

Syllabus

IN THE MATTER OF
MCDONNELL & SONS, INC.COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 3907. Complaint, Oct. 4, 1939—Decision, May 28, 1940*

Where a corporation engaged in sale of grave markers, monuments, memorials, and mausoleums, and in installation thereof in cemeteries, and in thus selling its said products direct to owners of cemetery lots in various other States of the United States and in the District of Columbia, in active competition with others engaged in sale of similar products in commerce, as aforesaid, among practically all the States—

Represented, through catalogs and advertising matter to which it gave wide distribution in various States, that sales of such markers, monuments, memorials, and mausoleums were made by it direct from quarry to cemetery and that it designed, manufactured, and erected memorials in any cemetery in the United States, and was one of the few erectors of monuments and memorials which owned quarries and a manufacturing plant at Barre, Vt., and made sales direct to cemetery lot owners, and that it was operating its quarry and finishing plant and that all work turned out by it was manufactured and finished by craftsmen in the plant and shops which it operated, and that its quarrying and manufacturing facilities placed it in a position to execute the highest grade of memorial work at the lowest possible cost, and illustrated its catalog and advertising with apparent pictures of the plant in active operation and men at work in its quarry;

Facts being that, while business in question had been established over 80 years ago by grandfather of president of said corporation, and continuously carried on in family since that time, and said corporation did own a granite quarry and fully equipped plant at Barre, suitable for the finishing of granite parts for grave markers, and maintained an office in the plant building, in charge of the corporate vice president and treasurer, under whose direct supervision work produced for it as below set forth was gotten out, no granite had been produced from said quarry nor the finishing plant operated for some 5 or 6 years or more last past, and granite parts for grave markers, monuments, memorials, and mausoleums sold by it were produced for it by proprietors of finishing plants other than that owned by it, as aforesaid, and from another quarry, or quarries, and, while catalogs and other advertising aforesaid were gotten out when it was producing granite from its own quarries and operating its factory and finishing plant at Barre, it continued to distribute from supply thereof remaining, after discontinuance of operation, such catalogs and advertising to prospective customers in the various States, and reprints thereof after exhaustion of original supply;

With capacity and tendency to mislead and deceive purchasing public, through representations that it was selling direct from quarry to cemetery and was prepared to render complete service in sale of its said grave markers, monuments, memorials, and mausoleums, many purchasers of which products have preference for buying same directly from the quarry and the

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manufacturer as securing them an advantage in lower prices and benefit of services not available in making such purchases through middlemen or wholesalers, and to cause members of public to purchase said various products from it in the mistaken belief that such grave markers, monuments, memorials, and mausoleums had been made from granite quarry operated by it and finished in a plant which it operated, and with result that trade was diverted unfairly to it from its competitors in commerce: *Held*, That said acts and practices, and statements and representations, under the circumstances as above set forth, were all to the prejudice and injury of the public and competitors, and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William C. Reeves*, trial examiner.

Mr. William L. Pencke for the Commission.

Burke & Desmond, of Buffalo, N. Y., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that McDonnell & Sons, Inc., hereinafter referred to as respondent, has violated the provisions of the said act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, McDonnell & Sons, Inc., is a corporation organized, existing, and doing business under the laws of the State of New York, with its principal office and place of business at 858-860 Main Street, Buffalo, N. Y.

PAR. 2. Said respondent is now, and for many years last past has been, engaged in the sale and distribution of grave markers, monuments, memorials, and mausoleums in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes said products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said grave markers, monuments, memorials, and mausoleums in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. The respondent, McDonnell & Sons, Inc., in connection with the sale and distribution of said grave markers, monuments, memorials, and mausoleums, and for the purpose of inducing the purchase thereof, makes certain representations in its catalogs, pamphlets,

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advertising literature, and otherwise, of which the following are typical examples;

Direct from Quarry to Cemetery.

We design, manufacture and erect memorials complete in any cemetery in the United States. * * *

In one of its pamphlets appear illustrations of respondent's marble quarry and finishing plant situated at Barre, Vt., which illustrations create the impression of said quarry and finishing plant being in active operation. Other representations made in said advertising literature are to the effect that—

McDonnell & Sons are one of the few erectors of monuments and memorials owning quarries and a manufacturing plant at Barre, Vt. and selling direct to the cemetery lot owner. All work is finished in the firm's plant at Barre, Vt., and shipped direct to all parts of the United States. * * *

Manufactured by craftsmen at the McDonnell finishing plant and shops * * *. All work is finished in the firm's plant at Barre, Vt.

Our quarrying and manufacturing facilities place us in a position to execute the highest grade of memorial work at the lowest possible cost, and our setters are men of ability and experience. * * *

PAR. 4. All of said statements, together with similar statements appearing in respondent's advertising literature, purport to represent to the purchasing public that the material used in respondent's grave markers, monuments, memorials, and mausoleums is secured from the quarry owned by respondent; that all monuments or memorials are sold direct from respondent's quarry to the ultimate consumer; that the completing and finishing of all work is performed in respondent's own finishing plant at Barre, Vt., and shipped direct from said plant to the purchasers thereof. Respondent further represents and implies that all of the several steps in the manufacture of monuments and memorials from the time the marble is quarried from respondent's quarry until the delivery of the finished product to the ultimate purchaser are taken exclusively in respondent's own quarry and finishing plant.

PAR. 5. In truth and in fact, said statements and representations were and are false and misleading. While it is true that the respondent owns a quarry and a finishing plant at Barre, Vt., said quarry has not been in operation since the year 1928 and said finishing plant has not been in operation since the year 1932. In truth and in fact, all of respondent's supply of marble is purchased from other quarries and all work is finished by other independent manufacturers and finishing plants.

PAR. 6. Many purchasers of grave markers, monuments, memorials, and mausoleums show a preference for products which may be pur-

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chased directly from the quarrier and manufacturer in the belief that in so purchasing they may have the advantage of cheaper prices and the benefit of services which would not be available if said purchases would have to be made through middlemen or wholesalers. The respondent by representing to the purchasing public that it is selling its products direct from quarry to cemetery and rendering one complete service leads the purchasing public into the mistaken belief that it in fact furnished the material for said products from its own quarry and completes the manufacture in its own finishing plant.

PAR. 7. The use by the respondent of the foregoing false, misleading, and deceptive statements and representations hereinabove set forth in selling said grave markers, monuments, memorials, and mausoleums had, and now has the capacity and tendency to, and does, mislead and deceive a substantial portion of the purchasing public into buying said grave markers, monuments, memorials, and mausoleums in the erroneous beliefs that such representations are true and that respondent is in fact using marble from its own quarry and manufacturing and finishing its products in its own finishing plant.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 4, 1939, issued its complaint in the above-entitled proceeding and caused same to be served upon the respondent, McDonnell & Sons, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of an answer thereto by said respondent, William C. Reeves, an examiner for said Commission, was designated and appointed to take testimony and to receive evidence in said proceeding, and, pursuant thereto, a hearing was held at Buffalo, N. Y., on November 13, 1939, at which hearing testimony was introduced and evidence received in support of the charges stated in the complaint at the instance of William L. Pencke, counsel for the Commission, and in opposition thereto by Thomas C. Burke, and Charles S. Desmond, of the firm of Burke & Desmond, of Buffalo, N. Y., which testimony was reduced to writing and filed in the office of the Commission, together

with numerous pieces of documentary evidence received as exhibits. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the said complaint and answer thereto, the testimony and other evidence, briefs by counsel for the Commission and counsel for the respondent and the oral argument of the respective counsel and the Commission having duly considered the matter and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, McDonnell & Sons, Inc., is a corporation organized under the laws of the State of New York, with principal places of business at Buffalo in said State and at Barre, in the State of Vermont. It is engaged in the business of the sale of grave markers, monuments, memorials, and mausoleums, and the installation of same, in cemeteries in various States of the United States. Such sales are made by respondent direct to owners of lots in cemeteries. Respondent causes the markers, monuments, memorials, and mausoleums sold by it to be transported, when sold, from Barre in the State of Vermont, or from Buffalo, in the State of New York, through and into various other States of the United States and into the District of Columbia to the respective purchasers thereof, and in the course and conduct of its said business respondent has been, and is now, in active competition with various persons and partnerships and other corporations also engaged in the sale of similar grave markers, monuments, memorials, and mausoleums in commerce among practically all of the States of the United States.

PAR. 2. The business conducted by the respondent was established about 82 years ago by the grandfather of the president of the respondent, and at all times since it was established, such business has been carried on first by the original proprietor and since his death by his descendants, and all the capital stock of the respondent has been owned by descendants of such original proprietor, except that the widow of one of such descendants was active in the business as an officer and stockholder for a number of years after the death of her husband. The main sales office of the respondent is located at Buffalo, N. Y. It owns a granite quarry, consisting of a 40-acre tract of land at Barre, Vt. It also owns a fully equipped plant located on a 4-acre tract of land at Barre, Vt., which plant is suitable for the finishing of granite parts of grave markers. No granite has been produced from such quarry since about 1931, and the finishing plant has not been operated since 1932, but respondent maintains an office in the

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plant building, which office is in charge of the vice president and treasurer of respondent. Since 1932 granite parts for grave markers monuments, memorials, and mausoleums sold by respondent have been produced for respondent by proprietors of finishing plants other than that owned by respondent and from granite taken from the quarry operated by the firm of Wetmore & Morse, at Barre, Vt., except in a small number of instances in which the customer specified that the granite from another quarry be used, but in all instances the work produced for respondent by others has been gotten out under the direct supervision of the vice president and treasurer of respondent, located at its office at Barre, Vt.

PAR. 3. The respondent, in the course and conduct of its business, as set out in paragraphs 1 and 2 hereof, for the purpose of inducing members of the public to purchase the grave markers, monuments, memorials, and mausoleums, offered for sale and sold by it made use of catalogs and advertising matter which it gave wide distribution in various States which catalogs and advertising matter contained representations to the effect that sales of such markers, monuments, memorials, and mausoleums were made by respondent direct from quarry to cemetery; that respondent designed, manufactured, and erected memorials in any cemetery in the United States; that respondent was one of the few erectors of monuments and memorials which owned quarries and a manufacturing plant at Barre, Vt., and made sales direct to the cemetery lot owners; that respondent was operating its quarry and finishing plant and that all work turned out by it was manufactured and finished by craftsmen in the plant and shops operated by respondent; that the quarrying and manufacturing facilities of respondent placed it in a position to execute the highest grade of memorial work at the lowest possible cost. The catalogs and advertising were illustrated by what would appear to be pictures of the plant in active operation and with men at work at its quarry. At the time the original of these catalogs and pieces of advertising matter was gotten out by respondent, it was then producing granite from its own quarries and was operating its factory and finishing plant at Barre, Vt., but when such operations were discontinued by respondent it had on hand a supply of such catalogs and advertising matter which it continued to distribute to prospective customers in various States of the United States and when that supply was exhausted it had made reprints of same and continued their distribution.

PAR. 4. Many purchasers of grave markers, monuments, memorials, and mausoleums have a preference for such grave markers,

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monuments, memorials, and mausoleums which may be purchased directly from the quarrier and manufacturer in the belief that in so purchasing they may have an advantage of lower prices and the benefit of services which would not be available when purchases are made through middlemen or wholesalers. The representations made by respondent to the purchasing public to the effect that it has been selling grave markers, monuments, memorials, and mausoleums direct from quarry to cemetery and was prepared to render one complete service, have the capacity and tendency to mislead and deceive the purchasing public and to cause members of the public to purchase grave markers, monuments, memorials, and mausoleums from respondent in the mistaken belief that such grave markers, monuments, memorials, and mausoleums had been made from granite produced from a quarry operated by respondent and had been finished in a plant operated by respondent, and as a result trade has been diverted unfairly to respondent from its competitors in commerce between and among various States of the United States.

CONCLUSION

The acts and practices of the respondent, and the statements and representations made by it, as herein set forth, have been, and are, all to the prejudice and injury of the public and to the competitors of respondent and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before William C. Reeves, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein and oral arguments by William L. Pencke, counsel for the Commission, and by Thomas C. Burke, counsel for the respondent, and the Commission having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, McDonnell & Sons, Inc., its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of granite grave markers, monuments, memorials, and mausoleums in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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Representing that products which are not made from granite obtained from a quarry owned by the respondent, are sold direct from the quarry to the ultimate purchaser; or that the granite from which such products are made is produced in a quarry owned and operated by the respondent; or that products which are not manufactured and finished in a plant owned, operated, or controlled by the respondent, are made or manufactured by the respondent.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

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IN THE MATTER OF
THE HYDROSAL COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 4049. Complaint, Mar. 6, 1940—Decision, May 28, 1940*

Where a corporation engaged in sale and distribution of its "Hydrosal Liquid" and "Hydrosal Ointment," to purchasers in various other States and in the District of Columbia; in advertisements thereof which it disseminated and caused to be disseminated through the mails, by insertion in newspapers and periodicals having general circulation, and in circulars and other printed or written matter distributed in commerce, and by other means, and which were intended or likely to induce purchase of its said products—

Represented, directly and by implication, that said products possessed remedial, curative, or healing properties with respect to eczema, piles, athlete's foot, and poison ivy, and with respect to those disorders characterized by or associated with pimples and with skin rashes, outbreaks, and itches, including foot and toe itches and skin itches generally, and that they possessed therapeutic properties of value in the treatment of said various ailments and conditions, in excess of temporary relief from itching symptom associated therewith, and were adopted by and used in many hospitals and also by many doctors;

Facts being they did not possess any remedial, curative, or healing properties for aforesaid ailments and conditions, nor possess any therapeutic properties of beneficial value in the treatment thereof in excess of affording temporary relief from the symptom of itching usually associated with or accompanying said diseases or disorders, by virtue of the emollient and astringent properties which they possessed and which might serve, at most, as palliatives for such temporary relief, and they had not been adopted by hospitals or doctors generally, and were not generally thus used, and representations used and disseminated by it as above set forth were grossly exaggerated, misleading, and untrue, and constituted false advertisements;

With effect of misleading and deceiving substantial portion of purchasing public into erroneous and mistaken belief that such false statements, representations, and advertisements were true, and into purchase of its said medicinal preparations as result of such statements, representations, and advertisements;

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Mr. J. W. Brookfield, Jr. for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said act, the Federal Trade Commission, having reason to believe that The Hydrosal Co., a corporation, hereinafter referred to as respondent, has violated