

1928. I am herewith enclosing said corrected abstract of title, warranty deed, encumbrance estimate, controlling board certificate and other files relating to the purchase of the property here under investigation.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3219.

APPROVAL, LEASE FOR RIGHT TO PRODUCE OIL AND NATURAL GAS ON LANDS IN READING TOWNSHIP, PERRY COUNTY, OHIO—THE ARNOLD OIL AND GAS COMPANY.

COLUMBUS, OHIO, May 12, 1931.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and approval a certain lease in duplicate entered into by and between yourself, as Auditor of State, and The Arnold Oil and Gas Company of Bremen, Ohio, whereby there is leased to said corporation the right to produce oil and natural gas in a certain tract of section 16, school lands in Reading Township, Perry County, Ohio, said tract of land being more particularly described as being the east half of the northwest quarter of the northeast quarter of section 16, township 16, range 16, containing 21 1/8 acres, more or less.

The lease here in question is one for a term of one year and as much longer thereafter as oil and gas is found in paying quantities on said land and the rentals to be paid are certain royalties reserved in said lease and to be paid to you as state supervisor of school lands.

Upon examination of said lease, I find that the same has been properly executed and that the same, by its terms and provisions, is in conformity with section 3209-1, General Code, relating to leases of this kind. Said lease is accordingly hereby approved by me, as to legality and form, and my approval is endorsed upon said lease and upon the duplicate copy thereof, both of which are herewith returned.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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3220.

TUITION—OF PUPIL HAVING TEMPORARY ABODE WITH PARENT IN SCHOOL DISTRICT WHERE NO HIGH SCHOOL MAINTAINED AND ATTENDING SUCH SCHOOL IN ANOTHER DISTRICT—BY WHOM PAYABLE—TERM "LEGAL SCHOOL RESIDENCE" CONSTRUED.

## SYLLABUS:

1. The term "legal school residence" as used in Section 7747, General Code, wherein it is provided that the tuition of pupils who are eligible for admission to high school and who reside in districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have a legal school residence, should be construed as importing that status which is held by a child, ward or apprentice of an actual resident of a school district, as the term "actual resident" is used in Section 7681, General Code.

2. The term "actual residents" as used in Section 7681, General Code, which provides that the schools of each district shall be free to all youth of school age who are children, wards or apprentices of actual residents of the district, means those persons who live in the district, or are inhabitants of the district, for the time being, at least, with or without the intention of making that location their permanent abode. It imports physical presence within the district, coupled with the idea of its being a present habitation or abode, and negates an intention of immediate removal therefrom, but does not include that affirmative concept of permanency of abode which is necessary to establish a domicile.

COLUMBUS, OHIO, May 12, 1931.

HON. PAUL SPRIGGS, *Prosecuting Attorney, Paulding, Ohio.*

DEAR SIR:—This will acknowledge receipt of your request for my opinion, which reads as follows:

"G. A. has for the past three years resided in Crane Township, Paulding County, Ohio. All his real property is located in Mark Township, Defiance County, Ohio. He pays taxes to Defiance County only and has always voted there. He has intimated that he will return to Defiance County when conditions are more favorable there. One of his children, who at present lives with his father, G. A., in Crane Township, attends high school in Mark Township.

There is no high school in the district of Crane Township where Mr. A. now lives, and all high school pupils are transported to Mark Township. The Board of Education of Mark Township has sent the Board of Education of Crane Township a bill for tuition for the son of G. A.

Under the above statement of facts, would the son of G. A., be a resident of Crane Township in Paulding County, or a resident of Mark Township, in Defiance County? I should also like to know whether or not Crane Township would be liable to Mark Township for tuition for the son of G. A."

Section 7747, General Code, reads in part, as follows:

"The tuition of pupils who are eligible for admission to high school and who reside in districts in which no high school is maintained, shall be paid by the board of education of the school district in which they have legal school residence, \* \* \* \*"

The substantial legal question involved in your inquiry is the proper construction of the words "legal school residence," as used in the above statute. Following this determination, it becomes necessary to apply that construction to the facts submitted by you.

If it be determined that the "legal school residence" of Mr. A.'s child who is attending school in Mark Township, Defiance County, is in Crane Township, Paulding County, it clearly follows from the terms of the statute quoted above, that his tuition should be paid by Crane Township. On the other hand, if it should be determined that the "legal school residence" of Mr. A.'s child is in Mark Township, Defiance County, he may attend school in that district without paying tuition. In that case some question may arise as to where Mr. A.'s other children may attend school free of charge.

The words "residence" and "residents" which are often used in statutory law, are incapable of being definitely and positively defined, so that the definition may be applied in all cases.

In a former opinion of this office, where the question is discussed at considerable length, and a large number of cases are cited, it is said:

"Upon consideration of the many attempts to define the word 'resident' as an abstract term, and the many and diverse observations of courts in distinguishing between residents and inhabitants on the one hand and 'residence' and 'domicile' on the other, the most helpful, positive rule that may be evolved is that it is a word whose statutory meaning is dependent upon the context and purpose of the statute wherein it is found."

See Opinions of the Attorney General for 1928, page 2550, at page 2553.

In some statutes the word "residence" is held to be synonymous with "domicile." In others, it is held to import merely personal presence in a fixed and permanent abode and not to be synonymous with "domicile." Jacobs on Domicile, Section 72; Wharton on Conflict of Laws, Section 21; *Hill v. Blumenberg*, 19 O. A., 404; *State ex rel v. Kuhn*, 8 O. N. P., 197; *Pickering v. Winch*, 48 Oreg., 500; 9 L. R. A., N. S., 1159-1164; *Brisenden v. Chamberlain*, 53 Fed., 311; Cahon's Est., 15 Pa. Co. Ct. Rep., 312; Appeal of Taney, 97 Pa., 74; *Sears v. Boston*, 1 Metc. (Mass.) 251; *Roosevelt v. Kellog*, 20 Johns (N. Y.) 208.

Forty years ago high school facilities were not so generally provided, especially for pupils residing in country districts; nor was advantage so generally taken of the facilities that were provided. Very few country school districts maintained high schools. In 1892, the General Assembly enacted an act entitled: "An Act to provide for graduation from the common schools of subdistricts and special districts." (89 O. L., 123). Sections 1 and 2 of this act provided for the method of graduation. Section 3 of the act provided as follows:

"The tuition of such graduates as may attend any village or city high school of the county may be paid by the board of education of the special or township districts in which such pupils may reside."

This act was amended in 1902 (95 O. L., 72). As then amended, it provided that the tuition of pupils holding diplomas entitling them to attend high school, and residing in township, special or joint subdistricts in which no high school is maintained, shall be paid in another high school which they may attend, by the board of education of the district in which they have a "legal school residence." The term "legal school residence" in this connection, has been carried through a number of revisions of the statute until the present time, and is now found in Section 7747, General Code, quoted above.

The fact alone, that the legislature changed the word "reside" as used in the act of 1892, to the "legal school residence" upon the revision of the statute in 1902,

clearly indicates that something else is meant by "legal school residence" than is generally comprehended by the word "residence."

A number of years prior to 1902, provision had been made by law for free public schools. Provision to that effect is contained in the School Code of 1873 (70 O. L., 195, Section 71) as follows:

"The schools established by this act shall be free to all youth between six and twenty-one years of age who are children, wards or apprentices of *actual residents of the school district.*" (Italics, the writer's.)

By this act, a legal school residence was established as meaning "actual residents of the school district." A similar provision is contained in later revisions of the act and was in force in 1902, when the provisions for the payment of tuition was enacted as stated above. This provision was incorporated in Section 7681, General Code, as codified in 1910, and remains in practically the same language in present section 7681, General Code.

Upon consideration of the history of these statutes, it is apparent that the legislature meant, by the use of the term "legal school residence" in the act of 1902, referred to above, and later similar acts finally culminating in Section 7747, General Code, that status fixed by earlier acts as being the kind or quality of residence necessary to receive the benefits of the free public school system. In other words "legal school residence" means that residence which is attributable to an "actual resident" as the term is used in the school code of 1873, and later statutes fixing the right of persons to enjoy the privileges of the free public school system, the present statute being Section 7681, General Code.

It becomes necessary, therefore, to determine what is meant by the term "actual resident" as so used. By the weight of authority, the term "residence," or "resident," when used in statutes, fixing the right to school privileges, is held to be not synonymous with domicile, but to import actual presence in the district, and being an inhabitant thereof for the time being without any present intention of removal therefrom. Physical presence, coupled with an intention to make that location home, temporarily, at least, is sufficient to constitute school residence, as the term "residence" or "resident" when used in such statutes is construed in most jurisdictions. This is well stated in Ruling Case Law, Volume 24, page 624, under the heading, "What constitutes school residence," as follows:

"Although there is some conflict among the decisions as to what constitutes a residence which will entitle a child to school privileges, statutes providing for a free public school system are, by the weight of authority, construed as evidencing an intention on the part of the state that all children within its borders shall enjoy the opportunity of a free education, and in determining whether a person is or is not a resident in a school district, within the meaning of such a rule, the usual and ordinary indicia of residence or the absence thereof, should be the proper guide.

In line with this construction of the statutes, residence entitling an infant to school privileges is distinguished from domicile, or the technical and narrow use of the term 'residence,' for the purpose of suffrage or other like purpose, and it is construed in a liberal sense as meaning to live in, or be an inhabitant of, a school district, the purpose being not to debar from school privileges any child of school age found within the district under the care, custody, or control of a resident thereof. Such

rule does not usually require that there shall be a legal domicile but it is sufficient if the child and its parent, or the person in loco parentis, are actually resident in the district, with apparently no present purpose of removal."

See 3 Annotated Cases, 694, note; Annotated Cases 1915 C 791; 36 L. R. A., N. S., 341; *Independent Order of Odd Fellows v. Board of Education*, 90 W. Va. 8, 48 A. L. R., 1092; *Marcelona Township School District No. 1 v. Custer Township School District No. 1*, 236 Mich., 677, 211 N. W., 60. There are some cases to the contrary, however. See Annotated Cases, 1915 C. 791 note.

That the construction given the word "resident" in this connection, spoken of in Ruling Case Law as being the construction supported by the weight of authority, is the proper construction of the term as used in our own statute, is fortified by the fact that the word "resident" as therein used, is preceded by the word "actual" thereby importing that something different is meant than the technical and narrow use of the word "resident." This construction was placed upon the term by a former Attorney General, in an opinion found in the Opinions of the Attorney General for 1922; at page 32, wherein it is said:

"1. The phrase 'actual residents of the district' occurring within the provisions of section 7681 G. C. requires an actual residence, in fact, or the physical presence and dwelling of the parent or person standing in loco parentis to the pupil, for the time being at least, within the school district.

2. The school residence required by section 7681 G. C. and the voting residence required by section 4866 G. C. are not identical."

In New York, where constitutional provisions and statutes relating to schools very similar to those in Ohio are in force, it was held in *People ex rel. Brooklyn Children's Aid Society v. Hendrickson et al.*, 104 N. Y. S., 122, as follows:

"'domicile' denotes the actual or constructive presence of a person in a given place, coupled with the intention to remain there permanently.

Consolidated School Law, Laws 1894, page 1225 c 556 title 7 Section 36 provides that the common schools shall be free to all persons of certain age 'residing in the district.' Held \* \* \* the well recognized policy of the state relating to education as expressed in Constitution, Article 9, Section 1, School Law, Title 7, Sections 11, 59, 60 and Compulsory Education Law, Laws of 1894, pages 1682, 1687, Chapter 671, Sections 2 and 13, making it obvious that it was not the intention to employ the word 'residence' as used in the school law, in the narrow sense of 'domicile.'"

It seems conclusive, in the light of these authorities that "legal school residence," as the term is used in Section 7747, means that status which may be said to be held by a child, ward or apprentice of an "actual resident" of a school district, as the term is used in Section 7681, General Code; that to be an "actual resident" of a school district, as the term is so used, it is only necessary that one be living there with the present intention of making it his home for the time being at least; and that it is not necessary that he intend it to be his permanent residence so that it might be said that it is his domicile.

Applying this construction to the facts submitted by you, it seems apparent

that the child in question, has a "legal school residence" in Crane Township, Paulding County, and that inasmuch as Crane Township does not maintain a high school and he is attending high school in Mark Township, Defiance County, the said Crane Township is legally liable to Mark Township for tuition for the said child.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

3221.

APPROVAL, ABSTRACT OF TITLE TO LAND OF LUCIUS J. OTIS, ET AL., IN MIFFLIN TOWNSHIP, PIKE COUNTY, OHIO.

COLUMBUS, OHIO, May 13, 1931.

HON. CARL E. STEEB, *Secretary, Ohio Agricultural Experiment Station, Columbus, Ohio.*

DEAR SIR:—I have in hand your letter, submitting for my examination and approval, an abstract of title, copy of real estate option, deed, encumbrance estimate No. 1776, authority of the Controlling Board, plat, and tax receipts for the years 1929 and 1930, relating to the proposed purchase of 90 acres of land in Mifflin Township, Pike County, Ohio, from Lucius J. Otis, et al, said land being a part of Ohio State University Lot No. 20.

An examination of the abstract, certified under date of February 4, 1931, indicates that the fee simple title to this land is in the following persons who hold respectively the following undivided interests: Grace Otis Sage, a widow, an undivided one-sixth interest; Winnifred Otis Hine, an undivided one-sixth interest; Lucius J. Otis, a bachelor, an undivided three-twelfths interest; Lucius J. Otis, as trustee under the will of Margaretta E. Otis, deceased, an undivided one-sixth interest; and the trustees (whose identity will later be discussed) under the will of Charles T. Otis, deceased, an undivided three-twelfths interest.

I come now to a discussion of the trustees under the will of Charles T. Otis. Said testator, in the eighth clause of his will (p. 27 abstract), appointed Margaretta E. Otis, his sister, and Lucius J. Otis, his brother, to act as trustees. The eleventh clause of said will (p. 30 abstract) provides:

"In the case of the death, resignation, inability or refusal to act of either of said Margaretta E. Otis or Lucius E. Otis, either as executor, executrix or trustee, then I nominate and appoint the Northern Trust Co., of Chicago, Ill., as co-executor or trustee with the remaining executor, executrix or trustee, as the case may be. In case of the death, resignation, inability or refusal to act of both of said Margaretta E. Otis and Lucius J. Otis, as executrix and executor respectively, or as trustees hereunder, then the Northern Trust of Chicago, Ill., shall act as sole executor or trustee hereunder with the same powers and duties as above provided in favor of the said Margaretta E. Otis and Lucius J. Otis; in case of the resignation or refusal of the Northern Trust Co. to act as