IN THE

# Supreme Court of the United States

**CHARLES F. CHAMPION,**
*Appellant,*

*vs.*

**JOHN C. AMES, United States Marshal,**
*Appellee.*

**Number 360.**

**Appeal from the Circuit Court of the United States For the Northern District of Illinois.**

# BRIEF OF APPELLANT.

## STATEMENT OF CASE.

On May 9, 1899, a complaint was made by G. H. Voss, before Lewis F. Mason, a United States Commissioner, at Chicago, charging appellant, C. F. Champion, W. F. Champion and Charles B. Park with conspiring to commit an offense against the United States, to-wit: For the purpose of disposing of the same, to cause to be carried from Dallas, Texas, to Fresno, California, certain papers, certificates and instruments, purporting to be, and representing tickets, chances, shares and interests in, and depending on the event of a lottery thereafter to take place, and offering prizes dependent on lot or chance; that said papers, certificates and tickets were deposited with, and carried by the Wells, Fargo

Express Company, a corporation engaged in carrying freight and packages over railways from Dallas, Texas, to Fresno, California, for hire. (Rec., 8-13.) Attached to and made a part of said complaint, are—

*First.* The indictment of the Grand Jury for the Northern District of Texas, being an indictment charging C. F. Champion, W. F. Champion and C. B. Park with substantially what they are charged in the body of the complaint. (Rec., 14.)

*Second.* The record of the case of *United States of America, appellant,* v. *C. F. Champion, appellee,* filed in the Circuit Court of Appeals of the Seventh Circuit. (Rec., 34 to 110.)

On the hearing of the said complaint, appellant, C. F. Champion, who was the only defendant arrested at Chicago, was ordered by said United States Commissioner to enter into a recognizance in the sum of $1,000 for trial before the United States District Court of Texas, at the next January term; in default of bail he was remanded to the custody of the Marshal. (Rec., 7.)

Thereupon he sued out a writ of habeas corpus before Judge Kohlsaat of the District Court, and said writ was made returnable before Judge Jenkins of the Circuit Court. (Rec., 1 to 7.)

The United States Marshal returned said writ, simply reciting that he had the petitioner in custody June 22, 1899, by virtue of the commitment of United States Commissioner Mason, and that the petitioner was subsequently (that is, between the issuance of the writ and the date of the Marshal's return) bailed by order of court. (Rec., 111.)

On the hearing of said petition by Judge Jenkins, it was adjudged that the writ be discharged and the petitioner remanded to the custody of the Marshal.

Champion thereupon perfected his appeal to this court.

In the court below both counsel for petitioner and for the Government argued the sufficiency of the evidence before the Commissioner, and the court in its opinion also passed upon the weight of the testimony. Since making up the record, however, a more careful investigation of the authorities has convinced us that the sufficiency of the evidence was a question for the Commissioner, and one which the court could not properly go into on *habeas corpus,* and hence this court, in its consideration of the case, can eliminate from the record all of the testimony and accompanying exhibits, and confine itself solely to the constitutional question raised by the petition.

The second and third paragraphs of the petition are as follows:

"*Second.* The offense which it is alleged in said indict-
"ment your petitioner and said other accused persons con-
"spired to commit, to-wit, the violation of section 1 of the
"act of Congress passed March 2d, 1895,—2 Supp. Revised
"Statutes United States, page 435,—is not such an offence
"as the Congress of the United States had the right to
"create, and that Congress exceeded its power in passing
"the said statute, in that such power was not conferred upon
"Congress by the Constitution of the United States, and such
"statute is null and void.

"*Third.* The statute last above mentioned, which created
"the offence which it is charged by said indictment and said
"complaint last filed before said Commissioner Mason, your
"petitioner, and said other accused persons, conspired to
"violate, is unconstitutional and void and contrary to the
"first amendment to the Constitution of the United States,
"in that the same abridges the freedom of the press." (Rec., 5.)

That the constitutional questions were fairly raised and argued, appears from the certificate of Judge Jenkins. (Rec., 122):

"I, James G. Jenkins, one of the judges of the Circuit "Court of the United States for the Seventh Judicial Cir- "cuit, do hereby certify that upon the hearing of the above "cause the construction and application of the first amend- "ment to the Constitution of the United States was fairly "raised by the petition of said petitioner for a writ of *habeas* "*corpus,* and was argued upon the hearing of the same, and "was by me determined.

"And I do further certify that the application of clause "3 of section 8 of article 1 of the Constitution of the United "States was fairly raised by the petition of said petitioner "for a writ of *habeas corpus,* and was argued upon the hear- "ing of the same and was by me determined.

"And that the power of the Congress of the United States "to pass section 1 of the act of March 2, 1895, 2 Supp. R. "S. U. S., 435, was fairly raised by the petition of said peti- "tioner for a writ of *habeas corpus,* and was argued upon "the hearing of the same, and was by me determined.

"And that the constitutionality of section 1 of the act of "March 2, 1895, 2 Supp. R. S. U. S., 435, was involved in "said above cause, and was argued by the respective counsel "upon the hearing of the same, and was by me determined."

The sole question, then for determination, is whether so much of Section 1 of the Lottery Act of March 2, 1895, as prohibits the sending of lottery matter and lottery advertisements from one state to another, by means other than the mails, is invalid because not authorized by, and in violation of the Constitution of the United States.

## Assignment of Errors Relied Upon.

1. By the record aforesaid it appears that the judgment aforesaid was given for the respondent and against the petitioner, whereas, by the law of the land, said judgment ought to have been given for said petitioner, Charles F. Champion, and against the said respondent.

2. The court erred in entering an order and judgment discharging the writ of *habeas corpus* and remanding petitioner to the custody of the respondent.

3. The court erred in not entering an order discharging petitioner upon said writ of *habeas corpus.*

4. The court erred in not holding and finding that that portion of Sec. 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, is unconstitutional and void and in violation of the first amendment of the Constitution of the United States.

5. The court erred in not finding that the Congress of the United States was not empowered under and by virtue of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States to pass and enact that portion of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States, any paper, certificate, or instrument, purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lot-

tery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States.

6. The court erred in not finding and deciding that it was beyond the power of Congress to pass and enact that part of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, and that that portion of said statute was unconstitutional, null, and void.

7. The court erred in holding that the commissioner, Lewis F. Mason, had jurisdiction of the subject-matter in the proceedings before him, said commissioner, as set forth in the record herein.

8. The court erred in finding that said petitioner should not be discharged upon said writ of *habeas corpus* for the reasons set forth in the petition of said petitioner, alleging that he was unlawfully restrained of his liberty by the respondent, John C. Ames, United States Marshal.

## I.

**That portion of Section 1 of the Lottery Act of March 2, 1895, which prohibits the transportation of lottery matter from one state to another, by means other than the mails, is unconstitutional and void.**

Appellant contends that Section 1 is unconstitutional, first, because paragraph 3 of Section 8 of Article 1 of the Constitution, which gives Congress the power "to regulate "commerce with foreign nations and among the several "states and with the Indian tribes," is not broad enough to authorize Congress to make a law prohibiting the transmission of lottery tickets and advertisements from one state to another, by means other than the United States mails; and, second, because the act is contrary to the first amendment to the Constitution, which provides that "Congress "shall make no law abridging the freedom of * * * the "press."

FIRST. THE ACT IS UNCONSTITUTIONAL BECAUSE IT IS NOT A REGULATION OF FOREIGN OR INTERSTATE COMMERCE.

What is the legitimate end sought by the act? Is it to regulate commerce between the states, or is it to regulate the morals of the people of the states? If the former, it is constitutional; if the latter, it is unconstitutional. Hence, it almost necessarily follows that Congress has made the regulation of commerce its *apparent purpose*.

We insist that (A) an analysis of the act, and (B) the evolution of lottery legislation in the United States, demonstrates to a certainty that the *real* purpose of Congress in the passage of this act was to regulate the morals of the people and to control and destroy the lottery business.

A.

An uninterrupted line of authorities supports the proposition that the test of the validity of a statute is its *real* and not its *apparent* object, and that its real object must be ascertained by determining whether the legitimate end sought is within the scope of the legislative power.

In *Yick Wo* v. *Hopkins,* 118 U. S., 356, where this court had under consideration the validity of an order of the City and County of San Francisco, which made it unlawful for any person to engage in the laundry business within the corporate limits " without first having obtained the consent of " the board of supervisors, except the same be located in a " building constructed of brick or stone," it was held that though its *apparent* purpose was to enact a police regulation, yet its actual enforcement showed that its *real* purpose was to drive the Chinese out of the laundry business. Hence, it was declared unconstitutional.

*Morgan R. R. Steamship Co.* v. *Louisiana,* 118 U. S., 455:

The plaintiff sought to restrain the Louisiana board of health from collecting certain quarantine fees provided for by an act of the Louisiana legislature, on the ground that said act was unconstitutional, among other reasons, because it was in violation of the commerce clause of the Federal Constitution. In discussing the case Justice MILLER says (p. 462):

" In all cases of this kind it has been repeatedly held that " when the question is raised whether the state statute is a " just exercise of state power, or is intended, by roundabout " means, to invade the domain of federal authority, this

" court will look into the operation and effect of the statute " to discern its purpose."

In *United States* v. *Fox,* 95 U. S., 670, wherein was involved the validity of that provision of the Bankrupt Act which made it an offense to obtain goods on credit by false pretenses three months before the petition in bankruptcy was filed, the court say:

" There is no doubt of the competency of Congress to pro- " vide, by suitable penalties, for the enforcement of all legis- " lation necessary or proper to the execution of powers with " which it is entrusted. * * * Any act committed with a " view of evading the legislation of Congress passed in the " execution of any of its powers, or of fraudulently securing " the benefit of such legislation, may properly be made an " offense against the United States, but an act committed " within a state, whether for a good or a bad purpose, or " whether with an honest or criminal intent, cannot be made " an offense against the United States unless it have some re- " lation to the execution of a power of Congress, or to some " matter within the jurisdiction of the United States. An act " not having any such relation is one in respect of which the " state can alone legislate."

*Minnesota* v. *Barber,* 136 U. S., 313:

This court held the Meat Inspection Law of Minnesota void, because of interference with interstate commerce. Justice HARLAN says (p. 326):

" Although this statute is not avowedly, or in terms, di- " rected against the bringing into Minnesota of the products " of other states, its necessary effect is to burden or obstruct " commerce with other states."

And, again, after reviewing a great many authorities, he says:

"Upon the authority of those cases and others that could "be cited, it is our duty to inquire in respect to the statute "before us, not only whether there is a real or substantial "relation between its avowed objects and the means devised "for obtaining those objects, but whether, by its necessary "or natural operation, it impairs or destroys rights secured "by the Constitution of the United States."

*Henderson* v. *Wickham,* 92 U. S., 259:

The statute of the State of New York requiring owners of vessels to give certain bonds before landing passengers, or pay a fixed sum for each passenger landed in lieu of such bonds, was held void. Justice MILLER says (p. 268):

"In whatever language a statute may be framed, its pur- "pose must be determined by its natural and reasonable ef- "fect; and if it is apparent that the object of this statute, "as judged by that criterion, is to compel the owners of ves- "sels to pay a sum of money for every passenger brought by "them from a foreign shore and landed at the Port of New "York, it is as much a tax on passengers, if collected from "them, or a tax on the vessel or owners for the exercise of the "right of landing their passengers in that city, as was the "statute held void in the *Passenger* cases."

The cases of *City of New York* v. *Miln,* 11 Pet., 103, and *The Passenger Cases,* 7 How., 283, also clearly illustrate the proposition. Moreover, the principle is recognized by this court in connection with this very statute, in the case of *In re Rapier,* 143 U. S., 110-133.

Applying this method of interpretation to the act in question, can there be the slightest doubt as to what was the *real*

purpose of Congress? Does the title of the act, "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce," etc., deceive? Is it not clear that it is a palpable attempt on the part of the National Legislature to usurp the functions of the State Legislature? Can the act be construed as a legitimate regulation of commerce? Is the transportation from one state to another of any tangible thing, commerce?

Counsel for the government must concede that unless the statute alleged to have been violated by appellant, was enacted by Congress by virtue of the authority of the Commerce Clause of the Constitution, the act is a nullity. We maintain that no such authority was conferred upon Congress by this provision of the Constitution; that commerce, within the meaning of the Federal Constitution, does not include traffic in lottery tickets or transportation of lottery advertisements, and that there is no property in a lottery ticket so as to make it a subject of commerce; that traffic in lottery tickets is gambling, pure and simple, and not a regulation of inter-state commerce, but a subject wholly under the control of the several states of the Union.

These contentions naturally lead us, first, to an inquiry as to the definition and construction of the word "commerce," within the meaning of the Commerce Clause of the Constitution. In the Century Dictionary, "commerce" is defined to be "interchange of goods, merchandise or property of "any kind; trade, traffic; used more especially of trade on a "large scale carried on by transportation of merchandise "between different countries, or between different parts of "the same country."

"Commerce" has been often defined by this court. One of the most comprehensive definitions ever given, is that of Mr. Justice FIELD, in *Welton* v. *Missouri*, 91 U. S., 275: "Commerce is a term of the largest "import. It comprehends intercourse for the purposes of

" trade in any and all its forms, including the transporta-
" tion, purchase, sale and exchange of commodities between
" the citizens of our country and the citizens or subjects of
"other countries, and between the citizens of different
" states."

One of the most frequently quoted definitions is that of Chief Justice MARSHALL, in *Gibbons* v. *Ogden,* 9 Wheaton, 1: " Commerce undoubtedly is traffic, but it is something
" more; it is intercourse. It describes the commercial inter-
" course between nations and parts of nations, in all its
" branches, and is regulated by prescribing rules for carry-
" ing on that intercourse."

It is clear, however, that commerce, as used in the Constitution, is restricted to commercial intercourse. Even Webster, in his great argument in *Gibbons* v. *Ogden, supra,* recognizes that the constitutional phrase has its limitations. " It should be repeated," he says, " that the words used in
" the Constitution, ' to regulate commerce,' are so very gen-
" eral and extensive that they might be construed to cover a
" vast field of legislation, part of which has always been
" occupied by state laws; and therefore, the words must have
" a reasonable construction, and the power should be con-
" sidered as exclusively vested in Congress, so far, and so
" far only, as the nature of the power requires." (Page 14.)

Again this court has said in the *Trade Mark* cases, 100 U. S., p. 95:

" Every specie of property which is the subject of com-
" merce, but which is used, or even essential in commerce,
" is not brought by this clause within the control of Con-
" gress. The barrels and casks, the bottles and boxes in which
" alone certain articles of commerce are kept for safety and
" by which their contents are transferred from the seller to

" the buyer, do not thereby become subjects of congressional " legislation more than other property."

These definitions might be multiplied by citing from many other cases, but we deem it unnecessary. We have seen that there is no broader definition of commerce in the books than, " commercial intercourse." Hence, after all, the simple proposition can be stated thus: Is the sending of lottery tickets and lottery advertisements via express by a citizen of Texas to a citizen of California, " commercial intercourse ? "

The solution of this question depends primarily upon whether a lottery ticket or a lottery advertisement is an *article of commerce.* The test to be applied as to whether a thing is subject of commerce, should be, " Is it a com- " modity ? " " Has it a market or intrinsic value ? " " Is " there any right of property in it ? " " Is it a thing prop- " erly the subject of barter and sale ? " It certainly can not be seriously contended that there is any right of property in a lottery ticket, or that such ticket is anything more than what it purports to represent, namely, an instrument or certificate representing a chance in the happening of a future event, to be determined by lot, wherein money or property may be drawn; in other words that it is speculation or gambling, whereby, by the investment of a small sum of money, the holder of such ticket may possibly become possessed of a larger sum or lose his entire investment made in the purchase of such ticket. It is nothing more than a voucher or receipt given by a lottery company that it will pay to the holder of such voucher or receipt a certain sum of money provided that at some subsequent drawing the number upon the purchaser's ticket shall be drawn.

In other words, it is but the evidence of a contract between the lottery company and the purchaser of the ticket. It has no intrinsic value as an article of merchandise; it has no value in and of itself, except that it is the printed evidence of a contract. If the lottery company refuses to carry out such contract, the ticket is at once worthless. There is no market for its sale as such, and it has no market value. It is not a commodity or an article of merchandise that is handled in the marts of trade.

While this court did not agree with the Supreme Court of Tennessee in the case recently decided of *Austin* v. *State of Tennessee,* that cigarettes were not articles of commerce, yet neither the majority opinion nor the dissenting opinion of Justice Brewer condemns the argument of the Tennessee court to the effect that there *are* tangible objects that are not articles of commerce. The following language taken from the opinion, met with no dissent in this court:

"Only those things which are in fact commodities in some "true sense, and, as such, are proper things for importa- "tion and use, can be legitimate articles of commerce, and "within the scope of the constitutional provision invoked "by the defendant in this case. Regulation of traffic in "things not suited for commerce was not by that provision "delegated to Congress."

*Austin* v. *State,* 101 Tenn., 563.

Illustrative of the proposition that a lottery ticket is not an article of commerce:

(*a.*) A railroad ticket is not an article of commerce. A railroad ticket is not merchandise; it is only a receipt or voucher for the payment of the passenger's fare, and is but

evidence of the contract of carriage between the railroad company and the passenger.

Ray's Neg. of Pass., Carriers, 198, 199, 494, 495.
2 Beach on Railways, Sec. 869.
*Commonwealth* v. *Wilson,* 14 Phil., 384-393.

(*b.*) An insurance policy is not an articue of commerce. In *Paul* v. *Virginia,* 8 Wallace, 168, Justice FIELD says (p. 183):

"Issuing a policy of insurance is not a transaction of com-
"merce. 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
"meaning of the word. They are not subjects of trade and
"barter offered in the market as something having an ex-
"istence 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."

In *Hooper* v. *California,* 155 U. S., 648, after having approvingly discussed the case of *Paul* v. *Virginia,* Justice WHITE says (p. 655):

"The business of insurance is not commerce. The con-
"tract of insurance is not an instrumentality of commerce.
"The making of such contract is a mere incident of com-
"mercial intercourse, and in this respect there is no differ-
"ence whatever between insurance against fire and insur-
"ance against 'the perils of the sea.'"

The same doctrine was adhered to with respect to a life insurance policy in

*New York Life Ins. Co.* v. *Cravens,* 178 U. S., 389, 401.

(*c.*) It has been held that the business of an interstate mercantile agency is not commerce. In a case involving the constitutionality of a law imposing certain taxes on mercantile agencies, where the law was attacked, among other reasons, for being an interference with interstate commerce, the Supreme Court of South Dakota, in an ably considered opinion, *State* v. *Morgan,* 2 S. D., 32, 53, held that the business of the R. G. Dun Mercantile Agency was not commerce. It was urged by the plaintiff in error (the agent of Dun's) that the agency was an instrument of commerce, but the court say:

"Information or intelligence is not an article of com-
"merce, 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."

What is a lottery ticket but that which gives to its purchaser evidence or information that if a certain number that is stamped on the face of the ticket shall be selected at a subsequent drawing, he will be entitled to a certain sum of money? The ticket is of worth only if the number that it evidences is drawn. After the drawing, if that number draws no prize, the ticket has no value. Before the drawing and at the time of shipment, the ticket is worthless. If the numbers selected by those gambling in the result of the lottery could be tabulated by the lottery company without the aid of the tickets, the commercial aspect of the transaction, if any, would be the same as now.

(*d.*) A bill to foreclose a mortgage was filed in Alabama by a foreign corporation, and the Supreme Court, discussing the constitutional provision relative to foreign corporations and its relation to the Federal Commerce Clause, say:

"Money is not a commodity of barter and sale; or to be "put up and sold after being shipped. The loaning of money "by foreign corporations engaged in that business is not a "matter of interstate commerce."

*Nelms* v. *Edinburg-American Loan Mortgage Co.*, 92 Ala., 157-161.

In Prentice & Egan on the Commerce Clause of the Federal Constitution (p. 55), the authors say:

"The protection of the Constitution does not extend to "lotteries, games of chance or speculation. These may be "interstate gambling, but are not commerce. A state may "regulate or prohibit buying and selling what are commonly "known as 'futures'; may prohibit the sale of lottery tickets "or of bonds containing conditions which make their value "dependent upon chance. It may forbid the sale of pools "on horse races conducted without the State, although not "forbidden as to races conducted within the State, and may "forbid the sending of money without the State for gambling "purposes."

A great many cases are cited in the notes in support of the above.

The State of Illinois has had since 1847 a law making it a penal offense to operate a lottery or to sell, or have in one's possession with intent to sell, lottery tickets. Suppose that prior to the act of 1895 a citizen of New York, traveling by rail from New York to Chicago, had brought with him in his satchel a package of lottery tickets, with the intention of selling the package in Chicago. He is arrested by the State authorities, and charged with having in his possession a *package* of lottery tickets with the intention of selling the same in the State of Illinois. He interposes the defense that was made by Leisey in *Leisey* v. *Hardin,* 135 U. S., 100.

He contends that a package of lottery tickets, the same as a barrel of beer or a case of liquors, is a commercial commodity —an article of interstate commerce, and that the law of the State of Illinois denying him the right to bring within the State and sell such a package, is unconstitutional and void as being an unwarranted interference with interstate commerce. What would have been the judgment of this court? Would it have placed lottery matter in the same category with spirituous liquors, and have held that the lottery tickets were articles of interstate commerce?

Suppose, again, lotteries were legal in Illinois. Instead of selling lottery tickets, a number of persons were deputized to act as—let us say—lottery salesmen. A is authorized to sell *numbers* (not tickets) from 1 to 100; B from 100 to 200, etc. The drawing is held at Chicago. A goes to Indiana to sell his *numbers* from 1 to 100, and he succeeds in selling them to 100 different persons; the purchasers, however, receive nothing to evidence their purchases. A keeps a list of persons to whom he has sold numbers, showing the numbers sold to each person. He returns to Chicago, and this list guides the company in the distribution of its prizes. Has A been engaged in an act of interstate commerce?

Under this act, if a man living in Kansas City, Missouri, having his place of business in Kansas City, Kansas (the State line divides the city in two parts), should be reading a newspaper containing a lottery advertisement while riding in a street car from his home to his place of business, he would be guilty (not taking into consideration the element of the criminal intent). The language of the act is broad enough to include a newspaper so carried and to characterize it as an article of commerce.

**B.**

We insist that the evolution of Federal lottery legislation demonstrates that the purpose of Congress in passing the act of 1895 was not to regulate interstate commerce, but to destroy interstate lottery gambling. In an appendix to this brief, the court will find all of the lottery statutes enacted by Congress, beginning with the act of 1827, and ending with the act of 1895.

Until 1872 no penalty attached to sending lottery matter through the mails. Under that act, the fine was not less than $100, and not more than $500. This penalty, however, did not deter offenders, and in 1890 it was increased by adding the imprisonment clause, and for the first time the law prohibiting the sending of lottery matter through the mails became effective. Up to this time there was no pretense that the legislation was enacted for any other purpose than to keep the mails free from obnoxious matter; no pretense that there was an effort to regulate lottery traffic through foreign and interstate commerce. But it was found that though debarred from using the mails, the express companies were still open to the lotteries. Congress discovered that the stringent law of 1890 was easily circumvented.

In the meantime all of the States where lotteries were theretofore legally conducted, had, by constitutional enactments, prohibited lotteries, and the anti-lottery sentiment had developed so rapidly that Congress, in order to finally destroy the alleged evil, found it necessary to pass the comprehensive act of March 2, 1895, and was of necessity forced to take the false position that it was " An Act for the sup-
" pression of lottery traffic through national and interstate
" commerce."

SECOND. THAT PORTION OF THE FIRST SECTION OF THE ACT WHICH PROHIBITS THE TRANSPORTATION OF LOTTERY ADVERTISEMENTS BY MEANS OTHER THAN THE MAILS, IS UNCONSTITUTIONAL AND VOID, BECAUSE IT VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION IN ABRIDGING THE FREEDOM OF THE PRESS.

We insist that this act, in so far as it prohibits the transportation by any other method than through the mails, of lottery tickets and advertisements of a lottery, is contrary to the first amendment of the Constitution. We concede that under clause 7 of Section 8 of Article 1 of the Constitution, Congress has the power to exclude from the mails lottery tickets, advertisements of a lottery, etc., but that it can prohibit the transportation of such matter by an express company or by any other method we deny. Nor can it be contended that the power to prohibit the transmission of lottery matter is *incidental* to the power to regulate commerce, firstly, because the reasons already presented, demonstrate that lottery traffic is not commercial intercourse, and secondly, because of the direct inhibition of the first amendment.

We do not propose to enter into any extended discussion of this proposition, and shall content ourselves by calling the court's attention to the several authorities where the question has heretofore been considered.

We can well rest our claim that the act, as at present constituted, does abridge the freedom of the press, upon the decisions of this court in

*Ex parte Jackson,* 96 U. S., 727, and
*In re Rapier,* 143 U. S., 110.

In *ex parte Jackson, supra,* the question was whether Section 3894 of the Revised Statutes, which made it a penal offense to send letters or circulars concerning lotteries by mail, etc., was constitutional. Counsel for petitioners in the *Jackson* case, based their arguments largely on the views expressed by eminent statesmen during the congressional debates in 1836 relative to the exclusion of anti-slavery publications from the mails. Replying to this argument, Justice FIELD, in the opinion of the court, says (p. 735):

"Great reliance is placed by the petitioner upon these "views, coming, as they did in many instances, from men "alike distinguished as jurists and statesmen. But it is "evident that they were founded upon the assumption that "it was competent for Congress to prohibit the transporta- "tion of newspapers and pamphlets over postal routes in "any other way than by mail; and of course, it would fol- "low that if with such a prohibition, the transportation in "the mail could also be forbidden, the circulation of the "documents would be destroyed, and a fatal blow given to "the freedom of the press. But we do not think that Con- "gress possesses the power to prevent the transportation in "other ways, as merchandise, of matter which it excludes "from the mails. To give efficiency to its regulations and "prevent rival postal systems, it may, perhaps, prohibit the "carriage by others for hire, over postal routes, of articles "which legitimately constitute mail matter, in the sense in "which those terms were used when the Constitution was "adopted—consisting of letters and of newspapers and "pamphlets, when not sent as merchandise; but further "than this its power of prohibition can not extend."

And again on page 733:

"Nor can any regulations be enforced against the trans- "portation of printed matter in the mail, which is open to

" examination, so as to interfere in any manner with the " freedom of the press. Liberty of circulating is as essen- " tial to that freedom as liberty of publishing; indeed, with- " out the circulation, the publication would be of little value. " If, therefore, printed matter be excluded from the mails, " its transportation in any other way can not be forbidden " by Congress."

The *Jackson* case was decided in 1877, and arose under the Act of 1876. After the Act of 1890 was passed, its constitutionality was tested in the case of *in re Rapier, supra.* This latter case was argued by the respective counsel at great length, and the court was asked to overrule the decision in *ex parte Jackson, supra.* Chief Justice FULLER, delivering the opinion of the court, said (p. 133):

" The question for determination relates to the constitu- " tionality of Section 3894 of the Revised Statutes as amend- " ed by that act. In *ex parte Jackson,* 96 U. S., 727, it " was held that the power vested in Congress to establish " post-offices and post-roads embraced the regulation of the " entire postal system of the country, and that under it " Congress may designate what may be carried in the mail " and what excluded; that in excluding various articles from " the mails the object of Congress is not to interfere with " the freedom of the press or with any other rights of the " people, but to refuse the facilities for the distribution of " matter deemed injurious by Congress to the public morals; " and that the transportation in any other way of matters " excluded from the mails would not be forbidden. Unless " we are prepared to overrule that decision, it is decisive of " the question before us." * * *

(P. 135.) " In short, we do not find sufficient grounds " in the arguments of counsel, able and exhaustive as they " have been, to induce us to change the views already ex- " pressed in the case to which we have referred. We adhere " to the conclusion therein announced."

Not only do these decisions show that the court throughout based its opinions upon the fact that all sources other than the mails were open for the circulation of lottery advertisements, but the arguments of counsel for the government proceeded upon that theory. In the argument of Attorney General Miller, in the *Rapier* case, appear the following statements, remarkable in the light of the present act. (We quote from the arguments as published in 143 U. S., L. C. P. Co. Ed., as the Attorney General's argument does not appear in the Davis Edition):

"The main effort," said the Attorney General, "of coun-
"sel for petitioners, in each of the briefs, seems to be to
"becloud the issue. To this end their arguments assume that
"the refusal of the general government to be the instru-
"mentality for the circulation of lottery literature, is the
"same thing as forbidding the publication or circulation
'of such literature. The only escape from a violation of
"the prohibition in the first amendment to the Federal Con-
"stitution against making a law abridging the freedom of
"the press, is for every official of the post-office department
"to become the servant, and every carrier the errand boy
"of the Louisiana Lottery Company.

"They totally ignore the fact that the sole effect of the
"act of Congress is, that the general government, its offi-
"cers, employes and agencies, shall in no way aid or abet
"this business; that its mail bags and the hands of its serv-
"ants, shall not be used in spreading and manipulating
"snares for its unwary victims; that it simply says to Fed-
"eral officials, 'Hands off.'" (p. 98.)

Again on page 100:

"Seriously, is it not too plain for argument that under
"this first amendment to the Constitution, Congress does
"its whole duty to the press when it fails to put any re-

" striction whatever upon the printing, publication or circu-
" lation thereof, by those interested therein, through such
" private agencies as they are able to command? It is sub-
" mitted that no question under the first amendment of the
" Constitution is in issue in this case, nor can be in issue,
" so far as the Louisiana Lottery is concerned, until a stat-
" ute shall be passed forbidding, not merely the circulation
" of papers carrying its advertisements through the mails,
" but forbidding the circulation of such newspapers through
" any agency whatsoever."

Assistant Attorney General Maury, on page 102, concluded his argument thus:

" The exclusion of newspapers from the mails, which con-
" stitute but one means of circulation, is not an abridgement
" of the freedom of the press, all other means of circulation
" being left open to them."

In the opinion of Judge JENKINS, found on page 103 of the record in this case, he says:

" In considering the constitutionality of this act of Con-
" gress I have read the opinion in the case cited, *France* v.
" *United States,* 164 U. S., 676, in which the Supreme Court
" declined to pass upon its constitutionality. I have care-
" fully considered the matter, and I think it fairly a debat-
" able and doubtful question whether the act will be held
" to be constitutional."

We respectfully submit that the judgment of the lower court should be reversed and the petitioner discharged.

MORITZ ROSENTHAL,
JOSEPH B. DAVID,
*Attorneys for Appellant.*

# APPENDIX.

Act of 1827 (March 2, 1827) (4 Stat. L., 238, Sec. 6):

"That no postmaster or assistant postmaster shall act as "agent for lottery offices or under any color of purchase, or "otherwise, send lottery tickets; nor shall any postmaster "receive free of postage or frank lottery schemes, circulars "or tickets."

Act of 1868 (July 27, 1868) (15 Stat. L., 194-196, Sec. 13):

"That it shall not be lawful to deposit in a post-office, to "be sent by mail, any letters or circulars concerning lotteries, "so-called gift concerts or similar enterprises, offering prizes "of any kind on any pretext whatever."

Act of 1872 (June 8, 1872) (17 Stat. L., 302):

"Sec. 3894. No letter or circular concerning illegal lot- "teries, so-called gift concerts, or other similar enterprises, "offering prizes, or concerning schemes devised and intended "to deceive and defraud the public for the purpose of ob- "taining money under false pretences, shall be carried in "the mail. Any person who shall knowingly deposit or send "anything to be conveyed by mail in violation of this section "shall be punishable by a fine not more than five hundred dol- "lars nor less than one hundred dollars, with costs of prose- "cution."

Act of 1876 (July 12, 1876) (19 Stat. L., 90, Sec. 2):

Section 3894 (as above) was amended by striking out the word "illegal."

Act of September 19, 1890 (1 Supp. Rev. St., 803):

"Be it enacted, etc., that section thirty-eight hundred and "ninety-four of the Revised Statutes be, and the same is "hereby amended to read as follows:

"Sec. 3894. No letter, postal card or circular concerning "any lottery, so-called gift concert, or other similar enter- "prise offering prizes dependent upon lot or chance, or con- "cerning schemes devised for the purpose of obtaining money "or property under false pretenses, and no list of the draw- "ings at any lottery or similar scheme, and no lottery ticket, "or part thereof, and no check, draft, bill, money, postal note "or money order for the purchase of any ticket, tickets or "part thereof, or of any share or any chance in any such "lottery or gift enterprise shall be carried in the mail or de- "livered at or through any post-office or branch thereof, or by "any letter carrier.

"Nor shall any newspaper, circular, pamphlet or publica- "tion of any kind containing any advertisement of any lot- "tery or gift enterprise of any kind offering prizes depend- "ent upon lot or chance, or containing any list of prizes "awarded at the drawings of any such lottery or gift enter- "prize, whether said list is of any part or of all of the draw- "ing, be carried in the mail or delivered by any postmaster "or letter carrier.

"Any person who shall knowingly deposit or cause to be "deposited, or who shall knowingly send or cause to be sent, "anything to be conveyed or delivered by mail in violation of "this section or who shall knowingly cause to be delivered by "mail anything herein forbidden to be carried by mail, shall "be deemed guilty of a misdemeanor, and on conviction "shall be punished by a fine of not more than five hundred "dollars or by imprisonment for not more than one year, or "by both such fine and imprisonment for each offense."

Act of March 2, 1895 (2 Supp. Rev. St., 435):

Chap 191. An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States.

"Be it enacted, etc., that any person who shall cause to "be brought within the United States from abroad, for the "purpose of disposing of the same, or deposited in or carried "by the mails of the United States, or carried from one state "to another in the United States, any paper, certificate or in- "strument purporting to be or represent a ticket, chance, "share or interest in or dependent upon the event of a lot- "tery, so-called gift concert, or similar enterprize, offering "prizes dependent upon lot or chance, or shall cause any ad- "vertisement of such lottery, so-called gift concert or sim- "ilar enterprise, offering prizes dependent upon lot or chance, "to be brought into the United States, or deposited in or car- "ried by the mails of the United States, or transferred from "one state to another in the same, shall be punishable in the "first offense by imprisonment for not more than two years "or by a fine of not more than one thousand dollars, or both, "and in the second and after offenses by such imprisonment "only."