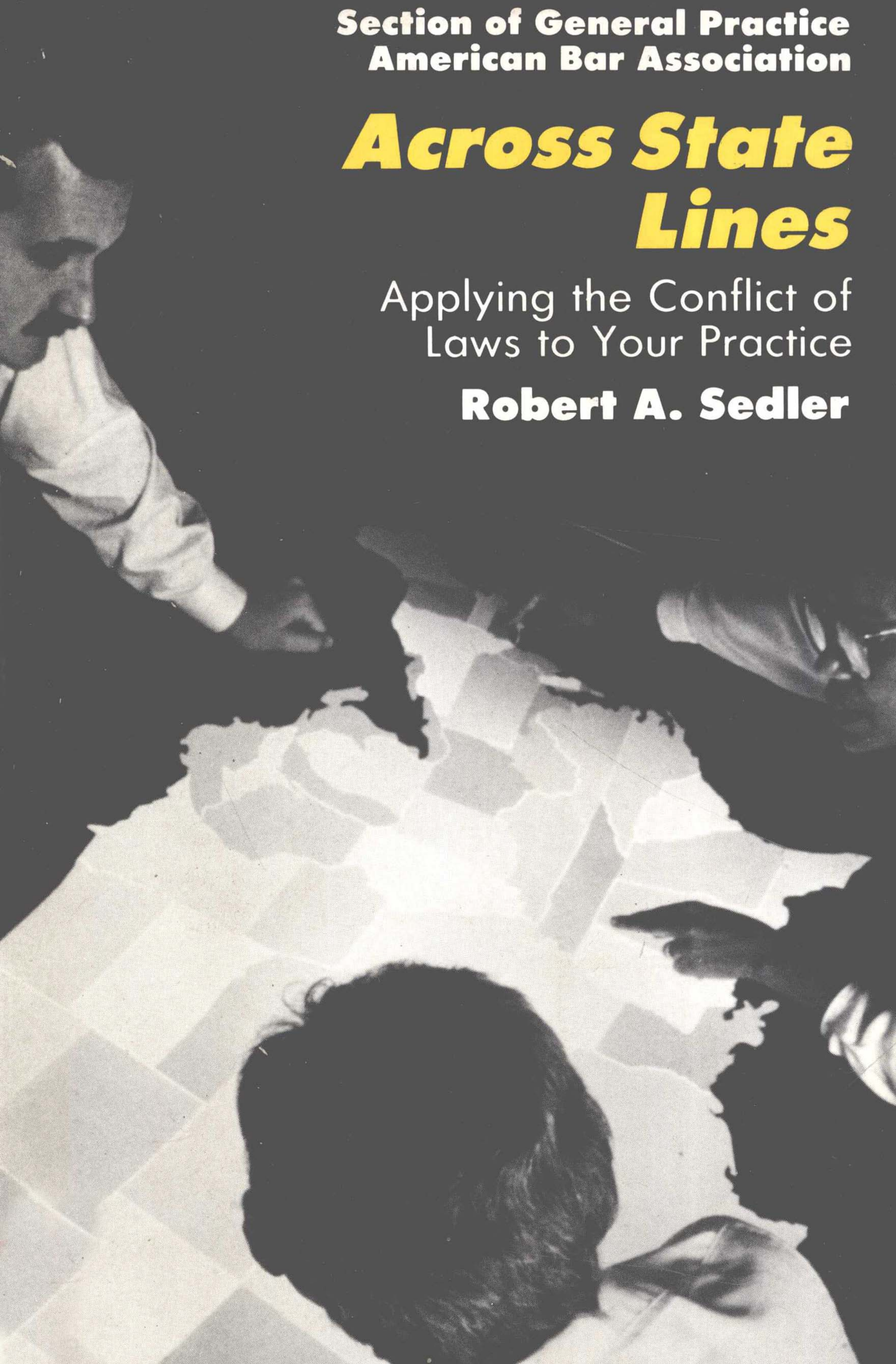
Section of General Practice
American Bar Association
Across State Lines
Applying the Conflict of Laws to Your Practice
Robert A. Sedler

Section of General Practice
American Bar Association

Across State Lines

Applying the Conflict of Laws to Your Practice

Robert A. Sedler

The material contained herein represents the opinions of the authors and editors and should not be construed to be the action of either the American Bar Association or the Section of General Practice unless adopted pursuant to the By-laws of the Association.

© 1989 American Bar Association. All rights reserved.

Printed in the United States of America.
Library of Congress Catalog Card Number 88-84015
ISBN 0-89707-408-4

Discounts are available for books ordered in bulk. Special consideration is given to state bars, CLE programs, and other bar-related organizations. Inquire at Publications Planning & Marketing, American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611.

94 93 92 91 90 5 4 3 2 1

Preface

The Conflict of Laws is often thought of as a highly theoretical subject, having little utility for the practicing lawyer. In practice, however, conflicts problems do arise with considerable frequency, since more and more transactions have interstate and even international ramifications. The purpose of this book is to relate conflict of laws theory and doctrine to the kind of conflicts problems the lawyer is likely to face in everyday practice. The author relies heavily on illustrative cases to demonstrate both the operation of conflicts theory and the practice of the courts in deciding conflicts cases. Much emphasis is placed on strategic considerations and on the results that the courts reach in the actual cases coming before them for decision.

The book should be viewed as a starting point for the lawyer's analysis of conflicts problems. While it discusses and cites cases from many states, it does not attempt to set forth comprehensively the conflicts law of any particular state. The lawyer will have to consult the conflicts law of the state in which the lawyer is practicing, but the material in the book should provide the analytical framework for the lawyer's in-depth analysis of the particular conflicts problem with which the lawyer is dealing. The cut-off date for cases included in the book was October 1988.

The structure of this book has been modeled on the structure of Sedler and Cramton, *The Sum and Substance of the Conflict of Laws* (3d ed. 1987), which is a book oriented primarily to law students. The Barrister Project, which publishes the Sum and Substance Series and holds the copyright to *The Sum and Substance of the Conflict of Laws*, has granted the author permission to incorporate portions of the text of *The Sum and Substance of the Conflict of Laws* into the present book. This grant of permission by the Barrister Project and by Professor Roger C. Cramton, the co-author of *The Sum and Substance of the Conflict of Laws*, is acknowledged with much appreciation.

It is the author's hope that this book will be of benefit to practicing lawyers as they grapple with the increasing number of conflicts problems that arise in this interdependent nation and interdependent world.

Robert A. Sedler
Professor of Law
Wayne State University
Detroit, Michigan

试读结束，需要全本PDF请购买 www.ertongbook.com

Table of Contents

Preface v

Chapter 1: Introduction 1

Chapter 2: General Principles 7
- Domicile 7
- The Relationship between Jurisdiction and Choice of Law 10
- Legislative Directives as to Choice of Law 12
- The Other State's Conflicts Law 15
- Choice of Law as to Different Issues: Dépeçage 16
- Public Policy, Penal Laws and Revenue Laws 18
- Raising a Choice of Law Issue and Proving the Content of Foreign Law 21
- Foreign Law as Datum 23

Chapter 3: Approaches to Choice of Law 27
- The Traditional Approach 29
- The Restatement Second 33
- Interest Analysis 37
- Choice-Influencing Considerations 41
- The New York Approach 43
- A Transitional Note 44

Chapter 4: Tort Cases 47
- Illustrative Problems Involving Interstate Accidents and Enterprise Liability 50
  - Parties from the Forum State Involved in an Accident in Another State 50
  - Parties from a Recovery State Involved in an Accident in a Non-Recovery State 51
  - Parties from a Non-Recovery State Involved in an Accident in a Recovery State 52
  - Plaintiff from a Recovery State and Defendant from a Non-Recovery State 53

Plaintiff from a Non-Recovery State and Defendant from a Recovery State 57
Products Liability 58
No-Fault Insurance 61
Worker's Compensation and Tort Liability 62
Illustrative Problems Involving Admonitory Torts 63
Application of the Law of the Place of Acting 64
Application of the Law of the Place of Harm 65
Defamation and Invasion of Privacy 67

Chapter 5: Contracts and Property 69
Choice of Law in Contracts Cases 70
Choice of Law Planning 70
Applicable Law in the Absence of an Effective Choice 75
Choice of Law in Claims of Usury 83
Choice of Law in Property Matters 85
Succession to Property 86
Inter Vivos Transfers 88
Security Interests 90
Trusts and Future Interests 93
Marital Property 94

Chapter 6: Substance-Procedure and Constitutional Limitations 99
Substance-Procedure 99
Constitutional Limitations in the Choice of Law Process 108

Chapter 7: Judicial Jurisdiction 121
General Considerations and Constitutional Principles 126
The Bases of Jurisdiction 136
General Jurisdiction: Forum-Defendant Contacts 136
Specific Jurisdiction: Forum-Transaction Contacts 140
Specific Jurisdiction: Forum-Property Contacts 153
Forum Non Conveniens and Transfer of Venue 154

Chapter 8: Recognition of Judgments 161
Full Faith and Credit to Judgments of Sister States 163
The Operation of Collateral Estoppel in Multistate Litigation 172

Chapter 9: The Interstate Family 177
Family Status in an Interstate Context 178
Interstate Divorce and the Incidents of Divorce 183
Custody of the "Interstate Child" 190

Table of Cases 199

Index 217

1

Introduction

If lawyers were asked to prepare a list of esoteric legal subjects, the conflict of laws would rank high on most lists. Some years ago, an eminent authority on torts law referred to the conflict of laws as a "dismal swamp inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon," and concluded that, "the ordinary lawyer is quite lost when engulfed and entangled in it."[1] Many lawyers think of the conflict of laws in terms of a course that they had to take in law school because it was on the bar examination (there is a direct correlation between student enrollment in the Conflict of Laws course and the presence or absence of Conflict of Laws on the bar examination) and an area of law that appears to have little practical utility.

In practice, however, conflict of laws problems do arise with some frequency, and more significantly, there is the need for the lawyer to be attuned to the interstate and sometimes international ramifications of legal transactions. Law professors who teach the subject sometimes say that, "Most lawyers wouldn't recognize a conflicts problem if they had one," and this statement is sometimes unfortunately true. Whenever a transaction is connected with more than one state, the astute lawyer must be aware of the conflicts implications, both during the planning stage of the transaction, and in the event that litigation results.

The conflict of laws may be defined as that area of law which determines whether, and to what extent, the courts of a state[2] where the case is being heard, the *forum,* will give effect to the presence of a for-

1. Prosser, *Interstate Publication,* 51 MICH. L. REV. 959, 971 (1953).

2. For conflict of laws purposes, a *state* is defined as any geographic portion of the earth's surface having an independent system of law. In a federal system such as the United States, each state of the union, the territories and the District of Columbia are "states" for conflict of laws purposes. The same is true of a Canadian province. Unitary systems such as France and

eign element in that case. A case contains a foreign element when some or all of the legally significant facts occurred in a state other than the forum or one of the parties is not a forum resident. The fact that the case contains a foreign element does not necessarily mean that the forum court will end up treating the case differently from the way it treats a fully domestic case. Rather it means that the forum court must consider whether and to what extent the case requires different treatment because of the presence of a foreign element, and the conflict of laws is that body of law that provides the answers to this question.

Let us take a typical conflicts case that occurs with some frequency in practice. A and B, residents of State X, are traveling together in B's automobile on a day trip to a city across the border in State Y. An accident occurs in State Y, in which A is injured. She is taken to a hospital in State Y. After she is released from the hospital, she returns to her home in State X and consults a lawyer there. It is possible that her lawyer and the lawyer for B's insurance company will ignore the fact that this case contains a foreign element in that the accident occurred in State Y and treat it as if it were a purely domestic case. My discussions with practicing lawyers indicate that in a case such as this one, this is exactly what happens.

Suppose, however, that one or both lawyers is conflicts sensitive, and analyzes the case with reference to its conflicts implications. Because B is a resident of State X and the accident occurred in State Y, if litigation becomes necessary, A's lawyer has a choice of forum in which to bring the suit. In this case B is subject to suit in the courts of State X, where he resides, but he is also subject to suit in the courts of State Y, where the accident occurred, under the State Y long-arm act. This choice of forum may make the case worth more for settlement purposes or in the event of actual litigation. This would be so if, for example, jury verdicts in State Y (or the county in State Y where venue is proper) are generally higher than jury verdicts in State X. The lawyer for A thus has a strategy option that would not be available if the case did not contain a foreign element.

There may also be a difference in the substantive law of State X and State Y. Perhaps State Y is one of the few states that still has a guest statute barring suits by guest passengers against host drivers unless gross negligence can be shown, while State X does not. Or perhaps State X has a no-fault law, while State Y does not, and A's losses

Italy are also states for conflicts purposes, and there can be a conflict of laws between the law of a state in a federal system, such as New York, and the law of a unitary state, such as France or Italy.

may not satisfy the threshold requirement of the State X no-fault law. The matter of which state's law applies on these issues thus may control the ultimate outcome of the litigation. Good lawyering dictates that the lawyer for A structure the case in such a way as to maximize the possibilities for the application of whichever state's law is more favorable to A, while the lawyer for B's insurance company tries to bring about the application of whichever state's law is more favorable to B. The lawyer who ignores the conflicts implications of a case containing a foreign element is doing a disservice to the client and in certain circumstances could well be subject to a suit for legal malpractice.

An understanding of the conflicts implications of a transaction is very important when the lawyer is planning transactions that have interstate ramifications. To take a very common example in practice, let us suppose an estate planning situation where the client resides in State X, and the estate consists of securities in a number of multistate corporations, bank accounts located in State X and in State Y, and real estate located in States X, Y, and Z. The lawyer must devise an estate plan that will satisfy the requirements of the laws of the different states that will be applicable to the disposition of the different portions of the estate. In this example, if the lawyer devises an estate plan that satisfies the requirements of State X law, but does not satisfy the requirements of State Y law and State Z law, the lawyer may find out—too late—that State Y law and State Z law may be applicable to the disposition of the real estate located in those states.

Another example of a conflicts problem that arises frequently in practice involves child custody disputes that cut across state lines. The variations of this problem are numerous. Suppose that the parties were divorced in State X, the marital domicile, and custody was awarded to the mother, with visitation rights to the father. The mother has moved to State Y with the child, and brings an action against the father there to restrict or terminate visitation rights. Or, when the child is visiting the father in State X, the father refuses to return the child at the end of the visitation period, and brings an action in State X to have custody awarded to him. Again, the conflict of laws is that body of law which provides the answers to questions such as whether the State Y court or the State X court can exercise jurisdiction to change the custody award in these circumstances.

As the above examples should make clear, the conflict of laws is a very important area of law in practice. For most lawyers, however, conflicts questions arise only sporadically in their practice, and it is fair to say that lawyers are generally less familiar with this area of law than they are with many others. The primary purpose of this book is to relate the conflict of laws to the day-to-day practice of law and to the real world in which lawyers operate.

The subject of the conflict of laws has traditionally been divided into three parts: (1) choice of law; (2) jurisdiction of courts; and (3) recognition of judgments. Jurisdiction of courts is the part of conflicts law that probably is most familiar to lawyers, because they deal with it most frequently. Jurisdiction in the broad sense refers to the power of a particular court to hear and determine a case, and includes what may be referred to as local law questions, such as which of the various courts established by the state has subject matter jurisdiction over the particular case, or within which geographical part of the state the case must be brought, *i.e.,* proper venue. Jurisdiction is a conflict of laws problem to the extent that a court's decision whether or not to exercise jurisdiction in a particular case is affected by the presence of a foreign element in that case. The concept of *judicial jurisdiction* determines whether a court can exercise jurisdiction in a case containing a foreign element. While there are some differences in state laws authorizing the exercise of judicial jurisdiction, the Fourteenth Amendment's due process clause imposes what may be called *basic limitations* on the exercise of jurisdiction in cases containing a foreign element, and in practice most questions of judicial jurisdiction arise in the context of determining whether the exercise of such jurisdiction would be constitutional in the circumstances presented. Our discussion of judicial jurisdiction will focus on the constitutional limits on the exercise of jurisdiction, which the Supreme Court has been defining with greater precision in more recent years.

Recognition of judgments is probably the least complex part of the conflict of laws. Here the question is whether the judgment of a court of one state in a prior case will be recognized in whole or in part when that judgment is put in issue in a subsequent case before the courts of another state. There are general principles of recognition that serve to implement the common policy of all states in regard to finality of litigation. More significantly, as between states of the United States, recognition of a judgment rendered by a court of a sister state or a federal court is governed almost entirely by the Full Faith and Credit Clause of Article IV, section 1, which imposes stringent requirements of recognition.

This brings us to the choice of law, an area of great uncertainty and change, and clearly the most complex part of the conflict of laws. In this area the courts have always been concerned about *theory and approach,* and have tended to give great weight to the views of academic commentators. As we will see, there is substantial disagreement about the proper approach to the resolution of choice of law problems, both among academic commentators and on the part of the courts. It is thus necessary for the lawyer to understand the different theories and approaches to choice of law.

试读结束，需要全本PDF请购买 www.ertongbook.com

Nonetheless, it is the submission of the author that choice of law is not all that complex when analyzed in terms of the *results* that the courts reach in practice. Our discussion of choice of law, therefore, while including theories and approaches, will focus on results. It will also relate choice of law results to the exercise of judicial jurisdiction and to the different states where a particular suit may be brought in the event that the laws of the involved states differ in material respects. In certain cases, the choice of law result—and the outcome of the litigation—may be determined by the forum in which suit is brought.[3]

The book is organized as follows. In Chapter 2 we will discuss general principles of the conflict of laws. In Chapter 3 we will discuss approaches to choice of law. In Chapters 4 through 6, we will discuss choice of law in practice. Chapter 4 will deal with torts cases, which comprise the clear majority of choice of law cases arising in practice. Chapter 5 will deal with choice of law in contracts cases and property matters. Chapter 6 will deal with substance-procedure and constitutional limitations on choice of law. Judicial jurisdiction will be covered in Chapter 7, and recognition of judgments will be covered in Chapter 8. Chapter 9 will be devoted to the Interstate Family—to divorce, support, and custody problems that cut across state lines.

The objective of this book is to provide a basic framework for the understanding of conflicts problems by lawyers. It is intended to be a starting point for the lawyer's analysis of a particular conflicts problem, and not necessarily to provide the definitive answer to all conflicts problems that may arise in practice.[4] The citations in the text will mostly be to cases, and an effort will be made to include representative cases from most states.[5]

It is the author's hope that this book will make the conflict of laws seem less esoteric to the lawyers who must deal with conflicts problems in the real world.

---

3. Since conflicts cases not infrequently involve parties resident in different states, these cases can be brought in or removed to federal court on the basis of diversity of citizenship. Under the *Erie* doctrine, the federal court in a diversity case is required to apply the conflicts law of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Since this is so, it usually is not necessary to distinguish between conflicts cases brought in federal court and conflicts cases brought in state court, and in our discussion, we will treat the federal court in a conflicts case as if it were a court of the state in which it sits.

4. Certain highly specialized areas, such as administration of estates and corporations, have not been included. The book also does not generally deal with the federal jurisdiction problems that arise in federal diversity litigation, or with conflicts between federal and state law.

5. There are three outstanding texts in this area. LEFLAR, MCDOUGAL & FELIX, AMERICAN CONFLICTS LAW (4th ed. 1986) (The Michie Company); SCOLES & HAY, CONFLICT OF LAWS (1982) (West Publishing Co.,); WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986) (Foundation Press).

2

General Principles

In the next chapter we will discuss the various approaches to the choice of law process. In this chapter we will discuss a number of general principles and certain problems that are inherent in the choice of law process regardless of the particular approach that is taken to choice of law. The application of these principles and the resolution of the problems, however, will often be affected by the particular approach that is taken to choice of law.

DOMICILE

In common law countries, and in a number of other countries as well, domicile is considered to be the primary connecting factor between a person and a state. This being so, domicile is a reasonable basis for assigning a "personal law" to a party, and the choice of law result in a particular case may often depend on the law of the state where a party is domiciled.

Domicile is also a recognized basis for the exercise of judicial jurisdiction, and is the primary basis of jurisdiction in matters involving personal status, such as jurisdiction to divorce. The importance of domicile is not limited to the conflict of laws. It determines matters such as a person's state citizenship under the Fourteenth Amendment, a person's right to vote, and a person's amenability to a state's general taxation power. Domicile is the most important connection that a person has with a state, and in various contexts, it is necessary for a court to determine where a person is in fact domiciled.

Domicile is generally defined as requiring (1) physical presence in a state and (2) the intention of remaining there "indefinitely," or more accurately, "for the time being at least." It is distinguished from being in a state temporarily with the intention of leaving within a fairly determinate period of time. Residence, as opposed to domicile, usually refers only to physical presence in a state, perhaps on more than a transient basis, but without the intention to remain there "for

the time being at least." Ordinarily it is not necessary to distinguish between "domicile" and "residence," because most people are domiciled in the state where they in fact reside, and the courts tend to use the terms interchangeably except where an issue as to domicile is specifically presented. We will follow that practice in this book, and when we refer to a party as being "resident" in a state, this means that the party is "domiciled" there. For the present, however, we are concerned with the situation where an issue as to domicile is specifically presented, that is, where it is necessary to determine precisely where a person is domiciled for a particular purpose.[1]

"Residence" is the term most frequently used in statutes, and most often the courts will interpret "residence" as being synonymous with "domicile," such as where the statute allows substituted service on absent "residents." Sometimes, "residence" means only actual physical presence without regard to domiciliary intent, such as when the statute provides for compulsory schooling for "resident children." And sometimes, the term "residence" is intended to impose a requirement in addition to domicile, such as when the statute authorizes the courts to exercise divorce jurisdiction over "persons who have resided in this state for one year."[2]

1. The concept of domicile, as pointed out above, is relied on to establish a connection between a person and a state for a number of different purposes, with differing consequences both for the person and the state to which or by which a domiciliary affiliation is claimed. Since general principles of domicile are broadly formulated, it should not be surprising to find that in practice courts will often interpret the concept of domicile differently for different purposes. A court, for example, may be willing to accept relatively little evidence of "permanent connection" when a party seeks to obtain a divorce in that state; the same court may be unwilling to find this "permanent connection" when a recently-arrived student at the state university claims to be a domiciliary in order to qualify for the lower tuition rate applicable to a "resident." Thus, in practice, domicile is not a unitary concept which will be viewed in the same way either by different courts or by the courts of the same state for different purposes. While legal theory would say that a person can have only one domicile at a given time, a more realistic statement is that a person can have only one domicile under the law of a particular state, and it should not be assumed that one court's determination of a person's domicile will be binding on the courts of other states or on the courts of the same state for other purposes.

2. When a statute imposes a durational residency requirement for certain purposes, such as jurisdiction to divorce or eligibility to vote or receipt of welfare benefits, in addition to the basic requirement of domicile, the state has in effect acted to treat new residents differently from older ones. This discrimination between new and old residents operates to implicate the right to interstate travel and may be unconstitutional. In testing these durational residency requirements against the assertion of a "compelling" state interest, the Supreme Court has held that a state can impose only a minimal waiting period before allowing new domiciliaries to register to vote, Dunn v. Blumstein, 405 U.S. 330 (1972), and cannot impose any waiting period for the receipt of essential welfare benefits. Shapiro v. Thompson, 394 U.S. 618 (1969). On the other hand, it has held that a state can impose a one-year residency requirement as a condition for the exercise of jurisdiction to divorce. Sosna v. Iowa, 419 U.S. 393 (1975).

We may now consider general principles of domicile.[3] Since, in theory, every person must be domiciled somewhere, every person is assigned a domicile at birth, known as the *domicile of origin.* The legitimate child is assigned the domicile of the parents, while the illegitimate child is assigned the domicile of the mother. If parents become separated or divorced, the minor child takes the domicile of the parent with whom the child lives. Upon emancipation, the minor child, like any other person, can acquire a *domicile of choice.*

By operation of law, a person retains the former domicile until a new domicile of choice is acquired, even though the person has left the former domicile. A person acquires a new domicile of choice on the basis of physical presence in the new state *concurrently* with the intention to remain there indefinitely, or, as we have said, for the time being at least. Given the concurrence of the requisite presence and intent, the amount of time the person has actually been present in the new state is irrelevant—the change of domicile is effected as soon as the person crosses the state line. An unqualified intention to make one's home in the new state suffices, and when this requirement is satisfied, the motive for the change of domicile is immaterial.

At common law, a married woman took her husband's domicile by operation of law, but today such a rule would be invalid as constituting invidious discrimination on the basis of gender, in violation of the Fourteenth Amendment's equal protection clause. There is no logical reason why spouses who live in different states (as for example, where their separate careers take them to different states) should not be able to acquire separate domiciles. If there are children in that situation, the child presumably would take the domicile of the parent with whom the child lives most of the time.

Persons living in a particular place under compulsion, such as persons in military service or prisoners, should be able to acquire a domicile of choice in the place where they are stationed or confined, so long as the requisite domiciliary intent exists. Since domiciliary intent is based on a person's state of mind, the fact that a person went to a particular place under compulsion does not prevent the person from developing the requisite intention to remain there after the compulsion has been removed. For example, a person in military service may have been stationed in the same place for several years, may own or rent a home there, may be active in community affairs, and may plan to live there after separation from service. Similarly, a prisoner may

3. The general principles of domicile are set out in the Restatement of Conflict of Laws Second, §§ 11-23 (1971). For a more complete discussion, see SCOLES & HAY, CONFLICT OF LAWS, ch. 4 (1982).

intend to live in the state where he has been confined after he has been released. The Supreme Court has held that it is a denial of equal protection to preclude a member of the armed forces from establishing a domicile of choice, at least for voting purposes, in the state where stationed, and other courts have held that a person in military service or a prisoner should not be precluded from showing that he has developed the intention "to be domiciled at the place where he has been forced to remove."[4] Today, the fact that a person is in a particular place under compulsion is only one factor to be considered in determining domiciliary intent; upon establishing the requisite intent, such persons will be able to acquire a domicile of choice in the state where they are stationed or confined.

Students have encountered difficulty in acquiring a domicile of choice in the place where they are studying due to doubts as to the genuineness of their claimed unqualified intention. The question arises most frequently when students attempt to register to vote in the state where they are attending school or to claim the lower tuition rate for "residents" at public universities. The Supreme Court has held that a rule that a student can never obtain domiciliary status at the place where the student is studying is violative of due process and that the student must be permitted to show that the student has acquired the requisite domiciliary intent.[5] While there is a greater disposition today to find domiciliary status on the part of students for voting purposes, a student who enrolled as an out-of-state resident may have some difficulty convincing university officials that the student is now domiciled in that state so as to be entitled to the lower resident tuition rates.

The above discussion of the general principles of domicile and the necessity for determining a person's domicile in particular instances should not obscure the fact that for most persons, "domicile" and "residence" are synonymous. Most persons are domiciled in the state where they in fact reside, and hereafter, when we refer to a person as residing in a state, that is also the state where the person is domiciled.

THE RELATIONSHIP BETWEEN JURISDICTION AND CHOICE OF LAW

Although analytically distinct, jurisdiction and choice of law are related in two significant ways. First, the considerations that justify a

4. *See* Carrington v. Rash, 380 U.S. 89 (1965); Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973).

5. Vlandis v. Kline, 412 U.S. 441 (1973).

试读结束，需要全本PDF请购买 www.ertongbook.com