United States Circuit Court of Appeals
Brief for Appellee
Masses Publishing Co. v. Patten

6145

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FOR THE SECOND CIRCUIT.

MASSES PUBLISHING COMPANY,
Complainant-Appellee,

vs.

THOMAS G. PATTEN, Postmaster
of the City of New York,
Defendant-Appellant.

BRIEF FOR COMPLAINANT-APPELLEE.

GILBERT E. ROE,
Attorney for Complainant-Appellee,
Office and P. O. Address,
55 Liberty Street,
Borough of Manhattan,
New York City.

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Statement.

This is an appeal from an order of the District Court of the Southern District of New York granting an injunction pendente lite requiring the Postmaster of the City of New York to forward through the mails the August, 1917, issue of the magazine called "The Masses." The motion for the temporary injunction was made upon the bill of complaint and supporting affidavits of Max Eastman, the editor of "The Masses" and Merrill Rogers, the Manager of the Masses Publishing Company, the corporation owning and publishing "The Masses." The defendant appeared in opposition to the motion by Assistant United States District Attorney, Earl B. Barnes, and affidavits were filed on behalf of the defendant by A. S. Burleson, Postmaster General, and William H. Lamar, Solicitor for the Post Office Department. No answer has been in-

terposed and none of the allegations of the complaint or moving affidavits are denied. The District Court after an extended oral argument and the submission of elaborate briefs on both sides, granted the motion and an order was entered herein directing the Postmaster of the City of New York, as prayed, to transmit the August, 1917, issue of "The Masses" through the mails. It is from this order, dated July 26, 1917, that the present appeal is taken. The facts are all admitted and may be briefly summarized as follows: The defendant is the Postmaster of the City of New York. "The Masses" is a monthly magazine of about fifty pages with a circulation of from twenty to twenty-five thousand copies monthly, and has, for a number of years past, circulated freely through the Post Office in the City of New York and elsewhere and has gone through the mails in the usual way to its subscribers not only throughout the State of New York, but the other States of the United States and that it is absolutely necessary to the maintenance of the magazine and to its continued publication that it should be received and delivered and circulated through the Post Office and not be held up or discriminated against or the delivery delayed. The retail price of the magazine is fifteen cents a copy. The subscription price is One dollar and fifty cents a year. A copy of the August, 1917, issue of the magazine identical in all respects with the other copies of that issue was submitted as part of the moving papers. According to the custom and course of business of "The Masses" for a great many years, the August, 1917, issue thereof, amounting to many hundred copies, comprising particularly those intended for circulation in different portions of the United States were properly wrapped and postage paid to the Postmaster of the

City of New York and delivered to said Postmaster on and between the 1st and 5th days of July, 1917. The magazine was received at the Post Office as formerly without objection and the postage received and retained by the Postmaster. An intimation having been received by the complainant that the August issue of the magazine was not being mailed out, Mr. Rogers, for the complainant, called the Post Office at New York on the 'phone and made inquiries concerning the matter and was advised that said August, 1917, issue of the magazine was being held pending advices from Washington. Thereafter, and on the 5th day of July, 1917, defendant wrote plaintiff the following letter:

"Office of the Postmaster,
United States Post Office,
TFM New York City.
In replying please refer to initials and date.
SMC.

Publishers of "The Masses,"
34 Union Square, East,
New York, New York.

Gentlemen:

Confirming the information telephoned to you to-day you are informed that according to advice from the Solicitor for the Post Office Department, the August, 1917, issue of "The Masses" is non-mailable under the Act of June 15, 1917.

Very respectfully,

T. G. PATTEN,
Postmaster,
Per Thos. F. Murphy,
Assistant Postmaster."

M-jj

(See fols. 18-21).

The action of the defendant was taken without any hearing and will, if persisted in, completely ruin the business of the complainant (See also fols. 42-43). It further appears from the affidavit of Mr. Rogers that as soon as he received the said letter of July 5th, 1917, he went to Washington and saw Mr. William Lamar, Solicitor for the Post Office Department, inquired what part of the magazine was objected to and *"offered to strike out from said magazine any matter which the solicitor for said Post Office Department might hold to be objectionable"* (fol. 52). The solicitor of the Post Office Department refused to specify what, if any, portion of the magazine was regarded as objectionable, and refused to indicate what portion of the Act of June 5, 1917, referred to in the said letter of July 5th, it was claimed had been violated or would be violated by the mailing of the magazine (fol. 53).

The affidavit of the Postmaster General, however, specifies four cartoons and four articles. These cartoons are designated respectively:

"Liberty Bell" (see page 4 of magazine).
"Conscription" (see page 9 of magazine).
"Making the World Safe for Capitalism" (see page 26 of the magazine).
"Congress and Big Business" (see page 33 of the magazine).

The articles were entitled:

"A Question" (see page 10 of magazine).
"A Tribute" (see page 28 of magazine).
"Conscientious Objectors" (see page 29 of magazine).
"Friends of American Freedom" (see page 36 of magazine).

These articles are set out and the cartoons described in the opinion of Judge Hand and will be found in the August, 1917, issue of the magazine at the pages indicated, copies of which are being furnished by complainant for the convenience of the Court. The affidavit of A. S. Burleson is set out at pages 19 to 25 of the record. The affidavit of Mr. William Lamar, submitted on behalf of the defendant, states that the Attorney General after examining *portions* of the said August, 1917, issue of "The Masses" advised the deponent that its circulation would constitute an offense under the Espionage Act (fol. 80). As part of the affidavit of Mr. Burleson, the June and July issues of "The Masses" and the June issue of a publication called "Mother Earth" were submitted to the Court. This was done over complainant's objection and the fact that such objection was made to the consideration of said last named publications is preserved by stipulation on this appeal (see page 52). Mr. Lamar states in his affidavit that the June and July issues of "The Masses" and also the issue of "Mother Earth" in question *"were taken into consideration in determining the question as to the mailability of the August issue of 'The Masses'"* (fols. 78-79). *It appears by the affidavit of Mr. Eastman and is not disputed that both the June and July issues of "The Masses" were printed, published and mailed before the enactment of the Espionage Law.* The June issue was printed, published and mailed before the enactment of the Draft Law, having been published and mailed on May 10th. The July issue was published and mailed on June 10th. The Espionage Act did not become a law until June 15th. The Draft Act did not become a law until May 18, 1917. The copy of Mother Earth referred to in defendant's affidavits had

never been seen by the editor of "The Masses" who had never seen but one copy of that magazine and that was two years previously. (See Eastman affidavit (page 28). We are not advised whether the Postal authorities would have regarded the August issue of "The Masses" non-mailable except as they took into consideration, improperly, as we contend, the above-mentioned magazines.

POINT I.

The District Court did not err in holding that the August, 1917 issue of the masses was mailable.

The learned District Attorney in his brief, in addition to discussing the proposition involved in the foregoing point argues, as I understand him, under Points II and III of his brief that even if the August issue of "The Masses" were mailable, the District Court erred in interfering with the decision of the Postmaster General in refusing to mail it and further that even though "the act of the Postmaster General is unauthorized by law and constitutes a violation of the legal rights of the complainant * * * the learned District Judge committed error in granting an injunction *pendente lite*" (page 23 of Appellant's Brief). The very able and ingenious argument of the learned District Attorney under these two latter points hardly needs consideration. However valuable such argument might be in a case where the Postmaster was called upon to investigate and determine whether a given business was fraudulent or not, where questions of mixed fact and law may arise, it has no place in the present discussion. In this

case, we have a Statute known as the "Espionage Law" which makes it a crime to do certain things and, among others, to mail certain prohibited matter. We have a magazine presented for mailing. The Postmaster holds that to transmit the magazine through the mails is a violation of the Espionage Law. Either the law prohibits the mailing of the magazine or it does not. If it does prohibit it, the Postmaster was wholly right and the learned District Court was wholly wrong. If the law does not prohibit the mailing of the magazine, then the Postmaster was wholly wrong and the learned District Court was wholly right and the complainant had a right to have the magazine mailed and it was the duty of the Court to protect him in that right. Both the complaint and the moving affidavits allege, and it is nowhere denied, that this is a monthly magazine circulating through the mails in New York and other States and that it will wholly ruin and destroy the business of the complainant to deny it access to the mails. Even without such an allegation, anyone knows that a monthly magazine, dependent for its existence upon to subscribers to whom it goes as second class mail matter, could not possibly exist and do business if it was denied the right to reach its readers and subscribers through the mails.

I. *The Court had jurisdiction to issue the order appealed from and the proper practice was adopted by the complainant to obtain relief.*

The United States District Court has jurisdiction of all cases arising under the Postal Laws (see Sec. 24, subdivision 6, of the Judicial Code). The right and duty of the Court to interfere by injunction as was done in this case where a Post Office

Official has unlawfully denied the mails to a publication and the principles upon whch the Court acts are now well settled. If the official course of the Postmaster is not authorized by some law, the Court must so decide and grant the appropriate relief, just as it would do in any other case.

School of Magnetic Healing vs. McAnnulty, 187 U. S., 94;
Lewis Publishing Co. vs. Wyman, 152 Fed., 787;
People's U. S. Bank vs. Gilson, 161 Fed., 286.
Magruder vs. Belle Fourche Valley Water User Ass'n, 219 Fed., 72;
Whitfield vs. Hanges, 222 Fed., 745;
Post Publishing Co. vs. Murray, 230 Fed. R., 773;
Bruce vs. United States, 202 Fed. R., 98;
United States vs. Atlanta Journal, 210 Fed. R., 275;
Noble vs. Union River Logging Co., 147 U. S., 165;
Giegiow vs. Uhl, 239 U. S., 3.

The fact that the decision of the Postmaster has the presumptions in its favor cannot affect the case where the question simply is: does or does not the mailing of a certain publication violate a certain statute.

See

Bates & Guild Co. vs. Payne, 194 U. S., 106;
Public Clearing House vs. Coyne, 194 U. S., 497.

In the School of Magnetic Healing, supra, the Postmaster of the City of Nevada, State of Missouri, made an order at the direction of the Postmaster General denying the use of the mails to the complainant on the ground that his business was fraudulent. That case was decided upon the fraud order statute, which provides that the Postmaster General, upon any evidence satisfactory to him that any person was conducting a fraudulent, lottery, gift enterprise, etc., and using the mails for such purpose, could instruct the Postermasters to return the letters addressed to such person with the word "fraudulent" stamped on them (See Sec. 3929 R. S.). The lower court refused to interfere with the decision of the Post Office officials. The Supreme Court, however, reversed the decision of the lower court and said:

> "That the complainants had a hearing before the Postmaster General" (in the case at bar it will be noted that there was no hearing) "and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants, and upon what it is founded, is admitted by the demurrer, and we therefore have undisputed and admitted facts which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts it is obvious that complainants, in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not, as matter of law, cover the facts herein. Second, conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails,

and that it may provide who may and who may not use them, and that its action is not subject to review by the Courts, and also conceding the conclusive character of the determination by the Postmaster General of any material and relevant question of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the Court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order. Has Congress entrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows, beyond any room for dispute or doubt, that the case, in any view, is beyond the statutes, and not covered or provided for by them. That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the Courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual, the Courts generally have jurisdiction to grant relief."

After referring to the right which the Court had always exercised to review the decision of the Land Department, the opinion continues:

> "His (the Postmaster General's) right to exclude letters or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding, *arguendo,* that, when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not a subject of review by any Court, yet to that assumption must be added the statement that, if the evidence before the Postmaster General in any view of the facts, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact."

Exactly so in the case at bar, the facts are conceded. Either they show a violation of the Espionage Act or they do not. If they do show a violation of the law, then the order appealed from will be reversed. If they do not show a violation of the law, the order appealed from will be affirmed. This brings us directly to a consideration of the principal question of this case, namely—the construction of the Espionage Act.

2. *Meaning of the Espionage Act.*

The Court will, in this connection, of course, read and consider the entire Act, in order that its meaning and purpose may be fully appreciated. For convenience of reference, I have printed Title XII thereof and also Title I. The Act is entitled:

> "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes."

Title XII of the Act, the only one relating to the use of the mails is as follows:

"Title XII.

Use of Mails.

SECTION 1.—Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this Act is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier: PROVIDED that nothing in this Act shall be so construed as to authorize any person other than an employe 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.

SECTION 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 nonmailable.

SECTION 3.—Whoever shall use or attempt to use the mails or Postal Service of the United States for the transmission of any matter declared by this title to be nonmailable, shall be fined not more than $5,000 or imprisoned not more than five years, or both. Any person violating any 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."

Title I of the Act is as follows:

"Title I.
Espionage.

SECTION 1.—That (a) whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, air

craft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section six of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts, or induces or aids another to copy, take, make or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe,

at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, protograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both.

SEC. 2. (a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit,

to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: PROVIDED, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years.

SEC. 3. Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the mili-

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

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

SEC. 5. Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe or suspect, has committed, or is about to commit, an offense under this title shall be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or both.

SEC. 6. The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title: PROVIDED, that he shall determine that information with respect thereto would be prejudicial to the national defense.

SEC. 7. Nothing contained in this title shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial under sections thirteen hundred and forty-two, thirteen hundred and forty-three, and sixteen hundred and twenty-four of the Revised Statutes as amended.

SEC. 8. The provisions of this title shall extend to all territories, possessions, and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable hereunder.

SEC. 9. The Act entitled "An Act to prevent the disclosure of national defense secrets" approved March third, nineteen hundred and eleven, is hereby repealed."

It was contended by the defendant in the lower Court that the mailing of the magazine in question

was prohibited as well by Section 2, Title XII, as by Section 3, Title I of the Espionage Act. As I understand the contention of the appellant in this Court, no claim is made that there is anything in the magazine which would prevent its mailing under Section 2 of Title XII. That such is the position of the appellant appears not only from the general course of the argument in his brief but from the statements in the brief, page 12, 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." Title XII does operate in times of peace. Section 3 of Title I, by its terms only applies in time of war. In other words, it is not now contended by the appellant that the magazine contains *"any matter advocating or urging treason, insurrection or forcible resistance to any law of the United States"* in violation of Section 2 of Title XII. The legislative history of Title XII, however, throws a light upon the meaning of the entire Act, and will be briefly referred to in connection with the discussion of the meaning of Title I. The material portions of Section 3, Title I, supra, are as follows:

> "Whoever * * * 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, &c.

It is urged by the learned District Attorney that printed matter sent through the mails may be of a character intended or calculated to induce or

promote insubordination, disloyalty, mutiny or refusal of duty, or might be of a character to discourage recruiting, and that such printed matter would be nonmailable under Section I of Title XII, which declares any writing or matter or thing of any kind nonmailable which is *"in violation of any of the provisions of this Act."* It is obvious at once, from a consideration of the above language of the Statute that an effort is being made to piece together two unrelated statutes in order to exclude from the mails matter which does not come within the prohibition of Section I of Title XII. It seems almost too plain for argument that all that the legislature meant by Section I of Title XII forbidding the use of the mails for the purpose of transmitting anything *"in violation"* of the provisions of the Act was so that the country might not be in the ridiculous position of having convicted a spy or informer of some of the unlawful acts referred to in Title I, as, for instance, making sketches of fortifications, while the mails were still open to transmit the unlawful sketch. That is what the statute was intended to accomplish and what it does accomplish. It is the only construction that can be put on the Statute without doing violence to its language. Such a construction of Section 3 of Title I as the District Attorney contends would render the statute unconstitutional because it would leave to the unrestrained arbitrary discretion of the postmaster the determination of what offended and what did not, with no definite rule or criterion to guide him. Title I, in which is found Section 3, deals with espionage. The whole title shows that it is directed against the *efforts of spies seeking to gather or convey information concerning the military or naval forces or armaments of the United States, to the injury of*

the United States. This is admittedly the whole purpose of Section 1 and 2. Section 3, following along the same line, in the first part of the section, prohibits the willful making of *false reports or false statements,* with *intent* to interfere with the success of our military or naval forces, or to promote the success of the forces of the enemy. And it cannot be fairly contended, of course, that "The Masses" comes under that portion of the section. The section then goes one step further, and provides—*whoever,* not whatever, shall *willfully* cause or attempt to cause insubordination, disloyalty, mutiny, &c., on the part of our forces, shall be guilty of an offence, and also, whoever shall *willfully* obstruct recruiting *"to the injury of the service or of the United States"* shall be guilty of an offence, &c. Now, nothing can be plainer than that this section of the statute doesn't relate and wasn't intended to relate to public discussions, expressions of opinion, or to criticism or condemnation of the government, its policies or its laws. It doesn't relate to the use of the mails at all.

Suppose, to put the strongest case possible for the prosecution, that someone, in order to *willfully* obstruct recruiting, should mail to the registered men a pamphlet urging them to evade the draft law. Even that would not be an offence under Section 3, for which the party sending the matter could be convicted; for you would have to go one step further, and to show that this action actually resulted in injury to the service of the United States. But suppose it could be proved, not only that the pamphlet was mailed, but that it was received, and thereby the service was injured. Such person would be punished by a fine of not more than ten thousand dollars, or imprisonment for not more than twenty years, or both, under Sec

tion 3. Now, suppose the government wanted to have the pamphlet or circular mailed by such person declared "nonmailable matter," under Section 1 of Title XII, and prosecute under Title XII the sender of such pamphlet for mailing nonmailable matter. In such case the offender, under the penal clause of Title XII would be fined not more than five thousand dollars, or imprisoned not more than five years, or both. Could the offender be punished for the same act twice? The difference in the penalties shows that Section 3 of Title I was dealing with a serious military offence, that of an offence against the military and naval forces and defences of the United States. The maximum penalty provided in Title XII shows that an offence of a much milder and different character was in contemplation. By referring to the other section of Title I, the purpose becomes even plainer. Section 5 prohibits harboring suspects, who, it is believed, intend to commit the offences mentioned in the title. Section 6 gives the President power virtually to declare military areas in respect to which information prejudicial to the national defense shall not be given out. Section 7 provides that nothing in the title shall interfere with the jurisdiction of courts-martial and military commissions. Section 8 provides, among other things, that, when the offences provided for in the title are committed upon the "high seas," the same penalty shall attach. I suppose it will not be contended that it was expected that "The Masses" or other publications would be mailed upon the high seas. While Section 9 of Title I completes the argument by providing that the Act of March 13th, 1911, is repealed. That Act was entitled, "An Act to Prevent Disclosure of National Defense Secrets." And that Act is just what its title

indicates. It is directed against spies, and is intended to prevent disclosures of secrets relating to the national defense. That is precisely what Title I of the Act here under consideration is. Title I is entitled "Espionage." The Title of the Act itself declares that it is an Act, among other things, "to punish espionage." It's merely humorous to suggest, as has been done here by the government, that anything in Title I of this Act to prevent and punish the secret work of spies against our military operations, had anything to do with publishing, broadcast, opinions or arguments relating to the draft law, or the conduct of the war, or the causes of the war, or what should be our aims or objects in the war. Title XII, as it appeared in Senate Bill No. 2 was introduced April 3, 1917, reported with amendments April 17th, 1917, and again reported by Mr. Overman, with amendments, April 20th, 1917, Section 1 of that Title was as follows:

> "Section I. Every letter, writing, circular, postal card, picture, print, engraving, photograph, newspaper, pamphlet, book, or other publication, matter or thing, of any kind, in violation of any of the provisions of this Act, *or intended or calculated to induce, promote or further any of the acts or things by any provision of this Act declared unlawful,* 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."

The words italicized above, it will be observed, were omitted afterwards in conference before the bill was passed. As provided in the bill, every writing, &c., intended or calculated to induce or

promote or further any of the acts declared unlawful was rendered non-mailable. With that language in the bill, it could have been argued, with some force, that writing which was merely intended to cause insubordination was non-mailable. The omission, however, from the bill of those words, and confining the non-mailable character of the matter, so far as that section was concerned, to writings which were *"in violation"* of the provisions of this Act shows the legislative purpose to avoid having the statute used as it is being urged by the Post Office Department, namely, as a means of suppressing publications hostile in comment to the administration. The history of Section 2 of Title XII of the bill is also illuminating. That section in the bill was as follows:

> "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 of a *seditious* anarchistic or treasonable character, is hereby declared to be non-mailable."

It will be observed that the words "seditious, anarchistic or treasonable" were stricken out, and the much more definite words "treason, insurrection or *forcible* resistance of the law" substituted in the Act. The word "seditious" in the bill was omitted altogether, and nothing of the sort appears in the Act as it was finally passed. The Congressional debates upon the subject show exactly how this happened, and are entitled, I think, to some consideration by the Court in construing the law as it stands. In the Congressional Record of May 10th, 1917, page 2147, we find the following:

"Mr. Hardwick: (after reading Sec. 2 of the bill as above quoted) Mr. President, I move an amendment substituting for the words 'of a seditious, anarchistic or treasonable character' the words 'advocating or urging treason, insurrection or forcible resistance to any laws of the United States.' I will state the reason why I have suggested that modification. In conferring upon executive officers arbitrary power, it is most important, where we confer at all, that the power shall be as sharply limited and as clearly defined as human language can limit and define it. The words of a 'seditious, anarchistic or treasonable character' are words in which there is much room for construction. Something that would not be accounted treason under the principles of law applicable to this question, might be said to be, with show of plausibility and reason, of a treasonable character. Something that might not amount to sedition or insurrection under the law and jurisprudence of this country, might be said to be of a seditious or insurrectionary character.

Mr. Overman: (In charge of the bill) I will state to the Senator that if he should offer that as an amendment, I do not object to it.

Mr. Hardwick: That is the first one?

Mr. Overman: I will accept that. I am glad to accept it.

Mr. Hardwick: Then we agree to that, and of course, I do not care to discuss it any further. If we use language that is already defined by the courts, and has a precise and fixed meaning in the jurisprudence of every civilized country, there is less room for abuse of power

than if this doubtful and vague language were left in."

So it was that the amendment was agreed to. Can it be supposed for one moment that the Senate, anxious to so limit the powers of the executive officers that they would not leave in the bill the fairly specific words "matter of a seditious, anarchistic or treasonable character" intended to confer upon postmaster and mail carriers all over the country the discretion to exclude from the mails any matter which they thought might obstruct recruiting? The language of Section 3 of Title I is sufficiently definite and specific when a defendant is put on trial for violating it before a court and jury, with both sides represented, witnesses examined and cross examined, the defendant heard, and the question of motive inquired into. But it is a flat contradiction of the record which Congress has made upon this subject, to assume that it intended to allow Post Office officials *ex parte* to say that a newspaper *per se* was "in violation" of some of the provisions of Section 3 of Title I, and therefore exclude it from the mails. Moreover, the Court will observe that all the prohibitons in Sec. 3 of Title I are directed at a person not at the mailable character of an article. It says "whoever * * * shall *willfully*" make or convey false reports with *intent* to interfere with the success of military operations and *whoever* shall *willfully* cause or attempt to cause insubordination, etc., and whoever shall *willfully* obstruct recruiting to the injury of the service of the United States shall be punished, etc. Now, it is of the very essence of an offence under this Section that it should be committed *willfully* and that it should be committed with *criminal intent* yet the purpose or intent or knowledge for that

matter of the person seeking to mail nonmailable matter should have nothing to do with the question whether the Postmaster should receive it or not. If the matter offered for mailing is obscene, it is nonmailable under another statute; if it is of a character to permit fraudulent practices, it is nonmailable under still a different statute; if it is of such a character as to amount to advocacy of treason, insurrection or forcible resistance to the law, it is nonmailable under Section 2 of Title XII. In all these cases, the object of the statute clearly is to prevent the mails being used to send through it matter of the character described. The person presenting it for mailing may be entirely innocent and have absolutely no knowledge that the matter offered is of a character which renders it nonmailable, but that makes no difference and should make no difference so far as accomplishment of the object of the statute is concerned, to wit: to prevent the mails being used for the transmission of matter which Congress, *in its judgment,* says should not go through the mail. But if you are going to treat Section 3 of Title I of this Act as having any relation to mailable matter, all this has to be changed. It is no violation of Section 3, Title I to mail "false reports or false statements" unless it is done *willfully* and with the *intent* to interfere with the operation or success of the military or naval forces, etc. Is it going to be contended that all "false reports or false statements" are nonmailable? It is not the intent of a document, if a document can be supposed to have intent, which Section 3, Title I penalizes, but it is the intent of the person who willfully makes or conveys the false reports or false statements. And so it is with all the balance of the penal provisions of this Section of the Statute. The whole trouble arises

from the attempt made by the Post Office Department officials to read into the statute something which is not there and which the Congress, as I have now shown by the history of the legislation, refused to put into the law. Section 211 of the United States Criminal Code as amended in 1911, forbids the use of the mails to any matter of a character tending to incite "arson, murder or assasination." This was done by an addition to the Obscenity Statute. Up to that time, printed matter might be of a character tending to incite arson, murder or assasination but it was still mailable. See Opinion of Attorney General, No. 29, 1911, page 555. The Congress has now by the Act of June 15, 1917, forbidden the use of the mails to matter advocating or urging treason, insurrection or forcible resistance to any law of the United States and such other matter or thing as is itself "in violation" of the provisions of this Act. For example, it is in violation of Title I of the Act for a tourist, as well as anyone else, however innocently, to make a photograph or sketch of a fort. Such photograph would, if innocently made, be mailable except for Section 1 of Title XII. It is to cover cases of this kind that Section 1 of Title XII was passed and it has no other purpose.

But whether I am right in this construction of the statute or not, it is certainly true that the language of Section 3 of Title I does not, by any possibility, refer to general newspaper or magazine publications, circulating widely and publicly, containing discussions on the conduct of the war, the terms of a possible peace, the draft law, or any other law that may be passed in connection with the war. The legislative history of this section is also illuminating. The section first appeared in House Bill No. 291, introduced May 15th, 1917. Section 3 of that bill was as follows:

> "SEC. 3. Whoever in time of war shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the the success of their enemies and whoever in time of war shall willfully cause or attempt to cause *disaffection* in the military or naval forces of the United States, or shall interfere with or 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 imprisonment for not more than twenty years."

It will be observed that the word "disaffection" was used in the original bill. It was pointed out in Congress that that word was too broad, and that, since the purpose of the section was to prevent stirring up mutiny and insubordination *in the military forces*, the section should be so modified as to express that exact idea. It was modified accordingly, the word "disaffection" stricken out, and the specific words, "insubordination, disloyalty, mutiny or refusal of duty" substituted. Congress, in this whole legislation, clearly shows that it was never intended that any of that freedom of discussion which the great leaders of political thought in this country have always held necessary to the security of the country, should in any way be limited.

The brief of the learned District Attorney on this point is so remarkable as to justify some further comment.

On page 12, he says:

> "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."

Again, he says, on the same page:

"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 italics in the above are those of the learned District Attorney. The learned District Attorney evidently forgot when he wrote the above that the "Russian disorganization" to which he refers is the result of the identical sort of suppression of free discussion and criticism which he is attempting to show Congress intended to apply to this country by the "Espionage Act." Does he conceive that the Congress of the United States thought it necessary to protect the educated and enlightened soldiers composing our military forces against the results of a free discussion of the causes, objects and purposes of the present war, even as he thinks it is necessary to protect the ignorant and totally illiterate soldiers of the Russian army from any

discussion of those subjects? The reference by the District Attorney to *loyal* citizens who are sacrificing their incomes for the purpose of carrying on the war is not happy. The facts are that, owing to the opposition of our *loyal* citizens to a reasonable tax on war profits and excess incomes, the present Congress seems about to adjourn, without having levied even an approximately just tax upon such incomes and war profits. Of war profits estimated for the current year at four billion and more dollars—which means profits in excess of all normal profits, Congress is to take apparently only about one billion dollars in taxes or somewhere from twenty-five to thirty per cent. England is taking in taxes on war profits, eighty per cent. in all cases except the shipping industry, where she is taking eighty-eight per cent. The surplus incomes of our individual citizens are escaping with a proportionately even lighter tax. The bill introduced in Congress a few days ago, providing for a payment to soldiers of Fifty ($50) Dollars a month while engaged in foreign service in addition to the pittance allowed as regular army pay was defeated. This action on the part of the Government is being condemned by farmers and labor organizations in violent and denouncitory language. I know of no literature more apt to arouse disatisfaction and opposition to the war on the part of the men who have been drafted to do the fighting than much of the comment appearing in speeches and newspapers upon those loyal citizens who have succeeded in saving their war profits and excess incomes from taxation. If the District Attorney is correct, then it is only disloyal citizens who indulge in speech of that sort. If the District Attorney is correct, then any discussion of that subject must be denied the mails.

In his brief, the District Attorney also says: "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" (see page 11 of the brief). That statement is wholly incorrect. But suppose a war is "being conducted for the selfish ends of the unconscionable rich," what is to be done about it? The remedy of the District Attorney is apparently to suppress all discussion of the facts or at least all discussion that will reveal the unconscionable character of the war. We know that such wars have been engaged in, they have even been engaged in by us. General Grant, in his memoirs, says that the Mexican War was one of the most unconscionable that a stronger nation ever waged against a weaker one. Now, the District Attorney argues that Congress intended to deal with this subject by passing a statute which will suppress all discussion which may tend to show that the war is unjust, unwise, impolitic, or that for any reason it should not be persevered in until one side or the other is exhausted in men and money and must accept peace upon such terms as the victor dictates. Such may be the policy which an Absolute Monarch lays down for the guidance of his subjects but it sounds strange indeed when it is suggested that that was the principle that the Congress of the United States intended to embody in the law. *It may be that a war cannot be conducted in a democratic manner, but it is certainly true that a democratic people must decide whether they will conduct the war at all; upon what terms they will conduct it and what the objects are upon the accomplishment of which they will make peace.* True, they must act through their representatives but they must elect representatives who will obey the popular

will when that is ascertained. This necessarily involves the right on the part of the citizen to freely and fully discuss the war, praise or condemn it, commend or condemn the objects for which it is being fought and discuss and declare the terms upon which it is believed peace should be concluded. This has been the policy of our Government since it was founded and when the time comes, if it ever does, that it is no longer the policy of the Government, I should be glad to have anyone point out how this Government differs from that of an Absolute Monarchy. These principles have been upheld by the men in this country in all generations whose names are synonymous with patriotism and devotion to their country. In 1848, during the Mexican War, Lincoln, speaking in the House of Representatives in opposition to that war, said:

> "At its beginning, General Scott was by this same President driven into disfavor if not disgrace, for intimating that peace could not be conquered in less than three or four months. But now, at the end of twenty months * * * this same President gives a long message, without showing us that as to the end he himself has even an imaginary conception. As I have said, he knows not where he is. He is a bewildered, confounded, and miserably perplexed man. God grant he may be able to show there is not something about his conscience more painful than his mental perplexity."

Here was a plain intimation on the part of Lincoln that President Polk's motives in the Mexican War were base, and that his conscience troubled him painfully.

The Mexican War was declared on the 11th day of May, 1846, Daniel Webster, on the 6th day of November 1846, at Faneuil Hall, Boston, in a public speech, said:

> "The Mexican War is universally odious throughout the United States, and we have yet to find any Sempronius who raises his voice for it."

In the same speech he said:

> "It is not the habit of the American people, nor natural to their character, to consider the expense of a war which they deem just or necessary; but it is their habit and belongs to their character, to inquire into the justice and the necessity of a war in which it is proposed to involve them."

On September 29th, 1847, in Springfield, Massachusetts, in another great speech, Webster said:

> "We are, in my opinion, in a most unnecessary and therefore a most unjustifiable war. I hope we are nearing the close of it. I attend carefully and anxiously to every rumor and every breeze that brings to us any report that the effusion of blood, caused, in my judgment, by a rash and unjustifiable proceeding on the part of the government, may cease."

It was not counted treason or treasonable in 1847 to declare that the government had thrust upon the people an odious war by rash and unjustifiable proceedings. Neither did anyone think of construing such language into advocacy of insurrection or forcible resistance to law.

Henry Clay, on the 13th of November 1847, then over seventy years of age, came out of his voluntary retirement, and in a speech at Lexington, Kentucky, on that day, referring to the Mexican War, said:

> "Must we blindly continue the conflict, without any visible object, or any prospect of a definite termination? * * * It is the privilege of the people, in their primary assemblies, and of every private citizen, however humble, to express an opinion in regard to the purposes for which the war should be continued; and such an expression will receive just so much consideration as it is entitled to, and no more."

The advice given to the American People at the present time from Washington, "to obey the law, and keep your mouth shut," seems not to have been regarded by Lincoln, Webster, Clay, or, indeed, any of the men whose names are inseparably connected with the honor and political achievements of this country.

As a part of that address, Mr. Clay presented a series of resolutions condemning the Mexican War. The concluding resolution he presented at that time was as follows:

> "Resolved, That we invite our fellow-citizens of the United States, who are anxious for the restoration of the blessing of peace, or, if the existing War shall continue to be prosecuted, are desirous that its purposes and objects shall be defined and known, who are anxious to avert present and future perils and dangers, with which it may be fraught, and who are also anxious to produce contenment and satisfac-

tion at home, and to elevate the national character abroad, to assemble together in their respective communities, and *to express their views, feelings and opinions.*"

Charles Summer, in his speech delivered at Fremont Temple, Boston, November 5, 1846, said:

"The Mexican War is an enormity born of slavery. * * * Base in object, atrocious in beginning, immoral in all its influences, vainly prodigal of treasure and life; it is a war of infamy, which must blot the pages of our history."

He said in closing:

"Hang out, fellow citizens, the white banner of Peace; let the citizens of Boston rally about it; and may it be borne forward by an enlightened, conscientious people, aroused to condemnation of this murderous war, until Mexico, now wet with blood unjustly shed, shall repose undisturbed beneath its folds."

Theodore Parker, one of the greatest preachers of this country, on Sunday, June 7, 1846, in the Congregational Church in Boston on that date, speaking of the Mexican War, among other things said:

"But why talk forever? What shall we do? In regard to this present war, we can refuse to take any part in it; we can encourage others to do the same; we can aid men, if need be, who suffer because they refuse. * * *

> We can hold public meetings in favour of peace, in which what is wrong shall be exposed and condemned. It is proof of our cowardice that this has not been done before now. We can show in what the infamy of a nation consists; in what its real glory."

On February 11, 1847, Senator Thomas Corwin, in the U. S. Senate, discussed the very doctrine urged then as now, that once war was declared, there was no other course open to the Congress and the people but to continue it until the executive was willing to conclude it. Of that doctrine, he said:

> "With these doctrines for our guide, I will thank any Senator to furnish me with any means of escaping from the prosecution of this or any other war, for a hundred years to come, if it please the President who shall be, to continue it so long. Tell me, ye who contend that, being in war, duty demands of Congress for its prosecution all the money and every able-bodied man in America to carry it on if need be, who also contend that it is the right of the President, without the control of Congress, to march your embodied hosts to Monterey, to Yucatan, to Mexico, to Panama, to China, and that under penalty of death to the officer who disobeys him—tell me, I demand it of you—tell me, tell the American people, tell the nations of Christendom, what is the difference between your American Democracy and the most odious, most hateful despotism, that a merciful God has ever allowed a nation to be afflicated with since government on earth began? You may call this free government,

> but it is such freedom, and so other, as of old was established at Babylon, at Susa, at Bactrina, or Persepolis. Its parallel is scarcely to be found when thus falsely understood, in any even the worst forms of civil policy in modern time. Sir, it is not so; such is not your Constitution; it is something else, something other and better than this."

When the Constitution of the United States vested in Congress the sole power to declare war, the sole power to raise the money to prosecute the war and limited to two years the appropriations of money which might be made for that purpose, and then provided for the election of one-third of the senators and all the members of the House each two years, it is plain that it was intended by the Constitution to give the people direct control over the war policy. If they are not satisfied with the war policy of the Congress which declares the war, and that Congress and the President are inflexiable in their determination to prosecute the war, the people under the Constitution have but to elect a House of Representatives that will not vote the funds to prosecute the war and the war must stop. But are the people to be required to vote blindly without the aid of the freeest possible discussion and especially without the aid which comes from hearing and understanding and appreciating the views of those who believe the war is wrong or unwise? Not only does our Constitution protect this right of free discussion but indeed it is built upon it. This doctrine of free discussion of the policies of the Government, whether in war or peace, does not originate in the Constitution. From Lord Chatham to Lloyd George, the policy of criticising and condemning the wars in which their country has en-

gaged in has been one of the most inalienable rights of English speaking people. The most violent condemnation of any war in all history, of its origin, objects, and methods, I believe, was that launched by Lloyd George against the conduct of England in the Boer War.

On October 27th, 1899, the eleventh day of the sitting of Parliament, and many days after war was declared, Mr. George, in his speech said:

> "The fact is that the war has been forced on us by a government which has divided three millions of money among its own supporters by a measure carried by a Chamber composed of lords who benefit to the tune of hundreds of thousands of pounds."
>
> Du Parcq's Life of David Lloyd George, Vol. II, pages 216 and 217.

Parallel this statement of Lloyd George with the statement that before our entry into the present war our bankers had loaned to the Entente Allies and to individuals and municipalities for war purpose, over two billion dollars, an amount equal to the amount of the "Liberty Loan"; that the success of Germany's submarine warfare was endangering the Entente Allies, and consequently affecting the value of the tremendous quantity of securities held in this country. Put that in a cartoon, and label it—"The Cause of the War"—and you will have said no more than David Lloyd George said in the speech I have quoted.

On March 6th, 1900, Lloyd George addressed a peace meeting in his district. Mr. Kier-Hardie was at the head of a force which defended the meeting

from the attacks of a patriotic mob. The meeting adopted a resolution "condemning the war and declaring for the independence of the republics" meaning, of course, the Boer republics. In replying to the argument that after war was declared, he should refrain from addressing public meetings in opposition to it, he said, referring to the anti-war party:

> "If the policy of abstaining from meetings to instruct the people is adhered to, judgment will go by default against us, and we will be hopelessly beaten, as we deserve to be."

And again, quoting from the same author, Lloyd George, on March 30th, 1900, wrote:

> "Just had a wire from Bangor" (which was in his own district) "that Trustees of Penrhyn Hall won't let it without substantial guarantees against damages * * * and we are fighting for free speech and equal rights in the Transvaal. First great object lesson. I mean to get there."

In the House of Commons on July 25, 1900, in reply to the Prime Minister, Lloyd George spoke as follows:

> "He has led us into two blunders. The first was the war, but worse than the war is the change that has been effected in the purposes for which we are prosecuting the war. We went into the war for equal rights. We are prosecuting it for annexation. * * * You entered into these two republics for *philanthropic purposes, and remained to commit burglary.*"

May it not with at least equal truth be said that we went into the present war to protect our commerce against the unlawful action of the German submarines but are staying into fight the battles of the allies?

Lloyd George also charged the Administration with purposely causing the death, by starvation, of thousands of women, children and old men in "Concentration Camps" in order to break the spirit of the Boer soldiers in the field. See

> Du Parcq's Life of Lloyd George, page 254.

If I have quoted at unnecessary length in order to show what manner of freedom of discussion men of undoubted patriotism have thought it their duty to indulge in, in war times, it is only because the learned District Attorney and the present administrators of the Post Office Department seem to think that since such discussion may tend to cause disaffection or demoralization of the military forces or distrust of the war on the part of men subject to the draft that therefore it was intended by Congress to prohibit such freedom of discussion. I believe that I have shown that nothing was further from the intention of Congress. I have shown it by the history of this Act; it appears from the language of the Act itself and it appears also from the settled policy of our Government to allow discussion such as I have quoted, even though the District Attorney says that a citizen who believes that the war is being conducted for selfish ends will not enlist. The remedy in this country for such a condition is to convince the citizen by discussion (not by suppressing discussion) that the war is being fought for worthy ends and then

he will support it. If he cannot be convinced of that, then it is not impossible that he is right in his conclusions as to the purposes of the war. In any event, it is for the citizen to decide and to decide upon the freeest possible discussion.

When in the light of these principles, we come to examine the articles and cartoons complained of in "The Masses" the objections urged against them are seen to be not only unsubstantial but trivial.

3. *The Cartoons and Articles complained of.*

In considering the articles and cartoons complained of, two facts must be kept in mind. The first is that "The Masses" in no sense is a pro-German publication or one having the least sympathy with the German Government or its methods. Every person connected with "The Masses" is an American as their names indicate. "The Masses," as it frankly states, is a radical and revolutionary paper. Not revolutionary, of course, in the sense assumed by the District Attorney that it desires to overturn existing forms of Governments with blood and violence, but rather revolutionary in that it wishes to banish blood and violence as a means of either overturning or supporting Governments. It is revolutionary in art and literature. It delights to seize upon some obscure poet, writer or worker in some cause either in this or past generations, who has received scant consideration from the public and extol whatever admirable qualities it may be found such person possesses. It does the same thing for a picture or a poem. It shows us that our idols often have feet of clay; that our heroes are very human; that the despised of the world have often been the most deserving. It has no politics and

no creed. It makes no appeal to a class. There is no paper in the United States which is so little susceptible of being a vehicle of pro-German propaganda as "The Masses." Then, another thing which must be conceded in this case is that there is no proof of any intention that the August copy of "The Masses" should ever be seen by any member of the military or naval forces. It probably never was seen by any of them and would never have been heard of by any of them if it had not been for the ill advised action of the Post Office Department in trying to suppress it. But, as we have seen, it is claimed that Section 3 of Title I is violated by this publication. There is no evidence that anyone connected with "The Masses" ever sent a copy of it to any member of the military or naval forces of the United States or tried in any way to bring any knowledge of its contents to the naval or military forces. Surely, if one was willfully causing or attempting to cause insubordination or mutiny in the military or naval forces of the United States, he would have brought to the attention of such forces the material which he expected would cause insubordination or mutiny, but nothing of the sort was done here.

(1) *"Liberty Bell,"*

Of this cartoon, I only care to say that if the Postmaster can exclude a magazine from the mails because of it, then the only correct presentation of the "Liberty Bell" would be one which showed it not merely broken, but in fragments.

(2) *"Conscription."*

This cartoon is a powerful argument against the "Conscription Law." It says, in effect, that the

youth of the land are by it forced into military service. That the law binds labor to military service as well. That it causes great agony and suffering to the womanhood of the country and that the mothers of the country with children too small to be subject to the "Draft" pray to God that the Draft Law may be repealed before their children come to military age, and that Democracy is trampled under foot by such a law. That is what this picture says. Is it unlawful to say it? Does not it force the youth of the country into the army to kill and be killed against their will? It is only necessary to turn to the records to see that from eighty to eighty-five per cent. of the drafted men have claimed exemptions and have endeavored to escape the draft. Does it not do to labor and the womanhood in every country where it has been adopted exactly what this picture says? Whether it does so or not is not for us to determine, but it is certain that there are millions of just as good loyal citizens as any who will participate in this litigagation who believe that the draft law does all of these things and that Democracy cannot exist if the "Draft Law" continues. They argue that so long as the forces to fight a foreign war must be raised by voluntary enlistments, so long the people had a check upon either the ambition or unwisdom of the Congress and the President. If the people would not volunteer to fight a war, the war must stop and Congress and the President must find some way out, if the Congress had declared war. In the absence of a "Draft Law" no war would be entered upon which did not have popular approval. With the "Draft Law" it is wholly immaterial whether the people wish to support a war or not; they will be commanded to go and fight for

whatever cause and in whatever part of the world a particular administration may desire. If they refuse they will be stood up against the wall and shot. Now, this all may be consistent with Democracy, upon that question we need express no opinion, but I deny that the Congress of the United States has atempted to make it a crime to say that it is not.

(3) *"Making the World Safe for Capitalism."*

I think no one but an over-sensitive Post Office official would have ever thought that the cartoon "Making the World Safe for Capitalism" could be seriously objected to by anyone. The cartoon shows a Russian absorbed in studying a paper marked "Plans for a Genuine Democracy." On one side of him Japan and England appear in a threatening attitude and on the other, Mr. Root and Mr. Russell appear in the guise of "advisors." Mr. Root has in his hands a noose labeled "Advice," with which it is intended to insnare the Russian people into adopting Mr. Root's and Mr. Russell's plans of Democracy. A more harmless cartoon is hard to imagine. It is, of course, well known that with all his excellant qualities Mr. Root has never been an advocate, in this country, of those radical democratic doctrines which are very popular in Russia since the Revolution. The first thing the Russians did after the Revolution was to admit the women to an equality with men in all matters relating to Government. Mr. Root, as is well known, has ever been the consistent opponent of such a movement in this country, and is active against that movement in the present campaign. Mr. Root has always been the opponent here of "direct primaries" and other so-called democratic measures for which

there has been a strong popular demand in recent years. The defeat, in this State, not long ago, by the largest majority ever given on any proposition in the State, of the new proposed State Constitu- the authorship of which was credited to Mr. Root, much more largely than any other man, is pretty good evidence that even the mass of people in this State were not in entire accord with Mr. Root's notions of Government. Now, it is fair to presume that the advice which he was to give the Russians would be along the line of his own ideas, as exemplified in his activities in this country. Such advice, if followed, would certainly have throttled those ultra democratic reforms which the people of Russia are demanding. Now, it may be that Mr. Root is right in his notions about democracy and it may be that he is wrong, but it certainly is not a crime to suggest that he is either right or wrong.

(4) As to the fourth cartoon, in which Congress is represented as a dignified but disconsolate stranger being told to run along by the representatives of "Big Business" now that it had declared war, it need only be said that statements to the same effect as this cartoon are made on the floor of Congress every day and appear in the public press every day, and these statements are far more pointed and offensive than anything in this cartoon. It is well known, that "Big Business" as represented in the Council of National Defense, is taking a prominent part never before played by it in making the war plans of an Administration. What is there that the Congress has done since the declaration of war except to pass bills virtually handed to it by the Administration? Now, possibly, Congress has been in the discharge of its highest duty in permitting itself to be made, as it is commonly said in the

newspapers, a mere "rubber stamp" during the war period, but since members of Congress are elected by the people and are elected for the purpose of carrying out the will of the people, it is certainly not a crime to suggest that Congress was influenced by "Big Business" in making the declaration of war and has had little control of the war since that time.

When we turn to the article complained of, we find they are, if possible, even less suggestive than the cartoons of anything calculated to stir up insubordination in the military forces of the country.

(1) *"The Question."*

Here the question is asked, which must, during these last few months, have suggested itself to every thoughtful man, namely: do the people of this country, as a whole, agree with that portion of the press which speaks of the arrest of men, however misguided, but nevertheless of genuine courage, in their conscientious objection to combatant military service, as a "round-up of slackers"? the papers speak of a "round-up of thugs," of a "round-up of burglars," and of a "round-up of gamblers." These are men of vicious habits and vicious lives, who steal, lie and cheat, and murder when necessary. The "slacker" so-called, as far as I have observed, is seldom from this class. He is a young man usually clean living, hard working, honest, who is adverse to taking the life of his fellows even at the command of his Government. The public press makes no difference in its reference to the "round-up" of these two classes of men at the present time. Do you suppose that the mass of people in this country see that there is a difference in these two classes of men? I do not know.

But I do not believe that I am committing a crime when I put the question. That the writer of "A Question" had no thought of inducing anyone to violate the law is evidenced by his last sentence where he said that possibly the American Government might be induced "To undertake the imprisonment of heroic young men with a certain sorrowful dignity that will be new in the world."

(2) *"A Tribute."*

This is merely a poem by some contributor, named "Josephine Bell" dedicated to Emma Goldman and Alexander Berkman and tries to make it appear in the language of poetry that they have the great elemental quality of force akin to the rocks and trees and rivers. It has not even a remote bearing upon anything involved in this case.

(3) *"Conscientious Objectors."*

I cannot imagine an article less likely than this to induce one to disobey the "Draft Law." The letters it publishes from conscientious objectors in England, if they can have any significance at all here, would constitute a powerful argument in favor of obeying the law instead of resisting it and taking the consequences. Indeed, as I understand it, the article is rather a warning to conscientious objectors not to violate the law than a suggestion that they should violate it. It assumes the fact which everyone knows, that in this country, as well as in England, there are many thousands of conscientious objectors. When these conscientious objectors in this country belong to a church, as for instance, "The Quakers" we recognize their objects as lawful and probably on the whole as commend-

able. I think we all of us rather admire the firmness with which "The Quakers" through hundreds of years have maintained their position on this question of war, until they have compelled Governments to recognize everywhere the stand they have taken. My own opinion is that we would have done better in this country had we exempted the conscientious objector whether he belonged to an organized church or not. He will probably make a poor soldier any way. The writer of the article in question merely recognizes the existence of conscientious objectors and takes the position that they may be just as "conscientious" outside of church membership as in it. In this position, if press reports are correct, he is suported by the opinion of Judge Hughes, who is Chairman of the Draft Appeal Board of this District. The writer of the article said: "We recommend to all who intend to stick it out to the end" that is, all who do not intend to give up their convictions by undertaking military service, "a thorough reading of the cases which follow so that they may be prepared for what is at least rather likely to happen to them." Then follows some very distressing letters from conscientious objectors in England showing how they have suffered for their "stubborness." On the whole, I should call this article a pretty strong argument in favor of the conscientious objector obeying the draft law if he could in any way reconcile such action with his convictions.

(4) *Friends of American Freedom.*

This article, like the poem previously referred to, has not even a remote bearing on anything before the court. It eulogizes those qualities of courage or stubbornness, call it what you will, which

lead Alexander Berkman and Emma Goldman into frequent conflict with the laws of the country although in all matters of personal honesty and integrity, no one has had occasion to complain of them. It only shows to what straights the Post Office Department was reduced in order to find some excuse for suppressing the paper, when it complains of this article. If the contention of the Postmaster is sustained then he can suppress, at will, any issue of any publication which must depend upon the mails for its circulation. This would include all monthly magazines and all weekly newspapers. It is no answer to say that the Postmaster General probably will not suppress them. The question is, has the Congress attempted to give him the power to suppress them. There is not a paper published in this City any day that does not offend against this Statute, if it is construed as the Postmaster attempts to construe it. For example, in the "Evening Mail," of a recent date, I find the following:

> "We shall have to assume, therefore, that the list of exemption doctors is heavily charged with politics—politics of the two party kind, which is the worst kind."

The editorial then proceeds at great length along the same lines. Now, what could possibly obstruct the operation of the draft law more than the argument that exemptions were not being granted on merit but according to politics? Yet, would you suppress that sort of discussion?

And, in the staid old New York Tribune of recent date, I find the following head lines:

> "Senators Charge South is Favored in Draft. Juggling of Figures to throw Burden

> on North is charged. Pomerene Democrat leads in attack. Brandegee says 'Even patriotic men balk at *loaded dice.*'"

The article then proceeds to show, as the fact probably is, that because the draft has been applied not according to population as the law itself provides, but according to registration, some localities like New York City are furnishing hundreds of men too many and others correspondingly too few. The postmaster General has it absolutely in his power to stop all discussion of this sort in the press of this country if he pleases to do so, if the contention of the Post Office Department and the District Attorney are sustained.

Attorney are sustained. These same articles and cartoons have appeared in other papers and no one thought of objecting. For example, the New York Tribune of July 22nd last published the Emma Goldman poem and three of the cartoons.

Character is given to all the preceding publications complained of in "The Masses" by the final page 43, which contains a petition to the President and Congress of the United States for the immediate repeal of the present Conscription Law. This petition summarizes ably the arguments for a repeal of the Conscription Law and ends as follows:

> "We who share the democratic ideals set forth by our President, cannot but believe that the present Conscription Law constitutes a fatal abandonment of those ideals. In the interests of that democracy of which the American people have made you the guardians, we ask the immediate repeal of the present Conscription Law."

"The Masses," whatever else may be said of it, does nothing by indirection. It does not hint; it asserts. It does not insinuate; it declares. It is often brutal and offensive in its bluntness. It is never evasive or cowardly. On page 12 of the appellant's brief, a quotation is made from the case of *U. S.* vs. *Baker and Wilhid* (D. C. Md. July 11, 1917) to the effect that under color or pretense of arguing against the wisdom of a law or of advocating its repeal, a publisher may not do anything with intent to procure the violation of the law. I will submit a certified copy of the entire opinion in that case to the Court. I do not find that it has been reported. That case squarely holds that literature which went much further than anything in "The Masses" in its opposition to the draft law and the present war policy of the Administration violated no law of the land, and that no one could be convicted for circulating it, even when, as in that case, it was handed directly to soldiers. By the doctrine of that decision, we are willing to abide.

POINT II.

There is nothing in the August issue of "The Masses" that by any possibility can be construed as an advocacy of "treason, insurrection or forcible resistance to any law of the United States."

As I have shown in the earlier part of this brief, there is not only no contention made by the learned District Attorney in opposition to the foregoing point but his brief affirmatively admits that no such contention is made. Treason, insurrection and

forcible resistance to the law are terms perfectly well understood. "Treason," according to the Constitution, consists only in levying war against the United States, in adhering to the enemies of the United States, and giving them aid and comfort. "Treason" requires an overt act, "adhering to their enemies," giving them aid and comfort, means, joining their armies or getting others to join, furnishing them with ammunitions or articles, carrying on a traitorous correspondence, and the like. See

Willoughby on the Constitution, Vol. 2,

page 833.

U. S. vs. Burr, 4 Cranch (Appx.), 470.

2 Burr's Trial , 401;
Respublica vs. Carlisle, 1 Dallas, 35, 37;
Ex parte Bollman, 4 Cranch, 75.

There is, of course, no such thing as the crime of "sedition" in this country and has not been since the sedition statute passed in the time of the elder President Adams. When Jefferson became President he released all of the men who had been imprisoned under the Act and obtained from Congress an appropriation to reimburse all those who paid fines under it.

The statute itself is found in the Laws of the 5th Congress, Chap. 91, and is as follows:

> "If any person shall write, print, utter or publish any false or malicious writing against the Government or the President with intent to defame them, or either of them, or to bring

them or either of them into contempt or disrepute or to excite against them or either of them the hatred of the good people of the United States, then such person being thereof convicted before any court of the United States having jurisdiction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment not exceeding two years."

Even this most obnoxious statute did not go as far in suppressing publications as the Post Office Department is attempting to go now.

POINT III.

There was no evidence before the postmaster of any violation of Section 3 of Title I of the Espionage Act.

I have tried to show that Section 3 of Title I was never intended by the Congress to have any relation to general newspaper discussion; that offences against that section of the Act must be purely military in character. The offences, to come within the Act, must be directed against the forces in the field or else, be of such specific character as positively injured the service of the United States by preventing recruiting. This argument is reinforced also by the penalty clause of Section 3, Title I, which provides as the maximum punishment, a fine of $10,000 or imprisonment for not more than twenty years, or both, whereas, if you will turn to Section 1 of Title I, you will see that the positive sale of military secrets, and wrongfully getting plans of the fortifications, etc., is only punishable by a maximum fine of $10,000 or

by imprisonment for two years or both. If the district attorney's theory is correct, the Congress thought it a more serious offence to publish an editorial in a metropolitan paper criticising the conduct of the war, which, if it happened to fall into the hands of a soldier might make him disgusted with the war, than it was to sell out the military secrets of the United States to the enemies.

But whether I am correct in this construction of the Act or not, it is certain, that there can be no violation of Section 3 of Title I unless somebody does the things, there prohibited, *willfully* and *with intent* to interfere with the success of the military or naval forces, or with the *willfull* intent to cause insubordination, disloyalty, etc., in the ranks of the troops. Now, until somebody does those prohibited things, the statute has not been violated. How can it be said that a newspaper or magazine is, in the language of Section 1 of Title XII, *"in violation"* of Section 3 of Title I until it is proved that somebody has violated Section 3 of Title I? Unless the Court is to make a crime where the legislature has made none or worse yet, is going to permit the postmaster to say that Section 3 of Title I has been violated without any proof that it has been violated, then there is no authority for anyone saying that any publication is "in violation" of Section 3 of Title I until it has been established by competent proof that Section 3 has been violated.

POINT IV.

The defendant postmaster had no authority, under Section 3 of Title I, to exclude the entire magazine because he claimed certain articles in it to be non-mailable.

If the Court will look at the language of Section 2, Title XII, it will be seen that the language is that every letter, publication, etc., *"containing any matter"* advocating or urging treason, etc., is thereby declared to be non-mailable. Under that section an entire magazine must be held up if any article in it is non-mailable because that is the command of the statute. Section 1 of Title XII, however, which in connection with Section 3 of Title I constitutes the law here relied on by the District Attorney merely provides that every letter, writing, pamphlet, book, publication, matter or thing of any kind "in violation" of any provisions of this Act is declared to be non-mailable. If this section is relied on to give the postmaster authority to exclude matter from the mails, then he cannot exclude an entire publication because a line or a page may, in his opinion be non-mailable. It is only the thing which is "in violation" of the Act that is non-mailable. When, therefore, the plaintiff offered to eliminate from the August issue of "The Masses" anything to which the postmaster objected, it was his duty to specify what, in his opinion, was objectionable. There was no other way that the plaintiff could learn what was objected to than from the postmaster himself. The postmaster had no right to suppress the August, 1917, issue of "The Masses" because it *contained something* he regarded as non-mailable if he was acting under Section 1 of Title XII and Section 3 of Title I.

POINT V.

The Espionage Act, if construed as the Post Office Department construes it, plainly violates the First and Fifth Amendments to the Federal Constitution.

The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of the press." The Fifth Amendment to the Constitution provides that "No person shall be deprived of life, liberty or property without due process of law." I have endeavored to show that the Espionage Law furnishes no authority for the acts of the postmaster here complained of. The acts of the postmaster, in my opinion, are outside the law. But, if the law is to be construed so as to cover his conduct, then it clearly offends against both of the two Constitutional Amendments heretofore referred to.

See

Kroschel vs. Munkers, Chief of Police, 179 Fed., 961;
Patterson vs. Colorado, 205 U. S., 454;
Reynolds vs. U. S., 98 U. S., 145, 168;
Hoover vs. McChesney, 81 Fed., 472;
Ex parte Jackson, 96 U. S., 72.

The fact admitted by the defendant that in excluding the August issue of "The Masses," the publication "Mother Earth" never seen by plaintiff was considered as well as copies of "The Masses," published long before the draft or espionage law was passed, shows how little regard for "due process of law," was involved in the action of the post-

master. It was a clear error of law to consider these publications in deciding whether the August issue violated the Espionage Act.

But this brief is already much too long.

POINT VI.

The interlocutory decree should be affirmed.

Respectfully submitted,

GILBERT E. ROE,
Attorney for Complainant-Appellee,
Office and P. O. Address,
55 Liberty Street,
Borough of Manhattan,
New York City.