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Nonresident Tuition: Chipping Away at the Blockade

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The Louisiana courts of appeal, apparently reluctant to impose tort liability on the partner in addition to compensation liability on the partnership, have molded a rule that the partner is not a third party under the Workmen's Compensation Act unless he is an employee of the partnership. Such a rule cannot be reconciled with the Louisiana entity theory of partnership under which an employee is properly employed by the partnership entity rather than the partner. The partner is a third party regardless of any employee status he might have with the partnership, and the employer's immunity under the Workmen's Compensation Act should properly attach to the partnership rather than the partner. By changing their positions in *Leger, Cockerham* and *Bersuder,* the courts could remain faithful to the entity theory by holding that the partner, like the corporate officer, is a third party. Since the overruling of *Peterson*, the partner and the corporate officer may not be distinguished by the mere fact that the primary obligation of the partnership is also the secondary obligation of the partner.

Randy J. McClanahan

NONRESIDENT TUITION: CHIPPING AWAY AT THE BLOCKADE

In *Vlandis v. Kline,*[1] two University of Connecticut students challenged a Connecticut statute[2] that irreversibly classified them as nonresidents for the entire period of their attendance at the university. Claiming that they were bona fide residents of Connecticut, the students argued that the state's statutory definition of residence for tuition purposes violated their constitutional rights to due process and equal protection. The United States District Court held the statute invalid and granted injunctive relief.[3] On appeal, the United States Supreme Court affirmed, *holding* that the due process clause forbids classification based on:

presented must be maintained as resulting from our peculiar law, though it would be true in no other state of the Union. Elsewhere the partners are always individually liable, and the partnership as a distinct being cannot be cited. In Louisiana, during the existence of a commercial partnership, it alone can be sued for a partnership debt, and the citation may be served upon the firm by service upon the partner." Liverpool, Brazil & River Platte Nav. Co. v. Agar & Lelong, 14 F. 615 (Circuit Court, E.D. La. 1882).

1. 412 U.S. 441 (1973).

2. CONN. GEN. STAT. REV. § 10-329b, *as amended by* Public Act No. 5, § 126 (1971).

3. Kline v. Vlandis, 346 F. Supp. 526 (D. Conn. 1972).

> a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination.[4]

Nonresidents who attend state-supported universities are generally required to pay tuition and fees at a higher rate than residents. In recent years this differential tuition scheme has been challenged on several occasions.[5] The courts have consistently held that a state may discriminate between *properly classified* resident and nonresident students,[6] on the ground that the differential scheme protects the legitimate state purpose of financing higher educational facilities.[7] The argument is that, unlike residents, nonresidents have not contributed to the state's economy in the past through the payment of taxes and are likely to leave after graduation.[8] Hence, the higher tuition requirement is characterized as a valid attempt to equalize the cost of education between the two classes. The *Kline* decision does not alter the right of the state to condition the benefit of a largely subsidized education on the basis of residency.[9] Although this specific issue was not before the Court in *Kline*, Justice Stewart remarked

> we fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis.[10]

Despite the Court's summary treatment of the issue, even the admitted nonresident is not wholly without constitutional arguments

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4. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

5. *See, e.g.*, Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972); Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

6. *See, e,g.*, Johns v. Redeker, 406 F.2d 878 (8th Cir. 1969), *cert. denied sub nom.*, Twist v. Redeker, 396 U.S. 853 (1969); Clarke v. Redeker, 259 F.Supp. 117 (S.D. Iowa 1966), *cert. denied*, 396 U.S. 862 (1969); Arizona Board of Regents v. Harper, 108 Ariz. 223, 495 P.2d 453 (1972); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970); Landwehr v. Regents of Univ. of Colorado, 156 Colo. 1, 396 P.2d 451 (1964); Thompson v. Board of Regents, 187 Neb. 252, 188 N.W.2d 840 (1971).

7. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234, 237 (D. Minn. 1970); Clarke v. Redeker, 259 F. Supp. 117, 123 (S.D. Iowa 1966).

8. *See, e.g.*, Starns v. Malkerson, 326 F. Supp. 234, 240-41 (D. Minn. 1970).

9. In statutes and regulations dealing with nonresident tuition the terms "residence" and "domicile" are often used synonymously. Generally a person's domicile is "that place where he has his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." C. WRIGHT, LAW OF FEDERAL COURTS § 26, at 86 (2d ed. 1970).

10. Vlandis v. Kline, 412 U.S. 441, 452-53 (1973).

to base his claim against the validity of residency requirements. The interstate privileges and immunities clause,[11] the commerce clause,[12] and the right to travel[13] have all been invoked by nonresidents. However, in each instance the courts have upheld the differential scheme as bearing a rational relationship to the state's proposed goal of cost equalization.[14]

Although the courts have upheld the right of the states to charge discriminatory fees to a *properly classified* nonresident, the question arises as to what constitutes proper classification. Many states impose a waiting period, usually of one year, which must be met before a student may be classified as a resident.[15] This requirement is distinct from that of residency alone since it operates to deny to new residents as well as nonresidents the benefits of a subsidized education. The Court in *Kline* cautioned that the decision should not "be construed to deny a State the right to impose on a student . . . a reasonable durational requirement which can be met while in student

11. U.S. CONST. art. IV, § 2. *See, e.g.*, Kirk v. Board of Regents, 273 Cal. App. 2d 430, 444-45, 78 Cal. Rptr. 260, 269 (1969).

12. U.S. CONST. art. I, § 8. *See, e.g.*, Clarke v. Redeker, 259 F. Supp. 117, 123 n.7 (S.D. Iowa 1966).

13. Although the right to travel from one state to another is no longer disputed, the source of that right has not been ascribed to a particular constitutional provision. Nevertheless, since the Court has deemed the right to be fundamental, any classification which penalizes the exercise of that right must be invalidated under the equal protection clause of the fourteenth amendment unless such classification is necessary to promote a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 630-31, 634 (1969). Hence, the nonresident student must show that the higher tuition has produced such dire effects as to warrant its classification as a penalty on his right to travel, before the courts will feel bound to employ the strict-scrutiny, compelling interest test when analyzing the state provisions. However, the courts have chosen to regard nonresident tuition as something less than a penalty on interstate travel, and insist that it is not an infringement of a fundamental right. *See* Starns v. Malkerson, 326 F. Supp. 234, 238 (D. Minn. 1970); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 440, 78 Cal. Rptr. 260, 266-67 (1969).

14. *But see* Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education under the Interstate Privileges and Immunities Clause*, 50 NEB. L. REV. 31, 34-35 (1971) for the proposition that the state's purported goal of cost equalization is not furthered by the discriminatory rate. Clarke argues that many states maintain surplus educational facilities and that the marginal cost of educating nonresidents who fill these excess places may well be below the amount of tuition collected from them. Hence, rather than serving to equalize costs, nonresident tuition "requires nonresidents to pay more of the fixed costs of governmental benefits so residents can receive the same benefits at a smaller charge."

15. *See, e.g.*, the Minnesota requirement in *Starns v. Malkerson*, 326 F. Supp. 234, 235-36 (D. Minn. 1970) and California's requirement in *Kirk v. Board of Regents*, 273 Cal. App. 2d 430, 433, 78 Cal. Rptr. 260, 262 (1969).

status."[16] The Court proceeded to cite with approval[17] its affirmance of *Starns v. Malkerson,*[18] a three judge district court opinion that upheld a Minnesota one year irrebuttable requirement. Hence, although the Court in *Kline* invalidated Connecticut's irrebuttable presumption, it nevertheless allowed Minnesota's incontestable presumption to stand. Of course, the distinction may be made that the presumption in *Kline* was permanent, while the presumption in *Starns* continued for only one year. However, as pointed out by Justice Rehnquist's dissent, "one may read the Court's opinion in vain to ascertain why it is a difference of constitutional significance."[19]

The Court's rationale for approving the durational residency requirement in *Starns* was that such a requirement could be regarded by the State as one indispensable element of proof of domicilliary intent.[20] Although the length of time a student has resided in the state is certainly a method of ascertaining his intention to become a resident, the Court gave no reason why such a requirement should be considered by the state as indispensable. There are other practicable methods of demonstrating the requisite intention that will ensure that all bona fide residents are treated equally.[21] Instead of providing a workable guideline for states in their determination of a student's status, the irrebuttable waiting period merely postpones the time when the appropriate classifying body must assess the facts of a particular case to the detriment of those students who were indeed residents from the moment they entered the state. Moreover, if the waiting period is not considered a means of testing domicilliary intent, it could only operate to differentiate between old and new residents. Although a state may condition the benefits of a subsidized education on the basis of residency, it may not limit these benefits solely to old or established residents. The United States Supreme Court has held that under both the minimum and compelling interest standards of review, the equal protection clause forbids the apportioning of state services among *residents* based on past tax contributions.[22] Hence, if the Court's rationale for upholding the irrebuttable

16. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

17. *Id.* at 452-53 n.9.

18. 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem,* 401 U.S. 985 (1971).

19. Vlandis v. Kline, 412 U.S. 441, 467 (1973).

20. *Id.* at 452-53 n.9.

21. See the criteria suggested by the Attorney General of Connecticut which include voter registration, property ownership, etc. Vlandis v. Kline, 412 U.S. 441, 454 (1973).

22. *See, e.g.,* Vlandis v. Kline, 412 U.S. 441, 450 n.6 (1973); Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969).

requirement of *Starns* is rejected, the conclusion that such a requirement violates the equal protection clause seems inescapable.[23]

The *Kline* decision did not have the effect of validating every irrebuttable presumption, however. A distinction must be drawn between those waiting period requirements which may be met while a student is attending school and those which may only be met exclusive of school attendance. *Kline* approved only the former. The latter requirement[24] forces a student to either drop out of school for the requisite period or be classified as a nonresident for the entire time he attends school. The effect of such a requirement is to create a permanent presumption of nonresidence for all those persons who do not choose to interrupt their education.[25] Furthermore, there is no rational basis for requiring that an individual be denied the right to prove his resident status simply because he is a student.[26] However, only those waiting periods that create a conclusive presumption of nonresidency for the entire period of school attendance are forbidden by *Kline*. *Kline* does not prevent a university from initially classifying a student as a nonresident as long as that student is given the right at some reasonable future time to controvert such a presumption of nonresidence by presenting evidence of his intention to remain in the state. A state is only prohibited from using an irrebuttable durational requirement, which cannot be met while a student, as a device to create a permanent presumption of nonresidence.

Finally, once a student has resided in the state for the required waiting period, a determination must then be made concerning his true residency status. Many states provide that a student is presumed to be a nonresident if he moves into the state with the primary

23. "I now have serious question as to the validity of that summary decision [Starns v. Malkerson] in light of well-established principles, under the Equal Protection Clause of the Fourteenth Amendment, which limit the States' ability to set residency requirements for the receipt of rights and benefits bestowed on bona fide residents." Vlandis v. Kline, 412 U.S. 441, 445 (1973) (concurring opinion).

24. *See, e.g.*, the tuition regulations of the University of North Carolina which require that a student maintain his domicile in North Carolina for six continuous months exclusive of any time spent in attendance at any institution of higher education. Glusman v. Trustees of the Univ. of North Carolina, 281 N.C. 629, 190 S.E.2d 213 (1972).

25. *See* Covell v. Douglas, 501 P.2d 1047 (Colo. 1972), *cert. denied*, 412 U.S. 952 (1973) (declaring such requirements unconstitutional). *See also* Glusman v. Trustees of the Univ. of North Carolina, 281 N.C. 629, 190 S.E.2d 213 (1972), *vacated*, 412 U.S. 947 (1973).

26. *Cf.* Carrington v. Rash, 380 U.S. 89 (1965) (which struck down a Texas residence requirement for voting which prevented a serviceman from voting in Texas unless he resided there at the time of entry into the service).

purpose of attending school.[27] This presumption is strengthened by the inference that a student originally from out of state who is attending school in state, moved there primarily for the purpose of attending school. This presumption is not entirely correct. Even if a person's primary motivation for moving is to acquire an education, it is still possible that he intends to make his new habitat his permanent residence. However, the *Kline* decision does not forbid the state from making its initial determination on this basis.[28] Such an initial determination merely narrows down the class of students who may eventually be properly classified as nonresidents. However, *Kline* does make it clear that at least after residing in the state for one year, a student has the right to present evidence that he is a bona fide resident of that state.[29] In so doing, the Court approved the Attorney General of Connecticut's standard for determining the residential status of a student, stating

> [e]ach individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.[30]

In applying such a standard, the lower courts have held that an appellate review committee may properly place the burden of proof on a student to present by clear and convincing evidence that he is a bona fide resident.[31] However, the student's statement of intent and the evidence he adduces to support it should not be brushed aside as a self-serving attempt to controvert the law. Moreover, each student who is classified as a nonresident should be informed of the procedural remedies afforded him to change his classification.[32] Despite the administrative burden, expense and uncertainty that arises from affording each student a full review on his case for residency, the due process clause allows no less.

The *Kline* decision does not have the effect of invalidating the regulations involving residency classification at Louisiana State University.[33] Like most state-supported schools, LSU charges its students

27. LSU GENERAL CATALOGUE 17 (1973).

28. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

29. *Id.*

30. *Id.* at 454.

31. Arizona Board of Regents v. Harper, 108 Ariz. 223, 229, 495 P.2d 453, 459 (1972).

32. *Id.*

33. Regulations are set out in *Presidential Memorandum* 31, (May 15, 1972) (unpublished).

who are classified as nonresidents an additional fee above that assessed to residents.[34] The residency regulations stipulate that a student will be classified as a nonresident unless his parents are Louisiana residents[35] or the student has resided in Louisiana for a year exclusive of time spent in full time study at the university.[36] Exceptions are provided for former residents of Louisiana,[37] persons serving in the Armed Forces,[38] and full time employees of the university.[39] A student who is unable to fit into one of these exceptions and who has therefore been classified as a nonresident has the right to appeal his classification to two appellate committees.[40] The final appellate body has the authority to use its discretion in determining the status of the student and may deviate from the guidelines in the regulations. Because the conditions for attaining resident status are merely rebuttable presumptions, the LSU regulations are not on their face unconstitutional. Most importantly, the final appellate body has the right to reclassify a student "if all of the circumstances in his case show strongly and convincingly that the student is a bona fide resident of the state."[41] However, the administration of such guidelines must comply with the guarantees of the fourteenth amendment. As the lower courts have recognized, administrative review bodies may abuse their discretion if they allow rebuttable presumptions to become hard and fast rules in their application.[42]

The dictates of the *Kline* decision mean that it will become administratively more difficult to continue the present differential scheme. Because of the increased cost of providing the constitutionally required review, it is possible that such increased costs may offset any additional revenues received from the higher nonresident tuition. One possible solution to this dilemma has been implemented by Minnesota and Wisconsin which have recently entered into a reciprocal agreement whereby each state will admit the other state's students at in-state rates. However, the better solution would be to end the discriminatory rates entirely, an option that is now left to the legisla-

34. LSU GENERAL CATALOGUE 24 (1973), states that the nonresident fee per semester for full time undergraduate students is $315.00.

35. *Presidential Memorandum* 31 at 2 (May 15, 1972) (unpublished).

36. *Id.*

37. *Id.* at 3.

38. *Id.*

39. *Id.*

40. *Id.* at 4.

41. *Id.*

42. *See* Clarke v. Redeker, 259 F. Supp. 117, 125 (S.D. Iowa 1966) (The court reclassified a student as a resident claiming that the application of the regulations by the Review Committee was unduly rigid.)

ture. Justice Hay in *Arizona Board of Regents v. Harper*[43] best expresses the need for such a new approach.

> It must be recognized that the nonresident students bring to the campus a pollinating effect in the form of new ideas from other parts of the country and the world. They prevent sterility and provincialism in local thinking. The schools with the most cosmopolitan student bodies are among those most highly regarded in America today. A school which prohibits the enrollment of nonresidents is doomed to mediocrity.[44]

Martha Salvant

THE REQUIREMENT OF A DEFINITE TIME PERIOD IN OPTION CONTRACTS

Louisiana courts have, on several occasions, held that options to purchase which do not contain definite time periods for the life of the options are invalid.[1] The reason given, in the cases so holding, is that an option with no limit on its duration could hold the affected property out of commerce perpetually if the option were never exercised. The most recent example of this is the case of *Delcambre v. Dubois*,[2] in which the plaintiff sued for specific performance of an unrecorded counterletter granting him the right to repurchase his interest in certain lands sold to defendant co-owners. The court, on original hearing,[3] found that the counterletter was an option, invalid for lack of a definite time period:

> Our jurisprudence establishes a public policy in this state against holding property out of commerce. . . . The . . . option, which

43. 108 Ariz. 223, 495 P.2d 453 (1972).

44. *Id.* at 228, 495 P.2d at 458.

1. Williams v. McCormick, 139 La. 319, 71 So. 523 (1916); Parrott v. McCormick, 139 La. 318, 71 So. 523 (1916); Nervis v. McCormick, 139 La. 318, 71 So. 523 (1916); Dunham v. McCormick, 139 La. 317, 71 So. 523 (1916); Calhoun v. Christine Oil & Gas Co., 139 La. 316, 71 So. 522 (1916); Bristo v. Christine Oil & Gas Co., 139 La. 312, 71 So. 521 (1916); Delcambre v. Dubois, 263 So. 2d 96 (La. App. 3d Cir. 1972); Clark v. Dixon, 254 So. 2d 482 (La. App. 3d Cir. 1971).

2. 263 So. 2d 96 (La. App. 3d Cir. 1972).

3. On rehearing, the court, apparently conceding the conclusions of law drawn on original hearing, found the counterletter to be a reservation of the right of repurchase, which is not invalid for the lack of definite time period, but rather is reducible to the statutory maximum of 10 years provided in article 2568.