

INSURANCE IN ITS RELATION TO THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Article 1, Section 8, of the Constitution of the United States provides that "the Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes." The object of this paper is to consider what relation, if any, insurance, as carried on by corporations of one state with the people of other states, bears to "commerce among the several states." As the solution of this question depends, first, upon the meaning of the words "commerce among the several states," and second, upon the nature of insurance, the subject will be discussed under these heads.

I. THE COMMERCE CLAUSE.

It is an interesting fact that at the beginning of the present century—several years after the adoption of the Constitution—there was nothing deserving of the title "commerce among the several states." The various scattered colonial communities received from abroad whatever necessities were not produced in their immediate vicinities: Travel from one colony to another was burdensome and infrequent. We read that when the national government was removed from Philadelphia to Washington its goods were sent down the river in a frail bark, and the President and his wife, proceeding by land, were lost in the woods beyond Baltimore. The Alleghany mountains constituted an almost insurmountable barrier between what was then known as the East and the West. In spite of this, however, the jealousies which had already existed between the colonies, their selfishness towards each other, and the frequent discriminations by one colony against another, warned the framers of the Constitution that if there ever should be commerce among the several states it must be regulated by the national government.

In the consideration by the Supreme Court of this part of the commerce clause, *it has never been even suggested that the words bear less than their usual signification.* That court has, however, in certain cases, given them a larger meaning than ordinarily attaches to them. In order to intelligently apply these decisions of the Supreme Court to our subject, it is desirable to first briefly consider the usual or common signification of the words "commerce among the several states."

"Commerce" is defined to be "interchange of goods, merchandise or property of any kind." It is trade or traffic and includes the instrumentalities of trade or traffic.

"Among," if standing alone, might be broad enough to be construed within or throughout. In the connection, however, in which it is used, this construction is impossible and must be limited. "Among the several states" evidently means between the several states.

The word "states" seems perhaps more indefinite than either the words "commerce" or "among." Woolsey in his "Introduction to International Law," Section 36, defines a state to be "a community of persons living within certain limits of territory, under a permanent organization, which aims to secure the prevalence of justice by self-imposed law." The uncertainty attaching to the word "states" arises from the fact that it is sometimes popularly used to indicate certain portions of land contained within given geographical limits. This conception of the word is as narrow as it is inaccurate. The state is, in reality, the whole people of one body politic. When we further consider that the body politic is not organized for the purpose of engaging in commercial transactions, but that such transactions occur between the individuals who constitute the body politic, we may conclude that commerce between the several states means commerce between an individual or individuals of one state and an individual or individuals of another state. In short, the obvious intent of the commerce clause is not to draw geographical lines as such, but to protect persons, viz., the persons of one state against the jealousies, selfishness and discriminations of other states.

The usual and common signification of the phrase "com-

merce among the several states" appears therefore to be an exchange of property between the people of one state and the people of another state or other states. As already remarked, it has never been held that the phrase should be limited within a narrower scope, but, on the contrary, its meaning has been somewhat enlarged by the Supreme Court.

Whenever this clause has been presented to it, the Supreme Court has been obliged to consider directly whether a particular statute is a regulation of commerce, which indirectly raises the question whether the subject-matter of the statute is commerce. General broad definitions of the word "commerce" are nothing more than *dicta* except in so far as the definition was necessary to the decision of the case in which it was given. As to these *dicta*, however, it should be noted that even in them there have been no suggestions that the words of the commerce clause bear less than their usual signification. Consequently, we approach the cases which decide secondarily what is meant by "commerce among the several states," but primarily what constitutes a regulation of that commerce, in order to ascertain to what extent, if any, the Supreme Court in determining the latter has added to the ordinary meaning of the former.

Before proceeding in this it is interesting to note the historical fact as set forth by Messrs. Prentice and Eagen in their exhaustive and useful work upon this clause, page 14, that for thirty-five years after the framing and adoption of the Constitution, no case involving the extent of this power arose in the Federal Supreme Court. "Before the year 1840," the text continues, "the construction of this clause had been involved in but five cases submitted to the Supreme Court of the United States. In 1860 the number of cases in that court involving its construction had increased to twenty; in 1870 the number was thirty; by 1880 the number had increased to seventy-seven; in 1890 it was one hundred and forty-eight; while at the present time" (1898) "it is not less than two hundred and thirteen. In the State Courts and United States Circuit and District Courts the progress is not less significant. In 1840 this clause of the Constitution had been involved in those courts in forty-eight cases only. In 1860 the number had increased to one hundred and sixty-

four; in 1870 it was two hundred and thirty-eight; in 1880 it was four hundred and ninety-four; in 1890 it was eight hundred, while at the present time" (1898) "it is nearly fourteen hundred." And the authors remark that "such a history as this can, it is believed, find its parallel in no other branch of constitutional law. To this field has been transferred in large part the modern battle of states' rights. . . . More significant than all, we find here in the majority of cases *the element of discrimination by one state against another*, showing that the old Hellenic appetite which found its satisfaction in the commercial chaos of the Confederation has been neither extinguished nor slaked." The purpose of the commerce clause being to prevent this discrimination, it will, wherever possible, be given a construction equal to the accomplishment of that purpose.

The cases which relate to the regulation of interstate commerce arise upon two lines of legislation,—state and national. In almost all cases the regulation out of which the complaint grows *has not been directly of commerce itself, but of one or more of the instrumentalities of commerce*. Commerce is the exchange of property, while its instrumentalities are the means by which that exchange is effected. Consequently, the Supreme Court has been called upon to consider, first, whether the commerce clause is broad enough to include the instrumentalities of commerce, and second, in each case, with few exceptions, whether or not the particular regulation before it is a regulation of an instrumentality. This distinction is an important one, and should not be lost sight of in a discussion of the matter before us, which directly raises the question as to what relation insurance bears to commerce itself, irrespective of its instrumentalities, as well as suggests, possibly, the further question, whether or not insurance is also an instrumentality of commerce. It is with the first question that we are at present concerned. In order, however, to understand the exact position which the Supreme Court has taken, it is necessary to consider a few of the leading cases that deal with the regulation of the instrumentalities of commerce before considering those which directly decide whether or not a particular transaction or line of transactions constitute commerce itself.

The discussion was opened by the leading case of *Gibbons v. Ogden*, 9 Wheat. 1. In his opinion delivered in that case, Mr. Chief Justice Marshall, than whom there has never been an abler expounder of the Constitution, defined in unmistakable terms the broad and liberal spirit in which the instrument is to be interpreted. Upon this subject he said: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? . . . If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government *those powers which the words of the grant, as usually understood, import*, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, *and render it unequal for the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent*; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally apply the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, *must be understood to have employed words in their natural sense, and to have intended what they have said.* . . . *We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.* . . .

"The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or to the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects,

to one of its significations. 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 is regulated by prescribing rules for carrying on that intercourse. . . . The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted *as if that term had been added to the word 'commerce.'*”

In the above quotation Mr. Chief Justice Marshall has indicated the error of limiting a general term, applicable to many objects, to one of its significations. The regulation of commerce is undoubtedly the regulation of traffic or trade or exchange directly. In the sense in which the phrase is used in the Constitution, however, it includes something more, viz., the regulation of the instrumentalities of traffic or trade or exchange. In short, the word “commerce,” with reference to its regulation, expresses the commercial intercourse between the parts of our nation, which may thus be regulated by prescribing rules for carrying on that intercourse as well as rules directly regulating what we have before referred to as commerce itself; but more often by the former, as in the statute passed upon in the case of *Gibbons v. Ogden*.

It was held in that case that certain laws of New York which granted to two men the exclusive right to navigate all the waters within the jurisdiction of that state, with boats moved by steam or fire for a term of years, amounted to a regulation of commerce. And while the language of Mr. Chief Justice Marshall might, at first glance, suggest that he intended to enlarge the common significance of the commerce clause, yet considered in relation to the question before the court, it merely amounts to an authoritative declaration that, as navigation is one of the necessary instrumentalities of commerce, the regulation of it is a regulation of commerce. Every complete commercial transaction consists of a number of dependent parts, and in so far as any of the latter are regulated, there is to that extent a regulation of commerce. If, for instance, transportation constitutes part of a commercial transaction, a regulation of the transporta-

tion is a partial regulation of commerce. Likewise of all other parts of the transaction.

The principle just referred to has been recognized and re-asserted in many cases to which, with one exception, reference need not now be made. The case of the *Pensacola Telegraph Company v. The Western Union Telegraph Company*, 96 United States 1, illustrates the extent to which the principle enunciated in *Gibbons v. Ogden* may be carried. An act of Congress declared that the erection of telegraph lines should, as against state interference, be free to all who might accept its terms and conditions, and that a telegraph company of one state should not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction. A subsequent statute of the State of Florida granted to the Pensacola Telegraph Company the exclusive right of establishing and maintaining lines of electric telegraph as therein specified. This statute was held to be in conflict with the act of Congress, and therefore inoperative against a corporation of another state entitled to the privileges which that act conferred. The question whether or not the telegraph is an instrumentality of commerce was determined in the affirmative. Upon this subject Mr. Chief Justice Waite said: "Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted *are not confined to the instrumentalities of commerce*, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to

meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. *As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation."*

The long line of cases, of which the foregoing are illustrations, hold that commerce may be regulated by the regulation of its instrumentalities, and determine what those instrumentalities are. This brings us to a consideration of another line of cases which treat directly of what constitutes commerce itself. This line is as short as the other is long. For our purpose only two need be cited. The first undoubtedly enlarges the usual and common signification of the commerce clause. In the *Passenger Cases*, 7 Howard, 283, it was held that a state law which required the masters of vessels, engaged in foreign commerce, to pay a certain sum to a state officer, on account of every passenger brought from a foreign country into the state, or before landing any alien passenger in the state, was inoperative by reason of its conflict with the commerce clause of the Constitution. After referring to a *dictum* of Mr. Chief Justice Marshall in *Gibbons v. Ogden*, Mr. Chief Justice McLean says: "The transportation of passengers is regulated by Congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector a list of the passengers from a foreign port, stating the age, sex and occupation of each, and the place of their destination. In England, the same subject is regulated by act of Parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation,—upon what may, in effect, be called an import. *In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers.*

For the transportation of both, the ship-owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the state, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the state, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the state, they become subject to its laws."

This decision enlarges the meaning of the word "commerce," which ordinarily implies an exchange of property. We have seen that it may have many instrumentalities, of which one is transportation and another the telegraph. A regulation of all transportation in a certain locality must be a regulation of commerce in that locality, as it prohibits, except under given circumstances, the use of this instrumentality. Transportation, however, might be employed in other than commercial transactions, involving no exchange of property. The mere moving of property is not commerce in the common acceptation of that word, nor is the moving of men. When, therefore, the Supreme Court states that "in a commercial sense no distinction can be made" (as regards the law before it) "between the transportation of merchandise and passengers," it enlarges to that extent the meaning of the word "commerce." In view of the fact that transportation has grown to be such an important agency of commerce, there is sometimes an inclination to confuse the terms and regard them as being about synonymous. *It is well, therefore, to bear in mind that the Supreme Court has, in considering what is a regulation of commerce, merely extended the meaning of the word to include within its scope something in addition to, but not in limitation of its ordinary signification—an exchange of property.*

Whether or not the effect of the Passenger Cases is to insert the word "transportation" into the commerce clause by substituting the words "commerce and transportation" for the word "commerce" is a question which we are not at present called upon to discuss.

In *Paul v. Va.*, 8 Wallace, 168, it was held that a state

statute which enacted that no insurance company, not incorporated under the laws of the state passing the statute, should carry on its business within the state without previously obtaining a license for that purpose, and that it should not receive such license until it had deposited with the treasurer of the state bonds of a specified character, to an amount varying from thirty to fifty thousand dollars, according to the extent of the capital employed, was not in conflict with the commerce clause of the Constitution.

The following argument was made on behalf of the appellant: "The business of insurance is commerce. *It is intercourse for the purpose of exchanging sums of money for promises of indemnity against losses.* The term 'commerce' as used in the Constitution has been authoritatively construed to have a signification wide enough to include this subject." The appellant rested his case on the question whether or not an exchange of a sum of money for a promise of indemnity—regarding this as being in itself the substance of the transaction—is commerce. Of course, the court answered the question in the negative, and based its decision upon its answer.

Mr. Justice Field said: "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. *These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.* They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. *They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration.* Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce

between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

It is to be noted here that the court does not hold that exchange of property is not commerce, nor does it hint at a limitation of the ordinary signification of the commerce clause. It merely decides that making a contract (of insurance) is not a transaction of commerce, *because that contract is not an article of commerce* in any proper meaning of the word, and that such contracts are not interstate transactions because they are not executed until delivered by the agent. In this case the wrong question appears to have been presented to the court by the counsel for the appellant. A contract is an agreement to do or not to do a certain thing. No contract is an article of commerce in any other capacity than as a piece of paper. It may or may not be an instrumentality of commerce, according to the circumstances in which it is employed. The question which should have been presented to the court is whether or not the thing contemplated to be done by the contract of insurance, *irrespective of the form of the contract or the manner of its execution*, is commerce. A contract to make an exchange of wheat is not an article of commerce; but wheat is such an article, and its exchange is commerce. Likewise, a contract to make an exchange of money is not an article of commerce, but money is such an article. Its exchange is commerce, and as we have already seen, whatever regulates that exchange or its instrumentalities is a regulation of commerce.

The logic employed in *Paul v. Va.* is that the insurance business consists in an exchange of a contract for money, and that as a contract is not an article of commerce, the exchange is not commerce. If, however, the insurance business as transacted at the present day is something more; if it is not in substance the exchange of money for a contract, *but consists in what is contemplated by the contract, irrespective of the manner in which the contract is executed*, the case of *Paul v. Va.* has no further application. What, then, is the nature of insurance?

Before leaving *Paul v. Va.*, which has been treated in sev-

eral later cases as a precedent without being discussed, it may be well to add that the insurance business must be regulated by legislation either of Congress or of the states. If Congress has the right to regulate it, or any part of it, and is silent, it must be regulated by the states in the exercise of the police power. Owing to the magnitude of the business, to which reference shall be made later, the security of policy-holders requires strict supervision. Therefore, even if Congress may act in the matter, *public policy requires that until Congress does act, the states shall protect insurance policy-holders by adequate legislation.* As Congress has not acted, such legislation as that passed upon in *Paul v. Va.* is not at the present day in conflict with the commerce clause of the Constitution.

This brings us to a consideration of

2. THE NATURE OF INSURANCE.

In Biddle on Insurance, page 1, is the following: "The general term insurance is applied to two species of contract: insurance in respect of property and insurance in respect of life, which are not analogous in their elements, and which proceed upon different principles. Insurance in respect of property may be defined as an agreement by the insurer for a consideration to indemnify the insured against loss, damage or prejudice to certain property that may be during a certain period sustained by reason of specified perils to which the property may be exposed. . . . Though insurance in respect of property is technically a contract of indemnity, it is not, strictly speaking, intended necessarily to be an absolute indemnification of the insured nor to place him in precisely the same position he occupied before the loss, but the indemnity intended *is simply the repayment to the insured of so much of the insured subject matter as is lost at an estimated value or at its then market value.* . . . The earlier form of insurance in England was probably marine; then came life, and in 1635 'estates combustible' were insured, and latterly a great variety of perils have been insured against, as injury from lightning, explosions, storms or tornadoes, breakage of plate-glass windows, whether in transit or in place; the dishonesty or infidelity of servants or officials, and also the liability of a contractor to pay for

injuries to his workmen. Insurance in respect of life, which is substantially the purchase by the insured from the insurer of a reversionary interest for a present sum of money, may be defined to be an agreement by the insurer *to pay to the insured or his nominee a specified sum of money*, either on the death of a designated life or at the end of a certain period, provided the death does not occur before, in consideration of the present payment of a fixed amount, or of an annuity till the death occurs or the period of insurance is ended. . . . Life insurance is not in any sense a contract of indemnity." The same authority says further on page 12: "The last essential element of the contract is a consideration, or, as it is usually termed, the premium. This, ordinarily, is money, though no reason is observed why it must necessarily be so; for a contract of insurance would no doubt be perfectly valid where the consideration agreed to be paid was otherwise than in money, as, for instance, *an insurance may be in exchange for goods*, or in consideration of work and labor done, or in payment of rent or for any other valuable consideration."

Insurance in respect of property is therefore *an agreement to pay* to the insured the value of so much of the insured subject matter as is lost, and insurance in respect of life is *an agreement to pay* the insured or his nominee a specified sum of money upon the happening of a certain event. In the former, the event upon which the payment is to be made may or may not happen; in the latter the event will happen, but at an indefinite time. In one case the uncertainty attaches to the event, while in the other it attaches to the time of the occurrence of the event, but in all lines of insurance the substance of the agreement is to pay. The form of the contract may or may not be one of indemnity. It may be expressed in a great variety of forms. Different contracts may have numerous individual peculiarities, but it is not with the form we have to do, it is with the substance. Every contract of insurance is an agreement to pay, for which there is a sufficient consideration. Such being the substance of the contract, the final object of insurance, or of the insurance business, is *an exchange of property*. This fact stands out most clearly, perhaps, in life insurance, where A. delivers annually

to B. a certain amount of property, and B. in return, at a given date, or upon the happening of a given event, delivers to A., or his appointee, a certain amount of property. The property generally consists of money. In fire insurance A. delivers to B. a certain amount of property, and B., upon the happening of a specified contingency, delivers to A. a certain amount of property. That the contingency never happen does not alter the fact. The chief object of the business of fire insurance is to deliver the property upon the happening of the contingency. In other words, while a fire-insurance contract is a conditional one, the substance of the business of fire insurance is not that the insurer will pay, but that he does pay upon the happening of the fire. This is equally true of all other lines of business in which contracts are employed. The contract of insurance contemplates an exchange of property between the insured and the insurer, and *vice versa*, and that exchange, not the contract, is the real business of the insurer. The usual discrepancy between the amount of premium and the amount of indemnity in other than life insurance is, of course, accounted for by the presence of conditions in the contract.

An examination of other branches of the business of insurance will show that in them all its object is an exchange of property in the form of money. At the office of the insurer we see premiums flowing in from all parts of the country, and payments on account of losses flowing out, the whole business being transacted through the medium of contracts or policies of insurance.

No large insurance company confines its operations within the limits of any one state, but extends its business into all parts of the country. In fact, a large portion of the business of most insurance companies is with persons residing in states other than those of their respective domiciles. The regulation of the business of these companies has become an important matter, and is intimately connected with the interests of all policy-holders. Every state has enacted legislation upon this subject, with an utter disregard of the legislation of the other states, and of such a character as to show clearly that the old Hellenic appetite "has been neither extinguished nor slaked."

In an excellent paper entitled "Significant Factors in National Regulation of Insurance," read before the National Convention of Insurance Commissioners at Detroit, in 1899, Mr. Max Cohen said: "A recent tabulation issued by the National Board of Fire Underwriters shows that fifteen states have anti-compact laws, twenty-one have anti-rebate laws, ten prohibit the use of the co-insurance clause, seven require special deposits from insurance companies, thirty have resident agent laws, twenty have valued policy laws and thirty-one retaliatory laws."

A specific instance of the nature of present insurance regulation is afforded by the laws of New Mexico, which require an insurance company organized outside of that state to deposit ten thousand dollars, cash (without interest), in the state or some county treasury, or in lieu thereof, bonds of the United States, or of that state, or of some county thereof, and invest its surplus in the same, or, "other indebtedness of any solvent dividend-paying institution, incorporated under the laws of the territory, or of the United States." There could be but one object of such legislation, and that is to market by force securities and "indebtedness of any solvent dividend-paying institution incorporated under the laws of the territory," which ought to be viewed with suspicion by every conservative investor. Under this law the surplus of a company authorized to do business in New Mexico could be invested in the mining stocks of some "wild-cat company" of that state, and be solvent. If, however, this surplus be invested in the first mortgage gold bonds of a leading railway company of another state, the insurance company is declared by the laws of that state to be insolvent and unable to pay its indebtedness. Comment is unnecessary.

In his paper, from which a quotation has already been taken, Mr. Cohen stated the following relative to the recent growth and present proportions of the insurance business: "A faint conception of the magnitude of the insurance business, and its essential scope for the needs of the people, may be obtained from this brief outline of but two of its most important branches—life and fire. Over thirteen million people are policy-holders in life-insurance companies and as-

sociations, and nearly two million hold benefit-certificates in the fraternal orders conducting life-insurance features. Of this total of fifteen million policies, nine million were issued by the industrial life-insurance companies alone, and are now held by the toilers in the nation's workshop for the protection of their families. *And these fifteen million of policies represent an aggregate of over thirteen billion dollars in outstanding life insurance. The amount of risks annually written and carried by the fire-insurance institutions for the protection of property and industries in the United States amount to over nineteen billion dollars.*"

The total volume of our national currency was reported on September 1, 1900, to be \$2,096,683,042. As fire insurance is at the present day only one branch of the insurance business, we may from the figures given above derive a fair idea of the enormity of that business.

It is impracticable within the scope of this paper to refer to all the evils incident to the regulation by state legislatures of the business of insurance carried on with the people of one state by corporations of another. They are such, however, as to make national regulation of this business an urgent need. That Congress has not power to institute and impose such regulation has never been held; and upon the basis of our examination it seems not improper to assume, until a contrary decision shall have been rendered by the Supreme Court, that Congress has this power. When we consider the common signification of the words "commerce among the several states," and find that judicial interpretation has not served to limit, but rather to enlarge, that common signification; and when we bear in mind that the essence of that portion of the insurance business we are considering lies in an exchange of property between the citizens of one state and an insurance corporation of another, it can hardly appear illogical to attempt to argue that insurance should be included within the term "commerce among the several states." If this be true, and the commerce clause shall be held to vest in Congress the power to regulate this business as well as those other branches and instrumentalities of commerce carried on among the several states, it is submitted that, as suggested by the language of Mr. Chief Justice

Waite above quoted, it is not only the right of Congress, but its duty, to see to it that the business of insurance among the states is not obstructed nor unnecessarily encumbered by state legislation.

Reginald H. Innes.