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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JACOB ABRAMS, ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES.
No. 316.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF THE UNITED STATES.

QUESTIONS INVOLVED.

While there are in the record eight assignments of error (R. 258–262), the questions raised therein resolve themselves to two, and to two only, viz:

First. Was the enactment by Congress of section 3, Title I, of the act of June 15, 1917, in the respects in which it was amended by the act of May 16, 1918, 40 Stat. 553, clearly in excess of any power conferred upon the Congress by the Constitution?

Second. Was there any evidence in the case at bar to go to the jury of a violation of that act by the plaintiffs in error?

THE STATUTE.

The portions of the statute material to the discussion of these questions are as follows:

> Whoever, when the United States is at war, shall * * * wilfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government of United States * * * or any language intended to bring the form of government of the United States * * * into contempt, scorn, contumely, or disrepute, or shall wilfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, * * * or shall wilfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of anything or things, product, or products, necessary or essential to the prosecution of the war in which the United States may be engaged with intent by such curtailment to cripple or hinder the United States in the prosecution of the war * * * shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

STATEMENT OF THE CASE.

The indictment.

The indictment (R. 2–19) contained four counts covering the four different clauses of the statute, and all for conspiracy. The first charged a conspiracy, while the United States was at war, wilfully to utter,

print, write, and publish disloyal, scurrilous, and abusive language about the form of government of the United States by printing, publishing and circulating among the people of the Borough of Manhattan a leaflet in the English and a leaflet in the Yiddish language, copies of which were attached to the indictment, and made a part thereof. The main overt acts charged were the printing and circulation of these leaflets. The second count charged a conspiracy, while the United States was at war, wilfully to utter, print, write, and publish language intended to bring the form of government of the United States into contempt, scorn, contumely, and disrepute by the same means, and with the same overt acts. The third count charged a conspiracy wilfully to utter, print, write, and publish language intended to incite, provoke, and encourage resistance to the United States in its war with Germany by the same means and with the same overt acts. The fourth count charged a conspiracy, while the United States was at war, wilfully by utterance, writing, printing, and publication to urge, incite, and advocate curtailment of production of things and products, to wit, ordnance and ammunition, necessary and essential to the prosecution of the war, with intent by such curtailment to cripple and hinder the United States in the prosecution of said war, by the same means and with the same overt acts.

4

The leaflets.

The leaflets whose publication and circulation were complained of were as follows, the second or Yiddish being translated:

THE HYPOCRISY OF THE UNITED STATES AND HER ALLIES.

"Our" President Wilson, with his beautiful phraseology, has hypnotized the people of America to such an extent that they do not see his hypocrisy.

Know, you people of America, that a frank enemy is always preferable to a concealed friend. When we say the people of America, we do not mean the few Kaisers of America, we mean the "People of America." You people of America were deceived by the wonderful speeches of the masked President Wilson. His shameful, cowardly silence about the intervention in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.

The President was afraid to announce to the American people the intervention in Russia. He is too much of a coward to come out openly and say: "We capitalistic nations can not afford to have a proletarian republic in Russia." Instead, he uttered beautiful phrases about Russia, which, as you see, he did not mean, and secretly, cowardly, sent troops to crush the Russian revolution. Do you see how German militarism combined with allied capitalism to crush the Russian revolution?

This is not new. The tyrants of the world fight each other until they see a common

enemy—working class—enlightenment—as soon as they find a common enemy they combine to crush it.

In 1815 monarchic nations combined under the name of the "Holy Alliance" to crush the the French Revolution. Now militarism and capitalism combine, though not openly, to crush the Russian revolution.

What have you to say about it?

Will you allow the Russian revolution to be crushed? You: Yes, we mean you the people of America!

The Russian revolution calls to the workers of the world for help.

The Russian revolution cries: "Workers of the world! Awake! Rise! Put down your enemy and mine!

Yes, friends, there is only one enemy of the workers of the world and that is capitalism.

It is a crime, that workers of America, workers of Germany, workers of Japan, etc., to fight the workers' republic of Russia.

Awake! Awake, you workers of the world! Revolutionists

P. S.—It is absurd to call us pro-German. We hate and despise German militarism more than do your hypocritical tyrants. We have more reasons for denouncing German militarism than has the coward of the White House.

WORKERS—WAKE UP.

The preparatory work for Russia's emancipation is brought to an end by his Majesty, Mr. Wilson, and the rest of the gang; dogs of all colors!

America, together with the Allies, will march to Russia, not, "God forbid," to interfere with the Russian affairs, but to help the Czecho-slovaks in their struggle against the Bolshe-viki.

Oh! ugly hypocrites; this time they shall not succeed in fooling the Russian emigrants and the friends of Russia in America. Too visible is their audacious move.

Workers, Russian emigrants, you who had the least belief in the honesty of our Govern-ment, must now throw away all confidence, must spit in the face of the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans but also for the workers' Soviets of Russia. Workers in the ammunition fac-tories, you are producing bullets, bayonets, cannon to murder not only the Germans but also your dearest, best, who are in Russia and are fighting for freedom.

You who emigrated from Russia, you who are friends of Russia, will you carry on your conscience in cold blood the shame spot as a helper to choke the workers' Soviets? Will you give your consent to the inquisitionary expedition to Russia? Will you be calm spectators to the fleecing blood from the hearts of the best sons of Russia?

America and her allies have betrayed (the workers). Their robberish aims are clear to all men. The destruction of the Russian

Revolution, that is the politics of the march to Russia.

Workers, our reply to the barbaric intervention has to be a general strike! An open challenge only will let the Government know that not only the Russian worker fights for freedom, but also here in America lives the spirit of revolution.

Do not let the Government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. Workers, up to fight.

Three hundred years had the Romanoff dynasty taught us how to fight. Let all rulers remember this, from the smallest to the biggest despot, that the hand of the revolution will not shiver in a fight.

Woe unto those who will be in the way of progress. Let solidarity live!

THE REBELS.

The evidence.

(*a*) The conspiracy to print, publish, and circulate the said leaflets and the actual indiscriminate circulation of them, not only among the people of the Borough of Manhattan, but in places and at public meetings where the character of the readers would be such as to lend the greatest effect to the more extreme and passionate statements in them is admitted or not denied. (R. 170, 171, 198, 211, 212, 213, 224, 225, 23–29.)

(*b*) In addition there was undisputed evidence that they were printed and circulated in a furtive, secretive

manner consistent with a knowledge that the action was contrary to law, and with an intent to violate the law.

(c) In so far as the actual intent with which the defendants printed and circulated the leaflets is material, there is nothing in their own testimony to rebut the inference that they intended in the leaflets to refer to the form of government of the United States (as they understood it and asserted it to be), to advocate resistance to, and overthrow of that form of government by force, to bring it into scorn and contempt, to interfere with its success in the war, so far as they could, and for that purpose to incite complete curtailment of production of all munitions of war. (R. 164, 174, 175, 183, 188, 191, 201, 207.)

The defendants, with the exception of Lipman, were all anarchists of the force group, or circle, whose religion is (as they claim) to establish by force a social organization where there shall be no constitution or laws in the sense embodied in the form of government of the United States. Lipman was a Socialist, but since he was a strong adherent of the Bolshevist or Soviet Government of Russia, it will be presumed that he was a Socialist of that type and believed in the establishment by force of a form of government where all social and political functions are owned and operated by a minority class, called the proletariat. All of the defendants were opposed to war of every kind, no matter how just, if waged by a "capitalistic" form of government, to which type the United States of America belonged (in their judgment). In

addition they were all Russian aliens, none of whom had made any attempt to become a citizen of the United States of America because, it may be presumed, they despised its form of government, and it may with equal propriety be presumed on this record that their true and loyal allegiance was, not to the Government of the United States of America, but to the Soviet Government of Russia. The jury, being the sole judges of the true meaning of these leaflets and of the true intent with which they were published and circulated, could properly take all the above matters into consideration in reaching their verdict.

ARGUMENT.

I.

The enactment of section 3, Title I, of the Act of June 15, 1917, in the respects in which it was amended by the Act of May 16, 1918, was within the constitutional powers of Congress.

(*a*) It is the settled doctrine of this court, established by many decisions, that before an act of Congress will be held unconstitutional there must be a clear showing made that the subject matter and the provisions thereof are outside of any power specifically granted to Congress by the Constitution, or implied in the very structure of the form of government established thereby, or reasonably adapted to the efficient exercise of any such power specifically or impliedly granted. With the policy or propriety of the legislation, either generally or as adapted to

the particular conditions which induced its passage, this court, so it has often declared, has nothing to do. Of such matters Congress is the sole judge.

(*b*) The constitutional power under which the legislation in question may be safely justified and on which it rests is inherent in the very nature of the Government established by the Constitution, as it is inherent in every Government worthy of the name, and is this, namely, the power of self-preservation. After severe trials and with the deepest consideration the people of the United States established a form of government in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity. Through equally severe trials they have maintained it in the form in which it was constituted. Necessarily it does not contain within itself the germ of its own destruction, and from the same necessity it follows that Congress is implicitly vested with power to enact legislation necessary in its judgment to preserve the form of government by the Constitution and laws established and reasonably adapted to this great end.

This form of government is, first, the people of the United States as the source, fundamental basis, and resource; second, the Congress, the Executive, and the Judiciary as the representative organs of the people, functioning in the fields marked out by the

Constitution, and subject to the control of the people by methods specifically designated in the Constitution and easily available. In addition, that there might be no chance of defeating the will of the people when soberly determined and clearly expressed, the Constitution itself provided a satisfactory and available method for its own amendment to any extent and in any manner which should approve itself after due deliberation to a clear majority of the whole people.

This is the form of government of the United States which Congress is empowered by the Constitution to preserve in so far as legislation is adapted to this end, and this is the form of government to which the amendment of May 16, 1918, refers.

(*c*) These principles we suppose to be so axiomatic that this court would not look with favor on any extended citation of authority in support of them. Certain decisions, however, more particularly bearing on the case at bar may properly be referred to.

In *Anderson* v. *Dunn* (1821), 6 Wheat. 204, this court unanimously held that Congress had an implied power to punish contempt against its dignity and authority. It is said (p. 229):

> that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.

In *United States* v. *Hudson* (1812), 7 Cranch. 32, in holding that the courts of the United States had no

common law, inherent jurisdiction over a seditious libel, the court said (p. 34):

> Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers. To fine for contempt—imprison for contumacy—inforce the observance of order, &c., are powers which can not be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute.

And this view is affirmed in *ex parte Terry* (1888), 128 U. S. 289, 302–304, with the citation of many authorities.

In *in re Neagle* (1889), 135 U. S. 1, it was held that the Executive had inherent power to protect judges of the United States courts in the performance of their duties. Judge Miller, delivering the opinion of the court, said (p. 59):

> It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

In *ex parte Siebold* (1879), 100 U. S. 371, and in *ex parte Yarborough* (1883), 110 U. S. 651, it was held that Congress could enact statutes to prevent

and punish frauds at elections for Members of the House of Representatives. In the latter case it is said (p. 667):

> If the Government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.

In *Logan* v. *United States* (1891), 144 U. S. 263, and in *Motes* v. *United States* (1899), 178 U. S. 458, it was held that Congress had implied power to protect citizens of the United States in their relations with the constituted authorities, the court saying in the *Logan case*, page 295:

> The United States are bound to protect against lawless violence all persons in their service or custody in the course of the administration of justice.

In so far as protection to officers of the United States is concerned, this had been previously affirmed in *Tennessee* v. *Davis* (1879), 100 U. S. 257, 262, 263. It is said in this case:

> A more important question can hardly be imagined. Upon its answer may depend the

possibility of the general Government's preserving its own existence.

In *Nishimura Ekiu* v. *United States* (1891), 142 U. S. 651, 659, it is said:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, secs. 94, 100; 1 Phillimore (3d ed.) c. 10, sec. 220. In the United States this power is vested in the National Government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.

These views are affirmed in the most vigorous manner in *The Chinese Exclusion Case* (1888), 130 U. S. 581, 606–609, and applied to the deportation of aliens in *Fong Yue Ting* v. *United States* (1892), 149 U. S. 698, 707.

In *in re Debs* (1894), 158 U. S. 564, the power of the Executive and of the courts to restrain and put down organized obstruction of and interference with the lawful functions of the Government was maintained, and it was said (in answer to the claim that such action must be confined to criminal prosecutions after the event, p. 582):

> But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part

> of the land the full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the Army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws.

So as the real basis of the *Selective Draft Law Cases*, 245 U. S. 366, is the thought that the Nation's right of self-preservation must of necessity be paramount to any claimed right of the individual to the exercise of his rights in opposition to the necessity of the State.

It should be noted that the power of Congress to define the offence of treason—the most dangerous of all to the safety of the State—is only granted in the Constitution by implication in section 3 of Article 3. Clearly it was supposed that the power to define such an offense and to punish it was inherent in Congress, the only thing deemed necessary being the limitation of this inherent power.

So the offense of a seditious conspiracy was defined and punished by the act of July 31, 1861, 12 Stat. 284, and is placed in the Revised Statutes and the Criminal Code with treason among the offenses against the existence of the Government (R. S. sec. 5336, Cr. Code, sec. 6). This statute was before this court in *Baldwin* v. *Franks* (1886), 120 U. S. 678,

692–694, and evidently no member of the court entertained any doubt of the power of Congress to enact it.

This statute, it will be noted, makes the bare conspiracy an offense, and does not require any overt act. It is true that the conspiracy dealt with is one to oppose the Government by deed, rather than by words. But it is too late to argue, since the decisions of this court in *Schenck* v. *United States*, 249 U. S. 47, *Frohwerk* v. *United States*, 249 U. S. 204, and *Debs* v. *United States*, 249 U. S. 211 (see also *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, 419), that the publication of words may not be considered by Congress equivalent to deeds for this purpose. In *Schenck's case* it is said (p. 52):

> It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917 in § 4 punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.

And in *Frohwerk's case* (p. 206):

> * * * we have decided in *Schenck* v. *United States*, that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion.

(*d*) It having been decided in the *Schenck*, *Frohwerk* and *Debs cases* that the clauses of section 3 of Title I of the act of June 15, 1917, creating the offenses of wilfully causing or attempting to cause insubordination and disloyalty in the military forces of the United States, or obstructing the recruiting and enlistment service of the United States, although the offense as so defined includes mere publication of words, are constitutional, it follows necessarily as a corollary thereto that the last two clauses of the amendment of May 16, 1918, viz, those defining the offenses of wilfully publishing language intended to incite resistance to the United States, or by such publication, inciting curtailment of the production of munitions of war, are equally constitutional. There is clearly no difference in kind, it may be said there is no difference in degree, between causing insubordination in the military forces and obstructing the recruiting service of the United States on the one hand and inciting resistance to the United States or the curtailment of production of munitions of war on the other. They are merely two different forms of the same dangerous activities.

(*e*) As to the first two clauses of the act of May 16, 1918, viz, those defining the offense of wilfully publishing scurrilous, abusive, or disloyal language about the form of government of the United States, or language intended to bring that form of government into contempt, scorn, contumely, and disrepute, they simply define the offense of seditious libel, confining

it, however, to time of war, when, as this court said in *Schenck's case:*

> Many things which might be said in time of peace are such a hindrance to its (the Nation's) effort that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right.

We shall show later, when speaking of the liberty of the press, that the offense of seditious libel was well known to the Common Law prior to and at the time the Constitution was adopted, and that its existence as a common law offense was distinctly and in the most public manner recognized in this country prior to and immediately following the adoption of the Constitution. It is an offense, like treason and seditious conspiracy, of a nature directly affecting the existence of the Government itself. The act of May 16, 1918, however, does not adopt the common law offense in its full stature, but limits it to publications concerning the very form of government itself, as distinguished from criticism, no matter how violent and abusive, of public officials. As so limited there can, it is submitted, be no doubt of the power of Congress to enact it, a power implied from the necessity of protecting the form of government lawfully established from seditious attacks.

II.

The act of May 16, 1918, does not violate Article I of the amendments of the Constitution relating to the freedom of the press.

(*a*) The language of the amendment is:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It will be at once noticed that whereas it is provided that Congress *shall make no law* respecting the establishment of religion or prohibiting its free exercise, in regard to the freedom of the press it is merely provided that the right thereto shall not be *abridged*. This provision clearly refers us back to the law prior to the adoption of the Constitution, and intends to fix the liberty of the press by that law. What such liberty was at the time of the adoption of the Constitution, that it shall continue to be, no more, no less. This meaning is attributed to the Constitution by the committee of the House of Representatives reporting on the alien and sedition laws in 1799 (American State Papers, vol. 1, Miscellaneous, 181, 183). It is inconceivable that a committee of the House would have dared at that time to give an incorrect interpretation of the meaning of the Constitution on such an important point.

(*b*) It is not, however, necessary to adopt the view of Blackstone (Vol. IV, pp. 151, 152) and Kent (Vol.

II, p. 17), referred to by this court in *Patterson* v. *Colorado*, 205 U. S. 454, 462, viz, that the liberty of the press at the time the Constitution was adopted consisted merely in freedom from censorship or licensing, although this view has great authority in its favor. The better way to look at the matter, in our judgment, is that of Sir James Stephen in his *History of the Criminal Law of England*, vol. 2, pp. 348, 349, where, after citing Lord Mansfield and Lord Kenyon as defining liberty of the press in conformity with Blackstone's definition and intimating that such was the law, he states that such, however, was not public opinion, and hence "the law and common practice had come into direct contradiction to each other." In other words, it was a transition period, and it would be unfair to the makers of the Constitution to suppose that they meant to adopt a view which the English people were about to discard. It is, however, proper to claim that no liberty of the press was conceived of which included the unlimited right to publish a seditious libel. No claim of that sort was ever made by any respectable person. Sir James Stephen defines the offense in his *Digest of the Criminal Law*, articles 91 and 93, in a manner which received the approval of all the judges (per Cave, J., in *Regina* v. *Burns* (1886), 16 Cox Cr. Cas. 355, 359), viz:

> Every one commits a misdemeanor who publishes verbally or otherwise any words or any document with a seditious intention.

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs or successors, or the Government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in church or state by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill will and hostility between different classes of such subjects.
>
> An intention to show that Her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the Government or constitution as by law established, with a view to their reformation, or to excite Her Majesty's subjects to attempt by lawful means the alteration of any matter in church or state by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce, feelings of hatred and ill will between classes of Her Majesty's subjects, is not a seditious intention.

It is clear that, in so far as the common law of England was concerned, the liberty of the press never did and does not now include the absolute right to publish a seditious libel. It is equally clear that it was not supposed to go to this extent by any person in this country at the time the Constitution was adopted. The case of Zenger, reported 17 State

Trials 675 (1735), was a celebrated one and is interestingly described by Fiske in his *History of the Dutch and Quaker Colonies*, vol. 2, pp. 238–248. Zenger was successfully defended by able counsel, but neither that counsel nor the historian thought of making the claim that the liberty of the press was a bar to any prosecution at all. Their utmost claims were that the truth can be given in evidence and that the jury are entitled to bring in a general verdict. So in *Crosswell's case* (1804), 3 Johns Cas. 340, Alexander Hamilton, who represented the defendant and who had shown his courage in *Rutgers* v. *Waddington*, claimed no more than his namesake in *Zenger's case* (see p. 353), and Kent, J., who thought that the truth could be given in evidence and that the jury could return a general verdict, made no claim that there was complete immunity for seditious libel (see p. 393). So in *Respublica* v. *Dennie* (1805), 4 Yeates 267, Yeates, J., with the approval of two other justices, charged the jury (p. 270):

> It is no infraction of the law to publish temperate investigations of the nature and forms of government. * * * But there is a marked and evident distinction between such publications, and those which are plainly accompanied with a *criminal intent*, deliberately designed to unloosen the social band of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power, by the known constituted authorities. These latter writings are subversive of all government and good order.

He also quotes from Hamilton in *Crosswell's case, supra:*

"The liberty of the press consists in publishing the truth from *good motives* and for *justifiable ends*, though it reflects on government or on magistrates."

Reference may also be made to the cases of Lyon (1798), Wharton's State Trials 33, Cooper (1800), ib. 659, especially 670, Callender (1800), ib. 688, and Haswell (1800), ib. 684, as representing the views of three judges of the United States courts.

It is therefore quite clear that the power to punish the publication of language dangerous to the existence of the Government of the United States, impliedly granted by the Constitution, is not taken away by Article I of the Amendments. Upon this subject the Chief Justice, delivering the opinion of this court in *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, 419, said:

> *The asserted inapplicability of the statute under the assumption that the publications complained of related to a matter of public concern and were safeguarded from being made the basis of contempt proceedings by the assuredly secured freedom of the press.*
>
> We might well pass the proposition by, because to state it is to answer it, since it involves in its very statement the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including

> that of the press, depends. The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rests, and that freedom, therefore, does not and can not be held to include the right virtually to destroy such institutions. It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong doing.

Indeed the decisions of this court in the *Schenck*, *Frohwerk*, and *Debs cases* seem to determine the extent of the provision in Article I relating to the liberty of the press in a manner decisive, to all intents and purposes, of the claim made in the case at bar. As stated above, they certainly do so as to the last two clauses of the act of May 16, 1918. The first two clauses, however, differ merely in degree, not in kind, from the last two. There can be no doubt that they define an offense which was fully included in the definition of a seditious libel at common law. To publish scurrilous, abusive, disloyal language about the *form of government* of the United States, as distinguished from the particular individuals who may happen to be in power, or language intended to bring this *form of government* into contempt, scorn, contumely, or disrepute, and to do this in time of war, is, surely, to do something in excess of and outside of any right to the freedom of the press, as that right was understood at the time

the Constitution was adopted or has ever been understood since. To publish in time of war language of the said character or intent with reference to the very structure of the Government is, surely, to attack the existence of the Government, and to punish it is, surely, an exercise of the right of self-preservation.

III.

There was evidence to go to the jury that the defendants conspired to violate the act of May 16, 1918.

(*a*) As has been stated above, the conspiracy and the doing of the overt acts are admitted. The question is therefore resolved to this, viz: Could the jury properly find, on the evidence before them, that the leaflets set out above were—

> (1) Disloyal, scurrilous, and abusive language about the form of government of the United States;
>
> (2) Language intended to bring said form of government into contempt, scorn, contumely, and disrepute;
>
> (3) Language intended to incite, provoke, and encourage resistance to the United States in its war with Germany;
>
> (4) Language urging, inciting, and advocating curtailment of production of munitions of war with intent to cripple and hinder the United States in its war with Germany?

(*b*) The jury have a particularly important function in cases of this sort dealing with published writings Even before the passage of Fox's Libel Act in 1791, it was admitted by those who took the most limited

view of the power of the jury that they were sole judges of the truth of the innuendoes. (Stephen's History of Criminal Law, Vol. 2, e. g., p. 329, referring to Stockdale's Case.) After the act in *Rex* v. *Burdett*, 1 State Trials, n. s., 1, 111, Best, J., told the jury:

> With respect to whether this was a libel, I told the jury that the question, whether it was published with the intention alleged in the information, was peculiarly for their consideration; but I added that the intention was to be collected from the paper itself, unless the import of the paper were explained by the mode of publication, or any other circumstances. I added that, if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce.

The jury in the case at bar have by their verdict found that the leaflets offered in evidence before them had the meaning and were published with the intent ascribed to them in the indictment. This finding will not be disturbed on a writ of error if it be one which could possibly be made by reasonable men.

The general rule as to the province of the jury is thus stated by Mr. Justice Baldwin in *Hepburn* v. *Dubois*, 12 Peters 345, 376:

> If this court can comprehend what these rules are, or promulgate them in intelligible language, they are these: "That where the evidence in a cause conduces to prove a fact

> in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer, on a demurrer to the evidence; after a verdict in favor of either party, on the evidence, he has a right to demand of a court of error, that they look to the evidence for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the appellate court should hold, that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom, in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by, the evidence."

To the same effect is the decision rendered by this court in *Carter* v. *Ruddy*, 166 U. S. 493, 498:

> Of course, the verdict of the jury determines the questions of fact adversely to the plaintiff and it is not the province of this court to review such determination or to examine the testimony further than to see that there was sufficient to justify the conclusions reached by the jury.

To the same effect is the decision of this court in *Standard Oil Company* v. *Brown*, 218 U. S. 78, 86:

> But what the facts were in such regard, and what conclusions were to be drawn from them, were for the jury and can not be reviewed here.

(*c*) Let, then, the leaflets be analyzed in the light of the evidence before the jury, of those surrounding circumstances of time, place, and affairs which were matters of common knowledge, and of the peculiar function of the jury as to the true meaning and intent of the papers.

They were published in August, 1918, at a critical period of the war when the Nation needed the concentration and cooperation of all its forces of men and material to reach the result which it happily attained. They were circulated in the largest city and port in the country, where men and munitions of war were constantly assembled in large numbers for transportation, and where manufacturing of every kind of material necessary for the war was carried on on a great scale. The defendants were anarchists or socialists of the force type, and devoted adherents of the soviet government of Russia, itself a government established and maintained by force. Such were the atmosphere and personalities surrounding the circulation of these leaflets.

NOTE.[1]—The English one (Exhibit A, R. 16) is headed: "The Hypocrisy of the United States and

[1]Wherever, in what follows, a meaning is attributed to the language of these papers, it is meant that the jury might reasonably have attributed such a meaning to them.

Her Allies," and is signed "Revolutionists." The heading means that the United States Government, as regards its regular functioning in the war, is that despicable character, a hypocrite, assuming a virtue, viz, of establishing democracy and freeing peoples which it does not have.

The first paragraph calls the President a hypocrite, and implies that, though constitutionally holding his office, he is not the President of the writers, nor, perhaps, of the "people" whom they address.

The second paragraph amplifies this "hypocrisy," and contrasts the "People of America" with "the few Kaisers of America," the latter presumably being the persons who exercise the real power under the form of government established in this country. It also speaks of "the hypocrisy of the plutocratic gang in Washington," which presumably includes Congress and the other functionaries of the Government in that city.

The third paragraph states that the President was afraid to announce to "the American people" the intervention in Russia, this in face of the fact that the decision to send the troops was announced in the public press August 5, 1918. It then gives the reason for his "cowardice," viz, he was afraid to say, "We capitalistic nations can not afford to have a proletarian republic in Russia;" meaning that the form of government in the United States is "capitalistic," i. e., an oligarchy of the rich; that the true form of government is a proletarian republic, i. e., an oligarchy of the poor, and that the real reason for

the intervention in Russia was the fear that if an oligarchy of the proletariat were ever established there, it would, like Pharaoh's lean kine, swallow up the established governments in other countries, including this. In brief, the form of government in this country is capitalistic, and "the workers" should see to it at once that it be made a proletarian republic by any means.

The fourth paragraph speaks of "the tyrants of the world" and their "common enemy" "working class enlightenment" which they combine to crush. The meaning is that the form of government in the United States is tyrannical, that it does not represent working class enlightenment, but, on the contrary it opposes it and desires to crush it.

The fifth paragraph states that the Holy Alliance crushed the French Revolution, and in the same manner "militarism and capitalism" are now combined, though not even openly, to crush the Russian Revolution; meaning that the form of government of the United States is not only militaristic and capitalistic, but meanly and aggressively so.

The moral of these statements is then pointed in six brief, glaring, and passionate paragraphs. The readers are first asked what they have to say about it, and whether they will allow the Russian Revolution to be crushed; meaning whether they will allow the capitalistic government of the United States to crush the much finer proletarian republic of Russia; and they are vehemently reminded in the language

of Job: "Indeed ye are the people and wisdom died with you."

It is then stated that "The Russian Revolution" calls to the workers of the world for help and cries to them "Awake! Arise! Put down your enemy and mine!" meaning that the workers of the United States should arise and put down by force the hypocritical, aristocratical, oligarchical, capitalistic government in this country.

To make this clear, it is added that the workers have only one enemy, namely, "Capitalism;" meaning that the form of government of the United States was the only enemy of the working man.

The last paragraph states that "it is a crime" that the workers of this country should fight the "Workers' Republic of Russia;" meaning that it is a crime to support the Government of the United States as at present established by law.

The fitting close to this discord is "Awake! Awake, You Workers of the World!" Signed "Revolutionists"; meaning that the workers should arise and put down by force the hypocritical, capitalistic, reactionary government established in the United States.

The Yiddish leaflet (Exhibit B, R. 18) is headed, "Workers—Wake Up."

The first paragraph states that Russia's emancipation has been brought to an end by "his Majesty, Mr. Wilson and the rest of the gang; dogs of all colors"; meaning that the President, while engaged in the exercise of his lawful powers under

the Constitution, viz., faithfully executing the laws declaring war on Germany and Austria and acting as Commander in Chief of the Army and Navy, is a tyrant, and as such is preventing the establishment of the better and contrasted form of Government, viz., the Soviet Government of Russia.

The second and third paragraphs harp upon the same string of the hypocrisy of this Government in its intervention in Russia.

The fourth paragraph calls upon the Russian emigrants, provided they are also "workers," to throw away their confidence in the honesty of the Government of the United States, to "spit in the face" of the military propaganda which has deceived them, calling forth their help in the prosecution of the war, and reminds them that their money, and labor in so far as it is employed in ammunition factories, are producing munitions of war to "murder" their dearest and best fighting for freedom; meaning that they should throw off their allegiance to this country (owed even by an alien, *Carlisle* v. *United States* 16 Wall. 147), and should violently oppose the war, which was in substance a war against the Soviet republic.

The fifth and sixth paragraphs refer to "the shame spot" of "a helper to choke the Workers' Soviets," to the "fleecing blood from the hearts of the best sons of Russia," to the betrayal of the workers by America, and to its robberish aims; meaning that the Government of the United States as by law established has been and is guilty of these things.

The seventh paragraph calls the action of the Government of the United States "barbaric," and specifically advocates "a general strike." This general strike is to be an open challenge to the Government of the United States and is to show it that the Russian Worker "fights for freedom," and that in this country lives "the spirit of revloution"; meaning that a general strike of all workers should be had in order to stop the production of munitions, and to overthrow by force the form of government of the United States as by law established.

The eighth paragraph urges the "workers" not to be scared by the wild punishment in prisons, hanging and shooting, and not to betray the splendid fighters of Russia, ending with the exhortation "Workers, up to fight"; meaning that the punishments inflicted by the Government of the United States in the due course of law under the Constitution were "wild," i. e., without reason, savage, and that the "workers" should consequently destroy that Government as the fighters of the Soviets had destroyed the Kerensky government, namely by force of arms.

The ninth paragraph states that the Romanoff dynasty had taught "us" how to fight, and admonishes all rulers that the hand of the revolution will not shiver in a fight; meaning that the "workers" should overthrow by force of arms the despotic government established in the United States in the same manner and for the same reasons as in the overthrow by the "workers" of the Romanoff dynasty.

The last paragraph cries out, "Woe unto those who will be in the way of progress," and the whole is signed "The Rebels;" meaning that unless the Government of the United States voluntarily removes itself to make way for a soviet form of government, it will be removed by a rebellion of the "workers" instituted and carried on by force of arms.

Attention should also be called to Exhibits 11 and 13 (R. 250–255). A detailed analysis of them would unduly lengthen this brief, but particular reference is made to the last paragraph of Exhibit 11 and to the last three paragraphs of Exhibit 13.

The above analysis of the leaflets in question, and deduction of their meaning as the jury was entitled to find it, show beyond question that they refer to and deal with the form of government of the United States, that they would naturally incite resistance to the United States in its war with Germany, and that they incite curtailment of production of munitions of war in such a manner and at such a time as naturally to cripple the United States in the prosecution of the war. The burden of their song is that the United States is a "capitalistic" form of government, i. e., an oligarchy of plutocrats, that it is hypocritical in claiming, as it does in the preamble to the Constitution, to be a democracy, that it is tyrannical, despotic, and militaristic, the enemy of the working man, whom it intends and has combined to crush in the interests of plutocracy and capitalism; that, consequently, it should be opposed by general strikes and by force of arms so that its troops may be kept busy

dealing with internal, civil war, rebellion, or revolution. To say that these leaflets only attack Mr. Wilson's administration of the Government, and criticize it for illegal, unconstitutional actions, was mere sophistry in the eyes of the jury, and only increased the seriousness of the offense by showing that the authors of these leaflets, though bold enough when printing them in a basement and circulating them from disguised headquarters, did not have the courage of their convictions (unless in the case of the woman, Mollie Steimer, see R. 218, 221, 222), when put to the ordeal of a solemn, public trial. The jury thought that no one could read these papers and not draw the conclusion that the authors of them regarded the Government of the United States, and not Mr. Wilson particularly, with contempt and hatred, that they desired to hamper it in the war and in every other of its "capitalistic" activities, and finally, if possible, to overthrow it by force and substitute for it a soviet or proletarian republic.

As to the third and fourth counts of the indictment, viz, those charging incitement of resistance to the United States in the war, and curtailment of production of munitions of war, the leaflets directly violate these counts, and the jury was clearly justified in finding them guilty thereon. Nothing we can say in addition can make this any more evident than does the analysis of the papers submitted above. A general strike in the munition factories is specifically urged in the most violent manner, and this, not to improve the condition of the employees

either as to wages or hours of labor, but generally to prevent, at a most critical period of the war, the manufacture and shipment of munitions. Rebellion and revolution are passionately demanded for the purpose of creating a condition where the United States shall have an enemy in its midst as well as in its front.

In our judgment, the verdict upon the first two counts is equally justified. As to the first count, a lengthly analysis of the meaning of the words "disloyal," "scurrilous," "abusive," is not necessary. The idea which Congress had in mind was simply that contained in the definition of seditious libel as given, e. g., in Stephen's *Digest* and in Yeates's, J.'s, charge to the jury, *supra*, viz: To distinguish between bona fide criticism of the form of government, no matter how vituperative and fallacious, with a view to its reformation by lawful means, on the one hand, and appeals to passion, prejudice, and hatred, with the intent "to loosen the social bond," and thus to dissolve the state into anarchy as preliminary to the establishment by force and revolution of another form of government, on the other. The words "disloyal" and "abusive" particularly bring this out as indicating language which repudiates that tie of legiance to the United States which binds, in this respect, even aliens, and exceeds the use to which language can be properly put by a person bound by this tie when speaking of the form of government under which he lives and whose existence is the very breath of his nostrils.

The same is true of the second count, for to bring the form of government into contempt, scorn, contumely, and disrepute is but to produce the result desired by the use of the language specified in the first count. In other words, the person, who thought the language of these leaflets scurrilous, disloyal, and abusive, in the sense defined above, in its references to the form of government of the United States, would necessarily think that it was intended to bring that form of government into contempt, scorn, contumely, and disrepute.

We respectfully submit that giving the language of these leaflets the meaning attributed to them in the analysis given above—a meaning which the jury was entitled to give them—it clearly falls within the description and clearly has the legal intent ascribed to it in the first and second counts. We are entirely willing to take the judgment of any fair-minded reader upon the question whether the language of these papers is not abusive and disloyal throughout its references to the form of government of the United States, and whether the fair inference from it is not that the authors felt scorn and contempt for that form of government, and passionately desired to bring the readers into the same state of mind.

(*d*) Since the general sentences imposed (R. 242–244) did not exceed those which might lawfully have been imposed for conviction on any single count, it is sufficient, under the well established doctrine of this court, if the conviction on any one of the counts was proper.

CONCLUSION.

The judgment of the court below should be affirmed.

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