1970

# Leonard E. Hill v. Zale Corporation : Brief of Defendant-Respondent

# IN THE SUPREME COURT OF THE STATE OF UTAH

LEONARD E. HILL,
*Plaintiff-~~Respondent~~ Appellant,*

vs.

ZALE CORPORATION,
*Defendant-Respondent.*

Case No. 12136

## Brief of Defendant-Respondent

**Appeal from Order of Dismissal of the Third Judicial District Court for Salt Lake County, Honorable Gordon R. Hall.**


**SAMUEL BERNSTEIN**
**404 Boston Building**
**Salt Lake City, Utah 84111**

**BRUCE G. COHNE**
**GEORGE H. SPECIALE**
**1010 University Club Building**
**Salt Lake City, Utah 84111**
**Attorneys for Defendant-Respondent**

**RICHARD M. DAY**
**818 Continental Bank Building**
**Salt Lake City, Utah 84101**
**Attorney for Plaintiff-Appellant**

## TABLE OF CONTENTS

## CASES CITED

Page

## STATUTES CITED

## TEXTS CITED

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

LEONARD E. HILL,
*Plaintiff-Respondent,*

vs.

ZALE CORPORATION,
*Defendant-Respondent.*

Case No. 12136

---

## Brief of Defendant-Respondent

---

### NATURE OF CASE

This is an action based upon a claim by plaintiff, Leonard E. Hill, to recover wages, vacation pay, moving expenses and an incentive cash award from defendant Zale Corporation.

### DISPOSITION IN LOWER COURT

Defendant Zale Corporation's motion to dismiss the action was granted, the court having found that the de-

fendant is a corporation duly organized and existi... under the laws of the State of Texas and is not subje... to service of process within the State of Utah.

## RELIEF SOUGHT ON APPEAL

The defendant submits that the judgment of the trial court granting defendant's motion to dismiss should be affirmed.

## STATEMENT OF FACTS

Plaintiff-Appellant, Leonard C. Hill (hereinafter "Hill") is a former employee of Zale-Anchorage, Inc. an Alaska Corporation (hereinafter "Zale-Anchorage"), and a wholly owned subsidiary of Zale Corporation, a Texas Corporation (hereinafter "Zale"). (R. 11

Hill brought suit against Zale based upon the claimed wrongful deduction of $1546.81 from a termination wage settlement (R. 1, No. 4); failure to pay an incentive cash award in the amount of $100.00 (R. 2, Second Cause of Action, Paragraph No. 3); failure to pay for vacation time not taken, in the amount of $666.60, (R. 2, Third Cause of Action, Paragraph No. 3); and failure to pay moving expenses after termination in the amount of $469.40. (R. 3, Fourth Cause of Action Paragraph No. 3), all of which occurred in Anchorage, Alaska, during the term of his employment with Zale Anchorage.

Each cause upon which complaint is had is the result of transactions within the State of Alaska by and between Hill and Zale-Anchorage. (R. 1 through R. 3).

Zale is the parent corporate entity of numerous wholly owned subsidiaries engaged in the business of retail merchandising. Coordination of activities of all subsidiaries in order to achieve economy of scale is effected through various unincorporated divisions of Zale.

Zale itself is neither organized nor qualified to do business in the States of Alaska or Utah (R. 11), although Zale-Anchorage is organized as an Alaskan Corporation and although there are various "Zale" stores in Utah, each of which is a distinct and separate Utah Corporation. (R. 11).

Hill sought to maintain his action in the District Court of Salt Lake County upon the basis of service of process made upon Richard Hankin, an officer only of an unincorporated division of Zale, in Salt Lake City, Utah.

Zale moved to dismiss the action for failure to state a claim upon which relief can be granted; that Zale is not subject to service of process within the State of Utah; and that Zale had not been properly served. The Court granted Zale's motion on the basis that Zale is not subject to service of process in Utah.

Whereupon this appeal was taken.

## ARGUMENT

## POINT 1

## THE DECISION OF THE LOWER COURT SHOULD BE AFFIRMED UPON THE BASIS OF PLAINTIFF'S FAILURE TO SUSTAIN THE BURDEN OF PROOF WITH REGARD TO THE DEFENDANT'S ACTIVITIES WITHIN THE STATE OF UTAH.

### A. Zale's Motion to Dismiss was properly treated as a Motion for Summary Judgment and properly granted owing to Hill's failure to show a genuine issue as to any material fact.

Rule 12(b) U.R.C.P., 1953, provides in part that:

> "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim which relief can be granted, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Rule 56(b) U.R.C.P., 1953, provides that:

> "A party against whom a claim . . . is asserted . . ., may, at any time, move with or without supporting affidavits for a summary judgment in his favor . . ."

And subparagraph (c) of that Rule provides that:

> "The adverse party prior to the day of hearing may serve opposing affidavits. The judgment

> sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law."

Zale's motion to dismiss (R. 9) was based upon (1) failure of the complaint to state a claim upon which relief can be granted, (2) the fact that Zale is a Texas corporation not subject to service of process in Utah, (3) improper service, (4) the affidavit of Ben A. Lipshy, President of Zale Corporation.

The form of the motion, together with the affidavit as "matters outside the pleading" which was presented to and not excluded by the court, suffices to cause the motion to be treated as one for summary judgment, pursuant to Rule 56, U.R.C.P., as previously noted.

The affidavit aforesaid, (R. 11), states that "Zale Corporation is a Texas Corporation . . . not qualified to do business in the State of Utah and does not do business in that state." Hill failed to rebut the affidavit of Lipshy by counter-affidavit or otherwise.

This court examined a similar failure in *Dupler v. Yates*, 10 Utah 2d 251, 351 P.2d 624 (1960):

> ". . . Where the moving party's evidentiary material is in itself sufficient and the opposing party fails to proffer any evidentiary matter when he is presumably in a position to do so, the courts should be justified in concluding that no genuine issue of fact is present, nor would one be present

at the trial. [Citing 99 Univ. Pa. L. Rev. 21: 223 (1950).]

"Upon a motion for summary judgment, the courts ought to recognize, as a minimum, that the opposing party produce some evidentiary matter in contradiction of the movant's case or specify in an affidavit the reason why he cannot do so." [Citing 99 Univ. Pa. L. Rev. 212, 228.]

"Where . . . the materials presented by the moving party are sufficient to entitle him to a directed verdict and the opposing party fails either to offer counter-affidavits or other materials that raise a credible issue or to show that he has evidence not then available, summary judgment may be rendered for the moving party." [Citing 6 Moore, Federal Practice (2d Ed.) p. 2067; *James v. Honaker Drilling, Inc.*, 10 Cir. 254 F.2d 702, 706.]

Notwithstanding that Hill made use of discovery procedures (R. 4 through R. 8, R. 12 through R. 16) to determine (Brief of plaintiff-appellant, pp. 2-7 *passim*) that "the conclusion is . . . inescapable that Zale Corporation is 'doing business' in Utah" (Brief, *supra* at p. 14), the District Court was not so convinced.

Justice Callister of this court has approved authority which states that:

"So long as the party opposing the motion [for summary judgment] has full access to the facts —as normally he will through the discovery procedure—the motion should be granted if he has failed to show any genuine issue as to a material fact." *Fox v. Allstate Ins. Co.*, 22 Utah 2d 383, 453 P.2d 701 (1969) (dissenting opinion), citing

3 Barron and Holtzoff, Federal Practice and Procedure, § 1232.2, p. 114 and *Bolack v. Underwood*, (C.A.10, 1965) 340 F.2d 816, 819.

The majority opinion in *Fox v. Allstate Ins. Co., supra*, based its reversal of the lower court order granting summary judgment on the basis that assertions in an affidavit should not be the sole basis of granting "summary judgment simply because there could not be a counter-affidavit filed, particularly where the assertions would be tried as issues before a jury." *Fox v. Allstate Ins. Co., supra* at p. 704.

The instant case presented the question of jurisdiction of the court, a question of law properly decided by the court. In addition, the plaintiff had apparently satisfied himself that the answers to questions propounded in discovery proceedings would convince the court that service was proper. It should be noted that submission of the interrogatories and request for admissions (R. 4 to R. 8) followed the submission of the motion to dismiss with attached affidavit (R. 9 to R. 11) and that the questions were designed to refute the statement contained in the affidavit. This they failed to do, as shown by the resulting Order of the lower court granting defendant's motion to dismiss. (R. 18).

B. The trial court based its decision on oral argument which does not appear of record, and upon the pleadings and evidence.

"In reviewing a case . . . where issues of fact are involved and there are no findings of fact, we do not review the facts, but assume that the trier of

> the facts found them in accord with its decisio and we affirm the decision if from the evidence would be reasonable to support it." *Western G Appliances v. Servel, Inc.*, 123 Utah 229, 25 P.2d 950 (1953) citing *Mower v. McCarthy*, 1 Utah 1, 245 P.2d 224, 226 (1952).

The Brief of plaintiff-appellant Hill sets forth ex tensive factual allegations in support of Hill's positio none of which appears of record: ". . . arrangements ha been made by Zale Corporation to transfer [Hill] t Utah." (Brief, p. 3); ". . . defendant maintains [in Sa *permanent and established basis.*" (emphasis supplied Lake County] . . . an officer and managing agent on (Brief, p. 10); ". . . it is established that [the agent's job . . . must certainly necessitate control over corporate affairs, [etc.]." (Brief, pp. 10-11); "At the hearing . . Defendant's counsel appealed to the court . . . that [de nial of the motion to dismiss] would . . . subject [Zale to the regulatory and taxing statutes of fifty states. (Brief p. 12); ". . . it is obvious that [the agent] is fur thering the main business enterprise of Zale Corporation in Utah . . ." (Brief, p. 14); "the power and prerogative is retained somewhere within the maze of Zale's corpo rate structure . . ." (Brief, p. 15); "It is obvious . . . that the 'wholly-owned subsidiaries' are merely parts of an integrated marketing operation . . ." (Brief, p. 15). ". . . Zale Corporation . . . determined . . . such matters as wage settlements, sales promotion and incentive pro grams, vacation pay, and moving expenses." (Brief, p. 17); ". . . employees of the Zale stores are under direct supervision . . . of an executive officer of Zale Corpora

tion." (Brief, p. 22); ". . . the facts establish a high degree of activity in Utah by Zale Corporation. . . ." (Brief, p. 24); "The almost complete and antonomous control over the affairs of its subsidiaries retained and exerted by Zale Corporation in effect makes the subsidiaries merely the alter ego of Zale Corporation." (Brief, p. 29). If these assertions had been proven to the satisfaction of the lower court, the necessity of this Appeal would have been obviated.

"In any event, this court cannot consider facts stated in the briefs which may be true but absent in the official record." *Watkins v. Simonds*, 14 Utah 2d 406, 385 P.2d 154 (1963), citing *Cooper v. Foresters Underwriters, Inc.*, 123 Utah 215, 257 P.2d 540 (1953).

The order granting defendant's motion to dismiss recites that the court heard oral argument of respective counsel, and it may be assumed that counsel for Hill raised and was heard on all of the factual agreements set forth in his brief. None of it, however, appears of record.

> "Judgments of courts are presumed to be correct if nothing in the record appears to the contrary, and all doubts are resolved in their favor. The record on appeal in this case being devoid of any and all evidence, it must be assumed that the proceedings in the court below established a sufficient basis to support and justify the court's findings, conclusions and judgment. *Watkins v. Simonds, supra,* citing *Baine v. Beckstead*, 10 Utah 2d 4, 347 P.2d 554 (1959); and *Johnson v. Peoples Finance & Thrift Co.*, 2 Utah 2d 246, 272 P.2d 171 (1954).

As additional evidence in support of his position, Hill cites from his complaint allegations which "indicate that the defendant, rather than the individual Zale Stores, claims the authority and/or the prerogative to withhold amounts from wage settlements [citation omitted] and that the defendant rather than the individual Zale Stores retains and exercises the authority to determine such matters as sales promotion and incentive programs by employees [citation omitted], vacation pay [citation omitted], and payment of moving expenses when employees are transferred [citation omitted]. (Brief of plaintiff-appellant pp. 6-7). These contentions were considered by the lower court in arriving at its determination to grant the motion to dismiss, and found wanting.

> ". . . if the summary judgment procedure is to be effective, it must be held that when adequate proof is submitted in support of the motion, the pleadings are not sufficient to raise an issue of fact." *Dupler v. Yates, supra*, citing Asbill & Snell, Summary Judgments under the Federal Rules, 51 Mich. L. Rev. 1143, 1155 (1953); Barron & Holtzoff, Federal Practice and Procedure 82.

## POINT 2

## THE TRIAL COURT PROPERLY GRANTED DEFENDANT-RESPONDENT CORPORATION'S MOTION TO DISMISS ON THE GROUND THAT THE CORPORATION IS

NOT SUBJECT TO SERVICE OF PROCESS WITHIN THE STATE OF UTAH.

Hill points out a number of situations in which service may be had on a corporation, pursuant to Rule 4(e)(4), U.R.C.P. (Brief of plaintiff-appellant pp. 8-9). He quotes first that service may be had "by delivering a copy . . . to an officer, a managing or general agent." But continuing the language of the rule, "or to *any other agent* authorized by appointment or by law to receive service of process . . ." (emphasis added). No evidence was adduced, that appears of record, to indicate that Zale had any agent authorized by appointment or law to receive or accept service of process.

Appellant says that "[t]he second situation is '[i]f no such officer or [managing or general] agent can be found in the county in which the action is brought;' service may then be had . . . 'upon any such officer *or* agent or any clerk, cashier, managing agent, chief clerk, or other agent having the management direction, control of any property of such corporation . . . with [sic] the state (emphasis added).'" Hill failed to show that there is any officer or agent within the State of Utah who has management, direction or control of any property of Zale within the State of Utah, and no such showing appears of record although appellant had the opportunity to make such a showing.

Finally, "[i]n the situation where the defendant corporation is 'doing business,' which is something more than owning property, the legislature has made service

easiest of all; it may be 'then upon the person doing such business or in charge of . . . [the] place of business.'"

Hill failed to produce any evidence sufficient to convince the court that Zale was doing business within the state, as witness the order granting defendant's motion to dismiss.

Appellant allows that service may not be had "upon a mere employee of a foreign corporation nor upon an agent who was merely temporarily within the state . . ." (Brief, pp. 9-10), and cites as authority for the proposition, *W. L. Beard v. White, Green & Addison Assoc. Inc.*, 8 Utah 2d 424, 336 P.2d 125 (1959), and *Western Gas Appliances v. Servel, supra.*

The *Beard* case, *supra*, was an action to quiet title to mining claims located within the State of Utah. The only question was whether the person served at the mining claim site was a suitable person to receive service of process. This court ruled that he was not. The instant case did not present the trial court the relatively easy decision of who may be served since it was not a foregone conclusion that Zale is doing business within the State as was White, Green & Addison Assoc. Inc.

In *Western Gas Appliance, supra*, this court felt that regular, infrequent trips to this state by a sales manager coupled with "general promotion and supervision of the business" of Servel distributorships was not doing business such as would suffice to permit service of summons upon that person.

Appellant contends (Brief, *supra*, p. 10) that *Beard, supra*, and *Wills v. National Mineral Co.*, 176 Okla. 193, 55 P.2d 449, 453, 454 (1936) stand as authority for the proposition that Zale should be subject to service within this state. The *Wills* court said that:

> "The solution of this question [whether service was proper] depends on what is meant by the term 'doing business' . . ."
>
> "Business is largely the barter, sale, or exchange of things of value, usually property. Doing business is therefore 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 whenever an important combination of these functions is being performed, business is being done."

Reliance on the *Wills* case to establish that Zale is subject to service in Utah is surely misplaced—the record does not show that Zale engaged in the activities mentioned.

*Prudential Fed. Sav. & Loan Ass'n. v. William L. Perera & Assoc.*, 16 Utah 2d 365, 401 P.2d 439 (1965), also cited by Hill, involved service of process on the Utah Secretary of State, where no agent of defendant could be served in Utah. The trial court had found that the defendant was "doing business" within the State of

Utah, having entered the state for the express purpos of supervising construction of a building in Utah whic defendant had designed. This court set out the natur and extent of the defendant's activities in Utah and con cluded that, "[a]ll of this constitutes such a plethora o evidence supporting the trial court's conclusion that th defendant was doing business in Utah that it seems al most incredible that the point was raised on cross-ap peal." The court said that service was proper based upo the facts of the case.

## POINT 3

## THE TRIAL COURT PROPERLY FOUND THAT DEFENDANT-RESPONDENT WAS NOT "DOING BUSINESS" IN THE STATE OF UTAH BASED UPON THE ORAL ARGUMENT AND EVIDENCE PRESENTED.

### A. Zale does not fall within the standards of any test of "doing business" in this jurisdiction.

The Trial Court examined the pleadings, including the interrogatories and responses, and requests for admissions and responses, and the affidavit of the president of Zale, and concluded that Zale was not doing business within the State of Utah and could not then be served with process in this jurisdiction.

> ". . . Plaintiff has the burden of affirmatively showing that defendant was doing business within the state." *Western Gas Appliances v. Servel Inc., supra,* citing *Mayer v. Wright*, 234 Iowa 1158, 15 N.W.2d 268.

This has not been done.

Appellant contends that "even if the view that the respondent is 'doing business' in Utah should not prevail, this court is not required to reject jurisdiction . . . because the test of . . . 'doing business' . . . has . . . undergone much change toward liberalization . . ." (Brief, p. 17). Appellant cites a wealth of authority for the proposition that the test has been liberalized, none of which indicates that the court may retain jurisdiction even though a defendant be found not to be doing business within the meaning of the statutory authority for service of process. Apparently Hill urges upon this Court adoption of the Federal test of "doing business" as enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945), which had its origins in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413 (1952). Appellant's brief presents ample evidence of the predilictions of at least one other jurisdiction:

"[I]t is 'apparent that South Carolina now resolves the jurisdictional question in the terms employed in the opinion in *International Shoe*'." *Szanty v. Beech Aircraft Corp.*, 237 F.Supp. 393 (E.D.S.C. 1965) quoting *Shealy v. Challanger Mfg. Co.*, 304 F.2d 102, 106 (4th Cir. 1962). But see, *Springs Cotton Mills v. Machinecraft, Inc.*, 156 F.Supp. 372 (W.D.S.C. 1957), cited by appellant, (Brief, p. 30):

> "Merely because the defendant has had business solicited for it by another does not bring the defendant within the orbit of 'doing business' in that state."

This court has recognized the constitutional imperati
set forth in *International Shoe*, but has not expres
adopted the International Shoe test of "doing busines
*Western Gas Appliance v. Servel, Inc., supra,* at p. 95

> "[T]he mere presence here of an officer of a fo
> eign corporation will not subject it to suit . .
> * * * "[The] term 'presence' is 'used merely t
> sybolize those activities of the corporation's age
> within the state which courts will deem to satis
> the demands of due process.'" Citing *Inter
> tional Shoe.*

And, *McGriff v. Charles Antell, Inc.*, 123 Utah 10
256 P.2d 703, 705 (1953):

> "Beyond . . . solicitation the activity to conte
> jurisdiction must be of sufficient substance and
> such scope and variety as would lead a court
> last resort to conclude that immunization of th
> foreign corporation against the power of ou
> forum would be unrealistic, unreasonable and
> vehicle for oppressing or meting out injustice t
> our own local citizens."

Even though the liberal "doing business" test of *Inter
national Shoe* were adopted, it appears that maintenanc
of jurisdiction in the instant case would be inappropriat
in light of the language of the *International Shoe* case

> " 'Presence' in the state . . . has never been doub
> ed when the activities of the corporation ther
> have not only been continuous and systemat
> *but also give rise to the liabilities sued on.* .
> (Emphasis added.)

Nothing appears of record to show that the acts complained of took place in this jurisdiction, or that the liabilities sued on arose in this jurisdiction; to the contrary, all evidence points to acts or omissions without this jurisdiction, but within the jurisdiction of the State of Alaska. Appellant informs us that "one court has apparently been willing to abandon even the requirement of a minimum contact."(Brief, p. 24). The court said, in finding sufficient minimum contact:

> "We are not prepared to say, on the basis of what this record shows . . . that there was no projection of appellee's corporation presence into the District of Columbia adequate to support jurisdiction over a claim of this character. On the contrary, we think the presence was sufficiently tangible to require appellee, properly summoned, to answer a District resident in a District Court for an alleged dereliction having its immediate impact in the District." *Washington v. Hospital Serv. Plan*, 345 F.2d 105 (D.C. Cir. 1965).

Appellant asserts that jurisdiction over Zale may be had by virtue of the presence of a wholly owned subsidiary incorporated in this state, citing for authority *Szanty v. Beech Aircraft Co., supra,* which applied the *International Shoe* test, and *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135 (5th Cir. 1964), which applied a Florida "long-arm" statute:

> "Fla.Stat. § 47.16(2), F.S.A.: 'Any person, firm or corporation which through brokers, jobbers, wholesalers or distributors sells, consigns, or leases by any means whatsoever, tangible or intangible personal property, to any person, firm

> or corporation in this state, shall be conclusive presumed to be operating, conducting, engage in or carrying on a business venture in this sta Florida Laws 1957, ch. 57-747, § 1." (Quoted p. 138 n.9.)

The instant action was not the result of service pu suant to the Utah "long-arm" statute, Section 78-27- U.C.A. 1953, as amended, *et. seq.*, nor could it be, sin none of the acts complained of occurred in this state as expressly required by that statute.

Appellant correctly states that "the court plac great emphasis on the management contract between th foreign and domestic corporation," in *Kane v. U.S.S.R* 267 F.Supp. 709 (E.D.Pa. 1967), an admiralty ca The corporation upon which service was made was n a "wholly-owned subsidiary" of the defendant, but thi error makes little difference, since as the court stated:

> "The [Ship's Agency] Agreement requirin Mor-mack [the agent] to 'take all necessary step to protect the interest of the vessel in connectio * * * with all claims that may be made against th vessel,' is broad enough to authorize Mor-mac to accept service of process . . ."

No such agreement or agency has been shown in the in stant case.

Appellant argues that the subsidiaries of Zale ar mere alter egos ,and that this court should examine th relationship, based upon *Chicago, M.&St.P. Ry.* v. Mi *neapolis Civic Assn.*, 247 U.S. 490, 62 L.Ed. 12 (1918), a case which examined parent-subsidiary corp

rate relationships as an adjunct to a rate regulation dispute, and *Pergament v. Frazier*, 93 F.Supp. 9 (E.D. Mich. 1949), which applied a Michigan Statute:

> "' In all cases where suit is brought against a foreign corporation, process may be served upon any officer or agent of such corporation within this state, and *any person representing such corporation in any capacity*, shall be deemed an agent within the meaning of this section.' (Emphasis supplied.) Section 27.761, Stats.Ann., Comp.Laws 1948 § 613.31."

"The instructive discussion in 73 Harvard L.Rev. 909 at page 932-33" commended to this court by Appellant (Brief, pp. 29-30) sheds no light on this case since each case cited as authority was decided on the factual basis of evidence before the court. *Balor v. Boosey & Hawkes, Ltd.*, 80 F.Supp. 294 (S.D.N.Y. 1948); ". . . it is clear from these undisputed facts that the New York subsidiary is acting here as a mere agent for the English corporation. . . ." *Duraladd Prods. Corp. v. Superior Court*, 134 Cal.App.2d 226, 285 P.2d 699 (1955); ". . . it is apparent that Duraladd maintained a continuous course of business with the California company and continued after the original installation of the assembly equipment to maintain an interest in seeing that the assembly was done properly. . . ." *H. F. Campbell Const. Co. v. Palombit*, 347 Mich. 340, 79 N.W.2d 915 (1956); the court, applying the *International Shoe* test, said that a consignment agreement with the corporation whereby all goods shipped into the jurisdiction were to be stored, held and insured in the name of the defendant, consti-

tuted "doing business." *United States v. Buffalo We[illegible] ing & Belting Co.*, 155 F.Supp. 454 (S.D.N.Y. 1956)

> "It is established by decision of the Circuit as wel as of the Supreme Court that the mere domina tion, through stock ownership of interlocking di rectorates, of a corporate subsidiary, does not o itself bring the parent within the jurisdiction where the subsidiary does business. *Cannon Mfg Co. v. Cudahy Packing Co.* 1925, 267 U.S. 333 45 S.Ct. 250, 69 L.Ed. 634; *Echeverry v. Ke logg Switchboard & Supply Co.*, 2 Cir., 1949, 17 F.2d 900. * * * '[B]oth opinions are at pains t distinguish between corporate separation mani fested by business ararngements, though forma and circumscribed, and a separation which i purely fictitious. This case falls within the latte category. All of the corporate entities have be come parties to agreements in which each, to se cure the continuance of Buffalo as a going bus ness, has become responsible for the debt of on of them—they have so intertwined their obliga tions as to make impracticable the resolution o the controversy in a suit against any of them in dividually."

Notwithstanding that the respondent has not been shown to have met the requirements of any test of "do ing business," this court could still apply the "minimum contacts" test of the *International Shoe* case. In tha event, the court could find that respondent does not have "minimum contacts . . . such that the maintenance of th suit does not offend traditional notions of fair play an substantial justice." *International Shoe Co. v. Washing ton, supra.*

It must be remembered that appellant complains of acts or omissions which occurred in the State of Alaska at a time when he was a resident of Alaska employed by an Alaska Corporation; that all persons who would have direct knowledge of the claimed acts or omissions are likely resident within the State of Alaska; that any claimed corporate presence of Zale within the State of Utah is so miniscule that to cause Zale to attempt to defend the action in this jurisdiction would be offensive to the "traditional notions of fair-play and substantial justice"; and that this court has not previously subscribed to the notion that jurisdiction may be had over a foreign corporation which does no business in the state, but which may have fortuitously located an employee in this state.

B. Zale's activities within this jurisdiction fall within a specific statutory exemption from "doing business."

Section 16-10-102 U.C.A., 1953, as amended, provides in part that:

> ". . . a foreign corporation shall not be considered to be transacting business in this state . . . by reason of carrying on in this state any one or more of the following activities:
>
> (b) Holding meetings of its directors or shareholders *or carrying on other activities concerning its internal affairs.*" (Emphasis added.)

Appellant requested through discovery procedure information regarding the activities of the person who was served with process in Utah for Zale:

> "State fully and completely the duties, functio and responsibilities performed by Mr. Hankin regard to all offices or positions he holds in b Zale Corporation and any of the Zale Stores Utah." (R. 4 paragraph 3.b.)

Respondent answered:

> "Richard Hankin is supervisor of certain Z Stores in the western part of the United State (R. 13 paragraph 3.b.)

Apparently Mr. Hankin's location in Utah is merely convenient central location from which to maintain ordination of activities of the various western subsi aries. That is to say, he is performing *internal* corpora coordination.

Appellant also requested information regardi Zale's Security Division's activities in Utah (R. 5, pa graph 6). Respondent's reply indicates that the Secur Division has performed certain duties in Utah—agai economy of scale achieved in strictly internal matters obviating the need of a separate security division each subsidiary corporation. (R. 13 paragraph 6).

Nowhere is it shown that the activities of any em ployee of Zale within the State of Utah have been othe wise than purely *internal affairs*, within the meaning Section 16-10-102, U.C.A. 1953, as amended.

## CONCLUSION

Respondent Zale Corporation respectfully subm that the trial court correctly granted the Motion to D

miss, and that this court should affirm that decision, on the basis that the trial court heard oral argument and examined the pleadings in determining whether Zale was "doing business" within the state, and found that it was not; that having so found ,it properly concluded that Zale could not be served with process in the State of Utah; that the only evidence of record reasonably supports the decision; and that no evidence was presented which would indicate "doing business" within the meaning of the authority cited by either party.

Respectfully submitted,

SAMUEL BERNSTEIN
404 Boston Building
Salt Lake City, Utah 84111

BRUCE G. COHNE
GEORGE H. SPECIALE
1010 University Club Building
Salt Lake City, Utah 84111

*Attorneys for Defendant-Respondent*