 1962 the Immigration Restriction (British Subjects) Law, No. 15 of 1961, Ch. 67 came into force and by section 35 of that Law, the Administrator of the Cayman Islands may direct any British Subject exempt, either unconditionally or subject to such conditions as the Administrator may impose as to the right of such British Subject to remain in the Cayman Islands. Nowhere in his petition or with his papers has the petitioner disclosed his right to remain in the Cayman Islands.

It cannot be questioned that the burden of proof lies upon those who assert that a change of domicile has taken place and that the standard of proof required was such as would satisfy the conscience of the Court; that the acquisition of a domicile of choice was a serious matter not to be lightly inferred from slight indications or casual words: see In the Estate of Fuld, Dec'd (1966) 2 W.L.R. 717. Here, we have the appellant refusing to establish to the Judge of the Grand Court how he entered the Cayman Islands, and by what authority he remained therein.

In those circumstances, the petitioner, in my view, could not according to the laws of the Cayman Islands, acquire a domicil of choice. The petitioner owed his allegiance to the laws of the country in which he seeks to choose a domicil. Of course, after March 27, 1972 when the Caymanian Protection Law No. 23 of 1971 came into force, by section 2 of that law, the common law concept as to domicil was for the first time ever introduced.

C. Ordinarily resident.

Whether a person is ordinarily resident in a country is a question of fact and section 15 (b) of The Caymanian Protection Law No. 23 of 1971 provides also that the petitioner can claim Caymanian status as of right if he "has been ordinarily resident in the Cayman Islands for a total of five years out of the seven years immediately prior to the coming into effect of this Law" .... that is, March 27, 1972.

In his petition the petitioner claimed that he entered or

landed in the Cayman Islands in October 1960. He does not state in what way he entered or landed therein. If he entered clandestinely or in breach of the Immigration (Restriction) Law No. 9 of 1941, although the time within which to prosecute him for the summary conviction offence for his unlawful entry had passed, I would follow the preponderant weight of opinions in the Court of Appeal and in the House of Lords in Reg v Governor Pentonville, Ex p. Azam (1974) A.C. 18.

In that case, the appellants A, K and S were commonwealth citizens. A and K arrived in the United Kingdom clandestinely in January 1970 and December 1968. S arrived in December 1967 and again in January 1968 and was on both occasions refused admission by the immigration authorities. Soon after S arrived clandestinely and remained. As a result of detention orders made under the provisions of the Immigration Act 1971, they unsuccessfully applied to the Divisional Court of the Queen's Bench Division for writs of habeas corpus, and their appeals to the Court of Appeal were dismissed (Buckley L.J., dissenting). On appeal to the House of Lords their appeals were heard by five members and dismissed (Lord Salmon dissenting as to A and K). In that case, the effect of unlawful entry and presence in breach of immigration laws in the context of the words "ordinarily resident" were discussed.

In the Court of Appeal Lord Denning M.R. has put the matter clearly, at p. 29, he said:

> "So in practice, it meant that, between 1968 and 1973, if a Commonwealth immigrant landed clandestinely, he was after six months virtually untouchable. He could not be prosecuted for the unlawful landing. He could not be removed. He could not be deported, unless he committed a fresh criminal offence and was recommended for deportation.
>
> But this does not mean that after six months he was here as of right: or that his presence here was lawful. His presence here was unlawful in its inception. It continued to be unlawful during the six months that he could be prosecuted for it. After the six months, it continued to be unlawful. It is a general rule of law that the expiry of a time limit does not make that lawful which was previously unlawful. It only bars the remedy in respect of it."

Stephenson L.J., arrived at the same conclusion.

Buckley L.J., dissented.

In the House of Lords, Lord Wilberforce dealing with the Immigration Act 1971 on the same subject said at p. 62:

"The relevant provisions (omitting immaterialities) must be set out:

> '.... indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).'

The critical word is 'settled'. And it is to be noticed that this section in terms relate to persons already in the United Kingdom when the section came into force.

Section 33(1) provides that 'settled' shall be construed in accordance with section 2 (3) (d), and the latter states that:

> '.... references to a person being settled in the United Kingdom ... are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.' "

Up to this point A, K & S having arrived clandestinely in the United Kingdom were not subjected to any restriction under the immigration laws. Lord Wilberforce continued:

> " 'Ordinarily resident' is not defined in the Act, so it must be given its normally understood meaning. I think it is clear that, apart from the next provision to be mentioned, all three applicants would be regarded as 'ordinarily resident' in the United Kingdom on January 1, 1973.
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> But section 33 (2) /Immigration Act 1971/ declares that:
>
> '.... except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom .... at a time when he is there in breach of the immigration laws.'
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> It is upon the last 13 words that this point depends."

At p. 63, he said:

> "... The words are not 'when he is committing a breach': the emphasis is on 'there.' - They are apt, if not ideal, to cover the case of a person whose presence there arises from a breach - indeed to cover any case of an illegal entrant. They apply just as much to an illegal entrant, because he entered the United Kingdom in breach of the immigration laws, and yet may not be there in breach of the immigration laws is too subtle an argument for me to accept.
>
> But I would not wish to decide this point on a dry interpretation of the words alone. It is necessary to try to understand the Parliamentary intention. In search of this I can find no warrant for introducing a class of persons whose presence was once illegal, but whose illegality has 'dropped away.' If Parliament had intended to confer an indirect amnesty of this kind, it would surely have done so by express words. If the presence here was once 'in breach of the immigration laws' I find difficulty in seeing how, unless Parliament so states, it could change its quality by the mere expiry of a time fixed for summary prosecution."

In the instant case, there are no protective measures in the Caymanian Protection Law No. 23 of 1971 which would operate in favour of the petitioner as would operate in favour of A, K and S by virtue of the provisions of the Immigration Act 1971. Whether the petitioner entered the Cayman Islands clandestinely or having entered with permission he failed to comply with the conditions to remain, his presence in the Cayman Islands up to the present time has been in breach of the immigration laws of the Cayman Islands.

Lords Hodson and Kilbrandon agreed with the speech delivered by Lord Wilberforce. Lord Pearson wrote his own speech and also agreed with Lord Wilberforce. At p. 68, Lord Pearson added more cogent reasons, thus:-

> "Those who made their secret entry after the coming into force of the Act of 1968 committed an offence against the new section 4A. If they escaped detection long enough they became immune from prosecution and deportation for that offence, but, as a matter of ordinary language without statutory definition, they were illegal entrants and they were present in the United Kingdom in breach of the immigration laws .....

> Those who when they landed failed to comply with section 4A were illegal entrants because the landing was or formed part of their entry into the United Kingdom. They have been from the beginning and still are in the United Kingdom in breach of the immigration laws; that is a continuing status, as no leave to remain has been given."

Section 4(1)(a) of the Commonwealth Immigrants Act 1968 is as follows:-

> "If ..... a commonwealth citizen .... (a) enters or remains within the United Kingdom, otherwise than in accordance with the directions or under the authority of an immigration officer, while a refusal of admission under s.2 of this Act is in force ... he shall be guilty of an offence ...."

Section 2 of the Act empowered immigration officers to examine any person who lands or seeks to land in the United Kingdom, to refuse him admission or to admit him subject to conditions.

Section 27 (3) (e) of the Immigration (Restriction) Law of the Cayman Islands No. 9 of 1941 provides: "Any person who .... fails to comply with or contravenes the conditions under which any permit, certificate or other document issued to him under this law shall, on summary conviction ... be liable to a penalty ..."

Section 30 (e) of the Immigration Restriction (British Subjects) Law of the Cayman Islands Chapter 67 provides: "Any person who ... fails to comply with or contravenes the conditions under which leave to land or remain in the Islands has been granted to him or under which any certificate or other document has been issued to him under this Law ... shall be guilty of an offence ..."

It would have been quite a simple matter apart from his ipse dixit for the petitioner to have stated how he arrived in the Cayman Islands. Was it with permission? One reasonable conclusion is that he entered clandestinely. Another is that he entered with permission but remained in breach of the immigration laws.

Lord Salmon in his dissenting judgment said, at p.72:-

> "The result of this appeal can, therefore, be seen to turn upon whether during the years in which the appellants Azam and Khera were residing and working in the United Kingdom they were there 'in breach of the immigration laws.' I agree with Buckley L.J., that they were not. In my view, in spite of having

committed a breach of section 4A of the Act of 1962 they were here in pursuance of their common law rights, untouched by that Act, to be here as commonwealth citizens - rights which they enjoyed as British subjects up to January 1, 1973. It is true that as from that date their common law rights were taken away. (underlining mine).....

The only section of that Act [1962] affecting the appellants was section 4A. That section regulated the manner in which they should exercise their common law rights of entry. It did not purport to take away those rights or the right to be or remain here. If they entered in breach of the section (as they undoubtedly did) then, as Buckley L.J., has so aptly said, all the section did was to impose a discouraging penalty. Their method of landing and entering constituted an offence but it was not a continuing offence. It was complete at the time of landing or entry. It was then that they committed the breach. They were not committing a breach of section 4A at any time thereafter."

If I may repeat what I have stated before that in the United Kingdom, the King was under a duty to protect his liege subjects. Until the British Nationality Act 1948, the status of a British subject was based on allegiance. The right to enter the United Kingdom was enjoyed by those who owed allegiance. In 1962, the Commonwealth Immigration Act was passed, it was amended in 1968. That Act provided that Commonwealth citizens had no right to enter the United Kingdom without leave; they were subject to examination by immigration officers, who would admit or refuse admission according to the rules. But there was a big gap in the Act of 1962. That is, that if a man did not enter through a recognised port of entry (where there were immigration officers) but came in clandestinely - such as landing on a lonely beach, he was guilty of no offence whatever: R v Bhagwan (1972) A.C. 60. He was as free as any commonwealth citizen who had entered before 1962, because then by allegiance to the King he had the same rights as any native-born Englishman. If I may add, in 1971, the Immigration Act which came into force in 1973 provided a new code which comprehended all persons who wish to enter into or stay in the United Kingdom. It divided them into two broad classes:

(1) Those who have a right of abode in the United Kingdom. Those are called patrials. (2) Those who have not got the right of abode in the United Kingdom. Those are non-patrials. As I have already mentioned, there are no similar protective measures for persons who did not originally belong to the Cayman Islands.

According to the laws of the Cayman Islands which were in force before and after October 1960, if the appellant entered with leave and remained therein upon condition (as he must have done unless he arrived clandestinely) and committed a breach of such condition he was in breach of the immigration laws. The views of Buckley L.J. and of Lord Salmon cannot avail the appellant because his entry and his presence in the Cayman Islands could not be in pursuance of any common law right.

Because of the common law right which originally existed in a commonwealth citizen to enter and remain in the United Kingdom without leave before 1962 and because of the Bhagwan gap in the 1962 legislation, section 33(2) of the Immigration (UK) Act 1971 had to make it quite clear that a person in the United Kingdom in breach of its immigration laws could not be treated as ordinarily resident.

By Section 27 (3)(e) of the Immigration (Restriction) Law No. 9 of 1941 of the Cayman Islands and Section 30 (e) of the Immigration Restriction (British Subjects) Ch. 67, the appellant's continuing "status" was in breach of the immigration laws of the Cayman Islands and he has not established by what means or by what leave he remained therein. Though he may have escaped detection for long enough he became immune from prosecution and deportation for that offence. Nevertheless, as a matter of ordinary language apart from statutory definition his presence in the Cayman Islands has been in breach of the immigration laws. The appellant could not therefore be treated as being "ordinarily resident" in the Cayman Islands - hence he could not acquire a domicil of choice.

For the above further reasons, I hold that the refusal made against the appellant by the Judge of the Grand Court dated October 1, 1973 of a declaration under section 16 of the Caymanian Protection Law, No. 23 of 1971, was correct. I would, therefore, dismiss the appeal and make no order as to costs of appeal.

GRAHAM-PERKINS, J.A.:

When the appellant's petition was heard in the first instance by the learned judge of the Grand Court of the Cayman Islands he arrived at a decision adverse to the appellant on grounds which a majority of this Court held to be untenable. I say "a majority of this Court" deliberately for reasons which will appear later. The learned judge had expressed his conclusion in the following terms:-

> "Mr. Macdonald and any others who petition this Court for a declaration under the Cayman Protection Law must satisfy the Court that they were domiciled here when the Cayman Protection Law came into operation within the meaning of this definition in Cap. 67.
>
> Mr. Macdonald's petition shows that he arrived in the Cayman Islands on or before the month of October 1960 but his residence could have been conditional or temporary."

Having regard to certain submissions advanced by the learned Attorney General as to the effect of the judgments of this Court in the previous appeal it is not without importance to ascertain why this Court considered that the appellant's petition should be re-heard by the Grand Court.

In his judgment Smith, J.A., (as he then was) said:

> "The question whether a claimant under s. 15 (b) was 'domiciled' or not is to be determined by the law in existence when it is alleged the domicile was acquired and not by the law in force immediately prior to the Law of 1971 taking effect .... No reference was made either in in the Grand Court or on appeal to the state of the law relevant to domicile during the period between the appellant's arrival to reside in the Cayman Islands and the coming into force of Cap. 67 .... The appellant may well have acquired a domicile before March 1, 1962 under the then existing law."

An examination of the judgment of Smith, J.A., reveals that it was almost entirely devoted to the question whether the word "domicile" in the Caymanian Protection Law 1971 ought, in the circumstances of the case, to be assigned a meaning other than that attributed to it by s. 2 of that Law. Having concluded that the context in which the word was used in s. 15 (b) of the 1971 Law required it to be understood by reference to the state of the law existing at the time of the alleged acquisition by the appellant of a domicile of choice he did not pursue any enquiry into the state of the law as it existed at that time. What is perfectly clear, however, is that Smith, J.A., reached the conclusion

that the matter should be remitted for reconsideration by the Grand Court because Horsfall, J., had not addressed his mind to the question whether the appellant had acquired a domicile of choice prior to March 1, 1962.

Edun, J.A., expressed his view thus:

> "The learned Judge of the Grand Court, in reaching his conclusion had taken the facts (insufficient as they were) into account. He had approached the facts in the right way, that is, that the onus of proving that the applicant was domiciled in the Cayman Islands, was upon him and that his residence could have been conditional or temporary; there was no evidence before him that it was not.
>
> In the conclusion, however, I would agree with my learned brothers that the matter be remitted to the Grand Court for a reconsideration of evidence tendered in support of the petition on the basis that the applicant be given an opportunity to have substantial justice done to the merits of his application in the light of certain relevant laws."

Edun, J.A., had said earlier:

> "The applicant here claims Caymanian status as of right and the Deportation (British Subjects) Law, Ch. 37 and the Immigration Restriction (British Subjects) Law, Ch. 67 of the Cayman Islands provide 'what rights of movement or residence are granted by or attached to that status,' that is, residential qualification for domicile of at least two years not under conditional or temporary permission before he can acquire Caymanian status as of right. The applicant's mere <u>ipse dixit</u> - 'and slight indications or casual words" - are not enough. If they were, then the abovementioned Caymanian Laws would be rendered void and inoperative."

I am not clear why Edun, J.A., thought that the matter should be reconsidered by the Grand Court, and I am in some doubt as to the meaning of the phrase "in the light of certain relevant <u>laws</u>" Nor do I understand what is meant by the clause "that the applicant be given an opportunity to have substantial justice done to the <u>merits</u> of his application". It is manifest, nevertheless, that however the conclusion of Edun, J.A., is to be interpreted his reason for remitting the matter for reconsideration, <u>notwithstanding</u> the clear finding expressed in the penultimate paragraph of his judgment, was that he agreed "with (his) learned brothers that the matter should be remitted".

In my judgment I expressed my firm opinion that -

> "the appellant's petition (was) demonstrably capable of leading to a conclusion that he had, at some point of time between October 1960 and March 1, 1962,

> acquired a domicile of choice within the Cayman Islands."

I was, nevertheless, compelled to the conclusion that / the appellant's petition should be reconsidered because Horsfall, J., had, quite obviously, not addressed his mind to that situation at all.

It will be seen, therefore, that the learned judge was in error when, in adverting to the reasons assigned by this Court for remitting the case, he said:

> "For the reasons for this Order this Court bows to the majority judgments of Mr. Justice Smith and Mr. Justice Edun."

I am by no means clear what is meant by bowing to the majority judgments. In my view, where three or more judges constitute an appellate tribunal, the question is not merely one of majority judgments. Rather the question is whether there was a majority ratio decidendi, or, more precisely, a ratio common to two or more judgments, as distinct from two or more judgments involving separate bases. The authorities make it clear that it is the former only that is binding, but I do not pursue this. The critical importance of the foregoing examination is that it reveals, contrary to what the learned Attorney General contended, that the only factor common to the three judgments was the decision in each that the matter be remitted to the Grand Court. Smith, J.A, and I reached that conclusion for identical reasons. Edun, J.A., reached a contrary conclusion but, as I have noted earlier, agreed, nevertheless, that the matter be remitted.

In his reasons for refusing the declaration sought by the appellant, Horsfall, J., having reconsidered the appellant's petition in accordance with the Order of this Court, said:

> "The 1941 (i.e. the Immigration (Restriction) Law 1941) was the relevant Law then in existence governing the immigration of British subjects into the Cayman Islands when Mr.McDonald arrived here on or before October 1960. The onus is on him to establish a domicile according to that Law. He must have been a visitor when he came here in 1960 and have been granted a permit. His residence here was conditional. Up to the date of the coming into operation of Cap. 67 his residence must have continued to be conditional. I find that Mr McDonald has not established a domicile."

With the greatest respect to the learned judge the foregoing passage reflects, in my opinion, a grave misunderstanding of what is involved in the acquisition of a domicile of choice, and the proof thereof. I was at pains in my previous judgment to analyse the concept of domicile and to investigate the circumstances in which a domicile of choice could be acquired. I apprehend I must now attempt to show why I think the learned

judge has erred once again.

I do not for a moment question the proposition that the onus was on the appellant to establish that he had acquired a domicile of choice. This onus involved a balance of probability. The case advanced by the appellant was in no sense dependent on "slight indications or casual words" as Edun, J.A., appears to have thought. I quote the first paragraph of my judgment in the first appeal:

> "The appellant is a British subject and an Attorney-at-Law practising in the Cayman Islands. He was born at Calgary, Alberta, Canada, on March 15, 1922. He arrived in the Cayman Islands in October 1960 and has made his home there with his wife and son. His petition and affidavit disclose that his only residence and home are, and since October 1960 have been, in the Cayman Islands and that he has no intention of residing or making his home elsewhere. He swears too that on, or prior to, his arrival in the Cayman Islands he abandonedhis Canadian domicil of origin and that on March 27, 1972 he was domiciled in the Cayman Islands. Implicit in those statements is the assertion that on his arrival in the Cayman Islands there was present in his mind an intention to make his permanent home there.

The foregoing is a summary of the appellant's case. It is my respectful view a misuse of language to describe that case as depending on slight indications or casual words. As to the observations concerning the appellants's ipse dixit I say only that a court will always be in a much safer position in resolving a question as to domicile when it is afforded the ipse dixit of the de cuius than when it is forced to depend on the reported words of deceased persons as the cases of In re Flynn, dec'd. (1968) 1 All E.R. 49, and In re Fuld dec'd. (1966) 2 W.L.R. 717 show.

I dissent most emphatically from the proposition that the appellant was required "to establish a domicile according to (the 1941 Law)". There is not a single word in the 1941 Law that provides for the establishment of a domicile. A man must have, in terms of Private International Law, either a domicile of origin or a domicile of choice. The former depends on the principles of the common law; the latter involves as well a state of mind. I am not aware of any statute by in any part of the common law world which seeks to prescribe the method by which a domicile of choice may be acquired. To say that a man must establish a domicile according to a statute is to introduce into the concept of domicile a dimension heretofore unknown either to the common law or to the legislatures of those countries in which the common law is fundamental.

The acquisition of a domicile of choice is, by its very nature, predicated on the hypothesis of the exercise of a man's will. It cannot,

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and does not, depend on the provisions of a statute. It involves not alone the factum of residence, conditional or otherwise, but, of far greater importance, a state of mind - the presence of "an intention to settle permanently in the new country of residence". See May v. May & Lehmann (1943) 2 All E.R. 146. I quote again the dicta of Pilcher, J., in that case at p. 149:

> "The two requirements necessary to the acquisition of a domicile of choice are actual residence and the intention to settle permanently in the new country of residence. No doubt the knowledge that the residence in the new country may be cut short at any moment by the Home Secretary under the powers conferred upon him by the Aliens Restrictions (Amendment) Act 1919 and the orders made thereunder, may influence the mind of the alien concerned in forming the intention which is necessary before a domicile can be acquired, but once the court is satisfied that the intention has been formed, all the elements necessary to the acquisition of a domicile of choice are present and the domicile is acquired."

The principle enunciated in the foregoing dicta has been accepted without qualification in every jurisidiction in which the common law has its place. The fact that a statute provides, as the 1941 Law provides, that a person "shall not be deemed to have a domicile" in a particular place for particular purposes cannot prevent the acquisition de facto by that person of a domicile of choice for any purpose. See the judgment of Lord Coleridge, C.J., in Milnes v. Mayor of Huddersfield (1883-84) 12 Q.B.D. 443. Indeed, the words "shall not be deemed" make it unmistakably clear that the legislature realised the probability of the acquisition of a domicile of choice by a person entering the Cayman Islands with a "present intention" of making his permanent home in these Islands. But, says the legislature, 'although it may be the fact that you have acquired a domicile of choice you will not be regarded as having acquired it for certain purposes'. In the language of the law, there can be no point in deeming a state of affairs or an event not to have occurred unless that state or event has, or may have, occurred. In my opinion, Horsfall, J., did not appreciate the significance of the deeming provisions of the 1941 Law.

Next, "He must have been a visitor when he came here in 1960 and have been granted a permit. His residence here was conditional". I do not understand the basis of this conclusion. I am not aware of any principle, nor have my researches led to the discovery of any, by which a court is entitled to presume that an act has been done merely because a statute requires that act to be done in certain circumstances. It is undoubtedly true that "where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution";

This proceeds, of course, from the maxim omnia praesumuntur rite et solenniter esse acta donec probetur in contrarium, But this maxim can have no application unless it is shown that some act has been done, and what is in question is the validity or otherwise of that act. Where, for example, a man in fact acts in a public capacity, a presumption arises that he was properly appointed and is duly authorised so to act. See R. v. Verelst, 3 Camp. 432, per Lord Ellenborough. On the other hand, and arising from the foregoing principle, there is a general rule, depending on the maxim stabitur praesumptioni donec probetur in contrarium, that where a person is required to do an act, the failure to do which would expose him to a charge of criminal neglect of duty, "it shall be intended that he has duly performed it unless the contrary is shown". It is abundantly clear, in the circumstances of this case, that Horsfall, J., was not entitled to call in aid either the one or the other of the foregoing maxims in order to reach a conclusion that the appellant "must ... have been granted a permit" and that, as a consequence, "his residence here was conditional". Certainly, in relation to the latter maxim, there is no penal sanction to which an Immigration Officer was exposed by the 1941 Law or any other statute. In the absence of the application of the principles enunciated in the foregoing maxims there was no evidential basis on which the learned judge's view could be made to rest. Having established a premise founded on a non sequitur the learned judge continued: "Up to the date of the coming into operation of Cap. 67 his residence must have continued to be conditional". This conclusion is in my respectful view manifestly untenable. Indeed, it overlooks the words "otherwise than under terms of conditional or temporary residence permitted by" the 1941 Law. If language means anything the word "otherwise" recognises the probability of residence that is neither conditional nor temporary.

In concluding his judgment Horsfall, J., said:

> "Grammatically the definition of 'domicile' contained in Law 9 of 1941, the Immigration (Restriction) Law 1941 ... takes the form of a compound sentence consisting of a first clause stating the definition in general terms followed by two other clauses limiting the scope of the general clause. (This definition) should be construed in the context of the subject (matter) of the (Law) in which (it is) contained."

Section 2 (2) of the 1941 Law provides, as far as is relevant:

> "For the purposes of this Law ... a person shall be deemed to belong to the Dependency if he is a British subject and ... (b) is domiciled in the Dependency; ..."

Section 2 (1) provides, inter alia:

" 'Domicile' shall have a corresponding meaning."

What is this corresponding meaning? One has to look to the immediately preceding paragraph which says:

> "Domicile means the place in which a person has his present home or in which he resides or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose;"

Then follows a provision by which a person "shall not be deemed to have a domicile within the Dependency for the purpose of this Law unless" certain circumstances occur. That this negative deeming provision is not part of the statutory definition of domicile, as I attempted to show in my judgment in the previous appeal, is made abundantly clear by the presence in the paragraph of another provision by which, for the purposes of the Law, a person shall be deemed, in certain circumstances, to have lost his domicile. If a question arose, for example, whether the appellant or person similarly circumstanced, should "be deemed to belong to the Dependency" for the purposes of the 1941 Law the answer would, quite obviously, depend on whether (i) he was a British subject, and, if so, whether (ii) he was caught by the exclusory provisions as to "conditional or temporary residence". But that was not the question to which Horsfall, J., was required to find an answer.

With great respect to the learned judge it is my firm view that to describe a provision by which, in certain defined circumstances, and for certain purposes, a person is to be deemed to have lost his domicile as "a clause limiting the scope of the general clause" is to do violence to the fundamentals of grammar. I make the same observation with respect to the first limiting clause so called, with the qualification that to regard it as such is to read into it that which the legislature did not say and could not have intended. If one attaches, as I think one must, to the word domicile any of the meanings assigned to that word in the first four lines of the paragraph one arrives at the result, inter alia, that a person who resided in Grand Cayman was to be deemed for certain purposes not to have resided there at all, at any rate for at least two years. But, more significantly, if he had resided there for over two years "otherwise than under terms of conditional residence" does it mean that he was thereafter to "be deemed to have a domicile within the Dependency for the purposes of this Law" even though there was at all material times a present intention to cease to reside in the Dependency at some indeterminate time in the future? Any by whom was he to be so deemed? This is but one of the manifestly absurd results that must necessarily

have followed upon the learned judge's interpretation of what he described as a ... compound sentence consisting of three clauses the last two of which limited the scope of the first. It is possible to demonstrate equally improbable results from such an interpretation but no purpose would be served thereby.

I ...

I remain unpersuaded by anything in the reasons advanced by Horsfall, J., in his ... judgment herein that I should re-examine the view I formed of the appellant's petition. I made that view clear in my previous judgment. I have also referred to it earlier in this judgment. Suffice it to say that I still incline to that view. For this reason I would grant the declaration prayed for by the appellant, as there cannot now arise any question of remitting the cause.

Since writing this judgment, I have had an opportunity of reading the judgment of Swaby, J.A. I wish to express my agreement with the conclusion arrived at in the earlier part of that judgment.

SWABY, J.A.:

This appeal came before the present panel of the Court of Appeal for the Cayman Islands, sitting at Georgetown, Grand Cayman, on June 28, 1974 consequent upon the Order made by the Court, comprising Smith, Edun and Graham-Perkins, JJ.A. on April 30, 1973, when they allowed the appeal against the judgment of the Judge of the Grand Court dated December 18, 1972, and remitted the matter to the Grand Court for re-consideration of the evidence on the basis of the relevant law applicable to the petition of the appellant for a declaration under s.16 of the Caymanian Protection Law, Law 23 of 1971 (hereinafter referred to as the 1971 Law) that he is a British Subject who was domiciled in the Cayman Islands at the time of the coming into operation of that Law.

On the re-hearing before Horsfall, J., that learned judge by order dated October 1, 1973 refused the declaration sought. He said:-

> "The 1941 law was the relevant law then in existence governing the immigration of British Subjects into the Cayman Islands when Mr. Macdonald arrived here on or before October 1960. The onus is on him to establish a domicile according to that law. He must have been a visitor when he came here in 1960 and have been granted a permit. His residence here was conditional. Up to the date of coming into operation of Chapter 67, his residence must have continued to be conditional. I find that Mr. Macdonald has not established a domicile.

In order to appreciate the relevance of the reference to the 1941 law, namely, the Immigration (Restriction) Law 1941, Law 9 of 1941 reference must be made to the 1971 Law, section 15 (b) of which provides that:

> "Every British Subject who -
>
> (b) was domiciled in the Cayman Islands at the time of the coming into effect of this law and has been declared to be so domiciled under subsection (1) of Section 16; or .....
>
> is a person of Caymanian status as of right.

The appellant having grounded his application for the declaration on this subsection, it becomes necessary to determine what was the law applicable on the subject of domicile "at the time of the coming into effect of the 1971 Law. I concur with the view of Smith, J.A., (as he then was) that the "Legislature intended the domicile referred to in s. 15 (b) to be one which was already established when the 1971 Law came into operation". In 1960 when the appellant entered the Cayman Islands the applicable law was Law 9 of 1941 by s. 2 of which 'domicile' is defined to mean:

> "Domicile means the place in which a person has his present home or in which he resides or to which he

> returns as his place of present permanent abode and not for a mere special or temporary purpose; and a person shall not be deemed to have a domicile within the Dependency for the purposes of this Law unless he has resided therein for at least two years otherwise than under terms of conditional or temporary residence permitted by this Law or any other Law in force in the Dependency or as a person under detention in prison, reformatory, orphanage, mental hospital or leper asylum; and a person shall be deemed for the purposes of this Law to have lost his domicile within the Dependency if he voluntarily go and reside outside the Dependency (except for a special or temporary purpose) with the intention of making his home outside the Dependency; and "Domiciled" shall have a corresponding meaning.

Since October 1960 the appellant together with his wife and child have lived continously in the Islands where he has been practising his profession as an attorney-at-law openly and without hindrance. There was nothing to suggest that a deportation or restriction order has ever been made against him, nor was there any suggestion of the imposition of any conditions on his residence in the Islands. The fact of the appellant's residence for nearly twelve years up to the time of his petition and the animus manendi to which he has sworn lead irresistibly to the conclusion that a domicile of choice had been acquired and which fulfills the requirement under Law 9 of 1941.

On the other hand on these same facts and in the absence of any evidence of the imposition of any conditions on his residence pursuant to Law 9 of 1941, it seems impossible to draw any inferences negativing the acquisition of a domicile of choice by the appellant. The balance of the probabilities is manifestly in his favour, and so I can find no support on the facts for the view so positively advanced by Horsfall, J., that "his residence here was conditional".

At this juncture it may be relevant to mention the Immigration Restriction (British Subjects) Law, Cap. 67 of the 1963 Revised Laws of the Cayman Islands. In that Law 'domicile' is, for purposes material to this case, defined in terms similar to the definition in the 1941 Law. It came into effect on March 1, 1962, that is to say, at a time prior to the completion of two continuous years residence in the Cayman Islands by the appellant. This 1961 Law did not, however, expressly or impliedly take away the benefit of any residential qualification which had accrued or was accruing to persons who were desirous of acquiring a domicile of choice within the Cayman Islands for the purposes of the 1941 Law. Accordingly the appellant by his continued residence in the Cayman Islands and his continued animus manendi would have had with the passage of time the necessary period of residence to have acquired a domicile within

the Cayman Islands for the purposes of their Immigration Laws.

Reference must, however, be made to section 16 (2) of the Caymanian Protection Law, 1971, whereunder it is provided that "in determining whether a person is entitled to such a declaration (see s. 16 (1)), the said Court shall not take into account any period of residence in the Cayman Islands prior to seven years before the application ..." The appellant's application having been made on the 23rd of August, 1972, the relevant date from which any period of residence in the Cayman Islands, if necessary, would have to be established would accordingly be August 24, 1965. The applicable law on the question of 'domicile' on that date was Cap. 67, whereunder, as already stated, as in the case of Law 9 of 1941 a British subject was not to be deemed to have a domicile within the Islands for the purposes of the Law unless he had resided therein for at least two years continuously, otherwise than under terms of conditional or temporary residence permitted by Cap. 67 or any other Law in force. The appellant had by August 23, 1967 the necessary residential qualification for domicile within the Islands for the purposes of the 1971 Law. Whether therefore for purposes of domicile the fact of residence of the appellant is to be reckoned from the date in October 1960 when he first arrived in the Islands or from the 24th of August 1965, the appellant has satisfied the statutory requirements for the acquisition of a domicile of choice and his status in the Islands whether in 1962 or 1967 is quite irrelevant to the acquisition of a domicile of choice - see Boldrini v. Boldrini et al (1932) P. 9, at 17 and 18.

In passing, it may be observed, that pursuant to the amendment of section 2 of Cap. 37 by Law 10 of 1968, the appellant would have ceased to be an immigrant British subject from October, 1965, i.e. when he had had 5 years continuous residence after his arrival in the Islands and would have acquired the status of a person belonging to the Islands by virtue of the provisions of s. 2 (2) (c) of Cap. 67 which had replaced Law 9 of 1941 and would not be a prohibited immigrant by section 6 of Cap. 67. As such he would have been immune to the penalties and restrictions under Cap. 37. The appellant's application was, however, not based on residential qualification but on domicile.

Having since October, 1960 nurtured the desire and intention of making the Cayman Islands his home, he would have acquired a domicile of choice there.

From whatever angle the issue is approached it seems clear that on March 27, 1972, the date of the coming into effect of The Caymanian Protection Law, 1971, the appellant would long before have acquired a domicile of choice in the Cayman Islands as he asserts, entitling him as of right to Caymanian Status. I would therefore grant the declaration prayed.

EDUN, J.A.:

The appeal is allowed - the declaration sought by the appellant is granted. No order as to costs.