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TABLE OF CASES CITED.

IN THE

Supreme Court of the United States

October Term, 1925—No. 10.

CHARLOTTE ANITA WHITNEY,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, STATE OF CALIFORNIA.

Brief for Plaintiff-in-Error.

The appeal is from a conviction under the Criminal Syndicalism Law of California. An information was filed against Miss Whitney, charging her in five counts, following the language of the five sections of the statute, with all the offenses by that statute condemned. On none of the charges of personal participation—the advocacy or furtherance of forbidden doctrines—was she

convicted. She was found guilty upon the first count alone, which charged her with having organized, or become, or been a member of some unnamed party or assemblage. Miss Whitney's personal connection was a wholly innocent one. The only questionable organization she had anything to do with was an organization in the process of formation. To that organization she and the Resolutions Committee on which she served attempted to give a strictly political and admittedly innocent character. The resolution she helped to prepare and which she herself read to the convention was, however, rejected, and the organization was thus, over her opposition, given a quality which the California courts have condemned. The indefiniteness of the charge from beginning to end of the prosecution and the innocent character of Miss Whitney's own acts, are the foundation for her contention that, as applied to her case, the California Criminal Syndicalism Law, and in particular its prohibitions upon assemblage and membership, violate the Fourteenth Amendment of the Constitution of the United States.

* * * * *

The writ of error (page 12) reviews the judgment of the District Court of Appeal, First Appellate District, Division I of the State of California (opinion reported 57 Cal. App., 449), dated April 25, 1922 (Record, page 1) affirming the conviction. The Supreme Court of California, without opinion, denied a petition for leave to appeal to that Court (page 1); two of the seven judges dissented and one judge was absent.

Specific claims advanced, and rulings made in the California Courts, relied upon as the basis of this Court's jurisdiction.

By demurrer to the information (pages 65-66) —by motion for a bill of particulars (pages 59-64)—by motion for a directed verdict after the opening statement of the District Attorney (page 73)—by motion to compel an election (pages 305-307)—by requests at the close of the case that the Court instruct the jury to bring in a verdict of not guilty (page 31)—by motions after verdict for a new trial and in arrest of judgment (page 30)—Miss Whitney's counsel before trial, during the trial, and after the trial challenged the sufficiency and the definiteness of the accusation upon which she was convicted. The ruling in each case was against her (pages 17-18; 30-31; 307).

Miss Whitney's counsel requested the trial court to charge that there could be no conviction under any section of the statute in the absence of a showing of personal participation in, and furtherance of, a seditious intention (page 33; see also page 17, this brief *infra*, footnote). The court, however, charged in effect (page 40) that membership or presence *per se*—without regard to her intent in joining or attending, and without inquiry whether her purpose was to give a lawful or unlawful character to the body then in process of organization—could be made the basis of conviction* This theory of guilt the Cali-

*By Section 1259 of the Penal Code of California, the need of exceptions in criminal cases, and with respect to "any instruction given, refused or modified" the need of objections is done away with when an appeal is taken in open court, as

fornia District Court of Appeal in terms approved (page 4).

In the District Court of Appeal and also upon her application for leave to appeal to the Supreme Court of California, Miss Whitney contended that the statute "and its application in this case is repugnant to the provisions of the Fourteenth Amendment of the Constitution of the United States—providing that no state shall deprive any person of life, liberty or property, without due process of law, and that all persons shall be accorded the equal protection of the laws" (*Stipulation and addition to the record,* filed Dec. 16, 1924, and printed as pages 338-339). That contention "was considered and passed upon" by the District Court of Appeal—the highest California Court to which appeal was permitted (see page 1)—and was overruled by that court (*Order amending record,* page 337).

Statutory provisions under which the jurisdiction of this Court is invoked.

Judicial Code, Section 237, provides:

> "A final judgment * * * in any suit in the highest Court of a State in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Con-

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Miss Whitney's was (pages 29-30); see also Section 1176. (Sections 1259 and 1176 are printed in the appendix to this brief as Appendix C.)

stitution * * * of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

Cases sustaining jurisdiction.

That writ of error lies to the judgment of the California District Court of Appeal in this case, see

Gregory vs. *McVeigh,* 23 Wall., 294;

and compare

Davis vs. *L. L. Cohen & Co., Inc.,* Adv. Op., 69 L. Ed., July 1, 1925, page 702.

That a decision against a claim of Federal right in the State Court of last resort is sufficient to give this Court jurisdiction, see

Chicago R. I. & Pac. Co. vs. *Perry,* 259 U. S., 548.

That the raising of the Federal question and its determination by the State Court of last resort may be shown by certificate of that Court, "made part of the record by that Court," see

Cincinnati Packet Co. vs. *Bay,* 200 U. S., 179, page 182.

Compare

Consolidated Turnpike Co. vs. *Norfolk, etc., Railway Co.,* 228 U. S., 596.

Statement of the Case.

California Criminal Syndicalism Act.

The verdict of guilty (page 30) was upon the first count which, in the general language of the statute (California Criminal Syndicalism Act—Stat. 1919, page 281), charges a violation of Section 2, Subdivision 4, thereof.*

Criminal Syndicalism is defined in the first section of the statute as follows:

> "The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or 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), or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change."

Subdivision 4 of Section 2, for violation of which plaintiff-in-error was convicted, is as follows:

> "Any person who
>
> * * * * * * *
>
> Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism
>
> * * * * * * *

*The whole statute appears as Appendix A.

> Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years."

The basic facts upon which Miss Whitney's appeal rests are, as we have seen, two: the fact namely that at no time was she—or the jury—informed in any precise manner of the accusation against her upon this count, and the fact that her personal connection and personal activity were in every respect innocent. The nature of these contentions involves a rather detailed review of the proceedings before and at the trial, and of the opinion of the California District Court of Appeal. The whole story of the proceedings in Miss Whitney's case is as follows:

The Information.

The information against Miss Whitney was filed on December 30, 1919 (page 14). All five counts are drawn in the language of the statute. The first, which alone resulted in conviction, charges that

> "the said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized

and assembled to advocate, teach, aid and abet criminal syndicalism'' (page 15).

The second, third, fourth and fifth counts—all of which failed (pages 30, 54-55)—charge respectively the publication and circulation of printed matter advocating criminal syndicalism; the advocacy and teaching ''by personal conduct''; the justifying and attempting to justify criminal, violent and unlawful methods ''by spoken and written words''; and the unlawful, wrongful, wilful, deliberate and felonious practice and commission of forbidden things by ''personal acts'' (pages 14-16)*.

The date of each of the offenses is given as ''on or about the 28th day of November,'' 1919 (pages 15-16).

No organization is named anywhere in the information.

Demurrer to information overruled and bill of particulars denied.

Miss Whitney first demurred to the information, and to the first count thereof, on the grounds, among others, ''that it contains no statement of the acts constituting the alleged offense in ordinary or concise language or in such manner as to enable a person of common understanding to know what is intended'' and ''that the facts stated do not constitute a public offense for the reason that the purported statute therein referred to is void, invalid, and unconstitutional'' (pages 65-66). The demurrer was overruled (page 18).

*The whole information is annexed to this brief as Appendix B.

Defendant thereafter moved for a bill of particulars. The motion was denied (pages 59-64, 18).

District Attorney's Opening.

The trial commenced on January 28, 1920, within a month after the filing of the information (page 70). The district attorney in two pages professed to give "a very brief synopsis of the case that the People of the State of California intend to prove" (page 70)—a case which then embodied five counts and covered the entire range of the statute. He mentioned a number of organizations, assemblages and groups,—the Socialist Party and a radical wing of it (page 70); delegates from Oakland to a convention in Chicago (page 71); a convention in Oakland of a party "which was termed the Communist Labor Party"* (page 71); the I. W. W. (page 72). Nowhere did he state in clear language which of these bodies Miss Whitney was charged with organizing; which she was charged with membership in; which she was charged with assembling with.**

*The evidence subsequently applied the term "Communist Labor Party" to at least three bodies of one sort or another, Local Oakland (which remained an independent body up to the time of the trial), the California party which was organized at a convention in Oakland, and a national party organized in Chicago (*infra* this brief, pages 10-13).

**The emphasis of the opening was largely upon personal advocacy charged in the other counts. The District Attorney's statement (page 72) that incendiary or objectionable literature was found in Miss Whitney's home was absolutely unsubstantiated by the evidence subsequently received or offered and the jury did not convict on the counts which charged this.

(*Footnote continued on next page.*)

Defendant's counsel moved for a directed verdict after this opening, and the motion was denied (pages 72-73).

Evidence.

Plaintiff-in-error had been a member of Local Oakland (pages 117-118), a local branch of the Socialist organization (pages 119, 189). This local sent delegates to the National Convention of the Socialist Party held in Chicago on August 30 and September 1, 1919 (page 205). Plaintiff-in-error voted for these delegates (pages 205-6); the election was by written ballot circulated among the members—not at a meeting (page 206). At the Chicago Convention the "radicals" were ejected; they went to another hall and formed the Communist Labor Party of America (page 100). The delegates sent by Local Oakland "went over" to this group (page 100). Local Oakland thereafter withdrew from the Socialist Party (pages 153, 155) and after receiving some communication or communications from the Communist Labor Party of America (pages 153-155, 158), and an announcement from Local San Francisco that a convention would be held in Oakland on No-

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The reference in the District Attorney's opening to the "red flag" (page 71) was subsequently explained. At one of the sessions of the meeting of November 9th, there was a red table cloth hung over the American flag (page 92). The witness Condon who testified to this incident admitted on cross examination that Captain Thompson of the police force had stated to him that he had one of his men drape the table cloth in this way (pages 108-109; 113-115). Captain Thompson subsequently denied that *he had told the witness* that "he had a man to do that thing" (page 148). However, the red flag incident "went out" of the case (page 109) on the express statement of the District Attorney.

vember 9, 1919, to decide upon a state organization (pages 82; 153-4) Local Oakland sent delegates to this state Oakland convention, among them plaintiff-in-error (pages 151, 152). Although the convention resulted in the organization of the Communist Labor Party of California, Local Oakland up to the time of the trial maintained its independent character and had not applied for a charter as a local of the Communist Labor Party (page 156), nor ratified the action of the convention (page 190). While the Local thus tentatively adopted the Communist Labor name, it never joined the state organization, and therefore did not and, indeed, could not belong to the national body either (pages 154, 184).

Plaintiff-in-error attended this state convention which was held on November 9, 1919, at Loring Hall in Oakland (pages 74, 81, 87, 151, 309), and took part in the convention as chairman of the Credentials Committee (83, 113, 308) and as a member of the Resolutions Committee (87, 309).

While the constitution was still in the hands of the Committee on the Constitution, and before the presentation or adoption of any resolution, defendant was elected to serve as one of two alternate members on the State Executive Committee (page 121).

Miss Whitney's resolution for political action and its defeat.

One of the resolutions which plaintiff-in-error's Committee presented and which she herself read to the convention (page 309) is as follows:

"The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class.

Signed by the Whole Committee, H. L. Griest, Chairman. W. H. Eichhorn, J. G. Wieler, D. D. Wemich, Charlotte Anita Whitney, Edw. R. Alverson" (pages 101-2, see also 123).

The resolution thus bore Miss Whitney's signature, and there is no question that it had her personal approval (page 309).

The critical importance of this resolution in the case this Court will at once recognize: It is "unlawful methods" of political or industrial change that the statute penalizes, and the District Attorney in his opening stressed the contrast between

changes "by the ballot, by political method" and "by industrial action," "direct action" (page 70).

This resolution naturally aroused much controversy among the delegates (pages 121, 142),—"a tong war broke out" (page 142). The proposal was strongly opposed on the ground "that the adoption of this resolution would have undone all that the Communist Labor Party Convention at Chicago had put down in their platform and program, and again lined us up with the Socialist Party from which we had just escaped" (page 142). It was voted down and *in its stead* (page 121) was adopted the program of the Communist Labor Party of America (pages 171-188) which, to adopt the characterization of the secretary, "clearly defines that the ballot is practically worthless as an instrument of emancipation and we must look to organizing the workers industrially as our great weapon of offense and defense" (page 142).

* * * * * * *

The prosecution went on to prove a number of other and distinct incidents—whether as characterizing the Oakland Convention or as substantive bases of accusation neither the District Attorney nor the Court ever explained to the jury.

There was a scrap of testimony that Miss Whitney in the capacity of an alternate attended a meeting of the Executive Committee of the California Communist Labor Party in San Jose in December, 1919 (pages 125, 127, 150), and a meeting in San Francisco in January, 1920 (pages 127, 150). No particulars were given of what the committee did on any of these occasions, and

there was no testimony that Miss Whitney did anything (pages 126-7).

There was evidence by a police officer that on one occasion in November, one in December and one in January he had seen Miss Whitney in that part of the building called Loring Hall which he said was occupied by the Communist Labor Party, and that he saw other members "coming and going" (page 206).

The prosecution, as our references to the District Attorney's opening have indicated, made repeated effort in some way to drag the I. W. W. into Miss Whitney's case. Acts of violence by certain members of the I. W. W. (pages 228, 258-9, 262-71, 290, 294) and the incendiary nature of its literature (pages 225-7, 234, 256) were proved. There was, however, not an item of evidence that defendant had ever attended a single meeting of that body, or any branch of it, much less that she was a member of it or had organized or had helped to organize it. There was a shred of evidence merely that on one or two occasions in July and August, 1918 (pages 274, 282) she had been at the headquarters of the I. W. W. in San Francisco and had spoken to the secretary of that organization in regard to circulating defense cards (pages 274, 281).

The foregoing is the whole story of Miss Whitney's activities. The Communist Labor Party of California was in process of organization and she tried to give it a character which the majority of those present at the meeting of November 9, 1919, refused to accept. Its organization was only that day undertaken and Miss Whitney's connection with it continued so vague and so ill-

fined that even up to the time of the trial she apparently had not signed a membership card (compare page 193), although she declared herself at that time to be a member—whether of some local, or of the state, or of the national body does not appear (page 310). (She had signed a "temporary card" which one "had" to take out in order to attend the convention of November 9 [pages 190-1.])

No proof was offered that plaintiff-in-error ever advocated the use of violence, terrorism or any other unlawful measure to effect political change, or that she intended to assist or promote any act of criminal syndicalism or any other unlawful act. The evidence was all directly to the contrary (page 136, compare 137; pages 309, 335).

Trial Court's refusal to require an election by the prosecution and failure to identify the organization.

At the close of the trial the court—which had previously overruled various objections that recited the ignorance of the defense of "what this lady is being tried for" (pages 283; 291)—declined to require the prosecution to elect and designate the specific offense under the first count which the District Attorney desired to submit to the jury (pages 305-7).

The charge of the trial judge with reference to this count repeated the language of the section (pages 43-4), without separately presenting the various offenses covered by the section, and designated no specific organization to which

ant was accused of belonging and no specific act or occasion constituting the offense. He did not instruct the jury that the evidence concerning other parties and organizations than the Communist Labor Party of California was to be taken into consideration only in determining the nature of that party, but left the identity of the organization whose character was to be determined, altogether uncertain. The instruction on this point was as follows:

> "Evidence has been admitted in this case of statements, acts and declarations of persons other than the defendant, and not made and done in the presence of the defendant, and of printed matter purporting to be printed matter of the I. W. W. and of the Communist Labor Party, or circulated or publicly displayed by the I. W. W. and by the Communist Labor Party, and taken from places and at times at which the defendant was not present, and which was not directly connected with the defendant, and which the evidence does not show was circulated, printed or publicly displayed with her acquiescence or consent. Evidence has also been admitted of other objects which are not directly connected with the defendant.
>
> The Court instructs you that such evidence was admitted for but one purpose, and is to be considered by you for that one purpose only, and that is to determine the character of the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing * * * (page 46)."

What "organization" was thus "claimed," the judge stated neither at that point of the charge nor at any other.

Charges and requested charges on the subject of intent.

The trial court was requested to charge the jury

> "that in this case to constitute any crime there must exist a union or joint operation of act and intent";

and the further instruction was requested:

> "I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had a criminal intent of doing an act forbidden by the law under which this prosecution is brought" (Record, page 33).*

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*In the list of requested instructions submitted by defendant was also the following on the question of intent:

> "One of the charges brought against this defendant is that she knowingly became a member of an organization organized to advocate criminal syndicalism. Before she can be convicted of this charge every member of the jury must be convinced beyond all reasonable doubt not only that the organization in question was organized for such criminal purpose, but also that the defendant knew that it was organized for such criminal purpose * * *."

This reqested instruction was perhaps accepted by the judge when submitted, as it is marked "given as modified" (page 33). It was not, however, given to the jury in any form (see pages 38-48; and especially 40).

These sentences appear in weakened form in the charge as given: The court added "criminal negligence" as a possible alternative to "intent" in the first, and omitted "criminal" before "intent" in the second. He immediately added sentences whose effect was, that intent was to be deduced from soundness of mind and that soundness of mind could be predicated of all but idiots and lunatics. As actually given the charge on this subject reads as follows:

> "I charge you that you must not convict in this case unless convinced beyond all reasonable doubt that defendant had an intent of doing an act forbidden by the law under which this prosecution is brought.
>
> In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense and the sound mind and discretion of the accused.
>
> *All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity.*
>
> *It is a presumption of law that an unlawful act is done with an unlawful intent.*
>
> *A malicious and guilty intent is always presumed from the deliberate commission of an unlawful act for the purpose of injuring another.*
>
> While it is true that the law presumes that every man intends the natural consequences of his acts knowingly and deliberately committed, in a case like this, the

> sumption is not conclusive but is probitary [*sic*] in character. It is for the consideration of the jury in connection with all the other evidence in this case, to the end that you may determine the real intent of the party in doing what you may find she did do. You may infer the intent from the character, and the natural, ordinary, necessary consequences of the acts done. The defendant's intent is to be determined from all the evidence'' (page 40).

Unsuccessful attempt at identification of the organization by the District Court of Appeal, and affirmance and perpetuation of the trial court's ruling that guilty purpose could be presumed from mere membership or presence.

The District Court of Appeal took note (page 3) of defendant's contention that there had been an ''omission to specifically designate the name of the organization, society, group or assemblage of persons which she is charged with having organized and assisted in organizing.'' Judge Richards declared however that ''upon the *voir dire* examination of the jurors and in the opening statement of the District Attorney,'' the defendant ''was fully advised'' ''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,* the local branch of the Communist Party of California'' (page 3). He went on to say that ''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" (page 4).

This is exactly what the evidence does *not* show. There was no evidence concerning the organization of "the Oakland Branch of the Communist Labor Party of California." Local Oakland never applied, even up to the trial, for a charter in the Communist Labor Party (page 156; compare page 166), and never ratified the action of the State Convention (page 190) or had a report concerning it (pages 190, 157). There was no proof of any resolution, platform or program ever adopted at any meeting—whether before or after November 9, 1919—by the Oakland Local. There was affirmative evidence that Miss Whitney attended no meeting of Local Oakland after the state convention of November 9 (pages 189, 192). There was no proof, again, of any of the circumstances of Miss Whitney's joining Local Oakland —for example, whether it was before the passage of the Criminal Syndicalism Law in April, 1919, or after—and no proof that she ever in her life attended a single meeting of the body. The only evidence concerning Miss Whitney's connection with Local Oakland was the proof that in August, 1919, she voted by written ballot as a member of that local for delegates to the convention of the Socialist Party of America (pages 205-6); that she was a delegate from Local Oakland to the convention which on November 9, 1919, was held to organize the Communist Labor Party of California (page 152); and that on two or three

casions after November 9, 1919, she was seen by a police officer in Loring Hall when no meeting was in progress, but when members of Local Oakland were "coming and going" (page 206).

To the convention on November 9, 1919, at which the state party was organized and which Miss Whitney attended, the Appellate Court referred in a casual sentence near the close of the opinion (page 4). That casual sentence is in each of its particulars wholly erroneous. Judge Richards there speaks of "her participation in the drafting of the resolutions and formulation of the constitution of the organization itself." The record does not disclose that Miss Whitney had any part in the "formulation of the constitution"; she was not on the constitution committee (page 119). Her "participation in the drafting of the resolutions" consisted in the preparation and submission of a resolution of admittedly innocent character which the convention rejected (*Supra,* pages 11-13).

Judge Richards who failed to apprehend both the identity of the organization and the quality of Miss Whitney's connection with it, speaks of "an organization whose purposes and sympathies savored of treason" (page 4). The organization truly involved—had the accusation been at any time particularized, was an organization which had *no* "purposes and sympathies," a temporary organization—an organization whose purposes and sympathies were necessarily in the making and which Miss Whitney tried, though in vain, to make innocent beyond all question.

It thus remains wholly true that even after trial and in the "highest court of the state" to

which Miss Whitney's appeal ran, both the identity of the organization and the occasion of her connection remained undefined and were in fact misconceived.

The short opinion substantially concludes (page 4) with an explicit reaffirmation of the trial Court's declaration that the question of Miss Whitney's personal guilt—the inquiry whether she furthered or opposed those purposes which the organization finally adopted and which the Court condemned—was immaterial.

> "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.*" (Our italics.)

Assigned Errors Urged.

Plaintiff-in-error urges the following errors assigned (pages 8-11):

That the Supreme Court of California when it refused to grant leave to appeal, the District Court of Appeal when it affirmed, and the Superior Court when it rendered judgment

nied her the equal protection of the laws (Assignments I, II and III); that the Superior Court erred in overruling her demurrer to the indictment, and in denying her motion to set aside the information, and in denying her motion for a new trial, and in denying her motion for a bill of particulars (Assignments IV, V, VI, VII), and that the District Court of Appeal, erred in affirming these rulings (Assignment VIII); and finally that the Superior Court and the District Court of Appeal, erred in holding that the statute was not a violation of the due process and equal protection of the laws provisions of the Fourteenth Amendment (Assignments IX, X) and that the California Supreme Court erred in failing to grant an appeal and in failing to hold the judgment of conviction a denial of constitutional rights under the Fourteenth Amendment (Assignment XI).

OUTLINE OF POINTS.

Our argument, as we have already indicated, rests upon two general contentions: In Points I and II we shall show that the conviction would have been a denial of due process even had the statute been admittedly valid and even had facts been proved which could constitutionally be punishable,—the failure ever to specify the accusation invalidated the conviction. In Points III-X we shall submit various reasons why Miss Whitney—even had the prosecution been wholly specific and perfect in form—could not constitutionally be convicted because of the quality which other persons over her protest gave to the organization she joined. Briefly stated our points are as follows:

I. The failure alike in the information and at every subsequent stage of the proceedings to identify either the organization or occasion of which guilt was sought to be predicated, makes her conviction a denial of due process (*Hodgson* vs. *Vermont*, 168 U. S. 262) (pages 27-37).

II. Although the record showed only one occasion of organization, membership or assemblage on Miss Whitney's part in Alameda County after the passage of the Criminal Syndicalism Act—namely, the convention of November 9, 1919—the court submitted to the jury without discrimination many other incidents whose consideration as substantive bases of guilt should have been absolutely excluded (pages 38-46).

III. Miss Whitney's act in attending the convention of November 9, 1919, cannot constitutionally be made punishable by reason of "a subsequent event" brought about against her will, by the agency of others (*U. S.* vs. *Fox,* 95 U. S., 670) (pages 47-51).

IV. The crime which the Criminal Syndicalism Law, Section 2, subdivision 4, defines, has been recognized by the California Courts as a crime of conspiracy; to that crime a specific and "corrupt" intent to join in the forbidden purpose of the combination is an essential; that essential cannot constitutionally be supplied, in opposition to proved and undisputed facts, by statutory presumption (*McFarland* vs. *American Sugar Co.,* 241 U. S., 79) (pages 52-60).

V. The statute as construed and applied in this case is so indefinite that a conviction under it is a denial of due process. To adjudge Miss Whitney guilty of felony because she failed to foresee the quality others would give to the convention of November 9, 1919, is to inflict criminal penalties by reason of a lack of "prophetic" understanding (*International Harvester Co.* vs. *Kentucky,* 234 U. S., 216) (pages 61-65).

VI. The statute as applied in this case is a "previous restraint" upon assembly and invalid within the analogy of *Patterson* vs. *Colorado,* 205 U. S., 454 (pages 66-69).

VII. The statute as applied in this case is as well a previous restraint upon free speech (*Patterson* vs. *Colorado,* 205 U. S., 454) (pages 70-71).

VIII. The statute as here applied is a violation of the right of association, which is an element of liberty protected by the Fourteenth Amendment (*Meyer* vs. *Nebraska,* 262 U. S., 390) (pages 72-74).

IX. No quality of incitement attaches to the proceedings of the convention of November 9, 1919, and no conviction by reason of the convention that day held could constitutionally have been had even if Miss Whitney had shared the purposes of the majority (*Gitlow* vs. *New York,* 45 Sup. Ct., 625) (pages 75-79).

X. The Criminal Syndicalism Law, Section 2, subdivision 4, unfairly discriminates between different political and economic opinions and denies the equal protection of the laws (*Truax* vs. *Corrigan,* 257 U. S., 312) (pages 80-81).

POINT I.

The case was submitted to the jury and the conviction was affirmed by the District Court of Appeal without any specification of the assemblage, group, occasion or connection of which guilt was predicated. The information named no group or party but merely charged organization, assembly and membership in the general language of the statute. A demurrer to it was overruled and a bill of particulars denied. The District Attorney never particularized the accusation in his opening and neither he nor the Court did so while the evidence was being received. A motion to compel the prosecution to elect was overruled, and the Judge's charge did not identify the party, group, or occasion of which guilt was predicated. The failure to apprise the defendant of the charge against her thus continued from beginning to end of the proceedings; after verdict and affirmance it remains today uncertain of what offense Miss Whitney has been convicted and whether upon the same state of facts she could not be convicted again. The result is a denial of due process under the doctrine of Hodgson vs. Vermont, 168 U. S., 262.

Miss Whitney relies upon several aspects of the due process principle and relies in this first point upon that principle in its simplest form. The information never apprised her of the accusation against her and the subsequent rulings of the court, instead of clarifying the matter, confused it still further. The result was a denial of her right under the Fourteenth

ment within the test carefully laid down by this Court in *Hodgson* vs. *Vermont* (168 U. S., 262).

In that case the state's attorney of Vermont filed an information against Hodgson charging that on a day and at a place named he "did at divers times, sell, furnish and give away intoxicating liquor without authority, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state." The individuals to whom sales were made were not named. At the same time the state's attorney filed specifications which gave the names though without addresses. This Court approved the holding of the Vermont Supreme Court that the specification to which defendant was entitled "as a matter of right" (page 272) supplied the defects in the information. Speaking upon the general principles of the subject, it noted defendant's insistence

> "that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense, so that he may appear in court prepared to meet every feature of the accusation against him" (page 269).

And this Court went on to concede "*that this is a correct statement of the rights of an accused person, and that, if deprived of such rights, he*

may properly invoke the protection of the Constitution of the United States'' (page 269); and again (pages 272-3):

> ''We concede the proposition, so earnestly urged on behalf of the plaintiff-in-error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and *administration* of the criminal laws of a State, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute.'' (Our italics.)

The principles of the subject are then wholly clear:

A defendant in a criminal case must be apprised of the nature of the accusation against him; if he is not so apprised, the result is a denial of due process. If the information is vague, specifications may supply the lack. But apprised the defendant must be.

It remains then merely to test the instant prosecution by these simple principles:

The *information* was a blanket charge covering all possible offenses included in the language of the statute, and neither in the first count nor in any other, named any organization (pages 14-16).

The inquiry then is: was the lack subsequently supplied? The *demurrer* to the information was overruled (pages 17-18, 65-6).

Miss Whitney *moved for a bill of particulars.* The motion papers show her and her counsel's complete uncertainty on January 13, 1920—two weeks before the trial began (see page 69)—what the occasion was upon which the prosecution was based. The date named in the information was "on or about the 28th day of November" (page 15). The District Attorney on the previous argument of the motion for a demurrer had, according to the repeated and undenied allegations of Miss Whitney's attorney, declared that the prosecution was "connected with the occurrence of November 28th and 'centering around that date'" (page 63)—which was the date of her arrest (page 62). The meeting Miss Whitney attended on that day was a meeting of the Civic League of Oakland which she addressed on the negro problem (page 62). The question is of course, not of the date alone; the point is that neither by an accurate date nor by the name of a specified organization was the occasion charged in any way identified (see the motion papers, pages 61-64; see for a good statement of the theory of many objections, 305-6). The motion for a bill of particulars was denied (pages 17-18), and Miss Whitney was compelled to go to trial without the sort of information Hodgson had from the beginning.

The defects we have thus far noticed are defects which in substance the highest court of the State of California, passing upon a prosecution under the same section, has admitted. The prosecution in *People* vs. *Taylor* (187 Cal., 378) was

directed against one whose complete identification with the Communist Labor Party—the national organization as well as the California state organization—and whose personal activity in furtherance of its policies were abundantly shown by the record. Taylor, too, was convicted under section 2, subdivision 4 of the Criminal Syndicalism Law. But even in his case, the California Supreme Court found the count drawn "in the exact language of the statute" (page 397) "clearly insufficient"* (page 398).

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*The California Court affirmed the conviction as to that count because Taylor "upon the *voir dire* of the jury, asked the District Attorney to specifically state what organization or party was referred to in the indictment for which it was intended to prosecute him. The District Attorney replied 'Communist Labor Party' so that during the actual trial of the case there was no doubt in the mind of the defendant as to the organization with which he was charged with affiliating" (page 382). Taylor's brief showed plainly—the Court goes on to explain—that he knew that the accusation was based on "his prominent part in the organization of the Communist Labor Party of California." "In the absence of some indication in the record or some claim on appeal that the defendant was surprised by the method in which the charge against him was made and proven, we cannot see that the defendant was prejudiced by the failure to mention the name of the organization to which it is charged he belonged" (187 Cal., page 382).

The District Court of Appeal in the *Whitney case* (page 3), cites the *Taylor* case and declares the "two cases" to be "identical." Judge Richards added that "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" concerning the identity of the organization. In spite of the inaccurate use of "each," the obvious meaning is that in the *Taylor* case this information was given upon the *voir dire* and in the *Whitney* case upon the opening: the opinion in the *Taylor* case makes no reference to the opening; on the other hand this record shows no reference to any organization in the *voir dire* (pages 19-22). (As to the district attorney's opening in this case, see pages 9-10 *supra*, and page 32 *infra*.)

See also

> *State* vs. *Laundy,* 103 Ore., 443, cited infra, page 34, footnote.

It is thus clear that Miss Whitney was not accorded the right to which, under the *Hodgson* opinion, as we read it, she was entitled—the right to *go* to court "*prepared.*" No less manifest is it that the lack was never supplied in the course of the trial and that the original uncertainty persisted and was indeed intensified.

The District Attorney's *opening,* as the statement of facts (pages 9-10, *supra*) has shown, mentioned various groups and bodies, the Chicago Convention (page 70), the Oakland Local (page 71), the I. W. W. (page 72). It did not even name the Communist Labor Party *of California.* It did not specify the convention of November 9, 1919, as the occasion of the offense for which Miss Whitney was to be prosecuted under the first count. So utterly inadequate was the opening indeed that the District Court of Appeal, as we have seen, conceived it as directed to establishing a guilty connection with the Oakland Local (*supra,* pages 19-22).

Miss Whitney's counsel *moved for the direction of a verdict* after the opening and pointed out the vagueness of the accusation as a basis for his application (pages 72-3); the motion was denied, as was also a general objection to the admission of evidence "on the ground that the information does not state any public offense" (pages 73, 20).

To the ruling thus made, the trial judge steadily adhered. Miss Whitney's counsel for example

objected to the admission of evidence relating to the I. W. W. on the ground that "We don't know what this lady is being tried for. Is she being tried for being a member of the I. W. W., aiding, abetting or assisting them; or being a member of the Communist Labor Party, and aiding, abetting and assisting them?" (page 283, see also pages 291, 298). The District Attorney distinctly argued that "her relationship with the I. W. W. organization" (page 283) was itself at issue. He contended for the admissibility of the evidence as a circumstance "to bring her home in connection with the I. W. W." (see page 282, see also 283). "She agreed to do certain things for the I. W. W. organization," the District Attorney said (page 280); "we are going to follow it up by showing there was a meeting then" (page 280).

The court declared merely that "we have the Communist Labor Party here on trial *rather than* the I. W. W. organization" (page 288) and received the evidence. "It would be proper" the court ruled a little later "to show what the action of any of the locals or branches of the I. W. W. was and what they did in their meetings" (page 292).

At the end of the state's case, counsel for plaintiff-in-error again attempted to secure a ruling which would make it clear "what this jury is trying" under the first count of the indictment (page 307). He said that from the conduct of the case he assumed that Miss Whitney was charged with having become a member of the Communist Labor Party of California at the state convention on November 9, 1919, and that the evidence concerning I. W. W. outrages was admitted to show

the character of the organization which the Communist Labor Party of America had in some sense endorsed or at least "recognized" (page 176), and which the Communist Labor Party of California in adopting the national platform and program (in place of the resolution which had Miss Whitney's sanction and which she herself read to the convention) had therefore endorsed at second hand. He then asked that the prosecution, if it did not accept this theory, be required to *elect and state* the offense which it did desire to submit to the jury under this count (see pages 305, 307). The prosecution ironically declined to adopt this theory of its case* and the Court declined to require the prosecution to make the election or to define the issue for the jury** (page 307, see for a similar attempt by the defense and its failure, pages 133-4, 137).

Defendant requested the *direction of a verdict* on "each and every count" after the evidence was in, including the ground of "variance between

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*"Mr. Calkins: It is always illuminating to get somebody else's understanding of the theory—I don't feel that there is anything which now compels me to analyze your version of my theory" (page 305).

**In *State* vs. *Laundy* (103 Ore., 443), the Supreme Court of Oregon reversed a conviction under the Oregon Criminal Syndicalism Law. The indictment, which followed the language of the statute (corresponding to Section 2 [4] of the California statute) charged organizing, membership and assembling, all in one count. The organization (the I. W. W.) was named. Refusal at the end of the trial to require the prosecution to elect whether it would go to the jury on a charge of *membership* in the I. W. W. or on a charge of *assembling* with the I. W. W. (there was no evidence to support the charge of organizing) was held reversible error.

information and proof" (page 31); the request was refused.

The court supplied the jury with *"forms of verdict"* (pages 47-8). The jury struggled to bring their verdict within some one of these forms (page 49). The forms were wholly general (pages 47-48) and so was the verdict (pages 28, 30)—"guilty of felony as to counts One and not guilty as to counts ....." (pages 28, 30).

The *affirmance* by the California District Court of Appeal shrouded the result in additional uncertainty (pages 3-4). It remains today an enigma what Miss Whitney was charged with and of what she was convicted.

The result does not amount merely to a misapplication of the state's recognized forms of criminal procedure. It goes far deeper. The California courts' application of the Criminal Syndicalism Act to Miss Whitney's case deprived her of the fundamental requirement of due process—notice of the accusation against her. The test of constitutionality cannot, of course, be narrowed to the mere wording of a state statute. If such were the rule, state courts would be free to indulge in the most unconstitutional practices under cover of an unobjectionably worded statute (compare *Scott* vs. *McNeil,* 154 U. S., 34).

See also

Roller vs. *Holly,* 176 U. S., 398;
Londoner vs. *Denver,* 210 U. S., 373, 385.

> "inquiry is not precluded or ended by the mere fact that the judgment complained of

> was reached by proceedings in a state Court in pursuance of the provisions of a state statute'' (*Hodgson* vs. *Vermont, supra,* 168 U. S., at page 273).
> * * * * * * *

The failure throughout the trial ever to designate either the particular offense—the statute covered organizing, membership and assembly—or the particular occasion of the offense, is the basis of another and related contention. One of the reasons why an indictment or information must contain particulars, or those particulars must subsequently be supplied is, of course, to protect the defendant against double jeopardy. It is ''fundamental in the law of criminal procedure,'' that the accused must be apprised with reasonable certainty of the nature of the accusation against him, both that he may prepare his defence, and that he may ''*plead the judgment as a bar to any subsequent prosecution for the same offense.* An indictment not so framed is defective, although it may follow the language of the statute'' (*U. S.* vs. *Simmons,* 96 U. S., 360, 362, our italics).

See also

> *U. S.* vs. *Cruikshank,* 92 U. S., 542, 558;
> *Cochran* vs. *U. S.,* 157 U. S., 286, 290.

Miss Whitney's counsel was absolutely correct in arguing in support of his motion that if ''this Court brings in a verdict of 'Not Guilty' in this case on this Information * * * it will not prevent

the District Attorney from starting a new action about the 9th and bringing in the very same facts he is bringing in this case" (page 73).

This Court has thus far found it unnecessary to decide whether a subjection to double jeopardy would *by itself* be a denial of due process within the meaning of the Fourteenth Amendment (*Keerl* vs. *Montana,* 213 U. S., 135). In this case the double jeopardy point does not stand alone. It is but the necessary consequence of the denial of proper notice which this Court has recognized as a fundamental right,—a right which it is the "duty" of this Court to protect against infringement by the states (*Hodgson* vs. *Vermont, supra*).

POINT II.

The Court's consistent refusal to particularize the issue permitted the jury to predicate guilt of meetings and assemblages that were outside Alameda County and that took place either before the passage of the Criminal Syndicalism Law or after the date named in the information. The general verdict could, as far as appears, have been based upon any one of these occasions, every one of which should have been peremptorily excluded from the jury's consideration as a basis of conviction. That confusion of issues which the rule of Hodgson vs. Vermont (168 U. S., 262) is designed to prevent, appears in Miss Whitney's case in its most prejudicial form.

We have seen that as the case was in fact submitted to the jury, it is the merest speculation what connection of Miss Whitney's they found to be the guilty one, whether with the Oakland Local or the Communist Labor Party of California or the Communist Labor Party of the United States or the State Executive Committee or the I. W. W., and what the nature of that connection was—whether organization, membership or assemblage.

In this point we shall demonstrate how grievously damaging the confusion of issues was. In succeeding points we shall argue that for a variety of constitutional reasons, conviction cannot be based upon the Oakland convention. We shall here show that *not one* of the other incidents, which the Court without discrimination submitted to the jury constituted assembly,

zation or membership in Alameda County between the passage of the Syndicalism Law on April 30, 1919 and November 28, 1919, the date named in the information, or indeed up to the date of the trial.

(1) Manifestly the references to the I. W. W. should have been definitely excluded from the jury's consideration as substantive bases of conviction. There was absolutely no evidence that Miss Whitney ever belonged to the organization or had anything to do with it. The admitted "informer" (page 228)—once an I. W. W. Secretary (page 224)—whom the prosecution called, "knew that this lady never held a card in the organization" (page 231; see also page 232). Her only contact with individual members—casual meetings in connection with legal defense—were in July and August, 1918 (pages 274, 282)—while the Criminal Syndicalism Law, as the information shows, was passed only in 1919 (page 15). Nevertheless, scores of pages of the testimony were taken up with the proceedings and acts of the I. W. W. (see, for example, pages 220-228). This evidence was largely related to a particular convention in Chicago in 1916 (page 225)—three years before the Syndicalism Law was passed; there was proof too (pages 255-260) concerning a meeting in Sacramento more than five years before the enactment (page 255). The most striking evidence that went before the jury was the evidence of particular acts of incendiarism and cattle poisoning by members of the I. W. W. (pages 258-266, 269-271), and, as we have seen, the District Attorney himself avowed his intention to directly connect defendant

with the I. W. W. (page 282; see also page 280). "It is a circumstance to bring home to her her relationship with the I. W. W. organization" (page 283; see also for the District Attorney's opening, pages 70-72).

(2) The Chicago Convention of the National Communist Labor Party also should have been definitely excluded from the jury's consideration as a basis of guilt both because Miss Whitney never attended the convention and because it was held outside Alameda County and outside the State of California.

(3) Despite the belief of the District Court of Appeal that her connection with the Oakland Local was the guilty one, there is in fact no evidence in the record that she ever organized, helped to organize or assembled with that body; the record shows merely that at some time—whether before or after the passage of the act on April 30, 1919, is left uncertain—she had become a member of it (page 118) while it was a Socialist body (pages 119, 189). The record shows absolutely no connection with the body after the Communist Labor Party of California was formed. It was affirmatively proved that Miss Whitney attended no meeting of this Local after that date (pages 189, 192). Her physical presence on three occasions—two of them after the date named in the indictment—at Loring Hall when members of Local Oakland were "coming and going" and no meeting was in progress (page 206)—is not claimed to constitute assembly.

Finally, not a single resolution, proceeding, platform or program of Local Oakland was received or offered in evidence, and as its character was thus left undefined, there is no basis for a finding that association with it could be punishable. We know that the proceedings at the State convention were *not* reported to Local Oakland (page 157) or ratified by it (page 190), and that it *never* had a charter as a Local in the Communist Labor Party of California (page 156) and therefore was no part of the national body either (pages 153, 154; 184). "It was independent of every other organization" (page 156). It had not put in an application for a charter (page 156).

Summarizing and re-stating the foregoing, we find the case with respect to the Oakland Local to be this: There is not one item of evidence when Miss Whitney became a member of the body—whether before or after the Criminal Syndicalism Law was passed,—though it is proved affirmatively and without contradiction that it was definitely a Socialist and in no possible sense a Communist Labor Organization at the time; there is no shred of evidence that she ever organized or helped to organize the body or when or how or by whom it was organized; there is no shred of evidence that she ever attended a meeting of the body either before the Criminal Syndicalism Law was passed or after, and there is affirmative and undisputed proof that she did not attend any such meeting after the Communist Labor Party of California was founded; there is no proof of any declaration by the Local,—the only evidence as to its character is that it was a Socialist body in the beginning and remained "independent" to the end.

(4) Miss Whitney's attendances as alternate at two meetings of the Executive Committee of the State Party (supra, pages 13-14)—one in San Jose, one in San Francisco—should again have been explicitly excluded from the jury's consideration for all of the following reasons: because both of these meetings were after the date named in the information; because both of them were outside of Alameda County—one being in Santa Clara County, the other in San Francisco County,—and finally because there is absolutely no proof what Miss Whitney or any other person said or did at either of the meetings, or that she or any one did anything.

The Judge's charge never informed the jury whether it was the Communist Labor Party or the I. W. W. whose character was at issue; on the contrary, he treated them together and, adopting a charge of the prosecution (pages 36-7), mentioned the I. W. W. first (page 46). He told the jury—again in the language of the prosecution (page 37)—that it was for them "to determine the character of the organization of which it is claimed the defendant is a member" (page 46), but, as we have seen, he did not tell them what that organization was.

Under the doctrine of *Hodgson* vs. *Vermont* there would have been a denial of constitutional rights had the confusion been between accusations all of them in themselves valid; the fact that there *was* confusion would have deprived the defendant of her right to go to court "prepared." But Miss Whitney's case went to the jury without the elimination of all these occasions which

had been emphasized in the evidence, every one of which as a matter of law should have been strictly excluded from the jury's consideration as a substantive basis of guilt. Guilt may in fact have been found by the jury by reason of one or several of these very issues. On the prosecution of Rose Pastor Stokes for violating the Espionage Act a "false issue" (264 Fed. at page 21) was submitted along with an incident of which guilt could properly be predicated. The Circuit Court of Appeals remarked (citing *Maryland* vs. *Baldwin,* 112 U. S., 490) that "the generality of the verdict renders it impossible to determine upon which theory the jury based it" (*Stokes* vs. *U. S.,* 264 Fed., 18, 23), and proceeded to reverse the conviction.

Much in point upon the practical situation Miss Whitney's case presents, is the decision of Sanborn, C. J., in *Fontana* vs. *U. S.* (262 Fed., 283). Fontana was indicted under the Espionage Act. In that case, as in this case, the indictment set forth the accusation in the most general language only (262 Fed. at pages 286, 287). In that case, too, every incident, except one, was an incident whose consideration as a substantive basis of conviction should have been definitely excluded: "All of the evidence recited, except that with reference to the sermon in August, relates to expressions used prior to June 15, 1917 [when the Espionage Act was passed] for the use of which he could not be convicted if they had been charged" (262 Fed. at page 290). With respect to the generality of the accusation, Judge Sanborn thus expressed himself:

> "If the pleader had set forth in this indictment any fact or facts, such as the time, place, occasion, circumstances, persons present, or any other distinctive earmark whereby the defendant could have found out or identified the occasion or occasions when the government intended to attempt to prove that the defendant uttered any of the nine sayings charged he might have been able to investigate the basis of the charges to learn who were or were not present on the occasions referred to, hence who were possible witnesses, and to prepare his defense; but there is nothing of that kind in the indictment. As it reads, he might have been called to meet on each of the nine charges testimony that at any time of day or night, at any place in New Salem, on any occasion, public or private, before the indictment was filed, and after the Espionage Act was passed on June 15, 1917, he had uttered to any one whomsoever any of the statements charged in the indictment. These considerations compel the conclusion that this pleading signally failed to state the facts which the government claimed constituted the alleged offense in this case, so distinctly as to give the defendant a fair opportunity to prepare his defense to meet any of them, and that he could not and did not have that notice of them required to give him a fair trial" (286-7).

The Circuit Court of Appeals of course reversed the conviction.

That Miss Whitney's trial was not "a fair trial" cases like *Stokes* vs. *U. S.* and *Fontana* vs. *U. S.* clearly establish; that the right denied was a right around which the Fourteenth Amendment throws the protection of the Constitution of the United States, *Hodgson* vs. *Vermont,* makes wholly clear.

The actual injury the denial of that right worked in Miss Whitney's case, the present record from beginning to end illustrates. Nothing illustrates this more clearly indeed than the jury's verdict, general though that verdict was. What specific occasion induced it, we do not and cannot know. One great fact, however, stands out: the comparatively concrete accusations which the second, third, fourth and fifth counts embody—accusations of advocacy by "speech" and "writing" and "personal acts"—all failed. It was upon the count that from beginning to end of the case remained an enigma—upon the count that at the end of the case was a greater enigma than at the beginning—that conviction was had.*

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*Certain incidents of the trial increased the burden under which the defense labored. The trial was begun (page 70) within a month after the information was filed (page 14). The influenza epidemic was raging at the time: there was serious illness in the family of Miss Whitney's trial counsel, Mr. O'Connor, at the opening of the case, but his request for a continuance was denied (page 69). By the second day of the trial (pages 20, 117) Mr. O'Connor himself was ill (page 134). By the third day (pages 21, 137, 144) he was a very sick man, though still in court (page 145). His illness seriously interfered with the cross examination of the prosecution's witnesses (page 145), as the Court indeed noted (page 149). At the next session, February 2 (pages 21, 195), Mr. O'Connor was unable to be present (pages 198, 200), and a two days' continuance was granted. On Wednesday, February 4 (page 200), further adjournment was refused, although Mr. O'Connor's associate, Mr.

(Footnote continued on next page.)

* * * * *

In succeeding points we shall see that not only should every incident except the convention of November 9, 1919 have been withdrawn from the jury's consideration as a substantive basis for a finding of guilt but that for many constitutional reasons no conviction based upon that incident can stand, and that the result, even apart from the doctrine of *Hodgson* vs. *Vermont*, was a plain denial of due process of law. In this case it will thereby appear *every* issue was a "false issue."

Pemberton, declared that it would be "dangerous to Mr. O'Connor to be unable to tell him that the case is postponed" (page 201). Mr. Pemberton, who had previously been threatened with punishment for contempt by the Court (page 131), objected to assuming the burden of the defense, and Miss Whitney announced that she did not wish Mr. Pemberton to act as her trial counsel (page 199; see also pages 202-203). The Court, however, refused to allow Mr. Pemberton to withdraw, and required him to go on with the trial after a recess of a few moments (page 204). On Monday, February 9 (page 212), the death of Mr. O'Connor was announced in court and after one day's adjournment, on February 10 (page 213), Mr. Coghlan was substituted as trial counsel for Miss Whitney, and the trial continued (page 214). Miss Whitney herself was ill for a time during the trial (pages 196-8; 200) and one of the jurors died (page 212) and was replaced by the alternate juror.

POINT III.

If the conviction was based on defendant's participation in the Oakland convention of November 9, 1919 she was punished not for her own acts but for the subsequent acts of other persons. This, within the decision of this Court in U. S. vs. Fox, 95 U. S., 670, constitutes a denial of due process.

Our discussion has now been narrowed to the convention of November 9, 1919. The facts are in no dispute.

Until November 9, 1919, the Communist Labor Party of California was in process of preliminary organization (pages 82; 153-4). On that day its convention was held. There was naturally—and indeed necessarily—the organization being still temporary and tentative, a continuing uncertainty at least until that day what character the majority of the convention would give to the party. This uncertainty lasted until the precise moment when Miss Whitney's resolution for political action was voted down by the majority in its final session (compare as to the precise time, pages 117; 121; 140; 308-9).

Miss Whitney's committee introduced and she signed and approved a resolution which "fully recognized the value of political action" (pages 101-2; 123). Had that resolution been adopted the Communist Labor Party would have taken an unequivocal stand in support of "changes in our Government by the ballot, by political method" (compare the opening of the District Attorney, page 70; see also statement of Mr. Harris, page 122), and could not by any possibility have

fallen within the prohibition of a statute leveled against acts of "crime," "sabotage" or "unlawful methods of terrorism." The effort of Miss Whitney and her associates failed (pages 121; 142-3) and the majority of the convention committed themselves to a purpose that the California courts have condemned.

The case was thereafter submitted to the jury upon the theory that Miss Whitney's personal purposes and intents were immaterial and that permitted the jury to find her guilty merely by reason of her presence. The trial court disposed of the question of intent by quoting the general declaration that "all persons are of sound mind who are neither idiots nor lunatics nor affected with insanity" and that it is a "presumption of law that an unlawful act is done with an unlawful intent" (page 40). By charging "that the law presumes that every man intends the natural consequences of his acts knowingly and deliberately committed" the court did away with any requirement of personal intent or—as in the law of crimes it is often called—"specific intent" on Miss Whitney's part. This theory the appellate court fully adopted. "That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty," the California District Court of Appeal declared, "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" (page 4).

As Miss Whitney's connection with the convention of November 9, 1919, was not only admittedly innocent but, judged by the District Attorney's

own standards (page 70; see also 122), proper and even laudable, this theory of prosecution was the very crux of the case, and the constitutional question that it raises goes to the foundation.

That question is: Can one be constitutionally convicted of felony and subjected to imprisonment* for joining a body which at the time he joins has no character and which is subsequently, by the action of others, taken over his protest, given an objectionable character?

Stated more generally, the question is: Can an act, innocent at the time, constitutionally become a crime by reason of the subsequent action of other persons? To that question the case of *U. S.* vs. *Fox* (95 U. S., 670), supplies the answer. The statute there considered provided

> "that 'every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor,' who, within three months before their commencement, 'under the false color and pretense of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud,' shall be punished by imprisonment for a period not exceeding three years."

The statute, in other words, made guilt or innocence of the offence of obtaining goods on credit "under false color and pretense" dependent upon

*The statute leaves no alternative to a prison sentence of from one to fourteen years (Appendix A).

the subsequent action either of the defendant himself or of other persons in filing voluntary or involuntary bankruptcy proceedings. This Court condemned the statute as unconstitutional—partly as an unwarrantable intrusion by the federal government into the ordinary criminal law of the states—but in the first instance "upon principle." Mr. Justice Field began his opinion with the following statement (page 671):

> "The question presented by the certificate of division [of the court below] does not appear to us difficult of solution. Upon principle, an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretenses is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, *and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction.*" (Our italics.)

The case at bar is a much clearer case than the *Fox* case: Miss Whitney's act in joining a still temporary and tentative body was a colorless act; Fox obtained credit "under false color and pretense." The "subsequent event" which brought

Fox's act within the prohibition of the statute was an act of his own,—"the defendant filed a petition in bankruptcy" (95 U. S. at page 670); the subsequent event in Miss Whitney's case was the action of others who rejected her resolution and adopted contrary policies.

POINT IV.

The crime of membership, organization or assemblage defined by the California Criminal Syndicalism Law has been recognized by the Supreme Court of California as a crime of conspiracy. To conspiracy a specific intent to participate in the purposes of the combination is an essential. The trial Court submitted the case to the jury and the District Court of Appeal sustained the conviction upon the theory that that intent could be conclusively presumed from the mere fact of presence. The application of that presumption to the case is, within the doctrine of McFarland vs. American Sugar Co., 241 U. S., 79, a denial of due process.

The nature of the crime defined by Section 2, subdivision 4, of the Criminal Syndicalism Law of California is not in doubt. In the leading case of *People* vs. *Steelik* (187 Cal., 361) Wilbur, P. J., reviewing the whole statute, said (pages 368-9):

> "It seems clear that not more than three crimes are described in the statute: First, the commission of a crime for the purpose of effecting the desired change; second, advocating the commission of such a crime, although it might not have occurred, and where the advocates would not therefore be accomplices in the crime; this would include those who print or write documents in furtherance of such crime; and third, *forming a criminal conspiracy for the purpose of committing such a crime.*"
>
> * * * * * * *

> *"The conspiracy denounced in subdivision 4, section 2, is also a separate and distinct crime, which may result in the commission of the crime advocated, in which event the conspirators can be charged as principals in the crime."*
>
> * * * * * * *
>
> "There was thus evidence before the jury that the defendant had violated section 2, subdivision 4, of the statute, that is, *he knowingly belonged to a conspiracy to commit crimes, in furtherance of industrial and political control."* (Our italics.)

Precisely as the defendant in a larceny case must intend to deprive another in some way or other of property or the defendant in a malicious mischief case must actually intend to do harm, so a conspirator must have a "corrupt intent." The late decision of the Circuit Court of Appeals for the Sixth Circuit in *Landen* vs. *U. S.* (299 Fed., 75) well states the familiar principle and gives to that principle a striking illustration. The prosecution was for conspiracy to violate the National Prohibition Act by selling intoxicating liquor without the necessary permit. The evidence disclosed that defendants in good faith believed that no permit was in their case necessary. The Court recognized that even as to *mala prohibita* a conspiracy conviction must rest upon a showing of conscious intent to do a forbidden thing. At pages 78-79, Denison, C. J., thus rationalizes the subject:

> "It is settled that with regard to criminal prosecutions for those acts which are not

mala in se, but which through legislative exercise of the police power have become mala prohibita, no conscious intent to break any law is essential. The respondent need not even know that the law exists. *Shevlin* vs. *Minnesota,* 218 U. S., 57, 68; *U. S.* vs. *Balint,* 258 U. S., 250, 252; *Armour* vs. *U. S.,* 209 U. S., 56, 85, 86. When, however, the prosecution is for conspiracy, the text-books and elementary discussions seem to agree that there must be a 'corrupt intent,' which is interpreted to be the mens rea, the conscious and intentional purpose to break the law. Bishop's Criminal Law (8th Ed.), §§297, 300; 12 C. J., page 552, §16; 5 R. C. L., page 1066, §6. The principle that even a mistake of law may protect one accused of crime has familiar illustration in the rule that, if the respondent in a prosecution for larceny took the property in a good-faith, though erroneous, belief that he had the legal right to its possession, he is not guilty."

Judge Denison goes on to note that

"the principle was applied to conspiracy in *People* vs. *Powell,* 63 N. Y., 88, 91, 92. In a careful opinion by Judge Andrews, the *difference between the intent involved in the substantive offense, which intent the law will imply from the act, and the 'corrupt intent' necessary to make conspiracy,* which intent does not necessarily follow from a plan to do the act, is clearly pointed out. The case has stood for 50 years

> as the leading one on the subject, and if it be confined, as it is (page 92), to a plan to do an act 'innocent in itself,' it has never, so far as we find, been questioned." (Our italics.)

The doctrine which Judge Denison so recently expounded and applied is a doctrine which derives from the basic principle Shaw, C. J., thus stated in *Commonwealth* vs. *Hunt* (4 Metc., 111) —an early and leading case on conspiracy: "The unlawful agreement constitutes the gist of the offense" (page 125). It follows (as the great Chief Justice of the Massachusetts went on to say) that

> "when an association is formed for purposes actually innocent, and afterwards its powers are abused, by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, *but not in the other members of the association*" (page 129; our italics.)*

*The principle of the conspiracy cases has regularly been applied to crimes in the nature of seditious assembly (*Redford* vs. *Burley*, 3 Starkie, N. P., 76, 102, 107, 110-128; *Duane's case*, Wharton American State Trials, 345, 386, 388; 2 Stephen, History of the Criminal Law of England, 386; see also as to treasonous assembly the case of *Green* vs. *Bedell*, stated and approved in *Rex* vs. *Huggins*, 2 Ld. Raymond, 1574, 1585).

In no case before the present, as far as we have been able to discover, that has been submitted to any *court*, has the attempt been made to impose any legal consequences, civil or criminal, by reason of membership in an organization or attendance at a meeting in the face of affirmative proof of dissent from questionable practices. A somewhat similar question was, however, presented to the Labor Department of the United States under the act of October 16, 1918 (40 Stat., 1012,

(*Footnote continued on next page.*)

How then did the California courts deal with this basic requirement of the crime for which

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Chap. 186), providing for the deportation of aliens "who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the government of the United States." The Department ruled that membership in the Communist Party—though not in the Communist Labor Party—was, in general, ground for deportation (see infra, page 77, footnote). Deportation was not, however, permitted where the evidence showed the alien's personal ignorance of the Communist Party's purposes. The leading case is *In re Truss* (Decision of the Labor Department reported in "Hearings before a sub-committee of the Committee on Immigration and Naturalization, House of Representatives, 66th Congress, 2nd Session," April 21-24, 1920—Government Printing Office, Washington, pages 14-18). The Department recognized the problem with which the statute dealt as a problem of conspiracy,—"to permit aliens to violate the hospitality of this country by *conspiring* against it is something which no American contemplates with patience" (17). The following extracts show the basis for its ruling that innocent membership in a guilty organization was not a basis for deportation:

> "In some cases the membership is 'automatic,' the arrested alien having been transferred from a lawful organization to the unlawful one by vote of a group or branch of the former and without his knowledge. In some cases he has had knowledge of the transfer but none at all of the character of the organization to which he has been transferred. In other cases he has signed applications before the existence of the unlawful organization and has never confirmed his membership by any conscious act. Sometimes an organizer or a friend has signed the application for him" (16-17).
>
> * * * * * * * *
>
> "The Congress of the United States should not hastily be presumed to have intended that resident aliens be arrested and deported as members of an unlawful organization, when all the circumstances show the alien himself to have been innocent of any guilty knowledge of [or] malice in taking membership and when it appears not only that he is and has been wholly free from any hostile purpose toward this Government, but that he is sympathetic with our democratic institutions" (page 16).

Miss Whitney was convicted? The trial judge took out from the charge, as the defendant submitted it (page 33), the requirement of the "*criminal* intent of doing an act forbidden by the law" (see page 40); he thus took out of the definition of the crime that "conscious and intentional purpose to break the law" which in a conspiracy there "must be" (*Landen* vs. *U. S., supra*); at the same time he ruled that the "malicious and guilty intent," might be made out by presumption, by "presumption of law" (page 40). While he perhaps indicated that the presumption was rebuttable he denied all practical effect to the possibility of rebutting it by giving as his illustration of persons outside the presumption only "idiots" and "lunatics" (page 40). The California District Court of Appeal definitely declared the presumption an absolute one; Judge Richards said that with Miss Whitney's personal opinions and attitudes, with the question what she did or did not "realize," "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" (page 4).

It was by this presumption that the trial court laid the foundation for Miss Whitney's conviction on a charge that the Supreme Court of the state had recognized and authoritatively defined as a "charge of conspiracy" (*People* vs. *Steelik,* 187 Cal., 361, 368-9); and it was by virtue of what it declared to be a "conclusive presumption" of "law" that the District Court of Appeal affirmed that conviction.

A conviction of conspiracy so founded is a denial of due process. The result would indeed be constitutionally forbidden were the presumption merely *prima facie* and actually rebuttable. So this Court has definitely held. The Louisiana statute considered in *McFarland* vs. *American Sugar Co.* (241 U. S., 79), provided that

> "'any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine of five hundred dollars a day for the period during which he is adjudged to have done so'" (page 81).

This Court in holding the statute unconstitutional said (page 86):

> "As to the presumptions, of course, the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R.* vs. *Turnipseed,* 219 U. S., 35, 43. The presumption created here has no relation in experience to general facts."

And again (*ibid.*):

> "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

Clear as is the decided case, the case at bar is clearer yet. The "rebuttable presumption" (see headnote 241 U. S., at page 79 and compare page 81) considered in the *McFarland* case had "no relation in experience to general facts"; the all but irrebutable presumption which supplied the basis for Miss Whitney's conviction and the "conclusive presumption" whereby that conviction was sustained were in direct *opposition* to the proved and undisputed facts,—the facts namely that Miss Whitney far from concurring in the questionable policies which the convention of November 9, 1919, finally adopted, fought those policies but was outvoted and overruled by the majority.

* * * * * * *

The precise error into which both the California courts fell and its effect may be thus restated. Relying on certain presumptions of fact*

*Sections 1962 and 1963 of the California Civil Code list certain presumptions as "conclusive" and others as "disputable." Section 1962 (Subd. I) provides that the presumption of "a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another" shall be "conclusive." The trial court paraphrased this statutory statement in its charge (page 40); the District Court of Appeal likewise paraphrased it, cited the section, and expressly declared the presumption "conclusive" (page 4). The trial court further relied (page 40) on the presumption which Section 1963 lays down "that an unlawful act was done with an unlawful intent" (Record, page 40).

codified by the California Civil Code, these courts accepted as applicable to *all* the offenses defined by the California Syndicalism Law the conclusive presumption of unlawful intent that ordinarily flows from the doing of an unlawful act. This presumption is inapplicable to the *only* count upon which Miss Whitney was convicted, the count in the nature of conspiracy. In thus applying it the courts overlooked the "difference between the intent involved in the substantive offense, which intent the law would imply from the act, and the 'corrupt intent necessary to make conspiracy' " (*Landen* vs. *U. S., supra*). The result was a denial of due process. The conviction under the California Syndicalism Law, as construed and applied in this case is as plainly a violation of the Fourteenth Amendment as if that statute said in so many words that guilt of conspiracy could be presumed from mere presence in an assembage and without proof of concurrence.

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment."
>
> *Bailey* vs. *Alabama,* 219 U. S., 219, 239.

See also

> *Truax* vs. *Corrigan,* 257 U. S., 312, 324, collecting cases.

POINT V.

The statute provides no definite test of criminality. Defendant could not know at the time of joining an organization still in its formative stage whether the action of other persons would or would not give it a character which the statute might condemn. Because the statute thus in effect calls for "prophetic" quality, it works a denial of due process under the doctrine of International Harvester Co. vs. Kentucky, 234 U. S., 216.

The California courts in this case refused to apply any test of Miss Whitney's personal intentions and attitudes to the problem of her guilt. By so doing they made her guilt dependent not upon the intention which accompanied her own act in joining an organization still in process of formation and not upon the quality of any of her own acts in connection with the organization, but upon the character which other persons after her joining gave to the organization. The standard of conduct which the statute as construed and applied imposed upon Miss Whitney was a standard too vague to be a constitutional basis for criminal prosecution.

In its application to many conceivable states of fact, where the purposes of the organization or assemblage were fixed or where the defendant's own share in the activity of the organization or in the acts of the assemblage are such as to clearly come within the definition of criminal syndicalism —as was true in the cases which the California Supreme Court reviewed and affirmed (*People* vs.

Steelik, 187 Cal., 361; *People* vs. *Taylor,* 187 Cal., 378)—no practical difficulty with this statute on the ground of uncertainty need arise. But the case of the plaintiff-in-error is not such a case. The lack of definiteness of which she complains is the impossibility of applying the statute with any reasonable degree of certainty to the problem of her own conduct.

> "Laws which create crime ought be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."
>
> *U. S.* vs. *Brewer,* 139 U. S., 278, page 288.
>
> "No penal law can be sustained unless its mandates are so clearly expressed that an ordinary person can determine in advance what he may and what he may not do under it."
>
> *Chicago & N. W. Rwy. Co.* vs. *Dey,* 35 Fed., 866, page 876—Brewer, J.

See also

> *U. S.* vs. *Cohen Grocery Co.,* 255 U. S., 81;
> *U. S.* vs. *Reese,* 92 U. S., 214, 219.

What then was the standard of conduct which this statute exacted of plaintiff-in-error, and wherein did she deviate from this standard?

She was a member of Local Oakland, which was a branch of the Socialist organization. She voted for the delegates which Local Oakland sent to the convention of the Socialist Party held in Chicago on August 30 and September 1, 1919. She did not attend that convention and therefore had no part in the formation of the Communist Labor Party of the United States of America which resulted from that convention. She was named as a delegate of Local Oakland to a convention to organize a State branch of the Communist Labor Party and attended that convention. The sentiments and purpose of the state organization still remained to be determined, and the character of the resulting organization could not be foretold. The convention was an open one, no violation of law being intended or foreseen (pages 112, 335). Defendant in attending had no purpose of helping to create an instrument of terrorism and it was not her purpose, nor, as far as she knew or could know, the purpose of the convention—if an inchoate organization of this character could be said to have anything so unified as a purpose—to do anything unlawful (pages 309, 335). She took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot. As things turned out, the majority of the meeting were contrary-minded, and other less temperate policies prevailed. The record shows no further act done by the plaintiff-in-error within the district in which she was prosecuted. At what point did this course of conduct, which was admittedly

innocent in the beginning, become a crime, and how could she have certainly avoided incurring the penalty of the statute? Avoidance in her case would have required the power to foresee the future and correctly prognosticate the outcome of the convention. No law, however, can constitutionally require prophetic power from an individual and punish him for not having such power. (*International Harvester Co.* vs. *Kentucky,* 234 U. S., 216.)

The exactions of this law upon the plaintiff-in-error are precisely analagous to the exactions of the Kentucky law condemned by this Court in the *International Harvester Co.* case. That statute made it unlawful for any number of persons to combine the crops of wheat, tobacco, corn, oats, hay or other market products raised by them "for the purpose of obtaining a higher price than they could get by selling them separately." The state courts in reviewing this and related statutes had declared the combination of such producers to be not in itself unlawful and had identified the criminality of the act proscribed with the price-fixing feature solely. This Court declared the problem what the price would have been had the lawful combination not been in existence, "a problem that no human ingenuity could solve." Such a law, by reason of the penalty which its infringement carried, deprived the producers of liberty and property without due process of law, because

> "To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an

certain extent; to define prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess'' (234 U. S., pages 223-4).

POINT VI.

The right of assembly is an element of the liberty which the due process clause protects. A statute which is applied to attach penal consequences to joining an organization still in its formative stage because that organization subsequently acquires over defendant's protest a questionable character, imposes a "previous restraint" upon the right of assembly and within the analogy of Patterson vs. Colorado, 205 U. S., 454, works a denial of due process.

It is now wholly clear upon authority as well as upon principle that the elementary civil rights are parts of that liberty which the due process clause protects. So it was declared in *Meyer* vs. *Nebraska* (262 U. S., 390, 399) of the right "to worship God according to the dictates of one's own conscience"; so this Court "might" and "did assume" in *Gitlow* vs. *New York* (45 Sup. Ct. Rep., 625, at page 630) of "freedom of speech and of the press"; so it was first of all declared of freedom of assembly itself (*U. S.* vs. *Cruikshank,* 92 U. S., 542, 551, 554):

> "The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons* vs. *Ogden,* 9 Wheat., 211, 'from those laws whose authority is

knowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection" (page 551).

*"The Fourteenth Amendment * * * furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society"* (page 554; our italics).

See the citation of this case in *Twining* vs. *N. J.*, 211 U. S., 78, 96-7.

What then is the limitation upon freedom of assembly which the Criminal Syndicalism Law of California, section 2, subdivision 4, as "applied in the present case" (*Gitlow* vs. *New York, supra,* at page 632), imposes? That statute says: You must not join an organization even for the purpose of lending your own power of persuasion and your own influence to insure its peaceable character if subsequently it acquires a quality the law condemns. You may not go to a meeting to advocate the use of lawful methods without subjecting yourself to criminal prosecution if the majority turns out to be against you.

It is unnecessary to do more than allude to the *policy* of such a statute,—its obvious effect in keeping orderly and law-abiding persons out of

organizations, and its necessary tendency to increase the likelihood that organizations will fall into the hands of the reckless and the violent. For the issue is wholly clear upon principle and authority applying by the closest analogy.

A statute, which by reason of subsequent events attaches penal consequences to assemblage, is by definition a prior restraint upon assemblage. And a prior restraint upon assemblage is constitutionally void.

Statutory restraints upon freedom of assembly have been almost unknown throughout the whole course of American constitutional law. Precise authorities are therefore lacking. There can, however, be no doubt where to turn for precedents,—namely to the law of free speech. The freedom of assembly and the freedom of speech and of the press are in effect parts of one general liberty of expression. At the very least the right of assemblage is as broad as the right of utterance. The liberty to listen manifestly cannot be subjected to greater restraints than the liberty to speak or write.

If then a prior restraint upon speech or writing is constitutionally void, so must be a prior restraint upon assemblage. That such a prior restraint *is* forbidden, the decisions, including the decisions of this Court, leave in no doubt. In *Patterson* vs. *Colorado* (205 U. S., 454, 462) this Court said of the free speech and free press principles:

> "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon

tions as had been practiced by other governments'." (*Citing authority, italics the Court's.*)

See also

Schenck vs. *United States,* 249 U. S., 47, 51,

and among many other cases,

Marlin Fire Arms Co. vs. *Shields,* 171 N. Y., 384;
Dearborn Pub. Co. vs. *Fitzgerald,* 271 Fed., 479, 482.

POINT VII.

The statute, which attaches penal consequences to attendance at a meeting for the purpose of addressing that meeting and urging orderly action, likewise imposes a prior restraint upon freedom of speech (Patterson vs. Colorado, 205 U. S., 454) and works a denial of due process.

It is not by analogy alone that the authorities upon freedom of speech and upon prior restraints apply to the case at bar. A statute which is construed and applied to make mere attendance at a meeting criminal by reason of the subsequent action there taken may include within its penalties—and in the case at bar did include within its penalties—one who attends for the purpose of addressing the meeting. It may include within its penalties—and in the case at bar did include within its penalties—one who addresses the meeting in opposition to that course of the majority which subsequently gave to the assemblage the quality to which objection is taken. Miss Whitney herself read to the meeting of November 9, 1919, the resolution in favor of political action.

Where a statute in fact operates as a prior restraint upon speech, it is wholly immaterial that that statute does not in terms mention speech. The legislation considered in *Louthan* vs. *Commonwealth* (79 Va., 197) made it unlawful for certain public officers, judges, superintendents of schools and the like "to participate actively in politics" and provided that

> "making political speeches, or the active or unofficial participation in political meetings,

> shall be deemed to be an active participation in politics within the meaning of this section."

The Virginia Court squarely held the statute invalid as a violation of the right of free speech. It denied the power of any

> "legislative body, to seal the lips of citizens, and exclude them from the assemblies of the people, unless they will sit dumb among their fellowmen, and to forbid their holding communion with their fellow-citizens on governmental questions, to directly or indirectly influence the votes of others" (page 204).

To the same effect is

> *State* vs. *Junkin,* 85 Neb., 1, 3.

See also

> *Ex Parte Harrison,* 212 Mo., 88;
> *State* vs. *Pierce,* 163 Wis., 615.

POINT VIII.

The right of association is an essential element of liberty (Meyer vs. Nebraska, 262 U. S., 390). A prior restraint upon association is upon principle and upon unbroken authority a denial of due process.

The historical analogy to the right of assembly is the analogy we have given to the right of free expression in speech and in the press. A clear logical analogy lies as well to what has frequently been defined as the right of association. Indeed the right of assembly is the most conspicuous illustration—most conspicuous because most favored by the policy of free institutions and therefore singled out by the constitutions of the United States and of the states—of a general right to associate. That right is one of "those privileges long recognized at common law as essential to the ordinary pursuit of happiness by free men" (*Meyer* vs. *Nebraska,* 262 U. S., 390, 399).

An unbroken course of decisions establishes that a previous restraint upon association is prohibited by the due process principle. In all of the cases listed below the attempt to limit the right of association failed and failed under the due process provision of the states. In those cases the attempt was to circumscribe the moral and physical contagion of vice and crime by making it criminal to associate with prostitutes, drunkards and the like.

St. Louis vs. *Fitz,* 53 Mo., 582;
St. Louis vs. *Roche,* 128 Mo., 541;

Ex parte Smith, 135 Mo., 223;
City of Lancaster vs. *Reed,* 207 S. W., 868 (Mo., 1919, not officially reported);
City of Watertown vs. *Christnacht,* 39 S. D., 290;
Watertown vs. *Barker,* 39 S. D., 407.

To somewhat the same effect are:

Hechinger vs. *City of Maysville,* 22 Ky. L. Rep., 486;
Cady vs. *Barnesville,* 4 Weekly Cinc. Law Bull., 101;
Stoutenburgh vs. *Frazier,* 16 D. C. Appeals, 229.

The constitutional case against these statutes, while sufficient, was manifestly less cogent than the case against section 2, subdivision 4. The legislation there considered was passed in pursuance of the police power in its simplest form and subject to the principle which gives peculiar latitude to legislation directed against vice (compare e. g., *Scott* vs. *Donald,* 165 U. S., 58, 91); the legislation here considered is legislation in derogation of a basic constitutional right of freedom. Again, the legislation there considered was held constitutionally objectionable even when limited to persons consorting "with the intent to agree, conspire, combine or confederate" (*St. Louis* vs. *Roche,* supra, a leading case); the California Syndicalism Act as applied in Miss Whitney's case has resulted in her conviction despite a definite showing that her intent and her effort were in the fullest sense innocent.

In *Ex parte Smith,* supra (135 Mo. at 227), the Court said:

> "We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be,"

and, again:

> "As to that portion of the eighth clause which uses the words 'for the purpose or with the intent to agree, conspire, or combine or confederate to commit any offense,' etc., it is quite enough to say that human laws and human agencies have not arrived at such a degree of perfection as to be able, without some overt act done, to discern and determine by what intent or purpose the human heart is actuated."

POINT IX.

No quality of incitement attaches to the proceedings of the convention of November 9, 1919. Judged by the standards definitely laid down by this Court in Gitlow vs. New York ~~(45 Sup. Ct., 625)~~, Miss Whitney's conviction would have worked a denial of due process even had she participated in all the purposes and activities of the convention.

Our argument has presented from various points of view a single contention: It is a denial of due process to convict Miss Whitney of crime by reason of the quality which others gave to the convention of November 9, 1919. She cannot be charged, we have said, with the purposes of those she opposed but failed to convince. Our argument now goes further. Had she fully shared every purpose and participated in every action of the Communist Labor Party of California, her conviction still would have been a denial of due process,—a denial of those rights of free assembly and free speech which are foundations of that "liberty" the Fourteenth Amendment protects.

The due process clause, declared the Chief Justice in *Truax* vs. *Corrigan* (257 U. S., 312, page 332), supplies

> "a required minimum of protection for everyone's right of life, liberty and property which the Congress or the legislature may not withhold."

What that "required minimum" in this precise field is, the late decision in *Gitlow* vs. *New*

York (45 Sup. Ct., 625) makes clear. The state may punish "incitement" to violent action; it may punish incitement even in the absence of a showing of specific danger from the utterance. "The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale" (page 631). But nothing short of incitement is punishable.

In the *Gitlow* case this Court went on to a most detailed analysis of the Communist Manifesto, an analysis accompanied by full quotation. That analysis culminated in the declaration (page 629):

> "The Manifesto, plainly, is neither the statement of abstract doctrine nor, as suggested by counsel, mere prediction that industrial disturbances and revolutionary mass strikes will result spontaneously in an inevitable process of evolution in the economic system. It advocates and urges in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government. It concludes with a call to action in these words:
>
> > 'The proletariat revolution and the Communist reconstruction of society—*the struggle for these*—is now indispensable. * * * The Communist International calls the proletariat of the world to the final struggle.'

> This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement."

Such were the tests to which the Manifesto of the Communist Party was subjected in this court and by which in the view of the majority it was condemned; it remains merely to apply these same tests to the platform and program of the Communist Labor Party of California.*

The constitution and platform and program of the Communist Labor Party of California including the program of the National Chicago Convention—which was substituted for Miss Whitney's

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*The Court will understand that the Communist and Communist Labor parties are wholly distinct bodies (Record, pages 88-89). The Department of Labor of the United States consistently held members of the Communist Party deportable under the act of October, 16, 1918, which provides for the deportation of aliens "who are members of or affiliated with any organization that entertains a belief in, teaches or advocates the overthrow by force or violence of the Government of the United States" (40 Stat., 1012, Chap. 186). In that ruling as to the Communist Party, it was sustained by the Courts (*Skeffington* vs. *Katzeff*, 277 Fed., 129; *U. S.* vs. *Wallis*, 268 Fed., 413). The Department of Labor, however, held membership in the Communist Labor Party no ground for deportation.

The opinion of the Labor Department in the case of one Carl Miller, which settled the practice, is quoted in a footnote to *Colyer* vs. *Skeffington* (265 Fed., at pages 65-68). After an analysis of the same platform and program printed in this record (page 171) the Secretary of Labor concluded:

> "The excerpts from the Communist Labor Party platform and program quoted above indicate an extremely radical objective, but there is nothing in them that discloses an intention to use force or violence or that is incompatible with the use of parliamentary machinery to attain the radical end it has in view."

resolution—appear at pages 159-188. The great bulk of these pages is taken up with purely mechanical and formal provisions for the organization of committees and the like. The platform appears at pages 171-178. It is sufficient to refer to the sole passages to which the prosecution at the trial took objection. At page 176 appears the following:

> "In any mention of revolutionary industrial unionism in this country, there must be recognized of [*sic*] 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."

This passing reference in a platform which was substituted for the resolution which Miss Whitney proposed and which was rejected, was made the basis for the admission of much evidence concerning the I. W. W. (see e. g., pages 221, 223). But it never was even argued as far as we know, and cannot be argued, that this generalized statement of collective sympathy was upon any possible construction an incitement, much less a "direct incitement." This is the more plainly true as criminal activity was shown by the evidence not to be an *avowed* object at least of the I. W. W.;

the lawless practices the prosecution stressed were, according to its own witnesses, agreed upon in secret outside of the regular meetings (pages 258-9; 227-8); many of the "rank and file" of the I. W. W. "knew nothing about it at all" (286-7).

The prosecution laid much stress (see the cross examination of Miss Whitney, pages 310-21) upon the following resolution:

> "Resolutions Committee recommends that the C. L. P. use all its strength and energy in the organization and education of the workers to utilize to the full extent their collective power to force the unconditional release of each and every one now serving sentence as a political or class war prisoner" (page 103).

Even more plainly is this "recommendation" no "incitement" to anything. It was, in Miss Whitney's own words "absolutely not," introduced with any intention of incitement (page 335).*

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*Much supposedly incendiary literature was received in evidence. Its identification was through "a witness who had seized certain documents of the I. W. W." (page 223) and the only ground for receiving the documents was the alleged recommendation of them as propaganda by the I. W. W. convention of 1916 in Chicago (page 225; see generally pages 224-249). These documents included I. W. W. songs (pages 236-243), books or pamphlets by one Perry (page 233), by one St. John (page 234), by William Haywood (page 243), by one Pouget (page 246), with an extract read to the jury from Giovannitti "Essex Co. Jail, Lawrence, Mass, August, 1912" (page 249), by one Walker Smith (page 249), and by Miss Flynn (page 272). The only document connected with the Communist Labor Party consists of five scattered paragraphs (pages 217-219) of a book

POINT X.

The California Criminal Syndicalism Law, and especially Section 2, Subdivision 4 thereof—by confining its penalties to advocates of change and especially of "change in industrial ownership or control"—discriminates between differing political and economic opinions and their respective supporters and thus denies the equal protection of the laws. (Truax vs. Corrigan, 257 U. S., 312.)

The Chief Justice in *Truax* vs. *Corrigan,* pointed out the relation and the difference between the due process and the equal protection provisions. The one guarantees a "required minimum" of liberty; the other " 'is a pledge of the protection of equal laws'." (*Yick Wo* vs. *Hopkins,* 118 U. S., 356, 369, quoted at 257 U. S., 333.)

The law under review, especially in the penalties it imposes in its membership provisions is, an *unequal* law. Like the Arizona statute before this court in the *Truax* case, this statute deals with "industrial" conflict. From the opposite direction, but in quite the same degree, it discriminates between parties to that conflict and denies equal protection. Organizing, being a member

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on Syndicalism by Ford and Foster (page 216) which Police Captain Kyle seized at Loring Hall (page 209). (He estimated the amount of his seizure as "around a ton" [page 209].) The work was never mentioned as far as the record shows at the convention of November 9, 1919, or at any of the proceedings of any of the bodies mentioned in the case. The specific statement of the District Attorney in his opening that at Miss Whitney's home the officers found "radical and red literature" (page 72) is absolutely unsubstantiated by any evidence in the record (see *supra* this brief, page 9, footnote).

of, and assembling with, organizations or groups whose purpose is terrorism and unlawful destruction of property become punishable only if the purpose of these bodies is political or *industrial* change; there is no restraint upon joining any organization, whatever its purposes or methods, and however clearly they are avowed, whose object is maintenance of the existing order. Two organizations or two meetings may both be parties to the same political and industrial conflict and the methods practiced by both may be identical. Concretely applying the California Statute to the case of two organizations so widely known as the Ku Klux Klan and I. W. W. and assuming, for the purpose of argument and illustration, that the same methods of terrorism were employed by some of the members of both organizations, the result would be that a member of the Ku Klux Klan could be convicted for the outrage only in accordance with the ordinary rules of conspiracy—upon proof that he was consciously a party to it; but a member of the I. W. W. could be convicted upon mere proof of membership itself.

It is no answer to this to argue, as the prosecution has argued, that the statute operates upon all social classes alike and that Miss Whitney herself may have been a woman of position or wealth. The inequality urged is not precisely between members of different economic or social classes. The inequality of the statute is that it subjects persons who differ in opinion to differing rules of law.

The two groups of contentions developed respectively in Points I-II and in Points III-X, are

independent. No conviction for any offense can stand, where that offense itself is specified neither in the indictment nor in the course of the trial, nor in the charge; to convict anyone of any felony in such circumstances is to deprive him of liberty without due process of law. Again, had the forms of procedure been the most technically regular conceivable, Miss Whitney's conviction would still have been a deprivation of liberty without "due process": her own acts were demonstrably innocent and she cannot constitutionally be condemned because others rejected the purposes she held, avowed and defended.

While thus separately stated and independently valid, the effect of the two sets of principles upon which we have relied is cumulative: Miss Whitney was in fact prosecuted without discrimination upon a number of unspecified and undifferentiated accusations. Conditions of time and space —to mention no others—should have precluded once and for all even the submission of all but one of the supposed issues as in themselves substantive bases of conviction; a conviction upon that one, a half-dozen formulations of the due process principle forbid.

For *each* of the following reasons—and for *all* of them—Miss Whitney's conviction was a violation of due process:

Because it was her right to know "the essential particulars of the offense, so that she might appear in court prepared to meet every feature of the accusation against her" (*Hodgson* vs. *Vermont*), and that right was denied her—denied so completely as to render wholly possible a second prosecution by reason of the same facts;

Because "the criminal intent essential to the commission of a crime must exist when the act complained of is done." "Upon principle" one cannot be declared guilty of crime "upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another" (*U. S.* vs. *Fox*);

Because "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime" (*McFarland* vs. *Amer. Sugar Co.*),—least of all (by doing away with "corrupt intent") guilty of conspiracy;

Because no legislature may "exact gifts that mankind does not possess" and impose criminal penalties for a lack of "prophetic" understanding (*Int. Harvester Co.* vs. *Ky.*);

Because the exercise of those elementary rights of free assemblage and free speech which lie at the foundation of liberty may not be subjected to "previous restraint" (*Patterson* vs. *Colorado*);

Because no "legislative body" may "choose for our citizens who their associates shall be" (*ex parte Smith*);

Because the state may prohibit "direct incitement" alone (*Gitlow* vs. *New York*), and even the platform which, over Miss Whitney's opposition, was substituted for her own resolution, shows no incitement, direct or indirect.

The conviction should be reversed and the plaintiff-in-error discharged.

Dated, September 4, 1925, and respectfully submitted,

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APPENDIX A.

THE CRIMINAL SYNDICALISM ACT OF CALIFORNIA.

Act 5086—An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith and in pursuance thereof and providing penalties and punishments therefor.

History: Approved April 30, 1919. In effect immediately. States. 1919, page 281.

Criminal syndicalism defined.

#1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or 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), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

Unlawful acts. Penalty.

#2. Any person who:

1. By spoken, or written words or personal conduct advocates, teaches or aids and abets criminal syndicalism or the duty, necessity or propriety of committing crime, sabotage, violence or any unlawful method of terrorism as a means of accomplishing a change in

dustrial ownership or control, or effecting any political change; or

2. Wilfully and deliberately by spoken or written words justifies or attempts to justify criminal syndicalism or the commission or attempt to commit crime, sabotage, violence or unlawful methods of terrorism with intent to approve, advocate or further the doctrine of criminal syndicalism; or

3. Prints, publishes, edits, issues or circulates or publicly displays any book, paper, pamphlet, document, poster or written or printed matter in any other form, containing or carrying written or printed advocacy, teaching, or aid and abetment of, or advising, criminal sydicalism; or

4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism; or

5. Wilfully by personal actor conduct, practices or commits any act advised, advocated, taught or aided and abetted by the doctrine or precept of criminal syndicalism, with intent to accomplish a change in industrial ownership or control, or effecting any political change;

Is guilty of a felony and punishable by imprisonment in the state prison not less than one nor more than fourteen years.

Constitutionality.

#3. If for any reason any section, clause or provision of this act shall by any court be held unconstitutional then the legislature hereby declares that irrespective of the unconstitutionality so determined of such section, clause or provision, it would have enacted and made the law of this state all other sections, clauses and provisions of this act.

Urgency measure.

#4. Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state, advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the governor.

APPENDIX B.

IN SUPERIOR COURT,

ALAMEDA COUNTY.

THE PEOPLE OF THE STATE OF CALIFORNIA

against

CHARLOTTE A. WHITNEY.

Information—Filed Dec. 30, 1919.

In the Superior Court of the County of Alameda, State of California, the 30th day of December, A. D. nineteen hundred and nineteen, Charlotte A. Whitney, is accused by the District Attorney of the said County of Alameda by this information of the crime of felony, to wit: a violation of an Act entitled, "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approval April 30th, 1919, committed as follows: The said Charlotte A Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist

in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Second Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to wit: a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof, and providing penalties and punishments therefor," approved April 30, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November, A. D. nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously print, publish, edit, issue, circulate and publicly display books, papers, pamphlets, documents, posters and written and printed matter containing and carrying written and printed advocacy, teaching and aid and abetment of, and advising, criminal syndicalism.

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such

case made and provided, and against the peace and dignity of the people of the State of California.

Third Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishments therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney, prior to the time of filing this information, and on or about the 28th day of November A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, deliberately and feloniously by spoken and written words, and by personal conduct advocate, teach, aid and abet criminal syndicalism, and the duty, necessity and propriety of committing crime, sabotage, violence and unlawful methods of terrorism as a means of accomplishing a change in industrial ownership and control, and as a means of effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of California.

Fourth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the

crime of felony, to wit, a violation of an Act entitled "An Act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows: The said Charlotte A. Whitney prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously, by spoken and written words justify and attempt to justify criminal syndicalism and the commission and attempt to commit crime, sabotage, violence, and unlawful methods of terrorism with intent then and there to approve, advocate and further the doctrine of criminal syndicalism;

And all of the acts of the said Charlotte A. Whitney, in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California;

Fifth Count. And the said Charlotte A. Whitney is accused by the District Attorney of said County of Alameda by this information of the crime of felony, to-wit, a violation of an Act entitled, "An act defining criminal syndicalism and sabotage, proscribing certain acts and methods in connection therewith, and in pursuance thereof and providing penalties and punishment therefor," approved April 30th, 1919, committed as follows, to-wit: The said Charlotte A. Whitney

prior to the time of filing this information, and on or about the 28th day of November, A. D., nineteen hundred and nineteen, at the said County of Alameda, State of California, did then and there unlawfully, wrongfully, wilfully, deliberately and feloniously by personal acts and conduct practice and commit acts, advised, advocated, taught and aided and abetted by the doctrine and precept of criminal syndicalism with intent to accomplish a change in industrial ownership and control and effecting a political change;

And all of the acts of the said Charlotte A. Whitney in the premises were and are contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Ezra W. Decoto, District Attorney in and for said County of Alameda, State of California, by A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California. Geo. E. Gross, Clerk, by L. A. Rudolph, Deputy Clerk. Ezra W. Decoto, District Attorney, by A. A. Rogers, Deputy District Attorney in and for the County of Alameda, State of California. (File endorsement omitted.)

APPENDIX C.

California Penal Code.

§1176. *Written charges need not be excepted to.* When written instructions have been presented, and given, modified, or refused, or when the charge of the court has been taken down by the reporter, the questions presented in such instructions or charged need not be excepted to or embodied in a bill of exceptions; but the Judge must make and sign an indorsement upon such instructions, showing the action of the court thereon, and certify to the correctness of the reporter's transcript of the charge; and thereupon the same, with the endorsements, become a part of the record, and any error in the action of the court thereon may be reviewed on appeal in like manner as if presented in a bill of exceptions. [Amendment approved 1905; Stats. 1905, page 762.]

§1259. *Appellate court may review what.* Upon an appeal taken by the defendant in open court, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby (Amendment approved 1909; Stats. 1909, page 1088).