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Supreme Court of the United States.
STANDARD FASHION CO.
v.
MAGRANE-HOUSTON CO.
No. 20.

Argued Jan. 25, 1921.
Reargued Jan. 16, 1922.
Decided April 10, 1922.

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Suit by the Standard Fashion Company against the Magrane-Houston Company. A decree dismissing the bill was affirmed by the Circuit Court of Appeals, and complainant brings certiorari. Affirmed.

West Headnotes

Appeal and Error 781(4)
30k781(4) Most Cited Cases
A suit to restrain the violation of a contract for the sale of patterns is not rendered moot by the expiration of the contract term pending appeal from the decree dismissing the bill, where the bill also prayed for the recovery of damages as far as they were capable of ascertainment, and the record shows that damages were capable at least of partial ascertainment.

Antitrust and Trade Regulation 524
29Tk524 Most Cited Cases
(Formerly 265k10)
The Clayton Act, 38 Stat. 730, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Anti-Trust Act of 1890, 15 U.S.C.A. §§ 1-7, 15, which has been construed to apply to contracts, combinations, and conspiracies which unduly obstruct the free and natural flow of commerce.

Antitrust and Trade Regulation 560
29Tk560 Most Cited Cases
(Formerly 265k12(1.1), 265k17(1))

Antitrust and Trade Regulation 650
29Tk650 Most Cited Cases
(Formerly 265k12(1.1), 265k17(1))
Clayton Act, § 3, 15 U.S.C.A. § 14, prohibiting sales or agreements whose effect may be substantially to lessen competition or tend to create a monopoly, does not, by the use of the word "may," prohibit the mere possibility of the consequences described, but was intended to prevent such agreements as under the circumstances disclosed probably would lessen competition or create an actual tendency to monopoly.

Antitrust and Trade Regulation 564
29Tk564 Most Cited Cases
(Formerly 265k17(2.2), 265k17(2.1), 265k17(2.5))
A violation of Clayton Act, § 3, 15 U.S.C.A. § 14, is not avoided by limiting the restriction against sale of a competitor's goods to sales in the merchant's place of business.

Antitrust and Trade Regulation 659
29Tk659 Most Cited Cases
(Formerly 265k17(2.2), 265k17(2.1), 265k17(2.5))
A contract whereby a maker of standard patterns, who, with its affiliated organizations, controlled two-fifths of the pattern agencies, whereby the purchaser of the patterns agreed not to sell in its place of business patterns of any other make, substantially lessened competition, and tended to create a monopoly so as to be void under Clayton Act, § 3, 15 U.S.C.A. § 14.

Antitrust and Trade Regulation 575
29Tk575 Most Cited Cases
(Formerly 265k17(2.3), 265k17(3))
A contract whereby defendant agreed to purchase from complainant a stated quantity of standard patterns at 50 per cent. discount from list price and to replace the patterns sold by it, and which provided for the exchange of unsold patterns for other patterns and for the repurchase of patterns on hand at the termination of the contract, was not a contract

of agency or joint adventure, though it was denominated a contract of agency, but was a "contract of sale," within Clayton Act, § 3, 15 U.S.C.A. § 14, invalidating contracts of sale which contain certain prohibited provisions.

****360 *347** Messrs. Herbert Noble, of New York City, Robert G. Dodge, of Boston, Mass., and Charles E. Hughes and James B. Sheehan, both of New York City, for petitioner.

***351** Mr. Solicitor General James M. Beck, of Washington, D. C. (Messrs. La Rue Brown, and Elias Field, both of Boston, Mass., of counsel and on the brief), for respondent.

Mr. Justice DAY delivered the opinion of the Court.

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. 259 Fed. 793, 170 C. C. A. 593.

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 14, 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. Petitioner ****361** agreed to sell to respondent standard patterns ***352** at a discount of 50 per cent. from retail prices, with advertising matter and publications upon terms stated, and to allow respondent to return discarded patterns semiannually between January 15th and February 15th, and July 15th and August 15th, in exchange at nine-tenths cost for other patterns to be shipped from time to time thereafter. The contract provided that patterns returned for exchange must have been purchased from the petitioner, and must be delivered in good order to the general office of the seller in New York. Respondent agreed to purchase a substantial number of standard fashion sheets, to purchase and keep on hand at all times, except during the period of exchange, $1,000 value in standard patterns at net invoice price, and to pay petitioner for the pattern stock to be selected by it on terms of payment which are stated. 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. Respondent agreed to permit petitioner to take account of pattern stock whenever it desired, to pay proper attention to the sale of standard patterns, to conserve the best interests of the agency at all times, and to reorder promptly as patterns were sold. Either party desiring to terminate the agreement was required to give the other party 3 months' notice in writing within 30 days after the expiration of any contract period, the agency to continue during such 3 months. Upon expiration of such notice respondent agreed to promptly return to petitioner all standard patterns, and petitioner agreed to credit respondent for the same on receipt in good order at three-fourths cost. Neglect to return the pattern stock within 2 weeks after the expiration of the 3 months' notice to relieve the petitioner from all obligation to ***353** redeem the same. It was further stipulated that in the event the business property of the respondent, or a substantial part thereof, should be disposed of by respondent for business other than that of dry goods or as a general department store, the respondent should have the privilege of terminating the contract by giving the petitioner due notice of such change. Two weeks after the change in the premises had been made the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

[1] We agree with the courts below that the notices not having been gives as required by the contract,

the same continued in force until three months from November 25, 1918, to wit, to February 25, 1919. It is contended in the brief for the government, filed by it as amicus curiae, that, as the date last mentioned had elapsed pending the suit, the case has become moot; but we are unable to agree with such contention. The bill prayed an assessment of damages as far as chpable of ascertainment. The record shows that such damages were capable at least of partial ascertainment.

The suggestion that the respondent had wound up its affairs, and had gone out of business on March 27, 1920, is met by General Laws of Massachusetts, § 51, continuing its corporate existence for the period of 3 years for the purpose of prosecuting or defending suits by or against it.

The principal question in the case, and the one upon which the writ of certiorari was granted, involves the construction of section 3 of the Clayton Act, 38 Stats. 731 (Comp. St. § 8835c). That section, so far as pertinent here, provides:

> 'It shall be unlawful * * * to * * * make a sale or contract for sale of goods * * * or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the ***354** lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.'

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.

[2] It is insisted by the petitioner that the contract is not one of sale, but is one of agency or joint venture; but an analysis of the contract shows that a sale was in fact intended and made. It is provided that patterns returned for exchange must have been purchased from the petitioner. Respondent agreed to purchase a certain number of patterns. Upon expiration of the notice of termination the respondent agreed to promptly return all standard patterns bought under the contract. In the event of the disposition of the business property of the respondent at Washington street and Temple place, the respondent might deliver its stock of standard patterns to the petitioner for repurchase under the repurchase clause of the contract.

Full title and dominion passed to the buyer. While this contract is denominated one of agency, it is perfectly apparent that it is one of sale. Straus et al. v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955.

****362** [3] 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 ***355** 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'?

[4] The Clayton Act, as its title and the history of its enactment discloses, was intended to supplement the purpose and effect of other anti-trust legislation, principally the Sherman Act of 1890 (Comp. St. §§ 8820-8823, 8827-8830). The latter act had been interpreted by this court to apply to contracts, combinations and conspiracies which unduly obstruct the free and natural flow of commerce. The construction since regarded as controlling was stated in

the Standard Oil Case, 221 U. S. 1, 58, 31 Sup. Ct. 502, 515 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), wherein this court construed the act as intended to reach combinations unduly restrictive of the flow of commerce or unduly restrictive of competition. It was said that the act embraced:

> 'All contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.'

See, also, ***356**United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. St. Louis Terminal Co., 224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107; United States v. Union Pacific R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; United States v. Reading Co., 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; Straus v. American Pub. Ass'n 231 U. S. 222, 34 Sup. Ct. 84, 58 L. Ed. 192, L. R. A. 1915A, 1099, Ann. Cas. 1915A, 369.

As the Sherman Act was usually administered, when a case was made out, it resulted in a decree dissolving the combination, sometimes with unsatisfactory results so far as the purpose to maintain free competition was concerned.

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 specifictests 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.'

[5] 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. See Railroad Commission of Wisconsin et al. v. C., B. & Q. R. R. Co. (decided February 27, 1922) 257 U. S. 563, 42 Sup. Ct. 232, 66 L. Ed. 371, and previous decisions of this court therein cited.

[6] Section 3 condemns sales or agreement 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. ***357** 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.

[7] 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 its 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 ****363** 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.

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