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The Conflict of Laws Restatement with Oregon Notes (Chapters I and II)

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THE CONFLICT OF LAWS RESTATEMENT WITH
OREGON NOTES *

(*Chapters I and II*)

BERNARD C. GAVIT

Chapter I

INTRODUCTION

Section 1. The Conflict of Laws deals with the extent to which the law of a state operates, and determines whether the law of one or of another state governs a legal situation.¹

Comment:

(a) A conflict between possibly applicable laws may arise in three cases: first, when it is a question whether the laws of one or of another state apply to a given legal situation; second, when it is a question whether earlier or later laws of the same state apply; third, in a federated nation, when it is a question whether the laws of the federation or of a member apply. The Conflict of Laws deals with the first case only.

(b) Whenever there is a question of applying to a legal situation the law of one or of another state, this question is determined by the principles of the Conflict of Laws.

Illustrations:

(1) Parties claiming to have been married in one state are living together as man and wife in another state. Whether the validity of the marriage is to be determined by the law of the state in which the alleged marriage took place or by the law of the state in which the persons are domiciled, is a question of the Conflict of Laws.

(2) A horse is mortgaged in one state and then brought into another and sold. The determination of the title of the purchaser involves a question of the Conflict of Laws.

(3) A contract is made in one state to be performed in another. The determination of its validity involves a question of the Conflict of Laws.

(4) Suit is brought in one state for an alleged tort committed

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in another. Whether or not action will lie involves a question of the Conflict of Laws.

Oregon Notes

¹ No Oregon case has been found attempting to define the Conflict of Laws.

Section 2. As used in this Subject, the word state denotes a territorial unit possessing a single body of law, distinct from the law of any other territorial unit.¹

Comment:

(a) Each State of the Union is a state under this definition; so is each Territory and the District of Columbia. The United States, however, is not a state as the word is used in this subject (although it is a state in the political sense), since each State, Territory and District has an independent body of law, and even small areas of federal territory have different laws. The legislation of Congress is merely a portion of the law of each State which is identical in each of the States. In the British Empire, England, Scotland, each division of Ireland, each separated colony, and each province in the Dominion is a state.

(b) The body of law of a state is not necessarily applicable equally to all persons or places within the state. Thus different classes of persons or different localities may be governed by different laws, or local subdivisions of the state may be allowed by the state to make laws applicable in some particulars within their own boundaries. All such laws, however, form a portion of the law of the state.

Illustrations:

(1) By treaty the claims of Americans in China are adjudged by the American consul according to "the law of the United States." The law so applied by the consul is Chinese law.

(2) According to the law of British India, Hindus are governed by the Hindu law, Mohammedans by the Mohammedan law, Parsees by the Parsee law, and Europeans by the common law. Each of these systems of law is part of the Indian law.

(3) The city of Boston is authorized by the State of Massachusetts to make ordinances applicable within its territory. These ordinances are part of the law of Massachusetts.

(c) When a State of the United States is referred to in this subject the word is begun with a capital letter.

Oregon Notes

¹ No Oregon case has been found attempting to define "State."

Section 3. As used in this Subject, law is the body of principles, standards, and rules which the courts of a particular state apply in the decision of controversies brought before them.¹

Comment:

This sense of the word law, which is the sense in which the word is used in this subject unless it is modified by an adjective, is the only sense in which there can be a conflict of laws. Law as thus defined is the "particular law" of a state, that is the law which the courts of the state apply, as distinguished from a legal system, and is made up of three elements: (a) formulated legislative provisions, whether found in a constitution, a statute, or a local ordinance or by-law, that are in force within the state; (b) the rules of law enunciated by the courts of the state; (c) the general body of principles, standards and rules recognized by the state as the basis of its judicial action.

Oregon Notes

¹ No Oregon case has been found attempting to define "law."

Section 4. The common law is the general Anglo-American system of principles, standards, and rules which forms the basis of the law of the states which have adopted it.¹

Comment:

The common law prevails throughout the continental United States (except, in some particulars, in Louisiana) and in Hawaii. When "the common law" is mentioned in this subject, it is in the sense indicated in this section. If the common law of a particular state, as distinguished from its statute law, is mentioned, the phrase used is "the common law of" the state.

Oregon Notes

¹ Cf. "The common law does not consist of fixed rules, but is the best product of human reason applied to the premises of the ordinary and extraordinary conditions of life, as from time to time they are brought before the courts." *Re Hood River*, 114 Or. 112, 180, 227 Pac. 1065.

Section 5. The Conflict of Laws is a part of the common law. The Conflict of Laws of a particular state, like other parts of its law, is subject to change by constitutional or statutory provisions or by treaties; but in so far as it has not been changed, it is as binding upon the courts as any other parts of its law.

Comment:

(a) That part of the law of a state called the Conflict of Laws is not forced on a state by any external power. The state has the same freedom to adopt its own rules of Conflict of Laws that it has to adopt any rules of law. The Conflict of Laws as adopted becomes no less definitely a part of the law than any other branch of the state's law; and in the application of its principles the courts have no more discretion than in any other part of the law. Any question of altering the rules of Conflict of Laws generally in force in one state in relation to some other state because of the attitude of the latter state toward the first state or of reciprocity or comity toward another state is a matter for the legislature or the executive power, not for the courts.

(b) Each court applies the law of its own state, as it understands it; including its own conception of the Conflict of Laws. It derives this law from the same sources used for determining all its law; from precedent, from analogy, from legal reason, and from consideration of ethical and social need. In restating this branch of the law the same problems of generally accepted doctrine, of local peculiarity, and of statutory modification are presented as in restating any other subject of the law.¹

Oregon Notes

¹ The common law is a part of the law of Oregon. The Legislative Committee of the Provisional Government of Oregon Territory in 1844 enacted that "The common law of England, and the principles of equity, not modified by the statutes of Iowa Territory, or this government, shall be the law of the land."

Laws of Oregon Territory, 1843-49, p. 100.

The act of Congress, Aug. 14, 1848, organized Oregon Territory and provided that the laws in force in the territory under the authority of the provisional government should continue in force. (Sec. 14). Sec. 7, Art. 18, *Constitution of Oregon*, provided that all laws in force in the territory should continue in force.

See, *Hardenburg v. Ray*, 33 Fed. 812, 815, 816; *Re Hood River*, 114 Or. 112, 227 Pac. 1065.

In each of the following cases it was apparently assumed that the common law was in force in Oregon, without regard to the above statutes.

U. S. F. & G. Co. v. Bramwell, 108 Or. 261, 217 Pac. 332; *Peery v. Fletcher*, 93 Or. 43, 182 Pac. 143; *Runyan v. Winstock*, 55 Or. 202, 104 Pac. 417.

Section 6. Principles of the Conflict of Laws are not in force in one state simply because they prevail in another state.¹

Comment:

No legislation, judicial decision, or juristic opinion from another state has more compelling authority in the Conflict of Laws than it has in any other subject of law; but since the same problems in the Conflict of Laws are presented in each state and since their solution is usually arrived at by general legal reasoning, the solution of these problems in one state, even in a state where the common law does not prevail, is of more interest to lawyers and courts of another state than is the solution of problems involving technical or less universal branches of law.

Oregon Notes

¹ No Oregon case has been found involving or discussing this rule.

Section 7. Except as stated in Section 8, if a right alleged to have been created in one state is brought in question in a court of another state, its existence will be determined by that court, applying only such part of the law of the first state as determines in that state the creation of similar rights involving no question of foreign law.¹

Comment:

(a) The court in which a suit is brought, having determined that according to its own Conflict of Laws, the law of another state is to be applied to the situation, still has a further problem to solve, namely, whether the law of the other state which is to be applied is its entire law, including its rules of Conflict of Laws, or only the portion of its law which deals with the creation of such rights where no question of foreign law is involved.

Special Note: The question dealt with in this section, i. e., whether the entire law of the other state is to be applied or only the portion of its law which deals with the creation of rights where

no question of foreign law is involved, is frequently referred to as the problem of the "renvoi."²

(b) Except as stated in Section 8, each state decides cases in its courts according to its own rules of the Conflict of Laws without reference to a different doctrine of Conflict of Laws held in the state where the right originated.

Illustrations:

(1) A makes a contract in state X; a court in state Y holds that the validity of the contract is governed by the law of X. An expert in the law of X will be asked only, what is the contract law of X, and not what is the Conflict of Laws rule of X.

(2) An agreement was, according to the laws of state X, made in X and was invalid; according to the laws of state Y it was made in Y and was valid. Suit for breach of the agreement is brought in state Z; Z decides, according to its own law, where the agreement was made and what law applies to it.

Oregon Notes

¹ No Oregon case has been found involving or discussing this rule.

² The Oregon courts have, of course, recognized and enforced rights created by the law of another state in accordance with the rule of this section, but no question was raised as to the problem of the "renvoi."

See: *State v. You*, 20 Or. 215, 25 Pac. 355; *Bergman v. Inman*, 43 Or. 456, 73 Pac. 341; *Schwartz v. Gerhardt*, 44 Or. 425, 75 Pac. 698; *Cressey v. Tatom*, 9 Or. 541; *Aldrich v. Anchor Coal Co.*, 24 Or. 32, 32 Pac. 756; *North Pacific Lbr. Co. v. Lang*, 28 Or. 246, 42 Pac. 799.

Section 8. If a question of status or of title to land is to be determined, the court first decides in accordance with its own Conflict of Laws, by the Law of what state the existence of the status or of the title is to be determined and it then decides the question as it would be decided by a court of that state.¹

Comment:

(a) It is of such paramount importance to the states concerned that the existence of a particular status, such as marriage, should be determined in the same way in all states, that a court in which

the existence of that status is brought in question, after fixing, as a question of its own Conflict of Laws, what law governs that status, will then regard its existence as a foreign fact, to be determined by evidence. This is not a case of adopting the foreign law *in toto* to govern its decision. The doctrine of Conflict of Laws or any other peculiar doctrine of the foreign court is immaterial. The reason or the legal correctness, from the point of view of its own law, of the foreign court's action does not concern the court; its inquiry is confined to determining what result would in fact be reached in the courts of the state to which it has decided that the existence or non-existence of the status is properly referable.

Illustrations:

(1) A and B go through a marriage ceremony. The validity of the marriage comes in question in a court in state X, which decides that by its own Conflict of Laws the law of state Y determines the validity of the marriage. An expert in the law of Y will be asked whether a court of Y would find that A and B were married.

(2) A and B marry, and become domiciled in New York. A, the wife, goes to Nevada, acquires a separate domicile there, and sues for a divorce, B appears in the suit. The court grants the divorce. The validity of the divorce is brought in question in an English court. By English law the court of the husband's domicile alone can grant a divorce. The English court, however, holding that the law of New York, the husband's domicile, determines the validity of the divorce, inquires whether the divorce would be held good in a New York court.

(3) A, an Englishwoman, after a residence in Scotland, secures a divorce from her English husband, which is invalid, by the English law, and goes through the ceremony of marriage in Scotland with B, a Scotchman. A and B cohabit in Scotland and have a son. The question whether the child is a legitimate son of B arises in an English court. The court holds that by English law, the status of father and legitimate child is determined by the law of the father's domicile at the child's birth. That being Scotland, an expert in Scotch law will be asked whether a Scotch court would hold the child to be the legitimate son of B; and an attempt to show that the Scotch court would so hold because of its erroneous belief in the validity of the Scotch divorce and the ensuing marriage would not be permitted in the English court.

(b) The propriety of the law of the situs of land determining the title is so clear that the court of any state in which the question

of title is raised will decide the case as a court of the situs would decide it.

Illustration:

(4) A, a British subject domiciled in Egypt, acquires land in Egypt and dies, leaving a will, valid by the law of England and of Egypt, devising his land to his executor, to be sold and the proceeds applied to certain uses which are valid by the law of England and not by the law of Egypt. The executor sells the land and deposits the proceeds in an English bank and applies to an English court for instructions. By the Egyptian code, succession to land is governed by the law of the owner's nation. The English court will instruct the executor to deal with the proceeds of the land as an Egyptian court would do, that is, in accordance with the English law.

Oregon Notes

¹ The Oregon court has never given expression to this rule, but it has applied it in at least several cases.

Cressey v. Tatom, 9 Or. 541 (title to personal property of wife determined by law of state of domicile of husband at the time of its acquisition). *Ellis v. Abbott*, 69 Or. 234, 138 Pac. 488, (contract involving real estate in Washington, said to be "governed by the law of Washington.")

Section 9. As used in this Subject, a right is a legally recognized interest.¹

Special Note: The word *right* has constantly been used by lawyers in this broad sense; it has also been used in a much narrower sense, as the correlative of *duty*. Inasmuch as some general term is needed to express the broader idea, it is desirable to use the word *right* in the broader sense.

Comment:

In this subject the word is always used in its legal sense, as defined above, and not in the ethical or moral sense.

Illustration:

(1) Examples of rights are: the status of marriage; property in land; property in a contract; the liberty to use one's chattel; the right to be free from interference with such use; the discharged bankrupt's immunity from liability on his prior debts; the remedy for a wrong.

Oregon Notes

¹ No Oregon case has discussed in an analytical way, the conception of a "right."

Chapter II**DOMICIL****TOPIC 1. MEANING OF DOMICIL**

Section 10. Domicil is the place with which a person has a settled connection for legal purposes; either because his home is there or because it is assigned to him by the law.¹

Comment:

(a) Jurisdiction often depends upon domicil, and it is therefore necessary in order to determine questions of jurisdiction to establish the principles upon which domicil is based. The principal rights determined by a person's domicil concern: (a) status such as legitimacy, adoption and divorce; (b) the transfer by act of law of a personal estate as a whole, as for instance, upon death; (c) the incidence of personal taxes; (d) judicial jurisdiction.

(b) For the purpose of the Conflict of Laws, it is chiefly important to fix domicil within a state; but for other purposes of the law it may be necessary to fix it more definitely in a local sub-division of the state. Domicil is usually fixed in a particular house; in which case it would also be fixed in the city, county, and state which contain the house. On the other hand, it may not be possible to fix the domicil more definitely than in a city or state.

Illustrations:

(1) The laws pertaining to the distribution of personal property on the death of the owner in state X and in state Y are respectively equally applicable to all persons domiciled in the state. A dies leaving personal property. In determining A's domicil for the purpose of deciding whether his personal property shall be distributed under the law of X or under the law of Y, it is immaterial whether the area of his domicil is regarded as the boundaries of X or Y, or the boundaries of a political division of X or Y.

(2) Under the law of X the tax on A's personal property which A is obliged to pay and the place of payment depend on whether

A is domiciled in one or another county of X. It is material that A's domicile shall be fixed within the boundaries of a county of X.

(c) Domicil cannot be fixed in a broader unit than a territory having a single system of law, since otherwise the determination of domicile would not determine the law which is applicable by reason of domicile.

Illustrations:

(3) Each unit of federal territory, including the District of Columbia, has its own law. A is domiciled in the city of Washington; his domicile is not in "federal territory" in general, but in the District of Columbia.

(4) The District of Columbia was originally formed of a portion north of the Potomac ceded by Maryland and a portion south of the Potomac, including Alexandria, ceded by Virginia. A different law prevailed in each portion of the district. The portion of the district south of the Potomac was afterwards retroceded to Virginia. While this portion was still part of the District of Columbia, A was domiciled in Alexandria; his domicile was not in the District of Columbia, but in the southern portion of that district.

(d) It is correct to say either that domicile is a place or that domicile is in or at a place; but not to say that domicile is a relation between a person and a place.¹

Oregon Notes

¹"Domicile, strictly speaking, is the relation the law creates between an individual and a particular place or country." *Reed's Will*, 48 Or. 500, 504, 87 Pac. 763. Cf. Comment (d), *supra*. Later in the opinion the court quotes Dicey's definition: "The domicile of any person is, in general, the place or country which is in fact his permanent home."

"The domicile or habitancy of a person is that fixed place of abode to which he intends to return habitually when absent." *Miller v. Miller*, 67 Or. 359, 363, 36 Pac. 15.

Section 11. A question of domicile arising in litigation is determined by the law of the forum.¹

Comment:

(a) The principles or rules for ascertaining a person's domicile, hereinafter set forth, are those which are generally accepted in states where the Anglo-American common law prevails. In the

legal systems of other civilized states there is a conception of domicile which although it may differ in details from the common-law conception, in its broad outlines is the same. It is impossible for all legislatures and courts, in dealing with an idea or principle common to all countries, to express this idea or principle in identical language; and even if they agreed on identical language, it would be impossible that they should all attach the same meaning to such language. Each court in dealing with any case involving domicile will apply to the determination of the question its idea as to the law in its own state; for the law of domicile, like any law which is the expression of an international conception, is law only because it has been received as a part of the court's own domestic law; and it is as part of its own law that the court applies it to the solution of cases brought before it.

Illustrations:

(1) A judgment is obtained in X against A, without personal service, on the ground that A is domiciled in X. Suit is brought on the judgment in Y. According to the law of Y, A was not domiciled in X. The court in Y will refuse to enforce the judgment.

(2) A's domicile is alleged to be in France, and evidence is given which tends to establish the fact alleged. An offer is made to show that according to the French law another fact, not required by the law of the forum, is required to establish a domicile in France. This is immaterial, since the question of domicile in France is to be determined by the court according to its own law.

(b) In many countries the word domicile is also used in a different sense to express a different legal conception, as, for instance, the French doctrine of the elected domicile at a person's place of business, at which legal service may be had upon him. In the law of war the expression "commercial domicile" is used to designate the national character attached to the carrying on of business in a country, and has nothing but the name in common with the domicile herein dealt with. Domicile in these different senses should be carefully distinguished from domicile in its general international sense, which is the only form of domicile known to the Conflict of Laws.

Illustration:

(3) A decision that a person had a "commercial domicile" in X is cited as an authority on the law of domicile. No weight should be given it, since the question there decided is not properly one of domicile.

¹ No Oregon case has been found involving or discussing this rule.

Section 12. The term "residence" is not always used in the sense of domicil, and its meaning in a legal phrase must be determined in each case.

Comment:

(a) The term "residence" is sometimes used as equivalent to "domicil"; sometimes it has a broader meaning; and sometimes it has a narrower meaning. It may mean something more than domicil: the domicil, namely, at which a person is resident. On the other hand, it may mean something less than domicil: a dwelling-place adopted for the time being, but not necessarily with such an intention of making a home there as to create a domicil.¹

(b) In statutes relating to taxation² and voting,³ and in a statute of limitations,⁴ residence means domicil unless the contrary is indicated in the statute.

(c) In statutes relating to gaining a settlement under the poor law⁵ and to competence of a divorce court,⁶ residence means a domicil at which the person in question resides unless the contrary is indicated in the statute.

(d) In statutes relating to attachment,⁷ residence means a dwelling-place, without regard to domicil, unless the contrary is indicated in the statute.

(e) For other purposes the word residence must be given a meaning by the application of the ordinary rules for interpretation of written language.⁸

Oregon Notes

¹ "Residence and domicil are not interchangeable terms. Residence denotes a place of abode, whether temporary or permanent; while domicile denotes a fixed and permanent home, and need not be the actual place of abode." *Reed's Will*, 48 Or. 500, 505, 87 Pac. 763.

"The words 'resident' and 'inhabitant' not being (are not) synonymous, the latter implying a more fixed and permanent abode than the former." *McFarlane v. Cornelius*, 43 Or. 513, 522, 73 Pac. 325, 74 Pac. 468.

² *Taxation. Oregon Laws*, 4241, provides that every person shall be assessed in the county in which he resides. For the purposes of

taxation an executor, in his representative capacity, is a resident of the city in which he lives. *Johnson v. Oregon City*, 3 Or. 13, affirmed in 2 Or. 327.

No other case has been found construing the word 'resides' in the foregoing statute.

Oregon Laws, 14244, provides that personal property of a private corporation must be assessed in the county where the principal place of business is located.

Even though a foreign corporation is clearly domiciled out of the state it is possible to have a principal place of business in this state so as to make intangible property taxable there. See *Endicott, Johnson & Co. v. Multnomah Co.*, 96 Or. 679, 190 Pac. 1109. See also Sec. 42, *infra*, as to domicile of a corporation. Cf. *Collender Nov. Co. v. Pomeroy*, 61 Or. 343, 122 Pac. 758.

Oregon Laws, 4271 (as amended act, 1927, c. 339, p. 443) provides that personal property of a non-resident is to be taxed in the county where it is located. No case has been found construing this section.

³ *Voting. Constitution of Oregon*, Art. II, Sec. 2 (as amended June 28, 1927): "Every citizen . . . who shall have resided in the state six months . . ." is a qualified elector. In the cases of *Darragh v. Bird*, 3 Or. 229, 233, *Wood v. Fitzgerald*, 3 Or. 568, 572, 581, 582; and *Day v. Salem*, 65 Or. 114, 118, 131 Pac. 1028, "residence" and "domicil" are used interchangeably. All of these cases construe "residence" in Sec. 4, Art. II, as meaning "domicil." Quite clearly it means "domicil" in both sections. See *Conflict of Laws, Treatise No. 1(a) Supporting Restatement No. 1*, p. 23, 24.

Sec. 3722, *Oregon Laws*, provides that a voter in a municipal election must have "resided" in the city for 30 days. There is no case on this section.

Sec. 3907, *Oregon Laws*, provides certain rules for judges of elections to be used in determining the "residence" of persons offering to vote. There are no cases on this section deciding whether or not "residence" here means "domicil." Under Art. II, Sec. 17, "All qualified electors shall vote in the election precinct in the county where they may reside for county officer, and in any county in the state for state officers," etc. If "reside" here means something less than domicil, then Sec. 3907, which quite clearly uses "residence" as "domicil" would be ineffective in determining the voting qualifications in a county election. In *Wood v. Fitzgerald*, 3 Or. 568, 581, there is this language: "It is true that when an in-

dividual has established for himself a settled residence and fixed domicile in any precinct of a county, there he must vote. When, however, an individual is a *bona fide* resident of a county, but has no fixed residence or domicile in any particular precinct therein, he may vote in any precinct in which he finds himself on the day of election."

It is submitted, however, that this language must be discounted, and that "residence" in Art. II, Secs. 2, 4, 17, and Sec. 3907, *Oregon Laws*, means "domicil" in each instance. It is held in the cases cited above that it means "domicil" in Secs. 2 and 4, Art. II. It therefore means the same thing in Sec. 17. "The presumption is that the same meaning attaches to a given word or phrase whenever it occurs in a constitution." 12 *C. J.*, p. 706, sec. 49. The legislature in Sec. 3907 did not restrict its meaning because it could not.

Sec. 4056, *Oregon Laws* (as amended 1923, c. 126, p. 183), provides that under the registration law a voter must state his "residence." Sec. 4070 provides a penalty for registering in any precinct where the person is not a "resident" at the time. There is no case decided under these sections.

Sec. 5140, *Oregon Laws*, provides that any "citizen, who has resided" in the district thirty days may vote in certain school elections. No case has been found construing the word "resided" in this section. It may (and probably does) mean something less than domicile. See *Harris v. Burr*, 32 Or. 348, 52 Pac. 17 (school elections are not within the constitutional provisions on elections).

⁴*Statute of Limitations. Oregon Laws*, Sec. 16, provides that when a cause of action shall accrue against any person who shall be "out of the state," the Statute of Limitations runs only from the "date of return," and if after a cause accrues a person "depart from and reside out of the state," then the statute does not run until his return.

Oregon Laws, Sec. 26, provides that when a cause of action has arisen in another state between "non-residents" of this state, and by the laws of that state an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.

There are several decisions to the effect that if both parties are "non-residents" at the time the cause accrued, the case is governed by Sec. 26, and not Section 16, but there is no decision which attempts to define "non-residents" as used in Sec. 26.

See: *McCormick v. Blanchard*, 7 Or. 232; *Crawford v. Roberts*, 8 Or. 324; *Crane v. Jones*, 24 Or. 419, 33 Pac. 869; *Van Santvoord v. Roethler*, 35 Or. 250, 57 Pac. 628; *Fargo v. Dickover*, 87 Or. 215, 170 Pac. 287; *In re Wemples' Estate*, 92 Or. 41, 179 Pac. 674.

In *Van Santvoord v. Roethler*, *supra*, an allegation that the defendant "left South Dakota and acquired a residence in Oregon in 1890," was held to sustain an inference that the defendant was a non-resident of Oregon before 1890, within Sec. 26. It did not negative the possibility of the defendant having been in Oregon prior to that time, so the decision indicates that Sec. 26 requires domicil in the foreign state. Sec. 26 applies only where both parties are not residents of Oregon, so that if the defendant only was a non-resident he is "out of the state" within the meaning of Sec. 16, and that section applies.

Jamieson v. Potts, 55 Or. 292, 105 Pac. 93.

Whether or not under Sec. 16 the defendant must be actually domiciled out of the state has never been decided. In *Bailie v. Columbia Gold Mining Co.*, 87 Or. 1, 24, 166 Pac. 965, 167 Pac. 1167, the court said that an allegation that the defendant had "continuously resided in Minnesota" would be sufficient. This is a dictum, however, as no such allegation was before the court. The indication is that the court thought that domicil out of the state was necessary. By analogy to other decisions under this statute this ought to be the proper interpretation of the statute. In *Anderson v. Baxter*, 4 Or. 105, there was a suit to foreclose a mortgage, a plea of the Statute of Limitations and a reply that the defendants had resided out of the state; the court held that Sec. 16 had no application because the presence of the defendant was not necessary to give jurisdiction to foreclose the mortgage. This case was followed in *Eubanks v. Leveridge*, Fed. Case No. 4544.

In the case of *In re Webster's Estate*, 74 Or. 489, 145 Pac. 1063, it was said that the fact that the defendant had left property in the state which could have been attached and applied in satisfaction of the claim prevented the operation of Sec. 16, even although clearly the adverse party had been domiciled out of the state. If a person has a domiciliary home in the state and is but temporarily out of the state he can nevertheless be sued and personal "substituted" service had upon him at his domiciliary home under Sec. 55. The reason of these last decisions applies, and the result ought to be the same. If, of course, the defendant resided in the state when

the cause of action accrued, then Sec. 16 does not apply even although the plaintiff did not know where he was.

Rhoton v. Mendenhall, 17 Or. 199, 20 Pac. 49.

Foreign Corporations. In the sense of domicil, a foreign corporation is always out of the state. See Sec. 42, *Restatement, infra*. It was said in *Burns v. White Swan Mining Co.*, 35 Or. 305, 57 Pac. 637, that a foreign corporation is not out of the state within the meaning of Sec. 16 if it maintains a resident agent, because it is always possible to obtain service upon it. It was also said in *Bailie v. Columbia Gold Mining Co.*, 86 Or. 17, 166 Pac. 965, 167 Pac. 1167, that it was necessary to allege that a foreign corporation had never done business in Oregon in order to bring a cause of action within the provisions of Sec. 16.

But it was decided in *Hamilton v. North Pacific S. S. Co.*, 84 Or. 71, 164 Pac. 579, that under Sec. 26, *supra*, a foreign corporation is a non-resident, even though it have a resident agent in Oregon, and is doing business here. In that case a citizen of Washington sued for damages for an injury received on a boat belonging to the defendant California corporation while on the high seas. The defendant was doing business in Oregon and had a resident agent. The Statute of Limitations of California was one year, and of Oregon two years. The court held that the suit was one between non-residents; that the cause of action accrued in California in contemplation of law; that under Sec. 26 the California statute applied.

⁵ *Residence of Paupers.* *Oregon Laws*, 3343-3352, provides for relief in the county where the pauper "shall be found" to be paid by that county if the pauper has been a "resident for three months," otherwise by the county of the "residence." No case has been found construing the words "resident" and "residence" in these statutes.

⁶ *Divorce.* Sec. 509, *Oregon Laws*, provides that in a suit for divorce the plaintiff must be "an inhabitant of the state at the commencement of the suit, and for one year prior thereto."

"An inhabitant of" here clearly means "domiciled in."

Miller v. Miller, 67 Or. 359, 136 Pac. 15; *McFarland v. Cornelius*, 43 Or. 513, 73 Pac. 325, 74 Pac. 468; *Parrish v. Parrish*, 52 Or. 160, 96 Pac. 1066; *McFarlane v. McFarlane*, 43 Or. 477, 73 Pac. 203; *Holton v. Holton*, 64 Or. 290, 129 Pac. 532; *Hubner v. Hubner*, 67 Or. 557, 136 Pac. 667; *Stewart v. Stewart*, 117 Or.

157, 242 Pac. 852. Cf. *Noble v. Noble*, 97 Or. 497, 190 Pac. 1061. See, *Jurisdiction in Divorce*, Secs. 116-118, *Conflict of Laws Restatement No. 2*.

Annulment of Marriage. Act of 1921, c. 213, p. 424, provides that the plaintiff must be "inhabitant," which "residence" shall be sufficient. No Oregon case has been found interpreting "inhabitant" or "residence" in this statute. Under the previous statute, Sec. 508, *Oregon Laws*, there was similar language used but no case decided under it.

Domicil is meant here again.

See, Sec. 116-18, 122, *Conflict of Laws, Restatement No. 2*; *Parrish v. Parrish*, 52 Or. 160, 162, 96 Pac. 1066 (Dicta).

⁷ *Attachment.* *Oregon Laws*, 295 (as amended 1921, c. 73, p. 101) provides that an attachment may be had against the property of a defendant "not residing in this state." No case has been found construing this phrase.

⁸ *Adoption.* Act 1923, c. 203, p. 292, provides that a party may adopt a child by filing a petition in the county where the petitioner "resides," if a "resident" of Oregon, or in the county where the parent or guardian of the child "resides," or if the child is in an institution, in the county where the institution is located. If the parent does not consent to the adoption and the parent is "found in the state," then there must be personal notice, and if not "found in the state" then there must be notice by publication.

No Oregon case has been found construing the words "reside" in this statute.

Jurisdiction to deal with the status of adoption is covered by Sec. 145, *Restatement No. 3*: "The status of adoption is created by either: (a) The law of the state of domicil of the adopted child; or (b) The law of the state of domicil of the adoptive parent, if it has jurisdiction over the parent or domiciliary guardian of the child; or if the child is a waif and subject to the jurisdiction of the state."

The law as to the domicil of a child is found in Sections 32-40, *infra*.

The act in question must be interpreted in the light of the law as laid down in these sections.

In view of the fact that in adoption proceedings the court acts as a court of special and limited jurisdiction, the question as to the county in which the petition must be filed is a question of juris-

diction and not of venue, whether or not the words "resides" and "resident" be construed to mean "domicil," or something less. *Ferguson v. Jones*, 17 Or. 204, 20 Pac. 842. And in any event the act must be interpreted as giving power to enter an order of adoption only where there is jurisdiction to deal with the status of adoption under the principles of Conflict of Laws as restated in Sec. 145, *supra*. That depends normally on the domicil of the child, which in turn depends normally on the domicil of the parent. The provision in the act "found in the state" can only apply to the adoption of a "waif subject to the jurisdiction of the state." If the child is not a waif, and the parent is out of the state in the sense that his domicil is out of the state the act could not confer jurisdiction.

Service of Process. Sec. 55, *Oregon Laws*, provides that service of process, if the party cannot be found, may be made "at the dwelling house or usual place of abode." This means domicil.

Swift v. Meyers, 37 Fed. 37; *McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 325, 74 Pac. 468.

There is this exception: In a divorce action if the defendant has left the home, and has not acquired a new domicil, he cannot be served under Sec. 55 but must be served personally or by publication and mailing of notice as being temporarily absent from the state under subd. 2, sec. 56, *Oregon Laws*, and Sec. 57, as amended, Acts of 1927, c. 215, p. 261.

McFarlane v. Cornelius, supra.

Venue of Actions. *Oregon Laws*, Sec. 44, provides that in all so-called "transitory actions" the action may be begun "in the county in which the defendants, or either of them, reside, or may be found."

No Oregon case has been found involving the interpretation of the word "resides" in this statute as far as a natural person is concerned. "Reside" here might be interpreted to mean something less than domicil. Service of summons, of course, would still have to be either actual or at the real domicil.

Domestic Corporations. A domestic corporation resides in the county of its principal place of business.

Holgate v. O. P. R. R. Co., 16 Or. 123, 17 Pac. 859;

Bailey v. Malheur Irrig. Co., 36 Or. 54, 57 Pac. 910;

Winter v. Union Packing Co., 51 Or. 97, 93 Pac. 930.

It can have no residence outside of the county of its principal place of business.

Davies v. Oregon Placer Co., 61 Or. 594, 123 Pac. 906.

National Bank. A national bank is a resident of the county where it has its place of business.

Sweeney v. Jackson County, 93 Or. 96, 178 Pac. 365.

Foreign Corporations. A foreign corporation is considered to be at least a resident of the county where the principal place of business is located. Formerly a foreign corporation was considered to be a resident of any county in the state, if the cause of action arose in this state.

Aldrich v. Anchor Coal Co., 24 Or. 32, 32 Pac. 756;

Farrell v. Oregon Gold Co., 31 Or. 463, 49 Pac. 876.

Under *Oregon Laws*, Secs. 6908, 6909, Acts 1903, p. 39, providing for the appointment of a resident agent for service of process, and the designation of a principal place of business within the state, a suit may be brought in the county in which the resident agent resides, although the principal office is in another county and the cause of action arose in still another county.

Cunningham v. Klamath Lake R. Co., 54 Or. 13, 101

Pac. 213, 101 Pac. 1099.

The theory of this case seems to be that such a county is not the county of the residence of the corporation, nor is the foreign corporation found in that county, but that the act of 1903 impliedly amended the venue statute so that that additional county of venue was created. In the later case of *Ramaswamy v. Hammond Lumber Co.*, 78 Or. 407, 152 Pac. 223, it was decided that a suit against a foreign corporation could be brought in any county, regardless of the residence of the corporation or its resident agent. The theory of the decision is that the Act of 1903, *supra*, made inapplicable to foreign corporations the venue statute, *supra*. The decision is clearly not upon the theory that a foreign corporation is a resident of each county in the state, but that the place of residence is immaterial, there being no venue statute applicable to it. The previous decisions of *Aldrich v. Anchor Coal Co.*, 24 Or. 32, and *Farrell v. Oregon Gold Co.*, 31 Or. 463, *supra*, are impliedly overruled on this point.

Resident Agent and Director. *Oregon Laws*, 6908, provides that a foreign corporation shall appoint an agent for service of process who is a citizen and resident of this state.

Oregon Laws, 6327, provides that a foreign insurance corporation shall appoint an agent for service of process who is a "citizen and resident of this state."

Oregon Laws, 6865, provides that a majority of the directors of a domestic corporation must "be residents of this state."

Oregon Laws, 6866, provides that certain specified corporations "at least one director shall reside in this state."

No Oregon case has been found construing "reside" or "resident" in any of the foregoing statutes.

Resident Officials, Judges and Jurors. Art. IV, Sec. 8, *Constitution*, provides that a senator or representative "must have been for one year an inhabitant of the county or district when he may be chosen."

Art. V, Sec. 2, *Constitution*, provides that the governor must have been "for three years a resident within this state."

Art. VI, Sec. 8, *Constitution*, provides that a county officer shall be an elector of the county." (By Art. II, Sec. 2, an elector must "have resided in the state six months," see comment on this section, *supra*.)

Art. VII, Sec. 2, original *Constitution*, provided qualifications as to residence for judges of the supreme court, but in the opinion of the annotator this provision was repealed by the amendment of 1910, and there is now no constitutional provision as to qualifications of judges of the supreme court. But by Act 1878, p. 32, Sec. 9, the legislature provided that judges of the supreme and circuit courts must "reside" in the state at least three years. The constitutionality of this statute, as far as the qualifications of the judges of the supreme court are concerned may well be questioned (i. e., does a legislative act re-enacting a provision of the constitution have any force or effect, and what effect would the subsequent repeal of the constitutional provision have?). *Oregon Laws*, Secs. 948-3 provides that district judges "shall have resided in the district" for three years.

No case has been found construing the words "resided," "reside," "resident" and "inhabitant" in any of the foregoing sections.

Oregon Laws, 2441 and 990 (as amended, Act 1921, chap. 273), provides that a juror "must be an inhabitant." In *State v. Carlson*, 39 Or. 19, 62 Pac. 1016, 1119, the court said, "Notwithstanding it may have appeared that Connor (a juror) was absent from the state on temporary business without intent to change his habitation, such absence did not disqualify him as a grand juror."

Resident Executors and Administrators. *Oregon Laws*, 1173, provides that "non-residents" are not qualified to act as executors or administrators.

Oregon Laws, 1160, provides that if an executor or administrator becomes a "non-resident" the letters of administration are revoked.

No case has been found which discusses the meaning of "non-residents" in these statutes.

Resident Sureties. *Oregon Laws*, 269, provides that bail "shall be a resident and householder or freeholder within the state." The same qualifications apply to surety on a replevin bond (*Oregon Laws*, 290), an attachment bond (*Oregon Laws*, 297), a non-resident cost-bond (*Oregon Laws*, 580), an appeal bond (*Oregon Laws*, 550, and *Oregon Laws*, 2542). Sureties on the bond of the state treasurer must be "resident freeholders," (*Oregon Laws*, 2733). Sureties on the bond of a justice of peace must be "residents of the county," (*Oregon Laws*, 3567). The same qualification applies to the constables and sureties, (*Oregon Laws*, 3574), the sheriff's, (*Oregon Laws*, 3377), the clerk's and coroner's, (*Oregon Laws*, 3378), the county treasurer's, (*Oregon Laws*, 3408), the surveyor's and assessor's, (*Oregon Laws*, 3420). No case has been found construing the word "resident" in these statutes.

Non-resident Cost Bond. *Oregon Laws*, 579, provides for a cost bond if the plaintiff "resides out of the state." No case has been found construing the word "resides" in this statute.

Homestead and Exemptions. *Oregon Laws*, 221, provides that a homestead is exempt from execution or attachment. It must be the actual abode of and occupied by the owner; and "such exemptions shall not be impaired by temporary removal or absence."

No case is found which adds anything to the definition of "homestead" contained in the act itself. In *Mansfield v. Hill*, 56 Or. 450, 107 Pac. 471, 108 Pac. 1007, under a prior act, it was said, "Homestead is a place, and not an estate, . . . it signifies the place where the family dwells."

See also under the prior act, *Watson v. Hurlburt*, 87 Or. 297, 170 Pac. 541 (temporary absence on business did not defeat homestead), and *Paulson v. Hurlburt*, 93 Or. 419, 183 Pac. 937 (actual residence before levy of execution defeated foreclosure of mechanic's lien incurred in erecting home on the land).

Oregon Laws, 227, subd. 5, provides that household goods, etc., are exempt if owned by householder, and in actual use, or when being moved on a change of residence. In *Bond v. Turner*, 33 Pac. 553, 54 Pac. 158, 44 L. R. A. 430, it was held that household furniture being moved out of the state was exempt under this statute,

and it was said that the statute applied to "residents" and "non-residents" alike.

Dower and Curtesy. *Oregon Laws*, 10053, gives dower generally. *Oregon Laws*, 10073, gives dower to any woman residing out of the state as to any lands in the state of which the husband died seized. *Oregon Laws*, 10082, provides that all laws as to dower shall be applicable to estates by the curtesy. It was decided in *Thornburn v. Doscher*, 32 Fed. 810, that Sec. 10073 was a limitation on Sec. 10053, and that a non-resident widow had dower in only the land of which the husband died seized. In this case the widow and the decedent had clearly been domiciled out of the state. In *Ferry v. Spokane P. & S. Ry. Co.*, 268 Fed. 117, it was conceded that the widow was a non-resident of the state, and in the same case on appeal, 258 U. S. 317, it was only said that the widow was "living in New York." In *Cunningham v. Friendly*, 70 Or. 227, 139 Pac. 928, 140 Pac. 989, the widow was a "non-resident of this state." In *Woolsey v. Draper*, 103 Or. 103, 201 Pac. 730, 203 Pac. 582, the widow "testified she had been living at Custer, Montana." In none of these latter cases was the question of the domicil of the husband or widow raised but dower was refused because the widow was a "non-resident," or "living in New York."

In *Rieger v. Harrington*, 102 Or. 603, 203 Pac. 576, it was decided that a non-resident widower had no estate of curtesy in land conveyed by the wife during her life time. "The record in this case informs us not only that the plaintiff was a non-resident . . . at the time of the conveyance of the property by his wife . . . but that he continued to be a non-resident until the time of his death." There is nothing in the case to disclose what was the exact character of his non-residence.

TOPIC 2. GENERAL REQUIREMENTS OF DOMICIL

Section 13. Every person has at all times one domicil, and no person has more than one domicil at a time.

Comment:

Since jurisdiction depends in many cases upon domicil, it is essential that every person should have a domicil. In order that there should be no conflict as to the law affecting his rights, the law provides that he should have a single domicil.¹

Illustrations:

- (1) A is a wanderer, without a home; a domicile is assigned him by law.
- (2) A has two homes; only one of them is his domicile.

Oregon Notes

¹ "He can have only one domicile, and the law requires that for the purpose of the succession of his property he be domiciled somewhere. Every person is assumed by the law to have one domicile and one only." *Reed's Will*, 48 Or. 500, 504, 505, 87 Pac. 763.

"The reply avers the defendant was an inhabitant of Missouri and of Indian Territory. He could not have been domiciled in both places at the same time."

Cosner v. Hoskins, 64 Or. 254, 277, 128 Pac. 841, 130 Pac. 55. See also, *Stewart v. Stewart*, 117 Or. 157, 159, 242 Pac. 842; *Darragh v. Bird*, 3 Or. 229, 233.

Section 14. Except as stated in Sections 19, 29, 32, 34, 35, 36, 37, 39 and 41, where a person has one home and only one home, his domicile is the place where his home is.¹

Comment:

(a) The exceptions mentioned relate to domicile in a vehicle and to compelled domicile.

(b) The fundamental conception underlying domicile is that of home. The great majority of persons have homes; in normal cases a person's home is his domicile.

(c) Not all persons have homes; every person must have a domicile. (See Section 13.) Where a person has no home the law still assigns to such person a domicile. The rule for determining domicile in such a case is set forth in Section 25. Some persons have more than one home; no person can have more than one domicile at a time. (See Section 13.) The rule for determining a person's domicile where he has two or more homes is set forth in Section 26.

Oregon Notes

¹ No case has been found giving expression to this rule, in this exact form, although all of the cases involving the question of domicile assume its correctness.

"When the evidence shows that a person resides at some particular place this constitutes *prima facie* proof of his legal domicile." *Stewart v. Stewart*, 117 Or. 157, 160, 242 Pac. 852.

It is said in *Reed's Will*, 48 Or. 500, 504, 187 Pac. 763, "The word 'house' is undoubtedly the fundamental idea of domicile."

Section 15. A home, as the word is employed in sections relating to domicile, is a dwelling-place of the person whose home it is, distinguished from other dwelling-places, not homes, by its physical characteristics and by the relations between the person and the place.

Comment:

(a) The idea of home is incapable of exact definition because it is not composed of a definite combination of definable elements. It is possible to analyze the idea and indicate at least those elements which should be considered when the question arises whether a dwelling-place is a person's home.

(b) In determining whether a dwelling-place is a person's home, consideration should be given to:

- (1) Its physical characteristics;
- (2) The time he spends therein;
- (3) The things he does therein;
- (4) The persons and things therein;
- (5) His mental attitude toward the place;
- (6) His intention when absent to return to the place;
- (7) Elements of other dwelling-places of the person concerned.

(1) *Physical characteristics.*

No special physical characteristics are necessary. A person usually has his home within the four walls of a house, or an apartment, or room. If a person lives in a tent, or on a vessel, car or other moving vehicle, such tent, vessel or vehicle may be his home; but to prove it to be such, the other elements showing it to be a home, especially the mental attitude of the person concerned towards the permanency of the conditions, must be more pronounced than might be necessary if the usual physical characteristics of a home existed.

A person's home may be an area in which he has no one settled dwelling-place. To prove it to be such, it must be shown that the person intends to move about within the area definitely or for a very considerable period of time, and that he has no intention of ultimately settling down in one particular house within the area.

Illustrations:

(1) A is in legal possession of land X. He erects a tent on X in which he sleeps, eats and does all the usual things done in a

dwelling-house. He has no intention of living anywhere else. These facts considered by themselves would warrant the conclusion that A's home is in the tent.

(2) A owns a vessel. A sells his house in which he has had his home and lives with his family on the vessel until he can purchase a suitable house. The vessel is not A's home.

(3) A sells his house in Pennsylvania in which he has had his home and moves to California. He intends to live always in hotels in that State, but he has no intention of remaining long in any one hotel or of living in the same hotels each year. A's home is in California.

(4) A sells his house in Iowa in which he has his home, and purchases an automobile. He goes with his family in the automobile to California. He intends to move from one point of California to another, travelling in the automobile by day and camping in a tent by night, until he finds a place in which he would like to establish a home. A has no home in California until he finds such place and settles down in it.

(2) *The time he spends therein.*

It is not possible for a person to acquire a home without ever being therein (Section 18).

No definite amount of time spent in a place is essential to make that place a home; but the fact that a person lives a considerable time in a dwelling-house has a strong tendency to show that the house is his home.

Illustrations:

(5) A purchases a house in X, sends his family to X, directing them to occupy the house. A intends to follow in a short time. The family occupy the house. The house is not A's home until A enters it; it is his home the instant he enters it.

(6) A is an officer in the Navy. His family live in a house in X. A is away much of the time and often for more than a year at one time. These absences in themselves do not prevent the house in X from being A's home.

(3) *The things done therein.*

It is usual for a person to eat and sleep in his home. A person may have his home where he never eats, especially when all other elements that ordinarily go with a home exist. It is conceivable that a person can have a home in a place in which he never sleeps. Doing business in a place is not an important element in fixing his home there. Though a person does business in a place and spends

more than half his time there, it is presumably not his home if he does not sleep there.

(4) *The persons and things therein.*

When a person has his family living with him in a dwelling-place, it is strong evidence that the dwelling-place is his home. If, in addition, the person concerned has his furniture, pictures, books and other personal belongings in the place, the evidence that it is his home is strengthened; it is not conclusive, since he and his family may be living there temporarily without the intention of having a home there.¹

(5) *His mental attitude towards the place.*

The mental attitude of the person concerned towards the dwelling-place in respect to its character and permanency is an important factor in determining whether the place is or is not his home, but is not conclusive.²

Illustration:

(7) A is born and reared in X. A lives with his family in a house in Y for ten months in the year. For one month he and his family live in a hotel in X. A detests Y, and always speaks of X as his home, deeply regretting that there is no prospect of his being able to live anywhere else than Y for the greater part of each year. These facts are consistent with A's home being in the house in Y; not consistent with his home being in the hotel in X.

(6) *His intention when absent to return to the place.*

The intention to return to a dwelling-place existing whenever one is absent from that place is an important element in determining that the place is his home; but a person may regard a place as his home, though he intends to be absent even for long intervals. An intention to make a place one's home is not necessarily an intention to remain in that place constantly.

(7) *Elements connected with other dwelling-places of the person concerned.*

Whether a dwelling-place is the home of the person concerned may depend on the elements connected with other places in which he lives.

Illustrations:

(8) A lives entirely in hotels, remaining each year for nine months in a hotel in X, always occupying the same room. These facts are compatible with the room being his home.

(9) A (all other facts being the same as in the preceding illus-

tration) for three months each summer lives in his own house in Y. These facts are compatible with the house in Y, rather than the room in the hotel, being his home.

Oregon Notes

¹ "Considerable evidence is necessary to overcome the presumption that a man's residence, at any given time, is where he and his family are actually living." *Lee v. Simonds*, 1 Or. 158, 159, 160.

² "Residence denotes a place of abode, whether temporary or permanent; while domicile denotes a fixed and permanent home. . . . The acts of Mr. and Mrs. Reed, and the undisputed facts surrounding and characterizing their removal from Portland to California, and their subsequent residence in Pasadena show to our minds quite clearly that they at all times deemed and considered their residence there as temporary, rather than permanent." *Reed's Will*, 48 Or. 500, 506, 512, 87 Pac. 763.

"The legal residence of a person must be determined from his act and intention." *Stewart v. Stewart*, 117 Or. 157, 159, 242 Pac. 852. See also, *Swift v. Meyers*, 37 Fed. 37, 40.

TOPIC 3. ACQUISITION AND CHANGE OF DOMICIL

Section 16. The domicile of origin is the domicile assigned to every child at its birth. If the child is the legitimate child of its father, the domicile of its father is assigned to it; if the child is not the legitimate child of its father, or is posthumous, the domicile assigned is that of its mother.¹

Comment:

It may be difficult to determine in a particular case what was the domicile of the parent at the birth of the child; but the domicile of the parent having been determined, the domicile of the child is fixed at that of the parent. There will be particular difficulty if the domicile of origin of a vagrant or a gipsy is in question; for it is usually impossible to determine his parentage and if that can be determined it is probably more than ordinarily difficult to determine the parent's domicile at the child's birth. The court would accept as the domicile of origin the place to which the person in question could earliest be traced; but this is simply a method of proof in case other proof fails.

Illustrations:

(1) A, an army officer, who has never acquired a domicile for himself, is son of another officer who also had never acquired a domicile for himself; the grandfather was always domiciled in Scotland. A is domiciled in Scotland, though he has never been there.

(2) A, a gipsy, arrives in X with his young son B. Where A comes from is unknown. X will be taken to be B's domicile of origin.

Oregon Notes

¹ No Oregon case has been found involving the question of the domicile of a minor.

Section 17. (1) A domicile of choice is a domicile acquired by a person legally capable of changing his domicile through the exercise of his own will.¹

(2) To acquire a domicile of choice, a person must give up his home, if he has one, and establish a dwelling-place with the intention of making it his home.

(3) The fact of a dwelling-place and the intention to make it a home must concur; if they do so, even for a moment, the change of domicile takes place.²

(4) A person can acquire a domicile of choice only in one of these three ways:

- (a) having no home, he acquires a home in a place other than his former domicile;**
- (b) having a home, he gives it up as such and acquires a new home;**
- (c) having two homes, he comes to regard one of them as his principal home.**

Comment:

The requisites for acquiring a domicile of choice are (1) absence of intention to have a home at the former domicile; (2) presence in a new dwelling-place; (3) intention to make this new dwelling-place a home. To acquire a new domicile, these are necessary; but the order of occurrence of these facts is not material; if they all eventually coexist, the change is accomplished.³

To retain a domicile once acquired, it is not necessary that all these facts should continue to exist. (See Section 25.)

Illustrations:

(1) A without giving up his home in X acquires a new dwelling-place in Y, and lives there with an intention of making it his

home; his domicile remains in X. A now decides to give up his former home in X. His domicile is immediately changed to Y.

(2) A, intending to give up his old home in X, acquires a new dwelling-place in Y, in which he lives without intending to make it his home; he does not acquire a domicile in Y. A now decides to make his new dwelling place his home; at the moment he reaches that decision he acquires a domicile in Y.

Oregon Notes

¹ "Every person *sui juris* and capable of controlling his personal movements may change his domicile at pleasure, but a change of domicile involves intention as a dominant factor. . . . Residence alone, however long continued, will not effect a change of domicile. Domicile is made up of residence and intention. . . . Intention may be inferred from circumstances. . . . This domicile is presumed to have continued until it is shown that a new one was established in intent and in fact." *Reed's Will*, 48 Or. 500, 508, 509, 504, 505, 87 Pac. 763.

"A permanent residence within this state continues to be such so long as a resident when absent therefrom, intends to return thereto." *McFarlane v. Cornelius*, 43 Or. 513, 522, 73 Pac. 325, 74 Pac. 468.

² The fact of a dwelling place and the intention to make it a home must concur. *Miller v. Miller*, 67 Or. 357, 136 Pac. 15 (dwelling-place in Idaho, but intention to return to Oregon); *Lee v. Simonds*, 1 Or. 158 (intention to be domiciled in Oregon but no dwelling-place in Oregon). See also, *Stewart v. Stewart*, 117 Or. 157, 242 Pac. 852 (intention plus dwelling place); *Darragh v. Bird*, 3 Or. 229, 237, 238; *Wood v. Fitzgerald*, 3 Or. 568, 572, 573. (There is some language in these two latter cases which indicates that one may have a domicile of choice in the state without a dwelling-place here.)

³ Any evidence tending to prove the actual intention is admissible. *Reed's Will*, 48 Or. 500, 87 Pac. 763. Cf. "His voting in Idaho savors strongly of a self-serving declaration, and as such is of no consequence." *Miller v. Miller*, 67 Or. 359, 366, 136 Pac. 15.

Section 18. A person cannot acquire a domicile in a place without being physically present there; but a home in a particular building is not necessary for the acquisition of a domicile.¹

Comment:

(a) The presence of a member of a person's family at the in-

tended new home is not enough to change his domicile to the new home if he is not present there himself.

Illustration:

(1) A and his sister B live together and plan a change of home. A goes to the new dwelling-place but B, being ill, remains behind in a hospital. B's domicile does not change.

(b) Even the presence of a person's wife sent by him to take possession of a new dwelling-place is not enough to change his domicile if he is not present there himself. This would be true even if the doctrine of identity of husband and wife still prevailed in the law; since the conception of identity no longer prevails in the law all reason for an exception in this case has ceased.

Illustration:

(2) A, while absent from the country, desires to acquire a new home, and sends his wife to take possession of the new dwelling-house. A's domicile is not changed.

(c) A change of domicile may be accomplished when the person whose domicile is in question is present in the new dwelling-place with the intention of making it his home, though he has not yet eaten or slept there.

Illustration:

(3) A having no home is domiciled in X. Being about to marry, A procures and furnishes a dwelling-house in Y and goes there and makes it ready for occupation. He never actually eats or sleeps in the house before going away on his wedding journey. While he is on his wedding journey his domicile is in Y.

(d) A person may acquire a domicile of choice in a city by making a home there.

Illustration:

(4) A leaves the state in which he has been domiciled and comes to X, a city in another state, intending to make his home in the city; he lives in temporary lodgings, in hotels and clubs. He is domiciled in X.

Oregon Notes

¹ *Lee v. Simonds*, 1 Or. 158, 160; *Darragh v. Bird*, 3 Or. 229, 237, 238 (Cunningham's family remained in New York; held under the facts he was domiciled in Oregon, although no showing that he had any particular dwelling-house). See also, *Stewart v. Stewart*, 117 Or. 157, 242 Pac. 852 (semble).

Section 19. When a person makes his home in a vehicle (as a boat, a car, or a van), he acquires a domicile in the place, if any, where the vehicle regularly remains for a considerable time each year, and for a longer time than it regularly remains in any other place.¹

Comment:

If the location of the vehicle is not so fixed during a considerable part of the year, the domicile of the occupant remains his last previous domicile. (See Section 25.)

Illustrations:

(1) A traveling circus remains in quarters in X every winter, and travels during the remainder of the year. The domicile of persons whose home is in the vans of the circus is in X.

(2) The owner of a vessel has his home on the vessel. The vessel is laid up each winter in X. The owner is domiciled in X.

(3) A laborer on a railroad has his home in a box car, which is continually carried from place to place as his services are needed. He does not acquire a domicile of choice in any of the places to which the car is taken.

Oregon Notes

¹“T. H. Williams, a boatman, with no fixed residence, voted in Mosier’s precinct”; held, he had no domicile in the county for voting. *Darragh v. Bird*, 3 Or. 229, 235. (No inquiry was made as to where his boat regularly remained.)

Section 20. A person cannot change his domicile by removal to a new dwelling-place without an intention to make the new dwelling-place his home.¹

Comment:

(a) The intention to make a home involves to a certain extent the idea of fixity. A person does not intend to make a place his home unless he has an intention to remain there for a time at least. If he intends to remain there permanently, it is easier to find that he intends to make his home there than if he intends to move away at some time in the future. If he does not intend to move at a definite time, it is easier to find that he has made his home there than if he intends to move at a definite time. It is possible, however, for a person to make his home in a place even though he does intend to move at a definite time; although the more distant that

time is the easier it is to find that he has an intention to make his home there.

Illustrations:

(1) A, abandoning his former home, fixes his dwelling-place in X with the intention of staying there so long as he can get a good job, but when work is slack he intends to move on to another place where he can get better work; he takes his family to his dwelling-place and moves his belongings there. A has a home and a domicile in X.

(2) A, a student in the academic department of a University, is in the habit of returning to his father's home for his vacation and is dependent in part upon his father for support. A has no domicile at the university.

(3) A, after graduation from college, teaches school for several years and then comes to the law school of a university. His expenses are paid partly from his own money and partly from money borrowed from his father which he is under obligation to repay. If he intends to make it his home he has a domicile in the university town.

(4) A has earned his own living for several years. He comes to the university to attend the academic department. If he intends to live there, he has a domicile in the university town.

(b) When a person having a home in a dwelling-place acquires a new dwelling-place, it is easier to find an intention to make his home at the new dwelling-place if he gives up the former dwelling-place than it is if he retains it. It is possible for a person although he still regards the old dwelling-place as his home to regard the new dwelling place as his home also. It is possible, however, for a person to retain his old dwelling-place and to cease to regard it as a home. In that case if he regards the new dwelling-place as his home his domicile changes to the new dwelling-place.

Oregon Notes

¹ The following cases support this rule:

Reed's Will, 48 Or. 500, 87 Pac. 763; *Miller v. Miller*, 67 Or. 359, 136 Pac. 15; *McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 325, 74 Pac. 468; *Darragh v. Bird*, 3 Or. 229, 237; *Wood v. Ferguson*, 3 Or. 568.

Section 21. The intention required for the acquisition of a domicile of choice is an intention to make a home in fact, and not an intention to acquire a domicile.

Comment:

A person sometimes desires to have his domicile in a certain place, in order to get the benefit of one or more of the legal consequences of having a domicile there, but does not wish to change his home to that place; this desire to have a domicile in a certain place has no effect in fixing his domicile there.¹

Illustrations:

(1) A, domiciled in X, desires to vote in Y; he goes there on the registration day, intending to claim a domicile there, but not intending to make a home there, and has his name put on the voting-list as domiciled there. He is not legally listed in Y.

(2) A, domiciled in X, desires to have his estate distributed at his death by the law of Y; he goes to Y, engages a room for a year, and declares himself domiciled there. He however continues as before to live in X. His domicile remains in X.

Oregon Notes

¹ "The transfer of his domicile was accompanied by such appropriate acts on his part as to leave no doubt that it was a *bona fide* change of residence." *Wood v. Fitzgerald*, 3 Or. 568, 572. Cf. *Darrah v. Bird*, 3 Or. 229, 239: "The question of residence being one of act and intention, the framers of the constitution left the matter entirely to the discretion of the parties themselves. They say we will neither restrict nor enlarge the right of persons in this respect, but leave it with them to elect as to where they will claim their residence."

Section 22. The intention to make a home must be an intention to make a home at the moment, not to make a home in the future.¹

Comment:

(a) In order to possess the requisite intention one must be able to say not, this is to be my home, but, this is now my home.

Illustrations:

(1) A comes to Y from X intending to go into business and make his home there; he buys and occupies a house and business premises and returns to X to bring his family to Y. He is domiciled in Y.

(2) B comes from X to Y and buys a dwelling-house into which he intends to move and make it his home at the expiration of the

lease of his present home; and he employs workmen to fit the new dwelling-house for occupancy. B's domicile is still X.

(b) The intention to make a home must be an absolute one, not conditional on the happening of a future event.

Illustration:

(3) A goes to X intending to stay there only if he passes a certain examination, or if he can get work. A is not domiciled in X until the condition is fulfilled.

Oregon Notes

¹ The following cases are in point:

Lee v. Simonds, 1 Or. 158. *Cf. Darragh v. Bird*, 3 Or. 229, 238 (case of Cunningham).

Section 23. A person cannot acquire a domicile of choice by any act done under legal or physical compulsion.¹

Comment:

(a) A person does not acquire a domicile of choice in a place which he cannot legally leave when he chooses to do so.

The fact that he does not desire to leave is immaterial; as also his legal right and intention to remain after the period of legal detention expires.

Illustrations:

(1) A's domicile is X. A is released from jail on bond and required to live within a prescribed area, Y. A rents a house in Y, sends for his family, lives in Y for years and announces that he has no intention of leaving Y when the period of required residence expires. A during the period of required residence is still domiciled in X.

(2) A's domicile is X. As an officer in the army, A is required to live in Y at an army post, his family being permitted to reside and residing with him. A is still domiciled in X.

(b) The compulsion of poverty, or the compulsion arising from disgust with existing political and social conditions, is not legal or physical compulsion within the meaning of this section.

Illustrations:

(3) A's domicile is X. A being destitute and unable to work becomes, though not legally compelled, an inmate of a charitable institution situated at Y. He has no expectation that he will leave the institution. A may acquire a domicile of choice at Y.

(4) A's domicil is X. A gives up his home in X because of disgust at existing political or social conditions and acquires a home in Y without any intention of returning unless these conditions change. He hopes and expects such change. A acquires a domicil of choice in Y.

(c) Evidence ordinarily sufficient to establish a domicil of choice may be insufficient in the case of a person, (a) exiled from his domicil, or (b) resident in a place when performing the duties of a public office, though such persons may acquire a domicil of choice in the places where they reside if there is sufficient additional evidence.

Illustrations:

(5) A's domicil is X. A is exiled from X and resides with his family in Y intending to return to X when permitted to do so. A is still domiciled in X.

(6) A (all other facts in the preceding illustration remaining the same) intends to continue to reside in Y irrespective of any action on the part of the authorities in X. A acquires a domicil of choice in Y.

(7) A is elected Senator from State X. A purchases a house in Washington and lives there with his family. A is still domiciled in X.

(8) A's domicil is X. A accepts an executive appointment in Washington of a character usually held for life. He sells his house in X, purchases a house in Washington, and lives there with his family. He has no intention of resigning his position or returning to X and does not vote there. A acquires a domicil of choice in Washington.

(9) A's domicil is X. A is an army officer stationed at Y. He is permitted to live outside the army post. A marries a resident of Y, purchases a house in Y and lives there with his family with the intention of making it his home. A acquires a domicil of choice in Y.

Oregon Notes

¹ *Day v. Salem*, 65 Or. 114, 131 Pac. 1028 (employees of state asylum could acquire domicil there). *Darragh v. Bird*, 3 Or. 229, 239, 240; *Wood v. Fitzgerald*, 3 Or. 568, 572, (government employee may acquire domicil for voting).

Section 24. The motive with which a person acquires a new dwelling-place does not determine the question of the establishment of a domicile of choice, but it may be important evidence tending to show whether or not, when a dwelling-place is acquired, there is an intention to make a home there.¹

Comment:

(a) If the new dwelling-place is acquired with the necessary intention of making it a home, it becomes a domicile of choice even though there may be a special, even an unworthy motive, in making the change.

Illustrations:

(1) A changes his dwelling-place for the purpose of diminishing his taxes or avoiding the payment of a debt or for the purpose of securing a divorce. He intends, however, to make the new place his home. A's domicile is changed.

(2) A leaves his home and establishes a dwelling-place elsewhere for the purpose of business, education, or health, at which he lives for a long time; there is no evidence of an intention to give up his former home. A's domicile is unchanged.

(b) The domicile in the following cases must be determined by considering whether the change of residence has been accompanied by an intention to change the home.

Illustrations:

(1) *Presence for business.*

(3) A leaves his home in Turkey and comes to Massachusetts, earns money and transmits the money to his wife, who has remained at the Turkish home, to which he intends to return after earning a sufficient competence. A gets no domicile in Massachusetts.

(4) A leaves his home in Massachusetts, and goes with his family to Shanghai, where he acquires and publishes a newspaper; he stays in Shanghai for many years, taking part in the life and affairs of the city and evincing no interest in his old home. A is domiciled in Shanghai.

(2) *Presence for health or travel.*

(5) A, domiciled in New York, being advised to go abroad for his health, goes to Nice, takes a house on a long lease, and lives there for several years until his death; being unable on account of his health to return, although desirous of so doing. A remains domiciled in New York.

(6) A goes abroad with his family, is delighted with the life in Dresden, takes a house there on a long lease, and stays there until his death. A is domiciled in Dresden.

(3) *Presence for the education of children.*

(7) A, a farmer, moves into a city in the autumn in order to place his children in good schools during the winter. A's domicile is unchanged.

(8) A, a farmer's widow, sells the farm, and after examination of several places buys and occupies a dwelling-house in X, because she believes the schools in X will give her children the best education. A's domicile is X.

(4) *Presence to attend an educational institution.*

(9) A, a young man aged twenty-one, leaves his father's home to enter the senior class in the X university, being undecided where to go upon graduation. A's domicile is unchanged.

(10) A, a young man just graduated from college, marries and goes with his wife to X, where he enters a professional school. He takes a house there, intending to live there until he takes his professional degree. A's domicile is X.

(5) *Presence to escape legal process, or to gain access to a court.*

(11) A, a married woman, goes to X for the purpose of obtaining a divorce there, intending to go elsewhere upon obtaining the divorce. A does not acquire a domicile in X.

(12) A, a college teacher, desiring to obtain a divorce, solicits and obtains a teaching position in a college at X, choosing that college because the divorce laws at X are favorable to his needs. He intends to remain at the college unless he is later offered a better position elsewhere. A acquires a domicile in X.

(6) *Presence to work in various places.*

(13) A, an unmarried man with a domicile at X, goes about from place to place harvesting and logging, expecting to stay in no one place more than six months. A's domicile remains at X.

(14) A, a married man with a domicile at X, goes to Y where he obtains work in his trade, takes a house on a short lease, and brings his family and his furniture there. He expects to be employed there about six months. A's domicile is changed to Y.

Oregon Notes

¹ *Reed's Will*, 48 Or. 500, 510, 87 Pac. 763: "A residence for mere pleasure or health is not regarded as of any great weight." *Miller v. Miller*, 67 Or. 359, 136 Pac. 15 (education of children). *Stewart v. Stewart*, 117 Or. 157 (business). Art. II, Sec. 4, *Constitution of Oregon* (employment in State or Federal service; attendance at school, do not establish or destroy domicile for voting. See also, Sec. 3907, *Oregon Laws*.)

Section 25. A domicile once established continues until it is superseded by another domicile.¹

Comment:

If a man has no home, his domicile cannot be at his home. Every person must have a domicile (See Section 13). Therefore when a home is abandoned the domicile continues until a new home is acquired.

Illustrations:

(1) A having a domicile in X ceases to live there. A gets no other dwelling-place. A's domicile is X.

(2) A having a domicile in X goes to live in Y. A has not yet decided to make Y his home. A's domicile is X.

(3) A having a domicile in X decides to make his home in Y. A has not yet gone to Y. A's domicile is X.

(4) A having a domicile in X decides to make his home in Y. He leaves X and is on his way to Y but has not yet reached Y. His domicile is X.

Oregon Notes

¹ "When this (domicile) is shown to exist, it is presumed to continue until there is an intention manifested and carried into execution of abandoning the old domicile and acquiring another actual residence." *Reed's Will*, 48 Or. 500, 505. *Lee v. Simonds*, 1 Or. 158; *Miller v. Miller*, 67 Or. 359, 136 Pac. 15.

Section 26. When a person who has capacity to acquire a domicile of choice has more than one home, his domicile is in the earlier home, unless he regards the second home as his principal home.¹

Comment:

If a man has two dwelling-places, any one of the following situations may arise:

(a) One may be a home in the sense used in this restatement, and the other merely a residence.

(b) Both may be homes in the sense used in this restatement, but one may come to be his principal home as his civic and domestic interests attach themselves more and more to it rather than to the other. In this case the principal home is his domicil.

Illustration:

(1) A, a city merchant, retaining his city home, acquires also a country home. As his children become older he desires them to be brought up in the country, and comes to regard the country home as his principal one. His domicil is his country home.

(c) Both may be homes in the sense used in this restatement, and both in equal degree. In this unusual case, that one of the two homes which earlier became his domicil remains so.

The earlier home, having become the domicil and that home never having been abandoned, it does not cease to be the domicil.

Illustrations:

(2) A comes from the country to the city and engages in business, retaining his country home and establishing a new home in the city. The former home is his domicil. He does not regard either as his principal home.

(3) A, a city merchant, retaining his city home, acquires also a country home. He does not regard either as his principal home. The former is his domicil.

Oregon Notes

¹ See the following cases:

Reed's Will, 48 Or. 500, 87 Pac. 763; *Swift v. Meyers*, 37 Fed. 37; *McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 325, 75 Pac. 139.

Section 27. Where a person has his home in a dwelling-house which is situated upon a dividing line between political divisions of territory, his domicil is within that territorial division in which a preponderant part of his dwelling-house is situated; if there is no decided preponderance, the domicil is in the territorial division in which the principal entrance to the house is situated.¹

Comment:

The situation is a technical one, caused by the purely arbitrary political division; and any rule adopted to solve the problem must be an artificial one.

Illustrations:

(1) A's dwelling-house is cut by the line between X and Y. Only three feet along the western end of the house is in X, the remainder in Y. A is domiciled in Y.

(2) The line between X and Y nearly bisects A's dwelling-house. The principal entrance of the house is in Y. A is domiciled in Y.

Oregon Notes

¹ No Oregon case has been found involving this situation.

TOPIC 4. COMPELLED DOMICILE

Section 28. A person who has not capacity to acquire a domicile of choice has a domicile assigned to him regardless of his will. This domicile is a compelled domicile.¹

Comment:

A person's domicile may be the place at which he has his home, or it may be a place assigned to him by law as his domicile, even though it is not his home. (See Section 10.) A person who is legally capable of acquiring a domicile of choice may acquire a domicile in a place by making his home in that place. (See Section 17.) Certain persons are incapable of acquiring a domicile in this manner; but since such persons must have a domicile, a place is assigned to them by law as their domicile whether or not they have a home in that place. The principles governing the fixing of the domicile of these persons are given in Sections 29 to 41.

Oregon Notes

¹ *Cf. Darragh v. Bird*, 3 Or. 229, 233. "Every person . . . must have a domicile, or else he must labor under a disability that neither the law nor the courts can relieve."

No other case has been found involving or discussing this rule.

Section 29. Except as stated in Section 30, a wife has the same domicile as that of her husband.¹

Comment:

The husband is the head of the family, which includes the wife and minor children, and in normal cases the members of the family have their domicile at the place where he has his domicile.

(a) On marriage, the wife takes the domicil the husband has at that time.

Illustrations:

(1) A has a dwelling-house in X, where he has his domicil. He marries B. A and B travel on their honeymoon. B has never been in X. B's domicil is X.

(2) A is domiciled in X. He gives up his home in X but does not acquire a home elsewhere. He marries B. B's domicil is X.

(b) If the husband changes his domicil, the wife's domicil changes with it.

Illustration:

(3) A is domiciled in X. He goes to Y and buys a house and acquires a domicil there. B, his wife, remains in X for a time and has never been in Y. B's domicil is Y.

(c) A void marriage has no effect upon the domicil of the woman. If she does in fact make her home with her supposed husband, she acquires a domicil of choice in the place where she lives with him.

This is true whether or not the woman knows that the marriage is void.

Oregon Notes

¹ See the following cases:

Reed's Will, 48 Or. 500, 87 Pac. 763; *Miller v. Miller*, 67 Or. 359, 136 Pac. 15; *Bryant v. Dukehart*, 106 Or. 359, 367, 210 Pac. 454; *Stewart v. Stewart*, 117 Or. 157, 163, 242 Pac. 852.

Section 30. If a wife lives apart from her husband without being guilty of desertion, she may acquire a separate domicil.¹

Comment:

The determination of the circumstances under which a wife may live apart from her husband without being guilty of desertion is not a matter within the scope of this subject.

(a) If a wife lives apart from her husband without being guilty of desertion, she may retain her domicil, although he changes his domicil.

Illustrations:

(1) A is domiciled with B, her husband, in X. B elopes with another woman and makes his domicil in Y. A continues to make her home in X, A's domicil is X.

(2) A is domiciled with B, her husband, in X. B deserts her and goes to Y, where he establishes a domicile. A continues to make her home in X. A's domicile is X.

(3) A is domiciled with B, her husband, in X. B goes to Y and becomes domiciled there. He requests A to come and live with him, but she refuses to do so and keeps her home in X. By the law of X she is not guilty of desertion in refusing to follow him. A's domicile is X.

(b) If a wife live apart from her husband without being guilty of desertion, she may acquire a new domicile apart from his.

Illustrations:

(4) A is domiciled with B, her husband, in X. B commits adultery. A goes to Y and makes her home there. A is domiciled in Y.

(5) A is domiciled with B, her husband, in X. By a decree of a court of X, a judicial separation is granted. A makes her home in Y. A's domicile is Y.

(6) A is domiciled with B, her husband, in X. A and B separate by mutual consent. A makes her home in Y. A's domicile is Y.

(7) A is domiciled with B, her husband, in X. Against B's will, A goes to live and makes her home in Y. By the law of X this does not constitute desertion. A's domicile is Y.

Note: The rule as here stated goes to the limit of the law as it is generally accepted today. It is not intended to indicate an opinion that the law may not be modified in future as a result of the undoubted trend of social opinion in favor of full legal emancipation of married women.

Oregon Notes

¹ The following cases declare this rule:

Bryant v. Dukehart, 106 Or. 359, 367, 210 Pac. 454;
Miller v. Miller, 67 Or. 359, 365, 136 Pac. 15; *McFarlane v. Cornelius*, 43 Or. 513, 521, 73 Pac. 325, 75 Pac. 139.

Section 31. Upon the termination of the marriage in any way, or upon judicial separation, the wife may acquire a new domicile; until she does so, she retains the domicile which she had at the time of the termination of the marriage relation.¹

Comment:

Although the termination of the marriage, either by death or divorce, does not of itself change the wife's domicile, it removes whatever disabilities she was subject to as a married woman and leaves her free to acquire a new domicile.

Illustrations:

(1) A is domiciled with B, her husband, in X. He dies. A's domicile is X.

(2) A is domiciled with B, her husband, in X. The marriage is terminated by a divorce. A's domicile is X.

(3) A is the wife of B. Although B is domiciled in X, A is domiciled in Y. The marriage is terminated by a divorce. A's domicile is Y.

Oregon Notes

¹ *Reed's Will*, 48 Or. 500, 87 Pac. 763.

Section 32. Except as stated in Sections 33, 34, 35 and 36, a minor child has the same domicile as that of its father.¹

Comment:

(a) At birth, a legitimate child of a living father takes the domicile its father had at the time as its domicile of origin. (See Section 16.)

(b) The domicile of the child during its minority continues to be that of its father, and upon a change of domicile by its father the child takes the father's new domicile.

The fact that the child lives apart from the father, whether with the father's permission or not, is immaterial. The child has no power to acquire a domicile of choice, nor can the father fix the domicile of the child at any place other than that at which the father has his domicile.

Illustrations:

(1) A is domiciled in X. He sends B, his minor child, to school in Y. B's domicile is X.

(2) A is domiciled in X. He sends B, his minor child, to live with its grandfather in Y. B's domicile is X.

(3) A is domiciled in X. His minor child, B, runs away from home and lives in Y. B's domicile is X.

(4) A is domiciled in X. B, his minor child, is bound out to service by the public authorities in Y. B's domicile is X.

(c) By statute in several states the father and mother are con-

stituted "joint guardians" of their minor children. Where that is the case, if the father and mother have separate domicils, a minor child takes the domicil of the parent with whom it lives in fact. If it lives with neither, its domicil is that of the father.

Oregon Notes

¹No Oregon case has been found involving the domicil of a minor child.

Section 33. An emancipated minor child may acquire a domicil of choice.¹

Comment:

The determination of the circumstances under which a child is emancipated is not within the scope of this subject.

(a) A change of domicil by the father does not change the domicil of the emancipated child; for if a minor child is emancipated, the power of the parent to control the domicil of the child ceases.

(b) An emancipated child may acquire a new domicil as a domicil of choice.

Illustrations:

(1) A is domiciled in X. B, his minor son, marries with or without A's consent. By the law of X marriage emancipates a minor child. B makes his home in Y. B's domicil is Y.

(2) A is domiciled in X. B, his daughter, is married with or without A's consent to C, whose domicil is Y. By the law of X, marriage emancipates a minor child. C dies while B is still a minor. B's domicil is Y.

(3) A is domiciled in X. By the law of X, a father may voluntarily emancipate his minor child. A emancipates B, his minor child. A makes his home in Y. B makes his home in Z. B's domicil is Z.

(4) A and his wife B are domiciled in X. They abandon C, their minor child. By the law of X, abandonment emancipates a minor child. C goes to Y and earns his living there, making Y his home. B's domicil is Y.

Oregon Notes

¹No Oregon case has been found involving the domicil of an emancipated child. As to the capacities generally of such a child, see *Flynn v. Baisley*, 35 Or. 268, 57 Pac. 908.

Section 34. In the case of divorce or separation of the parents, the minor child's domicil is that of the parent to whose custody it has been legally given; if there has been no legal fixing of custody, its domicil is that of the parent with whom it lives, but if it lives with neither, it retains the father's domicil.¹

Comment:

This principle is applicable in the case of a divorce, judicial separation, or voluntary separation of the parents.

If the father abandons his family, the minor children living with the mother have the domicil of the mother.

Oregon Notes

¹ No Oregon case has been found involving the domicil of such a child.

In *Bryant v. Dukehart*, 106 Or. 359, 210 Pac. 452, a mother moved to Oregon from California where the father lived, bringing with her the child of the parties. The mother was separated from her husband with cause. The mother died, and the father sought the custody of the child. The court disposed of the case without inquiring into the domicil of the child. *Cf. Restatement No. 3, Conflict of Laws*, Secs. 147-151.

Section 35. An illegitimate minor child has the same domicil as that of its mother.¹

Comment:

(a) At birth, an illegitimate child takes the domicil its mother had at the time as its domicil of origin. (See Section 14.)

(b) Upon a subsequent change of domicil by its mother, the child takes the mother's new domicil.

(c) If an illegitimate child is legitimized as to the father, the child acquires the domicil of the father; and if the act of legitimation legitimizes the child from birth, the child's domicil becomes that of the father as from the time of its birth. (For a discussion of legitimation, see Sections .)

(d) If a child is legitimized as to the mother only, its domicil is unaffected by the legitimation.

Oregon Notes

¹ No Oregon case has been found involving the domicil of an illegitimate child. That a father, however, has no obligation to,

or control over, such a child, apart from statute, see *Nine v. Starr*, 8 Or. 49.

In *State v. McDonald*, 55 Or. 419; 103 Pac. 512; 104 Pac. 967, 106 Pac. 444, it was assumed that the Oregon statutes (on subsequent marriage of the parents) could legitimize a child born in Scotland, although the marriage took place in Scotland. Cf. *Restatement No. 3, Conflict of Laws*, Sec. 140.

Section 36. An adopted minor child has the same domicil as that of the adoptive parent.¹

Comment:

(a) The domicil of an adopted child becomes at the moment of adoption that of the adoptive parent.

(b) Upon a subsequent change of domicil by the adoptive parent, the domicil of the adopted child follows that of the adoptive parent.

(c) The domicil of the child, upon its adoption, ceases to follow that of the natural father.

Oregon Notes

¹No Oregon case has been found involving the domicil of an adopted minor child. The situation is covered by statute.

Sec. 9771, *Oregon Laws*, provides that upon an order of adoption being made a decree shall be made "ordering that from the date of the decree the child shall, to all legal intents and purposes, be the child of the petitioner." Sec. 9773, *Oregon Laws*, (as amended, L. 1927, c. 51, p. 59) provides that "The parents shall be deprived by such adoption of all legal rights as respects the child."

Section 37. Upon the death of the father, the domicil which a minor child has at the time of the father's death continues to be its domicil during minority, unless its domicil is changed according to the principles stated in Sections 38, 39 and 40.¹

Comment:

The death of the father does not emancipate the child, and it cannot by its own choice acquire a new domicil:

Illustration:

(1) A is domiciled in X. A tells B, his minor child, on A's death to go and live with his Uncle C, domiciled in Y. A dies. B obeys A's request. B's domicil is X.

Oregon Notes

¹ No Oregon case has been found involving the domicil of such a child.

In *Cohen v. B. P. O. E.*, 144 Fed. 266, a father had died apparently domiciled in Oregon; his minor child was said to have later become a "resident" of California (in a boy's home), but there is nothing in the case to indicate as to how his domicil was changed. (Service of notice by publication was allowed against him as a non-resident.)

Section 38. If a guardian of the child's person is appointed, he may change the domicil of the child by establishing its home within but not outside the state in which he was appointed.¹

Comment:

(a) The ward may acquire a domicil in any place where the guardian causes him to live within the state in which the guardian was appointed.

(2) The ward may not acquire a domicil in any place outside the state in which the guardian was appointed.

(c) The ward does not take the domicil of the guardian unless he lives with the guardian.

Oregon Notes

¹ No Oregon case has been found involving this rule.

The situation is probably covered by statute. Sec. 1314, *Oregon Laws*, (as amended, L. 1925, c. 145, p. 220) provides that the guardian of a minor child "shall have the custody and tuition of the minor," but the father, if living, or the mother if she survives, and remains unmarried, if competent to transact business, "shall be entitled to the custody of the person of the minor and the care of his education."

Section 39. If the father dies and no guardian of the child's person is appointed, the child has the same domicil as that of its mother.¹

Comment:

Upon the death of the father, if no legal guardian of the child's person is appointed, the mother is entitled to the custody of the child.

(a) If the father dies before birth of the child, it takes the domicil of its mother as its domicil of origin. (See Section 16.)

(b) If the father dies after the birth of the child, it then takes the domicile of the mother and its domicile changes with hers.

(c) Even if the mother remarries, the child's domicile follows that of the mother, if the child continues to make its home with the mother; if not it remains during minority domiciled in the place of the mother's domicile immediately before her remarriage.

Oregon Notes

¹ No Oregon case has been found involving the domicile of such a child. Cf. Sec. 1314, *Oregon Laws*, cited under Sec. 38.

Section 40. If both parents of a minor child are dead and no guardian of the child's person is appointed, a grandparent who takes the child to his home to live becomes its natural guardian, and the domicile of the child is that of the grandparent so long as the child continues to live with him.¹

Comment:

No other relative than the mother or one of the grandparents can be a natural guardian of the child. (See section .)

Illustrations:

(1) A, the surviving parent of B, a minor child, is domiciled in X. B is living with its grandfather in Y where the grandfather has his domicile. A dies. B's domicile is Y.

(2) A, the surviving parent of B, a minor child, is domiciled in X. He dies. No legal guardian is appointed. The child goes to live with its grandfather who is domiciled in Y. B's domicile is Y.

(3) A, the father of B, a minor child, is domiciled in X. A dies. B lives with its mother, C, in Y where she is domiciled. C dies and no legal guardian is appointed. B goes to live with D, its uncle who is domiciled in Z. B's domicile is Y.

(4) A, the father of B, a minor child, is domiciled in X. The mother is dead. A dies. C, his brother, clandestinely takes B to Y. B is still domiciled in X.

Oregon Notes

¹ No Oregon case has been found involving the domicile of such a child.

In *Ingalls v. Campbell*, 18 Or. 461, 24 Pac. 904, a grandparent was awarded the custody of a minor child as against an invalidly appointed testamentary guardian.

Section 41. An insane person or one of unsound mind, who is possessed of sufficient mental capacity to choose a home, may acquire a domicile as if he were sane; if he is so far deprived of his reason as to be incapable of choosing his home, he cannot acquire a domicile of choice.¹

Comment:

(a) It is in every case a question of fact whether a person who is insane or of unsound mind has sufficient mental capacity to choose a home.

(b) If a person after coming of age becomes mentally incompetent to choose a home and no legal guardian of his person is appointed, his domicile continues to be in the place in which he had his domicile before he became insane.

(c) If a person before coming of age becomes mentally incompetent to choose a home and he continues to live with his parent and no legal guardian of his person is appointed, he does not become emancipated and he continues to have the same domicile as that of his parent so long as he remains insane and continues to live with his parent.

(d) Except as stated in comment (c), an insane person who is mentally incompetent to choose a home, and of whose person no legal guardian is appointed, does not acquire a new domicile in a place in which he lives.

(e) If a guardian of an insane person who is incapable of acquiring a domicile of choice is appointed, the insane person acquires a domicile with the guardian if he lives with him, otherwise his domicile is unchanged.

(f) An insane person who is sent against his will to an asylum does not acquire a domicile in the asylum.

(g) If an insane person becomes sane, or mentally competent to choose a home, he may thereafter acquire a domicile of choice.

Oregon Notes

¹ No Oregon case has been found involving the domicile of an insane person.

Under Sec. 1321, *Oregon Laws*, the guardian of an insane person has the "care and custody of the person of the ward."

Section 42. A corporation is domiciled in the state where it was chartered, and cannot acquire a domicile outside that state.¹

Comment:

(a) The domicile of a corporation is in the state where it was chartered and at the place within the state where its principal office is located.

(b) Although the corporation does business outside the state where it was chartered, it cannot acquire a domicile outside that state.

Oregon Notes

¹ The following cases are in point:

Hamilton v. North Pac. S. S. Co., 84 Or. 71, 79, 164 Pac. 579; *Aldrich v. Anchor Coal Co.*, 24 Or. 32, 32 Pac. 756; *Farrell v. Oregon Gold Co.*, 31 Or. 463, 49 Pac. 876; *Cunningham v. Klamath Lake R. Co.*, 54 Or. 13, 17, 21, 101 Pac. 213, 1099; *Burns v. White Swan Mining Co.*, 35 Or. 305, 57 Pac. 637; *Callender Co. v. Pomeroy*, 61 Or. 343, 351, 122 Pac. 758; *Holgate v. O. P. R. R. Co.*, 16 Or. 123, 17 Pac. 859; *Bailey v. Malheur Irrig. Co.*, 36 Or. 54, 57 Pac. 910.