United States Circuit Court of Appeals Masses Publishing Statement

September 1917

Masses Publishing Co. v. Patten

United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

MASSES PUBLISHING COMPANY,
Complainant-Appellee,

vs.

THOMAS G. PATTEN, Postmaster, etc.,
Defendant-Appellant.

Statement.

Appeal pursuant to Section 129 of the Judicial Code, from an interlocutory order of the District Court for the Southern District of New York, granting an injunction *pendente lite*. The appellant is the Postmaster of the City of New York; the respondent the publisher of a monthly periodical called "The Masses"; the order appealed from directs the Postmaster to forward the August issue of "The Masses" through the mails forthwith.

A bill in equity was filed in the District Court on July 12th, 1917, by the Masses Publishing Company against Thomas G. Patten, Postmaster of the City of New York, for the purpose of compelling him to transmit through the United States mails certain copies of the August, 1917, issue of "The

Masses" which had been declared by the Postmaster General "non-mailable matter" within the meaning of Title XII of the Act of June 15, 1917, commonly known as the Espionage Act. The bill recites that the magazine in question has circulated for a number of years and been transmitted through the mails upon payment of the postage required of second class matter; that between July 1, and July 5, 1917, many hundred copies of the August issue were delivered to the Postmaster properly wrapped and addressed, and postage thereon paid; that on August 5, the Postmaster notified the publishers that the said issue had been declared "non-mailable under the Act of June 15, 1917"; that the magazines are still held by the Postmaster and he refuses to permit them to be delivered or transmitted from the Post Office. Then follow allegations that the act of the Postmaster is unauthorized and unlawful; that no hearing has been given to the publisher who has been unable to ascertain specifications of the alleged unlawful matter and that the continuance of the refusal to transmit through the mails will work irreparable injury to the publisher, for which no adequate remedy exists at law.

Simultaneously with the filing of the bill, an order was obtained directing the Postmaster to show cause why an injunction should not issue *pendente lite* restraining him from treating said issue as non-mailable and commanding him forthwith to transmit said magazines through the mails in the usual way. In support of this motion, affidavits were submitted, somewhat elaborating the allegations of the bill and laying especial stress upon an interview between the business manager of the publisher and the Solicitor for the Post Office Department, in which the former offered to strike from the magazine any objectionable matter and

the latter declined to specify the objectionable portions or to discuss the provision of the law against which he thought it offended.

In opposition to the motion, affidavits were submitted by the Postmaster General and the Solicitor of the Post Office Department, in which four cartoons and four pieces of text in the August issue were specified as more particularly in violation of the Espionage Act and certain articles and cartoons in the June and July, 1917, issues of "The Masses" and the June issue of "Mother Earth" were referred to as bearing upon the meaning intended to be conveyed by the cartoons and articles in the August issue, and the interpretation that would be placed thereon by habitual readers and subscribers to the periodical. The affidavit of the Solicitor for the Post Office Department states that the said earlier issues of "The Masses" and of "Mother Earth" were taken into consideration in determining the question as to the mailability of the August issue; that both the Attorney General and Judge Advocate General Crowder were consulted with before the said issue was declared nonmailable; that the former advised that its circulation would constitute an offense under the Espionage Act and the latter, as the military officer, charged that the administration of the Draft Act and other laws affecting the military establishment of the United States, expressed the view that the necessary effect of the said issue of "The Masses" would be to cause insubordination, disloyalty, mutiny and refusal of duty in the naval and military forces of the United States, and obstruct the recruiting and enlistment service of the United States, to the injury of the service and of the Government during the present war.

Argument upon the motion for a preliminary injunction was had on July 21st and on July 24th an opinion was filed granting the application. The order was duly entered July 26, and this appeal filed and allowed the same day. A stay of the order pending determination of this appeal was granted by Judge Hough on August 4th after argument on an order to show cause.

In presenting the appellant's contention that the order was improperly granted, we will first consider the statute upon which the Postmaster General declared the issue of complainant's publication non-mailable, and then urge the following points:

1. The District Court erred in holding that the issue in question was mailable matter.

2. The District Court erred in disturbing the determination of the Postmaster General that the issue in question was non-mailable matter.

3. The District Court erred in granting an injunction *pendente lite,* irrespective of the legal rights of complainant.

The Statute.

The Act of June 15, 1917, commonly known as the Espionage Act, consists of thirteen titles and covers a variety of subjects, most of which have no relation whatever to espionage. Title XII relates to the use of the mails and reads as follows:

> "Section 1. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book or other publication, matter or thing, of any kind, in viola-

tion of any of the provisions of this Act is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: *Provided*, That nothing in this Act shall be so construed as to authorize any person other than an employee of the Dead Letter Office, duly authorized thereto, or other person upon a search warrant authorized by law, to open any letter not addressed to himself.

Sec. 2. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be non-mailable.

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

It is the obvious intent of the above title to close the United States mails to any letters or literature in furtherance of any acts prohibited by the preceding eleven titles of the Statute.

Title I, Section 3, provides:

"Sec. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to inter-

> fere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

It will be observed that this section applies only in time of war, and forbids three classes of acts calculated to interfere with the successful conduct of the war, to wit:

(a) False statements made with intent to interfere with the operation or success of the national forces or to promote the success of the enemy;

(b) Causing or *attempting to cause* insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States; and

(c) Obstructing the national recruiting or enlistment service.

The language used is simple, comprehensive and free from the slightest ambiguity. Congress designed by this legislation to curb the disloyal activities that have manifested themselves since the declaration of war, by lying statements made for the purpose of promoting the success of the enemy or hindering the successful operation of the American forces, by attempts to demoralize the personnel of the army and navy and to interfere with the raising of armies under the Volunteer and Selective Draft Acts.

The statute is one of the greatest importance to the general welfare of the nation, designed as it is

to promote the successful conduct of the great war in which this country is soon to play so decisive a part. The clear language and unmistakable intent of Congress ought not to be defeated by a false and overstrict construction of the Statute merely because it is penal in character (Per Taney, C. J., in *U. S.* vs. *Morris,* 14 Pet., 475):

> "Criminal statutes like other acts of legislation are to receive a reasonable construction with a view to effecting the purpose of their enactment." Mr. Justice Day in *U. S.* vs. *N. Y. Cen., etc. R.,* 212 U. S., 509.

The rule of strict construction of penal statutes "is not to be so applied as to narrow the words of a statute to the exclusion of cases which those words *in their ordinary acceptation* or in that sense in which the legislature has obviously used them, would comprehend." (Per Ch. J. Marshal in *U. S.* vs. *Wiltberger*, 5 Wheat., 95.)

But Congress has not stopped short with the defining and prescribing of punishment for these war time offenses; it has by Title XII declared that the United States mails shall not be used as a medium for the dissemination of letters and literature in futherance of such propaganda. Not only are such things not to be conveyed in the United States mails or delivered from any post office or by any letter carrier, but a severe punishment is provided for those who use or attempt to use the mails in the transmission of such matter. The constitutionality of legislation of this description is too well known to require more than a citation of the leading authorities.

Public Clearing House vs. *Coyne,* 194 U. S., 497;
In re Rapier, 143 U. S., 110;
Ex Parte Jackson, 96 U. S., 727.

By comparison with the statutes relating to obscene matters and lottery enterprises (U. S. C. C., §§211, 213), it will be seen that Congress has followed the language of those statutes in the enactment of Title XII of the Espionage Act. It has been uniformly held that the determination in the first instance of the mailable character of postal offerings is to be made by the Postmaster General and under Paragraph 6 of Section 10, of the Postal Laws and Regulations, the duty of determining questions of this character is assigned to the Solicitor for the Post Office Department.

Under Supreme Court decisions, that will be cited in a subsequent point, it is well established that the decision of the Postmaster General upon questions relating to the administration of his department and involving the exercise of judgment or discretion will not be interfered with by the Courts unless it appears that he has overstepped his authority or that his action was clearly wrong.

We have then a statute prohibiting the use of the mails to literature designed to interfere with the successful conduct of the war either by false statements made with the intent of promoting the success of the enemy or hindering the successful operation of the national forces, or by attempts to demoralize the armed forces or by obstructing the recruiting and enlistment service; we have a decision by the Postmaster General acting through the Solicitor for the Post Office Department, that the August issue of the "Masses" falls within the prohibited definition.

Two questions suggest themselves:

1. Was the decision of the Postmaster General correct?

2. Was it so clearly wrong that the Courts will set it aside?

POINT I.

The District Court erred in holding that the issue in question was mailable matter.

Four cartoons and four pieces of text in the August issue of the "Masses" were specified by the Postmaster General as especially falling within the definition of non-mailable matter under Sections 1 and 2 of Title XII of the Espionage Act. These cartoons and articles are fully described in the opinion of the lower court (Rec., fols. 95, 101). Concerning the Liberty Bell cartoon it says:

> "The first is a picture of the Liberty Bell broken in fragments. The obvious implication, taking the cartoon in its context with the article as a whole is that the origin, purposes and conduct of the war have already destroyed the liberties of the country. It is a fair inference that the Draft Law is an especial instance of the violation of the liberty and fundamental rights of any free people."

Concerning "the conscription" cartoon (Rec., fol. 96):

> "The import of this cartoon is obviously that conscription is the destruction of youth, democracy and labor and the desolation of

the family. No one can dispute that it was intended to rouse detestation for the Draft Law."

Concerning "Congress and Big Business," the import of the cartoon was regarded as so obvious that it was unnecessary to expatiate thereupon (Rec., fol. 99).

These cartoons were adjudged by the Postmaster General to constitute attempts to cause insubordination, disloyalty, mutiny or refusal of duty in the military and naval forces and obstructions to the recruiting and enlistment service. In arriving at that conclusion, he also took into consideration various articles and cartoons appearing in the June and July issues of the same magazine and specifically mentioned in his affidavit (Rec., fols. 59-69). One of those articles appearing in the June issue and published and mailed May 10th, after the passage of the Conscription Act had become a certainty, calls upon those who love liberty and democracy enough to give their energy, money or lives for it, to "resist conscription if they have the courage" (Rec., fols. 60-61; 83). Another appearing in the July issue, published subsequent to the passage of the Conscription Act, calls upon the young men of America to maintain the right of the individual to judge for himself whether he will go to war or not (Rec., fols. 65, 83). Still another in the July issue advocates refusal to register and obey the draft (See July issue of the "Masses," page 22, "What shall I do?"). Other cartoons and articles specified in Postmaster General Burleson's affidavit (Rec., fols. 68-69) are to the same general effect. It is claimed by the complainant that the Postmaster General had no right to look beyond the covers of the issue immediately before him in determining the ques-

tion of its mailability. But that position is unsound. The message of text and particularly of cartoons depends largely for its correct interpretation, upon the views of current and past events that have been instilled into the persons for whose consumption the text or cartoon is intended. A very large proportion of the most effective cartoons presupposes upon the part of the reader a knowledge of history, and political, social and religious propaganda, without which the cartoon would be devoid of significance or appeal. This is especially true in the case of a propagandist magazine.

Now if Section 3 of Title 1 of the Espionage Act is intended to forbid attempts to demoralize the discipline of our forces and to induce, by argument or persuasion, our citizens to refuse to enlist and to resist conscription, it is difficult to conceive of a more direct violation of the law than by the publishing of cartoons of the character immediately under consideration. Practically the only method of causing insubordination and disloyalty in the military forces and obstructing the raising of an army is by propaganda of this character. *Disloyalty in particular is a condition of mind and can be caused only by argument and persuasions.* A soldier who is convinced that he is being used as the tool of the capitalistic classes, to throttle the liberties of the nation, is certain to be insubordinate, disloyal and mutinous; a citizen who is convinced that the war is being conducted for the selfish ends of the unconscionable rich will neither enlist nor obey the draft. The learned District Judge fully recognized the inevitable effect of such propaganda. In his opinion, however, he holds that because it is *normally the privilege* of our citizens to say anything they please, in any

way they please, about the Government, and the laws and institutions of our country, *Congress could not have intended* by this Act to curtail that privilege.

The first answer to this position is that the provisions of the Act under consideration, by express language of the statute do not operate in normal times, but apply only in time of war, a period in the life of a nation in which the normal privileges of its citizens are very materially curtailed in the interests of the general welfare. With the object lesson of the Russian disorganization before its eyes, it is not a violent presumption to assume that Congress desired to avoid the possibility of similar demoralization in the American army and intended precisely what the language of the statute plainly says. Congress has called upon our *loyal* citizens to abandon their normal pursuits, to sacrifice their incomes and their lives, if need be, for the purpose of carrying the war to a successful conclusion; may it not, without an undue stretch of the judicial imagination, be construed to have intended that our *disloyal* citizens should be compelled until the war is over to forego indulgence in speech and literature demoralizing to the discipline and effectiveness of our fighting forces and pregnant with comfort and encouragement to our enemy?

The second answer to the position taken by the District Court is found in the words of Judge Rose in ruling upon the admissibility of testimony in the case of *U. S.* vs. *Baker and Wilhid* (D. C. Md., July 11, 1917):

> "As long as the law is the law, it is the duty of every man to obey it and he may not, under color or pretense of arguing against the wisdom of the law or of advocating its repeal, do anything with intent to procure its violation."

The question of intent is a question of fact and the decision by the Postmaster General that these cartoons are non-mailable involves a finding of fact by him that they were made with the intent to produce a violation of Section 3 of Title 1 of the Espionage Act. There was no evidence before the lower court to negative that finding of fact; there was abundant evidence before the Postmaster General in the June, July and August issues of the "Masses" to support it.

The fourth cartoon entitled "Making the World Safe for Capitalism" will be found on pages 26-27 of the issue under consideration. Concerning this, the learned lower Court found (Rec., fol. 98):

> "The import again is unambiguous and undisputed. The Russian is being ensnared and bullied by the United States and its allies into continuance of the war for purposes prejudicial to true democracy."

At the day this cartoon was published, a commission had set out from this country to the Russian Government for the purpose (among others) of securing the co-operation of that country in the continuance of military operations against Germany and for the resumption of hostilities by the Russian army upon the eastern front. The import of the cartoon as the lower Court properly found, is that the American Commission was going to Russia for the purpose of ensnaring the Workmen's and Soldiers' Council. The Postmaster General found that that was a false statement made with the intent to interfere with the success of our military operations and promote the success of the enemy. The learned lower Court, however, finds that the statement is one of opinion, not of fact, and that it is certainly believed to be true by

the persons making it. In this the Court clearly erred. An expression of opinion may and very often does assume the form of a statement of fact. The legal test is not what the speaker has in his mind, but the form in which his thought is expressed. A statement that the mission to Russia was sent for the purpose of ensnaring the Russian people is an expression of opinion in the form of a statement of fact, and if it is false and known by the maker to be false and made with intent to promote the military success of the enemy (all of which considerations involve the determination of questions of fact by the Postmaster General), it falls within the meaning and language of Section 3 of Title I. Upon what evidence the Court determined that the statement was undoubtedly believed to be true by the person making it, the opinion is silent; none appears in the record and courts do not take judicial notice of the good faith of sedition propaganda.

Turning now to the four passages of the text specified by the Postmaster General as in violation of the Espionage Act (which will be found at fols. 136-147 of the Record), we find references to persons resisting the conscription law as men of "genuine courage" and "heroic young men" (Rec., fols. 136-139); to Emma Goldman and Alexander Berkman, convicted of conspiracy to urge people to violate the Selective Draft Act, as "elemental forces, forging the love of nations" (Rec., fols. 140-141); and to the Conscription Law itself as of a class of laws which the individual "possessing a free soul" feels that *he cannot obey* (Rec., fol. 143). The Postmaster General held that these passages taken in connection with the passages in the June and July issues heretofore mentioned, constituted an obstruction to the enlistment and recruiting

services of the United States. If anything short of physically preventing the registration or enlistment of citizens can constitute an obstruction to the recruiting and enlistment service he was clearly right. On the 10th of May, 1917, according to the affidavit of Max Eastman (Rec., fols. 83-84) he published in the June issue of the "Masses" the article found on page 6 thereof and reprinted in part at folios 60-61 of the Record. At that date both houses of Congress had passed by overwhelming majorities, the Conscription Act, and it was being held in conference pending adjustment of the riders relating to prohibition and the Roosevelt Expeditionary Force. The enactment of a conscription statute by Congress and its approval by the President were as certain events of the immediate future as the rising of tomorrow's sun. And at that time this magazine outlined its propaganda with respect to the war and the statute so soon to become a law. It called upon those who love liberty and democracy "to resist the war fever, the patriotic delirium" and to "resist conscription if they have the courage." On June 10th, after the Conscription Law had been passed and approved by the President, the same magazine published as its leading article an appeal entitled "War and Individual Liberty," the concluding paragraph of which is printed in the Record at folio 65. This calls upon the young men of America to maintain the right of the individual to judge for himself whether "he will engage in destruction at the bidding of men less wise and humane than himself, or whether he will preserve inviolate the claim that a man's own estimate of right and wrong should be the ultimate arbiter of his conduct." In the same issue the editor, Max Eastman, wrote an article denying the right of the

Government to draft him to a war "whose purposes I do not believe in" and again (July issue, page 22) there was an article by Rev. John Haynes Holmes advocating refusal to register and refusal to obey the draft by those who do not believe in war. In view of the foregoing propaganda, the text complained of in the August issue clearly warrants the finding of the Postmaster General that it constitutes an obstruction to the enlistment and recruiting service.

The learned lower Court found considerable difficulty in escaping the conclusion reached by the Postmaster General on this point, but finally held that "if one stops short of urging upon others that it is their duty or interest to resist the law, one should not be held to have attempted to cause its violation" and because the writings did not "directly advocate resistance" to the Conscription Act, they did not constitute an obstruction to the enlistment or recruiting service. It is submitted, however, that no possessor of a free soul fed and nourished upon the seditious diet of the June and July "Masses" could accept the article on conscientious objectors in the August issue (Rec., fols. 142-144), without feeling that it was his duty as such to suffer any punishment rather than obey the Conscription Act. And as very truly pointed out by Judge Hough in his opinion granting a stay of the order now under review:

> "It is at least arguable whether there can be any more direct incitement to action than to hold up to admiration those who do act. *Oratio obliqua* has always been preferred by rhetoricians to *oratio recta;* the Beatitudes have for some centuries been considered highly hortatory, though they do not contain the injunction 'Go thou and do likewise.'"

Subsequent to the decision of the lower Court in the case at bar, the publishers of the "Jeffersonian," a weekly periodical edited by Thomas E. Watson of Georgia, brought a similar bill against the Postmaster at Thomson, Georgia, and sought a similar injunction *pendente lite*. The opinion of the learned lower Court, in this case was the chief reliance of the complainant in the "Jeffersonian" case. The opinion of Judge Emory Speer in the "Jeffersonian" case, denying an injunction and sustaining the interpretation of the law adopted by the Postmaster General, and here urged by the appellant is published in the New York Law Journal of September 7, 1917. He concludes his consideration of this aspect of the case with the following:

> "Had the Postmaster General longer permitted the use of the great postal system which he controls, for the consumption of such poison, it would have been to forego the opportunity to serve his country afforded by his lofty station."

POINT II.

The District Court erred in disturbing the determination of the Postmaster General that the issue in question was non-mailable matter.

Since the decision of the Supreme Court in *School of Magnetic Healing* vs. *McAnnulty*, 187 U. S., 94, it is established that relief by injunction upon a proper showing of facts may be had by a person aggrieved by a decision of the Postmaster General excluding his literature as non-mailable, *where the Postmaster General has acted*

wholly without authorization of statute. We shall consider under this point the established rules by which the Courts are guided in reviewing the determination of the Postmaster General in a case of the character of the one at bar and point out in what respects we consider they were violated by the decision now under review.

In so far as the question of a judicial review of his decision is concerned, the determination by the Postmaster General of the mailability of matter offered for transmission through the Post Office is entirely analogous to his determination as to the class of mail to which matter offered for transmission properly belongs. The rule is stated by Mr. Justice Brown in the leading case of *Bates & Guild Co.* vs. *Payne,* 194 U. S., 106, 109, as follows:

> "The rule upon this subject may be summarized as follows: that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness and the courts will not ordinarily review it although they may have the power and will occasionally exercise the right of so doing."

To the same effect see, also, *Pub. Clearing House* vs. *Coyne,* 194 U. S., 497, 508-509; *U. S. ex rel. Dunlap* vs. *Black,* 128 U. S., 40, 48; *Peo. U. S. Bank* vs. *Gilson,* 161 Fed., 286 (C. C. A., 8 Ct.); *U. S. ex rel. Reinach* vs. *Cortelyou,* 28 App. Cas. (D. C.), 570.

Even though the Court may take a different view of the law, it will not assume to reverse the

determination of the Postmaster General if the decision taken by him may fairly be called arguable. The point is neatly illustrated in the decision of Judge Lacombe in the unreported case of *Heineman* vs. *Morgan* (D. C., S. D., N. Y., June, 1913). The plaintiff, a cigar manufacturer, had offered prizes for the first correct guesses of the final standing of the teams of the National League and American Baseball Association; competitors were not bound to purchase anything for the privilege of submitting their guesses. The Postmaster General had determined that the scheme was a lottery within the meaning of the statute and the plaintiff sought to review that decision by bill in equity and injunction *pendente lite*. Judge Lacombe in denying the motion for an injunction says:

> "Whether or not the complainant's offer may fairly be called a lottery is an arguable question. I do not think it is one, but the Postmaster General has reached a different conclusion. In view of the decision of the Supreme Court in Magnetic Healing Co. vs. McAnnulty, 187 U. S., 94, Pub. Clearing House vs. Coyne, 194 U. S., 597, and Lewis Pub. Co. vs. Morgan, 229 U. S., 228, it seems to me that this court has no authority to require the Postmaster to receive complainant's literature for transmission through the mails."

We have in the preceding point called attention to certain *questions of fact* necessarily involved in the determination of the Postmaster General that the cartoon "Making the World Safe for Capitalism" rendered the August issue of "The Masses" non-mailable. They were questions as to the truth or falsity of the statements made, the belief of the person making them as to their truth or fals-

ity and the intent with which they were made. Under the rules summarized in the *Bates & Guild Co.* case, the decision of the Postmaster General upon those questions of fact is conclusive. The decision now under review contravenes this rule; it reverses the Postmaster General's findings of fact without reviewing the evidence upon which they were based, viz, the contents of the earlier issues of the publication, and without the warrant of a single allegation in the bill or moving affidavits in support of its own conclusion.

But upon the purely legal question of the interpretation to be given to Section 1, of Title XII of the Espionage Act (and that is the particular section of the law under which this proceeding arises), the construction adopted by the Postmaster General is certainly a fairly arguable construction. The affidavit of the Solicitor for the Post Office Department shows that it was concurred in by the Attorney General of the United States and Judge Advocate General Crowder (Rec., fols. 79-81). And unless it may be said that the reasons advanced in the preceding point of this brief for sustaining the construction adopted by the Postmaster General are so devoid of logic or persuasiveness as to be unworthy of classifications as arguments, the decision now under consideration must be regarded as erroneous within the rule adopted by the Supreme Court as interpreted by Judge Lacombe. But the opinion of the Court below itself conceives that the question is arguable, for it admits that the text complained of "offers more embarrassment" (Rec., fol. 124). A high respect for the learned and judicial attainments of the author of that opinion makes it impossible for us to conceive of a question so clear

as not to be fairly arguable and yet presenting embarrassment to so well trained a legal mind. We are forced, therefore, to the conclusion that the learned District Judge overlooked the well established limitations upon the courts in reviewing the determination of the Postmaster General upon questions of fact, mixed law and fact, and law alone, and we are confirmed in this conclusion by the following extract from his opinion (Rec., fol. 129):

> "The question before me is similar to what would arise upon a motion to dismiss an indictment at the close of the proof; could any reasonable man say, not that the indirect result of the language might be to arouse a seditious disposition, for that would not be enough, but that the language directly advocated resistance to the draft? I cannot think that upon such language any verdict would stand. Of course the language of the statute cannot have one meaning in an indictment and another when the case comes up here, because by hypothesis, if this paper is nonmailable under Section 3 of Title I, its editors have committed a crime in uttering it."

As already pointed out, the question before the Court in cases of the kind under discussion is not whether the publishers beyond a reasonable doubt have violated the penal sections of the law, but whether the Postmaster General beyond a reasonable doubt has overstepped his authority or misconstrued the law. The distinction is well illustrated by the decision of Judge Mayer in *Sanden* vs. *Morgan,* 225 Fed., 266, where an application was made for an injunction to restrain the Postmaster General from enforcing a fraud order issued against the plaintiff. The plaintiff had been

acquitted on an indictment for a violation of the provisions of Section 215 U. S. C. C., and the fraud order against which he sought relief was based upon the same facts as formed the basis of the indictment. The Court held that the acquittal of the plaintiff in the criminal case had no bearing upon the question as to his right to his injunction, saying in part:

> "Of course, in the criminal case involving the trial on the indictment under Section 215, U. S. C. C., the Government was bound to prove the guilt of the defendant to the satisfaction of the jury beyond a reasonable doubt. Here, under the most favorable construction to plaintiff, the burden is upon him, in effect, to prove a negative by a preponderance of evidence—that is to say, to overcome the presumption that the conclusion of the Postmaster General is right or to point out that the Postmaster General has exceeded the statutory grant of power or exercised it wantonly or maliciously. As Judge Hough puts it: 'The presumption, however, is ample to put upon a complainant a burden of proof which it is difficult to imagine him meeting on a motion for preliminary injunction.'"

POINT III.

The District Court erred in granting an injunction pendente lite, irrespective of the legal rights of the complainant.

We have sought in the two preceding points of this brief to show that the Postmaster General was right and the lower Court wrong on the question of the violation of Title XII of the Espionage Act

by the August issue of "The Masses," or at any rate, that the Postmaster General was not so *clearly wrong* that the lower Court was justified in interfering with his decision as to the conduct of the great administrative department entrusted to his control. But even if it be assumed *arguendo* that the act of the Postmaster General is unauthorized by law and constitutes a violation of the legal rights of the complainant, we confidently submit that the learned District Judge committed error in granting an injunction *pendente lite* upon the papers and under the circumstances of the case at bar.

It will be borne in mind that what was sought here and obtained was a preliminary injunction of a mandatory character—a decree not to keep things in *statu quo* until the hearing of the case upon the merits, but to compel the defendant affirmatively to act and immediately to transmit through the mails certain specific copies of the August issue of "The Masses." Now this is an extraordinary remedy of the Court of Chancery not to be granted except in the clearest case of a violation of legal rights under circumstances of immediate impending irreparable injury and after careful consideration of the interests of the public as well as those of the parties to the action. And while it is frequently said that the granting and refusing of such an injunction rests in the sound discretion of the lower Court, that discretion is not an arbitrary one but must be exercised in accordance with well established equitable rules

In *Joyce on Injunctions,* Section 118, p. 213, the rule is stated as follows:

> "As distinguished from arbitrary discretion and from a lack of discretion, sound discretion consists in an observation of the rules and

> considerations which have generally guided and influenced the Courts in granting preliminary injunctions; * * * In any given case such discretion is shown in the steady judgment with which the Judge applies the general rules to the particular facts with which he has to deal. The granting of an injunction is a matter of grace in no sense except that it rests in the sound discretion of the Court, and that discretion is not an arbitrary one. If improperly exercised in any case, either in granting or refusing it, the error is one to be corrected upon appeal."

In the case at bar, it is respectfully submitted that the discretion of the District Court was improperly exercised for the following reasons:

(1) The granting of the injunction was in disregard of public interest and contrary to public policy.

(2) The plaintiff does not come into court with clean hands, within the meaning of that familiar equitable maxim.

(3) Neither the bill nor the moving affidavits allege sufficient *facts* to establish a claim of immediate impending irreparable injury.

(1) The rule with regard to the paramount consideration of the interests of the public in the granting or refusing of equitable remedies is well stated in 16 *Harvard Law Review,* page 444:

> "There is no more distinctive attribute of the power of the chancellor than the latitude of his discretion. Equitable remedies being extraordinary they may at the chancellor's discretion be refused or given in order to do equity. And equity is viewed in this connection in a large sense; it is not only what is just

> and right as between plaintiff and defendant, but also what, according to a sound public policy, is just and right as regards the interests of the public. Thus, where the plaintiff would not otherwise have succeeded we see equity give relief because of the public benefit; and where the plaintiff would ordinarily have prevailed, refusing it because of the public harm."

An interesting case upon the point is *Commerford* vs. *Thompson,* 1 Fed. 417 (C. C. Ky. 1880), brought to compel the Postmaster to deliver certain letters to the complainant, which he held under a claim that they concerned a lottery then being conducted by the complainant. Although the Court found that the refusal of the Postmaster to deliver the letters was not warranted by existing law, it took the position that equity will not lend its aid to enforce rights which might have been enforced from a point of law, but which rested upon a transaction violative of public policy. On this point the Court says:

> "Conceding that the act of the defendant in detaining these letters was unauthorized and that the complainant might maintain an action at law for damages, it does not necessarily follow that he is entitled to an injunction. The writ of injunction does not issue as a matter of course even if the complainant has made out a technical right to relief. An application to the courts of chancery for the exercise of its prohibiting powers or restrictive energies must come by the dictates of conscience and be sanctioned by the clearest principles of justice. The granting of an application is largely a matter of discretion and is addressed to the conscience of the chancellor acting in view of all the circumstances connected with the case. A party seeking this extraordinary remedy

> must come into court with clean hands and show not only that his claim is valid by a strict letter of the law, but that in justice and equity he is entitled to this particular mode of relief."

The injunction was denied and the complainant left to his remedy at law.

The rule is very strikingly illustrated in a recent decision by Judge Hough, sitting in the District Court of this District, entitled, *Marconi Wireless Tel. Co.* vs. *Simon,* 227 Fed., 906 (aff'd 231 Fed., 1021). The complainant in that case sought to restrain the defendant from infringing upon its wireless patent in carrying out a contract for the construction of certain radio apparatus for certain vessels of war, then nearing completion. An injunction *pendente lite* was asked for. The injunction was denied, not because of any question as to the violation by the defendant of the legal rights of the plaintiff, but solely because of the paramount public interest which required the speedy completion of the war vessels under construction.

Turning now to the case at bar, an examination of the June, July and August issue of "The Masses" will demonstrate, beyond possible question, that this magazine is engaged in a vigorous campaign to thwart the successful conduct of the war. The opinion of the learned lower Court finds as a fact concerning this magazine,

> "Publications of this kind enervate public feeling at home which is their chief purpose and encourage the success of the enemies of the United States abroad to which they are generally indifferent. Dissention within a country is a high source of comfort and assistance to its enemies; the least intimation of it they seize upon with jubilation. There cannot be the slightest question of the mischievous effects

> of such agitation upon the success of the national project; or of the correctness of the defendant's position,"

and concerning the text and cartoons of the August issue, in addition to the comments already noted under Point I of this brief, the following (fol. 100),

> "Throughout the rest are sprinkled other text designed to arouse animosity to the draft and to the war and criticisms of the President's consistency in favoring the declaration of war."

It is very earnestly submitted, upon the analogy of the cases above cited, that a Court of Equity should not grant the extraordinary remedy of mandatory injunction to spread propaganda of this sort but should leave the complainant to its remedy at law, if its legal rights have been violated. This point was not argued before the learned District Judge and is not touched upon in his opinion. It was, however, submitted to Judge Speer in the "Jeffersonian" case and commented upon by him as follows:

> "There is, moreover, an additional consideration of the weightiest character, which obliges the denial of such an injunction as is here sought. An appeal is made to an American Court of Equity to oblige the Postal authorities of our country to contribute its mailing facilities for the furtherance and success of a propaganda against the nation as distinct, as it is truculent and dangerous. Under the familiar rule in Equity, such an appeal is addressed largely to the discretion of the Court. It is to be determined by the conscience of the chancellor, and always with proper regard to the public welfare. This imports the coun-

> try's welfare. And, a party seeking this extraordinary remedy, under a rule equally familiar must come into Court with clean hands. Can one be said to come with clean hands when the policy, methods, and efforts he would maintain may cause his hands to be imbrued in the blood of the demoralized and defeated armies of his countrymen? If, by such propaganda, American soldiers may be convinced that they are the victims of lawless and unconstitutional oppression, vain indeed will be the efforts to make their deeds rival the glowing traditions of their hero strain. On the contrary, the world will behold America's degradation and shame, the disintegration under fire of our line of battle, the inglorious flight of our defenders, like the recent debacle of the Russian army, brought about by methods much the same, the ultimate conquest of our country, the destruction of its institutions and the perishing of popular Government on earth. The preliminary injunction is denied."

Had this point been raised and discussed on the argument in the case at bar, we are confident that a different decision would have been rendered, for it is inconceivable that so patriotic and so public-spirited a Judge would have raised a finger to assist and encourage the dissemination of literature designed to convince American soldiers "that they are the victims of lawless and unconstitutional oppression" and to disintegrate and demoralize the armies of our nation in this great struggle for the perpetuation of democracy throughout the world.

(2) The complainant does not come into court with clean hands within the meaning of the equitable maxim.

In *Mich. Pipe Co.* vs. *Fremont, Etc., Co.*, 111 Fed., 284, 287, Judge Sanborn states the well known rule,

"A suit in equity is an appeal for relief to the moral sense of the chancellor. A Court of Equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxim:

> 'He who comes into a Court of Equity must come with clean hands'

and,

> 'He who has done iniquity cannot have equity.'

A Court of Equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. I Pom. Eq. Jur., Secs. 397, 398, 400; Medicine Co. vs. Wood, 108 U. S., 218, 227; Marble Co. vs. Ripley, 10 Wall., 339, 357."

In granting a stay of the order now under review, Judge Hough said:

"In respect of the mails, the United States is certainly not a common carrier; it is pursuing a high governmental duty (Searight against

> Stokes, 3 How., at 169; Ct. Re. Deeds, 158 U. S., at 583), and it is at least arguable whether any constitutional government can be judicially compelled to assist in the dissemination and distribution of something which proclaims itself 'revolutionary,' which exists not to reform but to destroy the rule of any party, clique or faction that would give even lip service to the Constitution of the United States."

In the first column of page 2 of the August "Masses" will be found a statement of the aims and principles of this periodical included within which is the admission that it is a revolutionary and not a reform magazine. This application, in substance, is to a constitutional court to lend the aid of its most rarely granted remedy to compel the administrative officer of a constitutional government to further a propaganda which, if successful, will result in the overthrow of both the court and the government. Compared to this complainant, the historic highwayman who sought in a Court of Equity to obtain an accounting from the partner of his crimes was a petitioner of modest and unassuming disposition.

(3) No immediate impending irreparable injury is shown. The rule is well settled that a preliminary prohibitive injunction will not ordinarily issue in cases where it is not shown that irreparable injury is immediately impending and will be visited upon the complainant before the case can be brought to final trial. The authorities upon this point may be found in 22 Cyc., 762. As stated by this Court in *Stevens* vs. *Mo. K. & T. Ry. Co.*, 106 Fed., 771:

> "The pre-requisites to the allowance of such an injunction are that the complainant must

generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant which will seriously or irreparably injure his rights under such title unless restrained."

To the same effect see:

Hall Signal Co. vs. *Gen'l Ry. Signal Co.*, 153 Fed., 907 (C. C. A., 2nd Ct., 1907, per Coxe, C. J.).

U. S. vs. *La Compagnie Francaise*, 77 Fed., 495 (C. C. S. D. N. Y., per Lacombe, C. J.).

Miller vs. *Mut. Res., Etc., Assn.*, 109 Fed., 278 (C. C. S. D. N. Y., per Lacombe, C. J.).

And, of course, the rule as to a mandatory preliminary injunction is even more strict; only *instant impending irreparable injury* will warrant the Court in compelling the Postmaster to transmit through the mails the copies of the August "Masses" that are the sole subject of this litigation.

It is elementary that it is not sufficient merely to allege generally that irreparable damage will be suffered unless the necessary relief asked for is granted; *facts* must be set forth in the bill or moving affidavit from which the Court may itself see that such irreparable injury will result. In the case at bar, neither the bill of complaint nor the moving affidavits allege that other means of distributing the copies in question are unavailable to the complainant. It is not shown whether they were destined to subscribers or to dealers; if to the latter, certainly other copies could be forwarded by express at a slightly greater expense to the

complainant. As the claim of irreparable damage is the only basis for invoking equitable jurisdiction in this case, and no facts are alleged in the bill or moving affidavits to show the Court that such irreparable damage will be suffered unless injunctive relief is given, the order granting a preliminary injunction is contrary to established principles of equity jurisprudence.

POINT IV.

The interlocutory decree should be reversed.

Respectfully submitted,

FRANCIS G. CAFFEY,
United States Attorney for the
Southern District of New York,
Solicitor for Defendant-Appellant.

EARL B. BARNES,
JOSEPH A. BURDEAU,
Assistant U. S. Attorneys,
of Counsel.

24305-