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## The Legal Aspects of the Nonresident Tuition Fee

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THE LEGAL ASPECTS OF THE NONRESIDENT  
TUITION FEECARLTON E. SPENCER<sup>1</sup>

Most of the tax supported higher educational institutions of the United States discriminate among their students in the matter of tuition fees, basing this discrimination on the residence of the students; the purpose being to collect an additional fee from nonresidents. Heretofore, with few exceptions, the administration of this rule has been lax. Lax, partly because of lack of faith in the wisdom of the policy and partly because of the inability of busy lay administrative officers to solve the many technical legal problems which accompany almost every borderline case. The easiest, and frequently the only, solution is to let the student off in hard cases. As to the first of these causes of lenient enforcement, doubt as to policy, this article will not deal. Suffice it to say that a good many who have given the matter attention, question if the new blood brought into a state with the high type of young citizenry attracted by schools is not of considerable value; if a free interchange of young men and women between states and nations is not in itself of great benefit commercially, socially and otherwise, and if the exchange of students is not so nearly equal that no state is the gainer by erecting a wall of exclusion against sister states and nations. These problems, regarding which it is extremely difficult to get reliable evidence, are for the other social sciences than law. As for the present, the nonresidence fee rule is the vogue, having been demanded by taxpayers who see in it a measure of economy.

One of the evils resulting from loose enforcement manifests itself in unfairness to those who are conscientious and in a disrespect for law and honesty among those who evade the rule. In many places a student who is so simple as to get caught by the fee is an object of derision, among his

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*LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE* 351

fellows. As a result, misstatements, even under oath, regarding matters concerning which mistake is impossible, are not uncommon. Examples are: a false statement that the father is dead; that the signer, who has just arrived, has been domiciled in the state a year; that parents are residents of a state in which they have never lived. The students are not entirely to blame, because lax enforcement encourages deception, and custom and student public opinion approve the policy of beating the rule if you can. This situation is recognized by those in charge. The following statements have been taken from letters from university officials: "The determination from nonresident fees is one of my exasperating tasks." "It is the bane of my existence." "We do not know of any satisfactory way to differentiate between those who should be charged and those who should not. We feel that the liar gets by and the honest man pays." "We find that the students have no objection to the payment of regular fees but will even perjure themselves to attempt to get out of the payment of non-resident fees." "It amounts to a training school for perjurers." "Some to get out of paying the fee will declare themselves citizens when they have no intention of becoming citizens."

It would seem from every viewpoint that the nonresident rule, if it is to be enforced at all, should be enforced strictly. Any exceptions should be made advisedly, based on policy, and should be understood as exceptions and not as evasions of the rule. If there are benefits to be derived through the exclusion of nonresidents or the gaining of revenue from those who come, these benefits can best be obtained by strict enforcement. If the policy is not sound, socially and economically, that fact will be most quickly demonstrated by strict enforcement. Meanwhile, a demoralizing practice which encourages deceit and misstatement and generates disrespect for law will have been discontinued. Hence, the problem with which this article has to deal is, what is the extreme to which an educational institution can go legally in collecting the nonresident fee?

A number of institutions have adopted the "one-year rule" requiring every student to pay the nonresident fee who has not been domiciled in the state for at least one

year prior to enrollment.<sup>2</sup> This has proved a very practical device for safeguarding the bona fides of alleged domicile. In a field where the determining factors are, for the most part vague and intangible, here is one thing that can be seized upon that is definite, certain and capable of proof, actual presence in the state for one year. But, as pointed out hereafter, mere physical presence in the state does not amount to domicile, and after a year has elapsed we still have the problem of determining legal residence. The decision has merely been postponed a year, for even though the individual can show that he has lived in the state, he must still be required to prove that his domicile is there.

Many things may have an evidentiary bearing upon the question of one's domicile, such as acts and conduct (which frequently speak louder than words,<sup>3</sup>) making of investments, building of dwelling house, payment of taxes, undertaking business pursuits which will cover a long period of time, exercising the right of suffrage, holding office, oral and written declarations, reason for leaving former abode and relation to it since leaving, membership in lodge, club and church, location of family and home ties, self-support, etc. Now, living in a place continuously raises a presumption of fact that there was intent to remain and become domiciled there and consequently there is the presumption that a man who lives continuously in a state a year before entering an educational institution did not come there for the sole purpose of attending that school. Among the various forms of evidence this particular item has been picked out and demanded because it is highly significant and because it is relatively easy to establish. However, bear in mind that no particular period of time is necessary to establish domicile and if an immigrant to a state becomes domiciled the day of his arrival, he is then just as much a citizen and resident of that state as he is twelve months later. Consequently, in many cases residents, as well as

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<sup>2</sup> Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Kentucky, Maryland, Missouri, Montana, New Mexico, Tennessee, Washington and Wisconsin require one year's residence. Indiana, Michigan, Minnesota and Nevada require six months.

<sup>3</sup> *Moffett v. Hill*, 131 Ill. 239, 22 N. E. 821 (1889) quoting *Kreitz v. Behrensmeyer*, 125 Ill. 195, 17 N. E. 232 (1888); "On questions of domicile less weight should be given to a person's declarations than to his acts."

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 353

nonresidents, may be forced to pay the fee throughout the one-year period.

In the only case which the writer has found where the nonresident fee has been taken to a supreme court<sup>4</sup> the question of the constitutionality of granting educational privileges to one citizen and withholding them from another on the basis that one has been a citizen longer than another was involved. In the case of *Bryan v. Regents of University of California*,<sup>5</sup> Miss Bryan, a minor, who with her parents had resided in California for eleven months, sought to force the university to admit her without payment of the nonresident fee of \$75 for the first semester. This the university refused to do, relying on the following definition in the statute: "A non-resident student as used in this section shall mean any person who has not for more than one year immediately preceding his entrance into the university been a bona fide resident of the state of California." Miss Bryan contended that this legislation and the rule of the board of regents adopted in pursuance thereof was in violation of the state constitution which prohibits the granting of privileges or immunities to any citizen or class of citizens "which upon the same terms shall not be granted to all citizens." The statutes of California include in the definition of citizens of the state "all persons born out of this state who are citizens of the United States and residing within this state." Miss Bryan was clearly a citizen of California.

It was agreed that the legislature has power to enact laws classifying citizens where the classification is not unreasonable and arbitrary. For example, citizens are classified on the basis of period of residence in regard to voting and holding office. Miss Bryan, however, contended that there were no reasonable grounds for granting and denying university privileges on this basis. But the court says, "Now, one reason for denying a citizen of the state the right to vote in the state until he has been a resident of the state one year is that his residence for one year within the

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<sup>4</sup> The writer believes that the fact that the matter has not been taken to the courts is due to the tendency to give the student the "benefit of the doubt" wherever there have been close cases.

<sup>5</sup> 188 Cal. 559, 205 Pac. 1071 (1922).

state is evidence of his bona fide intent to remain in the state permanently \* \* \* \*. There seems to be no good reason for holding that the legislature may not make a similar classification in fixing the privilege for attending the state university." The court then discusses the impossibility of the state's educating all its citizens, limited facilities, increased enrollment and burden on taxpayers, and concludes that requiring a student to maintain a residence in the state a year as evidence of the bona fides of his intention to remain a permanent resident of the state, and that he is not temporarily residing there for the mere purpose of attending the university, is not an unreasonable or unconstitutional exercise of discretion by the legislature or the university.

The one-year rule makes a valuable and significant item of evidence and postpones the necessity of determining the domicile of the individual, but it does not in itself solve the problem. After a man has lived in the state a year, there is still the question, has he been an actual legal resident or has he been merely living there temporarily? This opens up the entire field of residence and domicile. The first difficulty confronting the university administrator at this stage is to find a workable definition of residence. In contemplation of law, residence is so closely involved with the term domicile that it cannot be considered separately, and we may well consider the meaning of domicile first.

The difficulty of defining the word is well illustrated by the following quotations cited by the Oregon court in the case of *Reed's Will*.<sup>6</sup> "Domicile is difficult of accurate definition and the opinion has been expressed by many judges and writers that the term cannot be successfully defined so as to embrace all its phases. Mr. Justice Shaw says: 'No exact definition can be given of domicile; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case.' *Thorndike v. Boston*, 1 Metc. (Mass.) 242. Vice-Chancellor Kindersley observes: 'With respect to those questions of domicile, there is no precise definition of the word, or any formula laid down by the ap-

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<sup>6</sup> 48 Ore. 500, 87 Pac. 763, 9 L. R. A. (N. S.) 1159 (1906).

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 355

plication of which to the facts of the case it is possible at once to say where the domicile may be.' *Cockrell v. Cockrell*, 25 L. J. Ch. (N. S.) 730, 731; *Cockrell v. Cockrell*, 2 Jur. (N. S.) 727. Lord Chancellor Hatherley declined to 'add to the many ineffectual attempts to define' the term: *Undy v. Undy*, L. R. 1 Sc. & Div. App. 441, 449. Mr. Jacobs and Mr. Dicey have both devoted many pages to a discussion of domicile and they each point out the variety of attempts to define it, and how futile have been the efforts: Jacobs, *Domicile*, Sec. 56 et seq.; Dicey, *Conflict of Laws*, p. 79."

One of the most common legal definitions of domicile has it as the place where a person has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning.<sup>7</sup> The concept of home enters in practically all legal definitions or descriptions of domicile.<sup>8</sup> The word is derived from the Latin *domus* meaning a home or dwelling house and no one word is more nearly synonymous with domicile than the word home.<sup>9</sup> The Roman codes described domicile as follows: "In whatever place an individual has set up his household gods, and made the chief seat of his affairs and interests, from which, without special avocation, he has no intention of departing; from which, when he has departed he is considered to be from home; and to which, when he has returned, he is considered to have returned home. In this place there is no doubt whatever, he has his domicile."<sup>10</sup> Several centuries before the codification of the Roman law, Cicero in his argument before the praetors for the citizenship of Archias defined domicile as the location of "the seat of all one's affairs and fortunes."<sup>11</sup>

The element of intention plays an important part. Some cases hold that domicile is the place in which a person has fixed his habitation with the intention of remaining there permanently. The two things must coincide or, at least,

<sup>7</sup> STORY, *CONFLICT OF LAWS* 40; 9 R. C. L. 538; 19 C. J. 392; *Miller v. Miller*, 67 Ore. 359, 136 Pac. 15 (1913).

<sup>8</sup> "By domicile we mean home, the permanent home, and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you do it." Lord Cranworth in *Whicker v. Hume*, 7 H. L. C. 124, 11 Reprint 50 (1858).

<sup>9</sup> *Burrill v. Jewett*, 25 N. Y. Super. Ct. (2 Rob.) 701 (1864).

<sup>10</sup> *Phillimore, Dom.*, Ch. II.

<sup>11</sup> Cicero, *Oration for Archias, the Poet* IV.

have existed simultaneously at some time, (a) the actual habitation and (b) the intention of remaining.<sup>12</sup> However, with the transitory population of new countries and the lack of definite intention regarding the future in the minds of a migratory people, the better rule substitutes a negative requirement: "without any intention of removing therefrom," or "a non-intention of removing therefrom."<sup>13</sup> It is recognized that a man's plans are subject to change. But habitation for never so long a period without the proper intent will not suffice.

In the case of *Winans v. Attorney General*,<sup>14</sup> a young engineer of Baltimore, went to Russia where he worked at his profession for nine years when his health forced him for the next ten years to spend part of his time in England. From then on he spent substantially all his time in the British Isles. He died, having been away from the United States fifty years and in England forty. In an action involving legacy duty it was held that he died domiciled in Baltimore, Maryland, U. S. A. After taking into consideration the purpose of his being in Europe, his acquisition of property and its location, his objects in life, his allegiance, his future plans, his oral and written expressions and all the circumstances surrounding the case it was clear that, while his habitation had been elsewhere many, many years, in his own mind, home was in the United States and the requisite intention never coincided with his European habitation to make it his domicile. Likewise Mrs. Reed, the founder of Reed College, died domiciled in Portland, Oregon, after having spent the last twelve years of her life in California.<sup>15</sup>

On the other hand, if the two elements do coincide for never so short a time, the domicile is established.<sup>16</sup> Mr. White lived on a farm in West Virginia near the Pennsylvania line. He bought a farm a few miles away but on the Pennsylvania side. He gave up possession of his West

<sup>12</sup> *White v. Tennant*, 31 W. Va. 790, 13 Am. St. Rep. 898 (1888).

<sup>13</sup> 19 Cyc. 393; WEARTON, *CONFLICT OF LAWS* 77; Appeal of Hindman, 85 Pa. 466 (1877); *Putnam v. Johnson*, 10 Mass. 488 (1813).

<sup>14</sup> App. Cas. 287, 73 L. J. K. 13, 613. Also *Bremer v. Freeman*, 10 Moore, P. C. 306, "A person may live fifty years in a place and not acquire a domicile, for he may have had all the time an intention to return to his own country."

<sup>15</sup> *Reed's Will*, *supra* n. 6.

<sup>16</sup> JACOBS, *DOMICILE* 136. "On the one hand, the shortest residence is sufficient if the requisite *animus* be present, and, on the other, the longest will not suffice if it be absent."



## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 357

Virginia farm, loaded his goods and family into the wagon and crossed over to his new home. About the time he had his wagon unloaded and the furniture in the house his wife became ill. Rather than undergo the inconvenience of their unsettled condition he went back across the line to a son's house. As the days went by the wife recovered but Mr. White, himself, caught the fever and died. Under the laws of West Virginia the wife should get all the personal property. The laws of Pennsylvania, however, provided that the brothers and sisters should get half. The supreme court of West Virginia found that Mr. White was domiciled in Pennsylvania at the time of his death and the property settlement should be made there. He had given up his home in West Virginia and assumed his habitation in Pennsylvania with the intention of making it his permanent home.<sup>17</sup>

The meaning of the word residence depends to a great extent upon where and how it is used, and questions as to the correspondence or difference in meaning between it and domicile are referable generally to the wording and purpose of the statutes, in some of which and for certain purposes the words are distinguishable, while in others they are regarded as synonyms.<sup>18</sup> The range in meaning reaches all the way from temporary abode to permanent domicile and even further. Webster's dictionary gives the following as synonyms of reside: to dwell, sojourn, abide, remain, live. These synonyms represent the common everyday acceptance of the word. The various shades of meaning ascribed to it legally hinge upon the question, what other elements, if any, must exist so that a man may be said to be a resident of the place where he abides, sojourns, dwells or lives? Must there be an element of permanency and, if so, to what extent?

A few illustrations will show the great variety of interpretations and the gradations in the degree of permanency demanded: "Residence means a place of abode; where a person lives."<sup>19</sup> "It is sometimes said that any place of

<sup>17</sup> *White v. Tennant*, *supra* n. 12.

<sup>18</sup> 9 R. C. L. 540; 34 Cyc. 1637.

<sup>19</sup> *Mays v. State*, 50 Tex. Crim. 391, 97 S. W. 703 (1906), (referring to a room in a school dormitory, the felonious entry of which constituted burglary of a private residence.)

abode, or dwelling place constitutes a residence, however temporary it may be. If his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his residence."<sup>20</sup> "Residence simply indicates the place of abode, whether permanent or temporary."<sup>21</sup> Residence, however, even where it is not equivalent to domicile requires something more than mere temporary presence in a locality. "The word residence may refer either to a fixed and settled abode, or to one merely of some duration."<sup>22</sup> "A mere temporary place of sojourn, to be sure, could not be called a residence; a limitation to this effect must be placed upon the very broad language sometimes used by courts in stating the meaning of the word. Residence is used to indicate any place of dwelling, whether more or less permanent, so long as it is not a temporary place of sojourn; domicile, to denote a fixed permanent residence to which, when absent, one has the intention of returning."<sup>23</sup>

Mr. and Mrs. G. S. Reed<sup>24</sup> lived in Oregon thirty-eight years. On account of Mr. Reed's health they moved to Pasadena, California, where they purchased residence property. They moved their household effects and personal belongings from Portland to Pasadena. However, they made no investments except those necessary for their comfort and pleasure. Mr. Reed retained his office and bank account in Portland and did not dispose of his property there. Church and charitable interests were retained. Three years later Mr. Reed died. Mrs. Reed continued to live in Pasadena until her death, nine years later. Most of her property she bequeathed to charitable and educational purposes. The statutes of California make void any devise or bequest for charitable uses in excess of a certain proportionate share of the estate of the deceased. Consequently, when the will was submitted to probate in an Oregon court, the heirs asserted that Mrs. Reed was domiciled in California and the disposition of her property was subject to its

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<sup>20</sup> BOUVIER'S LAW DICTIONARY 2920.

<sup>21</sup> 19 C. J. 395.

<sup>22</sup> *Kroge v. Modern Brotherhood of America*, 126 Mo. App. 693, 105 S. W. 685 (1907).

<sup>23</sup> Treatise No. 1 (a) CONFLICT OF LAWS, THE AMERICAN LAW INSTITUTE, 21.

<sup>24</sup> Reed's Will, *supra* n. 6.

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 359

laws. The court found, however, that "they at all times deemed and considered their residence there (at Pasadena) as temporary rather than permanent, and Portland was their legal domicile." In this case Mr. Chief Justice Robert S. Bear distinguishes between residence and domicile, residence being one of the elements of domicile. "It (domicile) is not in a legal sense synonymous with residence. A person may have more than one residence and more than one home, in the ordinary acceptance of those terms, but he can have only one domicile. \* \* \* \* Domicile is made up of residence and intention."

On the other hand the two terms are very frequently used synonymously.<sup>25</sup> "Domicile in its general and popular sense denotes residence and should be treated as synonymous therewith."<sup>26</sup> "The terms residence and domicile have been held to be synonymous."<sup>27</sup> "In the statutes of several states a definition of residence is given which makes it identical with domicile, and in Oklahoma the same meaning in all cases seems to be given the term by the court."<sup>28</sup> Residence has been held in some cases to mean more than domicile.<sup>29</sup>

The American Law Institute<sup>30</sup> has summarized the cases where residence means less than, the same as and more than domicile. Residence is said to mean less than domicile (less in the sense that actual residence without the element of permanency is sufficient) in the following: in some jurisdictional cases; for the purposes of attachment; in the school laws; in acts requiring the recording of a chattel mortgage at the residence; in statutes requiring a nonresident to give security for costs; in those allowing the arrest of a nonresident for debt; and in those requiring residents to serve on a jury.

According to the current of authority residence is synonymous with domicile in statutes referring to taxation; in

<sup>25</sup> 9 R. C. L. 540, 19 C. J. 395.

<sup>26</sup> Ry. Co. v. McKnight, 99 Tex. 289, 89 S. W. 755 (1905).

<sup>27</sup> WORD & PHRASES, 1st series, Vol. 3, 2175; 2nd series, Vol. 2, 139.

<sup>28</sup> Treatise No. 1 (a) CONFLICT OF LAWS, THE AMERICAN LAW INSTITUTE 21, citing CALIFORNIA POLITICAL CODE, §2; REV. CODES MONTANA, 1921, §3; NORTH DAKOTA, COMP. LAWS, 1913, §14; Jones v. Reser, 61 Okla. 46, 160 Pac. 58 (1916).

<sup>29</sup> Hampden v. Levant, 59 Me. 557 (1871), pauper could not be made a charge upon the community unless he actually dwelt there as well as had domicile there. Dutcher v. Dutcher, 39 Wis. 651 (1876), divorce proceedings. St. v. Joyce, 123 La. 631, 49 So. 219 (1909) voting.

<sup>30</sup> TREATISE No. 1 (a), CONFLICT OF LAWS.

statutes requiring residence as a qualification for voting, (except in Louisiana); in some cases involving residence to gain settlement under the poor-laws; in some cases as a basis of jurisdiction; in clauses which except nonresidents from the operation of the statute of limitations under some circumstances; in a statute requiring an office-holder to be a resident; in the naturalization act, which requires continuous residence; in the statute requiring militia service at one's residence; in the national homestead laws.

In a number of cases involving residence as foundation of jurisdiction for divorce the term is taken to require, in addition to domicile, an actual residence in the state. This has also been held in some cases under the poor-laws and in Louisiana as a qualification for voting. In a statute which provides that process may be served upon an absent defendant by notice at his residence, the word must necessarily be interpreted as meaning domicile which is an actual dwelling place, if the process is to be valid in another state; and such an interpretation is almost universally placed upon the word.

The foregoing discussion of the terms involved has been for the purpose of calling attention to the difficulties confronting a university administrator when he seeks, ready-made, a definition which he can enforce in collecting fees from nonresident students. The situation is not improved by using such words as inhabitancy, citizenship, etc., for the reason that their meaning also varies as does the subject matter with reference to which they are used and they come no nearer being susceptible of an exact, all-reaching definition.<sup>31</sup>

What shall "residence" mean in the nonresident rules? Obviously we might choose one of the more liberal meanings. This has been done where elementary school children are involved. By the weight of authority statutes providing for a free public school system have been construed as evidencing an intention on the part of the state that all the children within its borders shall enjoy the opportunity of a free education.<sup>32</sup> Hence, actual residence

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<sup>31</sup> Note to *Frost v. Brisbin*, 32 Am. Dec. 427.

<sup>32</sup> 24 R. C. L. 624; *People v. Hendrickson*, 104 N. Y. S. 122 (1907); *State v. Selleck*, 76 Nebr. 747, 107 N. W. 1022 (1906).

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 361

rather than legal residence or domicile has been held sufficient. Especially has this been true where dependent children have been placed in institutional homes or sent to live with relatives.<sup>33</sup> On the other hand, where parents, well able to take care of their children, have moved into the town temporarily during the school term, only to move away again during the summer, for the sole purpose of gaining school privileges,—there the courts have said that residence means domicile and the parents must pay tuition.<sup>34</sup>

The cases dealing with school children in the lower grades cannot be followed with safety. The policy is to force elementary education upon all children through compulsory attendance law. Children of tender years, as a general rule, live with their parents and there is not the problem of "going away to school" that exists with college students.<sup>35</sup> Furthermore, our purpose is to find the strictest workable definition. If we take the term in its lesser meanings we meet with endless absurdities, because it is impossible to attend an institution of learning without "residing" there under one or another of the various meanings of the term.<sup>36</sup>

The cases where residence means more than domicile (domicile plus actual abode) hold no possibilities for us, because there can be no question of "actual abode" when a student is living at and attending a college. Therefore, in striving to make the rule most effective we must proceed on the assumption that residence means domicile.<sup>37</sup> Therefore, the terms will be used as synonymous hereafter.

The one-year rules as worded usually state that the student, to avoid the fee must have been a resident for one year prior to enrollment. This would seem to preclude the possibility of his avoiding the fee on the strength of one year's domicile during which year he was also a

<sup>33</sup> Board of Trustees v. Powell, 36 L. R. A. (N. S.) 341; St. v. Clymer, 164 Mo. App. 671, 147 S. W. 1119 (1912); People v. Hendrickson, 109 N. Y. S. 403 (1908); Ashley v. Board of Ed., 275 Ill. 274, 114 N. E. 20 (1916); People v. Bd. of Ed., 206 Ill. App. 881 (1917). But Lake Farm v. Dist. Bd., 51 L. R. A. (N. S.) 234 and Black v. Graham, 44 L. R. A. (N. S.) 693, contra.

<sup>34</sup> St. v. Sch. Dist., 55 Nebr. 317, 75 N. W. 855 (1898).

<sup>35</sup> No attempt is made in this article to deal with the problems surrounding the emancipation of minors.

<sup>36</sup> No student is allowed to graduate without doing work "in residence," as distinguished from "in absentia."

<sup>37</sup> In the state of Washington "domicile" was used by the legislature in relation to the university; "residence" in relation to the state college. The terms were declared to be synonymous by the Attorney General.

student. In other words, if a student pays the fee at entrance he must pay it throughout his attendance. There will be cases where this phase of the rule is unenforceable, and it was so recognized by the University of California.<sup>38</sup>

Miss Bryan's parents had been domiciled in California less than a year when she entered the University. Before the first semester was completed she and her parents had been residents more than a year. No attempt was made to require of her the non-resident fee for more than the first semester. This was a clear case because, she being a minor, her domicile was by law established independently of her status as a student or even of her presence in the state. To have charged her the fee would have been to discriminate between residents all of whom had been such for more than a year.

Frequently adults come to the state, enter the university, pay the nonresident fee for one year and then claim exemption on the ground that they have established a domicile. This type of cases constitutes by far the greatest problem. The right to vote requires a period of residence and residence in this connection also means domicile.<sup>39</sup> Therefore we may well turn to the cases involving the right of students to vote.<sup>40</sup>

Whatever confusion there may be as to the meaning of domicile or residence, it is everywhere agreed that abiding in a place temporarily will not destroy one's old domicile or establish a new one at the place of temporary sojourn, it makes no difference what the purpose may be. Hence, a temporary stay in a locality for the purpose of attending

<sup>38</sup> Respondent's Brief, *Bryan v. Regents*, Sup. Ct. of Cal. 4, *supra* n. 5.

<sup>39</sup> Note to *Anderson v. Palmer Transfer Co.*, 19 L. R. A. (N. S.) 750.

<sup>40</sup> *Colorado, Parsons v. People*, 30 Colo. 388, 70 Pac. 689 (1902). *Illinois, Dale v. Irwin*, 78 Ill. 170 (1875); *Welch v. Shumway*, 232 Ill. 54, 88 N. E. 549 (1908); *Anderson v. Pifer*, 315 Ill. 164, 146 N. E. 171 (1925). *Indiana, Pedigo v. Grimes*, 113 Ind. 148, 13 N. E. 700 (1887). *Iowa, Vanderpoel v. O'Hanlon*, 53 Ia. 246, 5 N. W. 119 (1880). *Louisiana, Holmes v. Pino*, 131 La. 687, 60 So. 78 (1912). *Massachusetts, Putnam v. Johnson*, 10 Mass. 488 (1813); *Opinion of the Justices*, 46 Mass. (5 Metc.) 587 (1843). *Maryland, Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 484 (1890). *Maine, Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606 (1884). *Michigan, People v. Osborne*, 170 Mich. 143, 135 N. W. 921, 40 L. R. A. (N. S.) 168 (1912). *Missouri, Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97 (1895); *Goben v. Murrell*, 195 Mo. App. 104, 190 S. W. 985 (1916). *Nebraska, Berry v. Wilcox*, 44 Nebr. 82, 62 N. W. 249 (1895). *New Hampshire, St. v. Daniels*, 44 N. H. 383 (1862). *New York, In re Goodman*, 146 N. Y. 284, 40 N. E. 769 (1895); *In re Barry*, 164 N. Y. 18, 58 N. E. 12 (1900); *In re Blankford et al.*; 241 N. Y. 180, 149 N. E. 415 (1925). *Ohio, Esker v. McCoy*, 5 Oh. Dec. 578, 6 Am. Law Rec. 694 (1878); *Wickham v. Covner*, 30 Oh. Cir. Ct. Rep. 765. *Pennsylvania, Fry's Election Case*, 71 Pa. St. 302 (1872); *In re Lower Oxford Election*, 11 Phila. 641 (1875); *In re Merion Election*, 1 Chest. Co. Rep. 257 (1883); *In re Lower Oxford Contested Elections*, 2 Pa. Co. Ct. Rep. 323 (1886); *Wisconsin, Siebold, Ashbahr, Gross, Wadsworth v. Wahl*, 159 N. W. 546, 549-50 (1916).

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 363

school or for the purpose of engaging in any other work or occupation will not establish a domicile. But to determine the fact of domicile all the circumstances must be taken into consideration and the nature of the employment is one of the significant circumstances. Some occupations do not raise the presumption of permanency of abode; rather, the opposite. Such a one is attendance at an institution of learning. Said the justices of the Supreme Judicial Court of Massachusetts in a carefully framed opinion, "In general, it may be said that an intent to change one's domicile and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life; and therefore stronger facts and circumstances must concur to establish the proof of change of domicile, in the one case than in the other."<sup>41</sup> From Maryland, "In the absence of other proof the law would presume he (the student) was there for the purpose of prosecuting his studies and later returning to his former home."<sup>42</sup> The Supreme Court of Illinois quoting *Am. & Eng. Enc. of Law*, says, "A student in a college town is presumed not to have the right to vote. If he attempts to vote, the burden is upon him to prove his residence in that place, and it must be done by other evidence than his mere presence in the town."<sup>43</sup> Thus it would seem that there is a presumption of fact recognized at common law that a student at college is not domiciled there. Furthermore, in all cases, students or otherwise, the burden of proving change of domicile is on the person asserting it.<sup>44</sup>

Our case is that of a person, admittedly formerly domiciled in another state, coming into the State and entering an educational institution. He claims that his domicile was changed from one state to the other during the time he was a student. We have the original burden of proof made still heavier by the common law presumption against a

<sup>41</sup> Opinion of Justices, 46 Mass. (Metc.) 587 (1843).

<sup>42</sup> *Shaeffer v. Gilbert*, 78 Md. 66, 20 Atl. 434 (1890).

<sup>43</sup> *Welch v. Shumway*, 232 Ill. 54, 83 N. E. 549 (1908).

<sup>44</sup> *Starke v. Scott*, 78 Va. 180 (1883); *Price v. Price*, 156 Pa. 516, 27 Atl. 291 (1893); *Desmore v. U. S.* 93 U. S. 605 (1876); *In re Moir's Estate*, 207 Ill. 180, 69 N. W. 905 (1904); 9 R. C. L. 557; 19 C. J. 481.

change of domicile by a student, due to the temporary nature of his occupation. In addition to these, we have another factor. In twenty-two states there are constitutional or statutory provisions or both to the effect that a person shall not be held to have gained or lost a residence for purposes of voting while a student at any institution of learning.<sup>45</sup> Does this provision mean anything? Does it add to the general rule of law? The three cases quoted above recognizing the presumption against a change of domicile by a student are from states which do not have the provision.

In Wisconsin, another state which does not have the provision, the court after recognizing that "under this constitutional provision it has been held that even four years of study and express renouncing of all other homes are not sufficient, of themselves, to give the status of qualified elector" (citing the cases in New York, Colorado, Missouri and Pennsylvania), says, "the provision, however, does not seem to add anything to or change the general rule of law."<sup>46</sup> Missouri, which has the provision says it "is but a declaration of the law as generally recognized."<sup>47</sup> This seems also to be the view in Maine, and the principle is stated, "The presumption is against a student's right to vote, if he comes to college from out of town."<sup>48</sup> In Pennsylvania reference is made to the constitution as follows: "The constitution does not prohibit a student from voting if he proves absolute abandonment of his former residence. The burden is on the student."<sup>49</sup> In Colorado the constitution is cited although the decision apparently would have been the same under the general rule of law.<sup>50</sup> Louisiana seems to concede more force to the constitutional provision "The accepted rule seems to be that the effect of such a constitutional provision is not to disqualify a student from gaining or losing a residence at the seat of

<sup>45</sup> THE AM. LAW INST. TREATISE No. 1 (a) CONFLICT OF LAWS, n. 105. Constitutional provisions in Arizona, California, Colorado, Idaho, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Virginia, Washington. Statutory provisions in Alabama, Arizona, California, Colorado, Idaho, Montana, Nevada, New York, Utah, Vermont.

<sup>46</sup> *Siebold v. Wahl*, 164 Wis. 82, 159 N. W. 546 (1916).

<sup>47</sup> *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97 (1895).

<sup>48</sup> *Sanders v. Getchell*, 76 Me. 168, 49 Am. Rep. 606 (1884).

<sup>49</sup> *In re Lower Oxford Election*, 11 Phila. 641 (1875).

<sup>50</sup> *Parsons v. People*, 30 Colo. 388, 70 Pac. 639 (1902).



## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 365

the institution he is attending; but to render his presence or absence from the institution primarily without effect as to his political status."<sup>51</sup> This suggestion, that his status is to be determined independently of his presence or absence from the institution, is significant, especially in light of the New York series of cases<sup>52</sup> ending with *In re Blankford et al.*,<sup>53</sup> in 1925 which goes a long way toward a virtual prohibition of the acquisition of a voting residence by students.

In the Blankford Case seventeen men studying for the priesthood at the seminary of St. Andrews on the Hudson in the town of Hyde Park petitioned to compel the inspectors of election to enroll their names on the register of voters. They had previously been voters elsewhere in the state but had formally notified the commissioners of election at their former domiciles that such had been abandoned and new ones established at the location of the seminary. They also filed affidavits with the inspectors of elections at Hyde Park that they intended to reside there indefinitely as, indeed, was the case because, by the rules of the order, no one is allowed to remain in the seminary as a student unless he intends in good faith to become a priest and renounces all residences or homes save that of the seminary itself, and upon his admission to the priesthood he continued in the seminary unless and until assigned elsewhere by his ecclesiastical superiors. It would seem that here were ample grounds upon which to establish domicile at common law and this the court does not deny but, in its opinion, the constitutional provision takes the case out of the common law. "We do not need to determine whether, aside from the provisions of the constitution, a domicile in Hyde Park might be found at common law upon the facts established by petitioners. The constitution superseding the rule at common law, whatever that may be, eliminates from our consideration the fact of presence in the seminary and requires us to find elsewhere, if at all, the evidence of a change of domicile." Then quoting *In re Goodman*, a

<sup>51</sup> *Holmes v. Pino*, *supra* n. 40.

<sup>52</sup> *In re Goodman*, 146 N. Y. 284, 40 N. E. 769; *In re Barry, Garvey, Meiser et al.*, 148 N. Y. 117, 41 N. E. 439; *In re Gardiner*, 167 N. Y. S. 26 (1917).

<sup>53</sup> 241 N. Y. 180, 149 N. E. 415 (1925).

similar case thirty years previous, "The intention to change is not alone sufficient. It must exist but must concur with and be manifest by resultant acts which are independent of the presence as a student in the new locality."

In applying the New York rule to the case of a student in attendance at a college in a given state we should have to eliminate from our consideration the fact of his physical presence at the institution. This is not an impossible or even a difficult thing to do. Domicile is not dependent upon actual abode or upon the physical presence of the individual. A given case might be approached by asking, if this student were to pack his trunk and transfer to a college in another state tomorrow, would there be facts sufficient to prove that his domicile remains here, and that his abode elsewhere is temporary only? As a general rule physical presence, in addition to the other elements, is necessary to establish domicile but, once established, his temporary absence in another state to attend school would make no difference. Or, the problem might be approached from another angle: would he be domiciled in the locality which he claims if the institution of learning were not there?

Bear in mind that these tests are sound only provided we concede that the constitutional provision means that the declarant shall not be allowed to avail himself of any circumstances dependent upon his presence as a student in attempting to establish domicile. We have seen that this has been the practical effect of the provision in some states where the right of students to vote is involved and it is not unlikely that the courts would so hold in those states where excessive immigration of nonresident students has been deemed a serious financial burden to taxpayers.

There has even been a minority inclination, in connection with another class included in the same constitutional provision (inmates of a soldiers' home), to say that the establishment of a residence for voting is positively prohibited.<sup>54</sup>

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<sup>54</sup> *Silvey v. Lindsay*, 107 N. Y. 55, 13 N. E. 444 (1887); *In re Smith*, 44 Misc. 384, 89 N. Y. S. 1006 (1904); *Wolcott v. Holcomb*, 97 Mich. 361, 58 N. W. 837, 23 L. R. A. 215 (1893); *People v. Hanna*, 98 Mich. 515, 74 N. W. 788 (1894); *Powell v. Spickman*, 7 Idaho 692, 65 Pac. 503, 54 L. R. A. 378 (1901); *Lawrence v. Leidigh*, 58 Kan. 594, 50 Pac. 600 (1896), overruled by *Cory v. Spencer*, 67 Kan. 648, 73 Pac. 920, 63 L. R. A. 275 (1903).

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 367

These cases are significant as suggesting the extent to which the courts might go should it ever be deemed necessary to the welfare of the state to make impossible the establishment of a new domicile by persons attending school. The argument used applies equally well to most students, and, indeed, in the *obiter dictum* students are included.

In *Wolcott v. Holcomb*,<sup>55</sup> the leading case among this minority, the Michigan court held that the *intent* of the inmate of the soldiers' home to establish a residence was wholly immaterial. Says the court, "To permit his intent to control would result in the practical annulment of this provision of the constitution. The mischief intended to be avoided is as apparent in this case as in any. The inmates of the home own no home, pay no local taxes, do no work in or for the benefit of the municipality, and have no pecuniary interest in its local affairs. In fact, they have no connection with, and stand in no relation to, the local municipal government \* \* \* \* \*. If the construction were otherwise, it follows that all the inmates of county almshouses and of prisons and jails are electors, at their option, in the townships and cities where those institutions are located \* \* \* \*. Furthermore, students in all institutions of learning, although they are in attendance there for the sole purpose of obtaining an education, might, at their own will, become electors in the places where such institutions are located. *We think the constitution prohibits a change of residence under such circumstances*<sup>56</sup> and that when one's presence in any of the institutions named is due to the sole purpose of receiving the benefits conferred, his former residence must be considered his domicile."

This case was not followed in a later Michigan case<sup>57</sup> involving a student, which was distinguished on the ground that receiving the benefits of the institution was not the *sole* purpose of the student's presence, as it was in the case of the inmate of the soldiers' home. It might reasonably be supposed that the decision would have been otherwise had the student been of the ordinary type instead of a mature man, for twelve years independent and totally self

<sup>55</sup> *Ibid.*

<sup>56</sup> The italics are ours.

<sup>57</sup> *People v. Osborne*, 170 Mich. 143, 135 N. W. 921, 40 L. R. A. (N. S.) 168 (1912).

supporting, who, as it appeared to the court, had no residence elsewhere and who would have been totally disenfranchised had he not been declared a resident there.

We have assumed throughout this article that the decisions pertaining to residence in connection with the right to vote may be taken as authority on the question of residence in relation to the nonresident fee. Many persons will, at this point, suggest that students might be classified on the basis of their registration as voters. While the *law* pertaining to voting is applicable to our problem it is, on the other hand, most emphatically true that the *fact* of voting in an individual case, unadjudicated by the courts, is far from conclusive of the *right* to vote and is not a reliable test of residence. There is a very common opinion current that a man may vote anywhere he has lived the statutory period. This notion is entirely without legal warrant, for the right to register and vote depends upon an actual legal residence, that is, upon domicile. Students who pay the nonresident fee without question will sometimes register as voters. On the other hand, students will sometimes register for the purpose of substantiating their claim to residence.<sup>58</sup> In the absence of challenge or contest the procedure of registering is largely a formality.<sup>59</sup> The registrant's statement that he has resided in the state six months can be given but little weight for our purposes. Having, in most instances, no knowledge of the legal meaning of residence, he merely means that he has been present in the locality six months. The unreliability of the fact of voting as a test of residence is recognized by the courts.

The statutes of Oregon set out certain rules to be followed in determining the qualification of electors. One of these provides that if a person shall go from that state into any other state or territory and there exercise the right of suffrage, he shall be considered and held to have lost his residence in that state.<sup>60</sup> This would seem to follow as a matter of course, because residence as a basis for voting clearly means domicile. Hence, in order to vote in another

<sup>58</sup> A nonresident was directed by her father to register in order to avoid the fee.

<sup>59</sup> One registrant, when asked, "What is required for voting?" answered, "One must sign a card."

<sup>60</sup> Ore L. 3907.

## LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE 369

state without giving up his residence in Oregon a man would have to vote illegally because he can have but one domicile.<sup>61</sup> But in the case of *Miller v. Miller*<sup>62</sup> it was held that the fact that one, after registering as a voter in Oregon, went into another state and there voted, is not conclusive of his domicile there, as regards jurisdiction in an action for divorce. Says the court: "This regulation is a conventional one, applicable in its full force only to elections, and *was not intended to be controlling on any other subject.*"<sup>63</sup> At best, it is only a circumstance to be weighed with other evidence on the present issue." While the right to vote theoretically depends on domicile, yet the court recognizes that in practice the fact of voting is an unsound test of domicile. In other words, nonresident voting is so common that we must not take voting too seriously in determining residence. The mere fact that one is registered in a certain place and has voted therein is not conclusive on the question of his domicile.<sup>64</sup>

That the testimony of the person who is to benefit by the alleged change of domicile is not conclusive is well established and anyone who has had direct contact with the nonresident fee problem realizes how unreliable are the self-serving statements of the students themselves. Too much weight should not be attached to declarations of present and future purpose by a student after the question of residence is raised.<sup>65</sup> The statements made by a student who has no thought of the nonresident fee in mind are likely to be quite different from those made by him when attempting to avoid the fee. Declarations are of no avail when evidently made for the purpose of creating evidence in favor of the declarant after he has become appreciative of the consequences of a change of domicile.<sup>66</sup>

Many people have the impression that upon becoming of

<sup>61</sup> 9 R. C. L. 539; 19 C. J. 398; *In re Moir's Estate*, *supra* n. 44.

<sup>62</sup> 67 Ore. 359, 136 Pac. 15 (1913).

<sup>63</sup> The italics are ours.

<sup>64</sup> *Smith v. Croom*, 7 Fla. 71 (1857); *Easterly v. Goodwin*, 85 Conn. 285, 95 Am. Dec. 237 (1868); *Hayes v. Hayes*, 74 Ill. 312 (1874); *East Livermore v. Farmington*, 74 Me. 155 (1882); *Enfield v. Ellington*, 67 Conn. 459, 34 Atl. 818 (1896); *Bradley v. Davis*, 156 Cal. 267, 104 Pac. 302 (1909), citing *Quinn v. Nevills*, 7 Cal. App. 231, 93 Pac. 1055 (1908).

<sup>65</sup> *Lower Oxford Contested Election*, *supra* n. 40; *Anderson v. Pifer*, *supra* n. 40; *Goben v. Murrell*, *supra* n. 40; *Hall v. Schoenecke*, *supra* n. 40.

<sup>66</sup> 19 C. J. 440.

age and acquiring the legal capacity to establish a domicile, a person may do so merely by saying that he has formed an intention to make the locality his home. The fact of intention is entirely within the mind of the individual and is subject to frequent change. It would be imposing somewhat upon human nature not to expect a student, where several hundred dollars are involved, to be able to form an intention to stay in the state indefinitely, even though he may suspect that he will be forced to change his mind and leave the state as soon as he is through school, especially when his only home tie is membership in a fraternity or dormitory where non-students are not welcome except as visitors.

This scepticism with which the student's declarations are to be viewed is not attributable entirely to the temptation to juggle with the truth. He may be sincere but mistaken. "Calling it his residence does not make it so. He may have no right to so regard it. Believing the place to be his home is not enough. There may be no foundation for the belief. Swearing that it is his home must not be regarded as sufficient, if the facts are adverse to it."<sup>67</sup> Even bona fide intent to establish a domicile is not sufficient. It must actually be established.<sup>68</sup>

The Illinois cases<sup>69</sup> suggest the test of asking where the student would go in case of sickness or other affliction. This is a severe test and would exclude many who claim to have changed domicile, for a student must be alienated from his parental abode, indeed, who does not rely on that haven of refuge in time of trouble. The Anderson Case<sup>70</sup> also points out the danger of reliance on non-intention to return to parents after graduation, "The fact that a student does not expect to return home to live after he finishes school is not a very important one, for most persons attending universities and colleges expect, when they graduate, to enter some kind of business for themselves." Upon leaving home and going to college a student may fully intend to abandon

<sup>67</sup> Sanders v. Getchell, *supra* n. 40.

<sup>68</sup> *In re Goodman*, *supra* n. 40; *In re Barry*, *supra* n. 40; *In re Blankford*, *supra* n. 40.

<sup>69</sup> Dale v. Irwin, *supra* n. 40; Welch v. Shumway, *supra* n. 40; Anderson v. Pifer, *supra* n. 40.

<sup>70</sup> *Ibid.*

*LEGAL ASPECTS OF THE NONRESIDENT TUITION FEE* 371

his father's domicile. But a domicile is not lost until another is established. Conceivably a man might wander all his life looking for a place to establish his domicile. Until he does so, however, his former domicile remains. It is generally understood that a student who has come to college from a distance has done so in preparation for his life work. It is absurd for him or anyone else, in most cases, to contend that he has settled down and established a permanent home.

And yet there will be exceptional cases. Our problem is how to determine the bona fide exceptions. The meaning of the term residence cannot be made a matter of legislative construction, it is purely a judicial question, and while general rules and definitions as to its meaning may be laid down by the courts, there can be no absolute criterion by which to determine where a person actually resides. Each case must depend on its particular facts or circumstances.<sup>71</sup>

If it is to be the policy of a given institution to enforce the rule as strictly as possible, residence should be held to mean domicile and the law of domicile should govern. The one-year rule should be adopted. Until the courts rule to the contrary, the constitutional provision should be given full weight, enforcing the presumption that the sojourn of a student is not a legal residence. A nonresident at the time of his enrollment should be held to that classification throughout his presence as a student except in those rare cases where it can be proved that his previous domicile has been abandoned and a new one established independently of the school or of his attendance thereupon.

The purpose of this article has been to suggest the extent to which the courts might be relied upon to sustain rules designed to restrict the immigration of students. The wisdom of such restriction as a civic policy may be in doubt. In any event, a state or an institution should determine its policy with an understanding of the legal meaning and portent of terms used. If a mild and lenient restriction is all that is desired, it should be so expressed in clear language.

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<sup>71</sup> 9 R. C. L. 1081.

**Attempt should not be made to attain this end by enacting strict rules and then, through indifferent enforcement, leaving it to the ingenuity of the students to evade and circumvent the law.**