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IN THE

SUPREME COURT

OF THE

STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
FRANK HESTINGS and
ELIAS MATSON,
Appellants.

No.....

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THURSTON COUNTY.

HON. D. F. WRIGHT, Judge.

APPELLANTS' OPENING BRIEF.

GEORGE F. VANDERVEER,
RALPH S. PIERCE,
Attorneys for Appellants.

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Seattle, Washington.

The Equity Printing Co., Inc. Co-op., 1906 7th Ave., Seattle

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STATEMENT OF THE CASE.

This is an appeal from the Superior Court of Thurston County adjudging the appellants and each of them guilty of the crime of criminal syndicalism. The appellant Elias Matson was sentenced to the reformatory at Monroe for the indeterminate period of from two to ten years and to pay half the costs of the prosecution, and the appellant Frank Hestings to the penitentiary at Walla Walla for the indeterminate period of from four to ten years and to pay half the costs of the prosecution.

The information, omitting the formal portions, is as follows:

"That the said Elias Matson and Frank Hestings, on or about the 15th day of November, 1919, in the County of Thurston, State of Washington, committed the crime of criminal syndicalism, as follows, to wit: then and there being, said defendants Elias Matson and Frank Hestings, and each of them, did wilfully and feloniously give aid to, help to organize, be members

of and voluntarily assemble with an organization known as the Industrial Workers of the World and commonly known as the I. W. W., said Industrial Workers of the World then and there being a group of persons formed to advocate, advise and teach crime, sedition, violence, intimidation and injury as a means of effecting an industrial, economic, social and political change, contrary to the form of statute in such cases made and provided and against the peace and dignity of the State of Washington." (Ab. 1.)

To this information the appellants interposed a written demurrer presenting four questions:

(1) That the information did not state facts sufficient to constitute an offense;

(2) That the information charged the defendants with several separate and distinct offenses and was duplicitous in certain enumerated particulars;

(3) That Chapter 174 of the Laws of 1919 was unconstitutional in certain specified particulars;

(4) That the information was too vague, indefinite and uncertain to inform the defendants of the nature and cause of the accusation against them or to safeguard the defendants against a second prosecution for the same offense.

This demurrer was overruled and exception allowed. (Ab. 3.)

At the conclusion of the state's evidence the defendants moved the Court for a directed verdict and therein specifically raised the question of the Court's jurisdiction and the failure of the prosecution to establish the venue, and challenged the sufficiency of the evidence. This motion was denied and an exception allowed. (Ab. 40-41.)

In due time the appellants filed their motion for a new trial upon the ground of errors of law committed at the trial, and that the verdict of the jury was not supported by the evidence, and also a motion in arrest of judgment. Each of these motions was denied and exception allowed. (Ab. 6.)

Prior to the time that the jury returned its

verdict the appellants called to the Court's attention their exceptions to the Court's instructions and particularly directed the Court's attention to its failure to instruct with reference to intent, and at the time excepted to the refusal of the Court to instruct the jury upon that subject. (Ab. 17.)

THE EVIDENCE.

Under the instructions of the Court and the theory of the prosecution but two issues were presented to the jury for determination: first, Were the defendants members of the I. W. W.? second, Was the I. W. W. an organization formed to teach various doctrines enumerated in the information? The membership of the defendant Matson was admitted in court and his card introduced as Exhibit A. With reference to the membership of the defendant Hestings the proof was limited to admissions made by the defendant at the office of the Chief of Police and in the presence of the witnesses Endicott, Sticklin, Dunbar and Cusack. At the time the alleged admissions were made

the defendant was not under arrest, but had evidently been called before the officials for examination, the record affirmatively showing that after the examination the defendant "was turned loose and went to town." (Ab. 19.) According to the witnesses the defendant admitted that he had become a member of the I. W. W. in 1917; that he had for a short time been an organizer, but early in 1919 had turned in his credentials; that after the Centralia tragedy he had torn up his card. With the exception of such admissions made by the defendant under such circumstances there is no proof of any activity of the defendant Hestings in the affairs of the I. W. W. in Thurston County or elsewhere. In fact, proof was offered to the effect that the defendant had not in any way been active in the solicitation of members or promulgation of ideas, but such proof, upon objection by the state, was rejected by the Court as being purely negative. (Ab. 41.) The defendant Matson was arrested at Bordeaux while working in the logging camp referred to by the witnesses as Camp 4. There is no proof that such camp is within the limits

of Thurston County or that the defendant Matson was a resident of such county. The witness R. J. Hoag, on cross-examination, stated: "I could not say that Bordeaux is in this county. It is kind of close to the county line up there where the camp is." (Ab. 21.) The witness J. H. Gifford said: "I don't know where Camp 4 of the Mason County Logging Company is. I am not acquainted with the locality. I did not know it was in Grays Harbor County. It is very close to the line." (Ab. 22.) The witness A. J. Peterson testified: "He was arrested at the logging camp at Bordeaux. I couldn't tell you what county that camp is in." (Ab. 23.) The witness Lee Sondell testified that he had worked in Thurston County in various logging camps since the year 1911 and that he was well acquainted with Camp 4 where Matson was arrested, and that such camp was in Grays Harbor County. (Ab. 45.)

The defense injected into the proceedings the question of whether or not Camp 4 was in Thurston County by cross-examination of the state's witnesses early in the case. The state at no time offered any competent evidence to prove

that the defendant at the time of his arrest was in fact either in Thurston County or a resident thereof. Counsel did recall the witness Hoag to testify to the fact that Matson had told him at the time he was released on bail that letters addressed to him at Rochester in Thurston County would reach him and stated that he knew that Matson had a brother at Rochester. (Ab. 24.) To meet this testimony the witness Sondell was called by the defense and as we have indicated testified positively that Camp 4 was in Grays Harbor County and further testified that he knew Matson, knew that he was working at such a camp at the time of his arrest and that he had his trunk and clothes there. (Ab. 45.)

The witness Forsberg testified that the Matson residing at Rochester came from the same place that he did and that the Victor Matson referred to by the witness Hoag was not the brother and was not in any way related to the defendant Matson; that the defendant Matson stopped at Rochester when not working in the camps, but that he always worked. "He comes

there and stays over night or little longer. He has no brother there." (Ab. 45.)

To sustain the second issue, to wit: that the I. W. W. was formed to teach the doctrines enumerated in the information, the state introduced in evidence Exhibits B to Z and A 1, 3, 4, and 5, and certain oral testimony by various witnesses as to statements made by alleged members of the I. W. W. and the conclusions that such witnesses had drawn from such statements as to what principles the I. W. W. as an organization espoused and advocated. The exhibits were admitted upon the testimony of the witnesses Mitchell, Fisher and Majerus. The witness Mitchell, police officer of the city of Spokane, testified: "I am able to identify the literature of that organization; I have seen many of these books taken off of men who said they were I. W. W.s and who had a card on their persons." (Ab. 35.) This statement referred to all of the exhibits with the exception of State Identification Y. (Ab. 35.) With reference to the last named identification the witness was asked: "Have you seen that book on the persons of members of

the organization known as the Industrial Workers of the World, or in their halls?" A. "I have, many of them." Q. "Are you able to state whether or not that is distributed by the organization known as the I. W. W. as a part of their literature?" A. "Well, I have found it on many members or in their effects. I do not just recall now whether they had this or not, but it has been found in their effects."

MR. O'LEARY: At this time I want to offer in evidence State's Identification Y and ask that it be marked State's Exhibit Y.

MR. DURHAM: I object to that for the reason that the witness has said that he found it in the effects of somebody, but he did not know that it had been circulated by the Industrial Workers of the World. It is the work of an author that should not be used against these defendants. There is nothing in this identification that shows they were circulated, printed or advocated, or anything else. This book will throw no light on this case." (Ab. 36.)

Upon further examination the prosecuting attorney elicited from the witness the further statement that Exhibit Y had since March, 1919, been found either upon the persons or in the effects of members of the Industrial Workers of the World and in what was known as the I. W. W. headquarters, the secret headquarters, and, as the witness states, "Since March 4, 1919, they have not been allowed to keep open. They have rented residences in the residential district and have continued their business there and we have found them during that time in these places." Whereupon counsel again objected upon the ground that the exhibit was incompetent, irrelevant and immaterial. "They have not shown it was in circulation and the witness testified that it was in the headquarters of the I. W. W. and in the private effects of different members."

THE COURT: The objection may be overruled. It may be admitted and marked State's Exhibit Y. (Ab. 36.)

The witness Fisher is an inspector in the United States Immigration Service and testi-

fied with reference to Exhibits B to X: "I know that that literature is distributed and has been distributed right along by the organization. It has been distributed by mail, by express and by handing it out individually or selling it." (Ab. 27.) On cross-examination the witness admitted: "I don't know of any literature having been circulated in Thurston County. I know various other counties through the state but I don't know as to Thurston County. I do not know of any I. W. W. organization in this county. I have never had occasion to investigate in this county in connection with it." (Ab. 30.) The witness did not identify Plaintiff's Exhibit Y.

The witness Majerus, a police officer from Tacoma, testified: "I have had occasion to see quite a good deal of I. W. W. literature. I have seen it in Tacoma, Washington, being distributed in different propaganda meetings, Soldiers and Sailors Councils, composed of members of different organizations, approximately about fifteen members of the Industrial Workers of the World in this organization. I have been in halls about once a week and I have

seen their literature there and have seen their literature on persons of men under arrest."

In addition to the exhibits above referred to the state offered as evidence testimony of various witnesses as to statements they had heard made by alleged members of the I. W. W. and as to what in their judgment the I. W. W. advocated or taught.

The witness Fisher was permitted to testify: "As a result of the conversations which I have had with the various members of the organization and delegates, I think I am able to state what the particular object and purpose of the organization is. In their views as to private ownership of property they recognize no property rights. In bringing about this revolution they say they will bring it about, if possible, peaceably, and if not peaceably, then by any means they will accomplish the end. They advocate sabotage as one of the means of accomplishing that end."

MR. DURHAM: I object to this line of testimony for the reason that all that is being

said here by Mr. Fisher is hearsay, absolutely what somebody told him in Seattle or somewhere else outside of Thurston County. The state is attempting to put in evidence by this witness and permit this witness to testify as to what somebody told him. It is a most flagrant violation of the rules of evidence of law for Mr. Fisher to come in here and tell what somebody told him in Seattle, Spokane or somewhere else. I object to Mr. Fisher coming in here and saying what somebody told him at some indefinite time within the last nineteen years. It is certainly incompetent, irrelevant and immaterial in this case.

THE COURT: The objection is overruled.

MR. DURHAM: Exception. (Ab. 25.)

Q. From the conversations which you have had with various members of this organization, are you able to tell, Mr. Fisher, what their attitudes and teachings are with reference to the subject of patriotism?

MR. DURHAM: I object to that as incompetent, irrelevant and immaterial. It does not

tend to prove or disprove the guilt or innocence of these defendants.

MR. O'LEARY: I will change the word I used there from patriotism to sedition, the word which the statute uses.

THE COURT: The objection may be overruled.

Q. Have you, Mr. Fisher, in your conversations with members of this organization, heard discussed by them the matter of bolshevism or Russia?

MR. DURHAM: I object to that as incompetent, irrelevant and immaterial. The defendants are not charged with being Bolsheviki subjects. It is an outside matter. It has no bearing in this case, simply injected into the case, because there is no contention that there is similarity between these two organizations.

THE COURT: The objection may be overruled.

The witness was permitted to state: "A large number of them have stated that the

present existing Soviet form of government in Russia was the nearest existing form of government as to their ideas of an ideal government. From my investigation of the various members of the I. W. W., those members are very closely related with the Russian Labor Party. The Russian Labor Party in this country is a union of Russian workers. It claims to be the organization that formed and controlled the Bolshevik form of government in Russia. Membership in the Union of Russian Workers and the I. W. W. coincide in part, and a part of the members of the Union are not only members of the I. W. W., but they publish the publications distributed by the I. W. W. organization." (Ab. 27.)

The witness Alexander MacDonald was asked: "Have you made any investigation at all for the purpose of determining the percentage of members of the organization that you have come in contact with that were aliens?"

MR. DURHAM: I object to that as incompetent, irrelevant and immaterial.

MR. O'LEARY: The sole purpose in asking

this is to show the nature of the persons who belong to this organization and who go to make it up. The question is entirely proper only for this purpose and I ask it for that purpose only.

THE COURT: The objection is overruled.

The witness then stated: "Upon investigations which I have made I would say that about seven per cent of the members of the organizations are Americans. The greatest percentage of the I. W. W. are a migratory class of workers, about seventy or eighty per cent would be close to it. Very few of them are family men." (Ab. 32.) Mr, MacDonald was then asked: "In your conversations with the different members of the organization have they ever told you anything as to the attitude of the organization on the matter of sedition?"

MR. DURHAM: I object to this as incompetent, irrelevant and immaterial. It is certainly hearsay as to what somebody told this sergeant over in Spokane. I might go and tell the sergeant something that I want him to say against somebody who claimed to be an I. W.

W. There would not be any end to that kind of testimony.

MR. THOMPSON: The contention of the state is that these men are co-conspirators, that these men are in a conspiracy to overthrow the government and its subdivisions. It comes under the old established rule of law that the admission of a co-conspirator is proper and is an exception to the hearsay rule.

THE COURT: The objection may be overruled. (Ab. 33.)

Whereupon the witness MacDonald was permitted to testify: "I have heard them say in their speeches, speaking of the American flag, that the American flag was a dirty rag and to hell with the American flag, and trampled the American flag on the platform, and if they could not get possession of the industries of the United States in a peaceable way they would do it by violence, and he says 'Do not pinch the fruit with your fingers because if you do it will spoil and if you do the farmer will be looking for more labor and he will pay better wages.' Then he would say, 'Don't drive

spikes in the logs, but if you do, next year the loggers will be paid better wages.' (Ab. 33.) I have heard Gurley Flynn say that the I. W. W. would be the sole owners and would have control of the United States, instead of the present government. She said herself that she was an anarchist and that she was proud of it. I have never heard the I. W. W. say anything concerning the advisability of attempting to bring about these changes by use of the ballot. They say, do not bother going to the polls to vote—do it by other means. They use the words 'direct action,' which means by violence." (Ab. 34.)

THE INSTRUCTIONS.

The Court instructed the jury that the following were the essential elements of the offense charged:

"That a certain group of persons known as the Industrial Workers of the World was formed to advocate, advise and teach crime, sedition, violence, intimidation and injury as a means or way of effecting or resisting indus-

trial, economic, social or political change, which group or organization was in existence on or about the 15th day of November, 1919, and after the 19th day of March, 1919.

"That on or about the 15th day of November, 1919, and after March 19, 1919, defendants were members of or organizers of such group of persons.

"That between March 19, 1919, and November 15, 1919, defendants have at some time been in Thurston County, Washington." (Ab. 10.)

After the jury had retired to consider their verdict defendants excepted to the instructions of the court in the following language:

Defendants except to the instructions given in this case and the Court's attention was called to it before the return of the verdict; called attention to the fact that there was no instruction as to intent and that the men could not be convicted without showing there was intent. The Court's instructions 17 and 19 are the instructions, I believe, that the defendants called the Court's attention to while the jury was out and that we except to at this time. (Ab. 17.)

At the conclusion of the state's evidence the defendants moved for a dismissal upon the ground that the state had failed to make out a sufficient case to sustain the conviction as charged in the information in that it had failed to prove that the defendants gave aid to anybody, that either of the defendants were members of the I. W. W., that they had helped to organize the I. W. W. since March 19, 1919, or that they had voluntarily assembled with the organization known as the Industrial Workers of the World, and that the state failed to prove that the Superior Court of Thurston County had jurisdiction of the defendants or either of them. (Ab. 40.) This motion was denied and an exception was allowed.

In due time the defendants served and filed their motion for a new trial on the ground of error occurring at the trial and that the verdict of the jury was not supported by the evidence. This motion was by the Court denied and an exception allowed. (Ab. 6.) At the same time the defendants filed their motion for

arrest of judgment, which was likewise denied and an exception allowed. (Ab. 6.) On January 22nd the Court imposed sentence upon the defendants and upon the same date written notice of appeal to this Court was served and filed in the case. (Ab. 6.)

ASSIGNMENT OF ERRORS.

(1) The Court erred in overruling the demurrer to the information. (Ab. 3.)

(2) The Court erred in denying the defendants' motion for a directed verdict at the conclusion of the state's case. (Ab. 40.)

(3) The Court erred in denying the defendants' motion for a new trial. (Ab. 6.)

(4) The Court erred in denying the defendants' motion for an arrest of judgment. (Ab. 6.)

(5) The Court erred in imposing sentence upon the defendants and each of them, because the jursidiction of the Court had not been established.

(6) The Court erred in admitting in evidence State's Exhibit B.

(7) The Court erred in admitting in evidence State's Exhibit C.

(8) The Court erred in admitting in evidence State's Exhibit D.

(9) The Court erred in admitting in evidence State's Exhibit E.

(10) The Court erred in admitting in evidence State's Exhibit F.

(11) The Court erred in admitting in evidence State's Exhibit G.

(12) The Court erred in admitting in evidence State's Exhibit H.

(13) The Court erred in admitting in evidence State's Exhibit I.

(14) The Court erred in admitting in evidence State's Exhibit J.

(15) The Court erred in admitting in evidence State's Exhibit K.

(16) The Court erred in admitting in evidence State's Exhibit L.

(17) The Court erred in admitting in evidence State's Exhibit M.

(18) The Court erred in admitting in evidence State's Exhibit N.

(19) The Court erred in admitting in evidence State's Exhibit O.

(20) The Court erred in admitting in evidence State's Exhibit P.

(21) The Court erred in admitting in evidence State's Exhibit Q.

(22) The Court erred in admitting in evidence State's Exhibit R.

(23) The Court erred in admitting in evidence State's Exhibit S.

(24) The Court erred in admitting in evidence State's Exhibit T.

(25) The Court erred in admitting in evidence State's Exhibit U.

(26) The Court erred in admitting in evidence State's Exhibit V.

(27) The Court erred in admitting in evidence State's Exhibit W.

(28) The Court erred in admitting in evidence State's Exhibit X.

(29) The Court erred in admitting in evidence State's Exhibit Y.

(30) The Court erred in admitting in evidence State's Exhibit Z.

(31) The Court erred in admitting in evidence State's Exhibit 1A.

(32) The Court erred in admitting in evidence State's Exhibit 3.

(33) The Court erred in admitting in evidence State's Exhibit 4.

(34) The Court erred in admitting in evidence State's Exhibit 5.

(35) The Court erred in instructing the jury that the essential elements to be proved by the state were:

"That a certain group of persons known as the Industrial Workers of the World was formed to advocate, advise and teach crime, sedition, violence, intimidation and injury as a means or way of effecting or resisting indus-

trial, economic, social or political change, which group or organization was in existence on or about the 15th day of November, 1919, and after the 19th day of March, 1919.

"That on or about the 15th day of November, 1919, and after March 19, 1919, defendants were members of or organizers of such group of persons.

"That between March 19, 1919, and November 15, 1919, defendants have at some time been in Thurston County, Washington." (Ab. 10.)

(36) The Court erred in permitting the witness Fisher, over the objection of the appellants, to testify: "As a result of the conversations which I have had with the various members of the organization and delegates, I think I am able to state what the particular object and purpose of the organization is. In their views as to private ownership of property they recognize no property rights. In bringing about this revolution, they say they will bring it about, if possible, peaceably, and if not peaceably, then by any means they will accomplish

the end. They advocate sabotage as one of the means of accomplishing that end."

(37) The Court erred in permitting the witness Fisher, over the objection of counsel, to testify: "A large number of them have stated that the present existing Soviet form of government in Russia was the nearest existing form of government as to their ideas of an ideal government. From my investigation of the various members of the I. W. W., those members are very closely related with the Russian Labor Party. The Russian Labor Party in this country is a union of Russian workers. It claims to be the organization that formed and controlled the Bolshevik form of government in Russia. Membership in the Union of Russian Workers and the I. W. W. coincide in part, and a part of the members of the Union are not only members of the I. W. W., but they publish the publications distributed by the I. W. W. organizations." (Ab. 27.)

(38) The Court erred in permitting the witness Alexander MacDonald, over the objection

of counsel, to testify: "Upon investigations which I have made I would say that about seven per cent of the members of the organization are Americans. The greatest percentage of the I. W. W. members are a migratory class of workers, about seventy or eighty per cent would be close to it. Very few of them are family men." (Ab. 32.)

(39) The Court erred in permitting the witness MacDonald to testify, over the objection of counsel: "I have heard them say in their speeches, speaking of the American flag, that the American flag was a dirty rag and to hell with the American flag, and trampled the American flag on the platform, and if they could not get possession of the industries of the United States in a peaceable way they would do it by violence, and he says, 'Do not pinch the fruit with your fingers, because if you do it will spoil and if you do the farmer will be looking for more labor and he will pay better wages.' Then he would say, 'Don't drive spikes in the logs, but if you do, next year the loggers will be paid better wages.'" (Ab. 33.)

ARGUMENT.

We shall submit to the Court for consideration the following propositions:

POINT I.

Chapter 174 of the Laws of 1919 is unconstitutional for the following reasons:

(a) It amounts to an attempt to punish constructive treasons and libels upon government and is in violation of the provisions of Section 27 of Article 1 of the Constitution of Washington and of Section 3 of Article III of the Constitution of the United States.

(b) Because it abridges the right of free speech.

(c) Because it is class legislation.

(d) Because it violates Section 14 of Article I of the Constitution of Washington, prohibiting cruel punishments.

(e) Because it is indefinite, vague and uncertain in its terms and provisions.

(f) Because its title is insufficient and in violation of Section 19 of Article II of the Constitution of Washington.

(g) Because it invades the personal liberty of the citizen in a manner not justified by the police power of the state.

POINT II.

The Court erred in not submitting the issue of the defendants' knowledge and intent to the jury.

POINT III.

The Superior Court of Thurston County was without jurisdiction to enter judgment on the verdict.

POINT IV.

The information is duplicitous and the Court should have sustained the defendants' demurrer.

POINT V.

The information is bad for indefiniteness and uncertainty.

POINT VI.

The documentary evidence and oral testimony offered by the state and complained of in Assignments of Error Nos. 6 to 39, inclusive, were hearsay in character and wholly incompetent and immaterial.

POINT VII.

There was no evidence to sustain the information.

POINT I.

Each of the constitutional questions raised under Point I have been heretofore fully presented to this Court in other cases in which counsel are attorneys for the appellants. It is probable that prior to the time this case is finally assigned for hearing this Court will have rendered its decision on such constitutional questions. We therefore submit such constitutional questions to the Court without further argument, requesting that these appellants be given the benefit of any favorable decision by this Court in regard to them.

POINT II.

THE ELIMINATION OF THE ISSUE OF THE DEFENDANT'S KNOWLEDGE AND INTENT IN BECOMING A MEMBER OF THE ORGANIZATION DENIED THE DEFENDANT DUE PROCESS OF LAW AND DEPRIVED HIM OF HIS RIGHT OF TRIAL BY JURY.

The Court, in its Instruction No. 17, set out fully in our Assignment of Error No. 35, instructed the jury as to the essential elements of the charge against the defendants. The effect of this instruction was to eliminate entirely the element of intent. The matter was specifically called to the Court's attention prior to the time that the jury had returned its verdict. We contend that the elimination of the element of intent constitutes reversible error.

It is an axiom of law that there can be no crime in the absence of criminal intent. State vs. Considine, 43 Wash. 105; State vs. Nichols, 61 Wash. 144. In each of these cases the above rule was approved and its ex-

ceptions pointed out. The Considine case involved the sale of liquor to a minor, the Nichols case the sale of liquor to a half-breed. All that the Court held in these cases was that intent would be presumed from the doing of an act specifically enjoined by a statute passed as a police regulation. The Criminal Syndicalism statute does not fall within this exception. It does not prohibit any specific or well-defined act. As we have pointed out elsewhere in this brief it is pervaded by uncertainty and vagueness. Unless the prohibitions of the act are clear and definite and have a fixed and common meaning, criminal intent cannot be logically nor fairly presumed from their violation. The class of cases in which criminal intent may be presumed has been clearly pointed out by the Supreme Court in the case of Pettibone vs. U. S., 148 U. S. 209; 37th Law Edition 425:

> "It is insisted that evil intent is to be found not in the intent to violate the United States statute, but in the intent to do an unlawful act, in the doing of which justice will in fact be obstructed and that therefore the intent to proceed with the obstruction of justice must be supplied by

> the fiction of the law. But the specific intent to violate the statute must exist to justify a conviction and this being so, the doctrine that there must be a transfer of intent in regard to crimes following from general malevolence has no applicability." 1 Bishop, C. R., par. 335: "It is true that if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong intended, but if the unintended act was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it as a basis of criminal intent. The element is wanting through which such quality might be imparted."

The elimination of intent in a criminal case by omitting from the statute "knowingly," or words of similar import, fixes a rule of evidence and is governed by the same general principles as making one fact prima proof of another. Judge Lurton, in the recent case of Mobile J. & K. C. R. Co. vs. Turnipseed, 219 U. S. 35, 55th Law Ed., 78, said:

> "That a legislative presumption of one fact from the evidence of another may not constitute a denial of due process of law

> or a denial of the equal protection of the law, it is only essential that there be some rational connection between the fact proved and the ultimate fact presumed and the inference of one fact from the proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If the legislation provision, not unreasonable in itself, prescribing a rule of evidence in either civil or criminal cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In prosecutions under the Criminal Syndicalism statute "the unintended wrong" and "the ultimate fact presumed" is participation in the dissemination of the doctrines prohibited by the act. Under the rule laid down in the Pettibone case intent to commit this "unintended wrong" may be presumed only if the wrong is the natural and probable consequence of an intended wrongful act, or, as stated by Judge

Lurton, if there be a "rational connection" between the "fact proved" and the "ultimate fact" presumed.

In the instant case "the intended wrongful act" and "the fact proved" is membership in the I. W. W. Is the dissemination of the prohibited doctrines the natural and probable consequence of giving aid to or being a member of a labor organization? Is there a rational connection between the mere fact of such membership and the spreading of such doctrines? If not, criminal intent cannot be presumed. If I aid an organization in some indefinite and vague way not disclosed in the information, upon what theory may it be presumed that I adopt any unlawful doctrine it may endorse? If I voluntarily assemble with a group of persons I may be attracted by curiosity. My only purpose may be to ascertain what doctrines they in fact teach and I may assemble with them for the express purpose of combatting such doctrines. What logical connection is there between my presence at the assemblage and an intent to disseminate doctrines of the organization? Suppose an organization of which I

am a member over my dissenting voice advances a policy of which I disapprove; thinking to reverse this policy I retain my membership for the purpose of bringing about a reconsideration of the matter in issue, is there any rational connection between my membership and the advocating of the doctrines of which I disapprove? The courts are unanimous in holding that mere membership in any organization, or mere association with others guilty of doing an unlawful act, does not create either civil or criminal responsibility.

> "It has been urged here that the mere fact that any individual defendant was a member and contributed money to the treasury of the United Hatters' Association made him a principal of any and all agents who might be employed by its officers in carrying out the objects of the association and responsible as principal if such agents used illegal methods or caused illegal methods to be used in undertaking to carry out these objects, we cannot assent to this proposition. The clause of the United Hatters which provides that certain of its officers shall use all means in their power to bring such shop into the trade, does not necessarily imply that these officers shall use other than lawful means

> to accomplish the object. Surely the fact that an individual joins an association having such a clause in its constitution cannot be taken as expressing assent to the perpetration of arson and murder. Something more must be shown. As, for instance, that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association, that its agents were warranted in assuming that they might use such unlawful means in the future, that the association or its individual members would approve or tolerate such use whenever the ends sought to be obtained might best be obtained thereby." Lawler vs. Loewe, 187 Fed. 526. (C. C. A., 2 Cir.)

In Patterson vs. the United States, 222 Fed. 632 (C. C. A. 6th Cir.) the defendants were charged with conspiracy in restraint of trade. In dismissing several defendants, the appellate court said:

> "In order for the defendants to have so conspired it is essential that they had such connection with the national company that in the performance of their duties they had to do with its competitors. Those of its officers and agents who had nothing to do with competition, as, for instance, in the manufacturing department, cannot be

said to have so conspired. It is not enough to connect any officer or agent of the national company with the conspiracy that they knew of it or acquiesced in it. They must have, by word or deed, become a party to it."

In Union Pacific Coal Company vs. U. S. C. C. A., 8 Cir. 173 Fed. 737, the court said:

"A corporation is a person within the meaning of this Act. It is another and different person from any of its stockholders whether they are corporations or individuals and no corporation can, by violating a law, make any one of its stockholders who does not participate in that violation, criminally liable therefor."

"But there is another and fatal objection to all the accounts of this indictment. All the acts and matters charged as criminal offenses were, as shown upon the face of the indictment, the acts of the Distillery & Cattle Feeding Company, a corporation organized under the laws of Illinois. It is not alleged what relation the accused bore to said corporation nor does it appear whether their connection therewith was other than that of every stockholder. * * * If the acts charged constitute criminal offenses the Distillery & Cattle Feeding Company is the person who committed the same. It would be unheard of in crimi-

> nal jurisprudence to make its stockholders criminally responsible for the corporation's violation of the statute. That corporation can readily be reached and prosecuted by the government, either civilly or criminally, for what it may have done in contravention of the law without requiring the courts by strained construction of the statutes to extend its provisions and make them embrace all parties merely interested in such corporation. Except in conspiracy offenses there is no criminality by representation." In re Greene, 52 Fed. 119.

The rule announced by the above decisions has been followed and emphasized by another line of cases holding that the withdrawal of the issue of criminal intent from the jury deprives the defendant of his liberty without due process of law and denies him the right of trial by jury.

In the case of State vs. Strasberg, 60 Wash. 106, the Court had under consideration the constitutionality of the act denying to a defendant the right of advancing insanity as a defense to the commission of a crime. It was contended that the denial of such a right eliminated entirely the question of criminal intent

and therefore deprived the defendant of his right of trial by a jury. This Court invoked the doctrine that "an act done by me against my will is not my act" and declared the statute unconstitutional.

In State ex rel Kern vs. Emerson, 90 Wash. 567, the appellant had contracted to sell her property to one who used it for the purpose of lewdness. Under a complaint based upon the Red Light Law it was decreed that the premises be closed for six months and that the appellant pay a fine of three hundred dollars. The appeal was predicated solely upon the ground that the appellant had no knowledge of the use to which the premises had been put. Judge Chadwick, speaking for the Court, said:

> "We hold that the penalty of three hundred dollars may be imposed if the owner or his agent have actual knowledge of the misuse of his property or if the reputation of the place when considered in the light of the facts and circumstances is such as to warrant a jury in saying he should have known the character of the places or the uses to which it was put, that is to say, he must have notice, actual or constructive."

In Wibord vs. U. S., 163 U. S. 629, 41 Law Ed. 289, the defendants were charged with conspiring to organize a military expedition against a friendly power. In discussing the competency of certain evidence the Court, at page 299, said:

> "Assuming a secret combination between the parties and the captain or officers of the Horsa had been proved. Then on the question of whether such combination was legal or not, the motive or intention, declarations of those engaged in it, explanatory of the acts done in furtherance of its object, came within the general rule and were competent."

This rule is not avoided by designating an organization a conspiracy for criminal intent is the very essence of conspiracy.

> "The criminal quality resides in the intentions of the parties to the agreement construed in connection with the purpose contemplated. The mere fact that a conspiracy has for its object the doing of an unlawful act, followed by the doing of such act, does not constitute the crime of conspiracy unless the jury find that the parties were actuated by criminal intent. In many cases this inference would be irresistible, but the jury might find that

although the object of the agreement and the overt act were unlawful, nevertheless the parties charged acted under a misconception or in ignorance without any actual criminal motive. If that conclusion should be reached whatever other criminal penalties the parties might have incurred, the crime of conspiracy would not have been established and the defendants would be entitled to an acquittal. The actual criminal wrongful purpose must accompany the agreement and if that is absent the crime of conspiracy has not been committed." People vs. Flack (N. Y.), 26 N. E. 270.

"The mere knowledge, acquiescence or approval of the act without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose." Corpus Juris, Vol. 12, Page 544.

"It may be that the judge only meant to say that the acts of the defendant being merely in furtherance of the design of the conspirators would not make him a party to the conspiracy. It certainly would not unless he knew of the designs of the conspirators and intentionally lent his aid to them." People vs. Mather, 4 Wend. 229, 21 American Decisions, 148.

"Different inferences were at least possible and in cases of this kind where conspiracy to do an unlawful act is charged it should be left to the jury to say which inference shall be drawn. Moreover, it was for the jury to determine from the entire body of the proof what was the intent of the individuals who made up the combination or what they must have known were the necessary and inevitable consequences of their acts." Lawler vs. Loewe, 197 Fed. 522 (C. C. A., 2nd Cir.)

See also

Grate vs. Stewart, 76 Fed. 140;
People vs. Kirk, 134 Pac. 347;
Commonwealth vs. Tulley, 33 Pa. Sup. C. 35.
McKnight vs. U. S., 115 Fed. (C. C. A. 6 Cir.) 972;
Bendall vs. U. S., 262 Fed. (C. C. A. 8 Cir.) 747;
Stenzel vs. U. S., 261 Fed. (C. C. A. 8 Cir.) 161;
Hibbard vs. U. S., 172 Fed. (C. C. A. 7 Cir.) —;
German vs. U. S., 120 Fed. (C. C. A. 6 Cir.) 666;
Plath vs. People, 100 N. Y. 590;
People vs. Sweeney, 55 Mich. 586;
State vs. Norton, 76 Mo. 180;

State vs. Stewart, 29 Mo. 419;
State vs. Gibson, 19 S. W. (Mo.) 980;
State vs. DeBolt, 73 N. W. (La.) 499;
Patterson vs. State, 85 Ga. 131;
People vs. Landman, 37 Pac. (Cal.) 518;
Roberts vs. People, 19 Mich. 401;
People vs. Mize, 80 Cal. 42;
People vs. Wiman, 29 N. Y. Supp. 324;
2 Starkie on Evidence (Third Amer. Edit.) 739-740.

POINT III.

THE SUPERIOR COURT OF THURSTON COUNTY WAS WITHOUT JURISDICTION TO ENTER JUDGMENT ON THE VERDICT.

Section 2 of Article 1 of the Constitution of Washington provides:

> "In criminal prosecutions the accused shall * * * have a public trial by an impartial jury in the county in which the offense is alleged to have been committed."

It is, of course, elementary, that all jurisdictional facts must be proved as well as alleged and it will not be contended that there

was evidence in this case that the defendant ever advocated, advised or taught anything either in Thurston County or elsewhere in violation of subdivision 1 of Section 1 of the syndicalism statute or that he ever printed, published or issued, or in any manner distributed in Thurston County or elsewhere anything in violation of subdivision 2 of said section. His conviction, if it is to be sustained at all, either from the standpoint of the sufficiency of the evidence to sustain a verdict or from the standpoint of the court's jurisdiction to enter a judgement on the verdict, must rest on subdivision 3 of this section. More specifically, it must rest upon the charge that he was a member of the I. W. W., for there is no clear proof that the defendant either organized or helped to organize or give aid to or voluntarily assembled with any group of persons in Thurston County. In fact, the state did not prove or endeavor to prove that there was at any time in Thurston County such a group of persons as the one referred to in the information. The question then is reduced to this: Can a member of the I. W. W. be prosecuted in any county

where the officers may find his person, or only in that county where he maintains his membership in the unlawful group of persons?

Logically the first step in determining the venue of the offense of which the defendant is convicted is to determine the exact nature of the offense denounced by the words "be a member of" any group of persons formed to advocate, advise or teach, etc. Has the state of Washington by this provision assumed to punish all persons within its borders who are members of such a group wherever formed or has it merely assumed to prevent the formation of such groups within its borders by punishing those who stand in privity with them? It requires little or no argument to establish the latter and to definitely exclude the former. In the first place, the act itself will permit no other construction. Four distinct things are prohibited by subdivision 3:

1. To organize or help to organize.
2. Give aid to.
3. Be a member of.
4. To voluntarily assemble with any group

of persons formed to advocate, teach or advise crime, etc.

Two of these, "to organize or help to organize" and "to voluntarily assemble with," manifestly refer to a group of persons formed within the state of Washington. For, otherwise, the prohibition against organizing or assembling with such group is a palpable attempt at extra territorial legislation and is void.

The same disjunctive form is employed in referring to "aiding" and "being a member of" and the inference is plain that these two terms refer to a group of persons similarly formed. The prohibition of Section 11 of the Act strengthens our contention. It prohibits the owner of any property from permitting the use of his property by any person or persons engaged in the doing of the things made unlawful by Section 1. Clearly, a building could not be rented to a group of persons formed without the State of Washington and having no local formation. In the second place, any attempt on the part of the State of Washington, either directly or indirectly, to regulate or prohibit the formation of such groups in

another state or in a foreign nation, would be obviously beyond its jurisdiction no matter how invidious their philosophy might be to the people of this state. The question whether such group should be permitted to exist in the state of Illinois or Great Britain and the manner of their regulations are questions to be determined by those sovereignties in accordance with their own political ideas and the particular needs of their own people. Any attempt on the part of the State of Washington to punish a British subject on account of any relationship contracted there would be an offense against international law and any similar attempt to punish a citizen of the State of Illinois would violate the law of comity existing between the states. Manifestly, then, it cannot have been the intent of our legislature to exclude such persons from the State of Washington. If there be any power to do this it resides alone in the Federal government.

In the third place, the state has no power to punish a mere state of being or state of mind or to restrict law-abiding persons in their natural right to travel where they will and as-

sociate with whom they please. This subject has been exhaustively discussed and the authorities in support of our position cited in another part of the brief. A situation in many respects similar to this was presented to this Court in the case of State vs. Carroll, 55 Wash. 588. In that case it was sought to prosecute the defendant in King County for a burglary committed in San Juan County under a statute which provided that when property taken by burglary in one county is brought into another county, jurisdiction may be exercised in both counties. But this Court held that the statute in question was in violation of the constitutional provision above quoted and that jurisdiction was not a migratory thing which followed either the defendant or the stolen property in their wanderings but existed only in the county where the prohibited act had been committed. In the instant case the prohibited act is the maintenance of a prohibited rerationship, and there is not a scintilla of evidence in this record that such relationship existed in Thurston County. For all of the reasons above stated it is clear that the

intent of subdivision 3 of the syndicalism statute is to prevent the formation within the State of Washington of certain groups of persons which are regarded as hostile to the security of its people and institutions. The existence of such a group of persons within the State of Washington and within the particular county in which the prosecution is brought is an indispensable condition to the state's right to punish those identified with it and it follows necessarily that the group is the gravamen of the offense. Group means, in this case, conspiracy. Conspiracy is defined by both the common law and by our own statute as a combination of two or more persons to do a criminal or an unlawful act or to commit an act not in itself criminal or unlawful by criminal or unlawful means. No matter by what name you call it, a group of persons formed to advocate, advise or teach crime, sedition, etc., as a way or means of effecting an industrial or other change, is a conspiracy.

> "As in other criminal cases the prosecution must prove the existence of a conspiracy and the defendant's connection with it at some time within the period of

limitation and also that the offense charged was committed in the county in which the venue was laid." 8 Cyc. 676.

"Although, technically, the place where the conspiracy was entered into is the place of venue, yet it is generally held that the venue may be laid as to any and all conspiracies in the county in which the act was done by any of them in furtherance of their common design, and consequently in this county all the conspirators are indictable." Wharton Crim. Law., Par. 1664.

"It is only necessary to say that in an indictment for conspiracy the venue may be laid either in the county of the original unlawful confederation or in that wherein any overt act pursuant thereto transpired." American Fire Ins. Co. vs. State (Miss.), 22 So. 102.

The venue must then be established in conspiracy as well as any other cases. It can be laid only by establishing, first, that it was formed in the county; second, that one of the conspirators had committed some overt act in the county in furtherance of the objects of the conspiracy. Neither of these elements were proved in the instant case. Venue not having been proved, the court was without jurisdiction to impose sentence.

POINT IV.

THE INFORMATION IS DUPLICITOUS.

The information in this case clearly charges the defendant with each of the following offenses:

1. That he did wilfully, unlawfully and feloniously be a member of the I. W. W.

2. That he did wilfully, unlawfully and feloniously be an organizer of the I. W. W.

3. That he did wilfully, unlawfully and feloniously give aid to the I. W. W.

4. That he did voluntarily assemble with the I. W. W.

Each of these is most clearly a separate and distinct crime. If facts or acts had been pleaded, instead of mere conclusions, it would necessarily appear that each grew out of a separate and distinct fact or act, necessarily committed at separate and distinct times. To organize or help to organize means, as defined by law, to "form" or "equip with organs." This part of the charge necessarily relates to mat-

ters preceding the actual organization of the I. W. W. Giving aid to an organization presupposes the existence or formation of that organization, and it results necessarily that this part of the charge relates to matters subsequent to the event of organization. The same is true of the charge that the defendant assembled with the I. W. W. The charge that the defendant was a member is entirely independent of the three preceding charges in as much as membership is not essential to the commission of any of the offenses involved in said charges.

The practice of joining in one information offenses so diverse in the character of evidence necessary to sustain them has been so clearly denounced by this Court as to leave no room for discussion in the matter.

In the case of State vs. Dodd, 84 Wash. 438, the appellant was charged under the provision of Rem. & Bal. Code 2440, under Subdivision 1 of having placed a female in charge of another for an immoral purpose, under Subdivision 5 with having solicited persons to go to a house

of prostitution for immoral purposes, and under Subdivision 4 with being a husband of a woman and conniving and consenting to her leading a life of prostitution. It was the contention of the appellant that the information charged three separate and distinct offenses and not the commission of one offense by different means and for that reason violated the statutory provision that an information must charge but one crime and in one form only. In sustaining this contention Judge Fullerton, speaking for this court, said:

> "We think also that the information conceding it to be sufficient in the particulars discussed is faulty for the second reason urged by the appellant. It may be that a person could by a series of connected overt acts, violate the prohibitions of the clauses in question found in Subdivision 1 and 4 of the section quoted in such a manner as to permit the inclusion of the entire acts in one information. But it is still difficult to see how any series of acts could be so connected as to make it possible to include therein the prohibited matter found in Subdivision 5. Seemingly the acts prohibited by this latter Subdivision must, under all circumstances, be disconnected

> with the other prohibited acts. The act of a husband in placing his wife in custody of another person for the immoral purpose and with the intent that she shall lead a life of prostitution has no readily perceived connection with the act of soliciting persons to go to a house of prostitution for an immoral purpose, be that immoral purpose what it may. If this be true, to connect them in one information, is to make the information bad for duplicity."

In Seattle vs. Molin, 99 Wash. 213, the appellant was charged with violating the provisions of a city ordinance prohibiting traffic in intoxicating liquors. The complaint followed the provisions of the ordinance. It was the contention of the defendant that the complaint was duplicitous. In sustaining this contention it was said by this court:

> "It may be conceded that the same particular and technical accuracy of pleading is not required in prosecutions in the police court for violation of municipal ordinances as in cases prosecuted by indictment or information in a court of general jurisdiction. But this rule has its limitations. It does not go to the extent of permitting a person to be charged with a variety of wholly disconnected, inde-

pendent and inconsistent offenses and then convicted of whichever of the infractions, if any, the evidence may be sufficient to sustain. No one should be called upon to answer a dragnet charge of crime no matter in what court it may be made or in whose behalf it is prosecuted. Such a rule imposes no unreasonable burden upon the municipality in the enforcement of its ordinances and a less measure of protection to the accused would be contrary to the spirit of our institutions. Even in police court the defendant is entitled to be informed of the nature and cause of the accusation against him to the end that he may fairly and intelligently prepare his defense. A principle so thoroughly grounded in natural justice is not subject to any exceptions. In this case the complaint is neither direct nor certain as to the particular charge upon which the state intends to rely for conviction. On the contrary, it charges at least five separate and distinct offenses arising out of disconnected transactions and based upon wholly different provisions of the ordinance. Clearly it does not come within the principle that where a single offense may be committed in different ways or by the use of different means, it may be charged to have been committed by more than one of these ways or means provided they are not repugnant to each other. Here the

> charge is not single. The complaint charges a number of offenses. It does not allege different ways or means of committing the same offense but charges a number of separate offenses arising out of a variety of independent acts. Can it be said that manufacturing liquor, selling, bartering and disposing of liquor, buying liquor contrary to law and having a prohibited amount of liquor in one's possession are but different ways of committing the same offense? If so, what is the offense which these miscellaneous acts constitute? The complaint is so palpably duplicitous and indefinite we shall content ourselves by citing some of the authorities which demonstrate that it is so."

It may be suggested by counsel, however, that this error was cured by the fact that the Court instructed the jury only on membership and the formation of the organization to teach the doctrine. Our reply to this is three-fold: First, even if it were true that all of the charges but one was so withdrawn, that fact could furnish no reason or excuse for failing to comply with the plain mandate of the statute, that the information must charge but one offense. The defendant is entitled to be informed

of the nature and cause of the accusation against him in advance of the trial in order that he may intelligently prepare his defense thereto. Both the letter and plain intent of the law forbid that the prosecution shall load its information with horseshoe nails and scrap iron and then fire a broadside at the defendant in the hope that some one will strike him, and when this is done the situation is not remedied by withdrawing all the horseshoe nails that happen to miss.

POINT V.

THE INFORMATION IS BAD FOR INDEFINITENESS AND UNCERTAINTY.

The rule is most clearly announced in this state not only by statute, but by the repeated decisions of this Court, that the information charging a person with crime must plead the **acts** or **facts** constituting that crime and not mere conclusions; and when the statute defining an offense is couched in generic terms such as organize, give aid to, assemble with, etc., it is no longer sufficient to plead the offense in

the language of the statute, but the information must "descend to particulars."

Remington & Ballinger's Code 2057 provides:

> "The indictment or information must be direct and certain as it regards * * * the crime charged."

Section 2065 provides:

> "The indictment or information is sufficient if it can be understood therefrom * * * that the act charged as the crime is clearly and distinctly set forth in ordinary and concise language without repetition and in such a manner as to enable a person of common understanding to know what is intended."

Section 2059 provides:

> "The indictment or information must charge but one crime and in but one form only, except that where the crime may be committed by the use of different means, the indictment or information may allege the means in the alternative."

In construing the foregoing provision this Court has held that where the statute is couched in general terms an information based thereon is insufficient unless it sets forth the

act or acts falling within the general terms upon which the state seeks a conviction.

In State vs. Dodd, 84 Wash., page 438, the information was based upon Subdivision 1 of an act which prohibited the placing of a female in charge of another for immoral purposes. This Court, in discussing the information, said:

> "It will be observed that the words used in Subdivision 1 of the section quoted to define the crime sought to be charged therein are wide and general in their application and can be applied to acts wholly dissimilar in their nature. For example, it would be placing a female in the custody and control of another person for an immoral purpose to place her therein for the purpose of having her beg on the street for her custodian or to have her perform acts of theft for his benefit or to live with him in a state of concubinage or to practice prostitution with others for his gain. Many other acts falling within the meaning of this might be enumerated, but these are enough to show that a charge in the general words of the statute does not inform the defendant of the specific offense with which he is accused or, to use the language of the statute, 'it does not contain a statement of the acts constituting the offense in such a manner as to enable

a person of common understanding to know what was intended.' The fact is that the defendant is compelled to wait until the state develops its proof at the trial before he can know the specific charge against which he was required to defend. This is not enough. The information should state the particular immoral purpose on which the state intends to rely in support of its accusation. We are aware that it is a general rule that an indictment or information is sufficient if it charges the offense in the language of the statute. But to the rule there are many exceptions. Where the statute itself descends into particulars and recites the very acts which constitute the crime, it is sufficient to charge the crime in the language of the statute, but where, as here, the statute is couched in general terms, capable of being applied to a variety of acts, it is not sufficient that the information charge the offense in the general terms, but it must state the act or acts falling within the general terms on which the state intends to rely for a conviction."

In State vs. Mullen, 80 Wash. 368, this Court said:

"The statute defines the crime by the use of the generic term and unit. In such a case an information using the same gen-

eric terms as the statutory definition is insufficient as stating a conclusion. It must be more specific than the statute and state such particulars as will bring the act of the person charged within the generic term and notify him of the specific act charged. Our Constitution, Article 1, Section 22, declares in criminal prosecutions the accused shall have the right to demand the nature and cause of the accusation against him. In United States vs. Mills, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in United States vs. Cook, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species—it must descend to particulars.' 1 Arch Cr. Pr. & Pl. 291. The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal

> for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

In the case of State vs. Carey, 4 Wash. 431, it was charged that the defendant did unlawfully practice medicine within the State of Washington without having obtained a license provided for by law. The information was attacked upon the ground that the offense was not sufficiently described and the information was vague, indefinite and uncertain. This contention was sustained by the Court and Judge Dunbar in his decision discussed fully the vice of uncertainty in criminal complaint:

> "This is a crime not known to the common law. It is purely statutory and if the statute has failed to define it, it is not defined at all and the defendant is called upon to answer to an indefinite crime where no particular act constituting the

crime is charged. To meet this objection it is contended by the respondent that everybody knows what the term 'practicing medicine' means. Every person may know what his particular idea of practicing medicine means, but one person's idea as to what it means may be very different from another's. It may as well be claimed that everybody knows what murder means or theft or arson and it will not be claimed for a moment that an indictment charging a person with having on a certain day and at a certain time committed the crime of murder or theft or arson without further description of the crime would be sufficient and yet these are terms with a well-defined and well-understood meaning compared with the term practicing medicine. The fact that one is a common law crime and the other is statutory cannot affect the defendant's right to be informed of the precise nature of the offense with which he is charged so that he may be enabled to intelligently prepare his defense. In this instance, the defendant was compelled to deny a conclusion of law rather than a statement of fact. It is urged by the respondent that it is sufficient in an indictment for a statutory crime to charge the crime in the language of the statute. This proposition we are not inclined to controvert, but the complaint in this instance does not meet the requirements of the

proposition stated. Bishop on criminal procedure lays down the rule thus in paragraph 611:

'Where a statute defines the offense which it creates, it is ordinarily adequate while nothing else will in any instance suffice, to charge the defendant with all of the acts within the statutory definition substantially in the words of the statute, without further expansion.'

So that it will be seen that if the theory of the respondent is true that the statute in this instance does not define the crime, the rule limiting the indictment to the statutory words does not apply. For it only applies where the statute does define the offense which it creates, and if in this case the statute does define the crime, then, certainly the complaint falls short of the requirements, for it does not pretend to charge the defendant with the commission of the acts constituting the crime. The Supreme Court of the United States, in U. S. vs. Simmonds, 96 U. S. 360, in quoting the proposition stated by Bishop, says:

'But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he

may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute.'

And this principle runs through all of the cases, viz.: that the indictment must be so specific in the description of the charge that the defendant will be able to defend himself of his acquittal or conviction for protection against further prosecution for the same things. Supposing this defendant had seen fit to plead guilty to the indictment and had paid the fine imposed and had afterwards been indicted for practicing medicine on the same day, there could have been nothing in the record to show that it was not for the same offense and no plea in bar could possibly have been made, for there would have been no way to determine that fact unless it be concluded that a man cannot practice medicine but once in a given day, which is a conclusion unfortunately not warranted by the common experience of mankind. It is no hardship on the state to be held to this particularity, and it is nothing more than common justice that the defendant should know the particular unlawful acts he is charged with committing. In fact, outside of the authority of the cases cited, and the great weight of authority is opposed to sustaining this kind of indict-

ment, it seems to us that the requirements of our statute are not met by this indictment, for while our statute happily does away with many of the technical refinements which needlessly hampered and retarded the administration of justice under the common law practice, it has not gone to the other extreme of forcing a man to trial without informing him of the crime he is charged with committing. But it has substituted for such technical requirements the simplicity of a statement of facts. The code requires that the indictment must contain: First, the title of the action, specifying the name of the court in which the indictment is presented, and the names of the parties; second, a statement of the acts constituting the offense in ordinary and concise language, etc. **(not the name of the offense, but a statement of the acts constituting the offense).** These are mandatory provisions, and the second requirement of the statement of the acts constituting the offense is just as important and essential as the first requirement that the indictment must contain the title of the action and the name of the parties. There is no room for the construction of this statute; the language is plain and unequivocal, and tested by this statutory requirement the complaint in this case must fall."

Analyzed in the light of these principles, the information in question is manifestly insufficient. The words "organize" and "give aid to" are clearly most generic in character. The offenses denounced by these prohibitions in the statute may be committed by innumerable acts of widely divergent character. The defendant was entitled to be informed of these **acts.** In lieu of that he was merely informed that he had done something which, **in the opinion of the pleader,** amounted to organizing or giving aid to the I. W. W. It is equally clear that he was entitled to be informed of **the** meeting which it is charged that he assembled. Without this the information no longer describes the offense, it merely names it. Without this information the defendant's plea of not guilty is unintelligible either to him or the court. Can the pleader merely give his conclusion that a certain unidentified meeting and certain unidentified books were of the character described? These are matters about which opinions may well differ, and the rule is perfectly clear that in such circumstances the **facts** must be pleaded in order that the defendant may

know them and in order that the court may determine whether such facts justify the conclusion that the law has been violated.

In U. S. vs. Watson, 17 Fed. 145, the defendants were indicted for conspiracy to procure certain commissioners of election to make a false return of the votes cast. In quashing the indictment the court said:

> "By all rules of pleading, civil as well as criminal, when a written document is relied on to sustain the prosecution or plaintiff's case, it must be set out either verbatim or in substance and not a statement of the information of the pleader as to the fact it was intended or might produce."

In DeLacey vs. U. S., 249 Fed. 625, the Circuit Court of Appeals for the Ninth Circuit referred to the Watson case and said:

> "It is asserted that by the rules of criminal pleading, if a written document is relied upon to sustain the prosecution it must be set forth either verbatim or in substance, citing U. S. vs. Watson (D. C.), 17 Fed. 145. That was the case in which the defendant was charged with a conspiracy to accomplish a specific result by force, threat, intimidation, etc., or by any unlawful means, and as the information

alleged that the unlawful means used was a certain written instrument, it was held that the instrument should be set forth in order that the court might know whether an offense was charged."

In U. S. vs. Hess, 124 U. S. 483, 31 Law Ed. 516, the court said:

"The object of the indictment is to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances."

In Foster vs. U. S. (9th C. C. A.), 253 Fed. 481, the defendants were charged with making and conveying false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States. A demurrer was

interposed and overruled and a bill of particulars furnished. Judge Gilbert, speaking for the Appellate Court, said:

> "We are of the opinion that the indictment is fatally defective and that the demurrer should have been sustained. The plaintiffs in error had the constitutional right to be informed of the nature and cause of the accusation against them. To furnish them with that information it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general. A statutory offense may be so defined that the indictment will sufficiently charge the violation thereof if it follows the language of the statute, but this is so only in cases where the statute apprises the offender from the mere adoption of the statutory terms of the precise nature of the offense for which he is to be tried. Here the statute is very general in its terms and the indictment merely charges in the language of the statute. Thus in the first count it goes no further than to allege that the accused did wilfully, knowingly, unlawfully and feloniously make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States, and to pro-

> mote the success of its enemies. It conveyed no information to the accused of what the reports were, wherein they were false, nor to whom they were made. It is as bare of information as to the nature of their offense as would have been an indictment charging that at a designated time and place they 'committed larceny.'"

POINT VI.

THE DOCUMENTARY EVIDENCE AND ORAL TESTIMONY OFFERED BY THE STATE AND COMPLAINED OF IN ASSIGNMENTS OF ERROR NOS. 6 TO 39, INCLUSIVE, WERE HEARSAY IN CHARACTER AND WHOLLY INCOMPETENT AND IMMATERIAL.

The evidence was offered by the state and admitted by the Court to sustain the allegation of the information that the I. W. W. was a group of persons formed to teach and advocate certain doctrines. To determine the admissibility and competency of this evidence it is necessary to first determine what group of persons is referred to. The information states

"Said Industrial Workers of the World then and there being a group of persons formed to advocate," etc.

> "The words then and there in an allegation in the indictment for arson that the defendant burned a certain house then and there occupied, controlled and owned by him, referred to the time and county previously stated." Baker vs. State, 8 S. W. 23; 25 Tex. App. 1; 8 Am. St. Rep. 427.
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> "The words then and there as used in an indictment merely bring forward prior averments of date and venue and do not otherwise enlarge the description of the offense." Shaw vs. U. S., 165 Fed. 174; 99 C. C. A. 208.
>
> "Then and there as used in an indictment are words of reference and mean the time and place last previously stated in an indictment, and have the same effect as if the words designating the time and place were actually repeated." State vs. Colton, 24 N. H. 143 (4 Fost.).

A penal statute and an information based thereon will be strictly construed. The clear charge in the instant case is that the appel-

lants on or about November 15, 1919, were members of an organization formed in Thurston County to advocate, teach and advise certain doctrines. The prosecuting attorney did not during the trial amend or ask leave to amend the information. We know of no rule of evidence or construction that will permit the prosecution to prove an offense different from that charged. There is not a scintilla of evidence that such a group of persons were ever formed in Thurston County. In fact, the testimony is positive that the organization did not exist in such county. Mr. Fisher, a witness for the state, said: "I do not know of any I. W. W. organization in this county. I do not know of any literature having been circulated in Thurston County." (Ab. 30.) It is true that there is some testimony to the effect that the defendant Hestings admitted that he had been an organizer in Thurson County. The record discloses, however, that he had long prior to his arrest turned in his credentials (Ab. 20), and that such money as he had collected in Olympia had been sent to the local secretary at Tacoma. (Ab. 20.) There being

no group of persons in Thurston County as specifically alleged in the information, evidence as to what some other group formed elsewhere had advocated was clearly incompetent and immaterial. None of the exhibits introduced in evidence was found in Thurston County, none was in the possession of either of the defendants. None of the oral statements relating to the I. W. W. was uttered in Thurston County, and the record fails to disclose that either of the defendants had at any time or place made any statements, oral or in writing, in advocacy of the doctrines denounced by the information. The exhibits introduced were written and the statements testified to were made by third parties strangers to the record and were therefore pure hearsay. Counsel sought to justify their admission upon the theory that they were the declarations of co-conspirators. (Ab. 33.) The only conspiracy suggested by the information arose from the defendants' membership in a group of persons charged to have been formed in Thurston County. The existence of such a conspiracy was not proved, and it is academic that to ren-

der admissible the acts and statements of co-conspirators the specific conspiracy must be proved by independent evidence. We fully agree with the prosecutor that to establish venue it was necessary to allege the formation of a local group. The lower court, however, disregarded the limitation in the information, and instructed the jury that it was essential for the state to prove only that a group of persons known as the I. W. W. was formed to teach certain doctrines and was in existence at the time alleged in the information. The state contended that such a group was formed in Chicago in 1905. Was the evidence now under consideration competent to prove the purpose for which such organization was formed? There is no proof that any of the authors of the various exhibits were members of the I. W. W. There is no proof that any of them in any way participated in the formation of the organization or had any direct or personal knowledge of what transpired at the time the organization was born. The statements contained in the exhibits were, therefore, pure hearsay. The hearsay rule is too

well established in the jurisprudence of this country to require citations in its support. It is a salutary rule designed and affirmed to prevent injustice and to protect the accused from the dishonesty of hostile witnesses. In this state it is buttressed by the constitutional provision asserting the right of the accused to meet the winesses against him face to face. Exceptions to the rule should be granted with extreme caution. The law of conspiracy is an exception to the hearsay rule. We are unable to reconcile it with the above constitutional provision, but recognize that the courts have held that a conspirator is bound by the acts and statements of his co-conspirators. Was the evidence now under consideration admissible under the conspiracy rule? This rule, like others, has its exceptions. Both counsel and the lower court asserted the rule but ignored these exceptions. Because the conspiracy rule is a modification of the hearsay rule and is therefore capable of great abuses, the courts have applied it with caution and strictly limited its scope. Without quotation from the books, we may safely state that the courts have

uniformly restricted evidence in a conspiracy case by the adoption of the following propositions: First, the existence of the conspiracy must be proved and the agreement of the parties thereto to accomplish the common design prohibited by the information must be established; second, that the acts and statements of co-conspirators are admissible only if done or said to further such common design or in the event they are the natural and probable consequences thereto.

8 Cyc. 641;

Hitchman Coal Co. vs. Mitchell, 245 U. S. 248; 62 Law Ed. 275.

Measured by these restrictions, was the evidence now under discussion admissible? The charge is that the organization was formed to teach, etc. The prosecutor assumed the burden of proving that a group of men in Chicago in 1905 entered into an agreement to form an organization for the specific purpose of advocating certain doctrines enumerated in the information. To carry this burden he introduced in evidence pamphlets that were written,

statements that were made long subsequent to the formation of the group. Some authorities hold that acts done prior to the conspiracy or to the committing of a criminal act are admissible to establish the purpose of the conspiracy or to prove criminal intent. We have found no authorities that countenance the proposition that the purpose of a conspiracy or criminal intent may be proved by acts subsequent to the time the conspiracy was entered into or the crime committed. In this state by statutory provision it is unnecessary to prove an overt act to sustain a conspiracy charge. It logically follows that the mere proof of an overt act by one or more persons does not establish the existence of a conspiracy to do the overt act. The fact, if it be true, that the I. W. W. as an organization or that an individual member has since 1905 advocated certain doctrines does not prove nor tend to prove the common design or purpose of the original group. The purpose of the original group can be established only by the things said or done prior to its formation or contemporaneous therewith. The only exhibit that meets this

test is the constitution and preamble adopted by the original group. Had counsel adhered to his original theory and the specific charge that a group of persons was then and there formed to teach certain doctrines, there are some authorities (with which we disagree and which are not, in our judgment, the weight of authority) that hold that prior statements or acts would be admissible to prove the design and purpose of the conspiracy. But counsel saw fit to depart from such theory and charged and sought a conviction on the ground that a group of persons formed in Chicago in 1905 conspired to advocate and teach the doctrines denounced. To establish this proposition each of the exhibits and all of the oral statements were pure hearsay and therefore incompetent. Too great stress cannot be placed upon the importance of establishing by competent proof the original design and common purpose of a conspiracy, because the admissibility of all other testimony rests upon its relationship to the original design and its tendency to further it or upon the fact that it is the natural and probable consequence of it. The only compe-

tent testimony in the instant case to sustain the allegation of the information is, as we have suggested, the preamble and constitution. There is nothing in that to denote or indicate any design to advocate the doctrines denounced by the statute. The preamble frankly urges an industrial and economic change, but because the original group favored the abolition of the wage system does not indicate that they also favored the effecting of that change by force or violence or otherwise than by lawful means.

> "The clause of the United Hatters which provides that certain of its officers shall use all means in their power to bring such shops into the trade does not necessarily imply that these officers shall use other than legal means to accomplish the object. Surely the fact that an individual joins an organization having such a clause in its constitution cannot be taken as expressing assent to the perpetration of arson or murder." Lawler vs. Lowe, 187 Fed. 526; 6 C. C. A.

Unless and until it is proved that the original group intended and designed to effect the changes favored by the advocacy of the doc-

trines denounced by the statute, the fact that others who later joined the organization advocated such doctrines is entirely incompetent because not tending to further the common design. The distinction is vital. Testimony as to the acts and statements of third parties is admissible not because they were made or done by co-conspirators. If this were so, one joining a conspiracy would be bound by every crime committed by co-conspirators without reference to its relationship to the common purpose and design. The fact that the third party was a co-conspirator must be laid as a foundation, but the true test of the competency is, Was the statement made or the act done to further the original design by the means then agreed upon? The failure of the lower court to grasp this distinction resulted in the admission of incompetent testimony that was highly prejudicial. The testimony of the witness MacDonald fully illustrates the point. Over objection he was permitted to state that he had "heard them say in their speeches that the American flag was a dirty rag and to hell with the American flag, and trampled the

American flag on the platform." (Ab. 33.) Assuming that the persons making such statements were in fact members of the I. W. W. (which fact was not proved), what relationship to the original design to form a labor union did such statement bear? What tendency did it have to further the common design agreed upon by the group formed in Chicago in 1905? It would take the imagination of a Jules Verne to discover any connection between such statements and acts and the original purpose and design of the I. W. W. The same is true of the statements of the witness Fisher, that the I. W. W. favored the Soviet form of government (Ab. 27) and that a majority of them were aliens and but few of them family men. (Ab. 27.) All of these statements were admitted over objection. None of them had the slightest connection with the issues in the case. All of them tended to and undoubtedly did arouse the hostility of the jury. They were clearly inadmissible and highly prejudicial. The exhibits and statements now under discussion, then, were pure hearsay and were incompetent, first, because

written and made subsequent to the formation of the I. W. W.; second, because they had no direct relationship to the common design of the organization as stated in its preamble and are not the natural and probable consequences of the original purpose. They were clearly incompetent upon the further ground that the state failed to prove that they were the declarations of co-conspirators of the defendants. There is not a scintilla of evidence that one of the pamphlets admitted was written by an I. W. W. Some of them bear the I. W. W. label, others do not. Some were printed by the I. W. W. Publishing Bureau, others were printed by printing houses having not the slightest connection with the organization. There is no competent evidence as to what, if any, significance the label has, nor is there any proof as to the relationship, if any, between the I. W. W. Publishing Bureau and the organization. Pouget on Sabotage, State's Exhibit I, admitted over the defendants' objection, was printed by Charles H. Kerr & Co., and by them copyrighted. From this exhibit counsel read on pages 93, 99 and 77 (St. F. 55). The

Cross-Examination of William D. Haywood, State's Exhibit U, was not printed by the Publishing Bureau, bears the label of the Typographical Union, affiliated with the American Federation of Labor. From this exhibit counsel read extensively (St. F. 57). "When the Leaves Come Out," State's Exhibit Y, was printed by a private printing concern, was copyrighted by the author. It bears the I. W. W. label, but under it is printed "The work done by ——— Horn, erstwhile pressman of the I. W. W. Publishing Bureau." The exhibits, then, were not admitted because they bore the label, nor because they were published by the I. W. W. Publishing Bureau, nor because they were written by members of the I. W. W. The only evidence required by the lower court was the testimony of the witnesses Mitchell and Majerus that the pamphlets had been taken off the men who said they were I. W. W. and had a card on their persons (Ab. 35) and upon the conclusions of the witness Fisher that they had been distributed by mail, express and by handing it out individually or selling it. (Ab. 27.) None of the exhibits was found in

Thurston County. None was in the possession of either of the appellants. So far as the record discloses, neither of them had ever seen a single one of the exhibits introduced against him or had a reasonable opportunity to obtain them or to know that they were being circulated. Neither of them ever heard any of the oral statements alleged by the witnesses to have been made or had a reasonable chance to learn that they had been made. Upon what theory, then, are the appellants or any other member of the I. W. W. to be bound by such exhibits or statements? If an I. W. W. in Spokane had a set of burglary tools, would that prove that the appellant Matson favored burglary? If the Holy Bible had been found in the room and possession of the I. W. W., or in their secret headquarters, would that have indicated the appellant Hestings' attitude toward religion? If members of an organization are to be bound by literature that they never saw or read, never indorsed or circulated, some definite rule must be fixed to determine what literature is admissible, what should be rejected. We have examined the record carefully

and are entirely unable to ascertain upon what theory the literature was offered by the state or admitted by the court. Counsel will doubtless contend that a member is responsible for and is presumed to endorse the literature of the organization with which he is affiliated. What is the literature of the organization? What facts with reference to it must be proved to justify its admission against a defendant who has never seen it? We request counsel to outline in his answering brief any rule that is sound and tenable and at the same time broad enough to include all of the literature introduced in this case. The testimony with reference to the oral statements made by alleged members is so clearly incompetent that to state our position is to sustain it. Witnesses were permitted to relate conversations or speeches made by third parties upon the mere statement that such third parties had declared their membership in the I. W. W. It is axiomatic that an agent cannot prove his agency by his own declaration.

> "Neither the fact of agency nor the existence of the agent's authority can be

proved by admission or declaration of the alleged agent to third parties in the absence of the supposed principal." Clough vs. Munro, 86 Wash. 513.

"It is too well settled in law to permit of any controversy or question that the authority of an agent cannot be shown by his own declarations." Western Security Co. vs. Douglass, 14 Wash. 221.

Such being the rule in civil cases where only property rights are involved, a much stricter rule should be adopted in criminal cases where personal liberty is at stake. The same rule has been applied in conspiracy cases.

"In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent facts that there was a combination between them and the defendants." Hitchman Coal Co. vs. Mitchell, 245 U. S. 248; 62 Law Ed. 275.

The state did not prove nor offer to prove by independent facts or otherwise that the persons alleged to have made certain statements to or in the hearing of the witnesses Mitchell, Fisher and Majerus were in fact

members of the I. W. W. Their statements were admitted in evidence through a third party solely upon their own declarations as to their agency or membership in the organization. They were clearly inadmissible and constitute reversible error.

> "The state's learned counsel, however, contend that there was an abundance of evidence to sustain the conviction outside of the objectionable evidence and argued that its admission is for that reason not so far prejudicial as to require a reversal. But this court has no means of knowing what effect the erroneous evidence had upon the mind of the jury. It may have been the controlling factor that induced the verdict of guilty. Before the erroneous introduction of evidence can be regarded as non-prejudicial, it must clearly appear that it is so. It does not so appear in this instance. 'The appellant was deprived of a right which the law accorded him, objected to the deprivation and duly excepted, and the presumption is that he was injured thereby.'" State vs. Nist, 66 Wash. 61.

For the foregoing reasons we respectfully submit that the judgment of the lower court

should be reversed and the case remanded with instruction to dismiss the information against the defendants.

Respectfully submitted,

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We hereby acknowledge ~~due and legal service of the foregoing Brief by the~~ receipt of the within Brief of three copies ~~thereof~~; this 27th day of October, 1920.

Thos. H. O'Leary

Attorneys for Respondent.