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Interpretation of Mcguire Act in Regard to Sales from Free Trade to Fair Trade Jurisdiction - General Electric Co. v. Masters Mail Order Co.

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Interpretation Of McGuire Act In Regard To Sales From Free Trade To Fair Trade Jurisdiction

General Electric Co. v. Masters Mail Order Co.[1]

The United States Court of Appeals for the Fourth Circuit recently held in *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*[2] that a mail-order house located in the District of Columbia, a non-fair trade jurisdiction, could not be enjoined from advertising in Maryland that fair-traded articles could be bought in Washington, D.C., at prices below the minimum retail prices in effect in Maryland. That decision was based exclusively upon an interpretation of the Maryland Fair Trade Act,[3] which was construed to extend only to advertising made in connection with sales to be consummated within the State. Since the sales took place in the District of Columbia, the Maryland statute had no application.[4] This decision left open the question whether, under the McGuire Act,[5] any state had the power to apply its fair trade laws to sales into the state from a free trade jurisdiction. The *Bissell* case, *supra,* was noted in the MARYLAND LAW REVIEW which pointed out that the court in that case confined its attention to the Maryland statute and that "[a] more binding interpretation of the extent of (the McGuire Act) is still wanting."[6]

Such an interpretation has been proffered by the instant case. Here plaintiff manufacturer sought to enjoin the de-

[1] 244 F. 2d 681 (2nd Cir., 1957), cert. den., Tr. Req. Rep. ¶67,100, Dkt. 224, Oct. 14, 1957.
[2] 240 F. 2d 684 (4th Cir., 1957).
[3] Md. Code (1951), Art. 83, §§ 102-110.
[4] *Supra,* n. 2, 687-8.
[5] 66 Stat. 632 (1952), 15 U. S. C. A., Sec. 45(a)(1)-(5) (1956).
[6] 17 Md. L. Rev. 148, 152 (1957). Parenthetical material supplied.

fendant (the same defendant as in the *Bissell* case), a District of Columbia mail order discount house, from advertising, offering for sale, or selling plaintiff's products in New York below the duly-established New York fair trade prices. Defendant sent goods to New York customers in response to orders it received by mail in the District of Columbia. Order blanks had been distributed to prospective customers by mail and also over the counter in New York by defendant's parent corporation, a discount house located in New York. The District Court granted the injunction.[7] Because of the close supervision by the New York parent, the sales were considered as having taken place in New York. The decree was reversed, (2-1), on appeal. The Court considered the defendant and its parent to be distinct corporate entities and based its decision on an interpretation of the McGuire Act.[8] This statute permits the states to enact legislation validating resale price maintenance contracts, but only in those transactions in which the resale (or sale) occurs in the state attempting to apply its statute. The resales here occurred in the District of Columbia, a non-fair trade jurisdiction, and therefore the McGuire Act made the New York Fair Trade Act inapplicable to these transactions. Judge Clark held that the place of resale within the meaning of the statute was the place where title to the goods passed. Buyer and seller intended to take advantage of the non-fair trade prices in the District of Columbia, and since the intent of the parties governs the passage of title, the District of Columbia was the place of resale. Judge Waterman concurred in the result but on the ground that the place of resale was the situs of the retailer. Judge Lumbard dissented for the reasons offered by the District Court below.

Judge Waterman and Judge Lumbard indicated concern that the use of the concept of title in determining the place of resale might open the way to widespread evasion of fair trade law restrictions.[9] Both judges foresaw the possibility that parties located in the same or different fair trade jurisdictions could make specific provision for title to pass in a non-fair trade jurisdiction which had a direct and substantial relation to the transaction. However, circumvention of the statutes probably is not this easy. Contracting parties are not given that much latitude in stipulating where title is to pass. It is generally held in this country

[7] 145 F. Supp. 57 (S. D. N. Y. 1956).

[8] *Supra*, n. 5.

[9] *Supra*, n. 1, *conc. op.* 688, 690, for Judge Waterman's observation; and *dis. op.* 691, footnote 2 in Judge Lumbard's dissent.

that stipulation by the parties that a contract shall be governed by the law of a jurisdiction which is neither the place of making nor the place of performance of the contract is valid only if that jurisdiction has a *real and natural connection to the transaction.*[10] It seems evident, therefore, that the parties could go no further than to agree that title is to pass in the jurisdiction where either the vendor or the vendee is located. It is difficult to imagine any other situs which would have the necessary natural relation to the transaction.

A more pointed criticism of the title concept may be that the legislative history of the McGuire Act seems to indicate Congressional intent that the location of the vendor should determine the place of resale. *Sunbeam Corp. v. Wentling,*[11] held that the Pennsylvania Fair Trade Act did not apply to sales made from Pennsylvania into other states. A year later Congress passed the McGuire Act,[12] the apparent purpose of Section 4 of the Act being to overrule the *Wentling* decision.[13] It seems obvious that Congress intended that a seller in a fair-trade jurisdiction be subject to the fair trade prices in that jurisdiction, even when he sells to out-of-state consumers. Thus the District Court in Maryland in *Sunbeam Corp. v. MacMillan,*[14] enjoined a Maryland vendor from selling to an out-of-state buyer at less than the established fair trade price in Maryland, holding that the McGuire Act enabled the Maryland statute to reach this sale.[15] It becomes apparent that if the title concept is applied, then the result reached in *Sunbeam Corp. v. MacMillan* can easily be avoided by having the parties stipulate that title is to pass where the buyer is located. Stated another way, reading the title concept into the McGuire Act in effect frustrates the purpose for which Section 4 of the McGuire Act was enacted, *i.e.,* to close the "Wentling Loophole".

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[10] 112 A. L. R. 124 reviews the cases in numerous jurisdictions to this effect.

[11] 185 F. 2d 903 (3rd Cir., 1950), rev'd. 341 U. S. 944.

[12] *Supra,* n. 5.

[13] H. R. Rep. 1437, 82nd Cong., 2d Sess. (Feb. 27, 1952). Section 4 provides that the making and enforcing of fair trade contracts (lawful as applied to intrastate transactions) "shall (not) constitute an unlawful burden or restraint upon, or interference with, commerce". (Parenthetical material supplied.) Also see Sunbeam Corp. v. MacMillan, 110 F. Supp. 836, 842 (D. Md., 1953), which states that "[t]he language of subsection 4 (of the McGuire Act) seems very clearly to indicate that . . . Congress was expressing its public policy to the contrary of the Wentling decision. . . ."

[14] *Ibid.*

[15] Also see General Electric Co. v. Masters, Inc., 307 N. Y. 229, 120 N. E. 2d 802 (1954), where the New York Fair Trade Act was applied to sales from a New York vendor to out-of-state consumers.