1965

Flinco, Inc., A Utah Corporation v. The Goodyear Tire & Rubber Comp Any, A Foreign Corporation : Respondent's Word of Clarification

IN THE SUPREME COURT OF THE

STATE OF UTAH

FLINCO, INC., a Utah Corporation,

Plaintiff-Appellant,

vs.

THE GOODYEAR TIRE & RUBBER COMPANY, a Foreign Corporation,

Defendant-Respondent.

Case No. 10321

RESPONDENT'S WORD OF CLARIFICATION

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

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APPELLANT'S WORD OF CLARIFICATION

This document distributed by plaintiff-appellant, hereinafter called, defies classification. It cannot be an opening brief, for it is not timely, it cannot be a reply brief, for it does not answer but raises new matter. It can only be what it purports to be: Appellant's "To Be Inserted . . . ." In any event appellant's confusion of cases involving section 3 of the Clayton Act with the case at bar which is concerned with an entirely different statute calls for this word of clarification, which (since our earlier brief is without space for pocket supplements) may or may not be inserted, in the reader's discretion.

Appellant's "To Be Inserted . . . " calls to the court's attention three "new cases" (decided from 1 to 5 years before appellant's opening brief) which are supposed to illustrate the evil in "tying the sale of tires, batteries and accessories to the sale of gasoline." One

such case concerned the contractual arrangements between Goodyear and Atlantic Refining Company with respect to promotion by Atlantic of Goodyear's products in its service stations. Its only relevance to the case at bar would appear to be the identity of the tire manufacturer involved.

There are at least three answers to the argument that the holdings of the Lessig,[1] Goodyear[2] and Osborn[3] cases may even remotely assist in resolving the dispute at bar. The simplest and most obvious of these is that no tying agreement has been so much as alleged in the present case. Plaintiff was cancelled by Goodyear, not Texaco. So far as the record shows, if Texaco had any preference at all for brands of TBA, it was for other brands, not Goodyear (R. 44-45, 106-107).

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1 Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir. 1964).

2 Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394 (7th Cir. 1964).

3 Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960).

[illegible] even if this were a tying case, it is not true that the courts have "universally condemned" tying agreements, as appellant claims. See, e.g., Susser v. Carvel Corp., 332 F.2d 505, 515, 518 (2nd Cir. 1964). Tying agreements are unlawful under section 3 of the Clayton Act only when "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied [illegible] and a 'not insubstantial' amount of interstate commerce is affected." Northern Pacific [illegible] United States, 356 U.S. 1, 6 (19[illegible]). Plaintiff here, unlike each of its cited [illegible], has wholly failed to produce evidence of [illegible] essential elements. Competition among [illegible] for the business of Texaco [illegible] Salt Lake City was "brisk" and "[illegible]" (112-113, 147-148).

[illegible] most fundamentally: The [illegible] only to entirely different economic [illegible]. Section 3 of the Clayton Act prohibits [illegible] arrangements which may lessen

competition for the business of selling to a dealer by restricting his choice as to sources of supply. The Utah statute involved in the case at bar attacks a combination, conspiracy, etc. which is designed to "fix or limit the amount or quantity of . . . merchandise to be . . . sold in this state," i.e. the exercise of monopoly power in a particularly narrow area.

It is a little difficult to perceive how cases decided under a federal statute designed to proscribe [illegible] of economic injury to free competition and enacted some sixteen years after a state statute can be helpful in interpreting that state statute which applies to an entirely different type of restraint on competition.

[illegible] that appellant's position is not [illegible] limitation of these three irrelevant cases, and that its "To Be Inserted"

sheds no light on the case before the court.

RESPECTFULLY SUBMITTED this 13th day of October 1965.

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