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LOTTERY GAMBLING.

T. J. COMMERFORD
vs.
VIRGINIA C. THOMPSON,
Postmaster at Louisville, Ky.

United States Circuit Court for the Sixth Judicial Circuit.

ARGUMENT FOR THE DEFENDANT,

BY

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ASSISTANT ATTORNEY-GENERAL

FOR THE

POST-OFFICE DEPARTMENT.

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OF

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ASSISTANT ATTORNEY-GENERAL FOR THE POST OFFICE DEPARTMENT.

IN RE COMMONWEALTH DISTRIBUTION COMPANY

vs.

POSTMASTER LOUISVILLE, KENTUCKY.

MAY IT PLEASE THE COURT: This is an application for a mandatory injunction to restrain the postmaster at Louisville from obeying the order of the Postmaster-General, directing her to refuse to deliver letters addressed to the Commonwealth Distribution Company, and to return the same to the Dead-Letter Office. It involves the question as to whether the direction of the Postmaster-General has the sanction of the law, for it is admitted that the action of the postmaster in withholding such letters cannot be justified unless the instruction of the Postmaster-General is supported by authority of law.

It is the law rather than the instruction of the Postmaster-General that must justify her action. Within the last half century much has been said in this country and in England on the subject of the rights, powers, and duty of the government in the transmission of mail matter. As late as the 8th of April, 1845, Sir James Graham declared in the House of Commons that the power to open and examine letters had been intrusted to the Executive Government from the earliest period, bearing date even prior to the Revolution. That it was too much to expect that the postal authority of the government, conducted by responsible servants of the Crown, should be made the medium of communication in the promotion of violent and treasonable designs against the safety of the state, and against peace and good order. (Hansard's Parliamentary Debates, vol. 79, p. 318.)

This doctrine was stoutly resisted at that time, and happily has never obtained in this country.

The policy of our legislature has ever been to exclude improper matter altogether, and to preserve sacredly the inviolability of matter permitted to be sent. Once admitted that matter is unmailable, the duty of exclusion follows. On the other hand, when it is admitted that the matter is mailable, it becomes the duty of the government to forward it with due celerity and certainty, and to deliver it promptly. It is only when a question like the one now presented arises as to which of the two classes the matter belongs that any embarrassment can arise.

If the letters in controversy are mailable matter, then the petitioner is entitled to have them delivered to him; if not, he has no such interest

in them as will entitle him to sustain the action. It becomes necessary, therefore, to ascertain what the law is concerning this subject.

The first provision of law in relation to lotteries is found in section 13 of the act approved July 27, 1868, and is as follows:

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 other similar enterprises, offering prizes of any kind under any pretext whatever.

This was followed by the act of June 8, 1872, section 149 of which provided—

That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, 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 obtaining money under false pretenses, and a penalty of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction in any Federal court of the violation of this section.

This latter act was amended by section 2 of the act approved July 12, 1876, by striking out the word "illegal."

It became, therefore, under this act, unlawful to carry in the mail any letter concerning any character of lottery, whether legal or otherwise. The Postmaster-General, in pursuance of what he understood to be the law, instructed postmasters to refuse to receive or deliver letters addressed to lottery companies or their agents as such. This order was based on what he regarded as a fair and legal presumption that letters addressed to lottery companies "concern" a lottery.

I shall endeavor to show by reason and authority that this is the correct construction of the law, and that the order in question is simply in the line of carrying out the intention of Congress.

I desire to cite a case in which a court of very high authority laid down a rule by which the nature of the contents of a sealed letter might be presumed, without any other evidence of its contents than the circumstances under which it was being carried.

The sixteenth section of the act of April 30, 1810, provided that no person except a mail-carrier should receive for carriage over a mail route any letter or packet, excepting only "such letter or letters as may be directed to the owner or owners of such conveyances and relating to the same, or to the person to whom any packet or bundle in such conveyance is intended to be delivered." (2 Statutes, page 596.)

The supreme court of Massachusetts, in construing this statute, in the case of Dwight *vs.* Brewster (1 Pickering, 50), held as follows:

That section prohibits any person otherwise than the Postmaster-General or his deputies, or persons by them employed, from being concerned in setting up or maintaining any foot or horse post, stage, wagon, or other stage-carriage, on any established post-road, or from one post-town to another, on any adjacent or parallel road, for the purpose of carrying any letters or packets, except newspapers, &c., and punishes by penalty the carrying of letters, &c., except such as may be directed to the owner of the conveyance, and relating to the same, or the person to whom the packet or bundle in such conveyance is intended to be delivered. The carrier of the mail is not prohibited from taking packets and bundles any more than passengers. He will have a right, then, under this section to take letters directed to the owners of such packets or bundles. If, therefore, a letter had been proved to have been sent with a parcel of bank notes, no offense would have been committed. The case of Bennett *vs.* Clough is similar to the present one. There a parcel containing bank-notes, stamps, and a letter was sent by a *common carrier, and there being no evidence of the contents of the letter, the presumption of law was that it related to the parcel sent. So here, supposing a letter had been sent, unless its contents were proved, it would be presumed to relate to the bundle.*

If a letter sent by a common carrier directed to the consignee of a package conveyed at the same time raises a presumption that the contents of the letter relate to the package, with how much stronger reason-

ing may it be said that a letter addressed to a company or corporation raises the presumption that it relates to or concerns the business of that corporation? This presumption is supported by the almost universal experience of mankind. It is not unusual that letters are addressed to private individuals which do not concern their particular calling or avocation.

The subject-matter of communications thus addressed is of such a variety of character as to be subject to no classification, and give no indication in their address of the subject-matter of their contents. In the case of private partnerships the presumption that the letter addressed to such partnership relates to or concerns the business of the partnership, while stronger than the case of private individuals, is nevertheless not so conclusive as in the case of corporations. So strong, however, is the presumption that letters addressed to a person at his place of business relates to the business of the person addressed, that it was provided in case of bankrupts—

By 12 and 13 Vict., c. 106, s. 124, the court of bankruptcy may order that, for a period of three months from the date of any such order, all posted letters directed or addressed to any bankrupt at the place of which he shall be described in the petition for adjudication of bankruptcy shall be redirected, readdressed, sent, or delivered by the postmaster-general or the officers acting under him, to the official or other assignee or other person named in such order; and upon notice by transmission of a duplicate of any such order to the postmaster-general or the officers acting under him, by the official or other assignee or other person named in such order, of the making of such order, it shall be lawful for the postmaster-general or such officers as aforesaid, in England, Scotland, or Ireland, to readdress, redirect, send, or deliver all such posted letters to the official or other assignee or other person named in such order accordingly; and the court may, upon application to be made for that purpose, renew any such order for a like purpose or for any other less period as often as may be necessary. (Fisher's Common Law Digest, page 6855.)

It was accordingly held in Meirelles *vs.* Banning (2 Barnwell & Adolphus, 909) that—

Letters having arrived at a post-office, addressed to a party who had become bankrupt, the assignee, (in that character) demanded them of the postmaster, and he, believing *bona fide* that the assignee was entitled to have them for the purposes of the commission, delivered them up; this having been the practice of the office under similar circumstances for more than thirty years. Held, that the postmaster was not liable under 9 Anne, c. 10, s. 40, for wittingly, willingly, and knowingly detaining letters, and causing them to be detained and opened.

The presumption that letters addressed to a corporation concern the business for which the corporation was chartered is in fact rather an absolute conclusion of law than a mere presumption. Any presumption to the contrary involves the assumption as a matter of law that a corporation is acting *ultra vires*.

The company on whose motion these proceedings are had, and whose letters have been detained, has no authority of law for the transaction of other than lottery business. It has no social relations to be kept up or preserved through the medium of the mails, and its powers being defined and regulated by law, it is not empowered to transact business of a general character.

I have so far treated the question as if lottery companies occupied towards the government the position of ordinary corporations, chartered for the purpose of promoting agriculture, science, the arts, or other matters of general interest to the public. I submit, however, that a broad distinction exists between lottery companies, although authorized by law, and other institutions of the character mentioned.

Leaving out of view altogether the *morale* of the question, it is enough to say that the highest recognition they have ever received at the hands of the courts is that of mere toleration.

The Supreme Court of the United States, in the case of Brent *vs.* Davis (10 Wheaton, page 402), in discussing the right of a lottery company authorized by an act of Congress, observes:

> However questionable may be the policy of *tolerating* lotteries, there can be no question respecting the policy of removing, as far as possible, from those who are concerned in them, all temptation to fraud.

It is placed in the same category with the selling of intoxicating liquors, gaming, &c. (Bishop on Criminal Law, vol. 1, page 493.)

By the statute 10 and 11, W. III, c. 17, all lotteries are declared to be public nuisances, and all grants, patents, and licenses for the same to be contrary to law. (2 Blackstone, page 167.)

The act of Congress which declares that no letter or circular "concerning" a lottery shall be carried in the mail, recognizes this fact.

If lottery companies possess the same right to use the mail which is vested in private citizens, such an act of Congress would unquestionably render null and void the restriction upon carriage of the excluded matter by private post, for while Congress under the Constitution possesses plenary powers over the subject-matter of the establishment of post-offices and post-roads, yet the exercise of the power of exclusion must be confined to matter deemed injurious to the public morals, or in some manner detrimental to the common interests, otherwise the excluded matter may be carried by private post, for the power to prohibit the carriage of any special class of legitimate correspondence by private post rests upon the existing fact that mail facilities for that special class of correspondence is provided by the public post, and on the failure of such facilities, the government abandoning the monopoly as to that class, the reason of the restricting and the restriction itself fall together.

That the lottery business has a "demoralizing influence upon the people" is a fact that has been repeatedly recognized, both by the courts and by Congress.

The policy of the law is to widen and extend the range of mail facilities to the citizen for the transaction of legitimate business, and to deny it altogether for the purposes of promoting the business of lottery companies. There is every presumption of law in favor of the former; the sanctity of his right to use the mail is regarded as inviolate and perfect. Yet even this right does not permit the private citizen under cover of the seal to use the mail for prohibited purposes. In the language of the Supreme Court of the United States in *Ex parte* Jackson (6 Otto, 627)—

> Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, *they may be enforced* upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts.

If this right of the citizen is subject to this restriction as declared by the Supreme Court, how much less is the right of a corporation, whose chartered existence is a living invasion of the social law; whose only *chartered use* of the postal service is to violate its express law, which declares that nothing "concerning" it shall be carried in the mails. No circulars and no letters, sealed or unsealed, that "*concern*" a lottery shall be sent in the mails.

But it is insisted for the company that, notwithstanding the act of Congress prohibiting the transmission of letters "concerning" lotteries, lottery companies are nevertheless entitled to the use of the mails for the transmission of all matter declared by law to be mailable; that while neither the company nor individuals have a right to send let-

ters or circulars "concerning" a lottery, such company and its correspondents have, in common with all other citizens, the right to use the mails for the transmission of mailable matter; that if a letter addressed by a private individual to a lottery company "concerning" a lottery is unmailable, the same is equally true of such a letter addressed by one private individual to another; that the authority of a postmaster to detain a letter is the same in either case, and that if he is not authorized to detain letters in the one case on account of any suspicion he may have of its contents, he is equally unauthorized in the other.

In short, that while he may refuse to transmit or deliver letters "concerning" a lottery, yet he must do so at his peril. That if in the attempt to discharge this duty he should unwittingly detain a letter not subject to detention, he is guilty of a violation of section 3891 of the Revised Statutes, which prescribes a *heavy penalty* for unlawfully detaining, delaying, or opening letters.

If this be a correct construction of the law, and a fair interpretation of the right and duties of postmasters acting thereunder, it becomes at once evident that the statute is a dead letter, and cannot be enforced. It is something more; it is a snare to entrap the honest but unwary public official.

That a postmaster may, under some circumstances, lawfully detain a letter seems clearly implied by the wording of section 3890 Revised Statutes, which provides "that any postmaster who shall *unlawfully* detain in his office any letter or other mail matter, &c., *the posting of which is not prohibited by law, with intent*," &c.

It is not, therefore, every detention of *strictly mailable* matter that is unlawful.

Section 3937 Revised Statutes provides that—

> All domestic letters deposited in any post-office for mailing, on which postage is wholly unpaid, or paid at less than one full rate as required by law, except letters lawfully free, and duly certified letters of soldiers and sailors and marines in the service of the United States, shall be sent by the postmaster to the Dead-Letter Office at Washington.

Again, section 3895 provides that—

> All letters, packets, or other matter which may be seized or detained for violation of law shall be returned to the owner or sender, or otherwise disposed of as the Postmaster-General may direct.

It is, therefore, the *unlawful* detention of *mailable* matter that constitutes the offense. Let us admit, then, for the sake of the argument that lottery companies have the same right to use the mails as that possessed by other corporations, or by individuals, for the transmission of mailable matter. What then becomes its duty, and what the duty of the postal officials under the law? We think it will hardly be questioned that, under a statute which makes a letter "concerning" a lottery absolutely unmailable, a letter addressed to a lottery company is at least presumably unmailable.

The law excludes from the mails all liquids, poisons, glass, explosive material, obscene books, lottery letters and circulars, and all articles which from their form or nature are liable to destroy, deface, or otherwise injure the contents of the mail-bag, or the person of any one engaged in the postal service. Here is a very large class of unmailable matter, embracing thousands of articles, many of them useful, some of them absolutely essential to the comfort of mankind. Many of these articles are unmailable on account of their material, others on account of their form, and still others on account of their supposed moral effect. In determining whether any article presented for mailing falls within

the prohibition, or belongs to either one of the classes of prohibited matter, the postmaster is bound to exercise a sound discretion, and it is not to be presumed that the law requires him to exercise that discretion at his peril. It is equally unlawful for him to detain mailable matter, or to forward unmailable matter. How, for instance, is the postmaster to determine whether a book offered for mailing is obscene, or that a certain article is calculated to injure the contents of the mail-bag, or injure the person of any one engaged in the postal service? Explosives are unmailable. Must he test the suspected article? Poisons are excluded. Must he call in the aid of a chemist? Or, must these several articles be excluded by him at the peril of a heavy fine and imprisonment if he should make a mistake?

Such a construction of the law seems absurd. It is submitted that in all cases of this character it is not an unreasonable requirement to expect the sender of the questionable article to remove a doubt which he himself has raised. He, and he alone, can do it, and that, too, without expense or without violating the rights of any one. He ought to consider that the masses of the people, supposed to be represented by the law, have rights to be protected in common with himself.

It is freely admitted that many articles which are declared by law to be unmailable may be sent under the cover of a seal. A poison may be so concealed and sent; but if the usual sign used by druggists to indicate poison were printed on the envelope to warn persons handling it of its dangerous contents, it will hardly be contended that the sanctity of the seal would insure its transmission. The determination of these and similar questions involves the exercise of something more than merely ministerial functions. Certain matter is excluded from the mails on account of its *weight* alone. In the determination of the question of the mailability of articles of this character, nothing is left to the discretion of the officer.

But whether the contents of a letter "concern" a lottery, or are "liable to destroy, deface, or otherwise *injure* the contents of the mail-bag, or the *person of any one engaged in the postal service*," are not ministerial questions, but are judicial in their character, and must be solved in the exercise of a sound discretion, by the aid of such practical appliances as may be in the reach of the officer whose judgment is thus appealed to.

My argument thus far has been based on the assumption that lottery companies are entitled to use the mails for the transaction of other than lottery business. Now, may it please the court, I have the honor to submit, that under a fair interpretation of the postal laws and the laws regulating the powers of corporations, lottery companies are not entitled to use the mails for any purpose, and that the obvious effect of the statute forbidding the transmission of letters and circulars "concerning" a lottery is to interdict the transmission of any letter or circular addressed to a lottery company or its agent as such.

The Commonwealth Distribution Company, although chartered by the State of Kentucky, is not a citizen of the United States.

Mr. Chief Justice Taney, in delivering the opinion of the court in the case of the Ohio and Mississippi Railroad Company *vs.* Wheeler (1 Black, 295), said:

> In the case of the Bank of Augusta *vs.* Earle (13 Pet., 512) the court held that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law; and where that law ceases to operate the corporation can have no existence. It must dwell in the place of its creation.
>
> It had been decided in the case of The Bank *vs.* Deveaux (5 Cr., 61), long before the case of the Bank of Augusta *vs.* Earle came before the court, that a corporation is not

...OR THE LOTTERY COMPANIES.

The first issue between the Post Office Department and the lottery companies resulted on Monday in a victory for the department—an adverse decision to the lottery companies being prevented only by a withdrawal of the motion made by their counsel. A bill had been filed in the United States District Court in behalf of the Louisiana State Lottery, praying for an injunction to prevent the Postmaster General from withholding letters. The Postmaster General entered a demurrer. The *Tribune* dispatch describes the proceedings in the court as follows:

Counsel for the complaint asked that the decision be withheld, giving various reasons for the request; but Chief Justice Cartter refused to delay. Thereupon the counsel for the lottery company withdrew the bill, thus preventing the publication of an adverse decision with the reasons upon which it was based. In reply to the request for delay Chief Justice Cartter, after consultation with the other Justices, said: "No, I will not delay the decision. This case is being tried in the newspapers now, apparently in the interests of the lottery corporations, but whether by its procurement or not I do not know."

Judge Bartley, one of the lottery company's counsel, hurriedly interrupted Judge Cartter, saying: "Your Honor, we dismiss this case."

Judge Cartter said: "Well that disposes of the matter."

Judge Ray, counsel for the Postmaster General, said that the rule of the Postmaster General to show cause is then of course discharged. To this the Court assented. Counsel for the lottery company have announced their intention to file an amended bill. Judge Cartter declines to make public the grounds upon which his decision was based, as the same question may come before his court for further consideration.

a citizen within the meaning of the Constitution of the United States. * * * The averments in the declaration, said the judge, would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two States, and to be one and the same legal being in both States. If this were the case it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal existence upon the principles of the common law, or under the decision of this court in the case of the Bank of Augusta *vs.* Earle, before referred to.

Under the Constitution it is perfectly competent for Congress to deny the use of the mails to this or any other corporation. Unlike individuals corporations possess no natural rights, and only such legal rights as the law-making power may see proper to confer upon them. It invokes in this case the authority of law to compel an officer of the United States to deliver its mail matter under a law which declares that letters concerning its business shall not be carried in the mails. Its charter does not authorize it to transact other than lottery business. If the letters it seeks to get possession of do not relate to that business it has no interest in them; if they *do* relate to that business their delivery is unlawful. It must confine itself strictly to the purpose of its organization. Whatever it does "concerns" a lottery. If it sends a letter, it is a letter "concerning" a lottery. If it receives a letter, it is letter "concerning" a lottery. The very addresses on the back of the letters it now seeks to recover "concern" a lottery.

If the letters do not "concern" a lottery, then the lottery company ought not so seriously to concern itself about the letters. If these letters do not relate to its business as a lottery company, then the company is putting itself to an extraordinary amount of labor and expense to accomplish a purpose in which it has no interest.

It must not be forgotten in this connection that we are discussing the rights of the corporation as such. The individual members of it have rights in common with other citizens. They enjoy the same postal facilities; they may send or receive letters on any subject on which they may choose to write. It is the soulless concern known as the Commonwealth Distribution Company of Kentucky whose supposed rights we are discussing, a corporation whose only recognition by the laws of the United States is found in a statute that excludes its letters and its infamous literature from the mails. Its only legitimate business constitutes a species of gambling, the most insidious and, therefore, the most dangerous and demoralizing known to the experience of mankind. Denounced long ago by the laws of England as a nuisance, denied the use of the mails by the law of the land, and its very existence made a criminal offense by the laws of all the States except two or three, it requires a remarkable degree of forensic temerity to claim for it the same right to use the mails as that possessed by an incorporated institution of learning.

It is insisted, however, that the act of Congress must be literally construed. That if Congress had intended to prohibit the transmission of letters "directed" to lottery companies it would have said so. That the interdiction extends only to letters whose contents relate to or "concern" a lottery. A moment's consideration will, I think, demonstrate the incorrectness of this construction of the act. Let us see.

A letter addressed from A to B setting forth the character of the Commonwealth Distribution Company of Kentucky, showing how the investment of a few dollars in the tickets of that institution would realize to the investor a fortune without the labor and waiting incident to the old way of money making, would be a letter "concerning" a lottery; and yet I apprehend that no one will be found to insist that such a letter is within the interdiction of the statute, provided that neither of the

correspondents is in any way concerned as agent or otherwise in promoting the interest of the company. A circular setting forth the author's ideas of the immensely corrupting influence of this worst of all species of modern gambling would be literally a circular "concerning" lotteries, and yet the proposition that such a circular would be unmailable would be treated as simply absurd.

What does the act of Congress mean? What was its enactment designed to accomplish? It meant simply to strike down lottery business by breaking up all postal communications between the companies, their agents, and their victims. In order to effect this purpose it used the very strongest and most comprehensive term it could command.

This, like all other statutes, must be construed with reference, first, to the law as it existed at the date of its enactment, and as it was allowed to remain unaffected by the statute in question, and, second, to the intent of Congress. And in the third place, every act of Congress must receive, if possible, a construction that will render it operative in carrying out the intention of Congress, rather than a construction which renders it void and of no effect. Taking these rules as a guide, we submit, first, that under the law as it existed at the time this statute was passed, no post-office official or other officer of the government was authorized to open a letter with a view to ascertain its contents. It is reasonably fair, then, to conclude that Congress contemplated some other mode of determining whether a letter "concerned" a lottery. Nor is it perceived that there is any other means by which the postmaster whose duty it is claimed is to forward or deliver the letter is enabled to acquaint himself with its contents, except from the address upon the letter. The writer of the letter is unknown. The lottery company declines to disclose the contents of the letter or the name of the writer. As to the second proposition, we have already shown that the object sought to be attained by Congress was the suppression of lottery business so far as that object could be accomplished by denying to companies carrying on that business the right to use the mails.

We are, therefore, driven as a last resort to conclude either that the order of the Postmaster-General directing postmasters to refuse to forward or deliver letters addressed to lottery companies is authorized by law, or that the statute under consideration is a dead letter, a legislative abortion.

Are we driven to the latter alternative by the necessities of this case? Let us see if we are not warranted in assuming for administrative purposes that every letter arriving at this post-office addressed to this company concerns the business of the company, and is therefore unmailable. This company has in every leading newspaper in the United States advertised its business. The only business it proposes to do, the only business it is authorized to do, is a business concerning which the law declares "no letter or circular shall be carried in the mails." It invites the people everywhere to violate this law. It offers a bribe to any one who will disregard the law. It offers a premium for crime and promises the largest premium to the worst criminal. It carefully lays its snare and delusively spreads its fatal net, and then with the song of the siren it allures the thoughtless and tempts the avaricious.

In response to its seductive allurements, thousands of letters come pouring like a flood into the post-office. Now, if the court please, it is not seriously questioned that nine-tenths of these letters concern the lottery, and have been sent in violation of law; for it is idle to say that, of all the world, the postmaster is the only person supposed to be ignorant of the contents of these letters. Gentlemen may ridicule the propo-

sition that the postmaster is authorized to *presume* that these letters relate to the business of the lottery company. It is something more than presumption with him. He knows that the most of them relate to that business, and are, therefore, unmailable. This is a fact known to the postmaster, known to the parties, known to the court, and known to the world. Indeed, the plaintiff in this action does not dare to question it. "But," say the company, "while it is admitted that a portion of this mail, perhaps the larger portion, concerns our lottery, we possibly, and very probably, have other letters that do not concern the lottery, and those you dare not detain." We reply, unhesitatingly: "In the first place, if there are letters here that are simply addressed to you that do not in any manner concern your business, you have no interest in them and, therefore, no right to demand them. If you were a citizen of the United States it would be otherwise; you would then have a right to receive and transmit letters on any subject not prohibited by law, and the law will not presume that your letters relate to prohibited matter; but you are a corporation, and the only business you are authorized to transact is one concerning which the law declares no letters shall be sent in the mails. The necessary presumption or conclusion arising from the address of this letter makes it unmailable."

But, suppose, if the court please, that I am mistaken as to my conclusion that an address on a letter to a lottery company makes it unmailable, and that, on the contrary, such company is entitled to the use of the mails for other purposes, then I say it becomes the duty of the company to separate its mailable from its unmailable matter.

By the law, both of this country and England, the person whose property another has fraudulently mixed with his own, has the right to take possession of the whole mass, for the purpose of separating and securing, or of disposing of the portion belonging to himself, and where the separation and identification cannot be made, the law gives the entire property to him whose goods have been fraudulently mingled. It is for the party guilty of the fraud to distinguish his own goods satisfactorily or lose it. The court will not identify his property for him. (Bigelow on Frauds, pages 97 and 98 and notes.)

Where one person adds mill-logs of his own to a pile of logs belonging to another person, and marks them in the same manner as the others are already marked, he cannot afterwards maintain replevin against such other person for his proportion of the logs, but only for such logs as he can identify to be his own (Dillingham *v.* Smith, 30 Me., 370); Compare Haseltine *v.* Stockwell (30 Me., 237); Bryant *v.* Ware (30 Me., 295); Foster *v.* Cushing (35 Me., 60); Stephenson *v.* Little (10 Mich., 433); Wilson *v.* Wentworth (25 N. H., 5 Fost., 245); Jenkins *v.* Steanka (19 Wis., 126); Root *v.* Bonnema (22 W., 539). "The rule is so strict that if the confusion of goods is produced by the wrongful act of one of the owners, he loses his right to the whole, and even his creditors cannot attach his interest or share." (Beach *v.* Schneally, 20 Ills., 185; Breckenridge *v.* Holland, 2 Blaskyt, Ind., 377; Leary *v.* Dearborn, 19 N. H., 351; 39 W., 557; 2 John. Ch., 62; 4 Bos., 155.)

In the case of The Distilled Spirits, 11 Wal., 356, the Supreme Court, in pronouncing the opinion, use this language: "It needs no learned examination of the doctrine of confusion or mixture of goods to make it apparent that if certain spirits belonging to the government by forfeiture are voluntarily mixed with other spirits belonging to the same party and passed through the process of rectification in leaches, he cannot thereby deprive the government of its property; and if the government only claim its fair proportion of the rectified spirits, he certainly cannot com-

plain of injustice. The only result of applying the doctrine of confusion of goods would be to forfeit the entire mixture."

Is the right of this company to such of its letters as do not concern a lottery, supposing there are such (although no such allegation is made in the petition), of any higher character than that of the farmer to the wheat which he has fraudulently mingled with his neighbor's? The former, knowing that his wheat is of an unmerchantable grade, fraudulently mingles it with a better grade belonging to his neighbor. The law, therefore, tells him he must lose his wheat. The lottery gambler fraudulently procures his mailable and unmailable matter, to be so mingled as to render its separation impracticable. Now why should he be more highly favored than the farmer? "The law will not sanction the fraud of a corporation sooner than that of an individual." (Angell & Ames on corporations, sec. 284, p. 280.)

The proportion that the lottery business has assumed within the last few years, invokes the serious consideration of the court and the country. Take, for example, the State of New York, where the organization of lottery companies or even the sale of lottery tickets is prohibited by statute. There are to-day in the city of New York alone 33 lottery agencies, receiving weekly, on an average, 7,661 ordinary, and 1,993 registered letters. Millions of dollars are flowing annually into their coffers. They are huge financial vampires sucking the life-blood of legitimate business enterprises, inflicting upon society a species of distempered mental leprosy, which will require years to remove. This gigantic work of undermining the best interests of society is being accomplished by a monster that seeks to hide behind the mask of a State charter a visage more hideous than that of the veiled prophet.

Finally, it is insisted for the company that it has a vested interest in letters arriving at this office to its address, and that the action of the department in withholding them amounts to confiscation, and that, too, without due process of law. This argument, however, if good for any purpose, is based upon the assumption that the letters in controversy do not concern the lottery, and are therefore legitimate mail matter. It is only in case of matter entitled by law to be sent through the mails that the party addressed can acquire any interest in it by reason of its having been sent through the mails or deposited for that purpose. The postal authorities are not only not authorized to transmit these letters, but are positively prohibited from so doing, and the deposit in the post-office of these letters is forbidden, and in the absence of any statute on the subject, it would seem, on equitable principles, that the company cannot take advantage of its own wrong, and insist upon setting up a right acquired in violation of law.

The law not only declares that lottery letters shall not be carried in the mails, but denounces a penalty against any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section. In the transmission of legitimate mail matter, the government is the agent of both parties—the agent of the writer until the matter leaves the office of mailing, and thereafter the agent of the person addressed, except in extraordinary cases, when, for sufficient reasons shown by the writer, the Postmaster-General is authorized to stop the matter *in transitu*. But in the case of unmailable matter the government does not become the agent of either party, except as provided in section 3898 of the Revised Statutes, already referred to, which is as follows:

All letters, packets, or other matter which may be seized or detained for violation of law shall be returned to the owner or sender of the same, or otherwise disposed of, as the Postmaster-General may direct.

Under this statute, the writers of the letters in controversy have never parted with their property in them, so far as the lottery company is concerned, and are entitled by law to have them returned. It is no answer to say that the writers are not insisting on their rights; the law declares that the letters shall be returned or otherwise disposed of, as the Postmaster-General may direct, and does not consult their wishes in the premises. Having violated the law in sending them, they are not entitled to be heard to say what disposition the department may make of them. But whatever may be the equities of the writers, the disposition of these letters does not in any manner affect the rights of the company, for they have acquired no rights by the violation of the law.

If the government, in its efforts to protect the citizens against the immoral tendencies and ruinous results of lottery speculations, should return to him his property, which he had sought to part with in violation of law, it does not rest with the company to complain. In most of the States money lost at gaming may be recovered in an action against the winner. In this particular the complainant's charter may afford it immunity against the liability of the ordinary gambler, yet it is too much to require the government to transmit its stakes or to expect a seal (although, like charity, covering a multitude of sins) to cover the iniquity of its transactions.

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