

1954

Vincent Dykes v. Reliable Furniture & Carpet Company et al : Brief of Respondent

Utah Supreme Court

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Stewart, Cannon & Hanson; Attorneys for Respondent;

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IN THE SUPREME COURT
of the
STATE OF UTAH

VINCENT DYKES, by and through
Neil Farrell Dykes, his Guardian ad
Litem,

Plaintiff,

— vs. —

RELIABLE FURNITURE &
CARPET COMPANY,

*Defendant and Third-
Party Plaintiff and
Respondent,*

— vs. —

WALKER MANUFACTURING
COMPANY,

*Third Party Defendant
and Appellant.*

Case No. 8179

FILED
JUL 21 1954
BRIEF OF RESPONDENT

Clerk, Supreme Court, Utah

STEWART, CANNON & HANSON
Attorneys for Respondent

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IN THE SUPREME COURT of the STATE OF UTAH

VINCENT DYKES, by and through
Neil Farrell Dykes, his Guardian ad
Litem,

Plaintiff,

— vs. —

RELIABLE FURNITURE &
CARPET COMPANY,

*Defendant and Third-
Party Plaintiff and
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COMPANY,

*Third Party Defendant
and Appellant.*

Case No. 8179

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

In order to avoid confusion, we will adopt the procedure followed by the appellant and will refer to the parties as they are designated in the pleadings filed in the Lower Court.

Plaintiff, a minor, brought this action against the Reliable Furniture and Carpet Company to recover for

personal injuries alleged to have been received in a fall from a baby crib sold by the defendant Reliable Furniture and Carpet Company to the minor's parents. It is alleged that the crib was defective and that the defect was the cause of the plaintiff's fall and injuries. Defendant, after securing permission of the court to do so, filed a third party complaint against the Walker Manufacturing Company, the manufacturer of the crib. While not admitting that the baby crib was defective, defendant alleged that if the same was defective, the defect was not apparent and was the fault of the Walker Manufacturing Company, from whom the crib was purchased by the defendant (R. 2-4). The third party summons and complaint was served upon Harland Fredrickson in the State of Utah, who it is claimed is the agent for the Walker Manufacturing Company in this state (R. 7). The third party defendant has moved to dismiss the third party complaint upon the grounds that service upon Harland Fredrickson does not constitute valid service upon the Walker Manufacturing Company (R. 8).

Rule 4 (e) (1) of the Utah Rules of Civil Procedure provide for service of summons as follows :

“Upon any corporation, not herein otherwise provided for, upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy thereof to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer

or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the state. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business."

Rule 4 (e) (10) provides:

"Upon a natural person, nonresident of the state of Utah, doing business in this state at one or more place of business, as set forth in Rule 17 (e), by delivering a copy thereof to the defendant personally or to one of his managers, superintendents or agents."

The court denied the third party defendant's motion to dismiss the third party complaint. This appeal is taken from the court's ruling in this regard. The question presented is: Is the service upon Harland Fredrickson sufficient to confer jurisdiction over the Walker Manufacturing Company upon the court?

The appellant attempts to raise another issue, which is: "Said third party complaint states no claim and presents no issue upon which relief could be granted against said third party defendant in favor of said third party plaintiff."

This issue should not be considered by this court on this appeal for the reason that it was never submitted

to the Trial Court. The motion which was filed by the third party defendant and which was denied by the District Court appears on page 3 of its brief and is as follows:

“To dismiss the third party action or in lieu thereof to quash the return of service of the third party summons on the grounds (a) that the court lacks jurisdiction over the person of said third party defendant, and (b) that said third party defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of Sam Walker and Harland Fredrickson hereto annexed as Exhibit “A” and Exhibit “B”, respectively.” (R. 8).

Thus it was seen that the second point raised by the appellant in his brief was never presented to the District Court and should be denied or not even considered by this court upon that basis. However, since the issue has been raised in appellant’s brief, we will discuss the same herein.

STATEMENT OF FACTS

The fundamental question involved is whether or not Harland Fredrickson is the agent of the Walker Manufacturing Company in this state, upon whom service of summons may be made. His deposition has been taken and discloses the following:

The Walker Manufacturing Company manufactures infant furniture, including baby cribs (Dep. 5). It manufactures the same line of products which was formerly manufactured by the Tyre Manufacturing Company and then the Walker Manufacturing Company for a number

of years. Although Harland Fredrickson has no formal written agreement with the company, he, at the time of the service of summons upon him was the only representative of the Walker Manufacturing Company in the State of Utah (Dep. 12). On page 7 of the deposition, Mr. Fredrickson testified as follows:

“Q. Not referring to this particular transaction but just to a transaction generally, you did represent the Walker Manufacturing Company in January 1953?

A. Yes.

Q. And you did represent them during the year 1952. Is that correct?

A. Yes.

Q. And how many years back does that representation go?

A. Well, originally the company, or not this company in particular, was known as the Tyre Manufacturing Company. However, they decided here several years back to manufacture other items, and Mr. Walker had financing through the Tyre company, and he decided to manufacture these cribs; and up until the first of—well, let's see—I would imagine about the first of February the manufacturing company was known as Tyre.

Q. The first of February of what year?

A. Of this year.”

Upon inquiry to the company from a person in this area, Mr. Fredrickson's name would be furnished by the company as the company's representative (Dep. 10). On

page 10 of the deposition, he testified :

“Q. Does the Walker Manufacturing Company or did the company that preceded it, the Tyre company, furnish the people in the State of Utah such as the Reliable Furniture & Carpet Company who might buy their products the name of their representatives in various states?

A. I would imagine so.

Q. Did they furnish them your name as a representative of the company?

A. Well, it would happen in this case. If they should write the company and ask them who represented them or who had the pictures and so forth in order to show them what they manufactured, they would give my name.

Q. And that would be true of the Reliable Furniture & Carpet Company or any other company that happened to write the company and ask who represented them in this state. Is that correct?

A. Well, that's right.

Q. Do they have any other representatives in this state other than yourself?

A. No.

Q. And is your territory or your field in which you may represent them limited to the State of Utah?

A. Would you repeat that, please?

Q. Is your territory or the locality in which you represent them limited to the State of Utah?

A. No, it's unlimited. I could sell in New York if I wanted to.”

Continuing on page 12, Mr. Fredrickson testified:

“Q. Do you have the exclusive right to represent the Walker Manufacturing Company here in the State of Utah?

A. I don't have that in writing, no. He could have somebody else up here tomorrow without ever telling me about it. Of course, that is not a normal business procedure, but—

Q. Is it your understanding that you do have an exclusive right to represent them?

A. No, it isn't even that, because I can send his pictures and prices back to him and tell him I don't want to represent him any longer, and he can do the same thing for me.

Q. I mean as long as the relationship continues on a friendly basis, as long as—

A. It would be assuming that I was his—the only person selling in this area for him, yes.

Q. And would that same practice have prevailed during the time that it was known as the Tyre Manufacturing Company?

A. Yes.”

Although he represents a number of other companies, he does not represent any other company selling the same items as the Walker Manufacturing Company (Dep. 28), and believes that the company would object to his representing another company and not allow him to represent it further (Dep. 27).

The company furnished him with catalogues, brochures, pictures of the items they sold, price lists and order blanks (Dep. 5-6). He contacts prospective retail

outlets such as defendant Reliable Furniture & Carpet Company, furnishes them with catalogues and other materials and shows them pictures of the items offered for sale. Assuming he is successful, he will take an order for the particular items desired, quoting the prices shown on the price lists (Dep. 17-18). This order will generally be taken on one of the company's order blanks and will then be forwarded to the company.

The items ordered will be shipped directly from the company to the purchaser at the prices quoted by Fredrickson from the price lists. A notice that the item has been shipped, showing the price charged, is sent to Harland Fredrickson (Dep. 19-20). At the close of each month, the company forwards him a commission of six percent on all sales during the preceding period. He receives this commission on all sales made by the company in this area, whether the order was taken by him personally or not (Dep. 26).

The witness is kept advised of the status of the various accounts, and in the event of a delinquency has authority to speak to the customers about such delinquent accounts (Dep. 23). In the event payment was forthcoming, he would suggest that payment be forwarded directly to the company, but does feel that he might accept payment and forward the same to the company (Dep. 37).

In the event complaints were made about any of the items sold by the company, he would go to the customer registering the complaint, with a representative of the store which sold the item (Dep. 38), make an investiga-

tion of the complaint and forward a report of the same to the company (Dep. 13 and 38). The stores to whom Harland Fredrickson sells, when they have a request for items which they do not have on hand, sold by the Walker Manufacturing Company, generally arrange among themselves to secure the items from one another; however, according to the witness, they could call the witness and he would refer them to another store where they might be able to obtain the desired item.

As to his authority to make adjustments, Mr. Fredrickson testified on Page 13:

“Q. Now, did the Walker Manufacturing Company have any service men in the State of Utah who serviced their products?

A. No.

Q. If there were a particular item which they sold and the item happened not to be up to par, would there be anybody in the State of Utah whom they would call and have come and look over the equipment?

A. Well, in the event that some particular mechanism or crib panel or crib side or what have you proved dissatisfactory, the company would normally write to them for replacement; and in the event that there was some discrepancy, the company would probably write me and tell me to go examine it or inspect it and ascertain what the damage was in that regard. That would be the only thing.

Q. Would you have any authority in such circumstances to make an adjustment?

A. No, I couldn't make any adjustment of any

kind. All I could do was write the factory as to what I found, and then they would make the adjustment that they felt was satisfactory to both parties.

Q. If you found the equipment to be defective, could you pick the equipment up and send it back to the factory and have the factory send a replacement without writing—

A. It is never handled like that. In the event that the part was faulty, the normal course would be for the store to return it, or re-order a particular part, and when they received it, return the faulty one.”

And on Page 15 he testified:

“Q. Do you go on behalf of the Walker Manufacturing Company when there are complaints about their equipment to the home of the individual or to the store and make an inspection?

A. I would go to the store only, and I would only go with one of the representatives of the store to look at the merchandise because, you see, I can never go to a person’s home and look over some damaged merchandise by myself.

Q. And after you have looked over this damaged merchandise, would you then make a report of your findings to the company?

A. Well, see, as I say, that’s the only thing I can do because I’m not authorized to make a repair of any kind.

Q. If you decide that the particular fault that happened to exist in this particular product that you went to examine was not by reason of its faulty manufacture, would you then

have to report it to the company, or could you just inform them of your findings?

A. Well, all I would do is tell them what I found and let them draw their own conclusions.

Q. Tell who?

A. Mr. Walker.”

As to his procedure generally in representing the company in respect to sales, Mr. Fredrickson testified on Page 19:

“Q. And the person who bought the crib would order a specific crib. Is that correct?

A. That’s right.

Q. And on your order blank you would specify the particular crib that they wanted to buy?

A. That’s right.

Q. And you send that in to the company. Is that correct?

A. That’s right.

Q. Now, what would happen after you sent this order to the company?

A. Well, most of the factory’s shipments are based, of course, on orders or a back log of orders as they call it. As they receive an order, they place it on either the bottom of a file or top and, anyway, they work in sequence. They receive an order one day, and the order is scheduled for shipment the same day if there are no other orders preceding it, and then the item is boxed, packaged, and shipped directly to the party who ordered it.

Q. Now, the crib that you sold then would be

shipped directly to the party who ordered the crib. Is that correct?

A. Oh, I would probably receive a notice, yes.

Q. And what would happen with regard to the billing? Would you receive a bill for the crib?

A. No.

Q. Would the person to whom you sold it receive that bill?

A. Yes."

As to his authority to make collections, Mr. Fredrickson testified on Page 21:

"Q. You get that notice, and do you have any follow-up to ascertain whether or not the cribs are paid for?

A. In the event that they weren't paid for within a certain length of time, I would act at my own discretion. In other words, when you are selling a man something, he is a customer of yours, and you have got to determine which of those people you can approach and which you can't. It's a little insulting to ask a man for money at the time you are asking them for an order, so that is entirely up to the person's discretion. I am aware, however, of their current condition as far as payment is concerned, but that is a standard practice by all factories and manufacturers.

Q. And it is a standard practice of the Walker Manufacturing Company and prior to that the Tyre Manufacturing Company. Is that correct?

A. Oh, yes.

Q. Now, if an account became delinquent, would you go to the account and ask them about their delinquent account?

A. I never have.

Q. Well, whether you have or not, would that fall within the scope of your authorization if you—in other words, let me put it this way: Suppose you sold—

A. The only person that can really logically ask for payment is the company themselves or the company's direct paid representatives. Now, you would fall in that category in the event that some party refused to pay; then the only thing they could do would be to obtain counsel.

Q. I'm not interested—

A. That is, an attorney.

Q. —in this deposition in what the company can or can't do. All I am interested in is what you do .

A. No, I can't do that. I can go and ask them, suggest to them that they pay their bill, and I can in no circumstance demand or insist that they pay it."

As to the manner in which he was paid, he testified on Page 24:

"A. I am paid a commission on all shipments.

Q. And does that commission vary from item to item?

A. No, it's the same commission.

Q. Can you tell us what that commission was

during 1952 at the time you worked for the Tyre—

A. Six per cent.

Q. And what is it with Walker Manufacturing Company?

A. Six per cent.

Q. Now, when would that be paid? By that I mean would it be paid to you immediately upon sending in the order blank?

A. No, that's paid on a monthly basis.

Q. Now, would it make any difference when you were paid whether or not the person from whom you had solicited the order paid for it?

A. That's right.

Q. In other words, you wouldn't be paid until he had paid for the order that you had solicited?

A. No, I am paid as soon as the order is shipped. You see, the dating is two per cent ten days as far as the company is concerned. The dating is two per cent ten days, which means that if the company that received the shipment paid for it in ten days, they would receive a two per cent discount.

Q. And most of them do pay within ten days?

A. Ordinarily, but then the terms are two per cent net thirty, and in thirty days when the account is due and payable they pay the net amount rather than the two per cent.

Q. Suppose that a company from whom you had solicited an order on behalf of Walker Manufacturing Company or before that the Tyre

Manufacturing Company failed to pay for the particular items which were included in that order. Would you receive a commission on those particular items?

A. Yes.

Q. Regardless of whether they pay for them or not?

A. That's right.

Q. You receive your commission?

A. Uh huh.

Q. So your commission is six per cent of the cost of the items on the orders solicited regardless of whether or not they are paid for or not?

A. That's right.

Q. Now, do you have a discretion as to deciding who is a good credit risk or who isn't a good credit risk?

A. Yes, I am the sole judge.

Q. In other words, you can refuse to sell to certain people, or you can decide to sell to other people?

A. That's right. To decide is more accurate there. As far as refusing a sale is concerned, no, I can't. If the particular company that I haven't called on decides that they wanted to buy something from them, they would go ahead and do it, and it would be up to the discretion of the factory whether or not they wanted to ship them."

As to his authority to arrange for transfers of goods from one store to another in an emergency, Mr. Fredrickson had this to say: (Page 31)

- “Q. Now, do you ever have the situation arise in which maybe somebody needs something in a hurry, and one of your customers happens to have that particular item, and another customer doesn’t have that particular item and has a need for it, do you ever go to the one customer and pick that item up from that customer and take it over to the other customer?”
- A. No. Something like that is handled between stores. In other words, if one of the stores here on Main Street was out of a particular item, they might know who else sold the same thing, and they would simply call them up and say, ‘Joe, I need such and such. Have you got it to spare?’
- Q. Do they ever call you and ask if you know where they can get such and such?
- A. Oh, no.
- Q. In other words, if they wanted to find out what other store in town handled the same equipment that they handle so they could call them and get it from them, would they ever call you and ask you who was handling this equipment?
- A. They might, but it isn’t likely.
- Q. Has that ever happened during the course of your time you have represented the Walker Manufacturing Company?
- A. No.
- Q. Did that ever happen while you were representing the Tyre Manufacturing Company?
- A. No. Quite possibly during the war that hap-

pened, but it certainly never happened while I have been working.”

Summarizing the testimony, Mr. Fredrickson testified on Page 33:

“Q. Now, I would like — let me ask you a question which is more or less of a summation, and ask you if it is true, or if it is not true, in which way it is not true. Do you see what I mean? I understand your relationship with the Walker Manufacturing Company and before that the Tyre Manufacturing Company to be what you term as a manufacturer’s representative. Is that correct?

A. Yes.

Q. And you are empowered, speaking particularly now of the Walker Manufacturing Company and Tyre Manufacturing Company before, you are authorized — you are furnished by that company pictures and specifications, catalogs and brochures of the particular equipment the company has sold?

A. Yes.

Q. And you are also furnished a list of the prices of the particular equipment?

A. Yes.

Q. And you are also furnished order blanks with the name of the company on the order blank and printed by the company itself. Is that correct?

A. Well, yes, but—

Q. You wouldn’t necessarily have to take your orders on it?

A. No.

- Q. But you are furnished those order blanks?
- A. That's right.
- Q. Are you furnished any other stationery besides order blanks?
- A. No.
- Q. Then you would go to the particular customer that you felt that you might make a sale, and you would show him the brochures and the pictures of this equipment sold by the Walker Manufacturing Company or before that the Tyre Manufacturing Company. Is that correct?
- A. Yes.
- Q. And you would tell them the price of the particular equipment that you were showing them?
- A. Yes.
- Q. And if they desired to purchase that particular equipment, then you would make out an order ordinarily on the form published by the company. Is that correct?
- A. Well, it just depends; would depend more on what I had rather than on the company's form.
- Q. But you would fill out this order then, whether it was on the company's order form or not?
- A. Yes.
- Q. And you would send this order direct to the Walker Manufacturing Company or prior to that the Tyre Manufacturing Company?

A. Yes.

Q. In California. Now, as I understand it, they would ship the material that you specified on the order blank to the particular company. Is that correct?

A. The correction there would be what the dealer specified, not what I specified.

Q. What the dealer had specified to you and you had put down on the order blank?

A. That's right.

Q. And they would ship that direct to the person involved. Is that correct?

A. Yes.

Q. And they would—it has been your experience that they would ship it at the price that you quoted?

A. Well, that would be the price that they furnished me with.

Q. That's correct, but it is the price that the Walker Manufacturing Company furnished you with which you quoted to the consumer?

A. That's right.

Q. And at the time they shipped this material, they would send you some kind of a notice that the material had been shipped. Is that correct?

A. Yes.

Q. And the notice that it had been shipped would include in the notice a statement of the price of the particular items. In other words, the price would be—the cost would be upon this notice?

- A. That's right.
- Q. Now, the Walker Manufacturing Company and before that the Tyre Manufacturing Company paid you six per cent of the sale price of the equipment that you sold. Is that correct?
- A. Yes.
- Q. And that was true regardless of whether or not the consumer paid for it or not?
- A. That's right.
- Q. And the company would in addition to that pay you six per cent of every order that was sent in for their equipment from the State of Utah, even though you yourself had not solicited the particular order?
- A. That's right. Can I make a correction there?
- Q. Yes, you may.
- A. When you say that I receive six per cent on all orders, that simply means that the order is shipped from the factory in good faith, and the company pays for it, then you see that is fine. That is simply entered on their credit books; but in the event that the company doesn't pay for it, I would already have received my commission, but if the account proved faulty, then they would deduct the commission from that amount.
- Q. From other amounts that might be due to you. Is that it?
- A. No. If there was no way of collecting it, they would deduct the commission from that.
- Q. And what would they do with the rest of it?

A. Well, the rest of it, you see, I would have to stand good for selling a customer who wouldn't pay as well as the company.

Q. In other words, the company would lose everything but the commission, and you would

A. Yes, that's right. They would stand behind lose the commission?

that loss, and I would have to stand behind the loss of the commission.

Q. Now, on small amounts, accounts of two or three hundred dollars—and we are still talking about the Walker Manufacturing Company and the Tyre Manufacturing Company, your authority for them—if one of your consumers did not pay a bill, then, of course, you would have a discretion as to whether or not you might go around and talk to them about paying the bills?

MR. HENDERSON: Are you asking a question or stating it?

Q. Well is that correct?

A. Well, yes. It's only at my own discretion because I am neither authorized nor requested by the company to do these things. It is a case of cementing good business relations.

Q. Could you go to the company and make some kind of a provision for payment? In other words, suppose the company owed—a consumer owed three hundred dollars, and you went to them. Could you arrange that they might pay that off at the sum of twenty-five dollars per month?

A. No, only the company—that arrangement can be made only between the two companies.

Q. Could you discuss such an arrangement and then submit it to the company for approval?

A. No.

Q. Could you, if you went there and they said, 'Yes, we owe the company three hundred dollars, we have neglected to pay it, but here is the three hundred dollars,' could you accept the three hundred dollars?

A. I would suggest that they mail it to them. I could take it and mail it myself, but it would only be a case of my doing it instead of them, my putting a six cent stamp on an envelope instead of them doing it, because that wouldn't accomplish anything. You can realize that.

Q. Now, you have never received any complaints from the customers or the customers' customers about any of the equipment that you have sold for Walker Manufacturing Company or before that the Tyre Manufacturing Company. Is that correct?

A. That's true, yes.

Q. Now, it is your practice with these other companies that you represent that if you do receive complaints that you you go to the customers, your customer's store and look over the equipment. Is that correct?

MR. HENDERSON: I object to that. That's not his testimony, Mr. Hanson. It is suggesting, leading, and I object to the form of the question.

Q. Do you want to tell me what you can do if you receive a complaint about some of this stuff that you sell?

A. I believe that you will find a little bit further on that you asked this same question, and I told you at that time that I could only go to a customer's home, that is, a retail customer's home with representatives of the store or, that is, not one of their employees but one of the owners, and inspect it and then tell the factory exactly what I found, because I have no authorization to recommend any change in the merchandise whatsoever. The only ones that can do it, it is between the two companies."

We have only quoted the most pertinent parts of the deposition as to the points involved. A reading of the entire deposition will disclose other testimony supporting third party plaintiff's position, which we have not set out herein.

STATEMENT OF POINTS

POINT NO. I

THE DISTRICT COURT OF WEBER COUNTY DID NOT ERR IN DENYING THE MOTION OF THIRD PARTY DEFENDANT TO DISMISS THE THIRD PARTY ACTION UPON THE GROUND THAT THE COURT LACKED JURISDICTION OF SAID THIRD PARTY DEFENDANT AND THAT THE SERVICE OF SUMMONS WAS VOID.

POINT NO. II.

SAID THIRD PARTY COMPLAINT DID STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED TO THE THIRD PARTY PLAINTIFF AGAINST THE THIRD PARTY DEFENDANT.

ARGUMENT

POINT NO. I

THE DISTRICT COURT OF WEBER COUNTY DID NOT ERR IN DENYING THE MOTION OF THIRD PARTY DEFENDANT TO DISMISS THE THIRD PARTY ACTION UPON THE GROUND THAT THE COURT LACKED JURISDICTION OF SAID THIRD PARTY DEFENDANT AND THAT THE SERVICE OF SUMMONS WAS VOID.

While as stated in *Parke-Davis Co. v. Fifth Judicial Court in and for Beaver County*, 93 Utah 217, 72 P2 466:

“The mere solicitation and obtaining of orders within a store by the agent of a foreign corporation, for goods to be shipped into the state to the purchaser, does not amount to doing business within the state so as to render the corporation amenable to service of process therein.”

Very little more than mere solicitation is required to bring about this result.

As stated in *Frene v. Louisville Cement Co.*, 77 U.S. A.P. D.C., 129, 134 F2 511 of 146 ALR 926:

“The tradition crystallized when it was thought that nothing less than concluding contracts could constitute ‘doing business’ by foreign corporations, an idea now well exploded. It is now recognized that maintaining many kinds of regular business activity constitutes ‘doing business’ in the jurisdictional sense, notwithstanding they do not involve concluding contracts. In other words, the fundamental principle underlying the (doing business) concept seems to be the maintenance within the jurisdiction of a regular, continuous course of business activities, whether or not this includes the final stage of contracting. 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 theirs).

Thus, in the case of *Wabash Railroad Co. v. District Court, Salt Lake County*, 109 Utah 526, 167 P2 973, where a railroad company which had no tracks west of the Missouri River maintained an office in Salt Lake City for the convenience of its general agent and assistant clerks and where the employees' only function was to solicit shipments of freight by way of the Wabash Railroad from customers in the State of Utah; the employees having no authority to issue tickets, bills of lading, receipts, or to collect money, it was held that the corporation was doing business in the State of Utah.

And in the case of *Bristol v. Brent*, 38 Utah 58, 110 P. 556, the court held that the solicitation of freight business in the State of Utah, coupled with the maintenance of an office and an office force in this state, was doing business, even though the agent of the railroad company in the state had no power to bind the corporation in any of its business affairs.

In the case of *Industrial Commission v. Kemmerer Coal Co.*, 106 Utah 476, 370 P2 373, the defendant, a Wyoming corporation, maintained an office in the State of Utah, on the door of which its name was printed; was listed in the telephone directory and all of the expenses of the office were paid by the defendant. The three employees who used that office solicited sales of coal

to consumers in the State of Utah; it was likewise held that the corporation was doing business in the State of Utah.

In a leading case, *International Harvester Co. v. Kentucky*, 234 U.S. 579, the company's transactions in the State of Kentucky were conducted in accordance with the following order directed to persons negotiating sales for the company in the State of Kentucky:

“The company's transactions hereafter with the people of Kentucky must be on a strictly interstate commerce basis. Travelers negotiating sales must not hereafter have any headquarters or place of business in that state, but may reside there.

“Their authority must be limited to taking orders, and all orders must be taken subject to the approval of the general agent outside of the state, and all goods must be shipped from outside of the state after the orders have been approved. Travelers do not have authority to make a contract of any kind in the state of Kentucky. They merely take orders to be submitted to the general agent. If anyone in Kentucky owes the company a debt, they may receive the money, or a check or a draft for the same, but they do not have any authority to make any allowance or compromise any disputed claims. When a matter cannot be settled by payment of the amount due, the matter must be submitted to the general collection agent, as the case may be, for adjustment, and he can give the order as to what allowance or what compromise may be accepted. All contracts of sale must be made f.o.b. from some point outside of Kentucky, and the goods become the property of the purchaser when they are delivered to

the carrier outside of the state. Notes for the purchase price may be taken, and they may be made payable at any bank in Kentucky. All contracts of any and every kind made with the people of Kentucky must be made outside of that state, and they will be contracts governed by the laws of the various states in which we have general agencies handling interstate business with the people of Kentucky. For example, contracts (585) made by the general agent at Parkersburg, West Virginia, will be West Virginia contracts.

“If any one of the company’s general agents deviates from what is stated in this letter, the result will be just the same as if all of them had done so. Anything that is done that places the company in the position where it can be held as having done business in Kentucky will not only make the man transacting the business liable to a fine of from \$100.00 to \$1,000.00 for each offense, but it will make the company liable for doing business in the state without complying with the requirements of the laws of the state. We will therefore depend upon you to see that these instructions are strictly carried out.”

The court held that the mere solicitation of sales, coupled with a continuous course of business within the state was sufficient to confer jurisdiction on the State of Kentucky and said:

“Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited orders (586) in Kentucky, but

might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state."

It is to be noted that the agent's authority under the cited order or method of doing business is synonymous with the agent's authority in the matter now under consideration.

A case particularly in point is the case of *International Shoe Company v. State, et al* (Wash.), decided January 4, 1945, 154 P2 801. In that case the International Shoe Company employed eleven to thirteen salesmen who resided in the State of Washington and were regularly engaged therein in soliciting orders and displaying samples, sometimes in permanent display rooms, which were paid for by the salesmen, for which expense they were reimbursed by the company. Quoting from the case:

"The authority of the salesmen is limited to exhibiting to merchants who are probably buyers samples of merchandise for which they solicit orders, endeavoring to procure orders on prices and terms fixed by appellant. If orders are obtained, the salesmen transmit them to appellant's office in St. Louis, for acceptance or rejection. If the orders are accepted by appellant, the merchandise called for by such orders is shipped

f.o.b. shipping point, from outside the state of Washington. No salesman has authority to bind appellant with any contract, or to finally conclude any transaction in its behalf, nor can he make collections. Salesmen are not permitted to engage in an independently established trade occupation, profession, or business of the same nature as is involved in their employment by appellant."

The court held that service of summons on one of the salesman was sufficient to confer jurisdiction upon the tribunals of the State of Washington, and said:

"The cases dealing with the question here presented are multitudinous. While it is probably true that most of the cases which hold the corporation was doing business in the state so as to make it *amenable to process* have some slight activity on the part of the agent in addition to the solicitation of orders resulting in a continuous flow of the corporation's products into the state, yet it seems to us the basic fact upon which the courts have determined that the corporation was doing business was the regular and systematic solicitation of orders by the agent, resulting in the continuous flow of the corporation's products into the state by means of interstate carriers.

"The following are typical cases holding that the corporation was doing business in the state where service was attempted to be made. From our discussion of these cases will appear what facts, in addition to mere solicitation, the courts considered in determining that the corporation was doing business in the state. It will also appear from some of the decisions that a regular and systematic course of solicitation of orders by the agent of the corporation, resulting in a continuous flow of the corporation's products into the

state should be and is sufficient to warrant the court in holding the corporation was doing business in the state." (*Italics theirs.*)

The following is found in 113 A.L.R. 88:

"In a great majority of the cases in which the question has been presented, the courts have sustained the validity of service of process upon a sales agent or solicitor for a foreign corporation doing business in the state.

* * *

"Thus service of summons upon a salesman of a foreign corporation who took orders for its goods from retail merchants was held to be valid under a statute authorizing service on 'any officer or agent of such a corporation within this state.' *Genack v. Gorman*, (1923) 224 Mich. 79, 194 NW 575.

* * *

"And an agent with authority to solicit orders for goods to be shipped from outside the state, and who was designated by the corporation's officials as its 'western representative', was held to be an agent of the corporation upon whom process could be served." *Kirby v. Louismann-Capen Co.*, (1914; D.C.) 221 F. 267.

* * *

"A local agent employed by a foreign automobile manufacturing to take orders for cars on blank forms furnished by the company, on which the agent's name appeared as salesman, who took checks payable to the company in payment for the cars, and received compensation on a commission basis, was held to be an agent of the corporation, upon whom process could be served." *R. M. Owen & Co. v. Johnson* (1913) 184 Ill. App. 90.

"An employee of a foreign corporation who, in addition to soliciting orders for the corporations' goods, subject to approval by the corporation in another state and shipments from the other state, also made collections, adjusted claims, filled orders by securing goods from other purchasers, and kept some of the corporations' goods in stock at his home for immediate delivery, was held to be an agent under whom process could be served under a statute authorizing service upon 'any officer or agent of such corporation' and providing that any person representing such a corporation in any capacity should be deemed an 'agent' within the meaning of the statute." *Cheli v. Cudahy Bros. Co.* (1932) 20 Mich. 496, 245 NW 503.

"One who, in soliciting orders for the product of a foreign corporation, consulted with the corporation and undertook to remedy defects when the equipment sold did not function properly, installed such equipment with other employees of the corporation who came for the purpose of correcting such difficulties, and purchased fabricated materials in the state for use in attempts to remedy defects, was held to be an agent upon whom process could be served, under a statute authorizing service upon any officer or agent of a foreign corporation, and providing that any person representing such a corporation in any capacity should be deemed an agent." *Malooly v. New York Heating and Ventilating Corp.* (1935) 270 Mich. 240, 258 NW 622 (appeal dismissed in 1935); 296 U.S. 533, 80 L. Ed. 379; 56 S. Ct. 92, which had rehearing denied in 1935; 296 U.S. 662; 80 L. Ed. 471, 56 S. Ct. 166.)

* * *

"A person who solicited business for a for-

eign building and loan association, receipted for and remitted installments, dues and fines on a commission basis, and was held out by the corporation as its agent at the place where he was served, was held to be the 'resident agent' of the corporation upon whom process might be served." *Pollock v. Carolina Interstate Bldg. & Loan Assoc.* (1896); 48 S.C. 65; 25 S.E. 977; 59 Am. St. Rep. 695.

* * *

"A traveling salesman who solicited orders for goods on behalf of a foreign corporation, to be shipped from another state, subject to approval by the corporation at its home office in such state, was held to be an agent upon whom process could be served in an action against the corporation." *Harbich v. Hamilton-Brown Shoe Co.* (1932 D.C.) 11 F. Supp. 63.

"And service upon an agent of a foreign corporation whose duties were to solicit sales of the corporation's products throughout the state, at prices fixed by the corporation and subject to approval by the corporation at its home office, and who received a monthly salary for his services, was held to be sufficient." *Duluth Log Co. v. Pulpwood Co.* (1917) 137 Minn. 312, 163 NW 520.

The agent ~~Fredrickson~~ in this case has represented the Walker Manufacturing Company and its predecessor, who has done business in this state on a continued basis for a number of years. His function is not merely to solicit sales, although that is a part of his duties, but he is designated by the company as their agent here in the state of Utah. While he has no authority to make any binding contracts on their behalf he represents their business interests in this state. He may be called upon

by the company to collect accounts. He may be called upon by the company or their customers to investigate complaints and make a report of the same to the company. There can be no doubt that under the cases assigned his representation is of such a character that the company is doing business under Rule 4 of the Utah Rules of Civil Procedure and that service upon Harland Fredrickson is sufficient to confer jurisdiction over the third party defendant Walker Manufacturing Company upon this court.

POINT NO. II.

SAID THIRD PARTY COMPLAINT DID STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED TO THE THIRD PARTY PLAINTIFF AGAINST THE THIRD PARTY DEFENDANT.

As was pointed out previously, the third party defendant and appellant did not raise the point that the third party complaint did not allege facts entitling the third party plaintiff to relief at the time the case was in the District Court and this appeal, which is from an interlocutory decision of the court, was allowed only on those matters raised under the first point. This fact alone should dispose of the point; however, the following authorities are cited should the court desire to review them:

Rule 14(a) of the Utah Rules of Civil Procedure provides:

“Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and com-

plaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third party defendant, shall make his defenses to the third party plaintiff's claim as provided in Rule 12 and his counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in Rule 13. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant."

It is ordinarily true, as was said by Justice Henri Henriod in *Hardman v. Matthews*, (Utah) 262 P2 748, that joint tort feorsors cannot be interplead under this rule in the absence of a statute permitting contribution between them. However, this is not the situation in this case.

In this case, the third party complaint is not based upon any right of contribution between joint tort feorsors but on the right of indemnity.

Assuming the facts of plaintiff's complaint and the allegations of the third party complaint to be correct, as we must do at this point for the purpose of testing the validity of the pleadings, we are confronted with this situation: The defendant and third party plaintiff sold to the plaintiff a baby crib which was defective. This defective condition should, if we are to believe the plaintiff, have been known to the defendant and third party plaintiff. If we stop at this point, there is no ground for relief against the third party defendant, the manufacturer; however, if we assume, as alleged in the third party complaint, that the defective condition was either the result of the manufacturer's design of the crib or existed at the time the crib was sold by the manufacturer, and that the manufacturer should have known of or discovered the condition, then the third party plaintiff would be entitled to bring a suit against the third party defendant for the damages suffered by reason of said defective design or condition. Those damages would be measured by the recovery of the plaintiff in the first action. The action against the manufacturer would not be one based on any right of contribution between joint tortfeasors but rather would be one of indemnity based upon the manufacturer's express or implied warranties of sale. This is exactly the situation presented by the pleadings in this case except that the two actions have been made one under the procedure authorized by Rule 14(a) of the Utah Rules of Civil Procedure.

Rule 14(a) of the Utah Rules of Civil Procedure is exactly the same as Rule 14(a) of the Federal Rules of

Procedure. Under the Federal Rules of Procedure, it has been held that a defendant sued for damages for the negligent operation of an elevator may assert a claim against a third party defendant for defective construction of safety devices. *Tomko v. City Bank Farmers Trust Co.*, D.C.N.Y. 1943, 3 F.R.D. 31.

Under the Federal Rule, it has also been held that where plaintiff, injured while employed as grain shover on a boat being unloaded at defendant's elevator in New York, alleged negligence in that a hook broke causing plaintiff to be struck by a shovel, defendant was entitled to file third party complaint against manufacturer of hook, since manufacturer occupied position of indemnitor to defendant and manufacturer's liability to defendant was based upon breach of implied warranty. *Tevington v. International Milling Co.*, D.C.N.Y. 1947, 71 Fed. Supp. 621.

An analogous situation exists where a retailer sued by a consumer for breach of implied warranty of wholesomeness or fitness of food, seeks to bring in as a party defendant the wholesaler or manufacturer from whom the food was procured. There is an annotation in 24 ALR(2) 913, from which the following is taken:

“While there was no means under common-law procedure whereby a defendant could bring into the action a third person liable over to or severally with the defendant upon the causes of action being litigated, statutes and rules of practice have been enacted in a number of jurisdictions providing that when a defendant shows that some third person, not then a party to the action, may be alone liable, or liable over to the defend-

ant, or jointly and severally liable with him, on the cause of action sued upon, the court may order such person brought in as a party defendant.

"There are a few cases dealing with the specific question of the right of a retailer sued by a consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as party defendant the wholesaler or manufacturer from whom the article was procured, but the trend established by them is, clearly, that under modern practice statutes such an impleader is proper."

A number of cases from the jurisdiction of North Carolina, New York and the United States Courts supporting this proposition are set out therein.

In *DuRite Laundry, Inc. v. Washington Electric Co., Inc., et al*, 33 N.Y.S. 925, an action was brought against the seller for breach of contract because of defects therein. The original defendant sought to implead as an additional defendant the company engaged to inspect equipment before purchase thereof by original defendant from the manufacturer. It was held:

"Where any party to an action shows that some third person, not then a party to the action, is or will be liable to such party wholly or in part for the claim made against such party in the action, the court . . . may order such person to be brought in as a party to the action and direct that a supplemental summons and a pleading . . . be served upon such person." Subdiv. 2, Sec. 193, Civil Practice Act. "The Electric Company may implead the Inspection Company as a party as its cross-complaint shows a right to recover wholly or in part any amount for which it is liable to the Laundry Company."

A different approach was taken in *McLaughlin v. City of Syracuse*, 56 N.Y.S. 594. There a city was sued by a pedestrian struck by ice falling from the roof of a building. The city moved to make the property owners defendants. It was held the motion should have been granted. The court said:

“We are well acquainted with the rule that a joint tort-feasor ordinarily may not be brought in on the application of a defendant unless the plaintiff consents . . . but there are exceptions to such rule and the exceptions are well expressed in *Trustees of Village of Conandaigua v. Foster*, 81 Hun. 147, 149, 150; 30 N.Y.S. 686, 687 ‘. . . First where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant, acting within the scope of his employment; or second, where both parties have been in fault, but not in the same fault, towards the person injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Illustrations of the second class were found in cases, like the present: ‘of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former, the failure to remove it, in the exercise of its duty to care for the safety of public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied.’”

In the case at bar, the third party defendant, assuming the allegations of the complaints to be true, would be

required to indemnify the defendant for any damages the plaintiff might recover against defendant. His, the third party defendant's negligence was the positive and the effective cause of the injury. The negligence of defendant was negative; that is, the failure to discover the defect.

CONCLUSION

Thus it is seen, under the pleadings the third party defendant would be liable to the defendant for any damage plaintiff might recover, not on the theory of construction but on the theory of indemnity. The third party is therefore a proper party to be brought into the action under Rule 14(a) of the Utah Rules of Civil Procedure. Service was had upon the third party defendant by service upon his agent Harland Fredrickson, and the court has jurisdiction over him.

Respectfully submitted,

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