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Article 10

Service of Process: Usual Place of Abode

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RECENT DECISIONS

Service of Process— Usual Place of Abode—A race horse owner and his wife had sold their home in Amarillo, Texas, and had maintained residence at a hotel in Raton, New Mexico, keeping all of their personal property at the hotel. In June, 1952, they took the race horses and moved to Denver, Colorado for the racing season and rented a house where they lived with minor son, a married daughter and her husband. The son-in-law paid the rent. The wife still picked up her mail in Raton and stored some of her personal property in a warehouse there. Service of process was attempted upon her on July 28, 1952, by leaving a copy of the process with her son at the house in Denver. She left Denver without returning to the house after this attempted service. *Held:* this was not her usual place of abode and the summons and complaint had not been served. *First National Bank and Trust Co. of Tulsa v. Ingerton, 207 F2d 793 (10th Cir., 1953).*

Rule 4(d) (1) of the Federal Rules of Civil Procedure states that service of process may be accomplished by leaving copies thereof at "his dwelling house or usual place of abode." The problem arises in the attempts that various courts have made in defining the term "usual place of abode." There is considerable difference of opinion as to an exact definition[1] and two of the United States Circuit Courts of Appeal have stated that the state decisions on this question are in "hopeless and irreconcilable conflict."[2] No attempt will be made to discuss the conflicting state views, but the writer will concern himself with the interpretation of this phrase by the various federal courts and Wisconsin's position on the problem.

Prior to the instant case, there were only five federal cases construing this phrase.[4] The *McVeigh* case[5] dealt with a state statute stating that notice of a suit might be posted on the front door of one's "usual place of abode" when neither the party nor his family were present. There the Supreme Court held that the test of "usual place of abode" is that the person against whom the notice is posted should be living or have his home in that particular house, although he

[1] VOL. 43 WORDS and PHRASES, PERM. ED., "Usual place of abode" 545, 72 C.J.S. Process §47.

[2] First National Bank & Trust Co. v. Ingerton, 207 F 2d 793, (10th Cir., 1953) and Rovinski v. Rowe, 131 F 2d 687 (6th Cir., 1942).

[3] FED. R. CIV. P. 4 (d) (1).

[4] Earle v. McVeigh, 91 U.S. 503 (1876); Skidmore v. Green, 33 F. Supp. 529 (1940); Rovinski v. Rowe, 131 F. 2d 687 (6th Cir., 1942); McFadden v. Shore, 60 F. Supp. 8 (1945); Leigh v. Lynton, 9 F.R.D. 28 (1949); U.S. v. Chandler, 7 F.R.D. 365 (1947) followed the Skidmore case and held that service by leaving a copy of the process at the family residence complied with the federal rule when the defendant was being held in the penitentiary of another state at the time of service.

[5] Earle v. McVeigh, *supra*, n. 4.

may be temporarily absent. The basis of that ruling is that if the house is his usual abode when he returns, the copy left will act as notice. However, the court stated that the test is not the last place of abode, for a person may change his place of abode every month in the year. Only one's present residence is sufficient.[6] The result of the *McVeigh* case was that this attempted service was held void for the parties attempting the service knew that the party, upon whom service was attempted, had moved from that house with his entire family six weeks previosuly.

Skidmore v. Green[7] was the second major case on this problem. There service was attempted on the defendant, a retired policeman, who traveled around the country in an automobile and trailer by leaving a copy of the summons and complaint at his brother's home in New York State. This was held to be service based on Rule 4(d)(1) even though he did not reside there permanently because of several factors; namely, he had New York license plates, prior to 1937 he had lived in New York, he had listed his brother's home as his address in his license application, and he had also stated he was a New York resident when applying for license plates in South Carolina. The court decided this case on those facts and stated as their rule that "he does not reside there permanently but so far as the migratory nature of his life permits of any place of abode or dwelling house, it is the house in Kingston, New York."[8]

The third case on this subject was *Rovinski v. Rowe*.[9] There the defendant had worked in New York City for fourteen years and then became an employee of the Department of Commerce working throughout the United States. He had spent the last two years in Duluth, Minnesota. His mother resided in Menominee, Michigan, and it was there that service was attempted by leaving a copy of the process at his "usual place of abode." The Circuit Court of Appeals affirmed the District Court's ruling that this was effective service. The District Judge had stated this rule:

> "Taking all the circumstances in this case, I can see no surer way of a person knowing he has been asked to come into court to answer some complaint against him for damages than that notice should be left at a place which has been throughout his life the place of his legal residence, the place where his parents lived, where his mother lives now. . . ."[10]

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[6] Although this case dealt with a Virginia statute authorizing the posting of process on the usual place of abode, its discussion of "usual place of abode" is applicable wherever that term is used and has been relied on as the basis for the remaining cases mentioned in note 4.

[7] Skidmore v. Green, *supra*, n. 4.

[8] *Ibid.* at 530.

[9] Rovinski v. Rowe, *supra*, n. 4.

[10] *Ibid.* at 689. The circumstances were these; the defendant had always held

This was summarized when the District Judge remarked that the question of service must be resolved by

> "what best serves to give notice to a defendant that he is being served with process, considering the situation from a practical standpoint."[11]

The *McFadden case*[12] also deals with this problem but confines itself to the "usual place of abode" of soldiers and sailors. This District Court decision follows the weight of authority in ruling that military service is temporary and that where temporary residence is established away from the usual residence, the place of abode is the usual residence, not the temporary residence. However, some courts have ruled otherwise, but those decisions ar usually based on a manifested intent not to return to the former residence.[13] The Soldiers' and Sailors' Relief Act has no application to service.[14]

The most recent case outside of the instant case on this question was *Leigh v. Lynton.*[15] There the defendant had gone back to Great Britain in August 1948, and had not returned to the United States. After his departure, his wife and another woman rented an apartment in the Wyndham Hotel where they resided until October, 1948. On September 20, 1948, service on the defendant was attempted by leaving a copy at the hotel. The District Court held this was not his usual place of abode under Rule 4(d) (1).[16]

As to the above mentioned cases, the instant case[17] places much emphasis on the *McVeigh* case[18] and the *Shore* case[19] and derives the rule that "where temporary residence is established away from the normal or usual residence, the 'place of abode' is the usual residence regardless of the temporary residence."[20] In applying that rule to the facts, the court concludes that the residence in Denver was only a temporary arrangement and since they continued to receive their mail and had some belongings in the hotel in Raton, that was their usual place of abode.

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that place as his home, he had a telephone listed there in his own name, he had clothing and a room ready for his occupancy at all times, and he had never voted except as a citizen of Michigan.

[11] *Supra,* n. 9 at 689.

[12] McFadden v. Shore, *supra,* n. 4. See also, 158 A.L.R. 1450.

[13] Eckman v. Grear, 14 N.J. Misc. 807, 187 A 556 (1936). But see Kurilla v. Roth, 132 N.J.L. 213, 38 A 2d 862 (1944) where the opposite result is reached under similar facts. VOL. 43 WORDS and PHRASES, PERM. ED. "Usual Place of Abode," 547 (Supp. p. 145).

[14] Soldiers' & Sailors' Civil Relief Act of 1940; 50 U.S.C.A. Appendix §510 *et seq.;* supra, n. 12.

[15] Leigh v. Lynton, 9 F.R.D. 28 (1949).

[16] *Supra,* n. 3.

[17] *Supra,* n. 2.

[18] *Supra,* n. 5.

[19] *Supra,* n. 12.

[20] *Supra,* n. 2 at 795.

The dissenting judge points out that most courts agree that the usual place of abode is where a person is living at the particular time that service is made.[21] Since the defendant had a migratory life, the facts of her life are the deciding factors. That judge based his opinion on the fact that the wife and husband traveled wherever his horses were to run; that the defendant had not returned to the hotel in Raton for even one night, but had had her belongings turned over to a storage company and concluded that there was nothing in the record to show that the defendant's usual place of abode was anywhere but at her temporary residence since:

> "as race owners, the Ingerton's usual place of abode was whereever their horses happened to be running . . . at the particular time it was Denver."

The Ingerton case can be factually differentiated from several of these cases. For example, in the *Skidmore* case[23] there were several factors which led the court to its conclusion that the defendant held that place out as his residence. In the *Rovinski* case,[24] the facts that the defendant had left many of his personal belongings at his mother's home, that there was a room at all times ready for his occupancy, and that he had always voted as a Michigan resident form the basis for that decision. But in the *Ingerton* case[25] the only factors present were that they picked up their mail at Raton and that they paid rent on a room and kept personal belongings at the hotel. Yet that was held sufficient by the majority.

The problem as to this rule is whether it is to be construed liberally or strictly. On this point, there is a split of authority. The one group holds that since this type of substituted service is purely statutory, the statute must be followed "strictly, faithfully, fully, literally." But the *Rovinski v. Rowe* case held that these rules for service should be construed liberally to effectuate service where actual notice of the suit has been received by the defendant.[27] This doctrine is confined by two more recent decisions[28] but not so as to make it inapplicable to the *Ingerton* case. However, since there was no proof that actual notice had reached the defendant in that case, it could not be applied.

The Wisconsin rulings on the question of usual place of abode are few. An early case, *Healey v. Butter*,[29] adopted the rule that

[21] *Supra*, n. 2 citing State ex. rel. Merritt v. Hefferman, 142 Fla. 496, 195 So. 145, (1939).
[22] *Supra*, n. 2 at 796.
[23] *Supra*, n. 7.
[24] *Supra*, n. 9.
[25] *Supra*, n. 2.
[26] 72 C.J.S. Process §43.
[27] *Supra*, n. 9.
[28] Blain v. Young, 10 F.R.D. 109 (1950) and Berner v. Farney, 11 F.R.D. 508 (1951).
[29] Healey v. Butter, 66 Wis. 9, 27 N.W. 822 (1886).

man's last and usual place of abode is his present usual place of abode. This ruling was assailed in a federal court case[30] but never expressly overruled. Then in the *Caskey v. Peterson* case,[31] the court held that the usual place of abode of an emancipated boy who was working on and living at a farm away from his parents was at the farm and not at his present home. This decision interpreted the Wisconsin statute[32] on substituted service and seemed to follow the *Earle v. McVeigh* rule[33] that the usual place of abode is the place where the defendant is usually and actually living. However, Wisconsin rulings[43] differ from the *Rowe* case rulings[35] in that Wisconsin has held that all statutes on substituted service should be strictly construed.

The writer believes that the *Ingerton* case is an unnecessary enlargement of the temporary residence doctrine of earlier federal court cases. While its doctrine of liberal construction is not available under the facts in the *Ingerton* case as such, the policy of the decision of the *Rowe* case and the reasoning of the dissenting judge appear to this writer to be the sounder view on this problem and would be more in keeping with the other federal decisions on this question.[36]

DONALD GRIFFIN, JR.

Property—Commission for Sale of Farm after Listing Contract Has Expired—The plaintiff, Butterworth, an agent for the United Farm Agency, in pursuance of his listing agreement for the property, offered to lease the farm for a year with an option to buy during the year. This arrangement was acceptable to defendants and plaintiff ceased all efforts to find a purchaser. Five months after the brokerage contract expired, but during the life of the option, Mrs. Harrison persuaded one Vanadore to exercise his option and purchase the farm at the original price of $12,500. Agent now sues for his 10% commission. *HELD:* the defendants, by executing a sales contract with Vanadore (the purchaser produced by plaintiff) before the lease option contract had expired, in effect agreed to an extension of the listing agreement since it is clear that the lease option contract was a direct result of the listing agreement which Mrs. Harrison signed. Justice McFadden in his dissent claims that the broker is not entitled to any commission in this case because: (a) the sale was not made within the time stated

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[30] Swift v. Meyers, 37 Fed. 37 (1888).
[31] Cashey v. Peterson, 220 Wis. 690, 263 N.W. 658 (1935).
[32] WIS. STATS. (1951) §262.08 (4).
[33] *Supra,* n. 4.
[34] Pollard v. Wegener, 13 Wis. *569 (1860), Mechlem v. Blake, 19 Wis. *397 (1865).
[35] *Supra,* n. 9.
[36] *But see;* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) and 34 MARQ. L. REV. 120.