# INDEX.

## TABLE OF CASES CITED.

## STATUTES AND CONSTITUTIONS.

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.*

---

**Supplementary Brief for Plaintiff-in-Error Showing that Due Process and Equal Protection Provisions of the Fourteenth Amendment to the United States Constitution were Invoked in the California District Court of Appeal and there Denied; Together with Certain Considerations Affecting the Merits.**

---

This Court upon the first argument dismissed the cause "for want of jurisdiction." Plaintiff-in-Error petitioned for a rehearing, which was granted. The case was set down for a second argument upon the jurisdiction and the merits.

## Jurisdiction.

The first purpose of this memorandum is to make clear that plaintiff-in-error pressed upon the California District Court of Appeal—the court of last resort to which appeal ran—contentions based upon the due process and equal protection clauses of the Fourteenth Amendment and that that court denied those contentions:

(1) The relevant documents which have been submitted to this court are the following:

The record, including an addition thereto filed December 16, 1924, and printed as pages 337-339; extracts from the briefs of Miss Whitney's counsel in the California District Court of Appeal printed as an Appendix to our Petition for Rehearing by this Court; and a copy of the petition for a hearing* by the Supreme Court of California, filed on February 11, 1926, as an addition to the record in this court, by direction of this Court.

This petition for a hearing by the California Supreme Court serves merely to show, in conjunction with the order of the California Supreme Court denying the petition (Record, page 1, fol. 1), that the highest State court refused to review the judgment of the California District Court of Appeal. It has, of course, no bearing on the showing of Federal questions raised in the State court

*By typographical error, the copy of this document filed in this court is described on its cover as a "petition for a *re*-hearing." No hearing of this cause was of course ever had in in the California Supreme Court (see order denying the petition to have the cause heard in that court, Record, page 1), and the petition itself, especially in the opening and closing paragraphs (Addition to Record, pages 1-2, 35), clearly shows its character.

of last resort, which was the District Court of Appeal (infra, pages 6-7).

(2) The addition to the record, above mentioned, recites the following order of the California District Court of Appeal:

> "It is now ordered that the said remittitur be amended by inserting therein the following statement:
>
> 'The question whether the California Criminal Syndicalism Act (Statutes, 1919, page 281) and its application in this case is repugnant to the provisions of the Fourteenth Amendment to 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, was considered and passed upon by this Court.'
>
> And the Superior Court of the State of California in and for the County of Alameda is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly" (page 337).

The order is dated December 9, 1924, bears the signature of the Presiding Justice and is certified as correct by the clerk of the court (page 337—Compare as showing that the order is a court order, the order of affirmance by the District Court of Appeal, Record, page 1, fol. 2).

(3) It is settled that a certificate of the State court made part of the record by order of that court is sufficient to establish the raising of the Federal questions below (*Consolidated Turnpike*

*Co.* vs. *Norfolk, etc., Railway,* 228 U. S., 596, pages 598-599; *Merchants National Bank* vs. *Wehrmann,* 202 U. S., 295; *Cincinnati Packet Co.* vs. *Bay,* 200 U. S., 179, 182). The certificate in the case at bar is in the same form as the certificate in the recent and similar case of *Gitlow* vs. *New York.* In that case, after the addition of the certificate to the record, the application for a writ of error was referred to the full bench of this court and was granted (260 U. S., 703), and the Court proceeded to review the case upon its merits (268 U. S., 652).

(4) This Court's initial doubt with respect to the jurisdiction may have been based upon the fact that no Federal question is mentioned in the so-called "General Grounds of Appeal to the California District Court of Appeal" (Record, pages 57-9). The explanation is to be found in the principles of California criminal appellate practice. The statement of these general grounds is required only for the purpose of apprising the phonographic reporter "what portions" of his "notes it will be necessary to have transcribed to fairly present the points relied upon" (Record, page 57, see also page 59; see California Penal Code, §1247, California Statutes, 1911, page 692, amending Statutes of 1909, page 1084). Section 1247 of the California Penal Code and the related Section 1246 are attached hereto in an Appendix. An examination of these sections will show that the statement of general grounds of appeal is not directed to the formulation of legal propositions and in no way corresponds to the familiar assignment of errors in the appellate practice of many States and of the Federal courts. It is merely a require-

ment imposed upon the defeated party that "within five days" he inform the reporter which portions of the phonographic notes of *evidence* he thinks it necessary to have transcribed. The only reference to legal contentions is the declaration in the second paragraph of Section 1247 that "all argument of counsel not objected to at the time it was made" is to be "excluded" from the transcript.

The reference to "assignments of error made and passed upon in the State Court" which defendant-in-error quotes (page 4) was not made in a California case, and the phraseology there used would not be appropriate to the California practice.

(5) The failure to refer to Federal questions in the statement of grounds of appeal was therefore under the California practice as inevitable and as irrelevant as a failure to take exceptions in the trial court, as to which see Section 1259 of the California Penal Code:

> "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." *

*(Cal. Penal Code, §1259 is quoted in full as Appendix C to our main brief, page 93; see also as to charges of the Court, §1176 there quoted.)

Miss Whitney's appeal was taken in open court (Record, pages 29-30).

(6) It is wholly immaterial that the Federal question may not have been raised in the trial court, or rather that it does not appear by the transcript of notes—which in general (see again §1247, Cal. Penal Code) "excludes" argument of counsel—there to have been raised. "It is," by the express language of Judicial Code, Section 237, enough that the Federal question was raised and necessarily decided by "the highest court of the State in which a decision in the suit could be had" (*Cincinnati Packet Co.* vs. *Bay,* 200 U. S., 179, page 182; *Chicago R. I., etc., R. R. Co.* vs. *Perry,* 259 U. S., 548, 551 and cases cited).

(7) The California District Court of Appeal for the First Appellate District, became in this case "the highest court" of California "in which a decision in this suit could be had" when the California Supreme Court by its order of June 24, 1922 (Record, page 1), denied defendant's petition to have her cause heard in that court. This order of the Supreme Court of California is in exactly the same form as the order of that court in the case of *Mulcrevy* vs. *San Francisco* (231 U. S., 669, see page 672), in which case Mr. Justice McKenna, writing for this court, unmistakably declared that such an order was a refusal to review and not an affirmance, and that writ of error from this court should have been directed not to the California Supreme Court but to the California District Court of Appeal. The result in the *Mulcrevy* case was a necessary deduc-

tion from the rule announced in *Norfolk Turnpike Co.* vs. *Virginia* (225 U. S., 264, page 269), that this court would construe the refusal of the highest court of a State to review a cause as a refusal to take jurisdiction and not as an affirmance,*

> "unless it plainly appears on the face of the record, *by affirmance in express terms of the judgment or decree sought to be reviewed,* that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits." (225 U. S., page 269. Our italics.)

---

*The quality of the ruling by the Supreme Court of California as a refusal to allow an appeal and not as an affirmance, is conclusively shown by Article VI, Section 2 of the California Constitution which requires in the case of every actual "determination" by that court that "all decisions of the Court, in Bank or in Department, shall be given in writing, and the grounds of the decision shall be stated." There is no statement of grounds in the case at bar.

There was no appeal as of right to the California Supreme Court from the determination of the District Court of Appeal (Cal. Constitution, Art. VI, Section 4) so that the case at bar does not present the problem involved in the late decision in *Southern Electric Co.* vs. *Beha* (Advance Opinions, 1925-6, page 116—December 15, 1925). Appeals as of right in criminal causes are limited to "cases where judgment of death has been rendered." (See *Treadwell's* Annotated Constitution of California, 5th Edition, 1923, page 38.) The practice here adopted was the practice of applying for a transfer of the cause from the District Court of Appeal to the California Supreme Court after judgment of affirmance in the District Court of Appeal. Such discretionary order may be made by the Supreme Court "within 30 days after such judgment shall become final therein." That judgment does become final "upon the expiration of thirty days after the same shall have been pronounced," see *Treadwell,* ibid., page 41. For the dates in the case at bar, see judgment and remittitur of the District Court of Appeal, Record, pages 1-2, and order denying appeal by the Supreme Court, Record, page 1.

To the same effect see,

> *Merchants Liability Co.* vs. *Smart,* 267 U. S., 126, 127;
> *Davis* vs. *L. L. Cohen & Co.,* 268 U. S., 638, 639.

(8) In a case like the present it is only by certificate that it is possible to show that Federal questions were raised "in the highest court of the State in which a decision in the suit could be had." For the briefs in the State court are no part of the record here (*Zadig* vs. *Baldwin,* 166 U. S., 485). The oral arguments in the State court are not preserved. The opinion by the California District Court of Appeal made no reference to the Federal questions—a result, no doubt, induced by the circumstance that the Supreme Court of the State, in overruling an application by Miss Whitney for a writ of prohibition against the prosecution, had said:

> "We see no merit in the claim that the act under which petitioner is being prosecuted is invalid as being in violation of the *Federal* and State Constitutions." (*Whitney* vs. *Superior Court,* 182 Cal., 114—our italics.)

(9) The case was thus the familiar case in which a certificate of the State court, made part of the record, shows that the Federal contentions were urged below and there overruled. This Court, far from rejecting such a certificate, has been careful "to prevent any possible inference that there was any intention to doubt in the

slightest degree the accuracy of the statement contained in the certificate of the presiding judge of the court below" (*Consolidated Turnpike* vs. *Norfolk, etc., Railway,* supra, 228 U. S. at page 599).

(10) The only possible limitation upon the effect to be given to such a certificate or to any demonstration by the record itself that Federal questions were urged in the State court, is a limitation manifestly inapplicable here. We mean the limitation that if the record—or a concession of plaintiff-in-error (see *Dewey* vs. *Des Moines,* infra),—affirmatively shows that one clause of the Federal Constitution and one only was relied upon in the State courts, another clause may not be made the basis of argument here (*Keokuk Bridge Co.* vs. *Illinois,* 175 U. S., 626; *Cox* vs. *Texas,* 202 U. S., 446, 451-2), or that if only one error constituting a violation of the due process principle is shown by the record to have been urged in the State court, another error, wholly distinct and disconnected, may not be urged here (*Dewey* vs. *Des Moines,* 173 U. S., 193, 198).

In the case at bar, there is, as we shall see, no shadow of suggestion either in the record or by admission of counsel (compare *Dewey* vs. *Des Moines,* supra, page 197) that the Federal Constitutional rights to due process and equal protection raised in the District Court of Appeal and denied by that court (see order of District Court of Appeal, page 337), were limited in any way.

(11) Since the record thus shows, in the only way that it could in the circumstances show, that in the California District Court of Appeal plain-

tiff-in-error raised the Federal question of the violation of her rights under the due process and equal protection clauses of the Federal Constitution; since the record also shows conclusively that these questions were not raised too late under the State practice (*Cincinnati Packet Co.* vs. *Bay,* 200 U. S., 179, page 182), and since the record furthermore shows nothing to limit these Federal questions of due process and equal protection in their widest scope, it is accordingly open to plaintiff-in-error in this court to adduce all possible arguments in support of her claim that the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States were violated by the "California Criminal Syndicalism Act and its application in this case." "Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" (*Dewey* vs. *Des Moines,* 173 U. S., 193, at page 198). The parties, indeed, cannot be so restricted, for the oral arguments, as we have remarked, are, in so far as we know, regularly preserved in any jurisdiction.

(12) It happens, however, that in the case at bar, it can be and has been shown that the very arguments addressed by plaintiff-in-error to the California District Court of Appeal in support of these claims of Federal right and there rejected, were to a surprising degree the same arguments we have urged in our main brief in this court. We refer to the appendix to our petition for rehearing, in which we have submitted the relevant parts

of Miss Whitney's briefs in the California District Court of Appeal.

(13) In her closing brief in the California District Court of Appeal (Appendix, Exht. B,* pages xxxii, et seq.) plaintiff-in-error, in support of her claim that the "California Criminal Syndicalism Act and its application in this case," violated the 14th Amendment of the Constitution of the United States (Appendix, page xxxii) in that it denied the equal protection of the laws (Appendix, pages xxxii-xlvi; see especially quotations from the opinions in *American Sugar Refining Company* vs. *McFarland,* 229 Fed., 284 [pages xl-xli], and *In re Van Horn,* 70 Atl., 986 [page xliv], where the equal protection clause of the 14th Amendment is specifically mentioned), strongly argued that the statute unjustly discriminated between those who opposed and those who favored change in industrial ownership (Appendix, pages xxxii, xxxiii, xxxiv).

Substantially the same argument appears in Point X of our main brief in this court.

(14) In support of her claim that the California Criminal Syndicalism Act and its application in her case deprived her of liberty without due process of law, in violation of the 14th Amendment of the Federal Constitution, plaintiff-in-error argued in the California District Court of Appeal:

*The references in small Roman numerals are to the pages of the Appendix to the petition for re-hearing in the Supreme Court of the United States.

(a) That the statute was void for indefiniteness* (Appendix, Exh. B, pages xlvii-xlviii).

In our principal brief in this court we urged the same argument (Point V, pages 61-65) and as well a closely related argument (Point III, pages 47-51). Since the opinion of the Circuit Court of Appeal (Record, pages 2-4, especially page 4) in terms excluded from the statutory definition of the crime, the element of wrongful intent which might have supplied a definite standard of guilt (*Hygrade Provision Co.* vs. *Sherman*, 266 U. S., 497, page 501), this related ruling in the State court of last resort was made, in our main brief in this court, the subject of another separate point (Point IV, pages 52-60).

---

*At page 19 of the closing brief (Appendix, page xxxi) appears the caption "Constitutionality of Criminal Syndicalism Act." On the same page (Appendix, page xxxii) under the heading we have already noted:

> "Appellant respectfully urges that the criminal syndicalism law of the State of California, as it stands, is violative of the 14th Amendment of the Constitution of the United States";

there follows a continuous discussion of equal protection (to which we have referred) which ends at the bottom of page xlvi of the Appendix. At the top of page xlvii of the Appendix appears the following caption:

> "STATUTE VAGUE. *Again the statute is open to constitutional objection on the ground that its terms are vague and not susceptible of definition.*"

A contention of vagueness definitely connected with the Fourteenth Amendment was of necessity a due process contention (Compare *U. S.* vs. *Cohen Grocery Co.*, 255 U. S., 81, 89; see also *International Harvester Co.* vs. *Kentucky*, 234 U. S., 216).

(b) That the statute as applied in her case violated the constitutional rights of free thought, free speech and free assemblage.

This claim was urged in Miss Whitney's opening brief in the California District Court of Appeal (see Appendix, page ii), and it was made unmistakably clear that the "constitutional" rights referred to were Federal rights by the reassertion in the same brief of "the right of every citizen under the Constitution and fundamental laws of *this land* to freedom of conscience and freedom of speech and to advocate changes, both political and economic" (Appendix, page xix). Again in her closing brief in the California District Court of Appeal, emphatic reference was made to the fact that the California Criminal Syndicalism Law "had been utilized as an engine of tyranny to deprive American citizens of freedom of political thought and speech" (Appendix, page xxx).*

The same arguments and arguments closely related are found in our main brief in Points VI, VII, VIII and IX (see pages 66-79).

(15) In the California District Court of Appeal Miss Whitney's counsel repeatedly and explicitly argued (as we have argued in Points I and II of our main brief) that the overruling of the "demurrer" to the information and the denial of

*These claims of Federal right are made still clearer by repeated references to "the fundamental concepts of the rights of American citizens" (Appendix, page xxx) and to "American ideals of freedom of thought and freedom of speech" (Appendix, page xlviii).

a "bill of particulars" together with the general vagueness of the prosecution as to the occasion of the offense "deprived the defendant of a substantial right" (Appendix, page xvii); "the defendant and her counsel went into the trial of this case without the slightest knowledge as to what alleged acts of the defendant the District Attorney would rely upon for her conviction" (ibid., page xvii; see also pages iii-iv, xvii-xviii, xiv, lv). Miss Whitney's counsel urged, indeed, that the denial of the "constitutional right of every accused person 'to be informed of the nature of the accusation against him'" (Appendix, page iv) involved a genuine danger of double-jeopardy (Appendix, page vi, page xiv; compare our principal brief, Point I, pages 36-7; Point II, pages 38-46). Miss Whitney's counsel made these contentions although they could not anticipate the full extent of the injury until the District Court of Appeal itself made matters worse by an opinion which, instead of clarifying the issues, confounded them still further (see our principal brief, pages 19, 21, 35). (That the plaintiff-in-error is not bound to anticipate in the State court the unconstitutional rulings which that Court is going to make, see *Saunders* vs. *Shaw,* 244 U. S., 317; and to the same effect *Merchants National Bank* vs. *Wehrmann,* 202 U. S., 295, 299.)

(16) This Court has recognized that even where the record or the concession of plaintiff-in-error's counsel shows—as here it does not show—that a single Federal question only was raised in the court below there would be "no hesitation" in

considering here a "question" which is "only an enlargement" of the question in the State court or which is "so connected with it in substance as to form but another ground or reason for alleging the invalidity" of the ruling attacked below (*Dewey* vs. *Des Moines,* supra, 173 U. S., 197-8). The lack of definiteness in the prosecution urged in Points I and II of our principal brief here was but the logical outcome of the statute's failure to define the character of the association which it made a crime. The statute carefully avoids a requirement of either knowledge or intent as an element of guilt except in becoming a member. One is guilty who "is or knowingly becomes a member." The information followed the language of the statute. It charged that "at the said County of Alameda, State of California," she "was, is and knowingly became a member." (For quotations from both the statute and the information, see our principal brief, pages 6-7). Was Miss Whitney convicted for attending the Oakland convention or for association with some other assembly or group of the Communist Labor Party; was she convicted of "knowingly" becoming a member of a group whose purposes were forbidden, or of mere presence without knowledge of or assent to such purposes? The record, like the information, leaves both occasion and intent uncertain. The opinion of the District Court of Appeal perpetuated the uncertainty by its reference (Record, pages 3-4) to three different groups—the Oakland local, the Oakland convention, and the Communist Labor Party of California—and by in so many words declaring that

Miss Whitney's "knowledge" and "realization" was "a matter with which this Court can have no concern" (Record, page 4).

(17) The California Attorney General says that plaintiff-in-error has "saved" her "objections to the validity of the *statute* itself, but *not* the unconstitutionality of its *application*" (Defendant-in-error's brief on rehearing, page 2). The distinction is meaningless. "The case must be considered as though the statute, had in specific terms provided for liability upon the precise facts" of Miss Whitney's case (*Cudahy Co.* vs. *Parramore,* 263 U. S., 418, page 422; see also *Dahnke-Walker Milling Co.* vs. *Bondurant,* 257 U. S., 282, pages 288, 289). The attempted distinction is not between the question of due process presented by the statute itself and the question of due process presented by the procedure in this case; these questions the attorney general regards as one, for he says (Defendant-in-error's brief on rehearing, page 2) that one of the federal points made in the Court below was that "the act is void for indefiniteness and that *the information in the language thereof is insufficient.*" (Our italics.)

* * * * * * *

Summarizing and restating the jurisdictional issue we find the situation to be as follows: A certificate of the State court, made part of the record, shows that the Federal Constitutional issues based upon the due process and equal protection clauses of the Fourteenth Amendment were urged in that court and there denied; we know of no case where such a showing, or any

showing, made part of the record has been refused full effect except where the record itself or the concession of plaintiff-in-error demonstrates that only one particular aspect of the Federal right was urged below and wholly disconnected contentions are pressed here; in the case at bar the record shows no such limitation, and there is no concession by counsel for plaintiff-in-error and indeed no contention to this effect, as far as we know, by counsel for defendant-in-error. On the contrary, it affirmatively appears in the case at bar that even the same "arguments," or much the same arguments, were urged below that were urged and will be again urged here. And all this appears, although the oral arguments below are not preserved; although this Court, up to the time when the District Court of Appeal acted, had not recognized that issues of free speech and the like raised a question of Federal right (see *Prudential Insurance Co.* vs. *Cheek,* 259 U. S., 530, at page 543, decided almost exactly contemporaneously with the Whitney case in the District Court of Appeal); although the Supreme Court of California in litigation involving the Whitney prosecution had in terms denied that any question of Federal Constitutional right was presented (*Whitney* vs. *Superior Court,* 182 Cal., 114); although the full infraction of constitutional right involved was not and could not be apparent until the District Court of Appeal affirmed the ruling below, and although the appeal was taken under a practice which calls in so many words for the "exclusion" from the record of the argument of counsel in the trial court.

**General Considerations Concerning the Merits.**

This is not a case where a defendant, whose own conviction violates no constitutional right, seeks to avoid the penalty properly attached to his act by statute on the ground that the language of the statute is broad enough to include other acts which could not constitutionally be made punishable as crimes. It is to innocent acts which clearly come within the condemnation of the California Criminal Syndicalism Act that the penalty in this case is attached. And it is upon a construction of the statute which emphatically excludes the element of conscious intent from the crime created by this statute that defendant-in-error here takes its stand (Brief for Defendant-in-Error on Rehearing, page 27).

* * * * * * *

It is impossible to affirm without holding either

(1) that intent is not an element of the crime defined by section 2, subdivision 4 of the California Criminal Syndicalism Law—and this is the view of the question which defendant-in-error especially asks this Court to take (Defendant-in-error's brief on rehearing, page 27); or

(2) that an act which is innocent when committed can become criminal by reason of subsequent conduct or subsequently formed intent—a position squarely opposed to the principle that "the criminal intent essential to the commission of a public offense must exist when the act complained of was done" (opinion of Mr. Justice Field, in *U. S.* vs. *Fox,* 95 U. S., 670, page 671); or

(3) that the mere presence within the county of one who has committed an offense of membership elsewhere is in itself a crime—a position which followed to its logical conclusion would mean that a member of any organization (whether within or without the state) which the Courts of California might hold to be within the condemnation of this act, would in California commit a fresh offense every time he went from one county to another within the state, and thus would make the mere act of crossing the county line a crime.

* * * * * * *

We again direct the attention of this Court to the difficulty of finding in the record any ground of conviction which comes within the charge set forth in the information, which can be supported by any evidence in the record, and which can be upheld on constitutional grounds.

Was Miss Whitney's presence at the opening of the convention of November 9, the crime for which she was convicted? If that convention ever took on the character of criminal syndicalism, it was not until the end of the convention, and over Miss Whitney's protest. The Attorney General admits (Defendant-in-Error's Brief on Rehearing, page 8) that all that Miss Whitney did in the convention was done before the constitution of the State organization was adopted and that her election as alternative member of the state executive committee had likewise preceded the adoption of a constitution for the state organization. Can mere presence in any assembly, however violent the opinions expressed in that assembly, be a crime?

Was her crime assisting to organize the California Communist Labor Party after the convention of November 9th? The record shows (see our main brief, pages 13, 40-41) no organization meeting in Alameda County which she attended between November 9th and November 28th, the date mentioned in the information. She cannot, therefore, be said to have violated the statute in this way.

Was her crime membership in Local Oakland, the local socialist organization to which she had belonged? This local had not, up to the time of the trial, approved the action of the Oakland Convention (see our main brief, page 41). Without such action it could not have become a part of the organization which resulted from that convention and which received its character from the proceedings at the convention.*

---

*On page 6 of the defendant-in-error's brief on rehearing, the attorney general states that Local Oakland had before the convention of November 9 "endorsed the Communist Labor Party and had withdrawn from the Socialist Party." It is not noted by the attorney general that the testimony at this point (Record, page 154) made it perfectly clear that Local Oakland was not, up to the date named in the information, a part of the Communist Labor Party because that party had as yet no State organization.

The attorney general states (Brief on rehearing, page 6) that Miss Whitney "held a *membership card* at this time in said Oakland Branch of the Communist Labor Party." The evidence referred to (Record, pages 190-1) is that Miss Whitney took out a card in the "temporary organization," i. e., the organization which had for its purpose the holding of the convention at which the State party was to be formed. The prosecution relies upon the acts of the state convention in adopting the program and platform of the Communist Labor Party of America to give to the state organization the character of a criminal syndicalist organization (see defendant-in-

(*Footnote continued on next page.*)

Was her crime membership in the state organization which resulted from the convention of November 9th? This was not present in Alameda County any time between November 9th and November 28th. It had no local branch there, as we have said, and it held no meetings there at which Miss Whitney was present. Her mere presence in the County, even if she was a member of that organization, and even if that organization was of a forbidden character, cannot, in itself, have been a crime (supra, page 18).

* * * * * * *

Defendant-in-error in various parts of its brief points to different occasions and to Miss Whitney's connection with different groups as possible bases for her conviction.

The Attorney General dwells in one place upon her membership in the Oakland Local (Defendant-in-error's brief on rehearing, pages 6, 17).

In another place (Brief on rehearing, page 30) he dwells upon her part in the preliminary preparations for the Oakland Convention, as if the mere adoption of the name "Communist Labor Party" in connection with that convention and the temporary organization for it, had already brought that group within the prohibition of the California Criminal Syndicalism Act. This in spite of the fact shown by the whole history of the

---

error's brief, pages 9 to 11). Holding a membership card in the preliminary organization, before any specifically unlawful purposes had been adopted by any California group could not, even in the view of the prosecution itself, have been an offense under the statute. On the same page the Attorney General admits that the purpose of the Oakland convention was "to formulate the purpose" of the California Communist Labor Party.

Oakland Convention that the principles and policies of that body remained undetermined until almost the end of the convention, and that the adoption of the program and platform of the Communist Labor Party of America was by no means a foregone conclusion but was arrived at after much dispute and controversy (Record, pages 121, 142).

In another place (Brief on rehearing, pages 15-16, 26) he points to the fact that Miss Whitney did not withdraw from the convention although she could have done so, as if her crime were precisely her failure to register, by walking out of the convention, her disapproval of the adoption of the program and platform of the Communist Labor Party of America.

And still again, the Attorney General mentions (Brief on rehearing, page 14) Miss Whitney's "membership even up to the time of the trial," as "conclusively established by these bold admissions on the witness stand." That admission did not relate to any specific organization, national, state or local, and did not relate to any time other than the time of the trial. Much less was it an admission of any act or association within the County of Alameda on or before November 28, 1919 (Compare information, Record, page 15).

* * * * * * *

At pages 9 to 11 of defendant-in-error's brief on rehearing, a very few selected passages from the platform and program of the Communist Labor Party of America, which "the California branch" "adopted by reference" are presented as giving the character of criminal syndicalism to

the state organization. At page 11 the clause of the national program and platform referring to the Industrial Workers of the World is featured, with the name of this organization in huge black letters, and with abundance of italics. It is the adoption of this clause "by reference" at the Oakland convention that the prosecution chiefly relies upon (Brief on rehearing, pages 8-11, 24-25).

* * * * * * *

Miss Whitney's connection with any active measures of criminal syndicalism, was too remote to afford any possible basis of personal guilt. It was at the Chicago convention, a national convention, that this clause recognizing "the 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" was included in the national platform. There is nothing in the record to show that acts of violence on the part of individual I. W. W.s or individual I. W. W. locals in California or elsewhere, were meant to be approved by this expression of class solidarity. There is nothing to show that any such instances of violence on the part of the I. W. W. were before the Chicago Convention of the Communist Labor Party of America or that the recognition of the I. W. W. in that party's platform was intended as an endorsement of these methods. The Oakland Convention adopted, without change, the program and platform of the Chicago Convention. No particular emphasis was laid upon the sentence in the national platform

relating to the I. W. W. There is nothing to show that the Oakland Convention intended the adoption of this platform to be a public expression of approval of any of the objectionable methods of individual I. W. W.s in California. Objectionable I. W. W. methods were not discussed at the Oakland Convention any more than they appear to have been discussed at the National Convention. Still less does the record show that Miss Whitney, who merely sat in the Convention while this resolution as an undistinguished part of the National platform was adopted, regarded this adoption as an endorsement of the violent methods which on certain occasions had been employed by individual members of the I. W. W. in the State of California. Yet it was only by treating the platform adopted by the Chicago Convention and the subsequent adoption of the same platform by the Oakland Convention, while Miss Whitney was present, as an intentional endorsement of the violent methods of individual I. W. W.s in California that a California jury could have found the organization and Miss Whitney as a member to come within the condemnation of the statute.

* * * * * * *

A so-called "resolution" presented at the Tenth National convention of the I. W. W. in 1916 (Record, page 225) is printed in defendant-in-error's brief (pages 11-13). It clearly shows on its face that it was not a resolution, but that it was part of the report submitted by "Lambert," who was, so far as the record shows, a local secretary at Sacramento (see Record, page 229). It was ap-

pended to the report of the California "Wheatland Hop Pickers Defence Committee." This is very far from showing an official endorsement of acts of violence committed by I. W. W. members in California by even the national organization of the I. W. W. itself.

* * * * * * *

Defendant-in-error contends (brief on rehearing, pages 23-24) that the evidence in the record of the "propaganda and example of the I. W. W. and its activities" was introduced for the "sole purpose" (see page 23) of showing the character and purpose of the Communist Labor Party of California, and that the jury's consideration of this evidence was limited to this purpose by an instruction of the Court. But the instruction quoted on page 25 of defendant-in-error's brief, which the Attorney General calls the "limiting" instruction, did not in fact so limit the jury's consideration of this evidence. That instruction left it altogether vague as to whether "the organization of which it is claimed the defendant was a member, or which it is claimed she organized or assisted in organizing" was in fact the I. W. W. or the Communist Labor Party.

* * * * * * *

Defendant-in-error contends (brief on rehearing, pages 19-21) that the indefiniteness of the indictment was not a lack of due process because on the preliminary examination before the issuance of the information Miss Whitney had learned "what constituted the real substance of the state's case." It was in part precisely because this preliminary examination had dealt only with the con-

vention of November 9th while the information fixed the date of the offense as more than two weeks later that Miss Whitney was unable to know what was the occasion of the offense with which she was charged (see affidavit for bill of particulars, record, pages 61-62).

* * * * * * *

The contention that the endeavor of plaintiff-in-error is "to have this Court weigh the evidence rather than adjudicate the validity of the statute" (Defendant-in-error's brief on rehearing, page 4) shows a misapprehension as to the right of review in this court. The rule that the decision of a State Court upon a question of fact will not ordinarily be reviewed here is subject to "two equally well-settled exceptions; (1) where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts" (*Aetna Life Ins. Co.* vs. *Dunken,* 266 U. S., 389, page 394, citing *Northern Pacific Ry. Co.* vs. *North Dakota,* 236 U. S., 585, 593; *Truax* vs. *Corrigan,* 257 U. S., 312, pages 324-5). This case falls within both these exceptions.

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

Dated, March 12, 1926, and respectfully submitted.

JOHN FRANCIS NEYLAN,
THOMAS LLOYD LENNON,
of San Francisco,

WALTER NELLES,
WALTER H. POLLAK,
of New York City,
Attorneys for Plaintiff-in-Error.

WALTER H. POLLAK,
RUTH I. WILSON,
On the brief.

## APPENDIX.

*California Penal Code:*

Sec. 1246. *Papers to be transmitted to Appellate Court. Copy to defendant and District Attorney.* Upon the appeal being taken, the clerk of the court from which the appeal is taken must, without charge, within twenty days thereafter transmit to the Clerk of the Appellate Court a typewritten copy of the following papers:

1. The indictment, information or accusation;

2. A copy of the minutes of the plea;

3. A copy of the minutes of the demurrer;

4. A copy of the demurrer;

5. A copy of the minutes of the trial;

6. A copy of other minutes of the action, including the proceedings on motion for arrest of judgment or new trial;

7. A copy of the written charges given by the Court to the jury, or refused, or modified and given; also a transcript of any oral charge;

8. A copy of the judgment;

9. Any written or printed exhibits offered in evidence at the trial of the cause.

The clerk of the court from which the appeal is taken must also, within the time above specified,

deliver, without charge, to the defendant or his attorney, upon application therefor, a carbon copy of the original transmitted to the Clerk of the Appellate Court; and must also deliver, without charge, a carbon copy to the District Attorney upon his application therefor. (Amendment approved 1909; Stats. 1909, page 1087.)

Sec. 1247. *Settlement of grounds of appeal.* Upon an appeal being taken from any judgment or order of the Superior Court, to the Supreme Court or to a District Court of Appeal, in any criminal action or proceeding where such appeal is allowed by law, the defendant, or the District Attorney when the People appeal, must, within five days, file with the clerk and present an application to the trial Court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken.

*The Court shall, within two days after the filing of such application make an order* directing the phonographic reporter who reported the case to transcribe such portion of his notes as in the opinion of the Court may be necessary to fairly and fully present the points relied upon by the appellant. If the Court fails to make the order within two days after the application is filed, the notes requested in the application shall be transcribed

without such order. The phonographic reporter shall, within twenty days after the filing of such application, file with the clerk of the court an original transcription and three carbon copies of the portion of the notes so required to be transcribed, excluding therefrom all argument of counsel not objected to at the time it was made. The same shall be typewritten as prescribed by the rules of the Supreme Court. He shall append to the original and to each copy his original affidavit that is correct. (Amendment approved 1911; Stats. 1911, page 692.)