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Western Gas, Inc. v. Servel, Inc. : Brief of Respondents

Utah Supreme Court

Marr, Wilkins & Cannon; Richard H. Nebeker; Attorneys for Respondent;

Case No. 7958

IN THE SUPREME COURT
of the
STATE OF UTAH

WESTERN GAS APPLIANCES, INC., a corporation,
Plaintiff and Appellant,

vs.

SERVEL, INC., a corporation,
Defendant and Respondent.

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

This appeal is from an order of the trial court which granted defendant's motion to dismiss plaintiff's complaint for lack of jurisdiction over the person, and to quash the service of summons on the grounds that defendant is a foreign corporation not doing business in the State of Utah.

The defendant and respondent, Servel, Inc., is a corporation organized under the laws of the State of Delaware with its principal place of business in Indiana.

At its factory in Evansville, it manufactures gas water heaters, refrigerators, air conditioners and other appliances. The nationwide sale of its products is handled through a system of distributor's sales agreements. The plaintiff and appellant, Western Gas Appliances, Inc. was for several years Servel's distributor in Utah, southern Idaho and western Wyoming. On June 10, 1951, the franchise agreement of appellant was terminated by Servel, and thereafter Z.C.M.I. was appointed distributor. This suit was filed by appellant to recover damages for an alleged breach of contract.

While Mr. Frank Reid, Regional Appliance Service Manager for Servel, was temporarily within the state and staying at the Hotel Utah, summons was served upon him. The respondent moved to dismiss the complaint for lack of jurisdiction. Affidavits for and against the motion were filed and the matter was argued to the trial court. The trial court granted the motion, in effect holding that the respondent was not doing business within the state of Utah.

STATEMENT OF FACTS

The statement of facts of appellant is incomplete, inaccurate and misleading. To a large extent the points stated at pages 4 and 5 of appellant's brief are the conclusions of appellant's counsel, unsupported by affidavit. The same sort of loose statements were made in the trial court. The trial court having determined that it did not have jurisdiction, the facts on appeal are to be assumed

in accord with its decision. *Mower* vs. *McCarthy* (Utah, 1952) 245 P. 2d 224; *Dahl* vs. *Collette,* 202 Minn. 544, 279 N.W. 561.

Mr. Harold Fresne, who is president and business manager of Western Gas Appliances, Inc. (R. 35) was formerly a district manager for Servel, Inc. (R. 25). He, through his company, the appellant, prosecutes this lawsuit claiming an unlawful termination of the distributorship agreement. (Defendant's Exhibit No. 1. There is a printed copy of the agreement in the exhibit envelope). Pursuant to that agreement, *the distributor purchased the appliances F.O.B. factory and paid the freight charges to its warehouse in Salt Lake City* (R. 21, 26, paragraph 8 of the agreement). *The appliances were then sold by the distributor to its retail dealers throughout the assigned territory* (paragraph 6 of the complaint).

It is undisputed that *defendant maintains no office, warehouse, retail, wholesale or jobbing business of any kind in this state* (R. 20). *Servel, Inc. does not have any employees residing in Utah* (R. 25) *nor does it employ any dealers or traveling salesmen who have business relations with the distributor's dealers or members of the public in the state of Utah* (R. 26). It has no telephone nor telephone listing, no bank account nor does it own any property, real or personal in the state (R. 25).

On June 10, 1951 the franchise agreement was terminated by Servel, Inc. (paragraph 7 of complaint). Al-

though paragraph 22 of the parties' agreement specifically provides that the agreement "* * * may be terminated with or without cause at any time before the end of the stated term by either party * * *," plaintiff alleges that the termination was unlawful and claims damages because of: (1) maintaining servicemen, parts and personnel during the life of the agreement ($12,000.00); (2) the loss of prospective profits from the sale of six carloads of refrigerators ($11,500.00); (3) the cost of plaintiff attending a sales conference in Chicago ($1,200.00) and a service school in Evansville, Indiana ($600.00); and (4) the cost of putting on a dealer's show in Utah ($400.00) and the cost of crating and paying freight on refrigerators ($1,300.00).

1. After the termination of the agreement with plaintiff, Z.C.M.I. was appointed distributor for Servel, Inc. On October 9, 1951 summons was purportedly served on defendant by delivering a copy to Z.C.M.I., as an agent of Servel, Inc. (R. 5). This service was voluntarily withdrawn on motion of plaintiff (R. 6). Thereafter on July 22, 1952, eight and one-half months later, summons was served on Mr. Frank Reid while he was staying at a hotel in Salt Lake City (R. 8). Mr. Reid is Regional Appliance Service Manager for Servel, Inc. (R. 27). He resides in Portland, Oregon and supervises each distributor's service organization in Oregon, Washington, Montana, Idaho, northern Nevada and Utah (six states) (R. 27). He visits the state of Utah approximately once every three months (R. 29).

As explained in Mr. Reid's affidavit the distributor agrees to:

> "Establish and maintain a properly equipped and competently staffed installation and service department at distributor's headquarters city for the purpose of supervising the service activities of dealers in distributor's natural trading area and training dealers' service men and other personnel in rendering satisfactory service to customers." (Paragraph 5 (f) of the agreement).

Pursuant to this provision *the distributor assumes the responsibility of servicing all water heaters and refrigerators sold to its dealers* (R. 27). Mr. Reid aids the distributor in the proper training of the dealers' service representatives (R. 27). He checks on the supply of replacement parts kept in stock by the distributor and instructs the service men in the use and repair of Servel appliances (R. 28). When users of Servel products make complaint directly to the factory, the factory sends a letter to the distributor with a copy to Mr. Reid and Mr. Reid then reviews settlement of the complaint with the distributor on his next visit to Salt Lake City (R. 29). On one or two occasions Mr. Reid accompanied the distributor's service manager to a customer's home and supervised the repair of an unsatisfactory appliance (R. 28, 29). On such occasions he does not work upon the appliance but instructs the service manager as to how it properly should be repaired (R. 28). These visits to customers' homes were not made consistently and continuously as stated in point (1) of appellant's

brief. There has been only one or two isolated instances of such a visit and it has always been made in an advisory capacity, that is, the purpose was to train the service man, not to give service to the customer. Mr. Reid states in his affidavit that he has "never installed or repaired a Servel gas appliance in the state of Utah" (R. 28) and in this respect, Mr. Milton Jennings, who is an employee of Z.C.M.I., states that Mr. Reid has gone into the homes of appliance owners with him to act in an "advisory capacity" (R. 29). Mr. Reid also examines faulty parts to determine whether the same are replaceable under the Servel warranty (R. 31—a copy of the warranty is attached to Mr. Nensel's affidavit, R. 17).

A careful reading of Mr. Fresne's affidavit at page 42 of the record does not sustain the statement at page 2 of appellant's brief, that "Blair Hughes attended to all service himself without the assistance of a local service man." With an area of six states to cover, it can be appreciated by this court that the regional service representative of Servel, Inc. does not attend to or have the responsibility of servicing, maintaining and adjusting the Servel appliances sold in this state. Under paragraph 5 (f) and (h) of the agreement, the distributor's dealers' service men perform these functions. Mr. Reid is a representative of the manufacturer who trains and supervises these local service men. Therefore appellant misstates the record in its first statement of points, in saying that "defendant consistently and continuously

made adjustments and serviced and maintained equipment sold within the state of Utah."

2. Appellant next states that "defendant entered into written contracts with each purchaser, warranting equipment * * *." This is an attempt to create the notion that defendant has some personal business relations with each purchaser of Servel appliances. The fact is that Servel, Inc. warrants on a percentage basis that its water heaters (and other appliances) will be free from defects up to a period of ten years. (See the sample warranty at R. 17½). This warranty is delivered to the purchaser by the retail dealer at the time the appliance is purchased.

As to warehousing merchandise in the state of Utah in order to fulfill its warranty, the complete facts are stated in the affidavits of Mr. Nensel (R. 16) and Mr. Lateulere (R. 18). The customary business procedure of Servel, Inc. was to ship the replacement heaters to the distributor on sight draft, F.O.B. manufacturer's warehouse (R. 16). Thus the distributor would normally take title in Indiana to the replacement heaters (R. 51). Photostatic copies of an invoice, bill of lading and purchase order covering the routine shipment of water heaters intended for replacement are attached to the affidavit of Mr. Lateulere at page 50 of the record and are marked as exhibits 6, 7 and 8 thereto. Title to the merchandise is acquired by Western Gas Appliances, Inc. at Evansville, Indiana under these documents. The transaction is typical of how all water heater replace-

ments were invoiced by Servel, Inc. to Western Gas Appliances, Inc. (R. 51).

On several occasions Western Gas Appliances, Inc. did not honor the sight draft and take delivery of the heaters and the shipments were allowed to remain in the carriers' warehouse (R. 17). Mr. Nensel made several telephone calls to Mr. Fresne urging him to pay for and pick up the heaters, but because of plaintiff's financial inability to do so (R. 19), Servel, Inc. shipped replacement heaters to Utah on consignment in order to protect its good will with the customer (R. 17). Mr. Lateulere's affidavit contains the notation placed on the invoice by which title was retained and which differentiates these shipments (R. 19). The freight was paid by Western Gas Appliances, Inc. and the heaters were placed in Western's own warehouse along with its other inventories (R. 19). Servel, Inc. retained no control over the heaters; was not issued any warehouse receipt covering the same, nor did it maintain fire or other insurance on them (R. 19). Six of them were wrongfully appropriated by plaintiff and have never been paid for (R. 19). Servel, Inc. does not maintain nor has it maintained for the past ten years a warehouse in the state of Utah (R. 20). Furthermore, this one instance of shipment on consignment was extremely unusual and from 1946 until October of 1952, it was the only instance of heaters being so shipped to any distributor in the United States (R. 17). The shipment required the special approval of Mr. Schnakenburg, vice-president of Servel, Inc. (R. 17).

3. In 1948 Servel, Inc. installed an all-year air conditioner in the home of Mr. Harold Calder at Bountiful, Utah (R. 50). The unit was sold by Western Gas Appliances, Inc. to Mr. Calder. It was invoiced to Western Gas Appliances, Inc. on July 2, 1948 to fulfill its purchase order dated June 11, 1948. The sight draft drawn on Western Gas Appliances, Inc. was paid by it on presentment (R. 51). Defendant admits that its personnel installed this air conditioner in Mr. Calder's home.

4. To say that *defendant maintained* schools and clinics in the state of Utah is a misstatement. The display shows at which new models of appliances were introduced and exhibited are the function and responsibility of the distributor and are conducted and carried on by it (R. 21, 25). These shows are conducted to enthuse the local dealers with the selling features of new model appliances. The expenses and organization of the shows are assumed by the distributor (R. 26). See paragraph 10 of plaintiff's complaint. Mr. Seward Abbott, Regional Manager for Servel, Inc., has attended these display shows where he has given sales promotion talks and has distributed pamphlets and literature. But the one hundred prospective purchasers or customers who attended the meeting, as referred to in appellant's brief, were *all dealers* under contract with the distributor as retail outlets throughout the territory (R. 37). They are not ultimate users of the products. They are not customers of Servel, Inc.

The training clinics for servicemen are in the same

category as the sales promotion meetings. The distributor accepts the responsibility of educating and causing its dealers to install and service all Servel appliances sold by them (R. 21). The primary reason that Mr. Frank Reid comes into the state is to demonstrate to the service representatives of the distributor and its dealers, the latest means of servicing and adjusting Servel gas appliances (R. 22). Respondent admits appellant's allegation that the installation and servicing of the gas appliances is highly technical and requires skilled and trained men. For this reason, Mr. Reid's functions are necessary and important to the public welfare.

5. The paragraph in appellant's brief which recites that defendant solicited business within the state and had salesmen come through the state every ninety days, is again a misstatement and is inaccurate and misleading. Mr. Ken Taylor, who is affiliated with Z.C.M.I., states:

> "* * * that Servel, Inc. has no personnel or employees that are residents of the state of Utah; that Servel, Inc. does not have any office or place of business in this state, nor are there any salesmen of this company who come into the state and solicit orders for the purchase of its products from the consuming public." (R. 22).

Insofar as water heaters are concerned the appellant's contentions refer to Mr. Seward Abbott, who attends local sales promotion meetings and display shows at which new model appliances have been exhibited and whose selling features he has extolled. The customers

mentioned are the retail dealers referred to above. Mr. Abbott does not sell appliances to these dealers nor does he solicit their orders. His function is to promote the trade name and good will of Servel, Inc., and to acquaint the dealers with the latest selling features of Servel appliances.

Mr. W. D. Wagoner, who is the Regional Manager for the air-conditioning division of Servel, Inc., has accompanied Mr. Gordon Squires, a local salesman for Walter B. Lloyd Co., of Salt Lake City, to visit architects, contractors and prospective customers of the all-year air-conditioner (R. 32). This piece of equipment is a combination furnace and air conditioner. Walter B. Lloyd Co. has had this line of business a relatively short time (R. 32) and Mr. Wagoner assisted the distributor in familiarizing itself with a new product. Neither Mr. Abbott nor Mr. Wagoner has sold an appliance to a customer (the eventual user thereof) but they have urged the distributor and dealers to do so. They do not quote prices, they do not execute contracts of sale. They are regional managers who make suggestions in sales technique to the distributor and its dealers.

6. Appellant claims that merchandise flowed into the state as a result of Mr. Abbott's sales pressure. The continued flow of merchandise into the state of Utah was primarily the result of buyer's demands for these quality appliances. The business is highly competitive and sales promotion and supervision is a necessary function of every successful manufacturing firm.

SUMMARY OF FACTS

To summarize the facts: Servel, Inc. does not maintain an office or any salesmen or employees in the state. It does not engage in the selling business in Utah but sells all of its products at its factory in Evansville. There is no solicitation of customers in this state. There is no permanent character to its activities in Utah, but merely the supervisory functions of its regional manager. To obtain customer good will, Servel, Inc. warrants its products and requires each distributor to properly service and install all appliances. Mr. Reid helps the service organizations of the distributors and conducts training clinics. Likewise, Mr. Abbott and Mr. Wagoner contact the distributor and attend display shows. Advertising of Servel appliances is conducted on a shared cost basis (paragraph 12, 13 and 14 of the agreement). In one instance, replacement heaters were stored in plaintiff's warehouse, with title reserved to defendant. The precautions taken were of no avail as some of the heaters were sold by plaintiff without paying Servel, Inc. therefor. Mr. Reid has on one or two occasions gone into purchaser's home to supervise the repair of an appliance and in 1948 an all-year air-conditioner was installed by Servel, Inc. in a customer's home.

The issue presented is whether or not a foreign manufacturing corporation is doing business in the state by virtue of the sale of its products through a local distributor.

ARGUMENT AND AUTHORITIES

TO CONSTITUTE DOING BUSINESS IN UTAH, A REGULAR COURSE OF SOLICITATION OF BUSINESS MUST BE SHOWN.

Appellant has not seen fit to set forth in its brief the language of Rule 4 (e)(4) of the Utah Rules of Civil Procedure nor the doctrine as to what constitutes doing business enunciated by the decisions of this court. Rule 4 states:

> "(e) Personal service within the state shall be as follows:
>
> "(4) Upon any corporation * * * 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. *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.*"

The last sentence of the rule, which is in italics above, is substantially the same language as 104-5-11 U.C.A. 1943. There has been no change in meaning from the old code. The rule states that you can serve a corporate defendant which: (1) "advertises or holds itself out as having an office or place of business in this state." Because Servel, Inc. has no office, nor telephone, etc.,

no place of business where you can contact a Servel representative, it is obvious that appellant could not claim its service upon Frank Reid is good under the above provision of the rule.

The rule also provides: "or does business in this state, then upon the person doing such business." In interpreting this phrase, the following Utah cases have laid down the rule that *a regular course of solicitation of orders* must be shown in order to hold that a foreign corporation is doing business in this state and thus subject to jurisdiction. *Industrial Commission* v. *Kemmerer Coal Co.,* 106 Utah 476, 150 P. 2d 373; *Wabash Railroad Co.* v. *Third District Court,* 109 Utah 526, 167 P. 2d 973; *Marchant* v. *National Reserve Co. of America,* 103 Utah 530, 137 P. 2d 331.

In *Industrial Commission* v. *Kemmerer Coal Co.,* supra, the facts were as follows:

> "The defendant's affidavits in support of its motion to quash the service of process state that it is incorporated under the laws of the state of Wyoming and is a resident and citizen of that state; that under its charter it cannot carry on business in any other state than Wyoming; *that it maintains an office in a building in Salt Lake City, Utah, for the convenience of its sales force, which at present consists of three men who reside in Utah;* that the name of the defendant is painted on the door of the office and is listed on the directory of the building and in the telephone directory. *All the expenses of the office are paid by defendant and the furniture therein is owned by*

defendant. It also owns three automobiles which are used by its employees in this state.

"The summons was served on one L. M. Pratt, Jr., *one of the employees of defendant who resided and worked in Utah.* Mr. Pratt worked under the immediate supervision of one R. A. Davis, who is the *Division Soliciting Sales Manager of the defendant and also is employed and resides in Utah. These employees solicited persons in Utah and Northwestern states to buy coal from the defendant.*

"All orders received by them were subject to confirmation at the home office in Wyoming. No contracts were entered into in Utah and the coal was shipped F.O.B. railroad cars in Wyoming. The defendant maintained the office in Salt Lake City both for the convenience of its employees and so that they might keep it informed of business opportunities." (Italics ours).

The court then quoted language from the case of *Frene* v. *Louisville Cement Co.,* 134 F. 2d 511, 514, 146 A.L.R. 926 which is the rule in Utah:

"Consequently it is clear that if, in addition to a regular course of solicitation, other business activities are carried on, such as maintaining a warehouse, making deliveries, etc., the corporation is 'present' for jurisdictional purposes. *And very little more than 'mere solicitation' is required to bring about this result."* (Italics ours).

Under the rule as defined above, the basic, minimum requirement is that a regular course of solicitation must be shown.

In *Wabash Railroad Company* v. *Third District Court,* supra, the railroad company maintained an office in Salt Lake City for a general agent, an assistant and a clerk. Their duties were to solicit freight orders and promote good will. In addition to the solicitation of orders the agents facilitated the handling of claims for losses to shippers. The Supreme Court held that the "solicitation plus" rule laid down in the *Kemmerer Coal* case had been satisfied.

In *Wein* vs. *Crockett,* 113 Utah 301, 195 P. 2d 222, Morris Wein, a resident of California entered into a contract whereby plaintiff built a building for him here in Utah. Plaintiff sued for his services and served summons upon Julius Wein, an agent of the defendant who was operating a certain business in the building, which was known as "Bingo Lodge." The Supreme Court held that the statute was constitutional which provided that the non-resident could be sued on a cause of action arising out of the conduct of such business.

In every Utah case which has held that certain activities constitute doing business within this state, the objecting party through its agents has been physically and permanently present. Cases in which local jurisdiction was not acquired for failure to meet this requirement are *Alward* v. *Green,* Utah, July 1952, 245 P. 2d 855; *Advance Rumely Thresher Co.* v. *Stohl,* 75 Utah 124, 283 P. 731; *Miller Brewing Co.* v. *Capitol Distributing Co.,* 94 Utah 43, 72 P. 2d 1056; *Marchant* v. *National Reserve Co. of America,* supra.

It is important to keep in mind that the business of Servel, Inc. is manufacturing appliances. It sells its products at its factory in Indiana and obtains no profit from the subsequent wholesale and retail transactions conducted in Utah. Mr. Frank Reid, who was served in Utah, was performing the function of supervising and training service men. He visits the state four times a year and covers five other states besides. Whenever plaintiff corporation or any other person desires to get in touch with Servel, Inc., they must write or telephone to Evansville, Indiana. This corporation which plaintiff claims is doing business in this state is not physically present in any manner, shape or form.

> "There must be at least some permanence about the presence and business transactions of the corporation within the state." Marchant v. National Reserve Co. of America, supra.

THE MANUFACTURER-DISTRIBUTOR CASES

The respondent, Servel, Inc., relied on the *Kemmerer Coal Co.* and *Wabash Railroad Co.* cases in the trial court for the reason that it has not engaged in the solicitation of orders in the state of Utah. These cases concerned the solicitation of orders by salesmen who were employees of the foreign corporation and who resided, officed and solicited business in this state.

In applying the rule of solicitation plus some additional activities, to the manufacturer-distributor relationship, the majority decisions hold that the sales of a

product through a local broker, distributor or commission merchant do not constitute doing business in the state so as to subject it to service of process. Annotations, 60 A.L.R. 1011, 1038; 101 A.L.R. 129, 142; 146 A.L.R. 945, 965.

The following cases deal with the sale of a manufacturer's products to a local distributor for purposes of resale in the state. They are as nearly similar in their facts as can be found.

Truck Parts, Inc. v. *Briggs Clarifier Co.*, 25 F. Supp. 602 (Minn.).

Defendant corporation in this case was a manufacturer of automotive and industrial oil filters, its products being manufactured in the District of Columbia and sold in various parts of the United States by jobbers and distributors. The defendant was served while its president was temporarily in the state of Minnesota. Defendant maintained no office or place of business, nor did it have an officer or agent of the corporation reside within the state. It sold its products to distributors who in turn sold to persons in the territory served by them. The motion to quash the service of summons was granted. The opinion states:

> "The defendant was not doing business in Minnesota. The distributor was. The distributor was an independent merchant buying products from the defendant, and then selling those products which he had purchased from the defendant to people in this State. There was no relationship of principal and agent existing between the

defendant and the distributor. The defendant was a vendor and the distributor was a vendee. The defendant filled orders received from the plaintiff and other distributors, at Washington, D.C., and consigned its products from there to the distributors in Minnesota. Upon delivery of the merchandise in Minnesota, the duties of the defendant in relation thereto ceased. The business of the defendant with its distributors was not local, but was connected with interstate commerce. See Mandel Bros. Inc. v. Henry A. O'Neil, Inc., et al., 8 Cir., 69 F. 2d 452. *Efforts made on behalf of, and as an aid to distributors and dealers do not constitute that doing of business within the state which subjects the corporation to the local jurisdiction for the purpose of service of process upon it.* Peebles v. Chrysler Corporation et al., D.C.W.D. No., 57 F. 2d 867." (Italics ours).

Taylor et al. v. *H. A. Thrush and Company,* 127 N.J.L. 451, 23 Atl. (2d) 274 (New Jersey). *Held:* Service quashed.

"The evidence is uncontradicted that they made no sales direct to consumers; that all sales were made to jobbers and that the contracts of sale in every case were closed at the home office in Peru, Indiana. Our conclusion on this branch of the case is therefore that the defendant, Thrush and Company, is not within the purview of any statute of this state regulating service upon a foreign corporation doing business in this state. * * * In summary the defendant, Thrush and Company, did not do business in this state. All its contracts were made in Indiana. Its sales were

> made not to consumers such as the plaintiffs but to jobbers who in turn resold to the consumer and it had no agent in this state with the exception of Peterson whose duties were confined to making inspections, listening to complaints and directing the complainant to get in touch with their own contractors. Peterson testified that it was part of his duty to attend of a complaint of the Thrush appliance at the place where it was located but that he would not replace it but would instruct the owner to get in touch with the heating contractor. His general duties as testified to by another witness were to 'contact the distributors and contractors who buy their equipment from H. A. Thrush and Company as a good will representative.' "

Holzer v. *Dodge Bros.*, 233 N.Y. 216, 135 N.E. 268 (New York).

Defendant is a Michigan corporation engaged in the business of manufacturing automobiles and selling its automobiles at its distributing point. It sells the product of its manufacture by wholesale at Detroit, Michigan and not elsewhere. The sales are either made for cash at Detroit or shipped to the distributor's place of business with an attached bill of lading. After payment the dealers take title to the cars and defendant has no interest in or control over the cars in any way. Each dealer at his own expense maintains sales rooms for the purpose of exhibiting and selling cars and accessories. The dealers are not the agents of the manufacturing corporation. *The manufacturing corporation has what it calls a district representative whose duty*

it is to look after the interest of defendant in that locality and report to it from time to time. A district representative has no power to enter into contracts on behalf of the defendant to sell cars or to collect the purchase price of cars sold. Service of summons was made upon a person named Mathewson whose duties were to go from district to district and to see to it that the district representatives were properly performing their duties and to recommend from time to time changes in such representatives or the selection of new ones. *His duties also required him to attend from time to time automobile exhibits held in the different states where defendant's cars were shown.* It was while he was attending an automobile exhibit in the City of New York that the summons was served upon him. *Held:* Service quashed. The Supreme Court of New York stated:

> "Extent to which a corporation must do business in the state to justify the service of process upon its representative is not clearly defined; but, under all the authorities to which my attention has been called, it must be some substantial part of its main business. Nothing short of this will justify that service. Tauza v. Susquehana Coal Co., 115 N.E. 915; People's Tobacco Co. v. American Tobacco Co., 62 L. Ed. 587."

S. B. McMaster Inc. v. *Chevrolet Motor Co.,* 3 F. 2d 469 (South Carolina).

Chevrolet Motor Company sold automobiles to Barrow-Chevrolet, a dealer in South Carolina, the dealer to sell the cars and parts at the sellers price list, and

in a certain exclusive territory. The dealer purchases outright and retails on his own account. Dealer also agrees: (1) To develop the territory to seller's satisfaction; (2) Seller can sell to U.S. Government in dealer's territory; (3) Allotment of cars established—seller can accept or reject orders above allotment; (4) Seller can inspect dealer's showroom and inspect all records and accounts of the dealer; (5) Dealer agrees at his own expense to comply with all requirements of seller such as advertising, sales and servicing by dealer of the cars; (6) Dealer carries stock of parts; (7) Dealer agrees to order parts as seller may recommend; and (8) Dealer's associate salesman subject to seller's approval. ***Held:*** Service of summons upon the manager of the Barrow-Chevrolet Co. as agent for Chevrolet Motor Co. was quashed. This is not a contract of agency. Here the dealer is not a representative, acting for the seller—the dealer acts for himself. The dealer's acts are not binding upon the Chevrolet Company. Liability and responsibility belong to the dealer.

> "The plaintiff lays stress upon the fact that the seller retains the control of the actions of the dealer in a number of respects, but that is not determinative of the question of agency. A person may submit his actions to the control of another without being his agent. * * * There is no reason why a manufacturer or wholesaler may not require all persons to whom he sells his goods to do all they lawfully can in making resales to promote his interests. * * * The manufacturer desires to sell his products in such manner only that his

> interests may be promoted. He therefore demands as a part of the price in the making of the contract that the person to whom he sells his goods shall submit to certain restrictions. The person desiring to buy the manufacturer's goods is anxious to purchase them and in order to purchase them is willing to submit to the conditions and restrictions named."

The contract is a contract of sale and not a contract of agency. The acts of the Chevrolet Company in coming into the state to inspect the showrooms of the dealer, check over the records and accounts to see if everything is satisfactory, does not constitute doing business.

> "I do not think that if a manufacturer sends a person into this state to inspect the place of business of persons to whom he is in the habit of selling property to see how their business is managed and things of that sort, that such action would constitute the manufacturer's doing business in this state."

Other decisions which deal directly with the manufacturer-distributor relationship and contain a pertinent analysis of this problem are: *Moorhead* vs. *Curtis Publishing Co.,* 43 F. Supp. 67; *Oyler* v. *J. P. Seeburg Corp.,* 29 F. Supp. 927; *Reed* v. *Real Detective Publishing Co.,* 63 Ariz. 294, 162 P. 2d 133; 20 C.J.S. page 166; *Douglas* v. *Frigidaire Sales Corp.,* 173 S.C. 66, 174 S.E. 906; *Whitaker* v. *MacFadden Publications, Inc.,* 105 F. 2d 44.

A good definition of "doing business" is found in

Wills v. *National Mineral Co.*, 176 Okla. 193, 55 P. 2d 449.

> "Business is largely the barter, sale or exchange of things of value, usually property. 'Doing' business is therefore the engaging in such pursuit. The doing of business involves not only the ownership, possession, or control of property, but such functions as dealing with others in reference to the property, the exercise of discretion, the making of business decisions, the execution of contracts. It includes the functions of marketing the product, by advertising and solicitation, and of collecting for the sold product. It may conservatively be said that wherever an important combination of these functions is being performed, business is being done."

The important thing to note is that the courts have recognized the necessity of manufacturers supervising the distributor to the extent of attending display shows, listening to complaints and contacting the distributor as an aid to him and to see that everything is satisfactory. Western Gas Appliances, Inc. agreed to train its dealers and service men in the methods of installing and repairing appliances. The supervisory function of Mr. Reid in keeping these service men abreast of the latest factory techniques is collateral to the manufacturer's desire to maintain good will and a trade name of good reputation.

It is also important for the manufacturer to ascertain that the distributor is maintaining agreements with aggressive and well financed dealers in the territory

and that the distributor supervises and stimulates the sales activities of the dealer in accordance with paragraph 5 (a) and 5 (c) of the agreement. For failure to do so the manufacturer is justified in "really put(ting) the heat on the distributor." (R. 45). The contacts with Western Gas Appliances, Inc. made by Abbott and Wagoner, Regional Managers, were made for supervisory reasons and were not such activities as constitute the doing of business by Servel.

THE CASES CITED BY APPELLANT ARE DISTINGUISHABLE

The authorities which appellant contends sustain its argument that respondent is doing business in the State of Utah are cited under six statements of points in appellant's brief. Respondent will hereafter discuss the cases and the points of argument in the order in which they appear in appellant's brief.

1

As authority for the first point of its argument appellant has cited *Wabash Railroad* and *Kemmerer Coal Co.* which latter decision relied upon *Bristol* v. *Brent,* 38 Utah 58, 110 P. 356. *Bristol* v. *Brent* concerns the same fact situation as the *Wabash* case in that the company maintained an office in the state for the solicitation of freight orders and staffed said office with two resident employees. It is clear that service in all three cases was made upon the person who was in charge of an office at which place the corporation advertised or

held itself out as doing business. In *Bristol* v. *Brent,* supra, the court stated:

> "If the corporation, therefore, maintains an office in this state and places it in charge of a person whom it publicly announces to be its agent, or general agent, and if through him it solicits freight and passenger business, why is the corporation not represented by such an agent?"

Citation of authorities in which the foreign corporation solicited business through a local office or through a traveling salesman cannot sustain the service of summons upon Servel, Inc. in this case.

Cases from other jurisdictions are likewise distinguishable.

In *Dahl* v. *Collette,* supra, the defendant corporation manufactured butter cartons. The defendant had no office in Minnesota, but employed a traveling salesman in that state who solicited orders which were approved or rejected at the home office. The court held:

> "Solicitation in the regular course of business together with acceptance and performance of the contract within the state will give ample ground for the conclusion of corporate presence."

In *Case* v. *Mills Novelty Co.,* 187 Miss. 673, 193 So. 625, 126 A.L.R. 1102, an ice cream dispenser was sold by an Illinois corporation which had not qualified in Mississippi, the purchasers' residence. Because the con-

tract required it, the defendant hired a local mechanic to service the machine, which servicing activities were determined to constitute doing business. Thus in a suit to repossess the machine for failure of payments, the contract was held void because of the penalty provision in the statute relating to the doing of business by non-qualifying corporations. Frank Reid does not service appliances in the state of Utah. On the one or two occasions that he has gone into the home of a customer, he has aided the distributor's service man in an advisory capacity.

In *Cone* v. *New Britain Machine Co.*, 20 F. 2d 593, summons was served upon the manufacturer's sales representative in Ohio. "His sole duty is to solicit orders for machines and show the purchasers thereof how to use them * * *." The manufacturer also employed a local mechanic in Ohio who periodically adjusted and repaired the machines. Jurisdiction was thus acquired by the solicitation of orders plus servicing of the machines, both done by resident employees. The following quotation from the dissent is applicable to the argument in the case now before this court:

> "* * * A reasonable satisfactory system of service of this kind must be maintained at the peril of losing his business, by any manufacturer of such machinery who has competition. The maintenance of such a system and a good reputation therefor are a part of the manufacturer's stock in trade. The system builds up and maintains good will; it is a kind of advertising; and

> it becomes an advisable, if not a necessary, incident to an interstate business of manufacturing and selling such machines. Hence it results that large scale manufacturing corporations of this class, sending machinery into 30 or 40 different states, by transactions which are in each instance interstate sales, must and do give more or less of this service work in as many states. If this is 'doing business within the state,' not only are they subject to service of process in that state, but likewise to taxation and to burdensome reporting duties, as well as to serious penalties if they do not see fit to accept various local burdens which cannot be imposed on interstate commerce. So far as counsel advise us, this particular conduct within the state by a foreign corporation has not before been held to justify these liabilities and burdens."

In *Rendleman* v. *Niagara Sprayer Co.*, 16 F. 2d 122, jurisdiction was acquired on the basis of the activities of Jack Vernon who lived in the forum, solicited orders for the sale of spraying and dusting machines and installed and repaired them.

The weakness of appellant's position is revealed by the fact that none of the above cases deal with the manufacturer-distributor relationship which is the issue involved in this case.

2

Appellant next contends that the warranting of appliances and maintaining goods on consignment in the state constitutes doing business. The warranty which is delivered to the purchaser by the retail dealer at the

time the appliance is purchased is not a contract between Servel, Inc. and the purchaser. It is a statement of fact respecting the quality or character of goods sold, made to induce the sale and relied upon by the buyer, *Hercules Powder Co.* v. *Rich,* 3 F. 2d 12, 14. No court has gone so far as to hold that warranting merchandise amounts to entering into written contracts with the purchaser so as to constitute the "doing of business" by the warrantor in the purchaser's jurisdiction. Appellant has cited no such case. In *Advance Rumely Thresher Co.* v. *Stohl,* supra, the Thresher Co. warranted its machine and installed it at the purchaser's home in Tremonton, Utah. The court held that the Thresher Co. was not doing business in the state of Utah.

As to warehousing merchandise the decision in *Liquid Veneer Corporation* v. *Smuckler,* 90 F. 2d 196, bases jurisdiction on the defendant's consistent business practice of shipping merchandise in bulk and warehousing it in San Francisco for present and future use in filling its orders. From San Francisco stock shipments were sent to Los Angeles to fill given orders. The merchandise was stored until sold which took from one month to two years. In the instant case, Servel appliances with title in Servel, Inc. were stored in plaintiff's warehouse *on one occasion only.* This precaution was taken by Servel, Inc. because of the failure of Western Gas Appliances, Inc. to pay for and accept shipment of replacement heaters. Acquisition of jurisdiction over the defendant should not be upheld by this manner "of

lifting oneself by one's own bootstraps." Servel, Inc. does not now maintain nor has it ever at any time in the past ten years maintained a warehouse in the state of Utah (R. 20).

3

Any consideration of *Peck Williamson Heating and Ventilation Co.* v. *McKnight and Merz,* 140 Tenn. 563, 205 S.W. 419, as authority for the proposition that the installation of the all-year air-conditioner in Mr. Calder's home constitutes doing business, must include the subsequent Tennessee case of *Richmond Screw Anchor Co.* v. *E. W. Minter Co.,* 156 Tenn. 19, 300 S.W. at 579. It is there pointed out that the Peck Williamson Co. (penalized from bringing suit for failure to qualify) had, on at least five different occasions in 1912, 1913 and 1914 installed heating units within the state of Tennessee. This was the customary course of business of the Peck Williamson Co. In the *Richmond Screw Anchor Co.* case the rule was held not to apply to one or two isolated transactions.

Both of the above cases, like *Advance Rumely Thresher Co.* v. *Stohl,* supra, involve the question of whether or not a non-qualifying foreign corporation could maintain an action in the jurisdiction where it was claimed they were doing business. In the *Advance Rumely Thresher Co.* case the company sold a threshing machine to Mr. Stohl through the efforts of a Tremonton, Utah representative and a Pocatello, Idaho salesman. The contract of sale contained a warranty of

the machinery among other provisions. After the machine was delivered, two experts of the Thresher Co. came to Tremonton, assembled the machinery and started the motor to see that it would operate. This court held that the assembling activities did not constitute "doing business" within the state so as to prevent the Thresher Co. from maintaining an action for the purchase price thereof.

It is respondent's contention that the *Advance Rumely Thresher Co.* case cannot be distinguished on the ground that it involved the question of the corporation's right to maintain an action, having allegedly failed to qualify as a foreign corporation doing business in the state. The reason for respondent's contention is stated at page 43 of its brief. If the case is distinguishable, then for the same reason, *Peck Williamson Heating and Ventilation Co.* v. *McKnight and Merz,* supra, is similarly to be distinguished. Appellant's contention that bolting together a threshing machine is not like installing an all-year air-conditioner is absurd. Although one party uses a crescent wrench while the other party probably uses a Stilson, the factual difference between the two installation operations is not a legal distinction upon which a court could state that one corporation is doing business and the other is not. Replacement of parts under the Threshing Machine Company's warranty would presumably be done by an employee of the company. Servel, Inc. personnel will not service or repair the Calder air-conditioner.

4

The cases cited under point four of appellant's argument do not deal in any manner with the maintenance of service and repair clinics, or the training of local personnel to install and service a foreign manufacturer's appliances.

Williams v. *Bruce's Juices,* 35 F. Supp. 847, District Court, W. D. Kentucky holds that the motion to quash the return of service of summons is sustained for failure of the marshal's return to identify the person upon whom service was made. The dictum in the opinion states that the bare negotiation of a contract of distribution amounts to doing business, but no authorities are cited which hold that negotiating a contract amounts to solicitation of orders. This case is certainly opposed to the majority view stated in the A.L.R. annotations, supra, and the thorough, well reasoned cases of *Truck Parts, Inc.* v. *Briggs Clarifier; Taylor* v. *Thrush Co.,* and *Holzer* v. *Dodge Bros.,* which have been cited heretofore by respondent.

The Distributor's Sales Agreement entered into between respondent and appellant is not a Utah contract. It was executed in Indiana. There was considerable controversy concerning this issue in the trial court, but Mr. Fresne has not stated in any of his affidavits that the contract was signed by Mr. Knighton, the General Sales Manager of Servel, Inc., in Utah or prior to the time that Mr. Fresne signed. The court is familiar with the rule that: "A contract between parties in different states

is made at the place where the last act necessary to give it validity is performed." *Kansas City Wholesale Grocer Co.* v. *Weber Packing Corp.*, 93 Utah 414, 73 P. 2d 1272. The law of the place of contracting determines the validity of the provisions of the contract. *Restatement of the Law of Conflicts,* Section 332. The agreement here involved states in its concluding paragraph, number 27, that, "All questions arising hereunder shall be decided according to the laws of the state of Indiana." Furthermore, the affidavit of Robert B. Taylor states that the signature of John K. Knighton was affixed to the contract on January 23, 1951 and an "*executed copy*" of the contract was on that day returned to Mr. H. A. Fresne of Western Gas Appliances, Inc. (R. 48, 49 and exhibits attached thereto). Mr. Fresne had previously signed the contract in Salt Lake City and the final signature was affixed in Indiana by Mr. Knighton. The fact that this is an Indiana contract has dual significance. First, Servel, Inc. has not executed any contracts in Utah to engage distributors in this state. Second, inasmuch as the merits of this lawsuit will turn upon paragraph 22 of the agreement which provides that, "This agreement may be terminated with or without cause at any time before the stated term by either party * * *" it is important that the case be tried in Indiana, the forum of its governing law.

As noted above, *Frene* v. *Louisville Cement Co.*, supra, was cited and relied upon by this court (opinion written by Mr. Justice Wade) in the *Kemmerer Coal*

Co. case. In the *Frene* case, the continuous, systematic solicitation of orders for the sale of Brixment, the defendant's cement product, was well established. The controversy turned on what additional activities were attributable to the defendant and not just voluntary acts of Mr. Lovewell, the salesman covering the District of Columbia. Lovewell would check complaints, take Brixment specimens to government agents for testing purposes, and pointed out details in the specifications to brick masons in the course of construction of homes. Consideration of the additional activities of Mr. Lovewell to satisfy the *solicitation plus* rule was what prompted the court to say, "And very little more than mere solicitation is required to bring about this result." The *Frene* case is very thoroughly documented with authorities and states the majority view. Respondent believes this decision supports its contention that it is not doing business in the state of Utah, as does the *Kemmerer Coal Co.* case.

5

In the trial of the instant case the defendant filed a Memorandum of Authorities which is found at page 58 of the record. The manufacturer-distributor cases were cited and stressed by respondent in the argument before the trial court. Appellant has not attempted to distinguish these cases nor has it cited authority which holds that where merchandise is sold through a local distributor the manufacturer thereof is doing business. Under point five of its argument appellant has cited the fol-

lowing cases as authority for: "Solicitation of business in the State of Utah."

In *Loken* v. *Diamond T Motor Car Company,* 216 Minn. 223, 12 N.W. 2d 345, service of summons was sustained. There were 12 or 13 dealers in the state who solicited orders for Diamond T Trucks. Summons was served on a Mr. Dunn who secured and appointed the dealers, and also accompanied them to aid in demonstrating the trucks to a customer. The court does not state in its opinion that solicitation of orders is necessary. There was no independent distributor handling the wholesale distribution of trucks, but instead Mr. Dunn, the corporate agent, performed this function.

Meade Fibre Company v. *Varn,* 3 F. 2d 520, is a case in which the purchase of quantities of wood pulp and piling it at a railroad siding in South Carolina, and recording bills of sale in its name amounted to doing business by a foreign corporation.

Carroll Electric Co. v. *Freed Eisemann Radio Corp.,* 50 F. 2d 993 holds that the manufacturer-distributor contract creates a limited agency in the distributor. "The distributor was not an independent merchant dealing with the manufacturer upon its own initiative, but conducted its (the manufacturer's) business in the District of Columbia. * * *" The opinion cites *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359, 47 S. Ct. 400, 71 L. ed. 684, but that decision is based on a statutory interpretation of what the term "tran-

sacts business" means, as it is used in the venue provisions of the Clayton Anti-Trust Act. The *Eastman Kodak* decision states:

> "Manifestly the defendant was not present in the Georgia district through officers or agents engaged in carrying on business of such character that it was 'found' in that district and was amenable to the local jurisdiction for the service of process."

Appellant dismissed its service of process upon Z.C.M.I. because it realized that no agency relationship existed. The *Carroll Electric* case is opposed to *S. B. McMaster Inc.* v. *Chevrolet Motor Co.,* supra, which expresses a much sounder view of the law of agency.

In *State ex rel Taylor Laundry Company* v. *Second Judicial District Court,* 102 Mont. 274, 57 P. 2nd 772, the defendant corporation "solicited business from all the steam laundries in the State of Montana and sold thousands of dollars worth of machinery and replacement parts to maintain a dozen laundries in the state." This solicitation of business, plus the examination, adjustment and repair of washing machines, made the corporation amenable to process in the state of Montana.

6

International Shoe Co. v. *State,* 22 Wash. 2d 146, 154 P. 2d 801, is the same case in the state court as *International Shoe Co.* v. *Washington,* 326 U.S. 310, 90 L. ed. 95, 66 S. Ct. 154. Jurisdiction was based on the solicitation of orders by 11 or 13 resident agents. The

agents were under the direct supervision and control of sales managers at the home office in St. Louis, Missouri. It is a typical case of solicitation of orders plus additional activities by resident salesmen.

* * * * * *

There is in the exhibit envelope, a copy of a stipulation signed by appellant's counsel which extended the time until August 31st for Servel, Inc. to plead in the case. Although appellant has apparently abandoned its contention on appeal, the stipulation was introduced to show that the respondent had waived its objection to the jurisdiction of the court and had made a voluntary appearance. Rule 12 (b) of the Utah Rules of Civil Procedure states in this regard:

> "No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection."

In *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.,* 139 F. 2d 871, the claim was made that the filing of a stipulation for the extension of time in which to answer or plead amounted to a voluntary appearance in the action. The Third Circuit Court of Appeals held in this regard:

> "It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to

> attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, de bene esse, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse door which he possessed before he came in. * * *"

From the language of Rule 12 (b), it appears that the objection to jurisdiction may be raised in a defendant's answer, even after the denial of a motion for a more definite statement or a motion to strike, etc.

One other matter upon which counsel for respondent feel that the court may be aided by presentation of authorities is that the burden of proving that defendant is doing business in the state of Utah is upon the plaintiff. *Proctor & Schwartz* v. *Superior Court* (Calif.), 221 P. 2d 972; *Mayer* v. *Wright,* 234 Iowa 1158, 15 N.W. 2d 268; *Gravely Motor Plow & Cultivator Co.* v. *H. V. Carter Co.,* 193 F. 2d 158.

REASON FOR THE RULE THAT TO CONSTITUTE DOING BUSINESS A REGULAR COURSE OF SOLICITATION OF BUSINESS MUST BE SHOWN.

The great number of cases concerning the present problem indicates the importance of this concept in the law—What constitutes doing business? The rule has a vital bearing on trade and commerce and the manner in which business is to be conducted. Over the years the rule has developed that the solicitation of orders plus

some additional activity constitutes "doing business." This test is expressed in the *Kemmerer Coal Co.* case and in *Wabash Railroad* v. *Third District Court.* It is the accepted rule in nearly all jurisdictions. It can be relied upon by corporations as a known fixed standard. Definiteness in this field of law is a most important thing to business concerns.

Most cases concern the sale or distribution in the form of some product made by a foreign corporation at its foreign domicile or place of business. There are two ways that a foreign corporation can make its product available to residents of Utah. It can enter the state and sell its product through a branch office or through traveling salesmen. The second means is to sell to distributors at its factory for purposes of resale in the state and thereby relieve itself of a nationwide sales force and the attendant burdens.

If the first above course is taken, Rule 4 (e)(4) permits service of summons upon the agent in charge of the office, or upon the traveling salesman. In either situation, the corporation is soliciting orders and "very little more than mere solicitation is required." *Kemmerer Coal Co., supra.* But when the goods are sold at the factory and their resale then becomes the business of a number of local concerns, such as distributors, retailers, etc., the rule ought to be and is different. *The profit from the retail and wholesale transactions remain in the state.* The system creates a great number of independent local enterprises which assume the distribution

of thousands of items of merchandise. The system has created the job at which Mr. Fresne earned his living for the past several years.

Therefore, the rule that *a regular course of solicitation of orders* must be shown is a sound and definite standard by which business concerns can determine their method of distribution. A *regular* course of solicitation can not be interpreted to include the supervisory and promotion activities of Servel's, Inc., regional representatives. They do not make and close contracts with the distributor, nor accept payment therefor. They see that the trade name of Servel, Inc., is maintained in high standing and in this respect it sometimes becomes necessary to terminate distributorship franchises. The *Kemmerer Coal Co.* and *Wabash Railroad Co.* cases use the word solicitation as it applies to the sales efforts of resident salesman, agents of the foreign corporation, obtaining orders for coal or railway shipments. The A.L.R. annotations and the cases which deal with the manufacturer-distributor relationship (rather than traveling salesmen who solicit orders for their employer) cited above, all hold that the broad term "solicitation" does not include the supervision of the distributor by the manufacturer's representative.

Because Servel, Inc., does not solicit orders in the state, the instance in which it retained title to replacement water heaters stored in plaintiff's warehouse, and the instance in which it installed an all-year air-conditioner in Mr. Cader's home, do not constitute doing business.

The cases cited by appellant (*Liquid Veneer Corp. v. Smuckler* and *Peck Williamson Heating Co.*, etc.) do not sustain its contention that these isolated transactions of Servel, Inc., constitute *"doing business."* In *Marchant v. National Reserve Co. of America et al.*, supra, this court stated:

> "* * * that to be 'doing business' in a state a corporation must be engaged in a continuing course of business rather than a few isolated transactions, whether those transactions are within the usual scope of that corporation's business or not. There must be at least some *permanence about the presence* and business transactions of the corporation within the state." (emphasis added)

The tenor of the latest decisions of the Supreme Court of the United States is that the "presence" of a corporation within a jurisdiction so as to be subject to taxation or service of process is to be determined by a test which satisfies the demands of due process.

> "Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought there." International Shoe Co. v. Washington, 90 L. ed. 95, at 102 citing Judge Learned Hand in Hutchinson v. Chase & Gilbert, 45 F. 2d 139, 141.

See also the test at the constitutional level of "general

fairness" as expressed in *Perkins v. Benguet Consolidated Mining Co.*, 96 L. ed. 487.

As shown above the profits from the wholesale and retail sales of Servel's, Inc., merchandise is subject to taxation in the State of Utah. The distributor and each retail dealer pay license fees and income tax to the State of Utah on the basis of business conducted which includes the sale of Servel Appliances. This is not a case in which a foreign corporation solicits business in the state and removes the profit from the jurisdiction.

As the Court knows, there are two classes of cases dealing with the question of what constitutes doing business. One group is concerned with service of process; the other, with the ability or disability to bring suit. The Utah Legislature has decreed that a foreign corporation which fails to qualify in this state and is found to be "doing business" herein is unable to maintain any action in the courts or to counterclaim, cross-claim or demand any affirmative relief, 16-8-3, U.C.A., 1953. The statute further provides that "* * * every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such (non-qualifying) corporation within this state or to be executed or performed within this state shall be wholly *void* on behalf of such corporation * * * but shall be valid and enforceable against such corporation * * *" In formulating a test which is *reasonable* and *fair* as to what constitutes "doing business" so as to be subject to service of process, the Court should keep in mind the penalty provisions of 16-8-3, supra. In

the instant case, plaintiff misappropriated water heaters meant for replacement, title to which Servel, Inc., vainly tried to retain. Servel's, Inc., counterclaim cannot be settled between the two parties in this forum and the plaintiff thus gains a distinct unfair advantage. Jurisdictions in which such a severe penalty is not imposed upon the non-qualifying foreign corporation but merely require payment of a delinquent filing fee may express a more liberal view of what constitutes doing business and still the federal constitutional test of "general fairness" would be satisfied. In this connection the California Code, Section 6801 permits a foreign corporation to maintain an action whenever it qualifies to do business. The only penalty for not qualifying when it first enters the state is payment of a $250.00 delinquent penalty. The Minnesota statute, Section 303.20 states that failure to qualify as a foreign corporation does not impair the validity of any contract and a foreign corporation can maintain an action once it qualifies. Consider *Loken* v. *Diamond T. Motor Car Co.,* supra, in view of this statute.

The disability to sue is assessed against any "foreign corporation *doing business* within this state and failing to comply * * *" with the qualification statutes. It is submitted that "doing business" within the meaning of this statute does, and should have the identical definition as the term is used in Rule 4 (e) (4). The same test of what constitutes doing business is expressed in *Marchant v. National Reserve Co. of America,* supra, dealing with

the disabilities of noncomplying foreign corporations as is expressed in *Industrial Commission* v. *Kemmerer Coal Co.*, supra, which concerns corporate presence for jurisdictional purposes. When the same language is used in the two statutes, both affecting the same problem concerning foreign corporations, it is impractical and invites confusion to establish different definitions for the meaning of the same phrase. Consideration of the consequences of all foreign manufacturers dealing with local distributors under risk of having their contracts or statement of account treated as being voidable, without redress in court, should influence this court in the decision of all cases of this character.

CONCLUSION

The contract appellant has with respondent is an Indiana contract. If, as appellant claims, there has been a breach of that contract by respondent, then appellant may maintain its action for damages in the state where the contract was made, i.e., in Indiana, and nothing in this proceeding will prevent the maintenance of such a suit.

The trial court studied the affidavits, heard the arguments of counsel and has decided on the facts that respondent was not doing business within the State of Utah. Such finding is overwhelmingly supported by the affidavits. Any solicitation of business in this state would be in violation of the parties' agreement and would

have been alleged as an additional grievance in plaintiff's complaint if such had occurred. Appellant by alleging that respondent was transacting business in Utah seeks to take advantage of its own misconduct in claiming that the water heaters delivered to appellant on consignment for replacement under respondent's warranty constitutes doing business. The case is in fact the simple relationship between a manufacturer and its distributor. For this Court to hold otherwise would prevent every manufacturer from selling its goods in Utah without first qualifying as a foreign corporation to do business in Utah. The adoption of any such rule would be to the great disadvantage to the people of this state in that manufacturers could not comply with such a requirement. The decision of the trial court was right and the order of the Court should be affirmed.

Respectfully submitted,

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