

1951

Helene Shaw dba Arthur Murray Dance Studio v. Ara M. Dimond Jeppson : Brief of Respondent

Utah Supreme Court

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Case No. 7741

IN THE SUPREME COURT
of the

STATE OF UTAH FILED

OCT 20 1951

Supreme Court, Utah

HELENE SHAW, doing business as
ARTHUR MURRAY DANCE
STUDIO,

Plaintiff and Respondent,

— vs. —

ARA M. DIMOND JEPPSON,
Defendant and Appellant.

RESPONDENT'S BRIEF

CHENEY, MARR, WILKINS &
CANNON and ROBERT M.
YEATES,

Attorneys for Plaintiff and
Respondent.

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IN THE SUPREME COURT

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Defendant and Appellant.)

Please correct page one (1) by changing the word "Plaintiff's" to "Defendant's" in the third line so that the first sentence of the second paragraph will read:

"The facts as set forth in Defendant's brief consist principally of quotations from the contract between Plaintiff and Defendant."

Another Utah case dealing with what constitutes doing business is MARCHANT v. NATIONAL RESERVE COMPANY OF AMERICA, 103 Utah 530, 137 P. 2nd 331. The case holds that, where a foreign corporation takes four deeds to Utah property and has them recorded, it is still not doing business under the statute requiring a foreign corporation to qualify.

IN THE SUPREME COURT

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Plaintiff and Respondent,

— vs. —

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Defendant and Appellant.

Case No. 7741

RESPONDENT'S BRIEF

STATEMENT OF FACTS

In accordance with the Appellant's brief the parties herein will be referred to as Plaintiff and Defendant.

The facts as set forth in ^{Defendant's} Plaintiff's brief consist principally of quotations from the contract between Plaintiff and Defendant. It is incomplete and does not state all the facts necessary to decide the questions raised. We will therefore make a more complete statement, which facts we believe are substantially undisputed.

Arthur Murray Incorporated is a foreign corporation with its principal place of business in New York City (Answer of Defendant, Record page 6). Plaintiff

has a contract with that corporation (Exhibit 2) wherein she is licensed to use the "Arthur Murray Method" and the Arthur Murray name in connection with a dancing school. This license agreement consists of four pages of fine print. It is impractical to set forth even the substance of the entire contract in this brief but we will mention such portions as we believe are significant so far as they lend support to the theory of either Plaintiff or Defendant.

The Licensee is "Helene Druke Shaw," Plaintiff herein. It recites that Plaintiff "is desirous of *personally conducting* a dancing school in Salt Lake City" and of using the "Arthur Murray Method" and the name of "Arthur Murray." The Licensee is required to register or file statements "of his use of such name in the proper office of any county in which such dancing school or studio or any branch thereof may be located and in any other governmental office where it is mandatory or permissive that such a statement be filed . . ." (Paragraph 1, Exhibit 2) Licensee agrees to pay 10% of *gross receipts* to the Licensor. The license agreement has many provisions intended to assist the Licensee in maintaining Arthur Murray standards and that require the Licensee to keep the studio on a basis that is uniform in quality with Arthur Murray standards. Some of these requirements are set forth on pages 9-13 of Defendant's brief. The Defendant's statement as to these requirements is substantially correct with the following qualifications:

In paragraph 4 of the contract referred to on page

10 of Defendant's brief, while Licensee agrees to follow certain standards and policies, the failure to follow them gives the Licenser only the right to terminate the contract. On page 11 Defendant states that Licenser has "the right to hire or fire any or all employees of the Salt Lake studios". This is definitely a misstatement. No right to hire is contained in said paragraph or anywhere in the contract. Paragraph 7 does provide that any person hired (by Licensee) and found objectionable "shall be dismissed forthwith at the request of the Licenser." Licenser may not fire but may only request that some objectionable person shall be dismissed. Undoubtedly in any such case the contract would be so construed that the Licenser could not act arbitrarily. Nevertheless the only right given Licenser on failure to maintain standards is the right to terminate the agreement. Paragraph 7 specifically says that teachers are to be paid by the Licensee. There is no evidence that the Licenser ever did anything pertaining to the dismissal of any employees and in fact it never did. The remaining statements in Defendant's brief pertaining to the contract so far as it goes are substantially correct except that she uses the word "must" where the contract provides "shall."

The Licensee is solely responsible for all expenses of the dancing school (paragraph 10, Exhibit 2). The Licenser while requiring the Licensee to live up to certain requirements and standards has only the right in case of such failure on the part of the Licensee to terminate the agreement on certain notice. (See paragraph 16, 20

and 22 of Exhibit 2 in addition to paragraph 7 above mentioned.)

The contract may be analyzed as a license to use the name and methods of Arthur Murray in the conduct of a dancing school for which the Licensee pays a 10% royalty of gross receipts. There is an additional 5% paid to the Licensors which is placed in a trust fund to secure the performance by the Licensee in the giving of unfinished lessons contracted for at other studios. There are conditions imposed on the Licensee in the use of the name and methods of Arthur Murray, breach of which gives the right to terminate. The net profit in the operation of the studio belongs entirely to the Licensee and the Licensee is solely responsible for all losses (Record 33). The payment of the 10% of gross receipts to the Licensors is in no way conditioned upon whether or not the Licensee makes a profit and the Licensors, therefore, has no interest in profits or losses, taking a straight royalty on gross receipts.

Arthur Murray and no representative of Arthur Murray Inc., has ever visited plaintiff's studio (Record 68-69). Defendant does not contend that the making of this contract constituted doing business in the State of Utah by the Licensors, but the contract was necessarily signed outside of the State of Utah, Arthur Murray who signs for the corporation never having been within the State. The following is the undisputed testimony as to the manner in which the business is conducted.

Plaintiff testified that—"I am the employer." (Record 15) Arthur Murray advises Licensee to have own

lawyer look at all contracts (Record 42). Licensee can purchase instruction books or not as she wishes (Record 42). Licensee sends duplicate time slips to New York along with a weekly report (Record 56). This report shows only the lessons taught and the gross receipts (Record 57). It does not show wages paid or expenses (Record 57 and 67). The facilities at the studio, which consist of a desk, files, telephone, ballroom and phonograph records, are all owned by the Licensee (Record 60 and 67). No representative of Arthur Murray, Inc. has ever visited Salt Lake City (Record 68-69). Plaintiff testified—" . . . Mr. Murray regards us as individual owners of our studio and anything that comes up, we are not required to do it. We are not part of the corporation of Arthur Murray, et al." (Record 32) Plaintiff filed "Affidavit of Doing Business Under an Assumed Name" (Exhibit F). This exhibit shows that "Helene Druke Shaw" is the owner and the business is done "under the name of ARTHUR MURRAY STUDIOS (not incorporated)". Plaintiff registered the "ARTHUR MURRAY STUDIO" in the office of the Secretary of State (Exhibit G). This Exhibit states:

"Helene Druke Shaw, a franchise holder of the Arthur Murray Studio, registered with this office the trade name 'Arthur Murray Studio.'"

On October 12, 1949, plaintiff under the name of "Arthur Murray Dance Studio of Salt Lake City, Utah, hereinafter referred to as the 'Employer'" entered into a contract with the defendant (who was then Ara M.

Dimond and who later became Mrs. Jeppson) (Exhibit A). Paragraphs 5 to 11 of this agreement are set forth in plaintiff's brief at pages 4 to 7. The contract shows distinctly that Arthur Murray Dance Studio of Salt Lake City is separate and distinct from Arthur Murray, Inc. It recites that—"The employer conducts an Arthur Murray dancing school." It then refers to "Arthur Murray, Inc." and its predecessors, which have expended and will continue to expend large sums of money to develop methods of teaching and dancing. The contract thus clearly distinguishes between the employer and Arthur Murray, Inc.

In paragraph 6 of the agreement Arthur Murray, Inc. is further distinguished from the employer by the statement that—"The employer may photograph the employee, and *the employer and Arthur Murray, Inc.* may forever use his or her name . . .", etc. The contract is signed "Arthur Murray Dance Studio of Salt Lake City, Utah, by Helene Druke Shaw, Employer."

We thus see that the defendant was not misled as to whether she was employed by Helene Druke Shaw doing business as Arthur Murray Dance Studio of Salt Lake City, Utah, or by Arthur Murray, Inc., a New York corporation. She claims no misrepresentation to her as to who was her employer and relies on nothing but the form of the license agreement in her claim that Arthur Murray, Inc. was in fact her employer and is in fact the plaintiff in this case.

Since defendant relies solely on the defense that the plaintiff is in fact Arthur Murray, Inc., a foreign cor-

poration doing business in Salt Lake City, other evidence is perhaps not now particularly material. Nevertheless, a brief statement of other facts is helpful in giving a more complete picture of this case. Plaintiff testified that teachers such as the defendant are given a full training course of three to four months of four hours per day prior to the time the employee commences teaching. One hour a day of instruction is continued thereafter (Record 16). Plaintiff attends conventions of the Arthur Murray system periodically in order to keep up on the latest methods and dances. These conventions may be in any city of the United States (Record 16). These trips are all at the cost of the plaintiff (Record 17). Plaintiff has ten or twelve manuals published by Arthur Murray which cost from \$25 to \$200 each, one such manual costing \$400 (Record 18). All the material in these books and the knowledge acquired by plaintiff by fifteen years' experience is given the teachers (Record 19). This experience includes methods of approach and teaching as well as actual dance training (Record 20).

Defendant after being so employed quit after approximately one and a half years' employment without stating any reason (Record 20). It will be noted that the contract restricts the defendant from teaching dancing only for a period of two years and within a twenty-five mile radius of the Arthur Murray Dancing Studio. No claim is made that the restriction is not a reasonable and lawful one and necessary to protect the good will of plaintiff's business. It is undisputed that defendant was trained as a dancing teacher entirely by plaintiff;

that she has had access to all of the records and files of plaintiff showing names, telephone numbers and addresses of all students; that plaintiff has spent large sums of money to secure these students and train defendant. Defendant if permitted to break the contract could advertise as an Arthur Murray teacher, contact all students formerly with plaintiff and give them lessons at a much cheaper rate than plaintiff (Record 21 and 26). It was shown that prior to the institution of the Arthur Murray method there was only instruction on a commercial basis of the waltz and fox trot; that Arthur Murray has spent a great deal of money in research to develop South American dances, and that now one hundred twenty steps are taught; that this is unique in the history of dancing in the United States (Record 23). Plaintiff, therefore, has a great deal of good will to protect in the enforcement of this contract.

The trial court entered a decree enjoining defendant from teaching dancing, etc., as provided in the contract.

STATEMENT OF POINTS

1. This suit is by plaintiff in her own name and in her own right on a contract made exclusively between plaintiff and defendant.

2. Arthur Murray, Inc., a foreign corporation, is not a party to this action and, therefore, no question arises with regard to the right of a foreign corporation to sue in the State of Utah.

3. Assuming (without admitting) that doing all of

the things provided for in the license agreement by Arthur Murray, Inc., a foreign corporation, would constitute doing business in the State of Utah, the mere provision for such activity is insufficient to constitute doing business, and the question must be determined by what has actually been done by the foreign corporation.

4. There is nothing to support the claim that Arthur Murray, Inc. is doing business in the State of Utah.

ARGUMENT

1. THIS SUIT IS BY PLAINTIFF IN HER OWN NAME AND IN HER OWN RIGHT ON A CONTRACT MADE EXCLUSIVELY BETWEEN PLAINTIFF AND DEFENDANT.

The action herein involved is based solely on a written contract (Exhibit 1). The question of whether or not plaintiff sues in her own right or sues to enforce this contract in the right of Arthur Murray, Inc. should be determined by the provisions of the agreement. There is no contention that there is any matter agreed to between the plaintiff and defendant except as contained in the written contract. As pointed out in the statement of facts, the "employer" is "Arthur Murray Dance Studio of Salt Lake City, Utah." Arthur Murray, Inc. is expressly referred to in the contract as a third party and not as a party to the contract. All of the things to be done by the defendant are to be done for the employer, Arthur Murray Dance Studio of Salt Lake City, Utah. Everything which is to be done as consideration for the promises of the defendant is to be done by the Arthur

Murray Dance Studio of Salt Lake City, Utah. Such employer is responsible for the payment for the services rendered. In each instance it is the "employer" who obligates herself to the employee. Is it possible under this contract that the defendant could sue Arthur Murray, Inc. in the event of the failure of the employer to pay her wages? Certainly not. Arthur Murray, Inc. in no way enters into the contract as the principal. In whatever way Arthur Murray, Inc. may be a third party beneficiary, it is not as a party to this contract, either as disclosed or undisclosed principal. The fundamental relationship of any agency between Arthur Murray, Inc. and the plaintiff is missing in this contract and in this action.

In Volume 1, page 7, of the "Restatement of the Law of Agency" it is stated:

"(1) Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

(2) The one for whom action is to be taken is the principal.

(3) The one who is to act is the agent."

Agency is again defined in 2 Am. Jur. 13, Section 2, as follows:

"An agency may be defined as a contract either express or implied upon a consideration, or a gratuitous undertaking, by which one of the parties confides to the other the management of some business to be transacted in his name or

on his account, and by which that other assumes to do the business and render an account of it. This is comparable with the definition of agency as adopted by the American Law Institute."

The case of PURNELL vs. CITY OF FLORENCE, 175 SO. 417 gives the following statement defining agency:

"Under the rules, as laid down by all of the authorities, the distinguishing features of agency are its representative character and its derivative authority. Whether a particular relationship is an agency depends on the relations of the parties as they in fact exist, without regard to what they call their relationship. (citing cases) *Before there can be an agent, there must be a principal, and, when a person acts independently, he cannot be classed as an agent for any purpose.*"

Agency is further defined in the case of COLUMBIA UNIVERSITY CLUB vs. HIGGINS, 23 FED. SUPP. 572 at page 574 as follows:

"While innumerable definitions and interpretations of the term 'agency' may be found in the law reports and law digests, I think that the statement found in the case of S. B. McMaster, Inc., v. Chevrolet Motor Co., D. C., 3 F. 2d 469, 474, is sufficiently clear to merit quotation. It is there stated in part: 'Without undertaking to review in detail all the various definitions that have been made of the term, I think it may be safely asserted that they all recognize two distinctly essential elements. The first is that the agent is a representative and acts, not for him-

self, but for another. The second is that his acts within the scope of his authority must be binding upon his principal.' ”

The contract between plaintiff and defendant is simply one of employment of the defendant *by the plaintiff*. There is no possibility from any facts in this case which would make it possible for the plaintiff to have hired the defendant as an employee of Arthur Murray, Inc. Even if it were possible, it was not in fact done, the contract being unrelated to Arthur Murray, Inc. No question of a foreign corporation doing business in the State of Utah is presented.

2. ARTHUR MURRAY, INC., A FOREIGN CORPORATION, IS NOT A PARTY TO THIS ACTION AND, THEREFORE, NO QUESTION ARISES WITH REGARD TO THE RIGHT OF A FOREIGN CORPORATION TO SUE IN THE STATE OF UTAH.

This point is closely related to the first. Arthur Murray, Inc. of New York is seeking nothing, has not come into Court, and defendant has no reason to claim that it is a party in any way. Arthur Murray, Inc., either directly or indirectly, is asking nothing from this or the trial court. What has been said with regard to point No. 1 and the authorities in support thereof sustain point No. 2.

3. ASSUMING (WITHOUT ADMITTING) THAT DOING ALL OF THE THINGS PROVIDED FOR IN THE LICENSE AGREEMENT BY ARTHUR MURRAY, INC., A FOREIGN CORPORATION, WOULD CONSTITUTE DOING BUSINESS IN THE STATE OF UTAH, THE MERE PROVISION FOR

SUCH ACTIVITY IS INSUFFICIENT TO CONSTITUTE DOING BUSINESS, AND THE QUESTION MUST BE DETERMINED BY WHAT HAS ACTUALLY *BEEN* DONE BY THE FOREIGN CORPORATION.

The only possible support which defendant has for her contention that Arthur Murray, Inc. is doing business in the State of Utah is the license agreement between such corporation and the plaintiff (Exhibit 2). Assuming for the moment that if Arthur Murray, Inc. exercised its prerogatives that it would then be doing business in the State of Utah, it does not follow that it is doing business simply because it entered into the license agreement. It has never had any representative in the State of Utah. At least until it does some of the things provided for in the contract (which defendant claims would be doing business), no business is transacted within the State. This is supported by the case of UNITED STATES vs. AMERICAN BELL TELEPHONE COMPANY AND OTHERS, 29 FED. 17. The question in that case was whether or not a certain license agreement between a foreign corporation and a local telephone company constituted doing business. There were provisions similar to the license agreement in question. The Court held that it did not create the relationship of agency. The Court then further held that whether or not the foreign corporation is carrying on business in the State must be determined by what it has done or is doing and not the powers reserved in existing contracts, which powers have not yet been

exercised. The Court's holding is well stated in Syllabus 9 as follows:

"Whether a foreign corporation is carrying on business in a state must be determined by what it has done, or is doing, rather than by what it may hereafter do, under powers reserved to it in existing contracts, but not yet exercised. For one person to supply the means to another to do business with or on is not the doing of that business by the former."

This case is approved and the ruling clearly stated in *LAVARRE vs. INTERNATIONAL PAPER COMPANY*, 37 FED. 2d 141 at page 146. The Court said:

"The facts in the case above cited with approval by the Supreme Court are illustrative of the strictness with which that court regards service of process upon corporate defendants. The action there was against the American Bell Telephone Company, a Massachusetts corporation, and was brought in Ohio. Service was had upon the Cleveland Telephone Company, in which the Bell Company owned stock, and it was alleged to be an operating agency of the Bell Company in Ohio. The facts alleged in regard to the inter-corporate relation are stated by the court in an analysis of the bill of complaint. In a long and well-considered opinion, Judge Jackson held that such facts were not sufficient to make the Bell Company present and doing business in Ohio because of its relation with the local corporation. In conclusion the court said (29 F. page 46): 'The various matters relied on to show that the American Bell Telephone Company is to be found

in Ohio, and subject to the jurisdiction of this court, — such as its ownership of the telephone instruments used by the licensee corporations; the ownership of stock in one or more of the local companies; the rights and powers reserved to it of resuming possession of its telephone instruments, and taking control of the telephone business, in the event of default on the part of the licensee corporations in complying with the provisions of the license contracts; the sharing in the gross receipts of certain portions of the business done; the reservation of rents and royalties; the right to make changes; and the restrictions and limitations imposed upon the licensee companies, — neither singly nor in the aggregate establish the two essential facts necessary to bring the American Bell Telephone Company within the power and jurisdiction of this court, viz., that said corporation is now, or was at the commencement of this suit, carrying on its business in the State of Ohio, and that it had a “managing agent” or agents representing it here.’”

4. THERE IS NOTHING TO SUPPORT THE CLAIM THAT ARTHUR MURRAY, INC. IS DOING BUSINESS IN THE STATE OF UTAH.

The previous three points and authorities cited should, we think, clearly dispose of this case. However, there are cases in which admittedly the foreign corporation was involved as a party in the litigation but, under license agreements similar to the one involved herein, it was held that the foreign corporation was not doing business within statutes requiring foreign corporations to qualify.

A leading case on this subject is *McMASTER vs. CHEVROLET MOTOR COMPANY*, 3 FED. 2d 469. The question in this case was whether service of process on a "dealer" was good service on defendant, a foreign corporation. The question presented is stated as follows:

"I will now consider the defendant's motion to set aside the service and dismiss the case. While the motion is based both upon the ground that the defendant is not doing business in the state and that the person upon whom service was made is not defendant's agent, nevertheless the two grounds may be considered together, for under the facts in the case, if the defendant is doing business at all in this state, it is by virtue of the agency created by the contract referred to, and if, per contra, the contract does not create the relation of agency, the defendant is not doing business in the state. In other words, there is no proof or claim before this court that the defendant is doing business in the state save through the acts of the Barrow-Chevrolet Company, under the terms of the contract between that company and the defendant. It is true that the plaintiff does claim that when the defendant exercises the right under the contract to come into the state and inspect the Barrow-Chevrolet's place of business, records, accounts, etc., such acts themselves constitute doing business in the state. But I do not think that such acts alone would constitute doing business in the state in the sense that the defendant would be liable to process in such state. Therefore, as I view it, a decision upon the question of agency will dispose of both grounds of the motion." (Page 471)

The Court held that the agreement did not create an agency so as to constitute the Chevrolet Motor Company doing business in the state. The ruling of the court and the essential facts are contained in the following statement:

“Without undertaking to review in detail all the various definitions that have been made of the term, I think it may safely be asserted that they all recognize two distinctly essential elements. The first is that the agent is a representative and acts, not for himself, but for another. The second is that his acts within the scope of his authority must be binding upon his principal. In the contract in question one may search in vain for anything showing that whatever the person termed the ‘dealer’ is to do under the contract, he is acting for the person termed the ‘seller’. All of the acts of the dealer are for his own account. His purchases are made for himself. His maintenance of an office, station, service rendered, sales of cars, advertising, and all of the other various features in the contract upon which plaintiff relies as establishing an agency, are acts which the dealer performs, not as the act of the seller nor for the seller, but as his own act and for himself. We may also search in vain in the contract for any authority whatever for the dealer to bind the seller. Whatever may be required of that contract of the dealer, whatever he does under that contract, the liability and responsibility are his, so far as other persons are concerned, and not the liability or responsibility of the seller. To make assurance doubly sure, the parties have expressly declared that he shall have no such authority.

It is clear to my mind that no third party could hold the seller liable for any act of the dealer performed under that contract.” (Page 474)

In the case of *STATE vs. FORD MOTOR COMPANY*, 38 S.E. 242, the State of Carolina attempted to require the defendant to comply with the State law relating to foreign corporations which were doing business in the State. The Supreme Court of South Carolina had previously held that the defendant, Ford Motor Company, could be served with process in the State when the summons was served on C. E. McCallister, an employee of the defendant while “servicing its dealers”. It had not held that the “dealer” or any of its employees could be served with process as agents for the defendant. The Court made a distinction between doing business in the State for the service of process on an actual employee in the State on business of the foreign corporation and doing business within the statute requiring that the foreign corporation file its articles and pay fees and expenses. This case held that the Ford Motor Company was not doing business in the State for such purpose. The State in its claim relied upon the contract between the defendant and local dealers. For the form of the dealer’s contract the Court referred to and incorporated the case of *THOMPSON vs. FORD MOTOR COMPANY*, 21 S.E. 34 (see second column page 244 of 38 S.E. 2d). The dealer’s contract is analyzed at pages 37 to 39 of 21 S.E. We quote a portion of that opinion. The Court said:

"It is provided that 'title to all Company products, except in a case where the invoice shows sale to be on credit, shall be and remain with Company until actual receipt of the full purchase price in cash by Company.' With reference to checks and other negotiable paper from the dealer, the agreement provides: 'Until Company has received cash in full payment of any such check, draft or other commercial paper, its right to retake and resell Company products for which such paper is issued shall continue.' It is provided that the prices of all Company products shall be subject to change from time to time, that the dealer agrees to maintain a place of business 'and only one place of business' (subject to one or two exceptions) and that such place of business shall be 'located in a place and equipped in a manner acceptable to Company; to display conspicuously thereon approved Ford signs; to install and maintain therein the tools, machinery and equipment recommended by Company; to employ sufficient, competent salesmen to solicit adequately all potential purchasers of Company products in the community in which Dealer is located, and sufficient service mechanics to render prompt, efficient service to owners of Company products and to render such service to any owners of Company products engaging such service.' It further provides that the dealer is 'to install and maintain an accounting system in accordance with Ford Dealers Accounting Procedure Manual as approved by Company; to furnish Company at regular intervals as designated by Company accurate financial statements reflecting the true financial condition of dealer's business on standard forms provided by Company for that purpose; to allow representatives of

Company, at all reasonable times and from time to time, to examine all records, contracts and accounts covering sales or service of Company products by Dealer and to examine Dealer's stock and place of business and to test Dealer's equipment and facilities' and 'to submit promptly to Company, Dealer's Ten Day Reports accurately and fully prepared on forms provided by Company therefor and on the dates specified therein.

* * * * *

"Then follow certain restrictions upon the dealer with reference to sales made beyond his territory. In certain instances the Company acts as umpire between dealers, but does not guarantee the results. Then follow certain restrictions as to the sale of parts for Ford automobiles and trucks, except 'genuine Ford' parts. The dealer agrees not to use sales policies or advertising matter in any manner in connection with his business as a Ford Dealer which are detrimental to the Company or to other Ford dealers, or to which the Company may object as being detrimental to its good will.

* * * * *

"The contract contains many other provisions retaining and strengthening the vast control which respondent had the right to exercise over the conduct and affairs of D. W. Gavin & Co., Inc., but enough examples have been given herein to illustrate the authority which respondent exercised over this 'dealer'."

On these facts the Court held that the Ford Motor Company was not doing intrastate business within the statute requiring such foreign corporations to qualify. The Court said:

“Appellant’s business in South Carolina is interstate in character, according to the evidence, and it cannot be required to domesticate or suffer the statutory penalty for failure thereabout. Infliction of the latter would burden interstate commerce, which the state cannot constitutionally do. Appellant’s many dealers in the state are not its agents; they are in intrastate business here, not it. And its traveling representatives are here on occasions ‘servicing’ its warranties, cultivating the interstate business, supervising it and soliciting more, but they make no local sales or collections nor engage otherwise in intrastate business so far as the record before us shows. The activities of the itinerant representatives are incidental to the interstate business but they undoubtedly manifest the presence here of the corporation for jurisdictional purposes.” (38 S.E. 254)

See also the cases of STREET AND SMITH PUBLICATIONS vs. SPIKES, 120 FED. 2d 895; WATSON FIREPROOF WINDOW COMPANY vs. E. A. RYSDON, 189 ILL. APP. 134 (affirmed 190 Ill. App. 316); PAULINE OIL AND GAS COMPANY vs. MUTUAL TANK LINE (OKLA. 1926), 246 PAC. 851.

Defendant at the trial placed much emphasis on the fact that plaintiff advertised in the telephone directory and listed herself as “Helene Druke, Director” of Arthur Murray Studios. This has no significance whatever so far as we can see but it has been held that even though Arthur Murray, Inc. had listed its name in the directory it is not evidence of doing business. See the case of

GABRIEL GARLEN vs. BANCAMERICA-BLAIR
CORPORATION, 205 MINN. 275, 285 N.W. 723.

Perhaps there has been no previous Utah case with facts particularly similar to this case. We call attention, however, to the case of BROWNING vs. STATE TAX COMMISSION, 107 UTAH 457, 154 PACIFIC 2d 993. The question in this case was what portion of the Browning Company business should be allocated to the State of Utah for franchise tax purposes. The question was what was the "business done" within the State. It was claimed by the corporation that rentals collected from property outside of the State of Utah was not business done within the State. The test applied by the Court was whether or not the collection of the rent on property in another state would constitute doing business in that state. If not, then it was business done in the State of Utah where the main office was located. As to this test the Court said:

"Where a corporation is conducting an investment business in Utah and also in other states, the income derived from its entire investment business must be allocated in the manner prescribed by subsections (1) and (3) of Section 80-13-21. *Rents, interest and dividends derived from 'business done' by the taxpayer without the State of Utah should not be allocated to Utah.* Rents, interest and dividends derived from 'business done' by the taxpayer within the State of Utah should be allocated to Utah." (Page 464)

The Court held that the collection of rent on prop-

erty in another State was not doing business in that State and it was, therefore, business done in Utah where the home office was located. The Court said:

"If upon certain conduct it would be held that a corporation was doing business in Utah so as to subject it to the corporate franchise tax, the same conduct in another state would constitute doing business in said other state and income derived therefrom would not be allocated to Utah. The test as to whether a corporation is doing business in states other than Utah under particular fact situations would therefore be: Would such conduct if carried on in Utah be held to constitute doing business so as to subject the corporation to the Utah corporate franchise tax."

This Utah court held that the business done was in Utah. Arthur Murray, Inc. has its office in New York. Certainly the collection of royalties from a gross income of a business in Utah is no more doing business than the owning, managing and collecting of rent on property in another state.

ANALYSIS OF DEFENDANT'S CASES

INTERNATIONAL TEXT BOOK COMPANY vs. PIGG, 217 U. S. 91, 54 L. ed. 678. Plaintiff, a corporation of Pennsylvania, was selling correspondence school courses in Kansas. Sale was made through an agent. (The agency was not disputed.) The agent had an office in Kansas, worked on a salary plus commission, signed contracts with the purchasers, accepted a partial pay-

ment and forwarded the contract and the money to the office of the plaintiff in Pennsylvania. The pertinent facts are set forth in the following part of the opinion:

“During the period covered by the present transaction, the company had a solicitor-collector for the territory that included Topeka, Kansas, and he solicited students to take correspondence courses in the plaintiff’s schools. His office in Kansas was procured and maintained at his own expense, for the purpose of furthering the procuring of applications for scholarships and the collection of fees therefor. The company had no office of its own in that state. The solicitor-collector was paid a fixed salary by the company and a commission on the number of applications obtained and the collections made. He sent daily reports to the company for his territory, those reports showing that for March, 1906, the aggregate collections on scholarships and deferred payments on subscriptions approached \$500.

“At the date of the agreement sued on, and and at the time this suit was brought, numerous persons in Topeka were taking the plaintiff’s course of instruction by correspondence through the mails. The contracts for those courses were procured by its solicitor-collector assigned to duty in Kansas, and, as stated, payments thereon were collected and remitted by him to the plaintiff at Scranton.” (Pages 682-683)

Even on these facts the case is only dictum so far as doing business in the State is concerned as the plaintiff was permitted to recover because of the unconstitutionality of the statute. However, we do not question

the reasoning of the Supreme Court. The plaintiff was admittedly represented by an agent who made contracts in the State of Kansas in the name of and for the benefit of the foreign corporation. Money was collected on the contracts, which undoubtedly constituted doing business. There is no similarity upon the facts with the case before the Court.

FOX vs. LAVENDER, 89 UTAH 115, 56 PAC. 2d 1049. The question in this case was whether the driver of a car was the agent of defendant. In determining that question the Court said there were the following pertinent facts:

"The five ingredients of the problem before us to be taken into consideration to determine whether the wife had control of the husband (as driver of the car) during the trip to Bingham are: (1) The relationship of husband and wife; (2) the fact that they were on an errand to get a dress for the wife; (3) the joint ownership of the car; (4) the fact that the wife and husband agreed that the husband should drive; and (5) four occupants of the car were on a trip to call on the mother." (Pages 119-120)

There is nothing in this case at all helpful on the question of agency.

GOLDEN vs. AMERICAN KEENE CEMENT COMPANY, 98 UTAH 23, 95 PAC. 2d 755. Property consisting of a cement and plaster mill owned by the defendant, American Keene Cement and Plaster Company, had been legally owned by John Bowditch, Jr.,

who at the time of taking title in his name was Vice President and General Manager of California Stucco Products Company, a foreign corporation not qualified to do business in Utah. During such ownership by John Bowditch, Jr. the property was operated under the name of National Keene Cement Company, which was unincorporated and which we may assume was a trade name for the true owner. Later when Bowditch left the employment of the California Stucco Company the property was at that time conveyed to Thomas W. Golden, plaintiff herein, who was an employee of California Stucco Products Company. While legal title was in the name of Golden, a contract of sale was made by and in the name of California Stucco Products Company to the predecessor of defendant, Edward E. Jones Investment Company. It was recited in this contract that the California Stucco Products Company had an interest in the property. The sale provided for a note and mortgage which was later given by the defendant, American Keene Cement and Plaster Company, at the time transfer was made to it. Payments on this note and mortgage had been made to the California Stucco Products Company. On attempted foreclosure by Golden, in whose name the note and mortgage had been given, defendant claimed that California Stucco Products Company was the real owner and plaintiff and that it was not entitled to sue, being a foreign corporation having done business in the State and not qualified in accordance with our statute. The trial court had held for the plaintiff on this point. Certain evidence had been excluded. In

reversing the case for a new trial the Supreme Court suggested that there was strong evidence that Golden was really acting for and on behalf of the California Stucco Products Company. The Supreme Court said:

“As a matter of fact, it is rather hard to believe that Golden was other than an alter ego of the California Corporation. It is true that the evidence offered to prove that he was an employee of the corporation was properly ruled out, but when one considers how his name first came into the picture through the agreement; how all the transactions were carried through by officers and directors of the California Corporation; the significance of changes in title to the property as the personnel of the corporation changes, and as companies change; that interest payments were made to that corporation; and how Golden has been so conspicuously absent, even to the extent of failing to appear in the case by deposition attacking any of this evidence—when one considers these facts, there is more than a suspicion in one’s mind that all is not as it should be.” (Page 32)

There was nothing in the case to show that Golden personally had any beneficial interest in the property or the business conducted or in the note and mortgage that was sued on in his name; whereas, in the case before this Court the plaintiff has full beneficial interest as well as legal title to all property involved including furniture, fixtures, lease, accounts receivable and the contract herein sued upon. Arthur Murray, Inc. has only a contractual right to 10% of the gross income with

a right to terminate upon failure to pay or to comply with other conditions.

Another question in the Golden case was whether at the time the property was operated under the National Keene Cement Company name the business was not in fact carried on by or for the benefit of California Stucco Products Company. Letters had been offered in evidence showing that the California Stucco Products Company included in its income tax return the result of the business of National Keene Cement Company. Payments on the mortgage had in fact been made to California Stucco Products Company; the sale of the property had been in its name, the contract reciting that it had an interest. These and other facts which might appear in the new trial were suggested by the Supreme Court as evidence that the California Stucco Products Company was in fact doing business in the State. The Supreme Court, however, made no final conclusion. It suggested that one of the chief questions was who was interested as owner of the National Keene Cement Company. We submit that the facts of this case have no similarity to the case before this court.

FRANKLIN BUILDING AND LOAN COMPANY
vs. PEPPARD, 97 UTAH 483, 93 PAC. 2d 925. We do not dispute the holding of this case as stated by the defendant at page 18 of her brief that a foreign corporation actually doing business in the State cannot foreclose a mortgage unless qualified as a foreign corporation. The same may be said of the cases of DUNN vs. UTAH SERUM COMPANY, 65 UTAH 527, 238

PAC. 245, and FIRST NATIONAL BANK vs. PARKER, 57 UTAH 290, 194 PAC. 661, these cases being cited on page 19 of plaintiff's brief.

CONCLUSION

We submit that there is no evidence that Arthur Murray, Inc., a foreign corporation, is or has been doing business in the State of Utah. The signing of the license agreement did not constitute doing business because this would be insufficient under the adjudicated cases, and it was not signed in the State of Utah. Arthur Murray, Inc. has never exercised any of its prerogatives under the license agreement, which are at most only conditions under which the plaintiff can continue the use of the name and methods of Arthur Murray. It is clear from the evidence and facts in this case that plaintiff made a contract in her own right; that Arthur Murray, Inc. was not a party to the contract and that this suit is solely in the name of and for the benefit of the plaintiff.

Respectfully submitted,

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