support of and in opposition to Valley's motion for a preliminary injunction. We are not prejudging Valley's right to a permanent injunction at the end of the trial. That right depends on the evidence introduced at trial, which for all we know may cure the deficiencies in Valley's proof that require us to order that the denial of its motion for a preliminary injunction be, and it hereby is, affirmed.[27]

B. EXCLUSIVE DEALING

Clayton Act, Section 3

[Reprinted p. 859 *supra*]

Standard Fashion Co. v. Magrane–Houston Co.

Supreme Court of the United States, 1922.
258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653.

■ DAY, J. Petitioner brought suit in the United States District Court for the District of Massachusetts to restrain the respondent from violating a certain contract concerning the sale of patterns for garments worn by women and children, called Standard Patterns. The bill was dismissed by the District Court and its decree was affirmed by the Circuit Court of Appeals.

Petitioner is a New York corporation engaged in the manufacture and distribution of patterns. Respondent conducted a retail dry goods business at the corner of Washington Street and Temple Place in the City of Boston. On November 25, 1914, the parties entered into a contract by which the petitioner granted to the respondent an agency for the sale of Standard Patterns at respondent's store, for a term of two years from the date of the contract, and from term to term thereafter until the agreement should be terminated as thereinafter provided.... Respondent agreed not to assign or transfer the agency, or to remove it from its original location without the written consent of the petitioner, and not to sell or permit to be sold on its premises during the term of the contract any other make of patterns, and not to sell Standard Patterns except at labeled prices....

The contract contains an agreement that the respondent shall not sell or permit to be sold on its premises during the term of the contract any other make of patterns. It is shown that on or about July 1, 1917, the respondent discontinued the sale of the petitioner's patterns and placed on sale in its store patterns of a rival company known as the McCall Company....

27. On remand, the district court granted summary judgment for defendant Renfield and the Seventh Circuit affirmed. 822 F.2d 656 (7th Cir.1987).

The contract required the purchaser not to deal in goods of competitors of the seller. It is idle to say that the covenant was limited to the premises of the purchaser, and that sales might be made by it elsewhere. The contract should have a reasonable construction. The purchaser kept a retail store in Boston. It was not contemplated that it would make sales elsewhere. The covenant, read in the light of the circumstances in which it was made, is one by which the purchaser agreed not to sell any other make of patterns while the contract was in force. The real question is: Does the contract of sale come within the third section of the Clayton Act because the covenant not to sell the patterns of others "may be to substantially lessen competition or tend to create a monopoly." . . .

The Clayton Act sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own which declared illegal contracts of sale made upon the agreement or understanding that the purchaser shall not deal in the goods of a competitor or competitors of the seller, which may "substantially lessen competition or tend to create a monopoly."

Much is said in the briefs concerning the Reports of Committees concerned with the enactment of this legislation, but the words of the act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of such reports. . . .

Section 3 condemns sales or agreements where the effect of such sale or contract of sale "may" be to substantially lessen competition or tend to create monopoly. It thus deals with consequences to follow the making of the restrictive covenant limiting the right of the purchaser to deal in the goods of the seller only. But we do not think that the purpose in using the word "may" was to prohibit the mere possibility of the consequences described. It was intended to prevent such agreements as would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly. That it was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial.

Both courts below found that the contract interpreted in the light of the circumstances surrounding the making of it was within the provisions of the Clayton Act as one which substantially lessened competition and tended to create monopoly. These courts put special stress upon the fact found that, of 52,000 so-called pattern agencies in the entire country, the petitioner, or a holding company controlling it and two other pattern companies, approximately controlled two-fifths of such agencies. As the Circuit Court of Appeals summarizing the matter pertinently observed:

> The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most

resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two-fifths, will shortly have almost, if not quite, all the pattern business.

We agree with these conclusions, and have no doubt that the contract, properly interpreted, with its restrictive covenant, brings it fairly within the section of the Clayton Act under consideration.

Affirmed.

NOTES

1. Standard Oil Co. of California v. United States, 337 U.S. 293 (1949). Standard Oil Company of California and its wholly owned subsidiary, Standard Stations, Inc., entered into exclusive supply contracts with independent service stations. Standard Oil was the largest seller of gasoline in the market with 23% of the total taxable gallonage. Sales by company-owned service stations constituted 6.8% of the total, and sales under exclusive dealing contracts with independent service stations constituted 6.7%. Standard Oil had entered into exclusive supply contracts with about 16% of the independent service stations in the market. Justice Frankfurter, writing for the Court, trying to narrow the scope of the inquiry under Section 3 of the Clayton Act, held:

> We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected. It cannot be gainsaid that observance by a dealer of his requirements contract with Standard does effectively foreclose whatever opportunity there might be for competing suppliers to attract his patronage, and it is clear that the affected proportion of retail sales of petroleum products is substantial. In view of the widespread adoption of such contracts by Standard's competitors and the availability of alternative ways of obtaining an assured market, evidence that competitive activity has not actually declined is inconclusive. Standard's use of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity.[28]

2. Federal Trade Commission v. Motion Picture Advertising Service Co., 344 U.S. 392, 73 S.Ct. 361, 97 L.Ed. 426 (1953). Motion Picture Advertising's exclusive contracts were alleged to be an "unfair method of competition" in violation of § 5 of the Federal Trade Commission Act. Respondent produced and distributed advertising motion pictures which depict commodities offered for sale by commercial establishments. Its contracts with theatre owners for the display of such films provide that the theatre owner will display only advertising films supplied by the respondent, with certain exceptions. These contracts run for terms up to five years, although most are for one or two years. They covered almost forty percent of the theatres in the 27–state area in which it operated. Motion Picture and three other firms (against which proceedings were also brought) together had exclusive arrange-

28. 337 U.S. at 314.