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Recent Cases

RECENT CASES

AUTOMOBILE LIABILITY INSURANCE: RESCISSION OF ASSIGNED RISK COVERAGE AFTER ACCIDENT—An insurer in Virginia may cancel *ab initio* a voluntary Assigned Risk (poor risk) for fraud and misrepresentation in the procurement of the policy, even after the accident has occurred. *Virginia Farm Bureau Mutual Insurance Company* v. *Saccio,* 204 Va. 769, 133 S. E. 2d 268 (1963).

On the surface, this case seems to weaken the purpose sought to be achieved in enacting the Safety Responsibility Law as set out in Va. Code Ann. §46.1-388 to 46.1-514 (Repl. Vol. 1958).

Mass production made it possible for many people to own automobiles. Some of these persons were totally unable to secure insurance coverage, though they desired to do so. The companies did not want them as insurance risks. The several states tried to find a way to protect the innocent victim of a financially irresponsible motorist, and Virginia came up with the Safety Responsibility Law. This required all policies to carry certain minimum limits of coverage and to be uniform in application to an accident. This was not compulsory and vast numbers were still unable to obtain coverage.

Out of this grew the Virginia Automobile Assigned Risk Plan, which was designed to distribute these risks equitably among the companies operating in Virginia. It was authorized by the Virginia Legislature in Va. Code Ann. §38.1-264 (Repl. Vol. 1953). One who could not secure coverage otherwise may apply through the Plan and be assigned to a company. It was purely voluntary between the companies, but for it to be operative, all companies in Virginia had to agree to it. Once operative, it

became compulsory on each company to accept the risks assigned to it.

Section 18 of the Plan provides for cancellation by the insurer. This requires the insurer to give ten days notice to the manager of the Plan before the effective date of the cancellation. It would seem that this provision would provide only for prospective cancellation by the insurer.

Even with this Plan, many people were still uninsured. Thus Va. Code Ann. §46.1-497 (Repl. Vol. 1958), was enacted, setting up the Statutory Assigned Risks. Here if one fails to secure coverage otherwise, he may apply to the State Corporation Commission and be assigned to a company. This *is* compulsory on the companies and if a risk is assigned, they must accept and certify that a policy is in force and applicable to future accidents as set forth in Va. Code Ann. §46.1-471 (Repl. Vol. 1958). A company also may be required to certify under certain other conditions, but if certification is made and an accident occurs, the company's liability becomes absolute as to that accident.

It is easily seen that the trend has been to provide insurance for all persons using the highways. Along this line, the court in this case recognizes the different classes of risks as "desirable," "poor," and "statutory." This is significant both to the insurer and the insured, in determining their compliance with the Safety Responsibility Laws and their position after the accident has occurred.

The latest case arising in Virginia dealing with rescission of an automobile policy for fraud was *State Farm Insurance Company* v. *Butler*, 203 Va. 575, 125 S. E. 2d 823, decided in 1962. This case held, as applied to a "desirable" risk, that the insurer could cancel the policy *ab initio* for fraud and misrepresentation even after the accident had occurred. See also *Burruss* v. *National Life Assn.*, 96 Va. 543, 32 S. E. 49 (1899); *Life Insurance*

Company of Virginia v. *Hairston,* 108 Va. 832, 62 S. E. 1057 (1908); *Sterling Insurance Company* v. *Dansey,* 195 Va. 933, 81 S. E. 2d 446 (1954).

In the *Saccio* case, Miss Saccio was injured as a result of an accident with one Smith who had procured his insurance coverage through the Virginia Automobile Assigned Risk Plan and would be termed a voluntary Assigned Risk. (Poor Risk). In the investigation after the accident, the company determined that Smith had misrepresented certain facts that would have rendered him ineligible for insurance had they been truthfully disclosed. Following the investigation, the company disclaimed liability under the policy, cancelled it *ab initio,* and returned the full premium to Smith.

Miss Saccio then secured a judgment and had execution issued against Smith which was returned unsatisfied. She then proceeded against the Virginia Farm Bureau Mutual Insurance Company under conditions in the policy that would let her reach any indemnity due the insured. The compelling questions to be decided were whether the voluntary Assigned Risk Plan was compulsory on the carriers and whether Section 18 of the Plan provided only for prospective cancellation by the carrier giving ten days notice to the manager of the Plan. And finally, whether the companies by subscribing to the Plan gave up their rights to rescind the policy on the basis of fraud and misrepresentation after the accident had occurred.

The only case cited in support of Miss Saccio's position, and the only one the writer has been able to find dealing with a voluntary Assigned Risk similar to the Virginia Plan is, *Aetna Casualty and Surety Company* v. *O'Connor,* 8 N. Y. 2d 359, 207 N.Y.S. 2d 679, 170 N.E. 2d 681 (1960). In this case, the Plan was set up by the Superintendent of Insurance for the State of New York under legislative authority. All the companies were required to participate in the Plan and it was administered

by the Superintendent of Insurance. Aetna insured O'Connor under this Plan, made an investigation as to his prior driving record and failed to uncover any misrepresentations made. In an investigation after the accident, the fraud was discovered and Aetna attempted to cancel *ab initio*.

The New York court held that their Assigned Risk Plan abrogated the insurer's common law right to avoid a policy *ab initio* on the basis of fraud. The New York Legislature had taken this means of assuring coverage to persons who could not get it in the usual channels. After the accident had occurred, the company's liability was therefore absolute.

Our court, in the *Saccio* case, did not follow the *Aetna* case and held that the legislature in Va. Code Ann §38.1-264 (Repl. Vol. 1953) did not abrogate the *Butler* rule and neither did the companies do so when they voluntarily adopted the Plan and provided for prospective cancellation. The Virginia statute merely permits the companies to set up the Plan and does not require them to do so as was done in the New York case. Virginia has two types of Assigned Risks, voluntary under the Plan and statutory under Va. Code Ann. §46.1-497 (Repl. Vol. 1958), and the certification statutes. The court further held that neither did the companies, in adopting Section 18 of the Plan, abrogate the common law rule, as the purpose of the Plan was to make liability insurance available to the "poor risks," subject to the conditions of the Plan as regards the equitable distribution among the companies. The provision in Section 18 as to ten days notice was simply to keep the manager of the Plan informed and prevent the companies from cancelling a "poor risk" without adequate reason. Section 18 does not restrict the companies as to rescission for fraud in the procurement of the policy.

The *Butler* rule now applies to "desirable risks" and to "poor risks" in Virginia.

The distinction drawn by our court between the *Saccio* case and the *Aetna* case is that in Virginia the voluntary Plan under Va. Code Ann. §38.1-264 (Repl. Vol. 1953) is permissive, and in the *Aetna* case the New York statute was compulsory. This seems to be a very technical distinction, as actually the only choice the companies had under the Virginia statute was whether or not to adopt the Plan. Once it was adopted, each company *must* take its proportionate share of the risks assigned.

What if the companies had elected not to adopt the Plan? It seems doubtful that they would have had any choice in whether they would accept the "poor risks" because instead of having two types of assigned risks, as we have today, there would only be the statutory assigned risks under the Code. All "poor risks" would have ultimately been assigned to the companies anyway if the ones who wanted coverage could not procure it through the regular channels. Then it does not appear that the Virginia companies actually had any more choice in whether they accepted the risk than did the New York companies, but they were permitted to set up the method of distributing the risks in Virginia.

It is submitted, however, that the Virginia decision is sound when considered in the light of the purpose sought to be achieved by the legislature in passing the Safety Responsibility Act. That purpose is to afford a means of recovery for the innocent victim of the financially irresponsible motorist using our highways. Virginia also has an Uninsured Motorist Act, Va. Code Ann. §38.1-381 (Supp. 1962). Space will not permit a thorough discussion of this, but it is a part of each automobile liability policy issued in Virginia and applies when the insured suffers loss or injury as a result of an uninsured liability. One is uninsured if he does not have a policy, or if he has a policy, but the insurer disclaims liability thereunder for any reason.

When the Safety Responsibility Act and the Uninsured

Motorist Act are considered together, an insurer can still retain its common law defenses against fraud and misrepresentation, to prevent the wrongdoer from profiting by his wrong at the expense of the insurer and ultimately the premium paying public. Under the Uninsured Motorist Coverage, there would still be a redress to the innocent victim for his loss.

One other distinction could be drawn between the *Aetna* case and the Virginia case, but neither court seemed to attach much significance to this point. It is to be noted that Aetna investigated O'Connor before the accident occurred and had ample time to determine whether any misrepresentations had, in fact, been made that would be material to the risk. Then it could be argued that Aetna did not rely on the statements as made by O'Connor and relied on its own investigation. These facts were not present in the Virginia case and should strengthen the Virginia decision.

EDWARD H. ROUNTREE

PROPERTY: TENANCY BY THE ENTIRETY IN PERSONALTY—On October 14, 1954, Willis Lee Oliver and his wife, Betty H. Oliver, brought realty in Laurel Glen, Henrico County, Virginia, taking title thereto as tenants by the entireties with survivorship as at common law. On February 23, 1959, the Olivers entered into a contract to sell this property and the closing took place May 29, 1959. The proceeds from this sale were made payable to Betty H. Oliver and they were deposited in her name.

On May 17, 1960, Willis Lee Oliver and his brother, partners in an electrical business, filed voluntary petitions in bankruptcy and were adjudicated bankrupts. Subsequently, Charles W. Givens Jr. was appointed

trustee in bankruptcy. The trustee filed a Motion for Judgment against Betty H. Oliver in the Circuit Court of Hanover County to recover one-half of the net proceeds from the sale of the Laurel Glen property. The trial court held that the tenancy by the entirety had been terminated by the sale, and that the Olivers became tenants in common of the proceeds. Following this line of reasoning it was inevitable that the trial court find that the trustee was entitled to a judgment equal to one-half the net proceeds of the sale. Being tenants in common of the proceeds, Willis Oliver's share was subject to his debts, and the transfer of all the funds to his wife could be set aside as a fraudulent conveyance. This decision was appealed and the Virginia Supreme Court of Appeals in *Oliver* v. *Givens, Trustee,* 204 Va. 123, 129 S. E. 2d 661 (1963), reversed the trial court, and entered final judgment in favor of the appellant, Mrs. Oliver.

In reaching its decision the court said that the proceeds of the sale were held not as tenants in common, but by the entireties. Once this had been decided the court had ample authority for holding that there had been no conveyance in fraud of creditors. In *Vasilion* v. *Vasilion,* 192 Va. 735, 66 S. E. 2d 599 (1951), the Virginia Court of Appeals held that a conveyance of realty, owned by a wife and her husband as tenants by the entireties, to the wife solely, was not in fraud of creditors. This case is controlling once the court found that the Olivers owned the proceeds by the entireties. Surprisingly enough, until *Oliver* v. *Givens* the Virginia Court of Appeals had not dealt with the problem of whether personalty could be owned by the entireties.

There is a difference of opinion among other states which have decided this issue. The majority of jurisdictions hold that personalty can be owned by the entireties. See Annot., 64 A.L.R. 2d 8 (1959). Nevertheless there is a strong minority which holds contra. Among these states are Indiana, New York, New Jersey, Michigan, and

North Carolina. This writer, after reading a considerable cross section of these cases, tried to ascertain the reasons for states differing on this point. The statement most often encountered in the opinions from the majority jurisdictions is to the effect that the one obstacle to the existence of tenancies by the entireties in personalty has been removed by the Married Women's Acts. At common law the husband became the owner of all of his wife's personalty, and also had the power to reduce her choses in action to possession. As long as this were true there would be no ownership by the entirety in personalty, the husband being the sole owner. However, when the Married Women's Acts removed this disability there remained no reason why husband and wife could not own personalty by the entireties, since they may be considered as one person. These states seem to have adopted the attitude, that we shall hold personalty can be owned by the entireties because no one has shown us a reason why it should not be so owned.

Other states are convinced that entirety ownership must be confined to realty. One Oregon case uses as its authority a definition from *Blackstone's Commentaries.* In *Stout* v. *Van Zante,* 109 Ore. 430, 219 Pac. 804 (1923), the Oregon Court said:

> "In this state it has never been held that estates by the entirety exist in personal property, and, under the definition of estates by the entirety given by Blackstone, they were confined and restricted to estates in fee given to a man and his wife, which definition excludes personal property from the operation of the rule." 219 Pac. at 807.

There is also a feeling among authorities that such a rule opens the door to a legalized defrauding of creditors. It is contended that a person could take his assets and purchase stocks and bonds in the name of husband and

wife as tenants by the entirety and thereby immunize the property from all *future creditors,* except joint creditors of the husband and wife. There seems, to this writer, to be some merit in this concern. Nevertheless, the Virginia Supreme Court of Appeals has, from all appearances, joined wholeheartedly with the majority decisions. The court's feeling has caused it to say considerably more than necessary on the facts of the *Oliver* case.

The only issue before the court in *Oliver,* concerned the proceeds derived from the sale of realty which was owned by the entireties. As the court said:

> "The determination of this issue turns upon whether the *proceeds* of the sale of the Laurel Glen property, which the husband and wife owned as tenants by the entireties, were owned by them as tenants in common or as tenants by the entireties." 204 Va. at 125. (Emphasis supplied.)

The assignments of error listed by the appellant, Oliver, concerned the lower court's ruling, which dealt only with the proceeds of the sale of realty owned by the entireties.

Yet, note carefully the language of the appellate court:

> "While the question has not been previously presented to this court, we agree with the reasoning of the majority view and *hold* that in this State personal property as well as realty may be held by a husband and wife as tenants by the entireties." 204 Va. at 126. (Emphasis supplied.)

The court in this sweeping statement has not confined its "holding" to the issues before the court. It has said that any personalty can be owned by the entireties, not solely the proceeds derived from the sale of realty so

owned. Thus, the court would seem to be stating a broader rule than necessary to dispose of the present controversy.

The court goes on to say that in those jurisdictions recognizing tenancy by the entirety in personal property, it is almost universally held, in absence of an agreement or understanding to the contrary, that the proceeds derived from a voluntary sale of real estate held by entireties are likewise held by the entireties. While there is considerable authority for this proposition it does not necessarily follow that all states who hold that proceeds of entirety owned realty are to be owned by the entirety, also hold that *all* personalty can be owned by entireties. For example in *Koehring* v. *Bowman,* 194 Ind. 433, 142 N. E. 117 (1924), the court said:

> "Estates by entireties do not exist as to personal property [citation omitted] *except* when such property is directly derived from real estate held by that title, as crops produced by the cultivation of lands owned by entireties or proceeds arising from the sale of property so held." 142 N. E. at 118. (Emphasis supplied.)

The Virginia Court lists a decision by Judge Walter E. Hoffman of the United States District Court of the Eastern District of Virginia, *Moore* v. *Glotzbach,* 188 F. Supp. 267 (E.D. Va. 1960), as being in accord. But that case cannot enlarge the scope of the *Oliver* case as it also dealt with proceeds of land (rent) owned by the entireties. The *Moore* case does present some interesting observations from which it might be inferred that Virginia does recognize tenancies by the entireties in personalty.

A fair interpretation of the present Virginia situation is that while it has not actually been held on the facts that all personalty can be owned as tenants by the en-

tireties, should a case arise presenting that issue, the Virginia Supreme Court of Appeals would so hold.

JOHN PAGE RAWLINGS

DOMESTIC RELATIONS: JURISDICTION—Section 20-98 of the Code of Virginia in referring to "county or corporation in which the parties last cohabited" as jurisdiction for divorce proceedings does not mean last place of mere copulation. *Colley* v. *Colley,* 204 Va. 225, 129 S. E. 2d 630 (1963).

This suit was brought by complainant in the Circuit Court of Prince William County against her husband for divorce. From August, 1956 to December 21, 1960, the parties had lived together as husband and wife in Prince William County. In December, 1960, defendant decided that they would go to the home of his parents in Louisa County, Virginia, for the Christmas holidays and stay there until the first of the following month and then return to Prince William County. The only preparations made were those normally incidental to a visit, and nothing suggested any permanency to the trip. During the course of the visit a quarrel between the parties ensued, whereupon complainant left and returned to Prince William without the defendant. The complainant testified that the last time she had sexual relations with her husband was in January, 1961 in Louisa County.

The pertinent part of Va. Code Ann. §20-98 (Repl. Vol. 1960), provides that suit for divorce shall be brought in the county in which the parties last cohabited. Defendant contended that the parties last cohabited, within the meaning of the statute, in Louisa County since that was the last place of copulation. And consequently, he contended that the Circuit Court of Prince William County lacked potential jurisdiction of the suit.

Defendant based his argument upon two Virginia cases in which the court had construed the word "cohabit" in other statutes as meaning "copulate." See, *Martin* v. *Commonwealth*, 195 Va. 1107, 81 S. E. 2d 574 (1954); *Tarr* v. *Tarr*, 184 Va. 443, 35 S. E. 2d 401 (1945). The court, in the *Colley* case, noted that different statutes were involved in these earlier decisions and held that the last place of cohabitation, within the meaning of §20-98 of the Virginia Code, was not Louisa County.

The problem before the court was the interpretation or definition to be given the word "cohabit." In the *Martin* v. *Commonwealth* and *Tarr* v. *Tarr* cases *supra,* the legal or popular meaning had been adopted. However, the former case involved §18-97 [§18.1-206 Va. Code Ann. (Repl. Vol. 1960)], making it a felony for any person to receive money for procuring any female for the purpose of causing her to "cohabit" with any male person. The court stated that the word "cohabit" meant the having of illegal sexual intercourse. Clearly, the case is correct, but it is unfortunate that the statute uses the term "cohabit." The case of *Tarr* v. *Tarr* involved Va. Code Ann. §20-94 (Repl. Vol. 1960), which deals with the effect of cohabitation after knowledge of adultery. In this case, the court construed the word "cohabit" to mean copulation. Thus, two prior decisions handed down by the Virginia Supreme Court of Appeals have defined the word "cohabit" as meaning copulation. It would seem that the popular definition had thus been adopted in Virginia.

But in the instant case the court rejected this popular definition of "cohabit." The court, in effect, recognized that the word is not one of certain meaning. The acquired meaning varies necessarily with the connection in which the word is used.

The meaning of "cohabit" must involve copulation in dealing with the felony prohibited in §18.1-206 or the condonation implied in §20-94, since public policy pre-

cludes the giving of relief to persons who have offended either statute. In §18.1-206 of the Virginia Code, the term "cohabit" necessarily means copulation or sexual intercourse since there would be no offense otherwise. Obviously there is no public need to prevent any male and female from residing together if no illicit intercourse is involved. As stated in *Martin* v. *Commonwealth, supra,* "The whole tenor of §18-97 [§18.1-206 (Repl. Vol. 1960), *supra*] is to prohibit illicit and commercial prostitution and procurement." 195 Va. at 1109. *Tarr* v. *Tarr, supra,* ably expressed the policy behind §20-94 when the court there referred to *Herrman* v. *Herrman,* 93 Misc. 315, 156 N.Y.S. 688, 690 (1916) and quoted from that opinion:

> "No one would be heard to contend for a moment that a husband in an action for absolute divorce should be entitled to a decree where it appeared that he admitted having sexual intercourse with his wife after his discovery of her adultery."

The court in *Tarr* v. *Tarr, supra,* continued:

> "It would be shocking to the moral sense for a court of equity to grant a divorce to parties who, during the pendency of the suit, litigated by day and copulated by night." 184 Va. at 448, 449.

There is no such public policy in a statute giving jurisdiction to a court, since the purpose of this statute as stated in *Jennings* v. *McDougle,* 83 W. Va. 186, 98 S. E. 162 (1919), involving a similar West Virginia statute, is

> ". . . to save the plaintiff the embarrassment, annoyance, and expense necessarily incident to the pursuit of a resident defendant, should he or she abandon or desert the other or otherwise disregard the marriage vows or duties and depart from the county where they last cohabited." 98 S. E. at 163.

Therefore, Justice Buchanan, in delivering the opinion of the court, referred to the case of *Richardson* v. *Richardson,* 8 Va. Law Reg., N.S. 257 (1922), decided in the Law and Equity Court of the City of Richmond and accepted the literal definition of "cohabit" as espoused by that court. There, Judge Crump held that cohabitation in its proper meaning in the law of divorce has reference to a continuing condition and not to an act.

The logical and proper result was reached by the court in the principal case when it said:

> "To hold that 'last cohabited' as used in this statute means 'last copulated' would result in giving jurisdiction in any county or corporation where the parties last had sexual relations, regardless of the time or purpose of their being in that place. It is not to be supposed that the legislature intended such result." 204 Va. at 228.

Anticipating the definition which will be given the term "cohabit" in various contexts will be difficult for the Virginia practitioner since the word is so frequently used in the statutes. With reference to jurisdictional statutes it seems safe to assume that the court will follow the definition in the principal case. Although *Colley* v. *Colley* solves the problem in this particular situation, unless the Virginia Legislature chooses to provide definitions in the future, lawyers in Virginia will be faced with the problem that ambiguities always precipitate.

PAUL S. BARBERY AND ROBERT F. BROOKS

PROCEDURE: SERVICE OF PROCESS AT USUAL PLACE OF ABODE—The permanent residence of defendant remains his "usual place of abode" for substituted service of process although defendant has left for a vacation of two months. *Spiegelman* v. *Birch,* 204 Va. 96, 129 S. E. 2d 119 (1963).

The sheriff's return stated that on October 20, 1960, he served a copy of the Motion for Judgment on defendant by posting it at the front door of defendant's "usual place of abode," neither defendant nor a member of his family over sixteen years of age being found there. This return met all the requirements for substituted service as set forth in Va. Code Ann. §8-51 (Repl. Vol. 1957). Defendant proved that he had left Virginia on September 5, 1960, for a vacation in Florida and had not returned to Virginia until November 5, 1960. He argued that during this 60-day period, his Virginia home was not his "usual place of abode" within the meaning of the statute. The Supreme Court of Appeals ruled that since defendant was only temporarily absent from his Virginia residence, it remained his "usual place of abode" during the entire period of his vacation.

This appears to be the first case to reach the Supreme Court of Appeals on the question of whether defendant's home remains his "usual place of abode" while he is temporarily residing elsewhere. Although we now know that two months of temporary residence away from home does not change the status of the home as defendant's "usual place of abode," many questions remain unanswered. For example, how long can defendant remain away from home and continue to be only temporarily absent? Is defendant's temporary residence also his "usual place of abode"? What is defendant's "usual place of abode" if he lives three days a week in one home and four days in another? Where is the "usual place of abode" if defendant is a migratory worker?

Besides *Spiegelman,* there is only one other case inter-

preting Virginia law on this issue. That case, *Earle v. McVeigh,* 91 U. S. 503 (1876), reached the United States Supreme Court on facts similar to those in *Spiegelman* and involved the interpretation of a Virginia statute which was the prototype of the present Section 8-51 of the Virginia Code. In that case a copy of the process was posted at the front door of the house which defendant had abandoned to seek refuge behind the lines of the retreating Confederate Army during the Civil War. Defendant intended to return home only after the cessation of hostilities. The Supreme Court held that defendant's Virginia home was not his "usual place of abode." The Court defined "usual place of abode" as "then present residence."

The decision in *McVeigh* does not seem in conflict with *Spiegelman* as the continuation of the Civil War might have prevented defendant's return to his Virginia home for years. But the *McVeigh* definition of "usual place of abode" does see mto involve a difference in interpretation of the Virginia statute. If the *McVeigh* definition of "then present residence" had been followed in the *Spiegelman* case, defendant's temporary residence in Florida, not his Virginia home, would have been defendant's "usual place of abode."

A survey of cases in other states and in the Federal courts offers little in the determination of a clear-cut definition of the "usual place of abode" when defendant is temporarily residing away from his permanent home. The authorities are in hopeless confusion, but the weight of authority is that the permanent home remains the "usual place of abode." In *Rask* v. *American Federation of Labor,* 263 Minn. 198, 116 N. W. 2d 175 (1962), defendant, who lived in New York, visited his daughter in Minnesota for three months. Defendant did not own any property in Minnesota or conduct any business within the state. He was permanently registered as a voter in New York, had a New York license plate on his automo-

bile, and had his household goods and furniture in New York. The sheriff attempted substituted service upon him in Minnesota by handing a copy of the summons and complaint to his daughter during the period of defendant's visit in her home. The Minnesota Supreme Court held that the defendant's permanent residence in New York remained his "usual place of abode," therefore, service at the daughter's residence was invalid.

The majority rule has also been followed by the federal courts in their interpretation of Rule 4(d)1 of the Federal Rules of Civil Procedure which authorizes substituted service by leaving a copy of the process at defendant's dwelling house or "usual place of abode." Fed. R. Civ. P. 4(d)1. In the case of *First National Bank and Trust Company of Tulsa* v. *Ingerton,* 207 F. 2d 793 (10th Cir. 1953), defendant maintained residence at a hotel in New Mexico. Service of process was attempted upon defendant by leaving a copy of the process with her son at his house in Denver, Colorado, where defendant had been visiting for several months. Defendant kept all her personal effects in the hotel in New Mexico, and left Denver without returning to her son's house on the day attempted service of process was made. The United States Court of Appeals held that service was void because defendant's permanent home, not her temporary residence, was the "usual place of abode" at the time of service.

The minority rule is that the "usual place of abode" means the place where defendant is actually living at time of service. A leading case expressing this view is *State ex. rel. Merritt* v. *Heffernan,* 142 Fla. 496, 195 So. 145, 127 A. L. R. 1263 (1940). Defendant was a resident of Minnesota where he had an office, voted, and paid taxes. He established his family in an apartment at Miami Beach, Florida, for the winter season. He joined them twice during the season, his last visit ending on the very day substituted service of process was made on

him at the Florida apartment. In upholding the validity of the service of process, the Florida Court followed the rule in *Earle* v. *McVeigh, supra,* that "usual place of abode" means "then present residence." In explaining its decision, the court quoted from the earlier New Jersey case of *Eckman* v. *Grear,* 14 N. J. Misc. 807, 187 Atl. 556, 558 (1936):

> ". . . 'usual place of abode' is the place where the defendant is actually living at the time of the service. The word abode means one's fixed place of residence for the time being when the service is made. Thus, if a person have several residences, he must be served at the residence in which he is actually living at the time service is made." 195 So. at 147.

It seems that the courts have accomplished little in trying to distinguish between permanent residence and temporary residence as the "usual place of abode." In most of the cases both residences could logically be treated as the "usual place of abode." The important thing is to determine if defendant had a reasonable opportunity to learn of the service of process. This is to insure that defendant is not deprived of due process of law under the Fourteenth Amendment of the United States Constitution. The requirement for due process is met if the service of process is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. *Milliken* v. *Meyer,* 311 U. S. 457 (1940). If this requirement is met, then the statute should be liberally construed so as to validate service. The Connecticut Supreme Court appears to have adopted this view.

In *Dorus* v. *Lyon,* 92 Conn. 55, 101 Atl. 490 (1917), defendant leased an apartment in New York City but continued to spend three days a week at his mother's home in Connecticut. The Connecticut Supreme Court

indicated that a man may have a "usual place of abode" outside the state and may have one within the state at the same time. In *Clegg* v. *Bishop,* 105 Conn. 564, 136 Atl. 102 (1927), defendant and his wife occupied a house on a Connecticut farm each year from early in April until about Thanksgiving. The wife remained there for the entire period, and he from Saturday afternoon to Monday morning. During the rest of the time defendant lived in New York. The Connecticut Court stated that both the Connecticut and New York residences could be classified as the "usual place of abode."

The Connecticut view does not appear to be unfair to a defendant as he has a reasonable opportunity to learn of the service of process. It will lend more flexibility to court interpretations of the "usual place of abode" and reduce needless searches for technical definitions. Plaintiff will have a better opportunity to get his case before the court to be tried on the merits.

The *Spiegelman* case indicates that Virginia now follows the majority view that one's permanent residence remains his "usual place of abode" though he is temporarily residing elsewhere. But the court did not state, expressly or by implication, that the temporary residence could not also be the "usual place of abode." The Virginia Supreme Court of Appeals, therefore, could follow the liberal Connecticut view and treat both the permanent residence and temporary residence as the "usual place of abode" without overruling *Spiegelman.*

JOSEPH L. LEWIS