In the Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN FRANCIS ET AL., PETITIONERS,
v.
THE UNITED STATES. } No. 293.

CHARLES F. CHAMPION, APPELLANT,
v.
JOHN C. AMES, UNITED STATES marshal. } No. 9.

ARGUMENT FOR APPELLEE.

STATEMENT OF THE FRANCIS CASE.

The brief filed by Mr. Outcalt for the appellants was not served upon me until October 11, and as it is anticipated that the case will be argued on the 15th instant, there is not sufficient time to print other than a hurried reply. Were the appellants' brief confined to the question of the constitutionality of the act of March 2, 1895, I would not complain of the hardship of preparing in a few hours a reply to a brief which has evidently taken considerable time in its preparation. The appellants, however, ask the court to review the entire voluminous record, and to pass upon many alleged errors, as to which the

decision of the circuit court of appeals would have been final, had not the constitutional question involved in the present proceedings brought the case to this court. The issuance of a certiorari is a matter of grace, and while it is true that the court may review the entire record, it is also true that it may confine its inquiry to such questions as, in its judgment, justified the issuance of the certiorari. There is reason why this court should take the latter course in the present case. The petition for the certiorari only suggested as the grounds for its issuance the refusal of the court below to quash the indictment, and the constitutionality of the act of March 2, 1895. The Government, acting through the Solicitor-General, assented to the issuance of the certiorari for the reason and under the belief that it was only sought to review the constitutionality of the act, and it is to be presumed that this court did not grant the writ to review any alleged errors other than those suggested in the petition for certiorari. The counsel for the appellants at this late day file an elaborate brief which raises numerous questions in addition to those already indicated. They suggest:

(1) That the venue was not sufficiently proved. (Pages 31–32.)

(2) That a conspiracy was not established by sufficient testimony.

(3) That numerous errors were committed by the trial judge in the admission or exclusion of testimony. (Pages 34 to 48.) These comprised the greater part of the one hundred and fifty assignments of error which

were the subject of argument in the circuit court of appeals.

(4) Numerous instructions by the court were likewise the subject of complaint. (Pages 48 to 54, inclusive.)

I do not wish to deny counsel for appellants in the Francis case the right to argue the important constitutional question involved in the present proceeding at the same time that it is argued in the Champion case; but if the court intends to review all of the other errors which are now pressed upon its consideration, numbering over one hundred, I respectfully request that the Francis case either be restored to the docket for reargument, or that ample time be afforded the Government to file a brief in reply. It is impossible at this time to consider these numerous alleged errors, which do not affect the constitutional question involved, but which only have reference to the trial of the Francis case. I submit, however, that this court is under no obligation to review the decision of the circuit court of appeals with reference to these numerous questions. It was the intention of the act constituting the circuit court of appeals to make its decision final in all criminal cases, except those of a capital nature, and this court will only consider on certiorari such questions as are of great and general importance. To answer all of these numerous assignments of error above referred to, even were it practicable at this late day, would require a brief of such length that I do not care to submit one unless so directed by the court.

I shall therefore simply discuss in this brief two questions suggested by the record which are of general importance and which may, therefore, fairly be considered on certiorari, and which were fairly suggested by the petition for the certiorari.

1. Does the act of March 2, 1895, apply only to lottery matter which has been imported into this country?

2. Is the act in question constitutional?

I.

THE CONSTRUCTION OF THE ACT OF MARCH 2, 1895.

As to this first question the Government is content to rest its case upon the clear and satisfactory reasoning of Circuit Judge Severens, who announced the judgment of the circuit court of appeals. (See page 362, Transcript of Record.)

I need add little to that which Judge Severens has said. If the language be in doubt, the legislative history of the act will, I think, convince the court that Congress intended to suppress domestic lotteries as well as foreign lotteries. The court is familiar with the fact that for some years the Federal Government has sought to break up the lottery traffic. By Revised Statutes, 3894, 3929, and 4041, it excluded lottery matter from any branch of the mail service. This legislation having proved insufficient, the act of September 19, 1890, was passed, which, in more sweeping and, as was thought, in a more effective way, sought to prohibit the use of the mails in connection with lottery enterprises. Recognizing that much of this lottery matter

came from other countries, the act of August 28, 1894, prohibited the importation into this country of any lottery ticket or any advertisement of any lottery. All of these measures proved ineffective to wholly prohibit the lottery traffic. Excluded from the mails, and from all importation, the lottery companies resorted to express companies and other carriers, and transported their tickets in that way. Foreign lotteries, to evade the nonimportation act, constituted agencies in this country, and had the necessary tickets and other matter printed in this country and transported in the manner indicated. Congress therefore deemed it necessary, if the traffic was to be suppressed, to prohibit the carriage, by any method, of lottery matter. This gave rise to the act of March 2, 1895. It is unnatural to assume that Congress intended to limit the act of March 2, 1895, to lottery matter which had been first imported. Had this been the case the act would have been largely ineffective and fallen short of its obvious purpose, for tickets and other matter would have been printed in this country, as Mr. Guthrie has already pointed out in his brief in the Champion case. In my original brief in the Champion case, pages 7 to 11, inclusive, I have given the history of the legislation, and a reference to the debates will show that the entire lottery traffic, foreign or domestic, was evidently in the contemplation of Congress. See Senator Hoar's remarks in the Senate, and Mr. Broderick's in the House, quoted on page 11 of my original brief.

The title of the act clearly indicates the purpose to reach the entire traffic, domestic or foreign, and the reasonable and grammatical construction of the act would indicate the same thought. The matter whose carriage is forbidden is "a ticket, chance, share, or interest in, or dependent upon the event of a lottery." Any lottery, whether foreign or domestic is therefore, within the general language of the act. Had Congress referred only to foreign lotteries it would presumably have qualified the language in some way. Its purpose obviously was (1) to prevent the importation of lottery matter; (2) to prevent the carriage by mail of lottery matter; (3) to prevent the carriage from one State to another in the United States of lottery matter; and the situs of the lottery enterprise was wholly unimportant.

II.

IS THE ACT OF MARCH 2, 1895, CONSTITUTIONAL?

As to this question, this case does not differ in principle from the case of *Champion* v. *United States*, No. 106, October term, 1900, with which it is to be argued. It is true that the attempt on the part of the defendants to conduct their lottery business in secrecy caused them to issue tickets as the representative of the interests in their lottery which were informal. In the Champion case the ticket was drawn with all the necessary formalities to vest in the holder a definite and ascertained interest in the lottery enterprise; whereas, in the Francis case the ticket which entitled the holder to his interest consisted of nothing more than a number of figures printed on a slip of paper. This slip of

paper, however, to quote the language of the circuit court of appeals in affirming the conviction, "represented the interest of the purchaser of a chance, and although containing figures only, it had a definite meaning, and was understood by all the parties concerned." The law always has regard to the substance rather than to the form, and this is especially true in the enforcement of its criminal statutes, for otherwise they could be easily evaded. It is clear that, in the manner that this lottery was conducted, the slips of paper, although containing nothing more than figures, did entitle the holder thereof to an interest in the lottery, the value of which was dependent upon the actual drawing, and that such ticket, like a bond or an ordinary lottery ticket, was transferable upon delivery.

The interstate character of the transaction is also abundantly established. The principal office of the lottery was located in a building in Cincinnati, Ohio, at which the drawings took place. The management maintained in various other States—among them Newport, Ky.—offices or agencies at which the tickets or chances in the drawings could be purchased. From time to time these tickets were conveyed from the agencies in other States than that of Ohio to the office of the enterprise in Cincinnati, Ohio, and after the drawings were made the result was telegraphed by a cipher code from the main office in Cincinnati to the various agencies in other States, and the ticket, a duplicate of which was retained at the main office, was sent with the prize, if any, to the holder of the original slip in such other State.

The testimony furthermore abundantly established the defendants' connection with this lottery enterprise. Reilley was in charge of the principal office, Francis of the drawings, Hoff had charge of the agency in Newport, Ky., and Edgar conveyed the slips from Newport, Ky., to Cincinnati, Ohio, and the prize, if any, from Cincinnati to Newport.

The defendants were charged with conspiring to commit an offense against the United States in that they conspired to violate the act of March 2, 1895. In effect they are charged with conspiring "to cause to be carried from one State to another in the United States, to wit, from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates, and instruments purporting to be and to represent, as they then and there well knew, ticket chances, shares, and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance."

As the tickets in question were the evidence of the holder's right to participate in the drawing of a lottery *thereafter to take place*, the case presents the precise question which this court declined to pass upon in the case of *France* v. *United States* (164 U. S., 676).

In that case, it will be remembered, the matter transported was only the *announcement* of the results of a drawing which had *previously* taken place, and was, therefore, held to be without the strict letter of the statute.

In presenting the argument in behalf of the Government in the case at bar, it is not my purpose to

restate the argument on the constitutional question already filed in the Champion case. My brief already filed in that case was a careful attempt on my part to submit to the court whatever considerations pertinent to the issue which suggested themselves to me as of value to the court. I therefore submit the present case upon the brief already filed in the Champion case, and while I shall venture to amplify one or more of the suggestions contained in the Champion brief, yet whatever is herein stated should be regarded as supplemental only to that which has already been submitted to the court. Indeed, I hesitate to add anything to the two briefs already submitted, and only do so in view of some suggestions which were made on the oral argument, and also in view of some decisions of this court, which have been rendered since the Champion case was argued.

In my original brief (pp. 39, 44) I argued that even if the lottery ticket could not be regarded in itself as an article of commerce, yet the interest which it represented, and to which it was the legal title, could be regarded as an article of commerce, and as such within the Federal commercial power, when its purchase or sale is interstate in character. I argued that no practical or safe distinction could be made between the thing bought and sold and the evidence of title with which the thing is ordinarily sold. I cited the case of *Almy* v. *California* (24 How., 169), as explained by the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123, 137), by which it was decided that if a tax on merchandise

exported was void as a regulation of interstate commerce, that a tax on the bill of lading, which ordinarily accompanies it, was equally an unconstitutional regulation of commerce when attempted by a State. The court has since affirmed this view by the recent case of *Fairbanks* v. *United States* (181 U. S., 283). In the case the constitutionality of the war-revenue act imposing a stamp tax on a foreign bill of lading was under discussion. This court held that it was unconstitutional, as it offended the provision of article 1, section 9, of the Constitution, that "No tax or duty shall be laid on articles exported from any State."

It was argued in that case that an insignificant stamp tax upon a bill of lading, not necessarily (though ordinarily) used in connection with the exportation of goods, could not be regarded as a tax on the export itself; but this court negatived the contention.

This court, after again affirming the authority of *Almy* v. *California* and *Woodruff* v. *Parham*, and further citing the case of *Brown* v. *Maryland* (12 Wheat., 419), and the *Income Tax Cases* (157 U. S., 429), *Robbins* v. *Taxing District* (120 U. S., 489), thus stated the effect of these decisions:

> The scope of this argument is that inasmuch as interstate commerce can only be regulated by Congress, and is free from State interference, State legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, can not be sustained. Or, in other words, constitutional provisions, whether operating by way of grant

> or limitation, are to be enforced according to their letter and spirit, and can not be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

It follows as a necessary corollary that if Congress has the power to regulate interstate commerce by legislation which directly affects the commodities of commerce, that it has equal power to regulate the ordinary, and at times necessary, means, whereby such commodities are customarily bought and sold between citizens of different States. It is upon this theory that the instrumentalities of interstate commerce are brought within the commercial power of the Union without respect to the question as to whether the telegraph message relates to a commercial transaction or whether a commodity is in process of transportation with a view to sale or purchase. The instrumentalities of interstate commerce are each treated as an entirety, and can be regulated by Congress to such an extent that even the form of a brake can be subject to Congressional control. Similarly, the instruments of writing with which interstate commerce is ordinarily conducted, certainly those which are inseparable incidents to the purchase and sale of commodities, must likewise be within the protective power of the Federal Union. As I have already argued, page 43, nine-tenths of all the business of the country is transacted through drafts, checks, certificates of deposit, bills of exchange, promissory notes, etc., and a State could directly affect, and perhaps destroy, interstate commerce, if its power to interfere with and

destroy the commercial media of such commerce be once conceded.

I argued, therefore, that even though the lottery ticket be not in itself an article of commerce, yet it is an inseparable incident by which interests in the lottery enterprise are bought and sold, and if, therefore, the interest in a lottery can be the subject of interstate commerce, then the ticket is equally such subject.

This leads me to an argument to which I have already made brief reference in the Champion brief, and to which, because of its importance, I desire to make further and fuller reference.

I respectfully submit that if, for example, a citizen of Pennsylvania purchases, by correspondence, from a citizen of New York a hundred shares of Pennsylvania Railroad stock and sends to New York, either in specie or by the usual commercial remittance, the purchase value of the stock and receives from his vendor the certificates representing the said hundred shares, that that constitutes interstate commerce within the meaning of the Constitution. I admit that transportation must take place in every interstate commercial transaction, and for that reason land as such can not be the subject of interstate commerce. But in the illustration cited, two acts of transportation take place, the purchase money is sent from Pennsylvania to New York. If sent by specie, it is a physical conveyance of a tangible, visible commodity; if sent by draft, check, or other form of commercial remittance, it is none the less a trans-

portation of money, and ought to be as much within the commercial power of the Union, when made in the interstate sale of goods, as telegraph messages from State to State, of which Mr. Justice Field said, in *Western Union Telegraph Company* v. *Pendleton* (122 U. S., 347).

> Other commerce deals only with persons or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence.

Nevertheless, the transmitted intelligence of the telegraph was held to be interstate commerce, and a commercial remittance from a vendor in one State to a vendee in another State ought equally to be regarded as interstate commerce.

But the remittance of the purchase money is not the only physical act of transportation. The certificate of stock—the only outward, visible, or tangible representative of a valuable property interest—is physically conveyed from New York to Pennsylvania. It is true that only the certificate, which is merely the title to the interest, is conveyed, but from *Almy* v. *California*, *Woodruff* v. *Parham*, *Fairbank* v. *United States*, already cited, it is obvious that the certificate, without which interests in corporate enterprises could not be bought or sold, is a necessary incident of such purchase and sale, and is to be regarded on the same plane therewith. If the framers of the Constitution intended to vest in Congress the power to regulate the purchase and sale by citizens

of different States of a barrel of pork, why did they not equally contemplate a similar regulation for the purchase and sale by such citizens of interests in great corporate enterprises? In their day certificates of stock were comparatively insignificant in value to ordinary merchandise, but to-day the purchase and sale of stock has assumed such stupendous proportions as to include a considerable part of the entire business of the country, and the Constitution falls far short of its avowed purpose with respect to interstate commerce if it did not include such interstate transactions.

It may be true that the framers of the Constitution did not have in view the specific form of sales of corporate shares in vesting the power to regulate commerce in the Federal Government. But this court has already said that—

> The powers of Congress to regulate commerce with foreign nations and among the several States * * * is not confined to the instrumentalities of commerce * * * in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstance.

The fathers did contemplate, however, that all the commercial intercourse of the States, however it might be affected or changed in the centuries before them, should be the subject of Federal control; and to exclude from such operation property interests in which millions of shares are daily sold, and whose value in

dollars runs into the billions, is to materially limit and narrow the scope and field of the Federal power.

What is there in the commerce clause to forbid the inclusion of interests in corporate property as the subject of interstate commerce? Commerce, as the word is used in the Constitution, has received the broadest definition. It includes not only traffic, but every species of commercial intercourse among the States. (Marshall, C.J., in *Gibbons* v. *Ogden*, 9 Wheat., 190–194.)

"Commerce is a term of the largest import," and "comprehends intercourse for the purposes of trade in any and all its forms." *Welton* v. *State of Missouri*, 91 U. S., 280.

Commerce necessarily implies two things, the exchange of one commodity for another, and the transportation either of the purchase money or of the thing bought or sold, and to be within the Constitution this must be interstate. But an interest in a corporate enterprise, though invisible and intangible, may be bought and sold, and both the certificate which evidences this form of property, as well as the purchase money, are the subject of transportation.

It is true that in the line of cases commencing with *Paul* v. *Virginia* (8 Wall., 168), and concluding with *New York Life Insurance Company* v. *Cravens* (178 U. S., 389), it was held that the business of insurance was not interstate commerce. I have already discussed, and I trust distinguished, these cases in my supplemental brief in the Champion case. I have endeavored to show that these decisions were based

not only upon the right of the State to prescribe the terms upon which foreign corporations can do business within their boundaries, but also because the manner of conducting the insurance business is intrastate and not interstate. There is, moreover, a distinction between a policy of insurance and a certificate of stock, a bond or a ticket in a lottery enterprise. A policy of insurance is nothing more than a promise to indemnify a certain person against a possible contingency. It passes no present value; is not transferrable except by permission of the insurer, and is nothing more than an executory contract. A certificate of stock, a bond, or a lottery ticket are the representative of a present interest in property. Indeed, they are property, and can be made the subject of larceny, or a civil suit; as such they are taxable property. They do not constitute a contract between two people, but simply evidence the right of the holder of the ticket or certificate of share to a certain, definite, vested interest in an undivided property. Policies of insurance are not bought and sold as such, but certificates of shares or lottery tickets are the subject of purchase and sale, and can be made transferable upon delivery.

The cases of *Nicoll* v. *Ames* (173 U. S., 509) and *Hopkins* v. *United States* (171 U. S., 578) do not conflict with the view I have suggested. In the earlier case the Kansas City Live Stock Exchange was an unincorporated voluntary association of men, doing business at its stock yards, situated partly in Kansas City, Mo., and partly across the line separating Kansas City, Mo., from Kansas City, Kans. The business of its

members was to receive individually consignments of cattle, hogs, and other live stock from the owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, and to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds, after deducting charges, expenses, and advances. The members were in the habit of soliciting consignments from the owners of such stock, and of making them advances thereon. The question arose whether their business was interstate commerce, and this court held that it was not. The court was of opinion that this stock exchange was but an aid or facility to commerce, and only affected it in an indirect and incidental manner. The decision was clearly based upon the fact that no sale of live stock took place until it had reached the consignee at Kansas City, whereupon it was sold as a part of the business of said stock exchange by one of the members to another member. The transaction was therefore *intrastate*, and the fact that the stock originally came from another State did not alter that fact. Moreover, the precise question was the legality of the combination of members of the exchange with reference to such sales at the exchange, and Mr. Justice Peckham said:

> The selling of an article at its destination which has been sent from another State, while it may be regarded as an interstate sale and one

> which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade.

In *Nicol* v. *Ames* (173 U. S., 509) this court considered the constitutionality of the war-revenue tax upon sales of products or merchandise at exchanges or boards of trade, and also the adhesive-stamp tax upon bonds, debentures, or certificates of stock, etc. In that case the nature of boards of trade was fully inquired into. The court held that the tax was not a tax upon the business itself of purchase and sale, but simply upon the

> facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange, nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales

> at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise.

The authority of these decisions is not questioned. So far as interstate-commerce questions are concerned, they are consistent not only with the theory upon which they are based, of special and *local* facilities to trade, but also because all transactions on an exchange are necessarily intrastate, as brokers are primarily responsible each to the other for the full amount of the purchase. The unnamed principals are only secondarily interested in the matter. Plainly, therefore, the purchase and sale of the stocks on the floor of the stock exchanges or on the boards in the Union Stock Yards is not interstate, and therefore does not negative my argument that if a purchase and sale of corporate stock be directly and strictly interstate that it is within the interstate-commerce clause of the Constitution. If a citizen of New York sells to a citizen of Pennsylvania a hundred head of cattle, and ships them from New York to Philadelphia, it is plainly a transaction of interstate commerce. Why is it less so if the same man sells to the same man a hundred shares of Pennsylvania Railroad stock? The stock is as much property as the cattle. If it were a question of relative value, the stock is more important than the cattle. In each case the element of physical transportation is necessarily involved. I submit, therefore, that sales of shares of stock, when interstate, constitute interstate

commerce, even though such certificates represent only an intangible, but none the less substantial, interest in property.

If that be so, its application to these cases is apparent. In the Champion case, tickets representing an interest in a lottery to be drawn were being transported from Texas to California; and in the Francis case similar tickets, representing interests in a lottery, were being transported from Kentucky to Ohio. Congress has seen fit to make it a crime to cause these tickets to be transported from State to State. Why should not this be equally within its power as the right to regulate or prevent the transportation of diseased cattle or obscene literature?

THE POWER TO REGULATE IS THE POWER TO PROHIBIT.

On the oral argument of the Champion case a member of the court asked me, in substance, how I justified my conclusion that the right to regulate commerce included the right to prohibit commerce in a given article. Anticipating this suggestion, I had to some extent discussed it in my first brief, pages 53 to 60, inclusive. Supplementing what I then said, let me add that the right to prohibit commerce in a given article as a regulation thereof can not be seriously questioned if regard be had to the history of the Constitution. Its framers were thoroughly familiar with restrictive commercial statutes, and had good reason to know that the power to regulate included the power to prohibit. They had felt the full force of

such prohibitory commercial regulations of commerce. Laws had been passed which prohibited the exportation of wool, or any manufacture thereof, from any American colony and the exportation of manufactures of iron, except crude. Virginians were forbidden to ship their tobacco to a port of any other country except England. The New England shipowners were prohibited from engaging in foreign trade, and the South Carolinians from shipping their rice to European ports north of Cape Finisterre. The sugar act of 1732 forbade the importation of foreign sugar, molasses, or rum into any colonial port. The evasion of these restrictive commercial statutes led to the search warrants and writs of assistance, and from these came the Revolution.

When the colonies formed the confederation they recognized that the right to regulate commerce included the right to prohibit, as a necessary incident, and even the exigencies of a most critical situation could not persuade them to vest in the federation the power to regulate foreign commerce. It was soon perceived that the confederation could not negotiate advantageous commercial treaties if the commercial advantages which they conferred upon foreign nations could be destroyed at will by the reserved commercial power of the component States, and that, therefore, the power to regulate in the manner that independent nations at that day regulated their commerce must of necessity be given to the federal government. This thought was pressed home when, in 1783, England

commenced to regulate its commerce with the federation by excluding under prohibitions the importation into the British West Indies of much important merchandise from America. For the very purpose of counteracting this blow to our commerce by retaliatory measures, Congress recommended, on April 30, 1784, to the States to vest in the confederation for the term of fifteen years authority to *prohibit* the vessels of any power, not having treaties of commerce with the United States, from importing or exporting any commodities into or from any of the States; also with the power of prohibiting for a like term any foreign country, unless authorized by treaty, from importing into the United States any merchandise not the product or manufacture of such country. So clearly, however, did the States perceive that the power to regulate was the power to prohibit, that they acted upon the recommendation with great reluctance. In the meantime the States were preying upon the trade of each other by prohibitory tariffs and restrictive statutes until commercial chaos resulted and civil war was threatened. Out of this condition, and because of it, came the constitutional convention of 1787.

When, therefore, the framers of the Constitution considered the commerce clause of the Constitution they must have recognized that the power to regulate was the same general and unlimited power which other independent nations had at that time exercised, and included the right to prohibit commerce in any special article, when advantageous for the general commercial interests of the nation.

This is shown beyond question when we consider the great compromises of the Constitution. *So clearly did the framers recognize that the power to regulate commerce would include the power to prohibit, that they inserted an express exception to such power.*

Article I, section 9, provides:

> The immigration or importation of such persons as any of the States now existing shall think proper to admit shall not be *prohibited* by Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding $10 for each person.

Without the concession of this exception the Constitution could not have been adopted, and it seems, therefore, clear that the framers were of the opinion that after 1808, Congress could, under the power to regulate foreign commerce, prohibit the importation of slaves.

The commercial power of the Union was a concession of the South to the North, and the right to import slaves until after 1808 was the price paid for it. We know how heated was the debate which preceded the great compromise, and that it finally resulted in a reference, on motion of Gouverneur Morris, to a committee of one from each State If the power to regulate did not include the right to prohibit, all this discussion in the Constitutional Convention was a case of "Much ado about nothing"—a very tempest in a teapot. Is this conceivable? Were the delegates from the North, who insisted upon the power to prohibit the importation of slaves as a regulation of commerce, and the

delegates from the South, who struggled with equal tenacity to reserve the importation of slaves, equally in error as to their own meaning? And when they united upon the compromise which gave unlimited commercial power as to all objects except the slave trade, and as to that after 1808, were they both the subject of a gigantic delusion?

In the light of these facts the words of Marshall must be weighed, when in *Gibbons* v. *Ogden* he said that the power to regulate commerce "is complete in itself; may be exercised to its utmost extent, and no limitations thereof are prescribed in the Constitution."

At the time of the Revolution, moreover, the power to tax had been used as a power to regulate and prohibit commerce. I have already shown in my original brief, page 58, that the Fathers did not question the constitutionality of taxes which were designed to regulate commerce. I have also pointed out in the same brief, page 58, that the constitutionality of protective tariff duties, which were even prohibitive, has always been sustained under the commerce clause of the Constitution. The letter there referred to, of James Madison to Joseph C. Cabell, of September 18, 1828 (Writings of James Madison, vol. 3, p. 636), contains a strong exposition of the constitutionality of prohibitive tariff duties as a regulation of commerce. Mr. Madison, in discussing the question, said:

> It is a simple question under the Constitution of the United States, whether "the power to regulate trade with foreign nations," as a distinct and substantive item in the enumerated

> powers, embraces the object of encouraging, by duties, restrictions, and *prohibitions*, the manufactures and products of the country.

With his accustomed learning, he proceeds to answer the question in the affirmative by giving eight distinct reasons for his conclusion, to which I refer the court if the question admit of doubt.

This court has held that the absence of a Federal regulation of interstate commerce is to be regarded as its declaration that such commerce shall be free, and as the States are thereby denied the right to prohibit or regulate such commerce, except by strictly police measures, this doctrine carries with it, as a necessary implication, an equal power in the Federal Government to deny freedom of commerce in a given article. It is possible that the power to regulate commerce would not include the power to prohibit *all* commerce. It is not necessary to decide that abstract question; it is enough to say that the power to regulate *all* commerce includes the power to prohibit commerce in a given commodity.

In his brief for appellant in the Champion case, Mr. Guthrie admits that Congress has ample power not only to prevent the introduction of foreign lottery matter, but in order to render such inhibition perfect it may prohibit the passage from one State to another just as fully as it may prohibit the possession or transfer of smuggled imports or contraband goods. He proceeds to cite various prohibitory provisions with respect to foreign commerce, and, appreciating how pertinent their

validity must be to that of prohibitory regulations of interstate commerce, he proceeds to attempt to draw a distinction between the power to regulate the two classes of commerce. Unfortunately for his contention, the two grants of power are set forth in the same section of the Constitution and by precisely identical language; and were the identity of the power in doubt, the decisions of this court are conclusive. If citation is necessary, I refer to *Crutcher* v. *Kentucky* (141 U. S., 57), in which Mr. Justice Bradley says, *inter alia:*

> It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. * * * And the same thing is exactly true with regard to interstate commerce as it is with foreign commerce. No difference is perceivable between the two.

His argument is therefore based upon a false premise.

Mr. Outcalt in his brief suggests an ingenious argument that although lottery tickets were commercial commodities at the time of the adoption of the Constitution, that such tickets have ceased to be commercial commodities and can not, therefore, be the subject of Congressional regulation. The logic of this argument is that although Congress in 1800 could have regulated such commerce, the Congress of 1900 may not do so, not because the Constitution has changed, but because conditions have changed. Counsel base their premise that lottery tickets have ceased to be commercial commodities upon two premises: (1) That they

"rest to-day under the ban of repressive and prohibitive constitutional provisions or legislative enactment in every State of the Union." (2) The business, so-called, of lotteries is "just as much a thing of the past as the institution of slavery." The first statement may be true. If true, it has only been true in very recent years. If true, it is likely to be untrue at no distant day, as I am advised that several Western States are considering the advisability of giving legal sanction to lottery enterprises. So far as this premise is concerned, it is obvious that if the police legislation of one State can not destroy a commodity that is bought and sold the world over as an article of commerce, the legislation of all the States can not do so. If they could, the commercial power of the Union would be subordinate to the police power of the States, which could, at will, remove articles from Congressional legislation by internal police statutes. In this connection appellants' counsel are guilty of an inconsistency. After admitting that obscene literature is a commercial commodity, they justify prohibitive statutes on the ground that the prohibition of obscene literature is a regulation of commerce and not an attempt to regulate morals. This statement is somewhat surprising. On their argument, however, obscene literature must have ceased to be an article of commerce inasmuch as every State has a law against obscene literature, whereas counsel agree that obscene literature is an article of commerce, and therefore an appropriate subject of Congressional regulation when interstate.

Counsels' second premise that the lottery business is as much a past institution as slavery, has nothing in the record to substantiate it, and is contradicted by the common knowledge of men. Not only are lotteries conducted all over the world at this day, and under the auspicies of many reputable governments, but in this country the lottery business still exists to a surprising extent, and will continue to exist, the police laws of the States to the contrary notwithstanding, as long as the channels of foreign and interstate commerce are open to such lotteries. "'Tis true, 'tis pity, and pity 'tis 'tis true."

REPLY TO MR. EDMUNDS'S BRIEF.

Since dictating the within brief, I am in receipt of the supplemental brief in the Francis case submitted by Mr. Edmunds in behalf of the appellants. Without pretending to answer all of his points (most of which have been already discussed in this or preceding briefs), I venture to refer very briefly to several of the propositions advanced by Mr. Edmunds.

First. He suggests, in the first place, that a lottery ticket is but the evidence of a contract, and that interstate contracts are not within the commercial power of the Union. Assuming the last statement to be correct, a lottery ticket is more than a contract; it is, as I have argued, a *thing* having an intrinsic and exchangeable value. It is true that in a certain sense it is a contract, just as a bond or a share of stock is a contract, but custom has impressed upon a bond or corporate share, as it has upon a railroad ticket or a lottery

ticket, the character of a commodity. As such shares and bonds are daily sold to the value of many millions of dollars, and as the title to these valuable forms of property passes by delivery, it is difficult to distinguish in principle between their sale and the sale of any other chattel.

Mr. Edmunds further says (p. 5):

> If this attempt to deal with the social conduct and condition of the people of the States be upheld, there is no phase of life in the States any element or incident of which involves the passing of persons or things from one State to another that does not fall within the power of Congress to control according to its own discretion. It may make it a crime for any person to cross the line between two States on Sunday, although the two States may have made peaceful entrance lawful on that day, and, conversely, it may authorize all business intercourse between two States to be carried on on the Sabbath, contrary to the laws of both.

This is an extreme and erroneous statement of the Government's contention. The lottery act does not pretend to regulate the social conduct of the people of the States with reference to the purchase of lottery tickets, or to say that lotteries themselves are illegal. If it had attempted to prohibit a citizen of a State from conducting a lottery, or from purchasing an interest in a lottery, it would have clearly trespassed on the police power of the States. The statute simply prohibits interstate traffic in lottery tickets, a wholly different thing, and leaves the people of the

States at liberty to permit or forbid lotteries within their own boundaries. There is no analogy whatever between the suppression of interstate traffic in a thing which is the subject of purchase and sale and a statute forbidding a person from crossing the boundaries of a State on Sunday. The one deals with the right of entry into a State, and has no necessary relation whatever to commerce; the other deals with a necessary incident to interstate traffic in purchasable commodities.

Second. I agree with Mr. Edmunds that "the police power as controlling the conduct of the citizens of the several States and affecting their social order was not conferred upon Congress, excepting so far as it related to places and persons within its exclusive jurisdiction." And also that "it would be a perversion of the history and purpose of the Constitution to hold that the representatives of the States undertook, in framing the Constitution, to transfer the power in respect of the subjects of internal commerce to the discretion of Congress."

These principles are not applicable to the present case. If it be a fact, as can not be gainsaid, that there is an interstate commerce in lottery tickets, then such commerce is "within the exclusive jurisdiction of Congress," and there is no suggestion of any right in this act of Congress to control the "internal commerce" of a State in lottery tickets. They may legislate on this subject as their conceptions of morality or wisdom suggest. Congress simply provides that interstate traffic shall cease.

In this connection it is well to remember that this act was not passed to conflict with or trespass upon the police powers of the State. On the contrary, it was obviously designed to be supplemental to, and a valuable auxiliary of, such police power. Just as the Wilson Act, which was sustained in *In re Rahrer* (140 U. S., 545), was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to assist the various States in their attempt to suppress the lottery traffic. It is well known that all such attempts on the part of States have largely failed for the want of Congressional action with respect to interstate commerce. As long as lottery matter can be imported from other States, or from foreign countries, the local statutes of such States will be ineffective. So fully is this recognized that one western State has recently considered the wisdom of repealing its prohibitory statutes with reference to lotteries and authorizing a lottery as a fiscal agency of the State, in imitation of France, Austria, and other European nations, and the chief argument for such legislation has been that as it has been impossible to prevent the people of the States from purchasing lottery tickets where the situs of the lottery is in a foreign country or in another State, it would be better for the State to have its own lottery, and thus guarantee the fairness of its administration. *Indeed, the importance of these cases is that if this act be declared unconstitutional, and there be no power in Congress to suppress interstate commerce in lotteries,*

then the demoralization of these business enterprises can not be successfully combated. Is it possible that the Federal Government is so impotent that when it sees the channels of interstate commerce used as a means to strike down the police powers of the State that it can not by auxiliary legislation assist the States in their laudable purpose of suppressing this demoralizing business? This court in In re Rahrer, above cited, sustained the power of the Federal Government to lend its power in aid of State legislation; and the principle there vindicated with respect to liquors, about whose use men reasonably differ, may well be applied to interstate traffic in lotteries, about whose pernicious effects thoughtful men are in entire accord.

Respectfully submitted.

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