IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 123

DIRK DeJONGE, *Appellant,*

—VS.—

THE STATE OF OREGON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

BRIEF FOR APPELLANT

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I. Opinion of the Court Below.

This case comes to this Court by Appeal, probable jurisdiction having been noted by the Court on October 19, 1936.

The opinion below is reported in 152 Ore. 315, and appears in the record commencing at page 20. The separate concurring opinion and dissenting opinion do not relate to the questions before this Court.

II. Jurisdiction.

1. The statutory provision sustaining the jurisdiction is Judicial Code, Section 237 (a), as amended (28 U. S. C. A., Sec. 344).

2. The date of the judgment to be reviewed is November 26, 1935 (R. 46). A petition for rehearing was seasonably made and was denied January 21, 1936 (R. 46). The petition for the allowance of the appeal was filed April 17, 1936 (R. 1), and the appeal was allowed April 20, 1936 (R. 6). The papers were filed with this Court on June 16, 1936 (R. 47).

3. The case comes within the jurisdictional provisions as appears from the following:

At the conclusion of the State's case appellant moved for a direction of acquittal, claiming that the law under which he was charged violated the due process clause of the Fourteenth Amendment (R. 16). At the conclusion of the entire testimony appellant again moved for a directed verdict on substantially the same ground (R. 16). The Oregon Supreme Court expressly considered the question so raised and ruled against appellant (R. 29-31). The precise question was whether or not Oregon's Criminal Syndicalism Law as construed and applied to the facts of this case deprived appellant of his liberty without due process of law.

4. The following cases are relied on to sustain jurisdiction: *Stromberg* v. *California,* 283 U. S. 359, and *Fiske* v. *Kansas,* 274 U. S. 380. In the first of these cases this Court held void a law restricting the display of the red flag because of the vagueness of the law and the possibility that wholly lawful acts might be punished. In the second case this Court set aside a conviction because of the invalidity of the statute as applied to the facts of the particular case.

III. Statement of the Case.

The Criminal Syndicalism Law of Oregon is to be found in Code 1930, Sections 14-3110-3112, as amended by Chapter 459 of the Laws of 1933. It is set forth in full in the

appendix to this brief. Criminal syndicalism is defined as advocacy of the use of unlawful means to effect industrial change or revolution. The law punishes various acts, such as the teaching of this doctrine, the printing, selling or distribution of literature advocating it, the organization of a society which teaches it, as well as assisting and conducting a meeting of any organization which teaches the prohibited doctrine. It may be noted in passing that membership in a proscribed organization is not made a crime although such had been the law prior to the amendment of 1933.*

Appellant was indicted solely on the charge that he assisted at a meeting (R. (17-18). The indictment in substance charged that appellant assisted in conducting a meeting of the Communist Party on July 27, 1934, and that the Communist Party "then and there" advocated criminal syndicalism (R. 17-18). The Supreme Court of Oregon constructed this indictment as charging, not that the meeting at which appellant asisted advocated this doctrine, but merely that the Communist Party generally at the time charged in the indictment advocated it (R. 32). By sustaining the conviction the State court necessarily construed the statute in the same way: as punishing assistance at a meeting solely because of the auspices under which the meeting was held, regardles of what happened at the meeting itself.

The evidence at the trial, which was lengthy, has not been transcribed for this Court. Instead counsel have agreed upon a stipulation of the essential facts (R. 7-17). From these it appears that appellant was a speaker at a meeting which had been advertised by the Communist Party and that he was instructed to speak at that meeting in the name of the Party (R. 8). The meeting was called to protest

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* This change was evidently prompted by the harsh result of the *Boloff* case, 138 Ore. 568.

against illegal raids on workers' halls and homes and to protest against the shooting of strikers by the local police (R. 8). There were from 150 to 300 persons present at this meeting of which not more than 10% or 15% were members of the Communist Party (R. 7). The meeting was open to the public without charge and no questions were asked persons entering the hall as to their membership in or sympathy with that Party (R. 8).

At this meeting appellant stated that the attacks on the working class organizations were part of the effort of the steamship companies to break the longshoremen's and seamen's strike then in progress (R. 8). He advocated a drive to get more members for the Communist Party, requested those present to attend a forthcoming street meeting in defiance of the police, and urged the purchase of some of the literature being sold at the meeting, such as The Young Communist and The Daily Worker (R. 9). He was not indicted either for obtaining members in the Party or for in any way promoting the sale of party literature. There was no evidence of activity of any kind by the appellant on behalf of the Communist Party, except his participation in this one meeting.

The stipulation shows that this meeting was orderly and that appellant was arrested when the meeting was raided by the police (R. 9).

At the trial evidence was introduced by both sides on the question of the advocacy by the Communist Party of the doctrine of criminal syndicalism (see R. 32, 34). Since the jury found for the State on this issue it does not survive for the purposes of this appeal.

Defendant was sentenced by the Court for a term of seven years (R. 20).

IV. Errors Relied Upon; Summary of Argument.

The errors assigned in this Court are two:

1. That the State criminal syndicalism statute violated the due process clause of the Fourteenth Amendment (R. 5).

2. That the Criminal Syndicalism Law, as construed by the Supreme Court of Oregon and applied in appellant's case, violated the due process clause of the Fourteenth Amendment (R. 5).

Each assignment rests upon the refusal of the trial court to direct a verdict in favor of appellant upon such grounds (R. 46).

Appellant contends:

1. That the law is unconstitutional because, as construed by the Supreme Court of the State and as applied, it punishes participation in a lawful meeting, merely because the meeting was called by a group which the jury found elsewhere advocated the prescribed doctrines.

2. That appellant was entitled to a directed verdict.

Point I.

The Oregon Criminal Syndicalism Law as Construed by the Supreme Court of the State of Oregon and applied in this case is unconstitutional in that it denies appellant liberty, without due process of law in contravention of the Fourteenth Amendment to the United States Constitution by reason of its limitation on his right of freedom of speech and freedom of assemblage.

That the right to freedom of speech is protected by the due process clause of the Fourteenth Amendment is now

settled beyond possibility of argument. *Grosjean* v. *American Press Company*, 297 U. S. 233. In that case, indeed, Mr. Justice Sutherland, construing the first Scottsboro decision, *Powell* v. *Alabama*, 287 U. S. 45, said:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment."

Article I of the Amendments to the United States Constitution includes not only freedom of speech and freedom of the press but also "the right of the people peaceably to assemble." This Court in *United States* v. *Cruikshank*, 92 U. S. 542, pointed out that the right peaceably to assemble was an essential attribute of citizenship under a free government. Chief Justice Waite said:

> "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

This Court again, in *Whitney v. California*, 274 U. S. 357, evidently assumed that the right of assembly was among those now guaranteed by the Fourteenth Amendment against infringement by State action. Appellant contends, for these reasons, that the statute under which he was indicted was an unconstitutional denial of his rights to both freedom of speech and freedom peaceably to assemble.

In the case at bar it is conceded that the assembly was peaceful (R. 9); there is no claim in the indictment to the contrary. Indeed, there is not even a claim in it that the meeting advocated prohibited doctrines, and, as already noted, the State Supreme Court in its opinion expressly

held that the indictment did not so charge (R. 32). Judge Bailey there said:

> "The indictment does not, however, charge the defendant, nor the assemblage at which he spoke, with teaching or advocating at said meeting * * * the doctrine of criminal syndicalism or sabotage."

The question presented to this Court (and in this case for the first time), is whether a statute is constitutional which punishes a person for participation in a lawful meeting, called for a lawful purpose, merely because the meeting was called by an organization which, it is charged, advocated prohibited doctrines.

It is submitted that within the ruling of this Court in *Stromberg* v. *California,* 283 U. S. 359, the portion of the statute here involved is void. There a California law was held void because it was so vaguely drawn that wholly innocent acts might be punished under it. That law prohibited the display of a red flag at a meeting "as a sign, symbol and emblem of opposition to organized government." Despite the facts that the statute also punished the display of a flag as a stimulus to anarchistic action and as an aid to seditious propaganda, and that defendant had been convicted under an indictment bringing all these charges, this Court reversed the conviction on the ground that the first portion of the statute "might be construed as embracing conduct which the State could not constitutionally prohibit." The Chief Justice pointed out that the maintenance of the opportunity for free discussion was essential to the security of the country and was fundamental to our constitutional system. He then said:

> "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity

> is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

The case at bar is even stronger than the *Stromberg* case, since appellant's conviction rests upon a single portion of the statute. That statute, insofar as it is material, punishes anyone who assists "in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism." It is at once apparent that the statute can be so construed that it is not essential that the person charged with having violated it himself advocate the doctrine of criminal syndicalism or participate in any way in any such actual advocacy. It is thus that it has actually been construed in the case at bar.

Under such interpretation of this law, any person could be convicted who participated in a symposium called by the Communist Party for the discussion of the campaign issues of the current year, were such a person a Democrat, a Republican, or a member of any other political party, and that, entirely regardless of what might or might not have been said at the meeting he attended. It would constitute an attempt to make criminal the mere association in even a casual way with any persons accused of any wrongdoing at all—a doctrine wholly repugnant to the American system of justice. See *People* v. *Pieri*, 269 N. Y. 315, at 323.

Under this construction no person could risk speaking at any meeting called by the Communist Party, for it becomes evident under such construction that the accused person does not need to be a member of the Party or in sympathy with any part of its program, to be convicted. Under this construction it is not necessary that the accused person teach or advocate any doctrine offensive to the statute either at the meeting or at any other time. Nor is it neces-

sary that anyone else at the meeting teach or advocate any offensive doctrine.

It may be pointed out, further, that the various criminal syndicalism and criminal anarchy statutes have been applied almost exclusively in order to punish people for their activity on behalf of the under-privileged or the unemployed. In most such cases no direct advocacy even of prohibited doctrine has been charged to the defendant and conviction has rested largely on the verbiage of pamphlets. The abuse to which these laws can easily be put requires, therefore, the greatest scrutiny by this Court that the Constitutional guarantees of freedom of speech and freedom of assemblage be not destroyed.

There is nothing in *Gitlow* v. *New York,* 268 U. S. 652, or in *Whitney* v. *California,* 274 U. S. 357, which supports the conviction in the case at bar. The doctrine there announced, that validity must be given to legislative declarations that the act of assisting and organizing an unlawful association involved "such danger to the public peace and the security of the state that these acts should be penalized," is wholly inapplicable to the circumstances of this case.

To begin with, there is no basis for an inference that the Oregon Legislature had actually declared the act with which appellant was charged so dangerous that it should be prohibited, nor would there have been any reasonable basis for such a legislative declaration, had it been made

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* The recent cases have been collected and discussed in Legislation, Federal sedition bills; Restriction in Theory and Practice, 35 Col. L. R. 917, 920, 921. For a discussion of the philosophical issues underlying these cases see the separate opinion of Mr. Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357; Chafee, Freedom of Speech, particularly Chapters I and IV; Freund, The Police Power, Sections 475-484.

in the most explicit terms. The legislative presumption to which this Court referred in the *Whitney* and *Gitlow* cases can hardly have the same force as it had in those instances, when the statute is applied to a set of facts which is clearly innocuous, and that more especially, since it is by no means clear that the Legislature ever had such state of facts in mind. All that can be said with certainty about the legislative intention is that the Legislature believed a necessity existed for punishing advocacy by words. The very fact that in 1933 the Legislature so amended the law as to make it no longer criminal merely to belong to a proscribed organization, indicates that it did not consider it necessary to continue the crime of association. While this Court is of course bound by the interpretation placed upon the law by the highest court of the State, nevertheless it does not follow that the effect to be given to a legislative presumption is the same when the meaning of the law is arrived at only by interpretation. In other words, in order that there be a presumption that the Legislature believed conditions so serious as to warrant an infringement of the right of free speech and free assembly, the statement of the legislative intention to accomplish that result must be clear on its face. Here it cannot be said that it is clear on its face that the Legislature intended to punish a man merely for participating in a meeting on the ground that the meeting had been called by an organization charged with unlawful conduct.

Moreover, even if an inference can be drawn that the Legislature really concluded that conditions were so bad as to require this result, then it is submitted there was no rational connection between the end sought to be accomplished and the means employed. This Court has never hesitated to disregard the presumption of validity arising from declarations of a legislature when the law it passed

seemed arbitrary to a majority of the court. From *Adkins* v. *Children's Hospital,* 261 U. S. 525, to *Morehead* v. *New York ex rel. Tipaldo,* 298 U. S. 587, many laws have been declared void despite express legislative declarations as to their necessity.* Surely, if there was no reasonable basis for the legislative declaration that minimum wages were necessary in order to promote economic stability and to prevent the exploitation of women, it is difficult to see how, in the absence of extraordinary occurrences (of which there is no evidence in this case), there could be any basis for a legislative declaration that public safety required the imprisonment of all persons who participate in meetings called by the Communist Party, regardless of what takes place at the meetings.

If the conviction in this case can be sustained, then anyone who speaks at a meeting called by the Communist Party for any purpose whatsoever might likewise be convicted, provided the State in which the meeting is called happens to have a law similar to that of Oregon. Now the Communist Party is a recognized political party, with candidates for all elective offices. It has a place on the ballot in a majority of the States of the United States. Meetings of this Party are being held all over the country. The right of the Presidential candidate of that Party to speak

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* as, for instance:

Jay Burns Baking Co. v. *Bryan,* 264 U. S. 504;
Weaver v. *Palmer Bros. Co.,* 270 U. S. 402;
Frost Trucking Co. v. *Railroad Commission,* 271 U. S. 583;
Tyson v. *Banton,* 273 U. S. 418;
Fairmont Creamery Co. v. *Minnesota,* 274 U. S. 1;
New State Ice Co. v. *Liebmann,* 285 U. S. 262;
cf. *Railroad Retirement Board* v. *Alton R. Co.,* 295 U. S. 330.

over the radio has been only recently sustained by the Federal Communications Commission.

In this connection it may not be amiss to point out that the Communist Party was on the ballot in the State of Oregon in the year 1932, with candidates for Presidential electors as well as for some other offices. If the position of the State in the case at bar is sound, then anyone who took part in the proceedings which led up to the placing of the Communist Party on the ballot in that year, as well as anyone who took part in any of the meetings which were called to discuss the issues of that campaign, must have been guilty under this law. That, of course, is an absurdity. If a State permits a party to have a place on its ballot how can it be heard to say that the mere association with that party can constitute a crime?

This is not a case, such as was the *Gitlow* case (268 U. S. 652), in which defendant was the author of a manifesto considered by the majority of the Court sufficiently dangerous to justify his conviction. There is no charge in the case at bar that appellant was in any way concerned with the preparation of any offensive literature whatsoever. All that appears is that he was a member of the Party and that he attended this meeting under instructions. And there is no charge that anything which occurred at the meeting was otherwise than lawful.

This case differs in another important respect from *Whitney* v. *California*, 274 U. S. 357, also, since in that case the statute punished assistance to an organization "*to* advocate * * * criminal syndicalism", not, as in the case at bar, mere assistance to an organization "*which* advocates" the prohibited doctrines. The distinction is vital. In the one case participation in the wrongful advocacy is an essential part of the crime charged; in the other it is immaterial. Miss Whitney's conviction was

sustained because she participated in a meeting which itself advocated prohibited doctrines; appellant was convicted for participation in a meeting which the State Supreme Court ruled was not so charged (R. 32). There can be no basis for punishing a person merely for attendance at or participation in a meeting, when it is not charged that any prohibited doctrines were being advocated at the meeting he attended.

For these reasons it is submitted that the statute as applied in this case is unconstitutional, because it punishes a person for acts which from no point of view can reasonably be said themselves to produce danger to the State. The acts as such were harmless. No situation existed from which an inference could possibly be drawn that danger to the State might result merely because the meeting had been called by the Communist Party. No other facts exists in the case of any weight at all. A law which punishes a person for participating in a peaceful meeting and speaking at it, merely because the meeting is called by the Communist Party, is arbitrary and unreasonable and in violation of the constitutional guaranty of due process. The conviction of this appellant must be reversed, therefore, and the indictment dismissed, because no wrongful act was charged and proved.

Fiske v. *Kansas,* 274 U. S. 380.

Point II.

The trial court erred in failing to grant appellant's motion for a directed verdict on the ground that there was no evidence sufficient to permit a finding of guilty.

In view of the foregoing analysis of the charge against appellant, it is submitted that under the decisions of this Court in *Stromberg* v. *California,* 283 U. S. 359, and in

Fiske v. *Kansas,* 274 U. S. 380, appellant was entitled to have granted the motion for a directed verdict which he made at the close of the entire case.

Respectfully submitted,

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APPENDIX.

The criminal syndicalism law, Sections 14-3110, 14-3111 and 14-3112, Oregon Code 1930, as amended by chapter 459, Oregon Laws, 1933:

"SECTION 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage, or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"SECTION 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"SECTION 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine of criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the State penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."