## THE APPLICATION OF THE COMMERCE CLAUSE TO THE INTANGIBLE.

The Federal Constitution confers upon Congress power "to regulate *commerce* with foreign nations, and among the several States," etc. The difficulty and uncertainty involved in the application of this important provision seem to have largely resulted from vagueness of conception of the precise scope of the word *commerce*. For reasons that will presently appear, I am inclined to thing that its use in this connection was unfortunate; that the word *transportation* would have been preferable.

Etymologically it is based on the Latin word *"merx,"* defined as "goods, wares, commodities, merchandise," and commerce itself has been defined as "interchange of *goods, merchandise,* or property of any kind."[1] *Goods* have been defined as "movable effects or personal chattels; articles of portable property, as distinguished from money, lands, buildings, ships, rights in action, etc., as household *goods;*"[2] so *merchandise* as "any movable object of trade or traffic; that which is passed from hand to hand by purchase and sale."[3] *Property* is undoubtedly a broader term, yet it has been defined as "ownership; estates; especially, ownership of *tangible* things," and has been said to be "the general word for those *material* things which are one's own, whether for sale or not."[4]

It will, I think, be undisputed that these words "goods," "merchandise," "property" primarily and naturally suggest *the tangible,* such as furniture, clothing, cattle, and so on, rather than *the intangible.* And undoubtedly, at the time of

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[1] *Century Dictionary.*
[2] *Id.*
[3] *Id.*
[4] *Id.*

the adoption of the Constitution, and for a long time thereafter, the word *commerce* usually suggested no conception of what is not tangible. It then, as perhaps it does even now, conspicuously brought to mind vessels and their cargoes.

This early limitation of conception seems to me to survive in the definition most approved by the Supreme Court. "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."[5] It is also said: "Commerce among the States embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph."[6] Scarcely an improvement seems the following statement, which rather indicates an increasing confusion of conception: "Let us inquire what is commerce, the power to regulate which is given to Congress? The question has been frequently propounded in this court, and the answer has been—*and no more specific answer could well have been given*—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph."[7] A sorry conclusion, indeed, I say, if it be really true that "no more specific answer" can be given! But I hope to make it clear that the situation is, after all, not so discouraging.

Let us revert to the definition that I have referred to as the one most approved by the Supreme Court. It seems to me a most unfortunate one, as inadequate and misleading, It will presently appear that, in the opinion of the Supreme Court, at least, commerce but partially and imperfectly comprehends *intercourse*. And it scarcely seems to need

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[5] *County of Mobile* v. *Kimball*, 102 U. S. 691, 702 (Oct. 1880). This was approvingly quoted in *McCall* v. *California*, 136 U. S. 104 (1890); *Williams* v. *Fears*, 179 U. S. 270 (1900); *Champion* v. *Ames*, 188 U. S. 321, 351 (1903).

[6] *Champion* v. *Ames*, *supra*.

[7] *Adair* v. *U. S.*, 208 U. S. 161, 176 (1908).

pointing out that it does not comprehend mere *traffic* as such at all, or "the purchase, sale, and exchange of commodities."[8] These are of themselves merely internal transactions, and the power of Congress does not extend to "that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States."[9]

All then that really remains of the definition is that commerce consists in "the transportation of persons and property" (the words "and transit" being omitted as superfluous). For present purposes, we may ignore the transportation of persons, and simply define commerce as *"the transportation of property."* From the standpoint of the earlier conception already discussed, we may change this to "the transportation of *tangible* property." But even the use of the word *property* seems objectionable as involving an unnecessary limitation; for does not the commerce clause apply to the transportation of what is the property of no one, unless in a very qualified sense, such as ferocious and noxious wild beasts? The same may be said of refuse matter, such as garbage.

So then, still viewing the matter from the standpoint of the earlier conception, we have as a definition of commerce, *"the transportation of the tangible."* It is my particular object to consider the application and extension of this definition to *the intangible.*

From a strictly scientific or philosophical standpoint, the distinction between *the tangible* and *the intangible* may not be a radical one, though undoubtedly there is a sufficiently clear practical distinction between what is "capable of being touched or grasped, or of affecting the sense of touch;" and what is "incapable of being touched; not susceptible to the touch." It is true that when the occasion arose, the appli-

[8] For instance, in *N. Y. ex rel. Hatch* v. *Reardon*, 204 U. S. 152 (1907), the commerce clause was held not to apply to a mere sale of stock.

[9] *Employers' Liability Cases*, 207 U. S. 463, 493 (1908).

cation of the commerce clause to the intangible was readily enough recognized by the Supreme Court, but such recognition was partial and limited, by reason of the continuing influence of the earlier conception.

In *Gibbons* v. *Ogden,* Johnson, J., speaking perhaps somewhat in advance of his time, said that while "commerce, in its simplest signification, means an exchange, of goods," "in the advancement of society, *labor,* transportation, *intelligence,* care, and various mediums of exchange become commodities, and enter into commerce."[10] But the application of the commerce clause to the intangible was first conspicuously recognized in the case of transmission of messages by the electric telegraph. Thus in *Pensacola Tel. Co.* v. *Western Union Tel. Co,*[11] where it was declared to be "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." So, too, in *Western Union Tel. Co.* v. *Pendleton,*[12] where it was said of "intercourse by telegraphic messages:" "It differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports *nothing visible and tangible;* it carries only *ideas, wishes, orders, and intelligence.*"

In its general aspects, communication by telephone so closely resembles communication by telegraph that the application of the commerce clause to the former was readily recognized.[13] Nor does there seem any reason to doubt

[10] 9 Wheat. 1, 229 (1824).

[11] 96 U. S. 1 (Oct. 1877).

[12] 122 U. S. 347, 356 (1887).

[13] See *Central Union Tel. Co.* v. *State,* 118 Ind. 194 (1889); *Matter of Pennsylvania Tel. Co.* 48 N. J. Eq. 91 (1891); *Muskogee Tel. Co.* v. *Hall,* 118 Fed. 382 (C. C. A. 8th C. 1902).

that it is likewise applicable to communication by means of undulations of the luminiferous ether, without the assistance of a wire; that is, by wireless telegraph. And is not the same true of communication by means of undulations of the atmosphere; that is to say, by the use of the human voice in conversation, thus between persons situated at the time on opposite sides of a State boundary?

Now does it make any difference that such transportation of the intangible operates as a means of negotiation of a contract? It seems hard to see what rational basis of distinction there is in this respect. In determining the application of the commerce clause to communication by telegraph, has it ever been seriously considered whether telegrams should be classified as, so to speak, contractual or non-contractual; that is, with regard to whether a given telegram operates as a means of negotiation of a contract? The distinction, as thus applied, would, I think, be instinctively and generally regarded as absurd, to say nothing of the enormous practical difficulty of applying it. Nevertheless, we shall, I think, presently see that some such distinction has been solemnly established by the Supreme Court, by way of excluding from the application of the commerce clause, the intangible, if operating as a means of negotiation of a contract.

Some eight years after such application to the intangible had been so clearly recognized in *Western Union Tel. Co.* v. *Pendleton,* the following situation was presented in *Hooper* v. *California.*[14] Insurance brokers doing business in New York had an agent located in California, of whom inquiry was there made if he could procure insurance on a vessel. He communicated with his principals, requesting them to advise him of what, if anything, they had done or could do in the premises. Thereupon they sent a telegram, that is, from New York to California, containing information to the effect that insurance had been placed on the vessel, and the contents of the telegram were communicated

[14] 155 U. S. 648 (1895).

to the applicant. Thereafter the principals forwarded to the agent, that is, from New York to California, a policy issued by a Massachusetts corporation, and this was delivered to the applicant. The premium was paid, and the principals were informed by the agent that it had been collected and the amount deposited to their credit. The question for decision was whether the commerce clause was applicable, so as to preclude the application of State legislation.

In the light of our preceding discussion, the answer seems clear enough, as a matter of principle; so at any rate it seems to me. In *Pensacola Tel. Co.* v. *Western Union Tel. Co.* the commerce clause had been held applicable to "intercourse among the States and the transmission of intelligence;" in *Western Union Tel. Co.* v. *Pendleton* to the transportation of what is not "visible and tangible;" of "ideas, wishes, orders, and intelligence." And certainly these elements were present in the situation involved in *Hooper* v. *California,* whether we have in view the request sent by the agent from California to New York that the principals advise him of what they had done or could do, or the information sent by the principals from New York to California, to the effect that insurance had been placed. Furthermore, there was the employment of a telegraphic message, a circumstance that, strangely enough, it seems to me, the court entirely overlooked or ignored. And there was the transmission from New York to California of the policy, which certainly fell within the description of the tangible.[15]

Nevertheless, surprising as it may appear, the court concluded that the commerce clause was inapplicable, at any rate, for the purpose of precluding the application of State legislation. Neither the prevailing nor the dissenting opinion reveals any consciousness that the court had already decided that the commerce clause does apply to "intercourse among

[15] On this point the decision is, I submit, absolutely irreconcilable with *Champion* v. *Ames,* 188 U. S. 321 (1903), holding the commerce clause applicable to the transportation of a lottery ticket. This is made clear in the dissenting opinion in *Champion* v. *Ames.*

the States and the transmission of intelligence;" to the transportation of what is not "visible and tangible;" of "ideas, wishes, orders, and intelligence."

The explanation of this phenomenon appears to be that the court, whether consciously or unconsciously, reverted to the earlier conception of commerce as limited to *the transportation of the tangible.* This is, I think, made clear by the reliance on the following reasoning employed in *Paul* v. *Virginia:*[16] "Issuing a policy of insurance is not a transaction of commerce. The policies are simple 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 sense 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." Continuing the court said: "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse." The distinction thus stated is one that I confess my inability to comprehend.

The court has steadfastly adhered to the doctrine thus announced in *Paul v. Virginia,*[17] and it must now be regarded as a merely academic question whether the commerce clause is applicable to the mere negotiation of a contract between persons situated at the time in different States. Thus, in *Ware* v. *Mobile County,*[18] it was held inapplicable to such contracts for the sale of grain or cotton. This was the case of brokers taking orders and transmitting them to other States. The *performance* of the contract involved, however, no transportation from one State to another. That

[16] 8 Wall. 168 (Dec. 1868).

[17] For decisions since *Hooper* v. *California* see *Noble* v. *Mitchell,* 164 U. S. 367 (1896); *N. Y. Life Ins. Co.* v. *Cravens,* 178 U. S. 389, 401 (1900); *Nutting* v. *Massachusetts,* 183 U. S. 553 (1902).

[18] 209 U. S. 405 (1908).

is to say, a part of the transactions were "merely speculative and followed by no actual delivery," and in case of such as did, the property was bought in the State to which the order was transmitted and there held for the purchaser. "In neither class of contracts, for sale or purchase, was there necessarily any movement of commodities in interstate traffic, because of the contracts made by the brokers." The doctrine of *Paul v. Virginia* was expressly applied, the court saying: "Contracts between citizens of different States are not the subjects of interstate commerce, simply because they are negotiated between citizens of different States, or by the agent of a company in another State, where the contract itself is to be completed and carried out wholly within the borders of a State, although such contracts incidentally affect interstate trade."

Nevertheless, it was clearly recognized in *Ware* v. *Mobile County* that a contract negotiated between persons situated at the time in different States may be within the scope of the commerce clause, by reason of being incidental to what is within its scope. Thus, as here said, "the negotiation of sales of goods in a State by a person employed to solicit for them in another State, the goods to be shipped from the one State to the other, is interstate commerce." An illustration is furnished by *Rearick* v. *Pennsylvania*,[19] where an agent of a corporation located in Ohio negotiated in Pennsylvania with persons there situated, contracts for the sale of groceries, which were thereafter transported from Ohio to Pennsylvania. That is to say, a contract negotiated between persons situated at the time in different States, though not of itself within the scope of the commerce clause, was so by reason of being incidental to what was within its scope.

As applicable to the tangible generally, the principle thus stated is too well established to call for extended discussion.[20]

[19] 203 U. S. 507 (1906).

[20] Nevertheless it seems to me to have been overlooked or ignored in *Williams* v. *Fears*, 179 U. S. 270 (1900), where the commerce

But suppose that this Ohio corporation had been engaged in the business of furnishing means of communication by telegraph or telephone between Ohio and Pennsylvania, or even by wireless telegraph. Would not the negotiation of a contract to be performed by furnishing such means of communication have been equally within the scope of the commerce clause? So far as I can see, it would.

This brings us to a consideration of the important distinction between *the negotiation* and *the performance* of a contract, with reference to the application of the commerce clause to the intangible. We have seen that while such application does not extend to the mere negotiation of a contract, it may extend thereto by reason of its being incidental to what is within the scope of the commerce clause. This is so as to a contract the performance of which involves the transportation of the tangible. Is the same true of one the performance of which involves the transportation of the intangible?

I submit that it is. We have seen it to be established that, to an extent at least, the commerce clause does apply to transportation of the intangible; that is, to "intercourse among the States and the transmission of intelligence"; to the transportation of what is not "visible and tangible"; of "ideas, wishes, orders, and intelligence." To the extent that the performance of a contract involves such transportation of the intangible, I submit that the commerce clause is applicable thereto.

The point remains to be passed upon by the Supreme Court, but the courts that have had occasion to do so have manifested a decided inclination to deny the application of the commerce clause to this class of cases, this being, as it seems to me, a result of failure to apprehend such distinction between *the negotiation* and *the performance* of the contract.

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clause was held inapplicable to the business of hiring laborers "to be employed beyond the limits of the State," though concededly *"transportation must eventually take place as the result of such contracts."* Here again it was *Paul* v. *Virginia* that proved misleading.

In *International Text-book Co.* v. *Peterson*[21] were involved the transactions of a corporation located in Pennsylvania, the owner and proprietor of what are known as "International Correspondence Schools," its business being that of furnishing instruction by correspondence. It entered into a contract with a person in Wisconsin, such contract to be performed in the manner thus described: "The plaintiff was to send to the defendant by mail or express from Scranton, Pa., to Manitowoc, Wis., a first set of instruction papers, examination questions, and drawing plates pertaining to a course of instruction in the chemistry and manufacture of leather scholarship; defendant on receipt of these was to study the same, write out his work, and forward it to the plaintiff at Scranton, Pa., by mail, together with such questions or inquiries as he might need to make relative to the work; the plaintiff by its instructors, teachers, and correspondence clerks would thereupon correct the work of the defendant upon its receipt at Scranton, Pa., and return it to the defendant at Manitowoc, Wis., by mail, together with answers to his questions or inquiries, and together with a further set of copyrighted instruction papers, examination questions, and drawing plates; defendant was thereupon to take up this second set of papers, work upon them as before, and return his work to Scranton, Pa., in the manner above described, for correction; this process was to continue until defendant had received from plaintiff all the copyrighted instruction papers, examination questions, and drawing plates contracted for by defendant's accepted application above described; at the time the first set of copyrighted instruction papers, examination questions, and drawing plates were to be sent by the plaintiff to the defendant, the plaintiff was also to send to the defendant a set of bound volumes, the title thereto remaining in plaintiff, to be loaned to the defendant during such time as he made no default on his contract obligations."

I leave out of consideration the circumstance that the

[21] 133 Wis. 302 (1907).

performance of the contract pretty clearly involved transportation of the tangible; that is to say, of the instruction papers, examination questions, and drawing plates. I am utterly unable to see why this was not of itself sufficient to make the commerce clause applicable. The court disposed, however, of this point on the ground that this was "a contract with the defendant, domiciled in Wisconsin, which included *only incidentally* the transfer of articles of property by the usual transportation agencies from Pennsylvania to Wisconsin, and consisted *mainly* in an obligation to furnish, by such usual transportation agencies, the defendant in Wisconsin, from the domicile of the plaintiff in Pennsylvania, instruction or information continuously for a considerable period of time. The few and incidental articles of property furnished were not objects of sale, barter, or exchange, but instrumentalities through which the plaintiff imparted its instruction."

The court applied the doctrine of *Paul* v. *Virginia* and *Hooper* v. *California*, already considered, saying: "The decisions of the Supreme Court of the United States with reference to policies of insurance, and more particularly the reasons upon which these decisions are based, seem to exclude from the domain of interstate commerce the contract and transactions in the case at bar. * * * These cases lead us to believe in the existence of a tentative rule, which, while it does not stretch very far into the domain of commerce, still comprehends the contract in question, because that contract concerns something not a subject of trade or barter having an existence or value independent of the parties to the contract, and is like the insurance policy, 'not an instrumentality of commerce, but a mere incident of commercial intercourse.'"

In view of what has already been said, the fallacy of such a conclusion scarcely needs, I think, to be pointed out. It must be admitted that the commerce clause is not applicable to a mere contract between persons situated at the time in different States, to furnish instruction by correspondence.

But this is because *the performance* of the contract does not necessarily involve transportation from one State to another, any more than does the performance of a contract of insurance, though one between persons situated in different States. In the case under consideration the dealings constituting performance of the contract, instead of being between Scranton, Pa., and Manitowoc, Wis., might well have been between Milwaukee, Wis., and Manitowoc, Wis. On that supposition the case would have been like that under consideration in *Ware* v. *Mobile County*. But, as it was, the performance of the contract clearly involved transportation from Pennsylvania to Wisconsin.

The same corporation and substantially the same course of dealing were under consideration in *International Textbook Co.* v. *Inhabitants of Auburn*,[22] and in *International Text-book Co.* v. *Lynch*.[23] In the former the commerce clause was, on another ground, held inapplicable, but the court said: "The complainant claims that this is interstate commerce, a definition which may well be doubted. We may well question whether the mere occupation of giving instruction can be commerce, and whether, therefore, as the main purpose must be classified as noncommercial, the incidents thereof must not also be classified in the same way." In the other case, the same result was reached as by the Wisconsin court, reference being made to the rule as applied in *Paul* v. *Virginia* and *Hooper* v. *California*, but here there was regarded as involved a distinct consideration thus stated: "The transportation of letters and printed matter of all kinds is regulated by the postal laws of the country and not by the laws of interstate commerce. The obstruction of commerce and of the mails are offenses referred to and treated by the Supreme Court as controlled by separate and distinct laws."

In *State* v. *Morgan*,[24] were involved the transactions of

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[22] 155 Fed. 986 (C. C. Me. 1907).
[23] 81 Vt. 101 (1908).
[24] 2 S. D. 32, 53 (1891).

a mercantile agency doing business at Chicago, New York, and other points outside of South Dakota, in which State a person acted as special agent, transmitting information to his employers. In holding the commerce clause inapplicable, the court said: "The business is merely a bureau of information, acting as the agent of its employers, and its object is to collect and impart information to those who pay for it. It is true that this information may be confined within the limits of the State, or it may cross State lines, both in its collection and its dissemination, but for this reason it cannot be called interstate commerce. * * * Information or intelligence is not an article of 'commerce' in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities, to be shipped or forwarded from one State to another, and there put up for sale. The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties. It is individual in its character, and has no relation to the general public. The mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collecter, storer, and holder of it, to be given directly to those who wish to purchase or pay for it. The telegraph, the steamboat, and railroads are instruments of commerce, because it is by their instrumentality that articles and commodities are purchased, exchanged, and carried from one country or State to another. The telegraph and post office transmit the order from the purchaser to the seller; the steamboat and railway carry and deliver the goods and articles from the seller to the purchaser. A mercantile agency does neither. As well say that the ship builder, by whose skill and money a ship or steamboat is floated on river, lake or ocean; the mechanic, whose labor constructs, or the engineer, who runs the engine or car upon the railroad; the operator who sends the message upon the wire,—are instru-

ments of commerce, and properly coming within the clause of the United States Constitution regulating interstate commerce. The business, as conducted by mercantile agencies, may be an adjunct of commerce and of commercial transactions, but it is a separate and distinct appliance, and does not come within the principles of law which govern or regulate either of them."

In view of what has already been said, it seems unnecessary to discuss this decision in detail, and show how the reasoning therein is permeated with the conception of commerce as limited to the transportation of the tangible. I call attention, however, to what may be an unduly narrow conception of its application to communication by telegraph. It surely is untrue that it has such application only where by the instrumentality of the telegraph "articles and commodities are purchased, exchanged, and carried from one country or State to another." When in *Western Union Tel. Co.* v. *Pendleton,* a State statute regulating the delivery of telegrams was held inapplicable to telegrams sent to another State, there was certainly involved no implication that the rule is otherwise in a case where there is no purchase, exchange or carriage of "articles" or "commodities".

The results of the preceding discussion may thus be summarily stated. From the standpoint of the earlier conception of the word "commerce," as used in the commerce clause, we have, as a definition thereof, *"the transportation of the tangible."* Such definition came indeed to be applied to the intangible also, conspicuously so to communication by telegraph. Yet such application was but partial and limited, by reason of the continuing influence of the earlier conception. Thus, it is still refused application to the mere negotiation of a contract between persons situated at the time in different States, conspicuously so as to contracts of insurance. But it is allowed application to such negotiation, by reason of its being incidental to what is within the scope of the commerce clause—thus, where performance of the contract involves transportation of the intangible. It is sub-

mitted that it likewise has such application where such performance involves transportation of the intangible, but thus far it has been denied such application, especially with respect to contracts to furnish instruction by correspondence.

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