TABLE OF CONTENTS.

	Page
Statement of the Case	1
History and Purposes of the Act	8
Questions Involved.	
First Point—The Statute is not Void for Indefiniteness	11
Similar Cases	12
Cases Distinguished	24
The Information	27
"Due Process" in California	29
Second Point—The Statute does not Deny Equal Protection of the Laws	30
Free Speech not Abridged	35

TABLE OF CASES CITED.

	Page
Abrams vs. U. S., 250 U. S. 616	38
Atchison etc. R. Co. vs. Mathews, 174 U. S. 104	31
Board of Commissioners vs. Given, 82 N. E. 918; 169 Ind. 468	8
Cazarra vs. Dist of Columbia Medical Suprs., 25 Cal. App. (D. C.) 443	11
Com. vs. Blankenstein, 81 Pa. Sup. Ct. 340	13
Debs vs. U. S., 249 U. S. 211	38
Duncan vs. Missouri, 152 U. S. 382	31
Evans vs. State, 22 S. W. 18	11
Fox vs. Washington, 236 U. S. 273	20
Frohwerk vs. U. S., 249 U. S. 204	38
Hartman, In re, 182 Cal. 447	23
Hewitt vs. Board of Medical Examiners, 148 Cal. 590	25
McDermott, In re, 180 Cal. 783; 183 Pac. 437	2, 12
McPherson vs. Blacker, 146 U. S. 39	31
Nash vs. U. S., 229 U. S. 373	11, 21
Newgirg vs. Black, 174 Ia. 636; 156 N. W. 708	8
Omaechevarria vs. Idaho, 246 U. S. 343	11
O'Shea, In re, 11 Cal. App. 568; 105 Pac. 776	11
People vs. Carroll, 80 Cal. 153; 22 Pac. 129	11
People vs. Casdorf, 212 Pac. 237	12
People vs. Coon, 67 Hun. 523	11
People vs. Ferguson, 243 N. Y. 159; 136 N. E. 327	13
People vs. Flannagan, 223 Pac. 1014	24
People vs. Ford, 25 Cal. App. 388; 143 Pac. 1075	9
People vs. Gitlow, 234 N. Y. 132; 136 N. E. 317	13
People vs. La Rue, 216 Pac. 627	12
People vs. Lesse, 52 Cal. App. 280; 199 Pac. 46	8, 12

TABLE OF CASES CITED—Continued.

	Page
People vs. Lloyd, 136 N. E. 505	13, 37, 40
People vs. Laundy, 204 Pac. 958	37
People vs. Malley, 49 Cal. App. 597; 194 Pac. 48	11, 12, 27
People vs. McKenna, 81 Cal. 158	26
People vs. Roe, 209 Pac. 381	12, 24, 27, 39
People vs. Sanchez, 206 Pac. 760	12
People vs. Sherman, 209 Pac. 1023	12
People vs. Steelik, 187 Cal. 361; 203 Pac. 78	2, 12, 35
People vs. Suhr, 25 Cal. App. 805; 143 Pac. 1088	9
People vs. Taylor, 187 Cal. 378; 203 Pac. 85	2, 12, 24
People vs. Thornton, 219 Pac. 1020	24
People vs. Welton, 211 Pac. 802	12
People vs. Whitney, 57 Cal. App. 449; 207 Pac. 698	2, 3, 8, 12, 27
People vs. Wieler, 55 Cal. App. 687; 204 Pac. 410	12, 31
Schaefer vs. U. S., 251 U. S. 467	37
Schenck vs. U. S. 249 U. S. 47	38
Smith vs. State (Ind.), 115 N. E. 943	11
State vs. Aspelin, 203 Pac. 964	13
State vs. Berquist, 199 Pac. 101	13
State vs. Boyd, 91 Atl. 586	36
State vs. Breen, 205 Pac. 632	13
State vs. Brown, 108 Wash. 205; 182 Pac. 944	11, 18
State vs. Dingman, 219 Pac. 760	12, 34
State vs. Fox, 71 Wash. 185; 127 Pac. 1111	20
State vs. Hemhelter, 196 Pac. 581	13
State vs. Hennessy, 195 Pac. 211	13, 17, 32
State vs. Holm, 166 N. W. 181	37
State vs. I. W. W., 214 Pac. 617	13
State vs. Kowalchuk, 200 Pac. 333	13

TABLE OF CASES CITED—Continued.

	Page
State vs. Laundy, 103 Ore. 443; 204 Pac. 958; 206 Pac. 290	13, 34
State vs. Lawrence (Okla.), 130 Pac. 508	11
State vs. Moilen, 167 N. W. 345	13, 33
State vs. Payne, 200 Pac. 314	13
State vs. Sinchuck, 115 Atl. 33	12
State vs. Tonn, 191 N. W. 530	12
State vs. Workers, etc. Pub. Co., 185 N. W. 931	13
Stewart vs. State, 4 Okla. Cr. 564; 109 Pac. 243	11
Truax vs. Corrigan, 257 U. S. 311	34
U. S. vs. Cohen Groc. Co., 41 S. C. 298; 65 L. Ed. 560; 255 U. S. 81	24
U. S. vs. U. S. Brewers' Assn., 239 Fed. 163	11
Washington Term. Co. vs. Dist. of Columbia, 36 App. D. C. 186	8
Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86	11
Whitney vs. Superior Court, 182 Cal. 114; 187 Pac. 12	2, 12

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1924.

No. 375.

CHARLOTTE ANITA WHITNEY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE
STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

Plaintiff in error was charged by information, filed by the district attorney of the county of Alameda, State of California, with violating the Criminal Syndicalism Act of California (Statutes 1919, page 281) on five separate counts based upon the several subdivisions of said act. The jury found her guilty as charged in the first count, but disagreed as to the others, as to which dismissals were subsequently filed. The first count, and the only one involved in this proceeding, charged plaintiff in error, in the language of the statute, with wrongfully, deliberately and feloniously organizing and

assisting in organizing and knowingly becoming and being a member of an organization and group of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

From the judgment of conviction, she appealed to the District Court of Appeal of the State of California, as the result of which her conviction was affirmed.

People vs. *Whitney,* 57 Cal. App. 449; 207 Pac. 69. (Rec. pp. 2 to 4.)

Thereafter she petitioned to have said cause heard by the Supreme Court of the State of California, which petition was denied by the court, with but two of the seven justices dissenting, and not three as erroneously stated by counsel for plaintiff in error. Incidentally any question that the dissenting justices may have had, could only have been as to the facts, *i. e.,* sufficiency of the evidence, for these same justices theretofore and since have concurred in decisions wherein the constitutionality of the act and the very questions here presented were decided adversely to the contentions of plaintiff in error.

See

In Re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. *Superior Court,* 182 Cal. 114; 187 Pac. 12;
People vs. *Taylor,* 187 Cal. 378; 203 Pac. 85;
People vs. *Steelik,* 187 Cal. 361; 203 Pac. 78.

Plaintiff in error upon her trial and appeal admitted that she joined the Communist Labor Party

of California, taking an active part in its organization and proceedings, and serving upon its Resolutions Committee. As said in the opinion of the state court in *People* vs. *Whitney, supra*:

> "Upon the main question, however, as to the part which the defendant took in organizing and assisting to organize the Communist Labor Party, there is no dispute. In the brief of the appellant upon this appeal it is stated to be an '*admitted fact* that the defendant became a member of the so-called Communist Labor Party, attended a party convention Nov. 9th, 1919, and was *one of the committee on resolutions which reported the platform* herein above set forth.' In addition to the foregoing admission the evidence abundantly shows that the defendant not only took a leading and active part in the organization of the Oakland branch of the Communist Labor Party of California, but also in the subsequent meetings and acts of said organization." (Rec. pp. 3 and 4.)

The *constitution* of the COMMUNIST LABOR PARTY OF CALIFORNIA to which she subscribed provides in part as follows:

> "Section 1. The name of this organization shall be the Communist Labor Party of California. It shall be *affiliated with the Communist Labor Party of the U. S. of America* and subscribe to its program, platform and constitution. Through this affiliation it shall be *joined with the Communist International at Moscow.*" (Rec. p. 159.)

The conclusion is unescapable that one who merely became a member of the Communist Labor Party of California thereby became affiiliated with and subscribed to the constitution of the "Communist Labor Party of America" which, among other things, provides:

> "The Communist Labor Party of America declares itself in complete accord with the principles of communism as laid down in the Manifesto of the Third International formed at Moscow. (Rec. p. 172.)
>
> * * * * * * *
>
> The working class must organize and train itself for the capture of state power. (Rec. p. 172.)
>
> * * * * * * *
>
> The years of Socialist activity on the political field have brought no increase of power to the workers. Even the million votes piled up by the Socialist Party without any proportionate representation. The Supreme Court, which is the only body in any government in the world with power to review legislation passed by the popular representative assembly, would be able to obstruct the will of the working class, even if Congress registered it, which it does not. The Constitution, framed by the capitalist class for the benefit of the capitalist class, can not be amended in the workers' interest, no matter how large a majority may desire it. * * * (p. 173.)
>
> Not one of the great teachers of scientific Socialism has ever said that it is possible to achieve the Social Revolution by the ballot.

7. However, we do not ignore the value of voting, or of electing candidates to public office—so long as these are of assistance to the workers in their economic struggle. Political campaigns, and the election of public officials, provide opportunities for showing up capitalist democracy, educating the workers to a realization of their class position, and of demonstrating the necessity for the overthrow of the capitalist system. But it must be clearly emphasized that the chance of winning even advanced reforms of the present capitalist system at the polls is extremely remote; and even if it were possible, these reforms would not weaken the capitalist system. (Rec. p. 174.)

In any mention of revolutionary industrial unionism in this country, there must be recognized the immense effect upon the American Labor movement of the *propaganda* and *example* of the INDUSTRIAL WORKERS OF THE WORLD, whose long and *valiant* struggles and *heroic* sacrifices in the class-war have earned the respect and affection of all workers everywhere. We greet the revolutionary industrial proletariat of America, and *pledge them our wholehearted support* and cooperation in their struggles against the capitalist class." (Rec. p. 176.)

The foregoing demonstrates that plaintiff in error and all others who subscribed to the foregoing thereby strongly endorsed and lauded "the propaganda and example of the Industrial Workers of the World." That her endorsement was not merely constructive, but active and real, is shown in the evidence to the effect that she was seen at the I. W. W.

headquarters in San Francisco (Rec. p. 274), and also the headquarters of the Defense Committee of the "I. W. W." prisoners at Sacramento. (Rec. pp. 281 and 282.)

As illustrative of the "propaganda and example" which were thus adopted by endorsement, we quote from "People's Exhibit No. 30 * * * 'Sabotage,' by Walker C. Smith."

> " 'Sabotage is a mighty force as a revolutionary tactic against the repressive forces of capitalism, whether those repressions be direct or through the State.
>
> "It is guerilla warfare," is another cry against sabotage. Well, what of it? Has not guerilla warfare proven itself to be a useful thing to repel invaders and to make gains for one or the other of the opposing forces? Do not the capitalists use guerilla warfare? Guerilla warfare brings out the courage of individuals, it develops initiative, daring, resoluteness and audacity. Sabotage does the same for its users. It is to the social war what guerillas are to national wars. If it does no more than awaken a portion of the workers from their lethargy it will have been justified. But it will do more than that; it will keep the workers awake and will incite them to do battle with masters. It will give added hope to the militant minority, the few who always bear the brunt of the struggle.
>
> The saboteur is the sharpshooter of the revolution. * * * But he knows that loyalty to the employer means treason to his class. Sabotage is the smokeless power of the social war. It scores a hit, while its source is seldom detected. It is

> so universally feared by the employers that they do not even desire that it be condemned for fear slave class may learn still more its great value.' " (Rec. p. 253.)

The record in this case setting forth the organization of the Communist Labor Party of California in which plaintiff in error participated, and the activities of the so-called I. W. W. in California, whose sabotage and crop destruction were endorsed as aforesaid, is quite voluminous, but it is unnecessary to further discuss the evidence in this case for its sufficiency is not involved in this proceeding, and the brief portions of the record above adverted to have been referred to merely to illustrate the character of the organization of which plaintiff in error was one of the founders, as well as its precepts and purposes.

We shall content ourselves with merely quoting the following summary of the court below:

> "As to the knowledge which the defendant had and of her participation in the aims, expressions and activities of the Communist Labor Party of California there can also be no doubt in view of the admitted intelligence of the defendant and of her participation in the drafting of the resolutions and formulation of the constitution of the organization itself. That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose

purposes and sympathies savored of treason, is not only past belief but is a matter with which this court can have no concern, since it is one of the conclusive presumptions of our law that a guilty intent is presumed from the deliberate commission of an unlawful act. (C. C. P. Sec. 1962.)"

People vs. *Whitney, supra.* (Rec. p. 4.)

History and Purposes of the Act.

In construing a statute, the court must, as nearly as possible, place itself in the position of the legislature, and from contemporary facts determine the cause and necessity for the statute, and the evils sought to be remedied, and so interpret it as to suppress the mischief and advance the remedy.

Board of Commissioners vs. *Given,* 82 N. E. 918; 169 Ind. 468;
Newgirg vs. *Black,* 174 Ia. 636; 156 N. W. 708;
Washington Term. Co. vs. *Dist. of Columbia,* 36 App. D. C. 186.

It is unnecessary to discuss at length the history or activities of the *syndicalistic* organizations in this state or elsewhere. As well said in—

People vs. *Lesse,* 52 Cal. App. 280; 199 Pac 46,

"the purposes of the I. W. W. are a part of the current history of the day—a part of the history of the times. We are informed by the magazines, encyclopedias and dictionaries of the day that the organization advocates criminal syndicalism, revolutionary violence and sabotage."

In California the I. W. W. first began to make itself felt as a force by its means of sabotage and terrorism, a decade ago. Our judicial history shows that in 1913 two leaders of the I. W. W., Ford and Suhr, fomented a riot among some twenty-three hundred hop pickers in Yuba County, as a result of which the district attorney and a deputy sheriff were slain and two other officers severely injured.

People vs. *Ford,* 25 Cal. App. 388; 143 Pac. 1075;
People vs. *Suhr,* 25 Cal. App. 805; 143 Pac. 1088.

Subsequent to the affirmance of the convictions of Ford and Suhr, anonymous demands were sent the Governor of the state, threatening sabotage upon the agricultural properties of the state if they were not liberated from prison. (Rec. p. 231.)

The record in the present case devotes many pages to the activities and tactics used by the said I. W. W., such as the declaration by Lambert, the secretary, that "if it was necessary they would burn up the whole State of California." (Rec. p. 259.) This same person made a written report to the I. W. W. convention that it cost the State of California eight millions of dollars to keep Ford and Suhr in jail. (Rec. p. 231.) The record shows that they used incendiary bombs (Rec. p. 265); burned barns and haystacks (Rec. p. 266); poisoned cattle with cyanide potassium, and put lye in the shoes of men who would not join them (p. 271).

Immediately following the armistice and coincident with the revolution and success of the Red Army in

Russia, further outbreaks occurred as a result of which the Criminal Syndicalism Law was adopted being modeled upon a similar law in Minnesota. Concerning the purpose of this statute, Mr. Justice Waste, in one of the first cases on this subject in this state, declared:

> "The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed * * * in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like *in terrorem* methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the legislature is clear. Sabotage, as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces, among other lesser offense acts, the willful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. * * * It requires no argument to demonstrate that the subject matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or -

ing of the iniquitous and unlawful doctrines which it condemns. (*State* vs. *Moilen,* 140 Minn. 112, 114 (1 A. L. R. 331, 167 N. W. 345, 346).)"
People vs. *Malley,* 49 Cal. App. 597; 194 Pac. 48.

Questions Involved.

Plaintiff in error makes but two points:

First, that the statute is void for indefiniteness; and,

Second, that it denies equal protection of the laws.

First Point.

THE STATUTE IS NOT VOID FOR INDEFINITENESS.

A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary intelligence an adequate description of the evil intended to be prohibited.

State vs. *Brown,* 108 Wash. 205, 182 Pac. 944;
People vs. *Carroll,* 80 Cal. 153, 22 Pac. 129;
In re O'Shea, 11 Cal. App. 568, 105 Pac. 776;
Smith vs. *State* (Ind.), 115 N. E. 943;
People vs. *Coon,* 67 Hun. 523;
State vs. *Lawrence* (Okla.), 130 Pac. 508;
Evans vs. *State,* 22 S. W. 18;
Cazarra vs. *Dist. of Columbia Medical Suprs.,* 25 Cal. App. (D. C.) 443;
Stewart vs. *State,* 4 Okla. Cr. 564; 109 Pac. 243;
Nash vs. *U. S.,* 229 U. S. 373, supp. 377;
Waters-Pierce Oil Co. vs. *Texas,* 212 U. S. 86;
Omaechevarria vs. *Idaho,* 246 U. S. 343;
U. S. vs. *U. S. Brewers' Assn.,* 239 Fed. 163;

Similar Cases.

Criminal syndicalism laws or statutes of the same nature have been held valid in many jurisdictions, and convictions thereunder upheld.

California:

People vs. *Steelik,* 187 Cal. 361; 203 Pac. 78;
People vs. *Taylor,* 187 Cal. 378; 203 Pac. 85;
In re McDermott, 180 Cal. 783; 183 Pac. 437;
Whitney vs. *Superior Court,* 182 Cal. 114; 187 Pac. 12;
People vs. *Malley,* 49 Cal. App. 597; 194 Pac. 48;
People vs. *Whitney,* 57 Cal. App. 449; 207 Pac. 698;
People vs. *Lesse,* 52 Cal. App. 280; 199 Pac. 46;
People vs. *Wieler,* 55 Cal. App. 687; 204 Pac. 410;
People vs. *Welton,* 211 Pac. 802;
People vs. *Casdorf,* 212 Pac. 237;
People vs. *La Rue,* 216 Pac. 627;
People vs. *Roe,* 209 Pac. 381;
People vs. *Sherman,* 209 Pac. 1023;
People vs. *Sanchez,* 206 Pac. 760

Connecticut:

State vs. *Sinchuck,* 115 Atl. 33.

Idaho:

State vs. *Dingman,* 219 Pac. 760.
(Reversed by divided court on evidentiary error.)

Iowa:

State vs. *Tonn,* 191 N. W. 530.

Illinois:

People. vs. *Lloyd*, 136 N. E. 505.

Kansas:

State vs. *Berquist*, 199 Pac. 101;
State vs. *Breen*, 205 Pac. 632;
State vs. *I. W. W.*, 214 Pac. 617 (Injunction).

Minnesota:

State vs. *Moilen*, 167 N. W. 345;
State vs. *Workers etc. Pub. Co.*, 185 N. W. 931.

New York:

People vs. *Gitlow*, 234 N. Y. 132; 136 N. E. 317;
People vs. *Ferguson*, 234 N. Y. 159; 136 N. E. 327.

(Not a syndicalism but an anti-anarchy law involved in these cases.)

Oregon:

State vs. *Laundy*, 103 Ore. 443; 204 Pac. 958; 206 Pac. 290.

(Reversed on procedural error.)

Pennsylvania:

Com. vs. *Blankenstein*, 81 Pa. Super. Ct. 340. (Sedition Act.)

Washington:

State vs. *Hennessy*, 195 Pac. 211;
State vs. *Hemhelter*, 196 Pac. 581;
State vs. *Payne*, 200 Pac. 314;
State vs. *Kowalchuk*, 200 Pac. 333;
State vs. *Aspelin*, 203 Pac. 964.

That the meaning of this act is clear and definite is apparent from the following analysis thereof made by former Chief Justice Wilbur of the Supreme Court of California in the case of *People* vs. *Steelik*, 187 Cal. 378; 203 Pac. 78:

> "Appellant attacks the constitutionality of the statute because it denounces acts and conduct 'as a means' of accomplishing political change or change in industrial ownership, thus leaving to a court or jury to determine whether or not the particular act or conduct of the defendant is adapted to the result denounced by the statute. In considering that question it should be noted that the Criminal Syndicalism Act does not undertake to define the various acts, the advocacy of which is punishable under the statute. Such acts are *already denounced as wrongful under existing laws.* They are (1) the 'commission of crime,' (2) 'wilful and malicious physical damage to physical property,' (3) 'unlawful acts of force and violence,' (4) 'unlawful methods of terrorism.' We must look to the general law of the state to determine what are 'unlawful acts of force and violence,' and what are 'unlawful methods of terrorism,' and to ascertain what acts are crime. The 'malicious physical damage to physical property' is evidently synonymous with malicious mischief and arson, and other unlawful acts resulting in the damage to or destruction of physical property. These wrongful acts, most of them already punishable by the criminal law, are denounced by the statute and made felonious when done, or advocated as a means of political or

dustrial change. The Criminal Syndicalism Act might be summarized as an act to punish the advocacy of crime or wrong, engaging in conspiracies to commit crime or unlawful acts, or the commission of crime or unlawful acts as a means of changing industrial or political control. It is proper to seek desired changes in political and industrial control, but when criminal or unlawful means are used to effect political control, the means is punishable under the act defining and prohibiting criminal syndicalism, as well as under the act defining the crime. The latter act is no more uncertain than the one denouncing criminal conspiracy as a conspiracy to commit any act 'injurious to the public health' 'or to public morals' or the 'perversion and obstruction of justice' 'or due administration of the laws.' (Sec. 182, Pen. Code.) * * * '' (Our italics.)

This same contention is refuted in another California case, *People* vs. *Wieler*, 55 Cal. App. 687; 204 Pac. 410, as follows:

''In this same connection it is contended that the statute is void for indefiniteness. Counsel rests this objection on the fact that the statute does not define 'crime,' 'unlawful method of terrorism,' 'terrorism,' 'justify,' 'change in industrial ownership or control,' 'political,' etc. If any difficulty arises in the interpretation of the statute, and it becomes necessary to ascertain the meaning of those words, the decisions and code provisions contain numerous passages to assist the courts and there is no constitutional

> ment that such rules be provided within the bounds of each particular statutory enactment."

The words "aiding and abetting the commission of crime," "sabotage" (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), and "unlawful acts of force and violence" have a meaning so clear and definite that no reasonable person can fail to understand the same. That is "unlawful" which is expressly prohibited by law.

The word "sabotage" is expressly defined by the legislature in the act itself, as just seen. The phrase "unlawful methods of terrorism" is clear, and means just what its language imports. It would be difficult, if not impractical, to express this meaning more clearly. It includes any unlawful acts that would have the tendency to strike terror into the hearts of people for the purpose of breaking down their opposition to the proposed political or industrial change. The term "terrorism" is defined as follows:

> "The act of terrorizing, or state of being terrorized; a mode of government by terror or intimidation.."
>
> (Webster's International Dictionary.)

In this connection we desire to compare our California statute on extortion. Section 518 of the Penal Code of California declares: "Extortion is the obtaining of property from another with his consent induced by a wrongful use of force or *fear*, or under

color of official right." Section 519, following, declares: "Fear, such as will constitute extortion, may be induced by a threat, either: 1. To do an unlawful injury to the person or property of the individual threatened, * * *; or, 2. To accuse him, or any relative of his, * * * of any crime; or, 3. To expose, or impute to him or them any deformity or disgrace; or, 4. To expose any secret affecting him or them."

"Terrorism" is but a species of fear. "Fear," it is true, is a very general term, yet everyone knows what it means. The California legislature does not attempt to define the meaning of the word "fear," but confines itself to certain *causes* of fear, or, rather, certain fears which are induced as above stated. Observe the generality of the terms used in the statute above quoted, viz: "unlawful injury to * * * person or property," "any crime," "any deformity or disgrace," and, finally, "any *secret.*" These terms are much broader than those found in the syndicalism statute, and yet no one has ever questioned the legal sufficiency of the California extortion law.

Likewise in the state of Washington its criminal syndicalism law was sustained against a similar attack in a very able opinion rendered in

State vs. *Hennessy,* 195 Pac. 211.

The court there said in part:

"The sixth point is that the statute is void for

indefiniteness. In *State* vs. *Fox,* 71 Wash. 185, 127 Pac. 1111, *supra,* the same objection was made to the statute there being construed. * * *

In *State* vs. *Brown,* 108 Wash. 205, 182 Pac. 944, one of the questions was whether the statute which made it a misdemeanor for any person to drive or propel a vehicle upon any public street or highway which without its load should be of such weight as to destroy or permanently injure such street or highway was void for indefiniteness. It was there said:

'The objection to the statute is that it does not definitely and clearly define the offense intended to be denounced by it. It is argued that a statute to be free from the objection of indefiniteness and uncertainty must be so far specific that a person may know in advance whether his act will or will not be a violation of the statute, and that this statute is not thus specific, since the operator of the vehicle can not know until he actually makes the trial whether the load will or will not permanently injure the highway. In other words, the contention is that a statute, to be free from the objection, that it is indefinite and uncertain, must specifically point out the acts which constitute the crime, not merely prohibit results produced by acts. But such is not the rule. The legislation in creating an offense may define it by a particular description of the acts constituting it, or it may define it as an act which produces, or is reasonably calculated to produce, a certain defined or described result. 16 C. J. 67. If this were not so, it would be easy to find many statutes now upon the books which are open to the objection of

uncertainty, but which have heretofore never been suspected of that fault. As illustrations: the statutes making it an offense to wilfully disturb any religious meeting (Rem. Code, Sec. 2499), any assembly or meeting not unlawful in its character (Id., Sec. 2547), or any school meeting (Id., Sec. 4697), or the legislature, or either house thereof (Id., Sec. 2337), are all statutes which do not specify the particular acts which will constitute the disturbance; yet no case can be found where they have been held invalid for that reason, while there are many which have allowed convictions thereunder to stand. Other illustrations, without specifically enumerating them, can be found in the statutes against malicious mischief, injury to public utilities, injuries to property, the statutes defining and punishing vagrancy, obstructing an officer in the discharge of his duty, publishing articles tending to excite crime, or a breach of the peace, and the like, all of which define the crime by the result it produces rather than by the specific acts constituting the offense.'

The act now before us is no more indefinite than were the statutes which were before the court in those cases; to hold that the syndicalism act is void for indefiniteness would require a modification of the holding in the cases just cited and especially in the *Brown* case. The act is not void for indefiniteness."

A reading of the case just quoted will disclose that it not only cites more than once, but quotes from, and is indeed largely based on the earlier Washington case of

State vs. *Fox,* 71 Wash. 185; 127 Pac. 1111.

In that case a statute which in the most general and embracing language prohibited the publication of anything that had a "tendency to encourage * * * the commission of *any crime,* breach of the peace * * * or which shall intend to encourage or advocate disrespect to law" was held to be definite and valid.

This brings us to the point that we think is determinative of this case, and that is, that the *Fox* case was taken to this, the United States Supreme Court, which affirmed the decision of the Washington court, in

Fox vs. *Washington,* 236 U. S. 273.

Mr. Justice Holmes, who delivered the opinion of the court, declared in part as follows:

> "This is an information for editing printed matter tending to encourage and advocate disrespect for law contrary to a statute of Washington. The statute is as follows: 'Every person who shall wilfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of *any crime,* breach of the peace or act of violence, or which shall tend to *encourage* or advocate *disrespect for law* or for any court or courts of justice, shall be guilty of a gross misdemeanor'; Rem. and Bal. Code, Sec. 2564.

The defendant demurred on the ground that the act was unconstitutional.

* * * * * * *

So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; *United States* vs. *Delaware & Hudson Co.,* 213 U. S. 366; 407, 408; and it is to be presumed that state laws will be construed in that way by the state courts. We understand the state court by implication at least to have read the statute as confined to encouraging an actual breach of law. Therefore, *the argument that this act is both an unjustifiable restriction of liberty and too vague for a criminal law must fail.* It does not appear and is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general. In this present case the disrespect for law that was encouraged was disregard of it—an overt breach and technically criminal act. It would be in accord with the usages of English to interpret disrespect as manifested disrespect, as active disregard going beyond the line drawn by the law. That is all that has happened as yet, and we see no reason to believe that the statute will be stretched beyond that point.

If the statute should be construed as going no farther than it is necessary to go in order to bring the defendant within it, there is no trouble with it for want of definiteness. See *Nash* vs. *United States,* 229 U. S. 373. *International Harvester Co.* vs. *Kentucky,* 234 U. S. 216. It lays hold of encouragements that, apart from statute, if

> directed to a particular person's conduct, generally would make him who uttered them guilty of a misdemeanor if not an accomplice or a principal in the crime encouraged, and deals with the publication of them to a wider and less selected audience. Laws of this description are not unfamiliar. Of course we have nothing to do with the wisdom of the defendant, the prosecution, or the act. All that concerns us is that it can not be said to infringe the constitution of the United States. Judgment affirmed." (Italics ours.)

In line with the foregoing decision, it will be noted that the Supreme Court of California in the *Steelik* case above quoted has construed the statute in question as limited to the commission or encouragement of such acts as "are already denounced as wrongful under existing laws." Further along it declares,

> "We must look to the general law of the state to determine what are 'unlawful acts of force and violence' and what are 'unlawful methods of terrorism,' and to ascertain what acts are crime."

In a word, the language of the statute, as well as that of the highest court of the state in construing it, shows that the term "criminal syndicalism" is limited to acts which are in themselves *unlawful.* Moreover, the California Supreme Court in considering an ordinance of the city of Los Angeles, in conjunction with the criminal syndicalism law, held the former invalid, because it was not limited to positive acts of unlawfulness, as was the latter; and expressly recognized the right of every person, individually or

collectively, to advocate changes in our form of government by any *peaceable* or lawful means.

> "* * * Nothing would seem to be more certain than that the inhabitants of the United States have both individually and collectively the right to advocate peacable changes in our constitution, laws, or form of government, although such changes may be based upon theories or principles of government antagonistic to those which now serve as their basis. And it seems equally certain that an organization peacably advocating such changes may adopt a flag or emblem signifying its purpose, and that the display or possession of such flag or emblem, can not be made an unlawful act."
>
> *In Re Hartman,* 182 Cal. 447–449.

The foregoing case clearly differentiates the California statute from that of New Mexico, which was held invalid (*People* vs. *Diamond,* 202 Pacific 988) because it included within its prohibition every peaceful act having for its object a change in government.

Not only is the application of the California syndicalism statute, by judicial construction, confined to acts which are unlawful, but it is likewise limited in other respects. For instance, it has been held that where the charge of criminal syndicalism is based upon subdivisions 1, 2, 3 and 5 of section 2, the acts enumerated in said subdivisions must be pleaded with a degree of particularity that will impart to the accused precise information of the acts with which he is charged, and which, with the evidence adduced,

sustaining such charge, upon conviction, will operate as a bar to another prosecution for the same acts, with the exception that, where the charge is the violation of subdivision 4, as here (becoming a member of a syndicalistic organization), a charge in the language of said subdivision is sufficient.

People vs. *Taylor, supra;*
People vs. *Roe, supra.*

It has also been held "that knowledge of the purposes of the organization is an essential element of the crime here charged," and "that honest mistake as to the nature of the purposes of the organization is a good defense."

People vs. *Flannagan,* 223 Pac. 1014;
People vs. *Thornton,* 219 Pac. 1020.

Cases Distinguished.

The principal case cited by plaintiff in error on this first point is that of

U. S. vs. *Cohen Groc. Co.,* 41 S. C. 298; 65 L. Ed. 560; 255 U. S. 81.

This case distinguishes itself. The statute there considered was known as the Food Control or Lever Act, providing:

> "That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries, * * *"

Said this court:

> "* * * to attempt to enforce the section would

> be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest and unreasonable in the estimation of the court and jury."

As illustrative of the vice of such a statute, this court cites, in a footnote to the above decision, a number of cases involving prosecutions under this act, wherein it appears that no two courts gave it the same interpretation, but such demonstration is unnecessary, when it is considered that the adjective "unreasonable" has no limitation of meaning, but is obviously a word of general approximation. The word is subjective in that its meaning depends upon what anyone who reasons thinks about the matter, and as no two intellects function exactly the same, the connotation of the term is conceivably as various as the number of minds considering the matter.

Likewise is the *Lantz* case (90 W. Va. 738) distinguishable, because the statute there had the same vice in that it penalized the operation of automobiles around curves without reducing the speed to a *reasonable* or proper rate.

So too has our California Supreme Court held a provision in a medical practice act prohibiting "grossly improbable statements" in advertising void;

> *Hewitt* vs. *Board of Medical Examiners,* 148 Cal. 590;

and an information deficient which merely charged that the defendant did "defraud" another.

People vs. *McKenna,* 81 Cal. 158.

The court in the *Hewitt* case, *supra,* indicated that if the statute had prohibited a "false" statement it would have been sufficient, viz:

> "Under this provision the penalty of forfeiture of a physician's license is not made to depend upon falsity in fact of any matter contained in a statement or knowledge on the part of the physician that it is false, or for the reason that it was intended or had a tendency to deceive the public or to impose upon credulous or ignorant persons, and so be harmful and injurious to public morals, health and safety."

In the *Todd* (158 U. S. 278), *Brewer* (139 U. S. 228) and *Reese* (92 U. S. 214) cases cited by plaintiff in error we do not find any statute declared void for *indefiniteness,* but merely an abstract statement of principles with which we are in full accord.

In addition to what is said in the cases above quoted, as well as those merely cited, it is manifest that all penal statutes are, and indeed to be constitutional, must be, very general in their terminology. Each embraces a variety of acts or combination of circumstances. Consider the multitudinous methods in which homicide, false pretenses, embezzlement, larceny by trick and device, extortion, etc., may be committed. Observe the generality of statutes defining treason, criminal conspiracy, malicious mischief,

disturbing the peace, and crime against nature. Compared with the "Espionage Act," "Sherman Act," and "Mann Act," the statute of the type here considered is a model of exactitude, and it is significant that no court to this date has appeared to have had any difficulty in determining its *meaning,* whatever may have been the evidential, constitutional, and procedural questions raised and passed on.

The Information.

If, as established by the many foregoing authorities, this statute and similar statutes are constitutional, they do not become invalid by reason of the fact that any indictment or pleading thereunder might happen to be deficient. Therefore, it would appear that that portion of the argument of plaintiff in error which is devoted to a criticism of the sufficiency of the information in this case is outside the question here involved. In passing, it should be said that the same attack on the sufficiency of the information, including most of the cases cited, was made in the state courts both in this case and other cases, with a conclusion adverse to the plaintiff in error.

People vs. *Whitney, supra*;
People vs. *Malley, supra*;
People vs. *Roe, supra.*

It will be seen from the cases just cited that under the construction of the California courts it is necessary that the charges based upon subdivisions 1, 2, 3 and 5 of section 2 of the statute be pleaded with a

degree of particularity that will impart to the accused precise information of the acts with the commission of which he is charged, and where, as here, the charge involved relates solely to a violation of subdivision 4 of said section, in organizing and becoming a member of a group of persons assembled to advocate or aid and abet criminal syndicalism, it is sufficient to charge the crime in the words of the statute. As said in *People* vs. *Roe, supra* (209 Pac. 381 at 383):

> "* * * where the charge is the violation of subdivision 4, the statement in the indictment or information is sufficient if it is in the language of said subdivision, *since the acts therein denounced as acts of criminal syndicalism are sufficiently described by the language itself of said subdivision to make it perfectly clear what was thereby intended.*" (Our italics.)

In other words, charging a person with becoming a member of a syndicalistic organization such as defined in the statute here in question is a direct allegation of a definite fact, for *membership* is a very concrete fact. Thus if anyone in California is charged with *becoming a member* of a syndicalistic organization defined in this statute, he well knows what a charge he is called upon to meet. He knows that the main issue confronting him is whether he *did* or did *not* join an organization of that character. *Joining* is itself an act—an overt act. To charge that a person joined such an organization involves but three issues of fact—first, the joining, second, that

the organization was of the character prohibited by the act, and third, knowledge of its character. It would therefore necessitate pleading the evidence if the state were required, under said subdivision 4 of section 2 of the act to plead, in addition to the fact of joining an organization of the character described in this statute, the further activities of the defendant after he or she became a member as well as the activities of the organization itself.

"Due Process" in California.

In the determination of what constitutes "due process of law" in California, there must also be taken into consideration a notable addition to the constitution of California in the year 1910 in section 4½ of article VI:

> "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or *for error as to any matter of pleading,* or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in *a miscarriage of justice."*

This amendment had such a salutary effect upon law enforcement in California, that the people amended the statute in 1914 to include not only criminal but civil and all other cases as well, and this section now reads as above quoted with the word "criminal" deleted. Thus, in determining whether

or not prejudice was suffered by a defendant in a given case by reason of the form of the pleading, the appellate tribunals of this state consider not merely the face of the information itself, but read it in the light of the whole record. So it was that the court, in the case of *People* vs. *Whitney, supra* (57 Cal. App. 449, 451) declared:

> "Since the original submission of this cause the supreme court has decided the case of *People* vs. *Taylor,* 187 Cal. 378 (203 Pac. 85), covering the precise point which the appellant urges upon this contention. The two cases are identical as to the form of the charge and as to the procedure with relation to the trial thereon in the trial court. In each case the defendant was fully advised upon the *voir dire* examination of the jurors and in the opening statement of the district attorney that the organization which the defendant was charged with having organized and assisted in organizing in violation of the terms of the Criminal Syndicalism Act was the Communist Labor Party of Oakland, a local branch of the Communist Party of California. This being so, we are bound in conformity with the decision in *People* vs. *Taylor, supra,* to hold that the appellant's first contention is void of merit."

Second Point.

THE STATUTE DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

Plaintiff in error contends that the statute in question denies equal protection of the laws because it applies only to those who commit the acts in question

for the purpose of effecting a *change,* and does not include those who do the same things to maintain an industrial or a political condition.

The equal protection of the laws is secured where the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.

Duncan vs. *Missouri,* 152 U. S. 382;
Atchison, etc. R. Co. vs. *Mathews,* 174 U. S. 104;
McPherson vs. *Blacker,* 146 U. S. 39.

A mere statement of the above proposition would seem to be determinative of this question. Manifestly this statute applies to all persons who do the things therein denounced. It is not limited in its language or effect to employees, but includes employers; it is not confined to laborers, but includes capitalists as well; it makes no distinction between the poor "wobbly" and the rich communist. The present case is proof of this, for the record shows, and it is asserted in the opening brief (p. 2), that plaintiff in error "is a woman of refinement and culture * * * once possessed of wealth." This same point was thus disposed of in

People vs. *Wieler,* 55 Cal. App. 687:

> "Counsel for plaintiff points out that the act of April 30, 1919 (Stats. 1919, p. 281), and known as the criminal syndicalism law, penalizes certain acts done to accomplish an industrial or political change, but does not penalize the same acts if done for the purpose of maintaining and perpetuating

the same industrial or political condition. In other words, the attack is that certain things could have been penalized which have not been penalized. The same identical argument was made in the case entitled *In re Miller,* 162 Cal. 687 (124 Pac. 427). The court was considering the act of 1911 (page 437), forbidding the employment of women for more than eight hours and had in certain places. At page 697 of 162 Cal. (124 Pac. 430) the court says: 'The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But if this be true it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation.' " (Pp. 689, 690.)

The Supreme Court of Washington said on this subject in

State vs. *Hennessy,* 195 Pac. 211 (at 215):

"The fourth point is that the statute is class legislation. The argument here seems to be based on the assumption that it was 'intended to restrict the discussion of economic and industrial questions among labor organizations.' There is nothing, however, on the face of the act to justify this assumption, and the court, in considering the

question, is governed by its terms. The legislature has power to pass all needful police regulations, and so long as such regulations bear with equal weight upon all in like situation or of the same class, they are upheld by the courts. *State* vs. *Fraternal Knights & Ladies,* 35 Wash. 338, 77 Pac. 500; *State* vs. *Nichols,* 28 Wash. 628, 69 Pac. 372; *State* vs. *Nicolls,* 61 Wash. 142, 112 Pac. 269, Ann. Cas. 1912B, 1088. The act is general in its terms and provides that 'whoever' shall do the things there prohibited shall be guilty of a felony. Under this language any one, no matter what his business association or professional calling might be, who did the things prohibited by the act, would be subject to its provisions."

The Minnesota Supreme Court has even more fully answered this argument in

State vs. *Moilen,* 167 N. W. 345, at 347:

"It is next contended that, since the statute is limited in its application to employer and employee, with protection only to the employer to the exclusion of all other persons, it is class legislation and a denial of the equal protection of the law, and for that reason unconstitutional and void. The point is without force. While the practice of sabotage applies only between employer and employee, the other methods of terrorism referred to in the statute in that respect has general application. But for the purposes of the case it may be conceded that the statute applies only to the relation of employer and employee, yet we have no difficulty in

ing its validity against this attack. The relation of master and servant, employer and employee, has long been the basis and foundation for specific legislation in this state, as well as in the other states of this country. And though often vigorously challenged as class legislation statutes applying only to that relation have in later years been sustained by the courts with few exceptions."

Numerous citations supporting the above contention thereupon follow.

Says the Oregon Supreme Court in

State vs. *Laundy,* 204 Pac. 958 (at 964):

"The syndicalism statute is not class legislation. It affects all alike. It does not discriminate against some or favor others."

Likewise we find the Idaho Supreme Court declaring in

State vs. *Dingman,* 219 Pac. 760 (at 764):

"Neither do we think that this statute is open to the objection of creating an unreasonable distinction between classes and persons, because it limits the offense to the advocacy of the doctrine announced as a means of accomplishing industrial and political reform, and does not, in terms, at least, make such advocacy a crime if committed for other purposes, within the act."

Plaintiff in error cites the case of

Truax vs. *Corrigan,* 257 U. S. 311,

on this point. But that case if anything is authority

for the validity of the legislation herein attacked. It holds the anti-injunction law of Arizona in labor disputes unconstitutional because it "operates to make lawful such a wrong as * * * deprives the owner of the business and the premises of his property without due process, and can not be held valid under the 14th amendment." The court further condemns "moral coercion by illegal annoyance and obstruction," for as it says "violence could not have been more effective." Be this as it may, it should be a sufficient answer to point out that this case has no application to the instant one because the statute there considered expressly referred to controversies between "employers and employees," whereas manifestly the criminal syndicalism law as above noted is not so limited, and applies to every person, irrespective of condition, employment, or class.

Free Speech Not Abridged.

Plaintiff in error without having made a direct point of it, has devoted much of her brief to the argument that the statute infringes upon the right of free speech. As to this the Supreme Court of California says in

People vs. *Steelik,* 187 Cal. at 375:

> "The right of free speech was guaranteed to prevent legislation which would by censorship, injunction, or other method prevent the free publication by any citizen of anything that he deemed it was necessary to say or publish. * * *
> The right of free speech does not include the

right to advocate the destruction or overthrow of government or the criminal destruction of property. The Criminal Syndicalism Act does not violate the right of free speech. * * *

It is expressly provided in our constitution that the publisher is liable for an abuse of this power and for any unlawful publication. This statute does not prevent the publication; it punishes the publisher, and declares punishable the character of publication denounced by the act as illegal. The legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. (*People* vs. *Most, supra.*) It is clear that the statute does not violate the right of free speech as defined by law. (6) The defendant, however, is not in a position to raise the point, for he is not charged with or convicted of a violation of the Criminal Syndicalism Act involving anything that he said or published as hereinbefore indicated."

In *State* vs. *Boyd,* 91 Atlantic 586, at 587:

"The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible. Incitement to the commission of a crime is a misdemeanor at common law, whether the crime advocated be actually committed or not (*State* vs. *Quinlan, supra*); and this (by the weight of authority) whether the crime

cated be a felony or a misdemeanor (12 Cyc. 182, and cases cited). That the right of free speech is not unlimited is well settled."

State vs. *Holm,* 166 N. W. 181, at 183:

"It is settled that the state may prohibit publications or teachings which are injurious to society, or which tend to subvert or imperil the government or to impede or hinder it in the performance of its public and governmental duties without infringing the constitutional provisions which preserve freedom of speech and of the press. These constitutional provisions preserve the right to speak and to publish without previously submitting for official approval the matter to be spoken or published, but do not grant immunity to those who abuse this privilege, *nor prevent the state from making it a penal offense to publish or advocate matters or measures inimical to the public welfare.*"

People vs. *Laundy,* 204 Pac. 958, at 965:

"The Syndicalism Act does not violate the constitutional right to speak freely nor the constitutional right to assemble peaceably."

People vs. *Lloyd,* 136 N. E. 505, at 513:

"It would be a strange constitution, indeed, that would guarantee to any man the right to advocate the destruction by force of that which that constitution guarantees to the people living under its protection."

The following observation of this court in *Schaefer* vs. *U. S.,* 251 U. S. 467, at 477, is very appropriate:

"A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. In other words and explicitly, though it empowered congress to declare war and war is waged with armies, their formation (recruiting or enlisting) could be prevented or impeded, and the morale of the armies when formed could be weakened or debased by question or calumny of the motives of authority, and this could not be made a crime—that it was an impregnable attribute of free speech upon which no curb could be put. Verdicts and judgments of conviction were the reply to the challenge and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at bar."

Citing:

Schenck vs. *U. S.*, 249 U. S. 47;
Frohwerk vs. *U. S.*, 249 U. S. 204;
Debs vs. *U. S.*, 249 U. S. 211;
Abrams vs. *U. S.*, 250 U. S. 616.

Conclusion.

Much of the "Brief for Plaintiff in Error" is devoted to political rather than legal argumentation. It is asserted that the act is "repugnant to * * * a free America," is "subversive of governmental republicanism," and "mocks the theory of democracy." On the contrary, the very purpose of the statute was and is to safeguard the rights of property from the evils of sabotage, the liberties of the individual from mass terrorism, the State and Union from insidious treason, culminating in the horrors of revolution.

It is beside the question to argue, for all agree that men can not be punished for their thoughts provided they are not translated into illegal action. No man can be tried for his opinions so long as he does not incite riots or counsel crime. As said by Mr. Justice Hart in

People vs. *Roe, supra* (209 Pac. 385, at 386):

> "While, as stated, there is no criminal purpose to be imputed to the fact of the mere advocacy of a plan for the government of the peoples of the earth which would or might bring to them what may well be termed a condition of consummate beatitude in wordly affairs, yet, when in attempting to crystallize such a condition any organization resorts to criminal acts of any character, or prôposes to do it by the destruction of property and vested rights, then it has clearly

transcended the line of demarcation between right and wrong; and the vice of the whole scheme of the organization known as the I. W. W. is, according to the testimony in this case, in the methods which it advocates and to which its members without scruples resort for carrying out its principles, and as to this phase of the case the record before us overflows with proof of the most dastardly crimes known to the criminal law which were resorted to for the avowed purpose of terrorizing the people, in the vain hope of intimidating them into accepting the propaganda of the I. W. W. as the true faith in the matter of government."

To the same effect it is held in

People vs. *Lloyd,* 136 N. E. 505, at 530:

"If such a program were advocated by a few men in any community, they would be promptly arrested and punished, and no one would have the temerity to defend their acts. But plaintiffs in error seem to take the position that because their band has become so large and the nefarious doctrines they advocate have assumed world-wide proportions, it must be held to be an honest effort to reform a bad system of government. The fact that a conspiracy to commit a felony assumes tremendous proportions does not change the character of the conspiracy."

To suppress all such conspiracies and activities having as their object the overthrow of this free government, the criminal syndicalism law was enacted in

this and other states, and we respectfully submit that in its essence it is fundamentally sound and constitutional in that it stands out as one of the most effective bulwarks of the constitution itself.

Respectfully submitted.

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