

1964

# Thorp Finance Corp. v. F. M. Wright and Alice J. Wright : Brief of Appellants

Utah Supreme Court

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

                      
No. 10185  
                    

FILED  
NOV 10 1964

THORP FINANCE CORPORATION,  
A Wisconsin corporation

Plaintiff-Respondent

-vs-

F. M. WRIGHT and ALICE J. WRIGHT,  
husband and wife,

Defendants-Appellants

                      
**APPELLANTS' BRIEF**  
                    

Appeal from the Judgment of the  
Seventh District Court for Grand County  
Hon. F. W. Keller, Judge

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UNIVERSITY OF UTAH

APR 29 1965

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## STATEMENT OF THE KIND OF CASE

This is an action brought by a foreign corporation not qualified to do business in this State to enforce the terms of seven Conditional Sales Contracts relating to the purchase and sale of seven 1949 Bermuda House Trailers, and for damages for the alleged wrongfully detention thereof. The case is defended by the Defendants on the grounds that the Vendor, one George Dannenbaum, a citizen, resident and automobile and trailer dealer in the State of New Mexico brought the trailers to Moab, Utah by pulling them on the highways of this state and while here in Moab sold them to the Defendants without complying with the provisions of the Utah Law relative to such dealers posting a bond and without complying with the Utah law with respect to registering the vehicles and without complying with the Utah law with respect to obtaining a dealer's or salesman's license and without posting the bond required by Utah law.

## DISPOSITION IN LOWER COURT

The Court allowed the Plaintiff to maintain its action in the Utah courts and held in favor of the Plaintiff and against the Defendants on the technical grounds that a "house trailer" is not a "motor vehicle" and that the Utah law requiring all dealers and salesmen to obtain a license, post a bond and register vehicles were not applicable in this case for that reason.

## RELIEF SOUGHT ON APPEAL

The Defendants seek a reversal of the lower Court's decision and the enforcement of provisions of 41-3-1, Utah

Code Annotated, 1953, requiring non-resident dealers to post a bond and register motor vehicles within ten days after bringing the vehicle into the State; the provisions of 41-3-6, Utah Code Annotated, 1953, requiring persons who act as new or used motor vehicle dealers or salesmen to obtain a license from the Motor Vehicle Dealer's Administration before engaging in business in the State; the provisions of 41-3-16, Utah Code Annotated, 1953, requiring all dealers (as defined by statute) to post a bond before receiving a license and have this Court enforce the provisions of the Utah law and deny the Plaintiff the use of the courts of this state for his purposes.

### STATEMENT OF FACTS

The facts in this case were stipulated and are as follows:

That on the dates hereinafter set forth one, George Dannenbaum, a resident and citizen of New Mexico, having some time prior, towed seven house trailers from New Mexico to Moab, Utah, sold and delivered said house trailers, hereinafter described, to the Defendants' lot in Moab, Grand County, Utah, again using the highways of this state; that the said George Dannenbaum as "Seller" and F. M. Wright and Alice Wright, husband and wife, as "Buyer" executed seven Conditional Sales Contracts in Moab, Grand County, State of Utah, in which contracts the "Seller" agreed to sell and the "Buyer" agreed to purchase said house trailers on the terms and conditions therein set forth. Copies of the "Conditional Sales Contract" are attached to Plaintiff's Complaint as Exhibits 1 through 7, inclusive.

The sales were made as aforesaid on the property described as follows:

New or Used	Year	Make or Trade Name	Length and Description	Color & Model	Mfg'r's Serial No.
Used (a)	1959	Bermuda	38'-10' wide	G & W	1161-38-10-59
Used (b)	1959	Bermuda	38'-10' wide	G & W	1173-38-10-59
Used (c)	1959	Bermuda	38'-10' wide	G & W	1167-38-10-59
Used (d)	1959	Bermuda	38'-10' wide	G & W	1174-38-10-59
Used (e)	1959	Bermuda	38'-10' wide	G & W	1175-38-10-59
Used (f)	1959	Bermuda	38'-10' wide	G & W	1171-38-10-59
Used (g)	1959	Bermuda	38'-10' wide	G & W	1158-38-10-59

(a) and (b) of said Conditional Sales Contracts were entered into on the 24th day of October, A. D., 1961, and assigned on the 24th day of October, A. D., 1961, to Thorp Finance Corporation, Thorp, Wisconsin. (c), (d), (e), (f) and (g) of said Conditional Sales Contracts were entered into on the 14th day of December A. D., 1961, and assigned on the 14th day of December, A. D., 1961, to Thorp Finance Corporation, Thorp, Wisconsin.

Paragraph 9. of each of the Conditional Sales Contracts provides as follows:

"9 It is the intention of the parties hereto that all matters relating to the execution, interpretation, validity and performance of this contract shall be governed by the laws of the state in which the property will be located, which is the state designated on page 1 hereof."

In this instance, Utah.

Each of the seven Conditional Sales Contracts contains the following language:

"In Colorado only (strike the word or words in parentheses which are not applicable); Buyer states that

he (has) (has not) in effect an automobile liability policy on the MOTOR VEHICLE sold by this contract."

Each of the seven contracts is signed by George Dannenbaum on a space in said contract which reads as follows:

"Seller George Dannenbaum

By .....

Signature and title

Dannenbaum Trailers  
101 Acoma, Grants

Place of Business  
of Seller

New Mexico  
Box 397.

"

Each of said Conditional Sales Contracts was assigned by George Dannenbaum to the Plaintiff, Thorp Finance Corporation, a Wisconsin Corporation, NOT qualified to do business in the State of Utah, with full recourse.

All negotiations for the purchase and sale of the house trailers were conducted in Moab, Grand County, State of Utah. No negotiations for the purchase and sale of the trailers were made in New Mexico nor in interstate commerce, such as by telephone, telegraph, etc.

Mr. Dannenbaum has never complied with the provisions of Title 41-3-1, Utah Code Annotated, 1953, which section requires every dealer in used or second hand motor vehicles who is a non-resident of the state of Utah, or who does not have a permanent place of business in this state, and every person, firm or corporation who shall bring any used or second hand motor vehicles into the state of Utah for the purpose of sale or resale shall, within ten days from the date of entry of said motor vehicle within the limits of the state of Utah, register such motor vehicle

with the state tax commission of the State of Utah, or with Title 41-3-2, Utah Code Annotated, 1953, requiring every person, firm, or corporation upon the sale of any used or second hand motor vehicle to deliver the vendee a certificate of title, issued for such vehicle by the State of Utah, or with the provisions of Title 41-3-6, Utah Code Annotated, 1953, requiring salesmen to obtain a license before engaging in business in this state, or with the provisions of Title 41-3-16, as amended, Utah Code Annotated, 1953, requiring all dealers (as defined) to post a bond before receiving a license, but on the contrary has failed and neglected to comply with any of the provisions above mentioned.

The State Tax Commission of the State of Utah, has, as a matter of administrative interpretation, uniformly, since the acts were passed, interpreted house trailers as falling within the provisions of Title 41, Utah Code Annotated, as amended, 1953, and in its interpretation has required all Utah dealers and all non-resident dealers of house trailers in this state to obtain the license required under the provisions of Title 41-3-6, Utah Code Annotated, 1953, and has required all dealers to post a bond required under the provisions of Title 41-3-16, Utah Code Annotated, 1953, as amended, and has required certificates of title as provided in Title 41-3-2, Utah Code Annotated, 1953.

## ARGUMENT POINT I.

AN ILLEGAL ACT CANNOT BECOME THE BASIS  
OF A VALID CONSIDERATION FOR THE SALE OR

TRANSFER OF PROPERTY, EVEN THOUGH THE ACT IS MERELY MALUM PROHIBITUM AND NO RECOVERY CAN BE HAD FOR BREACH OF SUCH CONTRACT.

77 C. J. S., PAGE 719:

"In general.

"A sales contract in violation of positive law ordinarily is unenforceable for illegality.

"The general rule that an agreement in violation of positive law is illegal and ordinarily unenforceable applies to sales and this is true even though the illegal act is merely malum prohibitum."

NEIL v. UTAH WHOLESALE GROCERY, Supreme Court of Utah, 210 P 201, 61 Ut. 22:

"This serious question is the contention of the appellant that the contract is void and unenforceable. It conclusively appears that the respondent has failed to obtain a license authorizing him to engage in the business of selling sugar as a wholesale merchant during the second period covered by the contract.

"Section 5 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919 S 3115 1/8g), under the title "conservation of Supply and Control of Distribution of Necessaries," provides that the President, whenever it is "essential to license the importation \*\*or distribution of any necessities, in order to carry into effect any of the purposes of this act, shall publicly so announce," and that "no persons shall, after a date fixed in the announcement, engage in or carry on any business specified therein unless he shall secure and hold a license issued pursuant to this." It is also provided in that section that any person convicted of distributing such necessities as are set forth in the announcement without a license shall, upon conviction, be pun-

ished by a fine not exceeding \$5,000.00, or by imprisonment of not more than two years, or both. It is further provided that the limitations or restrictions shall not be applicable to retailers. A retailer is defined as any one engaged in distributing the articles mentioned in the proclamation whose annual sales do not exceed the sum of \$100,000. The act does not in express terms state that a contract made in violation of its provisions shall be void.

“(3) The preamble of the act as quoted states that it is for the purpose of effectually providing for the national security and defense in carrying on the war with a foreign country. \*\*\*Every reason for, and every purpose sought by, the enactment would indicate that it was the intent of Congress that any one making contracts in violation of the terms of the act should be without a remedy. It would be strange indeed if the Congress of the United States by the legislation in question, enacted as it was during the time of a great war, and having for its purpose the national security and defense, should be held to only intend that persons making contracts in violation of that legislation should have access to the civil courts for the enforcement of the penalties of such contracts. It should be remembered that the act was in no sense a revenue measure such as the act of Congress considered by the Massachusetts Supreme Court in *Larned v. Andrews*, 106 Mass. 436, 8 Am. Rep. 346, and other cases cited by respondent.

“(4) The contract in question here, in our judgment, was an illegal contract, and not enforceable. The right of recovery necessarily must bring into consideration this illegal contract. Courts will not enforce such contracts. In *Pullman's Car Co. v. Transportation Co.*, 171 U. S. at page 151, 18 Sup. Ct. at page 813 (43 L. Ed. 108) the court says: “They (the courts) are

substantially unanimous in expressing the view that in no way and through no channels, directly or indirectly, will the courts allow an action to be maintained for the recovery of property delivered under an illegal contract where, in order to maintain such recovery, it is necessary to have recourse to that contract. The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which injustice he ought to recover. But courts will not in such endeavor permit any recovery which will weaken the rule founded upon the principles of public policy already noticed."

Section 41-3-3 Utah Code Annotated, 1953, states:

"41-3-3. Penalties for violation of act — No action or right of action to recover any such motor vehicle, or any part of the selling price thereof shall be maintained in the Courts of this state by any such dealer or vendor, his successors or assigns, in any case wherein such vendor or dealer shall have failed to comply with the terms and provisions of this act, and such vendor or dealer, upon conviction for the violation of any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than \$299 or by imprisonment for not more than six months in the county jail or by both fine and imprisonment."

When a statute is clear and unambiguous as the one above, the courts have the duty of following its clear and unambiguous language.

PRICE v. TUTTLE: Supreme Court of Utah, 258 P 1016, 70 Utah 156.

Page 1017: "In the construction of statutes it is the duty of courts to ascertain the intent of the legislative body and, if the legislation is within the constitutional power of the legislature, to enforce that intent. In determining the intent of legislation not only the language of the act may be considered, but the purposes or objects sought by the legislature should be and are considered by the Courts indetermining legislative intent."

There is no question that Mr. Dannenbaum is a "dealer or vendor" under the provisions of Title 41-3-4, Utah Code Annotated, 1953, which reads as follows:

"41-3-4, Terms defined. — The terms, dealer" and "vendor", herein used shall be construed to include every individual, partnership, corporation or trust whose business in whole or in part is that of selling new or used motor vehicles and likewise shall be construed to include every agent, representative or consignee of any such dealer as defined above as fully as if same had been herein expressly set out; provided, no agent, representative or consignee of such dealer or vendor shall be required to make and file the said bond if such dealer or vendor for whom such agent, representative or consignee acts fully complies in each instance with the provisions of this act."

Mr. Dannenbaum signed the contract giving his place of business as Grants, New Mexico. He brought the trailers in question into Utah from New Mexico and sold them as "used" "Motor Vehicles". None of said vehicles were registered with the State Tax Commission on a form to be provided by the Tax Commission or therwise. No bond was ever posted as provided by law and no license was ever obtained by him in this State.

In view of the authorities cited the only remaining question to be answered is whether or not the seven trailers sold in this instance are vehicles subject to the bonding and registration provision of the Utah law and whether or not Mr. Dannenbaum was subject to the licensing provisions of the Utah law.

The contracts provide that the Utah law will govern and the contracts refer to the subject matter as "motor vehicles."

The Supreme Court of the State of Utah in the case of *Sinclair Refining Company v. State Tax Commission, et al.*, 130 P 2d 663, 102 Ut 340, referring to matters to be taken into account in determining legislative intent stated the guide line to be used as follows:

"... as to what may be included within such term in a statute depends upon its legislative environment. *State of Ohio v. Helverian*, 292 u. s. 360, 370; 54 S. Ct. 725; 78 L. Ed. 1307."

"The PURPOSE, the SUBJECT MATTER, the CONTEXT, the LEGISLATIVE HISTORY and the EXECUTIVE INTERPRETATION of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation (or other body or person) within the scope of the law."

Analyzing the matters to be taken into account as outlined by the Utah Supreme we find:

(a) PURPOSE: The purpose of the act is the protection of the citizens of this state from non-resident dealers who seek to sell their vehicles in this state without complying with the provisions of the law which applies to resi-

dent dealers. In the words of the legislature itself the declared purpose of passing Title 41-3-1, Utah Code Annotated, 1953, as follows:

"An act to regulate the business of selling used motor vehicles by dealers not residing in or having a permanent place of business in the State of Utah, and by resident dealers purchasing, handling and selling used motor vehicles received or acquired from non-resident dealers; requiring all used cars brought into the state for the purpose of sale to be registered with the State Tax Commission, all such dealers to execute and deliver to each purchaser of a used motor vehicle a bond indemnifying the purchaser against failure of title or breach of warranty or fraudulent misrepresentations, and the delivery of a certificate of title to the vendee; defining terms and providing penalties for the violation of the provisions of this act."

The declared purpose of Title 41-3-6, Utah Code Annotated, 1953, is as follows:

"An act providing for the regulation and control of the business of dealing in motor vehicles and the creation of the office of an administrator of the department of motor vehicles of the state of Utah; providing for the organization, licensing, examination, regulation and supervision of all dealers in motor vehicles both new and used engaged in the business of buying, selling or in any manner dealing in motor vehicles in the State of Utah; providing for an advisory counsel prescribing the powers, duties and functions and administration thereof."

"41-3-16. Dealer's Bond-Necessity-Filing-Amount-Sur-

ety-Form-Conditions-Maximum liability thereon. New Motor Vehicle Dealer's and Used Motor Vehicle Dealer's Bond: Before any new motor vehicle dealer's license or used motor vehicle dealer's license shall be issued by the administrator to any applicant therefor, the said applicant shall procure and file with the administrator a good and sufficient bond in the amount of (\$500.00) with corporate surety thereon, duly licensed to do business within the State of Utah, approved as to form by the attorney general of the State of Utah, and conditioned that said applicant shall conduct his business as a dealer without fraud or fraudulent representation, and without the violation of any of the provisions of this act. The bond may be continuous in form, and the total aggregate liability on the bond shall be limited to the payment of \$5000.00."

The Utah Supreme Court in the case of Clifford J. Lawrence v. J. Ray Ward et al, 300 P 2d 623, 5 Ut 2d 263, in referring to the license provisions stated:

"... the bond was intended to protect all persons doing business with another in his capacity as a licensed motor vehicle dealer."

(b) SUBJECT MATTER. The subject matter of the legislation in this case relates to the purchase and sale of house trailer titles which are handled exactly as car titles are handled. Surely there is no more reason for the legislature to protect its citizens from non-resident sellers of cars than to protect them from non-resident dealers of other vehicles. Surely the provisions of the Utah law and our Constitution which provide that no corporation organized outside of this state shall be allowed to transact business within this state, on conditions more favorable than those prescribed by law to similar corporations organized under

the laws of this state, applies equally to non-residents selling house trailers as well as to a non-resident dealer selling cars.

(c) **CONTEXT.** In studying the context of the statutes defining motor vehicles subject to the registration, licensing and bonding provisions of the motor vehicle division of the State Tax Commission it seems clear that it does and should include house trailers pulled into this state from New Mexico.

The Utah Statute defines a motor vehicle as follows:

“(a) **Title 41-3-7.** Every vehicle intended primarily for use and operation on the public highways which is self-propelled; and every vehicle intended primarily for operation on the public highways which is not driven or propelled by its own power, but which is designated either to be attached to and become a part of, or to be drawn by a self propelled vehicle; but not including farm tractors and other machines and tools used in the production, harvesting and care of farm products.

“(b) **Small trailer:** Every vehicle intended for use on the public highways which is not self-driven but which is designed to be attached or to be drawn by a motor vehicle, which has an unladen weight of not more than 750 lbs.”

“**Title 41-1-19.** Vehicles subject to registration. Every motor vehicle, combination of vehicles, trailer and semi-trailer, when driven or moved upon a highway shall be subject to the registration and certificate of title provisions of this act.”

In reading the context of these statutes in the light of the declared intent of the legislature in passing the acts,

namely to regulate the business of selling motor vehicles by dealers not residing in this state and for the regulation and control of the business of dealing in motor vehicles and providing for a means of licensing and supervising ALL dealers in the business of buying and selling or in any manner dealing in motor vehicles, it is apparent that the legislature intended to include house trailers. If it did not intend to include house trailers it could easily have included "house trailers" along with "farm tractors" as an exclusion. If it had not intended to include house trailers under the provisions of Title 41-1-19 as being a vehicle subject to the registration act it could have expressly excluded them from the generic term "trailers." If house trailers were intended to be excluded the machinery and mechanics of registering and titling them (same as cars) would not be necessary.

The Court was apparently disturbed by the words in Title 41-3-7, Utah Code Annotated, 1953, which defines a motor vehicle as every vehicle INTENDED PRIMARILY for use and operation on the highways. In studying the context of this definition the word "intended primarily" gives rise to the question of whose intent and whether the word "primarily" means AT THE BEGINNING or whether it means MOST OF THE TIME. It is clear that it was originally intended by Mr. Dannenbaum to bring the trailers into the state by pulling them here on Utah highways and if that intention was changed so that the trailers were given fixed locations, as found by the lower court, this intention would of necessity have been a state of mind of Mr. Wright, the Defendant, after he purchased the trailers, and should not relieve the out-of-state dealer

from complying with the provisions of the Utah law with respect to selling vehicles and should not relieve the out-of-state dealer of the requirements of Utah law with respect to registration of titles in this state.

(d) LEGISLATIVE HISTORY: Title 41-3-1 Utah Code Annotated, 1953, requiring non-resident dealers to post a bond, and register motor vehicles in this state within ten days has been a law in its present form since 1937.

Title 41-3-6 Utah Code Annotated, 1953, requiring dealers and salesmen of new or used motor vehicles to procure a license from the motor vehicle dealers administration has been a Utah law in its present form since 1949.

Title 41-3-16 Utah Code Annotated, 1953, requiring all dealers to post a bond before receiving a license was enacted in 1949 and amended to its present form in 1961.

(e) EXECUTIVE INTERPRETATION: The Motor Vehicle Division of the State Tax Commission has at all times interpreted the words "motor vehicle" under the provisions of Title 41, relating to Dealers and Salesmen as including house trailers and has required persons selling or dealing in same to post the required bonds and obtain the required licenses.

It is admitted by the Plaintiff that Mr. Dannenbaum did not do any of these things nor did he comply with the registration provisions.

The Utah Supreme Court, on speaking of the interpretation given to statutes by the administrative agency administering same, has given its determination great weight.

UTAH POWER & LIGHT CO. v. PUBLIC SERVICE COMMISSION, 152 P 2d 542; 107 Utah 155, quoting the Utah Court, page 557.

"The proposition of law implicit in this argument is well settled. Consistent administrative interpretation over the years by the officers charged with the duty of applying the statute and making each part work efficiently and smoothly are entitled to great weight by the Courts. United States v. American Trucking Assn. 310 U. S. 534, 60 S. Ct. 1059. 1067; 84 L. 1345, 1356; State Board of Land Commissioners v. Rivie, 56, Utah 213, 190 P. 59; Mutart v. Pratt, 51 Utah 246, 170 P. 67; Decker v. New York Life Insurance Co., 94 Utah 1661, 76 P 2d 568; 115 A. L. R. 1377; Murdoch v. Mabey, 59 Utah, 346, 203 P. 651; in re Lambourne's Estate 97 Utah 393, P. 21 475."

(f) INTERPRETATION BY THE PARTIES TO THE AGREEMENT. It is also interesting to note that the parties themselves in the contract on a form provided by Seller refers to "motor vehivle." The contract on the first page in bold print states as follows:

"In Colorado only (strike word or words in parentheses which are not applicable) BUYER STATES THAT HE (HAS) (HAS NOT) IN EFFECT AN AUTOMOBILE LIABILITY POLICY ON THE MOTOR VEHICLE SOLD BY THIS CONTRACT."

Mr. Dannenbaum selected the forms on which the contracts were written and the Plaintiff in this action accepted assignments of them with full recourse.

In the construction of contracts the rules apply. 77 C. J. S., page 728:

"In the construction of sales contracts, the intent of the parties, as gathered from pertinent facts and circumstances, generally governs. General rules apply to the construction of agreements between the Seller and the Buyer of personal property. The intent of the parties as expressed in the language used must govern in so far as it may be given effect without violating legal principles."

## POINT II.

THE PLAINTIFF CORPORATION, AS ASSIGNEE OF A DEALER WHO SOLD HOUSE TRAILERS IN THE STATE OF UTAH WITHOUT POSTING THE BOND REQUIRED BY UTAH LAW CANNOT, UNDER THE UTAH LAW, MAINTAIN AN ACTION IN THE COURTS OF THIS STATE AND A FOREIGN CORPORATION PLAINTIFF, WHO HAS NEVER COMPLIED WITH THE PROVISIONS OF OUR LAW RELATIVE TO ITS QUALIFICATIONS TO DO BUSINESS IN THIS STATE, CANNOT MAINTAIN AN ACTION IN THE UTAH COURTS UNDER THE LAWS EXISTING AT THE TIME THE CONTRACTS WERE ENTERED INTO OR THE AMENDMENTS THERETO.

Article XII, Section 6, Utah Constitution provides:

"No corporations organized outside this state shall be allowed to transact business within this state, on conditions more favorable than those prescribed by law to similar corporations organized under the laws of this state."

## CONCLUSION

To allow the Plaintiff in this case to maintain an action in this state against the Defendants and invoke the penalty provision of its private contracts contrary to the express intent of the legislature would not only be contrary to the express clear and unambiguous language of the legislature in denying such dealers access to the Utah courts, under the circumstances it would be contrary. Article XII Section 6 of the Utah Constitution.

It is also apparent that if this Court should uphold the lower Court and hold that a house trailer is not a motor vehicle under the provisions of the Utah Motor Vehicle Dealers and Salesmen Act, it will be contrary to the established procedure followed by the State Tax Commission since the passage of the Act in 1935 and re-enacted into law, with amendments, in 1943 and again in 1953 and would leave the door open for all unscrupulous house trailer dealers to take unfair advantage of the citizens of this state.