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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

CHARLES T. SCHENCK, PLAINTIFF in error, *v.* THE UNITED STATES OF AMERICA. } No. 437.

ELIZABETH BAER, PLAINTIFF IN error, *v.* THE UNITED STATES OF AMERICA. } No. 438.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The Selective Service Act was passed on May 18, 1917. The registration of persons subject to the draft took place in accordance with the proclamation of the President on June 5, 1917. The Selective Service regulations were promulgated by the President on June 30, 1917, and between that date and the dates of the events hereinafter described the draft boards had been organized, the order in which registrants were to be called for examination and exemption or induction had been determined by lots drawn at Washington, and, in Philadelphia as

elsewhere throughout the country, some of the registrants had been called before the boards, examined and accepted, rejected, or exempted. In Philadelphia, as elsewhere throughout the country, there appeared from day to day in the daily papers the names of those registrants who had been thus called, examined, and accepted.

The plaintiff in error, Charles T. Schenck (hereinafter called defendant), was general secretary of the Socialist Party of Philadelphia and in charge of its headquarters at 1326 Arch Street in that city. The plaintiff in error, Elizabeth Baer (hereinafter called defendant), was the recording secretary of the party, and, as shown by the defendant's own witness, was a member of its executive committee (R. 13, 38, 62). On August 13, 1917, the executive committee adopted the following resolutions:

> M. and S. That 15,000 leaflets be written to be printed on 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. (R. 18.)

Shortly thereafter one Lazar went to the printing shop of a newspaper entitled the "Jewish World," for which he was soliciting business (R. 22), and secured a quotation on 15,000 to 16,000 circulars (R. 24; see also R. 13), of the size and general type proposed to be sent out in pursuance of the foregoing resolutions. The next day Lazar and the defendant Schenck went to this printing office and the latter left the copy for the circular (R 24). The minutes of the August 20,

1917, meeting of the said executive committee under the head of "General Secretary's report," contain the entry:

> Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing same.

At the same meeting, under the head of "Unfinished business," the following resolution was adopted:

> M. and S. That Comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried. (R. 19.)

The minute book in which these entries were found was identified by Schenck (R. 13), after having been warned that anything he might say would be used against him (R. 28), and both the original minutes of the meeting in longhand and the typewritten copies thereof were identified by Dr. Baer as having been written by her (R. 14, 15). On August 28 Federal officers went to the headquarters with a search warrant and with a warrant for Schenck's arrest (R. 28) and seized, among other things, the minute book, bundles of the circulars, and many newspaper clippings containing lists of the names and addresses of men who had been accepted for military service by the draft boards (R. 13, 18).

The circular consisted of a leaflet printed on both sides, a facsimile of which appears in the record (R. 6, 8, 18).

One side of the leaflet is entitled "Long Live the Constitution of the United States. Wake Up, Amer-

ica. Your Liberties Are in Danger." A few quotations from this portion of the circular follow:

> A conscript is little better than a convict. He is deprived of his liberty and of his right to think and act as a freeman. A conscripted citizen is forced to surrender his right as a citizen and become a subject. He is forced into involuntary servitude. He is deprived of the protection given him by the Constitution of the United States. He is deprived of all freedom of conscience in being forced to kill against his will.
>
> Are you one who is opposed to war, and were you misled by the venal capitalist newspapers or intimidated or deceived by gang politicians and registrars into believing that you would not be allowed to register your objection to conscription? Do you know that many citizens of Philadelphia insisted on their right to answer the famous question twelve, and went on record with their honest opinion of opposition to war, notwithstanding the deceitful efforts of our rulers and the newspaper press to prevent them from doing so? Shall it be said that the citizens of Philadelphia, the cradle of American liberty, are so lost to a sense of right and justice that they will let such monstrous wrongs against humanity go unchallenged?
>
> Conscription laws belong to a bygone age. Even the people of Germany, long suffering under the yoke of militarism, are beginning to demand the abolition of conscription. Do you think it has a place in the United States? Do

you want to see unlimited power handed over to Wall Street's chosen few in America? If you do not, join the Socialist Party in its campaign for the repeal of the conscription act.

The reverse side of the circular is headed "Assert Your Rights." This contained the following passages:

The Socialist Party says that any individual or officers of the law intrusted with the administration of conscription regulations violate the provisions of the United States Constitution, the supreme law of the land, when they refuse to recognize your right to assert your opposition to the draft.

In exempting clergymen and members of the Society of Friends (popularly called Quakers) from active military service the examination boards have discriminated against you.

If you do not assert and support your rights, you are helping to "deny or disparage rights" which it is the solemn duty of all citizens and residents of the United States to retain.

In lending tacit or silent consent to the conscription law, in neglecting to assert your rights, you are (whether unknowingly or not) helping to condone and support a most infamous and insidious conspiracy to abridge and destroy the sacred and cherished rights of a free people. You are a citizen; not a subject! You delegate your power to the officers of the law to be used for your good and welfare, not against you.

They are your servants; not your masters. Their wages comes from the expenses of government which you pay. Will you allow them to unjustly rule you?

No power was delegated to send our citizens away to foreign shores to shoot up the people of other lands, no matter what may be their internal or international disputes.

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. Words could not express the condemnation such cold-blooded ruthlessness deserves.

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? Are you willing to submit to the degradation of having the Constitution of the United States treated as a "mere scrap of paper"?

Will you be lead astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a "war for democracy" can becloud the issue. Democracy can not be shot into a nation. It must come spontaneously and purely from within.

Democracy must come through liberal education. Upholders of military ideas are unfit teachers.

To advocate the persecution of other peoples through the prosecution of war is an insult to every good and wholesome American tradition.

You are responsible. You must do your share to maintain, support, and uphold the rights of the people of this country.

> In this world crisis where do you stand? Are you with the forces of liberty and light or war and darkness?

The one side had been printed several months before and some of the circulars so printed had been distributed at that time (R. 61).

At the headquarters there were kept on hand and given away to those who came for them stamped envelopes together with the circulars. A young lady named Clara Abramowitz was in charge of the book shop of the headquarters, and, in pursuance of defendant Schenck's directions, gave the circulars to all who called and asked for them (R. 62). Some of these callers asked for stamped envelopes in which to mail the circular, and Miss Abramowitz, as directed by Schenck, gave them the stamped envelopes which were on hand for that purpose (R. 35). Many hundreds had been mailed, some of which reached the addresses and others were held up by the postal authorities (R. 12, 57, 58). Ten men, registrants under the Selective Service Law who had been examined and accepted by the draft boards appeared at the trial and testified (R. 40, 41, 43, 44, 45, 47, 49, 50, 51, 52). Some had received these circulars through the mails; others opened, while on the witness stand, envelopes addressed to them which had been taken from a bundle of about 610 envelopes (R. 12, 57, 58) which the postal authorities had refused to transmit by mail (R. 12, 55, 56) and which contained the said leaflet. Furthermore, the Federal officers found at headquarters a large number of en-

velopes stamped and addressed. All of these circulars were identified as having been printed by the Jewish World pursuant to Schenck's order (R. 25, 26, 55), and the identity of some of them at least was admitted by counsel (R. 55). The envelopes in question were mailed during the latter part of August (R. 46), some on August 20 (R. 40), some on August 26 (R. 42), and others on August 28 (R. 46, 50, 56).

The persons to whom these circulars had been mailed, including some of those who testified for the Government as having received or having been the addressees of these circulars, as well as the addresses on the envelopes which were found at the headquarters, corresponded to those who had been called before and accepted by the local draft boards and whose names had appeared in the daily papers and in the clippings from these daily papers which were found at defendants' headquarters and which will be found described in the record on pages 13, 14, 18.

The indictments included three named persons other than the two plaintiffs in error, but the cases against them were early dismissed by the Government and there is no need of referring to them by name. The indictment also included "other persons to this grand inquest unknown."

In the first count of the indictment the defendants Schenck and Baer and others were charged with willful and unlawful conspiracy to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the

United States, in that they did conspire to have printed and circulated the above-described circulars to men who had been called and accepted for military service under the provisions of the Selective Service Act, in violation of Section 3, Title I, of the Espionage Act (act of June 15, 1917, c. 30, 40 Stat. 217). Five overt acts to effect the object of the conspiracy were set forth, namely, the adoption and approval of the above-described resolutions of the executive committee, the arrangements for the printing and circulation thereof, and the mailing and distribution thereof as above described.

The second count of the indictment was for conspiracy to use and attempt to use the mails and Postal Service of the United States for the transmission of matter declared to be nonmailable by Section 2 of Title XII of the Espionage Act, namely, the said circulars which were charged to be nonmailable, in that they were calculated to cause insubordination, disloyalty, mutiny, and refusal of duty in the military and naval forces of the United States and to obstruct the recruiting and enlistment service of the United States, and the same overt acts were set forth.

The third count of the indictment charged the substantive act of willfully and unlawfully using and attempting to use the mails and Postal Service of the United States for the transmission of said nonmailable matter.

The text of the sections of the Espionage Act upon which said charges were based, namely, Sections 3

and 4 of Title I, and Sections 1 and 3 of Title XII, are appended in the margin.[1]

The defendants were found guilty by the jury and the motion for a new trial was overruled.

The assignments of error in the record are very numerous, but in their brief the defendants have materially reduced the number of points upon which

[1] SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully 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.

SEC. 4. If two or more persons conspire to violate the provisions of section two or three of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided, conspiracies to commit offenses under this title shall be punished as provided by section thirty-seven of the act to codify, revise, and amend the penal laws of the United States approved March fourth, nineteen hundred and nine.

TITLE XII.

SECTION 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter, or thing of any kind, in violation of any of the provisions of this act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: *Provided*, That nothing in this act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

SEC. 3. Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable shall be fined not more than $5,000 or imprisoned not more than five years, or both. Any person violating any provisions of this title may be tried and punished either in the district in which the unlawful matter or publication was mailed, or to which it was carried by mail for delivery according to the direction thereon, or in which it was caused to be delivered by mail to the person to whom it was addressed.

they rely. They attack the verdict and judgment of conviction upon the grounds:

1. That Section 3, Title I, of the Espionage Act is unconstitutional, as a violation of the First Amendment of the Constitution;

2. That the case against the defendant Schenck rests on evidence not properly admitted against him;

3. That there was an entire failure of evidence to connect the defendant Schenck with the conspiracy;

4. That as against defendant Baer there was no evidence whatever tending to demonstrate the commission by her of the alleged offense; and

5. That the case against both of the defendants depended upon evidence whose admission was in violation of the Fourth and Fifth Amendments of the Constitution.

The Government will answer these claims of the defendant in the same order, contending:

1. That Section 3, Title I, of the Espionage Act is constitutional, and this point of constitutionality raised by the defendants is so unsubstantial and frivolous that no appeal to the jurisdiction of this court may be predicated thereon;

2. That the case against the defendant Schenck is sufficient without the evidence objected to by the defendants, but that said evidence was properly admitted into evidence;

3. That there was ample proof to connect Schenck with the conspiracy;

4. That the evidence against the defendant Baer was sufficient to justify submitting the case against her to the jury; and

5. That the admission of evidence obtained by the execution of a search warrant did not infringe upon the Fourth and Fifth Amendments of the Constitution, and the constitutionality of such admission is so well settled by the decisions of this court, that the point raised by the defendants may be considered as too unsubstantial and frivolous to justify an appeal to the jurisdiction of this court.

I.

First amendment of the Constitution not involved in this case—Defendant's claim of unconstitutionality frivolous and unsubstantial and insufficient upon which to base an appeal to the jurisdiction of this court.

The defendants were charged with a conspiracy to distribute to men who had been accepted for the draft under the Selective Service Act, circulars advocating resistance to the draft. There was also a count upon the substantive offense of mailing such circulars. In substance, the defendants were charged with attempting to induce young men subject to the draft law to disobey the requirements of that law. The defendants chose as the recipients of the circulars young men who had been accepted by the draft boards and were simply awaiting the orders to report for duty. This in itself is sufficient to support the verdict of the jury that the intent of the defendants was to in-

fluence the conduct of persons subject to the draft and to influence that conduct in relation to the draft. Any such claim as that made in their brief, that they were engaged in a legitimate political agitation for the repeal of the draft law, is, of course, negatived by this fact that they chose men already drafted and called as the persons to whom to address their arguments.

The unlawful purpose of the defendants is further clearly shown by the text of the circulars. The circular originally had one side printed. That was an attack upon the constitutionality of the draft law, full of bitter language against conscription, as "A conscript is little better than a convict," etc. It did contain an appeal for the repeal of the law. That was not sufficiently strong to satisfy the defendants' purpose. The executive committee resolved "that 15,000 leaflets be written to be printed on the *other side* of the leaflet now in use to *be mailed to men who have passed exemption boards*, also distribution." What was this "other side," which was to be specially mailed to drafted men? It was entitled "Assert Your Rights." It was a frank, bitter, passionate appeal for resistance to the Selective Service Law.

The defendants cite a number of decisions in the district courts. Extensive discussion of them is unnecessary, as none hold Section 3 of Title I of the Espionage Act or any part thereof to be unconstitutional, and none of them hold that circulars

such as those used by the defendants do not violate that section. The defendants were charged with conspiracy both to cause insubordination, disloyalty, and neglect of duty in the military forces of the United States and to obstruct the recruiting and enlistment service. While, in the hundreds of cases which have arisen, there have been variations of opinion as to the meaning of "military forces of the United States," the meaning of "obstruct," and the meaning of "recruiting and enlistment service," there has not been one case in which acts of the nature of those charged against the defendant have been held to fall outside of the constitutional scope of the Espionage Act.

Amongst the numerous cases in the district courts some were for conspiracy, some for attempts, some for the completed substantive offenses; different clauses of the section itself were involved in the various cases; some involved the question whether the particular acts and utterances charged against defendants were of a nature to fall within the statute, whereas others involved the question of the sufficiency of proof of the unlawful intent or purpose with which the acts were committed or the utterances published. A short quotation from this or that charge to the jury would consequently be of little value unless bearing upon a question analogous to that involved in the case at bar.

In the case of *United States* v. *Eastman*, 252 Fed. 232, cited on pages 7 and 12 of the defendants' brief, the court upheld an indictment based on the publica-

tion of articles in a periodical. These articles did not, like the defendants' circulars, openly suggest or advise resistance to the draft law, nor was there proof of deliberate distribution amongst men subject to the draft. Nor did the court use the language quoted by the defendants. That language occurs in a decision of the same judge in *Masses Pub. Co.* v. *Patten,* 244 Fed. 535, which was overruled by the Circuit Court of Appeals in 246 Fed. 25.

The *Stokes* case, referred to on page 7 of the defendants' brief, involved a complex state of facts and a lengthy and elaborate charge to the jury, and the defendants' short reference thereto gives an entirely erroneous impression of the facts of that case and the views of the trial court.

The *Groeschl* case, referred to on page 8 of defendant's brief, is unreported, nor do the defendants state nor do we know any facts of that case regarding the persons to whom the circular was distributed.

As for *U. S.* v. *Hall,* 248 Fed. 150, it was not concerned with a conspiracy to cause insubordination, etc., nor with a constitutional question. There do not appear to have been any facts, as in the present case, showing the purpose and intent to influence men subject to the draft. So far as appears from the report, that case does not decide any of the questions involved in the instant case. The legal conclusions at which the district judge arrived in that opinion are contrary to those held by the overwhelming majority of district judges in cases arising under the Espionage act or by the Circuit Courts of

Appeal in the cases which have reached those courts. Amongst reported cases, see (District Courts):

Masses Publishing Co. v. *Patten*, 245 Fed. 102.
U. S. v. *Sugarman*, 245 Fed. 604.
U. S. v. *Pierce*, 245 Fed. 878.
Jeffersonian Pub. Co. v. *West*, 245 Fed. 585.
U. S. v. *Schaefer*, 248 Fed. 290.
U. S. v. *Boutin*, 251 Fed. 313.
U. S. v. *Prieth*, 251 Fed. 946.
U. S. v. *Nearing*, 252 Fed. 223.
U. S. v. *Eastman*, 252 Fed. 232.
U. S. v. *Nagler*, 252 Fed. 217.

(Circuit Court of Appeals:)

Masses Publishing Co. v. *Patten*, 246 Fed. 25.
U. S. v. *Krafft*, 249 Fed. 919.

As for the *Zimmerman* case mentioned on page 11 of the defendants' brief, the quotation is entirely irrelevant to the case at bar. Here two of the counts of the indictment are for conspiracy to accomplish a result, so that the proposition set forth in that quotation, namely, that in an indictment for willfully obstructing the recruiting and enlistment service, there must be proof that some individual was induced not to serve, is not relevant to the conspiracy counts and obviously not relevant to the count for the mailing of the circulars. The decisions of the district courts are overwhelmingly contrary to the opinion in the *Zimmerman* case; but, in view of the irrelevancy thereof to this case, we shall not burden this brief with quotations from other courts, except the follow-

ing from an opinion of the Circuit Court of Appeals in *U. S.* v. *Krafft*, 249 Fed. 919 at 924:

> Both "willfully causing" and "willfully attempting to cause" are by the statute made alike criminal; and, such being the case, the attempt to cause being forbidden, as well as the causing, there is no ground to construe or apply this statute on theory that insubordination, mutiny, or disloyalty must be effected. To so hold would be to defeat the whole purpose of the statute. For the purpose of the statute as a whole was not to wait and see if the seed of insubordination—in this case sown in August in Newark—at a later date in some camp sprang into life and brought forth fruit, but it was to prevent the seed from being sown initially. Moreover, it is clear that this new statute was to enable the civil courts to prevent the sowing of the seeds of disloyalty, for with the fruits of disloyalty, to which a misguided soldier might be led by the disloyal advice, the military court-martial already provided was sufficient. The statute was not addressed to the misguided man who was in the service, but was manifestly to include any one—for "whoever" is a broad inclusive word—who in any way willfully created or attempted to cause insubordination. Clearly the court below was right in holding that if in fact the defendant used the language alleged, and if his purpose was willful to cause insubordination, then the statute was violated. Clearly it was right in holding that, to constitute the crime at the start, it was not necessary for that willful purpose to succeed.

The quotations from the *Olivereau* and *Ramp* cases on pages 13 and 14 of defendants' brief clearly support the Government's contention in the present case, and the remainder of the opinions in those cases would be found even more advantageous to these contentions. The following passage from the charge to the jury in the *Ramp* case (Bulletin 66, Interpretation of War Statutes, Department of Justice), defining the scope of the constitutional guaranty of free speech, is peculiarly appropriate:

> Reliance is had by the defendant upon the right of freedom of speech under the Federal Constitution for justification of his acts. That instrument does declare that Congress shall make no laws abridging the freedom of speech. The guaranty is a blessing to the people of this Government, and great latitude is preserved to them in the exercise of that right. But a citizen may not use his tongue or pen in such a way as to inflict legal injury upon his neighbor or use his own property to the detriment or injury of another. Nor has any person the right, under the guaranty of freedom of speech, to shape his language in such a way as to incite disorder, riot, or rebellion, because such action leads to a breach of the peace and disturbs good order and quietude in the community. Nor is he privileged to utter such language and sentiment as will lead to an infraction of law, for the laws of the land are designed to be observed and not to be disregarded and overridden. Much less has he the privilege, no matter upon

what claim or pretense, so to express himself with willful purpose as to lead to the obstruction and resistance of the due execution of the laws of the country, or as will induce others to do so. A citizen is entitled to fairly criticize men and measures—that is, men in public office, whether of high or low degree—and laws and ordinances intended for the government of the people, even the constitution of his State or of the United States; 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 willful intent to the incitement of disorder and riot, or to the infraction of the laws of the land or the Constitution of this country, or, with willful purpose, to the resistance and obstruction of the due execution of the laws by the proper authorities, it overleaps the bounds of all reasonable liberty accorded to him by the guaranty of the freedom of speech, and this because the very means adopted in an unlawful exercise of his privilege. Using the language of another, and adapting it to the present controversy: "The defendant, in common with all other citizens, has a perfect right, in good faith and for an honest purpose, to question the validity or constitutionality of a law affecting his property or his life, liberty, or happiness," but "neither the right of the citizen to resort to the courts for redress of his grievance nor his right to free speech as guaranteed by the Constitution confers any right, in the exercise

> of these great privileges, to use them as a medium through which to wantonly resist or obstruct the execution of the laws."

The constitutional point raised by the defendants corresponds to that raised in the Sugarman case (Case No. 345) set for hearing on the same day as this case. In the Government's brief in the Sugarman case, the frivolous and unsubstantial nature of this claim was discussed and we respectfully refer to that discussion. As there pointed out, this question has been foreclosed by the decisions of this court in the *Goldman, Baker,* and *Ruthenberg* cases in 245 U. S. 474. The Goldman and Baker cases were for conspiracy or attempts by means of speeches and circulars to induce young men of draft age not to register for the draft, and not upon any actual success in that attempt. The case at bar was similarly for an attempt to induce men of draft age to fail to comply with later stages of the draft process. The cases correspond, the only distinction being that they were brought under different statutes and relate to different stages of the duties of men subject to the draft—distinctions which have no relevance to the question of constitutionality.

This question of constitutionality must, therefore, be considered as settled by the decisions in this court, if authorities were needed for the proposition that the Congress of the United States has a constitutional right to prohibit a person from attempting during war to induce violations of a statute providing for military service. As pointed out in the Sugarman

brief, the contention is too well settled adversely to the defendants and too unsubstantial to form the basis of the jurisdiction of this court over this case.

II.

Admission into evidence against defendant Schenck of identification of minutes by defendant Baer was not error; and, as Schenck himself identified these minutes, the case was complete against him without any evidence of Baer's admissions.

The defendants complain that, as against the defendant Schenck, the admission into evidence of the defendant Baer's identification of the minutes of the Executive Committee was erroneous. The question is not important in this case, for Schenck himself identified these minutes, and the admission of Baer's statements, if erroneous, was not prejudicial error.

At the time of this identification, the distribution of the circulars was still in process, so that it can not be said that the conspiracy had terminated by the accomplishment or abandonment of its object, and cases against the admissibility of the declarations of a co-conspirator made after the termination of the conspiracy are not in point.

In *United States* v. *Cassidy*, 67 Fed. 698 at 703, the court says:

> It is also true that any declaration made by one of parties during the pendency of the illegal enterprise is not only evidence against himself but against the other parties who, when the combination is proved, are as much responsible for such declarations and the acts

to which they relate as if made and committed by themselves.

Logan v. *United States*, 144 U. S. 263.
Fain v. *United States*, 209 Fed. 525.

In *Commonwealth* v. *Zuern*, 16 Pa. Super 588 at 604 (this case was cited in the defendant's brief), the court says:

> The rule has been held generally to be that the declarations of a conspirator are evidence against himself and are also evidence against his associates when they are made during the pendency of the fraudulent transactions which constitute the crime charged, for they then form a part of such transactions, but when not made during the progress or continuation of the fraudulent scheme, but afterwards, they are not evidence. * * *
>
> The question, whether or not a conspiracy has been proven, is for the jury, but it is manifest from a statement of the rule relating to the admission of declarations that there is some point to be reached in the trial at which a trial judge is called upon to decide whether sufficient proof of a conspiracy has been adduced to warrant the introduction of evidence of declarations of conspirators. All of the evidence in a cause can not, in the nature of things, be introduced at the same time nor can it be foreseen by the trial judge. Again, where many defendants are being tried, it becomes a difficult thing to determine whether a particular defendant has been, by preceding evidence, so connected with the alleged conspiracy as to warrant the admis-

> sion of proof of his declarations. The proof of the conspiracy at the point in the trial when the declarations are sought to be introduced need not be conclusive, but only slight, in order to permit the introduction. See *McDowell* v. *Rissell*, 37 Pa. 168. * * *. It has been held, and with some show of reason, that the fact that some of the acts and declarations of the conspirators were allowed to come in before proof was made of the conspiracy or of the defendant's connection with it, is no ground of objection, since the matter is largely discretional with the trial judge. 4 Am. and Eng. Ency. of Law (1st ed., p. 634).

But Schenck was himself general secretary of the organization and in charge of its headquarters, where the minutes were found, and he himself identified these minutes and the records of the organization which contained them (R. 13). It is therefore useless to pursue the discussion of the admissibility, as against him, of Dr. Baer's identification of these same minutes.

III.

Eliminating all statements of defendant Baer and all her connection with the conspiracy, there still remains complete proof of defendant Schenck's connection with and participation in the conspiracy.

The defendants contend that the minutes constitute the only proof of a conspiracy; that they were identified by the defendant Baer; that her

statement is not admissible against Schenck; that, therefore, there is as against Schenck no proof of the conspiracy; that there is no proof whatever connecting the defendant Baer with any conspiracy; that, therefore, there is no coconspirator with Schenck and hence no proof of a conspiracy.

Schenck himself identified the minutes, so Dr. Baer's statement regarding them may be eliminated. Later the Government expects to show that there is sufficient in the record to implicate Dr. Baer in the conspiracy. Eliminating, for the sake of argument, the defendant Baer altogether, anything she did or said or any testimony about her, there will then still be found in the record against defendant Schenck a complete case of conspiracy, which may be summarized as follows:

The executive committee of the Socialist Party of Philadelphia passed resolutions ordering the second side of the leaflet to be written and then printed on the leaflets then in use and mailed to men accepted by the draft boards. Schenck, general secretary of the organization and in charge of its headquarters, obtained a bid for the printing and reported it to the committee. The committee authorized him to expend moneys for mailing the circulars. He ordered 15,000 of the circulars. He reported to the executive committee that he had obtained the leaflets from the printer and had started the work of addressing envelopes and folding and inclosing the leaflets. In his desk were found newspaper clippings containing the names of men

who had been accepted by draft boards, which corresponded to men who received the circulars through the mails. Schenck arranged for this mailing by having the circulars and stamped envelopes at headquarters and instructing the young lady in attendance there to hand these circulars and stamped envelopes out on request. Persons came in from time to time, requested copies of the circular and the stamped envelopes and, in accordance with instructions from Schenck, received them. These persons who called for the circulars and envelopes are amongst the "other persons to this grand inquest unknown" mentioned in the indictment. At least from the time he obtained bids for the printing up to the time of his arrest, he was an active, in fact the most active, participant in the conspiracy. All this is clearly proven by testimony exclusive of anything said by or about Dr. Baer.

The authorities clearly permit the indictment of one conspirator without the indictment of others or without even identifying the co-conspirators by name (see *Hyde* v. *U. S.*, 225 U. S. 347). It is equally well settled that a man who joins a conspiracy by taking any part in the execution thereof is treated by the law as a co-conspirator.

In the famous case of *Spies* v. *People*, 122 Ill. 1, the court held (*syllabus*):

> The combination in the first instance may be established by evidence having no relation to the defendants, by acts of different persons at different times and places, by the writings

> and speeches of such persons, and by any other circumstances which tend to prove its existence.

See 2 Wharton Criminal Law, eleventh edition, section 1655:

> A conspiracy must be by two persons at least; one can not be convicted of it, unless he has been indicted for conspiring with named persons, or with persons to the jurors unknown. (Citing *U. S.* v. *Stone*, 188 Fed. 836; 1 Hawk. P. C., chap. 72; *Reg.* v. *Denton*, Dears. C. C. 3, 18 Q. B. 761, 21 L. J. Mag. Cas. N. S. 207, 17 Jur. 435; *Reg.* v. *Thompson*, 16 Q. B. 832, Dears. C. C. 2, 20 L. J. Mag. Cas. N. S. 183, 15 Jur. 435, 5 Cox, C. C. 166; *Mulcahy* v. *Reg.*, L. R. 3 H. L. 306; *United States* v. *Cole*, 5 McLean, 513 Fed. Cas. No. 14,832, 1849; *Com.* v. *Irwin*, 8 Phila. 380, 1871.)

Section 1656:

> It is in the discretion of the prosecution to include only as many of the alleged co-conspirators in the indictment as it may deem expedient; and the nonjoinder of any such, provided there is enough alleged on the record to constitute the offense *aliunde*, is not matter for exception. (Citing *Reg.* v. *Ahearne*, 6 Cox, C. C. 6; *Com.* v. *Demain*, Brightly, Pa. 441.) Nor is it necessary that a co-conspirator referred to either specifically or as a person unknown should be indicted. (Citing *Heine* v. *Com.*, 91 Pa. 145, 1879.)

Section 1660:

> An indictment charging the defendant with conspiring with persons unknown is good, notwithstanding the names of some of the persons alleged unknown must necessarily have transpired to the grand jury. (Citing *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122, 1830; *Reg.* v. *Steel*, Car. & M. 337, 2 Moody C. C. 246.)

Section 1674:

> Two or more defendants must be joined to constitute the offense: and if only two are joined, an acquittal of one is an acquittal of the other, *unless there be allegation and proof of co-defendants unknown.*
>
> See also *State* v. *Adams*, 1 Houston Cr. Cas. 361 (Delaware)
>
> *State* v. *Slutz*, 30 So. 298 (Louisiana).
>
> *United States* v. *Hamilton*, 26 Fed. Cas. 90.
>
> *Browne* v. *United States*, 145 Fed. 1; 200 U. S. 618

On the elementary proposition that one becomes a principal by entering into a conspiracy already formed or by aiding it or carrying out any part of it, see—

> 2 Wharton Criminal Law, 11th ed., secs. 1657, 1666;
>
> *U. S.* v. *Standard Oil Co.*, 152 Fed. 290;
>
> *U. S.* v. *Cassidy*, 67 Fed. 698.

Nor should the third count of the indictment be overlooked. It was for the substantive offense of mailing the circulars and is included in the jury's

general verdict of guilty. Schenck's part in this mailing is amply shown in the testimony of Miss Abramowitz.

IV.

The case against defendant Baer is sufficient to justify submission to the jury.

The defendants contend that there is a complete lack of evidence to connect the defendant Baer with the conspiracy. The following is a summary of the evidence in this connection on which the case was sent to the jury.

As testified by one of her attorneys, Mr. Nelson, Dr. Baer was a member of the Executive Committee (R. 62). She was also the recording secretary of the organization (R. 13, 14, 15, 38, 62). The seditious circular herein issued was printed on the back of a handbill circular previously issued by the Executive Committee. On August 13 the Executive Committee by formal resolution directed that 15,000 leaflets be written, be printed on the circular already in use, and be mailed to men who had passed exemption boards. In the same meeting by resolution the secretary was directed to get bids on the price of the leaflets (R. 18). During the next few days the defendant Schenck went to the printing office, left the copy for the seditious circular, and arranged for its publication. In the official minutes of a meeting of the Executive Committee, held August 20, appears the following notation under the head of "General Secretary's report":

> Obtained new leaflet from printer and started work addressing envelopes and folding and enclosing same.

In the official minutes of this same meeting, under the head "Unfinished Business," appears the following resolution:

> M. and S. That comrade Schenck be authorized to spend $125 for sending leaflets through the mail. Carried. (R. 19.)

It is obvious that the authority of the defendant Schenck to carry out the conspiracy came from the official resolutions adopted by the Executive Committee, and that he obtained authority to incur the expense ($125) for this purpose from the official resolution so adopted. The recording of these official minutes was an essential part of the conspiracy. The defendant Baer herself admitted that the minutes of these two meetings were in her handwriting and that the four typewritten pages taken out of the official minute book were the same minutes. She referred to both sets of minutes as "hers" (R. 14, 15). The case of participation in the conspiracy against her is, of course, partly circumstantial, but proof of conspiracy generally is of a circumstantial character.

See *Marrash* v. *U. S.*, 168 Fed. 225, where, on a charge of conspiracy to defraud the United States of customs duties, an importer was held properly convicted when the whole case against him consisted of the fact that he was the consignee, was the addressee of letters from the exporters setting forth the fraudu-

lent scheme, and displayed alarm when there were indications that the fraudulent concealment of laces in a shipment marked as nuts would be dicsovered. The court at page 229 used the following language:

> It is argued that there was no direct evidence of conspiracy and the circumstantial evidence was insufficient to warrant a conviction. Under section 5440 it was necessary to prove that two or more of the defendants, Selim Marrash and George Sara, for instance, conspired to defraud the United States of duties lawfully due on imported laces, and that either Marrash or Sara did an act to carry it out. It is not necessary to establish the conspiracy by direct evidence. Conspirators do not go out upon the public highways and proclaim their purpose; their methods are devious, hidden, secret, and clandestine. It is enough that hey have a common purpose to defraud and that they act together for that purpose.
>
> It is not necessary that a formal agreement be proved; it is sufficient if the testimony shows that the parties are acting together understandingly to accomplish the same unlawful purpose, even though individual conspirators may do acts in furtherance of the common unlawful design apart from and unknown to the others. It is manifest, therefore, that in many and, indeed, in most cases of conspiracy the corrupt agreement is proved by circumstantial evidence. Such evidence must, of course, satisfy the jury beyond a reasonable doubt, but in this respect there is no distinction between circumstantial and direct evidence.

See also

U. S. v. *Babcock,* Fed. Cas. No. 14,487.
U. S. v. *Hamilton,* Fed. Cas. No. 15,288.
U. S. v. *Hutchins,* Fed. Cas. No. 15,430.
U. S. v. *Logan,* 45 Fed. 872.
Davis v. *U. S.,* 107 Fed. 753.
2 Wharton Criminal Law, 11th Ed., Sec. 1665.

There can be no reasonable doubt that the action of the Executive Committee constituted the conspiracy. One of the necessary and essential steps to carrying out the conspiracy was the recording in the official minutes of that committee of the unlawful resolutions. One becomes a principal by entering into a conspiracy already formed and becomes responsible for the acts of the other conspirators.

See

U. S. v. *Standard Oil Co.,* 152 Fed. 290.
U. S. v. *Cassidy,* 67 Fed. 698.
Logan v. *U. S.,* 144 U. S. 263.

It is respectfully submitted that upon all the facts the court was warranted in submitting to the jury the question of the participation by the defendant Baer and that there was sufficient to warrant the conclusion reached by the jury.

V.

The admission in evidence of documents seized on a search warrant does not infringe the fourth and fifth amendments to the Constitution, and the constitutionality of such admission is so well settled that the defendants' claim to the contrary is frivolous and, consequently, insufficient as a basis of jurisdiction of the Supreme Court of the United States.

The point raised in the defendants' brief relating to the constitutionality of the use of evidence obtained by search warrant is, by their own admission, authoritatively settled against them, for after discussing several cases, they conclude on page 30 of their own brief as follows:

> 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 this 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 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.

This conclusion is correct, having been settled by the case of *Adams* v. *New York*, 192 U. S. 585, in which this court held (syllabus):

> The fact that papers, which are pertinent to the issue, may have been illegally taken from the possession of the party against whom they are offered is not a valid objection to their admissibility. The court considers the competency of the evidence and not the method by which it was obtained.
>
> There is no violation of the constitutional guaranty of privilege from unlawful searches and seizures in admitting as evidence in a criminal trial, papers found in the execution of a valid search warrant prior to the indictment; and by the introduction of such evidence defendant is not compelled to incriminate himself.

This doctrine was affirmed in the case of *Weeks* v. *U. S.*, 232 U. S. 383, cited by the defendants. There the evidence had been obtained without any search warrant and by completely illegal seizure and the defendants had duly sought to obtain a return thereof. This court held under such circumstances that the information obtained from such evidence could not be used against the defendants, but reaffirmed the principle of the Adams case, saying in the syllabus in explanation of that case:

> While an incidental seizure of incriminating papers, made in the execution of a legal warrant, and their use as evidence, may be justified, and a collateral issue will not be raised to ascertain the source of competent

evidence, *Adams* v. *New York*, 192 U. S. 585, that rule does not justify the retention of letters seized in violation of the protection given by the fourth amendment where an application in the cause for their return has has been made by the accused before trial.

And in the text of the opinion, page 395:

Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the fourth and fifth amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, were competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property. It was further held, approving in that respect the doctrine laid down in 1 Greenleaf, section 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the courts in the course of a trial would not make an issue to determine that question, and many State cases were cited supporting that doctrine.

The Adams case was concerned with evidence unlawfully obtained, because falling outside of the scope of the search warrant. The Weeks case was concerned with papers illegally seized without any warrant at all, colorable or otherwise. In the case at bar, the evidence objected to by the defendants was within the scope of the search warrant, so that there is nothing whatever in the record tending to show the seizure thereof to have been unlawful. The defendants attempted in their brief to claim that there had not been a sufficient showing of probable cause before the court which issued the warrant. This is certainly, however, a collateral issue into which the trial court could not be asked to enter during the trial of the criminal case itself, nor does the record disclose what may or may not have been the showing upon which the search warrant had been issued. See *Flagg* v. *U. S.*, 233 Fed. 481. Certainly the discovery in the mails of six hundred of these seditious circulars, many of them mailed to men accepted for the draft, was a sufficient probable cause to justify a warrant for the search of the headquarters of the organization which had issued them.

The constitutional point having, as admitted by them, been settled against the defendants by the decisions of this court, is obviously too unsubstantial and frivolous upon which to predicate the jurisdiction of this court.

Lampasas v. *Bell,* 180 U. S. 276.
Farrell v. *O'Brien,* 199 U. S. 89.
Brolan v. *U. S.* 236 U. S. 216.

CONCLUSION.

There are no errors apparent on the record, but, by reason of the jurisdictional defect disclosed by the defendant's brief, the petition in error should be dismissed.

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