

1944

# The Industrial Commission of Utah v. Kemmerer Coal Company : Abstract of Record

Utah Supreme Court

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Grover A. Giles; Attorney General; Zar E. Hayes; Assistant Attorney General; A. U. Miner; Assistant Attorney General; Attorneys for Plaintiff;

Marlon E. Wilson; Attorney for Defendant;

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# In the Supreme Court of the State of Utah

THE INDUSTRIAL COMMISSION  
OF UTAH,

*Plaintiff,*

vs.

KEMMERER COAL COMPANY,  
a corporation,

*Defendant.*

Case  
No. 6650

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## ABSTRACT OF RECORD

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GROVER A. GILES,  
Attorney General,

ZAR E. HAYES,  
Assistant Attorney General,

A. U. MINER,  
Assistant Attorney General,  
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MAHLON E. WILSON,  
*Attorney for Defendant.*

FILED

ARROW PRESS, SALT LAKE

FEB 4 1944

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**Supreme Court of the State of Utah**

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THE INDUSTRIAL COMMISSION  
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**ABSTRACT OF RECORD**

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**PETITION FOR WRIT OF MANDATE**

The petition of the plaintiff above named represents and shows as follows:

(1) That Eldred M. Royle, Otto A. Wiesley, and Richard H. Dalrymple are the duly appointed, qualified and acting members of the Industrial Commission of the State of Utah.

(2) That the defendant is a non-resident corporation doing business in the State of Utah having offices in Salt Lake City, Salt Lake County, State of Utah.

(3) That the defendant at all times hereinafter mentioned was and now is engaged in and carries on and conducts a business of selling and marketing coal and dealing generally in coal and coal products in the State of Utah.

(4) That the defendant regularly employs in its said coal business in the State of Utah three or more employees.

(5) That on the fifteenth day of January, 1943, the Industrial Commission of Utah issued an order in words and figures as follows, to wit:

#### “ O R D E R

An investigation has been conducted by the staff of the Industrial Commission of Utah, and they have determined that during the first three quarters of the calendar year 1942, the Kemmerer Coal Company of Frontier, Wyoming, maintained a sales office in Salt Lake City in the Boston Building and employed during this period the following residents of Salt Lake City:

T. J. O'Brien, President  
R. A. Davis, Division Sales Manager  
George F. Eble, Traveling Sales Agent  
L. M. Pratt, Jr., Traveling Sales Agent

This indicates that the company has in service three or more workmen and in accordance with Sections 42-1-40 (2) and 42-1-44, is required to secure payment of compensation to these employees.

NOW, THEREFORE, IT IS ORDERED, that the Kemmerer Coal Company, with general offices at Frontier, Wyoming, secure the necessary coverage as provided by our law within fifteen days from date of this Order.

(SEAL)

Passed by the Industrial

Commission of Utah

Salt Lake City, Utah,

January 15, 1943

E. M. ROYLE,

Chairman

ATTEST: A. S. Frederickson

OTTO A. WIESLEY,

Commission Secretary

Commissioner

Motion No. 14453

FRANK A. JUGLER,

Resolution No.....

Commissioner"

That a copy of said order was served upon the defendant on said fifteenth day of January, 1943.

(6) That notwithstanding said order of the Industrial Commission, the defendant has failed, neglected, and refused, and still fails, neglects, and refuses to secure payment of compensation for industrial accidents which might result to its employees employed in the State of Utah in any of the ways provided for and required by the provisions of Section 42-1-44, Utah Code Annotated, 1943.

(7) That plaintiff has no speedy or adequate remedy at law to compel the defendant to secure payment of the compensation for industrial accidents for its employees in the manner required by the statutes of the State of Utah as aforesaid.

WHEREFORE, plaintiff prays that an alternative writ of mandate issue to the said defendant and that the said

Kemmerer Coal Company be commanded, upon the receipt of said writ, to secure payment of compensation for industrial accidents for its employees in the State of Utah, either (1) by insuring, and keeping insured, the payment of such compensation with the State Insurance Fund of the State of Utah, or (2) by insuring, and keeping insured, the payment of such compensation with a stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the State of Utah, or (3) by furnishing annually to the commission satisfactory proof of financial ability to pay direct compensation in the amount, in the manner, and when due as provided for in Title 42, Utah Code Annotated, 1943, all as required by Section 42-1-44, Utah Code Annotated, 1943, or to show cause before the Supreme Court of the State of Utah, at a time and place specified by said court, why said defendant has not done so.

## INDUSTRIAL COMMISSION OF UTAH

By OTTO A. WIESLEY,

Commissioner,

*Plaintiff*

GROVER A. GILES,

Attorney General

ZAR E. HAYES,

Assistant Attorney General

A. U. MINER,

Assistant Attorney General

*Attorneys for Plaintiff*

STATE OF UTAH }  
 County of Salt Lake } ss.

I, Otto A. Wiesley, being first duly sworn upon oath depose and say: That I am a duly appointed qualified and acting Industrial Commissioner of the State of Utah; that I have read the foregoing Petition for Writ of Mandate and know the contents thereof and that the same are true of my own knowledge except as to matters therein stated on information and belief and as to those matters, I believe it to be true.

OTTO A. WIESLEY

Subscribed and sworn to before me this 10th day of August, 1943.

ZAR E. HAYES

Notary Public

Residing at:

My Commission Expires:

Feb. 8, 1947

Filed in Supreme Court Sept. 8, 1943

No. 6650

[TITLE OF COURT AND CAUSE.]

### ALTERNATIVE WRIT OF MANDATE

The plaintiff above named having filed its petition in the above entitled court and it having been made to appear that the defendant, the Kemmerer Coal Company, a corporation, is engaged in the State of Utah in the business

of selling and dealing generally in coal and coal products and regularly employing in said business in the State of Utah three or more persons; and that said defendant has failed and refused and still fails and refuses to secure payment of compensation for industrial accidents which might occur to its employees in the State of Utah in one of the ways provided for by the provisions of Section 42-1-44, Utah Code Annotated, 1943, notwithstanding the fact that plaintiff has ordered and demanded that defendant comply with the law in this respect;

NOW THEREFORE, you, the defendant above named, the Kemmerer Coal Company, a corporation, are hereby commanded upon the service of this writ upon you to secure payment of compensation for industrial accidents for your employees (1) by insuring, and keeping insured, the payment of such compensation with the State Insurance Fund of the State of Utah, or (2) by insuring, and keeping insured, the payment of such compensation with a stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state, or (3) by furnishing annually to the Industrial Commission of Utah satisfactory proof of financial ability to pay direct compensation in the amount, in the manner, and when due as provided for in Title 42 Utah Code Annotated, 1943, all as provided and required by Section 42-1-44, Utah Code Annotated, 1943; or that you appear before the Supreme Court of the State of Utah in the Capitol Building in Salt Lake City, Salt Lake County, State of Utah, at 10:00 o'clock A.M. on the 30th day of December, 1943, and show cause why you have not done so.



WITNESS The Honorable Supreme Court of the State of Utah and the Justices thereof this 15th day of November, 1943.

L. M. CUMMINGS,

Clerk of the Supreme Court of Utah

(SEAL)

**RETURN ON ALTERNATIVE WRIT OF MANDATE  
SERVED ON KEMMERER COAL COMPANY**

STATE OF UTAH  
COUNTY OF SALT LAKE } ss.

I hereby certify and return that I received the within and hereto annexed Alternative Writ of Mandate on the 21st day of December, 1943; that I was unable to find the President, or other officer, of the defendant, Kemmerer Coal Company, a foreign corporation, or any person designated by such corporation as one upon whom process might be served in the State of Utah; that I served said Alternative writ of Mandate upon said defendant, Kemmerer Coal Company by delivering to and leaving with L. M. Pratt, Jr., Salesman, the person in charge of the office of said Defendant corporation at 411-412 Boston Building, Salt Lake City, Salt Lake County, State of Utah, a true and correct copy of said Alternative Writ of Mandate at Salt Lake City, Salt Lake County, State of Utah on the 22nd day of December, 1943.

I further certify that at the time of such service, on the copy of the Alternative Writ of Mandate so served, I endorsed the date and place of service and added my name and official title thereto.

Dated at Salt Lake City, Utah, this 22nd day of December, 1943.

S. GRANT YOUNG,  
Sheriff of Salt Lake County, State of Utah  
By (signed) Dominick Burns,  
Deputy

Filed in Supreme Court Dec. 23, 1943

No. 6650

[TITLE OF COURT AND CAUSE.]

### MOTION TO QUASH SERVICE

Now comes the above named defendant Kemmerer Coal Company, and not intending to enter its appearance, but on the contrary specially appearing for the purpose of this motion, and for no other purpose, and not in any way acceding or consenting to the jurisdiction of this court except so far as may be necessary for the purposes of this motion, and moves this Court to quash, set aside, vacate and hold for naught the pretended service of the alternative writ of mandate issued by this Court on the 15th day of November, A. D., 1943, upon the grounds and for the reasons following, to wit:

1. That L. M. Pratt, Jr., the person to whom a copy of said writ was delivered on the 22nd day of December, A. D., 1943, was not a person authorized to receive service of process on the defendant company, or a person upon whom service of process could lawfully be made.
2. That at the time said service of said writ was attempted the defendant company, a Wyoming corporation,

was not engaged in doing business in the State of Utah, and that said defendant has not been engaged in doing business in the State of Utah at any time since the defendant corporation was organized under the laws of the State of Wyoming in the year 1897.

3. That at the time of said alleged service of the said alternative writ the defendant corporation did not have, nor advertise as having, nor hold itself out as having, any office or place of business in the State of Utah; that at no time since its organization as a corporation in the year 1897 under the laws of the State of Wyoming has the defendant ever had any office or place of business in the State of Utah; nor has the defendant at any time engaged in, carried on or conducted the business of selling and marketing coal or dealing in coal or any coal products in the State of Utah, but that whatever coal or coal products or commodities the defendant has produced or sold for consumption in the State of Utah have been sold and produced in the State of Wyoming and not in the State of Utah or in any other state.

4. That the said L. M. Pratt, Jr., to whom a copy of the said alternative writ was delivered, was not doing any business of the defendant in the State of Utah, and has not been doing any business of the defendant in the State of Utah; nor is he in charge of any office or place of business of the defendant in the State of Utah; that neither the said L. M. Pratt, Jr., nor any person has any office of the defendant or place of business of the defendant in the State of Utah; nor has he had at any time since the

defendant corporation was organized under the laws of the State of Wyoming in the year 1897.

5. That the defendant corporation is now, and ever since the year 1897 has been, a corporation organized and existing under the laws of the State of Wyoming; that in said State of Wyoming it owns one or more mines, and has owned the same ever since its organization, and that it now produces, and ever since its organization has produced, coal from said mines situated in the vicinity of Kemmerer and Frontier, in the State of Wyoming; that from said mines it has produced coal, and is now engaged in the business of selling coal in the State of Wyoming for consumption in that State and in other States; that by contracts made in the State of Wyoming it has sold coal to various consumers situated in fourteen states between the Pacific Coast on the west and the States of Iowa and Minnesota on the east; that less than one-half of one per cent. of the coal produced by the defendant corporation in the last fifteen years has ever at any time during said years been moved into or been consumed within the State of Utah; that whatever coal produced by the defendant in Wyoming at its mines that has been used or consumed in the State of Utah has been trifling in amount as compared with the amount of coal produced by the defendant, and there has been no continuous flow of the product of the defendant into the State of Utah; that for the last fifteen years next preceding the date of this motion the defendant has produced at its mines approximately 400,000 tons of coal per annum, and of that coal there have been shipped into the State of Utah not to exceed 20,000 tons of coal, or less than 1500 tons per

year, and these movements of coal from the mines of the defendant in Wyoming into the State of Utah have been made only when there was some temporary or exceptional need for coal in said State of Utah.

6. That at no time since the defendant's organization in 1897 has it had any other place of business than that situated at Kemmerer, Lincoln County, Wyoming; that under its corporate charter or articles of incorporation the defendant is required to carry on its business in Kemmerer, Lincoln County, Wyoming, and at such other places in the State of Wyoming as its trustees or directors shall designate; that under said charter or articles of incorporation the defendant is restricted from carrying on or conducting the business of said corporation at or in any other state than in the State of Wyoming; that the officials of the defendant corporation have no power to establish any place of business for said corporation, or carry on any business of said corporation, at any time or in any other state than the State of Wyoming; that the sixth article of its articles of incorporation reads as follows:

"Sixth: The principle place of business of said corporation shall be at Kemmerer, Uinta County, Wyoming, and the business of said corporation shall be carried on in Uinta County and at such other places in the State of Wyoming as the trustees shall designate."

that since the organization of the defendant corporation said Uinta County was by the laws of the State of Wyoming subdivided and Lincoln County, Wyoming, was created; that Kemmerer and what is called "Frontier" are one and

the same and are, and for many years have been, situated in Lincoln County, Wyoming; that said article immediately herinbefore set forth has been at all times since the organization of the defendant in the year 1897, and is now, in full force and effect.

7. That the defendant corporation does not now employ, and never has at any time employed, in its coal business in the State of Utah three or more or any employees; that whatever employment the defendant gives either to T. J. O'Brien, R. A. Davis, George F. Eble and L. M. Pratt, Jr., the persons named in the petition for the alternative writ filed herein, is under and pursuant to contracts made at its principal place of business in Frontier, at or near Kemmerer, Wyoming; that these four men have been in the service of the defendant corporation for a number of years last past; that their contracts of employment were made between the defendant corporation and each of said persons at said principal place of business of the defendant corporation in the State of Wyoming and not elsewhere; that each of said men has been engaged during his employment with the defendant in assisting the solicitation of orders from consumers of coal or persons dealing in coal, whereby such persons ultimately purchase coal from the defendant; that all contracts for the sale or purchase of coal are made at the principal place of business of the defendant in Wyoming and not elsewhere; that from time to time when the business conditions justify it, these men, with the exception of T. J. O'Brien, solicit orders from those who consume or deal in coal throughout the States of Idaho, Washington, Oregon, California, Nevada and



Montana; that each of these men now resides, and for some-time has resided, in the State of Utah, not because Utah is any market place for the defendant's coal, but rather because it is more convenient and agreeable to those men herein named to live in Salt Lake City, Utah, and work out to other states from said city; that T. J. O'Brien named in the petition for alternative writ has resided in Salt Lake City for over thirty years last past; that for a number of years he has directed and still directs the persons named herein as solicitors for orders to purchase coal from the defendant corporation; that on account of the death of two former presidents of the defendant corporation, the said T. J. O'Brien, on October 27, 1933, became president of the defendant corporation, and ever since said date he has been and is now president of said corporation; that his residence in Salt Lake City, Utah, has nothing whatsoever to do with his acquisition of said office or his holding of the same; that all of his official duties as president are performed in the State of Wyoming and not elsewhere.

8. That the return of service of the alternative writ made upon L. M. Pratt, Jr., on the 22nd day of December, A. D., 1943, and filed in this action, is void and insufficient under the laws of the State of Utah and under the Constitution and laws of the United States, and is an unlawful attempt on the part of the plaintiff to bring the corporate defendant into the State of Utah when, as a matter of fact, said corporate defendant has never been present in said state.

9. That if the statutes of the State of Utah are construed so as to permit a service upon the defendant com-

pany by delivering a copy of the alternative writ of mandate, as is recited in said return, to a mere solicitor of orders such as L. M. Pratt, Jr., then such statutes so construed are repugnant to and in violation of (a) Section 8 of Article I of the Constitution of the United States of America, which provides that the Federal Congress shall have power to regulate commerce among the several states, because such statutes so construed impose a serious, unreasonable and unlawful burden upon interstate commerce; and (b) such statutes so construed are repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States, in that such statutes of Utah so construed deny to the defendant the equal protection of the laws; and (c) such statutes of Utah so construed are repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States of America in that such statutes so construed abridge the privileges and immunities of the defendant and deprive said defendant of liberty and property without due process of law.

And now, for the reasons hereinbefore set forth in this motion, the corporate defendant prays that this Court shall vacate and hold the pretended service alleged to have been made on the 22nd day of December, A. D., 1943, of the alternative writ for naught, and prays the judgment of this Court whether it shall be compelled to appear herein or plead to the petition for writ of mandate filed herein, because of the many defects in said alternative writ and the return as above set forth, by reason of which no legal service has been made on the defendant company; nor has



the defendant accepted service herein; nor has it appeared herein; nor has it waived service of process upon it.

This motion is based upon the records, minutes and files of this proceeding, and upon the affidavit of L. M. Pratt, Jr., hereto attached and made a part hereof, and the affidavit of R. A. Davis, dated the 2nd day of December, A. D., 1943, and served and filed as a apart of and in support of the defendant's motion to quash the alternative writ, a copy of which was delivered to R. A. Davis on November 17, 1943.

MAHLON E. WILSON,

Attorney for Defendant, specially  
appearing for the purpose of this  
motion.

### CERTIFICATE OF COUNSEL

And now comes Mahlon E. Wilson, and hereby certifies that he has prepared and read the foregoing motion made for the purposes therein set forth, and that said motion is in his opinion well founded in law and fact; that said motion is filed in good faith and not for the purpose of in any wise delaying or impeding the prosecution of this proceeding.

MAHLON E. WILSON.

Received copy of the foregoing Motion, together with

the Affidavit of L. M. Pratt, Jr., thereto attached on this 29 day of December, A. D., 1943.

GROVER A. GILES,  
Attorney General,

ZAR E. HAYES,  
Attorneys for Plaintiff.

Filed in Supreme Court Dec. 29, 1943.

[TITLE OF COURT AND CAUSE.]

# **AFFIDAVIT OF L. M. PRATT, JR., IN SUPPORT OF MOTION**

STATE OF UTAH,  
COUNTY OF SALT LAKE, } ss.

L. M. PRATT, JR., being first duly sworn, deposes and says that he is now, and ever since the year 1941 has been, a resident and citizen of Salt Lake City, Salt Lake County, State of Utah, and that he makes this affidavit for the purpose of supporting the defendant's motion to quash the alternative writ of mandate (2d) issued in said proceeding, a copy of which said alternative writ of mandate (2d)

was delivered to him on the 22nd day of December, A. D., 1943, and for said purpose the said affiant says:

1. That at the time of the commencement of the above entitled action, and at the time a copy of said alternative writ of mandate (2d) was delivered to him, the affiant, to-wit: on the 22nd day of December, 1943, the above named defendant was, and ever since the year 1897 has been, a corporation organized and existing under and by virtue of the laws of the State of Wyoming; that it was organized under the laws of that state on the 11th day of August, A. D., 1897; that ever since its organization it has been and is now a resident and citizen of the State of Wyoming.

2. That by the provisions of its charter and articles of incorporation its principal place of business was and has been at all times established at Kemmerer, Lincoln County, Wyoming; that in its said articles it was and is provided as follows:

“Sixth: The principal place of business of said corporation shall be at Kemmerer, Uinta County, Wyoming, and the business of said corporation shall be carried on in Uinta County and at such other places in the State of Wyoming as the trustees shall designate.”

that after the organization of the defendant company that portion of Uinta County in which Kemmerer was and is situated was by law made into and became and now is the County of Lincoln, State of Wyoming; that Kemmerer and

Frontier, Wyoming, are both in said County of Lincoln, and Frontier is for all practical purposes a part of the Town of Kemmerer, Wyoming; that said trustees of the defendant corporation, commonly called "directors," have never at any time designated any other place for the carrying on of the business of the defendant than that of Kemmerer, Lincoln County, Wyoming; that the defendant corporation has never had any other place of business than that designated in its articles, to-wit: Kemmerer, Lincoln County, Wyoming.

3. That at all times herein mentioned, and since its organization and now, the defendant corporation has been engaged in the mining of coal for commercial purposes; that said mining has been carried on, and is still carried on, exclusively in the State of Wyoming; that none of its mining operations have ever been carried on in the State of Utah; that said corporation never has owned, controlled or operated in any manner or at all any mine or mines within the State of Utah; that said defendant is not now engaged, and never was engaged, in the business of selling and marketing coal in the State of Utah, or in dealing in coal generally or specifically in the State of Utah; nor has it engaged in the business of producing, selling or marketing any coal products in the State of Utah; that all of the coal or commodities that it has ever produced since its organization have been produced from mines located and situated in the State of Wyoming; that this coal which it has produced in the State of Wyoming has been sold to purchasers, and those purchasers have from time to time consumed said coal in Wyoming and in other states than the State of Wyo-

ming; that only a small amount of coal produced by the defendant in the State of Wyoming has ever been used or consumed in the State of Utah, and then only at irregular intervals, when for some reason the coal produced in Utah was not readily available; that except as herein specially stated the corporate defendant has never owned, and does not now own, any property in the State of Utah, but, on the contrary, all of its property, real, personal, tangible and intangible, and all of its money, is situated, kept and deposited within the State of Wyoming; that it has not any bank account or any deposits in the State of Utah and never has had such bank accounts or deposits within said state.

4. That on the 22nd day of December, A. D., 1943, the said affiant was in the service of the defendant company and was designated as a "salesman" under and pursuant to a contract of employment made between him and the defendant corporation at the home office of said company in Lincoln County, Wyoming; that this contract of employment between the defendant and affiant was entered into as early as the year 1922, and, with some variations and a few years interruption, has continued ever since and now continues; that for a number of years affiant worked in the corporate office of the defendant at Kemmerer or Frontier, Wyoming; that for about six years next before the making of this affidavit the affiant has been soliciting orders for the sale of coal by the defendant to consumers in the State of Idaho and sometimes in the State of Wyoming; that it is not part of affiant's duty to solicit orders for the sale of coal to persons residing in the State of Utah; that affiant is paid from month to month and time

to time by the defendant for the service that he renders by company checks issued from the home office of the corporate defendant situated in Lincoln County, Wyoming; that from time to time as occasion may require said affiant goes about the various places situated in the States of Wyoming and Idaho where it is likely that customers seeking to purchase coal from the defendant corporation may be obtained; that from time to time as occasion may require said affiant goes to the principal place of business of the defendant in Lincoln County, Wyoming, and receives instructions concerning his work in obtaining orders for the purchase of coal; that at other times affiant receives instruction either by telephone or by mail, and from time to time receives instruction from R. A. Davis, Division Soliciting Sales Manager of the corporate defendant, with jurisdiction west of Laramie, Wyoming; that affiant has been and is now employed for the purpose of soliciting orders from various persons for the purchase of coal and for the purpose of undertaking to induce such persons to purchase coal from the defendant; that affiant's work has been confined, as aforesaid, to the States of Wyoming and Idaho; that affiant has no superintendence or control over any other person, but works under the immediate direction of the said R. A. Davis; that whenever affiant has obtained an order from anyone who desired to purchase coal from the corporate defendant, said order has been delivered either personally to the principal office of the defendant in Lincoln County, Wyoming, or has been mailed to said office; that neither the said affiant nor George F. Eble nor S. D. Atkin, who resides at Walla Walla, Washington,

nor R. A. Davis now has or ever had any authority whatsoever to enter into contracts for and in behalf of the defendant company; that affiant's only power and authority, and the only power and authority of said George F. Eble, S. D. Atkin or R. A. Davis was and is now to obtain orders and to influence prospective customers to patronize the defendant coal company by buying coal therefrom; that all orders obtained either by the affiant or by any of his associates were obtained with the understanding that said orders were to be sent to the home office of the company in Lincoln County, Wyoming, and there to be accepted or rejected by the defendant company as it might determine; that such has been the uniform practice of affiant and his associates throughout their entire service for the defendant company; that neither said affiant nor any of his associates named herein has or had any other power or authority or any other connection with the defendant company; that the said affiant and each of his associates were entirely without power or authority to make any contract, express or implied, for the sale of any coal either in the State of Utah or in any other state; that affiant has no authority of any kind or character except to solicit orders as herein stated; that neither affiant nor any of his associates have had or now have any power or authority to make any kind of a contract, express or implied, oral or written, that would bind the defendant company; that the authority of this affiant, and the authority of his associates, has been limited strictly to securing and conveying the orders which he or they might secure for the purchase of said coal to the home office of the defendant company; that said affiant and each



of his associates named in the petition for the alternative writ have been paid for their services by checks issued by the corporate defendant at its home office in Lincoln County, Wyoming; that neither said affiant nor any of his associates has ever been designated by the company as one upon whom summons or other legal process may be served; and the said affiant has no power or authority to accept or receive service of any process for the defendant company; that said defendant has never filed its articles of incorporation in any office in the State of Utah, and has never in any manner complied, or attempted to comply, with the laws of the State of Utah relative to foreign corporations doing business within said state; that said defendant corporation is not now, and never has been, present in the State of Utah; that T. J. O'Brien named in the petition for the alternative writ was for many years prior to October 27, 1933, the general director of solicitors for orders in the State of Utah; that he, the said T. J. O'Brien, has until recently directed the affiant and his associates as occasion may require; that neither T. J. O'Brien nor affiant nor any of affiant's associates have made or now make any contracts, so far as affiant knows, in the State of Utah; that for some months past the said T. J. O'Brien has been seriously ill and is now unable to perform any of his usual duties or to make any affidavit concerning the matters and things herein stated.

5. That at the time of the organization of the defendant company under the laws of the State of Wyoming in the year 1897, M. S. Kemmerer of Mauch Chunk, in the State of Pennsylvania, was president of the defendant company,



and so continued in said office until his death October 7, 1924; that from said last named date until his death on November 17, 1930, Patrick J. Quealy of Kemmerer, Wyoming, was president of said company; that from March 15, 1931, to October 27, 1933, John L. Kemmerer of Short Hills, New Jersey, was president of said company; that on account of his personal desires the said John L. Kemmerer resigned on October 27, 1933, and at that time it was so arranged that T. J. O'Brien of Salt Lake City, Utah, became president of said defendant company; that he, the said T. J. O'Brien, is now president of said defendant company; that said T. J. O'Brien resides at the Alta Club in Salt Lake City, Utah, where he has resided for many years, both prior to and since he became president of the defendant company; that outside of performing his official duties as president, which duties he performs entirely in the State of Wyoming, his duties as general director of solicitors seeking to obtain orders for coal for the defendant company have not changed; that none of said men, so far as this affiant is informed and believes, were chosen for the office of president because of their residence, and their places of residence have not in any wise affected the performance of their corporate official duties to the defendant corporation; that all of said official duties have been performed in the State of Wyoming, and none have ever been performed in the State of Utah; that this paragraph of this affidavit has been made upon the information obtained by said affiant by thorough investigation, and he hereby deposes and says that he believes said information to be true and accurate.

6. That to facilitate the securing of orders for the

purchase of coal, and to aid the work of influencing persons to buy coal and extend their patronage to the defendant, the defendant company has supplied R. A. Davis and his predecessors and associates, including this affiant, at its own expense, with desks and other incidental furniture, and has caused the same to be located in a certain room situated at 412 Boston Building, Salt Lake City, Salt Lake County, Utah; that said desks and furniture supplied by the defendant company as aforesaid, and situated as aforesaid, have been used by the said R. A. Davis and his assistants, including this affiant, in the interests of the defendant company for the exclusive purpose of aiding the work of securing and transmitting orders for the purchase of coal to the home office of the defendant company as aforesaid; that to facilitate the securing of said orders, and for the purpose of furnishing the said R. A. Davis and his assistants and associates, including this affiant, with a place where they might carry on their correspondence, the corporate defendant has paid the rent for said room by check transmitted from its home office situated in Lincoln County, Wyoming; that said corporate defendant has permitted the said R. A. Davis and his associates to place certain signs containing the name of the defendant corporation on the door of the room situated at 412 Boston Building, Salt Lake City, Utah; that this room, 412 Boston Building, Salt Lake City, Utah, has, according to affiant's information and belief, been maintained by the defendant corporation ever since the year 1918; that said room is from time to time occupied by T. J. O'Brien, George F. Eble, L. M. Pratt, Jr., and R. A. Davis; that whatever rent is paid and

whatever incidental expenses are incurred in maintaining said room is paid by the defendant company by checks sent from its principal place of business situated in Lincoln County, Wyoming; that there is and has been located in said room a telephone, and the corporate defendant's name has been listed in the telephone directory of the Telephone Company; that the name of the corporate defendant has been inserted and is now contained in the Salt Lake City directory, advertising the fact that the Kemmerer Coal Company and another company produce coal at their mines situated in the State of Wyoming, and that they maintain offices at 411-412 Boston Building, Salt Lake City, Utah; that said offices are maintained for the purpose of facilitating the obtaining of orders throughout the western states and for no other purpose; that said room at 412 Boston Building, Salt Lake City, Utah, is not maintained for the purpose of doing any of the defendant's corporate business in the State of Utah, but is maintained to make it convenient to affiant and his associates in doing their work of soliciting orders and in keeping in touch with the markets for coal, and in ascertaining the changing methods of doing business and ways and means to meet the competition that exists in the coal business; that by having this room for affiant and his associates, said affiant and said associates can more conveniently reach the prospective customers of the corporate defendant who reside in states west and northwest of Utah; that by communicating with the home office in Lincoln County, Wyoming, by mail or by telephone, affiant and his associates, with great frequency, avoid the necessity of traveling a distance of more than

200 miles; that the corporate defendant has maintained for its solicitors of orders an office at Grand Island, Nebraska, and one at Walla Walla, Washington, similar to that maintained in Salt Lake City, Utah; that these three offices, one situated at 412 Boston Building, Salt Lake City, Utah, and the others in the State of Nebraska, and the State of Washington, are each and all maintained for the exclusive purpose, and for no other purpose, of obtaining orders for the purchase of coal to be delivered to the defendant at its home office as herein stated.

7. That ever since its organization the defendant has done an extensive business in mining coal in the State of Wyoming; that within the fifteen years next preceding the date of this affidavit, the corporate defendant has produced approximately 6,000,000 tons of coal, or approximately 400,000 tons per year for the last fifteen years; that all of that coal has been sold by the defendant company from its principal office, and its only corporate office, situated in Lincoln County, Wyoming; that orders have been obtained by affiant and his associates and assistants from customers residing in fourteen different states,—Iowa and Minnesota being the eastern boundaries of its customers and the Pacific Coast the western boundary; and the defendant has sent or had solicitors for orders from time to time seeking to influence persons to buy coal from the defendant in each of those fourteen states.

8. That on account of the peculiarities of railroad freight rates and the fact that such rates between Kemmerer, Wyoming, and Utah points for the last fifteen years

have been substantially twenty-five cents per ton higher on Wyoming coal than on Utah coal, and on account of the fact that the mines in the State of Utah in normal times produce many times more coal than can be consumed by the inhabitants of said State of Utah, and for other reasons, a very small amount of defendant's coal has been shipped to Utah, and there has been little or no solicitation of orders by affiant or his associates for the purchase of coal by Utah consumers; that the office referred to in the preceding paragraph has not been maintained, and is not now maintained, for the purpose of getting customers who reside in Utah to purchase coal from the corporate defendant; that if the corporate defendant was confined to customers residing in the State of Utah, the amount of sales that it would make would not justify the payment of the salary of even one solicitor; that these solicitors who have their headquarters in the State of Utah are for the purpose of soliciting in the main orders from persons residing in other western and northwestern states; that during the fifteen years next preceding this year 1943 not over 20,000 tons of coal produced by the defendant in Wyoming have ever come into the State of Utah for consumption therein; that, of course, coal produced by the defendant has passed through the State of Utah in coal cars en route from Wyoming to other states; that when coal has come into Utah in any substantial quantity from the defendant's mine for consumption in Utah, it has been at a time when for some reason Utah consumers were unable to obtain Utah coal, and this condition has been sporadic and exceptional, and has existed only for short periods of time; that the defend-

ant company does not either through affiant or through any other person obtain any orders in the State of Utah for any purchase of coal in any substantial amount; that the coal produced by the defendant and used in the State of Utah during the last fifteen years has not averaged in excess of 1500 tons per year in the years intervening between 1927 and the time of making this affidavit; that less than one-half of one per cent. of the coal produced by the defendant corporation in the last fifteen years has been moved into or been consumed in the State of Utah, and that whatever coal has been produced in the State of Wyoming at defendant's mines and used or consumed in the State of Utah has been trifling in amount when compared with the total amount of coal produced by the defendant; that there has never been any continuous flow of coal from the defendant's mine in Wyoming into the State of Utah for the purpose of consumption in said last named state; that the reasons why affiant and his associates reside in Salt Lake City, Utah, rather than in the State of Wyoming, are, first, that of convenience to each of said persons personally; and, second, that it allows to each of said persons an opportunity to travel to other western states where they from time to time obtain large orders, and their residence here in this city requires them to cover less distance in mileage in making their various journeys; and, third, by residing in Salt Lake City, Utah, these solicitors can keep in touch with the general business throughout the western country and with the opportunities to obtain orders for the sale of coal and the needs of the trade in various states



where the corporate defendant is able to obtain such orders through the efforts of affiant and his associates.

9. And affiant further says that no meetings of the board of directors of the defendant have ever been held at Salt Lake City to his knowledge, and that no such lawful meeting could be held in the State of Utah; that no official corporate business of the defendant has ever been done in the State of Utah, and none could be done; that outside of the office furniture, which has a value not to exceed \$400, and three automobiles which from time to time come into Utah from the State of Wyoming, bearing Wyoming licenses, and are from time to time for temporary purposes and for convenience kept here in this state, this corporate defendant has no property of any kind or nature, tangible or intangible, situated in the State of Utah; that whatever money the defendant receives from the sale of its coal it receives in Wyoming, and whatever money it pays out either for expenses or otherwise, it pays out from its principal office situated in Lincoln County, Wyoming.

10. And affiant further says that according to his information and belief, acquired from an investigation of the affairs of the defendant and its business practices, the defendant's method of doing business has not varied from that which is stated herein since its organization in the year 1897 down to the present day; that so far as affiant is informed, no contention has ever been made that the corporate defendant was doing business in any other state than the state of its organization, except affiant is informed and believes and therefore alleges the fact to be that in

the year 1913, according to the records of the United States District Court for the District of Utah, it was contended in a case there pending that this corporate defendant was doing business within the State of Utah and was subject to service of process in said State of Utah; that affiant is informed and believes, and therefore avers the fact to be, that the United States District Court for the District of Utah, on August 11, 1913, held and decided that the corporate defendant was not doing business in the State of Utah, and was not subject to service of process in said state; that said decision has never been modified or reversed.

11. And said affiant further says that excepting always the place hereinbefore mentioned, situated at 412 Boston Building, Salt Lake City, Utah, and the matters and things hereinbefore mentioned as having been done by said affiant at the instance of said defendant, the said defendant company has never held itself out or advertised itself as having any office or place of business within the State of Utah, and said defendant has never held itself out as doing any business in the State of Utah except it has done the matters and things herein alleged.

12. And the said affiant further says that he has read the affidavit of R. A. Davis, dated the 2nd day of December, A. D., 1943, and heretofore filed in this proceeding; that according to affiant's best information and belief the facts stated in said affidavit of R. A. Davis are true; that so far as any facts stated herein that occurred prior to affiant having any connection with the defendant company, the said affiant has stated said facts in the fore-



going affidavit after full investigation of the records, and he verily believes said facts to be true.

And further affiant sayeth not.

L. M. PRATT, JR.

Subscribed in my presence and sworn to before me this 28th day of December, A. D., 1943.

My commission expires Nov. 14, 1946.

J. W. ENSIGN,

Notary Public, residing at

Salt Lake City, Utah

(Notarial Seal)

Filed in Supreme Court Dec. 29, 1943.