

1953

## Western Gas, Inc. v. Serval, Inc. : Brief of Appellant

Utah Supreme Court

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E. L. Schoenhals; Attorney for Plaintiff and Appellant;

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Case No. 7958

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

WESTERN GAS, INC.,  
a corporation,

*Plaintiff, and Appellant*

vs.

SERVEL, INC.,  
a corporation,

*Defendant, and Respondent.*

FILED  
MAR 11 1953

Supreme Court, Utah

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**APPELLANT'S BRIEF**

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*and Appellant*

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## I N D E X

	<i>Page</i>
Statement of Facts .....	1
Statement of Points .....	4
Argument .....	5
Points Argued:	
Defendant consistently and continuously made adjustments and service and maintained equipment sold within the State of Utah.....	5
Defendant warranted all equipment sold to each purchaser and maintained personal property on consignment in the State to replace defective equipment. ....	6
Defendant completely installed a combination furnace and air conditioning unit within the State of Utah. ....	6
Defendant maintained schools and clinics annually within the State for the following purposes:	
(a) Sales and sales promotion of products and introduction of new models.....	7
(b) Training local personnel for installation servicing and maintenance of defective products. ....	7
Solicitation of business in the State of Utah.....	7
Continuous flow of merchandise into the State of Utah. ....	8
Summary .....	8

## CASES CITED

	<i>Page</i>
Bristol vs. Brent, 110 Pac. 357, 38 Utah 58.....	5
Carrol Electric vs. Freed-Eismen, 50 Fed. 2nd 993.....	7
Case vs. Mills Novelty, 193 So. 625.....	6
Cone vs. New Britain Machine, 20 Fed. 2nd 593, 275 U.S. 552, 72 Law Ed. 421.....	6
Dahl vs. Collette, 279 N.W. 561.....	5
Industrial Commission vs. Kemmerer Coal Co., 150 Pac. 2nd 373, 106 Utah 56.....	5
International Shoe vs. State, 154 Pac. 2nd 801, 101 ALR 122 .....	8
Leo Frene et al., Appts., vs. Louisville Cement Co., 134 Fed. 2nd 511 .....	7
Liquid Veneer vs. Smuckler, 90 Fed. 2nd 196.....	6
Loken vs. Diamond T Motor, 12 N.W. 2nd 345.....	7
Meade Fife Company vs. Varn, 3 Fed., 2nd 520, 269 U.S. 564, 146 ALR 926.....	7
Peck Wilson Heatery vs. McKnight, 205 S.W. 419, 140 Tenn. 563 .....	6
Rendlemon vs. Niagara, 16 Fed. 2nd 122.....	6, 7, 8
Rumley Thresher vs. Stohl, 75 Utah 124, 283 P. 731....	8
State ex rel. Taylor Laundry vs. District Court, 57 Pac. 2nd 722, 146 ALR 953 and 959.....	7
Wabash R. Co. vs. District Court, 167 Pac. 2nd 973, 109 Utah 526 .....	5
Wein vs. Crockett, 195 P. 2nd 222, 113 Utah 301.....	7
Williams vs. Brece Juices, 35 Fed. Sup. 847.....	7, 8

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APPELLANT'S BRIEF

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References to pages of the record are designated as  
R.....

STATEMENT OF FACTS

1. Defendant and respondent hereinafter referred to as defendant, maintained a service man in the State of Utah. Said service man visited the service department of the local jobber not less than once every ninety

days. (R. 29) The service man had the sole discretion and responsibility in making determination as to whether or not defective parts were to be replaced at the defendant's cost, and said service man checked the files containing complaints, and brought with him complaints mailed by customers direct to defendant and adjusted and adjudicated all such matters and reviewed files while within the State of Utah. (R. 23, 29, 31, 38, 44, 46) Said service man went into the homes and assisted the local maintenance man in adjusting equipment and diagnosing problems in connection with malfunctioning units (R. 23), and checking on warranties and reviewing files. (R. 29) Defendant's agents exercised discretion while in Utah. (R. 46) The above practices were conducted for many years. The prior service man, Blair Hughes, attended to all service himself without the assistance of a local service man. (R. 42) Defective parts were replaced at the cost of the defendant. (R. 17½, 23, 35, 36) Adjustments were made in Utah. (R. 44)

2. Defendant entered into written contracts with each purchaser warranting equipment and maintained personal property on consignment in the state to replace defective parts and equipment. (R. 17½) Defendant consigned merchandise which run into thousands of dollars, one consignment alone being for 79 units. (R. 41) Defendant admits it was a consignment. (R. 17) See also R. 36, 40, 41, 42. Defendant maintained title with respect to the same and said property was warehoused within the state of Utah. (R. 36, 40, 41, 42)

3. Defendant installed a combination furnace and air conditioning unit costing \$1950.00. (R. 34) Equipment was shipped direct to customer. (R. 51½) Defendant sent three engineers into Utah for making the installation and attending to the connection, cutting into the house where the parts were installed and taking care of other installation problems with respect to said combination unit. (R. 34)

4. Defendant maintained schools and clinics never less than annually in the State of Utah and advertised same (R. 76), which clinics were for the following purposes:

(a) Sales and sales promotion of the products of the defendant and the introduction of new models. (R. 23, 36, 37, 40) That the defendant brought models into the state at the defendant's expense, and demonstrated, displayed and exhibited the products and distributed leaflets to as many as one hundred prospective purchasers or customers at a time (R. 23, 32), and assisted in taking orders and selling the products within the State of Utah. (R. 32, 36, 37, 42, 43, 45)

(b) For the training of local service men in the installation, servicing, and maintenance of gas burning equipment sold by the defendant. (R. 44, 45)

The gas burning equipment and the installation of the same is highly technical and requires highly skilled and trained men. The defendant maintained these training clinics in Utah (R. 44, 45.)

5. Defendant solicited business within the State of Utah and had salesman come through the State of Utah every ninety days in connection with sales and sales promotion of air conditioning and heating units (R. 32, 36), and calling on customers every three months in connection with the sales and sales promotion of refrigerators and water heaters (R. 36) and these salesmen really put the heat on the local jobbers and used sales pressure to get jobbers to purchase their said equipment and maintain sales quotas (R. 45. Defendant sold goods located in Utah to customers out of State (R. 46) and said salesmen likewise went directly to customers to assist in the direct sale of defendant's products (R. 37, 42, 43.) The defendant likewise sent its personnel into the state in connection with the solicitation of new jobbers and interviewed many prospective jobbers (R. 43.)

6. As the result of the continued sales pressure and promotion there was a continual flow of merchandise into the State of Utah exceeding a million dollars (R. 35, 46.)

## STATEMENT OF POINTS

1. DEFENDANT CONSISTENTLY AND CONTINUOUSLY MADE ADJUSTMENTS AND SERVICED AND MAINTAINED EQUIPMENT SOLD WITHIN THE STATE OF UTAH.

2. DEFENDANT WARRANTED ALL EQUIPMENT SOLD TO EACH PURCHASER AND MAINTAINED PER-



SONAL PROPERTY ON CONSIGNMENT IN THE STATE TO REPLACE DEFECTIVE EQUIPMENT.

3. DEFENDANT COMPLETELY INSTALLED A COMBINATION FURNACE AND AIR CONDITIONING UNIT WITHIN THE STATE OF UTAH.

4. DEFENDANT MAINTAINED SCHOOLS AND CLINICS ANNUALLY WITHIN THE STATE FOR THE FOLLOWING PURPOSES:

(a) SALES AND SALES PROMOTION OF PRODUCTS AND INTRODUCTION OF NEW MODELS.

(b) TRAINING LOCAL PERSONNEL FOR INSTALLATION, SERVICING AND MAINTENANCE OF DEFENDANTS PRODUCTS.

5. SOLICITATION OF BUSINESS IN THE STATE OF UTAH.

6. CONTINUOUS FLOW OF MERCHANDISE INTO THE STATE OF UTAH.

## ARGUMENT

1. DEFENDANT CONSISTENTLY AND CONTINUOUSLY MADE ADJUSTMENTS AND SERVICED AND MAINTAINED EQUIPMENT SOLD WITHIN THE STATE OF UTAH.

*Wabash R. Co. v. District Court*, 167 Pac. 2d 973  
109 Utah 526;

*Industrial Commission v. Kemmerer Coal Co.*, 150  
Pac. 2d 373 106 Utah 56;

*Bristol v. Brent*, 110 Pac. 357 38 Utah 58;

*Dahl v. Collette*, 279 N.W. 561. (See page 567)

This case cites many United States Supreme Court Cases.

*Case v. Mills Novelty*, 193 So. 625;

*Cone v. New Britian Machine*, 20 Fed. 2nd 593 275  
U.S. 552 72 Law Ed 421;

*Rendlemon v. Niagra Sprayer*, 16 Fed. 2nd 122.

Exercise of deseretion and adjusting claims in state held doing business.

2. DEFENDANT WARRANTED ALL EQUIPMENT SOLD TO EACH PURCHASER AND MAINTAINED PERSONAL PROPERTY ON CONSIGNMENT IN THE STATE TO REPLACE DEFECTIVE EQUIPMENT.

*Liquid Veneer v. Smuckler*, 90 Fed. 2nd 196.

3. DEFENDANT COMPLETELY INSTALLED A COMBINATION FURNACE AND AIR CONDITIONING UNIT WITHIN THE STATE OF UTAH.

*Peck, Wilson, Heatery v. McKnight*, 205 S.W. 419  
140 Tenn. 563.

This case is directly in point and holds that the installation of a heating unit does constitute doing business in the state.

4. DEFENDANT MAINTAINED SCHOOLS AND CLINICS ANNUALLY WITHIN THE STATE FOR THE FOLLOWING PURPOSES:

(a) SALES AND SALES PROMOTION OF PRODUCTS AND INTRODUCTION OF NEW MODELS.

(b) TRAINING LOCAL PERSONNEL FOR INSTALLATION, SERVICING AND MAINTENANCE OF DEFENDANTS PRODUCTS.

*Williams v. Brece Juices*, 35 Fed. Sup. 847.

A demonstration in this case was held sufficient to constitute doing business.

*Leo Frene et al., Appts., Louisville Cement Company*, 134 Fed. 2nd 511.

5. SOLICITATION OF BUSINESS IN THE STATE OF UTAH.

*Wein v. Crockett*, 195 P. 2d 222 113 Utah 301;

*Loken et al. V. Diamond T Motor*, 12 N.W. 2d 345;

*Rendlemon v. Niagra Sprayer*, 16 Fed. 2nd 122;

*Williams v. Brece Juices*, 35 Fed. Sup. 847;

*Meade Fife Company v. Varn*, 3 Fed. 2nd 520,  
269 U.S. 564 146 ALR 926;

*Carrol Electric v. Freed-Eismen*, 50 Fed. 2nd 993;

*State ex rel. Taylor Laundry Co. v. District Court*,  
57 Pac. 2nd 772 146 ALR 953 and 959.

Supervision of dealers or jobbers constituted agency or doing business.

*Rendlemon v. Niagra Sprayer*, 16 Fed. 2nd 122;  
*William v. Brece Juices*, 35 Fed. Sup. 847.

6. CONTINUOUS FLOW OF MERCHANDISE INTO THE STATE OF UTAH.

*International Slive Company v. State*, 154 Pac. 2nd 801 101 ALR 122.

The District Judge relied heavily on the *Advance, Rumely, Thresher Co., v. Stohl*, 75 Utah 124, 283 P. 731; This case as was pointed out to the District Judge was merely bolting together a machine that was shipped in a knocked down condition. Moreover, it was apparent from the case that it was an isolated transaction and bolting together an item is not like installing a heating system, and in addition to these facts the case involved the question of whether or not the plaintiff could maintain an action having failed to comply with the laws of the state with respect to corporations.

## SUMMARY

The defendant consistently and continuously solicited business in the State of Utah. There was a continuous flow of merchandise into the state. Defendant

maintained personal property in the state and adjusted all claims and replaced defective parts, which determination was made by an agent operating in the state and in addition thereto adjusted and maintained the equipment in the homes through an agent and assisting a local serviceman. Defendant provided display rooms, showed merchandise, called on the trades interested in said products along with the local jobber for the sale of their respective merchandise and promoted sales of the defendants merchandise, selected dealers and jobbers entered into contracts with purchasers and in fact conducted every possible act in connection with doing business that any local concern could do even to the installation of a large heating and air conditioning unit in the state.

Respectfully submitted,

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