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United States of America v. South-Eastern Underwriters Association

by HUGH EVANDER WILLIS

The present United States Supreme Court has overruled another prior Supreme Court decision, rendered in the case of *Paul v. Virginia*, and in doing so has done a fine piece of work. The writer wholly approves of this most recent insurance decision.

**Paul v. Virginia**

Is insurance interstate commerce? In the case of *Paul v. Virginia*, 8 Wall. 168 (1869) the Supreme Court held that insurance was not commerce and of course, therefore, could not be interstate commerce. The Supreme Court rendered this decision in a prosecution of an agent acting in Virginia for certain New York insurance companies without procuring a license as required by Virginia statute. In holding that the Virginia statute was constitutional, the Supreme Court held that issuing of policies of insurance is not a subject of trade and barter nor a commodity shipped in interstate commerce nor a transaction of interstate commerce but a local transaction, not commerce, governed by local law. At different times after this decision the Supreme Court was asked to overrule it, but in each case, until this most recent one, the Supreme Court refused to do so. *Hooper v. California*, 155 U. S. 648 (1895); *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495 (1913); *Osborn v. Ohio*, 310 U. S. 53 (1940).


Eight years ago when the writer published his textbook on constitutional law he criticized the decision in *Paul v. Virginia* and said it should be overruled (along with thirty other prior decisions of the Supreme Court all of which have now been overruled). Willis, *Constitutional Law of the United States*, 284, 288; Willis, *Constitution Making by the Supreme Court Since March 29, 1937* (to 1940), 15 Indiana L. J. 179. The Supreme Court has now done what the writer urged eight years ago and what many others have been urging for years, and has finally held that insurance is interstate commerce.

**S. E. U. A. Case**

In the case of the United States of America v. South-Eastern Underwriters Association — Supreme Court — (1944), two hun-
dred private stock fire insurance companies and twenty-seven individuals were indicted in the district court of the United States for the northern district of Georgia for alleged violations of the Sherman Anti-Trust Act, first of Section I of the Act in restraining interstate trade and commerce by fixing and maintaining premium rates, and second in violation of Section II in monopolizing trade and commerce in the same lines of insurance among six states. The indictment charged that the conspirators not only fixed premium rates and agents' commissions but employed boycott and other types of coercion to force non-member insurance companies into the conspiracies and to compel those needing insurance to buy only from S. E. U. A. members. The defense of the defendants set forth in a demurrer was that the business of fire insurance is not commerce. The district court sustained the demurrer on the ground that "the business of insurance is not commerce either intrastate or interstate," Justice Black in writing the majority opinion for the Court reversed the trial court and in doing so held that the indictment in this case alleged transactions in interstate commerce because of the continuous chain of events multi-state in character back and forth across state lines.

Is Insurance Interstate Commerce

The first main question in the case was whether or not there was interstate commerce. Justices Roberts and Reed took no part in the decision or consideration of the case. Four of the other Justices joined in the majority opinion and three Justices dissented. However, all the Justices agreed that insurance business could involve interstate commerce so as to be subject to federal regulation. But Justice Stone in dissenting took the position that in this particular case the only legal act charged was the making of a contract of insurance and he thought that this did not involve interstate commerce. Justice Black, on the other hand, though granting "that a contract of insurance, considered as a thing apart from negotiation and execution does not itself constitute interstate commerce," took the position that in this case the making of the contract was only a part of a chain of events involving the negotiation and performance of contracts and therefore there was interstate commerce. Justice Jackson in dissenting agreed with Justice Black so far as concerned the facts in this case, but he felt that, because of the long acquiescence in the fiction that insurance is not commerce and the absence of any expression by Congress of an intent to take federal responsibility over insurance, insurance supervision ought to be nationalized, not by court decision, but through Congressional legislation. Hence all the Justices, except Chief Justice Stone and Justice Frankfurter, agreed not only that insurance could be interstate commerce but that in this case there was interstate commerce.

Congressional Intent in Sherman Act

The second main question in this case was whether or not Congress intended the Sherman Anti-Trust Act to apply to insurance even if it was interstate commerce. On this point Chief Justice Stone was of the opinion that it was not the Congressional intent to make the Sherman Anti-Trust Act apply to insurance. He found this intent from the fact that Paul v. Virginia had declared that insurance was not commerce and that members of Congress had acquiesced in this decision and had legislated upon the assumption that insurance was not interstate commerce. Justice Black, however, was just as clear that the intent of Congress was inconclusive. He took this position because he could find no specific intent in the Act to exempt insurance companies and though it did not specifically include them it showed an intent to include all businesses which could come within the prohibition of the Sherman Anti-Trust Act so far as it was possible to make them; consequently, the majority of the Court held on the second question that it was the intent of the Sherman Anti-Trust Act to make it apply to insurance companies, as much as to any other persons or companies, if they were either restraining trade or commerce or undertaking to monopolize it.

State Regulation

Another objection to making the Sherman Act apply to insurance was that it would destroy a vast amount of state regulation of insurance and that there is not the need for federal regulation of insurance that there was for federal regulation of child labor because in the case of insurance there is no "no man's land" where there is no regulation at all. Chief Justice Stone also dissented on this ground. Justice Black apparently took the position that most state regulation would not be destroyed and so far as it would be destroyed it would be a good thing. Justice Black's argument on this point is more or less confusing and unsatisfactory. If he had classified the cases as I have done in my textbook, pp. 307-309, he would have avoided all this. Prior to 1852 the states and the federal government had a concurrent power of regi-
tion (police power) of interstate commerce. Between 1852 and 1894 the states had a concurrent power of regulation of interstate commerce only where the matters were local in nature, as in the case of pilotage and ferriage, and as to all other matters of interstate commerce the federal government's power of regulation was exclusive and the states could not even incidentally and indirectly regulate interstate commerce under its general police power. From and after 1894 the concurrent and exclusive powers of the states and federal government remained as between 1852 and 1894 but since 1894 the Supreme Court has held that the states may exercise their general police power (and power of taxation) for the protection of the social interests and purposes of the states, even though they incidentally and indirectly regulate interstate commerce, if the social interests to be protected by the state's legislation are more important than any social interest to be protected by the federal government in regulating interstate commerce. If Justice Black had adopted this classification of Supreme Court decisions he would have had no difficulty in giving the states all the police power and all the power of taxation which they ought to have over interstate commerce. At the present time there is no uniform rule as to police power and taxation among the forty-eight states of the Union when, for the most part, there should be a uniform rule throughout the United States. But, in the last analysis, the question of whether the federal government should have more power and the states less power, or vice versa, does not raise any question of constitutional law but only a question of practical policy. The nature of our dual form of government can be changed any time by the process of formal amendment or by the action of the Supreme Court in amending the Constitution.

Social Policy

So far as concerns the question of policy it would seem that federal regulation under the interstate commerce clause would be better than general state regulation both for the public and for the insurance companies. Under federal regulation the public would benefit either from the enforcement of competition under the Sherman Act or by the regulation of insurance companies under the law of public utilities on the theory of monopoly. The insurance companies would benefit from federal regulation because it would stop the discrimination by the states against such insurance companies both in the matter of taxation and in the matter of police power. So long as it is held that the foreign corporations engaged in insurance are not engaged in interstate commerce they are not protected by the equality clause.

It should be noted that it might be possible to build up a basis for some federal regulation of insurance, even though it was held not to be interstate commerce, wherever there might be an integration between insurance and recognized interstate commerce, Houston & Texas Ry. v. U. S., 234 U. S. 342 (1914), or a burden or interference with interstate commerce, Davis v. Farmers' Cooperatives Equity Co., 262 U. S. 312 (1923), or under the "flow" doctrine where otherwise the first situation did not exist, Swift & Co. v. U. S., 196 U. S. 375 (1905). National Labor Relations Board v. The Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).

True Definition of Commerce

Whether insurance is commerce and if it concerns more states than one in interstate commerce depends upon the definition of commerce. Chief Justice Marshall defined commerce as traffic and transportation, including navigation. Traffic means buying and selling. Chief Justice Marshall said that there was no doubt about traffic being commerce and he held in Gibbons v. Ogden, supra, that commerce also included navigation. Since Chief Justice Marshall's time there have been attempts by such Justices as Field, Fuller, and Peckham and Justices Butler, McReynolds, Sutherland and Van Devanter to give a narrower definition to this term. Justice Field in the case of Paul v. Virginia, supra, said that contracts of insurance are not trade, nor commodities, nor interstate transactions, but local transactions. He was undoubtedly partially wrong, at all events, in each one of these respects, but he did not define commerce as transportation. This did not happen until the time of Justices Butler, McReynolds, Sutherland, and Van Devanter. They held that commerce was transportation and nothing else; Blumenstock Brothers Advertising Agency v. Curtis Co., 252 U. S. 436 (1920); Railroad Retirement Board v. The Alton Railroad Co., 295 U. S. 330 (1935); Carter v. The Carter Coal Co., 298 U. S. 238 (1936). Justice Day even took this position in the first child labor decision, Hammer v. Dagenhart, 247 U. S. 251 (1918). This modification of Chief Justice Marshall's definition was never suggested by Justice Miller and his colleagues agreeing with him, nor by Justice Holmes and his colleagues agreeing with him, and
now the present Justices of the Supreme Court have entirely repudiated the modification made by the Justices confining commerce to transportation. In the case of Associated Press v. The National Labor Relations Board, 301 U. S. 103 (1937), the Supreme Court held that "interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution." This restores Chief Justice Marshall's definition and makes commerce include both traffic and transportation. Not only that but it defines traffic in a very liberal sense so as to include all interstate communications of a business nature. This makes the definition of commerce broad enough to include the business of insurance. The decision of United States of America v. South-Eastern Underwriters Association is, therefore, in harmony with the case of Associated Press v. The National Labor Relations Board, supra, and with the Supreme Court's doctrine as to interstate commerce from the time of Chief Justice Marshall to date, except for two short periods.

For the above reasons the writer is of the opinion that the decision in the S. E. U. A. case is a sound decision and he believes that in this particular case the arguments of the majority of the Court are better than the arguments of the minority of the Court.

**Effect of Decision**

The first and most lasting effect of this decision will be to give all insurance companies the benefit of the equality clause. This result will follow from making insurance interstate commerce, so as to give insurance companies the right to do business in every state without consenting to conditions of states for the privilege of entering the states. This will mean the stopping of all discriminations by the states under their tax power and police power against foreign insurance companies. This is a result that Congress cannot change because when the Supreme Court defines commerce its definition becomes a part of the Constitution and Congress cannot amend the Constitution.

This decision also gives the federal government the power to regulate interstate insurance companies as public utilities. The Supreme Court years ago put insurance companies into the class of public utilities. German Alliance Insurance Co. v. Lewis, 233 U. S. 389 (1914); National Insurance Co. v. Wanberg, 260 U. S. 71 (1922); but until insurance was made interstate commerce this increased the governmental powers of the states only. Now the federal government has this power, and if it is not an exclusive power it at least is a concurrent power, and any federal regulation would supersede state regulation in conflict therewith. This also is something Congress cannot change because it would be amending our Constitution. But, of course, Congress could refuse to implement the power, as by refusing to provide an insurance commission to apply and administer the common law standards for public utilities or new standards Congress might attempt to set up; and in that case the fact that the federal government has the power of regulation would not amount to much. To make it amount to much it would have to exercise the new power given it.

Congress, however, could amend the Sherman Anti-Trust Act, so as to provide that it shall not apply to insurance companies, because this act is not a part of the Constitution but only an act of legislation by way of exercising a power given to Congress by the commerce clause. In that case present regulation of insurance companies by authority of Congress would cease, and there would be no new regulation until Congress so provided. However, it should be remembered that the powers of the states would in any event be curtailed by the application of the equality clause to any regulation of insurance companies they might attempt in the future.

The writer believes that the time has come for full and complete regulation by the federal government of the insurance business engaged in interstate commerce. On the whole the insurance business is national in scope and it should be regulated by a political power national in scope, and giving a uniform system of regulation for all insurance coming under the commerce clause. This would set a standard for state regulation of all other insurance companies.

There are two other interesting facts in connection with this decision. For one thing this is the first insurance interstate commerce case to come before the Supreme Court which has involved a federal statute. For another thing the Supreme Court decided the case by a four to three vote, which is the first time the Court has overruled a prior decision without a majority of the whole Court instead of a majority of a quorum (6), but neither Constitution nor statute requires a majority of the Court but only a quorum, and since there was a quorum present there would seem to be no objection to the procedure. Chief Justice Marshall thought a full Court should sit when Constitutional questions were involved, but this rule has never been adhered to since his time. 12 George Wash., L. Rev. 175, 182.

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