[17,474.]

Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 106.

CHARLES F. CHAMPION,
Appellant,
vs.
JOHN C. AMES, United States Marshal.

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

BRIEF IN REPLY TO BRIEFS OF APPELLEE.

For the purposes of this case, it is to be assumed, as conceded by the United States on the oral argument, that the lottery tickets and advertisements in question (record, pp. 71–76) were printed in the United States and were not imported from abroad. It follows, therefore, that we are not concerned in the case at bar with any exercise of federal power in respect of imports or smuggled or contraband goods, but with an exercise by Congress of an assumed power (1) to prohibit the transfer from one state to another of any article, and (2) to determine conclusively what is or what is not an article of commerce within the true meaning of the Constitution of the United States.

I.

No decision of this court has held that Congress, under the commerce clause, could prohibit the transfer from one state to another of articles of commerce. Of

course, if the power exist, the wisdom of any particular measure or the motive which induced its passage could not be challenged in the courts. Such a power as is claimed by the Government in the case at bar would draw to Congress a range of legislative action beyond what has ever been seriously conceived to have been intended by those who framed the Constitution of the United States. The limits of the possible ramifications of such a power would, indeed, be difficult to imagine. Its scope would include every form and species of intercourse among the people of the United States, and would practically substitute for the limited power to regulate commerce, the unlimited power to regulate all intercourse, including public morals. So, also, a ruling that Congress may prohibit the transfer of any articles of commerce from state to state would be an expansion of the Constitution broader than anything yet intimated. Moreover, the power to enact absolute prohibition would mean the power of destruction; and surely "this power to regulate is not a power to destroy." [1]

The true rule would seem to be that if an article is in its nature an article of commerce Congress may regulate its transfer from state to state, and may say that after the transfer is completed such article shall or shall not become subject to the state's reserved police power. This is a fair incident of regulation. The Constitution does not say that commerce shall be absolutely free and untrammeled. But if the article in question is not an article of commerce, then the rule must be that Congress cannot under the commerce clause regulate it in any sense, for the simple reason, which must be self-evident, that if the article is not an article of commerce, the power

[1] Chief Justice Waite in the *Railroad Commission cases*, 116 U. S., 307, 331.

to regulate was not delegated, and, consequently, there is no jurisdiction in Congress.

It is, however, said that power must reside somewhere to prevent noxious articles from being introduced into a state. This is conceded. But it clearly resides in the states, and when exercised by the states, according to local policy and necessity, it has been found and is sufficient for all practical purposes.

A state may legislate against the bringing within its borders of any article which the legislature in its discretion considers deleterious, and the states actually do so in respect of many forms of intercourse. The power to exclude from the state noxious articles is absolute except when those articles are articles of commerce. If they are articles of commerce, and Congress has been silent upon the subject, they are presumably entitled to free entry, transportation and opportunity of sale. The police laws of the state cannot reach the article while it remains in its original package as an import and before it has been so separated as to become part of the general property of the state. In other words, while crossing the border, and until the sale in the original package, there must be freedom of sale if Congress has been silent, or if it has so ordained, or if it has not *regulated* in limitation of the right of sale.

But, Congress may, as to any article of commerce, ordain that as soon as it comes within the state, even in its original package, it may be subjected to the operation of the police laws of that state together with other similar property within the borders of the state. It may be suggested that this proposition involves the concession that Congress may thus indirectly prohibit interstate commerce in an article by permitting the states to inter-

fere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. There must be a vast difference between an act of Congress which should say that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another;—the one fully recognizes the reserved powers of the state, the other would absolutely interfere with the discretion and power of the states to permit or to prohibit. One state may desire to encourage what another must prohibit; in one locality a certain article, *e. g.* intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the case of *In re Rahrer*, 140 U. S. 545, will convince us that it was by no means the idea that the opinion was sanctioning the contention that Congress might prohibit all interstate traffic in liquors. As Mr. Chief-Justice Fuller said of the legislation then in question (at pp. 561 and 564): "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

As a broad question of statesmanship under a constitution intended to govern an empire—if we may employ

Hamilton's expression in the Federalist—it must be quite evident that the attempt by Congress to regulate by sumptuary laws, for example, the sale of liquor, and to prohibit interstate traffic therein, notwithstanding the wishes of the various states and local preferences, would be a departure which would cause much astonishment, whilst the exercise of the power discussed in *In re Rahrer* by no means involved any power which ought to be considered doubtful, or that any one could reasonably wish did not exist.

II.

In the case at bar, the principal, but not the sole or controlling, proposition of the appellant is that a lottery ticket or advertisement is not an article of commerce and that the protection of the people of the respective states from the evils of the lottery business should be left where it was the intention of the framers of the Constitution to leave it, namely, in the respective states, to permit, to regulate, or to prohibit. If the local laws be enforced, the states have ample power to regulate or prohibit the lottery business. If lottery tickets and advertisements are not articles of commerce, the states clearly have the fullest power to prevent any railroad or express company or other carrier or any person from carrying or transferring such matter within their respective borders.

Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially a judicial question. Otherwise, Congress could determine for itself the extent and limits of its own powers. A legislative fiat cannot make that commerce or a commercial commodity which in its essence and nature is not such. A transaction which in its nature or analysis

is not commercial, cannot become so merely because Congress declares it commerce. Congress could not, for example, declare insurance to be commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. Nor could Congress, under the guise of regulating interstate commerce, compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state laws prohibiting the sale of such tickets. A lottery agent indicted in New York under a statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause. Would not such a contention be simply preposterous?

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in three well considered cases,[1] this court has felt constrained to hold that insurance was not commerce and an insurance contract not a commercial transaction *within the true meaning of the Constitution*, then it must logically follow *a fortiori* that lottery tickets, which are but another form of aleatory contracts, and relate in no sense even remotely to commodities, are not commercial transactions. A reference to those cases will show that the analysis contained in the appellee's supplemental brief is not accurate. The court appreciated in *Hooper* v. *California*, 155 U. S. 648, 653, that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance,

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[1] *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 653, 655; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401; reviewed again at this term in *Williams* v. *Fears*, 179 U. S. 270, 277.

should be free as part of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. In that case, on the one side, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, and, on the other side, it was insisted on behalf of the state of California that insurance was not commerce. The briefs on file in the *Hooper* case show this fact conclusively. The question was thus distinctly presented, and the court, as above stated, felt constrained to hold that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse, as is also an immigrant agency.[1] Significant, too, is it that in the dissenting opinion of Mr. Justice Harlan in the *Hooper* case, there is not the slightest suggestion that insurance did constitute commerce. The dissent was placed on an entirely different ground.

The analogy between the business of insurance and lottery as understood and classed at the time of the adoption of the Constitution is most strikingly confirmed by the extract from Mr. Jefferson's writings submitted in the brief of the Government at p. 77, in which Jefferson is quoted as saying:

> "There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases."

The argument that lottery tickets are commodities

[1] *Williams* v. *Fears*, 179 U. S. 270, 273.

because they pass by delivery is not sound, nor does it advance us in the solution of this very broad and important constitutional point. This case must be decided on far broader considerations than this narrow and superficial feature of delivery. Insurance policies on goods in transit usually are not personal, but run in favor of the owner of the property, and the title to that property passes by delivery of the bill of lading or warehouse receipt. The fact that an insurance policy or ticket as it is sometimes called passes by delivery with the delivery of the bill of lading does not render it commerce within the Constitution. Most lottery tickets are now, it is true, payable to bearer and pass by delivery; and because of this fact the Government urges that the decision be placed upon the ground that the ticket may be treated as a commodity. But this contention involves the implication that such transactions would change their essential nature if the mode of doing business were altered and lottery tickets or slips were no longer made transferable by delivery but were confined to the individual first purchasing, with whom a personal contract was made! Such a ground would be entirely too narrow, and, moreover, would be very easily circumvented. It would not reach what of all things is most important, namely, the lottery circulars and advertisements. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is done on the race track) and then transfer from state to state simply the advertisements and circulars and the notices of drawings (*France* v. *United States*, 164 U. S. 676, 682).

III.

It is, however, contended by the appellee that Congress

may regulate express companies and other interstate carriers as instrumentalities of commerce, and that this involves the power to determine what they shall and what they shall not transport; in other words, that Congress has exactly the same power over these instrumentalities of commerce that it has over the United States mails. Under this contention, it would follow that Congress could prohibit the transfer from state to state of any class of commodities, of insurance policies, of municipal bonds, of notes, and of everything in fact that is used in interstate intercourse among the people of the respective states. It is submitted that the power to regulate commerce does not authorize Congress to say what shall or shall not be carried from state to state, especially without regard to the commercial character of the matter carried.

Besides, the indictment in the case at bar is not against a carrier; the act is not aimed at carriers; there was no intention to restrain or punish carriers as such; the defendant Champion is not a carrier. When an act of Congress shall be framed expressly applicable to carriers, it will be time enough to consider and determine whether or not Congress can say *quoad* the carrier what he shall or shall not transport and punish him criminally for disobedience. The present case does not present any such question, and at best, if we are to plead to the indictment and the statute, the offense charged is an attempt to cause the express company to do an act for which the express company itself would not be punishable and which act *quoad* the express company is not prohibited by the statute. The statute was drawn so as not to affect or punish the carrier, and perhaps designedly so.

IV.

The Government also suggests that even if lottery tick-

ets and advertisements are not to be treated as commercial commodities and the power to regulate commerce fall short of the power to prohibit and determine what carriers should or should not transport, Congress could, nevertheless, in order to protect what was called "legitimate commerce," regulate, as it were, the morals of all the people of the United States engaged in interstate intercourse and interstate commercial transactions. However desirable such a power might be, it was clearly not delegated to Congress. Exactly the same argument was urged upon this court in the case of *United States* v. *Fox*, 95 U. S. 670, 672, in support of the fraud clause of the bankruptcy legislation of 1867 (Rev. Stat. § 5132, p. 990), but this court said:

> "An act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation 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 to which the state can alone legislate."

V.

It also seems to be urged that, even if the legislation in certain aspects be unconstitutional, the court may uphold the act by limiting it to lottery tickets without regard to the provision as to advertisements on the ground that lottery tickets are commercial commodities, or uphold the act by limiting it to express companies or other carriers engaged in interstate commerce on the ground that they are instrumentalities of commerce. It must be patent that Congress did not intend to limit the act or its scope in either of these particulars. Is the court, for the purpose of making a portion of the act valid, to imply limitations which Congress omitted — and presumably with design? Such a form of judicial con-

struction would be nothing less than judicial legislation; it would be making the law and not declaring it; it would be amending the law and not construing it; it would be doing an act not within the province of the judiciary. Besides, the precedents are entirely against any such form of construction.

In *United States* v. *Reese et al.*, 92 U. S. 214, 221, an act of Congress, passed May 31, 1870 (16 Stat., 140), provided for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. The court was of opinion that Congress had constitutional power to punish such denial only when it was on account of race, color or previous condition of servitude. It was urged that the general description of the offense included the more limited one, and that the section was valid where such was, in fact, the cause of denial. But the court said through Mr. Chief Justice Waite:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*"

In the *Trade-Mark Cases*, 100 U. S. 82, 98, 99, an act of Congress provided for the registration of trade-marks generally without limiting their use to commerce

between the states or with foreign countries. The defendants were indicted for violating the provisions of this act. It was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the statute should be held valid in that class of cases, if no further. The court (Miller, J.) said:

> "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body" (p. 98). . . . "*If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation*, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law." (p. 99).

The act was, therefore, held to be wholly unconstitutional.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, certain bonds of the state of Virginia had been issued under an act providing that the coupons thereon should be receivable at and after maturity for all taxes due the state. Thereafter the legislature passed an act requiring tax collectors to receive in discharge of taxes gold, silver, treasury notes, national bank currency and nothing else, and forbidding the receipt of coupons issued under the foregoing act in payment therefor.

The latter act also abolished the actions of trespass and trespass on the case, and other particular forms of action as remedies for the taxpayer who had tendered his coupons in payment of taxes. The court held that the provisions of the act providing that the coupons should be receivable in payment of taxes constituted a contract, and that the act providing that they should not be so receivable was unconstitutional as it impaired the obligation of that contract. It held also that those parts of the latter act abolishing the remedies of the taxpayer were not separable from the remainder of the act, inasmuch as they all constituted part of one plan, and that the entire act was, therefore, unconstitutional. Matthews, J., said:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. *To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.*"

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, a statute of Georgia provided that any master of a vessel bearing toward any of the ports of the state, except coasters in the state, and between the ports of the state and those of South Carolina or of Florida, who refused to receive a pilot on board, should be liable, on his arrival in such port of the state, to pay the first pilot who might have offered his services outside the bar the full rates of pilotage established by law. It was held that this provision was unlawful by reason of the fact that it discriminated in rates between the ports of different states.

It was urged that the illegal exceptions might be disregarded so that the rest of the section could stand, upon the principle that a separable part which is unconstitutional, may be rejected, and the remainder of the statute preserved and enforced. The court said (Matthews, J.):

> "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. *It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*"

In *Baldwin* v. *Franks*, 120 U. S. 678, 685, an act of Congress provided for the punishment of those who in any state or territory conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It had previously been held that this statute was unconstitutional in so far as it applied to conspiracies to deprive persons of the equal protection of the laws of the state, no special rights or privileges arising under the constitution, laws or treaties of the United States being involved. It was contended that, while this was the fact, still the statute was effectual so far as concerned conspiracies to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. The court said (Waite, C. J.):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of

> separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. . . . It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The subject was again reviewed by Mr. Chief Justice Fuller in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635, 636, where the above cases of *Poindexter* v. *Greenhow* and *Spraigue* v. *Thompson* were particularly cited with approval.

CONCLUSION.

For these reasons and those suggested in the briefs already filed, it is submitted that this interstate commerce feature or portion of the act of Congress of March 2, 1895,[1] should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of public morals in respect of lotteries must be held to remain, as it has ever been, within the local jurisdiction of the respective states.

Washington, March 5, 1901.

WILLIAM D. GUTHRIE,
Of counsel for appellant.

[1]The several features of the act were passed at different times. Thus, the feature as to the United States mails was enacted in 1890 (26 Stat. 465); the feature as to imports from abroad, in 1894 (28 Stat. 549), and the feature as to transfers from state to state, in 1895 (28 Stat. 963).