1965

Flinco, Inc., A Utah Corporation v. The Goodyear Tire & Rubber Comp Any, A Foreign Corporation : Brief of Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

FLINCO, INC., a Utah Corporation,
Plaintiff-Appellant,

vs.

No. 10321

THE GOODYEAR TIRE & RUBBER COMPANY, a Foreign Corporation,
Defendant-Respondent.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District Court for Salt Lake County, Hon. Ray Van Cott, Jr., Judge

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action was brought by a dealer in tires, batteries and accessories (TBA) to recover damages from its former supplier for the alleged breach of a dealership contract and for an alleged violation of a state antitrust statute, § 50-1-2 UTAH CODE ANN. (1953). Defendant counterclaimed to recover sums owing for goods sold and delivered (R. 19-20). The allegations of the counterclaim were not in dispute and plaintiff has paid in full the amount claimed (R. 27-30, 33).

DISPOSITION IN TRIAL COURT

The remainder of the case was tried before a jury, the Honorable Ray Van Cott, Jr., presiding. Following plaintiff's opening statement, defendant moved for a directed verdict on the grounds that on the law and the facts as asserted by plaintiff's counsel plaintiff was not entitled to relief (R. 40-41, 52-53). The court took the motion under advisement and, following completion of plaintiff's testimony on the issue of liability, granted it (R. 224-230).

RELIEF SOUGHT ON APPEAL

Plaintiff has appealed for an order reversing the ruling of the trial court and requiring both of its claims to be submitted to the jury (R. 31). Defendant submits that the order of the trial court should be affirmed.

THE FACTS OF RECORD

This case arises out of the termination of a franchise agreement (Ex. 1) by written notice dated September 16, 1963 (Ex. 2). Under the agreement, signed by the parties on June 21, 1962, the plaintiff, Flinco, Inc. (Flinco), had been a dealer in TBA manufactured by defendant, The Goodyear Tire & Rubber Company (Goodyear).

Plaintiff is a Utah corporation having its principal office and place of business at 133 North First West, Salt Lake City, Utah. At all times material it was an independent distributor of petroleum of the Texas Company (Texaco) to Texaco service stations in Salt Lake City and vicinity (R. 43). In 1962 and 1963 Flinco was the contracted supplier of petroleum products to eleven of the approximately forty such stations; Flinco owned or leased six or eight of these eleven, which it either operated itself or leased to others (R. 61, 83, 109).

In about 1959 Flinco began to distribute automobile tires as a sideline to its petroleum business. In that year it distributed the U. S. Rubber Company's "Gillette" brand, but in early 1960 it switched to B. F. Goodrich Company's "Hood" line (R. 95-96; Ex. 4). In 1961 its purchases of Hood tires amounted to $88,-000., and in the first six months of 1962 they totaled $54,000. (Ex. 5). This volume was achieved despite Texaco's policy that only the three major brands of tires (B. F. Goodrich, Firestone and U. S. Royal) might be charged on Texaco credit cards—a restriction which confined plaintiff's tire sales to its retail outlet at 133 North First West (R. 44-45, 106-107).

Early in 1962 Texaco designated defendant Goodyear, a nationally known manufacturer of rubber products, as a fourth brand which might be charged on Texaco credit cards; and in May of that year G. E. apRoberts, plaintiff's vice-president, and Ed Ferguson, then Goodyear district manager, began to discuss the feasibility of Flinco's becoming a franchised Goodyear dealer (R. 47-49). On June 21 they signed the Franchise Agreement which is in evidence as Exhibit 1. apRoberts admitted at the trial that Ferguson did not ask him to cancel the Hood contract in order to take on the Goodyear line, but that he chose to do so because Flinco could not afford the expense of carrying two separate inventories and because he was "not naive enough to have believed we would have received the Goodyear line without offering to terminate the Hood line" (R. 80-81, 102, 104-105).

Paragraphs six, thirteen, and fourteen of the agreement cover the subject of cancellation, and provide:

> 6. Upon failure of the Dealer to make any payments when due, Goodyear may, at its option, cancel this agreement or defer additional shipments until overdue accounts have been paid. Goodyear may decline to make deliveries except for cash whenever it is not satisfied with Dealer's financial responsibility.
>
> 13. This agreement shall become effective when signed by an authorized District Manager of Goodyear and shall expire five (5) years from date of execution *unless otherwise previously terminated as hereinafter provided.* It cancels and supersedes any other Franchise Agreement and any other sales agreement now in effect between the parties covering the sale by Goodyear to the Dealer of any product included hereunder. (Emphasis supplied).
>
> 14. *This agreement may be cancelled upon thirty* (30) *days' written notice by the Dealer*

> *to Goodyear, or by Goodyear through its local manager to the Dealer.* At the expiration of said thirty (30) days, Goodyear shall have the right to cancel all unfilled orders, and during such time may refuse any orders in excess of the average thirty-day requirements of the Dealer based on orders actually given hereunder during the term hereof. (Emphasis supplied).

Paragraph twelve of the agreement states, in large print:

> 12. The entire agreement regarding the subject matter is set forth herein. Any change in the printed terms, other than a change in the terms of settlement making all invoices payable C. O. D., shall make this agreement void. No modification or amendment shall be effective unless in writing signed by an authorized representative of the Dealer and by an executive officer of Goodyear.

Plaintiff sought at the trial to introduce testimony that during the negotiations prior to June 21, 1962, defendant had represented "that the agreement between the parties would be for a five-year period." Defendant objected on the ground that the offered testimony would vary the terms of the written instrument, and the trial court sustained the objection (R. 68-70).

The Goodyear franchise gave plaintiff two advantages it had not previously enjoyed: it "opened up" for plaintiff "an avenue to establish forty [Texaco] stations" as additional TBA outlets; and it gave plaintiff for the first time a complete line of batteries and accessories—filters, spark plugs, fan belts, windshield wipers, etc.—to complement its line of tires (R. 48-49, 72, 94). Plaintiff's witnesses testified that plaintiff's TBA salesman, Walter Nelson, worked full-time calling on not only the forty Texaco stations, but the "hundreds" of other stations in the Salt Lake area, trying to sell all these products—tires, batteries, and accessories—from a fully-stocked delivery van. (R. 84, 132, 164, 176).

Yet, despite this "greatly expanded" operation, Flinco's volume in Goodyear products never matched its earlier volume in Hood, which had been sold from the single outlet at 133 North First West. Its tire purchases, which had exceeded $54,000. (Hood) in the first half of 1962, fell to $34,000. (Goodyear) in the second half, and to only $12,000. (Goodyear) in the first half of 1963 (Ex. 5; R. 106-108). In part, this rapid decline was due to the hostility of some of the stations who purchased petroleum from other sources, who regarded Flinco and its own chain of stations as competitors and price-cutters and for this reason refused to patronize Flinco by purchases of TBA (R. 113, 116-118, 178). Thus, Flinco succeeded in identifying[1] only twelve of its "hundreds" of potential customers

[1] The ultimate object of all TBA solicitation is to "identify" the station with the brand. As witness apRoberts described this goal:

> . . . [T]he service station operator, when he goes into handling TBA, he identifies the station by putting up a sign, whether it is a Goodyear sign or a Firestone sign, he puts a valance on his windows. He displays the Goodyear tires. He puts material on his station identified by Goodrich, Firestone or Goodyear. The whole station becomes identified. This is the first thing you do.
>
> When you identify a station you put the identification on, you put the finish on, you identify material. That is what we basically did with the ten to twelve stations. (R. 129).

as Goodyear retailers, and ten of these twelve—to whom plaintiff made "the bulk" of its sales—had been either owned by Flinco itself, or under contract to purchase petroleum from Flinco, before Flinco became a Goodyear dealer (R. 61, 83-84, 86, 109, 132, 178). In the fifteen months' life of the Goodyear franchise, plaintiff was never able to realize a profit on its TBA operation (R. 128).

Hoping "to at least try to make some money," Flinco began in May, 1963, to carry a second line of tires, the "Miller" brand manufactured by B. F. Goodrich (R. 126, 128), which sold at retail at a bigger mark-up over wholesale cost than did Goodyear (R. 189-190).[2] Although in June, 1962 it had regarded the expense of carrying two separate inventories as prohibitive (R. 81), plaintiff chose now, after eleven months of losses, to stock the Goodyear and Miller lines simultaneously. Almost immediately, Flinco's Goodyear business plummeted to rock-bottom. In May, 1963, in preparation for the big months of July and August (R. 132), plaintiff purchased nearly $12,000. in Miller tires—more than double its purchases of Goodyear the same month (Ex. 5). In June, it shipped a large quantity of these same Miller tires to a station which it had previously identified with Goodyear (R. 218) and throughout the summer of 1963 plaintiff's purchases of tires reflected a continuing emphasis on the new Miller line and a declining interest in Goodyear, as

[2] Goodyear also produced second-grade tires, which plaintiff could have carried had it wished. (R. 222).

the following table, taken from Exhibit 5, illustrates:

Month of Invoice	Miller	Goodyear
June	$3,216.41	$1,253.95
July	$6,381.52	$ 982.55
August	$1,114.91	$ 745.35
September	$2,667.61	$ 468.12

In July, Carl Crafts, Goodyear's Western Regional Manager, and other Goodyear personnel met with apRoberts and discussed Flinco's TBA efforts. Crafts expressed concern over Flinco's failure to penetrate a sufficient number of Texaco stations, and over the addition of the Miller tire (R. 90, 143), and requested Dean Adams, a local Goodyear salesman, to survey the petroleum market "to see what penetration [Flinco] had made" and "to see if it was possible for [Flinco] to handle both lines of tires" (R. 91, 92, 143-144). The results of the survey were not introduced into evidence, but sometime prior to September 1st Goodyear's District Manager recommended that the Flinco franchise be cancelled (R. 155).

In early September, William Sweatt, newly-appointed Goodyear District Manager, and a number of other Goodyear employees met with Flinco's principal officers at the Flinco office. By the accounts of plaintiff's witnesses, Goodyear "felt Flinco was not performing . . . satisfactorily", was "unhappy" with "Flinco production of Goodyear products" and "wanted to know what our future plans were and what, if any-[thing], we were doing to increase our activities as far as the sale and promotion of Goodyear products were concerned" (R. 59, 62, 154, 205, 219). Flinco's president replied that it contemplated one change only: to eliminate the fully-stocked delivery van in which its salesmen had called on stations, and to use instead a number of petroleum salesmen who would take orders which Flinco would fill when they returned to the office (R. 159-160, 176-177). Even though these salesmen would also sell Texaco petroleum products, Flinco expected them to sell TBA to non-Texaco stations (R. 177; but see R. 160).

To Goodyear, the elimination of the delivery van indicated further curtailment of efforts at Goodyear sales (R. 63, 155), and Sweatt announced that he would follow the advice of his predecessors and cancel the contract (R. 155, 160). On September 16, 1963, defendant sent plaintiff a written notice of cancellation, and for the next thirty days plaintiff continued to purchase Goodyear products (Ex. 2; R. 217). On September 19, plaintiff commenced this action (R. 5). Soon afterwards[3] plaintiff replaced its Goodyear franchise with one from B. F. Goodrich, under which it represented the B. F. Goodrich and Miller lines and B. F. Goodrich TBA up through the time of trial (R. 216; Ex. 10). At the time of trial in early 1965, plaintiff still had on hand $3,000. worth of Goodyear inventory which it had been unable to sell (R. 211-212).

[3] One of plaintiff's witnesses identified the lapse as "within a couple of weeks," although the date of the Goodrich contract would suggest that the period was about seven weeks. (R. 216; Ex. 10).

In addition to the foregoing facts, plaintiff produced evidence that during the summer of 1963, it was rumored in the trade either that Goodyear was about to cancel Flinco or that Flinco was about to cancel Goodyear (R. 174, 194); but plaintiff produced no evidence as to who initiated the rumor, and one of plaintiff's witnesses admitted that it could have been a competitor or other third party (R. 179).

Plaintiff's witnesses also testified to statements allegedly made by Goodyear employees to the effect that "it was not the policy of the Goodyear Tire & Rubber Company to allow any distributor to handle another line of tires" (R. 90, 152). But these same witnesses admitted that Goodyear had not required plaintiff to terminate its Hood line in order to take on Goodyear, that at least one other Goodyear distributor in the area regularly sold competing brands, and that the very person alleged to have made one such statement thereupon authorized a study of plaintiff's sales success "to see if it was possible for [Flinco] to handle both lines of tires" (R. 92, 104, 127). Plaintiff's witnesses also admitted that defendant is only one of four major tire companies in the Salt Lake market, that all four are represented locally in each major brand of service stations, and that competition between major tire companies is "brisk" and "stiff" (R. 62, 112-113, 147-148).

At the close of this evidence the trial court granted defendant's motion for a directed verdict, relying on authorities submitted in a memorandum by defendants at the start of trial, and cited hereafter. Of the contract's cancellation clause, the trial court held:

> . . . But the fundamental proposition in this case is this. This contract that these parties entered into has a provision in it that either one of them, the plaintiff or the defendant, upon giving a 30-day written notice, has the right to cancel this contract.
>
> It is an arbitrary provision, and the only requirement that is necessary is that the written notice be given. (R. 225-226; cf. R. 224-230).

On February 9, 1965, plaintiff filed its notice of appeal from the judgment of the trial court (R. 29-31).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DIRECTED A VERDICT FOR DEFENDANT ON THE CLAIM FOR ALLEGED BREACH OF CONTRACT.

A. The Contract's Termination Provisions Are Unambiguous. They Do Not Require Goodyear to Justify its Decision to Terminate Flinco's Dealership by a Showing of "Good Cause."

Defendant's motion in the trial court for a directed verdict, and its argument here for an affirmance of the trial court's judgment, rest principally upon paragraphs thirteen and fourteen of the written agreement (Ex. 1), which in their entirety provide:

> This agreement shall become effective when signed by an authorized District Manager of Goodyear and shall expire five (5) years from date of execution *unless otherwise previously terminated as hereinafter provided.* It cancels and supersedes any other Franchise Agreement and any other sales agreement now in effect between the parties covering the sale by Goodyear to the Dealer of any product included hereunder (Emphasis supplied).

> *This agreement may be cancelled upon thirty (30) days' written notice by the Dealer to Goodyear, or by Goodyear through its local manager to the Dealer.* At the expiration of said thirty (30) days, Goodyear shall have the right to cancel all unfilled orders, and during such time may refuse any orders in excess of the average thirty-day requirements of the Dealer based on orders actually given hereunder during the term hereof. (Emphasis supplied).

We submit that this language entitled Goodyear to cancel the franchise for whatever reasons it deemed sufficient, so long as it gave plaintiff thirty days' written notice.[4] The language is plain and unmistakable: Goodyear was *not* required to justify its decision by producing proof of "good cause" in court.

Almost universally, courts from other jurisdictions have refused to engraft a requirement of "good cause"

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4 The notice provisions were complied with (Ex. 2), and plaintiff continued to purchase Goodyear products until mid-October. (R. 217).

upon absolute rights of termination so clearly stated. Annot. 32 A.L.R. 209, 215 (1924); cf. 52 A.L.R. 546, 547 (1928), 89 A.L.R. 252, 254 (1934). Thus, in *Bushwick-Decatur Motors, Inc. v. Ford Motor Co.*, 116 F.2d 675 (2nd Cir. 1940), where the provisions under which Ford had cancelled a dealer's franchise provided that "this agreement may be terminated at any time at the will of either party by written notice to the other party . . . ," the court regarded as irrelevant plaintiff's contention that the termination was "malicious, in bad faith, and contrary to the custom of the trade and therefore wrongful" and held (at p. 677):

> With a power of termination at will here so unmistakably expressed, we certainly cannot assert that a limitation of good faith was anything the parties had in mind. Such a limitation can be read into the agreement only as an overriding requirement of public policy. This seems an extreme step for judges to take. The onerous nature of the contract for the successful dealer and the hardship which cancellation may bring him have caused some writers to advocate it, however; and an occasional case has seized upon elements of overreaching to come to such a result on particular facts. . . . But, generally speaking, the situation arises from the strong bargaining position which economic factors give the great automobile manufacturing companies: the dealers are not misled or imposed upon, but accept as nonetheless advantageous an agreement in form bilateral, in fact one-sided. To attempt to redress this balance by judicial action without legislative authority appears to us a

> doubtful policy. We have not proper facilities to weigh economic factors, nor have we before us a showing of the supposed needs which may lead the manufacturers to require these seemingly harsh bargains . . . .

Accord: *Buggs v. Ford Motor Co.,* 113 F. 2d 618 (7th Cir. 1940), *cert. denied,* 311 U.S. 688 (1940); *Ford Motor Co. v. Kirkmyer Motor Co.,* 65 F.2d 1001 (4th Cir. 1933); *Martin v. Ford Motor Co.,* 93 F. Supp. 920 (E.D. Mich. 1950).

Again, in *Motor Car Supply Co. v. General Household Utilities Co.,* 80 F.2d 167 (4th Cir. 1935), the court refused to grant recovery to a dealer who had been canceled under a clause which read: "It is agreed that either party may terminate this agreement by giving thirty (30) days notice by registered mail to the other." The court stated at pp. 170-171:

> The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed. . . . And, with respect to distributors' contracts, like that here under consideration, it is equally well settled that such a contract, which does not bind the manufacturer to sell and deliver, and which is terminable at will, imposes no liability upon him if he terminates it or refuses to make deliveries to the dealer. . . . [T]he contract merely "furnished a basis for future dealings to be observed no longer than was mutually satis-

> factory. There was no hard and fast commitment of either party if he chose to break away."

And in *Brooks v. Sinclair Refining Co.*, 139 F.2d 746 (10th Cir. 1944), the United St ates Court of Appeals for the Tenth Circuit refused to qualify a manufacturer's right to terminate a sales agency under the language, "either party may terminate this agreement at any time with or without cause." The court held at p. 747:

> The contract created an agency. Under it Sinclair was not bound to deliver any products to Brooks, the agent, for sale and was at liberty to reject, with or without cause, any orders taken by Brooks and either party could terminate the contract at any time with or without cause. The contract, in so far as it was executory, was wholly illusory. We conclude that termination of the contract imposed no liability upon Sinclair.

For additional authority to the same effect, see: *American Machine & Metals, Inc. v. De Bothezat Impeller Co., Inc.*, 180 F.2d 342 (2d. Cir. 1950), *cert. denied*, 339 U.S. 979 (1950); *A. S. Rampell, Inc. v. Hyster Co.*, 144 N.E. 2d 371 (N.Y. 1957); *Studebaker Corp. of America v. Wilson*, 247 Fed. 403 (3rd Cir. 1918); *Mohawk Agency, Inc. v. American Casualty Co.*, 227 F. Supp. 745 (N.D.N.Y. 1964); *Kane v. Chrysler Corp.*, 80 F. Supp. 360 (D.Del. 1948); *McClintock v. Truxell Sales & Service, Inc.*, 297 N.W. 493 (Mich. 1941).

The parties' agreement, we submit, does not limit their right to terminate by the standard of "good cause" or by any other standard; and what the agreement so clearly states in this regard the cases affirm.

B. The Trial Court Correctly Excluded Evidence of Preliminary Negotiations.

The excluded evidence that prior to June 21, 1962 the parties had understood that the contract would continue for five years was offered for the purpose of resolving a presumed "conflict" between paragraphs thirteen and fourteen of the contract (R. 68-69). As argued by appellant, those paragraphs are "contradictory and inconsistent" because one "provides that the agreement shall expire in five (5) years" and the other "provides that the agreement may be cancelled upon thirty days' written notice." (Br. p. 3). This transparent argument simply writes out of the contract the connecting bridge between the two provisos: "This agreement . . . shall expire five (5) years from date of execution *unless otherwise previously terminated as hereinafter provided.*"[5] The bridge replaced, the "conflict" vanishes. If neither party affirmatively *terminates* the relationship earlier, the contract will automatically *expire*—fall of its own weight—in five years.

At most, the rejected testimony could only have resurrected a prior oral agreement, superseded by the terms of the writing. For not only is the written document free of ambiguity, it also recites (in paragraphs twelve and thirteen) that "the entire agreement regard-

[5] Plaintiff's brief virtually ignores this provision. Nowhere in its brief does plaintiff set forth the entire contractural provisions with respect to termination.

ing the subject matter is set forth herein" and that the writing "cancels and supersedes" all earlier understandings. Even plaintiff's own cited cases acknowledge that "the court may not add, ignore, or discard words" in arriving at the parties' intent, *Cornwall v. Willow Creek Country Club,* 13 Utah 2d 160, 369 P.2d 928 (1962), and limit the interpretive role of parol evidence to resolving ambiguities. *Continental Bank and Trust Company v. Stewart,* 4 Utah 2d 228, 291 P.2d 890 (1955); *Mathis v. Madsen,* 1 Utah 2d 46, 261 P.2d 952 (1953). All this is hornbook law.

> Where one has contracted in writing to pay money, or to complete a building, or to deliver goods or to convey land, by a specified date, that contract supersedes and nullifies all antecedent understandings or agreements that this performance is to be rendered by a different date. Parol testimony to prove such an antecedent agreement would be utterly irrelevant and immaterial, as long as it is not part of an attack upon the validity of the subsequently made written contract. Again, if one contracts in writing (or orally) to buy and pay for property on the express condition that no war shall break out between this country and another before the day set for performance, neither oral nor written testimony will be relevant or material that the parties had a previous understanding or agreement to buy and pay for the property even if a war should break out. 3 CORBIN ON CONTRACTS § 573, p. 369 (2d ed. 1960).

On these well-settled principles, the proffered testimony was of no probative value whatever, and was properly excluded.

C. Paragraph Six of the Agreement Does Not Contradict Paragraph Fourteen.

Plaintiff argues in its brief that a seeming conflict between paragraphs six and fourteen of the franchise agreement creates an ambiguity which requires the contract to be construed "most strongly against the party furnishing the form"—by which plaintiff seems to mean that neither Goodyear *nor the dealer* may cancel under paragraph fourteen unless the dealer is in default, as stated in paragraph six! Paragraph six states:

> Upon failure of the Dealer to make any payments when due, Goodyear may, at its option, cancel this agreement or defer additional shipments until overdue accounts have been paid. Goodyear may decline to make deliveries except for cash whenever it is not satisfied with Dealer's financial responsibility.

The function of paragraph six seems quite clear from its language. If the dealer fails to make payments when due, Goodyear may exercise any one of three additional remedies: it may "defer additional shipments until overdue accounts have been paid;" it may "decline to make deliveries except for cash;" or it may "cancel this agreement." If it chooses the last alternative, it is not bound, as it would be under paragraph fourteen, to continue to fill orders for thirty days after cancellation, but it may decline to make any such deliveries "except for cash." Paragraph six is designed simply to make available to Goodyear alternative courses of action in a situation where the thirty-day notice requirement of paragraph fourteen would prove onerous.

It does not qualify, across-the-board, the rights created by paragraphs thirteen and fourteen, as the fact that its remedies are available to Goodyear only and not to the dealer, attests.

For the reasons given, plaintiff's attempt to discard the plain words of the parties' contract is void of merit. The trial court properly directed a verdict for defendant on the breach of contract issue.

POINT II

THE TRIAL COURT PROPERLY DIRECTED A VERDICT FOR DEFENDANT ON THE CLAIM OF VIOLATION OF SECTION 50-1-2 UTAH CODE ANNOTATED (1953).

Plaintiff claims that even if the cancellation did not breach the parties' contract, it nevertheless did violate § 50-1-2 Utah Code Ann. (1953) because it was motivated by the fact that plaintiff had taken on the competing Miller line.

The statute in question provides:

> Any person or association of persons who shall create, enter into, or become a member of or a party to, any pool, trust, agreement, combination, confederation or understanding with any other person or persons to regulate or fix the price of any article of merchandise or commodity; or who shall enter into, or become a member of or a party to, any pool, trust, agreement, contract, combination or confederation to fix or

> limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state shall be deemed and adjudged guilty of a conspiracy to defraud, and shall be subject to punishment as hereinafter provided.

It is clear that in order to establish a violation of the statute, plaintiff must show both a "pool, trust, agreement, combination, confederation or understanding with any other person or persons," and a purpose "to fix or limit the amount or quantity" of tires sold in the state of Utah. It is submitted that plaintiff's evidence fails to show either.

A. The Record Contains No Evidence of Conspiracy.

On the threshold requirement of a "*pool, trust, agreement, contract, combination or confederation*," the sum total of plaintiff's evidence, considered in the light most favorable to plaintiff, tended to establish *only* a *unilateral* policy by Goodyear "not . . . to allow any distributor to handle another line of tires." (R. 90, 152). Plaintiff produced no evidence that any distributor, anywhere, had *agreed* with Goodyear so to confine its activities, or that any distributor was so much as aware of this supposed policy at a time when it dealt exclusively in defendant's products. Indeed, one may search the record in vain for the name of a single Goodyear dealer who *did* deal exclusively in defendant's products.

None of plaintiff's cited cases will support the proposition that a *unilateral* policy of refusing to sell to dealers who handle competing lines violates the *conspiracy* provisions of any antitrust law. Other cases hold flatly that such a policy is *not* unlawful. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-541 (1954) (Sherman Act); *Keifer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (Sherman Act); *Paramount Film Distributing Corp. v. Village Theater, Inc.*, 228 F.2d 721 (10th Cir. 1955) (Sherman Act); *Brosius v. Pepsi-Cola Co.*, 155 F.2d 99, 102 (3rd Cir. 1946) (Sherman Act); *Arzee Supply Corp. of Conn. v. Ruberoid Co.*, 222 F. Supp. 237 (D. Conn. 1963) (Sherman Act); *Dart Drug Corp v. Parke, Davis & Co.*, 221 F. Supp. 948 (D.C.D.C. 1963) (Sherman Act); *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (Sherman and Clayton Acts); *Leo J. Meyberg Co. v. Eureka Williams Corp.*, 215 F.2d 100 (9th Cir. 1954), *cert. denied*, 348 U.S. 875 (1954) (Clayton Act); *Associated Beverages Co. v. P. Ballantine & Sons*, 287 F.2d 261 (5th Cir. 1961) (Clayton Act); *A.B.C. Distributing Co. v. Distillers Distributing Corp.*, 316 P.2d 71 (Calif. 1957) (Calif. antitrust law).

As early stated by the Supreme Court in *FTC v. Raymond Bros.-Clark Co.*, 263 U.S. 565, 573 (1924):

> It is the right, "long recognized," of a trader engaged in an entirely private business, "freely to exercise his own independent discretion as to the parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307, 63

L. ed. 992, 996, 7 A.L.R. 443, 39 Sup. Ct. Rep. 465. See also United States v. Trans-Missouri Freight Asso., 166 U.S. 290, 320, 41 L. ed 1007, 1020, 17 Sup. Ct. Rep. 540; Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 14 C.C.A. 14, 35 U.S. App. 16, 66 Fed. 637, 645; Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co., 141 C.C.A. 594, 227 Fed. 46, 48; Wholesale Grocers' Asso. v. Federal Trade Commission (C.C.A.) 277 Fed. 657, 664; Mennen Co. v. Federal Trade Commission (C.C.A.) 30 A.L.R. 1120, 288 Fed. 774, 780; Alfred W. Booth & Co. v. Burgess, 72 N.J. Eq. 181, 190, 65 Atl. 226; and 2 Cooley, Torts, 3d ed. 587. Thus, a retail dealer "has the unquestioned right to stop dealing with a wholesaler for reasons satisfactory to himself." Eastern States Retail Lumber Dealers' Asso. v. United States, 234 U.S. 600, 614, 58 L. ed. 1490, 1500, L.R.A. 1915A, 788, 34 Sup. Ct. Rep. 951; United States v. Colgate & Co. supra, p. 307. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440, 54 L. ed. 826, 830, 30 Sup. Ct. Rep. 535. Or he may stop dealing with a wholesaler who he thinks is acting unfairly in trying to undermine his trade. Eastern States Retail Lumber Dealers' Asso. v. United States, supra, p. 614; United States v. Colgate & Co. supra, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer "for reasons sufficient to himself." And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with

> his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain.

On the authority of the foregoing cases, we submit that a unilateral policy to refuse to deal, whatever the motive, does not in and of itself constitute evidence of a "pool, trust, agreement, contract, combination or confederation" within the prohibition of § 50-1-2 of the Utah statutes.

B. The Record Contains no Evidence of Intent to Restrict the Quantity of Goods to be Sold in the State.

Not only did plaintiff fail to produce evidence of a combination or conspiracy, it failed to produce evidence that Goodyear intended "to fix or limit the amount or quantity of any article . . . to be . . . sold in this state"—the second *sine qua non* of the statute. As cases arising under the federal antitrust laws have recognized, exclusive dealing contracts are not always conceived in sin. They sometimes have legitimate purposes and no adverse competitive effects, and under federal law, therefore, they are not *per se* unlawful. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Englander Motors, Inc. v. Ford Motor Co.*, 267 F. 2d 11 (6th Cir. 1959).

Plaintiff here produced no evidence that Goodyear's "policy" was intended substantially to lessen competition in tires or to limit the quantity of tires sold by plaintiff or anyone else in Utah. The slight evidence of record, indeed, hints that Goodyear may simply have been concerned that dealers carrying other lines might lack the capital and personnel to stock fully and represent the Goodyear line as well—a concern which plaintiff at one time shared (**R. 81**). For, in the only examples supplied by the record, Goodyear (a) freely supplied the dealer (**Big 'O'** in **Bountiful**) even though the dealer carried competing lines (R. 127), and (b) undertook a study of the dealer's (plaintiff's) sales success "to see if it was possible for [the dealer] to handle both lines of tires" (**R. 92**).

Unlike ***Standard Oil Co. v. United States,*** 337 U.S. 293 (1949),[6] where the government produced evidence that Standard's exclusive dealing contracts tied to its products nearly 6,000 independent retail gasoline outlets having an annual volume in excess of $65,000,000., plaintiff here produced no evidence that *any* Goodyear dealer had agreed to boycott competing lines or that any Goodyear dealer (other than plaintiff itself) had in fact—independently or otherwise—quit a competing line. Here the evidence of record tends to dispel all suspicions that Goodyear's alleged policy injured com-

[6] The **Standard Oil** case relied on by plaintiff involved a federal act (section 3 of the Clayton Act) which prohibits exclusive dealing contracts where the effect of such contracts is to injure competition or tend to create a monopoly. Here the Utah statute prohibits combinations, contracts, confederacies, etc., whose purpose is to restrict the quantity of goods sold. In the federal case the question was whether the requirements contracts in question used by Standard Oil Company with its stations tended to limit competition for the station operator's business. Both the facts and the law in that case are inapposite to the statute and facts in the case at bar. Here plaintiff has failed to show either of the statutory requisites, which are far different from those of the federal act.

petition or limited the quantity of tires sold in Utah. Goodyear was one of four major tire companies in the Salt Lake area, all four were represented in the major gas stations, and Goodyear was the last of the four to be recognized by Texaco. Competition, insofar as the record shows, was "brisk" and "stiff." (R. 44, 62, 112-113, 147-148).

On this evidence, no jury could justifiably have found that Goodyear's alleged "policy" of exclusive dealing was intended to, or did, "fix or limit the . . . quantity" of goods to be sold in the state of Utah.

CONCLUSION

Plaintiff has wholly failed to produce evidence from which the trier of fact might have found that defendant had either breached its contract with plaintiff or had violated the antitrust laws of the state of Utah. The trial court correctly excluded evidence which would have varied the terms of the written agreement, and even if such evidence had been admitted, it would not have been sufficient to send the breach of contract issue to the jury. Plaintiff's failures of proof require an affirmance of the judgment of the trial court.

Respectfully submitted this 9th day of July, 1965.

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