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Thomas Porter Hardman
West Virginia University College of Law

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DOES THE "BONE-DRY" LAW PROHIBIT THE INTERSTATE TRANSPORTATION OF INTOXICANTS BY THE OWNER FOR PERSONAL USE?

By Thomas Porter Hardman*

It has been recently held by the Federal courts, sitting in West Virginia Districts,¹ that interstate transportation of intoxicants by the owner for personal use is not interstate commerce, and, therefore, not prohibited by the so-called "Bone-Dry" Law.² But inasmuch as there are at least two prior decisions squarely contra,³ and apparently none in accord, it would seem proper, in view of the far-reaching effect of these recent decisions, to examine the soundness of their conclusions.

What, then, is commerce, or rather what is commerce in the sense in which that term is used in the Constitution? The specific aspect of this question as it arose in the principal case was whether the owner of intoxicants who personally carries the same from one state to another, not for purposes of trade but for personal use, is transporting intoxicants in interstate commerce. The court held that such a transaction is interstate transportation as distinguished from interstate commerce, the reason assigned being that the term commerce "necessarily connotes" a business transaction. The only authority cited is Webster's Dictionary; but even if it is admitted that the ordinary dictionary definition of the term does not cover such a transaction (which, however, is not admitted), still it does not follow that such a transaction is not commerce in the sense in which that term is used in the Constitution. Doubtless, a lexicographer might not think that a person simply walking across a bridge from one state to another is engaged in interstate commerce, nor does such a transaction come within that part of the die-

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¹United States v. Mitchell, 245 Fed. 691 (S. D., W. Va. 1917). The other case, from the Northern District of West Virginia, is unreported. Hence, the reported case will be herein referred to as the principal case.

²Act March 3, 1917, c. 162, § 5, 39 STAT. 1069. Whether this Act could be construed to extend only to transportation by mail is a point not mentioned by the court, and, hence, no opinion is herein expressed upon that point.

tionary definition which is quoted by the court, but the Supreme Court of the United States has definitely decided that such an interstate passage is commerce in the constitutional sense, and that, too, apparently, irrespective of the "commercial" or "non-commercial" purpose of the persons so passing. Does the term commerce, then, in the sense in which it is used in the Constitution, "necessarily connote" a so-called "commercial" or business transaction? It was argued in the leading case on interstate commerce (the argument doubtless being based largely on the lay conception of the term) that commerce was confined to traffic, but Mr. Chief Justice Marshall, speaking for the court, irrefutably answered the argument in an elaborate opinion which has ever since been regarded as the starting point on every question of interstate commerce. Said the learned Chief Justice:

"The counsel for the appellee would limit it [commerce] to traffic, to buying and selling, or the interchange of commodities . . . . [But] 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 . . . . The mind can scarcely conceive a system for regulating commerce . . . which shall . . . be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."

If, then, as the Supreme Court has repeatedly held, the term "commerce" as used in the Constitution, "is a term of the largest import," and cannot be restricted "to one of its significations," it becomes important to ascertain what the "largest import" of the term is—what "its significations" are. According to the best authorities, including Webster's Dictionary cited by the court in the principal case, the word commerce has two principal "significations": (1) business intercourse, and (2) social or personal intercourse or communication. Moreover, this latter signification was the more widely developed in the early use of the word commerce and has ever since been quite common. Furthermore, it may be appropriately observed that the word commerce comes from the

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4Covington, etc. Bridge Co. v. Kentucky, 154 U. S. 204 (1894).
6At p. 189. Italics ours.
8Gibbons v. Ogden, supra.
9See CENTURY DICTIONARY AND ENCYCLOPEDIA; and WEBSTER'S NEW INTERNATIONAL DICTIONARY.
Latin word commercium which, like its English derivative, has a double and very comprehensive meaning: (1) commercial or business intercourse, (2) non-commercial intercourse or communication.\(^\text{10}\) For example, the Romans spoke of a social exchange of letters as commerce (commercium),\(^\text{11}\) and, in fact the word commerce is still sometimes used to convey that meaning or similar meanings.\(^\text{12}\) The derivative word "commercial," however, has been confined to only "one of the significations" of the root word commerce, viz., to business transactions; and doubtless it is partly to this conception that the holding in the principal case must be attributed. But the power given to Congress was to "regulate commerce," not to "regulate commercial transactions." Therefore, to use again the language of Mr. Chief Justice Marshall,\(^\text{13}\) the holding in the principal case, if correct, would "restrict a general term, applicable to many objects, to one of its significations," but such a restriction the great expounder of the Constitution held could not be made.

Such being the "large import" of the term, the next important question is whether in giving Congress the power to regulate interstate commerce the broad purpose, comprehending the evil sought to be remedied, is necessarily confined to purely business or so-called "commercial" transactions. "It is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."\(^\text{14}\) Prior to the adoption of the Constitution the states imposed different import and export duties, which, of course, resulted in exceedingly vexatious state regulations and restrictions. Hence, the general purpose of the commerce clause was, broadly speaking, to prevent interference by a state with the free interstate transportation of persons or property.\(^\text{15}\) Doesn't this purpose, then, cover transactions like that in the principal case? It is difficult to see why it does not, for if such interstate transportation is not interstate commerce then one wishing to transport his own property for personal use from, say, New York to San

\(^{\text{10}}\)See Harper's Latin Dictionary.

\(^{\text{11}}\)Id. See also, Seneca, Epistolae, 38, 1: "Merito exigis ut hoo inter nos epistolarum commercium frequentemus."

\(^{\text{12}}\)See e. g., Emerson, Friendship, and Century Dictionary.

\(^{\text{13}}\)In Gibbons v. Ogden, supra.

\(^{\text{14}}\)County of Mobile v. Kimball, 102 U. S. 691, 697 (1880).

\(^{\text{15}}\)See 24 Harv. L. Rev. 230.
Francisco might be subjected to all sorts of "conflicting and discriminating state legislation." For instance, suppose that A has a pleasure car which he never uses for "commercial" purposes and he wishes to drive it from New York to San Francisco for purely pleasure purposes. Could each state tax him for the mere privilege of crossing the state line? Or could the interfering states put prohibitive taxes on the flask of brandy which he carries in his pocket for the purpose of using in case of accident? It would seem clear that such transactions fall within the general purpose of the commerce clause and, hence, constitute interstate commerce. To hold so would neither do violence to language, nor violate legal principle, but would not only effectuate justice, but be in harmony with every definition of commerce that has ever been propounded by the highest court of the land. Thus, the most generally accepted definition of commerce is the one laid down by the United States Supreme Court in County of Mobile v. Kimball, and repeated verbatim in numerous subsequent cases:

"Commerce . . . . 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."

Perhaps the most satisfactory judicial exposition of the term is the one recently quoted with approval by the United States Supreme Court in International Textbook Co. v. Pigg. Said the court:

"Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing . . . . which contemplates and causes such importation whether it be of goods, persons or information, is a transaction of interstate commerce."

The omitted words are, "between citizens of different states," but it seems quite clear that diverse citizenship has nothing to do

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23 The term definition is here used in its strict sense and does not include a mere description of what is commerce in a particular case. Thus, the Supreme Court has said that "transportation for others as an independent business is commerce irrespective of the purpose" of the transportation. Hanley v. Kansas City, etc. Co., 187 U. S. 617, 619 (1903). But the court did not say that transportation not for others as an independent business is not commerce. This passage is further explained below.

24 Supra. Italics ours.

with commerce; and besides, the Supreme Court has held recently that transportation by the owner for himself, i.e., transportation not "between citizens of different states" may be commerce. In other words, as it was more concisely expressed by the United States Supreme Court in *Railroad Co. v. Husen*: "transportation is essential to commerce or rather it is commerce itself," i.e., commerce in the constitutional sense is simply transportation (including transit and transmission) of persons or things. Moreover, this conception of the term commerce, viz., as simply transportation of persons or things, seems to be carried out by the unbroken current of Supreme Court decisions. Thus, Mr. Justice Holmes, speaking for the United States Supreme Court, has said:

"Transportation for others, as an independent business, is commerce irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."

It is true that the learned justice says transportation for others is commerce, irrespective of the purpose, but the case was a case dealing with transportation for others, and a judge usually and wisely confines his language as nearly as possible to the facts of the case. Besides, the same learned justice, speaking for the same court, has subsequently held that the fact that the transportation is by and for the owner of the thing transported (that is to say, the fact that it is transportation not for others but for the transporter himself) does not prevent the transportation from being interstate commerce. Hence, it would seem to follow that interstate transportation is interstate commerce, irrespective of the purpose of the transportation or of the person for whom or by whom the transportation is performed.

This view, moreover, is strongly supported by two recent decisions of the United States Supreme Court, both under the White Slave Traffic Act. In the first case it was said in effect that a woman was engaged in interstate commerce if, unsolicited and unaided by the man, she went from one state to another for the immoral purpose prohibited by the Act. In the second case the

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19 The Pipe Line Cases, 234 U. S. 549 (1914).
22 *The Pipe Line Cases*, supra.
23 *United States v. Hulte*, 236 U. S. 140, 145 (1915). Lamar and Day, JJ., dissenting, one reason for the dissent being that such transit would not be interstate commerce.
accused was indicted for transporting a woman in interstate commerce, for immoral purposes, etc. The transportation, however, was not for a "commercial" purpose, i.e., not for purposes of profit, as the woman was simply to become the unpaid concubine of the accused; and it was accordingly contended that the Act could only extend to "commercialized vice" as otherwise the transportation would not be interstate commerce. The Supreme Court held, however, that the transportation was commerce,24 i.e., the transportation was commerce in the constitutional sense though it was not a transportation for a commercial purpose. From the two cases, therefore, it would seem to follow that if the woman, unsolicited and unaided by the man, had traveled from the one state to the other for the purely personal "non-commercial" purpose involved in the second case, such transit would be commerce in the constitutional sense. It would seem to follow, therefore, that the transportation in the principal case was interstate commerce and that commerce, in the sense in which it is used in the Constitution, is simply transportation, irrespective of the purpose of the transportation or of the ownership, if any, of that which is transported.

Furthermore, apart from appropriate congressional legislation, such as now exists, it is settled law that a state cannot prevent a person from importing (through another) intoxicants for his personal non-commercial use, the reason being that such importation is interstate commerce.25 But if the principal case is correct the state could without such congressional legislation prevent him from personally importing it into the state. In other words, if the principal case is correct, then what is admittedly commerce if done by an agent ceases to be commerce if done by the principal himself. But such a conclusion seems absurd, for certainly the essential nature of a transportation is the same whether it is done by the principal himself or by his paid agent. As bearing upon this point the following observation of the United States Supreme Court may be mentioned:

"The means of transportation . . . does not change the character of the business as one of commerce . . . . . . . . The grant of power [viz., "to regulate commerce"] is general in commerce, See particularly the last paragraph of the dissenting opinion at p. 150, and the majority opinion at p. 145.
its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted . . . . whatever be the instrumentality by which it is carried on." 28

In accord with the view herein expressed is the well-reasoned opinion of the Supreme Court of South Carolina in a case in which the facts were substantially the same as in the principal case but the conclusion reached was squarely contra. In that case, State v. Holeyman, 27 the defendants had purchased liquor in North Carolina and had transported it in their own buggy into South Carolina, for their own personal use. The court, however, held that the transportation was interstate commerce although it was a transportation by the owner for a non-commercial purpose. Said the court:

"This brings us to a consideration of the principal element of interstate commerce in this case, to wit, the transportation of the liquor. At the time the United States Constitution was adopted the vehicles for the convenience of travel and common carriage were insignificant as compared with those of the present day, and the transportation of merchandise from one state into another was to a great extent conducted under the supervision of the purchaser and in vehicles belonging to him. The right under the Constitution to transport merchandise was guaranteed to him [i. e., free from state interference but subject of course to the power granted to Congress to "regulate" the transportation]; but, for convenience, this right which was primarily in him might be exercised through agents who undertook to deliver the goods to him at their destination. . . . . . Can it be contended for a moment that, if the defendants had employed men to transport them and their liquors to their homes in South Carolina in buggies, the liquor, although it was in the possession of the defendants when they crossed the state line, would have been subject to seizure before it reached its destination? [That is, if it was interstate commerce, the state, prior to the present congressional legislation (as the U. S. Supreme Court held it to be interstate commerce28), could not seize it] . . . . . . . . . . . . . . . . . . . It would be anomalous to hold that, if the defendants had transported the liquor through an agent, it would have been protected [as interstate commerce] until it reached its destination and was delivered to the consignee, while, if the defendants themselves undertook to transport the liquor, it was subject to

27 Note 3, supra. Italics, in the quotation, infra, ours.
26 Vance v. W. A. Vandercook, supra.
the laws of the state [i.e., not interstate commerce] as soon as it came within its borders. It would be the exercise by an agent of greater powers and the enjoyment of larger privileges than those possessed by the principal, which cannot be done."

In another rather recent case, *Alexander v. State,* the accused had personally carried liquor into the state for his personal use, but the court did not hesitate to hold the transportation interstate commerce, although it was, as in the principal case, a transportation by the owner for a non-commercial purpose. Said the court:

"Under the Constitution of the United States and the decisions of the Supreme Court of the United States it is clear that... such shipments [viz., by the owner himself for his personal use] constitute interstate commerce... . . . The exact language of the Supreme Court of the United State is as follows: "Equally established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress... . . . The right of persons in one state to ship liquor into another state to his residence for his own use is derived from the Constitution of the United States and does not rest on the state law."

Most text-writers have wholly ignored the point raised in the principal case and do not cite either *State v. Holleyman* or *Alexander v. State.* The holding in *State v. Holleyman,* however, is set out, apparently with approval, in Cooley's *Constitutional Limitations.* And Prentice and Egan state unqualifiedly but without authorities to support the proposition, that "the Federal power extends over all travel and transportation among the states, whether conducted for purposes of trade or not."

In the light of the authorities, therefore, and upon general principles, it would seem safe to assert that interstate transportation is interstate commerce, irrespective of the purpose of the transportation, and irrespective of the person by whom or for whom the transportation is performed. Thus, the Supreme Court of the United States has held that a person walking across an interstate bridge is engaged in interstate commerce. Said the court:

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30Note 8, supra.
31From Vance v. W. A. Vandercook, supra.
327th ed. at p. 848.
33The Commerce Clause of the Federal Constitution, at p. 44.
34Covington, etc. Bridge Co. v. Kentucky, supra, at p. 218.
"The thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise . . . . ."

But just as truly thousands of these thousands who cross do not cross and recross for so-called commercial purposes. Are, then, the thousands who cross for pleasure or non-commercial purposes to be distinguished in this respect from those who cross for so-called "commercial" purposes? If so, the Supreme Court does not draw any such distinction and such a distinction would be wholly impractical and practically unenforceable. If there is such a distinction then the state regulation in the case before the Supreme Court would have been valid as to those crossing for non-commercial purposes for that would not be interstate commerce, but invalid as to those crossing for commercial purposes. But the court drew no such distinction. To make such an unworkable distinction would be to invoke an impractical technicality, whereas it has been laid down by the United States Supreme Court that commerce "is not a technical legal conception but a practical one." To somewhat the same effect the Court of Appeals of New York has recently held that

"It is not practical in determining the application of the Federal or the state law to distinguish between the transportation of supplies from one state to another for the carriers' own use and transportation of merchandise for sale or exchange."

Accordingly it is submitted that it is not practical to draw any distinction between transportation by the owner for so-called "commercial" and transportation by the owner for so-called "non-commercial" purposes; that each is commerce in the constitutional sense, that to hold so does violence neither to language nor to legal principle, but rather gives full effect to the "largest import" of the term commerce, enables Congress to regulate evils which would seem to fall clearly within the general purpose of the commerce clause; and finally not only effectuates complete justice, but at the same time avoids the adoption of a wholly unpractical, technical and unnecessary limitation to a just and practical general rule.

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Per Mr. Justice Holmes in Swift & Co. v. United States, 198 U. S. 375, 398 (1905).