FEDERAL VS. STATE SUPERVISION OF INSURANCE*

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This topic has been discussed for nearly a century—in fact ever since insurance began to take a prominent place in the business life of the country. The subject has been worn threadbare by theorists, by insurance practitioners of one kind or another, and by learned judges in opinions that have been among the most carefully reasoned. The question has been declared settled time and time again and anyone who starts digging into the cases and reading the arguments and opinions will soon appreciate the basis for the view that if there is anything *judicially* certain in our ever-changing business life it is the dictum of Mr. Justice Field in Paul *vs.* Virginia that, strange as it may seem, *insurance is not commerce.* This was and has remained the basis of the Supreme Court determination that insurance cannot be reached by Congress under the Commerce Clause of the Constitution.

It seems that Congress has never legislated regarding the business of insurance otherwise than to levy income taxes. Each of the many decisions that have reiterated the one of Paul *vs.* Virginia has resulted from a contest over a state's effort to tax or otherwise interfere with the activities of an insurance company or its representative in a state other than that of its domicile. Repeatedly the view has been expressed that a different decision might appear if the same problem should arise with a Federal statute at stake.

Settled as this question may seem to be, it is not difficult to see why it keeps bobbing up. Company officers become exasperated by the requirements of laws and supervising officials of a large number of different states. These requirements may be merely troublesome because of conflict between them or because of the

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immense amount of detail that some of them require. On the other hand, they may be unreasonably burdensome, discriminatory, confiscatory, or capricious. Each of these adjectives and many others that sound no better have been repeatedly applied.

State officials have plenty of cause for irritation in their efforts to prevent the operation of weak or unscrupulous organizations that may or may not comply with the laws of their home states. Under such circumstances the first thought is likely to be some control that shall be more sweeping than that of separate states.

Company and state officials frequently resent the activities of supervising authorities of other states when their desire to examine a company seems to have a selfish motive or to reflect upon the good name of the company or the efficiency of the officials of its home state. Pride, like hope, springs eternal in the human breast.

A commissioner of insurance on the other hand has a responsibility with regard to the companies licensed to do business in his state. His legal responsibility may be determined by statutes, but the citizens look to him for protection regardless of statutes. Yet that intangible principle of official politeness called "comity between states," together with its inseparable companions that lay no claim to politeness, retaliatory legislation and retaliatory official action, often place conscientious commissioners in embarrassing situations.

And when we come to an impasse in business life, we are all pretty much alike—we are apt to say: "There ought to be a law." Sometimes it is obvious that a law in a single state cannot turn the trick and then we appeal for Federal help. But this is by no means a complete picture. Facility of travel and communication and contacts of a business as well as a social nature familiarize us with methods of other countries. The insurance business is not only national; much of it is distinctly international. So we read and ask and come to know how other countries handle similar problems. We find that supervision elsewhere is largely on a national scale and this adds to our wonder as to methods here.

Before following this thought further, it may be of interest to review briefly the litigation on this question, to find just what has been involved, what motives have prompted discussion, how attitudes have gradually changed and what would be involved in change of rules of law on this point.

THE LAW

Section 8 of the first article of the Constitution of the United States delegates to Congress "power . . . to regulate commerce with foreign nations and among the several states, and with the Indian tribes." Just after the Civil War some fire insurance companies of New York wanted to find out just what significance this constitutional provision had, if any, with reference to their business. A Mr. Samuel Paul was appointed agent for them in Virginia in the year 1866. He filed his authority from them with the state auditor and applied for a license, offering to comply with all state requirements so far as he was concerned. But the state law required that in order to do business in the state a company must deposit from $30,000 to $50,000 in bonds of specified type with the state—a requirement that did not apply to local companies—and this the New York companies failed to do. Although Paul was refused a license, he proceeded to solicit business and actually completed, for a Virginia client, a fire insurance contract with one of these non-admitted companies. He was convicted and fined $50. Apparently this decision has gone far in determining the method of supervision of insurance companies in the United States.

These New York companies argued through Paul that they, as citizens, were being deprived by the State of Virginia of the right guaranteed by Article IV, Section 2, of the Constitution that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." Furthermore, they contended that they were engaged in interstate commerce and hence that the right of Congress to regulate them made it improper for the State of Virginia to interfere with their business. But the Supreme Court said: "No"; New York corporations are not citizens within the meaning of the Constitution and, furthermore, insurance isn't commerce so it can't be interstate commerce.

And subsequent to that momentous decision of 1868, opinions in a long list of cases that have reached the Supreme Court have consistently quoted it with approval until the expressions *Paul* vs. *Virginia* and *insurance is not commerce* are almost inseparable. Yet many will agree with the statement of Bernard C. Gavit in his treatise "The Commerce Clause": "The expression 'insurance is not commerce' has become almost a classic. There is nothing more to be said for it."

The wonder at first thought is, of course, how can there be so much ado about such a simple matter. Surely it should be possible to find what the word "commerce" means and to distinguish the earmarks of interstate commerce. But no. This has been a contest of over half a century. Wise indeed was the Constitutional Convention in not attempting to define this and many other terms similarly used in the Constitution. Any attempt to enumerate the varieties of commerce at that time must have omitted the telephone, telegraph, and radio. To appreciate the growing pains of a developing idea, it is only necessary to read the opinions in some of these cases that have brought in question the Commerce Clause. Yet the practical fact is that we are bound by these decisions as to what this word "commerce" means. That commerce is more than trade and traffic was appreciated early. Chief Justice Marshall, whose opinions have become classics and have done so much to give direction to our constitutional developments, introduced a word in his discussion of commerce that has proved to be of sufficient generality to ease many unforeseen difficulties,—the word "intercourse." In Gibbon *vs.* Ogden he said: "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."

It is not intended here to present, or even to summarize, the many legal discussions as to what commerce is, or is not; nor shall we try to reach an opinion as to whether or not this term should comprehend the business of insurance. It may be of interest, however, to point out that the real contention of the Paul *vs.* Virginia decision was not the cryptic ultimatum that is so glibly quoted, but rather that the *issuing of a policy of insurance* is not a transaction of commerce. The opinion stated: "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." Little attention was paid to the *intercourse* that is involved in the conduct of an insurance business as contrasted with the final act that brings into being an insurance contract. Yet the decision has carried enormous weight as a precedent in later contests despite the fact that in them the intercourse and traffic involved in a national or international insurance business have been stressed.

POINTS AT ISSUE IN DIFFERENT CASES

It may be of interest and possibly of some value to note the points that have been at issue in some of these insurance cases. As stated above, the question in the case of Paul *vs.* Virginia (8 Wallace 168) was whether or not a foreign fire insurance company could do business in Virginia without making a deposit as required by a Virginia statute; the decision was that Virginia could require this.

In the Philadelphia Fire Association *vs.* New York (119 U. S. Reporter 110) the question was whether or not the State of New York could require the payment of a retaliatory tax from a Philadelphia company if it did business in New York. The decision was that such a requirement was not in conflict with the guarantee of equal rights to citizens, contained in the Fourteenth Amendment to the Constitution.

In Hooper *vs.* California (155 U. S. 648) it was determined that California's law is not in conflict with the Constitution in making it a misdemeanor for a person in California to procure insurance for a resident in the state from a foreign insurance company that has not filed the bond required by the state of companies doing business in the state. Much hinged on the place of contracting; it seems that the contract was completed in California. A dissenting opinion pointed out that the broker was acting for his principal, a brokerage firm of New York, and not for the insurance company, a Massachusetts corporation; that a citizen may employ an agent to do what he can do himself; and that it would be legal for a citizen to procure a policy by mail, or for delivery to be made to him by someone acting under instructions from the company. The majority held that the state law was not a regulation of commerce and hence was not repugnant to the Commerce Clause.

In Allgeyer *vs.* Louisiana (165 U. S. 578) a Louisiana statute was in question that attempted to prevent a citizen from making a contract with a non-licensed company while the citizen was in the state, even though the contract was completed in New York. The Supreme Court overruled this attempt but in so doing reiterated that "there is no doubt of the power of the state to prohibit foreign insurance companies from doing business within its limits."

In New York Life Insurance Company *vs.* Cravens (178 U. S. 389) it was decided that a contract completed in Missouri was subject to the provisions of the Missouri law as to policy provisions regardless of a statement in the policy that it was to be considered a New York contract. The contest was over the amount of a death claim. The company contested the right of Missouri to interfere, on the ground that interstate commerce was involved.

In New York Life *vs.* Deer Lodge County (231 U. S. 495) contest arose over a tax levied by the state of Montana on the excess of premiums paid over losses and ordinary expenses incurred within the state. The company argued that this was a burden on interstate commerce but made no headway. There were two dissenters from the decision, Charles Evans Hughes, and Willis Van Devanter.

Two noted cases that have nothing to do with insurance have been widely discussed as bearing on the point at issue.

The Lottery Case (188 U. S. 321) is the only one here cited in which a Federal statute was in question. The statute was designed to prevent the carriage of lottery tickets from one state to another by common carrier. The Court decided that "lottery tickets are subjects of traffic among those who choose to sell and buy them and that the carriage of such tickets by independent carriers from one state to another is, therefore, interstate commerce"; and that the power of Congress to regulate interstate commerce gave it sufficient authority to prohibit such carriage.

In the other case, International Text Book Company *vs.* Pigg (217 U. S. 91), a correspondence school student of Kansas was sued in Kansas for failure to complete payment according to contract for a course of instruction. Pigg did not deny the indebtedness but contended that the company could not sue in Kansas because it was not doing business there. The company admitted that it was not doing business in Kansas but contended that it could sue there. The Court held that interstate commerce was involved and that the suit could be maintained.

Rationalization

We should expect to find running through the decisions summarized above some of the fundamentals by which our judicial

system helps to keep society on an even keel. The crux of the matter seems to lie in the unexpressed premise that regulation of interstate insurance is desirable and in the fact that at the time of these decisions no Federal regulation existed or had been attempted. A state might be unreasonable about what it expected of an outside company, but such a company should not be footloose just because Congress had not legislated. Otherwise a company might incorporate in a state wherein it expected to do little or no business and thus be subject to no regulation whatever regarding the bulk of its business; society could thus be deprived of official aid in investigating the stability of corporations organized for the purpose of selling promises.

As we see it now, at the time Paul was prosecuted in Virginia, a change to Federal supervision of interstate insurance would not have involved a serious disturbance of established practice. But as the business has grown and state supervision has become more and more thoroughly established, it has been recognized that a reversal of the early decisions would be a serious matter. That the court has given consideration to this is indicated in the opinion accompanying the decision in the case of the New York Life Insurance Company *vs.* Deer Lodge County. The following words are significant:

> "If we consider these cases numerically, the deliberation of their reasoning and the time they cover, they constitute a formidable body of authority and strongly invoke the sanction of the rule of stare decisis. . . .
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> "For over 45 years they (previous cases) have been the legal justification for such legislation. To reverse the cases, therefore, would require us to promulgate a new rule of constitutional inhibition upon the states and which would compel a change of their policy and a readjustment of their laws. Such result necessarily urges against a change of decision."

Here we find ideas expressed that have doubtless had their influence in the germination of many other decisions, even though the records make no such disclosure.

Development of State Supervision of Insurance

Effective supervision of insurance began when Elizur Wright was appointed one of the two commissioners of insurance in the

State of Massachusetts in 1858. In many states the principal purpose of attention to insurance companies has been to collect taxes; it is therefore significant that the start made by Wright in Massachusetts was on quite different grounds. He was interested primarily in developing safeguards for the benefit of the insuring public. He recognized the inability of the individual to acquaint himself with the merits of a particular insurer. He realized how serious was the failure of an insurance promise, especially because that failure would be felt at just the time when the insured could least help himself. He emphasized particularly the plight of widows and orphans when life insurance companies failed.

Here, he reasoned, was a service for which there was a crying need. The importance of insurance in business and social life was growing rapidly; few realized the importance of guiding and controlling it; few realized the danger from well meaning groups of individuals who were being attracted by this newly discovered lucrative activity, but who were quite innocent as to the safeguards necessary for the success of their undertakings. Aside from having an understanding of these matters that was rare at that time, Wright was a persistent, tenacious fighter and an indefatigable worker. However much we may differ with his views, we must admire his insight, his selflessness and his industry; and it is to the eternal credit of the regulation of the insurance business that its beginning was made for the best interests of all and with no thought of fastening on the business unreasonable burdens of taxes and fees or narrow gauged restrictions for the advantage of corporations of particular states.

New York was second to establish an insurance department. This step was opposed by influential companies in 1856 but urged by them in 1859 when the necessary legislation was enacted. Their conversion was due to the finding of the state auditor that six fire insurance companies were insolvent.

In the 60's and early 70's the formation of insurance companies was rapid to the point of recklessness and this led various states to make starts in insurance legislation and supervision. It is an interesting fact that many, if not most, of these states followed either the Massachusetts or the New York precedent, many sections of the laws being copied verbatim from these prototypes. Probably the wide variations that exist to-day in the rules of

supervision in different states is due to arrested development, especially in those states having few local companies.

Growth in Sentiment for Federal Supervision

To return to our principal topic, it was when companies began their feverish expansion to do business in various states that both company and state officials appreciated the complications caused by each state undertaking to supervise all the companies doing business within its borders, whether of local or outside domicile. So, as early as 1865, the commissioners of insurance of both Massachusetts and Connecticut advocated Federal supervision of insurance; and the organization of the National Convention of Insurance Commissioners in 1871 was for the express purpose of seeking uniformity of records and other details of supervision by different states. This was only the beginning. From that time until after the Armstrong investigation, discussion of the question of Federal supervision was almost continuous. It came up many times before the N. C. I. C. For a number of years an insurance magazine entitled "Views," published at Washington, D. C., argued persistently for Federal supervision. A perusal of the issues of this magazine will give the reader about every conceivable argument in support of this proposal.

In 1865 Wright thought that insurance, being of widespread interest, should be secure against the adverse operation of local causes; that simplicity required a national bureau; and that a state could probably not protect itself as well with reference to insurers of other states as it could be protected by the Federal Government. Commenting in 1870 on the Paul *vs.* Virginia decision, Wright said that loss of nationality was a very serious matter and suggested that the guardians of life insurance should bestir themselves to prevent this if possible.

Commissioner William A. Frick of Wisconsin was an ardent advocate of Federal supervision. In his 1895 report he stated that there were many reasons for national regulation and few objections to it. He complained of forty-nine different insurance codes, methods of taxing, and kinds of supervision, and said there was no attempt at uniformity.

While some of the leading state supervisors have favored Federal supervision and have brought their thoughts before the

N. C. I. C. from time to time, it is only to be expected that the idea of states' rights should be strong in the minds of most of these state officials.

In recent years there has been a predominance of this sentiment and it has from time to time been defended in admirable fashion. In 1920 Commissioner Young of North Carolina in addressing the N. C. I. C. expressed the view that Federal supervision would hardly come soon and that when it comes it will be received with no greater favor than that now accorded to state supervision. In discussing Mr. Young's address, Commissioner Mansfield of Connecticut said he thought that Federal supervision would be a good thing if it could be made thorough and efficient and if it should replace state supervision, but he did not think this possible. Superintendent Phillips of New York went further, holding that even if the ideal conditions specified by Commissioner Mansfield should obtain, he would still favor state supervision, that the states would be reluctant to surrender to the Federal Government the power to regulate business within their own territories and that this power should remain in the state.

The remarks of the present Superintendent of Insurance in the State of New York on this subject are worthy of careful attention. In his report to the Legislature dated January 15, 1936, Mr. Pink reviewed the development of insurance supervision, called attention to the interstate character of the insurance business and discussed in some detail, although briefly, the question of Federal supervision. While he said that "in many ways the logic of Federal control is unassailable," he added that "there are important considerations militating against it." Among these were the Supreme Court decisions, the fact that "the insurance industry as a whole is bitterly opposed to Federal supervision," the danger of jurisdictional conflicts, the reluctance of states to give up their authority, and the difficulty of central supervision in meeting local needs.

Legislative Efforts

From time to time Federal officials and legislators have taken an interest in this question. As early as 1871 the Treasurer of the United States reported to the Secretary of the Treasury on

the need of Federal regulation of insurance. In 1892 a bill was introduced in Congress by John M. Pattison, then President of the Union Central Life Insurance Company, that would have created a national bureau with power to license a company doing business in any state, subject to the requirements of its home state and of this bill. This was followed in 1897 by the "Platt Bill" of similar import, but without success.

Congressional initiative appeared in a different way in 1903. As originally contemplated the Department of Commerce and Labor was to have a bureau of insurance. This was supported by the life insurance companies through Mr. Charlton T. Lewis, a member of the Chamber of Commerce of New York, who said in part: "It is simply the needless and obviously superfluous burden of multiplied, unenlightened, and oppressive supervision which we want to do away with." The Committee on Interstate and Foreign Commerce of the House of Representatives went on record in reporting the bill for the creation of this Department as follows:

> "The insurance interests of our country have become so great, and the business of insurance is so essentially a matter of interstate business, and hence largely beyond any effectual control by the State authorities, that your committee has recommended the establishment of a bureau of insurance.
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> "It seems evident that it is time for the national government to take such notice of, and exercise such control over, insurance companies as it may be entitled to under the Constitution, to the extent, at least, of the publication of information of general interest."

President Theodore Roosevelt supported this project and included the following in his message to Congress in December, 1904:

> "The business of insurance vitally affects the great mass of the people of the United States and is national and not local in its application. It involves a multitude of transactions among the people of the different States and between American companies and foreign governments. I urge that the Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance."

But Paul *vs.* Virginia arose to haunt the legislators again and all regulatory power over insurance was stricken from the new bureau.

SUPPORT OF DRYDEN AND KINGSLEY

It seems that between the years 1900 and 1910 sentiment for Federal supervision reached its zenith. A number of leading company executives advocated it, the evidence indicating that their objective was really to be free from the known burden of state supervision under the conditions then existing. Among the most thorough presentations of the issue were those made by presidents of two prominent life insurance companies, Senator John F. Dryden, founder of the Prudential Insurance Company of America and Darwin P. Kingsley, President of the New York Life Insurance Company.

Senator Dryden wrote and talked much on the subject and introduced a bill in the United States Senate in January, 1906, embodying his ideas. In the volume of his addresses and papers entitled "Life Insurance and Other Subjects" are published an address delivered in 1904 before the Boston Life Underwriters Association entitled "The Regulation of Insurance by Congress" and an address at a banquet of the Board of Trade in 1906 entitled "The Commercial Aspects of Federal Regulation of Insurance." The first of these is of particular interest in that, in addition to setting forth Senator Dryden's arguments, it gives a summary of the discussion of the subject reaching back to the early 1860's. Throughout this address Dryden used the method of quoting views and recording the acts of various advocates, although he did not hesitate to state his own opinions. He speaks of overlegislation, conflicting legislation, prohibitory taxation, forced loans and deposits, and unreasonable advertising fees. He mentions Alexander Hamilton's statement in his argument on the constitutionality of the United States bank that not all of the powers conferred in the Constitution are specifically mentioned in it and points out that in his list of "palpable omissions" that would "admit of little if any question" Hamilton included "the regulation of policies of insurance." Dryden's second address above mentioned is more of an argument and less of a history. He calls attention to the enormous growth in the insurance business since the Constitution was adopted, how it has become not only national but international in character, and the centralized control of this business that exists in other countries; in part, he says: "Insurance is to-day, as it has been for centuries, a part of the law merchant of the principal

commercial nations, and in every important country except ours insurance is the subject of regulation by the national or supreme government."

As indicative of the sentiment at that time Senator Dryden records the results of a questionnaire that he sent in 1905 to some 8,000 associations and individuals asking four questions devised to disclose opinion as to Federal supervision. Widespread interest was indicated by the fact that he received 7,454 replies to the question "Do you endorse the suggestion of President Roosevelt that insurance companies engaged in interstate insurance business should be regulated by and brought under the control of the Federal Government?" Of these replies, more than 88% were favorable.

Mr. Kingsley threw his full strength as President of the New York Life Insurance Company into an effort to have recognized the merits of his contentions as to the national character of the insurance business. Two of the outstanding contests on this question that reached the Supreme Court of the United States arose through his company. He wrote and spoke often and forcefully on the subject. In a collection of his works entitled "Militant Life Insurance" are reproduced two such addresses, one delivered in 1909 and one in 1910, entitled respectively "Insurance Supervision and National Ideals" and "Life Insurance and Our Dual Citizenship." The 1909 address is reprinted in "Yale Readings in Insurance" and in the *North American Review* for April, 1909. It is a scholarly study of the Constitution of the United States, giving some interesting sidelights on the difficulties of its adoption and the emergencies it has faced. He reviews the insurance cases that have reached the Supreme Court and discusses the question of whether or not the insurance business is commerce.

In his interesting and valuable book published in 1909 entitled "The Romance of Life Insurance," William J. Graham, now Vice-President of the Equitable Life Assurance Society, included a chapter on life insurance supervision. This is a serious indictment of state supervision as it existed at that time; a statement of the position of the advocates of national supervision; a description of efforts to obtain more nearly uniform state legislation; and a discussion of a plan that was proposed in Congress to strengthen supervision of the District of Columbia over all companies operat-

ing there, as a means of a centralized control over a substantial proportion of the companies that operate widely. Mr. Graham contended that "the policyholders paying to more than forty different States for supervision are humbugged more than forty times" in that they profited by thorough supervisions from not a single state. He spoke of unwarranted dictation and ignorant and prejudiced public officials. This chapter is, however, distinctly constructive in tone and it is gratifying now to realize the advance that has been made since that time through the increased cooperation of state insurance officials that was suggested in Mr. Graham's final sentence as follows:

> "What has made for uniformity and unity of action in the recent past among State insurance departments, largely through the devoted efforts of a few able commissioners, is but an earnest of what can be accomplished in the future."

Several years earlier Miles M. Dawson, noted as the actuarial consultant of the Armstrong Committee, advocated Federal supervision in his book "The Business of Life Insurance." This was in 1905, and he said "Life insurance interests, as a whole, are warmly favourable to National supervision."

Mr. Dawson wrote at length on the development of supervision in Great Britain as well as in this country. He discussed a number of evils that had grown up in state supervision, including unjust and inefficient examinations, the weakness of comity between states when one state is inefficient or worse, use by states of actuaries who are pecuniarily interested in the companies they examine, and conflicting rulings of state officials of the same or different states.

Decline in Sentiment for Federal Supervision

Insurance as an institution has made much progress during the last quarter of a century. It has made strides in volume, and hence in magnitude of service, beyond the wildest dreams of the most confirmed optimists. It has thus belied the prophecies of those who were convinced that a continuation of state supervision would stifle expansion. But state supervision has also made strides; forces of cooperation have been at play that were not contemplated and through these various agencies a confidence has de-

veloped, on the part of the insuring public, in the value of insurance and the integrity of the companies, that could not have been foretold in the year 1910 or earlier.

Insurance has taken root as an essential institution in our modern business and social life and has done so under a regime of state supervision. And so, the pragmatic test has been applied to our crude method of forty-nine different mentors. Our method has worked. And today little is heard in the way of propaganda for Federal control of interstate insurance. Of course, this is not the whole story. There has for long been a spirit of hopelessness as to the possibility of a change in the attitude of the courts; there has been little faith that Federal supervision would replace state interference but rather a fear that it would be merely an added burden; there has been doubt as to the prospect of superiority of Federal supervision. All of these forces have had their influence, but if the business had not prospered as it did up to the time of the great depression, the attitude toward state supervision might have been different.

One of the most recent pleas for government regulation is found in a chapter with that title in "The Story of NYLIC," a book by Lawrence F. Abbott, published in 1930 by the New York Life Insurance Company. In it is repeated a statement by Darwin P. Kingsley made in 1909 as follows:

> "An applicant for life insurance lives in New Jersey and I have a policy on his life ready for delivery on my desk. If I telegraph him about the policy, the message is interstate commerce. If I telephone him about the policy, that is interstate commerce. But if I send the policy itself to him by hand or through the mails or by express, that is not interstate commerce."

The closing paragraph of this chapter states a suggestion that is credited to Theodore Roosevelt and to President Hadley of Yale that life insurance companies be made Federal rather than state corporations.

We are indebted to an address by U. S. Brandt, President of the Ohio State Life Insurance Company, before the American Life Convention in 1933 for a discussion of various aspects of this whole question. His study is sufficiently recent to reflect the relative weight now usually given to different points of view. Anyone undertaking a thorough investigation along this line would do

well to start with Mr. Brandt's article and the bibliography that he appends.

Forces at Play

Testing and Reorganization. Let us now take a look at some of the forces that have saved insurance from the fate predicted for it thirty years ago by those who thought it could not survive under state supervision. In the first place, there can be little doubt that insurance as an institution has profited from the overhauling it received between 1905 and 1910. The criticisms of that period led to a searching of values that produced a distinctly better institution. In many ways insurance had grown up like Topsy. Development had been rapid. Precedents were not available for guidance. Competition was rampant. As a result its foundations were inadequate; its guidance was non-professional; its objectives were commensurate with neither its possibilities nor its responsibilities. As we see it now, insurance could never have had the expansion that it has had and never could have fulfilled its function as it has, had it not been for the rigid scrutiny that was forced upon it thirty years ago.

Cooperation. In the second place, probably nothing has been more important than the development of the attitude of cooperation that has taken place during this period. The N. C. I. C. existed long before. The rapid growth of the business and its national character forced continually increasing cooperation between different states and the mechanism of the National Convention was ready at hand to make this possible. Superintendent Pink speaks in his 1936 Report of the importance of the National Association of Insurance Commissioners and adds: "Without unifying influence the presence of forty-nine independent supervisory bodies within the borders of the United States might well create intolerable situations." And a little later he warns that "if the machinery which coordinates state supervision proves inadequate to bear its load, Federal control in one form or another will probably result."

But the N. C. I. C. has not been alone as a force for coordination or cooperation. Many other national organizations have been

formed during this period. Agency organizations; company presidents' organizations; financial officers' organizations; actuarial organizations; underwriters' organizations; rating organizations;—some of these existed before but all of them have learned much about cooperation during the last thirty years and many of them have cooperated in one way or another with state supervising officials and with the N. C. I. C. One of the most potent organizations is the Committee on Blanks of the N. A. I. C. This Committee not only welcomes suggestions from companies, but also welcomes the presence of company representatives at many of its meetings.

And right here is the place to mention the substantial number of shifts of individuals from company service to state service and vice versa. State laws have at times put a curb on such transfers —and with reason—but there is much to be said for them. There are many leading company officers to-day who served for years in the capacity of state supervisors. While there may be dangers in this shifting, there are also values in it. If a conscientious state employee enters company service, he is bound to carry with him training in the rules of the game that are necessary for the best interests of all concerned; and the effect will surely be all to the good for the conduct of the business.

Uniformity. To obtain a high degree of uniformity in the laws, rules, and practices of different states is at once very important for the comfort of insurance companies and their clients, and very difficult for the insurance supervisors. As a rule the commissioner of insurance is a political appointee and his official life is usually very short. It is, therefore, difficult for a good man to have a lasting influence and easy for political considerations and personal ambitions to interfere with efforts to bring the laws and practices of a particular state in line with those of others. A few states have large enough insurance businesses to have built up strong permanent organizations in their insurance departments; but this is not true of many and, besides, size is by no means a guarantee of quality. All states have equal votes in the National Association of Insurance Commissioners and ambition leads representatives of all states to seek prominence in the Association's deliberations.

The wonder is that the Association has been able to make the headway and to command the respect that it can rightly claim.

One of the most promising prospects of uniformity appears through the cooperation of the American Bar Association. This organization has formulated an insurance code and has suggested its enactment by various states that have recognized the need for a revision of their codes.

Possible Shortcomings of Federal Supervision

In the main the advocates of Federal supervision have been trying to get away from something—the troubles of state supervision—and have probably not analyzed thoroughly the troubles that might beset them under Federal supervision. The common conviction to-day is that there would be no assurance of freedom from state supervision even if the Government stepped in. This was pointed out by Mr. Brandt and again by Superintendent Pink in his 1936 Report to the New York legislature. The usual suggestion has been supervision by the state of domicile and by a Federal bureau, but not by other states. Another suggestion is that of Federal incorporation; a third is extension of the supervision exercised by the Insurance Department of the District of Columbia.

To simplify the discussion, consider for a moment the situation under Federal incorporation. There would be no state supervision at all unless it be to the extent necessary to collect taxes. Here we must meet squarely the question—what are the relative dangers of drastic legislation by states and by the Federal Government? Is it better to deal with forty-nine supervisors, any one of whom may spring a surprise at any time, or to deal with one unit and take the consequences of its decisions applying, as they would, country-wide? The choice is not an easy one. Insofar as we must experiment, there is much to be said for experimentation in small units. On the other hand, it would be far simpler and advantageous in some other respects to have one set of rules, even though we might recognize them as second rate, rather than to have many different sets, each of which might be superior in some particular.

Again, many questions can be handled more expeditiously and probably more intelligently by local officials with a background of long acquaintance than by a distant bureau at Washington. Of course, this argument is partly answered by the prospect that

under Federal supervision a large number of district offices would be necessary.

Turning now to the possibility of Federal supervision in addition to state scrutiny, we reach the acme of the undesirable from the standpoint of the companies. The reason given by Superintendent Pink for the "bitter opposition" of the insurance industry to Federal supervision, was fear of "the superimposition of another regulatory body without the abolition of the existing state agencies." Conflict of jurisdiction would probably creep in. Additional, not substitute reports, would probably be required, and examination difficulties might be even greater. But this is highly speculative; until some details of prospective division of responsibility are known, it is idle to draw conclusions. It is the common view that barring a revamping of the whole of our taxing methods, it will be extremely difficult to obtain Federal control over taxation, to obtain uniformity in taxation by states, or to prevent taxation by municipalities. This is one of the most serious menaces confronting the institution of insurance to-day.

Present Status

Some features of the present status may be stated briefly. Others are very difficult to analyze. It is quite clear that insurance companies are not now seeking Federal supervision. No prospect is seen of reversing Paul *vs.* Virginia; there is no hope of obtaining freedom from state restrictions; there is a fear that Federal rules might be worse.

State insurance officials are representatives of their states first and philosophers second. Occasionally one of them favors Federal control or fears it as a consequence of faults in present methods. But, as a rule, state officials advocate the continuation of the powers they exercise. Yet these state officials have frequently asked that control of the mails be invoked to help them solve their problems.

Repeatedly it has been said in recent years that state supervision is on the defensive. While insurance weathered the depression far better than did other financial institutions, there were failures and losses. These failures disclosed weaknesses in state supervision. They also disclosed that individual states are not equipped to

handle liquidation of national businesses either economically or expeditiously. Regarding such liquidations Superintendent Pink wrote in his 1936 Report: "The result has been disastrous. Delinquent companies have been subject to different handling and different theories in dozens of different states. Confusion has been widespread and untold amounts have been wasted."

Here again the tendency is to fly to a remedy that we know not of, not with a definite prospect of perfection that we can visualize in it, but rather because it is a short-cut to uniformity, and cures ills of which we are all too conscious. Yet better judgment counsels of the danger of going from the frying pan into the fire; and suggests, not abandonment of efforts at reform, but caution in preliminary analysis before embracing a particular remedy.

Certainly we can all agree that if it were conceivable that the United States were starting to-day with its present social, economic, and industrial development, there is no reason to think that states would be laid out as they now are and that insurance, among other things, would be conducted and controlled as it now is. But in our theorizing we are too apt to ignore the historic roots of our institutions. No more serious error can be made. The fact is that we have state supervision and that the present rules and customs are the results of more than half a century of evolution—the results of that long period of conflict and cooperation, competition and combination, selfishness and altruism, enlightenment and ignorance. While certain principles have become established, we should think twice before attempting to transplant them bodily into a Federal system. That a Federal system might appear full blown overnight and function satisfactorily is beyond the realm of reasonable expectation.

We cannot ignore our background; the part of wisdom is to build the new onto the old. This may be poor policy in building skyscrapers, but if the experiences of history teach anything, it is that evolution is better than revolution and that social, economic, and industrial institutions had better change by adding to the old rather than by destroying it and starting anew. When we look at Europe to-day, Great Britain stands out clearly as the most stable among the larger nations. And among the most characteristic features of British institutions—possibly even to a fault—is the building of the new onto the old.

Comity Between States

Comity is somewhat difficult to define but is nonetheless real. In insurance matters it seems to be as important to-day as it was half a century ago. Whether a state be highly developed industrially or predominantly agricultural, whether it be large or small, populous or sparsely peopled, and whether or not it be the domicile of extensive insurance interests, the insurance commissioner is a self-respecting adult ready to defend the dignity of his office and of his state. He may know nothing about the valuation of the liabilities of a company, but he accepts the statements of other commissioners regarding their companies and feels that they in turn should accept his statements regarding his own companies. He may have little conception of the meaning of many of the items in an annual statement, but he accepts the audit made by other states of the records of their companies operating in his state, and these other states should, in comity, accept his audit of his home companies. He accepts the reports of examination of other commissioners regarding their companies operating in his state and they should rely on his inspection of the companies of his state.

This is called comity between states. It has a deep seated basis in the mutual respect that individuals should show to one another. So long as it remains on this plane it is admirable although it can easily go too far. But fundamental weaknesses are involved. In the first place, comity is an essentially unstable concept because it so readily degenerates into retaliation. One rule says, I will bring up my own children in the way they should go and shall have faith in the training of yours. The other says, if you spank my children, I will spank yours.

In the second place, and far more important from the standpoint of the insuring public, it is unsound to assume that approval by home state officials is sufficient guarantee that a company will be acceptable to another state. Some states have given far less attention to the safeguarding of the insurance business than have others. The very volume of insurance transactions has forced some states to give a great deal of thought to these matters for half a century. In others the same attention would have been quite indefensible because of the insignificance of the volume of business. Yet comity is based on the assumption that these two

states are equally competent in regulating the business for the protection of the insuring public.

This is far from a simple problem. The interplay of personalities of mature adults is involved. Self-respect, pride, training, selfishness, and fear of the unknown all have their influence. Neither magnitude of transactions nor length of experience can replace native intelligence or a sense of fair play; and selfishness and personal ambitions know no geographical limits. Furthermore, it is extremely important in a national business that, regardless of the strength of an insurance corporation and the idealism of its leading officials, that corporation will be judged in a particular locality by its representative there. Neither the high character of the company nor the high standing of the insurance laws or supervision in the home state is a guarantee of either the ideals or the fitness of this representative. In case of difficulty, whether the home state, the home office, or the local representative is in the wrong is of little interest to the parties affected. All of these considerations have their bearing and give point to the contention that comity should be practiced.

But the dominant motivating force that makes for comity is fear of retaliation. State A may have a dozen strong companies doing a large business in State B, while State B has one company doing a comparatively small business in State A. But if State A tries to bring the company of State B to a high standard of performance, the companies of State A may find themselves in difficulty in State B. Their policy forms may be found unsatisfactory; some accounting detail of the annual statement may need modification; agents may be unable to qualify or their authority may be delayed; a troublesome tax law may be uncovered; or the commissioner of State B may find it necessary to examine each of the companies from State A at great expense and inconvenience to them. And the alternative may be to allow the company of State B to operate in State A as it sees fit.

This serious problem seems inseparable from our method of supervision by states. It has persisted through the years. Probably no year goes by without the threat of retaliation on the part of some insurance commissioner who is peeved because another commissioner has failed to respect the principle of comity to the extent that the first thinks he should. The tendency is clearly to

lower the standards of supervision of all states to that of the lowest. Fortunately there are counteracting forces, some of which have already been mentioned. Probably most hopeful are efforts at cooperation and uniformity and to this end the various activities of the N. A. I. C. are invaluable, resulting as they do in acquainting the state commissioners with each other and in encouraging them to counsel with each other regarding common problems.

Limitations on Use of Mails

Developments of recent years have brought into prominence a suggestion for Federal regulation that was not contemplated in the earlier discussions of the alternatives of state or Federal supervision—the possibility of limiting the use of the mails. This has resulted at least in part from improvement in methods of communication and the consequent facility in solicitation other than by personal contact. Improvements in printing, devices for cheap duplication and addressing of letters, mechanical methods of mailing, increased advertising in magazines and newspapers, the freer use of the telephone and telegraph, improvements in postal service, and finally the radio—all these have contributed to the increased volume of solicitation otherwise than by agents. They are means by which a corporation can reach prospects in any part of the country and are unrelated to requirements for doing business in the various states. They have been used to an increasing extent in recent years by "fly-by-night" outfits that all respectable individuals and organizations desire to see exterminated. But the difficulty is that the same means of communication are being used very extensively by corporations, fraternal benefit and mutual aid societies, and many other organizations of a wide variety with motives quite as admirable as those of any corporations that do business by means of personal representatives.

It is also recognized that regardless of the means of original contact with prospects, the bulk of the intercourse in the operation of an insurance business, other than industrial, is by use of the mails. We already have laws devised to close the mails to socially undesirable commodities, such as lottery tickets and obscene literature, so that we think immediately of using this weapon against the activities of organizations that seem to menace the general welfare. But as yet we have been baffled as to procedure because

every suggestion that has been made has been considered oppressive to large numbers of eminently respectable organizations.

At least three devices have been suggested in bills proposed for congressional legislation in recent years. These involve closing the mails except to those:

(a) with Federal license;
(b) with state license where mail is addressed; or
(c) with agents appointed for service of process in states where mail is addressed.

None of these bills has as yet been enacted but their introduction is significant. Some of them have been suggested by state insurance officials, and others have been backed by them—not with any thought of decreasing state authority, but rather with the conviction that Federal assistance is needed by the state officials in curbing the activities of unscrupulous and unsound organizations. The most extensive discussion of these questions that has appeared in print is the record of hearing before a Subcommittee of the Committee on the Post Office and Post Roads of the House of Representatives with reference to a bill, H.R. 6452 submitted to the Seventy-fourth Congress, first session. The hearings were held in March and April, 1935.

This record will probably convince a reader that the bill in question was formulated without due regard to, and probably with only sporadic knowledge of, the ramifications of non-agency insurance activities, both competitive and otherwise. Congress is especially sensitive to the welfare of uncommercialized mutual undertakings and it seems probable that no hasty action will be taken to the detriment of substantial legitimate interests. It would be unfortunate if legislation should place insurance ventures in a strait-jacket that would make impossible the institution of new methods or new combinations of old methods of providing desirable coverage.

SUMMARY

In the beginning supervision of insurance appeared in states; most companies had only local ambitions when incorporated; need for a minimum of supervision was recognized early; the Federal Government was not and should not have been interested, so the states stepped in.

As the business grew and as companies expanded, national interest appeared; in considering the right of a state to enforce special requirements on companies of other states, the Supreme Court declared in 1868 that insurance is not commerce; this decision has been reiterated in later cases. Constitutional lawyers have for many years questioned the decision and the arguments that supported it, but the decision stands.

As the complications of state supervision grew, so also did the propaganda for Federal supervision. At the time of the Armstrong investigation, sentiment seems to have been distinctly favorable to this change, but all efforts at legislation to institute Federal supervision were rejected by the judiciary committees of Congress so that no Federal act with this objective has ever appeared.

The rapid growth of the insurance business since the year 1910 or thereabouts has brought with it increasing cooperation between states and between company and state officials; this has resulted in increased uniformity in state laws and practices, and hence in less irritation because of conflicts in supervisory rules. At the same time this development has necessarily meant the expansion of the work of state insurance departments, has shown insurance to be a lucrative and stable source of taxes for the different states, and has developed a sense of vested interests on the part of state officials in this supervision. The result of all this to-day is that there is no well defined interest in Federal supervision; there is no hope of avoiding state supervision; there is no hope of limiting the freedom of each state to tax the business as it sees fit. Briefly, we have lost the early conviction that Federal control was a panacea for all ills and along with it the hope that state taxes and the details of state supervision might be eliminated. And so, insurancewise, the conviction has grown, not only that we must, but that it is probably best that we should, build the future on the structures of the past.

In recent years the Federal Government has been asked to supplement state supervision by closing the mails to undesirable concerns, but as yet without success. It is not now clear how this can be accomplished within constitutional limitations and without the danger of doing more harm than good.

At present we seem reconciled to state supervision despite the fact that fundamental difficulties inhere in comity between states and the related dangers of retaliation. During the past half century, we have become accustomed to these conditions and have learned how to minimize their effects. Our present hope rests largely on the advances that have been and are being made in uniformity in laws and procedures and in cooperation between states.