

1979

Ted R. Brown and Associates, Inc. v. Carnes Corporation and Long Deming Utah, Inc. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TED R. BROWN AND ASSOCIATES, :
INC., a corporation, :

Plaintiff and :
Appellant, :

vs. :

CARNES CORPORATION, :

Defendant and :
Respondent, :

and :

LONG DEMING UTAH, INC., :

Defendant. :

Supreme Court No. 15928

BRIEF OF APPELLANT

Appeal from Judgments of Third Judicial District Court
in and for Salt Lake County, Honorable Gordon R. Hall, Judge,
Quashing Service of Summons on Defendant-Respondent Carnes,
and Judgment of Third Judicial District Court in and for
Salt Lake County, Honorable Peter F. Leary, Judge,
Quashing Service of Summons on Defendant Carnes.

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CARNES CORPORATION, :

Defendant and :
Respondent, :

and :

LONG DEMING UTAH, INC., :

Defendant. :

BRIEF OF APPELLANT

STATEMENT OF THE
NATURE OF THE CASE

The prolonged proceedings in the lower Court in this matter requires, in the opinion of Appellant's Counsel, a more complete explanation in this brief than the usual desired one sentence statement suggested by the Rules as to the Nature of the Case. This matter has been before the Courts since October 26, 1973. There have been two prior references to this Court. Accordingly, Appellant undertakes to make a more meaningful Statement of the Nature of the Case, which hopefully may assist the Court to an early understanding of the problem and to make more pertinent the exposition of the details which will be later set out in the brief.

Appellant, Ted R. Brown and Associates, Inc., is a Utah Corporation. Under a written Sales Representative Agreement with Carnes Corporation, a Wisconsin corporation, it performed services in the sale of Carnes products to the L.D.S. Church which Brown believes entitles it to the payment of a commission by Carnes in the amount of some Fifty Thousand Dollars. Before payment of the commission which Brown believed it earned, Carnes cancelled the Sales Representative Agreement with Brown, and entered into an agreement with Long Deming Utah, Inc., a Utah corporation. Subsequently, Brown was informed, Carnes paid the commission which Brown believed itself to be entitled to, to Long Deming Utah, Inc. Since the entire matter arose out of the construction of the L.D.S. Church Office Building, the actions which gave rise to the claim took place in Utah, involved primarily Utah people, and two Utah corporations. Brown and its counsel believed that the proper forum for presentation of the cause was the Third Judicial District Court in and for Salt Lake County, State of Utah. Accordingly, Brown filed its complaint there October 26, 1973. Counsel for Brown had no doubt, applying the then recognized standards for securing jurisdiction over the out of State Wisconsin corporation that it could be accomplished both under the Utah Long Arm Statute 78-27-22 et seq. UCA 1953 as amended, and also under the provisions of Rule 4(e)(4) URCP. Summons was accordingly served in both manners upon Carnes. The matter now before this Court involves solely the effort by Brown to secure jurisdiction

of the Utah Court. The merits of the case have never been presented or considered.

This case has been twice previously before this Court on various aspects of the effort by Appellant to secure jurisdiction over the Respondent Carnes Corporation in the State of Utah. The first time upon an Interlocutory Appeal sought by Carnes Corporation from an Order of Stewart M. Hanson, Jr., Judge of the Third Judicial District Court, vacating an attachment issued by that Court against Carnes and ruling that Carnes, in asking that the attachment be vacated and that the Utah law on attachment be declared unconstitutional, had made a general appearance and was subject to the jurisdiction of the Court. This Court granted the Appeal and ruled that Carnes had not made a general appearance, docket number 14057. This case was before this Court once again on a second petition by Respondent Carnes for Interlocutory Appeal from an Order of the Honorable David Dee, Judge of the Third Judicial District Court, granting a special setting and hearing on the jurisdictional facts to Brown. The second petition for Interlocutory Appeal was denied by this Court, docket number 15564. The present Appeal is the first brought before this Court by Appellant Brown. At the present stage of this case, Long Deming Utah, Inc., defendant, is not involved in the Appeal. The present conflict involves solely the effort by the plaintiff Ted R. Brown and Associates, Inc. to establish jurisdiction over the defendant Carnes. Carnes Corporation was originally

a Wisconsin corporation and is presently an unincorporated division of WEHR CORPORATION, a Wisconsin corporation. (R255) More than five years before the Court has been consumed in the effort by the plaintiff and Appellant Ted R. Brown and Associates, Inc. to establish jurisdiction over Carnes. The case presents clearly the difficulty and frustration encountered by the plaintiff and its counsel in attempting to achieve what should be a litigant's primary right, to have the Court permit the adequate development of the facts and then to examine and apply the applicable law thereto. This simple goal has not yet been achieved. The review of this case will necessitate a painstaking and detailed examination of the entire record of the proceedings in the Court below. We recognize that in a fifty page brief, we can only hope to highlight the significant problems. We earnestly beseech this Court to afford this matter the careful consideration that the basic issues involved herein entitle it to receive. The decision should not be based upon technicalities of inter Court relationships between Judges of the same Court, nor upon one Judge's view of the actions of counsel which counsel has never been asked or allowed to explain to the Court.

The plaintiff-Appellant, Ted R. Brown and Associates, Inc., will throughout this brief be referred to as either Brown, or as Appellant. The defendant, Carnes Corporation, will be referred to hereinafter as Carnes or Respondent.

DISPOSITION OF THE CASE IN THE LOWER COURT

Initially Judge Gordon R. Hall entered an Order Dismissing the claims and quashing service of Summons on Carnes. (R117) On application made by Brown for reconsideration and to vacate the Order the Order was amended by striking the portion which dismissed the claims of Brown, but left standing the portion which quashed service of Summons on Carnes. (R74-75) Judge Stewart M. Hanson, Jr. issued an attachment on funds of Carnes on application of Brown which he subsequently vacated but entered an Order declaring Carnes subject to jurisdiction of the Court by reason of a general appearance. (R65) The Supreme Court overturned Judge Hanson's ruling on Interlocutory Appeal by Carnes, Supreme Court Docket No. 14057. Judge G. Hal Taylor refused to consider a motion to declare jurisdiction established over Carnes and that an Order be issued to require answer or be declared in default, stating that there was no precedent therefore nor any rule under which he could so act and he, therefore, denied the motion. (R224) After re-service of Summons and a new Motion to Quash, Judge David Dee issued an Order granting to Brown a special hearing at which evidence could be introduced and testimony be taken relative to: (a) Carnes activities in the State of Utah which would subject it to jurisdiction under the Long Arm Statute; and (b) The nature of the relationship of Carnes to its sales representative to determine whether service thereon would meet the requirements of Rule 4(e)(4) URCP. (R304)

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Carnes petitioned for Interlocutory Appeal of Judge Dee's Order. This petition was denied, Supreme Court Docket No. 15564. After the evidentiary hearing before Judge Leary, held pursuant to the requirements of Judge Dee's Order, Judge Leary entered an Order refusing to consider the facts on the question of jurisdiction and, in effect, imposing sanctions for what he apparently considered on his own motion and without notice to counsel or an opportunity to respond thereto, a failure by counsel for Brown to conduct adequate discovery and entered an Order of Dismissal declaring himself to be bound by the earlier ruling of Judge Hall. (R350-357)

NATURE OF THE RELIEF SOUGHT ON APPEAL

Appellant seeks to have both the Order of Gordon R. Hall and the Order of Peter F. Leary granting the motion of the defendant Carnes for dismissal and quashing service of Summons reversed and vacated. Appellant asks this Court to recognize the sufficiency of the service of Summons upon the defendant Carnes and the jurisdiction of the District Court of Salt Lake County over the defendant Carnes. The case should be remanded to the District Court in and for Salt Lake County, Carnes should be allowed to plead to the Amended Complaint and the case should be tried on the merits.

STATEMENT OF FACTS

As previously stated in the introduction to this brief, this appeal involves solely the effort of Appellant to obtain

jurisdiction over the Respondent Carnes in a lawsuit commenced in the District Court of Salt Lake County. Appellant filed its Complaint in the District Court of Salt Lake County, October 26, 1973, in which Appellant is named as plaintiff, the defendant Carnes Corporation is named as defendant and Long Deming Utah, Inc. is named as a defendant. (R160-163) The Complaint alleges that Ted R. Brown and Associates, Inc., a Utah corporation, had a Sales Representative Agreement with Carnes Corporation whereby Ted R. Brown and Associates sold products of Carnes Corporation in the State of Utah. (R160-161) Acting in collaboration with participating Carnes personnel, Ted R. Brown and Associates, Inc. sold a specifically fabricated product and other material manufactured by Carnes and used in the heating and air conditioning systems of the new church office building constructed in Salt Lake City for the L.D.S. Church. (R160-161, R537 through 542) Before the Church Office Building was constructed, but after the Carnes material had been selected by the Church architect and incorporated in the specifications due to Brown's efforts, (R523-530) Carnes Corporation cancelled Brown's representative agreement and appointed Long Deming Utah, Inc. as its sales representative in Utah (R161-162). Carnes refused to pay to Ted R. Brown and Associates, Inc. the commission which it had earned for sale of the Church Office Building job and to which Ted R. Brown and Associates laid claim. (R160-163) Brown learned that the commission had been paid to Long Deming Utah, Inc. This action

was commenced to recover the commission from Carnes and from Long Deming Utah, Inc. and damages for the failure to honor the contract with Ted R. Brown and Associates, Inc. (R160-163) Appellant, through its counsel, caused Summons to be issued upon the Complaint and service was duly made upon Long Deming Utah, Inc. as sales representative of Carnes Corporation in Utah, by serving Lynn Felton, an officer of Long Deming Utah, Inc. (R156) This service was made pursuant to the provisions of Rule 4(e)(4) URCP. Brown also caused Summons to be served under the Long Arm Statute of Utah, 78-27-22 et seq., UCA 1953 as amended, on Carnes by making personal service on Richard Nichols, a Vice President of Carnes Corporation at the home office of the company at Verona, Dane County, Wisconsin. (R159) Long Deming Utah, Inc. answered to the Complaint within the time allotted. (R141-143) Carnes, through its counsel, filed a Motion to Quash Service and Dismiss. (R139) It should be noted that the motion was filed November 29, 1973, and recited that an affidavit in support thereof would be filed subsequently, that it was then in preparation. (R139) The affidavit of Richard Nichols was not filed until January 4, 1974. (R135) Due to the many factors which do not appear in the record because no issue has at any time been raised in regard thereto, the motion was not called up for hearing before the Court until October 1, 1974. (R124) It was called up, as is the usual procedure, before the Law and Motion Division of the Court. The matter was presented on oral argument and the

affidavit of Nichols (R135-137) and of Ted R. Brown (R133-134), Mr. O. Wood Moyle III appearing for Carnes and Craig G. Adamson appearing for Brown. Judge Hall took the matter under advisement and subsequently, on October 18, 1974, entered an Order dismissing the claims of the plaintiff Brown and quashing the service of Summons against Carnes. (R117-118) Appellant, on October 25, 1974, filed a Motion for Reconsideration or to Vacate or in the Alternative Amend the Judgement. (R113) This motion was not immediately called up for hearing before the Court by Appellant because in the meantime counsel for the Appellant had learned that the final payment for the construction of the L.D.S. Church Office Building had not been made and that, possibly, the Church or the general contractor might still have funds which would be ultimately paid to Carnes. Accordingly, on November 4, 1974, Appellant applied to the Court for issuance of a Writ of Attachment. (R109) The Writ was issued and served. (R57, 44, 55, 56, 107) No funds were attached, however, both parties attached advising they held no such funds. (R77) Mr. Moyle on behalf of Carnes filed a Motion to Release the Attachment on the grounds that there was no Complaint on file within the meaning of Rule 64C, that the Rule 64C did not comply with the Constitution of the United States, and further alleging that the attachment was not issued in compliance with Rule 64C. (R102) On January 8, 1975,

being apprised that the parties attached claimed not to have any funds belonging to Carnes and seeking to elicit further information which might possibly be used at a future hearing on the motion pending before Judge Hall, Appellant served a Notice of Taking of Deposition of the Vice President of Long Deming Utah, Inc., Lynn Felton. (R103) This was promptly met by counsel for Long Deming Utah, Inc., who filed a Motion for Protective Order and to Quash Request for Production of Documents (R99-100) on January 14, 1975. A reply to this Motion for Protective Order was filed by Appellant on January 16, 1975. On January 16, 1975, counsel for Carnes called up by Notice of Hearing, the motion pending before Judge Hall for reconsideration of the Judgment entered by him and also the motion of Carnes for release of attachment. (R93) This was to be heard January 23, 1975. (R93) An amended Notice of Hearing dated January 17, 1975, and filed by counsel for Carnes on January 20, 1975, rescheduled the proposed hearing to February 11, 1975, at 9:00 a.m. (R95) At the hearing before Judge Hall on this Motion, he was requested by counsel for the Appellant to vacate his Order Quashing Service of Summons and set the matter for a hearing at which the facts concerning the activities of Carnes in the State of Utah might be shown by an evidentiary hearing which could not be had before the Law and Motion Division. Judge Hall recognized his error in dismissing the plaintiff's claims and amended his Order by striking the portion of the Order which so

provided, but he refused to reconsider the Order to Quash Service of Summons and denied the verbal request for a further hearing on that matter. (R74-75) Judge Hall refused to consider the matter of the release of attachment stating that since this was issued by Judge Hanson, it would have to be presented to Judge Hanson. (R75) The Order of Judge Hall was entered on March 5, 1975. Thereafter Appellant, acting under Rule 72(a) preserved its right of appeal from Judge Hall's Order by filing a Notice of Intention to Appeal. (R70) On March 18, 1975, Appellant filed a Motion for Order Determining Defendant Carnes had Entered a General Appearance, Declaring Jurisdiction of the Court over Carnes, and Requiring Carnes to Answer to the Complaint. This motion together with the Motion of Long Deming for a protective Order and the Motion to Release the Attachment, filed by Carnes, were all noticed up for hearing before Judge Hanson on the 26th day of March, 1975. (R68) On the day appointed, all parties appeared by counsel and the matters were argued to the Court. (R65) Judge Hanson ordered the attachment released for irregularities in compliance with rules relating to pre-judgment attachments, but held that Carnes, in seeking a Constitutional determination on the matter of the attachment procedures and Rules in Utah, had entered a general appearance and ordered that Carnes answer to the Complaint within ten days from the entry of the Order. The parties stipulated that the matter of the protective Order sought by Long Deming had in part been

rendered moot by the other rulings of the Court and accordingly the Court struck the matter from the calendar to be recalled when and if desired by either party. (R65-66)

Carnes promptly petitioned for an Interlocutory Appeal to this Court from the Order of Judge Hanson. The appeal was granted. This Court ruled that Carnes had not made a general appearance and that the Order of Judge Hanson in so determining and requiring Carnes to answer should be and was set aside. (Docket No. 14057 in the Supreme Court) To re-activate the proceedings in the District Court, Appellant elected to file a Motion Declaring Service of Summons on Carnes Sufficient and requesting that the Court order Carnes to Answer or be found in default. (R198) This matter was called up before Judge G. Hal Taylor who was at that time sitting on law and motion, to be heard on February 17, 1977. (R219) At the hearing counsel for Brown moved the Court to set a special hearing at which evidence could be presented concerning the activities of Carnes in the State of Utah which Appellant believed sufficient to subject it to the jurisdiction of the Utah Courts. Judge Taylor stated that he could find no rule under which the motion presented could be made and refused to consider the same on the ground that there was no precedent therefore and the Court had no authority to make such an Order. The Court also denied the Motion made orally for a hearing on the evidence. (R221, 222, 223)

Acting under Rule 4(b) where service has been obtained upon one defendant within the year, (service having been had on Long Deming Utah, Inc.) Appellant issued a new Summons and caused the same to be served on the newly appointed sales representative for Carnes, Utemp - Utah Air Sales, which was duly served by the Sheriff on Richard Bartlett McDowell, an officer of Utemp - Utah Air Sales. (R230) Appellant also caused service under the Long Arm Statute to be made by making service upon an officer of the Carnes Company at its home office in Verona, Wisconsin. The Sheriff served Bruce J. Kessler, process agent. (R234-235) Appellant had preserved its right to appeal from the Order entered by G. Hal Taylor by filing a Notice of Intention to Appeal under Rule 72(a). (R227) Carnes, again acting through its attorney, O. Wood Moyle III, filed a Motion to Dismiss. (R232) Instead of calling up this new Motion to Dismiss before the Law and Motion Division of the Court for hearing, Appellant filed a motion asking that a special hearing be granted at which evidence and testimony could be presented before the Court on the activities of Carnes in the State of Utah, and of the activities of Utemp - Utah Air Sales, its sales representative. (R237-238) This matter was heard before Judge David Dee on August 23, 1977 at 2:00 p.m. Judge Dee heard the arguments of counsel, reviewed the record and considered the affidavit filed by the parties as well as the extensive memoranda submitted by counsel in support of their respective positions

and then made and entered a memorandum decision followed by an Order based thereon which granted the special hearing requested by Appellant and provided:

"ORDERED, ADJUDGED AND DECREED:

"1. The motion of the plaintiff for an order designating a special setting for an evidentiary hearing is granted and said hearing shall not be limited solely to evidence concerning the service of process on Richard Barrett McDowell. The parties shall be permitted to present all evidence pertinent to determination of the question of whether or not Carnes was doing business in the State of Utah so as to subject said corporation to the jurisdiction of the courts of this State.

"2. Counsel for the plaintiff shall arrange for such evidentiary hearing before one of the judges assigned to the Trial Division of this Court.

"3. The claim of the defendant Carnes in support of its motion to dismiss, that the entire issue of jurisdiction of the Court over the defendant Carnes is Res Judicata, is denied." (R304)

Carnes, through its counsel, objected to the Order and a further hearing was granted but the Court entered an Order denying and overruling the objections of Carnes to the above mentioned Order. (R302-303) This Order was entered November 17, 1977. Carnes promptly petitioned the Supreme Court for an Interlocutory Appeal on the ground that the matter of jurisdiction over Carnes was res judicata by reason of Judge Hall's and Judge Taylor's rulings and that therefore Judge Dee could not make such an Order. Appellant answered Carne's petition for Interlocutory Appeal. The Supreme Court entered

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an Order on January 11, 1978, denying the Interlocutory Appeal. (See the Record on the petition and supporting memoranda in the file of this Court under docket number 15564, also R320.)

Appellant in compliance with the Order of Judge Dee arranged a hearing at which evidence could be adduced and testimony of witnesses taken. This hearing was scheduled before the Honorable Judge Peter F. Leary on January 11, 1978, at 10:00 a.m. (R308) A full hearing was held before the Court, both Appellant and Carnes presented evidence and Witnesses. A comprehensive statement of the prior proceedings and the status of the matter was made to the Court by counsel for both parties. (R405-424) The proceedings before Judge Leary continued through January 12, 1978. Judge Leary was fully advised by counsel of the Petition for Interlocutory Appeal taken to the Supreme Court from Judge Dee's Order on grounds that the issue of jurisdiction over Carnes was res judicata by virtue of the Order previously entered by Judge Hall, and was notified that the Petition had been denied and a copy of the Notice of the decision of the Supreme Court was filed with the Court. (R320,419) The position of the parties was fully argued to the Court. Judge Leary took the matter under advisement. He subsequently, on March 31, 1978, entered a memorandum decision. (R322-326) The decision ignored the facts presented and totally failed to comply with the terms of the Order of Judge Dee which was the

basis for the hearing before Judge Leary. (R322-326) A proposed Order was presented and Appellant promptly presented objections to the Order of Judge Leary Quashing Service of Process on Carnes. (R342-347) A hearing was had before Judge Leary on the objections on May 2, 1978, at 1:00 p.m. Judge Leary expressed himself as dissatisfied with the Order presented by Counsel for Carnes,

"The Court will take a look at the matter. But I would--do make this comment, Mr. Moyle: that I don't think that the Order which was prepared for the Court's signature precisely sets forth what the Court intended by its memorandum decision. I'll take a look at it." (R395)

In fact, Judge Leary did nothing and the Order objected to by Appellant was entered. This appeal is prosecuted from that Order and from the other orders denying the jurisdiction over Carnes the right of appeal from which had been preserved under Rule 72(a) as more particularly hereinbefore delineated in this statement of facts.

The facts developed in the evidentiary hearing before Judge Leary on January 11 and 12, 1978, supported the initial affidavit of Ted R. Brown which reflected that Carnes was in fact doing business within the State of Utah, and that it was a substantial volume of business. (R387-674) The details of this conduct on the part of Carnes which Appellant contends subjects it to the jurisdiction of the Utah Courts will be more specifically developed in the Argument.

This statement comprises, we believe, an adequate presentation of the factual situation. If additional facts appear necessary to any part of the argument, they will be set forth therein.

ARGUMENT

POINT I

RESPONDENT CARNES HAS DONE BUSINESS WITHIN THE STATE OF UTAH WITHIN THE DEFINITION OF THE LONG ARM STATUTE OF UTAH AND THE SERVICE OF SUMMONS ON CARNES VESTS THE UTAH COURT WITH JURISDICTION.

At least since May 24, 1961, when Carnes Corporation of Verona, Wisconsin entered into a Sales Agreement with Ted R. Brown and Associates, it has been doing business within the State of Utah. (R145) The extensive activities within this State commenced with contracting with a sales representative to actively solicit sales of Carnes products in this State. (R145, 203, 600, and Ex 1P) While the Sales Agreement purported to be providing for the services of the sales representative as independent contractors, it was uniformly testified by Ted R. Brown, Lynn Felton, Richard McDowell, and James A. Carlsen, that while Carnes did not maintain a place of business as such in the State of Utah, that the sales representative was given sales literature by Carnes upon which he was to place his name, address, and telephone number and distribute the same and actively let it be known that he was the representative of Carnes in the State of Utah. (R427,468, 497, 601,602)

Goods sold were shipped directly to the customer in Utah, freight allowed, all freight being paid by Carnes, billing was direct by Carnes to the customer. (R453, 451, 477) The goods were warranted and the warranty was in writing by Carnes direct to the customer. (R 443, 478-481) If there were any problems in respect to any materials supplied to Utah consumers, they complained to the Utah sales representative who usually represented Carnes in the handling of the matter unless, as in the case of the Church Office Building, Carnes elected to send personnel to handle the matter from the home office. (R133, 425-432, 443-447, 468-481, 488, 489, 492-494, 502-506, 512-513) Carnes also had the Utah sales representative help in handling collection of bills owing from purchasers of the Carnes products, including the filing of liens in Utah by Carnes to collect for products sold here. (R509-510) Carnes did a substantial volume of business each year in the State of Utah. Sales through Long Deming Utah, Inc., the sales representative were, 1968 - \$26,451; 1969 - \$448,445; 1970 - \$82,433; 1971 - \$164,800; 1972 - \$127,338; 1973 - \$126,212. The sales were estimated for 1974 - \$200,000; 1975 - \$175,000. These figures were supplied by Mr. Felton of Long Deming Utah, Inc. (R502) A review of the sum total of the testimony of the representatives of Carnes, including Mr. Weamer, a present Carnes official, leaves no doubt of the scope and extent of the conduct of business in Utah by this Company. (R401-675) The specific claim asserted by Ted R. Brown and Associates, Inc. in this action against Carnes and Long Deming

Utah, Inc. arose out of the contract and the actual supplying of Carnes product for the incorporation into the Church Office Building of the Church of Jesus Christ of Latter Day Saints, constructed in Salt Lake City, Utah between 1968 and 1972. (R160-163, 337-341) It was testified by Mr. Ted R. Brown that in the 1960's, upon learning of the Church Office Building construction project which was to be undertaken with Bishop George Cannon Young as Church architect, that he immediately commenced to negotiate to try and supply Carnes material for this job. The testimony of not only Mr. Brown, but of Mr. Richard Young, member of the architectural firm of George Cannon Young; Mr. Quentin Tregeagle, the engineer for the project; and of Mr. Felton of Long Deming Utah, Inc., gave this picture of the development and ultimate supplying of Carnes material to the Church Office Building job. After the initial contacts by Mr. Brown, as sales representative of Carnes, it was learned that Bishop Cannon Young, the architect, and Mr. Tregeagle were collaborating to develop an idea for modular air bar ventilating equipment which was Mr. Young's idea. It required special equipment which had not been developed before. Bishop Cannon Young and Mr. Tregeagle were both concerned that they should get the services of a competent manufacturer and supplier of air conditioning equipment in order to be sure that the equipment which was necessary would function properly and would do the job in the building to be constructed. Accordingly, they requested that Mr. Brown arrange for Carnes to

make a "mock up" of the proposed product and it was testified that during the preliminary negotiations for this work, Mr. Tregeagle, at Carnes' expense, visited the Carnes factory in Verona, Wisconsin, and that he was shown by Carnes and their engineers the method by which they proposed to put this product into production and make the same available for the Church job. Ultimately an actual "mock up" of the product was developed, manufactured and sent to Utah with Mr. Watts, an engineer from the sales division of Carnes, and Mr. Watts and Ted Brown set up the "mock up" in a room at the Ambassador Club on Fifth East in Salt Lake City, Utah, where a demonstration of the product was conducted for the benefit of Mr. Tregeagle and the benefit of Bishop George Cannon Young, the church architect. After the demonstration and the assurances by the Carnes personnel directly to both Mr. Tregeagle and to Bishop Cannon Young, it was decided that the Carnes material would be utilized in the job and Richard Young testified that the architect thereupon, together with the collaboration of Mr. Tregeagle, wrote into the specifications a requirement for the Carnes material. Mr. Richard Young testified in this regard as follows:

"Q And with what architectural firm are you associated?

A George Cannon Young Associates.

Q Was that firm the architect for the LDS Church Office Building in Salt Lake City?

A Yes, it was.

Q And in your capacity in that architectural firm, did you have anything to do with the LDS Church Office Building plans or construction?

A Yes, I was the project architect.

Q As such were you acquainted with the material referred to generally in heating and air diffusing part of that construction known as Carnes material?

A Yes, I was.

Q Do you know from what source that material was obtained?

A It was first introduced by our mechanical engineer, Mr. Tregeagle, and he was represented also by Ted R. Brown.

Q And was this material especially designed and constructed by Carnes for that job?

A Yes, it was a special adaptation of --for an air bar. We had looked the market over and could not find the diffuser that would meet all of the requirements of our particular job.

Q Now, was this air bar to which you refer something that your father designed with Mr. Tregeagle?

A Yes, it was."

"...A At a later time that design was sent on to Carnes. They sent back shop drawings on the manufacture of it. And then in 1964 the associated mechanical engineer, Frank Bridgers, addressed a letter to Carnes in care of Mr. Kenneth Watts asking that assembly be tested in their testing facility in Verona, Wisconsin. And he makes mention in his letter that the mockup had been reviewed here in Salt Lake, and several questions had been raised about short circuiting of

of the air supply in the air return system.

Q What is the mockup you referred to, Mr. Young?

A The mockup was sent out by Carnes. It was an actual physical sample of the assembly. It was set up in the Ambassador Club as was mentioned.

Q Did you see it there?

A Yes, I saw it there."

"...A In our specification. In fact on the air bar assembly since we had worked with them exclusively we made it a proprietary item then by addendum at the request of the owner and included one other manufacturer as being acceptable to supply that item.

Q So that actually, then, by your specification you almost mandated that the item be purchased from Carnes?

A Yes, if you'd like me to read that section of the specifications--..."

"...The air bar ceiling distribution system shall be as manufactured by Carnes Corporation or approved equal." (R524-527)

Mr. Young further testified that there was difficulty with the product once it had been installed, that it did not work properly. (R527) Mr. Tregeagle similarly testified and that at least two engineers visited the job from Carnes Corporation in an effort to solve problems arising from the installation of this product in the job. They were Norman Rick, an officer in the sales end of the corporation, and Duaine Shackelford, the project engineer or one of the chief engineers for the Company. (R550) Corroborative of the testimony of both Mr. Brown, Mr.

Tregeagle and Mr. Young are the Exhibits which were introduced and received by the Court. (Exhibits 8P through 25P) The sales figures previously set forth for the year 1969 and 1970, principal years of construction during which the Carnes material was supplied to the Church Office Building, reflect that in 1969 the sales in Utah were \$428,445 and in 1970 - \$82,433. (R502)

Under the Sales Representative Agreement which Ted R. Brown and Associates, Inc. had with Carnes, upon the consummation of the sale and the placement of the materials into the Church Office Building, Brown became entitled to a commission for his sales effort. (R145-154, 149 and 442) This was recognized according to the testimony of Mr. Brown who referred to a letter he had received from Dan Deviser, an officer of Carnes. However, Carnes terminated the Sales Representative Agreement with Brown and entered into a new Sales Representative Agreement with Long Deming Utah, Inc. (R442) Mr. Brown never did receive the commission. (R442) This action was brought to recover the commission and damages for what is alleged to be the collusive action of Carnes and Long Deming Utah, Inc. to deprive Brown of its commission. (R160-163, R337-341)

The Long Arm Statute of the State of Utah at 78-27-24 UCA 1953, as amended, reads as follows:

"78-27-24. Jurisdiction over non-residents - Acts submitting person to jurisdiction. - Any person, notwithstanding section 16-10-102, whether or not a citizen or resident of this State,

who in person or through an agent does any of the following enumerated acts, submits himself, and if an individual, his personal representative, to the jurisdiction of the courts of this State as to any claim arising from:

"(1) The transaction of any business within this state;

"(2) Contracting to supply services or goods in this state; ..."

It is the contention of Appellant that the record clearly shows that Carnes Corporation did transact business within this State and did contract to supply service or goods in this State and that the claim of Ted R. Brown and Associates for the commission arose out of this action of Carnes.

It is interesting to note that consistently in the presentation of this matter to the Court below, the attorney for Carnes has taken the position that if the L.D.S. Church was to commence an action against Carnes, it could secure jurisdiction over Carnes under the Long Arm Statute, but that the claim of Ted R. Brown and Associates, Inc. does not arise out of the transaction of business in the State of Utah by Carnes and that therefore, Ted R. Brown and Associates could not substantiate service under the Statute upon Carnes. We quote from the statement made by Mr. Moyle to Judge Leary at the commencement of this proceeding before Judge Leary:

"But I want to return to a discussion of the Long Arm Statute and what--the way that was argued to Judge Hall because it puts the case in its perspective, and because it will affect materially the type of evidence that's presented here today.

"The jurisdiction allocation and complaint in the plaintiff's complaint is Section 78-27-24(2). Now, that says that the court has jurisdiction over a party contracting to supply services or goods in this State.

"Now, if we move on to Section 26 of the Long Arm Statute, that section provides, and I quote,

Only claims arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this act.

Now, the question that was presented to Judge Hall, and the question that will be presented to Your Honor today, is: Is the plaintiff's suit against Carnes one that arises from acts enumerated "herein", specifically the jurisdictional allegations that this is a suit arising out of a contract to supply services or goods in this state.

"And I present to Your Honor that that is not so. The suit is for breach of contract..." (R421)

Mr. Moyle later even offered to Stipulate, though the offer was withdrawn:

"MR. MOYLE: We would be willing to stipulate Your Honor, that the business conducted by Carnes which results in the importation of goods into the state of Utah is such that in this instance, had suit been brought by the purchaser of the goods manufactured and supplied by Carnes, to-wit the owners of the LDS Church Office Building, that there would have been sufficient nexus to give this court jurisdiction over that suit. ..." (R435)

Mr. Moyle, subsequently backed away from the stipulation stating:

"I think I'll back off on that. We conceded arguendo in the entire argument before Hall, but there we didn't have live

witnesses. I was doing it to avoid the necessity of them. I think since we have live witnesses we'd better let the facts show what the facts show and I'll withdraw the proffer." (R436)

It should be noted, however, that while backing away from the stipulation, Mr. Moyle continued the admission that this was the basis of his position taken before Judge Hall. He did not at any time offer any other position in regard to his resistance to the jurisdiction under the Long Arm Statute save and except that he attempted to raise a problem based on the contention that the plaintiff's Complaint limited the claim of jurisdiction under the Long Arm Statute to sub paragraph (2) of 78-27-24 (Contracting to supply services or goods in this State), and was not broad enough to permit it to avail itself of the transaction of any business within this State, sub paragraph (1). While counsel for Brown did not agree with the interpretation placed upon the language embodied in the Complaint:

"3. Jurisdiction of the Court over Carnes Corporation is based on Section 78-27-24 (2) and related provisions of the Utah Code Annotated 1953, as amended." (Emphasis ours)

Counsel nevertheless asked leave of Court to file an amended complaint to eliminate any possibility of confusion in regard thereto and the Court granted this permission. The verbal order of the Court permitting amendment was reduced to writing (R335-336), and the amended Complaint was in fact filed. (R337-341)

It is respectfully submitted to the Court that even under the more restricted interpretation of the Long Arm Statute adopted by this Court up to the recent case of Abbott G. M. Diesel, Inc. vs. Piper Aircraft Corporation, filed April 14th, 1978, 578 P2d 850, the argument contended for by Mr. Moyle could not be supported. The Zales Jewelry case, Hill vs. Zale Corporation, decided March 9, 1971, 25 U2d 357, 482 P2d 332, involved a matter wherein Hill, the plaintiff, sought to enforce against Zale Corporation, a Texas corporation, a claim for his wages and an incentive award, vacation pay, and moving expenses, which he claimed to be due to him for services which he rendered to the defendant at Anchorage, Alaska. The transaction of business in the State of Utah by Zale Corporation had nothing whatever to do with Mr. Hill's claim and the Utah Supreme Court found that the minimal contacts required in Utah had been maintained by Zale and allowed Hill to bring the action in the State of Utah. We also point out that the International Shoe case decided by the United States Supreme Court, 326 US 310, 66 Sup. Ct. 154, 90 L.Ed. 95, did not in any manner involve a claim by a customer of the shoe company but involved the effort by the State of Washington to collect taxes based upon the fact that the International Shoe Company had been doing business within the State of Washington. We urge upon this Court that the Appellant Brown is asserting a claim for a commission arising directly out of the sale of merchandise to a Utah customer, to-wit: The Church of Jesus Christ

of Latter Day Saints, is not as remote from the transaction of business within the State of Utah as either Mr. Hill in the Zale case or the State of Washington in the International Shoe case. Under the doctrine enunciated by the Court in the Abbott GM case vs. Piper Aircraft Corporation, supra the activities of Carnes within the State of Utah establish beyond any question of a doubt its presence here for all purposes. We respectfully submit that the service of Summons on Carnes accomplished on either or both occasions under the Long Arm Statute would be sufficient to permit Ted R. Brown and Associates, Inc. to proceed in the Courts of the State of Utah against this defendant to permit the Utah Courts to try the action based on Brown's claim of a commission due for sale of Carnes products utilized in the construction of the L.D.S. Church Office Building located in Salt Lake City, Utah.

POINT II

SERVICE OF SUMMONS ON OFFICERS OF LONG DEMING UTAH, INC. AND UTEMP-UTAH AIR SALES, CARNES' EXCLUSIVE SALES REPRESENTATIVES IN UTAH, WAS GOOD SERVICE OF SUMMONS ON CARNES CORPORATION UNDER THE PROVISIONS OF RULE 4(e) (4) URCP.

In Point I of this brief some factual information has been presented concerning the activities of Long Deming Utah, Inc. and of Utemp-Utah Air Sales in their capacity as the contractual sales representatives acting in the State of Utah for Carnes. Without reiterating all of that information under this Point, we refer the Court again to those factual disclo-

The evidence showed that Long Deming Utah, Inc. entered into a contract with Carnes Corporation to act as its exclusive sales representative in the State of Utah. This contract, dated September 3, 1968, was in full force and effect from that date in 1968 through the year 1973. (R201-218) Clause 13 of the contract, found at R217, specifically defines the obligation of the distributor or representative to cooperate fully and promptly with Carnes in the sale of products covered by the Agreement. We quote the provision.

"13. Cooperation of Distributor or Representative with Carnes

The distributor or representative agrees at all times to cooperate fully and promptly with Carnes in the sale of all products covered in this agreement, and to render such information and reports as and when such information is requested, and to furnish to Carnes copies of all correspondence, quotations, and invoices, covering the products covered by this agreement, when such information is specifically requested by Carnes."

Mr. Ted R. Brown, who acted under a similar Sales Agreement, testified as to the wide range of activities that he conducted for Carnes in the State of Utah as its representative, including the setting up of the "mock up" participated in by Mr. Watts of the air bar construction to be manufactured by Carnes for the Church Office Building. (R568-569, 577, Exhibit 22P and 23P) He related activities he had undertaken for Carnes in handling credit and collection problems substantiated by Exhibits 2 and 3, and handling of damaged shipments. (R532, Exhibit 4). All disclose the active conduct of business in

the State of Utah by Ted R. Brown for Carnes. Mr. Felton of Long Deming Utah, Inc. was specific in the duties which he performed. He also stated that Carnes frequently sent representatives from the home office into the State of Utah to discuss with Long Deming personnel their sales records, their performance, new products, and introduction of new products. (R503) He admitted that Carnes made suggestions as to things which Carnes could supply and the manufacturing processes they could provide. He admitted that he handled warrantys and claims under warrantys for Carnes, acting as an employee of Long Deming Utah, Inc., the sales representative of Carnes. He specifically referred to a given paragraph of the Sales Representative Agreement which he felt governed Long Deming's activities in that regard. (R505) He was asked:

"Q And as the exclusive representative, did you deem that it was necessary for you to undertake and act as the intermediary as you describe in the warranty claims?

A That's correct."

In regard to the dissemination of the Carnes catalogue and sales at R507:

"Q So that in some manner you disseminated the knowledge to people of this State if they wanted to buy Carnes material, Long Deming is the place to get it, is that correct?

A That's right.

Q How would that be done?

A We published a listing of all of the

manufacturers represented by us and distributed to appropriate contractors, architects, engineer, that might constitute a market for our products.

Q Did that give your office address and your telephone number and where you could be reached?

A Yes."

At page 509 of the record, Mr. Felton of Long Deming Utah, Inc. was asked:

"Q Now, did you ever have anything to do with the collection of any of the amounts that were due for Carnes material?

A Yes.

Q What did you do?

A Larger projects. The Carnes Corporation have often asked us to provide them with various job information including such things as the names of all of the parties that were party to the contract - That is, the owner, the general contractor, the mechanical contractor, the sheet metal contractor, so forth - whether or not the job was a public or private job, whether or not the job was bonded, the name of the bonding company, the address of the bonding company, all of the information necessary for Carnes to protect its interest in the job, its equipment.

Q Now, suppose that they didn't pay? Did you ever take any action to try and collect such an account?

A During the course of our representation for Carnes, we assisted them in collection efforts from time to time.

Q Did you ever file a lien against a job?

A We were not--we could not file a lien

for them, but we helped them in obtaining legal descriptions and so forth, details for them to file the lien.

Q Did they ever file a lien to your knowledge in this State?

A My memory is a little bit hazy, but I am quite sure that they did. I remember Carnes being involved in a lien, but I couldn't provide any more details than that." (R510)

With respect to the Church Office job, Mr. Felton testified that when trouble developed, he worked with the representatives from Carnes in solving the problem and that Carnes sent out Norm Rick, a products manager and that they sent an engineer whose name he could not recall. Mr. Felton was asked:

"Q And did you continue to pursue this on behalf of Carnes as their representative in the State of Utah to try and effect a correction of this trouble?

A Yes.

Q And did Carnes on several occasions before it was finally concluded, send representatives out to work on this problem?

A Yes." (R513)

Mr. Carlsen of Utemp-Utah Air Sales testified that Utemp-Air Sales was working as the representative for Carnes in the State of Utah under an agreement dated September 16, 1975, which was replaced by a new agreement April 22, 1977. The agreement is made an Exhibit in the file. (Exhibit 1D, R493) Mr. Carlsen outlined similar activities conducted by Utemp-Utah Air Sales as did Mr. McDowell of that Company, in their respective testimonies to those referred to in the record under the testimony

given by Mr. Felton and Mr. Ted R. Brown. There is thus a long period of time in which Carnes has had the benefit of doing business within the State of Utah through the activities of its sales representative.

Appellant maintains that Service of Summons upon the duly authorized officer of Long Deming Utah, Inc. and subsequently Utemp-Utah Air Sales constituted a good and sufficient service under the provisions of Rule 4(e) (4) URCP, which provides:

"(4) Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business."

Increasingly, it is being recognized that a corporation can do business in a State through an independent contractor and that the fact that such business is done through an independent contractor does not, in any manner, protect the foreign

corporation from process within the State in which it does business through such a contractor. We quote Fletcher's Cyclopedia of Corporations (Perm Ed) Volume 18, revised 1977, Section 8724, as follows, to-wit:

"8724. -Contracts and transactions through resident agent, representative or independent contractor.

"Even before the International Shoe case, it was universally held that it was not essential to jurisdiction in personam over a foreign corporation that it be physically present within the state, but it is sufficient if it exists in the state of its domicile, and acts by agent in the state assuming jurisdiction. And the fact that the foreign corporation's agent in the state is a corporation is not material. Thus where a foreign corporation maintains a stock of goods on the premises of, and in the charge of, a domestic warehouse company, and furnishes such company a credit list authorizing it to allow certain customers to withdraw goods on their own written orders, and the company notifies the foreign corporation of the details of its delivery of goods to customers, and the customers are billed directly from the home office of the foreign corporation, the warehouse company is agent of the foreign corporation, and its activities on its behalf constitute doing business in the state by the corporation, and service of process on the warehouse company is service on the corporation, and this is so though the warehouse company functions in a similar way for others and disclaims the agency.

"And where a foreign insurance company empowers a domestic corporation to adjust losses for it, and letters written by the company refer to the domestic corporation as its representative, and correspondence between the two corporations also evidences the existence of an agency, the foreign company is doing business in the state

through the agency of the domestic corporation, and service of summons upon the latter is valid service on such company.

"But it is equally well settled that the mere presence or "doing business" will not suffice to confer jurisdiction in personam over the defendant foreign corporation.

"The recent trend is that a foreign corporation is not immunized from service of process merely because it operates through an independent contractor. While it is essential under due process that there be a showing that the foreign corporation purposefully availed itself of the privilege of conducting activities within the forum state, it is recognized that such activities may be carried on by an independent agent or manufacturer's representative. In addition the mere fact that the agent works for several principals should not be necessarily determinative of the question. Thus, in a decision following the International Shoe doctrine, a foreign magazine publisher was held subject to service of process for an alleged libel where all the printing and distribution was done in the forum, though by a domestic independent contractor."

If a foreign corporation not qualified to do business in the State of Utah can contract to have services performed to enable it to do business as Carnes did, in active competition with Utah residents and merchants in the manner testified to by Mr. Brown, Mr. Felton, Mr. Carlsen, and Mr. McDowell, it is neither unfair nor unjust to also vest that representative with the capacity under the law to accept service of Summons for that corporation and to base jurisdiction of the foreign corporation in Utah Courts on such service. We submit that the

service upon Mr. Felton, as an officer of Long Deming Utah, Inc. while that corporation was acting under written sales agreement as the representative of Carnes in the State of Utah, and the subsequent service upon Mr. Richard Bartlett McDowell, an officer of Utemp-Utah Air Sales while that company was acting as a representative under a written agreement with Carnes, constitute good and sufficient service on Carnes and should subject that corporation to the jurisdiction of the Utah Courts.

POINT III

THE DECISIONS AND ORDERS OF JUDGE HALL AND OF JUDGE LEARY QUASHING SERVICE OF SUMMONS ON CARNES, FOR WHATEVER REASONS, ARE IN ERROR AND SHOULD BE REVERSED.

As has been previously explained in the Statement of Facts and under Points I and II, this matter first came on before Judge Gordon R. Hall on Carnes' Motion to Quash Service of Summons and Dismiss. (R139, 124) The matter had been noticed up before the Law and Motion Division of the Court. (R124) It was submitted to the Court on the basis of the Complaint as filed (R160-165) and the Affidavit of Mr. Ted R. Brown, President of Ted R. Brown and Associates, Inc. (R133-134) The affidavit of Nichols admitted the validity of the Sales Agreement entered into by Carnes with Ted R. Brown for services to be performed by Brown for Carnes in the State of Utah, a copy of which had been filed with the Complaint marked Exhibit "A". (R160-163) (Apparently through oversight the exhibit was not attached to the Complaint. On November 20, 1973, counsel

having learned of this error, immediately filed the Exhibit "A" and served copies on counsel for Carnes and Long Deming Utah, Inc.) (Rl44-154) Mr. Nichols' affidavit also admitted that plaintiff, Ted R. Brown and Associates, did act as a sales representative for Carnes, soliciting orders from contractors in Utah and transmitting such orders to Carnes and that all such orders received by Carnes, including the orders for the Church Office Building involved in this case, were shipped directly by Carnes to the ultimate purchaser in Utah and that payments therefore were made directly to Carnes by the purchaser. (Rl36, par. 5) Mr. Brown's affidavit stated that between May 24, 1961, and August 29, 1968, Ted R. Brown and Associates, Inc., had been the authorized distributor or representative of Carnes in Utah and that to his knowledge Carnes had contracted to supply goods, wares and merchandise to buyers within the State of Utah on many occasions and that the goods, wares and merchandise were warranted to the buyers as expressed on Carnes Corporation's acknowledgment of order issued to such buyers. His affidavit stated that pursuant to such contracts, Carnes had supplied goods to persons in this State and had paid to Brown a commission based on the sales in accordance with the agreement which Carnes had for Brown's services. The affidavit stated that:

"the sale and delivery of the goods that gave rise to the present claim was consummated in the State of Utah and said goods were, in fact delivered to and incorporated into the LDS Church Office Building in Salt Lake City." (Rl34, par. 3)

These admissions by Nichols and by Brown were not traversed. The hearing was scheduled on October 1st, 1974. In the afternoon of September 27, 1974, counsel for Brown was served with a Memorandum in Support of Defendant Carnes Corporation's Motion to Quash Service and Dismiss, prepared by counsel for Carnes. (R125-132) The 27th day of September was a Friday. Counsel for Brown had no opportunity to prepare any responsive memorandum for the Court before hearing on Tuesday, October 1st.

At the oral argument in Court, Mr. Moyle acting for Carnes, laid most of his emphasis upon the contention that the claim asserted by Brown did not come within the purview of the Long Arm Statute and that therefore the jurisdiction over Carnes must fail. (R435-436) However, he extensively argued also his contention that the minimal contacts required under the doctrine enunciated by the Supreme Court of Utah in the Hill vs. Zale Corporation case, 25 U2d 357; 482 P2d 332, were not met. (R125) To counsel for the Appellant Brown, the affidavits of Nichols and Brown seemed to establish the fact that Carnes was indeed contracting to and in fact supplying goods in the State of Utah. The question of whether Brown was in fact asserting a claim based upon the enumerated acts mentioned in the Long Arm Statute seemed apparent on its face, since the claim was for commissions based on sales of Carnes material to the Church of Jesus Christ of Latter Day Saints to be incorporated in the Church Office Building. The fact that a claim for damages and collusion between Carnes and Long Deming Utah, Inc., in depriving Brown of

the commission was alleged in the Complaint certainly did not appear to be any basis upon which jurisdiction under the Long Arm Statute could be denied. No mention in the Memorandum submitted by Carnes or in oral argument was specifically made by Counsel for Carnes or Brown about the service of summons which had been made on Long Deming Utah, Inc., as the sales representative for Carnes under Rule 4(e) (4) URCP.

When Judge Hall entered his Order entitled "JUDGMENT" after having taken the matter under advisement, he gave no clue as to the basis upon which he was granting the motion of the defendant Carnes. (R121-122) He not only quashed the Service of Summons but he dismissed the claims. (R117) That he could not dismiss the plaintiff's claim was clear. Counsel for Brown believed that the entire Order was in error. The portion wherein the Court dismissed the claims ignored the fact that Long Deming had been validly served with Summons as a party defendant and had duly answered the Complaint, and no request had been made on its part for dismissal. (R141-143)

A motion was filed on behalf of Brown asking the Court to reconsider its action or vacate or amend the Judgment. As set forth before, it had been learned that apparently, funds still remained due to Carnes from the Church or its general contractor and accordingly, counsel did not immediately call up for argument its motion for reconsideration but proceeded with an attachment. As more particularly set forth in the Statement of Facts herein, (pg.9 to 12) this resulted in considerable delay.

Counsel for Carnes called up both that Motion and the previously filed Motion of Brown for Reconsideration of Judge Hall's Judgment for hearing. (R93-96) This matter was heard by Judge Hall who refused to consider the matter of the Release of Attachment stating it should be heard by the Judge who granted the attachment. He amended his previous Judgment by striking the portion which related to the dismissal of claims. He denied the request for reconsideration of the Motion to Quash. (R74-75) Counsel for Brown had specifically asked Judge Hall to allow an opportunity to present evidence on the matter of the jurisdiction under the Long Arm Statute and on the matter of the validity of the service on the sales representative of Carnes, Long Deming Utah, Inc., but Judge Hall declined to reconsider the matter and would not grant such a hearing. (R74-75) Again Judge Hall gave no clue as to what had motivated his decision. Whether he considered the matter of minimal contacts of compelling importance, or whether he acceded to the argument of Mr. Moyle on the fact that Brown could not claim the benefit for the Long Arm Statute was not disclosed. Counsel for Brown knew that the factual situation with regard to the activities of Carnes in the State of Utah could be clarified if a hearing could be obtained at which evidence could be presented and witnesses examined. This could not be done on the Law and Motion calendar. The problem confronting counsel for Brown was whether to immediately appeal Judge Hall's decision, which counsel considered erroneous on the existing state of the record or whether it would be

better to try to get a hearing at which the facts could be adduced in regard to Carnes' activities in Utah. The election was made to preserve the right to appeal from Judge Hall's decision by filing a Notice of Intention to Appeal under 72(a) URCP, and proceed with the hearing on the Motion for Release of Attachment which posed a possible alternative method of obtaining jurisdiction. It appeared to counsel that in moving for a release of attachment when no property had been successfully attached and in asking that the Court consider the Constitutionality of the Utah Attachment procedure, went far beyond the scope of a special appearance and constituted a general appearance by counsel for Carnes. (R102) Accordingly, counsel filed a Motion to have the Court declare that Carnes had entered a general appearance and directing that it respond to the Complaint or be found in default. (R72-73) Carnes' Motion for Release of Attachment and Brown's Motion for Declaration of General Appearance by Carnes were both noticed up for hearing before Judge Hanson. (R68-69) Judge Hanson released the attachment but found that Carnes had entered a general appearance and ordered that it suitably plead within ten days. (R65) Carnes immediately petitioned for an Interlocutory Appeal to this Court. Appellant in a separate Petition, asked that this Court grant an Interlocutory Appeal from Judge Hall's decision. This Petition was not acted on by the Court which simply refunded the petitioner's fee. The Interlocutory Appeal was granted to Carnes. (Docket No. 14057 in the Supreme Court) This Court held that Carnes had not

entered a general appearance. Accordingly, counsel was still left with the problem of getting the facts concerning Carnes' activities in Utah more fully developed through having an evidentiary hearing before the Court. A try at an unprecedented procedure based on a Motion to Declare Service of Summons Sufficient, heard by Judge Taylor, died aborning, for the Judge refused to set any hearing for the taking of evidence saying that he could find no basis in the rules for such a procedure. (R224)

Rule 4(b) URCP specifically provides that Summons can be served on a party at any time before trial if one party to the action has been served. Counsel therefor decided to reserve Summons on Carnes which was done by service personally by the Sheriff of Wisconsin on a designated process agent, and in Utah by serving an officer of Utemp-Utah Air Sales, the sales representative in Utah under contract with Carnes. (R229-230, 234-235) Counsel for Carnes promptly filed a Motion to Dismiss claiming lack of jurisdiction. (R232) Instead of noticing up that Motion for hearing before the Law and Motion Division of the Court, counsel for Brown filed a Motion asking that a special hearing be set at which witnesses could be produced and evidence presented on the matter of Carnes' activities in Utah, as a basis for resisting the Motion to Dismiss and to Quash. (R237) This Motion of Brown was heard by Judge David Dee. An imposing memorandum of authorities filed by counsel for Brown, and a reply thereto by counsel for Carnes. The Court permitted a long oral argument. Among

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the contentions made by Carnes in support of its position that no special hearing should be granted was a claim that the entire matter of jurisdiction over Carnes was res judicata by virtue of the previous Order of Judge Hall. This position was argued extensively orally and in the memoranda to Judge Dee. (R255-257, 283-292) Judge Dee granted the hearing as requested by Brown, (R304) and overruled objections thereto filed by Carnes. (R302) Carnes promptly filed a petition for Interlocutory Appeal. This petition was based primarily on the claim that the Order of Judge Hall made the jurisdictional matter res judicata. This Court denied the Petition for Interlocutory Appeal and allowed the special hearing to go forward. (Docket No. 15564, R320)

It should be recognized that this Court has made known the purpose of an Interlocutory Appeal in opinions handed down over the years. One of the leading authorities is the case of Manwill vs. Oyler, 11 U2d 433, 361 P2d 177. In that case the Court states:

"(1) The purpose to be served in granting an interlocutory appeal is to get directly at and dispose of the issues as quickly as possible consistent with thoroughness and efficiency in the administration of justice. But that objective is not always served by granting such an appeal. In some instances, the necessity of remanding for trial may result in protracting rather than shortening the litigation. For this reason, whenever it appears likely that the matter in dispute can be finally disposed of upon a trial; or where they may become moot; or where they can, without involving any serious difficulty, abide determination in the event of an appeal after the trial, the desired objective is best served by refusing

to entertain an interlocutory appeal and letting the case proceed to trial. Then, if an appeal is necessary, there is this additional advantage: the issues of facts have been determined and the record is viewed in the light most favorable to the judgment, instead of the reverse.

"(2) On the other hand, the desired objective of efficiency in procedure can be promoted, and the interlocutory appeal is properly granted, if it appears essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed; or if there is a high likelihood that the litigation can be finally disposed of on such an appeal." (Emphasis ours)

Since in the instant case, if the contention of the counsel for Carnes that Judge Hall's decision made the matter of jurisdiction res judicata was upheld on interlocutory appeal, it would dispose of the litigation, it apparently meant this Court did not agree with counsel's position and upheld Judge Dee's Order, and that Brown was entitled to an evidentiary hearing for the purpose of developing the facts necessary to a proper consideration of the jurisdictional question. That interpretation of this Court's action on the Petition for Interlocutory Appeal is entirely consistent with the position taken in other doing business within the State of Utah and Long Arm Statute cases wherein the Court has held:

"The question here, that of whether a non-resident is doing business in the State is strictly a factual one, and each case, therefore, must be determined on its own peculiar and significant facts to determine if the local forum has jurisdiction to try and adjudge the claims or obligations of one domiciled elsewhere." Foreign Study League vs. Holland-America Line, 27 U2d 442, 497 P2d 244 at 244.

It is also consistent with the viewpoint that has been expressed by not only this Court but by the Supreme Court of the United States in the International Shoe Co. vs. Washington case, 326 US310, 66 Sup. Ct. 154, 90 L. Ed. 95, and cited with approval by this Court in Hill vs. Zale, Supra:

"...due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 482 P2d 332 at 334.

We submit that traditional notions of fair play and substantial justice can hardly be violated by requiring that Carnes respond to Summons before the Courts of the State of Utah in the face of the involvement of that company in the sale of goods and products in this State to residents of this State, and in particular, the designing, manufacturing, providing, warranting, and collecting some \$450,000.00 for materials incorporated into the Church Office Building job.

We believe in refusing to grant the Interlocutory Appeal, this Court may have also considered that Judge Hall's Order, as contended by Brown, was contrary to law. Counsel for Carnes admitted in argument before Judge Hall that if the L.D.S. Church were to commence an action against Carnes, it could secure jurisdiction over Carnes under the Long Arm Statute. (R435-436) This constituted an admission of the minimal contacts in this State and the fact of having supplied goods and services and having transacted business within the State, sufficient to satisfy the jurisdictional requirements established by this

Court. The only point then left for consideration by Judge Hall was the novel argument that Brown did not qualify as one entitled to claim the benefits of the Long Arm Statute because Carnes contended that Brown's claim did not arise from acts enumerated in the Statute. (R422) How a claim could more directly arise from the acts of the defendant Carnes enumerated under the act than Brown's claim is difficult to conceive. Brown's claim arises out of the sale and delivery of goods by Carnes to the L.D.S. Church for incorporation into the Church Office Building, for the sale of which Carnes owes Brown a commission. In the Zale case, Mr. Hill, the plaintiff, sought to enforce a wage claim for services rendered in Alaska, and he chose as his forum the State of Utah. This Court in that case stated that the extent to which the alleged facts of the asserted claim arose from activities within the State was only one of the factors to be considered in determining whether jurisdiction could be established in Utah. Even though Hill did not serve Zale in Utah, the Supreme Court found no injustice in granting jurisdiction over the corporation to enforce the wage claim for services performed in Alaska. This Court in the Foreign Study League vs. Holland-America Line, 27 U2d 442, 497 P2d 244, found even more tenuous contacts with Utah residents sufficient to support a law suit in this State against the Holland-America Line. In that case, nothing was delivered into the State. Sales of cruises on the ships of this line were solicited by sales agents who received a commission for making such sales. The Line did nothing in this

State save make a combined social and business call on an "agent" in this State. We respectfully submit that reviewed in the light of these standards, Judge Hall's decision was clearly wrong.

In considering the action taken by Judge Leary, it should be born in mind that at the start of the hearing before Judge Leary, he was informed of the fact that the Order under which he was acting, issued by Judge Dee, had been the subject matter of a Petition of Interlocutory Appeal, and that the Appeal had been denied by this Court. Despite the mandate given by Judge Dee's Order, and the fact that the Supreme Court did not, when it clearly could have done so, stop the hearing under Judge Dee's Order by granting the Interlocutory Appeal, Judge Leary nevertheless failed to make a decision based upon the factual situation presented before him and instead grounded his Order upon his view of the matter which is clearly shown by the Memorandum Decision which he entered, and which, among other things provided:

"1. That plaintiff had a right to present evidence in opposition to defendant Carnes' Motion to Quash Service and Dismiss which came on for hearing before Judge Hall October 1, 1974.

"2. That plaintiff had an opportunity from the date of the filing of the complaint (October 26, 1973) until the hearing on defendant Carnes' Motion to Quash Service and Dismiss (October 1, 1974) within which to conduct discovery for the purpose of obtaining evidence as to Carnes coming within the provisions of long arm statute and as to Long Deming Utah, Inc. being the agent of Carnes for the service of process.

"3. That substantially all of the evidence presented before this Court was peculiarly within the knowledge of plaintiff, was obtainable by interrogation of the witnesses Young and Tregeagle, or by discovery prior to the hearing before Judge Hall on October 1, 1974.

"4. That plaintiff commenced no discovery until January 8, 1975.

"5. That the testimony of the witnesses McDowell and Carlsen of Utemp, Inc. was cumulative.

"6. That the service upon defendant Carnes Corporation by leaving with Lynn Felton and the service upon defendant Carnes Corporation by leaving with Richard McDowell were identical in the sense that at the time of service each was an officer of the then Sales Representative of Carnes Corporation in the State of Utah.

"7. That the motions to strike made during the course of the hearing by defendant Carnes should be denied.

"8. That Service of Summons upon defendant Carnes should be quashed but the Amended Complaint should not be dismissed.

"The Court Concludes:

"Plaintiff is entitled to an order overruling the motions to strike made by defendant Carnes.

"That this Court cannot overrule the decision of another judge of the same Court and that consistent with the ruling of Judge Hall, defendant is entitled to a judgment quashing service of process on Carnes Corporation but not dismissing the Amended Complaint."

Finding No. 1 is true but as a practical matter with Judge Hall on the Law and Motion Division of the Court, the counsel both knew that nothing more than the affidavits could be pre-

sented to that division of the Court. Since the matter was not discussed before Judge Leary and no issue was raised in regard to that matter, he could not have known nor did he attempt to inform himself as to whether a hearing had been requested before Judge Hall at which testimony could be given.

Finding No. 2 as a statement of broad general principal may be correct, but it was not in fact correct and Judge Leary did not request any enlightenment on this matter. No accusation was made that counsel had not proceeded properly nor was counsel asked to afford any explanation as to why discovery had not been undertaken prior to 1975. It must be remembered that Carnes had immediately, and within the time allowed by rule for a responsive pleading, filed its Motion to Dismiss and Quash Service of Summons. Counsel for Carnes took the position that discovery conducted by plaintiff after the filing of such a Motion would not be binding on Carnes because Carnes could not participate in such discovery as it did not recognize the jurisdiction of the Utah Court and that therefore it did not have to participate in or be bound by any such discovery efforts.

Finding No. 3 is not in conformity with the evidence. The facts did not lie within the knowledge of plaintiff. They had to be obtained from the witnesses who only became available to the plaintiff after a special hearing had been set and subpoenas could be issued, and were in fact issued. So long as the attitude of counsel for Carnes was that discovery could not be conducted which would be binding upon it, plaintiff could not

nesses to any voluntary disclosure could not be better demonstrated than by the immediate reaction of Long Deming Utah, Inc., which through its counsel immediately sought a protective order and proceeded to contest the right of the plaintiff to any information concerning the transactions involving the Church Office Building or involving Long Deming's relationship to Carnes. (R99-101) It was only when Judge Hanson ruled that Carnes had made a general appearance and was subject to the jurisdiction of the Court that any meaningful discovery became possible. In open Court, Judge Hanson was informed by all counsel, including counsel for Long Deming, that by reason of his ruling, consideration of most of the matters raised by Long Deming's Motion for Protective Order had been rendered moot, and Judge Hanson incorporated this into his Order:

"...and the Court having announced its disposition of the aforesaid motions and it thereupon being stipulated in open court by the attorney for the Plaintiff, Allen H. Tibbals, and the attorney for the defendant, Long Deming Utah, Inc., for the protective order and to quash request for the production of certain documents was rendered in part moot by the decision of the court on the prior motions and that any remaining issues the counsel believed could be resolved by conference..." (R65-66)

The issue of whether or not counsel for Brown had properly conducted the discovery proceedings and had proceeded in a correct manner was neither raised, argued or presented to Judge Leary. Likewise, Judge Leary was not asked to pass upon the question of whether he could or could not 'overrule the decision' of Judge Hall. The issue of the status of the matter before

Judge Hall had been preserved for ultimate consideration by the Supreme Court. It was not submitted to Judge Leary. He was acting under the Order of Judge Dee and was mandated by that Order to make a determination of whether Carnes had or had not by its conduct and contacts submitted itself to the jurisdiction of the Utah Courts and whether or not the sales representatives under contract with Carnes to act as such were qualified as persons upon whom Service of Summons could be had to secure jurisdiction over Carnes.

It has long been recognized as elementary in the law that relief cannot be granted by the Court upon its own motion on issues neither raised or tried.

"...While it is true that our rules provide for liberality in procedure and the granting of relief to which the evidence shows a party entitled, this does not go so far as to authorize the granting of relief on issues neither raised nor tried."
Cornia vs. Cornia, 546 P2d 890 at 893.

The Oregon Supreme Court has similarly held:

"It is well settled that the pleadings may be introduced to show what was adjudicated, and in the absence of conflicting evidence they are, of course, conclusive. It is elementary law that the relief granted must necessarily be responsive to and in conformity with the pleadings and proof. (citing other cases)"
Jarvis vs. Indemnity Insurance Co. of North America, 227 Ore. 508, 363 P2d 740 at 743.

The Order of Judge Dee under which the matter was presented to Judge Leary did not call for Judge Leary to pass upon any of the matters which he incorporated in this manner into his decision. Objections to the decision and the proposed

Order by Judge Leary were duly filed by counsel for Brown.
(R342-347) A hearing was held thereon and Judge Leary admitted the Order presented did not express his intention:

"But I would--do make this comment Mr. Moyle; that I don't think that the Order which was prepared for the Court's signature precisely sets forth what the Court intended by its Memorandum decision..." (R395)

However, Judge Leary did not rectify the Order. It was filed as originally presented and Appellant's objections were overruled. (R357) Judge Leary's action was erroneous and should be reversed. Fortunately, the factual data obtained at the hearing before Judge Leary is available for the review and consideration of this Court in determining Justice and equity between the parties. (R397, 675, Ex. 1-25 inc.)

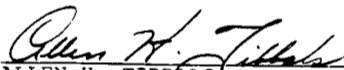
CONCLUSION

We respectfully submit that a sense of fair play and justice and equity require that this Court find that Carnes has done business within the State of Utah in such a manner as to subject it to the jurisdiction of the Utah Courts. The duration and vagaries of the battle before the lower Court and on Interlocutory Appeal to this Court should not obscure the essential necessity of recognizing the rights of the parties to fair and impartial consideration of the issues. The facts as developed support the jurisdiction of the Utah Court over the controversy between Brown, Carnes and Long Deming Utah, Inc. We ask that this honorable Court so rule and mandate this


action to the lower Court for a trial upon the merits.

Respectfully submitted this 15th day of January, 1979.

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Received ~~one~~^{two} copy of the foregoing Brief of Appellant,
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