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## Statutes -- Interpretation of "Residence"

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of Justice and the Internal Revenue Service will not abuse the use of the method.

NELSON W. TAYLOR, III.

### Statutes—Interpretation of “Residence”

The North Carolina Supreme Court was recently faced with the problem of interpreting the word “residing” in what appears to be a new setting. In *Barker v. Iowa Mutual Insurance Company*,<sup>1</sup> the court determined that a minor and dependent son, though married and living in another city while attending college, was “residing with” his father within the meaning of the clause in a fire insurance policy covering personalty “belonging to the insured or any member of the family of and residing with, the insured, while elsewhere than on the described premises.”<sup>2</sup> The court said that the term “residing with” was equivalent to having a residence with the insured, construing the word residence to mean domicile.

Whether or not a particular place is a person’s residence or domicile has long been a problem. This problem is always acute since a person must have a residence or domicile in a particular place for many purposes. Among these purposes for which a person’s residence or domicile is important are attachment,<sup>3</sup> candidacy for office,<sup>4</sup> registration of chattel mortgages and conditional sales contracts,<sup>5</sup> as executor or administrator of a decedent’s estate,<sup>6</sup> divorce,<sup>7</sup> homestead,<sup>8</sup> both petit and grand jury service,<sup>9</sup> in actions before a justice of the peace,<sup>10</sup> as a candidate for the state bar examination,<sup>11</sup> naturalization,<sup>12</sup> service of process on nonresi-

<sup>1</sup> 241 N. C. 397, 85 S. E. 2d 305 (1955).

<sup>2</sup> *Id.* at 399, 85 S. E. 2d at 306.

<sup>3</sup> *E.g.*, *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927); N. C. GEN. STAT. § 1-440.3 (1953).

<sup>4</sup> *E.g.*, *Hannon v. Grizzard*, 89 N. C. 115 (1883).

<sup>5</sup> *E.g.*, *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. 2d 356 (1950); *Industrial Discount Corp. v. Radecky*, 205 N. C. 163, 170 S. E. 640 (1933); *Weeks v. Adams*, 196 N. C. 512, 146 S. E. 130 (1928); N. C. GEN. STAT. § 47-20.2 (1953).

<sup>6</sup> *E.g.*, *Branch Banking and Trust Co. v. Finch*, 232 N. C. 485, 61 S. E. 2d 377 (1950).

<sup>7</sup> *E.g.*, *Williams v. North Carolina*, 325 U. S. 226 (1945); *McLean v. McLean*, 233 N. C. 139, 63 S. E. 2d 138 (1950); *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. 2d 227 (1950); *Bryant v. Bryant*, 228 N. C. 287, 45 S. E. 2d 572 (1947); N. C. GEN. STAT. §§ 50-5 (4), 50-5 (6), 50-6 (1950 as amended 1953).

<sup>8</sup> *E.g.*, *Taylor v. Hayes*, 172 N. C. 663, 90 S. E. 801 (1916); *Cromer v. Self*, 149 N. C. 164, 62 S. E. 885 (1908); *Fulton v. Roberts*, 113 N. C. 422, 18 S. E. 510 (1890); *Munds v. Cassidey*, 95 N. C. 558, 4 S. E. 353 (1887); N. C. CONST. ART. X, § 1.

<sup>9</sup> *E.g.*, *State v. Wilcox*, 104 N. C. 847, 10 S. E. 453 (1889); *State v. Bullock*, 63 N. C. 520 (1869); N. C. GEN. STAT. § 9-1 (1953).

<sup>10</sup> *E.g.*, *Austin v. Lewis*, 156 N. C. 461, 72 S. E. 493 (1911); N. C. GEN. STAT. §§ 7-138 and 7-142 (1953).

<sup>11</sup> *E.g.*, *Baker v. Varsar*, 240 N. C. 260, 82 S. E. 2d 90 (1954); Rule Five of the Rules Governing Admission to Practice of Law in North Carolina, Vol. 4 N. C. GEN. STAT. 65 *et seq.* (1943).

<sup>12</sup> *E.g.*, *Hantzopoulos v. United States*, 20 F. 2d 146 (M. D. N. C. 1927).

dent motorists,<sup>13</sup> for purposes of some local ordinances,<sup>14</sup> for service of process in general,<sup>15</sup> for statute of limitation purposes,<sup>16</sup> tuition at college,<sup>17</sup> property taxes,<sup>18</sup> inheritance taxes,<sup>19</sup> voting,<sup>20</sup> legal settlement for admission to the poor house,<sup>21</sup> and venue.<sup>22</sup>

It is well established that two essential things must concur to constitute a domicile: there must be physical presence at a dwelling place and an intent to make it a home.<sup>23</sup> Domicile is defined as a person's fixed, established, permanent dwelling place as distinguished from his temporary, though actual, place of residence.<sup>24</sup> Residence has always been the problem. In *Watson v. North Carolina Railroad Company*,<sup>25</sup> the court said: "The word 'residence' has, like the word 'fixtures,' different shades of meaning in the statutes . . . and even in the constitution, according to its purpose and context." Generally, residence means something more than mere physical presence at a particular place and something less than a domicile.<sup>26</sup> Isolated statements on residence, when taken out of their context and compared, would seem to show confusion and inconsistency on the part of the court.<sup>27</sup> In one case there seems to

<sup>13</sup> *E.g.*, *Winborne v. Stokes*, 238 N. C. 414, 78 S. E. 2d 171 (1953); *Ewing v. Thompson*, 233 N. C. 564, 65 S. E. 2d 17 (1951); N. C. GEN. STAT. § 1-105 (1953). See also, Note 33 N. C. L. REV. — (1955).

<sup>14</sup> *E.g.*, *Aydlett v. Elizabeth City*, 121 N. C. 4, 27 S. E. 1002 (1897).

<sup>15</sup> *E.g.*, *Southern Mills v. Armstrong*, 223 N. C. 495, 27 S. E. 2d 281 (1943); *Current v. Webb*, 220 N. C. 425, 17 S. E. 2d 614 (1941); *Greenleaf v. Peoples Bank of Buffalo*, 133 N. C. 292, 45 S. E. 638 (1903).

<sup>16</sup> *E.g.*, *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406 (1936); *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896); *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887).

<sup>17</sup> *E.g.*, N. C. GEN. STAT. § 116-144 (1952).

<sup>18</sup> *E.g.*, *Texas Co. v. Elizabeth City*, 210 N. C. 454, 187 S. E. 551 (1936); *Roanoke Rapids v. Patterson*, 184 N. C. 135, 113 S. E. 603 (1922); N. C. GEN. STAT. § 105-302 (1950).

<sup>19</sup> *E.g.*, *Rhode Island Hospital Trust Co. v. Doughton*, 270 U. S. 69 (1926), reversing 187 N. C. 263, 121 S. E. 741 (1924).

<sup>20</sup> *E.g.*, *Owens v. Chaplin*, 229 N. C. 797, 48 S. E. 2d 37 (1948); *Gower v. Carter*, 195 N. C. 697, 143 S. E. 513 (1928); *Groves v. Commissioners of Rutherford*, 180 N. C. 568, 105 S. E. 172 (1920); N. C. CONST. ART. VI, § 2; N. C. GEN. STAT. §§ 163-25 (f) and 163-26 (1952).

<sup>21</sup> *E.g.*, *Commissioners of Burke v. Commissioners of Buncombe*, 101 N. C. 520, 8 S. E. 176 (1888); N. C. GEN. STAT. § 153-159 (1952).

<sup>22</sup> *E.g.*, *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138 (1937); N. C. GEN. STAT. § 1-82 (1953).

<sup>23</sup> *Horne v. Horne*, 31 N. C. 99 (1848); RESTATEMENT, CONFLICT OF LAWS §§ 15, 16, 18 (1934).

<sup>24</sup> *Roanoke Rapids v. Patterson*, 184 N. C. 135, 113 S. E. 603 (1922). In *Granite Trading Corp. v. Harris*, 80 F. 2d 174, 176 (4th Cir. 1935), the court gave the following simple definition of domicile: "No better practical concept of a man's legal domicile can be obtained than from the untechnical definition of the Roman law, *i.e.*, the place 'from which when he goes away he seems to be wandering from home.'"

<sup>25</sup> 152 N. C. 215, 216, 67 S. E. 502, 503 (1910).

<sup>26</sup> *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. 2d 356 (1950).

<sup>27</sup> Residence and domicile found to be synonymous: *Hannon v. Grizzard*, 89 N. C. 115, 120: "Residence as the word is used in this section in defining political rights, is, in our opinion, essentially synonymous with domicile denoting a permanent as distinguished from a temporary dwelling place." Similar statements are

have been actual confusion.<sup>28</sup> However, on close examination of the cases, it becomes clear that in certain situations residence is always interpreted to mean domicile, as in the divorce<sup>29</sup> and voting<sup>30</sup> cases; and in other situations, residence is interpreted to mean actual residence, as in the homestead<sup>31</sup> and attachment<sup>32</sup> cases. Whether residence is synonymous with domicile in a particular connection depends upon the nature of the subject matter, the context in which the word is used, and the purpose of the legislation or writing in which the word is used.<sup>33</sup> This principal is reiterated in the *Barker* case<sup>34</sup> with great clarity.

The cases involving students have been primarily concerned with the residence of students for voting purposes.<sup>35</sup> As a general rule, a student

found in *Owens v. Chaplin*, 229 N. C. 797, 48 S. E. 2d 37 (1948); *Gower v. Carter*, 195 N. C. 697, 143 S. E. 513 (1928); *Groves v. Commissioners of Rutherford*, 180 N. C. 568, 105 S. E. 172 (1920); *Roberts v. Canon*, 20 N. C. 398 (1839). All of these cases deal with residence requirements for voting or holding office.

*Roanoke Rapids v. Patterson*, 184 N. C. 135, 137, 113 S. E. 603, 604 (1922): "When accurately used, 'domicile' and 'residence' are not convertible terms. Domicile is a person's fixed, permanent, established, dwelling-place, as distinguished from his temporary, although actual, place of residence." This case involved the requirement of listing property for taxation in the township in which the taxpayer resides.

*Watson v. North Carolina R. R.*, 152 N. C. 215, 217, 67 S. E. 502, 503 (1910), quoting with approval from *Barney v. Oelrichs*, 138 U. S. 529 (1891): "Residence is dwelling in a place for some continuance of time and is not synonymous with domicile, but means a fixed and permanent abode or dwelling, as distinguished from a mere temporary locality of existence; and to entitle one to the character of a 'resident,' there must be a settled, fixed abode, and an intention to remain permanently. . . ." The case involved the venue requirement of bringing suit in the county in which the plaintiff resided, which was construed to mean domicile although the court, in the above quotation, states that the words are not synonymous.

Residence and domicile not synonymous: *Sheffield v. Walker*, 231 N. C. 556, 559, 58 S. E. 2d 356, 359 (1950): "'Residence' is sometimes synonymous with 'domicile.' But when the words are accurately and precisely used, they are not convertible terms." This was a case involving recordation of a conditional sales contract in the county where the conditional vendee resides. Residence was held to mean actual, personal residence and not domicile.

<sup>28</sup> *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138 (1937). The court held that residence in the venue statute means a person's domicile, but the opinion after stating that residence and domicile are not synonymous goes on to define both terms as a person's fixed, permanent, and established abode.

<sup>29</sup> Cases cited note 7 *supra*.

<sup>30</sup> Cases cited note 20 *supra*.

<sup>31</sup> Cases cited note 8 *supra*.

<sup>32</sup> Cases cited note 3 *supra*. The purpose of the attachment statute, for example, is to protect domestic creditors against debtors who are out of the state and cannot be served with legal process. Six months' absence may be sufficient to justify attachment of the debtor's property although the debtor still retains his domicile in the state for other purposes such as administration of his estate at his death. See the discussion in *RESTATEMENT, CONFLICT OF LAWS* § 9, comment *e* (1934).

<sup>33</sup> *Baker v. Varsar*, 240 N. C. 260, 82 S. E. 2d 90 (1954); *Industrial Discount Corp. v. Radecky*, 205 N. C. 163, 170 S. E. 640 (1933).

<sup>34</sup> 241 N. C. 397, 399, 85 S. E. 2d 305, 306, 307 (1955): "Residence has been variously defined by this court. The definitions vary according to the purposes of the several statutes referring to residence and the objects to be accomplished by them."

<sup>35</sup> See 37 A. L. R. 134 (1925).

who resides in a college town while seeking an education will not acquire a legal residence or a domicile in that town even though he is an adult.<sup>36</sup> An adult student may acquire a domicile in the college town while attending school if he intends to remain there permanently or indefinitely without any present intention of returning to his former home.<sup>37</sup> Thus students who intend to remain in the college community only during the time necessary to complete their education and then intending to locate elsewhere are not residents for voting purposes.<sup>38</sup> It has been said that there must be a bona fide intent to make the city their home for a period not limited by the length of time that would be required for their educational stay.<sup>39</sup> It is to be noted that in these cases the word "residence" is construed to mean "domicile."

Many other cases have arisen regarding residence of a child in a school district for the purpose of obtaining a free public education. When a minor leaves his father's home and goes to another place for the sole purpose of seeking a free public school education, maintaining an intent to return to his former home, he will not become a "resident" in the school district.<sup>40</sup> Generally, however, the courts have construed residence here as actual residence rather than domicile.<sup>41</sup>

In an interesting South Carolina case,<sup>42</sup> a student attending college was held to be an "actual" resident of the university community for purposes of a venue statute though his "legal" residence may have been elsewhere. The dissent in this case vigorously attacked this conclusion, stating that the student's residence was with his parents. This is another example of "residence" meaning "actual residence."

A student who joined a National Guard unit in the state where he attended college, his domicile being in another state, has been held to be a resident of the state in which he attended school and therefore not entitled to a discharge under a statute limiting membership in the militia to residents of the state.<sup>43</sup>

<sup>36</sup> See 28 C. J. S., *Domicile* § 12(g) 3 (1941) and 17 AM. JUR., *Domicile* § 74 (1938), and cases cited therein.

<sup>37</sup> *Baker v. Varser*, 240 N. C. 260, 82 S. E. 2d 906 (1954); *Berry v. Wilcox*, 44 Neb. 82, 62 N. W. 249, 48 Am. St. Rep. 706 (1895).

<sup>38</sup> *Chomeau v. Roth*, 230 Mo. App. 709, 72 S. W. 2d 997 (1934); *Goben v. Murrell*, 195 Mo. App. 104, 190 S. W. 986 (1916).

<sup>39</sup> *Ptak v. Jameson*, 215 Ark. 292, 220 S. W. 2d 592 (1949).

<sup>40</sup> *State v. School Dist. No. 12, Niobrara County*, 45 Wyo. 365, 18 P. 2d 1010 (1933); *Mt. Hope School Dist. v. Hendrickson*, 197 Iowa 191, 197 N. W. 47 (1924). The court found in the Mt. Hope case that the children were emancipated by their father, had no intention of returning to their Canadian home, and were, therefore, residents of the school district.

<sup>41</sup> *People v. Hendrickson*, 54 Misc. 337, 104 N. Y. S. 122 (Sup. Ct. 1907), *aff'd*, 196 N. Y. 551, 90 N. E. 1163 (1909). The court held that an orphan residing with a resident of the school district was entitled to a free education since the legislature did not intend residence to be construed as domicile. See *State v. School Dist. No. 12, Niobrara County*, 45 Wyo. 365, 376, 18 P. 2d 1010, 1013 (1933).

<sup>42</sup> *Roof v. Tiller*, 195 S. C. 132, 10 S. E. 2d 333 (1940).

<sup>43</sup> *Owens v. Huntling*, 115 F. 2d 160 (9th Cir. 1940).

Students have also been held to be nonresidents of the state of their domicile for the purpose of service of process under the nonresident motorist statutes of their home states.<sup>44</sup>

Many states have statutes permitting their state universities to charge higher tuition for nonresident students than that charged for resident students.<sup>45</sup> While there is a dearth of cases on the point possibly due to the relatively small amounts involved, it seems that in the absence of express rules governing this matter, those charged with the duty of deciding who shall be assessed nonresident tuition fees rely on the common law rules of domicile.<sup>46</sup>

In summation, the cases involving students and their "residence" show that, as in the cases involving residence of those in other situations, whether the student is a resident of the college community will be determined by the purpose of the statute involved and the objects to be accomplished by it.

The domicile of an unemancipated child ordinarily follows that of the father.<sup>47</sup> This domicile cannot be changed by the child on its own volition since it is *non sui juris*.<sup>48</sup> A child may, however, reside in one place while its domicile is in another.<sup>49</sup> Marriage may emancipate an infant so that it may acquire a domicile of its own choice,<sup>50</sup> but this does not always follow as a matter of course.<sup>51</sup>

In determining the meaning of residence in the *Barker* case, the court said that under the tuition statutes in North Carolina a student does not become a resident of the college community merely by attending classes; that to say the son became a resident of Raleigh under the facts in the case would be to give a narrow and restricted meaning to the words "residing with the insured" which would be unjustified in view of the principle of construing insurance policies liberally with respect to the insured. Such a view seems to have been justified though the court came close in result to saying that "residing with" meant "having his domicile with" by its analogy to the tuition situation in which rules of domicile

<sup>44</sup> *Uslan v. Woronoff*, 173 Misc. 693, 18 N. Y. S. 2d 222 (New Rochelle City Ct. 1940), *aff'd mem.*, 259 App. Div. 1093, 21 N. Y. S. 2d 613 (2d Dep't 1940); *Hughes v. Luckner*, 233 Minn. 207, 46 N. W. 2d 497 (1951).

<sup>45</sup> See *e.g.*, N. C. GEN. STAT. § 116-144 (1952).

<sup>46</sup> *Dykstra and Dykstra, Who Are Nonresident Students*, 16 JOURNAL OF THE AMERICAN ASSOCIATION OF COLLEGIATE REGISTRARS 255 (1941).

<sup>47</sup> *Allman v. Register*, 233 N. C. 531, 64 S. E. 2d 861 (1951); *Thayer v. Thayer*, 187 N. C. 573, 122 S. E. 307 (1924); *In re Means*, 176 N. C. 307, 97 S. E. 39 (1918).

<sup>48</sup> *In re Blalock*, 233 N. C. 493, 64 S. E. 2d 848, 25 A. L. R. 2d 818 (1951); *Thayer v. Thayer*, 187 N. C. 573, 122 S. E. 307 (1924).

<sup>49</sup> *Allman v. Register*, 233 N. C. 531, 64 S. E. 2d 861 (1951).

<sup>50</sup> *Bonneau v. Russell*, 117 Vt. 134, 85 A. 2d 569 (1952); *Ex parte Olcott*, 141 N. J. Eq. 8, 55 A. 2d 820 (Ch. 1947); RESTATEMENT, CONFLICT OF LAWS § 31 (1934).

<sup>51</sup> *In re Dawkins*, 190 Misc. 995, 75 N. Y. S. 2d 546 (N. Y. Dom. Rel. Ct. 1947).

are usually said to apply,<sup>52</sup> and by relying on a similar case in which a court said that a minor's residence was where his domicile was, since domicile includes residence.<sup>53</sup>

The important thing to be remembered is that the North Carolina court will look to the nature of the subject matter, the purpose of the statute or other instrument, and the context in which the word is used in determining what "residence" means. An equally important corollary is that cases interpreting the word "residence" in one connection do not necessarily indicate the way in which that word will be interpreted when it arises in another connection.

F. KENT BURNS.

### Descent and Distribution—Homicide—Effect on Guilty Party's Right to Inherit

A husband was acquitted of the unlawful homicide of his wife, whom he killed while shooting at a man he suspected of being her lover. In a subsequent suit by her son and her administrator for a declaratory judgment debarring him from inheriting from his wife, the husband's right to inherit was declared unchanged by the mere fact of the homicide.<sup>1</sup> A statute<sup>2</sup> which provided that no one convicted of "unlawfully killing" another should benefit from the death had no application, since the husband had been acquitted of any unlawful killing.

The theory of the court in allowing the husband to inherit was that the intent necessary to preclude a killer from benefiting by the death of his victim is more than a mere general criminal intent, or an intent directed at a third person. It must be an intent to kill unlawfully the person by whose death the killer seeks to benefit. The evidence showed that such intent had been absent in this case.

The problem of whether one who kills an ancestor, a testator, or a joint tenant, may acquire property from his victim, thus benefiting by virtue of his own homicidal act, has long been the subject of judicial and legislative discord.<sup>3</sup> A brief look at some of the decisions and statutes may aid in understanding the problems raised by the principal case.

In the absence of statutes directly in point the courts have, in general, fallen into one of three groups:

<sup>52</sup> Dykstra and Dykstra, *supra* note 46.

<sup>53</sup> Central Manufacturers Mutual Ins. Co. v. Friedman, 213 Ark. 9, 12, 209 S. W. 2d 102, 103, 1 A. L. R. 2d 557, 559, 560 (1948): "The domicile of Benno was with his father . . . Domicile includes residence. . . ."

<sup>1</sup> Legette v. Smith, 85 S. E. 2d 576 (S. C. 1955).

<sup>2</sup> S. C. CODE § 19-5 (1952).

<sup>3</sup> See generally, 16 AM. JUR., *Descent and Distribution* §§ 74-78 (1938); Note, 39 A. L. R. 2d 477 (1955); 3 BOGERT, TRUSTS AND TRUSTEES § 477 (1946); Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. R. 715 (1936); AMES, LECTURES ON LEGAL HISTORY 310-312 (1913).