

1955

# Howard C. Teague v. District Court of the Third Judicial District in and for Salt Lake County, State of Utah, and Milton C. Brandon : Brief of Defendants

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

HOWARD C. TEAGUE,

*Plaintiff,*

— vs. —

THE DISTRICT COURT OF THE  
THIRD JUDICIAL DISTRICT IN  
AND FOR SALT LAKE COUNTY,  
STATE OF UTAH, and MILTON  
C. BRANDON,

*Defendants.*

**FILED**

JAN 14 1955

Clerk, Supreme Court, Utah

**BRIEF OF DEFENDANTS**

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HOWARD C. TEAGUE,

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— vs. —

THE DISTRICT COURT OF THE  
THIRD JUDICIAL DISTRICT IN  
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C. BRANDON,

*Defendants.*

Case No. 8232

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## BRIEF OF DEFENDANTS

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### STATEMENT OF FACTS

Defendants are able to agree with the facts as stated in plaintiff's brief as far as accuracy of the matters stated is concerned. However, the facts as stated are not complete in all details pertinent, and defendants, therefore, make the following additional statement of pertinent facts.

The record reveals that counsel for defendant Brandon in the Civil Case No. 99973, filed a notice of intention to move for the entry of default. In the notice, it is re-

cited that the Affidavit, Notice, Affidavit of Mailing and Complaint were actually served on the plaintiff, Howard C. Teague, at his address, Route 1, Mooresboro, North Carolina. Exhibit "2" in the same case, reveals that the notice was actually served on the 24th day of October, 1953, the exhibit being a return receipt from the United States Post Office Department.

Exhibit "1" is a photostatic copy of the Motor Vehicle Accident Report showing the result of the investigation by State Highway Patrolman D. C. Jenner. It reveals that the automobile owned by plaintiff and involved in the accident in which defendant Brandon was injured, was a 1948 Mercury Coupe automobile with a 1952 license plate, #571540, from the State of North Carolina. The same accident report reveals that Teague's address was Deseret Chemical Depot. The affidavit of counsel for plaintiff and the testimony of said attorney, reveals that he had no personal knowledge of the intentions or residence of Howard C. Teague (R-14, 21).

Deseret Chemical Depot is a United States military reservation, the address of which is Tooele County, Utah. No evidence was submitted that Teague ever resided at any place other than on the United States military reservation. The affidavit of mailing recites that the last known address of plaintiff Teague was "Sgt. Howard C. Teague, Deseret Chemical Depot, Tooele County, Utah.

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## STATEMENT OF POINTS

### POINT I.

THE RESIDENCE OF A PERSON IS A FACTUAL QUESTION.

### POINT II.

THE DISTRICT COURT'S FINDING THAT TEAGUE WAS A NONRESIDENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

## ARGUMENT

### POINT I.

THE RESIDENCE OF A PERSON IS A FACTUAL QUESTION.

Whether or not a person is a resident or nonresident of the State of Utah is a question of fact which must be decided by the trier of the fact on the evidence which is presented for his consideration. This basic and fundamental proposition seems to be undisputed by the plaintiff and the cases which he cites all are concerned with resolving the basic proposition of whether or not the evidence presented forms a basis for the finding as made.

Examples of this basic consideration are illustrated by plaintiff's brief. The case of *Suit v. Shailer*, 18 Fed. 568, which is cited at pages 7 and 14 of plaintiff's brief, was concerned with an examination of the facts surrounding the establishment of a residence. In examining this

question, the Court states that the facts must be examined to see whether or not the person was in good faith a resident of the State in which he was sued as a nonresident and then stated as follows, page 571:

“\* \* \* Thus, in *Shaeffer v. Gilbert*, *supra*, the Maryland Court of Appeals, in discussing the characteristics of residence for the exercise of political rights, said (page 71 of 73 Md., 20 A. 434, 435): ‘It does not mean, as we have said, one’s permanent place of abode, where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one’s residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as we understand it, *one’s actual home*, in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time.’ The Supreme Court of Massachusetts, by Chief Justice Rugg, in *Jenkins v. North Shore Dye House, Inc.*, 277 Mass. 440, 178 N.E. 644, 646, in defining the term ‘residence’ in a statute requiring registration of motor vehicles, said: “‘Residence’ means in general a personal presence at some place of abode with no present intention of definite and early removal and with a purpose to remain for an undetermined period, not infrequently but not necessarily combined with a design to stay permanently’.”

The courts of California have on several occasions examined questions of residency as far as military personnel are concerned. These California decisions all demonstrate that the primary question is a question of fact to be determined by the trier of the fact on evidence

presented to him. The most recent case which defendants discover is the case of *Briggs v. Superior Court of Alameda County*, 81 Cal. App. 2nd 240, 183 Pac. 2nd 758. In the Briggs case, the nonresident motorist statute was under consideration. The claimed nonresident was a man who had been a member of the naval service but had since been discharged to civilian life. A considerable amount of evidence was presented concerning the intentions and desires of the person it was claimed was a nonresident. The length of time the person stayed within the State of California; the place where he resided; whether or not he registered his car in California; whether or not he moved his wife and furniture to California; and all the other facts surrounding the sojourn in California were discussed. The Court determined that Briggs was a nonresident even though he had established a place of residence and was residing within the State of California at the time of the collision giving rise to the lawsuit against him.

The test used in California is that the residency must be more than just a temporary stay within the State, it must be a stay of an indefinite length with intention to make a home. The *Suit v. Shailer* case cited by plaintiff and many other authorities, including prior California cases, were examined. One of the cases examined in the Briggs case is *Berger v. Superior Court*, 79 Cal. App. 2d 425, 179 Pac. 2nd 600, which sets down the basic rules governing the determination of whether or not a person is a resident. The general principles applicable are set



down with particularity and defendants submit that those principles are applicable to the case at bar. The California Appellate Court stated the principles as follows, page 601:

“Respondent points out that Section 404 does not contain any definition of the term ‘nonresident’ and argues that the general laws of California must be consulted for the purpose of determining whether a person is a resident or nonresident within the meaning of said section. Section 243 and 244 of the Government Code provide as follows:

‘Every person has, in law, a residence.

‘In determining the place of residence the following rules are to be observed:

‘(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.

‘(b) There can only be one residence.

‘(c) A residence can not be lost until another is gained.

\* \* \* \*

‘(g) The residence can be changed only by the union of act and intent.’

“Counsel for respondent argues that a change of residence is obtained by act and intent and that the mere fact that a soldier in the armed forces was stationed at a place and lived there did not establish such place as his residence. He argues further that a soldier has no choice as to his dwelling place and that the fact that he re-

mains in any one place for a considerable length of time is merely a fortuitous circumstance. He cites the case of *Johnston v. Benton*, 73 Cal. App. 565, at page 569, 239 P. 60, at page 62, where the court said:

‘It is well settled that the domicile of a person is in no way affected by his enlistment in the civil, military, or naval service of his country; and he does not thereby abandon or lose his domicile which he had when he entered the service, nor does he acquire one at the place where he serves. 9 R.C.L. 551; *Stewart v. Kyser*, 105 Cal. 459, 39 P. 19; *People ex rel. Budd v. Holden*, 28 Cal. (123) 124; *Estate of Gordon*, 142 Cal. 125, 75 P. 672; *Percy v. Percy*, 188 Cal. (765) 768, 207 P. 369. True, the fact of his being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed (*Percy v. Percy*, *supra*); but the uncontradicted evidence here is that such was not Benton’s desire — that he never had any intention of doing so’.”

The cases cited both by plaintiff and defendant demonstrate beyond refutation that the question of whether or not a person is a resident or nonresident is one of fact to be determined by the trier of the fact based on the evidence submitted. Defendants submit that such is the undisputed law applicable to the case at bar.

## POINT II.

**THE DISTRICT COURT’S FINDING THAT TEAGUE WAS A NONRESIDENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The facts recited by both the brief of plaintiff and the brief of defendant were largely undisputed. It would appear that the following are salient undisputed facts for consideration by this Court.

1. That Howard C. Teague at all times he was present in the State of Utah was a member of the United States Armed Forces.

2. That at all times Howard C. Teague was within the State of Utah, he actually lived on the Deseret Chemical Depot, a military reservation located in Tooele County, Utah.

3. That Howard C. Teague was driving an automobile which he owned and which was registered in the State of North Carolina and carrying North Carolina license plates.

4. That Howard C. Teague returned to the State of North Carolina, his home, and was residing there at the time plaintiff commenced his action in the State of Utah.

5. That there is no evidence that Howard C. Teague ever intended to make the State of Utah his home or to reside within the State of Utah permanently or for any indefinite length of time.

6. That there is no evidence that Howard C. Teague ever lived at any place other than a military reservation under jurisdiction of the United States while present within the State of Utah.

The recited propositions are uncontradicted and are the basis for a finding by the trier of the fact that Howard C. Teague was not a resident of the State of Utah but was, in fact, a nonresident within the meaning of that term as it is used in the Motor Vehicle Code.

The fundamental difference between plaintiff and defendants' concept of the problem confronting this Court involves the significance of actual presence within the boundaries of the State. Under military order, such presence is involuntary and temporary. Defendants submit it is not sufficient to support any inference that the soldier intends to be a resident. It has always been the law that a soldier or sailor does not acquire a new residence merely by being stationed at a particular place. His residence remains the same as when he entered the service unless there is shown a clear and unequivocal intention to change residence. *Isaac Island v. Fireman's Fund Indemnity Company*, 30 Cal. 2nd 541, 184 Pac. 2nd 153, 173 A.L.R. 896; *Commercial Credit Corp. v. Smith*, 187 S.W. 2nd 363, 158 A.L.R. 1474. See also discussion under Point I of *Berger v. Superior Court* (supra) pages 5, 6 and 7.

The proposition of residence of persons in the Armed Forces has been the subject of a lengthy and exhaustive annotation which is contained in 148 A.L.R. commencing at page 1413. All of the cases cited in the annotation seem to agree on one basic and fundamental proposition. It is that the mere presence of a soldier or sailor within the State on a military reservation is not evidence of inten-

tion to change his residence from the place of induction to the place where he is stationed on military duty. There must be shown an unequivocal and clear intention that a change of residence occur. In the absence of the showing of a clear and unequivocal intention, the residence of the soldier or sailor remains the residence which he had at the commencement of his military duty.

Applying these principles to the undisputed facts recited, it appears that there is no showing of any intention on the part of plaintiff Teague to change his residence from the State of North Carolina to the State of Utah. The evidence is to the contrary and shows a clear and unequivocal intention not to change his residence. Teague had his automobile registered within the State of North Carolina and it was so registered at the time of the accident injuring defendant Brandon. He returned to the State of North Carolina where he was actually served with the papers required to perfect service on nonresidents. The facts are amply sufficient to provide a basis for the finding by the Court that Howard C. Teague was a nonresident of the State of Utah on August 4, 1952 and that the statutes of the State of Utah permitting the service on Teague by service on the Secretary of State were applicable.

Plaintiff cites and relies heavily on the case of *Booth v. Crockett, District Judge*, 110 Utah 336, 173 Pac. 2nd 647, and submits that this Court's determination of the meaning of the words "usual place of abode" and "resi-

dence" should be the same. He requests the Court to decide that a person in the Armed Services stationed within the State of Utah automatically is a resident of the State of Utah. This proposition defendants submit is palpably fallacious. In the Booth decision, this Court adopted the meaning of "place of abode" which had been attributed to those words by the Supreme Court of New Jersey. In its decision, the Court cites *Grant v. Lawrence*, 37 Utah 450, 108 Pac. 931, 933. The language there quoted was from the New Jersey case of *Mygatt v. Coe*, 63 N.J.L. 510, 512, 44 A. 198. The Booth decision also recites and quotes the later case of *Kurilla v. Roth*, 132 N.J.L. 213, 38 A. 2nd 862. The definition which had been set forth for "place of abode" in New Jersey was much more restrictive than is used for the definition of the word "residence." The cases in New Jersey and *Booth v. Crockett*, all say that "place of abode" means the place where the person is actually living and abiding at the time service is attempted. The residence need not be the place where the person is actually residing and abiding and may, in fact, be some other place than the place the person is actually located. The restrictive meaning of the phrase "place of abode" is unmistakably set forth in this Court's decision in *Booth v. Crockett*. The language is as follows, page 649:

"The Statute does not direct service to be made, at the 'residence' of the defendant, but at his dwelling house or usual place of abode, which is a much more restricted term. As was said in *Stout v. Leonard*, 37 N.J.L. 492, many persons

have several residences, which they permanently maintain, occupying one at one period of the year and one at another period. Where such conditions exist, a summons must be serve *at the dwelling house in which the defendant is living at the time when service is made.*'

"That is, where a person abides—lives—at the particular time when the summons is served, constitutes his usual place of abode. A similar question was before the Supreme Court of the United States in *Earle v. McVeigh*, 91 U.S. (503) at page 508, 23 L. Ed. 398, where it is held that, where service of summons is required to be made at the 'usual place of abode' such service, in order to constitute legal service, must be made at the defendant's 'then present residence.' *In other words, at the place where the defendant then lives or abides.*' (Italics ours)

"(1) We think the interpretation given the phrase 'usual place of abode' in *Grant v. Lawrence*, supra, is correct. We must assume the legislature used the phrase advisedly. Had it meant 'residence' or 'domicile' it would have used one of those terms as it must have been well aware of the meanings which the courts have given those words. The usual place of abode of a person is where he usually lives or abides.

"Under the rule of *Grant v. Lawrence*, supra, the question in this case becomes: Was Frank Fairbanks *living* at his parents' home on December 13, 1945, when the copy of the summons was left there?

“Frank joined the navy and eight days before the copy of the summons was left at the Fairbanks home departed from this state to start training at a navy base in California. Before entering the navy and departing for duty, his ordinary activities of living were centered around and focused at his parents’ home. He usually ate and slept there. He returned to his parents’ home after short trips. His clothes and personal belongings were there and he was tied to that home by ties of blood and affection. He was ordinarily physically present at the place or was expected there in a short time. In short, Frank was living at the Fairbanks home prior to his departure for navy service.”

Defendants submit that this Court should not decide that the mere length of time which the person may actually be within the State should be the criterion of whether or not he is a resident or nonresident. For the Court to make such a decision, the defendants submit would require every case to be decided on whether or not the claimed nonresident stayed within the State a sufficient number of days to cast doubt on the efficacy of service under our Motor Vehicle Code provision. The facts of this case demonstrate the dangers of such an interpretation. A person with the proper intent and actually living within the State of Utah could establish his residence here by a very short stay, while a person



without the proper intent could be present for years and remain a nonresident during the whole period that he stayed within the State of Utah.

All of the cases seem to adopt the proper test, which is: Did the person who is claimed to be a resident actually intend to make the State of Utah his home? When applying this test to the facts on which Judge Van Cott made his decision, it is submitted that there can be only one lawful determination. It is that the evidence supports the trial court's determination that Howard C. Teague was a nonresident of the State of Utah on the 4th day of August, 1952, at the time of the accident in which Brandon was injured. It is further submitted that there is no evidence, either substantial or otherwise, which would support a finding that Teague was a resident of the State of Utah and intended to make his home here on August 4, 1952.

## CONCLUSION

Defendants submit that the determination of residency or nonresidency is a question of fact and that the trial court properly determined that Howard C. Teague was a nonresident on August 4, 1952. This determination is supported by substantial evidence and therefor this

Court should dismiss the complaint of the plaintiff filed in the above entitled Court and should determine that the District Court of the Third Judicial District in and for Salt Lake County had jurisdiction over plaintiff, Howard C. Teague, and that Case No. 99973 may be pursued to its ultimate determination.

Respectfully submitted,

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