INDEX.

CASES REFERRED TO.

I. ABSTRACT OF THE CASE.

This is a writ of error made in behalf of the defendants, Charles T. Schenck and Elizabeth Baer, who were found guilty:—

(1) Of conspiracy under Section 4, Title I of the Espionage Act, to violate the provisions of Section 3, to wit, "* * * whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both."

(2) Of conspiracy to commit an offense against the United States—that is, the use of the mails for the transmission of matter (circulars) declared by Section 2, Title XII, of the Act to be non-mailable; and

(3) The use of the mails for the transmission of such matter.

The questions involved are, primarily:—

(1) The Constitutional validity of Section 3, Title I, of the Espionage Act, namely, whether or not it constitutes an abridgement of freedom of speech and the right of petition, in contravention of the First Amendment to the Constitution.

(2) Whether or not the defendants were lawfully found guilty of conspiracy under all the evidence.

(3) Whether or not papers seized under a search warrant were lawfully used as evidence against them under the constitutional provision against unlawful search

(Amendment IV. of the Constitution), and the constitutional provision against a defendant being made to testify against himself (Amendment V. of the Constitution).

The defendants were indicted jointly with three other persons, as above set forth, on September 15, 1917. They were found guilty by a jury on December 20, 1917, the three other persons being found not guilty by the jury under instructions from the trial Judge. The acts alleged against the defendants occurred on August 13-20, 1917, and consisted of mailing and distributing circulars to the public and to men listed in newspapers as being liable under the Selective Draft Act of May 18, 1917. This was before this Court had rendered an opinion declaring the said Draft Act constitutional. The circular referred to is reproduced in the Transcript of Record (pages 4½, 8½, 18½). The acts alleged to have been committed by the defendants and to constitute the crimes charged in the indictment are the same under all counts.

II. SPECIFICATION OF ERRORS.

All of the three questions involved are raised by exceptions to the refusal of the trial Court to affirm points submitted by the defense, which were declined (see page 70 of the Transcript of Record), namely:—

> "1. Under all the evidence, your verdict should be 'not guilty.'
>
> "4. If the jury can only determine guilt on the part of the accused from evidence based on books, papers, printing or writing taken from the accused by government officials or agents, then their verdict should be 'not guilty.'

"9. Under the First Amendment to the Constitution, freedom of speech and of the press cannot be abridged, and people can only be held responsible for the results of their utterance. If, therefore, the Government has not shown you that any injury was caused to the service of the United States or to the United States as a result of the utterances alleged against these defendants, then your verdict should be 'not guilty.' "

III. ARGUMENT.

1. The Constitutionality of Section 3, Title I, of the Espionage Act of June 15th, 1917.

The first amendment to the Constitution reads in part as follows:—

> "Congress shall make no law * * * abridging the freedom of speech, or of the press."

Title I, Section 3, established three new offences: (1) false statements or reports interfering with military or naval operations or promoting the success of our enemies; (2) causing or attempting to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces; (3) obstruction of enlistment and recruiting.

In general, our courts have held that the free speech and free press amendment applies to freedom from interference *before* publication. The Espionage Act only imposes punishment *after* publication. Under this view, following the rule laid down by Blackstone, the Government is prohibited from heading off objectionable discussion through a censorship or the use of injunctions but is not prohibited from punishing an utterance it chooses to consider criminal when once it is spoken or written.

Thus the Government could not (except through the arbitrary act of one of its branches, like the Postoffice)

directly suspend a newspaper which regularly furnished military information to the enemy or censor indecent moving pictures before exhibition.

But such film censorship has been held by this Court (1915) not to infringe freedom of speech; and under the Espionage Act a Federal Judge enjoined the production of "The Spirit of '76" (U. S. *vs.* Motion Picture Film, 252 Fed. 946) a film depicting, *inter alia,* Paul Revere's Ride, because it tended "to make us a little bit slack in our loyalty to Great Britain."

The original rule, therefore, seems to have important exceptions.

But how can a speaker or writer be said to be free to discuss the actions of the Government if twenty years in prison stares him in the face if he makes a mistake and says too much? Severe punishment for sedition will stop political discussion as effectively as censorship.

Censorship had been abolished in England a century befor the adoption of our Constitution; but the Fathers who made the Constitution had experienced fifty successful English prosecutions for libel in the previous thirty years. They knew the meaning of the repudiation of these rules of law by the jury in the trial of the New York printer, Peter Zenger.

When Congress passed the Sedition Law of 1798, punishing "writings against the Government of the United States and the President," Jefferson treated it as unconstitutional. A few years later, Hamilton defended a Federalist editor from prosecution.

In Cooley's Constitutional Limitations, the argument is advanced that the evils to be prevented by the free speech clause are not merely the censorship but any governmental action which may prevent such free and general discussion of public matters as seems essential to prepare the public for an intelligent exercise of their rights as citizens and to subject those in power to scrutiny and condemnation.

The spread of truth in matters of general concern is essential to the stability of a republic. How can truth sur-

vive if force is to be used, possibly on the wrong side? Absolutely unlimited discussion is the only means by which to make sure that "truth is mighty and will prevail."

This does not mean a man may with impunity violate the Draft Law by refusing to do military service when so required; but it does mean he can say the Draft Law is wrong and ought to be repealed. Some of our judges have made this distinction; while others virtually make all opposition to the war criminal.

It can be even urged farther that the right of free speech, if it is allowed fully, gives the right to persuade another to violate a law, since, legally, it is only the one who actually violates the law who should be punished. It is no excuse for a thief to say John Jones persuaded him to steal; or, as the homely adage has it, "you don't have to put your hand into the fire because I tell you to do so."

This is the distinction between words and acts.

To illustrate the wide divergence of judicial views under the Espionage Act:—

Judge Hand in the "Masses" case (U S. *vs.* Eastman, 252 Fed. 232), says:—

> "Political agitation * * * may in fact stimulate men to violation of law. * * * Yet to assimilate agitation * * * with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation, which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge but a hard-bought acquisition in the fight for freedom."

On the other hand, Judge Van Valkenburgh, in the trial of Rose Pastor Stokes (U. S. *vs.* Stokes, West. Dist. Mo., May, 1918), says that her letter to a newspaper in which she said, "I am for the people, while the government is for the profiteers," might interfere with the operation of the military forces, because it might dampen the spirits of the newspaper subscribers and "our armies in the field can succeed only so far as they are supported by the folks at home."

If all opponents of a war are suppressed and all advocates of a war are given free rein, is it not conceivable that a peace-loving president might be prevented from making an early, honorable peace, founded on justice! How can the citizens find out whether a war is just or unjust unless there is free and full discussion! If it is criminal to say the Draft Law is wrong, then it is criminal to say that any law is wrong, for the Constitution, we are told, is not suspended in time of war; but we dare not *attack* it or our form of government. It is conceivable, under such a rule, that a citizen might be a criminal who advocated the election of senators by popular vote, the adoption of the referendum, or what not; but probably such would only be the case in time of war when he might thereby give aid and comfort to the enemy.

Must we return to conditions which prevailed under George III and be punished for criticizing our Government?

The Espionage Act breaks with the precedents of English and American law. The Sedition Act of 1798 wrecked the Federalist Party. Lincoln was big enough to stop his generals from suppressing a *disloyal press*. England, in the past, has been big enough to allow her citizens to criticise her official acts in war. Are we Americans big enough to allow honest criticism of the majority by the minority! In days gone by it was held criminal to talk against flogging in the army; nowadays it is generally considered criminal to talk against Wall Street.

Revolutions are not caused by freedom of expression.

Up to June of this year the Department of Justice announced a total of nearly twelve hundred cases under the Espionage Act, with one hundred and twenty-five convictions and six hundred and seventy-two cases pending.

Let us look at some of the cases.

In U. S. *vs.* Groeschl (Dist. of Ky., Nov. 1917), the defendant was indicted under the Espionage Act for distributing a leaflet among employees of a meat-packing house. It read as follows:—

"A WORD TO THE PEOPLE, THE MEN AND THE WOMEN OF LOUISVILLE AND OF THE WHOLE COUNTRY AND ALL OTHER COUNTRIES, FOR THAT MATTER.

"We should allow all those enthusiastic patriots and patriotic enthusiasts, who are so willing, so eager and so anxious,' to 'serve their country,' to sacrifice their all, and who want war so bad and go to war so bad, and who want to fight, shoot, stab, kill and be killed, we should allow them *to go to war,* to the very front of it, where the fighting is the thickest and the hottest and let them fight, shoot, stab, kill and be killed to their heart's content. But they should let other decent, honest, sincere, sensible, reasonable, fair-minded people *alone,* people who believe in 'live and let live,' and in settling individual, national and international disputes and troubles by appealing *to reason, truth, justice, liberty and humanity, and not in resorting to brute force, to bayonets and bullets, to guns, bombs and cannons and the destruction of millions of irreparable human lives and billions worth of precious property Think this over."*

The prosecution urged conviction on the ground that possibly the leaflet in question might find its way into the hands of soldiers. Judge Evans of the United States District Court for the Western District of Kentucky held the defendant did not come within the Act and instructed the jury to find him not guilty.

This case is similar to the one at bar, except that in the case at bar the leaflet consists largely of quotations from the Constitution and of words used by Congressmen in the debate over the Draft Act. Also, in the case at bar it was not a question as to whether or not the leaflet might come into the hands of soldiers. It did come into their hands and into the hands of men who had been drafted, and it was mailed to them.

In United States *vs.* Hall, 248 Fed. 150, the defendant

was charged (1) with making and conveying false reports with intent to interfere with the operations and success of the military forces and to promote the success of enemies, and (2) with causing and attempting to cause insubordination in the military forces and obstructing recruiting to the injury of the United States.

Specific acts were charged against him as follows:—

> "At divers times in the presence of sundry persons, some of whom had registered for the draft, defendant declared that he would flee to avoid going to war, that Germany would whip the United States, and he hoped so, that the President was a Wall Street tool, using the United States forces in the war because he was a British tool, that the President was the crookedest—ever President, that he was the richest man in the United States, that the President brought us into the war by British dictation, that Germany had right to sink ships and kill Americans without warning, and that the United States was only fighting for Wall Street millionaires and to protect Morgan's interest in England."

Defendant made the declarations in Montana at a village of some sixty people, sixty miles from a railway, and none of the armies or navies within hundreds of miles. They were oral, some in badinage with the landlady in a hotel kitchen, some at a picinic, some in the street and some in hot and furious saloon arguments.

Judge Bourquin said:—

> "The Espionage Act is not intended to suppress criticism or denunciation, truth or slander, oratory or gossip, argument or loose talk, but only false facts wilfully put forward as true and broadly, with the specific intent to interfere with army or navy operations. The more or less public impression that for any slanderous or disloyal remark the utterer can be prosecuted by the United States is a mistake."

"Military and naval forces in the Espionage Act means the same as in the declarations of war, the ordinary meaning, viz: those organized and in service—not persons merely registered and subject to future organization and service."

"The evidence would justify a finding that defendant did so make the declarations charged. But it would not support a verdict of guilty of any of the crimes charged."

"To sustain the charge, actual obstruction and injury must be proven, not mere attempts to obstruct. The Espionage Act does not create the crime of attempting to obstruct, but only the crime of actual obstruction, and when causing injury to the service."

In United States *vs.* Zimmerman (Dist. of Ind., March 19, 1918, Anderson, D. J.), the Judge said:—

"Are we, notwithstanding we are at war, not permitted to speak? I still think that a man has a right to speak freely, and that means he has a right to speak foolishly as well as wisely. If we are going to limit the right of free speech to people who talk wisely, there would probably be dead silence all around. * * * It is not enough that he (the defendant) wilfully obstructs the recruiting or enlistment service. It has got to be to the injury of the service of the United States. So that, in order to come within this statute, you will have to show, just as they did in the Milwaukee case, that somebody who would otherwise have entered the service was induced not to, because otherwise there would be no injury."

The defendant was charged, *inter alia,* with criticising the Root Commission, with asserting that loyal citizens should withdraw from the war and with alleging that Great Britain was not doing her share, etc. The jury was instructed to return a verdict of not guilty.

In United States *vs.* Eastman (Masses Publishing Co., *et al.*) 252 Fed. 232, the defendants were indicted on the charge of conspiracy (1) to cause insubordination, etc., in the military forces, and (2) to obstruct the recruiting and enlistment service. The first count was dismissed on motion, because the indictment did not allege any intended action which would have effected the alleged forbidden intent. The trial on the second count resulted in a disagreement.

Judge Hand said:—

> "* * * Every man has the right to have such economic, philosophic or religious opinions as seem to him best, whether they be socialistic, anarchistic or atheistic.
>
> "Each defendant has the constitutional right of freedom of speech also, unless he violates the express law, which he is accused of violating, no matter how ill-timed, unsuited to your sense of propriety or morally wrong his opinions, utterances or writings may be. * * *
>
> "Every citizen has a right, without intent to obstruct the recruiting or enlistment service, to think, feel, and express disapproval or abhorrence of any law or policy or proposed law or policy, including the Declaration of War, the Conscription Act, and the so-called sedition clauses of the Espionage Act; belief that the war is not or was not a war for democracy; belief that our participation in it was forced or induced by powers with selfish interests to be served thereby; belief that our participation was against the will of the majority of the citizens or voters of the country; belief that the self-sacrifice of persons who elect to suffer for freedom of conscience is admirable; belief that war is horrible; belief that the Allies' war aims were or are selfish and undemocratic; belief that the Hon. Elihu Root is hostile to socialism, and that his selection to represent America in a socialistic republic was ill-advised.

"It is the constitutional right of every citizen to express his opinion about the war or the participation of the United States in it; about the desirability of peace; about the merits or demerits of the system of conscription, and about the moral rights or claims of conscientious objectors to be exempt from conscription. It is the constitutional right of the citizen to express such opinions, even though they are opposed to the opinions or policies of the administration; and even though the expression of such opinion may unintentionally or indirectly discourage recruiting and enlistment. * * *"

"If it was the conscious purpose of the defendants to state truth as they saw it; to do this clearly and persuasively in order to lead others to see things in the same way, with the object to bring about modification, reconstruction or reshaping of national policy in accordance with what they believed right and true, and obstruction of the recruiting and enlistment service was not their object, the jury cannot find them guilty. * * *"

In United States *vs.* Olivereau (Dist. of Wash.), the indictment included counts alleging the commission of the second and third offences defined in Section 3 of the Espionage Act, and also the mailing of matter urging treason, insurrection or forcible resistance to law.

Judge Neterer said:—

"All persons are free to express their views on all public questions so long as they are actuated by honest purposes, and not for the purpose of obstructing the execution of the laws of the United States * * * A person may say or do anything not in itself unlawful to prevent the passage of a law, or to secure the repeal of one already passed, but after the law is passed it is every person's duty to conform his *acts* * * * and a person may not, for the purpose of creating senti-

ment against the wisdom of the law, *do* anything with intent to procure a violation of the law."

In United States *vs.* Ramp, Judge Wolverton said:—

> "A citizen is entitled to fairly criticize men and measures * * * this with a view, by the use of lawful means, to improve the public service, or to amend the laws by which he is governed or to which he is subjected. But when his criticism extends, or leads by wilful intent, to the incitement of disorder or riot, or to the infraction of the laws * * * it overleaps the bounds of all reasonable liberty accorded to him by the guaranty of freedom of speech, and this because the very means adopted is an unlawful exercise of his privilege."

As result of an examination of the foregoing cases, it would seem that the fair test of protection by the constitutional guarantee of free speech is whether an expression is made with sincere purpose to communicate honest opinion or belief, or whether it masks a primary intent to incite to forbidden action, or whether it does, in fact, incite to forbidden action.

Let us look, then, at the circular (pages 4½, 8½, 18½, Transcript of Record), the distribution of which through the mails and otherwise was the basis of the prosecution in the case at bar. It was printed on two sides. The heading on one side was: "Assert Your Rights," and on the other side, "Long Live the Constitution of the United States. Wake up, America! Your Liberties Are In Danger!" The unconstitutionality and foolishness of conscription were asserted and people were called upon to assert their constitutional rights.

Both sides of the circular consist largely of quotations from and references to the Constitution. There was no attempt to hide the source of the circular. In fact, readers were urged to go to the Socialist Party Headquarters, 1326 Arch Street, Philadelphia, and *sign a petition to repeal*

the Conscription Act. The worst that could be charged against the circular was that it said "A conscript is little better than a convict," and these, according to the Congressional Record, were the exact words used by Mr. Champ Clark in a speech in Congress.

2. WERE THE DEFENDANTS GUILTY OF CONSPIRACY?

The alleged overt acts of defendants are charged in the indictment in the following language (page 6, Transcript of Record):—

> "1. On, to wit: August 13th, 1917, at Philadelphia aforesaid, the said defendants, *as members of the Executive Committee of the Socialist Party,* did, at a meeting of the said committee adopt a resolution of the following nature, to wit:
>
> " 'M. and S. 15,000 leaflets to be written to be printed on the other side of leaflet—now in use—to be mailed to men who have passed the exemption board, also distribution.
>
> " 'M. and S. Secretary get bids in price of leaflets.'
>
> "2. On, to wit: August 20th, 1917, at Philadelphia aforesaid, at a further meeting of the said Executive Committee the said defendants *did join in approving the minutes* of the aforesaid meeting held August 13th, 1917, wherein the resolution aforesaid was set forth as moved and seconded and did provide for the taking of certain action *in furtherance of the aforesaid resolution,* to wit:
>
> " 'M. and S. that Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried.'
>
> "3. On, or to wit: August 16th, 1917, at Philadelphia aforesaid, the said Charles J. Schenck, *pursuant to the said resolution of August 13th, 1917, did direct* the printing of the circular aforesaid, and did direct the purchase of stamped envelopes for the purpose of distributing the said circulars through the mails.

"4. On, to wit: August 18th, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises at 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia.

"5. On, to wit: August 20th, 1917, and on divers dates thereafter, the said Charles J. Schenck, at Philadelphia aforesaid, did distribute and cause to be distributed the aforesaid circulars, together with stamped envelopes, to persons whose names are to this Grand Inquest unknown, entering on the premises 1326 Arch Street, Philadelphia, which said premises constitute the headquarters of the Socialist Party in Philadelphia, and for the purpose of having the said circulars mailed to men who had been called and accepted for military service."

A large number of witnesses were called by the Government at the trial of the cause, but all the evidence tending to establish the guilt of the defendants may be fairly summarized as follows:—

The Government proved through the witness Samuel O. Wynne, a postoffice inspector, over the defendants' objections, that the defendant Elizabeth Baer admitted that certain papers written in longhand (and also typewritten), were in her handwriting (Transcript of Record, page 14). The said papers were thereupon admitted in evidence over the defendants' objections (Transcript of Record, page 18). The witness had previously testified that the defendant Schenck had identified the said papers as the minutes of the executive committee of the Socialist Party (Transcript of Record, page 13).

Reading from the minutes, the said witness testified as follows:—

"A. On August 13th there appeared here in the minutes under the heading 'New Business' the following:

"'M. and S. that 15,000 leaflets be written or printed on the other side of the leaflet now in use to be mailed to men who have passed exemption boards, also distribution.

"'M. and S. Secretary gets bids on price of leaflets.'

"On August 20th, under the general secretary's report, it says, 'Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing,' and, under unfinished business was, 'M. and S. That Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried.'" (Transcript of Record, pages 18-19.)

It was further shown that the defendant Schenck had ordered a quantity of leaflets (15,000 to 16,000) printed by the "Jewish World." The said leaflets are the leaflets set out in the indictment, entitled as aforesaid, on one page:—

"Long Live the Constitution of the United States"

and on the other page:—

"Assert Your Rights"

A quantity of such leaflets were found in the headquarters of the Socialist Party, 1326 Arch Street, in the City of Philadelphia, which said office was in charge of the defendant Schenck, who was in charge of such headquarters as the general secretary of the Socialist Party (Transcript of Record, page 13). The said circulars were piled up on a table, and the defendant Schenck stated to the witness Wynne, as was also testified by the witness Clara Abramowitz, that they were there for free distribution so that anybody who wanted them could come into headquarters and receive them (Transcript of Record, pages 13, 35).

A number of newspaper clippings containing lists of names and addresses said to be those of persons drafted

into the army under the provisions of the Selective Draft Act, were also found at the said headquarters of the Socialist Party at 1326 Arch Street, and it was shown that a number of the said leaflets or circulars were sent through the mails to persons so drafted into the army.

At the close of the Government's case the defendants moved for a direction of acquittal on the ground that no case had been made out against them. The Government thereupon withdrew the prosecution against the defendants Charles Sehl, Jacob H. Root and William J. Higgins, and the Court denied the defendants' motion as against Elizabeth Baer and Charles T. Schenck. An exception was duly taken by the said defendants to the denial of the said motion (Transcript of Record, page 60).

The jury returned a verdict of guilty against the said two defendants.

The defendants contend that the said verdict should be set aside against them on the ground that it is contrary to law and devoid of any evidence to sustain it.

For the purposes of this argument, and for such purposes only, the defendants assume that the character of the leaflet or circular offered in evidence herein is such that it may present a question for the jury whether an agreement to circulate the same among men engaged in the military forces of the United States would constitute a conspiracy to wilfully cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty under the provisions of the Act of June 15th, 1917.

As to Defendant Elizabeth Baer.

The sole testimony against her is that she wrote the minutes of the meeting of the Executive Committee of the Socialist Party dated respectively August 13th and 20th, 1917. The said minutes were admitted in evidence against her upon the said testimony.

There is absolutely no further proof of any kind to connect the said defendant Elizabeth Baer with the alleged conspiracy. No attempt was made to show that she ever saw

or read the leaflets before or after the printing thereof, or that she had any part in the circulation, distribution or mailing of the same. *There is even no proof that the leaflets found in the Socialist Party headquarters and circulated through the mails were the identical leaflets authorized to be printed, distributed and mailed by the Executive Committee of the Socialist Party.*

There is furthermore not a scintilla of evidence to show that the defendant Elizabeth Baer was a member of the said Executive Committee. The testimony against her comes exclusively from the witness Samuel O. Wynne and is as follows:—

> "A little later, about September 12th, I called on Dr. Baer, who is one of the defendants now, although she was not at that time, in her office, at 129 South Eighteenth Street, I believe, in this city, and I told Dr. Baer who I was and my official position and showed her my commission. I had with me at that time the minutes which were taken out of this book of the meetings of August 20th and August 13th, and those four pages which are the typewritten minutes and also the longhand minutes of the same meeting. I had those with me. I told Dr. Baer that I would like to ask her about these minutes, and she looked at them and *said these were hers.*" (Transcript of Record, page 14.)

And again:—

> "Dr. Baer looked at these two longhand sheets and said that was her handwriting of the minutes of these two meetings, and the four typewritten pages I had were the minutes of the same meeting. I asked her who were on the Executive Committee of the Socialist Party, and she said before she answered she would like to call up her attorney to get his advice about answering, and I told her, 'All right,' and she called up some one on the telephone and called him Mr. Nelson,

> and she told this party on the telephone that Mr. Wynne of the Postoffice Department was there and had the minutes of the meetings of August 20th and August 13th and wanted her to tell him as to who were on the Executive Committee, and who made certain motions. She hung up the receiver and then said her attorney advised her not to talk to me. I told her that was perfectly all right, that she should be guided by whatever her attorney told her, and I wasn't there, I suppose, over five or ten minutes." (Transcript of Record, page 15.)

That was all.

There is nothing in the minutes so offered in evidence or in any other testimony in the case to show who were the members of the Executive Committee and who of them were present at the meetings of August 13th and 20th. The mere fact that the defendant Elizabeth Baer kept the minutes of the meeting falls, of course, very short from proof that she was a member of the Executive Committee. She might have been employed to keep the minutes as secretary, stenographer or otherwise. But a still more fatal objection to the verdict against the defendant Baer is the absolute lack of proof that she voted in favor of the resolutions set forth in the minutes of the meetings of August 13th and 20th, or approved of such resolutions or participated in the deliberations and decisions of the Executive Committee in any way.

A conspiracy is a criminal *agreement* on the part of the defendants and a conviction of such conspiracy can only be sustained against each of the defendants upon positive proof beyond a reasonable doubt of his or her actual participation in such conspiracy, but the utmost that the testimony would warrant the jury in finding against the defendant Baer is that she had mere knowledge of the alleged conspiracy. This, the courts have uniformly held, is entirely insufficient to sustain a conviction of conspiracy.

In the case of McClarty *vs.* U. S. (191 Fed. Rep. 518) the Court said:—

"Imputation to one person of the acts of another can not in criminal cases find adequate basis in mere moral or argumentative considerations. Criminally a man can only be held responsible for what he does or actually procures to be done."

And again:—

"A mere failure on the part of the conspirator to prevent another from doing the act of his own volition cannot be sufficient (to establish a conspiracy on his part) unless we disregard clearly established canons of statutory interpretation."

In the case of Marrash *vs.* U. S. (168 Fed. Rep. 225) the Court expressed the doctrine in the following language:—

"We are unable to find sufficient evidence against Habib Marrash. There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which rises to the dignity of proof required in criminal cases. Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough."

In the case of Patterson *vs.* U. S. (222 Fed. Rep. 599, at page 631) it was said by the Court:—

"It is not sufficient to connect any officer or agent of the company with the conspiracy that they knew of it or acquiesced in it. *They must by word or deed have become a party to it.*"

And likewise in the case of U. S. *vs.* Newton (52 Fed. Rep. 275):—

"Proof of mere suspicion, or bare knowledge, that the act is being done by others, without such inten-

> tional participancy in or connection with it, is not sufficient * * * mere knowledge, without more * * * would not make the person a party to the acts."

And this doctrine has been followed in the State Courts as well as in the Federal Courts.

In the case of Commonwealth *vs.* Tilly (33 Pa. Super. 35), a prosecution for conspiracy was based upon the collective wrongful acts of a school board, all of the members of which were convicted for such conspiracy. In setting aside the verdict against such members of the board as had not been shown to have actively and knowingly participated in the wrongful act, the Court held that where certain members of the board were shown to be guilty of conspiracy, other members can not be convicted of the same offense merely because they were members of the board but that "it must be shown affirmatively that such members participated with the others in the criminal confederation."

How much stronger is the case of Elizabeth Baer who was not even shown to be a member of the Executive Committee of the Socialist Party?

As to the Defendant Charles T. Schenck.

The proof of conspiracy against the defendant Schenck is predicated solely and exclusively upon his alleged cooperation and confederacy with the Executive Committee of the Socialist Party in drafting, printing, circulating, distributing and mailing the leaflets or circular above described. The indictment charges the defendants, including the defendant Schenck with having committed the said acts "as members of the Executive Committee of the Socialist Party" and "in furtherance of the aforesaid resolutions" (contained in the minutes of the meetings of August 13th and 20th), and again "pursuant to the said resolution of August 13th, 1917;" and the theory of the Government throughout the trial rested solely upon the alleged connection between the alleged resolutions of the said Executive Committee and the alleged acts of the defendant Schenck.

The Court's denial of the motion to acquit the said defendant Schenck was likewise based upon the theory that there was proof in the case of such co-operation or confederacy between the Executive Committee of the Socialist Party and the defendant Schenck. The alleged crime of which the defendant Schenck was found guilty by the jury is the crime of conspiracy which is inevitably predicated upon the acts and criminal co-operation of at least two persons. One person cannot conspire with himself. The conviction against the defendant Schenck can not stand unless a criminal agreement between him and the Executive Committee of the Socialist Party was shown.

If we eliminate the alleged minutes of the Executive Committee of August 13th and 20th from the testimony in this case, the only proof against the defendant Schenck remains that he ordered the incriminating leaflet or circular and that he kept quantities of the same in his office available for use by any persons who might ask for the same. This in itself might or might not involve a direct and personal violation of some provisions of the Espionage Law but it could not possibly support a conviction of the crime of conspiracy.

The question then with reference to the defendant Schenck resolves itself to this: Is there in the testimony herein any legal, admissible proof of any agreement, understanding, co-operation or connection between him and the Executive Committee of the Socialist Party in the drafting printing, circulating, distributing or mailing of the said leaflets or circulars.

Counsel contends that there is no such proof.

As shown above, there is nothing to indicate that the circulars caused to be printed by the defendant Schenck were the circulars referred to in the minutes of the Executive Committee of the Socialist Party.

But even a weightier objection is that the alleged minutes of the said meetings of the Executive Committee of August 13th and 20th, if admissible at all, were only admissible against the defendant Elizabeth Baer and not as against the defendant Schenck, and that as far as he is concerned they

could not be considered by the jury. They were non-existent as to him.

The rule of law is clearly established that while the act of one conspirator in the prosecution of the enterprise is, *after independent proof of the conspiracy,* evidence against all of the conspirators, his admissions as to the existence of the conspiracy itself, are inadmissible in evidence against his alleged co-conspirators.

Fain *vs.* U. S., 209 Fed. Rep. 525, at page 534;
Logan *vs.* U. S., 144 U. S. 263;
Brown *vs.* U. S., 150 U. S. 93.

In a criminal prosecution acts and declarations of one conspirator made in the absence and beyond the hearing of an alleged co-conspirator, are not admissible against the latter, particularly after the accomplishment of the conspiracy (Commonwealth *vs.* Zuern, 16 Pa. Super. 588), or at least until the existence of the conspiracy has been shown by testimony independent of such acts and declarations of a co-conspirator (People *vs.* Kelly, 64 Pac. 1091).

In this case the alleged admission of defendant Elizabeth Baer cannot be claimed to have been an act done or declaration made in pursuance and as part of the alleged conspiracy. It was clearly an admission of the conspiracy itself. It was made after the alleged conspiracy had been fully accomplished. It was made in the absence and beyond the hearing of the defendant Schenck, and there was no other proof of the alleged conspiracy except the declaration of the defendant Baer.

Under the circumstances the alleged admission of the defendant Elizabeth Baer was clearly inadmissible against the defendant Schenck and as far as he is concerned there is no proof of any resolution passed by the Executive Committee of the Socialist Party authorizing or directing the publication or distribution of any leaflet or circular.

The defendant Schenck even if shown guilty of wrongdoing, is thus left without any confederates as far as the legal evidence in the case shows and as was said in the case of U. S. *vs.* Newton (*supra*):—

> "One person cannot constitute a conspiracy. If every part of the acts charged in the indictment had been done by the defendant alone, and without any other person having combined with him in any arrangement or agreement with reference thereto, * * * then there would be in law no conspiracy."

The defendants assert the following incontrovertible propositions:—

1. That the defendants herein were found guilty of the crime of conspiracy and not of direct individual violations of the Espionage law.

2. That the alleged conspiracy was one formed by the Executive Committee of the Socialist party of the City of Philadelphia, and that such conspiracy had for its object the printing, mailing and distribution of a certain circular among persons in the military service of the United States. This was the sole theory upon which the indictment was drawn and the case tried and submitted to the jury. No other conspiracy was either charged or attempted to be established upon the trial, nor could any other conspiracy be spelled out from the evidence.

3. The only proof of such alleged conspiracy offered upon the trial was that contained in the resolutions alleged to have been adopted by the Executive Committee of the Socialist party on August 13th and 20th. The charge of the alleged conspiracy must stand or fall by the proof of these resolutions.

Upon these simple propositions the defendants contend:—

As to the Defendant Charles T. Schenck.

That the alleged resolutions were not admissible as against him upon the admission of his co-defendant Elizabeth Baer, and that there was no other competent testimony of the adoption of the said alleged resolutions.

As to the defendant Schenck therefore, the record is absolutely devoid of any proof of conspiracy. The fact that he ordered and had in his possession the incriminating circulars and permitted them to be distributed, and that he had in his possession lists of names of drafted men, does not cure the fatal defect. All these elements become relevant only as proof of overt acts after the alleged conspiracy has been independently established. No attempt was made upon the trial to establish a conspiracy between the defendant Schenck, the witness Clara Abramowitz or any of the persons who distributed the circular. If Schenck participated in any conspiracy, it must have been in the alleged conspiracy of the Executive Committee or not at all, and we repeat as to the defendant Schenck, there is not a scintilla of competent evidence to prove the existence of such a conspiracy. There is also no strength in the contention of the prosecution that the conviction may be upheld under the third count of the indictment, charging the defendants with unlawfully using and attempting to use the mails and postal service of the United States, because the record is barren of any proof that the defendant Schenck mailed or attempted to mail a single one of such circulars. The alleged appropriation of One hundred twenty-five dollars ($125) for such purpose by the Executive Committee of the Socialist party is not any evidence against the defendant Schenck, since the resolution to that effect was not admissible as against him.

As to the Defendant Elizabeth Baer.

There is an absolute failure of proof that she assented to, or voted for the alleged resolutions of the Executive Committee of the Socialist Party, or that she did anything or committed any acts in furtherance of the objects of the said resolutions. The utmost that can be claimed against her, perhaps and inferentially, is that she was present at the meetings at which the said resolutions were adopted. Even under the contention of the Government, that is by far

not enough, to charge her with active participation in a criminal conspiracy.

3. CONSTITUTIONALITY OF SEARCH WARRANT AND OF USE OF EVIDENCE SO OBTAINED.

The fourth amendment to the Constitution reads:—

> "The right of the people to be secure * * * against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath * * * and particularly describing the place to be searched and the persons or things to be seized."

The fifth amendment to the Constitution reads:—

> "No person shall be * * * compelled in any criminal case to be a witness against himself. * * *"

In U. S. *vs.* Tureaud, 20 Fed. 621, 623, it was said:—

> "The rule which was established was that the warrant should issue only upon probable cause, supported by oath or affirmation of the person making the charge, in which should be stated the facts within his own knowledge, constituting the grounds of such belief or suspicion. The probable cause supported by oath or affirmation prescribed by the fundamental law of the United States, is, then the oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense. It does not appear, from the affidavit upon which these procedures are based, that the affiant has any knowledge whatever of the truth of the matters contained in the informations; but simply that 'all the statements and averments are true as he verily believes, *i. e.*, that he believes them all to be true without any showing as to the grounds of the belief."

In the matter of a Rule of Court, 3 Woods (U. S.) 502, Bradley, C. J., said:—

> "One cause of this evil seems to be the fact that warrants are issued upon the affidavit of some officer, who, upon the relation of others, whose names are not disclosed, swears that upon information, he has reason to believe, and does believe, the person charged has committed the offense charged. * * * In view of these considerations * * * No warrant shall be issued by any commissioner of this Court for the seizure or arrest of any person charged with a crime or offense against the laws of the United States upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief or suspicion."

The affidavit on which the search warrant was issued in this case bears out the testimony of Postoffice Inspector Wynne (page 12, Transcript of Record):—

> "Q. During August of this year did you receive a complaint concerning the mailing of a particular circular?
>
> "A. Yes, on August 27th, of this—we received a number of complaints of people who mailed their complaints in, addressed to the Postoffice Inspector, and other people came in in person and brought their letters that they had received through the mails and the letter contained a circular which I have here and they complained as to the receipt of it."
>
> * * * * * * *
>
> "Q. What did you do after you received that circular?
>
> "A. The same time, or about the same time, on the same day, I also received complaint from various postoffice station superintendents in Philadelphia that a

great number of these letters were being mailed through their station. I directed them to hold the letters from mailing and send them into my office, and I received that pack of letters there, and there are some six hundred of them, I think, as I counted them."

(Page 13, Transcript of Record):—

"Q. Then what was your next action?

"A. The matter was then submitted to the United States Atorney and by his direction, a search warrant was issued for the headquarters of the Socialist Party at 1326 Arch Street as it appeared on this circular."

He said he had reason to believe, and did believe, that there had been a violation of the Act of June 15th, 1917, to wit, Section 3 of Title XII of the Espionage Act, but he failed to show how it was he got his belief and why he did believe. It is true he mentioned this specific place, 1326 Arch Street, and asked for a search warrant specifically for mailing lists, circulars, letters, books and papers; but no mention was made of any particular person who gave him the information, or when and where he got the information or how he got it.

Chief Justice Marshall, in *ex parte* Bollman, 4 Cranch (U. S.) 75, says, on page 130:—

"This probable cause therefore ought to be proved by testimony, in itself illegal, and which, though from the nature of the case it must be *ex parte* ought in most other respects to be such as a court and jury might hear."

In U. S. *vs.* Sapinkow, 90 Fed. 654, 660 (C. C. N. Y.), it was stated:—

"As his affidavit stands, the deponent has stated on information and belief that the defendant was guilty of various acts and omissions, but he fails utterly to give the slightest substantiations of such information and belief or either."

Conviction obtained by evidence obtained in an illegal search and seizure is illegal:

Weeks *vs.* U. S., 232 U. S. 383;

Flagg *vs.* U. S., 233 Fed. 481 (C. C. A. 2d Cir. and authorities there cited).

Although the Constitution says that no person shall be compelled in any criminal case to be a witness against himself, it seems that judicial decision has modified the exact words of the Constitution to mean that no person shall be compelled in a criminal case to be a witness against himself, provided his testimony is verbal. If, however, he should be unfortunate enough to write something or save some printed matter, the rule no longer holds; and he can be convicted out of his own mouth, just as if the Constitution never said anything about the matter.

There is no doubt that the cases show that the general rule is that evidence obtained by means of a search warrant is not inadmissible, either on the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself. The courts seem only to modify the rule in the case of unreasonable search or seizure.

U. S. *vs.* Wong Quong Nong, 94 Fed. 832.

Some of the cases seem to hold that it is an unreasonable search if a defendant's *private* papers are taken. Others seem to hold that it is an unreasonable search if papers are taken from the defendant's *personal* possession. But it strikes counsel for the defendants in the case at bar that no scientific difference can be made between a person's private papers and other papers and between papers in a defendant's personal possession and otherwise possessed. In theory, at least, the defendants maintain that the Constitution was intended, in this respect, to prevent a prosecutor from making a defendant testify against himself, whether by verbal, written, printed or other testimony.

Looking at the case at bar from all points of view, the

defendants contend that they are not criminals in the ordinary sense of the word. This is no question of moral turpitude. This is a political question. No matter what the law may be, no matter what even this high Court may decide, there is a question here of human freedom which will not down in spite of what the laws may say or what the laws may be.

Even this high Court, one of the greatest in the civilized world, has changed its opinion on political subjects and changed its opinion with regard to the meaning of laws passed by the Legislature, always holding, however, that it construed the laws of the Legislature as to their meaning and constitutionality.

Martyrs are not always right. Conscientious objectors are sometimes wiped out and their opinions are entirely lost in the progress of humanity. But it remains a fact, nevertheless, that no government and no court and no law can easily afford to take issue with the smallest minority of citizens, if they are not hypocrites and if they are not seeking self-aggrandizement, but are steadfastly standing for what they honestly, conscientiously believe, and pointing to the history of the past to show that the trend of events is in their favor.

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