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States' Rights and Fire Insurance Regulation

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In that case, as between two wrongdoers the negligence of the plaintiff is the proximate cause of the harm and he cannot be heard to complain. In the other case, however, the plaintiff's negligence, continuing or otherwise, is known to the defendant in time to avoid the harmful consequences, and by means of the creation of a new legal duty the courts reason that the moment the defendant learns of plaintiff's precarious predicament, if he has the opportunity to aid, there is a shifting of responsibility from plaintiff to defendant. The defendant's conduct under such circumstances, if reasonable care is not used, becomes the proximate cause of the harm and the basis of defendant's liability, all of which is in keeping with the policy of this state not to condone, tolerate or even countenance *"inert and callous"* conduct.

KATHERINE BITSES.

STATES' RIGHTS AND FIRE INSURANCE REGULATION

In recent years the States' Rights doctrine had been a relatively unimportant political factor only treated by the dissenting opinions [1] of Justices Holmes and Brandeis who sought to protect and define the rights of the states to regulate industry and commerce in the public interest. The revival of the doctrine as a political and economic issue occurred during the past decade when opponents of the social legislation, inaugurated to meet the crises of depression and war, used this doctrine as a weapon to discredit these laws as tending to usurp the powers of the states.[2] Recent examples of this type of attack have been the defeat of the Federal Ballot Bill [3] and the scrapping of the bill providing for federal supervision and administration of compensation to returning servicemen.[4] On the constitutional scene the *United States v. South-Eastern Underwriters' Association* case [5] brought this conflict to a head. The response evoked by this decision affords an excellent illustration of the fact that the present controversy conforms to the historical pattern of the States' Rights doctrine being used as a political weapon and as a means of beclouding the true nature of the economic interests involved.[6]

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[1] Tyson Brothers United Ticket Offices, Inc. v. Banton, 296 U. S. 315, 71 L. Ed. 718 (1926); Weaver v. Palmer, 270 U. S. 402, 70 L. Ed. 654 (1925); Western Union v. Kansas, 216 U. S. 1, 54 L. Ed. 355 (1909); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462 (1904); *cf.* Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315 (1935).

[2] *See* COUDERT, F. R., THE NEW DEAL AND THE SUPREME COURT (1936).

[3] GREEN-LUCAS BILL § 1612.

[4] MURRAY-KILGORE-CELLER BILL § 2061.

[5] United States v. S.E.U.A., 322 U. S. 533, 64 Sup. Ct. 1162 (1944).

[6] For historical treatment see THE STATES' RIGHTS FETISH, SCHLESINGER NEW VIEWPOINTS IN AMERICAN HISTORY (1926) 220–244.

In the *United States v. South-Eastern Underwriters' Association* case the District Court had dismissed the Government's complaint charging the Association with a conspiracy to restrain interstate trade and commerce by maintaining arbitrary and non-competitive premium rates on fire insurance and allied lines in Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia, in violation of Section 1 of the Sherman Anti-Trust Act; and in violation of Section 2 of the Act by monopolizing trade and commerce in the same lines of insurance in and among the same states.[7] The case came to the Supreme Court on direct appeal from the District Court's dismissal of the complaint. By its demurrer the defendant in effect admitted the alleged practices, but claimed exemption from the provisions of the Sherman Anti-Trust Act because this Act refers to interstate commerce and the "insurance business not in commerce either interstate or intrastate." Thus for the first time in the history of the Supreme Court the issue was squarely presented as to whether the commerce clause[8] grants to Congress power to regulate insurance transactions stretching across state lines.

In support of its contention that the business of insurance is not commerce, the Association relied upon the leading case of *Paul v. Virginia*.[9] In this case, decided some seventy-five years ago, the Supreme Court upheld one of Virginia's statutes regulating insurance abuses. This decision declared valid a state law regulating foreign insurance companies but did not enter into the question of federal regulation. As Justice Black pointed out, "attention was focused on the validity of state statutes and the extent to which the Commerce Clause automatically deprived the states of power to regulate the insurance business."[10] Any other decision would have been tantamount to a blanket license to operate without legal restraint whatsoever. But legal formulae devised to uphold state power cannot "uncritically be accepted as trustworthy guides to determine congressional power under the commerce clause."[11]

The defendant Association[12] further argued (1) that Congress did not intend in the Sherman Act to exercise power over the interstate insurance trade; (2) that insurance policies are not commodities

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[7] SHERMAN ANTI-TRUST ACT, 15 U. S. C. A. §§ 1, 2 (1890).

Sec. 1.—Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. . . . Every person who shall make any contract declared by Section 7 of this title to be illegal shall be deemed guilty of a misdemeanor.

Sec. 2.—Every person who shall monopolize, or attempt to monopolize or combine . . . shall be guilty of a misdemeanor.

[8] U. S. CONST. Art. I, § 8, cl. 3 (1789).

[9] Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (U. S. 1868).

[10] United States v. S.E.U.A., cited *supra* note 5.

[11] *Ibid.*

[12] According to the statement of facts in the decision, the S.E.U.A. controlled 90% of the fire insurance and allied lines sold by stock fire insurance companies where the conspiracies were consummated, and 85% of the other

to be shipped or forwarded from one state to another; (3) that virtually all states regulate the insurance business on the theory that competition in the field of insurance is detrimental both to insurers and insured; and (4) that if the Sherman Act be held applicable to insurance, much of the state regulation will be destroyed.

The majority decision written by Justice Black did not accept these contentions, and held that as a matter of law the insurance business did come within the provisions of the Commerce clause and the Sherman Anti-Trust Act. As for the question of whether competition is a good thing for the insurance business the majority opinion holds that this is not within the province of the court to decide but must be left to Congress to make specific exceptions. These conclusions are based on the following reasoning:

(1) In 1787 "commerce" included "trade" and trade included the business of insurance. Thus Article I, Section 8, Clause 3 included in the general term "commerce", such business as that of insurance.

(2) The insurance business is not more intangible than many other matters subject to the regulation of Congress under the "commerce clause". Such matters include "non-commercial, sporadic and illegal transactions which constitute commerce though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information."

(3) In determining activities subject to state or federal control, or both, the primary test is not the mechanical one of what is local and what is interstate, but whether competing demands of state and national interests involved in particular cases can be accommodated.

(4) Insurance companies which conduct their activities across state lines are within the regulating power of Congress under the commerce clause.

(5) Therefore, the provisions of Sections 1 and 2 of the Sherman Anti-Trust Act, penalizing restraint of trade and monopoly in interstate commerce, are applicable to the insurance business.

The verdict of the District Court of Georgia was reversed by a four to three decision, Justices Stone, Frankfurter and Jackson dissenting in separate opinions.[13]

No sooner was this decision announced than a furious debate

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types of casualty insurance. Composed of nearly two hundred private companies and twenty-seven individuals, the S.E.U.A. not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force non-member companies into conspiracies.

[13] Chief Justice Stone states that the question in the case is whether Congress in enacting the Sherman Act, has asserted its power over the business of insurance; that is, whether or not the business of insurance is interstate trade or commerce, and if so whether the transactions alleged in the indictment constitute interstate commerce. He believes in the negative, and concludes that "if the business of entering into insurance contracts is not interstate commerce, it seems plain that agreements to fix premium rates, or other restraints . . . are not violations of the Sherman Act."

ensued. The States' Rights doctrine again assumed importance as it had at various times during the 19th century. This decision, the spokesman for the insurance industry said, was nothing more or less than an infringement of the states' right to regulate the insurance business. The National Board of Fire Underwriters, in a brief submitted to the National Association of Insurance Commissioners stated, "the aim of all actions against the Supreme Court decision should be not only toward preserving state regulation as an academic theory, but toward preserving in that regulation or in any form of regulation, the right of insurers to engage in practices long deemed essential to the service of the public and the solvency of the companies." [14] They further demanded that there be a congressional declaration that, "state regulation shall not be held an interference with interstate commerce." Immediately the Baily-Walter Bill [15] was formulated which even went further and attempted to exempt insurance from interstate commerce regulation altogether. Finally, on September 1, 1944, the S.E.U.A. made a formal petition for a rehearing which the court took under advisement and denied on October 9, 1944.[16]

The tender regard for state regulation evinced by the insurance companies in the foregoing is rather novel. In *Paul v. Virginia,*[17] and subsequent decisions based on it such as *N. Y. Life Insurance Co. v. Deer Lodge County,*[18] such regulation was bitterly fought, much the same as in the 19th century the railroads fought against the Granger laws providing for state regulation.[19] In the *N. Y. Life Insurance* case the company protested against a Montana tax and strongly urged that its business, at least, was so conducted as to be engaged in interstate commerce!

What the insurance companies really desire can be gleaned from a speech by Frank G. Dickinson, Associate Professor of Economics of the University of Illinois and President of the American Association of University Teachers of Insurance, in which he stated three social and economic reasons why the court's ruling were contrary to the best interests of the American people.[20]

Professor Dickinson stated, "Superiority of state control arises from the peculiar nature of insurance. Insurance companies are as

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[14] *See* "Insurance Men Fear Confusion in Court Ruling", N. Y. Herald-Tribune, Aug. 9, 1944, p. 30, col. 7.

[15] BAILY-WALTER BILL, H. R. 3270.

[16] "Rehearing Asked in Insurance Case", N. Y. Times, Sept. 2, 1944, p [illegible], col. 8.

[17] Paul v. Virginia, cited *supra* note 9; *accord,* Fire Ass'n of Philad[illegible] v. N. Y., 119 U. S. 110, 30 L. Ed. 342 (1886); Ducat v. Chicago, 10 Wal[illegible] 77 U. S. 410 (1870).

[18] N. Y. Life Insurance Co. v. Deer Lodge County, 231 U. S. 495, [illegible] Ed. 332 (1913).

[19] Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77 (1876).

[20] "Casualty Men Ask Insurance Appeal", N. Y. Times, Aug. 18, [illegible]4, p. 18, col. 6.

accessible as their agents . . . and these are usually located in local vicinities." But this statement neglects the fact brought out by Justice Black in the S.E.U.A. decision, "that a contract of insurance as a thing apart from its negotiation and execution does not of itself constitute interstate commerce, does not preclude the courts from examining the entire transaction to determine whether there is a chain of events that becomes interstate commerce, since a nation-wide business is not deprived of its interstate character merely because built upon sales contracts which are local in nature." [21] From this point of view the insurance business is no more "peculiar" than railroads or motor carriers in interstate commerce, who nevertheless maintain local agencies and terminals in various states.[22]

Professor Dickinson's second contention is that "State control of insurance permits the purchaser of insurance to vote twice on questions of insurance regulation; he can vote for his state officers who promise to improve insurance laws, and through choosing to pay his premiums to well-managed insurance companies in states with strong insurance regulations, he casts a powerful vote for the best kind of regulation." Here Professor Dickinson is arguing for state regulation. But state regulation, within its proper sphere, is not precluded by federal control of matters entering into interstate commerce. Justices Holmes in one of his dissenting opinions states this idea succinctly when he said, "The right to prohibit, regulate or tax foreign corporations in respect of business done wholly within a state, is not taken away by the fact that they are also engaged in commerce among the states." [23]

Finally, Professor Dickinson stated, "If the Federal Government should establish standards as high as those of New York,[24] I still would not consider them best for the American people. The standards in New York were set so high after the Armstrong Investigation in 1905, that no mutual life insurance company has been organized in this state since.[25] We need a lack of uniformity in insurance

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[21] United States v. S.E.U.A., cited *supra* note 5.

[22] The railroads attempted the same argument to claim interpretive exemption from the Sherman Act, but were defeated. *See* United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007 (1897).

[23] Western Union v. Kansas, 216 U. S. 1, 54 L. Ed. 355 (1909); *accord*, Railway Express Agency v. Virginia, 282 U. S. 440, 75 L. Ed. 450 (1931), in which the right of Virginia to require interstate carriers to secure a Virginia charter before doing local business was upheld.

[24] The standards mentioned here were adopted by the New York Legislature in 1906 largely at the insistence of Charles Evans Hughes, counsel for the Armstrong Committee. *See* BRANDEIS, OTHER PEOPLE'S MONEY (1926) 10, 11.

[25] The Armstrong investigation started in 1905 after Justice Brandeis had revealed that nearly one-half of the tremendous assets of American life insurance were concentrated in three Wall Street companies, and that under their unscientific and wasteful management, excessive costs were saddled on the investors. *See* MASON, BRANDEIS AND THE MODERN STATE (1933) 38. After the recommendations of the Armstrong Committee were enacted into law, some improvement was shown. The *Seventy-first Annual Report of N. Y. Supt. of*

laws so that new companies may be started and flourish." We question whether the "lack of uniformity" favored by Professor Dickinson could provide new companies with an opportunity to enter the field. For by this phrase, he must be referring to state regulation in a form similar to that which exists today. How much opportunity a new company could have to enter the field in the six states covered by the S.E.U.A., can be inferred from the statistics presented by Justice Black in the majority decision. As already noted, 90 percent of all fire insurance and allied lines are controlled by the Association in that area. By refusing reinsurance privileges to new companies and by intimidating brokers and policy holders, the field has been effectively closed to *bona fide* competition.

What Professor Dickinson, in effect, is saying when he denies the right of the Federal Government to regulate interstate aspects of the insurance business and at the same time criticizes the high standards of New York State, is that he does not want effective regulation at all. That is precisely the attitude of the S.E.U.A. as well, and is the real issue at stake in this controversy rather than a zealous regard for States' Rights.

SEYMOUR LAUNER.

LOCAL PREJUDICE AND REMOVAL OF CRIMINAL CASES FROM STATE TO FEDERAL COURTS

An accused who has been unable to obtain a change of venue in a state court on the ground of local prejudice or even though successful in that, but aware that the prejudice has moved along with him from the original to the present situs, may well desire to have the case removed from the state to a federal court. This desire will be accentuated if the accused is in a state where only one change of venue is permitted, regardless of the existence and the degree of local prejudice in the second situs. In any event the accused may feel that he will benefit by the higher procedural standards and safeguards of a federal tribunal less subject to the emotionalism of the original situs. In 1866 Congress made provision for such an occurrence when it enacted as a part of the Civil Rights Laws a statute providing for removal of criminal cases from a state to a federal court:

When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit

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Insurance, Part II (1930), showed that in a study of acquisition costs for forty-seven companies authorized to do business here and for two hundred fifteen companies not so authorized, the cost in the New York authorized companies was 48% of the first year's premiums while the cost for the other companies was 75.5% of such premiums.