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## Insurance Declared Interstate Commerce

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# CONSTITUTIONAL LAW

## INSURANCE DECLARED INTERSTATE COMMERCE

Nearly 200 private stock fire insurance companies formed a combination, operating in six southern states, to fix agents' commissions and to fix non-competitive premium rates, to be effected by boycotts against persons purchasing insurance from non-members, by refusing to allow agents representing non-member insurance companies to represent them, and refusing the opportunity of re-insurance to non-member companies. Members of the association were indicted for alleged violation of the Sherman Anti-Trust Act.<sup>1</sup> The District Court dismissed the indictment.<sup>2</sup> The Supreme Court, in reversing this action held that "fire insurance transactions which stretch across state lines constitute 'commerce among the several state'." United States v. South Eastern Underwriters Association, 322 U.S. 533 (1944).

In Paul v. Virginia,<sup>3</sup> the Supreme Court announced that "the business of insurance is not commerce,"<sup>4</sup> and in the intervening years

17. Waller v. State, 40 Ala. 325 (1865); Stroope v. State, 72 Ark. 379, 80 S.W. 749 (1904); Bonner v. State, 67 Ga. 510 (1881); State v. Wilcoxon, 200 Iowa 1250, 206 N.W. 260 (1925); State v. Myrick, 38 Kan. 238, 16 Pac. 330 (1888); State v. Grisafulli, 135 Ohio St. 87, 19 N.E. (2d) 645 (1939); Schafer v. State, 118 Texas Cr. R. 500, 40 S.W. (2d) 147 (1931).
  18. In Davidson v. State, 108 Ark. 191, 195, 158 S.W. 1103, 1107 (1913) the court said, "It is not essential to a valid waiver that defendant should make the agreement in his own person. He may do so through his own counsel, and, as before stated, in the absence of a showing to the contrary, authority to perform an act in the progress of the trial, which counsel assume to do, will be presumed." Accord, Nelson v. State, 190 Ark. 1027, 82 S.W. (2d) 619 (1935); Durham v. State, 179 Ark. 507, 16 S.W. (2d) 991 (1929); Schruggs v. State, 131 Ark. 320, 193 S.W. 694 (1917).
  19. Biggs v. Lloyd, 70 Cal. 447 (1886); Commonwealth v. Andrews, 3 Mass. 126 (1807); French v. State, 85 Wis. 400, 55 N.W. 566 (1893).
1. 26 Stat. 209 (1890), 15 U. S. C. A. §§ 1-2.
  2. 51 F. Supp. 712 (194 ) See Legis. Note (1943) 32 Geo. L. J. 66.
  3. 8 Wall. (U.S.) 168 (1869).
  4. See also, Liverpool and L. Life and F. Ins. Co. v. Massachusetts, 10 Wall. (U.S.) 566, (1870); Hooper v. California, 155 U.S. 648, (1894). Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Colgate v. Harvey, 296 U.S. 404 (1935). For a general collection of cases, see Gavitt, The Commerce Clause

the states have set up their own systems for the regulation of insurance companies operating within their borders.<sup>5</sup> With the instant decision, the Supreme Court has cleared the way for federal control. Already, a state law has been held invalid under this decision.<sup>6</sup>

The dissenting opinion in the instant case is based on the theory that merely entering into a contract cannot constitute an act of interstate commerce;<sup>7</sup> that neither the incidental use of the mails or other instrumentalities of interstate commerce, nor the insurance of goods moving in interstate commerce could bring the business of insurance within federal control.

However, Mr. Justice Jackson, who wrote a separate opinion, dissenting in part, takes notice of the fact that there does not seem to be "any satisfactory distinction between insurance business as now conducted and other transactions that are held to constitute interstate commerce."<sup>8</sup> "Were we considering the question for the first time and writing upon a clean slate, I would have no misgivings about holding that insurance business is commerce and where conducted across state lines is interstate commerce."

He bases his opinion on six principles:

1. Modern insurance business, as usually conducted, is commerce.<sup>9</sup>
2. "For constitutional purposes a fiction has been established,

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(1932) 134-139; Powell, *Insurance as Commerce in Constitution and Statute*, 57 *Harv. L. Rev.* 937 (1944); *Recent Decision* (1944) 44 *Col. L. Rev.* 772.

5. Thirty-nine states joined as *amicus curiae* in a petition for a rehearing. See 30, *A. B. A. J.* 580 (1944).
6. *Ware v. Travelers Insurance Co.*, (U.S.D.C. Idaho, No. Dist., July 28, 1944), held a resident-agent law was an undue burden on interstate commerce. *Pensacola Telegraph Co. v. Western U. Telegraph Co.*, 96 *U.S.* 1, (1877), "The power of Congress to regulate interstate commerce is exclusive in all cases where the subject over which the power is exercised is in nature national, or admits of one uniform system or plan of regulation. The inaction of Congress upon such a subject is equivalent to a declaration that it shall be free from all state regulation or interference." *Baldwin v. Seelig*, 294 *U.S.* 511 (1934).
7. See majority opinion, n. 50. "Whether reliance on earlier statements of this Court in the *Paul v. Virginia* line of cases that insurance is not 'commerce' could ever be pleaded as a defense to a criminal prosecution under the Sherman Act is a question which has been suggested but it is not necessary to discuss at this time." The impact of monopoly upon the public consciousness as disclosed in pamphlet, party platforms, and congressional debate is effectively, set forth in the majority opinion, nn. 39-48. *Burke, Is the Business of Insurance Commerce?* 42 *Mich. L. Rev.* 409 (1943).
8. *International Textbook v. Pigg*, 217 *U.S.* 91, (1909), where it was held that sending a correspondence course through the mails from one state to another constituted interstate commerce; *United States v. General Motors Corporation*, 121 *F. (2nd)* 376 (1941), and for a discussion of same see, Note (1942) 17 *Ind. L. J.* 255.
9. *Gibbons v. Ogden*, 9 *Wheat. (U.S.)* 1, (1824), "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches."

and long acted upon by the Court, the states, and the Congress, that insurance is not commerce."<sup>10</sup>

3. So long as Congress acquiesces, this Court should adhere to the rule which sustains the regulation of insurance companies by the states.

4. Congressional enactment on the subject is of presumptive constitutional validity.

5. Congress may, without exerting its full powers, prohibit acts involving the insurance business "which substantially affect or unduly burden or restrain interstate commerce."

6. "The antitrust laws should be construed to reach the business of insurance and those who are engaged in it only under the latter congressional power."

Under this construction all combinations could be prosecuted if they unreasonably restrain interstate commerce.<sup>11</sup> It would leave state regulations intact. The lone act of conspiring to fix rates in several states would be sufficient to sustain the indictment.<sup>12</sup>

This decision has been called a four to three decision, but on the principle that insurance is in fact interstate commerce, Mr. Justice Jackson can be included with the majority of the court.<sup>13</sup> He refused merely to do violence to existing controls over insurance, when in fact Congress has taken no steps to establish federal regulation. The conspiracy alleged could have been found to be a violation of the anti-trust act because of its effect on interstate commerce without directly deciding whether or not insurance is interstate commerce.<sup>14</sup>

10. The Paul v. Virginia line of cases held that the mere issuing of a policy of insurance takes place in one state and the mere incidental use of the mails is not enough to constitute interstate commerce; that the contracts are not subjects of trade and barter offered in the market as something having an existence and value of the parties to them. It is suggested that with the growth of common carriers, expansion of the insurance business, and change in methods of handling insurance sales and promotion, insurance is in fact a necessary part of interstate commerce.
11. Fashion Originators Guild of America Inc. et al. v. Federal Trade Commission, 312 U.S. 457, (1940); National Cotton Oil Co. v. Texas, 197 U.S. 115, (1904).
12. Conspiracies under the Sherman Act are not dependent on the "doing of any act other than the act of conspiring" as a condition of liability, Nash v. United States, 229 U.S. 373, (1912). Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, (1939).
13. The Paul v. Virginia line of cases were all in relation to attempts to sustain state regulatory laws. Davis v. Department of Labor and Industries, 317 U.S. 249, 255 (1942) recognized that certain former decisions as to the dividing line between state and federal power were illogical and theoretically wrong, but at the same time, it announced that it would adhere to them because both governments had accommodated the structure of their laws to the error.
14. This decision of the Court should be read and considered along with the decision handed down the same day in Polish National Alliance of U.S. v. N.L.R.B. 322 U.S. 1196 (1944), in which the

## MASTER AND SERVANT

### EMPLOYER'S LIABILITY FOR SERVANT'S NEGLIGENT PEDESTRIANISM

A messenger boy, engaged in behalf of the Postal Telegraph Company, appellee, in the delivery of a telegram, negligently collided with the appellant on a public sidewalk. Both parties to the accident were pedestrians. In the appellant's action for personal injuries the trial court sustained the appellee's demurrer on the grounds that the messenger boy used his legs and the public sidewalk in his own right, which right was not and could not be delegated to him by the appellee, and that the doctrine of "respondeat superior" had no application to such a state of facts. Held, reversed. The applicability of "respondeat superior" is tested by a determination of whether, at the time of the injury, the employee is performing some duty within the scope of his authority.<sup>1</sup>

By the doctrine of "respondeat superior"<sup>2</sup> a master is liable for negligent acts<sup>3</sup> committed by his agents or servants acting in the course of employment<sup>4</sup> or the line of duty.<sup>5</sup> Realizing that the great

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three dissenting judges in this case and Justice Rutledge (who was of the opinion of the Court in this case), and Justice Reed (who did not consider this case) held that labor disputes among insurance workers are subject to regulation by the National Labor Relations Board because of the affect on interstate commerce. Three judges concurring in the Polish Alliance case did so because they believed insurance to be interstate commerce, and that the regulation was justifiable because of this. However, the harm to existing regulation had already been done in the South-Eastern Underwriters case.

1. *Anna L. Annis v. Postal Telegraph Co.*, — Ind. App. —, 52 N.E. (2d) 373 (1944).
2. Literally translated, "Let the principal answer."
3. It is often said that the master is liable whether the act of the servant be negligent or willful and wanton. See *Alabama Power Co. v. Bodine*, 213 Ala. 627, 105 So. 869, 870 (1925).
4. See Restatement, "Agency" (1933) § 228, where it is said that the conduct of a servant is within the scope of employment, if (a) it is the kind he is employed to perform, (b) it occurs substantially within the authorized time and space limits and (c) it is actuated, at least in part, by a purpose to serve the master. See also Note (1943) 4 Ga. B. J. 45. However, it should be noted that the exact meaning of an "act within the scope of employment" has always been a mooted question.
5. This is the usual statement of the rule of "respondeat superior." See *Illinois Central R.R. et al. v. Hawkins, Administratrix*, 66 Ind. App. 312, 317, 318, 115 N.E. 613, 614 (1917). The Kentucky Supreme Court aptly states the reason for the doctrine as one of public policy and necessity for holding a responsible person liable for acts done by others in the prosecution of his business, as well as for placing on employers an incentive to hire only careful employees. *Johnson et al. v. Brewer*, 266 Ky. 314, 317, 98 S.W. (2d) 889, 891 (1936). See *William F. Barker v. Chicago, Peoria, & St. Louis Ry.*, 243 Ill. 482, 488, 90 N.E. 1057, 1059, 26 L.R.A. (N.S.) 1058 (1909); *Hantke v. Harris Ice Mach. Works*, 152 Ore. 564, 54 P. (2d) 293, 295 (1936). See also Note (1942) 6 Md. L. Rev. 248, 249.