Carl & Anne Braden
4403 Virginia Ave.,
Louisville 11, Ky.

COURT OF APPEALS OF KENTUCKY

CARL BRADEN, - - - - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, - - Appellee.

APPEAL FROM JEFFERSON CIRCUIT COURT,
CRIMINAL BRANCH, SECOND DIVISION.

BRIEF OF APPELLANT.

LOUIS LUSKY,
ROBERT W. ZOLLINGER,
Attorneys for Appellant.

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Dec. 9, 1955

COURT OF APPEALS OF KENTUCKY

CARL BRADEN, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - *Appellee.*

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COURT OF APPEALS OF KENTUCKY

CARL BRADEN, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - *Appellee.*

BRIEF OF APPELLANT.

STATEMENT.

May it please the Court:

This is an appeal from a judgment of the Jefferson Circuit Court, Criminal Branch, Second Division, entered January 17, 1955, sentencing the defendant to a term of fifteen years at hard labor in the State Penitentiary at LaGrange, Kentucky, and a fine of $5,000, upon his conviction under KRS §432.040 (R. 84).*

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*In this brief the following system of notation will be used for record references: Pages in the Clerk's transcript will be referred to by the prefix "R." Pages in the transcript of evidence will be referred to by the prefix "Tr.", preceded by the name of the witness if any— *e. g.*, "Braden, Tr. ___". Pages in the formal bill of exceptions will be designated "Bill of Exceptions, p. ___". Pages in the grand jury transcript will be referred to by the prefix "G. J. Tr.", followed by the hearing date appearing on the relevant volume—*e. g.*, "G. J. Tr. 9/15/54, p. ___". Pages in the transcript of the hearing of November 20, 1954, on the motion to suppress seized documents, will be referred to by the prefix "Tr. 11/20/54." Prosecution exhibits will be referred to simply by the prefix "Ex." Defense exhibits will be referred to by the prefix "Deft. Ex."

The defendant was indicted October 1, 1954, on a charge that he had advocated criminal syndicalism or sedition, or circulated documents so advocating, or adhered to an organization so advocating (R. 2-3). A demurrer to the indictment and a motion to dismiss (R. 4-6) were overruled (R. 6-9).

A motion to suppress certain evidence which had been seized at the defendant's home after his indictment was filed November 16, 1954 (R. 28-30). Argument was heard November 20, 1954, and the motion was overruled November 23, 1954 (R. 32-34).

The trial began November 29, 1954, and continued from day to day thereafter, eventuating in a verdict of guilty on December 13, 1954 (R. 65; Bill of Exceptions, pp. 4-16).

The defendant on December 22, 1954, filed his motion and grounds for a new trial and on the following day filed a motion in arrest of judgment (R. 68-83). The motions were argued January 10, 1955, and were overruled the next day (R. 83-84). The case then proceeded to judgment as noted above.

By order of the trial Court and this Court, the defendant's time to file the bill of exceptions in the trial Court was extended to and including September 22, 1955. The bill of exceptions was timely filed, and the record was filed in this Court on November 15, 1955, within sixty days thereafter, as provided by CCP §336(4).

THE FACTS.

This statement of facts will summarize the material evidence in the case—that is, the evidence relating to the *actions* of the *defendant*. Most of the huge record, to be sure, is devoted to other matters—the *opinions* of the defendant on a variety of questions, and the opinions and actions of *other people* not alleged or shown to be under his control. But the material facts can be simply stated.

(1) *Purchase of the Wade house.* In the spring of 1954 the defendant was visited at his home in Louisville by a young Negro veteran named Andrew E. Wade IV, who told the defendant that he wanted to buy a ranch-type house; that he had looked all over for such a house in the "Negro" sections and couldn't find what he wanted; that he had found a house he wanted in New Albany, Indiana (just across the river from Louisville); and that he wanted the defendant to buy it for him (Braden, Tr. 1825).

Young Wade had previously attempted to buy this house himself; but on the day that he was to make a $100 deposit on it, the real estate agent called the deal off because he could not obtain the owners' consent (Wade IV, Tr. 160-161). Wade believed that this was done because of his color (Wade IV, Tr. 161, 171, 172, 173). He still wanted the house, and asked the defendant—who for some years had been an acquaintance of his and a fairly close friend of his father and business partner, Andrew E. Wade, Jr.—to help him

get it (Wade IV, Tr. 162-163; Braden, Tr. 1877; Wade Jr., Tr. 1300-1301).

The defendant said he was inclined to comply with the request but wanted to consult his wife, and told young Wade to come back the next day, which he did. The Bradens then suggested that instead of buying the New Albany house he move into their own neighborhood, a "mixed" neighborhood where both whites and Negroes lived. Young Wade declined, saying that he and his wife both liked the New Albany house and wanted to buy it. Accordingly the defendant went there as requested, but found that the house had just been sold (Braden, Tr. 1825-1826; Wade IV, Tr. 163).

About ten days later, after making another unsuccessful attempt on his own and being turned down because of his color, young Wade again sought the defendant's help. He had found a house he liked on Lynnview Drive, in Jefferson County, and at his request the defendant made a $100 down payment, using Wade's money. This purchase was not consummated because Wade decided the monthly payments were too high, and the $100 was returned to him (Wade IV, Tr. 165, 170, 172-173; Braden, Tr. 1826-1827).

About a week or ten days later, young Wade again came to the defendant's home and said he had found a ranch-type house he liked on Rone Court, which is located in a very sparsely built-up neighborhood near Shively, in Jefferson County. He asked the defendant to buy the house for him. The defendant renewed his suggestion that Wade move into the defendant's own "mixed" neighborhood, but Wade said he wanted the

Rone Court house. On May 10, 1954, the defendant and his wife purchased it with Wade's money and on May 13 they conveyed it to Wade and his wife (Wade IV, Tr. 171, 174, 176, 335, 376; Braden, Tr. 1827).

This was the end of defendant's connection with the Rone Court house as such, except that in early June, at young Wade's request, the defendant or his wife typed letters of transmittal enclosing monthly payments to the two mortgagees. Wade had drafted the letters in longhand but wanted them put in neat and business-like form. He used his money for the payments, and mailed the letters himself (Wade IV, Tr. 372-376; Braden, Tr. 1877-1878).

It may be noted that although the defendant recognized a moral duty to give young Wade the help he had requested in avoiding the effects of racial discrimination, the entire initiative in these transactions came from Wade and not the defendant. As Wade testified (Wade IV, Tr. 326-327):

> "781Q. Now, Mr. Wade, did Mr. Braden in the incipiency of the transactions leading up to the purchase of the real property—and I want you to keep that in mind—in seeking to get possession of the property and a home, were you importuned by Mr. Braden at that time or did you importune Mr. Braden to assist you in that desideratum.
>
> A. I asked the favor of Mr. Braden.
>
> 782Q. What did you ask him to do, sir?
>
> A. I explained the situation to him that I had made attempts and looked into the matter of purchasing homes, and I found that the abundance of new homes that are for sale and at a cheaper

price are open, supposedly, to white only in subdivisions designated that same way by the unwritten law, I will say, and that if he would purchase a house for me that myself and my wife select I would highly appreciate it.

783Q. And was that the only reason that you sought his assistance in the matter?

A. That's the only reason. I hadn't seen him for a long time."

The defendant's reaction to this request is best stated in his own words (Braden, Tr. 1824, 1827-1828):

"388Q. Now, Carl, did you buy the house on Rone Court for the Wades?

A. I did.

389Q. And why did you buy that for them?

A. Well, in the first place, Mr. Wade asked me to do it for him as a favor. And in the second place, I felt that he had a right to live in the house of his choice, where he wanted to live. And I felt that if I was going to preach democracy, which I'd done all my life, and still do, I should practice it. I could do nothing else. When the man asked me such a vital thing as that, I could do nothing else but say that I would help him.

* * * * * * *

396Q. * * Now, Mr. Braden, I'd like to break in there and ask you, between the time of the New Albany affair and the time that you attempted to buy the house on Rone Court, did you contact Mr. Wade at all?

A. I did not. He came back to see me and asked me about the house on Lynnview Drive, and I went and made the down-payment on it. * * * then, about a week or ten days later he came to our house again, and he said that he had found this house on Rone Court. * * * He liked this house

and he wanted to live there. So I felt that I had a moral duty to help him, and so I went to the real estate man and made a down-payment on the house—

397Q. (Interrupting) Moral duty—what do you mean by that, Carl? Explain that to the jury.

A. Well, if a man believes in certain things, like freedom of choice and democratic right to live where you want to and to have—to have the right to work where you want to, you can't do anything but follow your beliefs. Or, you have—you have a duty to—to yourself, a moral duty. If you—if you didn't do what you believed in, you would not be doing right, and therefore you would be immoral, not in the sense of being immoral as commonly understood, but—but that you just won't be doing right by yourself and according to your conscience. I believe that if—that you act according to your conscience. Whatever—if you believe in—in helping to improve conditions of the working people, the trade union people, and the Negro people, well, then you have an obligation to do what you can, and not to shirk. That—that is the best way I can explain it.

398Q. Now, Mr. Braden, did you ever encourage a Negro to move into a white neighborhood?

A. I did not.

399Q. Will you explain to the jury what your feeling on that encouragement of something like that is?

A. Well, I—I don't believe that I have a right to encourage anyone to do anything like that. I mean—if you believe in freedom of choice, you don't—

By the Court (Interrupting): Well, that answers the question. Just . . .

A. Yes, sir."

Despite this interruption, the foregoing testimony makes clear the defendant's motivation in purchasing the house. Nothing in the whole record gives any basis for believing that he bought it for any provocative or other ulterior purpose. Both Wade and the defendant knew, of course, that some adverse feeling might develop; but they also knew that Louisville had been a tolerant and law-abiding community where in at least one similar situation, involving a Filipino family, initial ill feeling had been dissipated without violence (Wade IV, Tr. 174, 1361-1362).

(2) *Events following the house purchase.* The record discloses nothing which even remotely suggests that the defendant was in any way responsible for the sad events which took place at Rone Court after the Wades took possession of their new house, culminating with its bombing. Therefore, in strict logic, these events have no place in this summary of material facts. The prosecution, however, besides burdening the record with hundreds of pages of immaterial testimony on this subject, has introduced evidence that defendant prepared certain literature and radio scripts commenting on these events (Wade IV, Tr. 1341-1345, 1349-1358; Braden, Tr. 1882). It is therefore appropriate to summarize them briefly.

The Wades moved into the Rone Court house on Saturday, May 15, 1954 (Wade IV, Tr. 335). Before 4:30 that afternoon, rocks were thrown through the windows (Wade IV, Tr. 332-333). At about 10:30 that night, five men burned a cross on the adjoining vacant lot, about fifteen feet off the Wade property, and ran

away yelling, "Nigger, get out".* At about 2 o'clock the next morning, ten shots were fired at the house, two going through the door (Wade IV, Tr. 197-198, 203-208).

A few days later a weekly neighborhood newspaper, the Shively Newsweek, began publication of a series of inflammatory editorials and other items, impugning the motives of the Wades and the defendant and calculated to incite violence against them. Two typical articles are set forth in full in the transcript (Wade IV, Tr. 349-360).

Thereafter the Wades were subjected to repeated insults and shouted threats by persons driving by their house and Wade's place of business, and by letter and telephone. Around-the-clock guard was set up by the County Police shortly after the shooting, and was maintained for two or three weeks (after which a night guard only was maintained). But the police guard was ineffective in affording protection from these threats. For example, when the elder Wade was repairing a window broken the night of the shooting, several people drove by and shouted that there was no need to put the window in, "We're going to break it out again tonight." Despite the presence of the police guard, they then drove to the end of the dead-end street, wrapped up their license plate, drove back by the house

*Three of these men testified to the grand jury that they had participated in the cross-burning, one of them admitting specifically that the purpose was to intimidate Wade (G. J. Tr. 9/15/54 and 9/24/54, pp. 107-109; G. J. Tr. 9/17/54, pp. 9-10, 97; G. J. Tr. 9/22/54, p. 258). No indictment against them was returned. Wade later swore out a warrant against them under KRS §437.110, which makes it a crime to band together for purposes of intimidation. The examining court dismissed the charge on the ground that the grand jury had heard the evidence and had failed to indict. Louisville *Courier-Journal*, March 10, 1955, §2, p. 1.

and got away. On such occasions the police would tell the Wades, "You people are too intelligent to get excited over those little things, just let them go" (Wade IV, Tr. 256-262, 315-316; Wade Jr., Tr. 1321-1325).

Beginning about May 13 and continuing for about four months, the defendant and his wife were also subjected to a barrage of anonymous abuse (Wade IV, Tr. 1360; Braden, Tr. 1829). For about a week, a police guard was maintained at their home (Wade IV, Tr. 1360; Luton, Tr. 2140-2141). At one point the defendant's wife, in defendant's presence, asked young Wade to move out of the house because of the troubles it had brought; but he did not do so (Wade IV, Tr. 1362-1363; Braden, Tr. 1829).

Because of the foregoing threats, abuse and acts of overt violence, coupled with the ineffectiveness of police protection, the Wades took defensive measures. Guns and pistols were kept in the house for defense against attack. Friends of the Wades served as volunteer guards. A group of whites and Negroes who were sympathetic to the Wades formed the "Wade Defense Committee" for legal aid, public relations and related purposes (Wade IV, Tr. 190-195, 228-229, 305, 316-317, 324-325, 331-332, 345-346; Wade Jr., Tr. 1312-1314, 1341).

At about 12:30 A.M. on Sunday, June 27, 1954, a dynamite bomb exploded under the house. The Wades and some friends, who were on the opposite side of the house from the point of explosion, were uninjured; but the house was badly damaged and rendered unin-

habitable. A great deal of testimony was put in concerning the bombing, but the record is devoid of even a scintilla of evidence that the defendant had anything to do with it (Wade IV, Tr. 255-256, 268-297, 307-309, 313-315, 336-338; Blair, Tr. 1206-1210; Johns, Tr. 1245-1259; Davis, Tr. 1260-1268; Blevins, Tr. 1269-1278; Wade Jr., Tr. 1307-1311, 1320-1321, 1329; Bixby, Tr. 1335-1341).

The defendant did, however, raise his voice in a plea for justice, tolerance and non-violence. Being an experienced newspaperman,* he served on the Publicity Committee of the Wade Defense Committee, and in that capacity wrote some radio scripts and helped prepare a fact sheet called "The Wades" (Wade IV, Tr. 250-251; Braden, Tr. 1882). One of the radio scripts is set forth verbatim in the record (Wade IV, Tr. 1349-1358). It is temperate in tone, factual in style, and stays well within the bounds of fair comment in so far as it touches on matters of opinion. There has been no suggestion that it contains inaccuracies or distortions; and we fail to see why the prosecution has imported it into the case, except perhaps on the premise that it is seditious for Americans to discuss certain public issues publicly, or for a journalist to lend his skill to the presentation of such discussion. The script says nothing for which apology needs be made.

(3) *Alleged Communist Party membership.* There is a flat conflict in the evidence as to whether the defendant was a member of the Communist Party (here-

*The defendant had been labor reporter for the Louisville *Times* and at the time of the house purchase was a copy-reader for the Louisville *Courier-Journal.*

inafter abbreviated "CP"). Ordinarily, an appellate court can consider such conflicts to have been resolved by the jury verdict. As will appear, however, that is not true in this case because, under the duplicitous instructions given to the jury, they might well have returned their verdict of guilty even though they believed defendant's testimony that he was not and never had been a CP member.

For present purposes it is enough to indicate the general nature of the evidence on this issue, reserving for later discussion certain serious questions of admissibility. In its case in chief, the prosecution sought to prove CP membership entirely by circumstantial and opinion evidence based on inferences from defendant's possession of certain books and papers. None of these documents said on its face that defendant was a CP member, but two of them—a souvenir edition of the Russian Constitution (Ex. 33) and a letter addressed "Dear Comrade" and purporting to discuss organizational dues (Ex. 82)—were described by witnesses as documents which would only be found in the possession of a CP member. And it was testified that certain of defendant's books and pamphlets were counterparts of similar material used by the CP in its activities (M. Edmiston, Tr. 52, 58-59; Strunk, Tr. 443, 447-449, 453-457, 467-468, 474-475, 487-492; Glatis, Tr. 552-555, 566-567, 711-712; J. Edmiston, Tr. 722-725, 729-731; Johnson, Tr. 833-835, 846-848; Patterson, Tr. 1113-1117, 1122, 1125-1129; Cvetic, Tr. 1174-1178).

After the prosecution had rested its case, the defendant took the stand and testified that he was not

and never had been a CP member. He testified that, as a journalist specializing in American trade-union matters, he considered it desirable to keep himself informed on the activities of the Communist Party, and that the best way to do this was to read its literature, which he had obtained through conventional trade channels. He specifically denied that he had ever possessed certain documents allegedly found in his home, including the two referred to above—the souvenir edition of the Russian Constitution (Ex. 33) and the dues letter (Ex. 82). (Braden, Tr. 1608-1610, 1694-1696, 1702, 1715-1716, 1789, 1837, 1859).

The defendant's testimony as to these two exhibits was supported by evidence strongly tending to show that certain documents allegedly found in a search of his home (including the souvenir Constitution) had in fact been seized elsewhere, and by the testimony of three non-Communist witnesses that they had purchased counterparts of the souvenir Constitution on the open market—one such witness actually producing his copy in court. (For a detailed analysis of this evidence, with appropriate record references, see Point V, *infra.*)

On rebuttal, for the first time, the prosecution produced direct evidence that defendant had been a CP member. One Alberta Ahearn, an F.B.I. employee, testified that the defendant had recruited her into the CP in 1951 and that, between January and July, 1954, she had attended six meetings of a CP cell consisting of herself, the defendant, and one I. O. Ford (Ahearn, Tr. 2277-2291). Serious limitations which the Court

imposed on her cross-examination, which raise a question as to the competency of her entire testimony, will be discussed below (Point VI, *infra*).

On surrebuttal, the defendant repeated his testimony that he had never been a CP member. He stated that he had met with Mrs. Ahearn on a number of occasions but that their conversations concerned the Louisville chapter of the American Peace Crusade, an organization in which Mrs. Ahearn was very active (Braden, Tr. 2367-2368, 2371-2373, 2379).

(4) *Connection of defendant with organizations other than the CP.* It is clear on the record that the defendant had had some contact with a considerable number of organizations, though he was a member of very few; that he made small monetary contributions to others of which he was not a member; and that, in his capacity as a journalist, he wrote factual articles for publication by still others. Some of these organizations were described by prosecution witnesses as "Communist fronts" which were "infiltrated" or "dominated" or "controlled" by the CP. We do not consider it necessary to review this evidence here in detail, in view of the fact that even the prosecution's "experts" agreed that adherence to such organizations does not in itself constitute seditious or otherwise unlawful conduct. They testified explicitly that "front" organizations serve as "belts"—*i. e.,* media of contact—between the CP and outsiders whom the witnesses called "dupes" (Braden, Tr. 1790-1797, 1816-1824, 1834-1836; Strunk, Tr. 469-471, 475-487; Glatis, Tr. 555-560, 562-566, 589-596, 610-613; J. Edmiston, Tr.

726-729; Johnson, Tr. 872-875; Malkin, Tr. 962, 970-979; Cvetic, Tr. 1170-1174, 1181-1183; Gitlow, Tr. 1230).

The "fronts" thus include in their adherents many people whom even J. Edgar Hoover has described as "loyal Americans" (quoted in *Wieman* v. *Updegraff*, 344 U. S. 183, 190 (1952)).

Since no inference adverse to the defendant can be drawn from his contact with these alleged "front" organizations, the extended and cumulative evidence on this subject has no place in a summary of the material facts. The evidence was of course prejudicial to the defendant, and strongly tended to prevent a fair trial; but this aspect of the evidence will be reserved for discussion below (Point VI).

(5) *The defendant's library and personal papers.* The defendant had a large library. It contained books on a wide variety of subjects, with special emphasis on history and the social sciences, particularly as related to the trade union movement. As already noted, some of them dealt with the CP; some contained opinions favorable to the CP, some were critical of it. The defendant and his wife also had voluminous files of correspondence, cancelled checks, birth certificates and other papers.

A large number, but by no means all, of these books and papers were seized at his home under a search warrant (the invalidity of which will be discussed hereafter). A large number, but by no means all, of the seized books and papers were introduced in evidence by the prosecution.

These books (445 in all, and containing a total of 21,938 pages), together with hundreds of pages of correspondence and other personal papers of the defendant and his wife, were admitted in evidence in bulk, without a one of them having been examined by the Court or subjected to any individual test of competency, relevancy or materiality. They were so admitted on the basis of (a) the general testimony of Zimmerman, a Commonwealth's detective, that he had seized them in the home of defendant and his wife, plus (b) the general testimony of Strunk, a former CP member, that he had examined the material and had found it similar to material which he had used in his own CP activities. None of it was stricken from the record even when Strunk admitted, on cross-examination, that he was wholly unfamiliar with some specific items which defense counsel had picked from it at random (Zimmerman, Tr. 380-382; Strunk, Tr. 440-447, 490-491, 523).

It is just as completely impossible to analyze this miscellaneous mass of documents now as it was to give the jury any clear understanding of them at the trial. It would take years even to read them. But it is pertinent to review some typical items and show the use to which they were put by the prosecution.

A few selected books were apparently relied on by the prosecution as containing seditious teaching. The two items which were given most promienence in this connection were the Communist Manifesto, by Marx and Engels, published in Germany in 1848 (Ex. 48), and (oddly enough) a pamphlet published by the House

Committee on Un-American Activities entitled, "One Hundred Things You Should Know About Communism in the U.S.A." (Ex. 90, subnumber 143).

These were the two items with which the prosecution confronted the defendant on cross-examination, challenging him to deny that they advocated forcible overthrow of the United States Government (Braden, Tr. 1838-1843). Specifically, he was examined on (a) the last paragraph of the Communist Manifesto which refers to "the forcible overthrow of all existing social conditions" and to "a communist revolution," and (b) a quotation attributed to William Z. Foster, head of the CP in this country, which is set forth on the back of the House Committee pamphlet, and which predicts that a Communist will some day head a Soviet United States of America even though no Communist can ever be elected president. There was no evidence, incidentally, that defendant had "circulated" or "distributed" or "published" either of these items, or ever intended to do so, though it is clear that the House Un-American Activities Committee distributed the pamphlet to defendant. Both these items were re-read to the jury by the prosecution in its closing argument, and they can fairly be taken as typical of the literature regarded by the prosecution as seditious.

Another type of material given great prominence was apparently read to the jury not because it advocated violent overthrow of the Government—*i. e.*, was seditious—but simply because it was shocking. In this class is a propaganda pamphlet published in Peiping, China, purporting to document the Chinese claim that

the U. N. troops used bacteriological warfare in Korea (Ex. 49). It is illustrated with photographs of U.N. prisoners and facsimile confessions allegedly signed by them. It was repeatedly exhibited to the jury, and was pointedly referred to in the prosecution's closing argument (Tr. 2455).

Another document in this class is a leaflet soliciting subscriptions to a monthly paper named "The Comet", and—apparently in order to give a sample of its wares—reprinting a disgusting and apparently demented article from one of its previous issues (Ex. 83). A long excerpt from the article was read to the jury (Tr. 1495-1499). One of the more revolting passages in this document was referred to by the prosecution in its closing argument (Tr. 2455):

> "This choice item here accused American Army officers of taking red-hot iron brands and pushing them into the vagina of women."

There was no evidence that defendant had "distributed", "circulated" or "published" the Bacteriological Warfare Report or the "Comet" leaflet, or ever intended to do so. As a matter of fact, he testified that he received them both in the mail from unknown sources, had filed them away as curiosities, and had never exhibited them to anyone (Tr. 1692, 1806-1807).

A third class of documents—mainly letters and copies of letters seized in defendant's home—seem to have been read not because they advocated overthrow of the government but because they revealed the defendant as a persistent critic of injustice to Negroes and

working men. The prosecution's purpose here was apparently to show that defendant was a troublemaker. Examples of this type are Exhibits 51-A, 60, 86-C, 86-D, 86-E, 86-F, 89 (Tr. 1527-1544; Braden, Tr. 1943-1945).

The foregoing summary covers somewhat more than all the evidence which can be considered material—that is, the evidence which relates to the *acts* of the *defendant*. In brief, he bought a house for a Negro in a white neighborhood. When the Negro was threatened and assaulted, he spoke out in his defense. There was evidence that he had belonged to the CP. He had contact with some organizations alleged to be CP "fronts". He possessed a sizeable library, which contained some literature alleged to be seditious. He lent some books to acquaintances. He was a journalist and a prolific correspondent, and he wrote articles and letters critical of what he regarded as social injustice. That is what *he* has *done*.

Most of the testimony concerned the acts and intentions of other people, who were said to have used the CP and other organizations for illegal purposes. Nearly all the testimony of the nine former CP members who testified in chief for the prosecution was confined to this subject. There being no proof that the defendant was in any way responsible for the allegedly illegal purpose of the organizations, or that he knowingly did anything to further such purposes, it is unnecessary to review this evidence here.

We shall present no argument on the question whether the CP, as an organization, advocated the forcible overthrow of the Government. At the trial the defense did not attempt to rebut the cascade of testimony on this subject. In its very nature it was unanswerable, whether true or false; it related to events at remote times and places, and could not be investigated in the brief period between the unannounced arrival of the nine "expert" witnesses and the end of the trial. The injustice inherent in this hit-and-run procedure is obvious, and we do not agree that the testimony of the "experts" can be accepted without reservation. But in this brief we shall take our stand on the proposition that the defendant's guilt or innocence depends not on his associations but on his own acts.

SUMMARY OF ARGUMENT.

Point I. The defendant was constitutionally entitled to a directed acquittal, for two separate reasons:

(a) The Constitutions of Kentucky and the United States forbid the imputation of guilt by association. A man can be punished only for his own misdeeds. He cannot be made responsible for the criminal acts of others unless he participated in the acts himself, either as an accessory or as a conspirator, with knowledge of the criminal acts and with intent to further them. The record contains no evidence that defendant committed any seditious act, or that he knowingly furthered the seditious acts of others.

(b) The Constitutions of Kentucky and the United States forbid the punishment of speech, writing or assembly as such. The defendant did no more than speak, write and assemble with others. The mere communication and discussion of ideas, no matter how noxious the ideas may be, is constitutionally protected unless there is a clear and present danger that harmful overt acts will result. No such danger is disclosed by this record.

Point II. The defendant was entitled to a directed acquittal because the record discloses no violation of KRS §432.040, as rightly construed in the light of its legislative history. The Kentucky statutes on criminal syndicalism and sedition, as originally enacted in 1920, included a section which prohibited the incitation of "enmity, discord or strife or ill feeling between classes of persons for the purpose of inducing public tumult or disorder in order to cause the forcible or violent change or overthrow of the Government". That is essentially what the defendant is charged with here. The General Assembly in 1922 recognized that this section suppressed discussion and experimentation in controversial social fields, and thereby infringed the constitutional guaranty of free speech and thought. For that reason the 1922 General Assembly repealed the section, and thus withdrew the public prosecutor's authority to bring to bear on public controversies, such as the desegregation issue, the furious power of the criminal process.

Point III. The indictment was invalid for several separate reasons, including the following:

(a) It was framed entirely in the language of the statute, and contained no factual allegations as to what the defendant did or when he did it. It failed to inform the defendant of the nature and cause of the accusation against him.

(b) It contained no allegation of wrongful intention on the part of the defendant, or of clear and present danger. These are constitutionally necessary elements of the offense.

(c) It was not only duplicitous, in that it charged several distinct offenses, but its accusatory paragraph charged three different offenses in the alternative. There was thus no direct accusation by the grand jury that the defendant had committed any one of the three offenses. He was however required to stand trial on all of the charges simultaneously; and even now it cannot be known which of them he was convicted on.

(d) It did not show the names of the grand jury witnesses.

(e) It was returned by a grand jury which, as the grand jury minutes show, heard no evidence connecting the defendant with any crime. He was indicted for the sole reason that he asserted his constitutional privilege against self-incrimination.

Point IV. After the defendant's indictment and while he was in jail, evidence against him was unlawfully obtained by the search of his home and the seizure of books and papers found there. The search warrants

were illegal for several separate reasons, including the following:

(a) They were issued by a justice of the peace who had no jurisdiction to issue them.

(b) They were issued on the basis of affidavits (based on information allegedly received by the prosecutor from the defendant's fifteen-year-old foster daughter) which did not afford a reasonable basis for believing that a crime had been committed.

(c) They described the documents to be seized in such general terms as to delegate to the executing officer the determination as to what should be seized.

(d) They authorized the seizure of private books and papers not constituting the instrumentalities or fruits of crime.

(e) They were not entered as public records after their execution and return. At the prosecutor's request, the justice of the peace kept the warrants and supporting affidavits secret until the hearing on their validity.

Point V. The documents seized at defendant's home were erroneously admitted in evidence, both because the searches were illegal and because many of the seized documents were not of the type which the warrant purported to describe. Moreover, the integrity of the seized documents was compromised before the trial, and prejudicial documents not in fact seized at defendant's home turned up among the seized documents.

Point VI. The rules of evidence were repeatedly and prejudicially disregarded, to such an extent as to

constitute an invitation to the jury to decide whether the defendant was a good or bad man, not whether he had committed specified acts.

Hundreds of books and papers were introduced in bulk, without regard to their individual competency, materiality or relevance, simply because they had allegedly been found in his home.

An inquisition was conducted into the opinions of the defendant on such questions as the wisdom of the McCarran Internal Security Act of 1950, resumption of trade with China, admission of the present Chinese government to the United Nations, universal military training, and responsibility for the Korean War.

A great volume of evidence was received with respect to a number of "front" organizations, membership in which is not criminal. The defendant belonged to but very few of the organizations so referred to, and had only the remotest contact with a number of them.

Extensive testimony as to the nature of alleged "front" organizations was read to the jury from the "Guide to Subversive Organizations and Publications," issued by the House Committee on Un-American Activities. The Court recognized that this hearsay compilation of *ex parte* gossip was incompetent as substantive proof, but held it admissible as showing defendant's knowledge of the nature of the organizations—even though he testified that he had not read it. That is to say, the Court held that the "Guide" is too unreliable for the jury to believe, but that the defendant was bound at his peril to accept it as gospel. The

prejudicial effect of this error was aggravated by the apparently official form of the "Guide".

Hundreds of pages of testimony were admitted on the subject of the Wade house. A brutal and shocking crime was proved—a crime with which the defendant was not connected but which the jury was invited to punish him for if they disapproved of his lawful but perhaps unpopular insistence on equal rights for Negroes.

The prosecution was permitted to impeach the defendant's testimony by proving that he had claimed his privilege against self-incrimination before the grand jury which indicted him. His claim of privilege in this secret proceeding, unattended by counsel, where he had been warned that his statements might be used against him, has thus been used not only as the sole basis of his indictment but as a means of obtaining his conviction.

The defendant was deprived of his right of full and lawful cross-examination of Mrs. Ahearn, the most important prosecution witness. He was denied access to the reports which Mrs. Ahearn had made to the F.B.I. at the time of the alleged CP meetings at which she said defendant was present. These reports, which the defendant avowed would have proved her testimony to be false, and which were essential to the defense, were withheld from the defense on the basis of a claim made by the F.B.I. that they were privileged under a Department of Justice Order which was not examined by the Court; which prescribed a procedure not here followed by the F.B.I.; and which had been waived in any event

by previous disclosure of the supposedly secret documents to the prosecution.

Point VII. The case was submitted to the jury under instructions which submitted at least two separate charges for determination by a general verdict, so that the concurrence of all twelve jurors on any single charge was not required for conviction; which allowed conviction on charges not supported by any evidence; and which contained confusing definitions of the crucial terms "sedition" and "criminal syndicalism".

The instructions so applied the statute as to render it violative of Sections 1 and 11 of the Kentucky Constitution, the due process and privileges and immunities clauses of the Fourteenth Amendment, and a Federal statute providing that CP membership is not *per se* criminal. The instructions in effect directed the jury to ignore:

(a) The constitutional rule that even though an organization advocates violent overthrow of government, membership in it cannot be punished as criminal unless the member knows of such advocacy and intends to further it.

(b) The Federal statutory rule (50 U.S.C. §783(f)), which is binding on State Courts, that mere membership or the holding of office in the CP shall not of itself be punished as criminal in any Court.

(c) The constitutional rule that mere attendance at a peaceable assembly, even if it be a meeting of an organization which advocates violent overthrow of government, cannot be punished as criminal.

(d) The constitutional rule that mere circulation of writings, even though they advocate violent overthrow of government, cannot be punished as criminal unless the defendant intends them to cause such overthrow.

(e) The constitutional rule that speech and writing, even though they advocate violent overthrow of government, cannot be punished as criminal unless there is a clear and present danger that harmul overt acts will result.

The instructions follow literally the terms of KRS §432.040, which are so vague and sweeping that neither the defendant nor the jury could ascertain what acts are forbidden. Both the statute and the instructions permit a conviction for wholly innocent and constitutionally privileged conduct, and thus violate §11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment.

Point VIII. Other prejudicial errors added to the unfairness of the trial. The normal order of proof was completely disregarded in a manner which inevitably prejudiced the defendant's substantial rights. And the prosecution's closing argument to the jury was a monumental appeal to passion and prejudice.

Point IX. Federal legislation on the subject of sedition has superseded and rendered inoperative State legislation in that field, including the Kentucky statute on which this prosecution was based.

ARGUMENT.

I. THE DEFENDANT WAS CONSTITUTIONALLY ENTITLED TO A DIRECTED ACQUITTAL.

Before undertaking to discuss the various errors below, we wish to submit a broad affirmative proposition which is sufficient to dispose of the case. Passing for the moment the invalidity of the statute, the indictment and the search warrants; ignoring for the time being the numerous errors in rulings on evidence and in the instructions to the jury; leaving all this aside, and assuming *arguendo* the truth of all the evidence against the defendant, we say that he has not been shown to have done anything he did not have a constitutional right to do.

This conclusion results from two controlling facts: First, no word or action *of the defendant* is shown to have been accompanied by an intention on his part to overthrow or change the State or Federal Government by force, violence or any unlawful means. Second, no word or action of the defendant is shown to have created any clear and present *danger,* or indeed any danger, of harm to the State or Federal Government.

A. The Constitutions of the United States and Kentucky Forbid Imputation of Criminal Guilt by Association.

Since there was nothing criminal about buying the Wade house or speaking out against its destruction, the accusation against the defendant can only be that he belonged to the CP and attended CP meetings, and

that he owned and distributed seditious literature. But there is no evidence that he himself, either by such membership and assembly or through such literature, did or intended to do any act harmful to the State or Federal Governments. The case against him thus depends entirely on proof of the acts and intentions of other people—the people who organized and ran the CP, and the people who wrote the literature. We respectfully submit that such proof is constitutionally inadequate to support a conviction.

1. THE CHARGE OF UNLAWFUL ASSEMBLY.

The Supreme Court of the United States has made it clear that the Fourteenth Amendment due process clause forbids the punishment of a man solely by reason of his membership in or assembly with an organization, no matter how evil and illegal the purposes of the organization may be. He can in some circumstances be punished for helping to form such an organization, or for furthering its criminal purposes, but not for merely belonging to it and attending its meetings.

This constitutional rule was applied and explained in *De Jonge* v. *Oregon,* 299 U. S. 353 (1937). That case involved an Oregon statute which declared it a felony to "conduct or assist in conducting any assemblage of persons, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage." The facts are fully stated in the opinion of the Oregon Supreme Court. *State* v. *De Jonge*, 152 Ore. 315, 51 P. 2d 674 (1935).

A meeting had been held in Portland, Oregon, under the sponsorship of the CP. The meeting was attended by CP members and non-members, both in substantial number. De Jonge, who admittedly had been a CP member for several years, was the principal speaker. He testified (51 P. 2d at p. 675):

> "I went to that meeting because I was instructed by the section committee of the Communist Party through its section organizer, comrade Louis Olson, to speak at that meeting in the name of the Communist Party."

He did speak at the meeting. As the Oregon Supreme Court said (51 P. 2d at pp. 675-676):

> "De Jonge * * * in his talk protested against conditions at the county jail, the action of city police in relation to the maritime strike then in progress in Portland, and numerous other matters. As stated in his own language: 'Well, at that meeting, speaking as a Communist, representing the Communist party, I went into a discussion as to why the Workers' Book Shop, the Communist party headquarters, the Marine Workers' Industrial Union hall, the Civic Emergency Federation and International Labor Defense halls were raided. * * * I told the workers there, at least, I laid the background for the reasons why these workers' halls and offices were raided. I told the workers that the reason of these attacks upon the working class organizations was a stepping stone on the part of the steamship companies and stevedoring companies to break the maritime longshoremen's and seamen's strike; that they hoped to break that strike by pitting the maritime longshoremen and seamen against the Communist

> movement.' Much more in addition was stated by the defendant concerning what he spoke about in the meeting that evening."

There was also evidence that CP literature was sold at the meeting, and that De Jonge had urged those present to buy it; had made a plea for new members to join the CP; and had urged the audience to attend a CP street meeting the next evening. The assembly at which De Jonge spoke was orderly.

It was proved by ample evidence that the CP was an organization which advocated criminal syndicalism and sabotage, so that De Jonge's activities came within the exact words of the statute. He was indicted, convicted, and sentenced to prison for seven years. The Oregon Supreme Court affirmed the conviction, rejecting his contention that, because there had been no unlawful advocacy at that particular meeting, he was entitled to a directed acquittal.

The United States Supreme Court, speaking through Chief Justice Hughes, unanimously reversed on the ground that the defendant himself had not been shown to have advocated the forbidden doctrine, and that he could not be punished solely because of his connection with an organization which did. The Court said (299 U. S. at pp. 364-365):

> "Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. [Citations omitted.] The right of peaceable assembly is a right cognate to those of free speech and free press and is

equally fundamental. As this Court said in *United States* v. *Cruikshank,* 92 U. S. 542, 552: 'The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.' The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. But explicit mention there does not argue exclusion elsewhere. For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,—principles which the Fourteenth Amendment embodies in the general terms of its due process clause. [Citations omitted.]

"These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. *But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.* The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

"It follows from these considerations that, consistently with the Federal Constitution, *peace-*

able assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. *The question,* if the rights of free speech and peaceable assembly are to be preserved, *is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects.* If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, *seizes upon mere participation in a peaceable assembly and a lawful public discussion* as the basis for a criminal charge." (Emphasis added.)

The Court did not question the finding of the State Court as to the unlawful character of the CP, but said (*Id.* at pp. 365-366):

> "We are not called upon to review the findings of the state court as to the objectives of the Communist Party. Notwithstanding those objectives, the defendant still enjoyed his personal right of free speech *and to take part in a peaceable assembly having a lawful purpose, although called by that Party.* The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. *That was of the essence of his guaranteed personal liberty.*

> "We hold that the Oregon statute as applied to the particular charge as defined by the state court is repugnant to the due process clause of the Fourteenth Amendment. * * *" (Emphasis added.)

Review of the more recent cases will show how firmly entrenched in our constitutional law is this rule that, as said in *Kotteakos* v. *United States,* 328 U. S. 750, 772 (1946):

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application."

The rule has been applied even in non-criminal cases, where the Government's case need not be proved beyond a reasonable doubt (*Schneiderman* v. *United States,* 320 U. S. 118 (1943)); and in fields such as eligibility for public employment, where the power of the state is almost unlimited (*Wieman* v. *Updegraff,* 344 U. S. 183 (1952)).

Thus, in the *Schneiderman* case, the Supreme Court applied the rule in a denaturalization case. The Government had sued to revoke the naturalization of William Schneiderman on the ground that, by reason of his membership in the Young Communist League and the CP before and at the time of his naturalization, he could not have been "attached to the principles of the Constitution." As the dissenting opinion shows, the organizations advocated violent overthrow of the Government. It was not shown, however, that Schneiderman had personally so advocated; and on this

ground a judgment against him was reversed. The Court said (320 U. S. at pp. 136, 146-147, 154):

> "At this point it is appropriate to mention what will be more fully developed later—that under our traditions beliefs are personal and not a matter of mere association, and that men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles. * * *
>
> "Apart from the question whether the alleged principles of the Party which petitioner assertedly believed were so fundamentally opposed to the Constitution that he was not attached to its principles in 1927, the Government contends that petitioner was not attached because he believed in the use of force and violence instead of peaceful democratic methods to achieve his desires. In support of this phase of its argument the Government asserts that the organizations with which petitioner was actively affiliated advised, advocated and taught the overthrow of the Government, Constitution and laws of the United States by force and violence, and that petitioner therefore believed in that method of governmental change.
>
> "Apart from his membership in the League and the Party, the record is barren of any conduct or statement on petitioner's part which indicates in the slightest that he believed in and advocated the employment of force and violence, instead of peaceful persuasion, as a means of attaining political ends. To find that he so believed and advocated it is necessary, therefore, to find that such was a principle of the organizations to which he belonged and then impute that principle to him on the basis of his activity in those organizations and his statement that he subscribed to their

> principles. The Government frankly concedes that 'it is normally true * * * that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writings to each member * * *' But the Government contends, however, that it is proper to impute to petitioner certain excerpts from the documents in evidence upon which it particularly relies to show that advocacy of force and violence was a principle of the Communist Party of the United States in 1927, because those documents were official publications carefully supervised by the Party, because of the Party's notorious discipline over its members, and because petitioner was not a mere 'rank and file or accidental member of the party,' but 'an intelligent and educated individual' who 'became a leader of these organizations as an intellectual revolutionary.' * * *
>
> "* * * The Government has not proved that petitioner's beliefs on the subject of force and violence were such that he was not attached to the Constitution in 1927." (Footnotes omitted.)

In the *Wieman* case, the Supreme Court went so far as to hold that a public employee cannot be discharged for mere membership in a proscribed organization. Speaking for a unanimous Court, Mr. Justice Clark said (344 U. S. at pp. 190, 191):

> "We are thus brought to the question * * * whether the Due Process Clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged. For, under the statute before

us, the fact of membership alone disqualifies. If the rule be expressed as a presumption of disloyalty, it is a conclusive one.

"But membership may be innocent. A state servant may have joined a proscribed organization unaware of its activities and purposes. In recent years, many completely loyal persons have severed organizational ties after learning for the first time of the character of groups to which they had belonged. 'They had joined, [but] did not know what it was, they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something.'[3] At the time of affiliation, a group itself may be innocent, only later coming under the influence of those who would turn it toward illegitimate ends. Conversely, an organization formerly subversive and therefore designated as such may have subsequently freed itself from the influences which originally led to its listing.

"* * * under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

To the same effect, see *Bridges* v. *Wixon,* 326 U. S. 135, 163 (1945) (Murphy, J., concurring); *Joint Anti-*

[3]Testimony of J. Edgar Hoover, Hearings before House Committee on Un-American Activities on H. R. 1884 and H. R. 2122, 80th Cong., 1st Sess. 46." (Footnote by the Court.)

Fascist Refugee Committee v. *McGrath,* 341 U. S. 123, 178-179 (1951) (Douglas, J., concurring).

Section 1, Sixth, of the Constitution of Kentucky contains the same guaranty of the right of peaceable assembly which is provided in the First Amendment to the United States Constitution (which has been rendered applicable to the States by the due process clause of the Fourteenth Amendment). Section 11 of the Kentucky Constitution, which provides that an accused cannot be deprived of his life, liberty or property "unless by * * * the law of the land", likewise embodies the substance of the Fourteenth Amendment due process clause. The above-cited decisions of the United States Supreme Court are thus not only binding interpretations of the United States Constitution, but are sound precedents for application of the corresponding provisions of the Kentucky Constitution.

The extent to which the rule that guilt must be personal is embedded in the very fabric of civilized law is nowhere more strikingly shown than in the decision of the International Military Tribunal at Nuremberg in 1946. The jurisdiction of this Court was established by a Charter promulgated August 8, 1945, by the governments of the United States, Great Britain, France and Russia. Its function was to adjudicate responsibility of individuals *and organizations* for crimes against peace, war crimes, and crimes against humanity. Article 10 of the Charter provided:

> "In cases where a group or organization is declared criminal by the Tribunal the competent

> national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

Thus, membership in any organization found guilty could itself be made criminal.

The Tribunal found a number of organizations, including the Gestapo and the S.S., to be guilty of the most frightful crimes, ranging from administration of slave labor programs to lethal medical experiments on human beings and mass murder of Jews and war prisoners. ("Nazi Conspiracy and Aggression: Opinion and Judgment," published by U. S. Government Printing Office, 1947, at pp. 87-107.) But the Tribunal declined to enter a judgment of the type authorized by the Charter, making membership in the criminal organizations punishable *per se*. It said (*Id.*, pp. 85-86) that its discretion to declare organizations criminal

> "*should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal,* and that mass punishments should be avoided. If satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

"A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, *that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization* and those who were drafted by the State for membership, *unless they were personally implicated in the commission of acts declared criminal* by Article 6 of the Charter as members of the organization. *Membership alone is not enough to come within the scope of these declarations.*" (Emphasis added.)

Here was a Court operating free of all restrictions save those required by the fundamental decencies of civilized law. It was limited by no constitution, no due process clause. Its Charter expressly authorized it to impose guilt by association. There was no right of appeal from its decision. The defendants were agents of a defeated enemy which lay prostrate at the feet of the four nations represented on the Tribunal, many of whose citizens had been the victims of the crimes charged. Germany was voiceless; no public demand for individual justice could be heard. Outraged public opinion in the victorious nations was clamoring for stern and sweeping punishment. And yet these judges clung to the "well-settled legal principle" that "*criminal guilt is personal.*"

Now let us examine the record to see whether it shows, any more than the *De Jonge* and *Schneiderman* records showed, that the defendant, in such activities as he is said to have carried on as a CP member, exceeded the limits of his constitutional privilege—whether he is shown to have said or done anything which renders inapplicable the rule that the legality of an assembly depends on what is done there, not on the auspices under which it is held.

In answering this question, resort must be had to the testimony of Mrs. Ahearn (Tr. 2274-2300, 2303-2363). She testified that at the six CP meetings she said she had attended with defendant, the following things had been "discussed" or "talked about": (a) certain books and magazines; (b) the Louisville Peace Crusade; (c) "peace on Russian terms"; (d) Communism and Marxism and the "front" organizations; (e) the principles and beliefs of the CP; and (f) a pamphlet allegedly written by defendant on resumption of China trade. She nowhere specifically said that the defendant himself had "discussed" or "talked about" these things at the meetings, or, if so, what views he had expressed. Her testimony leaves open the possibility that she and Mr. Ford did all the discussing and talking. But even assuming that he did "discuss" or "talk about" peace, and China trade, and Marxism, and CP principles, *talk* and *discussion* are constitutionally privileged and cannot render unlawful an otherwise lawful meeting.

The distinction between discussion and advocacy is well recognized. Advocacy can be punished under

some circumstances; discussion can never be. As the Supreme Court said in *Schneiderman* v. *United States, supra* (320 U. S. at pp. 157-158):

> "There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future time—prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason. Cf. *Bridges* v. *California,* 314 U. S. 252, and Justice Brandeis' concurring opinion in *Whitney* v. *California,* 274 U. S. 357, 372-80. See also *Taylor* v. *Mississippi,* 319 U. S. 583. * * *"

See also *Dennis* v. *United States,* 341 U. S. 494, 502 (1951) (opinion of Vinson, C. J.).

The only other things the defendant is claimed to have done at these six meetings were to sell Mrs. Ahearn two issues of a magazine called "Political Affairs"; to have collected from Mrs. Ahearn CP dues amounting to 35 cents a month, and monthly contributions to the CP amounting to $2.00 a month, plus one of $5.00; to have given her a pamphlet styled "Women's Committee for Equal Justice"; to have said "that when a country falls, two things happen; the government fails to provide for the people, and the workers rise up against it"; to have advised against use of the telephone for CP business; to have given Mr. Ford money for ten copies of the "Daily Worker" and one subscription to "Political Affairs"; to have

given Mrs. Ahearn a copy of a magazine called "Soviet Literature," containing an article on Marxism; to have said "that 1953 was the year for the capitalists, but 1954 was a year for the Communists to go forward"; and to have recommended to Mrs. Ahearn the purchase of certain allegedly seditious books. None of these things, singly or collectively, amounts to seditious activity.

The two quoted statements attributed to the defendant were, on their face, general observations and not advocacy of anything. Far more inflammatory statements, on the part of De Jonge, were held to be constitutionally privileged.

The receipt of dues and contributions, if not *de minimis,* was of the same order of importance as De Jonge's open solicitation of CP membership applications, which was held not to render punishable his attendance at a CP meeting. (Incidentally, it was not testified that defendant actively solicited such payments from Mrs. Ahearn; she said the F.B.I. reimbursed her for all such payments (Tr. 2305-2306) and the initiative may well have been hers.)

Nor does the recommendation or distribution of literature distinguish this case from the *De Jonge* case. De Jonge admitted that he had distributed CP literature at his meeting. But the Supreme Court held that where the particular meeting was not in itself unlawful, peaceable assembly could not be punished even though the meeting had been called by the CP and CP literature was distributed there. The same rule applies here.

So much for the evidence relating to the charge of "assembling." Let us now examine the other major charge.

2. THE CHARGE OF CIRCULATION OF LITERATURE.

The charge relating to literature raises the issue of guilt by association in a different form. Here the question is whether a man *whose own purposes are not shown to be criminal* can be punished because of his handling of a book or pamphlet written for criminal purposes. Stated differently, the question is whether it is within the constitutional power of the state to establish an *index expurgatorius* rendering the books themselves criminal, so that no one can lawfully show them to another for any purpose, good or bad.

This broad issue is quite clearly presented on the present record. The indictment charged the defendant with

> "the crime of advocating, suggesting or teaching the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing, or knowingly circulating, selling or distributing, or having in [his] possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting, or teaching criminal syndicalism or sedition * * *"

Thus, the defendant was charged separately with (a) advocating the proscribed doctrines *himself,* and (b) circulating literature which advocated them.

When the indictment is compared with the instructions given to the jury (R. 65-67), a very interesting fact appears. The question whether the defendant *himself* advocated criminal syndicalism or sedition was withdrawn from the jury. And this was done for the obvious reason that, as an examination of the record will show, there is not a scrap of evidence that the defendant himself ever "advocated or suggested" criminal syndicalism or sedition.

As a matter of fact, there was much affirmative evidence that he had not done so. Mr. Grover Sales, organizer and chairman of the Louisville Labor-Management Committee, a city-sponsored mediation agency, testified in circumstantial detail as to the defendant's devoted assistance in the creation of that agency and his successful efforts to effect peaceful settlement of at least two major strikes in Louisville—one a garbage-tipper's strike and one a threatened bus strike (Tr. 2053-2059). Two of the defendant's fellow-copy-readers at the Courier-Journal attested the objectivity of his work on the paper; one of them even detailed an incident in which the defendant had suggested a change in a news story to eliminate a slant toward the CP line (Foisie, Tr. 2078-2082; Goodman, Tr. 2087-2089). His minister, his associates and his neighbors —people who had known him well for a long time—all testified that they had never heard him advocate criminal syndicalism or sedition (Sales, Tr. 2060; Bennett, Tr. 2014-2015; Witten, Tr. 2120-2122; Kaleher, Tr. 2128-2131; Luton, Tr. 2137-2139; Elder, Tr. 2210-2211; Hammons, Tr. 2249-2250; Hyman, Tr. 2255-

2256; McKinney, Tr. 2267). He himself flatly denied such advocacy (Tr. 1604-1605). And, as already shown, even Alberta Ahearn did not attribute such advocacy to him.

Thus, the trial Court rightly withdrew the advocacy charge from the jury. What does this mean? Such action would not have been taken if there had been any evidence justifying the inference that the defendant had circulated seditious literature *for the purpose of propagating seditious doctrine contained in it.* Circulation for such a purpose would plainly have amounted to personal advocacy by the defendant, and would have required submission of the advocacy charge to the jury. But the literature branch of the case was submitted to the jury only on the question whether defendant had circulated the books *at all*—for good purpose, seditious purpose or no purpose.

On this record there is accordingly presented the clean-cut question whether criminal guilt can be predicated on association with books. We believe this question has long since been settled in the negative by the United States Supreme Court.

What is really involved here is the choice between two possible ways of dealing with literature which is believed to contain false and pernicious ideas. One way is the way of the official censor, who on behalf of the State decides what the people can safely be permitted to read. The essential characteristic of censorship is that it operates on the literature *in rem,* and disregards as immaterial the possibility that it may have good uses as well as bad. All uses are forbidden.

It is a necessary feature of any censorship system that some representative of the Government, such as a judge or a jury or a licensing authority, must be given the power to declare which publications are safe and which are unsafe.

Except perhaps in the limited field of obscene literature, which involves special considerations not here important, this *in rem* approach is forbidden by the First and Fourteenth Amendments. These Amendments require adoption of the second possible way of dealing with literature believed to be undesirable. They establish the rule that the legality of writings depends not on what they say but on the uses to which they are put. If they are used for the purpose of inciting revolt, they can under some circumstances be punished. But ownership or possession or circulation cannot be punished without proof of unlawful purpose.

As Chief Justice Hughes declared in the quotation set forth above (*supra,* p. 32), the rights of free speech and press may be abused by using them to incite violence and crime, and the Legislature may forbid such *abuse.* "But the legislative intervention can find constitutional justification only by dealing with such abuse. The rights themselves must not be curtailed." An attempt to ban a book *as such* goes beyond prevention of abuse, and infringes the guaranteed freedom of the press. Where, as in this case, the question of abuse of the literature is considered immaterial, the effect is not to punish abuse of the press but to infringe the guaranteed right itself.

The point was well put in the concurring opinion of Mr. Justice Jackson in *Thomas* v. *Collins,* 323 U. S. 516, 545-546 (1945):

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.
>
> "This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy." (Footnote omitted.)

The same point was more succinctly stated in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion * * *."

The Supreme Court has stated fully and explicitly that its fixed insistence on protecting the right to disseminate literature unless abuse of the right is shown, is based on the practical judgment that government based on popular consent is not otherwise possible. Thus, in *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940), the Court said:

> "*First.* The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.
>
> "The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153n. * * *" (Footnote omitted.)

And in *Jones* v. *Opelika,* 316 U. S. 584, 594 (1942), though holding valid a city ordinance designed to prevent a recognized abuse, the Court said:

"If all expression of religion or opinion, however, were subject to the discretion of authority, our unfettered dynamic thoughts or moral impulses might be made only colorless and sterile ideas. To give them life and force, the Constitution protects their use. No difference of view as to the importance of the freedoms of press or religion exists. They are 'fundamental personal rights and liberties.' *Schneider* v. *State,* 308 U. S. 147, 161. To proscribe the dissemination of doctrines or arguments which do not transgress military or moral limits is to destroy the principal bases of democracy—knowledge and discussion. One man, with views contrary to the rest of his compatriots, is entitled to the privilege of expressing his ideas by speech or broadside to anyone willing to listen or to read. Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. But that hearing may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order."

Again, in *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949), the Court declared:

"The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *De Jonge* v. *Oregon,* 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."

See also *Stromberg* v. *California,* 283 U. S. 359, 369 (1931).

The Supreme Court has made special note of the peculiar vice of licensing laws, which deal with literature *in rem.* See *Lovell* v. *Griffin,* 303 U. S. 444, 451-452 (1938):

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. See *Patterson* v. *Colorado,* 205 U. S. 454, 462; *Near* v. *Minnesota,* 283 U. S. 697, 713-716; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 245, 246. Legislation of the type of the ordinance in question would restore the system of license and censorship in its baldest form.
>
> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of pub-

> lication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near* v. *Minnesota, supra; Grosjean* v. *American Press Co., supra; De Jonge* v. *Oregon, supra.*
>
> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson,* 96 U. S. 727, 733. The license tax in *Grosjean* v. *American Press Co., supra,* was held invalid because of its direct tendency to restrict circulation." (Footnotes omitted.)

And in *Schneider* v. *State,* 308 U. S. 147, 164 (1939), the Court held:

> "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees."

The indictment in the present case, in charging that circulation of certain literature is felonious regardless of the intent with which it is circulated, follows the literal terms of KRS §432.040. The statute on its face purports to adopt this *in rem* approach characteristic of a licensing system. Indeed, it is far more restrictive. Under a licensing system it is at least possible to find out beforehand whether circulation of a book or pamphlet is illegal. But under the Kentucky statute a man must risk a 21-year prison sentence and a $10,000 fine on his ability to predict correctly the deci-

sion of twelve jurors. Under such circumstances the normal course of a prudent person will be to shun like plague any literature which even *might be* held illegal.

It is for this reason that the Supreme Court has held that statutes imposing criminal penalties on dissemination of ideas will be tested on their face rather than on the basis of their application in the particular case—the same rule that is applied to licensing requirements. In *Thornhill* v. *Alabama, supra,* the Court held (310 U. S. at pp. 97-98):

> "There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas. *Schneider* v. *State,* 308 U. S. 147, 162-165; *Hague* v. *C. I. O.,* 307 U. S. 496, 516; *Lovell* v. *Griffin,* 303 U. S. 444, 451. The cases when interpreted in the light of their facts indicate that the rule is not based upon any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil inherent in a licensing system. The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near* v. *Minnesota,* 283 U. S. 697, 713. One who might have had a license for the asking may therefore call into question the whole scheme of

licensing when he is prosecuted for failure to procure it. *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *C. I. O.,* 307 U. S. 496. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. It is not any less effective or, if the restraint is not permissible, less pernicious than the restraint on freedom of discussion imposed by the threat of censorship. An accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. *Schneider* v. *State,* 308 U. S. 147, 155, 162-163. Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California,* 283 U. S. 359, 368; *Schneider* v. *State,* 308 U. S. 147, 155, 162-163. Compare *Lanzetta* v. *New Jersey,* 306 U. S. 451." (Footnotes omitted.)

The guaranties of free speech and press which are contained in the First Amendment to the United

States Constitution, and the due process clause of the Fourteenth Amendment, which renders the First Amendment applicable to the States, find their counterparts in Section 1, Fourth, and Sections 8 and 11 of the Kentucky Constitution. The above-cited decisions of the United States Supreme Court are thus not only binding interpretations of the United States Constitution, but are sound precedents for application of the corresponding provisions of the Kentucky Constitution.

The record in this case well illustrates the necessary implications of a statute which gives a jury the power to punish a man because of the nature of his books rather than because of the nature of the use to which he puts them. Let us consider the two items referred to above (pp. 16-17), on which the prosecution placed such emphasis at the trial—the Communist Manifesto (Ex. 48) and the Foster quotation on the back of the House Un-American Activities Committee pamphlet (Ex. 100, subnumber 143).

Dr. Ernest Hassold, head of the English Department and Chairman of the Division of Humanities at the University of Louisville, testified fully about the Communist Manifesto (Tr. 2261-2264). He described it as "a well-known publication which is being read by a great many college students at different levels." He had spot-checked fifteen senior students the previous day, and had found that seven of them had read it—one of them in an indoctrination camp for Marine officers. It has repeatedly been designated as required reading in the humanities course at the University.

Dr. Hassold went on to state in detail how the book would be used in teaching. The essential features of the background of the time (1848) and place (Germany) it was written would be pointed out. The students would be reminded that the explosive violence of the book is accounted for by the context in which it was written, when working class conditions were bad and prospects of peaceful improvement seemed slight because of the absence of universal suffrage, effective labor unions, and general education. It would be pointed out that some of the ten specific measures proposed by the *Manifesto,* such as the graduated income tax, have already been, or are in the process of being, fulfilled—not by the violent approach which Marx advocated, but by social reform measures made possible by general education and suffrage. Finally, the question would be raised, "Let's project the thing now as to the present and into the future, and let's see whether you are going to achieve what you hoped to achieve better by violent means or by following along the lines that American presidents have laid down in the last three administrations."

Before Dr. Hassold had finished this statement, a revealing incident occurred (Tr. 2264). The Court, on its own motion, interrupted him, saying:

> "I believe you have answered the question. Most of your answer is opinion anyhow."

The Court could hardly have intended to disparage the right of this distinguished scholar, whose qualifications as an expert had been fully established (Tr. 2259-

2260), to express an opinion as to the significance of the *Manifesto* to at least some 20th Century readers such as himself and his own classes.* What the Court was saying was that this really had no importance in the case.

Now this position of the Court was reasonable and proper if, but only if, the jury was being called upon to determine merely the character of the book as such, and not to evaluate the purpose to which defendant had put it. As is shown by the instructions given to the jury, that is exactly how the trial judge saw the issue (see Point VII, *infra*). The failure of Dr. Hassold's testimony to impress him is thus understandable.

But from the viewpoint of the issue which the Supreme Court says is constitutionally controlling—whether the defendant was *using* the book to advocate seditious doctrine—Dr. Hassold's testimony was by no means unimportant. At the very least, he was giving an actual play-by-play account of how the book could be and had been used for non-seditious (and indeed anti-seditious) purposes.

Dr. Hassold's testimony on this point corroborated the previous testimony of the defendant as to his own understanding of the book's true significance, namely, that it was written for the German working man over a century ago and that, as Engels himself had later written, it had no application to the Western democracies (Tr. 1998-2002). This testimony, like Dr. Has-

*Compare the unvarying deference shown to the opinions of the ex-Communist "experts". Malkin, for example, who had been a charter CP member and had served a term in Sing Sing for illegal activities in a New York fur strike (Tr. 956, 958), was allowed to testify as an expert on current CP policies even though he had been expelled from the CP in 1937 (Tr. 959, 965-966, 968-970).

sold's, ~~who~~ was gratuitously disparaged by the trial judge, who on his own motion interrupted to remark (Tr. 1999):

> "I think it wouldn't be competent for the witness to give his opinion as to what the application is, inasmuch as the book shows for itself what it is, what it teaches."

The judge reemphasized his view as to the immateriality of defendant's belief as to what the book meant, by sustaining an objection *on grounds of hearsay* to defendant's testimony as to Engels' later interpretation of the *Manifesto* as being inapplicable to the Western democracies. If defendant's understanding of the book's real meaning had been considered material, he would of course have been allowed to state what he understood and to explain why.

When Mrs. Ahearn later testified that the Communist Manifesto had been "discussed" at a CP cell meeting attended by the defendant and herself, she did not say what if anything he had told her about it. For all that appears in the record, he told her no more than what he told the jury (Tr. 1998-2002).

Quite clearly, then, it was the book that was being tried, and not the defendant's use of it. Equally clearly, Dr. Hassold, and probably many of his students, and very likely the librarian of every sizeable library in Kentucky—perhaps even some of the members of this Court—would be guilty of a felony under KRS §432.040, if this were the law. It cannot be the law.

Much the same analysis could be made of the evidence relating to the House Committee pamphlet.

But here the full implications of the rule applied by the trial Court, in obedience to the literal words of the statute, become still more manifest. This pamphlet was published by the most thoroughly anti-Communist agency in the Government. The pamphlet describes itself as "the first of a series on the Communist conspiracy and its influence in this country as a whole, on religion, on education, on labor and on our Government." The Committee apparently considered it desirable to circulate the Foster statement which appears on the back of the pamphlet—doubtless with the purpose of arousing opposition to the CP. And yet the defendant is charged with a felony because he possessed it.

Here again the trial judge made clear his view that the contents of the document were all that mattered. After the defendant had been vigorously cross-examined as to whether he had read the Foster paragraph, and as to its meaning (Tr. 1838-1841) the following colloquy took place (Tr. 1841):

> "Mr. Zollinger: Now, if the Court please, is Mr. Higgins [the assistant prosecutor] suggesting that this pamphlet put out by the House and Un-American Affairs Committee is seditious?
>
> "By the Court: I think the pamphlet shows for itself, the reading. That's up to the jury to decide that."

It would extend this brief beyond all reasonable bounds to review the testimony with respect to each of the allegedly seditious documents. The defendant took them one by one and endeavored to explain his

understanding of them and his use of them (Tr. 1611-1820). Some of the books he had not read. Of those he had read, he stated his understanding as to which were objective and which were partisan, which were pro-CP and which were anti-CP. He said, and his testimony stands uncontradicted, that whenever he lent a book he advised the borrower whether he thought it was slanted and, if so, which way it was slanted. There is no evidence that he circulated or distributed any of them for unlawful purposes. Even Alberta Ahearn did not so testify.

The issue is thus plainly drawn. On the one hand is the view that bad books should be kept in quarantine. On the other hand is the view expressed in the historic opinion of Mr. Justice Holmes in *Abrams* v. *United States,* 250 U. S. 616, 630-631 (1919), which, though given in dissent, has since been recognized as a sound exposition of constitutional doctrine:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in

> ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law * * * abridging the freedom of speech.' ''

Nor is there anything old-fashioned or obsolete about the proposition that our salvation lies in seeking knowledge, even of unpleasant things, rather than in efforts to suppress it. As recently as November 17, 1954, less than two weeks before the trial started, President Eisenhower declared in an address to the Land Grant College Association:

> "We know, let us say, that the people of a certain country are suspicious of our motives when we know those motives to be good, or are so ignorant of what we are trying to do in the world that our efforts to help are translated into efforts to dominate. Now unless we make the effort, and I mean the effort right down at the grass roots level of our country, to understand something of the culture of that people, of its history, of its aspirations, the tribulations and trials through which that people may have passed, unless we understand that we will never comprehend why our motives are misunderstood."

We cannot gain this understanding if books such as many of those found in defendant's library, and used as the basis of this prosecution, are to be denied all circulation.

The foregoing discussion covers all the documents introduced against the defendant except those which he wrote himself. As to such documents, of course, the question of guilt by association does not arise. But an examination of these documents (Exs. 50, 51-A, 51-B, 54, 60, 74-C, 74-P, 74-U, 74-V, 89, 97) will reveal that none of them advocates or suggests criminal syndicalism or sedition, or indeed any illegal act whatever.

The only reference to revolution in the seized correspondence was contained in an unsigned copy of a letter addressed "Dear Barbara," dated March 17, 1949, which neither the defendant nor anyone else was able to identify as to authorship (Tr. 1514-1516;

Braden, Tr. 1806). It is a long letter which contains, near the end, the remark:

> "We figure the revolution to take place about 1974 and for things to be pretty well straightened out by 2001. We should live so long!"

The letter closes, "Viva la revolucion."

This is idle chatter, not seditious teaching or advocacy. In *Butash* v. *State,* 212 Ind. 492, 9 N. E. 2d 88 (1937) a similar statement was dismissed as too trivial for judicial attention.

One letter of defendant's ended, "Yours for the abolition of capitalism" (Ex. 86-D, Tr. 1542-1543). Aside from the defendant's testimony that it was a frivolous statement (Tr. 1800), the fact is that there is obviously nothing seditious about it. The Socialist Party lawfully advocates the peaceable abolition of capitalism in this country, as does the Labor Party in Great Britain. As was said by Mr. Justice Jackson in *Terminiello* v. *Chicago,* 337 U. S. 1, 32 (1949), in a dissenting opinion which however agreed with the majority on this point:

> "No one will disagree that the fundamental, permanent and overriding policy of police and courts should be to permit and encourage utmost freedom of utterance. It is the legal right of any American citizen to advocate peaceful adoption of fascism or communism, socialism or capitalism. He may go far in expressing sentiments whether pro-Semitic or anti-Semitic, pro-Negro, or anti-Negro, pro-Catholic or anti-Catholic. He is legally free to argue for some anti-American system of government to supersede by constitutional methods

> the one we have. It is our philosophy that the course of government should be controlled by a consensus of the governed. This process of reaching intelligent popular decisions requires free discussion. Hence we should tolerate no law or custom of censorship or suppression."

To the same effect, see *Stromberg* v. *California,* 283 U. S. 359, 369 (1931).

We respectfully submit that, under Sections 1, 8 and 11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment, the defendant was constitutionally entitled to a directed acquittal because there was no evidence that any unlawful purpose accompanied either (a) his alleged membership in and assembly with the CP or (b) his distribution, circulation or possession of any document. And, as we have shown, proof of such purpose was constitutionally necessary to a legal conviction.

B. The Constitutions of the United States and Kentucky Forbid Punishment for Speech, Writing and Assembly Not Creating a Clear and Present Danger of Harmful Overt Acts.

In addition to the constitutional ban on imputation of guilt by association, discussed above, there is a second constitutional reason why the evidence in this record was insufficient to make a case for the jury. Even if it had been proved that the defendant himself had advocated forcible overthrow of the Government and had assembled with the CP in order to promote that objective, such advocacy and assembly would not

be punishable unless they created a clear and present danger of harmful overt acts.

In order to clarify the discussion of this question it is necessary to make an assumption contrary to the facts shown by the record—that is, to assume that the defendant advocated the commission of unlawful acts. As already noted, the issue of personal advocacy of unlawful acts was withdrawn from the jury by the trial judge because there was no proof that the defendant had himself engaged in such advocacy. But even if he had so engaged, the proof would be insufficient for reasons now to be discussed.

The so-called First Amendment freedoms of speech, press and peaceable assembly, which the Fourteenth Amendment protects from abridgment by the states, constitute the basic underpinning of our free way of life. As Mr. Justice Cardozo said in *Palko* v. *Connecticut,* 302 U. S. 319, 326-327 (1937):

> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. *Twining* v. *New Jersey, supra*, p. 99. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.

> With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action." (Footnotes omitted.)

Because freedom of thought and speech is "the matrix, the indispensable condition" of a free society, the Supreme Court has provided a special constitutional rule as a safeguard against their infringement. The rule is generally called the "clear and present danger" rule. The essence of this rule is that when the state seeks to punish speech or writing or assembly as such, without proof of actual harmful conequences, it cannot rest upon a showing that the defendant *intended* harmful consequences; it must go farther and show that, *from the viewpoint of objective probabilities,* there was some clear danger that harmful consequences were likely to follow.

As an example, suppose a man should sit in a country store and say to his cronies, "The Federal Government is no good. Let's organize an army and overthrow it." Suppose also that he really means what he says, and that he would do it if he could. But suppose also that there is not the slightest chance, as a matter of objective probability, that his words will be acted on in any way.

Under the literal terms of KRS §432.030 he could be convicted of a felony for uttering these words, and could be sent to prison for 21 years and fined

$10,000. But the Supreme Court has recognized that we owe our greatness as a nation to our tolerance of dissent, and that words which are *in fact* harmless, and carry no clearly demonstrable potentiality for harm, must not be punished.

The law was not always thus. The clear and present danger rule was first formulated as a limitation on Federal action in *Schenck* v. *United States,* 249 U. S. 47, 52 (1919), where the Court through Mr. Justice Holmes said:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The rule did not win immediate acceptance as a limitation on the enforcement of state statutes such as those penalizing advocacy of criminal anarchy and criminal syndicalism. Thus in *Gitlow* v. *New York,* 268 U. S. 652 (1925) and *Whitney* v. *California,* 274 U. S. 357 (1927) the Court held that when a state legislature has by statute determined that a particular type of speech is dangerous enough to be punished, that determination is conclusive and the courts will not make their own determination.

Justices Holmes and Brandeis, however, disagreed. They dissented in the *Gitlow* case and concurred specially, for procedural reasons only, in the *Whitney* case. And, as will be seen, their minority views have since become the law of the land.

In his *Gitlow* dissent, Mr. Justice Holmes favored application of the clear and present danger rule as stated in the *Schenck* case. He said (268 U. S. at p. 673):

> "If what I think the correct test is applied, it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views. It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration. If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.
>
> "If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more."

The concurring opinion of Mr. Justice Brandeis in the *Whitney* case sets forth a powerful exposition of the reasons underlying this position (274 U. S. at pp. 374-376):

> "* * * we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.
>
> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[2] They recognized the risks to which all human institutions are subject. But they knew that order can-

"[2]Compare Thomas Jefferson: 'We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge.' Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: 'If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.'" (Footnote by the Court.)

> not be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

He asserted that words and assembly can be punished only if there is a real reason to fear harmful consequences (*Id.* at p. 376):

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still

further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated." (Footnote omitted.)

He explained the nature of the public interest at stake—preservation of the processes of popular government (*Id.* at p. 377):

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. *It is therefore always open to Americans to challenge a law abridging*

free speech and assembly by showing that there was no emergency justifying it." (Footnote omitted; emphasis added.)

And he emphasized that unless the anticipated evil be a substantial one, even a clear and present danger would not justify the suppression of speech (*Id.* at pp. 377-378):

"Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent

crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly."

These minority views have since been accepted by the Supreme Court as the law of the land. As the Supreme Court of California said in *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 P. 2d 885, 890, 891 (1946):

> "When the United States Supreme Court held in Bridges v. California, *supra* [314 U. S. 252], that the suppression of freedom of speech in the absence of a clear and present danger of substantive evils is a violation of the constitutional guaranty of free speech, it adopted the views of Mr. Justice Holmes and Mr. Justice Brandeis in their minority opinions in Gitlow v. New York, 268 U. S. 652, 672, 45 S. Ct. 625, 69 L. Ed. 1138; Whitney v. California, 274 U. S. 357, 372, 47 S. Ct. 641, 71 L. Ed. 1095, and other cases. These opinions were based on the reasoning that doctrines advocating the overthrow of the government by force do not of themselves constitute a substantial danger, and that the state is therefore not justified in suppressing the freedom of speech of those who happen to be members of an organization committed to such doctrines. * * *
>
> "* * * The Criminal Syndicalism Act can thus be applied only when there is imminent danger that the advocacy of the doctrines it seeks to prohibit will give rise to evils that the state may prevent."

And see the opinion of Chief Justice Vinson in *Dennis* v. *United States,* 341 U. S. 494, 507 (1951):

> "Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale." (Footnote omitted.)

The clear and present danger rule has been given concrete application in a case involving the same major questions as the present one. *Herndon* v. *Lowry,* 301 U. S. 242 (1937). Herndon was convicted under a Georgia statute prohibiting attempts to incite insurrection. The evidence showed that he was a CP member who had come to Atlanta "as a paid organizer for the party, his duties being to call meetings, to educate and disseminate information respecting the party, to distribute literature, to secure members, and to work up an organization of the party in Atlanta; and that he had held or attended three meetings called by him." He recruited five or six CP members. (*Id.* at p. 247). Upon his arrest various newspapers, periodicals and other documents were found on his person and in his room, which he said had been sent to him from CP headquarters in New York.

The documentary material included CP membership blanks and receipt books; magazines, pamphlets and newspapers such as the "Daily Worker"; books; transcripts of minutes of meetings; and circulars appealing to the white and Negro unemployed to organize and seek increased county unemployment relief.

Herndon was convicted and sentenced to a term of 18 to 20 years. The United States Supreme Court, on

habeas corpus, held his conviction unconstitutional and ordered him discharged from custody.

The Court, speaking through Mr. Justice Roberts, first held that Herndon's possession of the books was immaterial (*Id.* at p. 249):

> "No inference can be drawn from the possession of the books mentioned, either that they embodied the doctrines of the Communist Party or that they represented views advocated by the appellant."

The Court also held immaterial the minutes and circulars, because (like many of the exhibits in the present case) they contained nothing indicating the aims and purposes of the CP, or disclosing any intent to overthrow organized government.

As for the membership blanks, the Court said (*Id.* at pp. 249-250):

> "The matter appearing upon the membership blanks is innocent upon its face however foolish and pernicious the aims it suggests. Under the heading 'What is the Communist Party?' this appears:
>
> > 'The Party is the vanguard of the working class and consists of the best, most class conscious, most active, the most courageous members of that class. It incorporates the whole body of experience of the proletarian struggle, basing itself upon the revolutionary theory of Marxism and representing the general and lasting interests of the whole of the working class, the Party personifies the unity of proletarian principles, of proletarian will and of proletarian revolutionary action.

'We are the Party of the working class. Consequently, nearly the whole of that class(in time of war and civil war, the whole of that class) should work under the guidance of our Party, should create the closest contacts with our Party.'

"This vague declaration falls short of an attempt to bring about insurrection either immediately or within a reasonable time but amounts merely to a statement of ultimate ideals. The blanks, however, indicate more specific aims for which members of the Communist Party are to vote. They are to vote Communist for

'1. Unemployment and Social Insurance at the expense of the State and employers.

'2. Against Hoover's wage-cutting policy.

'3. Emergency relief for the poor farmers without restrictions by the government and banks; exemption of poor farmers from taxes and from forced collection of rents or debts.

'4. Equal rights for the Negroes and self-determination for the Black Belt.

'5. Against capitalistic terror: against all forms of suppression of the political rights of the workers.

'6. Against imperialist war; for the defense of the Chinese people and of the Soviet Union.'

"None of these aims is criminal upon its face. As to one, the 4th, the claim is that criminality may be found because of extrinsic facts. Those facts consist of possession by appellant of booklets and other literature * * * illustrating the party doctrines. * * *"

The Court went on to review this literature, which advocated the detachment of the "Black Belt" from the United States as a separate sovereign nation, and

called for an agrarian revolution to be followed by "confiscation of the landed property of the white landowners and capitalists for the benefit of the negro farmers."

There was no direct evidence that Herndon had distributed any literature advocating forcible subversion of government authority, or that he had personally so advocated himself. Summarizing the evidence, the Court said (*Id.* at p. 253):

> "There is evidence tending to prove that the appellant held meetings for the purpose of recruiting members of the Communist Party and solicited contributions for the support of that party and there is proof of the doctrines which that party espouses. Appellant's intent to incite insurrection, if it is to be found, must rest upon his procuring members for the Communist Party and his possession of that party's literature when he was arrested."

The conviction was set aside for two reasons: First, in the absence of any proof that the defendant personally advocated revolutionary doctrine, it was an "unwarranted invasion of the right of freedom of speech" to punish membership in and solicitation of members for the CP, even though some of its tenets may be assumed to be unlawful (*Id.* at pp. 260-261). Second, the State Court's interpretation of the statute as not requiring proof of clear and present danger rendered it unconstitutionally vague.

In its discussion of the latter point, the Court makes clear the practical reason why the clear and present

danger rule is necessary if freedom of speech is to have any real meaning (*Id.* at pp. 261-264):

> "The test of guilt is thus formulated by the Supreme Court of the state. Forcible action must have been contemplated but it would be sufficient to sustain a conviction if the accused intended that an insurrection 'should happen at any time within which he might reasonably expect his influence to continue to be directly operative in causing such action by those whom he sought to induce.' If the jury conclude that the defendant should have contemplated that any act or utterance of his in opposition to the established order or advocating a change in that order, might, in the distant future, eventuate in a combination to offer forcible resistance to the State, or as the State says, if the jury believes he should have known that his words would have 'a dangerous tendency' then he may be convicted. To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitate for a change in the frame of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be

convicted of the offense of inciting insurrection. Proof that the accused in fact believed that his effort would cause a violent assault upon the state would not be necessary to conviction. It would be sufficient if the jury thought he reasonably might foretell that those he persuaded to join the party might, at some time in the indefinite future, resort to forcible resistance of government. The question thus proposed to a jury involves pure speculation as to future trends of thought and action. Within what time might one reasonably expect that an attempted organization of the Communist Party in the United States would result in violent action by that party? If a jury returned a special verdict saying twenty years or even fifty years the verdict could not be shown to be wrong. The law, as thus construed, licenses the jury to create its own standard in each case. * * *

"The statute, as construed and applied, amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. No reasonably ascertainable standard of guilt is prescribed. So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment."

It may be noted that the State Court in the *Herndon* case had at least recognized the need for proof of *some* objective probability that the defendant's words would lead to harmful consequences. In the present case, the element of objective danger was ignored entirely by the trial Court.

Since the *Herndon* case, the Supreme Court has repeatedly reaffirmed the need for proving objective danger whenever limitation of the First Amendment freedoms is undertaken. See, for example, *Bridges* v. *California,* 314 U. S. 252, 263 (1941) (contempt for publication; convictions reversed):

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (Footnote omitted.)

See also *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943) (flag salute requirement held invalid); *Thomas* v. *Collins,* 323 U. S. 516, 529-530 (1945) (conviction for unlicensed solicitation of union membership reversed); *Terminiello* v. *Chicago,* 337 U. S. 1, 4 (1949) (conviction of disorderly conduct for inflammatory public speech reversed). The list of citations could be multiplied.

In *Dennis* v. *United States,* 341 U. S. 494 (1951), the Court reaffirmed the need for a showing of objective danger, but held that under the circumstances of that case the requirement had been satisfied by the ex-

press finding of the trial Court that "there is a sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

In the *Dennis* case the top leaders of the CP in the United States were convicted of conspiracy to organize the CP in this country and to advocate forcible overthrow of the Government, in violation of Sections 2(a)(1) and 2(a)(3) of the Smith Act (18 U. S. C. (1946 ed.) §11). The Court accepted Judge Learned Hand's formulation of the clear and present danger rule as stated in his opinion below:

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

Applying this rule in the *Dennis* case, Chief Justice Vinson declared (341 U. S. at 516-517):

> "Petitioners intended to overthrow the Government of the United States as speedily as the circumstances would permit. Their conspiracy to organize the Communist Party and to teach and advocate the overthrow of the Government of the United States by force and violence created a 'clear and present danger' of an attempt to overthrow the Government by force and violence."

For present purposes it is not important to explore the more refined implications of Judge Hand's formulation, or to inquire as to just how imminent the danger of harmful consequences must be before words or assembly can constitutionally be punished. A more re-

mote danger can be punished where it is shown that a very great evil is threatened. But the *Dennis* case reaffirms the essential element of the "clear and present danger" rule—that *some* objective danger of harmful consequences must be shown.

In determining the existence of a clear and present danger, a distinction must be made between the danger created by a defendant's own acts and the danger created by an organization with which he is alleged to be connected. In the *Dennis* case, of course, this distinction was unimportant since the defendants had themselves formed the organization and were its moving spirits. But Chief Justice Vinson declared (341 U. S. at p. 516):

> "Where there is doubt as to the intent *of the defendants,* the nature of *their activities,* or *their power* to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." (Emphasis added.)

Thus, where the defendant is not claimed to have controlled the organization in any way, a clear and present danger must be shown to have resulted from his own acts and not simply from the acts of the organization.

Such a showing is entirely lacking in the present case. The prosecution's evidence, taken at full value, shows that the defendant was an ordinary CP member whose CP activities consisted of recruiting one F.B.I. employee into the CP; attending six "meetings" with this F.B.I. employee, a 79-year-old retired river boat captain, and occasionally the defendant's wife; collecting a few dollars in dues and contributions; and

recommending some books to the F.B.I. emloyee, which she purchased and turned in to the F.B.I. On any objective test which could be devised, this activity did not threaten the security of Kentucky or the United States. Neither the trial judge nor the jury has found that a "clear and present" danger, or any danger, was created by defendant's speech, writing or assembly. Under §11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution, he was therefore entitled to a directed acquittal.

II. THE DEFENDANT WAS ENTITLED TO A DIRECTED ACQUITTAL BECAUSE THE KENTUCKY SEDITION STATUTE DOES NOT FORBID CONTROVERSIAL ACTION IN THE FIELD OF DESEGREGATION.

The discussion under Point I proceeds on the assumption that this is essentially a prosecution instituted to punish a supposed attack on the Constitution and the Government. The assumption is unreal. The defendant has been indicted and convicted not because he attacked the Constitution but because he tried to give meaning to the equalitarian principles which it embodies. This is not a sedition case but a desegregation case.

We shall presently demonstrate, by a review of pertinent portions of the record, the truth of this assertion. First, however, it is appropriate to consider the legislative history of the Kentucky sedition statute and to show that despite its broad language it was not in-

tended as a deterrent to peaceable experiment in controversial social fields.

The statute was originally enacted as Chapter 100 of the Acts of 1920. When it was presented to Governor Morrow for approval, he recognized the danger of its abuse. He particularly condemned Section 10 of the statute, which would have made it possible to punish exactly what is sought to be punished here—unpopular insistence that the legal rights of minority groups be given content and meaning in real life. Section 10 provided:

> "It shall be unlawful for any person, or persons, by speech, writing or otherwise, to arouse, incite or fix, or attempt to arouse, incite or fix enmity, discord or strife or ill feeling between classes or persons for the purpose of inducing public tumult or disorder in order to cause the forcible or violent change or overthrow of the Government of the United States, or of the Government of the Commonwealth of Kentucky, or for the purpose of inciting resistance to the courts, laws, officers or constituted authorities of the Commonwealth of Kentucky, and it shall be unlawful, for any such purpose, to display in any parade, meeting, assembly or other place any red flag, revolutionary insignia or any revolutionary banner, flag, placard, tag, sticker, circular, device or picture, and any person taking part in such parade or meeting, or violating this section, shall be guilty of a felony and on conviction shall be punished by confinement in the State Penitentiary for not more than twenty-one years, or by a fine of not more than $10,000, or by both such imprisonment and fine."

Governor Morrow's statement in connection with the signing of the bill is reproduced in full in the *Louisville Courier-Journal* of March 26, 1920 (pages 1 and 9). He begins:

> "I have signed the law as the syndicalism and sedition law with reluctance and serious misgivings. I have signed it only for the purpose of preserving certain provisions in it which should be enacted into law, namely, its provisions against criminal syndicalism and sedition and not because I approve Sections 6, 10 and 12."

Governor Morrow explains that he has signed the bill because of his belief that the prohibitions on criminal syndicalism and sedition were needed to punish "those who engage in* criminal syndicalism and promote* sedition against the Government of the United States." As appears in Point III, *infra,* these prohibitions are quite different from KRS §432.040 under which the present case arises.

Governor Morrow then continues:

> "If the proposed bill had provided such laws with proper penalties to enforce them and had gone no further, all would have been well and there would have been no occasion for discussion, but most unfortunately this bill by its provisions goes very much farther than this; it goes far afield and far beyond syndicalism and sedition.
>
> "It is with the provisions which go beyond the true limits of necessity with which I am most deeply concerned. This bill, after defining criminal syndicalism in the broadest terms as aiding or

*Note the assumption that the law was aimed at those who themselves engage in harmful acts or advocacy.

counseling crime, physical violence, destruction of property, intimidation or other unlawful acts or methods as a means of accomplishing political ends or as a means of bringing about political revolution, and after having defined sedition as the advocacy or suggestion by word or writing of the overthrow of the Government of the United States, or the Commonwealth of Kentucky, or the Constitution or laws of either of them, or resistance to them by force or violence adds Section 10, which is not criminal syndicalism, but which is an altogether different thing and an altogether different subject, so in the consideration of this law it must be borne in mind that it is not altogether a law against syndicalism and sedition.

"If I could consider this bill as a law only against syndicalism and sedition I would say that it is a good law; a needed law, and one which should be commended, upheld and enforced by every power of the Commonwealth, but the portion of the bill which has caused me the greatest uneasiness is an altogether different matter.

"Section 10 of this proposed act provides:

" 'That it shall be unlawful for any person or persons, by speech, writing or otherwise, to arouse, incite or fix enmity, discord or strife or ill feeling between classes of persons for the purpose of inducing tumult or disorder.'

"This is a clear attempt to fix and prescribe the limits of speech, and, in my mind, is a denial of the right of free speech, or at least it presents a means by which that right may be seriously hampered. *Speech arousing ill feeling between classes of persons is a far different thing than advocating violent resistance to law or the overthrow of the Government by force. Speech which may arouse ill feeling between classes may frequently induce*

public disorder, and yet be in a cause as holy as the rights of man, or as sacred as the rights of womanhood or childhood.

"Under the provisions of Section 10 every Abolitionist, including Henry Ward Beecher and Theodore Parker, could and doubtless would have been convicted as felons because they gave utterance to speech calculated to arouse discord and ill feeling between classes of persons, and every advocate of slavery in a Northern State tried before a jury of the vicinage, would, under this law, have been found guilty.

"The terms 'public tumult or disorder' are vague and uncertain. There is no limit placed upon them.

"Under the ordinary rule, that one intends the natural consequence of his act, a speech on a great moral issue against a class committing a great moral wrong might produce discord, ill feeling and strife and tumult among the class denounced or among those who, holding a wrongful position or a wrongful privilege, were determined to maintain same regardless of consequences, and with Section 10, as a law in their hands and entrenched by the power of a subservient court, it would be no difficult matter for those rightfully denounced and rightfully excoriated to have a judgment of the court that their denouncer had a purpose when he made his denunciation of arousing discord and public tumult.

"A speech delivered in a community controlled by those who believe in child labor in mill and factory, which denounced such a practice and condemned it as inhuman and monstrous would doubtless create disorder and might cause tumult, and, therefore, though delivered in a holy cause, might be declared to be a speech calculated to 'arouse ill

feeling between classes for the purpose of promoting disorder.'

"It is essential to the progress of humanity that wrong shall be denounced, and that the lips of truth shall not be sealed by the law of silence, and that a people may have the right to determine what is the truth from free discussion and through the agencies of free speech. Free speech is the guarantor of liberty—the avatar of progress.

"It is light, progress, hope; it is the dearest-bought right of the sons of freedom.

"I believe that Section 10 of this act presents a means and a possibility of stifling free speech; of preventing open discussion, and that it may be so warped in its application as to produce injurious and tyrannical consequences. I do not believe that Kentucky needs such a law. I do not believe there is necessity for it. I further believe that it violates the Constitution of the United States and the Constitution of Kentucky, and that it will be so declared by courts of the land." (Emphasis added.)

Governor Morrow concludes:

"I have signed this bill with this belief; I have signed it because I feel the need of law against those who advise* the overthrow of the Government by force, but with the belief that the courts of the land will take out of this law the sections which make it dangerous.

"I have also signed it with the full knowledge that as Chief Executive I will have the power to prevent Section 10 from being used to limit the right of free speech, and I do not now hesitate to say that if any evident attempt is made to use Section 10 as a means of preventing free speech

*Again the reference to personal advocacy.

> in the State of Kentucky, I will use the full power of the Executive to thwart such a purpose: I further propose to urge the next General Assembly to amend or repeal the objectionable sections referred to.
>
> "The Government of the United States lives, and will live. Those who seek its overthrow by force or violence, or those who counsel resistance to its laws by unlawful means must be destroyed, but the right of free speech is the blood-bought heritage of every citizen: it is the palladium of our liberties, and it must and shall be preserved."

The recommendation for elimination of the objectionable sections was adopted. In 1922 the General Assembly repealed them. Acts of 1922, c.20.

The meaning of this legislative history is clear. The criminal syndicalism and sedition provisions of the statute (§§ 1-4), which have been preserved as KRS §§432.020, 432.030 and 432.040, cannot be read as covering the subject-matter of Section 10. See *Gregory* v. *Commonwealth,* 226 Ky. 617, 11 S. W. 2d 432 (1928), applying the rule against redundancy to Sections 3 and 7 of the statute. The repeal of Section 10, if it meant anything, must have meant that despite the broad language of the remaining provisions they cannot be read as prohibiting attempts "to arouse, incite or fix enmity, discord or strife or ill feeling between classes or persons for the purpose of causing public tumult or disorder in order to cause the forcible or violent change or overthrow of the Government of the United States, or the Government of the Commonwealth of Kentucky."

This is not to say, of course, that the General Assembly approved such attempts or considered them morally right. It did, however, pay heed to Governor Morrow's warning that punishment of such activity as a felony would, in practice, abolish the right of free speech in controversial fields by making the way of the peaceable but unpopular dissenter too hazardous. It recognized the danger that a "jury of the vicinage" might fine and imprison an outspoken champion of Negro rights, ostensibly because of seditious purpose but actually because they disagreed with his point of view. And because of this danger the General Assembly determined that the "arousing of ill feeling between classes" shall not be punished as a felony, even in cases where a seditious purpose could be proved (as it has not been in the present case). The alternative course involved too great a threat to our basic liberties. It would make the legality of a point of view depend on the violence of its opponents' reaction to it. Any idea or action impinging upon settled prejudices could, as a practical matter, be outlawed. The possibility of modifying such prejudices through the traditional American method of appealing to the conscience of the community could be nullified.

The constitutional necessity of tolerating the social gadfly has been affirmed by the United States Supreme Court. In *Terminiello* v. *Chicago,* 337 U. S. 1 (1949) the Court held that even a disorderly conduct conviction violated due process when based on proof that the defendant had given a speech calculated to provoke violence. The speech was a shamelessly anti-Semitic

address given to a large Chicago audience, and violence did in fact result despite the restraining efforts of the police. Yet the Court, through Mr. Justice Douglas, declared (337 U. S. at pp. 4-5):

> "* * * a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire, supra,* pp. 571-572, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. See *Bridges* v. *California,* 314 U. S. 252, 262; *Craig* v. *Harney,* 331 U. S. 367, 373. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.
>
> "The ordinance as construed by the trial court seriously invaded this province. It permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand."

And Mr. Justice Jackson, though dissenting because he thought the speech created a clear danger of immediate riot, said (*Id.* at pp. 32-33, 36):

"In considering abuse of freedom by provocative utterances it is necessary to observe that the law is more tolerant of discussion than are most individuals or communities. Law is so indifferent to subjects of talk that I think of none that it should close to discussion. Religious, social and political topics that in other times or countries have not been open to lawful debate may be freely discussed here.

* * * * * * *

"I would not be understood as suggesting that the United States can or should meet this dilemma by suppression of free, open and public speaking on the part of any group or ideology. Suppression has never been a successful permanent policy; any surface serenity that it creates is a false security, while conspiratorial forces go underground. My confidence in American institutions and in the sound sense of the American people is such that if with a stroke of the pen I could silence every fascist and communist speaker, I would not do it. For I agree with Woodrow Wilson, who said:

> 'I have always been among those who believed that the greatest freedom of speech was the greatest safety, because if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking. It cannot be so easily discovered if you allow him to remain silent and look wise, but if you let him speak, the secret is out and the world knows that he is a fool. So it is by the exposure of folly that it is defeated; not by the seclusion of folly, and in this free air of free speech men get into that sort of communication with one another which constitutes the basis of all common achievement.' Address at the Institute of France, Paris,

> May 10, 1919. *2 Selected Literary and Political Papers and Addresses of Woodrow Wilson* (1926) 333."

In *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940) the Court said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

And see *Thomas* v. *Collins,* 323 U. S. 516, 545-546 (1945) (Jackson, J., concurring).

In light of the legislative history set forth above, the Kentucky statute on which this prosecution was based must be interpreted in the light of a rule of reason. Rightly construed, it penalizes attempts at forcible revolution—not challenges to the settled prejudices of the community. It does not authorize punishment of a man for hopefully assisting a Negro

family to test the readiness of white people in a rural Jefferson County area to accept them as neighbors.

Integration of the Negro people into the general community is one of the most important and difficult problems of the present day. For a long time it was deemed permissible to enforce segregation of the races by law. Recent decisions of the Supreme Court, however, have withdrawn constitutional sanction from officially enforced segregation in one field after another. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948) (enforcement of racial covenants in real estate deeds held unconstitutional); *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (school segregation held unconstitutional); *Baltimore* v. *Dawson* and *Holmes* v. *Atlanta,* 24 U.S.L. Week 3128 (1955) (segregation in public parks, golf courses and bathing beaches held unconstitutional). This has given the people of local communities the opportunity, and imposed on them the responsibility, for devising their own solutions for race relations problems within the framework of democratic processes.

It is right and wholesome that private persons, white as well as colored, should take an interest in this vitally important problem. It is a controversial problem for which no solution of general applicability has yet been found. The best American tradition calls for an experimental, trial and error approach, seeking sound empirical solutions rather than rigid doctrinaire judgments. Those who think integration should come sooner, and those who think it should come more gradually or not at all, should be allowed to expound their opposing viewpoints and try them out in practice,

all without official intervention except for the protection of legal rights of person and property.

Lest it be thought that the action of the defendant in purchasing the Wade house was so obviously wrongheaded that it could not have been intended as a sincere and constructive action and must therefore be attributed to some sinister and disloyal motive, it is appropriate to review the conclusions of some of the responsible agencies which have made studies relevant to the desegregation problem. There is a respectable body of opinion that harmful tensions between the races can most effectively be eased by letting people of different color associate together if they wish to do so, and thus learn to see each other not as group stereotypes but as individual men and women with individual hopes and fears and virtues and failings.

Consider, for example, the findings of the President's Committee on Civil Rights, established in 1946 by executive order of President Truman and headed by Mr. Charles E. Wilson. The following year the Committee issued its report, entitled *To Secure These Rights* (U. S. Government Printing Office, 1947). The report evaluated officially enforced segregation from several points of view. It inquired not only whether segregation is just to the Negroes, but whether it is helpful or harmful to the community as a whole: whether, in other words, it really serves to further the purpose for which it was presumably designed—to minimize hostility between the races.

This is a question of fact, and the Committee approached it as such. It examined various situations

in which integration had been given a trial, and found that it tended to ease interracial tensions, not aggravate them. The integration of Negroes into eleven white combat divisions in the European Theater of Operations during the last war was found to have led to a change in the attitude of the white soldiers. As the Committee's report said (pp. 83, 84):

> "The Negro soldiers were trained and organized into platoons, which were placed in regiments in eleven white combat divisions. For months the Negro and white men in these divisions worked and fought side by side. Then, white officers, noncommissioned officers, and enlisted men in seven of the eleven divisions were interviewed. At least two of these divisions were composed of men who were predominantly southern in background. It is surprising how little the response of these southern men varied from that of men from other parts of the country.
>
> "Two out of every three white men admitted that at first they had been unfavorable to the idea of serving alongside colored platoons. Three out of every four said that their feelings toward the Negro soldiers had changed after serving with them in combat.
>
> "* * * the findings which have the greatest significance for the elimination of prejudices are in the answers to this question:
>
> "Some Army divisions have companies which include Negro platoons and white platoons. How would you feel about it if your outfit was set up something like this?
>
> "The question was asked of four sample groups of white servicemen. The first had had direct, immediate and personal contact with Negroes as

fellow soldiers; the second had been close to the situation and had had an opportunity to see how it worked; the third had been further away and the fourth had had no experience whatsoever.

"The conclusion can be stated simply: the closer white infantrymen had been to the actual experience of working with Negroes in combat units the more willing they were to accept integrated Negro platoons in white companies as a good idea for the future. Moreover, the sharpest break was between groups which had even the slightest contact with the experience of integration, and those which had none at all."

A similar finding was made with respect to experience in the Merchant Marine (p. 85):

"Here again what determined whether a white man was prejudiced against Negroes was the kind and amount of experience he had had with them. Where there was contact with Negroes on an equal footing in a situation of mutual dependence and common effort prejudice declined."

And on the question of housing, the report said (p. 85):

"A study of two housing communities reinforces still further the pattern revealed in the Army and the Merchant Marine instances. The study was done under the direction of Professor Robert K. Merton of Columbia University for the Lavanburg Foundation and reported to this Committee by Professor Paul F. Lazarsfeld. An interracial housing community was set up in a northern city. Before they moved into the project only one out of every 25 whites thought that race relations would turn out well, while five times as many felt that there would be nothing but conflict

between the people of the two races. After a few years, one out of every five whites said that race relations were better than they had thought they would be, while only about one-fourth as many thought that they were worse than they had expected. But of the people who had anticipated really serious race conflicts, three out of every four were willing to say that their fears had been proved groundless."

Summarizing its findings on this question, the Committee declared (p. 87):

> "These three studies were done under widely varying circumstances by different scientists, with different people as subjects. The results add up to an indictment of segregation.
>
> "The separate but equal doctrine stands convicted on three grounds. It contravenes the equalitarian spirit of the American heritage. It has failed to operate, for history shows that inequality of service has been the omnipresent consequence of separation. It has institutionalized segregation and kept groups apart despite indisputable evidence that *normal contacts among these groups tend to promote social harmony.*" (Emphasis added.)

On the basis of these findings, the Committee made a number of recommendations for action, including "renewed court attack, with intervention by the Department of Justice, upon restrictive covenants" (Report, p. 169).

Racial integration in the armed forces has since gone forward on a more general basis. In 1950 another Presidential committee, headed by Hon. Charles Fahy (formerly Solicitor General of the United States and

now a judge of the District of Columbia Court of Appeals) investigated the results. Its report, entitled *Freedom to Serve* (U. S. Government Printing Office, 1950), draws the following conclusion from the experience of the Navy and Air Force, which had taken the lead in racial integration (p. 44):

> "5. Integration of the two races at work, in school, and in living quarters did not present insurmountable difficulties. As a matter of fact, integration in two of the services had brought a decrease in racial friction."

See also Groner and Helfeld, "Race Discrimination in Housing," 57 Yale L. J. 426, 433 (1948).

It would be possible to multiply the above citations many times. It would be possible to explore the findings of scientists as to the psychological mechanisms which segregation brings into play. (Compare Chief Justice Warren's opinion in the school desegregation case, 347 U. S. at p. 494). But this is unnecessary for present purposes. It is not even important to inquire whether the conclusions contained in the above reports are sound, or whether they should be accepted without qualification for application in a particular city such as Louisville. The point here is that it is no evidence of a disloyal attitude or of a destructive and seditious purpose to seek the objective of racial integration. Reasonable men can reasonably believe that a non-segregated community is, in the long run, a happier and more prosperous community.

In the field of private housing, the only way to find out whether this is so at a given place and time is by

experiment. The premise on which proponents of integration proceed is that racial prejudice tends to disappear as members of the white and Negro races get to know each other better. In the schools, elimination of legally enforced segregation automatically leads to interracial contact. In the case of housing this is not so. There is no way for Negroes to show white people that they can be good neighbors unless some of them first become neighbors. That is what the Wades tried to do, and what the defendant helped them do.

It will not do to say that their judgment was bad. To be sure, they anticipated that some initial opposition would be expressed. But it cannot be said that they wanted or expected the vituperative reaction of the Shively Newsweek, or the cross-burning and shooting and bombing which followed. These were not natural and probable consequences of the house purchase. No one is bound to assume that the law will be ineffective to afford protection from criminal violence. As Governor Morrow and the 1922 General Assembly declared, no man can be punished because his own peaceable efforts in the field of race relations are countered by the violence of others.

A review of the proceedings below will show that the gravamen of the present charge against the defendant is exactly what the 1922 General Assembly excluded from the reach of the sedition statute. The gravamen of the charge is that the defendant purchased the house for the purpose of arousing ill feeling between the races, in order to further a revolutionary purpose. In order to make this clear, we shall consider (1) the

evidence before the grand jury; (2) the prosecutor's opening statement to the trial jury; (3) the evidence received at the trial and (4) the prosecution's closing argument.

(1) *Evidence before the grand jury.* On September 15, 1954, the Jefferson County grand jury began an investigation of the Wade house bombing. The transcript of the evidence before it has been incorporated into this record as Exhibit C, and we request the Court to read it in full. The transcript shows quite clearly that the question of sedition was imported into the hearing on the sole theory that the *bombing* was inspired by the CP.

The defendant was examined closely on his reasons for buying the house and as to the events which followed. On these subjects he testified fully and without reserve (G. J. Tr. 9/15/54, pp. 3-21).

The prosecutor then asked him about his acquaintance with one Barnett, a member of the Wade Defense Committee, who the prosecutor said had been discharged as a security risk. He also asked the defendant whether he had ever been a CP member or a member of any of seven other specified organizations; whether he had ever subscribed to the Daily Worker or owned or read a copy of it; and what attorneys he had consulted about the matter in the previous two months. The defendant refused to answer these questions and they were certified to the Court for a ruling (*Id.*, pp. 21-24).

The prosecutor stated to the Court the theory on which he considered these questions to be relevant to the inquiry (*Id.*, pp. 24-25):

> "I stated to this so-called Wade Defense Committee ever since they have been talking to me about this thing that we doubted whether or not the County Police had progressed far enough to yet definitely charge anybody with the commission of this crime. They have been to see me three or four times I suppose, and I have offered each time to call a court of inquiry. That was during the summer when the Grand Jury was not in session. And here a couple weeks ago they came to me, the so-called Wade Defense Committee, and wanted me to go on and present it to the Grand Jury, and I told them at the time that I would, but I also told them that there had been two theories about the bombing out there, and one of them was that it was set off, the explosion, by people living in that neighborhood who were endeavoring to run the Wades out of the community; that the other was that it was more or less an inside job so to speak and was done to stir up trouble between the white and colored races in Louisville, and that some people even thought that it was inspired by a principle of Communism so to speak, and I told them that if it was presented to the Grand Jury that it was going to be explored from both sides."

There is no objection, of course, to the exploration of this theory by the prosecution. If the grand jury had heard any evidence that a CP member was responsible for the bombing, he should have been indicted. If it had been shown that he had bombed the house for revolutionary purposes, it might have been proper to indict him for criminal syndicalism. If it had been

shown that he was acting under instructions from the CP, it would have been proper to indict also any other CP members who had conspired with him or cooperated with him as principals or accessories in the bombing. But there was no evidence of any of these things, either before the grand jury or at the trial.

What did happen was that the defendant and a number of other people were interrogated as to whether they were members of the CP, and similar matters, and refused to answer, first on the ground of irrelevancy and later on the ground of possible self-incrimination, pleading their constitutional privilege. There was no affirmative evidence that any of them belonged or had belonged to the CP, but the grand jury treated these claims of privilege as admissions of CP membership. As one juror put it to a witness who had claimed the privilege (G. J. Tr. 9/30/54, p. 28):

> "Sometimes one has to disprove in order to prove. * * * I think your lack of cooperation ties our hands. Now if * * * you refuse to answer on the basis that you might incriminate yourself, then it leaves us no alternative to formulate ideas, which perhaps you aren't being fair to yourself. I don't know. That's the only supposition that we as a jury can work on."

This position, of course, is based on a misconception of the law; a claim of privilege is not evidence for any purpose, and an indictment based solely on such a claim is void (see Point III.B., *infra*). But even if the grand jury had been entitled to treat claims of privilege as evidence, and to proceed on the same basis as if the questions had been answered in an incriminating man-

ner, it still could have had no basis for connecting defendant with the bombing, nor could it have found that he had engaged in any seditious activity *unless the purchase of the house was seditious.* The charge against him could have been only that he bought the house and that, as a CP member, he would be assumed to have bought it for the purpose of arousing ill feeling between the races—*the offense described by the repealed §10.*

(2) *The prosecutor's opening statement to the jury.* The indictment is too vague to throw any light on the theory of the prosecution; it is framed entirely in the statutory language (see Point III, *infra*). But from the very outset of the trial, the prosecutor made it plain that the house purchase and bombing was the gist of the case. In his opening statement to the jury, the prosecutor first described the revolutionary purposes of the CP, in general, and then continued (Tr. 16-16a):

> "Now another argument or policy or theory of Communism is—and you will be told it from the witness stand and it will be read to you from these books—the Communists want to create class conflicts throughout the world. In other words, they want to see trouble between the colored and the white races in this country. They want to see trouble between the Catholics, as an example, and Protestants, anything to stir up trouble among their enemies. Now in view of that, the evidence will show that last March Andrew Wade IV and his wife entered into an agreement with Carl Braden and his wife whereby the Bradens would buy a house here in what you might refer to as a white residential section out here near Shively."

He then continued to describe, in great detail, the anticipated evidence relating to the house purchase and the bombing. He read to the jury a newspaper clipping about the destruction by dynamite of a Negro's store in Manchester, Kentucky, accompanied by the penciled notation, "Request protest resolutions and letters and so forth. Call attention of Negro, labor and so forth organizations * * * (I was maybe twenty miles away—part of pattern of violence against both unions and Negroes and friends)." He said the clipping and notation had been found among defendant's papers. (The clipping and notation were later received in evidence, as Exhibit 88, on the sole ground that they were found there, but the authorship of neither was ever established (Tr. 16a-16e; Tr. 1504-1508; Braden, Tr. 1808-1810).)

More than half of the prosecutor's opening statement was devoted to these matters. Inasmuch as there was no assertion that the defendant was responsible for the bombing, the only theory on which the reference to them can be explained is that the defendant had bought the house hoping or expecting that ill feeling between the races would result—*the offense described by the repealed §10.*

(3) *The evidence received at the trial.* If this had been a true sedition or criminal syndicalism prosecution, in which the gravamen of the charge was that the defendant was attempting revolution, there would have been no justification for introducing any evidence of the house purchase and the subsequent events culminating with the bombing, unless it could be shown that

these things were part of a larger revolutionary plot. Had it been shown that the defendant bought the house at the direction of the CP, or that the CP had in some way been responsible for the bombing or any of the other violence directed at the Wade house, it could perhaps be argued that sufficient connection existed to render this evidence admissible. But nothing of this sort was shown.

Well over 300 pages of testimony was taken on the house purchase, and the bombing and other violence which ensued (Wade IV, Tr. 160-376, 1341-1370; Blair, Tr. 1206-1209; Curella, Tr. 1240-1243; Johns, Tr. 1243-1259; Davis, Tr. 1259-1269; Blevins, Tr. 1269-1278; Wade Jr., Tr. 1300-1334; Bixby, Tr. 1335-1341; Braden, Tr. 1824-1829, 1877-1882). It was never connected with any revolutionary plot. So far as the house purchase was concerned, the evidence was clear and uncontradicted that the whole initiative came from young Wade (*supra,* pp. 5-7). So far as the bombing and other violence was concerned, there was a total failure of proof that the defendant, or anyone else named in the testimony as a CP member, was responsible for it in any way.

It should be particularly noted that even Alberta Ahearn did not make any reference to the Wade house. If her testimony is to be believed, she was completely privy to the defendant's alleged CP activities. She said she attended a CP cell meeting with the defendant on May 13, 1954 (Tr. 2282-2284). This was the very day on which the house was conveyed to the Wades by defendant. She testified about another such meeting on

June 3, 1954, after the shooting, cross-burning and window-breaking, and still another such meeting on July 9, 1954, less than two weeks after the bombing (Tr. 2276-2282). Yet her notes, which purported to describe the proceedings in great detail, gave no indication that the Wade house had even been mentioned.

When the absence of connection between the Wade house evidence and the CP had become apparent, defense counsel made timely motions to strike it (Tr. 1340-1341, 2141). The motions were overruled.

On what basis could the prosecution be allowed to submit this evidence for the jury's consideration? Clearly, it was highly prejudicial to the defendant, and cannot be ignored as a triviality. A man on trial for sedition cannot be tried fairly if the passions of the jury are inflamed by proof of brutal crimes which he did not commit. The evidence must therefore have been left in the record on the theory that it somehow tended to prove a revolutionary purpose.

But through what chain of reasoning could such a theory be supported? Not on the theory that the defendant or the CP caused the violence, because there was no such evidence. The only other possible theory was that the defendant must have foreseen the violence when he bought the house for Wade, and that he is chargeable with seditious purpose because the house purchase, albeit lawful in itself, was undertaken in order to arouse ill feeling between the races, for ulterior revolutionary objectives. *This is the theory of the repealed §10.*

(4) *The prosecution's closing argument.* The prosecution, in its closing argument, reemphasized the contention that the defendant should be punished because of the house purchase. Mr. Hamilton, after referring to a statement of Joseph Stalin predicting revolution when "all the class forces hostile to us have become sufficiently entangled, are sufficiently at loggerheads with each other", declared (Tr. 2437-2438, 2439):

> "* * * when and if we become at loggerheads with the colored people, the Jews, the Catholics against the Protestants and that sort of thing, then we are at loggerheads, and in that connection I cannot help but refer to Commonwealth's Exhibit 88, this letter addressed to 'Dear Friend', Lexington, Kentucky, July 10, 4:00 p.m., signed G. This thing on the back of it, this newspaper clipping, where it says 'Dynamite blast destroys small Manchester store. A small store building near the southern city limits of Manchester was destroyed by a dynamite blast at 2:00 a.m. today. Walter Pennington, 55-year-old Negro owner of the store, estimated his loss at $5,000 and said windows in his home located next door to the store were blasted out. Pennington, his wife and two children escaped injury. Detective Walter Woods is investigating.' And on the right of that newspaper clipping there is written in longhand, 'Request protest resolutions and letters, et cetera. Call to the attention of Negro, labor et cetera organizations. (I was maybe twenty miles away. Part of pattern of violence against both unions and Negroes and friends.) But call to the attention of Negro, labor et cetera organizations.' I assure you that if a white man were accused of dynamiting that colored man's store, wouldn't that help to put us at loggerheads with each other?
>
> * * * * * * *

"And I reiterate, would not the explosion at Manchester, Kentucky, have brought about a situation, would not the purchase and the sale and the dynamiting of the Wade house bring about a situation where the white people who were so inclined could take over and impress the colored people with their supposedly honest belief that they were actually trying to assist these colored people?"

And Mr. Higgins developed the same theme (Tr. 2462-2465):

"Let me very quickly touch upon this Wade bombing that Mr. Zollinger has repeatedly said, 'What in the name of God has that to do with this,' or 'What in the name of God did Braden have to do with it?' Let me recall very quickly what our proof was in that regard. You will recall Mr. Hamilton reading from Political Affairs that the white leaders had to create a situation. You will recall he had in his possession at the time the newspaper clipping there about the Negro bombing. Now a man with those two documents in his possession goes out here and buys a house in a white neighborhood for a Negro. He did it in a sneaking clandestine way. But is that all he did? No, no. That is not all he did. He wrote letters forwarding the payments, he wrote letters about the insurance. After these incidents happened, [Wade] called him first. But most important of all, gentlemen, immediately after Braden bought that house for Wade, Wade was immediately surrounded by whom? Bown, Ford, Lubka, Gilbert, all the rest of the names that you have heard so many times throughout this trial connected with Carl Braden over a period of years.

"Mr. Zollinger: Objection, Your Honor. There's been no proof of that at all.

"The Court: Well, the jury will remember that. We could go back and refer to the notes, the stenographer could.

"Mr. Higgins: Now get this, Bown, a white man, moves into the Wade residence where there are only two bedrooms, where they have a child or where Mrs. Wade is pregnant, and going to have a child in the immediate future. He moves in lock, stock and barrel. Two days after he moves into that house, he brings in a radio, a portable battery-type radio. Now there is proof that radios were already there, and there is proof that that same radio which Wade said was last seen in Bown's bedroom was found under that house with a wire running from it to a nail, nailed into a beam underneath that house. Now you talk about this not being an inside job. From the time that house was purchased, one of these things was always true: Someone was in that house all the time, either the Wades or one of their armed guards or more of their armed guards. They had their arsenal out there of high-powered rifles—and in addition to that a police watch 24 hours a day for a time, and then from nightfall to morning. At the time of the bombing, that house was under constant surveillance and there was only one entrance underneath that basement, and that entrance was in direct view of the police officer at all times. You gentlemen were out there and saw the situation. It sits in practically an open field. Anyone coming up there had to come across the field. Anyone running away had to cross the field to get away. It sat right out in the open, and Wade, none of the men there that night or the police saw anyone come to that house or leave it. Nobody. Now the night of the bombing, can it be mere coincidence that the

> little child was taken away? Can it be mere coincidence that at 12:30 in the morning every occupant of that house was on the outside on the opposite side from the explosion, except Edwards, who the police says was standing in the door and who is now dead? Is it a coincidence that none of them was on the front porch that you saw was a larger place to sit and recline? Why would they be on the smaller one on the side furtherest away from the side where the explosion occurred? Gentlemen, here perhaps is the biggest factor of all. You men saw the utter destruction of that house, and yet not one single person received the slightest injury at the scene of that explosion, not the slightest injury was received by a single person and you gentlemen saw the utter destruction of that house."

Entirely apart from the questions whether the permissible limits of appeal to emotion were exceeded and whether the statements of fact went outside the record, it is clear that the prosecution was attempting to condemn the defendant for the purchase of the house as an attempt to create racial antipathies—*the offense defined by the repealed §10.* And for good measure the prosecution invited the jury to punish the defendant for a bombing he did not cause, simply because the prosecution had been unable to ascertain and prove who did cause it.

We submit that the Wade house evidence was, as a matter of practical reality, the central element in the case. Had the defendant not bought the house and protested its destruction, he would never have been prosecuted. The very fact that the prosecution thought it necessary to give the Wade house such a prominent

place in the evidence and argument implies a tacit recognition that the evidence of defendant's alleged CP membership, and his possession of books alleged to be dangerous, would not have been sufficient to produce a guilty verdict.

The essence of the case was, rather, that the defendant had insulted the prevailing views of the community on the question of racial segregation. This was what the prosecution relied on to translate the charge of seditious activity into terms which had meaning to the jurors in their everyday lives. They were primarily asked to convict the defendant not because he had tried to overthrow the Government but because he had bought the Wade house and because somebody blew it up.

A prosecution on such grounds is what Governor Morrow feared, and what the 1922 General Assembly sought to prevent. Much as we may dislike those who hold up the mirror to the community and remind us that our ideals of justice and tolerance and equality are not yet fully realized in actual practice, we must beware the danger of making the way of the critic too hazardous. If he demands a standard of performance which is presently beyond the capacity of the community, his criticism may not be effective. If he adopts illegal methods, his illegal acts should be punished. But if his methods are lawful we must not silence him because we dislike his views. And we must not punish him because lawless means are used to oppose him.

The best, and perhaps the only, hope of a sane and wholesome solution to such problems as racial integra-

tion is to allow peaceable experimentation of the sort the Wades attempted. To help them attempt it, as the defendant did, is not a crime. Whether or not one may think, in light of hindsight, that it was ill-advised, such experimentation cannot be suppressed by criminal process unless we are ready to forsake the central principle of our democratic society. As Mr. Justice Holmes said in the *Abrams* case (250 U. S. at 630):

> "* * * when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

III. THE INDICTMENT IS FATALLY DEFECTIVE AND SHOULD BE DISMISSED.

In Points I and II we have tacitly assumed, for the sake of argument, that the indictment is valid. This assumption was made in order to simplify discussion of the broad contention there presented: that the evidence against defendant simply did not add up to proof of a crime, so that an acquittal should have been directed on the merits regardless of the validity of the indictment. We now turn to an examination of the more technical but equally important reasons why the indictment is invalid and must be dismissed.

In order to make clear the full extent to which the indictment fell short of the minimum constitutional and statutory requirements, we must first analyze carefully the substantive statute law of Kentucky in the field of criminal syndicalism and sedition, and then examine closely the words of the indictment.

Analysis of the Statutes. Criminal syndicalism is prohibited by KRS §432.020, which provides:

> "Criminal syndicalism. Any person who commits, aids or counsels any crime, physical violence, destruction of property, intimidation, terrorism or other unlawful act or method to accomplish any political end or to bring about political revolution shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both."

Sedition is prohibited by KRS §432.030, which provides:

> "Sedition. Any person who advocates or suggests by word, act or writing any public disorder or resistance to, or the change or modification of, the government, Constitution or laws of the United States or of this state by force or violence or by any unlawful means shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both."

Let us note a few things about these statutes.

(1) Both statutes make criminal guilt depend on the wrongful purposes of the defendant. To be guilty of criminal syndicalism one must *himself* participate in a crime for the accomplishment of political ends. To be guilty of sedition, one must *himself* advocate or suggest something.

(2) The statutes complement each other. The criminal syndicalism statute strikes at unlawful means to possibly lawful "political ends." The sedition statute strikes at the pursuit of unlawful ends by a normally lawful means—speech.

(3) Neither statute purports to enumerate all the unlawful means or unlawful ends which it refers to. The criminal syndicalism statute would be violated, for instance by the commission of murder, robbery, rape or arson (or, presumably, petty larceny or reckless driving) for the accomplishment of political ends—the political motivation being deemed to aggravate an offense defined by other statutes or common law rules. Likewise, the sedition statute would be violated by the giving of a public speech advocating that laws be changed by violent revolution, or by mass civil dis-

obedience (or, presumably, by stuffing ballot boxes or by bribing legislators).

The defendant is not charged with the violation of either of these statutes. Instead, he is charged with violation of a third statute, KRS §432.040, which provides:

> "Teaching, publishing, joining society to advocate criminal syndicalism or sedition. Any person who by word or writing advocates, suggests or teaches the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes, publicly displays or has in his possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition, or who organizes or helps to organize, or becomes a member of or voluntarily assembles with any society or assemblage of persons that teaches, advocates or suggests the doctrine of criminal syndicalism or sedition shall be confined in the penitentiary for not more than twenty-one years, or fined not more than ten thousand dollars, or both."

There are several things to be noted about this statute:

(1) It extends the reach of the criminal syndicalism and sedition statutes very greatly by penalizing certain activities having only an indirect tendency, if any, to produce the evils which the legislature sought to prevent—politically motivated crime and advocacy of unlawful methods of governmental change.

(2) The statute defines three distinct forms of activity which it purports to punish as criminal *per se,* regardless of the intent of the defendant:

(a) Advocating criminal syndicalism or sedition.
(b) Circulating literature which so advocates.
(c) Organizing, joining or assembling with an organization which so advocates.

Three separate crimes are thus defined. Each of the three clauses of the statute stands on its own feet. Any one of them can be violated without violation of the other two, or of the separate statutes prohibiting criminal syndicalism and sedition.

(3) KRS §432.040 prohibits "becoming a member" of a proscribed organization, but not *being* a member. Thus, one who joins such an organization in another state and later comes to Kentucky, but does nothing more, does not violate the statute. The distinction is made plain in *State* v. *Berquist,* 109 Kan. 368, 199 P. 101 (1921); *State* v. *Laundy,* 103 Ore. 443, 204 P. 958, 969 (1922); *People* v. *Thurman,* 61 Cal. App. 147, 216 P. 394 (1923). (In the present case there was no evidence whatever that the defendant had *joined* the CP in Jefferson County, or even in Kentucky.)

(4) KRS §432.040 does not itself contain a full factual description of the acts which it prohibits. It does not define the terms "criminal syndicalism" or "sedition", but refers to these two offenses by name, thus necessitating reference to KRS §§432.020 and 432.030 for a definition of the terms. Moreover, as has been noted, these preceding statutes themselves

contain no complete factual description of the acts which constitute criminal syndicalism and sedition. They condemn "unlawful acts or methods" and "unlawful means", and thus in turn refer to other statutes or rules of law which make the acts, methods or means unlawful.

To illustrate the fact that KRS §432.040 is a vast extension of the criminal syndicalism and sedition statutes, and not merely a particularization of them, consider the following hypothetical cases:

Case I: A history professor teaches his class as follows: "The Constitution of the United States was made effective upon ratification by only eleven states, rather than by the unanimous vote of thirteen states as required by the Articles of Confederation. This was a change of the Government and Constitution by unlawful means; indeed, it was a revolutionary act, though a peaceful one. (This history is reviewed in *State* v. *Diamond,* 27 N. M. 477, 202 P. 988, 991 (1921)). I myself do not think this was right, and I do not advocate that such procedure ever be followed. But in the light of history I must recognize that it was expedient for the Founding Fathers to advocate it. And if a similar situation should arise today, such advocacy would again be expedient." The teacher has not committed sedition, but he has taught the expediency of advocating it. Therefore, though he has not violated KRS §432.030, he has contravened the literal terms of KRS §432.040.

Case II: A delivers a speech teaching the expediency of sedition. A written transcript of the speech comes into the possession of B (either a private citizen or a member of the House Committee on Un-American Activities), who is vio-

lently opposed to the point of view expressed in it. B reproduces the speech and circulates it to other people, telling them, "This is the sort of thing I am opposed to. I want you to see what A says, so you can help me make clear to everyone the fallacy of his position." B's circulation of the document does not constitute sedition, but it does contravene the literal terms of KRS §432.040, which forbids the circulation of any written matter teaching sedition, regardless of the purpose of circulation.

Case III: At the request of the F.B.I., a woman becomes a member of an organization that teaches the doctrine of sedition. She does nothing herself to advocate such doctrine, her purpose being only to observe the activities of the organization and report to the F.B.I. She has not committed sedition, but has become a member of an organization which advocates it and thus has violated the literal terms of KRS §432.040, which makes her purpose immaterial.

Case IV: A man who strongly believes in racial equality is invited to join an organization which preaches the need for equal treatment of Negroes and whites. The organization in fact also advocates the doctrine of sedition, but he does not know this and joins for the sole purpose of promoting racial equality. His activities as a member of the organization are limited to this field, and he does not advocate sedition himself or knowingly help the organization to do so, and indeed opposes any such advocacy by the organization. He has not committed sedition, but (like the woman in Case III) has contravened the literal terms of KRS §432.040.

Incidentally, the foregoing hypothetical cases cannot be shrugged off as far-fetched. As will appear in Point VII, *infra,* the instructions given to the jury applied the statute in its full, literal scope. And there was evidence from which the jury might have found the facts to be essentially similar to one or more of the above hypothetical situations.

Analysis of the Indictment (R. 2-3). The indictment is reproduced in full in Appendix A hereto. The first, or accusatory, paragraph describes the offense in the exact words of KRS §432.040, making necessary changes in the form of the verbs.* The accusatory paragraph reads:

> "The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, accuse LaRue Spiker, Louise Gilbert, I. O. Ford, Carl Braden and Anne Braden, of the crime of advocating, suggesting or teaching the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing, or knowingly circulating, selling or distributing, or having in their possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting, or teaching criminal syndicalism or sedition, or of organizing or helping to organize, or becoming a member of, or voluntarily assembling with any society or assemblage of persons that teaches, advocates, or suggests the doctrine of criminal syndicalism or sedition, committed in manner and form as follows, to-wit:"

*The only exception is that the indictment does not charge the *public display* of proscribed literature, which the statutes does prohibit.

Although the three offenses described by the statute are charged in the disjunctive, so that there is no direct and certain charge that the defendant committed any particular one of them, it is clear that the indictment is laid under KRS §432.040 and that there is no charge of violation of the separate criminal syndicalism and sedition statutes.

The second, or descriptive, paragraph contains four separate clauses which must be examined one by one. It begins:

> "The said [defendants], in the said County of Jefferson, and before the finding of this indictment, did knowingly and feloniously, by word *or* writing, advocate *or* suggest the duty, necessity, propriety, and expediency of physical violence, intimidation, terrorism, *or* other unlawful acts *or* methods to accomplish a political end *or* to bring about political revolution * * *" (Emphasis added.)

The offense here referred to is advocacy or suggestion of criminal syndicalism. The advocacy language is taken directly from KRS §432.040, and the portion beginning "physical violence" is taken directly from the criminal syndicalism statute, KRS §432.020.

At this point it is appropriate to consider the effect of the use of the disjunctive "or" in this and other portions of the descriptive paragraph.* Where the means of committing a crime are alleged in the alternative, the sufficiency of the allegation depends on the sufficiency of each of the alternative allegations. If

*The use of the disjunctive in the accusatory paragraph raises somewhat different questions, which are discussed at pp. 130-131, *infra.*

any one of them is insufficient to describe a crime, the allegation is defective. For example, if a defendant were charged with murdering his mother *either* by shooting her dead *or* by running away from home and thus breaking her heart, the indictment would be insufficient. Each of the means alleged must be such as to make out a violation of the statute under which the indictment is laid. Cf. *United States* v. *Lattimore,* 215 F. 2d 847, 849-850 (App. D. C. 1954). Were this not the law, the valuable function of the demurrer would be destroyed. A defendant could be put to trial on an indictment which, even though one of its alternative branches were fully substantiated by proof, could not support a conviction.

In testing the allegation set forth above, it is therefore necessary to read it in terms of its weakest alternatives. So read, it alleges that the defendant

> "did * * * by word * * * suggest the duty, necessity, propriety, and expediency of * * * unlawful * * * methods to accomplish a political end * * *"

Let us now examine the other clauses of the descriptive paragraph. The second clause reads:

> "and did advocate *or* suggest by word, act, *or* writing, public disorder, *or* resistance to, *or* the change *or* modification of the Government, Constitution, and laws of the United States and the Commonwealth of Kentucky, by force, violence, *or* other unlawful means * * *" (Emphasis added.)

This language is taken directly from *the sedition statute* (KRS §432.030) and alleges not the advocacy of sedition, as charged in the accusatory paragraph, but sedition itself—which is a distinct offense. We confess our utter confusion as to the meaning of this allegation. On its face, it says that the defendant advocated sedition by committing sedition. A comparable charge would be that a defendant had become an accessory to larceny by committing the larceny. It is possible, of course, that one act can violate two statutes; but inasmuch as the draftsman of the indictment has simply quoted the statutes and has not favored us with any allegations as to what acts of the defendant are complained of, we can only speculate as to how the defendant is supposed to have violated KRS §432.040 by violating KRS §432.030.*

Be that as it may, the allegation loses much of its force when read, as it must be, in terms of its weaker alternatives. So read, it alleges that the defendant

> "did * * * suggest by word * * * modification of the * * * laws * * * by * * * unlawful means * * *"

The third clause of the descriptive paragraph reads:

> "and did knowingly circulate, sell, *or* distribute, and did have in their possession for the purpose of publication *or* circulation, written *or* printed matter, advocating, suggesting, and teaching criminal syndicalism, *or* sedition, *or* the change

*As noted above, p. 45, there was no evidence to show that the defendant advocated criminal syndicalism or sedition, and these charges were withdrawn from the jury's consideration.

> *or* modification of the Government of the United States and the Commonwealth of Kentucky by force *or* violence, *or* other unlawful means * * *'' (Emphasis added.)

Here again the language is taken directly from the statutes. The first part of the allegation, down through the word "sedition", comes from KRS §432.040. The remainder is taken from the sedition statute, KRS §432.030, and simply repeats a portion of the definition of sedition.

When read, as it must be, in terms of its weaker alternatives, the allegation is that the defendant

> "did knowingly circulate * * * and did have in [his] possession for the purpose of * * * circulation, written * * * matter, * * * suggesting * * * modification of the Government * * * by * * * unlawful means * * *''

The fourth and final clause of the descriptive paragraph reads:

> "and did become members of a society *or* assemblage, and did assemble with persons teaching, advocating, *or* suggesting the doctrine of criminal syndicalism *or* sedition, *or* the change *or* modification of the Government of the United States and the Commonwealth of Kentucky by force *or* violence *or* other unlawful means * * *'' (Emphasis added.)

The usual formal conclusion rounds out the indictment.

Again the allegation follows the language of KRS §432.040, closing with the repetition of a part of the definition of sedition as set forth in KRS §432.030.

But this time the pleader has given the statutory language a subtle twist which carries the indictment even beyond the broad terms of KRS §432.040.

In its provisions relating to societies and assemblages which teach criminal syndicalism or sedition, the statute makes criminality depend on the teaching of the society or assemblage itself, not of the individuals assembling under its auspices. It forbids (a) becoming a member of, and (b) voluntarily assembling with such a society or assemblage of persons.*

This fourth clause of the descriptive paragraph contains a double-barreled allegation (a) that the defendant (in Jefferson County) became a member of such a society or assemblage, and (b) that he assembled not with such a society or assemblage but with *persons* teaching forbidden doctrine. The importance of the distinction can be illustrated by reference to the evidence in this case with respect to the defendant's alleged attendance at CP cell meetings. There was no evidence that the three *persons* with whom he is said to have assembled (Mrs. Braden, Alberta Ahearn and I. O. Ford) advocated forbidden doctrine.

Moreover, the allegation that the defendant assembled with such *persons* goes outside the terms of KRS §432.040. Even that broad statute does not require a man to turn and run away whenever he hears sedition advocated in his presence. The assembling allegation thus fails to charge the commission of a crime.

*It also forbids organizing or helping to organize such a society or assemblage, but the descriptive paragraph does not allege that the defendant did so.

Once more we find that the allegation loses force when read, as it must be, in terms of its weaker alternatives. So read, it alleges that the defendants

> "did become members of a society * * * and did assemble with persons * * * suggesting the * * * modification of the Government * * * by * * * unlawful means * * *"

The following just comments can be made on the indictment as a whole:

(1) It contains not a single factual allegation as to what the defendant did or when or where or how he did it. It simply says, "Sometime in the past, somewhere in Jefferson County, you have violated one of the three parts of KRS §432.040 in some way or other. And in case you want to know what that statute provides, we will quote it to you from the statute book."

(2) The indictment does not allege any wrongful purpose on the part of the defendant.

(3) The indictment does not allege that any advocacy or literature or organizational affiliation of the defendant produced a clear and present danger, or any danger, that punishable overt acts would result therefrom.

It would seem almost unnecessary to cite authorities holding that a man cannot be put to trial for his liberty on any such caricature of an indictment. But a brief review of the applicable authorities will be presented.

A. The Demurrer to the Indictment Should Have Been Sustained.

The primary purpose of an indictment is to notify the defendant of (a) the crime he is charged with committing, *i. e.,* the *nature* of the accusation, and (b) the acts which are claimed to constitute that crime, *i. e.,* the *cause* of the accusation. As stated in Roberson's *New Kentucky Criminal Law and Procedure* (2d ed.), §1697:

> "It is fundamental that every person accused of crime shall be informed of the nature of the accusation against him, so that he may be prepared to make his defense. [Citing *Overstreet* v. *Commonwealth,* 147 Ky. 471, 144 S. W. 751 (1912).] This fundamental principle is embodied in the Constitution of Kentucky, which says: 'In all criminal prosecutions the accused has the right * * * to demand the nature and cause of the accusation against him.' [Section 11.] Carrying out this fundamental principle, it is provided in section 122 of the Criminal Code that: 'The indictment must contain (1) the title of the prosecution, specifying the name of the court in which the indictment is presented and the names of the parties; (2) a statement of the acts constituting the offense, in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and with such degree of certainty as to enable the court to pronounce judgment, on conviction, according to the right of the case.' And in section 124: 'The indictment must be direct and certain as regards (1) the party charged; (2) the offense charged; (3) the county in which the offense was committed; (4) the particular circumstances of the

> offense charged, if they be necessary to constitute a complete offense. * * *"

The requirement that the indictment contain a "statement of the acts constituting the offense" serves other important purposes in addition to the primary purpose of notice to the defendant. Among other things it enables the defendant to plead his conviction or acquittal in bar of a further prosecution for the same acts, and makes it possible to determine on demurrer whether the defendant's acts constitute the crime charged. See Roberson, *op. cit. supra,* §1702:

> "A general averment that the accused had committed a particular crime named, without more specific allegations, is insufficient, for no one can know what defense to make to a charge which is thus uncertain; the defendant would not know what evidence he might be called upon to meet, and could not properly prepare his defense; there would be no way to determine whether the facts given in evidence are the same as those of which he is accused; and an acquittal or conviction, under such general accusation, could not be pleaded in bar of another prosecution, for it could not be determined that the accusations were the same, and so a defendant might be twice punished for the same offense."

The present indictment performed none of these functions.

The form of the indictment is prescribed by CCP §123. It provides that the indictment shall be in two parts, the first of which (generally called the accusatory or accusative paragraph) must state the *nature*

of the accusation by designating the crime charged, and the second of which (generally called the descriptive paragraph) must state the *cause* of the accusation by setting forth "the acts constituting the offense." As stated by Judge O'Rear in *Commonwealth* v. *Tobin,* 140 Ky. 261, 262, 130 S. W. 1116 (1910):

> "The indictment must charge in its accusative part, the public offense for which it is intended to present the accused, and in the descriptive part, must state the facts which if established by the proof constitute the offense charged."

Where the offense charged has a specific name, such as murder or arson or rape, CCP §123 provides that a simple reference to it by name is sufficient for purposes of the accusatory paragraph. Where the offense has no specific name, as in the case of many statutory offenses, CCP §123 provides that the accusatory part shall give "a brief general description as given by the law." Normally an indictment for such an offense, in its accusatory paragraph, will set forth substantially *in haec verba* the terms of the statute relied upon. Subject to one qualification, there is no objection to this method of identifying the particular *offense* charged.

The qualification is that where a statute describes more than one offense, the indictment must state which of them is charged. As provided in CCP §126, an indictment must charge but one offense. In *Commonwealth* v. *Tupman,* 17 K. L. R. 217, 39 S. W. 661 (1895) the defendant was charged with malicious

shooting. Four types of malicious shooting were prohibited by statute. The Court held the indictment bad, saying:

> "It certainly cannot be said that the indictment is direct and certain when, under the description as given, the particulars of four offenses could equally be given."

As noted above, KRS §432.040 prohibits three separate offenses: advocacy, circulation of literature, and certain types of organizational affiliation. *Berg* v. *State,* 29 Okla. Cr. 112, 233 P. 497, 501-502 (1925). All three of these offenses were described in the accusatory paragraph of the present indictment. The indictment was thus duplicitous, and the timely demurrer (R. 5) should have been sustained. *Caudill* v. *Commonwealth,* 202 Ky. 730, 261 S. W. 253 (1924); *Lovelace* v. *Commonwealth,* 193 Ky. 425, 236 S. W. 567 (1922).

The duplicity of the present indictment takes a particularly aggravated form. It would be bad enough if the indictment had charged the defendant with all three of the offenses. In that case the grand jury could at least be thought to have found probable cause to believe that he had violated all three parts of KRS §432.040, and the Commonwealth might have been allowed to elect which offense to prosecute him for. But in fact the indictment contained no direct charge that he had committed any of them, since the three offenses are charged *in the alternative.* Thus, the grand jury through the indictment said to the defendant: "We don't know which of the three parts of

KRS §432.040 you have violated, but we charge you with violating some one of them. You must therefore be prepared to stand trial on all three of the charges, because you will be found guilty if the proof shows a violation of any one of them." Such an indictment failed to inform the defendant of the nature of the accusation against him, and violated his rights under §11 of the Kentucky Constitution.

So much for the accusatory paragraph. The descriptive paragraph fell still further short of the minimum statutory and constitutional requirements. It is pieced together entirely from the statutory language, and gives no factual description of the time, place or nature of the acts of defendant which were charged to constitute the offense.

This Court has often had occasion to consider how far an indictment can be restricted to the bare terms of the statute. Whatever the rule may be where the statute describes all the elements of the offense and describes them in wholly factual terms, it is quite clear that an indictment in the words of the statute is insufficient unless the words of the statute themselves satisfy the requirement of CCP §122:

> "The indictment must contain * * * A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended * * *"

Where the statute describes one or more of the elements of the offense in terms of legal conclusions, an indictment in the words of the statute is invalid.

Perhaps the clearest case arises where, as here, the statute explicitly refers to other statutes or rules of law in defining an element of the offense. In *Carroll* v. *Commonwealth,* 164 Ky. 599, 175 S. W. 1043 (1915) the defendant was charged under K.S. §1221, forbidding arrest, imprisonment or transportation of any person "otherwise than according to law." The indictment alleged that the defendant on June 5, 1914, arrested and detained Luther Neal, against his will, otherwise than according to law. This Court held the indictment defective and reversed a judgment of conviction, saying (164 Ky. at p. 604):

> "It will be observed that the statute under which defendant was convicted makes it an offense for any person or persons to arrest or imprison another, or transport him against his will beyond the bounds of the Commonwealth, 'otherwise than according to law,' or to cause or in any manner counsel, aid or abet in such arrest, imprisonment or transportation. It does not specify the circumstances under which such arrest, imprisonment or transportation is 'otherwise than according to law,' but *leaves the question of the illegality of the arrest, imprisonment or transportation to be determined by reference to other laws regulating these subjects. It is clear, therefore, that the language of the statute is not sufficient to state every fact necessary to constitute the offense,* and as the indictment does not state such facts, but merely employs the language of the statute, it follows that the indictment is insufficient, and the demurrer thereto should have been sustained." (Emphasis added.)

The *Carroll* case has been cited and followed as recently as 1954. In *Kimbler* v. *Commonwealth,* Ky., 269 S. W. 2d 273, this Court held invalid a similar indictment, saying (at pp. 274-275):

> "* * * if the offense is described only in general terms in the statute, it is necessary for the indictment to charge the particular facts and circumstances which constitute the offense, and an indictment in such an instance which only follows the language of the statute is not good on demurrer. Criminal Code of Practice, §124(4); Com. v. Fain, 248 Ky. 383, 58 S. W. 2d 642; Carroll v. Com., 164 Ky. 599, 175 S. W. 1043, and the authorities cited therein.
>
> "It will be noted that the statute and the indictment here, which followed the language of the statute, do not specify the circumstances and facts under which such unlawful arrest is made, 'otherwise than without authority of law', *but left the question of the legality of the arrest to be determined by reference to other laws regulating the subject.*" (Emphasis added.)

As has been noted, KRS §432.040 does not describe any of the three offenses in factual terms. Each of the prohibited acts is defined with reference to "criminal syndicalism" and "sedition", the names of the offenses defined by KRS §§432.020 and 432.030. Even more important, the criminal syndicalism and sedition statutes in turn make criminality dependent on the terms of still other laws. They speak in terms of "unlawful" acts, methods and means and thus, like the statute involved in the *Carroll* and *Kimbler* cases,

leave this question of legality "to be determined by reference to other laws".

Another application of the rule that an indictment cannot simply follow the words of a statute which defines the offense by legal conclusions, is illustrated by *Commonwealth* v. *Fain,* 248 Ky. 383, 58 S. W. 2d 642 (1933). The statute there made it a misdemeanor to "forcibly break up or prevent, or attempt to break up or prevent, the lawful holding of an election". The indictment charged that the defendant "did unlawfully and forcibly break up and prevent" two named persons from holding a school election. The place and nature of the election, and the authority of the two named election officers, were specified in detail, and there would seem to be little doubt that the indictment amply notified the defendant of the incident on which the charge was based. But it was held invalid because the word "forcibly" is too general to be regarded as a specific factual term. The Court ruled that it was necessary to allege the acts of the defendant which were claimed to be "forcible", so that it could be determined on demurrer whether those acts, as a matter of law, amounted to force within the meaning of the statute. Judge Thomas, speaking for the Court, said (58 S. W. 2d at p. 643):

> "In neither the accusatory nor the descriptive part of the indictment are any facts averred descriptive of the conduct of defendant in the commission of the offense with which he is accused, but only the general language employed in the statute is averred therein. That would be suf-

ficient, if contained alone in the accusing clause in the indictment, and when the facts constituting the offense are properly averred in its descriptive part, for it is the latter part of the indictment that is supposed to correctly describe the offense that the defendant therein is called upon to defend.

* * * * * * *

"The rule is, that where the words of the statute, creating an offense or prescribing punishment for a common-law offense which the statute does not describe, are descriptive of the offense, the indictment will be sufficient if it follows the language of the statute in preferring the charge against defendant. But that rule applies only to offenses which the statute makes complete in themselves. Where that is not done and the offense is described only in general terms without setting forth any of its elements, the indictment should charge the facts; it being insufficient to merely follow the wording of the statute. The rule, as so stated, is universal so far as we have been able to discover, and which is demanded in order to comply with subsection 4 of section 124 of the Criminal Code of Practice, saying that it is necessary, in order to make the indictment direct and certain, for it to contain 'the particular circumstances of the offense charged, if they be necessary to constitute a complete offense.' "

Judge Thomas went on to explain the reason for the rule. He pointed out that mere forcible insistence on the right to vote would not be punishable under the statute, and declared (*Id.* at p. 644):

"If such facts had been charged in the indictment, it would at once have been seen that he had perpetrated no act that the statute intended to

> punish, *and both he and the commonwealth would have been spared the expense, time, and trouble of the trial.* But, beyond that, we repeat again that the express requirement of the Criminal Code of Practice section *supra* (section 124), makes it mandatory that the facts creating the offense shall be stated in the indictment, and, *if the wording of the statute does not do so, but contains only general language, an indictment incorporating its general terms will be insufficient.*'' (Emphasis added.)

To the same effect, see *Foster* v. *Commonwealth,* 75 Ky. 373 (1876); *Commonwealth* v. *Owens,* 198 Ky. 655, 660, 249 S. W. 792 (1923).

The statutes from which the present indictment is quoted not only use the word ''force'' which in the *Fain* case was held to be too general to be regarded as a specific factual term, but employ other terms which are far more general. When one considers the vast range of acts comprehended in the words ''advocating'', ''teaching'' and ''suggesting'', and the limitless generality of such phrases as ''by word or writing'', ''unlawful acts or methods to accomplish a political end'', ''unlawful means'' and ''change or modification of the Government'', it is clear that the indictment does nothing whatever to describe the acts claimed to constitute the offenses charged.

But even if KRS §432.040 spoke in specific factual terms, an indictment in the terms of the statute would be insufficient because the statute does not enumerate all of the constitutionally necessary elements of the offenses it describes. If read according to its literal

terms, it requires no proof of wrongful purpose on the part of the defendant, nor any proof of clear and present danger. For the reasons given in Point I, *supra*, the United States and Kentucky Constitutions forbid punishment unless these two conditions are satisfied. We doubt that the Court will rewrite the statute in order to supply the deficiency. But even if the two missing elements can be added to the *statute* by judicial implication, they cannot be read into the *indictment,* which is fatally defective because it fails to allege all the elements of the offenses charged.

The point is well illustrated by the case of *Commonwealth* v. *Barney,* 115 Ky. 475, 74 S. W. 181 (1903). The statute there involved declared criminal all conversions of the property of another. Except in its title, it made no reference to any requirement that the conversion be fraudulent; and it nowhere referred to any requirement that a relation of trust be shown to exist between the defendant and the owner of the converted property. The indictment, in its accusatory paragraph, substantially followed the language of the statute. In its descriptive part it gave the particulars of the conversion—the property converted, the name of the owner, and the approximate date. It alleged that the conversion was fraudulent, but did not allege a relation of trust between the defendant and the owner.

The indictment was held insufficient for failure to allege a relation of trust. The Court recognized that the existence of such a relation was not required by the literal terms of the statute, but held that this additional

element of the offense must be included by implication in order to effectuate the true intent of the Legislature. And since an indictment in the words of the statute is valid "only where the words used in the statute are sufficient to describe every fact essential to constitute the offense * * * [t]he indictment in this case, not containing all essential averments, failed to state an offense" (115 Ky. at p. 487).

The Court also held that in order to avoid a serious doubt as to its constitutionality, the statute must be construed as punishing only *fraudulent* conversions. Judge O'Rear declared (115 Ky. at p. 479):

> "That the enacting clause of this statute meant to deal only with fraudulent or wicked conversions of another's property without his consent, we find abundant grounds to sustain, even outside of the expression in the title. To apply the terms of the act literally would be so far-reaching that quite frequent injustice and absurdity would result. This compels the rejection of that construction. It is argued for the Commonwealth that motive or intent, not being provided for in the act, are not essential; that many acts are made unlawful by legislative enactment without regard to the actor's intent. But that statement must be considered subject to its qualifications. Bishop's New Criminal Law, section 291b. While in civil actions the *quo animo* with which a thing is done may sometimes be immaterial, we apprehend that generally in legal, as always in moral, contemplation, *crime proceeds alone from a wicked mind.*" (Emphasis added.)

The same reasoning would seem to apply to KRS §432.040, the statute involved in the present case.

The rule of the *Barney* case has been consistently followed by this Court in testing the sufficiency of indictments. It was adhered to in *Shackleford* v. *Commonwealth,* 270 Ky. 60, 109 S. W. 2d 13, 14 (1937), where the Court said:

> "The indictment under consideration does follow the words of the statute, as enacted, creating the offense, but in the case of Commonwealth v. Barney, *supra,* the court has read into the statute words importing a confidential relationship between the offender and the owner of the thing converted, and held that to be good an indictment under the statute must charge such a relationship. The reason for the court's conclusion in the Barney Case is fully set forth in the opinion, and the rule enunciated in that opinion has been recognized and consistently followed. See Farmer v. Commonwealth, 91 S. W. 1129, 28 Ky. Law Rep. 1368, 1369; Commonwealth v. Kelley, 125 Ky. 245, 101 S. W. 315, 30 Ky. Law Rep. 1293, 15 Ann. Cas. 573; Commonwealth v. Weddle, 176 Ky. 780, 197 S. W. 446; Roland v. Commonwealth, 134 Ky. 170, 119 S. W. 760."

For the application of this rule in a recent sedition case, see *U. S.* v. *Schneiderman,* 102 F. Supp. 87 (S. D. Cal. 1951).

There is yet another reason why the present indictment is too vague. If the constitutional requirement that a defendant be informed of the cause of the accusation against him is to have any meaning whatever, the descriptive paragraph of the indictment must contain some allegations of the time, place and nature of the acts complained of. The use of the naked

statutory language should be permitted only in the accusatory paragraph. Such a rule would effectuate the clear intent of §11 of the Kentucky Constitution and of CCP §§122 and 123. All the decisions of this Court on felony indictments can be reconciled on the basis of this principle, since even when the use of statutory language has been approved it has appeared that the indictment contained some descriptive material sufficient to let the defendant know how to prepare his defense.

There is one misdemeanor case in which an indictment for drunken driving was upheld even though both the accusatory and descriptive paragraphs were couched substantially in the words of the statute. *Commonwealth* v. *Black,* 230 Ky. 677, 20 S. W. 2d 741 (1929). Whether or not the case was rightly decided, it must be read in the light of the nature of the offense there charged. The charge was a misdemeanor which could have been prosecuted in an inferior Court by warrant or information rather than indictment (KRS §455.080). There was no constitutional right to an indictment. The statute described the offense in entirely factual terms, and made no reference to any other statute or rule of law.

Moreover, certain practical considerations may have had weight with the Court. Drunken driving is a single, well-defined act. Normally a defendant will in fact know the incident which has led to the indictment; in the usual case he will have been arrested *flagrante delicto,* and the possibility of surprise at the trial is slight. The charge is subject to a one year

statute of limitations, which provides at least some degree of certainty with respect to the time of the offense. The punishment is relatively slight, and the results of a miscarriage of justice correspondingly less serious. It is unthinkable that the same rule could be applied to a felony charge under KRS §432.040, which covers the widest conceivable range of acts and words, over the entire previous life of the defendant, and with a possible punishment of 21 years in the penitentiary and $10,000 fine.

It would extend this brief unduly to review all the decisions which illustrate the solicitude with which this Court has safeguarded the defendant's right to full notice in felony cases. Many of the cases are collected in Roberson, *op. cit. supra,* §1702 *et seq.* The Kentucky Reports can be searched in vain for a felony case in which an indictment in any way comparable to that in the present case has been upheld.

Let it not be suggested that the constitutional safeguards can rightly be overlooked or minimized in cases where the defendant is charged with criminal syndicalism or sedition. In *People* v. *Taylor,* 187 Cal. 378, 203 P. 85 (1921), a criminal syndicalism indictment framed in the language of the statute was held invalid, the Court saying (203 P. at pp. 90, 93):

> "As to the second and third counts of the indictment, we do not wish to be understood as holding that an indictment couched in the language of the statute is sufficient where the charge made relates to the advocacy of doctrines or the publication and circulation of books, etc. As each separate act and publication would constitute

separate and distinct violations of the statute, the specific acts charged should be designated in the information with certainty. Without such information it would be impossible for the defendant to make his defense, and such information is always given and required in indictments for libel, fraud, and similar offenses.

* * * * * * *

"We do not agree with the contention of the Attorney General that a charge under this statute in the language of the statute is sufficient. It is true that as to many crimes an indictment in the exact language of the statute is sufficient, but the fundamental rule which controls in the interpretation of the indictment is that announced in section 959, subdivision 6, of the Penal Code:

> " 'That the act or omission charged as the offense 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.*' (Emphasis by the Court.)

"The indictment in this case is no more illuminating in that regard as to counts 1, 2, 3 and 4 than if the defendant had been merely charged with 'violating the statute defining criminal syndicalism found in the statutes of 1919, p. 281.' This is clearly insufficient.

"The suggestions herein contained as to the sufficiency of the indictment as to counts 2 and 3 are made because it is clear from the many informations and indictments called to our attention that district attorneys generally are using the general language of the statute in indictments under the Criminal Syndicalism Act. And, in such cases it is manifest that great injustice may be done a defendant by a mass of evidence which

may establish the commission of many different offenses not called to the attention of the defendant with sufficient clearness to enable him to prepare an intelligent defense thereto. This is particularly true where a mass of documentary evidence is admitted to establish the character of the organization to which it is alleged the defendant belongs, and where there is also a general charge of criminal syndicalism under the subdivisions 1 and 2 of section 2.

* * * * * * *

"It is well to remember in this type of case that, while the defendants may be charged with an attempt to destroy this government, they are as much entitled to its protection, until convicted of crime as any other citizen or individual, and one of these fundamental rights is that when they are charged with crime they should know the particular crime they are charged with."

And in *U. S.* v. *Lattimore,* 112 F. Supp. 507 (D. C. Dist. Columbia, 1953), modified and aff'd 215 F. 2d 847 (App. D. C., 1954), the Court, in quashing certain counts of an indictment as unconstitutionally vague, declared (112 F. Supp. at pp. 518-519):

"The First Amendment protects an individual in the expression of ideas though they are repugnant to the orthodox. Communism's falacy [sic] and viciousness can be demonstrated without striking down the protection of the First Amendment of discourse, discussion and debate. When public excitement runs high as to alien ideologies, is the time when we must be particularly alert not to impair the ancient landmarks set up in the Bill of Rights. 'The greater the importance of safeguarding the community from incitements to the

> overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.
>
> "If we weaken the safeguards afforded under the Bill of Rights we impair our position with the democratic forces in the world fighting against the tyranny of Communism. 'Safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views.'
>
> "In our proper concern for the internal and external threat of Communism and in pursuing our efforts to strike down this threat, we should endeavor to be consistent and not attempt to require a conformity in thought and beliefs that has no relevancy to a present danger to our security."

It will perhaps be argued that the defects in the indictment were cured by the so-called bill of particulars. There are two reasons why this is not so. In the first place, an invalid indictment is not aided by a bill of particulars. It is the function of the grand jury, not the prosecutor, to frame the accusation. *Commonwealth* v. *Owens,* 198 Ky. 655, 660, 249 S. W. 792 (1923). A bill of particulars serves to limit proof under an indictment which, though it describes the defendant's acts with sufficient definiteness to be ade-

quate on its face, opens up such a broad area of possible proof that some additional specificity is required in the interests of justice. It is a restriction on the evidence, not an aid to the indictment.

In the second place, no true bill of particulars was provided to the defendant. On October 28, 1954, about a month before the trial, the defendant filed a verified motion alleging his inability to prepare his defense to the indictment and moving for a bill of particulars (R. 10-14). The motion called for the very minimum necessary for preparation of the defense. As to the allegation of advocating criminal syndicalism, it asked what words of advocacy were used and when, where and to whom they were communicated. A similar request was made with respect to the sedition allegation. As to the allegation of circulating literature, the motion asked what the literature was and when, where and to whom it was circulated. As to the allegation of joining and assembling with a society or assemblage, it asked for identification of the society or assemblage, the time and place of assembly, and with what words the society or assemblage advocated criminal syndicalism or sedition.

The motion was never ruled on. But two weeks later the prosecution filed a purported bill of particulars (R. 15-27). This document did not pretend to refer to the defendant alone, although he was to be tried separately; instead, it referred jointly to the defendant and his wife, a co-defendant. It did not respond at all to the request for particularization as to place. As to time, it particularized the indictment

only by stating that the acts were commenced in Jefferson County on or about January 1, 1947, and had been carried on elsewhere before that date. This did no more than enable the defendant to restrict his preparation to the period of 7 years and 9 months prior to the indictment, so far as his actions in Jefferson County were concerned.

The "bill of particulars" ignored completely the request for all other particulars. Instead, it listed 27 different organizations as being "among" those in which the defendant and his wife had allegedly been active; listed four publications for which they had allegedly written articles; and listed 44 items of literature and categories of literature, such as:

> "1. Divers volumes of the writings of Karl Marx, F. Engels, J. Lenin and J. Stalin, and others—all of which sets forth and teaches the basic philosophy of communism."

The "bill of particulars" took care not to limit the proof even to the listed organizations, publications and categories of literature.

The "bill of particulars" further declared that the prosecution would introduce in evidence "personal correspondence, letters and copies of letters written to and by the defendants, Carl Braden and Anne Braden, records of meetings, invoices and cancelled checks, and other written and printed matter" and "evidence pertaining to the purchase, sale, occupancy and destruction of the residence of Andrew Wade, IV, on Rone Court, Jefferson County, Kentucky, and evidence

similar to that herein set out pertaining to persons other than these defendants who frequented and assembled in and about said premises, and with whom these defendants assembled and associated."

This, of course, is not a bill of particulars at all. It told the defendant that evidence would be offered with respect to at least 27 organizations, but carefully refrained from saying which of them, if any, he had joined or assembled with, the acts prohibited by KRS §432.040. It said the defendant had written articles for at least four "Communist publications" but carefully refrained from saying which of the articles, if any, advocated anything forbidden by KRS §432.040. It said that thousands of pages of literature and private papers which had been seized at defendant's home would be introduced in evidence, but carefully refrained from saying which of them, if any, the defendant had circulated or intended to circulate—the acts prohibited by KRS §432.040. It said that evidence would be introduced about the Wade house and the people who had visited it, but did not indicate which of the allegations of the indictment, if any, this evidence would be connected with.

Essentially, what this remarkable document said was simply that the prosecution staff had examined the books and papers of defendant and his wife; that these books and papers would be introduced in evidence to prove whatever they proved; and that any additional evidence which might come to hand, including evidence concerning the Wade house, would likewise be introduced. This obviously gave the defendant and

his counsel no help in preparing for trial. It did nothing to narrow the general allegations of the indictment. It only served notice that the prosecution intended to take every possible advantage of that generality.

It also emphasized the fatal duplicity of the indictment. It hinted at dozens of offenses and specified none. The 27 organizations alone would call for preparation of 27 defenses. Compare *People* v. *Horiuchi,* 114 Cal. App. 415, 300 P. 457 (1931), invalidating a charge of membership in the CP and *three* affiliated organizations.

Even as a preview of the evidence the "bill of particulars" amounted to the play without Hamlet. There is no mention of Alberta Ahearn or the six alleged meetings about which she testified.

Nor was the defense aided by the knowledge that the great mass of documents referred to would be introduced in evidence. They were in the possession of the prosecution, and defense counsel despite repeated requests was denied access to them prior to the trial (Tr. 396, 472-474). Even during the trial, defense counsel was granted only the most limited access (Tr. 413, 441, 473-474, 501-502, 1407, 1419).

And even if free access had been granted on November 13, when the "bill of particulars" was served, there would have been no time to read the material before the trial began 16 days later.

As a matter of fact Mr. Zollinger, chief defense counsel, did not know at that time which of the several defendants was to be tried first. He represented the

defendant and two co-defendants, Anne Braden and Louise Gilbert. Their cases were all assigned for trial on November 29. On November 16 he moved for the assignment of separate trial dates so that he would know which case to prepare for that date, claiming that the refusal to do so would deny a fair trial as guaranteed by the Kentucky and Federal Constitutions (R. 31-32). The motion was not granted. Thereafter the prosecutor informed defense counsel, with reservations, that he expected to try the defendant on November 29. But not until the morning of the trial did defense counsel know for certain that the defendant's case was to be tried that day. Being thus subjected to the necessity to prepare three separate cases at once, he could hardly have found time to read the material listed in the "bill of particulars" even if it had been accessible to him and had not amounted to tens of thousands of pages.

At the opening of the trial the defendant filed an objection to the trial on constitutional grounds, claiming that he had not been made aware of the charges against him with sufficient certainty to prepare a defense, and was thereby denied a fair trial. Violation of §11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution was specifically claimed (R. 34, 37). We submit that the objection was well taken, and that the failure to sustain it deprived the defendant of liberty and property without due process of law, in violation of the said constitutional provisions.

To summarize: The indictment was defective. It was duplicitous and thus failed to inform the defendant of the *nature* of the accusation. It contained no description of the acts claimed to constitute the offenses, and thus failed to inform the defendant of the *cause* of the accusation. The "bill of particulars" could not cure the invalid indictment and in fact did nothing to narrow the issues. The defendant was deprived of all opportunity for reasonable preparation, and never abandoned his objection to the unfairness of the procedure.

The defendant's timely demurrer, and his objection to the trial on constitutional grounds, should have been sustained.

B. The Motion to Dismiss the Indictment Should Have Been Granted.

The day after the indictment was returned, a motion to dismiss it was filed (R. 4, 5-6). One ground of the motion was that the names of all witnesses examined by the grand jury were not written on the indictment as required by CCP §120. An examination of the indictment (R. 2-3) will show that the point was well taken. The Court overruled the motion, with an opinion which failed to refer to this contention (R. 6-9).

The requirement of CCP §120 is mandatory. *Sutton* v. *Commonwealth,* 97 Ky. 308, 30 S. W. 661 (1895). Prior to the amendment of CCP §281 in 1932, the trial Court's failure to set aside an indictment was not

subject to appellate review, so that the trial Court could disregard CCP §120 with impunity. The 1932 amendment, however, has authorized such review. The timely motion to dismiss should have been granted, and its denial is reversible error.

The motion to dismiss was also based on the ground that the grand jury had required the defendants to incriminate themselves. The grand jury transcript not yet being available, this branch of the motion could not be factually supported at that time. After the transcript did become available, and prior to the trial, the defendant moved for reconsideration of the order overruling the motion (R. 34, 38-42). The record thus fairly presents the question whether the privilege against self-incrimination guaranteed by §11 of the Kentucky Constitution is violated by the return of an indictment which is affirmatively shown to have resulted from the defendant's claim of the privilege.

We submit that the answer must be in the affirmative. It is contrary to all our traditions to permit a man to suffer prejudice in a criminal prosecution because he has refused to testify against himself. If a grand jury can call a suspected person before it, ask him whether he is guilty, and indict him for the suspected offense because he refuses to answer, we have countenanced a deliberate nullification and defiance of CCP §107, which requires indictments to be based on legal evidence, and have regressed far in the direction of the Inquisition and the Star Chamber.

The grand jury transcript can be searched in vain for any evidence that the defendant did anything to

bring himself within any of the broad provisions of KRS §432.040, under which he was indicted. There was a complete lack of evidence that he advocated forbidden doctrine or circulated forbidden literature or joined or assembled with any forbidden organization. We realize that this Court will ordinarily not inquire whether the evidence before the grand jury was sufficient to justify the indictment. *Bircham* v. *Commonwealth,* Ky., 238 S. W. 2d 1008, 1011 (1951), and cases there cited.* But where as here the lack of evidence is coupled with an affirmative showing that the defendant refused to answer questions designed to incriminate him for the suspected offense, and that the grand jury regarded this refusal as evidence that he had committed the offense (see p. 103, *supra*), the inference is irresistible that he was indicted for claiming his privilege. This raises not a question of criminal practice under CCP §107 but a question of constitutional right under §11 of the Constitution.

For both the above reasons, it was error to deny the motion to dismiss the indictment. Under CCP §281 the denial of the motion is reviewable by this Court. It should be reversed, and the indictment ordered dismissed.

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*It would seem possible that the rule of these cases applies only where the *quality* of the evidence before the grand jury is questioned and not where, as here, there is a complete *lack* of evidence. The distinction was noted by Judge Learned Hand in *Costello* v. *United States,* 221 F. 2d 668, 677 (C. A. 2, 1955):

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated. But that is in no sense true of hearsay * * *."

It would also seem possible that the rule of these cases is inapplicable where, as here, the grand jury minutes are available for inspection by the Court.

IV. THE SEARCHES OF DEFENDANT'S HOME, AND THE SEIZURE OF HIS BOOKS AND PAPERS, WERE ILLEGAL.

The defendant and his wife were indicted October 1, 1954, and bail was fixed for each of them in the amount of $10,000 (R. 2-4). In default of such bail they were committed to jail.

On October 5 and again on October 7, while they were still in jail, their home was searched under warrants issued by a justice of the peace (Tr. 1490; Braden, Tr. 1608; Deft. Exs. A and B) and a very large number of the defendant's books and papers were seized.

A great many of these documents were received in evidence (Zimmerman, Tr. 396-412; Exs. 9-91). Even the titles of these exhibits occupy 33 pages of the exhibit list filed by the official reporter as part of the transcript (pp. 2-34). They constituted the backbone of the prosecution's case in chief, being the only evidence (until Mrs. Ahearn's surprise appearance in rebuttal) which was even claimed to link the defendant with the CP or any other allegedly seditious organization, or to show that he circulated any allegedly seditious literature. If this evidence was incompetent because obtained by illegal searches, as we shall show it was, there can be no doubt of its prejudicial effect.

At the outset it may be observed that a case of this sort, being at least ostensibly brought for the purpose of protecting our Constitution and our tradi-

tions of individual dignity and personal freedom, calls for particularly stern adherence to constitutional procedures. If we propose to resist the doctrine that the state is all-powerfull, we must insist on respect for the time-honored liberties of the individual citizen. And one of the first of these is the immunity of a man's home from unreasonable searches and seizures. As this Court said in *Byrd* v. *Commonwealth,* Ky., 261 S. W. 2d 437, 438 (1953):

> "Section 10 of our Constitution and the Fourth Amendment to the Federal Constitution are practically the same in guaranteeing citizens to be free in their persons, houses, papers and possessions against unreasonable search and seizure, and no warrant shall issue for a search except upon probable cause supported by affidavit. The privacy of a citizen's home and his personal effects are thus made safe against the government and its agents by these sections which say these sacred rights may not be violated before arrest except by virtue of a search warrant. See Youman v. Commonwealth, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303, and authorities there cited, for a full discussion of the sanctity of a citizen's freedom against unreasonable search and seizure. It is there written that the rules of law pertaining to search warrants are of more than ordinary strictness. Courts never regard lightly the extraordinary and unusual procedure authorized by search warrants and are ever mindful of the constitutional guarantee to citizens to be free from unreasonable search and seizure."

This case is unusual in that—as shown in Points I and II—even the seized evidence was insufficient to

take the case to the jury. In the ordinary case the guilt of the defendant is undeniably proved by his possession of the seized evidence—usually liquor or stolen goods. But this Court has made it very clear that §10 of the Constitution must be enforced regardless of the guilt or innocence of the defendant. In a sense, it is enforced not for his benefit but for the protection of the general public whose security against arbitrary invasion of privacy would be imperiled by any relaxation of the rule against unreasonable searches and seizures. This point was forcefully expounded in *Willoughby* v. *Commonwealth,* 313 Ky. 291, 231 S. W. 2d 79, 80 (1950):

> "The accused does not deny his guilt of violating a law enacted to protect the people from the offense of gambling in one of its worst forms. At the same time he claims the protection of the law in order that he might escape punishment. This somewhat anomalous and inconsistent attitude—absolute disregard for one law and using another as a shield of defense—is a right which our benevolent government recognizes. The justification is that the right to protection from unlawful action by police officers in invading the privacy of a citizen and violating his security from unreasonable search is paramount. This is one of our greatest bulwarks of liberty. It is better that now and then a guilty man escape punishment than that this shield be impaired."

Section 10 protects against illegal warrants as well as searches without warrants. Indeed, history shows that the abuse which led to adoption of the constitutional guaranty was not so much the conducting of

searches without warrants as the use of vague warrants authorizing general searches for evidence of crime. See *Ash* v. *Commonwealth,* 193 Ky. 452, 456, 457-458, 458-459, 236 S. W. 1032 (1922):

> "It is doubtful if our boasted constitutional form of government affords any greater single protection or bulwark to American liberty than the one against unreasonable search and seizure, forbidding either without a warrant legally issued, authorizing it to be done * * *.
>
> * * * * * * *
>
> "A complete history of the conditions which brought about the insertion in our Federal Constitution and in most, if not all, of the Constitutions of the various states, the protecting provisions against unlawful seizures and searches is found in Cooley's Constitutional Limitations, seventh edition, pages 424-434, inclusive. It is there shown, as it is also done in the case of State v. Marxhausen, 3 A. L. R. 1505, that prior to our revolution a practice had grown up in England for the courts to issue what might be termed blanket warrants or orders authorizing the officer into whose hands the process went to search persons, houses and possessions in order to obtain evidence of the commission of a crime and to arrest the person whom the evidence indicated had committed it. Such practice and conduct, as well as high-handed procedure, was so inimical to the Anglo-Saxon notion of liberty that the judges of the higher courts of that country began to denounce the practice as revolutionary and tyrannical, and Lord Camden, in the case of Entinck v. Carrington, 19 Howard St. Tr. 1209, said: 'To enter a man's house, by virtue of a nameless warrant, in order to procure the evidence is worse

than the Spanish Inquisition—a law under which no Englishman would wish to live an hour.' See also May's Constitutional History of England, chapter 11.

"Similar unauthorized seizures and searches had commenced to be indulged in by the American Colonies, and at a trial had in Boston, Mass., in February 1761, James Otis, a celebrated lawyer of that day and a native of Massachusetts, was Advocate General of the Crown at Boston. He declined to prosecute the persons arrested under such unauthorized warrants and resigned his office and tendered his services to the defendants without remuneration, though offered a large fee, saying, 'In such a case as this I despise a fee.' His argument in the case will be found in the Life and Works of John Adams, vol. II, page 523, and in it he denounced such practices and such writs as 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law book,' and that they placed 'the liberty of every man in the hands of every petty officer.' John Adams afterwards, on March 29, 1817, wrote a letter to a friend in the course of which he said concerning the speech of Mr. Otis that 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' Amid such agitations and opposition to such arbitrary conduct the United States of America was formed and the fourth amendment to the Constitution was adopted, which says: 'The rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirma-

tion, and particularly describing the place to be searched, and the persons or things to be seized.' Since that provision was a limitation only upon the federal authorities the respective states adopted similar provisions in their constitutions for the protection of their citizens against arbitrary power exercised by the state, ours being the one hereinbefore inserted.

* * * * * * *

"A short while after the rendition of the Entinck opinion, and in 1766, the English House of Commons passed resolutions condemnatory of of grown-up practices concerning searches and seizures, and during the discussion of the resolutions Lord Chatham said: 'Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut, the wind may whistle around it, the rain may enter it, but the King cannot.' The interpretation given to our constitutional provision extends the same sacred protection to one's 'papers and possessions' as it does to his person or his houses, and it will indeed be a sad day when misguided innovators may succeed in destroying it. Shortsighted statesmanship, in order to serve immediate purposes, sometimes place the end to be accomplished above the means employed, although the 'means' might involve the setting aside and a virtual repeal of a sacred principle of constitutional liberty. The inevitable result of such a course, as is fully borne out by the world's history, is ultimate disintegration and destruction of the government."

The reason why the search warrant is hedged about with such careful restrictions is that it offers unique possibilities of oppression. Unlike most *ex parte*

process, such as an order of delivery, an attachment or a temporary restraining order, a search warrant can be obtained without the posting of a bond to protect the unheard party. It is not issued as an incident to a civil action to determine the right to possession, and can therefore result in retention of the seized property for an indefinite period. There is not even any legal assurance that a criminal prosecution will ever be instituted. The search warrant is the most summary process known to the law; and for over a century this Court has recognized the importance of strict insistence upon procedural regularity as the only effective assurance against abuse. As was said in *Reed* v. *Rice,* 25 Ky. 44, 46 (1829):

> "The proceedings upon search warrants, should be strictly legal, for there is not a description of process known to the law, the execution of which, is more distressing to the citizen. Perhaps there is none which excites such intense feeling, in consequences of its humiliating and degrading effects."

In *Youman* v. *Commonwealth,* 189 Ky. 152, 158, 224 S. W. 860 (1920), the Court quoted approvingly the classic statement of this principle as set forth in Cooley's *Constitutional Limitations*:

> "Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person, property, and papers, against even the process of the law, except in a few specified cases. The maxim that

'every man's house is his castle' is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.

"For the service of criminal process, the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works of the criminal law, and need not be enumerated here. And there are also cases where search warrants are allowed to be issued, under which an officer may be protected in the like action. *But as search warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness;* and if the party acting under them expects legal protection, it is essential that these rules be carefully observed." (Emphasis added.)

The rules by which the validity of searches and seizures must be tested are derived from §10 of the Kentucky Constitution:

> "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

These provisions mean, *inter alia,* that:

(a) A search warrant can only be issued by a judge having jurisdiction to do so.

(b) A search warrant can only be issued upon a showing, by affidavit, sufficiently circumstantial to convince a reasonable person that a crime has been committed.

(c) A search warrant is valid only if it describes the property to be seized with such particularity that the executing officer can know exactly what he is entitled to seize.

(d) A search warrant cannot authorize the seizure of private books and papers not shown to be the means of committing a crime or the fruits of a crime already committed.

(e) After execution and return, the warrant and its supporting affidavit must be entered as a public record so that a person desiring to question their sufficiency can ascertain their contents.

Each of these five rules has been violated in the present case.

A. The Justice of the Peace Who Issued the Search Warrants Lacked Jurisdiction To Do So.

Except in the special case of stolen goods, which will presently be discussed, justices of the peace have no common law power to issue search warrants. See Cornelius, *Search and Seizure,* §106:

> "While the statutes of the various states, usually confer upon justices of the peace, jurisdiction to issue search warrants, in the absence of statutory authority, they are without power to

> issue a search warrant." (Footnote citations omitted.)

To the same effect, see 31 Am. Jur., tit. *Searches and Seizures,* §29.

In Kentucky there is no constitutional or statutory provision giving justices of the peace general power to issue search warrants. No such grant is to be found in Section 142 of the Constitution, creating Justice's Courts, or in KRS §§25.010, 25.610-25.670, defining their jurisdiction, or in any provision of the Criminal Code of Practice.

The absence of general common law power is strongly corroborated by the existence of specific statutory authorization to issue search warrants in certain carefully defined types of cases. Thus, KRS §242.370 authorizes justices of the peace to issue search warrants for illegal alcoholic beverages and KRS §436.290 grants similar authority with respect to gambling tables. If justices of the peace had any general common law authority to issue search warrants, these statutes would be unnecessary.

So far as we can ascertain, this is the first case in which a Kentucky justice of the peace has even attempted to issue a search warrant without specific statutory authority (except in the case of stolen goods, where common law power does exist). We have carefully examined each of the 178 decisions of this Court which are referred to in West Publishing Company's Kentucky Digest, under the heading "Searches and Seizures." In 105 of these cases, search warrants had

been issued. Of these 105 cases, 86 involved warrants for alcoholic beverages and 17 involved warrants for stolen property. Of the remaining two cases, one involved a seizure of gambling implements on a warrant issued by the old Louisville Law and Equity Court under express statutory authority (*Commonwealth* v. *Watts,* 84 Ky. 537 (1886)). The other involved a warrant issued not by a justice of the peace but by a county judge pro tem (*Boles* v. *Commonwealth,* 304 Ky. 216, 200 S. W. 2d 467 (1947)).

The fact that justices of the peace have apparently never presumed to exercise the power to issue search warrants except where expressly authorized by statute, and in the case of stolen goods, suggests a recognition on their own part that their power is limited to such cases. And in view of the fact that the search warrant is "the most drastic instrument which can be placed in the hands of an officer" (*United States* v. *Palma,* 295 Fed. 149, 152 (D. Mass., 1924)) it is easy to see why the power to issue it will not be lightly implied.

The stolen goods cases stand on a special footing. It was for such cases that search warrants were originally devised, and justices of the peace have had common law power to issue such warrants since time immemorial. Cornelius, *op. cit. supra,* §§76,106. The distinction between warrants for stolen goods and warrants to seize books and papers as evidence of crime was pointed out by Lord Camden in *Entick* v. *Carrington,* 19 Howell's State Trials 1029 (1765), quoted in *Boyd* v. *United States,* 116 U. S. 616, 627-628 (1886):

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must

> attend at the execution of the warrant, to show them to the officer, who must see that they answer the description.''

The cases in which the Kentucky statutes do authorize justices of the peace to issue search warrants are comparable to the case of stolen goods in that the statutes negate the existence of *property rights* in the things to be seized. Under KRS §242.380 there are no property rights in alcoholic beverages possessed in violation of Chapter 242 of the Kentucky Revised Statutes, and KRS §436.280 contains a substantially similar provision with respect to gambling devices.

The search warrants in the present cases show on their face that they were not issued for stolen goods, alcoholic beverages or gambling devices. They were issued without jurisdiction, and must be regarded as nullities.

Moreover, even if there had been a statutory grant of power sufficient to authorize justices of the peace to issue warrants for seditious literature, jurisdiction would have been lacking under the circumstances here presented. At the time the warrants were issued, the defendant had already been indicted. Jurisdiction of his case had vested in Jefferson Circuit Court. The purpose of the warrants was to obtain evidence for use in that case. Assuming without conceding that a search warrant can properly be employed to obtain evidence for a prosecution already pending, it would seem clear that it must be issued by the Court which has jurisdiction of the case rather than by a justice of the peace who can have no such jurisdiction.

An analogous situation is presented where a judicial officer issues a search warrant in aid of a prosecution outside his territorial jurisdiction. In *Coleman* v. *Commonwealth,* 219 Ky. 139, 292 S. W. 771 (1927), the police judge of Phelps, Kentucky, issued a warrant to search for alcoholic beverages at a place outside the limits of the town. Despite his express statutory authority to issue search warrants for property of this type, the warrant was held invalid because his Court had no jurisdiction of offenses committed outside the town. Lacking jurisdiction of the offense, he could not issue a search warrant in aid of its prosecution.

The offenses of sedition and advocacy of sedition, being felonies, are outside the jurisdiction of justice's Courts. And in this case the justice's Court could not even have claimed jurisdiction as an examining Court, since the indictment had already been returned and there was no function for an examining Court to perform.

For the foregoing reasons the search warrants were issued without jurisdiction and were void.

B. The Affidavits on Which the Search Warrants were Issued Did Not Disclose Probable Cause to Believe That a Crime Had Been Committed.

The issuance of a search warrant is a judicial act. The judge himself must determine, from facts presented to him by affidavit, that there is probable cause to believe a public offense has been committed. The affiant's own belief that probable cause exists is im-

material. As stated in *Colley* v. *Commonwealth,* 195 Ky. 706, 710, 243 S. W. 913 (1922):

> "The framers of our Constitution were very careful to provide that no search warrant should be issued without 'probable cause,' supported by oath or affirmation. In other words, '*probable cause,*' must be set forth, under oath; and to state a conclusion such as affiants believe that there is probable cause, or have reasonable grounds for believing that the accused is guilty of a public offense, does not show probable cause, and is no protection whatever to the court in issuing the warrant nor to the officers in whose hands the warrant is placed for making the search."

To the same effect, see *Price* v. *Commonwealth,* 195 Ky. 711, 243 S. W. 927 (1922); *Mattingly* v. *Commonwealth,* 197 Ky. 583, 247 S. W. 938 (1923); *Goode* v. *Commonwealth,* 199 Ky. 755, 252 S. W. 105 (1923); *Sullivan* v. *Commonwealth,* 304 Ky. 780, 202 S. W. 2d 619 (1947). In the *Goode* case the Court said (199 Ky. at p. 758):

> "* * * the existence of probable cause is a question for the court, and cannot be delegated to the accuser."

As the *Goode* case holds, hearsay affidavits are permissible if they state sufficient *facts* to cause a reasonable man to say that an offense has probably been committed. But such facts must be stated, either on personal knowledge or as hearsay; and if as hearsay, then the affiant must state not only the facts constituting the offense but also the name of his informant and

such other information as makes the hearsay credible. *Thornton* v. *Commonwealth,* 245 Ky. 336, 53 S. W. 2d 707 (1932) (affidavit based on letter of "J. A. Smith, a reputable citizen" held insufficient where J. A. Smith not personally known to affiant or justice).

THE AFFIDAVIT FOR THE FIRST WARRANT.

With these principles in mind, let us examine the affidavit of Commonwealth's Attorney A. Scott Hamilton on which the October 5 search warrant was based. In the first paragraph the affiant says (Deft. Ex. A; Tr. 11/20/54, pp. 3-4):

> "that *he has probable cause to believe and does believe* that Carl Braden, and Anne Braden, his wife, have, in violation of the laws of the Commonwealth of Kentucky in such cases made and provided, and in particular, in violation of KRS 432.030 and KRS 432.040, committed the offense of sedition, having in his and her possession on the hereinafter described property, writings, printing, and publications with the intent to display and distribute, and otherwise publicize such material, in violation of said Statutes, and such material teaching, advocating, and suggesting the duty, necessity, and propriety or expediency of criminal syndicalism and sedition." (Emphasis added.)

So far, the affidavit is plainly insufficient under the cases cited above, since it states only the affiant's own belief.

Then, after describing the home of defendant and his wife and alleging that it is under their control, the affidavit continues:

> "The affiant states that his grounds for probable cause for the issuance of a search warrant are that Sonia Emaline Braden has stated to this affiant today, that she has seen *said material* in the above described premises within the past twenty four hours and on numerous occasions previous thereto, and that the said Carl Braden had discussed Communism with her on many occasions, and had recommended that she read said literature, and had recommended on numerous occasions that all property should be owned by the government and divided equally among all people." (Emphasis added.)

This statement contains nothing whatever which could justify a judicial determination that a crime had probably been committed.*

In the first place, Sonia Braden is not quoted as saying that the documents in question teach criminal syndicalism or sedition. This characterization of the literature is not hers but the affiant's.

Second, the affidavit does not identify the items of literature in question or say what they teach. It gives the justice of the peace no facts on which he can base his own determination as to whether they teach forbidden doctrine. The significance of this point can be

*The prosecutor obtained the statement of Sonia Braden in the form of an affidavit but did not file it with the justice of the peace who issued the warrant. At the hearing on the validity of the searches he declined to produce it though requested (Tr. 11/20/54, pp. 14, 16, 17). Neither defendant nor his counsel has ever seen it. Under these circumstances the rule of strict construction should be applied in all its rigor to the Hamilton affidavit which was filed as the sole basis of the warrant.

demonstrated by reference to the literature actually seized. For all that appears, Miss Braden may have had in mind such literature as the above mentioned House Un-American Activities Committee pamphlet which quoted the William Z. Foster paragraph (Ex. 90, subnumber 143). Whether or not this 15-year-old girl thought that the literature advocated sedition, the justice of the peace was bound to ascertain the basis of her belief and determine whether it was reasonable.

Third, there is nothing criminal in the possession of literature of any sort unless there is proof of an intent to circulate it. The prosecutor himself so declared in his opening statement to the jury (Tr. 14-15, 16i). Miss Braden states no facts which would justify a judicial determination that the literature was possessed with intent to circulate it. The only allegation which even looks in this direction is the statement that defendant "recommended that she read said literature." Even if such a recommendation to an infant member of one's own household could be regarded as a "publication or circulation" within the meaning of KRS §432.040, there is nothing to show for what purpose the recommendation was made. The allegation would be true if the defendant had said to her, "I recommend that you read the Communist Manifesto. You'll eventually be reading it in school anyway, and it will give you some useful historical background on the Communist Party." As has been shown under Point I of this brief, the mere circulation of seditious literature cannot be made a crime.

The woeful deficiency of the affidavit in this respect can be illustrated by pointing out that substantially similar allegations could have been truthfully made concerning the *prosecutor* after he obtained possession of the seized literature. It is safe to assume that he "discussed Communism * * * on many occasions" and "recommended" to his staff that they "read said literature." Of course, he had no unlawful purpose and was therefore not subject to search or indictment. But the affidavit contains no facts showing any wrongful purpose on the part of defendant.

Fourth, nothing is added by the allegations that defendant had discussed Communism and had recommended public ownership of all property. It is not unlawful to discuss Communism; if it were, every thinking American would be guilty. Nor is it unlawful to recommend public ownership of all property, *i. e.*, socialism, unless violent means of achieving it are also advocated.

Fifth, there is no statement as to when the defendant said the things attributed to him. Miss Braden is quoted as saying that she had seen the literature quite recently, but the ideas which she attributes to defendant could have been expressed years before. It is well settled that the affidavit must set forth acts done at a sufficiently recent date to justify the assumption that the same conditions exist at the time the warrant is issued. *Bentley* v. *Commonwealth,* 239 Ky. 122, 38 S. W. 2d 963 (1931) and cases there cited; *Coleman* v. *Commonwealth,* 219 Ky. 139, 292 S. W. 771 (1927). Nor is there any allegation here that the acts

attributed to defendant were done on the premises to be searched (or even that they were done in Kentucky), as required by *Baker* v. *Commonwealth,* 311 Ky. 93, 223 S. W. 2d 590 (1949).

Entirely apart from the technical insufficiency of the affidavit, there is one circumstance which we submit should be held to invalidate it as a matter of public policy. It is based on information allegedly given to the prosecutor by the defendant's 15-year-old foster daughter (Tr. 11/20/54, p. 12; Braden, Tr. 2048). The blood runs cold at the thought that, in America, infant children can be encouraged or permitted to inform against their parents and foster parents, and unlock the doors of their home to official search.

It is well settled that a wife cannot so inform against her husband. *Osborne* v. *Commonwealth,* 214 Ky. 84, 282 S. W. 762 (1926); *Wolford* v. *Commonwealth,* 215 Ky. 523, 284 S. W. 1116 (1926). And though the same technical reason (the marital disability) may not apply in the case of a child, the general policy considerations which underlie the technical rules are the same in each case.

As a matter of fact, it is not hard to perceive a sound technical basis for application of the exclusionary rule to a child as to whom the defendant stands *in loco parentis.* One main purpose of the requirement that a hearsay search warrant affidavit must name the affiant's informant, is to afford a basis for civil redress against the informant if the information is false. *Goode* v. *Commonwealth,* 199 Ky. 755, 759, 252 S. W. 105 (1923). But a parent cannot sue his unemanci-

pated minor child in tort. *Thompson* v. *Thompson,* Ky., 264 S. W. 2d 667 (1954). Thus, the parent is without redress if the child, for whatever reason, gives false information as the basis for a search of the parent's home.

THE AFFIDAVIT FOR THE SECOND WARRANT.

Pursuant to the October 5 affidavit a search was made that same day, as shown by the return (Deft. Ex. A; Tr. 11/20/54, p. 8). Commonwealth's Detective Leroy Zimmerman participated in the search (Zimmerman, Tr. 819). Two days later, on October 7, Mr. Hamilton filed another affidavit with the same justice of the peace, praying a second search warrant. The October 7 affidavit repeated the October 5 affidavit in its entirety, and then added:

> "that on October 7, 1954 the affiant was told by Leroy Zimmerman and Andrew Wade, Jr. that on October 6, 1954 Andrew Wade, Jr. took Leroy Zimmerman to the residence of Carl and Anne Braden, 4403 Virginia Avenue, Louisville, Kentucky for the purpose of looking for a pair of eye glasses which Zimmerman felt he had mislaid while in the said premises on October 5, 1954; that they entered the premises and looked for the eye glasses and while so doing saw writings, printings and publications of a Communistic nature and pamphlets on how to be a good Communist, and pamphlets on indoctrination into Communism and pamphlets condemning the United States, and which appeared to them to be of a seditious nature."

On the basis of this affidavit a second search warrant, identical with the first, was issued and a new search was made that same day (Deft. Ex. B; Tr. 11/20/54, pp. 5-7).

The October 7 affidavit is subject to the same defects as the previous one. The additional allegations provide no additional basis for a judicial determination that a crime had probably been committed.

Moreover, the additional allegations show on their face that they arise from observations made in the course of an illegal search. The October 6 entry was made without a warrant and for the stated purpose of retrieving some eye glasses. This Court has repeatedly held that a search warrant cannot be based on information obtained by an officer who has been granted access to the premises for a limited purpose of this kind. *White* v. *Commonwealth,* 221 Ky. 535, 299 S. W. 168 (1927) (entry to borrow hatchet; liquor found); *Thomas* v. *Commonwealth,* 226 Ky. 101, 10 S. W. 2d 606 (1928); *Adams* v. *Commonwealth,* 313 Ky. 298, 231 S. W. 2d 55 (1950).

The affidavits being insufficient in law, the warrants were void and the searches made pursuant to them were illegal.

C. The Search Warrants Failed to Describe the Things To Be Seized.

The two search warrants are exactly identical in their terms. Each of them commanded "the sheriff, constable, or any peace officer of Jefferson County" to search the defendant's home

> "for seditious material, same being writings, printing, and publications teaching, advocating, and suggesting the duty, necessity, and propriety or expediency of criminal syndicalism and sedition"

and to seize any material so found.

Perhaps the most important single requirement of a valid search warrant is that the judge who issues it, and no one else, must decide what is to be seized. The delegation of this power to the executing officers was the very abuse which led to constitutional outlawry of the notorious writs of assistance. Cornelius, *op. cit. supra,* § 3. As was said in *Marron* v. *United States,* 275 U. S. 192, 196 (1927):

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

See also *Lipschutz* v. *Davis,* 288 Fed. 974, 975 (E. D. Pa., 1922):

> "The only description of the books to be seized is that they are alleged to be 'used by the said I. L.

> Lipschutz in and about the wholesale liquor business conducted by him on the aforesaid premises.' This is no description at all, but leaves the determination of what is to be seized entirely to the judgment and discretion of the seizing officer to be exercised after the entry upon the premises and while the seizure is being made. Such language cannot be construed as 'particularly describing' the things to be seized * * *."

Cf. Hale v. *Henkel,* 201 U. S. 43, 76-77 (1906).

A generic description of the property to be seized is not objectionable where it is of such a nature that it can be identified by sight or smell, so that the executing officer needs only determine its physical characteristics. Thus, a general direction to seize alcoholic beverages is permissible because they can be identified by direct observation. But a determination as to whether documents advocate criminal syndicalism or sedition requires the executing officer to read them and make a highly discretionary judgment as to what they advocate.

The hopeless generality of the warrants can best be shown by the testimony of Zimmerman, one of the executing officers, as to how he decided what to seize. He was called as a prosecution witness to identify the seized material, and defense counsel on cross-examination sought to bring out that he had never read the material to determine whether the warrants authorized its seizure. The prosecution objected to this line of questioning, and the Court sustained the objection (Tr. 387-395):

> "Mr. Zollinger: * * * We do not believe that the party making the search and making the

seizure seized such material as is described in this search warrant * * * and we believe that it is necessary for him so to identify that material * * *.

The Court: This witness just testified that he did seize it.

Mr. Higgins: And we will put the witnesses on to prove it's seditious. *He's not an expert on it, Judge. He can't testify to what it is or isn't.* (Emphasis added.)

17Q. Mr. Zimmerman, you made a search of the premises of the Braden house?

A. I did.

18Q. Did you find any single item in that house that you can identify at this time wherein it was advocated that the Government of the United States be overthrown by force and violence?

Mr. Higgins: Objection, if the Court please. This officer has not stated that he is an authority on communism. We will prove the seditious nature of this material by other competent witnesses.

The Court: Yes, he has testified that he seized the material there on the table in obedience to that search warrant.

Mr. Zollinger: Yes, Your Honor, but the search warrant—

"The Court: And I think it would be unreasonable to ask this witness if he had read all these books and pamphlets."

* * * * * * *

"34Q. Well, you looked over these titles very zealously to see whether or not you could find anything seditious, did you not?

A. I did.

35Q. And you seized everything you found that was seditious?

A. Everything that I thought.

36Q. Oh. Now how did you reach that conclusion?

A. Would you repeat that question?

37Q. You said that you seized everything that you thought was seditious. Now how did you reach that conclusion?

A. Well, sir, I am not a communist. I have never been a communist. I never expect to be a communist. The only thing that I was going by was the issue of a paper and pamphlet put out by the Attorney General's office in Washington, D. C.

* * * * * * *

Mr. Zollinger: * * * This gentleman didn't have the ability to determine what was seditious, and the warrant giving to him the duty of determining that is a void warrant.

The Court: Well, maybe he didn't determine correctly, but we will know from the witnesses whether this paraphernalia is seditious or not."

The trial Court thus ruled that a search warrant can be couched in terms far too vague for the executing officer to comprehend its meaning; that under the authority of such a warrant the officer can conduct a fishing expedition, not even reading the documents but seizing anything he thinks may be incriminating; and that the seizure can be retroactively validated by the testimony of other witnesses that some of the seized material falls within the description of the warrant. If this is the law, Section 10 of the Constitution has become a dead letter.

It is interesting to note that Mr. Zimmerman said his determination as to what to seize was based solely on a pamphlet published by the United States Attorney

General. As a matter of fact, no such pamphlet was introduced in evidence.* But the use of such a guide was not authorized by the justice who issued the warrants; Mr. Zimmerman used his own discretion in deciding that it was a proper guide. Thus, the determination as to what should be seized was not only delegated by the justice to the executing officer, but was redelegated by him.

Moreover, the record clearly shows that Mr. Zimmerman was *not* guided solely by any such pamphlet. He seized not only printed literature, but a wide variety of private papers which could not conceivably have been described in any official publication. A great deal of personal correspondence was seized, such as the letters read to the jury at the close of the prosecution's case in chief (Tr. 1504-1544). A folder containing personal letters, notes and a New Year's card addressed to the defendant's wife was also taken (Zimmerman, Tr. 860-866). The defendant reviewed fully the seized material which was introduced in evidence by the prosecution (Tr. 1611-1720) and that which was not so introduced (Tr. 1723-1767). He pointed out that the seized material included such things as birth certificates, marriage licenses and canceled checks (Tr. 1723); a map of the British Empire (Tr. 1725; Deft. Ex. 500); British Information Service publications (Tr. 1726, 1727-1728, 1734-1735; Deft. Exs. 503, 507, 521); a pamphlet issued by the Democratic National Committee (Tr. 1726-1727; Deft. Ex. 504); publications of the

*A "Guide to Subversive Organizations and Publications," issued by the House Un-American Activities Committee, was introduced as Ex. 90, subnumber 100.

National Labor Relations Board and the United States Department of Labor (Tr. 1730-1731; Deft. Exs. 513, 514); a pamphlet entitled "How to Prepare Your Tax Return" (Tr. 1731, Deft. Ex. 516); works of William Cullen Bryant (Tr. 1731-1732, Deft. Ex. 516); and many other letters, pamphlets and books including some which were anti-Communist and many which had no political implications whatever.

We are not presently concerned with the evidentiary significance of this material. The point is that indiscriminate seizures of this kind are the natural and probable result of issuing search warrants couched in terms so broad and general as to have no meaning to the executing officer.

Such warrants violate the constitutional requirement that a judicial officer must decide what is to be seized. As said in *Johnson* v. *United States,* 333 U. S. 10, 13-14 (1948):

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate* instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." (Emphasis added; footnote omitted.)

See also *United States* v. *Smith,* 23 F. 2d 929, 930 (D. R. I., 1928), holding invalid a search warrant for property "intended for the unlawful manufacture of intoxicating liquor":

> "The determination of that intent is not a function to be so broadly delegated to the agent executing the warrant."

Additional cases are collected in Annotation, 74 A.L.R. 1513.

The warrants being fatally vague, the searches made pursuant to them were illegal.

D. The Law Forbids Search for Private Books and Papers Not Shown To Be the Instrumentalities or Fruits of Crime.

Even if the warrants had been issued upon sufficient affidavits by a judge having jurisdiction, and even if they had specifically described each document to be seized, they would nevertheless be invalid. It is a violation not only of the constitutional rule against unreasonable searches and seizures, but of the constitutional privilege against self-incrimination, to seize private books and papers under the circumstances here shown.

So far as we can ascertain, this is the first case in which a seizure of books and papers has been undertaken in Kentucky, and this Court has therefore not had occasion to consider the legality of such action. But we are not left without judicial guidance. The Court has recognized that Federal decisions interpreting the Fourth Amendment are good authority for the interpretation of the very similar provisions of Section 10 of the Kentucky Constitution. *Youman* v. *Commonwealth,* 189 Ky. 152, 158-159, 224 S. W. 860 (1920);

Brent v. *Commonwealth,* 194 Ky. 504, 513, 240 S. W. 45 (1922).

The leading case is *Boyd* v. *United States,* 116 U. S. 616 (1886). The Government sued to forfeit 35 cases of plate glass as having been imported in fraud of the customs laws. A Federal statute provided that in such cases the trial Court on motion could order the claimant (*i. e.,* the owner of the property sought to be forfeited) to produce in court any business book, invoice or paper shown by affidavit to have a bearing upon the issues of the case. An order was made for the production of an invoice for a previous plate glass shipment. It was produced and admitted in evidence over objection. Judgment went for the Government.

On writ of error to the United States Supreme Court, the judgment was reversed. The Court first held that the action, though civil in form, was penal in nature and was therefore controlled by the constitutional provisions applicable to criminal prosecutions. It then proceeded to consideration of the "principal question," which it stated as follows (at p. 622):

> "The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws—is such a proceeding for such a purpose an '*unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?"

The Court distinguished cases of permissible searches such as searches for stolen goods (p. 623):

> "The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not."

The Court then reviewed the historical background of the Fourth Amendment, showing that it was particularly designed to prevent general searches for incriminating books and papers (pp. 624-627):

> "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent

event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'

"These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. In the period from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the House of Commons passed resolutions condemnatory of general warrants, whether for the seizure of persons or papers, occurred the bitter controversy between the English government and Wilkes, in which the latter appeared as the champion of popular rights, and was, indeed, the pioneer in the contest which resulted in the abolition of some grievous abuses which had gradually crept into the administration of public affairs. *Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel.* Certain numbers of the North Briton, particularly No. 45, had been very bold in denunciation of the government, and were esteemed heinously libellous. By authority of the secretary's warrant Wilkes's house was searched, and his papers were indiscriminately seized. For this outrage he sued the perpetrators and obtained a verdict of £1000 against Wood, one of the party who made the search, and £4000 against Lord Halifax, the Secretary of State who issued the warrant. The case, however, which will always be celebrated as being

the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick* v. *Carrington and Three Other King's Messengers,* reported at length in 19 Howell's State Trials, 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord Camden pronounced the judgment of the court in Michaelmas Term, 1765, and the law as expounded by him has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.

"As every American statesmen [sic], during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." (Emphasis added; footnotes omitted.)

The opinion then quotes from the "celebrated judgment" of Lord Camden in the *Entick* case. After setting forth the passage quoted above at pp. 164-165, the Court continues (p. 629):

"Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

" 'Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.'

"After a few further observations, his Lordship concluded thus: 'I have now taken notice of everything that has been urged upon the present

point; and upon the whole *we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void'.*" (Footnote omitted; emphasis added.)

The *Boyd* opinion then explains the peculiar vice of requiring the production of books and papers. Such documents *speak.* It is not their *existence* which is incriminating, as in the case of stolen goods or intoxicating liquors; their incriminating tendency is in *what they say.* In a very real sense they are witnesses, and when they are forcibly taken from a defendant and read in evidence against him he is for all practical purposes being made to incriminate himself (pp. 630, 631-632, 633-634):

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, —it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but *any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or*

to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

* * * * * * *

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

* * * * * * *

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And *we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.* We think it is within the clear intent and meaning of those terms." (Emphasis added.)

Two of the justices, although they concurred in the holding that the statute was unconstitutional because

it compelled self-incrimination in violation of the Fifth Amendment, were of opinion that the Fourth Amendment did not apply because there had been no actual search. Answering them, the Court declared (pp. 634-635):

> "* * * we are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment. Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

It is interesting to note that, like the *Boyd* case, the case at bar also involves the seizure of invoices. The

prosecution, recognizing that mere possession of literature is not criminal, sought to prove that the defendant intended to circulate certain items; and the main evidence relied on for this purpose was a group of invoices showing that he had bought several copies of each of a few paper-backed publications claimed to be seditious (Strunk, Tr. 457-468; Johnson, Tr. 875-877; Patterson, Tr. 1118-1122; Braden, Tr. 1787-1788; Ex. 74). The invoices were referred to in the prosecution's closing argument (Tr. 2451) and were heavily relied upon to show that defendant intended to circulate literature. Their seizure and introduction in evidence was obviously prejudicial.

Many other documents which, like the invoices, contained no advocacy of criminal syndicalism or sedition, were also seized and introduced in evidence. The prosecution attached great significance to many of these documents, such as the New Year's card (Ex. 81), the "dues letter" (Ex. 82), the letter bearing the Manchester bombing clipping (Ex. 88), and the letters read to the jury at the close of the prosecution's case in chief (Tr. 1504-1544), all of which have been referred to above. The list could be multiplied.

It should be carefully noted that very few indeed of the seized items were even claimed to have been circulated or possessed with intent to circulate. All or nearly all of them were introduced because of what they said, not because they were regarded as instrumentalities of crime. The distinction is important. Books and papers are not immune from search simply because they are books and papers; for example, if they

had been stolen they could be seized under a proper warrant the same as any other stolen property. But they cannot be seized at their owner's home for the purpose of testifying against him.

This distinction is illustrated by *Gouled* v. *United States,* 255 U. S. 298 (1921). In that case the Court answered certified questions relating to the seizure of certain documents for use in a criminal prosecution. The Court said (p. 309):

> "Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the *Boyd* and *Weeks Cases, supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken. *Boyd Case,* pp. 623,624.
>
> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant."

The principle is then given concrete application (pp. 309-311):

> "The third question reads: 'Are papers of no pecuniary value but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215 of the United States Criminal Code, when taken under search warrants issued pursuant to the Act of June 15, 1917, from the house or office of the person so suspected,—seized and taken in violation of the 4th Amendment?
>
> * * * * * * *
>
> "Restraining the questions to the papers described, and first as to the unexecuted form of contract with Lavinsky, a stranger to the indictment. While the contents of this paper are not given, it is impossible to see how the Government could have such an interest in such a paper that under the principles of law stated it would have the right to take it into its possession to prevent injury to the public from its use. The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful.
>
> "Likewise the public could be interested in the bill of the attorney for legal services only to the extent that it might be used as evidence and the seizure of this also was unlawful.
>
> "As to the contract with Steinthal, also a stranger to the indictment. It is not difficult, as we have said, to imagine how an executed written contract might be an important agency or instrumentality in the bribing of a public servant and in perpetrating frauds upon the Government so that it would have a legitimate and important interest in seizing such a paper in order to prevent further

frauds, but the facts necessary to give this contract such a character do not appear in the certificate. On the contrary, this third question recites that the papers are all of no pecuniary, but are of evidential, value, and in the sixth question it is recited that they are 'of evidential value only,' so that it is impossible to say, on the record before us, that the Government had any interest in it other than as evidence against the accused, and therefore as to all three papers the answer to the question must be in the affirmative."

And in *United States* v. *Lefkowitz,* 285 U. S. 452, 464-466 (1932) the Court said:

"The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

* * * * * * *

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.

* * * * * * *

"Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find

> stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime."

See also Annotation, "Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime," 129 A. L. R. 1296.

In the trial Court, *Boles* v. *Commonwealth,* 304 Ky. 216, 200 S. W. 2d 467 (1947) was cited in support of the warrants. This Court held in the *Boles* case that a search warrant can be issued to obtain from the defendant a particular item of evidence—pants and shoes which bore physical indicia of the defendant's presence at the scene of a crime—even though the pants and shoes themselves were not illegally possessed. This was, to be sure, an extension of the previous scope of permissible search; but it fell far short of authorizing a search for books and papers to be used as "speaking witnesses" rather than as a link in a chain of circumstantial proof.

Were it legally possible to seize books and private papers simply because they contain evidence of crime, the rule against pretrial discovery in criminal cases would become very one-sided indeed. If these warrants should be sustained, it will doubtless come to pass

that search warrants will be issued as a matter of regular routine, to search the home and office of each person indicted for or even suspected of criminal behavior—and perhaps the office of his lawyer as well.

We submit that §§10 and 11 of the Constitution, and the due process clause of the Fourteenth Amendment, forbid. These searches and seizures of private books and papers were unreasonable as to subject matter, and violated the constitutional privilege against self-incrimination.

E. The Prosecutor, by Causing the Warrants and Affidavits To Be Kept Secret, Prevented the Defendant From Obtaining a Fair Hearing on Their Sufficiency.

Whatever need there may be for secrecy in the *application* for a search warrant, there is no such necessity after the warrant has been executed and returned to the judicial officer who has issued it. As was held in *Terrell* v. *Commonwealth,* 196 Ky. 288, 290, 244 S. W. 703 (1922):

> "The affidavits upon which a search warrant is issued, and the warrant as well, must be kept on file and preserved by the judicial officer who issues the warrant and are therefore to be considered as accessible to the defendant, and all others, and if he would use them as evidence in his defense, he may by rule or process require the production of such affidavits as evidence on his trial * * *"

See also *Miller* v. *Commonwealth,* 201 Ky. 423, 426, 257 S. W. 3 (1923).

KRS §25.660 provides:

> "Justices' courts are courts of record. Each justice shall keep an order book and an execution book, to be paid for by the county. He shall keep in it a full and fair record of his judicial proceedings, and sign it at the end of each term. The book shall be kept properly indexed. Each justice shall give to any person requesting it a certified copy of any record in his custody, and the copy shall be admissible in evidence."

The issue of a search warrant is, of course, a "judicial proceeding" within the meaning of the statute.

After the searches, defense counsel attempted unsuccessfully to find a public record of the warrants and affidavits, if any, but found none (Tr. 11/20/54, p. 12). He therefore assumed that the searches had been made without warrants, and on November 16, 1954, filed a petition and motion praying that the seized material be excluded from evidence upon the trial and that it be returned to the defendant and his wife (R. 29-30). This motion naturally made no mention of the warrants and affidavits, since they were not known to exist.

By agreement, the motion was brought on for hearing November 20, in advance of the trial. At this hearing the warrants and affidavits were made public for the first time. The prosecutor admitted (Tr. 11/20/54, p. 12):

> "I did ask the magistrate if possible not to make the affidavit public."

Having had no opportunity to prepare argument on the sufficiency of the warrants and affidavits, defense counsel was at a crippling disadvantage in attacking their sufficiency. The argument on his motion to suppress proceeded that same day; the motion was taken under submission; and the trial Court thereafter overruled it (R. 33-34). Prior to the trial the defendant filed exceptions to the ruling on constitutional grounds (R. 36-37). At the trial he objected to the introduction of the seized material in evidence (Strunk, Tr. 446; see also Tr. 35, 377). The Court, however, refused to entertain the objection on the ground that the search had already been ruled valid.

The hiding of the warrants and affidavits prior to the November 20 hearing has thus had the effect of denying to the defendant, both then and thereafter, an opportunity for a full and fair hearing, preceded by reasonable notice of the contents of the papers which formed the basis of the searches. Notice and an opportunity for hearing are of the very essence of due process, and their denial has deprived the defendant of his rights under Sections 11 and 14 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment. *Morgan County* v. *Governor of Kentucky,* 288 Ky. 532, 156 S. W. 2d 498 (1941).

V. THE SEIZED DOCUMENTS SHOULD HAVE BEEN EXCLUDED FROM EVIDENCE, BOTH BECAUSE THE SEARCHES WERE ILLEGAL AND BECAUSE THE INTEGRITY OF THE SEIZED DOCUMENTS WAS COMPROMISED BEFORE THE TRIAL.

We have shown in Point IV, *supra,* that for several different reasons the search warrants were invalid and that the searches conducted pursuant to them were therefore illegal. An invalid warrant is no warrant at all. *Weaver* v. *Ficke,* 174 Ky. 432, 192 S. W. 515 (1917). It follows, as a matter of law, that the seized documents should have been excluded from evidence. *Youman* v. *Commonwealth,* 189 Ky. 152, 224 S. W. 860 (1920).

Even if the warrants themselves had been valid, they could not justify the seizure of anything other than what they described, namely, documents advocating criminal syndicalism and sedition. A great number of the seized documents failed to fit this description but were nevertheless admitted in evidence and were used to the prejudice of the defendant. Examples are the Bacteriological Warfare Report (Ex. 49) and the "Comet" leaflet (Ex. 83), described at pp. 17-18, *supra;* a New Year's card from an alleged CP member, found among the personal papers of defendant's wife, and a note to her, allegedly found inside it (Ex. 81; Johnson, Tr. 855-856, 866-868; Zimmerman, Tr. 857-866); and the series of letters read to the jury at the close of the prosecution's case in chief (Tr. 1504-1544). Many other examples could be given. Whatever may be

thought of these documents, they did not advocate criminal syndicalism or sedition and their seizure was not justified by the warrants.

Defense counsel at the trial (as well as prior thereto on the motion to suppress) made timely objection to the introduction of any of the seized documents in evidence (Tr. 377). When the Court refused to entertain this objection, on the ground that the validity of the warrants had already been sustained on the pretrial motion to suppress, a further specific objection was made to the introduction of any documents not falling within the description of the warrants. This objection was likewise overruled, and exception taken (Tr. 386-389). (See also the written exceptions filed at the beginning of the trial (R. 36-37).) The objections have thus been preserved for consideration here.

But there is a further reason why the seized documents should have been excluded even though the search warrants had been valid and had fully described them. The record shows beyond any doubt that the integrity of the seized documents was not preserved during the period between the searches and the trial, and that at least four extraneous documents not in fact found at defendant's home were mixed in with documents seized there. When the whole mass of documents was introduced in bulk, these extraneous documents were introduced along with them and at least two of them were used by the prosecution with highly prejudicial effect. Before reviewing the testimony as to the custody of the seized documents as a

whole, we shall analyze the evidence as to these four documents.

(1) *The souvenir Russian Constitution* (Ex. 33). This exhibit is a small leather-bound edition of the Russian Constitution, printed in the English language but published in Moscow. It is finely wrought and is striking in appearance. It made its formal appearance on December 1, as one of the hundreds of seized books, pamphlets and papers simultaneously filed, being identified as Exhibit 33* (Tr. 339).

Even before its introduction, however, the first prosecution witness had directed attention to it as being a prize edition "which was passed out to favored Communist Party members" (M. Edmiston, Tr. 58-62). Defense counsel immediately stated that it had not come from the defendant's home (Tr. 61). At the first recess, defense counsel pressed the point and urged that the failure of the searching officers to inventory the seized documents had created a dangerous possibility of "confusion of those items with items taken in other raids" (Tr. 80). In the course of the colloquy the defendant specifically denied that the document had been in his home (Tr. 81). At that time it was not possible to substantiate the assertion; but, as will appear, full substantiation developed a few days later from a wholly unexpected source.

Meanwhile the book was referred to by one prosecution witness after another as a special edition which

*Several paper-bound copies of the same constitution were filed under the same exhibit number. These had no special significance, and the leather-bound edition was referred to throughout the trial simply as "Exhibit 33", without other identification. We shall follow that practice in this brief.

would only be found in the possession of a CP member (Strunk, Tr. 447-449; Glatis, Tr. 561-562, 680; J. Edmiston, Tr. 722-723). In order to understand fully its prejudicial effect, one must bear in mind that nearly all the books and papers introduced in evidence could admittedly be obtained by non-members of the CP, and their presence in defendant's home thus was as fully consistent with the defendant's testimony that he was only a student of CP affairs, as with the prosecution's hypothesis that he was a CP member. Only Exhibit 33 and the "dues letter", presently to be discussed (Ex. 82), were given special significance by testimony that *no one but* a CP member would possess them.*

On the morning of December 3 Mr. Zimmerman testified that he had found Exhibit 33 in defendant's desk during the search of October 7 (Tr. 822). At the noon recess Mr. John Briney, one of the newspaper reporters covering the trial, made a remark at the press table that he had seen the book, or one just like it, among the books and papers that had been seized in a search of the home of I. O. Ford and Vernon Bown. Mr. Briney added that he had mentioned the book in a news article he had written about that search (Briney, Tr. 1437, 1451, 2178). The remark came to the attention of defense counsel, who on that same day made a motion and affidavit for (a) a subpoena *duces*

*There was testimony that no one but a CP member would possess receipts for literature published by International Publishers (Ex. 74; Patterson, Tr. 1120-1122). But in view of the admitted fact that anyone can order literature from that publisher (Glatis, Tr. 695-698), this testimony must be disregarded as outside the conceivable knowledge of the witness.

tecum directing that the Ford-Bown documents be produced in Court, and (b) an order impounding them for inspection, in order to determine whether another copy of the Soviet Constitution, similar to Exhibit 33, was included therein (Tr. 998-999).

This was clearly a reasonable and proper request. Testimony that such a book had been seen among the Ford-Bown documents would prove its absence from the Braden documents if, but only if, no counterpart copy was to be found among the Ford-Bown documents at that time.

The motion was denied, but the Court did authorize defense counsel to look through the Ford-Bown documents in company with prosecution counsel, in order to see whether a counterpart copy could be found. This was done that same night, and no counterpart copy was found (Stipulation, Tr. 1432, 2184).

Mr. Briney testified both on *voir dire* (Tr. 1434-1452) and in the presence of the jury (Tr. 2177-2190). The news story written by him about the search of the Ford-Bown home on October 8, which appeared in the October 9 *Courier-Journal,* was read into the record (Tr. 1435-1439; Deft. Ex. F). In the course of describing a number of documents seized at the Ford-Bown home, the article said:

> "An English-language copy of the Constitution of the Soviet Union printed in Russia was also taken."

Mr. Briney was then shown Exhibit 33, and testified that it, "or one exactly like it," was the item referred to in the news article (Tr. 1439, 2182-2183).

Since no book similar to Exhibit 33 was found in the Bown-Ford documents, the conclusion is inescapable that the news article—written long before the significance of this item of proof became apparent—referred to the very book which was introduced as having been found in defendant's home, and that it was in fact taken from the home of Bown and Ford and not from defendant's. The defendant testified flatly that he had never seen it before the trial (Tr. 1608-1610) and the prosecutor could only testify that it had been in a box with the Braden documents since he began to study them, a month or so before the trial (Tr. 1482). He admitted (*ibid.*):

> "My memory would not be so good that I could swear I remember that every step of the way."

Subsequent testimony about Exhibit 33 throws an interesting sidelight on the reliability of the "experts" who, as noted above, testified so confidently that it would be found only in the possession of a CP member. In the short time available before the end of the trial, defense counsel was able to locate as many as three witnesses—all of whom testified without contradiction that they were not and never had been CP members—who had bought exact counterparts of Exhibit 33 in book stores. Henry A. Goodman bought one for 10 or 15 cents at Woodworth's in Chicago prior to 1950 (Tr. 2089-2090). Dr. Louis C. Kesselman, Chairman of the Political Science Department at the University of Louisville, bought one for 10 cents at Long's book store, across the street from Ohio State University in Columbus, Ohio, in 1941 or 1942 (Tr. 2109-2110). And

John F. Bennett bought two of them for five cents each in Boston in 1941 (Tr. 2096-2099). Mr. Bennett had preserved one of his copies and produced it at the trial. It is in the record as Defendant's Exhibit 568, and can be seen to be an exact counterpart of Exhibit 33.

(2) *Strategy and Tactics* (Ex. 91). As one of the large number of books comprising Exhibit 91, a book entitled "Strategy and Tactics" was introduced along with the other documents seized or allegedly seized at defendant's home (Tr. 411). It has a black and yellow jacket of distinctive design, and therefore shows up well on a photograph. For that reason, as will appear, it has become possible to substantiate by irrefutable proof the defendant's testimony (Tr. 1424, 1609) that he never saw it before the trial.

The first search of the Ford-Bown home took place September 24. Books and papers were seized and brought to the courtroom. Mr. Laurence Higgins, an assistant prosecutor, phoned Mr. William Stucky, a Courier-Journal reporter, and tipped him off that there was a good story, suggesting that a newspaper reporter and photographer be sent down. Acting on this information, Mr. Stucky and a photographer did come to the courtroom. Photographs were taken of some of the seized documents. Those photographs have been introduced in evidence (Deft. Exs. G, H and I) and clearly show the book "Strategy and Tactics" (Higgins, Tr. 1455-1456, 1458-1459, 1461; Stucky, Tr. 1453, 1467, 2191-2194).*

*The hopeless confusion that resulted from introduction of the great mass of evidence in bulk is illustrated by Mr. Higgins' uncertainty as to whether this exhibit had been put in evidence (Tr. 1485-1487). He himself had introduced it (Tr. 411).

This raised the same question as in the case of the little Russian constitution (Ex. 33). Unless a counterpart copy could be found among the Ford-Bown documents, it would be obvious that a book seized on September 24, long before the October 5 and 7 raids on the Braden home, had somehow found its way into the documents identified as having been found there. Defense counsel accordingly moved that the Ford-Bown documents be examined for this purpose (Tr. 1468). The motion was denied. Defense counsel thereupon made an avowal that, if such a search were made, no copy of "Strategy and Tactics" would be found among the Ford-Bown documents (Tr. 1491). For present purposes that avowal must be taken as true; and if it is, the prosecution's failure to preserve the integrity of the seized documents must be admitted.

(3) *The Peace Crusade Minutes* (Ex. 54). In 1951, for about a month, the defendant acted as Secretary and Treasurer of the Louisville Committee of the American Peace Crusade. As secretary, he took and signed certain minutes. He testified that he then turned them over to one John Clifford Young, another officer, and never saw them again until they were introduced in evidence among the several papers included in Exhibit 54, having allegedly been seized in his home. He denied that they had been so seized (Tr. 1423-1424, 1609-1610, 1791-1792).

It is perfectly clear that the defendant testified truly, and that these minutes had in fact been seized September 24, in the first search of the Ford-Bown home. As has been noted, Mr. Stucky was invited by

Mr. Higgins to inspect the documents seized in that search and make a report to the newspaper. He did so, and wrote a news article which appeared under his name in the September 25 *Courier-Journal* (Stucky, Tr. 1454, 2194-2196). In the article he quoted Mr. Higgins as saying that the Ford-Bown documents included "minutes of a local American Peace Crusade meeting signed by Braden" (Tr. 1467). Mr. Stucky testified that Mr. Higgins did tell him this on September 24 (Tr. 1467) and Mr. Higgins did not deny it (Tr. 1455-1456).

This was clearly a sufficient showing to justify a futher inspection of the documents seized at the Ford-Bown home, to ascertain whether they included any other Peace Crusade minutes signed by the defendant. But the defense motion for such an inspection was denied (Tr. 1468, 1489). Defense counsel made avowal that such a search would disclose no additional Peace Crusade minutes signed by the defendant (Tr. 1491). Taking the avowal as true, as must be done for present purposes, it is again made clear that the prosecution failed to preserve the integrity of the seized documents.

(4) *The "dues letter"* (Ex. 82). With respect to the three above-described exhibits it was possible to show affirmatively, by news articles or photographs, that they were seized at the Ford-Bown home and not at the home of defendant. Such affirmative proof is not available with respect to Exhibit 82; but here again a search of the Ford-Bown documents would have made it plain that the document came from that source and not from the home of defendant.

Exhibit 82 is a typed document in the form of a letter. It bears a typed signature, "State Organization Department," but no individual signature. It is addressed, "To all Sections: Dear Comrades," but bears no individual address. It is dated April 14, 1950.

On its face it makes no reference to the CP or any other organization. Several prosecution "experts" testified, however, that it was similar to a form regularly used by the CP when they were members, and that it would only be found in the home of a CP member (Strunk, Tr. 449-455; Glatis, Tr. 711-712; J. Edmiston, Tr. 723-724; Johnson, Tr. 847-848; Patterson, Tr. 1122-1123). As already noted, it was one of the only two documents (the other being the little Russian Constitution) which, according to the "experts", would be possessed by *no one but* a CP member. It seems entirely likely that, except for these two exhibits, the defendant would have received a directed acquittal at the close of the Commonwealth's case in chief. The jury may well have regarded them as giving indispensable corroboration to the testimony of Mrs. Ahearn. Thus the admission of Exhibit 82 in evidence, if erroneous, was clearly prejudicial; and every available means of determining where it came from should have been exhausted.

The "dues letter" was hustled into the record along with the many other documents allegedly seized at defendant's home (Tr. 406). It first received special attention from the prosecution witness Strunk (Tr. 449-455). In cross-examining him, defense counsel made plain his contention that it had not in fact come

from defendant's home (Tr. 540-544). Thereafter, Mr. Zimmerman testified rather vaguely that he thought it came from one of the defendant's desk drawers, though he couldn't be certain just where in defendant's house he had found it. The defendant testified unequivocally that it was not his (Tr. 1608):

> "44Q. Mr. Braden, I will show you Commonwealth's Exhibit Number 82, which has been identified as a dues letter. Have you ever seen that prior to its exhibition in this courtroom?
>
> (The document was shown to the witness.)
>
> A. No, sir. Until it was shown in this courtroom I never saw it in my life."

The "dues letter" does not in any way refer to defendant. A careful reading of its text, however, does suggest a means of resolving the conflict between the testimony of defendant and that of Zimmerman. The text shows that it is a form used *quarterly*. Indeed, one of the witnesses so testified (Strunk, Tr. 455). This would mean that whoever possessed one of these letters would also be likely to possess similar ones. It is hard to see why such a letter would be preserved for over four years, except as part of a file of similar letters. As a matter of fact, the letter bears physical evidence of having been previously attached to something else (Zimmerman, Tr. 819).

It was not claimed that defendant ever possessed a *file* of "dues letters." Defense counsel avowed that an inspection of the Ford-Bown documents would disclose "other samples of letters similar in content and makeup to Exhibit Number 82" (Tr. 1491). For pres-

ent purposes this avowal must be taken as true. If it is true—that is, if the documents seized at the home of Ford and Bown do include a file of "dues letters"—it can hardly be denied that Exhibit 82 came from there and not from defendant's home. In view of the key nature of the evidence and the conflicting testimony as to defendant's possession, it was an abuse of discretion for the trial Court to refuse the inspection—particularly in light of the strong showing of irregularity with respect to the other three exhibits.

We have thus far undertaken to demonstrate the prosecution's failure to preserve the integrity of the seized documents by showing specific instances of the admixture of outside documents. A review of the confused and conflicting evidence as to how the documents seized at defendant's home were handled after their seizure will show that there was ample opportunity for such admixture.

It is not necessary for the defendant to show that this admixture was intentionally perpetrated by the prosecution. The more probable explanation is that it resulted from the failure to use careful and systematic procedures in receiving, listing, marking and storing the massive quantities of documents seized. Confusion and error are almost inevitable under such circumstances.

In endeavoring to trace the seized documents from the searches to the trial, we encounter an initial difficulty with respect to the documents seized upon the first

search of defendant's home on October 5. According to the return on the October 5 warrant, it was executed that same day by City Detective John P. Hughes, who certified that he had made a seizure (Deft. Ex. A). His return does not include a list or inventory of the documents seized by him, and he did not identify those documents at the trial. There would thus appear to be a hiatus in the proof as to custody of the documents seized on this search.

The October 7 warrant was executed by Commonwealth's Detective Leroy Zimmerman, as shown by his return certifying that a seizure had been made (Deft. Ex. B). Mr. Zimmerman testified that the documents seized by him were brought to the courthouse and locked in a basement room in the custody of the prosecutor (Tr. 381-382). He later testified, however, that he himself had custody of them down to the trial, and that they had not even been looked over by anyone unless he was there (Tr. 383, 817).

His testimony on this point appears to conflict with that of the prosecutor, who testified that he had on some occasions taken home some of the seized Braden documents (Tr. 1472) and that on other occasions he had taken some of them to his office (Tr. 1478). The prosecutor also stated that the Braden documents had been brought to his office in the first place (Tr. 1011-1012) rather than to the basement room as Mr. Zimmerman testified. Mr. Briney also testified that the Braden documents had been first brought to the prosecutor's office (Tr. 1442).

The Ford-Bown documents seized October 8 were also taken first to the prosecutor's office, and the prosecutor admitted that it was not impossible that documents seized at the Braden home the preceding day were still in his office when the Ford-Bown documents were brought there (Tr. 1477-1478). He also testified that he had taken some of the Ford-Bown documents to his home to work on them there (Tr. 1471). There were obvious possibilities of confusing the unmarked papers of Ford and Bown with those seized at the defendant's home.

The record also shows that the seized documents were handled by unauthorized persons. The Ford-Bown documents seized on October 8 were handled by several newspaper reporters in the prosecutor's office, and "the stuff got pretty well in general circulation in the room" (Briney, Tr. 1444, 1448-1449). The examination procedure was "just about the same in the Braden raid and in the Bown raid and all the others" (Briney, Tr. 1452). On at least one occasion a file of Braden documents was handled by the prosecutor's son (Tr. 1444-1445). Two Velde Committee investigators named Williams and Curley examined the Braden documents over a period of ten days, and also examined the Ford-Bown documents (Hamilton, Tr. 1473-1475).

We submit that the prosecution has failed to show that the documents seized at defendant's home were handled in such a way as to exclude all reasonable possibility of confusion with other documents prior to the trial. Admittedly, the identification of the documents

seized in the several searches posed a serious problem; but it was a problem created by the prosecution itself. If indiscriminate seizure of large numbers of documents is to be permitted at all, it must be accompanied by the safeguards which common experience shows to be necessary. At a minimum, these safeguards should include the following:*

(a) The seizing officer, at the time of seizure, should affix to each seized item an identifying mark or tag.

(b) A written inventory of the seized items should be made immediately after the seizure and filed in court as a part of the return on the warrant.

(c) The seized items should be kept in the sole possession of the seizing officer, or (preferably) in the custody of the judge to whom the search warrant is returned, until they are introduced in evidence or returned to the owner.

The failure to observe these minimum precautions in the present case, with the unfortunate results described above, should have led the trial court to exclude the allegedly seized evidence in its entirety, pursuant to the defendant's motion (Tr. 1488-1489; exception taken, Tr. 1491).

Even in civil actions this Court has insisted upon the strictest proof that the integrity of evidence has not been compromised. Tort actions for injuries arising from the presence of foreign matter in bottled soft

*Compare the inventory and receipt requirements of Rule 41 of the Federal Rules of Criminal Procedure.

drinks involve the question whether the bottled drink received by the plaintiff originated in the defendant's bottling plant—an issue comparable to the present question whether certain documents actually were seized at the defendant's home. In the bottled drink cases the plaintiff is required to show that there was no reasonable possibility that the condition of the drink was changed while in the intervening custody of a third party. The burden is not on the defendant to show that such a change did take place. *East Kentucky Beverage Co.* v. *Stumbo,* 313 Ky. 66, 230 S. W. 2d 106 (1950); *Ashland Coca-Cola Bottling Co.* v. *Byrne,* Ky., 258 S. W. 2d 475 (1953). An equally strict rule should be applied in a criminal case, where not only the defendant's purse but his liberty is at stake.

In the present case, the prosecution's evidence as to the custody of the allegedly seized documents was vague and conflicting. The defendant affirmatively showed not only a possibility of the admixture of extraneous documents, but clear circumstantial proof that admixture had taken place. It was error for the trial Court to let the jury pass on the competence of the four particular documents as to which the defendant had been able to raise particular doubt (see Instruction No. 2, Bill of Exceptions, p. 15). Neither these documents nor any of the others should ever have been shown to the jury. The only proper course was to strike the allegedly seized documents from the record and declare a mistrial.

VI. THE TRIAL COURT COMMITTED PREJUDICIAL ERRORS IN THE ADMISSION AND EXCLUSION OF EVIDENCE.

In the course of the trial, the Court committed numerous errors in the admission and exclusion of evidence in addition to those already mentioned. We cannot treat all of such errors in detail, but shall briefly call them to the attention of this Court. Our brevity, however, should not be taken as an indication that these points are not important; at least some of them even involve violations of constitutional rights. We shall not consider any but reversible error.

A. Errors in the Admission of Evidence.

ADMISSION OF THE SEIZED DOCUMENTS IN BULK.

At the very outset of the trial the Court committed an error of such proportions as to render the rest of the trial a mockery of the rules of evidence. The Court admitted hundreds of allegedly seized books, pamphlets and papers into the record in bulk, without reading them or passing on their individual relevance or materiality. Even if all the documents had admittedly been found in defendant's possession, that fact alone would not have been sufficient to establish their *admissibility;* unless a document is shown to have some tendency to prove a fact material to the issues of the case, it has no place in the record.

The trial Court at first seemed inclined to recognize this principle. After Mr. Zimmerman had testified

generally that all of a large number of documents lying on a table in the courtroom had been taken from the defendant's home (Tr. 380), the prosecution proceeded to introduce them in evidence without separate adjudication of the relevance and materiality of each one. The trial Court then held that they had been marked for identification only (Tr. 412-413). This seemed to explain the previous ruling denying defense counsel the normal right to examine them before their introduction (Tr. 395-396), and appeared to promise that the prosecution would be required to follow the usual course of offering each document (or the allegedly relevant portion of it) separately, so that individual objections could be framed.

Defense counsel, who had previously been denied access to the seized documents (*supra*, p. 148), was granted permission to examine them from the close of Court that day until the opening of Court at 9 A. M. the following day (Tr. 413). This was clearly insufficient for anything more than a general perusal of the more than 20,000 pages involved, but it might have afforded some familiarity with the documents so that time would be saved when the documents were offered in evidence individually.

That time never came. The next day they were introduced in bulk, through the prosecution witness Strunk, over vigorous objection (Tr. 442-447). They were admitted on the sole basis of his testimony that he had examined the documents and that:

> "A. This is the same books and literature and pamphlets we used in our secret Communist Party

meetings. They are books in there we used during Communist Party meetings for discussions. We sat around a table, took for instance, one, the Political Affairs, everyone had to read a chapter out of them, and then the chapter was discussed, and these were closed Communist Party meetings."

On this slight predicate the entire mass of documents became a part of the record for all purposes (Tr. 445-447):

"Mr. Ousley: The Commonwealth now requests, if the Court please, that Commonwealth's tendered exhibits marked 9 to 91 now be filed in evidence, be read by the jury, examined by the jury if they so desire to see it or any part of it. May it be so filed, if the Court please?

* * * * * * *

The Court: Let it be filed as exhibits."

This momentous ruling deserves comment. In the first place, Strunk's testimony was insufficient on its face to show the relevance and materiality of the documents. It is as though a witness were to testify, concerning a gun found in the home of a defendant charged with murder, "This is the same gun I once used to commit a murder myself."

Second, the documents included not only "books and literature and pamphlets" referred to by Strunk, but also a great volume of private correspondence with which he could not possibly have been familiar.

Third, Strunk admitted that he was not even familiar with all the literature. He was unable to identify the New World Review (Ex. 31) at the request of the

prosecution (Tr. 490-491). And on cross-examination he admitted he could not identify every book on the table (Tr. 523).

Fourth, if the witness was impliedly being called on for a circumstantial inference—an inference that defendant was a CP member because a selected portion of his library resembled the library which Strunk had used as a CP member—we submit that the inference is not permissible. To allow such an inference would mean that anyone who collects a library on the subject of Communism lays himself open to a charge of being a CP member; even if his library contains anti-Communist books and a large amount of general literature as well, as defendant's library did, he runs the risk that a part of his books will be singled out and compared with the library of a former CP member.

Once admitted into the record, these documents formed an inexhaustible reservoir of irrelevant and often highly prejudicial material which was available for the prosecution to use in cross-examination and to read to the jury. Instead of the prosecution's having to show admissibility, the burden was on the defendant to show the contrary by way of a motion to prevent the use of particular documents. And in these efforts the defendant was almost uniformly unsuccessful. The Court permitted the prosecution to read and display a number of exhibits to the jury without any showing of relevance or materiality, simply on the ground that the defendant had signed them, or that they were addressed to him, or that he was mentioned in them, or that they were found in his home. For example:

(a) A handwritten note from a third party to defendant's wife, found in a file of her personal papers, was permitted to be read because the defendant was mentioned in it (Tr. 860, 863, 867). The text of the note was innocuous, but its admission in evidence was prejudicial because the sender was said to be a CP member (Tr. 848).

(b) The disgusting "Comet Supplement" (Ex. 83) was permitted to be read to the jury solely because it was found in defendant's home (Tr. 1409-1410, 1494-1499). It was in itself sufficiently prejudicial to require a reversal; one of the jurors referred to it as "very ghoulish" (Tr. 1564). In allowing it to be read, the court said: "If I'm wrong, the Court of Appeals will correct it" (Tr. 1411).

(c) A series of letters having nothing to do with the issues of the case but revealing the defendant as being actively interested in trade union matters and Negro rights were permitted to be read to the jury solely because they were written by or addressed to the defendant or, in some cases, simply because they were found at his home (Tr. 1504-1544).

The foregoing examples could be multiplied. But enough has been shown to make it clear that the rules of relevancy and materiality disappeared from the trial completely so far as the seized documents were concerned. Anything which had even the remotest connection with *defendant* was permitted to be read,

whether or not it had anything to do with the issues of the case. This, of course, was the natural consequence of (a) an indictment which did nothing to define the issues, and (b) the wholesale admission of documents without regard to their individual admissibility. The effect was to lay open the defendant's entire life to the jury's appraisal, rather than restricting the evidence to a particular charge of crime. To convict a defendant on the general ground that he is a bad man, as has been done here, is not only erroneous; it is a violation of Section 11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution.

EXPLORATION OF DEFENDANT'S POLITICAL OPINIONS.

An all-time low in denial of the freedoms of speech, press and thought and in disregard of the fundamental requirements of fair procedure was reached when the prosecution was allowed to inflame the jury against the defendant by showing that he held unorthodox views on some of the controversial political issues of the day. For example (Tr. 1973):

> "Q. Now, Mr. Braden, we have referred here to the McCarran Internal Security Law.
>
> A. Yes, sir.
>
> Q. Did any organization that you belong to, or did you personally make any effort to prevent the passage of that law?
>
> Mr. Zollinger: Objection, Your Honor. He has a perfect right to do anything he wants to.
>
> The Court: Yes. Objection sustained as to that.

"Mr. Higgins: This was the law that required the registration of the communist front organizations, which they fought tooth and nail so they wouldn't have to register any of these organizations. That's the purpose of the Act. They required the registration of communist organizations, and they fought it tooth and nail.

Mr. Zollinger: What's wrong with that?

The Court: I think that's admissible in evidence then, under that.

Mr. Zollinger: If it please the Court, he [Mr. Braden] hasn't said that. That's his [Mr. Higgins'] statement.

Mr. Higgins: I will ask Mr. Braden that."

After the defendant had explained at some length his understanding of the McCarran Act and his reasons for opposing it, the prosecution still persisted (Tr. 1976-1977):

"Q. Now, Mr. Braden, my question was, did you take any part, or did you do anything whatsoever to prevent the passage of that law?

Mr. Zollinger: Objection.

The Court: Overruled.

A. As an American citizen I have the right to write to Congress or to the President and state my disagreement with any proposal, even after the law is passed I have a right to disagree with it, but I particularly have a right before it is passed to voice my objection to it. I believe that if we begin outlawing all kinds of organizations, the first thing you know, you won't be able to even belong to the Daughters of Patricia. It will be declared subversive by somebody. Supposing the communists were to get into power in this country. What organizations do you suppose they might declare to

be subversive? The Kiwanis Club or the Optimists Club might be declared subversive.

Q. Exercising the right that you felt you had, what did you do to exercise the right?

A. I wrote to my congressman and I wrote to the senator, and told him that I didn't think that it was good legislation.

Q. Did you associate in any committee or anything where you got pamphlets or leaflets or letters, circular letters?

Mr. Zollinger: If it please the Court, I object to this line of questioning. It is certainly inquiring into a field of free privilege on the defendant's part. If the Court please, the question is the overthrow of the Government by force and violence. It isn't whether Mr. Braden ever had any political views or asserted them.

Mr. Higgins: It is along the same plane."

On cross-examination, the trial Court on its own motion excluded proof that the Act was opposed not only by the defendant but by the then President of the United States (Tr. 2045-2046):

"Q. This McCarran Internal Security Act that you were questioned about, wasn't that act vetoed by President Truman?

A. It was. The first time it went through Congress.

Q. Was that passed over his veto?

A. It was. He said it was dangerous legislation.

The Court: Well, don't consider that last answer, that it was passed, he says, over the veto of the President, and what he said about what somebody said, it was dangerous, or made some comment on it. You are not concerned with that."

As has already been shown (*supra*, pp. 63-64), the advocacy of socialism is not and cannot be made criminal so long as unlawful methods of achieving it are not urged. Yet the prosecution was allowed to probe the defendant's views on this subject, without regard to the question of unlawful methods (Tr. 1960-1961):

> "Q. Now, Mr. Braden, have you ever stated to anyone that you thought all the property in the United States should be owned by the Government?
>
> Mr. Zollinger: Objection. What he thought is absolutely immaterial.
>
> Mr. Higgins: I asked him if he stated.
>
> The Court: If he stated, then, ask him.
>
> A. I don't think I ever said that the Government should own all the property in the United States.
>
> Q. Did you say anything similar to that or along that line?
>
> Mr. Zollinger: Objection.
>
> The Court: Overruled.
>
> Mr. Zollinger: Exception.
>
> A. Well, you mean in degree as to how much property the Government should own or what part of it? You want me to say what I think about how much property I think the Government should own?
>
> Q. I asked you if you made any statement."

On objection, the trial Court ruled that the question could be asked only if the time, place and attendant circumstances were given. The questioning then proceeded (Tr. 1961-1963):

"Q. Well, as an example, Mr. Braden, did you within the past six months—

Mr. Zollinger: Objection.

Q. —state—

Mr. Zollinger: Too vague.

The Court: No. Overruled. Go ahead.

Mr. Zollinger: Exception.

Q. —state to your foster-daughter, fifteen years old, Sonia Braden, that all property in the United States, all property in the United States should be owned by the Government?

A. I did not.

Q. Made no statement similar to that?

A. Now, wait. You said similar to that?

Q. That's right.

A. Now, what would be similar to it, Mr. Higgins? I don't know what you mean by 'similar.'

Q. Something that would mean practically the same thing, Mr. Braden, perhaps using other words.

Mr. Zollinger: Objection.

Q. In substance that statement.

Mr. Zollinger: Objection.

The Court: Answer it, Mr. Braden.

Mr. Zollinger: Exception.

A. Well, I will tell you what I always say on that subject. I believe that where a particular enterprise that serves the people no longer meets the needs of the people, then the Government should step in and provide that service. For instance, if the electric power companies in the United States did not provide adequate service to meet the needs of the people of this country, then the Government should step in and establish power facilities such as they did in 1933 and 1934 in TVA, when the private power utilities in this country were not meeting the needs of the people.

That's what I think, that the Government ownership or control where it should come in, when private enterprise can no longer provide the services that it should.

Mr. Zollinger: If it please the Court, I do not believe that it is competent to inquire into any man's opinions in his mind. There is no such thing as thought control in this country, and Mr. Higgins is on a fishing expedition here in attempting to try to get something. This isn't the place for that, sir.

The Court: You might be right about that.

Mr. Zollinger: Thank you, sir.

The Court: Ask him no further question along the same line, Mr. Higgins."

Again ignoring the constitutional rule that peaceable expressions of opposition to governmental policies is absolutely privileged, the prosecution was allowed to bring out that the defendant had belonged to an organization which—as the prosecution asserted *but never proved*—opposed certain policies of the State Department in the field of foreign relations (Tr. 1890-1892, 1893-1897, 1899-1901):

"689Q. Now, Mr. Braden, at the meetings you attended, what would you discuss at these meetings?

Mr. Zollinger: What meetings?

690Q. The meetings of the American Peace Crusade.

A. Well, at the two I attended there was a discussion of settling international disputes by peaceful means, by negotiation, rather than by war.

691Q. Well, can you be any more specific than that and tell us exactly how you proposed to do it?

Mr. Zollinger: If it please the Court—

A. No.

By the Court: Well, I try to get the lawyers to make their objections to the Court so I can rule on them. It's hard to do.

692Q. I show you Prosecution Exhibit 54-A—

Mr. Zollinger: Are they all the same?

693Q. Yes, sir. And ask you if you have seen that literature before?

A. Yes.

694Q. Now, who prepared that?

A. I don't know.

695Q. Well, whose name appears at the bottom?

A. The Louisville Peace Crusade.

696Q. What is the address?

A. 523 South 7th Street.

697Q. And that's the time that the Progressive headquarters were at that same address, were they?

A. No; the Progressive headquarters was at 5th and York.

698Q. All right. Now, this literature said that 'China Trade Would Mean Two Million Jobs.' Now, did the—did this peace crusade that you belonged to advocate that there should be trade between the United States and China?

Mr. Zollinger: Objection, Your Honor. Now —pardon me—

By the Court: Well, if he knows what the arrangement was and what the teachings were, he may state it.

Mr. Zollinger: If it please the Court, regardless of whether or not they did advocate it, regardless of whether or not this man advocated something which is not the same as what the Republican Party advocates has nothing whatsoever to do with the case, and this man is being

tried in the advocacy of sedition, and—I just can't see where that—

Mr. Higgins: Judge, this organization has been testified here that it was a communist-front organization, and the purpose now is to show that their exact plan here in Louisville was to go directly opposite with those making the foreign policy of our State Department. Everything that the government advocated, they were opposed to; such as the admission of Red China into the U.N., the trade between us and China, and any intervention into Indo-China.

By the Court: If that exhibit has been found—

Mr. Higgins: In his possession.

Mr. Zollinger: Well, it hasn't been identified before.

Mr. Higgins: It certainly has. All of these exhibits have been identified.

Mr. Zollinger: Well, Your Honor, here's my objection to the thing; there's no charge in the indictment which covers this kind of stuff. Now, all of this is intended for the purpose of—

Mr. Higgins: Showing what the Louisville Peace Crusade was.

Mr. Zollinger: —prejudicing this defendant, and trying something that is not in the case.

By the Court: Well, it's sedition.

Mr. Higgins: That's right.

By the Court: Well—

Mr. Zollinger: Well, Your Honor, the advocation of trade with China is not sedition. It might not be popular, but it's certainly not sedition, if he did advocate it. I don't know whether he did or not.

Mr. Higgins: Judge this was a communist-front organization . . .

By the Court: Go ahead.

Mr. Zollinger: Could I except to Your Honor's ruling?

By the Court: Yes.

* * * * * * *

699Q. Mr. Braden, will you read that document, please?

A. This is headed, 'China Trade Would Mean Two Million Jobs. A half of our unemployment problem would be solved if we recognized the facts of life and began full-scale trade again with the mainland of China. At least two million jobs would be created by selling machinery and goods to the 475,000,000 Chinese. The Dutch, British, French and Germans are already moving in to sell large quantities of electrical equipment, industrial machinery and farm products. The Chinese also need farm machinery and railroad equipment. The Europeans do not try to pass judgment on the kind of government the Chinese have. They figure that is the business of the Chinese. The Europeans want to sell their goods and keep their people at work. We should be just as practical. By selling the same amount of goods per person to China as we sell to the Philippines, we would have a market for $10 million [sic. billion] worth of goods a year. This is on the basis of $22.18 worth to each Chinese; and that is just scratching the surface. Trade with China is blocked by a few big boys in the United States who have a monopoly on trade in the Far East. They fear that opening of the trade channels would end their monopoly which is for the benefit of the few and not the many who work for a living in the United States. The way to world peace is to demand that our government (1) end all bars against trade with China and other countries in Europe and Asia, and (2) stop sticking

our nose in the Indo-China war. The same people who are blocking China trade want to get us into war in China to assure their monopoly over raw materials produced in southeast Asia. Like McCarthy, they cover up their dirt by crying "communists". Let Eisenhower and Congress know how you feel about such goings-on.
Issued by the Louisville Peace Crusade, 523 South 7th Street—

Mr. Zollinger: Now—

A. —Clay 6820'.

700Q. Thank you.

Mr. Zollinger: If it please the Court, the defendant moves that this piece of literature and this testimony be stricken unless the Commonwealth introduces proof that what is stated in that is not true, and that otherwise we move for a mistrial.

Mr. Higgins: What do you mean what's stated in there is not true. This is stuff put out by the Peace Crusade.

Mr. Zollinger: Now, you prove that that statement is not true, then of course—

Mr. Higgins: Well, we'll let the Court rule on it. That's ridiculous.

By the Court: No; that's evidence.

Mr. Zollinger: All right, sir.

By the Court: For what it's worth.

Mr. Zollinger: What is it evidence of?

Mr. Higgins: It's evidence, Judge—it's evidence that this Peace Crusade, just like the communist party would want, took every position they took which was directly contrary to the position taken by the United States government. Every position they took, they took a different position. That's what we want to show.

By the Court: I think you better go ahead and get through with this witness.

Mr. Zollinger: Exception.

701Q. Mr. Braden, did the Peace Crusade here in Louisville also advocate or talk about and discuss the admission of Red China into the United Nations? Did they favor it?

A. To my knowledge—

Mr. Zollinger: While he was there, or if he knows.

A. I don't know.

702Q. Did the Peace Crusade oppose a universal military training?

Mr. Zollinger: Objection.

By the Court: If he knows.

Mr. Zollinger: If it please the Court—

Mr. Higgins: Judge—

Mr. Zollinger: —he can't be tried for his political views. I don't know what they are, but he can't be tried for them. And he can't be tried for any opinions expressed by any group.

Mr. Higgins: Judge, we want to show again, as I explained, that every time the government takes a position on the issue, they took an opposite position.

By the Court: They can show that.

Mr. Zollinger: I don't believe so, sir. It's immaterial, and prejudicial.

By the Court: I'm ruling that they can.

703Q. Did this Peace Crusade advocate the opposition to universal military training?

A. I don't know for sure.

704Q. Well, now how long did you say you were in the organization, Mr. Braden?

A. I joined the Louisville Peace Crusade, which issued that leaflet, in May, or the spring, of '51, and I was in it a short time. I think I attended two or three meetings.

704Q(2). Did—to your knowledge, did they oppose the United States rearming of Germany?

Mr. Zollinger: Objection, Your Honor.

By the Court: What was the question?

Mr. Higgins: To his knowledge, did this organization oppose the United States rearming of Germany.

By the Court: If he knows, he may answer.

Mr. Zollinger: Objection.

A. I don't know for sure.

* * * * * * *

713Q. Now, Mr. Braden, if you know, was each and every policy that this peace crusade advanced, here in Louisville, directly contrary to the foreign policy of this nation as set up by the State Department?

Mr. Zollinger: Objection, Your Honor. Even the Secretary of State doesn't know what that is.

Mr. Higgins: Well, I can tell him.

By the Court: If he knows. He may know or may not know. But if he knows, he may answer the question.

A. No; I don't.

714Q. Let me take them individually then. You do not know whether or not the State Department, the foreign policy of this government, opposes the admission of Red China into the United Nations?

Mr. Zollinger: Objection.

By the Court: Overruled.

Mr. Zollinger: Exception.

A. Well, sometimes it does, and sometimes it doesn't; as near as I can tell.

715Q. What is it right now, Mr. Braden, if you know?

A. I think at this time, from reading news reports, it opposes the admission of Red China into the U. N.

716Q. All right. If you know, does the foreign policy of this country, as stated by the State Department, oppose trade between the United States and Red China?

Mr. Zollinger: Objection. The State Department doesn't issue any statements like that.

Mr. Higgins: Well, if the Court please, I can put the policy as announced by the Secretary of State, Mr. Dulles—

By the Court: Answer; if you know.

A. I believe the last statement on it did oppose trade with Red China.

717Q. Well, Mr. Braden, do you know whether or not at the time the Peace Crusade was making those proposals of admitting Red China to the U.N. and trade with Red China, did you know then what the position of the State Department was?

A. No, sir; I really don't recall.

718Q. Mr. Braden, as a matter of fact, don't you know that every single proposal of the American Peace Crusade was in direct conflict with the announcements of the State Department of this government?

Mr. Zollinger: Objection, Your Honor. And if it please the Court—

By the Court: I believe he said while ago he didn't know.

719Q. May I ask him once more, Judge—do you or do you not know that?

A. I don't know that to be a fact.

720Q. Mr. Braden, let me ask you, if you know, whether or not you know as a matter of fact that the entire purpose of the American Peace Crusade, or one of their biggest purposes, was to disarm the United States?

Mr. Zollinger: If he knows.

A. I never heard any such proposal as that."

Again, on cross-examination, an attempt was made to show that the opinions criticized by the prosecution were held by persons of unquestionable loyalty (Tr. 2035):

"Q. Does the Congress of the United States oppose universal military training?

The Court:* It has been asked numerous occasions to pass a law requiring universal military training and has refused repeatedly to pass such a law.

Q. Mr. Braden, you were also asked about the entry of China into the UN. I will ask you if it is not true that in 1950, John Foster Dulles did not recommend the acceptance into the United Nations of the Communist Government of China?

A. He did.† So did Winston Churchill, and he still does. So does the British Labor Party and the Conservative Party of Great Britain, among others.

The Court: The jury would like to go, now. It's one o'clock."

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*It is believed that this statement was made by the witness, and that the transcript is in error in attributing it to the Court.

†See John Foster Dulles, "War or Peace" (1950), pp. 190-191:

"If the Communist government of China in fact proves its ability to govern China without serious domestic resistance, then it, too, should be admitted to the United Nations. However, a regime that claims to have become the government of a country through civil war should not be recognized until it has been tested over a reasonable period of time.

"If the United Nations membership were made substantially universal, that might end a preponderant voting superiority of the United States and its friends which, while pleasant, is somewhat fictitious.

"Communist governments today dominate more than 30 per cent of the population of the world. We may not like that fact; indeed, we do not like it at all. But if we want to have a *world* organization, then it should be representative of the world as it is." (Emphasis by Mr. Dulles.)

An effort along the same line was made after the luncheon recess (Tr. 2044-2045, 2046):

"Q. Now, Mr. Higgins has referred to your opposition to the State Department policy, Mr. Braden. I will ask you if Mr. Nolan, Senator Nolan [Knowland], follows the State Department policy?

Mr. Higgins: Objection.

The Court: Yes. That's an opinion.

Q. Is Mr. Nolan's public program—

Mr. Higgins: Objection.

Q. Do you know what the State Department program is, Mr. Braden?

A. With respect to what, sir?

Q. With respect to universal military training.

A. I don't know that they have taken any position on it. It's sort of out of their field. I know that General Eisenhower is somewhat in favor of a modified form of UMT, but Congress has refused to pass it. Now, as to other branches of Government, I don't know. I don't think the Supreme Court has ever passed on it, for instance.

* * * * * * *

Q. Isn't it true that Senator McCarthy has been in complete disagreement with the State Department?

Mr. Higgins: Objection.

The Court: Objection sustained."

Perhaps the most highly prejudicial exploration of defendant's opinions was the inquisition into his unwillingness to concede that responsibility for the Korean War had been fully established. Whether the

defendant's views on this question were right or wrong, he was constitutionally entitled to entertain them. His opinions on this subject cannot be regarded as advocacy of sedition or of anything else. The tendency to inflame any juror whose son or brother or friend had been involved in that conflict, or had been drafted because of it, was plain. Yet the inquisition was allowed to proceed.

The defendant was first read a letter he had written over four years before, a copy of which had been seized in his home (Ex. 74-F). As will be seen, the letter did not advocate sedition or criminal syndicalism; the only possible reason for reading it to the jury was to invite condemnation of defendant because of the opinions it contained (Tr. 1958-1960):

"Q. You did write it?
A. I did.

Q. 'October 1st, 1950.

'Mr. George Seldes, Editor, In Fact, 280 Lafayette Street, New York 12, New York.

'Dear Sir:

'Your September 25 article headed "Rearming Nazi Germany" is most heartening. It shows that you really do see the pattern of Wall Street aggression. At least, you do until the chips are down.

'Let us hope that if and when the fighting starts in Germany you will still see things so clearly. You didn't see so well after the fighting started in Korea. You fell for the line that the North Koreans were the aggressors—you and Henry Wallace.

'It is a strange thing that a man like you can see a steamroller when it is coming toward him but becomes suddenly blind when it starts to roll over him.

'Yours for a better analysis next time.'

Now, Mr. Braden, as I understand it, you were being critical of this man because he thought that the aggressors in the Korean War were the Koreans, is that correct?

A. I was critical of him because he was preaching that particular thing, and I don't think it has been established who was the aggressor in Korea. I think those people over there got to fighting among themselves. They had been arguing, the country was dividing, they had been fighting among themselves for a couple of years, and finally they got into a war. I think that the British Labor Party and other leaders in Great Britain have so stated that there is no way of telling who started the war in Korea, and for any—for Mr. Seldes to make such a flat statement without having definite proof was a mistake on his part.

Q. Mr. Braden, along that line, do you feel that the United States was an aggressor in Korea?

Mr. Zollinger: Objection.

The Court: Objection sustained.

Q. Have you at any time stated to anyone that the United States was a warmongering nation?

A. No, sir. I have said there are certain groups in this country that would like to see us in a war.

Q. That's the Wall Street group, for instance?

A. I expect many of them on Wall Street would.

Q. Passing back here to this same exhibit, Mr. Braden, along that, what did you mean by 'Wall Street aggression'?

A. I think there are certain people on Wall Street who make money out of war that wouldn't feel too bad about having a war.

Q. Who are the people on Wall Street that you refer to?

A. People in the field of international banking, particularly.

Q. Do you know who they are, or are you just referring to Wall Street?

A. No, not all the people on Wall Street want to see people slaughtered in order to make money. There are many decent people in big business on Wall Street, but I have the feeling that there are some people who would not mind making a little money out of selling munitions and means of slaughtering people."

The prosecution did not fail to capitalize on this appeal to passion and prejudice. See the closing argument to the jury (Tr. 2455-2456):

"We have the letter with his name on it where he wrote to George Seldes and said, 'You crazy fool you, you said that the North Koreans were the aggressors. How crazy can you be?' Mind you, the same man who had these documents in his possession writes a man and says, 'What a fool can you be to think the North Koreans were the aggressors,' and then when he was on the stand, gentlemen, and I asked him, he says, 'Why, we still don't know who the aggressors were in Korea.' Well, I wonder if the eleven American boys rotting in a Chinese prison today, I wonder if they know who the aggressors were in Korea, American boys who were shot down in North

Korea, imprisoned in China today as American spies. And Carl Braden sits on that stand and says to you, 'Why, it still isn't settled who the aggressor was.' Such calumny I have never heard."

Not content with attacking the defendant's views in the field of opinion, the prosecution invited the jury to convict him because of the lack of optimism displayed in a factual report on unemployment in the Louisville area, which he had written as a news service correspondent in 1948 (Tr. 1943-1945):

"Q. Now, Mr. Braden, I want to ask you if you can show the Court or the jury one single story that you forwarded to Federated Press that manifested an optimistic picture about the labor movement, a rosy picture.

Mr. Zollinger: Objection, Your Honor.

The Court: I will sustain that objection.

Q. All right, sir. Let me refer you to Prosecution Exhibit Number 51-A.

'12/17/48. Louisville, Kentucky, FP. Lines of jobless are forming again at Louisville plant gates, but only the little people seem concerned about it.'

Let me show this to you.

Mr. Zollinger: I haven't seen it, either.

(The document was handed to Mr. Zollinger, and to the witness.)

A. You want me to read it?

Q. To the extent of identifying whether or not you wrote that.

A. I did.

Q. Now, Mr. Braden, let me read this to you.

'Louisville, Kentucky. FP. Lines of jobless are forming again at Louisville plant gates. Only the little people are concerned about it.'

A Juror: Is there a date on that letter?

The Court: Yes.

Q. December 17, 1948. 'Many hundreds of CIO and A.F. of L. members are being laid off, but this rates no mention in the press and gets scant attention from the Kentucky State Unemployment Service. KSES dismisses the situation with the comment that the layoffs are seasonal. The daily papers have been lulled by industry statements that the layoffs are temporary. However, industry doesn't say how temporary.

'Hardest hit are plants making farm equipment and aluminum products. Also affected are woodworking, printing, and distilling. Tobacco factories hire a few people now and then, mostly as replacements. They have the longest lines in front of their gates every day.

' "It's got me worried," a veteran guard at a cigarette factory told the Federated Press. "This job used to be fun, but not any more. During the war people would come in and ask what the pay was. When you told them, they would tell you what to do with the job.

' "Now people come here begging for work. A lot of them are old folk who plead for a job with tears in their eyes. You know they'll probably never get anything. As for the others; well, it looks pretty bad." '

Now, Mr. Braden, I will ask you if it isn't true that practically, or if not all of the stories you submitted to the Federated Press were in this same vein.

A. No, sir.

Mr. Zollinger: Objection, Your Honor. Now, if it please the Court—

The Court: Yes. We are particular about each story.

Mr. Zollinger: That's right, and another thing, Your Honor—

The Court: Was that signed by anybody?

Mr. Higgins: It has 'Braden' on it, Judge.

Mr. Zollinger: Unless he can prove that story was false, we object to its being introduced.

The Court: No. You are wrong about that. Objection overruled as to that.

Mr. Zollinger: Exception.

A. I think history has shown that there was a severe unemployment situation in 1948 and 1949 in this country, and that was reflecting the true situation."

No evidence was ever offered to show that the news story (which certainly did not advocate criminal syndicalism or sedition) was false in any respect, or that the defendant believed it to be untrue. The Court, by ruling that its truth or falsity was immaterial, struck a far-reaching blow at freedom of the press. It is the proper function of reporters to report facts as they see them. If the facts are unpleasant, the need to publicize them may indeed be greater. To call a reporter before a jury and require him to justify the attitude manifested by a true news report he wrote six years before is to serve notice on the entire press that only the "rosy picture" can safely be painted.

In most of the instances cited above, formal objections and exceptions were taken; and the objections were renewed on constitutional grounds in Paragraph 3(a) of the Motion and Grounds for New Trial (R. 71-72). But we submit that even in the absence of a

formal objection, the trial Court *on its own motion* must take affirmative action to eradicate the prejudicial effect of plainly improper questions so framed as to inflame the jury regardless of whether or how they are answered. *People* v. *Malkin,** 250 N. Y. 185, 164 N. E. 900, 905-906 (1928); *Commonwealth* v. *Peay,* 369 Pa. 72, 85 A. 2d 425 (1951); compare *Viereck* v. *United States,* 318 U. S. 236, 248 (1943).

The excerpts from the transcript set forth above are replete with such questions. Occasionally objections were sustained, but the desired effect on the jury had nevertheless been produced. Questions as flagrantly improper as these should have evoked a stern reprimand to counsel and a forcible admonition to the jury, at the very least. Some of the questions individually, and certainly all of them in the aggregate, were so highly prejudicial as to necessitate a mistrial.

As is said in 1 Wigmore, *Evidence,* §57, p. 456:

> "The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."

Recognizing this human tendency, this Court has insisted that evidence in criminal cases be narrowly con-

*Maurice Malkin, one of the ex-Communist "experts" who testified for the prosecution in the present case, was convicted for assault committed in a New York fur strike while he was a CP member. His conviction was set aside because of the erroneous admission of evidence. Many errors of the same type, and equally prejudicial, were committed in admitting Malkin's own testimony in the case at bar.

Incidentally, Malkin was apparently convicted again on re-trial, since he served time in Sing Sing from 1928 to 1930 (Malkin, Tr. 955-961).

fined to the offense charged, excluding proof of collateral facts tending to damage the defendant in the eyes of the jury. See, *e. g., Hensley* v. *Commonwealth,* 31 K.L.R. 386, 102 S. W. 268 (1907); *Maiden* v. *Commonwealth,* 225 Ky. 671, 9 S. W. 2d 1018 (1928); *Coomer* v. *Commonwealth,* 288 Ky. 598, 157 S. W. 2d 97 (1941); *Acres* v. *Commonwealth,* Ky., 259 S. W. 2d 38 (1953).

This rule is particularly important in the field of sedition and criminal syndicalism, because of the strong tensions which inevitably pervade the community and the courtroom. In such cases the courts have demanded that evidence be confined to the precise charge contained in the indictment. See particularly *State* v. *Sentner,* 230 Iowa 590, 298 N. W. 813 (1941) (criminal syndicalism prosecution; admission of evidence of CP membership held prejudicially erroneous); *People* v. *Immonen,* 271 Mich. 384, 261 N. W. 59 (1935) (same ruling in red flag law prosecution). See also *People* v. *Maertz,* 375 Ill. 478, 32 N. E. 2d 169, 172 (1941); Annotation, "Prejudicial effect of evidence as to Communist or other subversive affiliation or association of accused," 30 A.L.R. 2d 589 (1951).

The prosecution cannot evade the requirement that one offense be proved at a time, by the simple expedient of framing the indictment so vaguely that it can be read to cover a large number of effenses. If the defendant is charged with the bombing, his political affiliations and his books and papers have no bearing. If he is charged with attending a CP meeting, all evidence concerning the Wade house is immaterial—as is also

evidence relating to the many organizations other than the CP, about which testimony was received. If the defendant is charged with distributing seditious literature, the Wade house evidence has no place in the record. And regardless of the charge, evidence of defendant's political opinions is *per se* immaterial and prejudicial.

The receipt of such evidence was not only erroneous; it was a violation of constitutional right. By allowing this inquisition into the defendant's opinions on controversial national questions the trial Court necessarily held that KRS §432.040 permits him to be punished for those opinions. So construed, the statute violates his right to freedom of speech and thought, as guaranteed by Sections 1 and 8 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment. See Point I, *supra.* Beyond this, it abridges his privileges and immunities as a citizen of the United States, as guaranteed by the Fourteenth Amendment. Those privileges and immunities have been held to include the right to discuss peaceably public issues which bear on matters within the cognizance of the Federal Government. As was said in *Hague* v. *C.I.O.*, 307 U. S. 496, 512, 513 (1939):

> "Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights against state abridgment, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in

citizenship of the United States which the Amendment protects. (Footnote omitted.)

* * * * * * *

"Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and oportunities to accrue to citizens therefrom."

The defendant was thus constitutionally privileged to express his opinions on such nationally important questions as the Korean War, universal military training, unemployment, resumption of trade with China, public ownership of property, the rearming of Germany, admission of the present Chinese Government to the United Nations, and the wisdom of the McCarran Internal Security Act. His constitutional privilege existed regardless of whether his views coincided with those of the State Department or any other agency or individual. And he was constitutionally immune from interrogation with respect to these opinions for the purpose of imposing criminal liability upon him.

EVIDENCE AS TO "FRONT" ORGANIZATIONS.

A great deal of evidence was received with respect to a number of organizations which the prosecution's witnesses described as "fronts." As has already been noted, support of such organizations is not and cannot be made criminal. By definition, "front" organizations are set up for at least ostensibly loyal purposes, and include many loyal Americans among their members.

In Point VII of this brief (pp. 298-307, *infra*) we have analyzed a sample of this evidence in order to show that it has no tendency to prove any of the charges contained in the indictment. This being so, the evidence was erroneously admitted, and—both because of its quantity and because of its inflammatory nature—the error was prejudicial.

THE HOUSE COMMITTEE "GUIDE".

It would have been bad enough if the evidence relating to alleged "front" organizations had been limited to the testimony of the prosecution "experts." But the trial Court went even further by admitting in evidence a pamphlet published by the House Committee on Un-American Activities, entitled, "Guide to Subversive Organizations and Publications" (Ex. 90, subnumber 100).

This pamphlet lists a large number of organizations and publications as to which the House Committee has received adverse testimony, and contains extensive quotations describing their alleged nature and purposes, taken from various sources. It is of course rank hearsay, untested by adverse cross-examination, and is inadmissible as proof of the "facts" which it contains. Even the list prepared by the Attorney General, which has far more official status, has been held inadmissible in a criminal prosecution. *United States* v. *Remington*, 191 F. 2d 246, 252 (C. A. 2, 1951) ; see *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123 (1951). Being simply an *ex*

parte compilation of gossip, the House Committee "Guide" lacks the reliability necessary for use as judicial evidence. Its capacity for misleading a jury is enhanced by its official format, which gives it the aspect of an *index expurgatorius* backed by the full authority of the law—which it is not and cannot constitutionally be.

The trial Court recognized the objectionable character of this "Guide" and ruled that it could not be read to the jury as proof of its contents (Glatis, Tr. 706-710). But later, on cross-examination of the defendant, this ruling was for all practical purposes reversed. The Court held, over objection and exception, that since the defendant had testified that he did not know certain organizations to be subversive, and since a copy of the "Guide" had been found in his home, the "Guide" could be used to prove the defendant's knowledge of the subversive character of the organizations (Braden, Tr. 1905-1906).

Cross-examination of the defendant then proceeded. The defendant testified that he had had the book for reference purposes, and had not read it through but had read the preface and scanned the rest (Tr. 1908, 1909, 1914). Extended excerpts from the "Guide" were nevertheless read to him, over objection, and he was repeatedly asked whether he had read them (Tr. 1907-1909, 1911-1916, 1936-1937, 1942, 1971, 1973, 1981-1983). In each case he answered that he had not read the quoted excerpts from the "Guide" but that if he had they would not have proved to him that the organizations referred to were in fact subversive.

On redirect, defense counsel directed his questions to the precise issue on which the "Guide" had been held relevant—the defendant's state of mind with respect to the reliability of the "Guide" as proof of the factual allegations it contained. The defendant began to explain (Tr. 1992-1993):

> "Q. I believe, Mr. Braden, you stated that if you had read anything in this book, that you would not have considered it to be proof. Will you tell the jury why you would not consider it to be proof?
>
> A. For one thing, the Circuit Court of Appeals of the United States has declared that it is not proof of anything; secondly, as I said before, I believe that every person and organization is entitled to a full and fair hearing before being found guilty of anything—both sides must be presented; and as far as I understand from what he read there, that publication lists only one side of it."

But a barrage of objections prevented him from giving the concrete reasons on which he based this attitude. He was asked (Tr. 1990):

> "Q. Was not Mr. Velde [chairman of the House Committee] the man who accused the Protestant churchmen of this country, Bishop Oxnam and Reverend McMichaels, of being fronts for the Communist Party?"

An objection was sustained, and the question was rephrased (Tr. 1992):

> "Q. Is it not true, Mr. Braden, that the fact that you have heard that the Velde Committee

made these attacks on the various Protestant churchmen of this country had a bearing on the way you considered the information contained in this pamphlet?

Mr. Higgins: He said he didn't consider any of it. He answered every one of those questions, he hadn't seen it, answered every single question he hadn't read it.

The Court: I believe he did say that, he hadn't read it.

Mr. Higgins: And if he had it wouldn't have meant anything to him.

The Court: I sustain the objection, then.

Mr. Zollinger: Exception, Your Honor."

The Court thus ruled that although the defendant's failure to read the "Guide" was not binding on the prosecution, and did not prevent the prosecutor from reading extended excerpts to the jury in the guise of questions, the defendant was precluded from explaining *why* he had not studied it and accepted it as authoritative.

Defense counsel continued (Tr. 1993):

"Q. * * * What was the basis for your opinion?

A. Well, another reason that I wouldn't have called it proof was that that committee has accused—

Mr. Higgins: Objection, unless he knows personally. If the Court please, that's exactly what I went into.

The Court: No hearsay, Mr. Braden.

The Witness: It's common knowledge.

Mr. Higgins: Objection.

The Court: Objection sustained.

Mr. Zollinger: Exception.

The Court: We can't have evidence, gentlemen of the jury, of something—hearsay evidence is not admissible. Hearsay evidence isn't admissible."

A final effort was made (Tr. 1993-1994):

"Q. Mr. Braden, to your knowledge, has this organization made charges, many charges which were later proved to be unfounded?

Mr. Higgins: Objection.

The Court: Wait a minute. That calls for a conclusion in the first place.

Mr. Zollinger: No. To his knowledge.

The Court: No. It is expressing an opinion. Objection sustained."

An avowal was then made (Tr. 1994-1995):

"Mr. Zollinger: The witness, if permitted to answer, would state as follows:

> That he has been, through the newspapers, well informed as to the many charges made by the Velde Committee, which have, after investigation, proven to be untrue; he is familiar with the book, called 'Ruled by Fear,' wherein a full and complete investigation of the Protestant Church has been pictured; that it was proven that the witnesses which were used as a basis for the accusations against Bishop Oxnam and Reverend McMichaels, which are Mr. and Mrs. Edmiston, Manning Johnson, and Mr. Patterson, were found to be falsifying in their testimony.

The Court: Now, just a minute. I don't think the newspapers should print an avowal. That isn't evidence at all. Don't print the avowal.

Mr. Zollinger: That because of his knowledge of these various false charges that he has placed no reliance upon this publication.

The Court: In view of the avowal, the objection to Mr. Zollinger's question to which the avowal relates was sustained for the reason that it constitutes hearsay evidence, and nothing but that; and further, such as calls for a conclusion on the part of the witness."

The Court's rulings defy analysis. It had already ruled that the "Guide" could be used only as the basis for an inference that the defendant believed its contents. When the defendant said he had not read it, that should have ended the matter; but the prosecution was permitted to read long portions of it into the record, presumably on the theory that the jury might think the defendant had in fact read and believed it. He was clearly entitled to explain fully why, like many other people, he declines to accept statements of the House Committee on Un-American Activities as true simply because the Committee says they are.

The defendant's own conclusions as to the reliability of the "Guide", and the information—hearsay or not—on which that conclusion was based, were indeed the only things the jury, under the Court's ruling, had a right to consider. That is the only possible meaning of the Court's admonition to the jury (Tr. 1989):

"The Court: * * * I believe that admonition is—

Mr. Zollinger: Your Honor, before you give it, I want to make a motion for a mistrial based

upon the introduction of it and the prejudicing of the jury on that basis, and that that was a denial to the defendant of a fair trial and due process of the law of the Fourteenth Amendment.

The Court: Overruled.

Mr. Zollinger: Exception. Thank you, sir.

The Court: Just a moment, now, Mr. Zollinger and Mr. Higgins. Mr. Higgins, does that admonition meet with approval of both counsel?

Mr. Zollinger: Insofar as an admonition can be taken to correct it at all, it does, sir.

The Court: All right. You can read the admonition to the jury, then.

The Reporter: (Reading) 'You may consider those exhibits referred to in Exhibit 90, Subsection 100, solely for the purpose as relating to the knowledge on the part of the witness as to whether or not they were subversive or not, but not as substantive proof that as a matter of fact they were subversive.' "

Moreover, the premise on which the "Guide" was admitted in evidence is inconsistent with the trial Court's insistence—reflected in various rulings throughout the trial and in the instructions to the jury—that it was immaterial whether the defendant knew the purpose of the organizations with which he was connected. As stated elsewhere in this brief, we think that this was a constitutionally erroneous position (see Points I and VII). But, having taken it, the Court should at least have applied it consistently.

More fundamentally, however, the admission of the "Guide" in evidence was erroneous because it is preposterous to say that the defendant was bound to accept it as gospel truth. It was admittedly too unre-

liable to be shown to the jury as proof of its contents. *A fortiori,* the defendant's mere possession of the "Guide" cannot be used as the basis of an inference that he (a) knew what it said and (b) believed that everything it said was true.

THE WADE HOUSE EVIDENCE.

There was yet another extensive category of immaterial and prejudicial evidence, relating to the purchase and bombing of the Wade house. This evidence has been outlined above at pages 3-11, and its great volume has been pointed out at page 106, *supra.* We have shown under Point II that the defendant's *purchase* of the house was not a violation of KRS §432.040, and there was never any evidence to connect him with the *bombing.* Despite this, the trial Court denied two separate motions to strike this evidence from the record (Tr. 1340-1341, 2141), and denied mistrial motions based on its introduction (Tr. 2302g, 2365-2366).

The prejudicial effect of this evidence cannot be denied. When a brutal crime such as the bombing is proved, it is too much to expect the outraged jury to refrain from punishing the only defendant in sight, whether or not he was responsible for it. The evidence of the house purchase was a calculated appeal to race prejudice, which was made still more pointed by the prosecution's repeated questions as to social relations between the white and colored races (Wade IV, Tr. 225, 230, 231, 240, 241, 242, 252-253; Wade Jr., Tr. 1301-1306).

On his cross-examination, the defendant was asked (Tr. 1882-1884):

"649Q. Now, Mr. Wade—*

Mr. Zollinger: (Interposing) Mr. Braden.

650Q. Pardon me, sir—Mr. Braden, do you recall the incident where the white and black people were to have a picnic at the colored park, Chickasaw Park, what it's called on the Parkway?

A. I covered the story—part of the story as a reporter for the Louisville Times.

651Q. You were not active in the formation of plans for that with Mr. Monsky?

A. I was not.

652Q. Do you know whether or not young Andrew Wade was in that?

A. No, sir; I do not, not of my own knowledge.

653Q. Well, now, you knew Mr. Wade, Sr. a little more intimate, didn't you?

A. Yes.

654Q. Now, he was involved in this integration of white and black people—white and colored people on the golf courses, is that right?

A. To my own knowledge—

Mr. Zollinger: (Interposing) If he knows.

A. —I don't know. I can't say.

655Q. Well, you had nothing to do with that then?

A. No, sir.

656Q. How about the swimming pools, did you have any discussions about that?

A. No, sir.

657Q. As I understand it then, besides this Wade—besides the purchase of this house, the only thing that you have entered into here in the racial

*On another occasion, the same assistant prosecutor addressed the defendant as "Mr. Foster" (Tr. 1927). Foster is head of the CP in the United States.

issues in Louisville was this interracial hospital committee?

A. No; that's not right. I have been active in the—in N.A.A.C.P.

658Q. Well, active in what way, Mr. Braden?

A. Well, I have contributed money to them. I have attended the meetings. And—I don't know that I have written anything for them, but have generally supported their program. I have also been active in the Committee for Democratic Schools.

659Q. You held many—many or few meetings in your home with Negroes?

Mr. Zollinger: If it please the Court, that's objected to, and it's certainly designed for the purpose of—

By the Court: I don't see how that has any relevancy in the issue being tried here. I'll tell the jury not to consider it. Pay no attention to the question.

Mr. Zollinger: I suppose I should move for a mistrial, Your Honor.

By the Court: Overruled."

The admission of evidence concerning the house purchase and bombing was specifically complained of in Paragraph 3(b) of the Motion and Grounds for New Trial (R. 72). The evidence was not relevant to any material issue in the case. Its presence in the record rendered the trial unfair, and is in itself sufficient to require a reversal.

PROOF THAT DEFENDANT HAD CLAIMED PRIVILEGE BEFORE THE GRAND JURY.

On cross-examination of the defendant, the prosecution was permitted to bring out that he had previously claimed his privilege against self-incrimination *before the grand jury* (Tr. 1845-1858). The prosecution's purpose was to demonstrate a supposed inconsistency between his testimony at the trial, in which he denied any criminal act, and his previous claim of privilege. The jury could be expected to interpret the claim of privilege as an admission of guilt, as the grand jury had already done (see pp. 103, 151-152, *supra*).

We submit that it was reversible error to open up the possibility of such an inference by the jury. There are any number of reasons why a prospective defendant can and should claim his privilege before the grand jury. He is required to appear without legal counsel, and thus lacks professional guidance as to the possible legal consequences of anything he might say. If he answers an apparently innocent question, he may unwittingly waive his privilege as to other more dangerous ones. He is subject to simultaneous interrogation by thirteen persons—twelve grand jurors and the prosecutor—and the possibilities of confusion are substantial. He has no knowledge as to what testimony previous witnesses may have given about him, truly or falsely; the most innocent question may be designed to complete a chain of evidence against him. There being as yet no indictment, no issues have been formulated, so that few if any rules as to materiality or relevance are applicable. No judge is present to confine the

inquiry to legitimate channels. The witness is warned at the outset that whatever he says may be used against him, and is thus formally notified that he is a prospective, or at least a possible, defendant. A claim of privilege under these circumstances cannot reasonably be interpreted as an admission of guilt. It is simply a recognition of the obvious fact that his testimony *may* tend to incriminate him.

The rule that a claim of the privilege cannot be used for incriminatory purposes was recognized in *Johnson* v. *United States,* 318 U. S. 189, 196-197 (1943):

> "As stated by the Supreme Court of Pennsylvania, 'If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the legal assertion by the witness of his constitutional right. The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it.' *Phelin* v. *Kenderdine,* 20 Pa. 354, 363; *Wireman* v. *Commonwealth,* 203 Ky. 57, 62-63, 261 S. W. 862. And see *State* v. *Vroman,* 45 S. D. 465, 473, 188 N. W. 746; *Carne* v. *Litchfield,* 2 Mich. 340; *People* v. *McGungill,* 41 Cal. 429."

As was recently said in *Southbridge Finishing Co.* v. *Golding,* 24 U. S. L. Week 2012 (N. Y. Sup. Ct., 1955):

> "It is, of course, well-settled law that no inference of guilt can be drawn from an assertion of the privilege and I am of the opinion that, except in occasional instances under comparatively rare

circumstances, such an inference is just as inadmissible in the realms of morals, logic, and justice as it is in a court room."

By departing from this rule in the present case, the trial Court has failed to accord to the privilege against self-incrimination the liberal construction to which its history entitles it. As Chief Justice Warren declared in *Quinn* v. *United States,* 349 U. S. 155, 161-162 (1955):

> "The privilege against self-incrimination is a right that was hard-earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. As early as 1650, remembrance of the horror of Star Chamber proceedings a decade before had firmly established the privilege in the common law of England. Transplanted to this country as part of our legal heritage, it soon made its way into various state constitutions and ultimately in 1791 into the federal Bill of Rights. The privilege, this Court has stated, 'was generally regarded then, as now, as a privilege of great value, *a protection to the innocent though a shelter to the guilty,* and a safeguard against heedless, unfounded or tyrannical prosecutions.' Co-equally with our other constitutional guarantees, the Self-Incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure.'" (Footnotes omitted; emphasis added.)

See also *Helton* v. *United States,* 221 F. 2d 338, 341-342 (C. A. 5, 1955):

> "History tells us that *it was the preliminary inquisition,* prior to trial on the merits, *which gave*

> *rise to the abuses,* which resulted in the recognition of the privilege against self-incrimination. * * * the fact that the accused here remained silent rather than risk unwitting distortion of his statement by a police officer at a later date does not give in law, and should not be allowed to give in fact, rise to an inference of guilt. 8 Wigmore on Evidence, §2272. *It must be remembered that it is not the guilty alone who may exercise the privilege of remaining silent. An innocent person is entitled to the same protection* when he deems his best interests will be served by electing that course. 8 Wigmore on Evidence, §2251." (Emphasis added.)

If the procedure followed in the present case were permissible, the prosecution of criminal cases could be reduced to a simple six-step formula. *First:* Call a suspected person before a grand jury, warn him that his testimony may be used against him, and let him claim his privilege. *Second:* Solely on the basis of his claim of privilege, indict him. *Third:* Search his home under a general warrant and seize all his books and papers. *Fourth:* Inflame the jury against him by showing that he has done something which, though legal, is unpopular in the community. *Fifth:* Introduce his books and papers in bulk, and thus place him in a position where he must take the stand to explain their contents. *Sixth:* Impeach his explanation by showing that he claimed his privilege before the grand jury.

Quite a different situation is presented where the defendant has declined to take the stand at a previous *trial.* A few cases can be found which permit that fact

to be shown for purposes of impeaching his testimony on a second trial. For present purposes we need not question the soundness of these decisions, for they do not touch the case at bar. It is one thing to permit an inference to be drawn from the defendant's reliance on the privilege in a plenary trial, where the entire proceedings have been conducted in his presence and where Court and counsel are available to protect the witness against irrelevant or otherwise improper questions. It is quite another to attach legal significance to a claim of privilege in a grand jury hearing.

If the foregoing formula could legally be followed, as it has been in this case, the privilege against self-incrimination would indeed have lost its meaning. The price of silence before the grand jury would be irreparable damage at the trial. We submit that no inference whatever can properly be drawn from a claim of privilege before the grand jury, and that the trial Court in this case, by allowing the jury to make such an inference, has not only committed reversible error but has violated defendant's rights under Section 11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment.

B. Erroneous Exclusion of Evidence.

By any standard, the testimony of Alberta Ahearn was the most important evidence in the case. It was the only direct evidence that defendant was a CP member, and was in square conflict with his own testimony on this subject. The supreme necessity of adopting all possible means of enabling the jury to make a fully

informed judgment as to the credibility of the Ahearn testimony is therefore obvious. Any substantial limitation on the legitimate cross-examination of this witness automatically resulted in prejudicial and reversible error. As was said in *Alford* v. *United States,* 282 U. S. 687, 692 (1931):

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them.*" (Emphasis added.)

The obvious method of testing the accuracy of Mrs. Ahearn's testimony was to ascertain whether or not it was consistent with objective facts not then within her control. A review of her testimony will show that it presented remarkably few opportunities for such a check against objective facts. She said she had never received any membership card, dues receipts, or other documentary evidence of her own CP membership (Tr. 2303-2304), and thus she could not be called upon to produce them. She said she had turned over to the F.B.I. the books she had bought (Tr. 2341), and thus she could not be required to display them. She said that she mailed her reports to the F.B.I. at a post office box; but the trial Court ruled that she need not disclose the box number because this "might reveal some secret of the Government" (Tr. 2310-2311). She stated the dates of six meetings she said she had attended with

the defendant, but the defendant had been deprived of the ordinary means of verifying his own whereabouts on those dates because the prosecution had seized all his personal papers including his check stubs and telephone bills (Tr. 2367-2368). She discredited in advance the other persons allegedly present at the meetings, by testifying that they were CP members. But there was one objective test which *could* be applied: Were her own reports to the F.B.I. consistent with her testimony at the trial?

She had testified that, within two or three days after each CP meeting, she had mailed to the F.B.I. a written report describing it (Tr. 2310). These contemporaneous reports remained on file at the Louisville office of the F.B.I. down to the time of the trial. On Friday night, December 10, she went to the F.B.I. office with Mr. Carl Ousley, assistant prosecutor. The two of them went over the reports together in the presence of Federal agents, finishing this work a few minutes before she took the stand Saturday afternoon, December 11. She made a number of handwritten notes consisting of excerpts from the reports, and held those notes in her hand during her testimony in chief, using them to refresh her recollection and occasionally reading from them directly (Tr. 2282-2283, 2298, 2310, 2334, 2337, 2355).

At the close of her testimony in chief, the Court allowed a recess until Monday morning, December 13, before the beginning of cross-examination. Defense counsel requested the right to examine the notes from which she had been testifying, but the Court ruled that

if he looked at them he would have to proceed immediately with cross-examination and conclude it that day, which he was not prepared to do (Tr. 2299-2300). He then asked that the witness be required to mark the notes for identification, but this request was denied (Tr. 2301).

On Monday morning, December 13, the cross-examination proceeded. Defense counsel applied for a subpoena *duces tecum* directed to Mr. Edward L. Boyle, special agent in charge of the F.B.I. for the State of Kentucky, requiring the production of the original Ahearn reports, of which she had used excerpts in refreshing her recollection when testifying. The subpoena was issued (Tr. 2334-2335). Defense counsel was permitted to examine the notes from which Mrs. Ahearn had testified, and offered them in evidence for later comparison with the reports, but the Court ruled that they should not be filed until Mr. Boyle arrived (Tr. 2335-2338, 2360).

Mr. Boyle appeared in court without the reports. He testified that he was not aware that they had been subpoenaed (Tr. 2383). The prosecutor stated that the clerk, instead of placing the subpoena in the hands of the sheriff for service, had handed it to the prosecutor who had telephoned Mr. Boyle (Tr. 2388).

Mr. Boyle testified that the reports were on file in his office (Tr. 2383); and since he was present in Court, the Court had jurisdiction to order him to produce them. He refused to do so, however, saying (Tr. 2384):

> "The Witness: The objection is made because of an executive order which prohibits us from re-

> vealing our records or bringing them into any hearing or court trial without the specific permission of the Attorney General of the United States, and that is the executive order under which I am obliged to operate."

Mr. J. Leonard Walker, United States District Attorney, appeared and claimed that the production of the reports was excused by Federal Executive Order No. 3229 (Tr. 2384, 2387). The Executive Order was not shown to the Court or defense counsel. Although defense counsel avowed that the reports would contradict Mrs. Ahearn's testimony, the Court upheld the claim of privilege and refused to order their production. The defendant excepted (Tr. 2386-2389).

The order relied upon was Department of Justice Order No. 3229, as revised January 13, 1953 (18 Fed. Register 1368):

> "Pursuant to authority vested in me by R.S. 161 (5 U. S. C. 22), it is hereby ordered:
>
> "1. When a United States Attorney or any other officer or employee of the Department of Justice is served with a subpoena or order for the production or disclosure of materials or information contained in the files of the Department, the United States Attorney, or such other attorney as may be designated, will appear with the person upon whom the demand is made and inform the court or other issuing authority that such person is not authorized to produce or disclose the materials or information sought. Time will be requested within which to refer the subpoena or order to the Attorney General, and the United States Attorney or other attorney designated will refer the court to this order as published in the

Federal Register. Advice as to such subpoena or order will be given immediately to the Attorney General without awaiting court appearance.

"2. In the event the court declines to defer a ruling until instructions from the Attorney General have been received, or in the event the court rules adversely on a claim of privilege asserted under instructions of the Attorney General, the person upon whom such demand is made will, pursuant to this order, respectfully decline to produce the material or information sought. United States *ex rel.* Touhy v. Ragen, 340 U. S. 462."

The most cursory examination of this Order will show that it does not authorize an unqualified refusal to produce documents from the F.B.I. files. What it does is to preserve the right of the Attorney General, as head of the Justice Department, to decide himself whether such documents should be released. It specifically directs that "Time will be requested within which to refer the subpoena or order to the Attorney General," *and authorizes refusal only if such request is denied or if the Attorney General instructs such refusal after considering the matter.* The *Touhy* case, referred to in the Order, holds only that it is lawful for such determinations to be centralized in the Attorney General as head of the Department rather than made by the local officials having custody of the documents. In this way the Attorney General himself is given not only the authority but the sole power and responsibility for determining whether any interest of the Government will be jeopardized by making the documents available.

Mr. Boyle and Mr. Walker ignored the plain terms of the Order and presumed to make this determination themselves. They did not request time to refer the question to the Attorney General, and so far as the record shows they have never so referred it. There has thus been no claim of the privilege by the only officer authorized to make such a claim. That this point is one of substance and not merely technical is forcefully pointed out by Chief Justice Vinson in *United States* v. *Reynolds,* 345 U. S. 1, 7-8 (1953):

> "The privilege * * * is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." (Footnotes omitted.)

And again, at p. 10:

> "* * * the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege."

This aspect of the matter was discussed in the recent case of *United States* v. *Certain Parcels of Land,* 15 F.R.D. 224, 229, 230 (S. D. Calif., 1954), where the Court stated:

> "All that Order No. 3229 (Revised) means then is that the Attorney General has reserved to himself the decision as to whether or not some privilege recognized in the law of evidence shall be claimed by the Government against an order of court calling for production or disclosure from the files of the Department of Justice."

The Court went on to say:

> "No formal claim of privilege has yet been lodged by the Attorney General, 'after actual personal consideration by that officer', against production of the documents sought by the motion at bar."

The Court further declared:

> "The sole ground for the claim is that the documents are 'confidential reports in Department of Justice files'; the Government's theory being, as stated before, that 'reports in the Department of Justice files' are privileged because made confidential by Order No. 3229 (Revised).
>
> "Clearly there is no such privilege known to the law of evidence. The most then that can be said for the Government's position is that there is a general public policy against unnecessary disclosure of files of the executive branches of the Government. However, this policy may readily be outweighed by the public interest in disclosure when such files contain documents of evidentiary value in a court of justice. See Reynolds v. United States, 3 Cir., 1951, 192 F. 2d 987, 995, reversed on other grounds, 1953, 345 U. S. 1, 73 S. Ct. 528."

Even if the present record had shown (which it does not) that Mr. Boyle or Mr. Walker had informally discussed the matter with the Attorney General, this would be insufficient. As was said in *Parsons* v. *State,* 251 Ala. 467, 38 So. 2d 209 (1948), where a robbery conviction was reversed because of the trial Court's failure to require the production of documents in possession of the United States Justice Department, or to allow time for the Attorney General to consider the matter (38 So. 2d at p. 216):

> "Informal information to the court that the Attorney-General had advised the United States District Attorney at Birmingham not to permit a release of the matter for use in this case is not conclusive as to what he would do in response to a formal request by the court."

It cannot be assumed that the Attorney General would have decided to withhold the requested reports. They were not internal memoranda of the Justice Department but were merely the reports of an informer whose identity had already been disclosed. They had already been shown to Mr. Ousley, a member of the prosecution staff, who was not a Department of Justice employee. The Attorney General, as chief law enforcement officer of the Government, was under an official duty not only to protect the interests of the Government but to protect the substantial rights of persons charged with crime (see pp. 277-278, *infra*). At the very least, the Attorney General might well have allowed the reports to be examined privately by the trial judge so that he could decide whether their withholding was prejudicial to the defendant's rights—a procedure which, as will be seen, has been followed in a number of cases.

The primary responsibility for seeing that justice was done to the defendant rested squarely on the trial court, however, and this responsibility was in no wise diminished by the claim of privilege. As was said in *United States* v. *Reynolds, supra* (345 U. S. at pp. 8, 9-10):

> "The court itself must determine whether the circumstances are appropriate for the claim of privi-

> lege * * *. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." (Footnote omitted.)

See also *Parsons* v. *State, supra,* where, after analyzing the relevant cases, the Court declared (38 So. 2d at p. 215):

> "We think the cases may also be reconciled on the theory that if the evidence can be obtained in a way which is consistent with law and the Constitution, and it is then and there present in the state court, its relevancy and admissibility as evidence is one for the state court to determine under the Fourteenth Amendment, and the court is not then controlled by the department rule."

The trial Court was obligated to accept as true the avowal that Mrs. Ahearn's reports would have contradicted her testimony. See *United States* v. *Mesarosh,* 116 F. Supp. 345, 350 (W. D. Pa. 1953):

> "We are of the further opinion that the Government's contention that defendants are not entitled to the reports because they have not shown that the reports contradict Cvetic is untenable. Defendants cannot show that the reports contradict the witness unless they see them."

Under these circumstances there was only one way for the Court to protect the defendant's substantial rights. It was duty-bound to strike Mrs. Ahearn's entire testimony from the record as incomplete, and declare a mistrial, unless the reports were at least made available for inspection by the Court and were found by it to be immaterial to the defendant's case.*

*Even this might have been insufficient. *United States* v. *Coplon,* 185 F. 2d 629, 637-638 (C. A. 2, 1950), cert. denied 342 U. S. 920 (1952).

This question was presented in *United States* v. *Schneiderman,* 106 F. Supp. 731 (S. D. Calif. 1952). In that case a witness testified at the trial that he had been a secret agent of the F.B.I. while a member of the Communist Party and had submitted periodic written reports to the F.B.I. The defendants moved for an order directing the Government to produce these reports "for inspection and use by the defense upon cross-examination of the witness." There as here, the United States Attorney opposed the motion on the ground that such documents "are to be regarded as confidential" by virtue of Department of Justice Order No. 3229. The Court "ordered the reports delivered under seal to the clerk for inspection by the judge *in camera* to determine whether the documents have sufficient evidentiary value in any event to warrant disclosure to the defense." This was done and the judge, after examining the reports *in camera,* held that the documents were "essential to the defense" in some degree, and ordered their production, stating (at p. 735):

> "If a document material to the defense is of such a nature that the confidential information which it contains may be excised or by other means withheld from public disclosure without impairing the evidentiary value of the writing, the trial court will exercise discretionary powers to the end that the competing interests of both Government and defense may be satisfied. See United States v. Burr, C.C.Va., 1807, 25 Fed. Cas. 187, 190-193, No. 14694.

> "Where, however, the nature of the document or the character of its contents is such that the confidential information therein contained cannot fairly be withheld without diminishing the possible evidentiary value of the writing to the defense, then the court must determine in the exercise of discretion whether, notwithstanding the confidential information, the accused should be permitted to compel production of the document for use as evidence on behalf of the defense."

It is of interest to note that the defendants in the *Schneiderman* case argued on the motion that the reports should be held "essential to the defense" because the witness allegedly made use of the documents to refresh his recollection prior to his appearance on the witness stand. (See 106 F. Supp. at p. 737). Although the Court found that that was not the fact in the *Schneiderman* case (the "necessity" of the reports to the defense being based on other grounds) it *was* the fact in the case at bar, and constitutes an additional reason why production of the Ahearn reports should have been compelled (see *United States* v. *Mesarosh, supra,* 116 F. Supp. at p. 350).

The Government argued in the *Schneiderman* case, among other things, that disclosure of the reports would reveal the identity of one or more confidential informants and so contravene the public policy which encourages private citizens to furnish public officials with information relating to violations of law. The Court answered this argument as follows (106 F. Supp. at p. 737):

"The only confidential informants whose identity might be revealed through public disclosure of the reports sought by the defense at bar are those asserted by the witness to have attended Communist Party gatherings. Yet on direct examination the witness himself was asked by the Government to name the persons present. Presumably if the witness' memory served him, any confidential informants present have already been named. If not, the Government's interrogation of the witness as to the event must be held a waiver of the right to invoke the public policy favoring protection from disclosure of the identity of any informant who may have been among persons present. Cf. Sorrentino v. United States, supra, 163 F. 2d at page 627; Wilson v. United States, supra, 59 F. 2d at page 390; United States v. Schneiderman, supra, 104 F. Supp. at page 405.

"As the court put it in Wilson v. United States, supra, 59 F. 2d at pages 391-392:

" 'When the witness has been called by the United States, the trial court may modify the general doctrine by imposing the terms that consent to the disclosure be given *or the witness be withdrawn and his testimony struck out as incomplete.* * * * A trial court must dispose of the cause before it. If what is asked is useful evidence to vindicate the innocence of the accused or lessen the risk of false testimony or is essential to the proper disposition of the case, disclosure will be compelled'." (Emphasis added.)

The importance of checking informers' reports against their testimony in Court is well illustrated by the recent Smith Act case of *United States* v. *Flynn,* 130 F. Supp. 412 (S.D.N.Y. 1955). There, a motion

for new trial was made on the ground that one of the witnesses, Harvey Matusow, had committed perjury at the trial. The Court granted a new trial for two of the defendants, pointing out, among other things, that although the witness Matusow knew that one of the essential elements of proof was to establish the presence of a personal intent on the part of the individual defendants to cause the overthrow of the Government by force and violence, none of his periodic reports filed with the F.B.I. (which reports had been submitted to the judge) mentioned this intent.

The Court carefully analyzed Matusow's testimony at the trial and found that it differed in substantial respects from, and was a drastic amplification of, his F.B.I. reports, concluding (p. 419):

> "Thus does the history of the development of Matusow's testimony on the trial demonstrate its falsity."

Judge Dimock's opinion points out that the testimony of the witness can be contradicted by what his reports to the F.B.I. do not say, as well as by what they say. See 130 F. Supp. at p. 417:

> "As is said in 3 Wigmore on Evidence, 3rd ed., Section 1042, p. 733:
>
> "'A *failure to assert* a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact. This is conceded as a general principle of Evidence'." (Emphasis by the Court.)

We cannot know, of course, what the Ahearn reports contained. Even if they did not affirmatively contradict her testimony, they might have included statements having an important bearing on defendant's guilt. For example, they might have quoted the defendant as repudiating the desirability of force and violence, or as expressing the belief that the CP does not advocate unlawful methods. They might have shown that Mrs. Ahearn had acted as *agent provocateur*. They might have contained internal inconsistencies which would have discredited both her testimony at the trial and the reports themselves.

Had the trial Court examined the Ahearn reports and concluded that they were not material to the defense, its ruling would have been subject to review by this Court. The proper procedure is illustrated by *United States* v. *Lebron,* 222 F. 2d 531, 536-537 (C. A. 2, 1955):

> "Several defendants urge error in that the judge refused to permit them to inspect 27 written reports submitted to the FBI by Raymond Sorrell, who had been a secret FBI informant during the period in which he submitted the reports in question, and who testified extensively at the trial against the defendants. *Judge Walsh, in the privacy of chambers, read each of the reports* and determined that they contained no material (a) inconsistent with Sorrell's testimony, or (b) bearing on possible entrapment of defendants. On that basis he refused to permit defendants to examine the reports. Had the reports contained material tending to impeach the witness' veracity, or to show entrapment, then defendants would

> have been entitled to access to them. United States v. Krulewitch, 2 Cir., 145 F. 2d 76, 156 A.L.R. 337; United States v. Beekman, 2 Cir., 155 F. 2d 580; United States v. Coplon, 2 Cir., 185 F. 2d 629, 638-640, 28 A.L.R. 2d 1041; United States v. Alper, 2 Cir., 156 F. 2d 222, 226, but the judge found no such material. *These reports were ordered sealed and, in that manner, were made part of the record for our scrutiny.* We have read them and agree with Judge Walsh's evaluation of them." (Emphasis added.)

Many respected authorities have held that an informer's testimony must be received with suspicion and accepted only after vigorous cross-examination and corroboration. Two interesting articles on this subject give the historical reasons for this attitude. See Donnelly, "Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs," 60 Yale L. J. 1091 (1951); "An Informer's Tale: Its Use in Judicial and Administrative Proceedings," 63 Yale L. J. 206 (1953).

In this connection it is worth remembering that the Department of Justice, which is charged with enforcement of the Federal sedition act (the Smith Act) had Mrs. Ahearn's reports on file long before this case arose, and took no action on the basis of them. Any informer's reports are inherently suspect because of their pecuniary motivation, which was not lacking in the present case (Ahearn, Tr. 2307-2312, 2323). Normally they are not acted upon unless and until they are evaluated and cross-checked against independent sources of information. In the present case the only

available means of checking on Mrs. Ahearn's testimony was denied to the defendant.

There was a further reason why the claim of privilege under Order No. 3229 should have been disallowed. The privilege had clearly been waived by the disclosure of the reports to Mr. Ousley. In *United States ex rel. Touhy* v. *Ragen,* 180 F. 2d 321 (C. A. 7, 1950), affirmed 340 U. S. 462 (1951), the Court of Appeals held that Order No. 3229 "confers upon the Department of Justice the privilege of refusing to produce *unless there has been a waiver of such privilege*" (180 F. 2d at p. 327; emphasis added). In affirming, the Supreme Court pointed out that the record in that case did not raise the issue of waiver (340 U. S. at p. 468):

> "* * * the issue of how far the Attorney General could or did waive any claimed privilege against disclosure is not material in this case."

In the present case, however, the record does raise that issue. The courts have uniformly held that the Government cannot make documents available to one party to a case while withholding them from the other. For example, in *Fireman's Fund Indemnity Co.* v. *United States,* 103 F. Supp. 915 (N. D. Fla., 1952), a libellant in admiralty moved to require the United States to produce exhibits which had been filed with a Navy Court of Inquiry. The Secretary of the Navy filed with the Court a memorandum asserting that these exhibits were confidential and privileged from disclosure under 5 U. S. C., Section 22 and Article

1251 of the 1948 Navy Regulations. The Court held (at pp. 915-916):

> "The regulations referred to above vest in the Secretary of the Navy the authority to claim the privilege, which he here asserts and there is no question as to the right of the Secretary of the Navy to decline to produce the records where the public interest demands such action. Boske v. Comingore, 177 U. S. 459, 20 S. Ct. 701, 44 L. Ed. 846; Bank Line v. United States, 2 Cir., 163 F. 2d 133.
>
> "Where such action is justified, however, in cases in litigation, it is as applicable to the government counsel as to others. *During the course of the argument in these cases the court gained the impression that the Navy had already furnished proctor for respondent with all the documents which proctor for libellant seeks authority to inspect and copy or photograph. If this is true, these documents have lost their privileged and confidential status.* Pacific-Atlantic S. S. Co. v. United States, 4 Cir., 175 F. 2d 632." (Emphasis added.)

See also *Federal Savings Loan Insurance Co.* v. *First National Bank,* 3 F. R. D. 487 (D. Mo., 1944), where the defendant requested inspection of a report on the examination or audit of the affairs of the plaintiff, made under the authority of the Federal Home Loan Bank Administration. The plaintiff admitted that it had been supplied with a copy of the report. The Court held:

> "The same source of information is open to the defendant as to the plaintiff. It would have a

> right to take steps to obtain either the original or authenticated copies of the report made on the examination from Federal Home Loan Bank Administration. It does not appear to have been privileged matter for the reason that the examining authority has placed a copy in the hands of the plaintiff."

As these decisions show, the waiver rule applies whether or not the United States is a party to the case. Denying the claim of privilege in *United States ex rel. Schlueter* v. *Watkins,* 67 F. Supp. 556, 561 (S. D. N. Y. 1946), the Court explained the waiver rule on broad grounds of public policy:

> "* * * the theory of waiver upon which the requirement of disclosure has been based seems to me to be the kind of useful fiction which the law invents to express an underlying public policy. That public policy is that a person should not be deprived of his liberty without giving him an opportunity to have access to material which might exculpate him."

See also *Altman* v. *Third National Bank,* 30 Tenn. App. 81, 203 S. W. 2d 701 (1947); *Mayor and City Council* v. *Maxa,* 177 Md. 168, 9 A. 2d 235 (1939); 8 Wigmore, Evidence (3d ed.) §2378A.

The public policy favoring disclosure is at its strongest when invoked by the defendant in a criminal case. Judge Learned Hand remarked in *United States* v. *Coplon,* 185 F. 2d 629, 638 (C. A. 2, 1950), cert. denied 342 U. S. 920 (1952):

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to

disclose the evidence on which it seeks to forfeit the liberty of its citizens."

See also *United States* v. *Certain Parcels of Land,* 15 F. R. D. 224, 231 (S. D. Calif., 1954):

> "In criminal cases, the public interest in compelling the best available evidence and the constitutional right of the accused to compel the production of all evidence 'in his favor', U. S. Const. Amend. VI, may combine to outweigh any evidentiary privilege which the Government can assert."

The Courts have often had occasion to make it plain that a prosecutor is under a duty to come forward with relevant evidence even though it is helpful to the defendant. This obligation rests upon the United States Attorney General and District Attorney no less than on the State Court prosecutor. See *United States* v. *Schneiderman,* 106 F. Supp. 731, 739 (S. D. Calif., 1952):

> "In all events the Attorney General—no less than the United States Attorney—labors in every criminal prosecution under the solemn duty ex mero motu to see that 'justice shall be done.' Cf. Berger v. United States, 1935, 295 U. S. 78, 88-89, 55 S. Ct. 629, 633, 79 L. Ed. 1314. To that end he cannot properly withhold from the court evidence essential to proper disposition of the case, including a fortiori any evidence which may be material to the defense of the accused. See Canon 22, Canons of Professional Ethics, 62 A.B.A. Rep. 1112-1113 (1937)."

As was said in *People* v. *Davis,* 52 Mich. 569, 573, 18 N. W. 362, 363 (1884):

> "* * * the State has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons."

This statement was recently quoted with approval in *Gordon* v. *United States,* 344 U. S. 414 (1953). The Supreme Court held that where documents "were in existence, were in possession of the Government, were made by the Government's witness under examination, were contradictory of his present testimony, and * * * the contradiction was as to relevant, important and material matters which bore directly on the main issue being tried * * * the [trial] Court should have overruled the objections which the Government advanced and ordered production of the documents" (pp. 418-419).

That is equally true in the present case. The governmental privilege was waived. It was not claimed in the manner prescribed by Order No. 3229. And if it had been properly claimed and insisted upon, to the extent of denying even to the Court the opportunity to see the questioned reports and determine their importance to the defense, the Court was obliged to strike the entire testimony of Mrs. Ahearn and declare a mistrial. The withholding of the Ahearn reports was gravely prejudicial error, and constituted a denial of due process under the Fourteenth Amendment.

VII. THE INSTRUCTIONS GIVEN TO THE JURY WERE PREJUDICIALLY ERRONEOUS, AND SO APPLIED THE STATUTE AS TO RENDER IT UNCONSTITUTIONAL.

As noted above, the question whether the defendant had himself advocated any proscribed doctrine was not covered in the instructions given to the jury, because there was no evidence of any such advocacy. With this exception, however, the instructions followed the terms of KRS §432.040, applying it in its full literal scope and rigor (Bill of Exceptions, pp. 14-16).*

Instruction 1 was as follows:

> "If the jury believes from the evidence in this case beyond a reasonable doubt that the defendant, Carl Braden, in this county, before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, did print, publish, or knowingly circulate, sell, distribute, publicly display, or if you believe from the evidence beyond a reasonable doubt that he in this County, before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, had in his possession for the purpose of publication or circulation, any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition, or if you believe from the evidence beyond a reasonable doubt that in this County before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, the defendant Carl Braden organized or helped to organize or became a member of or voluntarily

*The instructions given to the jury are set forth in Appendix B.

assembled with any society or assemblage of persons that taught, advocated or suggested the doctrine of criminal syndicalism or sedition, you shall find the defendant guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for a term of not more than 21 years, or a fine of not more than $10,000.00, or both in your discretion."

Instruction 2 allowed the jury to decide whether or not to consider the four exhibits discussed in Point V, *supra*, which the defendant testified had not been seized in his home. The evidence relating to these exhibits has already been analyzed, and the instruction has been commented upon. No further comment is necessary here.

Instruction 3 was as follows:

"The words criminal syndicalism as referred to in these instructions mean any person who commits, aids, or counsels any crime, physical violence, destruction of property, intimidation, terrorism, or other unlawful act or method to accomplish any political end or to bring about political revolution.

"The word sedition as used in these instructions means any person who advocates or suggests by word, act, or writing, any public disorder or resistance to or the change or modification of the government, Constitution, or laws of the United States, or of this State by force or violence or by any unlawful means."

The remaining instructions (4 and 5) related to reasonable doubt and to the form of the verdict. They require no comment.

At the outset we must fully understand the exact meaning of these instructions, in the context of the evidence in this case. The instructions required a conviction if the jury believed that the defendant had circulated any literature which suggested sedition, even if the jury (a) believed all the testimony of the defendant, including his testimony that he had never been a CP member, and disbelieved all the testimony of Alberta Ahearn; even if the jury (b) believed that the defendant had circulated said literature for the sole purpose of spreading information about the CP or arousing opposition to it; and even if the jury (c) believed that no word or act of the defendant created a clear and present danger, or any danger, that harmful overt acts would result.

There were also various other possible factual findings which, under the instructions, would require a conviction. For example, if the jury believed that defendant had "assembled with" the CP or one of the many "front" organizations and that such organization advocated sedition, a guilty verdict was required even though the jury also believed that defendant had possessed no seditious literature; had entertained no criminal purpose in such assembling or in anything he did; and had created no danger of harmful overt acts.

Because of the variety of factual hypotheses on which a guilty verdict could have been based, the verdict cannot be taken to imply the finding of any particular fact or facts, or to imply the acceptance or rejection of the testimony of any particular witness.

Before discussing the constitutional errors in these instructions, we wish to point out certain other defects which in themselves were sufficient to require reversal.

First, Instruction 1 submitted at least three factual hypotheses in the alternative, without any instruction that all twelve jurors must concur in a verdict based upon some one or more of them. The defendant was to be found guilty if he circulated, etc., or if he possessed, etc., or if he voluntarily assembled, etc. Under this instruction, the general verdict of guilty (rendered in the form prescribed by Instruction 5) could have been based on a finding by no more than four jurors that the defendant had committed any one of the offenses described. This was clear error.

Second, the instructions covered charges as to which there was no supporting evidence. The jury was, for example, instructed to find the defendant guilty if they found that the defendant had *printed* forbidden literature, or had *organized* a forbidden society, or had *joined such a society in Jefferson County.* There was no evidence from which the jury could have found that the defendant had done any of these things, and it was error to allow the jury to speculate.

Third, the definitions of "criminal syndicalism" and "sedition" set forth in Instruction 3 were so confusing as to render the instructions meaningless. Criminal syndicalism is defined as "any person who" commits a crime for political purposes, etc. Sedition is defined as "any person who" advocates change of the laws by unlawful means, etc. Criminal syndicalism

and sedition are not persons. It was error to fail to give a crystal clear definition of these crucial terms.

Turning now to the constitutional questions, let us first observe what behavior Instruction 1 declared to be felonious. In order to do this it is necessary to substitute for the terms "criminal syndicalism" and "sedition" the definitions of those terms as set forth in Instruction 3. (For this purpose the definitions will be recast to omit the reference to "any person who"; unless this is done, Instruction 1 is completely unintelligible.)

Following this procedure, we see for example that the jury was not required to find that the defendant had circulated written matter suggesting change of the laws by unlawful means; they were instructed to find him guilty if he circulated written matter suggesting *sedition, i. e.,* if he circulated written matter which suggested that such change should be suggested. Likewise, the jury was not required to find that the defendant had assembled with a society which counsels unlawful acts for a political end; they were instructed to find him guilty if he assembled with a society which suggested *criminal syndicalism, i. e.,* if he assembled with a society which suggested that such acts should be counseled.

There is no need to explore the many permutations and combinations. These examples are sufficient to show that guilt was predicated on relationship with unlawful acts *thrice removed.* The defendant was to be found guilty even if he had *done* nothing to change the laws unlawfully, and even if he had not *suggested* that

it be done, and even if he had *possessed no literature* which suggested that it be done, if only the jury found that he possessed and intended to circulate a book *suggesting that it be suggested* that it be done.

This demonstration of the meaning of KRS §432.040, which is given concrete application in the four hypothetical cases set forth at pages 118-119, *supra,* should be sufficient without more to show the invalidity of the statute if applied, as it has been here, in its full literal scope. So applied, it condemns a tremendous range of wholly innocent and constitutionally privileged conduct. It punishes conduct so remotely related to evil acts that, for practical purposes, they are not related at all. Statutes far more specific in their terms have been held to be unconstitutionally vague. *Sullivan* v. *Brawner,* 237 Ky. 730, 36 S. W. 2d 364, 367 (1931); *Herndon* v. *Lowry,* cited and quoted at pp. 74-79, *supra;* compare *Commonwealth* v. *Barney,* cited and quoted at pp. 137-138, *supra.* As was said in *Stone* v. *State,* 220 Ind. 165, 41 N. E. 2d 609, 613 (1941):

> "To construe the statute as literally intended to provide punishment by imprisonment for counseling or encouraging any or every isolated act * * * would result in punishing as a crime many acts or omissions so trivial in themselves that it cannot be rationally concluded that it was intended that they should be made criminal. There is nothing in the act to indicate where the line is to be drawn between trivial and substantial things. It must be left to the judgment of each trial judge who is required to pass upon the sufficiency of affidavits or indictments. Such a statute is clearly bad for uncertainty."

The vagueness of the statute results not only from its tremendous reach, with consequent condemnation of many innocent and constitutionally privileged acts, but also from its use of terms having no certain and understandable meaning. Consider, by way of contrast, the provisions of the Federal Smith Act (18 U. S. C., §2385), which makes it unlawful to "advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing any government in the United States by force or violence, or by the assassination of any officer of any such government." KRS §432.040 and the instructions are much less precise. They use such terms as "suggest", "public disorder", "unlawful act or method" and "unlawful means".

The term "suggest" is far weaker and vaguer than "advocate, abet, advise, or teach". In *Lopa* v. *Smith,* 37 Ohio App. 346, 174 N. E. 258, 259 (1930), it is said:

> "A suggestion is in the nature of a hint or insinuation and lacks the element of probability. Facts which merely suggest do not raise an inference of the existence of the fact suggested, and therefore a suggestion is much less than an inference or presumption."

The dictionary definitions include the following: "to propose tentatively; to mention as a hint, a possible explanation or course, etc.; * * * to arouse ideas, etc., as through association, insinuation, etc." Webster's New International Dictionary (1947). "Suggestion" is the essence of *discussion,* as distinguished from advocacy or incitement; and mere discussion can never be punished. If the Government can be over-

thrown by suggestion, it is far weaker than has ever been supposed—or else the power of suggestion is far greater.

According to Black's Law Dictionary, State Edition, "disorder" includes such varied conduct as "turbulent or riotous behaviour, immoral or indecent conduct, the breach of the public decorum or morality."

But the terms "unlawful act or method" and "unlawful means" are the broadest of all. They not only include the entire range of felonies and misdemeanors (and probably torts), but—as used in the instructions—leave the question of lawfulness to be passed on by the jury. The jury is thus made the trier of the law as well as the facts, and this without the slightest guidance from the trial judge.

The net effect of the instructions is the same as if the jury had simply been handed the statute book and told to apply KRS §§432.020, 432.030 and 432.040 to the facts of the case. In a case of this complexity and novelty, involving offenses defined in terms unfamiliar and meaninglessly vague to the average juror, much more was necessary. The instructions are bad for uncertainty because they fail to define the offenses in any understandable way.

The vagueness objection applies not only to the instructions but to KRS §432.040, on which they are based. A statute whose terms are so indefinite "that men of common intelligence must guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Connally* v. *General Construction Co.*, 269 U. S. 385, 391 (1926); *Small* v.

American Sugar Refining Co., 267 U. S. 233 (1925). And legislation which purports to limit any of the First Amendment freedoms must be narrowly drawn, and the proscribed conduct so specifically described "that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation. Blurred signposts to criminality will not suffice to create it." *United States* v. *C. I. O.*, 335 U. S. 106, 142 (1948) (Rutledge, J., concurring).

We therefore submit that KRS §432.040, as construed and applied by the instructions given to the jury in this case, violates Section 11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment.

There are further constitutional objections as well. The statute and the instructions declare criminal the mere circulation of literature which suggests proscribed doctrine (indeed, mere possession with intent to circulate), and mere assembly with a society or assemblage which suggests proscribed doctrine, even though

> (a) the defendant does not himself know what is taught by the literature or by the organization, and
>
> (b) the defendant acts without seditious or criminal intent (or even with an anti-seditious intent), and
>
> (c) the acts of the defendant create no clear and present danger, or indeed any danger, of harmful overt acts.

In Point I of this brief we have reviewed the controlling decisions of the United States Supreme Court, which make it clear that each of these facts must be proved as a constitutionally necessary element of the offense. There is no need to repeat what is said there. But it is proper to discuss a few additional authorities which deal more specifically with the question of instructions to the jury.

In *Dennis* v. *United States,* 341 U. S. 494 (1951), the Smith Act was held constitutional as applied to the organizers of the CP in the United States. The trial Court had charged that the jury could not find them guilty unless they had the intent to overthrow the Government. Despite this instruction, the defendants argued that the *statute* was invalid because it made it unlawful "to knowingly *or* willfully advocate", etc., and thus forbade advocacy without regard to wilfulness, *i. e.,* criminal intent. Chief Justice Vinson held that the statute should be read as though it said, "knowingly *and* willfully", saying (341 U. S. at p. 499):

> "The structure and purpose of the statute demand the inclusion of intent as an element of the crime. * * * We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence."

In addition to the general due process requirement that guilty knowledge and criminal intent must be found to exist (see *Wieman* v. *Updegraff,* 344 U. S. 183 (1952), and the other cases discussed in Point I. A.,

supra), there is a specific statutory mandate of the Congress of the United States which applies to the particular case of CP membership. The Internal Security Act of 1950 provides (50 U. S. C., §783(f)):

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute *per se* a violation of * * * this section *or of any other criminal statute.*" (Emphasis added.)

There can be no doubt of the power of Congress to limit prosecution under State statutes. Article VI, Clause 2 of the United States Constitution declares:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

And it has been made clear that a Federal immunity statute may constitutionally extend to prosecution for State crimes. *Adams* v. *Maryland,* 347 U. S. 179 (1954).

In the present case the jury was so instructed as to permit a verdict of guilty even though the jury found only that the defendant had *joined* the CP. A requested instruction embodying the terms of the above Federal statute was refused (Bill of Exceptions, pp. 11-12). The instructions thus contravened the said statute, and denied to the defendant a Federal statutory right which he had specifically set up and claimed.

It will be helpful to compare the instructions given in this case with those given in the recent case of *United*

States v. *Schneiderman,* 106 F. Supp. 906 (S. D. Calif., 1952), in which the leaders of the CP on the West Coast were prosecuted for conspiracy to violate the Smith Act. The instructions, which are set forth in full at 106 F. Supp. 927-941, show a painstaking effort to give the jury real guidance in their deliberations. They include the following (at pp. 934, 935, 938, 939, 940):

> "Even if you find the conspiracy charged in the indictment has been proved beyond a reasonable doubt, you may not infer that any particular individual was a party to or member of such conspiracy merely because the evidence shows him or her to have been a member or officer of the Communist Party.
>
> * * * * * * *
>
> "Under our system of law, guilt of crime is a personal and individual matter. You may not convict any defendant merely by reason of the fact that you may find him or her to have been an officer or member of the Communist Party of the United States, no matter what you may find were the principles and doctrines advocated and taught by that party during the period covered by the indictment.
>
> * * * * * * *
>
> "The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.
>
> * * * * * * *

"The defendants, in common with all other persons living under our Constitution, have a general right protected by the First Amendment to hold, express, teach and advocate opinions, even though their opinions are rejected by the overwhelming majority of the American people; and have the further right to organize or combine peaceably with other persons for the purpose of spreading and promoting their opinions more effectively.

"Whether you agree with these opinions or whether they seem to you reasonable, unreasonable, absurd, distasteful or hateful has no bearing whatever on the right of other persons to maintain them and to seek to persuade others of their validity.

"No inference that any of the defendants knowingly and wilfully conspired as charged in the indictment, or intended to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from the advocacy or teaching of socialism or other economic or political or social doctrines, by reason of any unpopularity of such doctrines or by reason of any opinion you may hold with respect to whether such doctrines, or the opinions or beliefs of any of the defendants, are unreasonable, distasteful, absurd or hateful.

"The defendants, in common with other persons living under our Constitution, have the right protected by the First Amendment to criticize our system of Government and the Government itself, even though the speaking or writing of such criticism may undermine confidence in the Governernment or cause or increase discontent. They have the right also to criticize the foreign policy of the United States and the role being played by this country in international affairs; and to praise

the foreign policy of other governments and the role being played by those governments in international affairs.

"The right of the defendants to enjoy such freedom of expression is unaffected by whether or not the opinions spoken or published may seem to you to be crudely intemperate, or to contain falsehoods, or to be designed to embarass [sic] the Government. No inference of conspiracy to advocate and teach the necessity and duty of overthrow and destruction of the Government of the United States by force and violence, or of intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit, may be drawn from such expressions alone.

* * * * * * *

"In determining the issue as to the intent of any of the defendants, you may consider any meaning or interpretation given and any use made of any exhibit by such defendant, as shown by the evidence; including of course any statement or declaration such defendant may have made as to his or her understanding of the meaning of all or any part of the language of any exhibit.

"You should bear in mind that it is not your own understanding of the meaning of the language of an exhibit, but the defendant's understanding of the meaning of such language that is to be considered in arriving at your verdict.

* * * * * * *

"The defendants are not being tried to determine what kind of people they are, or what sort of things they would be likely to do if allowed to remain at liberty. Rather it is your duty to determine whether the evidence establishes beyond a

reasonable doubt that they did do in the past the things charged in the indictment.

"As previously stated, the intent required to convict a defendant is not merely the intentional conspiracy to teach and advocate the necessity and duty of overthrowing and destroying the Government of the United States by force and violence. It must also appear beyond a reasonable doubt from the evidence in the case that such defendant had the further specific intent to cause or bring about the overthrow and destruction of the Government of the United States by force and violence as speedily as circumstances would permit.

* * * * * * *

"Remember also that the question before you can never be: will the Government win or lose the case? The Government always wins when justice is done, regardless of whether the verdict be guilty or not guilty."

The instructions in the present case were constitutionally defective for the same reasons given by the Court in *Wood* v. *State,* 77 Okla. Cr. 305, 141 P. 2d 309 (Ct. Crim. App. 1943). Reversing the conviction of a CP member for criminal syndicalism, the Court declared (141 P. 2d at pp. 319-320):

"The cases decided by the Supreme Court of the United States since the decisions in the Gitlow and Whitney cases, most of which have heretofore been cited, have modified and overruled the principles announced in those cases, and have adhered to the principles announced in the dissenting opinions of Justices Holmes and Brandeis, as applied to the 'clear and present danger' doctrine. [Citations omitted.]

"From a reading of the opinions of the Supreme Court of the United States, it may be noted that they have been very jealous of their expressions concerning any activity which had a tendency to infringe upon the freedom of speech or of the press. Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660; Schneider v. State, supra.

"As we have so often stated, it is the highest court in the land. Its decisions considering the applicability of state statutes to the terms of the constitution of the United States are final and have and will be followed by this Court.

* * * * * * *

"It cannot be doubted but that the application placed upon the statute under consideration, by the instructions given, and the refusal to give the instructions requested by the defendant, constituted an abridgment of the rights guaranteed by the 14th Amendment to the Constitution of the United States.

"Under the instructions of the trial court, a conviction was proper under the statute if the jury found that the defendant had sold or displayed the books in question, and they further found that these books contained language which in the jury's opinion advocated force and violence. *This, without proof that the defendant advocated what was in the books, or that there was present a 'clear and present danger' by the disbursing of the same.* This construction and application of the statute amounted to holding that anyone who at any time and for any reason displayed or sold books of this character is presumed to have advocated the doctrines therein announced. Under this construction, any bookstore owner or manager, or librarian

selling or circulating such a book would be guilty of violation of the statute. We cannot feel that this application and construction was intended by the Legislature of this State at the time of the enactment of the Act. If it is to be so construed, it comes in direct conflict with the provisions of the Federal Constitution which guarantees freedom of speech and of the press, as construed by the many decisions of the Supreme Court of the United States. By the denial of the requested instructions, the jury was not given an opportunity to pass upon the issues above mentioned. This was clearly error, and denial of a fundamental right.

* * * * * * *

"It is our conclusion that the failure of the court to submit by proper instructions *the question as to whether defendant had an unlawful intent* to bring about an industrial or political change in our government by unlawful means, in the sale, displaying and circulation of the literature in question, was an error which materially prejudiced the rights of the defendant and constituted an unconstitutional application of the statute. Further, as has been heretofore pointed out, the court should have instructed the jury that they must find beyond a reasonable doubt not only that defendant knowingly sold and distributed the literature advocating criminal syndicalism as charged in the information with an unlawful intent, but that *they must further find that the selling, publicly displaying, and distributing of said literature by defendant was reasonably likely to result within the immediate future, in the commission of crime, serious violence, or other unlawful acts for the purpose of bringing about political or industrial change or revolution by such methods.* The jury under the instructions of the court was not per-

mitted to pass upon these issues." (Emphasis added.)

Perhaps it will be contended that, although the instructions permitted and directed conviction regardless of guilty knowledge, criminal intent, and clear and present danger, the jury may in fact have found these essential elements to exist. There are two answers to such an argument. First, as shown in Point I of this brief, there was no evidence from which such findings could have been made. Second, it is not permissible to speculate as to what the jury might have done; all we can know is that they were instructed to ignore these elements.

This latter point has received the specific attention of the United States Supreme Court. In *Stromberg* v. *California,* 283 U. S. 359 (1931), the defendant had been convicted under a state statute which forbade the display of a red flag for any of three purposes: "as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character." The trial Court had charged that if the defendant had displayed a red flag for any one of these three purposes, a verdict of guilty should be returned. There was a general verdict of guilty, which the State Supreme Court upheld on the ground that the second and third purposes rendered the flag display constitutionally punishable even though the first did not. The Supreme Court reversed, Chief Justice Hughes declaring (at pp. 367-370):

"We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause.

* * * * * * *

"It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

* * * * * * *

"The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag 'as a sign, symbol or emblem of opposition to organized government,' and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the State could not constitutionally prohibit.

* * * * * * *

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

> tunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

Finally, we desire to illustrate concretely from the present record the dangerous breadth of the trial court's ruling that assembly can be punished without proof of guilty knowledge or unlawful intent on the part of the defendant. We wish it were possible to analyze in its entirety the bewilderingly versatile testimony of the prosecution "experts" on the subject of the so-called "front" organizations; but limitations of space forbid. Instead, by way of example, we propose to examine in detail the testimony as to one alleged "front" organization — the Women's International League for Peace and Freedom (hereinafter abbreviated "WIL")—and in this way to show the unbelievable extent to which the principle of guilt by association has been embraced by the statute and the instructions.

The "bill of particulars" named the WIL as a "front" organization in which defendant "became active and participated" (R. 20). During the testimony of young Wade, the prosecution produced a mimeographed letter on WIL letterhead, addressed to the residents of Shively and pleading for tolerance toward the Wades. As will be seen, it is unexceptionable in tone and substance and in no way advocates criminal syndicalism or sedition. The letter reads as follows (Wade IV, Tr. 246-247):

"Louisville Branch, August 31, 1954. Dear Shively Residents. No doubt you are concerned about the recent events in your neighborhood following the purchase of a home there by the Andrew Wade IV family. The Louisville members of the Women's International League for Peace and Freedom are concerned, too. We have no connection with the Wade family, but this letter is a plea for tolerance. Our organization has been working for forty years to bring peace and freedom to all people through non-violent means. We do not know how you feel personally about this family moving to Shively, but we know that to many of you this was a new and shocking experience. We know, too, that many people have opposed the outbreak of violence and have seen with dismay this example of man's hatred to man. The Wades are of course, just human beings among other human beings. The purchase of a home for the Wades by a white family was, due to a circumstance we have forced upon them, the only way they could acquire a home such as they wanted. A look at the real estate ads will show you how difficult it is for a Negro family to find homes of the kind they want and can afford. As members of an international organization organized in the United States in 1915 by Jane Addams of Hull House, we have come to know people of all races and creeds. We find that color of skin makes no basic difference with people. Were you to become acquainted with the Wade family, you would find them having the same kind of home life, ambitions and ideals as yourselves. The very fact that they wanted to live in the kind of a neighborhood you also chose to live in shows this to be so. Some Shively residents have feared that the presence of a Negro family would decrease property values in the area. Negroes already reside in Crescent Hill, the Highlands, and

> other sections of East Louisville and have for a long time. Yet property values have gone up rather than down in these areas. Many of you in Shively are of German or Irish extraction. Your grandfathers or great-grandfathers probably came to the United States to escape oppression as did those of some of us members of the Women's International League. We believe that after you have thought this situation over you will want the Wades to have the same right to live decently that your forebears came here to attain. This may be a new idea, but in the United States we have learned to accept new ideas. Certainly, all of you are good Americans today and will not want bombing and terror to smirch the name of Shively."

The letter was signed by Mrs. Beatrice Pearson as corresponding secretary.

Over objection and exception (Tr. 244-245), the witness was questioned as to whether Mrs. Pearson had been at Wade's home. He testified that she had not been, as far as he knew, but that the WIL had undertaken to send the letter out at the request of the Wade Defense Committee (Tr. 248). He also testified that the defendant knew Mrs. Pearson (Tr. 250).

The prosecution stated that the purpose of the questions was to show unlawful assembly prohibited by the statute (Tr. 244). Over objection and exception, the testimony was admitted subject to connection (Tr. 244-245).

Two prosecution witnesses, both of whom had been devoted CP members, testified that the WIL is a "front" organization. Manning Johnson testified (Tr. 873):

> "I have occasion to know that this organization is a communist front organization that has as its purpose the dissemination of the communist phony peace program."

Maurice Malkin testified (Tr. 977):

> "That was the organization that was organized I think by Jane Addams, the social worker, who was also the leader of Hull House in Chicago. That was an organization that was infiltrated by the Communist Party, and it was used as a communist front. The fact is that Jane Addams, its leader, cooperated with me in the Communist Party, Chicago, when I was there as Organization Secretary of the Chicago District in 1932, and part of 1933."

Mrs. Marjorie Matson was called as a witness for the defense. Mrs. Matson is an attorney from Pittsburgh, Pa., who has held various public offices. She was Assistant District Attorney of Allegheny County, and had held that office at the time that Steve Nelson and others were prosecuted there for subversive activity (Tr. 1554-1555, 1575, 1587). She had been a member of the WIL since 1932 or 1933, and at the time of the trial was a vice-president of the Pittsburgh branch of the WIL and a member of the WIL national board (Tr. 1556).

Mrs. Matson testified that the WIL was originally organized in 1915 under the leadership of Jane Addams of Hull House, whom she described as the greatest social worker of the century. The original name of the organization was the Women's Peace Party. With liberal financial assistance from Henry Ford it worked

to achieve a mediated settlement of World War I. In 1919 it adopted its present name (Tr. 1556-1558).

Mrs. Matson testified fully as to the nature and purposes of the WIL. She testified that it was dedicated to the non-violent approach to international problems and that its membership was composed mostly of women motivated by deep religious convictions; in Pennsylvania, for instance, a high percentage are Quakers. She testified that it is not and never has been "a communist organization, a communist front organization, an organization in any way serving the interests of the Communist Party" (Tr. 1558). She testified further that although the House Committee on Un-American Activities has received testimony about the WIL, the WIL has never been listed as a communist front or subversive organization either by that Committee or by the Attorney General (Tr. 1583, 1590).

The witness pointed out that Jane Addams and Emily Greene Balch, the first two international presidents of the WIL, are the only two American women to have been awarded the Nobel Peace Prize. She added that the prize had also been awarded to the leader of the German section of the organization (Tr. 1570). She testified that the WIL has consultative status with the United Nations, being represented there by Gladys Walser, a former missionary to Japan, and that its legislative representative who handles its work with the Congress is Mrs. Anna Lee Stewart, an ordained Methodist minister (Tr. 1568, 1570).

Mrs. Matson produced in Court samples of literature relating to Jane Addams and the WIL, and

read pertinent extracts into the record (Tr. 1566-1569). This literature included Miss Addams' book, "Peace and Bread in Time of War", which describes the organization and work of the WIL (Deft. Ex. J). The book reveals Miss Addams' philosophy to be diametrically opposed to that ascribed to the CP by the prosecution witnesses; she believed that good ends never justify bad means. As John Dewey said in his foreword (quoted at Tr. 1566):

> "Miss Addams remarks in the present book that social advance depends as much upon the process through which it is secured as upon the result itself."

Mrs. Matson read the preamble to the original resolutions of organization, which included a declaration of belief "that international relations must be determined not by force but by friendship and justice." And, referring to the printed text of the 1953-1954 statement of WIL principles and policies, she said (Tr. 1568-1569):

> "As the title of the organization indicates, we are interested in peace and in freedom, and possibly the basic discussion here on peace, freedom, and justice is the most significant thing to be read in this.
>
> "'Peace: The peace for which we work is much more than the absence of war or maintenance of order through dominance of force. It is a positive principle of human relations and can be found only where there is free cooperation for the common good.

> "'Freedom: Liberty of the human spirit is a basic value. Although freedom must be exercised with responsibility, and individuals in society may have to accept much control in the interest of the common good, nevertheless they must have the right to contribute to decisions and to express differing opinions through free democratic processes. The enemies of freedom are found in all forms of dictatorship, in all imperialisms and in all oppression whether under fascism, communism, or under the guise of democracy. They manifest themselves in every violation of human rights, including any suppression of civil liberties, any suppression of political and economic rights, and in discrimination based on race, religion, class, sex, or opinions.'"

On cross-examination, Mrs. Matson was read a quotation from a piece of "communist literature," describing the WIL as a "left bourgeois" pacifist organization but not saying what connection, if any, it had with the CP. She testified that she had not seen the complete text and did not know what the reference was, adding (Tr. 1582):

> "I know that from time to time when the communists have been working for peace, they have felt that any organization, whether they call it left bourgeois, or any other case, that worked for that, was serving their interests, and I assume that some reference of that kind is what they have in mind."

The prosecution's theory must have been that the CP can taint an organization by simply referring to it with approval.

The prosecutor further asked Mrs. Matson whether she knew that one Walter S. Steele (not otherwise identified) had testified before the House Committee on Un-American Activities "that active communists and socialists were prominent in its [the WIL's] formation and creation." She said she had no report of such testimony (Tr. 1582-1584). The prosecution never introduced connecting evidence to show that such testimony had in fact been given.

The prosecutor then proceeded to ask Mrs. Matson whether the WIL had not received financial support from the Garland Fund. She answered that she knew of one $5,000 grant for publication of the regular bulletin of the organization (Tr. 1584). The questioning continued (Tr. 1584-1585):

> "66Q. Now, don't you know it to be a fact, Mrs. Matson, that the Garland Fund was an organization established in 1922 and that it was a major source for the financing of Communist Party enterprises such as the Daily Worker and New Masses?
>
> Mr. Zollinger: We expect Mr. Hamilton to give proof of that, Your Honor, if that is permitted.
>
> The Court: That's cross-examination. She can answer if she knows it.
>
> A. I do not know for what other purposes the funds were used. I know that they received this one bequest back in the 1920's. At the same time we received a bequest, or rather, a grant from the Woodrow Wilson Foundation.
>
> 67Q. Now, do you know whether or not this Garland Fund that you spoke of, and which you at least describe in part contributed more than a

> million five hundred thousand dollars all to the support of left-wing and Marxist projects? Did you know that or do you know that, whether or not that's true? Do you know that?
>
> A. I don't know whether that's true."

No connecting evidence was ever offered to show whether it was true or not.

Mrs. Matson did not deny that CP members may have belonged to the WIL (Tr. 1591-1592):

> "I don't say to you, Mr. Hamilton, that no communist has ever joined the WIL because I believe that communists have joined all different kinds of organizations from the Catholic Church right on down to the smallest local committee that might have been formed for any social purpose * * *."

If the WIL is indeed a "front," as so glibly testified by Manning Johnson (who had also testified that Dr. Ralph Bunche was guilty of subversive activities (Tr. 911)) and by Maurice Malkin (who had served a term in Sing Sing for illegal activities in a New York fur strike), and if contact with the WIL is made criminal by KRS §432.040 regardless of guilty knowledge or criminal intent, then it is clear that no Kentuckian can safely join any organization whatever. It matters not whether the founders and leaders of the organization are among the noblest and most loyal citizens of our country. It matters not that its declared purposes are consistent with our best traditions of humanity and non-violence. It matters not that the defendant believes its declaration of purposes and

adheres to the organization only because he approves them. The only question is whether "in fact"—the "facts" being supplied by such witnesses as Johnson and Malkin—the organization is an instrument of CP policy. And as an aid to the jury's understanding of the "facts", the prosecution is permitted to blacken the organization by a line of questioning (based on unsubstantiated hearsay) which suggests by innuendo that it is a "front" because it received money a quarter of a century ago from a certain fund, or because a piece of "communist literature" refers to it with approval, or because someone has said that "active communists and socialists" helped organize it.

Nor is it necessary to prove that the defendant had even joined the organization. The defendant, not being a woman, was not eligible for membership in the WIL and did not belong to it (Braden, Tr. 1795, 1824). Apparently the only connection between the defendant and the WIL was that he knew Mrs. Pearson, its corresponding secretary (whom Mrs. Ahearn named as a CP member), and that Mrs. Pearson had written a letter begging tolerance for the Wades whom defendant had assisted in the purchase of their house.

The defendant's connection with other alleged "front" organizations was almost equally remote. To some of them he did not belong but made small monetary contributions because he approved their declared purposes. Others published literature which he had in his home, but he had had no other contact with them. In one case his only connection with the organization was that he had corresponded with it on a single

occasion (Braden, Tr. 1792-1797, 1799-1800, 1815-1823). On this slight predicate the record was loaded with highly prejudicial testimony about dozens of organizations, only a few of which were shown to have had any activity in Jefferson County at all.

The constitutional right of peaceable assembly includes the right to join or otherwise support organizations established for the purpose of advancing views on controversial social and political issues. Only through such organizations can ordinary private citizens make their voices heard. Not everyone is able to publish a book or pamphlet, or write a newspaper editorial. Most of us must join with other people in clubs or lodges or trade unions or political parties and count on these organizations to make our views known and urge their acceptance by the powers that be. This is the very stuff and substance of the democratic process. If no one dared speak except with his own individual voice, few Americans would ever speak at all on the great public issues of the day.

We submit that this right of peaceable assembly is hollow and meaningless unless one can join or support an organization with impunity so long as he himself has no knowledge of its evil purposes, if any, and no intent to further such purposes. Otherwise such membership or support becomes so hazardous that few would risk it. In order to be safe from a 21 year prison term and a $10,000 fine, one who is asked to join even a Parent-Teachers Association must not only satisfy himself that its avowed purposes are legal but must make sure that none of its officers or influential mem-

bers has "infiltrated" the organization by joining it for ulterior and illegal purposes. He must also beware of the possibility that such "infiltration" may take place after he has joined or contributed to it or been placed on its mailing list, and must promptly and publicly repudiate it if this should happen. As a matter of fact, even this is not enough; for he is still unsafe if an officer of the organization, though in fact actuated only by the purest of motives, is accused—as Jane Addams, twenty years after her death, has been accused by Maurice Malkin—of being a CP member. The Constitution does not permit such hazards to be erected against organizational activity.

It must not be supposed that the reference to Parent-Teachers Associations is far-fetched. The prosecution witness Cvetic made clear the wide variety of organizations which, according to him, had been converted into "fronts" by CP "infiltration" (Tr. 1178-1181):

> "The basic program of the Communist Party of course was to divide and conquer, to turn race against race and creed against creed, and the purpose of all this being very subtly by infiltrating groups and organizations, by setting up what has commonly become known as a communist front organization. I mentioned, as I recall, that I helped to set up the Civil Rights Congress, the American Committee for the Protection of Foreign Born, the American Peace Crusade, the American-Slav Congress, and others. And then another method was to infiltrate the American Trade Union movement and there get into key positions of trust, and to use as a basis for revolution

against the United States. For example, a communist will pose as a trade unionist, but his real motive in the trade union will not be the benefit of the workers, but rather to use his base there to promote communist revolution, and the same thing with civil rights, ostensibly hiding behind a camouflage of fighting for civil rights and actually what he's trying to do is promote communist revolution which if successful would put everybody into the Kremlin orbit and then they would perpetuate themselves here like they have in China and Soviet Russia with the use of forced labor and mass murder, and this is all done by subversive tactics, by camouflaging their real aims behind, for example, they preempted something that they called the Progressive Party some years ago which in Western Pennsylvania we set up right in Communist Party headquarters, and this Progressive Party, which was set up and directed by the Communist Party was actually set up as a coalition party, as the communists called it, and the idea of this Progressive Party, for example, was to set up a coalition party like they did in some of the other countries where the communists took over, and so they called it the Progressive Party. We called it a coalition party of communists and progressives, and the progressives being those all who were willing to work with the Communist Party. According to the Communist Party, if you are not willing to work with the Communist Party, then you are not a liberal or progressive. But I am sure that many people who joined it did not know the communists' aim was then if they were successful in taking over the country the next step was to liquidate the rest of the Party and the communists would take over themselves.

25Q. You spoke of infiltration. Was there any infiltration or attempt to infiltrate into the churches?

A. Yes. When I mentioned infiltration, the infiltration tactics of the communists, especially today, is to gain respectability. One of the last instructions—despite the fact that I had to ostensibly give up my religion, because I was taught early in the Party that everything we did was based upon materialism, that there was no God and I had to ostensibly give up my religion to convince the communists that I was a good communist—nevertheless in 1949 I was directed by the Communist Party to join some church, and the way they put it, 'Comrade, any church, you don't have to believe that crap they teach you, but maybe you can even get on the church committee and do something for the Communist Party.' During my work in the Party I've seen communists posing as clergymen of the various faiths, and I would like to point out if you are a communist you can't be a clergyman, because a communist doesn't really believe in God, and that is the position of the Communist Party now to infiltrate the churches, our educational system, all for a purpose—the churches to give them a respectable basis from which to operate, and the educational system to indoctrinate the minds of our youth in communist ideology; infiltrate the trade union movement to use it as a basis of revolution; to infiltrate our veterans' organizations, our armed forces, and actually any place they can get their foot in the door, that's where they are going. As a matter of fact, when one of the rats gets in, it leaves the door open for the rest of them to crawl in.

26Q. Mr. Cvetic, may I ask you specifically if one of the organizations of infiltration was the parent-teachers association?

A. Yes, sir. That comes under the heading of education, and especially today when the communists are desperately trying to find respectability and hiding their real Party membership, they are certainly trying to infiltrate the PTA."

It is important to note that the existence of "infiltration" which converts an apparently wholesome organization into a "front" depends entirely on the motives of the "infiltrators"—not on their acts as members of the organization, or on the knowledge of their motives by the other members. The prosecution witness Glatis made this plain (Tr. 609-610):

"I would say that good movements are used by the Communist Party for agitation and propaganda purposes. I received specific instructions in 1949, for example, that we were to infiltrate fraternal, civic, veterans organizations. They are good organizations. They are organizations with good programs. But the point was there for us to infiltrate these organizations and suddenly use these for a basis of propaganda and agitation.

129Q. By the word 'infiltrate' you mean join?

A. Join with a purpose of ulterior motives. If we have a PTA, as an example, any teacher, any mother joining the PTA association has the best interests of her child at heart. A Party mother who joins the PTA association has other interests at heart, the promotion of agitation and propaganda."

As has been shown in Point I of this brief, the theory of our Constitution is that "the fitting remedy

for evil counsels is good ones." If we allow an organization to be outlawed simply because a few unworthy people succeed in joining it, we give them far more power than they would otherwise have. We give them the power to destroy the whole fabric of wholesome organizational activity on which our democratic processes are based. We must bear in mind the warning of James Madison, Father of the Constitution (*Federalist Papers,* No. 10):

> "Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency."

Glatis gave a specific example of the creation of a "front" organization, known as "The East Boston Tenant's Committee to Protest Evictions." The example is instructive because it graphically shows the injustice of condemning all who support such organizations. The construction of an express highway in the East Boston area necessitated the removal of a number of houses, with consequent eviction of the families living there as tenants. These tenants felt, of course, that they had a real grievance. Five CP members, including Glatis, called a meeting to protest the evictions. 500 to 700 people attended, and were addressed by one of the CP members. The speaker criticized the Marshall Plan, saying or implying that the money which was being sent overseas should be

used to supply Federal housing for the evicted tenants. 300 of these people went to the Boston Housing Authority and protested the evictions. 65 Daily Worker subscriptions were sold. Six people were found who became CP members (Tr. 591-596). Glatis emphasized that the members of the organization, other than the five CP members who organized it, were "duped" by the CP (Tr. 612-613):

> "133Q. Mr. Glatis, I wonder if you could tell us a little bit more about that program you were describing a little while ago about getting dupes into these organizations, these front organizations. How do you go about that?
>
> * * * * * * *
>
> A. As I stated to you before, when I said 700 people, those were round figures, 500 people came down to this particular meeting, these people were in fact duped by the Communist Party. I base that on the fact that the Communist Party had plotted this and was using as an instrument for this the East Boston as a committee to protest the eviction. These people had no idea whatsoever that this was the Communist Party."

Does our Constitution make it possible to punish the 700 tenants who "voluntarily assembled" with this organization, or the 300 who protested to the Housing Authority, or the 65 who subscribed to the Daily Worker, or even the six who joined the CP, without proof of guilty knowledge or criminal intent on their part? KRS §432.040, and the instructions given to the jury in the present case, say yes. We submit that, under the Kentucky and United States Constitutions, the answer must be no.

Parenthetically it may be noted that the organization of the East Boston committee casts an interesting sidelight on the question of clear and present danger. Glatis assisted with this enterprise even though he was at the time an F.B.I. employee. It is a fair inference that the F.B.I. thought it created no threat to the security of the Government, and it obviously did not. It eventuated in an apparently peaceable protest to a municipal agency, and perhaps in some grumbling about the Marshall Plan.

This is not the only instance disclosed by the record in which the F.B.I. permitted its agents to do things which in Kentucky would be criminal under KRS §432.040 as applied by the Court below. Cvetic helped organize various "fronts" (*supra,* p. 309). Mrs. Edmiston, while an F.B.I. employee, circulated a CP election petition and obtained signatures on it (Tr. 144). Her husband, while an F.B.I. employee, distributed at least one copy of one of the allegedly seditious books found in defendant's home. He testified (Tr. 751):

> "186Q. Now, the instructions that the FBI gave to you was not to engage in any activities that were actually subversive, is that right?
>
> A. That is correct. Any that were actually subversive.
>
> 187Q. And under their instructions, the distribution of literature was not subversive or seditious?
>
> A. That was their position on it, sir."

But the most striking example is afforded by the case of Alberta Ahearn herself. She admitted that, at

the F.B.I.'s request, she had joined the CP in Jefferson County. Under the terms of KRS §432.040, as literally applied by the instructions in this case, she was guilty of a felony. Even her anti-seditious purpose would not excuse her.

Let us return briefly to the case of the six "dupes" in the East Boston Committee who joined the CP. Perhaps it will be contended that the constitutional rule requiring proof of guilty knowledge and criminal intent does not apply to this particular organization. We have already shown, of course, that the Supreme Court has held otherwise on general due process grounds, and that a specific Federal statute (50 U.S.C. §783(f)) has reinforced the due process clause in this respect. But it is interesting to note that this very record shows how at least six people could be "duped" into joining the CP; or, stating the matter differently, that people may join even the CP because they approve of certain entirely legitimate aims which it professes—such as justice for evicted tenants—without believing that it advocates sedition, and without intending to further seditious advocacy.

One of the declared objectives of the CP is equal treatment of the white and colored races. Whether or not this humanitarian objective is sought in good faith, the power of its appeal should not be underestimated. It explains why the two Negroes called by the prosecution as "experts", Johnson and Patterson, joined the CP and served as dedicated members for ten and seven years respectively (Johnson, Tr. 831, 890-891, 905; Patterson, Tr. 1108-1109, 1133-1134).

And it may explain the membership of many others among the 30,000 persons who Glatis said are CP members at the present time (Tr. 595).

It is inconceivable that all of these 30,000 are subject to fine and imprisonment regardless of their own knowledge and intent. As has been noted (*supra,* pp. 38-40), even the Nuremberg Court was unwilling to pronounce such judgment on members of the Gestapo and the S.S. The Smith Act takes care to punish only those who are members of a seditious organization *"knowing the purposes thereof"* and those who circulate seditious literature "with intent to cause the overthrow or destruction" of any government in the United States (18 U.S.C. §2385). And, as has been shown, the Internal Security Act of 1950 squarely forbids the punishment of CP membership, or even the holding of office in the CP, *per se* (50 U.S.C. §783(f)). We submit that this is the minimum command of Section 11 of the Kentucky Constitution and the due process clause of the Fourteenth Amendment, and that KRS §432.040 and the trial Court's instructions must therefore be held unconstitutional.

VIII. OTHER PREJUDICIAL ERRORS ADDED TO THE UNFAIRNESS OF THE TRIAL.

This brief would not be complete without a reference to two additional errors, each of which in itself would require reversal: the complete disregard of the normal order of proof, and the prejudicial nature of the prosecution's closing argument to the jury.

(1) Although the trial Court has discretion to allow some departure from the conventional order of proof, certain minimum requirements of orderly procedure must be observed. All possibility of rational consideration of the evidence by the jury disappears where the evidence is thrown in completely at random, as it was in this case.

Ordinarily the first subject of proof is the *corpus delicti.* The most careful reading of the record leaves one in doubt as to what the trial Court considered the *corpus delicti* to be, and when if ever it was proved. After proof of the Wade house bombing had been received, defense counsel moved that the prosecution be held to have elected this act of force and violence as the basis of the charge, and to be precluded from offering evidence on other subjects (Tr. 297-298). Had this motion been granted the defendant could not have been required to meet three separate groups of charges at once. But the motion was overruled, and thereafter the defendant was tried simultaneously on the Wade house matter, the literature charge, and the assembly charge.

From the very outset the prosecution was permitted, over objection, to depart from the proper order of proof by introducing the testimony of Mrs. Edmiston, its first witness, who knew nothing whatever about the defendant or anything he had said or done (Tr. 39-42). From that time on, evidence was repeatedly received "subject to connection," and as often as not was never connected. But the most highly prejudicial irregularity occurred when Mrs. Ahearn was allowed to appear as a rebuttal witness to give testimony which was ad-

missible only as part of the prosecution's case in chief, if at all.

In its case in chief, the prosecution endeavored to prove that defendant was a CP member. That was the only possible purpose of introducing the souvenir Russian Constitution (Ex. 33) and the "dues letter" (Ex. 82), discussed in Point V, *supra.* The defendant's testimony that he had never been a CP member responded to the issue thus tendered; it imported no new affirmative issue justifying rebuttal. Yet Mrs. Ahearn was permitted to testify in rebuttal, over objection and exception, that defendant was a CP member.

The effect of Mrs. Ahearn's testimony was far greater than if it had been introduced in chief. If it had been so introduced, and the defendant had *then* voluntarily taken the stand to deny the truth of what she had said, the jury might have attached considerable weight to his testimony because of its voluntary character. The defendant was deprived of this advantage under the procedure actually followed, which also served to maximize the impact of Mrs. Ahearn's testimony by reserving it to the very end of the trial. The case was submitted to the jury the same day that she finished her testimony.

There was no showing of any "good reason in furtherance of justice," as required by CCP §224, for the admission of the Ahearn testimony. As was held in *People* v. *Castree,* 311 Ill. 392, 143 N. E. 112 (1924), the prosecution should not be permitted to close its case and then introduce important evidence in rebuttal,

without showing a reason for its failure to introduce it in chief. And where prejudice to the substantial rights of the defendant is shown, the admission of such evidence is reversible error. 53 Am. Jur., tit. *Trial,* §128.

(2) The prosecution's closing argument to the jury (Tr. 2432-2470) is a monumental appeal to passion and prejudice, and due objection was made on that ground (Tr. 2470). It must be read in its entirety to be fully appreciated, but a few references will suffice to show its character.

It denied the right to peaceable expression of opinion (Tr. 2441; see also Tr. 2432):

> "* * * I submit to you that if Braden's opinion [is] that communism is the better form of government, let Braden keep that opinion to himself."

It castigated the defendant for his opinions on the Korean War, universal military training, and the admission of the present Chinese government to the United Nations (Tr. 2455-2456, 2460).

It called upon the jury to condemn communism as such, ignoring the statutory and constitutional requirement that advocacy of unlawful means must be proved (Tr. 2449; see also Tr. 2456):

> "Sedition is communism and communism is sedition. There is no distinction."

It referred to the danger of foreign attack (Tr. 2432-2433) and to the "awful responsibiilty which your neighbors have put upon you here" (Tr. 2469).

It repeatedly referred to items of literature not shown to have been circulated by the defendant or possessed by him with intent to circulate, such as the Foster quotation contained in the House Committee pamphlet (Tr. 2439-2440); the Bacteriological Warfare exhibit (Tr. 2455); and the "Comet" leaflet (Tr. 2455). The error resulting from their admission was thus compounded.

It reviewed at great length the evidence relating to the Wade house purchase, which was legal in itself and untainted by any seditious purpose, and the evidence relating to the bombing, for which the defendant was not responsible (Tr. 2437-2439, 2462-2465).

This Court has repeatedly condemned arguments which appeal to passion and prejudice. *Goff* v. *Commonwealth,* 241 Ky. 428, 44 S. W. 2d 306 (1931); *Meland* v. *Commonwealth,* Ky., 280 S. W. 2d 145 (1955) and cases there cited. As Chief Justice Stone said in *Viereck* v. *United States,* 318 U. S. 236, 248 (1943):

> "* * * we do not doubt that these remarks addressed to the jury were highly prejudicial, and that they were offensive to the dignity and good order with which all proceedings in court should be conducted. We think that the trial judge should have stopped counsel's discourse without waiting for an objection. 'The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it should win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant

> of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' *Berger* v. *United States,* 295 U. S. 78, 88. Compare *New York Central R. Co.* v. *Johnson,* 279 U. S. 310, 316-18."

If there were any doubt that the jury's verdict was the result of passion and prejudice, the severity of the sentence would remove it. A sentence of 15 years and $5,000 is beyond the bounds of rational punishment for belonging to the CP and circulating a few books and pamphlets. Even the persons who organized the CP in the United States, and whose convictions were upheld in *Dennis* v. *United States, supra,* were sentenced only to five years imprisonment and a fine. The sentence in the present case can only have resulted from the jury's passionate disapproval of the defendant's lawful purchase of the Wade house. Such a conviction and sentence cannot be allowed to stand.

IX. FEDERAL LEGISLATION ON THE SUBJECT OF SEDITION HAS PRE-EMPTED THE FIELD, SUPERSEDING THE KENTUCKY STATUTES ON THAT SUBJECT.

The Supreme Court of Pennsylvania has recently held that the Smith Act of 1940 (18 U.S.C. §§2384-2385) supersedes state legislation on the subject of sedition and brings this field of regulation wholly under Federal control. *Commonwealth* v. *Nelson,* 377 Pa. 58, 104 A. 2d 133 (1954). Certiorari has been granted by the United States Supreme Court (348 U. S. 814 (1954)), but as of the time this brief is written the case has not been decided by that Court.

There is no need to analyze the Pennsylvania Supreme Court's ruling in detail. Its basis is sufficiently indicated by the following passage from its opinion (104 A. 2d at p. 139):

> "A state's jurisdiction of crime can extend only to acts committed within its borders. And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, it is only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has any one pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania. Indeed, it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States,—the Union of the forty-eight component States. Conversely, the duty of suppressing sedi-

> tion within a State rests directly upon the Federal Government by virtue of Article IV, §4, of the Constitution which charges the National Government with the duty of guaranteeing 'to every State in this Union a Republican Form of Government.' This positive constitutional mandate Congress undertook to carry out in the original Smith Act, 54 Stat. 671, by expressly making it a crime for any one to advocate, etc. the overthrow or destruction by force or violence of '*any* government in the United States'. The same interdiction was expressed in the 1948 revision of the Smith Act, 62 Stat. 808, as being applicable to the attempted overthrow or destruction of 'the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein * * *.' 18 U.S.C.A. §2385. Federal pre-emption could hardly be more clearly indicated." (Emphasis by the court.)

The Nelson prosecution, like the case at bar, was based on a statute dealing with sedition against the State as well as the Federal Government. The Nelson indictment, like the indictment here, contained charges of seditious advocacy against both the State and Federal Government.* The Nelson record, like the present record, contains no evidence of seditious activity, by the defendant or anyone else, against the State Government alone. Thus the Nelson decision, unless reversed, is clear authority for the quashing of the present indictment.

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*This does not appear from the *Nelson* opinion, but is disclosed by an examination of the indictment.

But even if the *Nelson* case should be reversed by the Supreme Court, it would by no means follow that KRS §432.040 should be upheld against the claim of Federal supersession. The *Nelson* case involves only supersession by the Smith Act of 1940. It gives no consideration to a number of additional Federal statutes enacted subsequent to the occurrences on which the Nelson indictment was based but prior to the indictment in the present case—the Internal Security Act of 1950 (50 U.S.C. §§781-798) and a group of 1954 statutes including the Communist Control Act of 1954 (50 U.S.C. §§841-844). The 1954 legislation is collected and analyzed in Note, *Federal Anti-Subversive Legislation of 1954,* 55 Columbia Law Rev. 631 (1955).

Even if it should be thought that the 1940 Smith Act does not fully occupy the field and supplant all state legislation therein, there would seem to be no doubt that the more recent Federal statutes do so. They constitute a complete and comprehensive scheme of regulation in an area where the paramount interest is national in character, and where the need for uniformity in administration and enforcement is clear. Under these circumstances there is no room for state statutes such as KRS §§432.020, 432.030 and 432.040. So long as the Federal legislation remains on the books these Kentucky statutes are legal nullities, and should be so declared by this Court.

CONCLUSION.

The judgment of conviction should be reversed. The indictment should be quashed and the statute on which it is based should be declared unconstitutional. And even if the statute and the indictment could be held valid, the many prejudicial errors in the proceedings below would require a new trial.

Respectfully submitted,

LOUIS LUSKY,
ROBERT W. ZOLLINGER,
Attorneys for Appellant.

Braden's conviction was overturned by Kentucky's highest court in June, 1956; remaining charges against him and others were dismissed without trial in November 1956.

APPENDIX A

INDICTMENT.

THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT, CRIMINAL DIVISION

September Term A. D., 1954

THE COMMONWEALTH OF KENTUCKY

Against

LaRue Spiker, Louise Gilbert, I. O. Ford, Carl Braden, and Anne Braden

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, accuse LaRue Spiker, Louise Gilbert, I. O. Ford, Carl Braden and Anne Braden, of the crime of advocating, suggesting or teaching the duty, necessity, propriety or expediency of criminal syndicalism or sedition, or of printing, publishing, editing, issuing, or knowingly circulating, selling or distributing, or having in their possession for the purpose of publication or circulation any written or printed matter in any form advocating, suggesting, or teaching criminal syndicalism or sedition, or of organizing or helping to organize, or becoming a member of, or voluntarily assembling with any society or assemblage of persons that teaches, advocates, or suggests the doctrine of criminal syndicalism or sedition, committed in manner and form as follows, to-wit:

The said LaRue Spiker, Louise Gilbert, I. O. Ford, Carl Braden, and Anne Braden, in the said County of Jefferson, and before the finding of this indictment, did knowingly and feloniously, by word or writing, advocate

or suggest the duty, necessity, propriety, and expediency of physical violence, intimidation, terrorism, or other unlawful acts or methods to accomplish a political end or to bring about political revolution, and did advocate or suggest by word, act, or writing, public disorder, or resistance to, or the change or modification of the Government, Constitution, and laws of the United States and the Commonwealth of Kentucky, by force, violence, or other unlawful means, and did knowingly circulate, sell, or distribute, and did have in their possession for the purpose of publication or circulation, written or printed matter, advocating, suggesting, and teaching criminal syndicalism, or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence, or other unlawful means, and did become members of a society or assemblage, and did assemble with persons teaching, advocating, or suggesting the doctrine of criminal syndicalism or sedition, or the change or modification of the Government of the United States and the Commonwealth of Kentucky by force or violence or other unlawful means; CONTRARY to the Statutes in such cases made and provided, and against the peace and dignity of the Commonwealth of Kentucky.

/s/ A. SCOTT HAMILTON
Commonwealth's Attorney

APPENDIX B

INSTRUCTIONS GIVEN TO THE JURY.

1. If the Jury believes from the evidence in this case beyond a reasonable doubt that the defendant, Carl Braden, in this county, before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, did print, publish, or knowingly circulate, sell, distribute, publicly display, or if you believe from the evidence beyond a reasonable doubt that he in this County, before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, had in his possession for the purpose of publication or circulation, any written or printed matter in any form advocating, suggesting or teaching criminal syndicalism or sedition, or if you believe from the evidence beyond a reasonable doubt that in this County before the finding of this indictment and after January 1, 1947, the date specified in the Bill of Particulars, the defendant Carl Braden organized or helped to organize or became a member of or voluntarily assembled with any society or assemblage of persons that taught, advocated or suggested the doctrine of criminal syndicalism or sedition, you shall find the defendant guilty as charged in the indictment and fix his punishment at confinement in the penitentiary for a term of not more than 21 years, or a fine of not more than $10,000.00, or both in your discretion.

2. The Jury will not consider for any purpose against the defendant Exhibits #33, The Constitution of the Union of Soviet Socialist Republics; #82, Dues Report Letter; #54, Minutes of the American Peace Crusade; or #91, Strategy and Tactics, unless you believe from the evidence beyond a reasonable doubt, that the said Exhibits were found in the home of Carl Braden at the time of the search and seizure referred to in the evidence.

3. The words criminal syndicalism as referred to in these instructions mean any person who commits, aids, or counsels any crime, physical violence, destruction of property, intimidation, terrorism, or other unlawful act or method to accomplish any political end or to bring about political revolution.

The word sedition as used in these instructions means any person who advocates or suggests by word, act, or writing, any public disorder or resistance to or the change or modification of the government, Constitution, or laws of the United States or of this State by force or violence or by any unlawful means.

4. The Jury are instructed that if there be a reasonable doubt of the defendant's being proven to be guilty, he is entitled to an acquittal.

5. If the Jury find the defendant not guilty, they will write their verdict in the following form on the back of the Instructions: We, the Jury, find the defendant (naming him) not guilty. If the Jury find the defendant guilty, they will write their verdict on the back of the Instructions thus: We, the Jury, find the defendant (naming him) guilty, as charged in the indictment, and fix his punishment at (indicating the punishment).