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Writ of Error to Supreme Court.

Filed January 9, 1928.

New Jersey, ss.:

THE STATE OF NEW JERSEY to the Chief Justice and other Justices of our Supreme Court of Judicature, *Greeting*:

(L.S.)

Because in the record and proceedings, and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between the State of New Jersey and John C. Butterworth and Roger N. Baldwin, George Cabbrizza, Basil Effsa, and David Nitkin, defendants upon an indictment, manifest error hath intervened to the great damage of the said defendants, as by their complaint we are informed; we being willing that the error if any there be, should in due manner be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all cases, at Trenton, on the 26th day of January, 1928, together with this writ, that the record and proceedings, aforesaid being inspected, we may cause to be done thereupon, for correcting that error what of right and according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of

our said Court of Errors and Appeals, at Trenton, aforesaid, the sixth day of January, 1928.

JOSEPH F. S. FITZPATRICK,
Clerk.

FEDER & RINZLER,
and SIGMUND UNGER,
Attorneys.

Return to Writ of Error to Supreme Court.

Writ of Error to Passaic County Court of Special Sessions.

Filed April 29, 1925.

New Jersey, ss.:

(Seal) To JOSEPH A. DELANEY, ESQ., Judge of the Court of Special Sessions in and for the County of Passaic: Because in the record and proceedings, and also in giving of judgment upon a certain indictment against John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, late of the City of Paterson, in the County of Passaic, aforesaid for having, on October 6, 1924, unlawfully assembled in said City of Paterson, pro ut the said indictment, whereof, before you, they have been indicted, and are thereof convicted by you sitting without a jury, as it is said, manifest error hath intervened to the great damage of the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin,

as from their complaint we have received information, we being willing, in their behalf, to correct to error, in due manner, if any there shall be, and that speedy justice be done to them, the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, command you that if judgment be thereon given, then that you distinctly and openly send, under your seal, the record of proceedings aforesaid, with all things touching the same, to our Supreme Court of the State of New Jersey, on the twenty-ninth day of April, 1925, and this writ, that the record and ther cause to be done thereupon for correcting that error, what of right and according to the laws and customs of New Jersey ought to be done.

Witness, WILLIAM S. GUMMERE, Chief Justice of our said Supreme Court, at Trenton, aforesaid, this ninth day of April, A. D., 1925.

ROSENKRANS & ROSENKRANS,
Attorneys.

EDWARD J. KELLEHER,
Clerk.

Return to Writ of Error to Passaic County Court of Special Sessions.

STATE OF NEW JERSEY.

Passaic County, to wit: Be it Remembered, That at a Court of Quarter Sessions, held at Paterson, in and for the said County of Passaic, on the Thirty-first day of October, in the year of our Lord one thousand nine hundred and twenty-four, being the day on which the Grand Jury heretofore summoned to come before the Court of Oyer and Terminer and now sitting in and for said County, desires to present bills, and no Justice of the Supreme Court being present at the Court House in said County, before the Honorable Joseph A. Delaney, Judge of the said Court of Quarter Sessions in and for the said County of Passaic, according to the form of the statute in that case made and provided; by the oath of:

1. William D. Plumb, Foreman,
2. Frank Vreeland,
3. William H. Bailey,
4. Joseph A. Dougherty,
5. George H. Crawford,
6. Charles H. Albonica, Jr.
7. Morris Rhode,
8. Matthew A. Pierce,
9. Mrs. Nellie A. Frazier,
10. Eli Mirandon,
11. Richard Randall,
12. John Wagner,
13. James Rigby,
14. Mrs. Kate Paton,
15. Miss Ethel H. Moulton,
16. William S. McDermott,
17. Joseph Boyle,
18. James Beckett, Jr.,

19. Joseph Keil,
20. Ernest Barber,
21. Mrs. Sarah L. Miller,
22. Mrs. Gertrude Van Riper,
23. Max Thomson,

good and lawful men of the said County of Passaic duly summoned and then and there sworn and charged to inquire in behalf of the State of New Jersey in and for the said County of Passaic; it is presented in manner and form following, to wit:

The Bills herewith presented are true Bills.

William D. Plumb,

Foreman.

J. Willard De Yoe,

Prosecutor.

Court of Oyer and Terminer in and for the County of Passaic, September Term A. D. Nineteen Hundred and Twenty-Four.

Passaic County, to wit: The Jurors of the State of New Jersey, in and for the body of the County of Passaic, upon their oath, Present, that John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale, David Nitkin, Charles Sayak, and Stanley Alutonis, late of the City of Paterson, in the County of Passaic aforesaid, on the sixth day of October, in the year of our Lord nineteen hundred and twenty-four, with force and arms, at the City aforesaid, in the County aforesaid, and within the jurisdiction of this Court, together with divers other evil disposed persons to the number of five hundred and more, to the jurors aforesaid unknown, unlawfully, routously, riotously and tumul-

tously did assemble and gather together to the disturbance of the public peace and being so unlawfully assembled and gathered together then and there unlawfully, routously, riotously and tumultuously did make a great noise and disturbance and did then and there remain and continue together as aforesaid for the space of one hour then next following, and being so then and there unlawfully assembled and gathered together as aforesaid did then and there unlawfully, routously, riotously and tumultuously make and utter great and loud noises and threatenings signifying among other things that the purpose and intent of the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabrizza, Basil Effsa, Kerrill Konzer, Bracco Natale, David Nitkin, Charles Sayak and Stanley Alutonis and their aforesaid associates, whose names are to the jurors unknown as aforesaid, unlawfully, routously, riotously and tumultuously to beat and assault and frighten and intimidate certain and quiet and orderly persons then and there gathered and standing, passing, and repassing in and upon the public streets of the said City of Paterson aforesaid, and unlawfully, routously, riotously and tumultuously assembled and gathered together to disturb the public peace, and to commit assault and battery upon the police officers, patrolmen and officers of the police department of the said City of Paterson, and to break injure, damage and destroy and wreck the City Hall, a municipal and public building of the said City of Paterson; to the great terror and disturbance, not only of the citizens of the said state there being and residing, but of all others the citizens of the said state then passing and repassing in and

along said public streets and common highways there, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

John M. Tracy,
Albert Schielke.

J. Willard De Yoe,
Prosecutor of the Pleas.

Thereupon the said Court of Quarter Sessions did receive such Indictment and the Clerk of the said Court of Quarter Sessions did file same in the said Court and also did thereupon make entry thereof in the Minutes of said Court at the then session of said Court, and afterwards, to wit, at the same term of said Court of Quarter Sessions, holden at Paterson, in and for the County of Passaic aforesaid, to wit: on the Fourteenth day of November, A. D. Nineteen Hundred and Twenty-four at a session thereof before Honorable Joseph A. Delaney, Judge of said Court, in and for said County of Passaic, according to the statute in such case made and provided, came the said John C. Butterworth, Ferris Dreeka, George Cabbrizza and Bracco Natale in their own proper person, and now touching the premises in said indictment above specified and charged against them, being them, being asked in what manner they will acquit themselves, say they are not guilty and of this they put themselves upon the country, etc., and J. Willard DeYoe, Esquire, who prosecutes for the State of New Jersey, in this behalf doth the like and on the Twenty-first day of November, A. D. Nineteen Hundred and Twenty-four, at a session thereof before the Honorable Joseph A. Delaney, Judge of

said Court, in and for said County of Passaic, according to the statute in such case made and provided, came the said Roger N. Baldwin, Basil Effsa, Kerrill Konzer and David Nitkin in their own proper person, and now touching the premises in said indictment above specified and charged against them, being them, being asked in what manner they will acquit themselves, say they are not guilty and of this they put themselves upon the country, etc., and J. Willard De Yoe, Esquire, who prosecutes for the State of New Jersey, in this behalf doth the like.

Therefore, let a jury come here before the Judge aforesaid, at Paterson aforesaid, in the County of Passaic aforesaid, at the same session of the Court of Quarter Sessions aforesaid, on the Fifteenth day of December, next ensuing, being as yet of the Term of September, A. D. Nineteen Hundred and Twenty-four, of twelve good and lawful persons, each of whom shall be a citizen of this State and a resident within the County of Passaic aforesaid, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, to recognize upon their oaths whether the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin be guilty as in the said indictment specified, or not guilty, because as well the said J. Willard De Yoe, Esquire, Prosecutor of the Pleas for the said County of Passaic aforesaid, who prosecutes for the State of New Jersey aforesaid, in this behalf, as the said

John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin have put themselves upon the said jury, and the same day is given to the parties aforesaid at the same place.

And the trial on this indictment having been continued from time to time until the Thirtieth day of March, A. D. Nineteen Hundred and Twenty-five, being of the Term of January, A. D. Nineteen Hundred and Twenty-five, of the Court of Special Sessions of the County of Passaic, holden at Paterson aforesaid, at which date before the Court of Special Sessions come as well the said J. Willard De Yoe, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin in their own proper person, and the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin having waived their right to a trial by jury, and requested to be tried before the said Court of Special Sessions in and for said County, and the evidence having been thereupon submitted and the argument of the respective counsel having been heard and the said Court having duly considered the same does find that the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin are guilty of the premises in the within indictment named and specified, in manner and form as by the indictment is charged against them.

And thereupon on the Ninth day of April, A. D.

Nineteen Hundred and Twenty-five, it was demanded of the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin if they have or know anything to say wherefore the Court here ought not upon the premises and verdict proceed to judgment against them, who nothing further say, unless as they have before said.

Wherefore, all and singular the premises being seen and by the Court here fully understood, it is considered by the Court, and the sentence of the law is, that the said Roger N. Baldwin be confined in the County Jail, of the County of Passaic, for the term of six months, and that John C. Butterworth, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin do pay a fine of Fifty Dollars each and stand committed until said fine be paid.

JOSEPH A. DELANEY,
Judge.

State of New Jersey, }
County of Passaic. } ss.:

I, John McCutcheon, Clerk of said County and Clerk of the County Courts thereof, do hereby certify that the foregoing is a true transcript of the record and proceedings in the case of John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, convicted of Unlawful Assembly, in our Court of Special Sessions, as the same is taken from and compared with the original record now remaining on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Courts and

County, at Paterson, this Twenty-eighth day of April, A. D. Nineteen Hundred and Twenty-five.

JOHN McCUTCHEON,
Clerk.

State of New Jersey, }
County of Passaic. } ss.:

I, Joseph A. Delaney, Judge of the Court of Special Sessions in and for the County of Passaic do hereby in the schedule hereto annexed send to the Justices or our Supreme Court of Judicature of the State of New Jersey, at Trenton, the record and proceedings mentioned in the within writ of error with all things touching the same, as I am therein commanded.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, at Paterson, the Twenty-eighth day of April A. D. 1925.

JOSEPH A. DELANEY,
Judge.

(Seal)

Bill of Exceptions.

Filed April 29, 1925.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
JOHN C. BUTTERWORTH, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin,
Plaintiffs in Error.

Be It Remembered that on the fifteenth day of December, 1924, at the Court of Special Sessions holden at Paterson, in and for the County of Passaic, before the Hon. Joseph A. Delaney, Judge of said Court of Special Sessions, the issue joined in the above stated cause between the State of New Jersey and the defendants, John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, came on to be tried before said Judge without a jury, whereupon,

1. At the close of the State's case, it appearing from the testimony of the State's witnesses that on the sixth day of October, 1924, between the hours of 7 and 8 o'clock in the evening, some two hundred or three hundred persons were congregated in and about a public square lying between the City Hall and Market Street in the center of the City of Paterson, which square is known as City Hall Plaza; that some of said persons were sitting upon the benches and others strolling or walking

about; that certain police officers of the City of Paterson to the number of ten or twelve were then stationed in and about said City Hall Plaza by order of the Chief of Police; that there had then been in the City of Paterson an industrial strike among workers in the silk mills since about August 1, 1924; that many of the persons so congregated in and about said City Hall Plaza were recognized as strikers by said police officers; that such of said persons as were standing were kept moving by said police officers; that at or about 7:30 o'clock on the evening of said day, a procession of persons marched along Market Street in twos from the Market Street headquarters of the Associated Silk Workers to said plaza, a distance of about a block and a half, and were followed by an increasing number of onlookers; that the procession was led by two young women bearing an American flag; that immediately behind them walked the defendants John C. Butterworth, Roger N. Baldwin and Ferris Dreeka; that none of the other defendants were identified by witnesses for the State as taking part in said procession; that when the procession approached the plaza, the number of persons in and about the plaza rapidly increased until the same totaled, at their maximum number, fifteen hundred or two thousand; that there were hurrahs and acclamations from among the crowd about the plaza on the approach of the flag and procession; that the individuals composing the procession, marching by twos, made their way through the thickening crowd across the plaza to the steps at the front entrance of the City Hall; but in so doing, two or three police officers were brushed against by the procession; that on reaching the City Hall steps, the young women carrying the flag, and defend-

ants, Butterworth and Baldwin, stood thereon; that defendant Butterworth started to address the crowd, saying, "Fellow Workers," whereupon he was interrupted by police officers who asked him whether he had a permit to hold a public meeting at that time and place; that he replied, "This is my permit," holding up a book in his hand; that he was then put under arrest, and quietly submitted thereto without further words or any physical resistance; that police officers attempted to wrest the flag from the two young women, whereupon there were sounds of disapprobation and protest from among the crowd; that both young women were then put under arrest, and each quiely submitted thereto; that a police officer then read the Riot Act or proclamation; that the police officers, then increased to about forty in number, at once began to disperse the crowd; that in the course of so doing, they met with opposition from four or five or more individuals standing in different parts of the crowd; that among the persons so offering resistance were defendants, Effsa, Natale, Konzer and Nitkin; that the police officers completely cleared the plaza and adjoining sidewalks of all persons; that no attempt was made on the part of the crowd to reassemble; that defendants, Cabbrizza, Effsa, Konzer, Natale and Nitkin were all identified by the State's witnesses as being present among the crowd; that defendant, Baldwin, voluntarily appeared at the Police Station in Paterson on the morning of October 7, 1924, and there told the Chief of Police that he, Baldwin, was responsible for the attempted meeting at the City Hall Plaza and should, if anyone, be arrested, and was accordingly arrested; that on the day of the attempted meeting, and since on or about August 1, 1924, a

strike was in progress in the City of Paterson in the silk industry; that the strikers had met in a body from about August 12, to September 26, 1924, daily and publicly in Turn Hall (a building privately owned and adapted for mass meetings and hired of the owners by the strikers) for the purpose of conserving and advancing the interest of the strike; that these meetings were held at 10 o'clock in the forenoon, and were attended by police officers of Paterson, by reporters employed by the local press, and by a stenographer, designated by the Chief of Police, whose known duty it was to take down stenographically and report to the Chief of Police what was said and done at the meetings; that on September 26, 1924, and continuously thereafter until and including said October 6, 1924, the strikers were prevented from holding their mass meetings in Turn Hall by order of the Chief of Police of the City of Paterson, and that such order was made effective by the daily presence at Turn Hall of police officers who stopped all persons approaching the entrance thereof and turned them away from the neighborhood; that no criminal complaint had been made against anyone by reason of anything said or done at said mass meetings in Turn Hall, nor was the arrest of any person sought for anything said or done thereat; that during three or four days immediately preceding said October 6, 1924, printed posters were openly distributed and exhibited in the City of Paterson, advertising a mass meeting in Turn Hall on the early evening of October 6, 1924, for the purpose of protesting against the alleged unlawful acts and supposed oppression of the police officers in excluding the strikers from Turn Hall and in preventing the continuing of their daily meetings

therein; that simultaneous announcements to the like effect of such intended meeting to protest the supposed grievance were published in the daily papers of the City of Paterson; that persons met, at the hour so advertised in the early evening of October 6, in front of Turn Hall and were dispersed by the police authorities; that the attempted meeting at the City Hall Plaza was known by the State's witnesses to be a meeting in substitution of the advertised meeting at Turn Hall, with the same avowed object of protesting the supposed public grievance; that there was no evidence that any defendant or any persons (save the police officers) in or about the City Hall Plaza at the time of the attempted meeting were armed; that no weapons were brandished or displayed at any time except sticks in the hands of the police officers after the reading of the proclamation; that there was no evidence that any person was alarmed or intimidated by the attempted meeting, except a young police officer, who had been on the police force only three or four months, who testified that he was afraid until the original ten or twelve police officers were reinforced by such additions as made their number to be about forty; Officer Love also testified the crowd put him in fear; that there was no evidence of any municipal ordinance or other valid rule or regulation or statute forbidding a public assembly at the City Hall Plaza or regulating the use thereof for public meetings or requiring any permit for a public meeting at that place; and that there was no testimony of any preconcerted purpose, pledge or program on the part of the defendants or any three of them or of any one or more of them with any two or more other persons, whether known or unknown, to intimidate anyone, to assault any-

one, to commit a breach of the peace or to damage or demolish the City Hall; and that there was no testimony of any such purpose, pledge or program formed at or during such attempted meeting among the defendants or any three of them or between any one or more of them and any other two or more persons, thereupon counsel for defendants moved that the defendants be not put to their defense, but be acquitted by the Court, upon the ground that there was no proof establishing the commission by the defendants or any of them of the crime charged in the indictment, in that it appeared (1) that the object of the meeting was not of a private nature, but one which affected the whole community, namely, the redress of a supposed public grievance, (2) that the meeting had, not an unlawful, but a lawful object, namely, to protest against the supposed oppression and unlawful acts of the police authorities in preventing the exercise by the strikers of the constitutional right of public assembly and of freedom of speech in Turn Hall, (3) that there was no evidence of any preconcerted purpose, pledge or program on the part of the defendants or any three of them or of any one or more of them with any two or more other persons known or unknown, to put anyone in fear, or to assault anyone, or to commit a breach of the peace, or to demolish or damage the City Hall, nor was there any testimony of any such mutual purpose, pledge or program formed at or during the course of the attempted meeting, and (4) that there was no evidence of any regulatory municipal ordinance or other valid rule or regulation or statute, applicable to the City Hall Plaza and rendering the attempted meeting there unlawful, nor was any such regulatory ordinance, rule, regulation or statute,

asserted by the State to exist; which motion was overruled, and thereupon counsel for defendants prayed exception, which exception was allowed and is sealed accordingly.

(Signed) JOSEPH A. DELANEY,
(Seal) Judge.

2. At the close of the whole case, it appearing from the testimony of defendants' witnesses, Robert Morse Lovett, Frank P. Walsh and Roger N. Baldwin, that several days prior to October 6, 1924, it was reported to the Board of Managers of the American Civil Liberties Union, an association with headquarters in New York City, having a membership of six thousand members residing throughout the United States, the objects of which association are "to preserve and enforce the freedom of the press, liberty of speech and the right of public assembly," that the police authorities of the City of Paterson had excluded since September 26, 1924, the silk strikers of the City of Paterson from continuing their daily conventions in Turn Hall, a building which the strikers had hired of the owner since on or about August 12, 1924, and in which they had held daily mass meetings at 10 o'clock in the forenoon for the purpose of conserving and advancing the interests of the strike; that up to September 26, 1924, when the police authorities prevented the assembling of the strikers in said hall, police officers, reporters employed by the local press and a stenographer representing the Chief of Police of the City of Paterson, had been in daily attendance at the mass meetings, and that the strikers had submitted to such surveillance of their deliberations and proceedings in their mass meetings,

that the police had prevented the strikers continuously after September 26, 1924, from continuing their mass meetings in Turn Hall on account of the supposed character of the public addresses of a non-resident speaker, who had frequently appeared before their meetings; that the alleged objection to his addresses was that he criticized the president of the United States, and abused the Court of Chancery of this state, out of which injunctive orders against picketing had been lately issued; that no criminal complaint had been made against the speaker, nor his arrest either made or sought; that no disorder had ever occurred at the meetings; and it appearing from the testimony of said witnesses on behalf of the defendants that the action of the police authorities in these circumstances was believed by the Board of Managers of the American Civil Liberties Union to be an arbitrary and oppressive assumption of authority and an invasion of fundamental rights, and that the Board of Managers of the American Civil Liberties Union, upon the foregoing report coming to them, instructed one of its officers, defendant Roger N. Baldwin, to call a public meeting in the City of Paterson to protest against the action of the police in preventing the silk strikers from continuing their mass meetings in Turn Hall; and it appearing from the testimony of defendant, Roger N. Baldwin, that, acting under the instructions of the Board of Managers of the American Civil Liberties Union, he arranged and advertised a jublic meeting, for the purpose aforesaid, to be held at Turn Hall in the early evening of October 6, 1924, and caused speakers to be invited to address the proposed meeting; that he caused posters to be printed and distributed in the City of Paterson announcing the time, place and said ob-

ject of said meeting, and caused notices of the time, place and object thereof to be published in the local newspapers of the City of Paterson; that prior to the evening of October 6, 1924, the police authorities had announced that they would not allow the proposed meeting to be held; that on October 6, 1924, at and before the advertised hour for said meeting, police officers were stationed in front of and about Turn Hall with orders to prevent the entrance of any persons into the building; that while defendant, Roger N. Baldwin was in the Market Street Headquarters of the Associated Silk Workers, it was reported to him that the proposed Workers, it was reported to him that the proposed public meeting at Turn Hall would, by orders of the Chief of Police, be prevented from being held therein; that he then determined to attempt to hold a substituted meeting at the City Hall Plaza in the City of Paterson on that evening, with the same object of protesting against the said supposed public grievance, resulting from the action of the police authorities of the City of Paterson in preventing the silk strikers from continuing their daily mass meetings in Turn Hall for the purpose of conserving and advancing the interests of their strike; and it appearing by the testimony of the defendants' witnesses that, in accordance with the arrangements then made by defendant, Baldwin, a procession of about thirty persons, marching in twos, started from the Market Street Headquarters of the Associated Silk Workers towards the City Hall Plaza; that just prior thereto, defendant Baldwin cautiously and insistently instructed as well those who were to address the open air meeting as all of the persons then in said headquarters, that they should submissively yield to the

police, if the police should undertake to prevent or hinder the proposed meeting at the City Hall Plaza; that there was no testimony either from the State's witnesses or from the witnesses of the defendants that anyone counseled resistance or planned or agreed to oppose the police, or that there was any understanding, pledge or program among the defendants, or any three of them, or any one or more of them with any two or more persons, that they should resist the police, assault anyone or intimidate anyone, or commit any breach of the peace; that all the defendants expressly denied that there was any preconcerted agreement between them, or between any three of them, or between any one or more of them with any two or more other persons, or any such agreement formed at or in the course of the attempted meeting at the City Hall Plaza, to offer any resistance to the police authoritites or to assault or intimidate anyone, or to commit a breach of the peace or to do any unlawful act; and it further appearing that the testimony of the defendants' witnesses as to what occurred at the attempted meeting at the City Hall Plaza did not differ substantially from the testimony of the State's witnesses, thereupon, counsel for the defendants moved that the defendants be acquitted upon the ground that there was no proof of the commission by them or by any of them of the offense charged in the indictment, in that (1) an unlawful assembly is where three or more persons assemble themselves together to do an unlawful act, and part without doing it or making any motion towards it, and it appeared that the defendants had assembled themselves together to do, not an unlawful, but a lawful and constitutional act, namely, to protest

against a supposed public grievance; in that (2) the State must show, in order to convict the defendants, ~~that the object of the defendants in as~~ fendants, that the object of the defendants in assembling together was of a private nature in contrary distinction to an object which affected the whole community, such as a redress of a public grievance, and there is no proof of a private object; in that (3) there is no proof of any preconcerted purpose, or of a mutual purpose formed at or in the course of the attempted meeting, among the defendants, or among any three of them, or among any one or more of them with any two or more other persons, to intimidate anyone, or to assault anyone, or to commit a breach of the peace, or to demolish or damage the City Hall; in that (4) it did not appear that in attempting to hold the meeting, the defendants violated any municipal ordinance or other valid rule or regulation or any statute; in that (5) it did not appear that the attempted meeting was held at an unlawful time or an unlawful place; in that (6) it did not appear that the police authorities had any right to prevent or break up the attempted meeting or disperse the persons composing the same; and in that (7) if the brushing against some police officers by the procession in making its way to the City Hall steps and the resistance to the police officers on the part of four or five persons after the proclamation had been read and the police were endeavoring to disperse the crowd, were conceived by the Court to amount to evidence of any preconcerted plan, or mutual agreement formed at or in the course of the attempted meeting, to commit a breach of the peace or to assault anyone or to put anyone in fear,

or to offer resistance to the police authorities, or to do any other unlawful act of a private nature, the offense was rout or riot and not unlawful assembly, which motion was overruled, and thereupon counsel for defendants prayed exception, which exception was allowed and is sealed accordingly.

JOSEPH A. DELANEY,
Judge.

(Seal)

3. It appearing that the defendant, Butterworth, was asked by counsel for the State on cross-examination whether he had a permit to hold the attempted meeting at the City Hall Plaza on the evening of October 6, 1924, and counsel for the defendants objected to the question on the grounds that it was not cross-examination (it appearing that the defendant, Butterworth, had not been examined in chief in regard to a permit) and that the question was irrelevant, because the State had neither shown or alleged that any permit was required by any municipal ordinance or other valid rule or regulation or by any statute for the attempted meeting, which objection was overruled and the defendant, Butterworth, instructed to answer the question, to which question he answered that he had no permit, to the overruling of which objection counsel for defendants prayed exception and exception was allowed and is sealed accordingly.

JOSEPH A. DELANEY,
Judge.

(Seal)

Bill of Exceptions.

4. It appearing that defendant, Butterworth, was asked on cross-examination by counsel for the State whether he had not been accustomed to obtain oral permits from the Chief of Police to hold meetings on street corners and other public places in the City of Paterson during his campaigns for office as a candidate on the Socialistic ticket, to which question counsel for the defendants objected on the ground that it was not cross-examination (it appearing that no inquiry had been made of this witness on his direct-examination in respect to any permit) and that the State had not shown that a permit for a public meeting upon the public streets or at other public places in the City of Paterson was required by any municipal ordinance or other valid rule or regulation or by any statute, which objection was overruled and the witness instructed by the Court to answer the question, which he did in the affirmative, to which ruling counsel for the defendants excepted, and exception was allowed and is sealed accordingly.

JOSEPH A. DELANEY,
(Sealed) Judge.

Assignments of Error.

Filed May 22, 1925.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, Defendant in Error, vs. JOHN C. BUTTERWORTH, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, Plaintiffs in Error.	In Error to Passaic County Court of Special Sessions.

Afterwards, to wit, on the return of the said writ, before the Justices of the Supreme Court of Judicature, at Trenton, comes the said John C. Butterworth, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, by Rosenkrans & Rosenkrans, their attorneys, and say that, in the record and proceedings aforesaid and also in the matters recited in the Bill of Exceptions and in the verdict and judgment aforesaid there is manifest error, to wit:

First: Because the Court, at the close of the State's case, it appearing from the testimony of the State's witnesses that on the sixth day of October, 1924, between the hours of 7 and 8 o'clock in the evening, some two hundred or three hundred persons were congregated in and about a public square lying between the City Hall and Market Street in the center of the City of Paterson, which square is known as the City Hall Plaza; that some of said persons were sitting upon the benches and others strolling or walking about; that certain police

officers of the City of Paterson to the number of ten or twelve were then stationed in and about said City Hall Plaza by order of the Chief of Police; that there had been in the City of Paterson an industrial strike among workers in the silk mills since about August 1, 1924; that many of the persons so congregated in and about said City Hall Plaza were recognized as strikers by said police officers; that such of said persons as were standing were kept moving by said police officers; that at or about 7:30 o'clock on the evening of said day, a procession of persons marched along Market Street in twos from the Market Street headquarters of the Associated Silk Workers to said plaza, a distance of about a block and a half, and were followed by an increasing number of onlookers; that the procession was led by two young women bearing an American flag; that immediately behind them walked the defendants, John C. Butterworth, Roger N. Baldwin and Ferris Breeka; that none of the other defendants were identified by witnesses for the State as taking part in said procession; that when the procession approached the plaza, the number of persons in and about the plaza rapidly increased until the same totaled, at their maximum number, fifteen hundred or two thousand; that there were hurrahs and acclamations from among the crowd about the plaza on the approach of the flag and procession; that the individuals composing the procession, marching by twos, made their way through the thickening crowd across the plaza to the steps at the front entrance of the City Hall; that in so doing, two or three police officers were brushed against by the procession; that on reaching the City Hall steps, the young women carrying the

flag, and defendants, Butterworth and Baldwin, stood thereon; that defendant Butterworth started to address the crowd, saying "Fellow-workers," whereupon he was interrupted by police officers who asked him whether he had a permit to hold a public meeting at that time and place; that he replied "This is my permit," holding up a book in his hand; that he was then put under arrest, and quietly submitted thereto without further words or any physical resistance; that ~~two~~ police officers attempted to wrest the flag from the two young women, whereupon there were sounds of disapprobation and protest from among the crowd; that both young women were then put under arrest, and each quietly submitted thereto; that a police officer then read the Riot Act or proclamation; that the police officers, then increased to about forty in number, at once began to disperse the crowd; that in the course of so doing, they met with opposition from four or five or more individuals standing in different parts of the crowd; that among the persons so offering resistance were defendants Effsa, Natale, Konzer and Nitkin; that the police officers completely cleared the plaza and adjoining sidewalks of all persons; that no attempt was made on the part of the crowd to reassemble; that defendants Cabbrizza, Effsa, Konza, Natale and Nitkin were all identified by the State's witnesses as being present among the crowd; that defendant Baldwin voluntarily appeared at the Police Station in Paterson on the morning of October 7, 1924, and there told the Chief of Police that he, Baldwin, was responsible for the attempted meeting at the City Hall Plaza and should, if anyone, be arrested, and was accordingly arrested; that on the day of the attempted meeting, and since on or about August 1,

1924, a strike was in progress in the City of Paterson in the silk industry; that the strikers had met in a body from about August 12, to September 26, 1924, daily and publicly in Turn Hall (a building privately owned and adapted for mass meetings and hired of the owners by the strikers) for the purpose of conserving and advancing the interest of the strike; that these meetings were held at 10 o'clock in the forenoon, and were attended by police officers of Paterson, by reporters employed by the local press, and by a stenographer, designated by the Chief of Police, whose known duty it was to take down stenographically and report to the Chief of Police what was said and done at the meetings; that on September 26, 1924, and continuously thereafter until and including said October 6, 1924, the strikers were prevented from holding their mass meetings in Turn Hall by order of the Chief of Police of the City of Paterson, and that such order was made effective by the daily presence at Turn Hall of police officers who stopped all persons approaching the entrance thereof and turned them away from the neighborhood; that no criminal complaint had been made against anyone by reason of anything said or done at said mass meeting in Turn Hall, nor was the arrest of any person sought for anything said or done thereat; that during three or four days immediately preceding said October 6, 1924, printed posters were openly distributed and exhibited in the City of Paterson, advertising a mass meeting in Turn Hall on the early evening of October 6, 1924, for the purpose of protesting against the alleged unlawful acts and supposed oppression of the police officers in excluding the strikers from Turn Hall and in preventing the continuing of their daily meetings therein; that simul-

taneous announcements to the like effect of such intended meeting to protest the supposed grievance were published in the daily papers of the City of Paterson; that persons met, at the hour so advertised in the early evening of October 6, in front of Turn Hall and were dispersed by the police authorities; that the attempted meeting at the City Hall Plaza was known by the State's witnesses to be a meeting in substitution of the advertised meeting at Turn Hall, with the same avowed object of protesting the supposed public grievance; that there was no evidence that any defendant or any persons (save the police officers) in or about the City Hall Plaza at the time of the attempted meeting were armed; that no weapons were brandished or displayed at any time except sticks in the hands of the police officers after the reading of the proclamation; that there was no evidence that any person was alarmed or intimidated by the attempted meeting, except a young police officer, who had been on the police force only three or four months, who testified that he was afraid until the original ten or twelve police officers were reinforced by such additions as made their number to be about forty; Officer Love also testified the crowd put him in fear; that there was no evidence of any municipal ordinance or other valid rule or regulation or statute forbidding a public assembly at the City Hall Plaza or regulating the use thereof for public meetings or requiring any permit for a public meeting at that place; and that there was no testimony of any preconcerted purpose, pledge or program on the part of the defendants or any three of them or of any one or more of them with any two or more other persons, whether known or unknown, to intimidate anyone, to assault anyone, to commit a

breach of the peace or to damage or demolish the City Hall; and that there was no testimony of any such purpose, pledge or program formed at or during such attempted meeting among the defendants or any three of them or between any one or more of them and any other two or more persons, thereupon counsel for defendants moved that the defendants be not put to their defense, but be acquitted by the Court, upon the ground that there was no proof establishing the commission by the defendants or any of them of the crime charged in the indictment, in that it appeared (1) that the object of the meeting was not of a private nature, but one which affected the whole community, namely, the redress of a supposed public grievance, (2) that the meeting had, not an unlawful, but a lawful object, namely, to protest against the supposed oppression and unlawful acts of the police authorities in preventing the exercise by the strikers of the constitutional right of public assembly and of freedom of speech in Turn Hall, (3) that there was no evidence of any preconcerted purpose, pledge or program on the part of the defendants or any three of them or of any one or more of them with any two or more other persons known or unknown, to put anyone in fear, or to assault anyone or to commit a breach of the peace, or to demolish or damage the City Hall, nor was there any testimony of any such mutual purpose, pledge or program formed at or during the course of the attempted meeting, and (4) that there was no evidence of any regulatory municipal ordinance or other valid rule or regulation or statute, applicable to the City Hall Plaza and rendering the attempted meeting there unlawful, nor was any such regulatory ordinance, rule, regulation or statute, asserted by the State to exist;

which motion was overruled, and thereupon counsel for defendants prayed exception, which exception was allowed and is sealed accordingly, which ruling of the Court was erroneous in law and to the substantial injury of the defendants.

Second: Because the Court, at the close of the whole case, it appearing from the testimony of defendants' witnesses, Robert Morse Lovett, Frank P. Walsh and Roger N. Baldwin, that several days prior to October 6, 1924, it was reported to the Board of Managers of the American Civil Liberties Union, an association with headquarters in New York City, having a membership of six thousand members residing throughout the United States, the objects of which association are "to preserve and enforce the freedom of the press, liberty of speech and the right of public assembly," that the police authorities of the City of Paterson had excluded since September 26, 1924, the silk strikers of the City of Paterson from continuing their daily conventions in Turn Hall, a building which the strikers had hired of the owner since on or about August 12, 1924, and in which they had held daily mass meetings at 10 o'clock in the forenoon for the purpose of conserving and advancing the interests of the strike; that up to September 26, 1924, when the police authorities prevented the assembling of the strikers in said hall, police officers, reporters employed by the local press and a stenographer representing the Chief of Police of the City of Paterson, had been in daily attendance at the mass meetings, and that the strikers had submitted to such surveillance of their deliberations and proceedings in their mass meetings, that the police had prevented the strikers continuously after September 26, 1924, from continuing their mass meetings

in Turn Hall on account of the supposed character of the public addresses of a non-resident speaker, who had frequently appeared before their meetings; that the alleged objection to his addresses was that he criticized the president of the United States, and abused the Court of Chancery of this State, out of which injunctive orders against picketing had been lately issued; that no criminal complaint had been made against the speaker, nor his arrest either made or sought; that no disorder had ever occurred at the meetings; and it appearing from the testimony of said witnesses on behalf of the defendants that the action of the police authorities in these circumstances was believed by the Board of Managers of the American Civil Liberties Union to be an arbitrary and oppressive assumption of authority and an invasion of fundamental rights, and that the Board of Managers of the American Civil Liberties Union, upon the foregoing report coming to them, instructed one of its officers, defendants, Roger N. Baldwin, to call a public meeting in the City of Paterson to protest against the action of the police in preventing the silk strikers from continuing their mass meetings in Turn Hall; and it appearing from the testimony of defendant, Roger N. Baldwin, that, acting under the instructions of the Board of Managers of the American Civil Liberties Union, he arranged and advertised a public meeting, for the purpose aforesaid, to be held at Turn Hall in the early evening of October 6, 1924, and caused speakers to be invited to address the proposed meeting; that he caused posters to be printed and distributed in the City of Paterson announcing the time, place and said object of said meeting, and caused notices of the time,

place and object thereof to be published in the local newspapers of the City of Paterson; that prior to the evening of October 6, 1924, the police authorities had announced that they would not allow the proposed meeting to be held; that on October 6, 1924, at and before the advertised hour for said meeting, police officers were stationed in front of and about Turn Hall with orders to prevent the entrance of any persons into the building; that while defendant, Roger N. Baldwin, was in the Market Street Headquarters of the Associated Silk Workers, it was reported to him that the proposed public meeting at Turn Hall would, by orders of the Chief of Police, be prevented from being held therein; that he then determined to attempt to hold a substituted meeting at the City Hall Plaza in the City of Paterson on that evening, with the same object of protesting against the said supposed public grievance, resulting from the action of the police authorities of the City of Paterson in preventing the silk strikers from continuing their daily mass meetings in Turn Hall for the purpose of conserving and advancing the interests of their strike; and it appearing by the testimony of the defendants' witnesses that in accordance with the arrangements then made by defendant, Baldwin, a procession of about thirty persons, marching in twos, started from the Market Street Headquarters of the Associated Silk Workers towards the City Hall Plaza; that just prior thereto, defendant, Baldwin, cautiously and insistently instructed as well those who were to address the open air meeting as all of the persons then in said headquarters, that they should submissively yield to the police, if the police should undertake to prevent or hinder the proposed meeting at the City Hall Plaza; that there

was no testimony either from the State's witnesses or from the witnesses of the defendants that anyone counseled resistance or planned or agreed to oppose the police, or that there was any understanding, pledge or program among the defendants or any three of them, or any one or more of them with any two or more persons, that they should resist the police, assault anyone or intimidate anyone, or commit any breach of the peace, that all of the defendants expressly denied that there was any preconcerted agreement between them, or between any three of them, or between any one or more of them with any two or more other persons, or any such agreement formed at or in the course of the attempted meeting at the City Hall Plaza, to offer any resistance to the police authorities or to assault or intimidate anyone, or to commit a breach of the peace or to do any unlawful act; and it further appearing that the testimony of the defendants' witnesses as to what occurred at the attempted meeting at the City Hall Plaza did not differ substantially from the testimony of the State's witnesses, thereupon, counsel for the defendants moved that the defendants be acquitted upon the ground that there was no proof of the commission by them or by any of them of the offense charged in the indictment, in that (1) an unlawful assembly is where three or more persons assemble themselves together to do an unlawful act, and part without doing it or making any motion towards it, and it appeared that the defendants had assembled themselves together to do, not an unlawful, but a lawful and constitutional act, namely, to protest against a supposed public grievance; in that (2) the State must show, in order to convict the defendants, that the object of the defendants in assembling together was

of a private nature in contrary distinction to an object which affected the whole community, such as a redress of a public grievance, and there is no proof of a private object; in that (3) there is no proof of any preconcerted purpose, or of a mutual purpose formed at or in the course of the attempted meeting, among the defendants, or among any three of them, or among any one or more of them with any two or more other persons, to intimidate anyone, or to assault anyone, or to commit a breach of the peace, or to demolish or damage the City Hall; in that (4) it did not appear that in attempting to hold the meeting, the defendants violated any municipal ordinance or other valid rule or regulation or any statute; in that (5) it did not appear that the attempted meeting was held at an unlawful time or an unlawful place; in that (6) it did not appear that the police authorities had any right to prevent or break up the attempted meeting or disperse the persons composing the same; and in that (7) if the brushing against some police officers by the procession in making its way to the City Hall steps and the resistance to the police officers on the part of four or five persons after the proclamation had been read and the police were endeavoring to disperse the crowd, were conceived by the Court to amount to evidence of any preconcerted plan, or mutual agreement formed at or in the course of the attempted meeting, to commit a breach of the peace or to assault anyone or to put anyone in fear, or to offer resistance to the police authorities, or to do any other unlawful act of a private nature, the offense was rout or riot and not unlawful assembly, which motion was overruled, and thereupon counsel for defendants prayed exception, which exception was allowed and is sealed accordingly, which ruling

of the Court was erroneous in law and to the substantial injury of the defendants.

Third: Because the Court during the trial of the cause, it appearing that the defendant, Butterworth, was asked by counsel for the State on cross examination whether he had a permit to hold the attempted meeting at the City Hall Plaza on the evening of October 6, 1924, and counsel for the defendants objected to the question on the grounds that it was not cross examination (it appearing that the defendant, Butterworth, had not been examined in chief in regard to a permit) and that the question was irrelevant, because the State had neither shown or alleged that any permit was required by any municipal ordinance or other valid rule or regulation or by any statute for the attempted meeting, which objection was overruled and the defendant, Butterworth, instructed to answer the question, to which question he answered that he had no permit, to the overruling of which objection counsel for defendants prayed exception and exception was allowed and is sealed accordingly, which ruling of the Court was erroneous in law and to the substantial injury of the defendants.

Fourth: Because the Court, it appearing that defendant, Butterworth, was asked on cross examination by counsel for the State whether he had not been accustomed to obtain oral permits from the Chief of Police to hold meetings on street corners and other public places in the City of Paterson during his campaigns for office as a candidate on the Socialist ticket, to which question counsel for the defendants objected on the ground that it was not cross examination (it appearing that no inquiry had been made of this witness on his direct examination in respect to any permit) and that the State had not shown that a permit for a public meeting upon the public streets or at other public places in the City of Paterson was required by any municipal ordinance or other valid rule or regulation or by any statute, which objection was overruled and the witness instructed by the Court to answer the question, which he did in the affirmative, to which ruling counsel for the defendants excepted, and exception was allowed and is sealed accordingly, which ruling of the Court was erroneous in law and to the substantial injury of the defendants.

Fifth: Because the Court sentenced the said defendant, Roger N. Baldwin, to be confined in the County Jail, of the County of Passaic, for the term of six months, and sentenced each of said other defendants, to wit; John C. Butterworth, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, to pay a fine of Fifty Dollars each and stand committed until their respective fines be paid, whereas for the reasons set forth in the Bill of Exceptions no sentence should have been imposed upon any of the said defendants.

ROSENKRANS & ROSENKRANS,
Attorneys for Plaintiffs-In-Error.

ADDISON P. ROSENKRANS,
Of Counsel with Plaintiffs-In-Error.

Service of a copy of the within Assignment of Errors is hereby acknowledged this May 21, 1925.

J. W. De YOE,
Prosecutor and of Counsel for State.

Opinion.

STATE v. BUTTERWORTH *et al.* (No. 7.)

Supreme Court of New Jersey. Nov. 1, 1927.

(*Syllabus by the Court.*)

1. Under section 215 of the Crimes Act (Comp. St. of N. J. p. 1811; Paterson's Laws of N. J. p. 220, § 68), an unlawful assembly is an offense at common law and declared to be a misdeameanor.

2. At common law, an assembly became unlawful alone by the manner of it, as by such circumstances of terror as tended to endanger the public peace and excite fear, alarm, and consternation among the people, and there need be no common purpose of such assembly, except such as might be implied by assembling in such manner and which might be either lawful or unlawful.

3. An intention to commit a crime by force or an unlawful purpose are not essential ingredients of an "unlawful assembly" at common law.

4. Whether the circumstances, as disclosed by the testimony and the conduct of the defendants, were such as would frighten and alarm persons of reasonable firmness and courage are questions of fact for a jury to determine.

5. For the facts of the case held sufficient to justify a conviction of the defendants for holding an unlawful assembly, at common law, see the opinion.

Error to Court of Special Sessions, Passaic County.

Argued May term, 1927, before *Gummere, C. J.*, and *Black* and *Lloyd, JJ.*

Decided November 1, 1927.

Opinion.

Rosenkrans & Rosenkrans, of Paterson, and Samuel Untermyer, of the New York Bar, for plaintiffs in error.

J. Vincent Barnitt, Prosecutor of the Pleas, of Paterson, for the State.

The opinion of the Court was delivered.

BLACK, *J.* The defendants, eight in number, were indicted for holding an unlawful assembly. The trial before Judge Delaney, without a jury in the Passaic special sessions, resulted in their conviction. A writ of error was issued out of this court to review the judgments of conviction. Five assignments of error were filed, the substance of which is the defendants were convicted without evidence. They should have been acquitted.

One of the defendants, Butterworth, was permitted to be asked by the state on cross-examination if he had a permit to hold a meeting at the City Hall Plaza, and whether he had not been accustomed to obtain oral permits from the chief of police to hold meetings on street corners in the city of Paterson. These latter are not argued in the appellants' brief. The facts on which the convictions were based are set out in the bill of exceptions sent up with the writ of error. The defendants were arrested on October 6, 1924, between 7 and 8 o'clock in the evening at the City Hall Plaza, in Paterson. There was and had been since August 1, 1924, an industrial strike among the workers in the silk mills of tne city. A procession of persons marched along Market Street in two's from the Market Street headquarters of the associated silk workers to the City Hall Plaza, a distance of a block and a half. They were followed by an increasing number

of onlookers. The procession was led by two young women bearing an American flag; behind them walked the defendants John C. Butterworth, Roger N. Baldwin, and Ferris Drecka. None of the other defendants were identified by witnesses for the state as taking part in the procession.

When the procession approached the Plaza, the number of persons in and about the Plaza rapidly increased, until the same totaled, at the maximum number, 1,500 or 2,000. There were hurrahs and acclamations, from among the crowd about the Plaza, on the approach of the flag and the procession.

On September 26, 1924, and continuously thereafter until and including October 6, 1924, the strikers were prevented from holding their mass meetings in Turn Hall by order of the chief of police of the city.

A police officer read the Riot Act or proclamation. Two or three police officers were brushed against by the procession. A young police officer, who had been on the police force three or four months, testified he was afraid until the original ten or twelve police officers were reinforced by such additions as made their number about forty. Officer Love testified the crowd put him in fear. When the police officers had increased to about forty in number, they at once began to disperse the crowd; in the course of so doing, they met with opposition. Persons offering resistance were the defendants Basil Effsa, Bracco Natale, Kerrill Konzer, David Nitkin, George Cabbrizza, and others.

(1) The arrests of the defendants were followed by indictments by the Passaic county grand jury for an unlawfull assembly. The indictment is of an offense at common law, declared to be a misdemeanor by section 215 of the Crimes Act (Comp. St. of N. J. p. 1811; Paterson's Laws of N. J. p. 220, § 68). The sufficiency of the indictment has not been attacked. It was not necessary for the state to prove all the allegations therein set out. The purpose of the meeting, as set out in printed posters openly distributed and exhibited in the city of Paterson, three or four days immediately preceding the meeting, October 6, 1924, was to protest against the alleged unlawful acts and supposed oppression of the police, in excluding the strikers from Turn Hall, and in preventing the continuing of their daily meetings therein. Such is some of the dominant testimony contained in the record of the case. Tested by the legal rules applicable, were the convictions of the defendants justified?

The main, if not the only, question therefore relates to the sufficiency of the evidence to support the charge laid in the indictment.

An unlawful assembly at common law has been defined in the reported cases and by text-book writers of recognized authority thus:

"Unlawful Assembly in General.—An unlawful assembly has been defined to be an assembly of three or more persons with intent either to commit a crime by open force or to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it." 2 Brill, Cyclopedia of Criminal Law, Vol. 2, p. 1588, § 1007, cited with approval in Reg. v. Cunninghame, 16 Cox, Crim. Cas. 420, 427.

Professor Wharton in his Criminal Law, vol. 3, p. 2050, § 1851 (11th Ed.) defines an unlawful assembly thus:

"Persons lawfully assembled may become an unlawful assembly, if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose; and this has been held to be the case with disorder got up suddenly, though concertedly, at a town meeting, and at a social assembling for dancing. In determining the question of terror, it has been said that the jury are to consider whether natural and firm men, in charge of families, would have under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done. An unlawful assembly does not in itself involve any overt act. If overt acts of violence are attempted, the offense is a riot."

(2) The Supreme Court of Wisconsin in the case of Bonneville v. State, 53 Wis. 680, 684, 11 N. W. 427, speaking through Mr. Justice Orton, said:

"At common law, an assembly became unlawful alone by the manner of it, as by such circumstances of terror as tender to endanger the public peace and excite fear, alarm, and consternation among the people; and there need be no common purpose of such assembly, except such as might be implied by assembling in such manner, and which might be either lawful or unlawful."

Attended with circumstances calculated to excite alarm, an assembly is unlawful. Reg. v. Neale, 9 Car. & P. 431; 38 Eng. C. L. 178. The temper of the meeting must be considered. Reg. v. Vincent, 9 Car. & P. 9, 93; 38 Eng. C. L. 48, 118.

Other authorities to the same effect are 39 Cyc. 831, where the cases are collected. Bishop's Criminal Law, p. 908, § 1256 (9th Ed.); Black's Law

Dict. p. 1187 (2d Ed.); Hawkins P. C. C. I. § 334 (2); Bouvier's Law Dict. page 3376 (3d Ed.); 4 Words and Phrases, Second Series, page 1079.

(3) From these authorities it is clear that an intention to commit a crime by force or an unlawful purpose is not an essential ingredient of an unlawful assembly at common law. This is an answer to the argument of the plaintiffs-in-error for a reversal of the judgments.

(4) It is also clear, that, whether the circumstances, as disclosed by the testimony and the conduct of the defendants, were such as would frighten and alarm persons of reasonable firmness and courage were questions of fact for a jury, and in this case for the judge sitting in the place of a jury. Slater v. Wood, 9 Bosw. (N. Y.) 15.

The testimony, a consideration of the background of the case, and the subsequent events also clearly show that the advertised meeting in the City Hall Plaza, the most conspicuous place in the city, laid out a program in defiance of the constituted authorities. It was intended, in a spectacular fashion, to emphasize a disapproval of the action of the police. They, of necessity, knew this would provoke police hostility, and from the inflamed state of a public mind in the midst of a strike nothing would be more likely than a consequent breach of the peace, if not by themselves, at least by others in sympathy with them. That such an outcome was probable is inferable from the meeting itself, under the circumstances, and that it was actually feared is evidenced by the testimony of the two police officers referred to.

The situation created by the defendants presented an analogy to a fire with obvious danger of a conflagration if not checked, and this tendency the principal defendant well knew.

Hence, it seems to ~~me~~ us idle to say, that the Trial Judge found these defendants guilty of an unlawful assembly without ample evidence to justify a conviction.

This leads to an affirmance of the judgments of the Court of Special Sessions of the County of Passaic and such judgments are affirmed.

Order Affirming Judgment and Remittitur.

Filed Nov. 7, 1927.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY, Defendant in Error, vs. JOHN C. BUTTERWORTH, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, Plaintiffs in Error.	On Appeal. Order on Affirmance of Judgment.

This cause having been duly argued at the May Term, 1927, of this Court by Samuel Untermyer, of counsel for the Plaintiffs-in-Error, and J. Vincent Barnitt, of counsel for the Defendant-in-Error, and the Court having considered the same and finding no error in the record or proceedings in the Passaic County Court of Special Sessions.

It is thereupon, on this 7th day of November, in the year of our Lord, one thousand nine hundred and twenty-seven, Ordered and adjudged, that the judgment of the Court of Special Sessions, removed by the appeal in this cause, be affirmed with costs; and that the record be remitted to the Court of Special Sessions to be proceeded with in accordance with this judgment and the practice of said Court.

Entered November 7, 1927.

On motion of
J. VINCENT BARNITT,
Attorney for Defendant-in-Error.

Certification by Chief Justice to Return of Supreme Court.

STATE OF NEW JERSEY, Defendant in Error, vs. JOHN C. BUTTERWORTH, Roger N. Baldwin, Ferris Dreeka, George Cabbrizza, Basil Effsa, Kerrill Konzer, Bracco Natale and David Nitkin, Plaintiffs in Error.	

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain Schedule to this Writ annexed, as within we have commanded.

WM. S. GUMMERE,
C. J.

Assignments of Error.

Filed Jan. 12, 1928.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY, Defendant in Error, vs. JOHN C. BUTTERWORTH, Roger N. Baldwin, George Cabbrizza, Basil Effsa and David Nitkin, Plaintiffs in Error.	On Writ of Error Assignments of Error.

New Jersey, ss:

Afterwards, to wit, on return of said writ before the New Jersey Court of Errors and Appeals, Trenton, came the said John C. Butterworth, Roger N. Baldwin, George Cabrizza, Basil Effsa and David Nitkin, Plaintiffs-in-Error, by Feder & Rinzler and Sigmund Unger, their attorneys and say that in the record and proceedings aforesaid and also in the giving of judgment there are manifest errors to wit:

1. Because the Supreme Court erred in giving judgment for the State of New Jersey and in affirming the judgment of the Passaic County Court of Special Sessions instead of giving judgment for the Plaintiffs in error and reversing the judgment of the Passaic County Court of Special Sessions, for

the several reasons set forth in the assignments of error and bill of exceptions and specifications for reversal.

FEDER & RINZLER
and SIGMUND UNGER,
Attorneys for, and of Counsel
with, Plaintiffs-in-Error.

Due and legal service acknowledged this 11th day of January, 1928.

J. VINCENT BARNITT,
Prosecutor of the Pleas and
Atty. for Defendant-in-Error.

100.

New Jersey Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Defendant-in-Error,

—against—

JOHN C. BUTTERWORTH, ROGER N. BALDWIN, GEORGE CABRIZZA, BASIL EFFSA and DAVID NITKIN,
Plaintiffs-in-Error.

BRIEF FOR PLAINTIFFS-IN-ERROR.

The plaintiffs-in-error* were jointly tried before Honorable Joseph L. Delaney, sitting without a jury, and convicted of unlawful assembly.

The indictment charges an unlawful assembly at the City Hall Plaza in Paterson on October 6, 1924, numbering 500 persons or more, a prolonged disturbance, lasting an hour, threats to beat orderly persons, and an intent to wreck the City Hall of Paterson and to assault the police.

General Statement.

In the fall of 1924, a strike was in progress in the silk mills of the City of Paterson. According to the evidence, it was an orderly strike, not a single complaint having been made against the

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* Hereinafter referred to as defendants.

strikers for anything they said or did. For a time, the strikers held open meetings in a private hall to further their interests. These meetings were attended by newspaper reporters, and the proceedings were taken down by a stenographer assigned by the Chief of Police. In September, the Chief of Police stopped the meetings. He assigned no reason for his action. It is suggested by the defendants that he appears to have objected to what he regarded as unwarranted criticism by one of the speakers of the President of the United States and of the courts of this State. Whatever the reason may have been, the Chief of Police evidently did not regard it as warranting prosecution, for it is conceded that no arrest was made, nor any complaint to the prosecuting authorities. All that appears is that the Chief of Police assumed the power to stop future meetings of the strikers.

This situation was brought to the attention of the American Civil Liberties Union. The Union is a national organization, including among its members persons of various political affiliations, many of them of national prominence. Its purpose is to preserve the personal liberties guaranteed by the bills of rights of the Nation and of the State. The Union believed that the action of a police official in baldly forbidding all meetings of strikers, during a strike which was, so far as it appeared, being conducted in an orderly and lawful manner, created a situation which called for public attention. It, therefore, directed the defendant Baldwin, one of its directors, to call a meeting in a private hall in Paterson in the interests of freedom of speech and assemblage.

On the evening appointed for the holding of the meeting, persons who appeared at the hall found policemen stationed to prevent entrance. Again,

the Chief of Police, upon the trial of this action, did not offer any explanation, or attempt any justification, of his conduct in preventing the holding of meetings in Paterson.

Before arriving at the hall, Baldwin was advised of the situation. He accordingly decided not to proceed to the hall. In order that there might, however, be a clear understanding as to the nature of the power of suppressing public discussion which the Chief of Police had apparently assumed, he decided to hold an open-air free-speech meeting. The purpose was carefully explained to those present, and they were cautioned to submit quietly, if arrested. The object of the meeting—the sole and undisputed object, as the evidence in the case shows—would thus be accomplished, namely, to have a judicially cognizable situation, so that it might be judicially determined to what extent a police official could, during an exceptionally orderly and lawful strike, control or forbid public discussion.

About thirty persons accordingly formed a procession of twos, and, preceded by an American flag, marched a distance of a block and a half to the City Hall Plaza. There were about twelve police officers at the Plaza, who were soon increased to about forty; and a crowd estimated by the police at from 1500 to 2000 was attracted.

The procession quietly crossed the Plaza. The record states that they brushed against one or two police officers. No one appears to have regarded this apparently accidental contact as significant, for the police permitted the procession to gather round the City Hall steps. They did not interfere until defendant Butterworth started to address the crowd. He was then asked by a policeman whether he had a permit to hold a meeting. He

replied that he had none—and it is admitted that none was required by any City ordinance—and was immediately arrested. The police then attempted to wrest the flag from two young women who were carrying it. There were some sounds of protest from the crowd at this act, but nothing more. The two young women were arrested, but do not appear as defendants in this prosecution, having apparently been subsequently released by the police.

A policeman then read the riot proclamation, and the police at once proceeded to clear the Plaza. In the course of so doing, they allege that they met with "opposition" from four or five "or more" persons in various parts of the crowd. The nature of this opposition is not explained. The Plaza was easily cleared, and the gathering made no attempt to re-assemble.

Of the persons arrested on the evening of October 6th, four (Effsa, Konzer, Natale and Nitkin) are alleged to have been among those who opposed the police. The State did not prove that they had any connection with, or interest in, the meeting. Two (Butterworth and Dreeka) are alleged to have marched in the procession to the Plaza. One (Cabrizza) appears to have been merely a bystander. These defendants were fined fifty dollars each.

Baldwin, though standing conspicuously on the City Hall steps, was not arrested. The following day he appeared at police headquarters and stated that, inasmuch as he had called the meeting, he if anyone should be arrested, rather than those who had marched with him and gathered to hear the speakers. He was then taken into custody. He has been sentenced to six months' imprisonment.

There was no evidence whatever of any hostile

intention, bad temper, or threatening conduct on the part of the gathering as a whole; and the general question is whether, in the light of these facts, of the admittedly lawful purpose of the meeting, and of the constitutional guarantees of freedom of speech and freedom of assemblage by reference to which the statute must be construed, the meeting in question can be deemed to have been an unlawful assembly.

The Facts.

The record presents practically an agreed statement of facts. Except as otherwise indicated in a few instances, the following analysis of the facts is accordingly taken exclusively from the narrative summary of the State's case.

The Background of the Meeting: The Suppression by the Chief of Police of Orderly Meetings of Strikers.

A strike of silk workers had been in progress in Paterson since about August 1, 1924 (p. 13, l. 4). The strikers had rented Turn Hall, a private hall, where they held daily meetings at ten o'clock in the morning "for the purpose of conserving and advancing the interests of the strike" (p. 15, ll. 2-11). Policemen and newspaper reporters regularly attended, and the Chief of Police had a stenographer present who took down the speeches (p. 15, l. 11).

On September 26, 1924, the Chief of Police stopped the meetings and stationed police in front of the hall to enforce his order (p. 15, l. 19). His action is unexplained by the State. Defendants suggest that the Chief of Police appears to have objected to the remarks of one speaker who is

alleged to have "criticized the President of the United States, and abused the Court of Chancery of this State, out of which injunctive orders against picketing had been lately issued" (p. 19, l. 9).

The State admitted "that no criminal complaint had been made against anyone by reason of anything said or done at said mass meetings, nor was the arrest of any person sought" (p. 19, l. 13). No facts were proved, either in the conduct of the meeting or of the strike as a whole, warranting a drastic suppression of assemblage (p. 19, l. 15).

It is not in evidence that the strikers made any further attempt to meet.

The Object of the Meeting: To Vindicate the Right of Assembly.

About October 3, 1924, posters were distributed and notices inserted in Paterson papers, advertising a meeting in Turn Hall on the evening of October 6, 1924 (p. 19, l. 31). The posters and notices stated the purpose of the meeting. It was to be a "mass meeting * * * for the purpose of protesting against the alleged unlawful acts and supposed oppression of the police officers in excluding the strikers from Turn Hall, and in preventing the continuance of their daily meetings therein" (p. 15, l. 37).

Robert Morse Lovett, Frank P. Walsh, and the defendant Baldwin explained, on behalf of defendants, that the meeting was called by Baldwin by direction of the Board of Managers of the American Civil Liberties Union (p. 18, l. 10). The Union is an association organized "to preserve and enforce the freedom of the press, liberty of speech and the right of public assembly" (p. 18, l. 20). It has headquarters in New York City, and a membership of 6,000 persons, residing throughout the United States (p. 18, l. 18).

The police authorities announced they would not allow the proposed meeting to be held (Defendants' case, p. 20, l. 13). On the evening of October 6, 1924, persons who assembled in front of Turn Hall were dispersed by the police (p. 20, l. 9). It is not in evidence that anyone attempted to enter the hall, or that the police had any difficulty in enforcing their order.

Baldwin was at the Market Street headquarters of the Associated Silk Workers when he learned that the Chief of Police had forbidden the meeting in Turn Hall (Defendant's case, p. 20, l. 13). He thereupon determined to attempt to hold a substituted meeting at the City Hall Plaza (Defendants' case, p. 20, l. 21).

This meeting had the same avowed object as the other, as the police knew (p. 16, l. 10).

The Defendant Baldwin's Preliminary Instructions to All the Participants to Submit Quietly if the Police Forbade the Meeting.

Before proceeding to the Plaza, however, the defendant Baldwin "cautiously and insistently instructed" those who were to speak, as well as everyone else present, to yield submissively to the police if the latter undertook to prevent or hinder the proposed meeting (Defendants' case, p. 20, l. 36).

The State offered no evidence of any other plan or purpose.

"There was no testimony either from the State's witnesses or from the witnesses of the defendants

that anyone counseled resistance, or planned or agreed to oppose the police, or that there was any understanding, pledge or program among the defendants, or among three of them. or any one or more of them with any two or more persons, that they should resist the police, assault anyone or intimidate anyone, or commit any breach of the peace" (p. 21, l. 3).

All the defendants expressly disclaimed such an understanding or purpose (Defendants' case, p. 21, l. 15).

The Actual Orderly Procession.

Baldwin then started out with a procession of thirty persons, marching in twos (p. 13, l. 15, Defendants' case, p. 20, l. 32). In front marched two young women, bearing an American flag; behind them came defendants Butterworth, Baldwin and Dreeka (p. 13, l. 22). "None of the other defendants was identified by witnesses for the State as taking part in said procession" (p. 13, l. 25). The procession marched along Market Street to the City Hall Plaza, a distance of about a block and a half, and was followed by an increasing number of onlookers (p. 13, l. 19).

At the City Hall Plaza about two or three hundred persons had congregated (p. 12, l. 33). Some were sitting on benches, others strolling or walking about (p. 12, l. 39). Many of them were recognized as strikers by the police (p. 13, l. 10). There were about ten or twelve police present by order of the Chief of Police (p. 13, l. 1). Before the meeting started, the number of police had increased to forty (p. 14, l. 19).

When the procession approached the Plaza, the

number of persons present rapidly increased until the crowd, according to the State's estimate, numbered fifteen hundred or two thousand (p. 13, l. 27). "The approach of the flag and procession" evoked "hurrahs and acclamations" (p. 13, l. 31). The procession, still marching in twos, made its way across the Plaza, brushing against two or three police officers in so doing (p. 13, l. 38). The police, however, did not take offense at this accidental brushing. The young women carrying the flag mounted the City Hall steps, as did Butterworth and Baldwin (p. 13, l. 40).

This is the complete story of events up to the time of the first arrest.

The first arrest, and the actual submission to the police, in accordance with the preliminary instructions of the defendant Baldwin.

Butterworth then started to address the crowd, saying, "Fellow workers", and was immediately interrupted by the police who asked him whether he had a permit to hold a public meeting (p. 14, l. 2). He held up a book and replied "This is my permit" (p. 14, l. 10).

He was then put under arrest.

He submitted quietly, without further words or any physical resistance (p. 14, l. 10).

The police then attempted "to wrest the flag from the two young women" (p. 14, l. 13). No motive for the act is suggested.

Both young women likewise submitted quietly to arrest (p. 14, l. 16).

The reaction of some onlookers to the sudden attempt of the police to wrest the flag from the young women expressed itself in "sounds of disapprobation and protest from among the crowd" (p. 14, l. 14).

Police then read the riot proclamation and at once began to disperse the crowd (p. 14, l. 18). They cleared the Plaza and adjoining sidewalks of all persons, and the crowd made no attempt to reassemble (p. 14, l. 17).

In the course of dispersing the crowd, however, the police "met with opposition from four or five or more individuals standing in different parts of the crowd" (p. 14, l. 22). Four of these were defendants Effsa, Natale, Konzer and Nitkin (p. 14, l. 25). These four "were all identified by the State's witnesses as being present among the crowd" (p. 14, l. 30). They were not otherwise identified as being strikers, or participants in the procession, or having any other relation to the meeting than that of onlookers or persons sitting in or strolling about the Plaza. Except Baldwin, Butterworth and Dreeka, none of the defendants was identified by witnesses for the State as taking part in the procession (p. 13, l. 25).

The Arrest of Baldwin.

Baldwin, who has been singled out by the Court for a sentence of six months' imprisonment, had mounted the steps of the City Hall Plaza together with Butterworth and the two young women (p. 13, l. 39). He had arranged and advertised the meeting (p. 19, l. 31). He remained conspicuously on the City Hall steps when the police intervened, and could have been arrested. He was not arrested, however, until he "voluntarily appeared at the Police Station in Paterson on the morning of October 7, 1924, and there told the Chief of Police that he, Baldwin, was responsible for the attempted meeting at the City Hall

Plaza and should, if anyone, be arrested and was accordingly arrested" (p. 14, l. 33).

The Character of the Crowd.

"There was no evidence that any defendant or any person (save the police officers) in or about the City Hall Plaza at the time of the attempted meeting were armed" (p. 16, l. 15). No weapons were brandished or displayed, except sticks in the hands of the police (p. 16, l. 18). No one was alarmed or intimidated by the crowd except a young police officer, three or four months on the force, "who testified that he was afraid until the original ten or twelve police officers were reinforced by such additions as made their number to be about forty" (p. 16, l. 22).

The Defendant Cabrizza.

Nothing is disclosed as to this defendant's activities, unless we may infer, from the fact of his arrest, that he was in the crowd.

What Was Not Shown.

The record is significantly silent as to the utterance of any threats, the display or possession of any weapons, even of anything in the nature of bad temper, on the part of the crowd. There is likewise complete silence as to the earlier existence in Paterson of any disturbance or threat of disturbance such as to make understandable the employment of unusually repressive measures. Everything in the record makes it clear that such evidence was omitted for the good and sufficient reason that it did not exist. There was a strike,

but the strike had been orderly and peaceful, and the daily meetings of the strikers, which had been stopped by the police, had not led to a single complaint or prosecution.

Argument.

POINT I.

The facts do not establish that the assembly was unlawful.

Section 215 of the Crimes Act (cited in Appendix A, p. 39, to this brief) under which the present indictment is laid, refers to "offenses of an indictable nature at common law", thus indicating that the legislature was neither creating the enumerated offenses, nor changing their definition, but adopting them in their common law form. *State* v. *Crusius,* 57 N. J. L. 279; *State* v. *Haywood* (not officially reported), Vol. 36, New Jersey Law Journal, page 146. Various definitions of unlawful assembly are cited in Appendix B, page 39, to this brief. An examination of these definitions makes it fairly clear that the offense is not one capable of very precise definition. An assembly may be unlawful if it has an unmistakably illegal purpose. If this illegal element is not present, however, the definitions do no more than provide a guide for the *interpretation* by the Court or the jury, as the case may be, of the proved facts.

Does the assembly threaten a breach of the peace? Is its conduct calculated to alarm reasonable men?.

Such criteria leave ample room for individual differences of opinion, and even for speculation as to remote possible consequences of certain conduct. As an example of speculative interpretation of the facts, reference may fairly be made to the statement of the Supreme Court, in its opinion in this case, that the circumstances bore an analogy to a fire which might spread into a conflagration if not promptly checked. *Opinion,* P. 43.*

Aside from these considerations, it must be borne in mind that the statute forbidding unlawful assemblies is subordinate to the constitutional guarantees of freedom of speech and freedom of assemblage. The Constitution of New Jersey provides that "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right." Article I, Sec. 5. It also provides that "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." Article I, Sec. 18.

These constitutional provisions, setting forth the ideals to which the people subscribe, are themselves in their nature incapable of precise definition. In the last analysis, their vitality depends in large degree upon the spirit in which the Court chooses to apply such a statute as the statute for-

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*~~The concluding paragraph of the Court's opinion was~~ omitted by error from the printed record. It reads: "The situation created by the defendants presented an analogy to a fire with obvious danger of a conflagration if not checked, and this tendency the principal defendants well knew. Hence, it seems to us idle to say that the trial Judge found these defendants guilty of an unlawful assembly without ample evidence to justify a conviction. This leads to an affirmance of the judgments of the Court of Special Sessions of the County of Passaic and such judgments are affirmed."

bidding unlawful assemblies which is here under consideration.

If a citizen, desiring to make a perfectly respectful protest against arbitrary and illegal action by police authorities, is forbidden by the same authority from holding the meeting; if he then, to test his right to hold the meeting, attempts in a perfectly peaceable manner to hold a meeting in the open air—there being no ordinance to forbid such an assembly—and is then clapped into jail on testimony that someone accidentally brushed against a policeman, or someone else "opposed" the police, it boots him little that the Constitution of the State contains a clear and noble declaration of the "natural and inalienable right" of liberty of the individual.

It is in the light of these constitutional principles, and in the light of the historical development of the theory of unlawful assembly, as illustrated in the English common law, from which it is inherited, that we respectfully submit the facts in this case should be considered.

It will clearly appear, as it seems to us, that no assembly could have been more peaceable in its intentions and in its actual conduct. On the part of Baldwin and his followers, there was a studied purpose to avoid giving offense to the police; on the part of the latter, an apparent eagerness to divert attention from the sole purpose of the meeting—which was to test the right of the Chief of Police to suppress public discussion—and by militant tactics to create an "incident" which might retroactively justify their arbitrary conduct in suppressing meetings. There was the attempt to wrest the flag carried by the procession from the two young women who were carrying it; the demand for a permit to hold a

meeting, where none was required by law, and the use of this demand as a pretext for reading the riot act to a peaceable assembly; the immediate resort to forcible measures to disperse the crowd, without giving it a chance peaceably to disperse, as the riot proclamation by its very terms contemplates (see Appendix C, p. 44, *infra*); the calling to the stand of one or two policemen to testify they were "frightened" in order to bolster the case against the defendants.

Such circumstances seem to us to call for the earnest consideration of the Court, with a view to determining to what extent the actual realities of this case can be squared with the constitutional declaration of rights.

We proceed, therefore, to a more detailed consideration of the facts.

The General Character of the Assembly.

The only evidence on that subject in the case is the testimony of one or two policemen that the crowd frightened them. The record is not clear as to whether the number of frightened policemen was one or two (p. 16, ll. 22-30). One, at any rate, was a young policeman, three or four months on the force. There were about forty policemen present (p. 14, ll. 19-20), none of whom testified that there was any cause for alarm. Nor was any civilian produced to testify to the alarming character of the assembly, though there were 1500 or 2000 present. Neither the young policeman, nor anyone else, testified to any actual circumstances, such as bad temper or threats on the part of the crowd, from which the plausibility of the claim of apprehension might be deduced.

The genesis of the young policeman's testimony is suggested by the case of *State* v. *Haywood* (not officially reported), Vol. 36, New Jersey Law Journal, page 146. Sustaining a writ of habeas corpus in that case—also an unlawful assembly case—Judge Minturn said:

> "But not one of these policemen attempted to say that he was frightened by the conduct of things there. One of them says he was not scared in the least. There was nothing there apparently to scare him or anybody else, *unless the mere appearance of a crowd on the street may be considered as an occasion for scaring anybody.*
>
> I am asked under this state of facts to adjudge these two men guilty of violating the common law of the land, which prohibits men from assembling in great crowds for the purpose of inciting fear and terror in the community. I fail to find from the testimony of the officers here that anyone was excited; that any one of them was in fear. I fail to find from the testimony in this case that anybody along the line in the streets where this crowd proceeded was interfered with, or in fear of anything that the crowd had said or were saying, or had done or were likely to do."

It was apparently to meet such a situation that the testimony of one or two policemen that they were frightened was introduced.

The young policeman in this case does not appear to have been alarmed by what anyone said or did. It was not any alleged opposition to the police which frightened him, for his apprehension antedated the forcible breakup of the meeting. "He was afraid until the original ten or twelve police officers were reinforced by such additions as made their number to be about forty" (p. 16, ll. 26-29). It was merely "the crowd" which

frightened him for a passing moment (p. 16, ll. 29-30).

American courts do not appear to have had the same occasion as the English courts to consider the doctrine of unlawful assembly. In the long history of the development of popular liberties in England, the courts of that country have had frequent occasion to consider and develop the correlation between the doctrine of unlawful assembly, on the one hand, and the right of public discussion which our own Supreme Court has declared to be inherent in the very idea of a republican government. *United States* v. *Cruikshank,* 92 U. S. 452, at page 552.

In the classic case of *Reg.* v. *Vincent* (9 Carr. & P. 91), a case dealing with one of the Chartist riots, numerous witnesses testified that the assembly in question alarmed them, and stated the grounds of their alarm. Notwithstanding ample testimony that persons were actually alarmed, Baron Alderson did not charge the jury that such statements were proof that the assembly was in fact alarming, but charged:

> "You will consider how far these meetings partook of that character, and whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, for I quite agree with the learned counsel for the defendants that the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage." (Page 109.)

The case of *Reg.* v. *Cunninghame-Graham* (16 Cox C. C. 420) was an outgrowth of the "Trafal-

gar Square Riots" of 1905, forming a part of the history of the agitation for Irish freedom. There had been disorderly meetings preceding the one in question and the police had forbidden further meetings. The Court indicated some doubt whether, even in these circumstances, the police were justified in forbidding further meetings, but inclined to the view that their action was justified. The defendants, after such prohibition by the police, approached Trafalgar Square, and, finding it guarded, attacked the police lines.

As an example of the jealousy with which the Court guarded the right of popular assembly, we quote the following from the charge of Charles, *J.*:

> "If, on the other hand, their intention was to present themselves at the place, and request to be allowed to hold their meeting, and then, on being refused, to depart, why then I think you would be of opinion that they are not guilty of any offense at all." (Pages 432-3.)

The striking applicability of the charge to the facts of the present case should be noted. It is not disputed that defendant Baldwin had no intention of holding a meeting if the police objected, that he carefully cautioned his followers to submit quietly to interference by the police, and that defendant Butterworth and the two young women did in fact submit quietly to arrest. The undisputed intention of the defendants was to hold their meeting at the City Hall Plaza, and if interfered with, to depart, or submit quietly to arrest. There is every reason to believe, in view of their previous conduct, that they would have obeyed the riot proclamation and peaceably dispersed. Nothing seemed to call for militant tactics on the part of the police.

The fact is that, until the police resorted to force, giving a wholly new turn to events, disorder was not remotely indicated by anything said or done. The forty policemen permitted the procession of thirty persons to cross the Plaza and assemble round the City Hall steps. To all appearances, it was like any other procession. The record states that the procession brushed against two or three policemen in crossing the Plaza, but it does not appear that the latter took offense at what was apparently a purely accidental contact, such as must happen innumerable times, whenever any public gathering takes place. It is indeed somewhat surprising that the Supreme Court should note this circumstance in its opinion as apparently having some significance. The police interference with the meeting was not put on that ground, or on any ground except that the meeting did not have a police permit. And none was required.

POINT II.

The meeting was not illegal for want of a police or other permit, for none was required.

No statute or ordinance is referred to in the record, and it is conceded that there is none (p. 16, l. 30), requiring persons to obtain a license or permit to hold a meeting in the City Hall Plaza.*

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* A municipal ordinance is a fact to be pleaded and proved. *Stevens* v. *Chicago*, 48 Ill. 498; *Peo.* v. *New York*, 7 How. Pr. 81; *Ill. C. R. Co.* v. *Ashline*, 171 Ill. 313; *Lewiston* v. *Fairfield*, 47 Me. 481; *Garlick* v. *No. Pac. R. Co.*, 131 Fed. 837. In the present case, there is no mention of any municipal ordinance either in the indictment or in the State of the Case.

The defendant Butterworth, however, was asked by the police "whether he had a permit to hold a public meeting at that time and place" (p. 14, l. 3). He had none, and was accordingly arrested.

Upon the trial the Court, over objection, allowed Butterworth to be asked "whether he had not been accustomed to obtain oral permits from the Chief of Police to hold meetings on street corners and other public places during his campaigns for office as a candidate on the Socialistic ticket" (p. 36, exceptions 3 and 4).

The evidence was apparently received to prove a sort of ordinance by estoppel or prescription.

The Supreme Court states (Opinion, p. 39), that this point was not raised in that court. The Court has overlooked the discussion under Point II of the brief in that court, which is herewith presented in the same language:

There is no evidence that the private practice adopted by Butterworth, of asking for permission to hold meetings, was known to any of the other defendants. The absence of a licensing ordinance in Paterson would lead an investigator to conclude that orderly meetings at the City Hall Plaza were lawful. From such absence, anyone would conclude that in Paterson the paramount interest of the public in the streets as thoroughfares had as yet been deemed not incompatible with the occasional use of a spacious square as a forum. Yet, if the ruling of the trial Court is to stand, such a person would run the risk of going to jail because he had overlooked an unwritten practice established by a private citizen and the police chief.

The police, of course, have discretion in keeping the streets unobstructed. They might, on this or any other occasion of public assemblage, establish

traffic lines or stop a meeting altogether if it obstructed traffic. Of such circumstances, however, there is not the slightest suggestion either in the case or in the indictment on which these defendants were tried. The alleged offense is not the obstruction of traffic; nor can illegal obstruction of traffic be inferred from the assembling of 1,500 or 2,000 persons. A baseball scoreboard during a World's Series undoubtedly attracts larger numbers, sometimes inconveniencing pedestrians, even upsetting good nature.

The alleged offense in this case which led to the initial interference by the police was simply the failure to obtain police permission to hold a meeting.

There is no provision, however, in the Charter of Paterson vesting the police chief with power to create ordinances, written or unwritten.

Nor can it be asserted broadly that any assembly in a public square is *per se* illegal. *Burden* v. *Rigler* (1911), 1 K. B. 447. Granted the paramount right of the public to use the streets for passage, people are not always, especially in the evening, intent on going somewhere. They gather to parade, to hold public celebrations, to watch a baseball scoreboard to listen to political orators, and for hundreds of similar innocent purposes. The strictest exponent of the paramount-right doctrine would hardly assert that all such harmless and agreeable uses of the public streets constitute public nuisances.

Every licensing ordinance, where such ordinances exist, implies a resognition of the propriety of occasional use of the streets for assemblage. It "does not absolutely forbid but by implication

recognizes some qualified privilege of public speaking at some time and under some restrictions" (*State* v. *Coleman* [Conn.], 113 A. 385, at p. 386).

The very form of the interrogation in this case implies a recognition by the Court and the prosecutor of the fact that a meeting in the streets is not, *per se,* illegal.

In the absence of a licensing ordinance, speakers of all sorts, political and otherwise, may and doubtless have freely addressed crowds in the City Hall Plaza and elsewhere on the streets of Paterson—whether they assembled ten or two thousand persons depending solely on their talents.

Whether an assembly is objectionable is a question of fact (*Parker* v. *Commonwealth,* 19 Pa. St. 412; *Harwood* v. *Trembley,* 97 N. J. L. 174). In the first case it was the violent and indecent language of the speaker which led to his indictment as a common nuisance; in the second it was the proved circumstances under which the crowd assembled—the defiant attitude of the speaker, the reasonable likelihood that his remarks would be provocative of disorder—which led the Court to hold that the mayor was justified in forbidding him to hold a meeting.

Had the State proved that these defendants met, and persisted in meeting, on a busy street or under other circumstances which made the meeting objectionable, a question of fact would have been presented but a different indictment required. This indictment is not for disorderly conduct or for obstructing traffic or for creating a public nuisance.

Nor are considerations of the wisdom or unwisdom of licensing regulations, or of the proper adjustment to be made between the paramount right

of the public to use the streets for passage, and other democratic uses to which streets have been put from time immemorial, involved in this case; it suffices that the City of Paterson has not made such regulations. The ancient statute against unlawful assemblies is not a licensing ordinance. Nor is it the function of the police or of the courts to attempt to reconcile such considerations under the pretext of enforcing that statute.

To outlaw this assembly, the State has invoked an ancient common-law doctrine which has a settled definition. It is not a device the police may use to suppress assemblies to which, for nameless reasons or none at all, they take a dislike.

The sole issue this indictment presents is whether the defendants were collectively guilty of meeting for a purpose or in a manner calculated to cause persons of ordinary firmness to fear on reasonable grounds a resulting breach of the peace. On that issue the record speaks decisively in the negative.

POINT III.

The fact that the police prohibited the advertised meeting in Turn Hall did not alter the lawful character of that proposed meeting or the legality of the subsequent attempt to meet in the Square. There is nothing in the constitution and statutes of New Jersey vesting the Chief of Police with the power to suspend public assemblage at will and to pronounce a meeting illegal.

The fact that the Chief of Police had forbidden a previous meeting plays a large though unexplained part in the record. This fact was ap-

parently accepted by the trial Court as in itself stamping with illegality the attempted assembly in the Plaza.

It should be noted that the only excuse for the Police Chief's action is the one which was suggested by the defendants, not the State, namely, that the Police Chief is supposed to have taken umbrage at the remarks of a speaker at one of the earlier *strikers'* meetings who was said to have criticized the President and the Court of Chancery, (see p. 6, *ante*). The Police Chief himself evidently did not regard the remarks referred to as warranting prosecution, for no action was taken against the speaker. "No criminal complaint had been made against *anyone* by reason of anything said or done at said meetings in Turn Hall, nor was the arrest of any person sought for anything said or done thereat" (p. 15, l. 27).

In *State* v. *Tachin* (92 N. J. L. 269, at page 273*) the New Jersey Court says:

> "The right of citizens to express their sentiments with freedom in a proper way could not constitutionally be taken away, and as long as the constitution has vigor, men may criticize the administration, even in time of war, as they have criticized without objection during the last two years."

Lawful utterance is not limited to such as will promote "quietism and public acquiescence."

George v. *Braddock*, 45 N. J. Eq. 757, at p. 763.**

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* Affirmed, 93 N. J. L. 485, on opinion of Swayze, *J.*, below.

** Sanctioning the application of a bequest to the distribution of Henry George's works.

In any event, the prohibition of *strikers'* meetings, whether justifiable or not, certainly has no bearing on the propriety of the Police Chief's subsequent act in forbidding public discussion of his own official conduct. The procession to the square and the gathering on the City Hall steps were clearly not illegal simply because the police —for reasons which they did not disclose at the trial—had forbidden *strikers'* meetings.

No valid reason was offered, or even suggested, for forbidding the meeting called by Baldwin. Not only was there no attempt to show that the situation in Paterson warranted a police official in assuming the power to suspend the constitutional right of assemblage, but, on the contrary, every legitimate inference from the record points to the fact that no valid reason existed for suspending this right.

The conviction must rest, if it is to stand, on the theory not merely that a mere police official is vested with the right during a strike to suspend fundamental civil rights, but that his determination of the need for suspension is so decisive that no Court will inquire into its justification.

If this is the law, it means:

1. That the police may at will suspend meetings, and

2. That they may then suspend discussion by the public of their act.

The analogy suggested is that of martial law. The prerogatives are those of the commander-in-chief of an army in time of war. If the Chief of Police of Paterson enjoys such prerogatives, it should be possible to find some reference to them in the constitution and laws of New Jersey.

The New Jersey Constitution embodies the Anglo-Saxon principle of separation of the powers of government. Article III provides:

> "The powers of the government shall be divided into three distinct departments—the legislative, executive and judicial; and no person or persons belonging to, or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except as herein expressly provided." *

In preserving the public peace, the police doubtless have occasion to give what may loosely be called orders. They may determine that a crowd is disorderly, order it to disperse and on non-compliance make arrests. But their orders are not laws; and in any subsequent prosecution the question, clearly, is whether the order was justified, *i.e.,* whether the crowd was in fact disorderly, whether its conduct violated some applicable statute. No indictment has ever been known to be laid "contrary to the order of the police chief", in place of the usual phrase "contrary to the form of the statute".**

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* This fundamental distinction between Anglo-Saxon and Continental systems is pointed out by Professor Dicey in his Law of the Constitution (p. 278): "In France the idea has always flourished that the Government, whether Royal, Imperial or Republican, possesses, as representing the State, rights and powers as against individuals superior to and independent of the ordinary law of the land. This is the real basis of their whole theory of that *droit administratif* which is so hard for Englishmen fully to understand."

" ** . . . The King cannot create any offense by his prohibition or proclamation which was not an offense before, for that was to change the law, and to make an offense which was not; for, *ubi non est lex, ibi non est transgressio; ergo,* that which cannot be punished without proclamation cannot be punished with it. . . . For all indictments conclude *contra legem et consuetudinem Angliae,* or *contra leges et statuta,* &c. But never was seen any indictment to conclude *contra regiam proclamationem.*" Proclamations, 12 Coke's Reports, 74.

It does not even appear in this case that the Police Chief *thought* these defendants planned to violate a law, or that he *thought* it unsafe to permit them to meet in a private hall. His order stands totally unexplained in the record, except as it is inferable that his official pride was hurt by the attempt to discuss his conduct. *The trial Court could not, nor did it, find that the interests of public security justified his order.*

Yet this unexplained police order was given by the Court an effect far more sweeping than would have been given even to a statute.

In applying a statute, courts apply tests of reasonableness and propriety. The criminal act must be definite (*State* v. *Gabriel,* 95 N. J. L. 337) and reasonably pertinent to public security (*State* v. *Tachin,* 92 N. J. L. 269, 273-5).

No such tests were applied by the Court below to this police order. It is simply a bald prohibition of a public assemblage called to discuss police conduct, and as such it was sustained by the trial Court.

If, then, the crime of which the Court found these defendants guilty lay in the attempt to meet against the expressed will of the police, the result of the Court's decision is that though a man may not be punished for violating an unjustifiable statute he may be punished for violating an unjustifiable police order.

In a notable case in which local officials undertook to prevent public assemblage during a strike (*Neelley* v. *Farr,* 61 Col. 485*), the Court said:

> "There was no reason to anticipate any disturbance. Therefore this bold denial was

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* The case presented the additional feature of the pendency of an electoral campaign.

an inexcusable and corrupt violation of the natural and inalienable rights of the citizens" (page 509).

The English courts have consistently held that proof that a meeting was prohibited by an executive official is not, standing alone, proof that the meeting was illegal. (*Rex* v. *Fursey,* 3 St. Tr. (N. S.) 543; 6 Carr & P. 81; *Redford* v. *Burleigh,* 3 Starkie N. P. 76; 1 St. Tr. (N. S.) 1217; *Beatty* v. *Gillbanks,* L. R., 9 Q. B. D. 308; *Reg.* v. *Cunninghame-Graham,* 16 Cox C. C. 420).

The law of these cases is summed up by Professor Dicey in his *Law of the Constitution,* page 287, as follows:

> "No public meeting, further, which would not otherwise be illegal, becomes so (unless in virtue of some special Act of Parliament) in consequence of any proclamation or notice by a Secretary of State, by a magistrate, or by any other official. Suppose, for example, that the Salvationists advertise throughout the town that they intend holding a meeting in a field which they have hired near Oxford; that they intend to assemble in St. Giles's and march thence, with banners flying and bands playing to their proposed place of worship. Suppose that the Home Secretary thinks that, for one reason or another, it is undesirable that the meeting should take place, and serves formal notice upon every member of the army, or on the officers who are going to conduct the so-called 'campaign' at Oxford, that the gathering must not take place. **This notice does not alter the character of the meeting,** though, if the meeting be illegal, the notice makes anyone who reads it aware of the character of the assembly, and thus affects his responsibility

> for attending it. (*Rex* v. *Fursey,* 3 St. Tr. (N. S.) 543; 6 Carr. & P. 81). Assume that the meeting would have been lawful if the notice had not been issued, and it certainly will not become unlawful because a Secretary of State has forbidden it to take place. The proclamation has, under the circumstances, as little legal effect as would have a proclamation from the Home Office forbidding me or any other person to walk down the High Street." (Dicey, *Introduction to the Law of the Constitution,* Eighth Ed., p. 287).

In two American cases, in which the effect of an executive declaration of illegality was considered, *it was held that such a declaration is not even competent evidence of actual illegality.* (*United States* v. *Bolles,* 209 Fed. 682; *Harrison* v. *United States,* 200 Fed. 662.)

The first was a prosecution for the crime of using the mails to defraud. It was held that a fraud order issued by the Postmaster-General barring the defendant's publication from the mail was not competent evidence against the defendant.

In the second the defendant had been convicted of using the mails to defraud. The Postmaster-General's fraud order had been prominently published in local newspapers at the time of the indictment. It seemed to the Appellate Court that the publications might have influenced the jury. On that ground the judgment was reversed.

The State did not prove—did not attempt to prove—that the original meeting scheduled for a private hall, and the subsequent assembling of the same persons in a public square, were in fact illegal because they violated or threatened to violate a specific law, either by threatening a breach of the peace or in some other manner.

POINT IV.

The meeting did not lay out a program in defiance of the constituted authorities.

As has been pointed out, the act of the Chief of Police in forbidding the meetings of strikers, and in then forbidding discussion of his act, finds no warrant in law. If, then, an attempt to hold a meeting in a perfectly peaceable manner, for the sole purpose of creating a judicially cognizable situation, is to be deemed, as the Supreme Court seems to hold, "defiance of the constituted authorities", there would seem to be no course open to citizens except "quietism and public acquiescence", to use the Court's phrase in *George* v. *Braddock* (45 N. J. Eq., 757, 763)—no matter how arbitrary and illegal the conduct is of the persons who happen for the time to hold the places of authority in government.

Entirely overlooked in the Supreme Court's view of the case, as it seems to us, is the fact that it has been the historic function of the courts to hold the balance between the efforts of properly constituted authorities to enlarge their power, and the rights of the citizen. As against the functions of constituted authority, there are the constitutional liberties of the individual. The latter seem to be left completely out of the reckoning when it is held that every protest against official action is *ipso facto* a defiance, and that properly constituted officials must, at all odds, be supported by the courts, without any inquiry into the legality of their conduct.

To say that the conduct of these defendants constituted a defiance of authority simply begs the question. This form of statement seems to invest a Chief of Police with all the majesty implied in

the term "constituted authority", and to suggest that it is a form of treason to call his acts in question. That, certainly, is not American theory. The preliminary question must be whether the Chief of Police was the proper constituted authority to suspend indefinitely the rights of speech and assemblage in Paterson. On that issue, it seems fairer to say that it was rather the Chief of Police whose conduct amounted to a defiance of constituted authority—including in the latter phrase the entire scheme of governmental authority and the reservation to the individual of certain fundamental rights under the Constitution which no authority, however properly constituted, can take away from him.

Aside from these considerations, the facts compel the conclusion that "defiance" of constituted authority was the last thing the defendants had in mind. Their object was not to defy authority, but to appeal to the authority of the courts to prevent what they conceived to be an unconstitutional usurpation of power by the Chief of Police. This object was accomplished when the police interfered and made arrests, to which they submitted quietly, in accordance with their prearranged plan.

Certainly, they were not bound to foresee that the police would attempt to obscure the real issue by turning a peaceable assembly into a milling crowd and provoking "opposition." It was not a natural and probable consequence of the act of assembling in a peaceable manner for a lawful purpose that the police would adopt methods of breaking up the assembly which would provoke resentment on the part of unidentified persons. If the brandishing of clubs by the police, and the needless resort to force—acts calculated to arouse

even a mild person to protest—provoked such resentment, it was plainly the consequence of the tactics employed, and not of the act of assembling. *Beatty* v. *Gillbanks,* L. R., 9 Q. B. D. 308; *Reg.* v. *Clarkson,* 17 Cox C. C. 483; *Wise* v. *Dunning,* 18 T. L. R. 85; *The Queen* v. *Justices of Londonderry,* 28 L. R. Ir. 440.

The State did not attempt to show that any understanding existed between the "four or five or more" persons who "opposed" the police. For all that appears, some or all of these persons may have been among the "quiet and orderly persons then and there gathered and standing" in the City Hall Plaza (Indictment, p. 6, l. 25ff). They may have been onlookers, of whom the State proved there was an "increasing number" (p. 13, ll. 20-21). In the crowd of 1500 or 2000, the onlookers probably greatly exceeded not only the thirty persons who marched in the procession, but any others immediately interested in the meeting. The presence of forty policemen was a sufficient magnet to attract a large crowd. And it is typical of the "innocent bystander", in the consciousness of his innocence, to elect to stand on his rights, and resent being pushed about.

The State itself proved that these persons were in different parts of the crowd (p. 14, ll. 22-25). Their testimony denying any understanding between any two or more of them is uncontradicted. Nor is there any evidence that any one of them saw or knew of or came to the aid of any other.

Bishop states that the element of common purpose or common conduct in unlawful assembly must be *a mutual understanding in the nature of a conspiracy.* Criminal Law, 9th ed., Vol. II, page 858.

In Chamberlayne, *The Modern Law of Evidence,* Book IV, Sec. 3244, the test of common purpose is stated as follows:

> "Either in its innocent aspect or in that of unlawful combination the existence of a common purpose is usually established by the *correlation* and *mutual dependency* of the acts done on distinct occasions * * *" (p. 4487).
>
> "In other words, the individual transactions must be *connected, correlated and systematized* in such a way that each act, though, perhaps, in a sense complete in itself, is yet a necessary element *in a plan to reach an ulterior object which has been in view from the start* * * *" (p. 4489).

There is not the slightest evidence in the present case to bring the facts within the definitions cited, or to warrant the inference that the meeting had any other object than holding a peaceable assemblage if the police permitted; and, if they did not, then to be in a position to make a test case of the matter.

The view of the Supreme Court that the circumstances presented an analogy to a fire which might spread into a conflagration if not promptly checked, is, it must be said with all due respect to the Court, an example of how easily constitutional liberties may be emasculated by apprehensive speculation as to the possible consequences of permitting the free exercise of those liberties.

As against the Court's view, we submit the considered conclusion of a student of police administrative methods, Mr. J. G. Brooks. Writing on *Problems of Police Administration,* in Volume 8, *Papers and Proceedings of the American Sociological Society,* Mr. Brooks says:

> "Finally, no lesson from this testimony is clearer than the danger of permitting

average officials to act on 'tendencies', to guess that some violence will befall unless assemblage or speech is choked off in good time. From few causes has public security suffered more than from hysterical prejudgments as to what is likely to occur unless somebody is first knocked about. This is invariably the mark of the crudest and least efficient policing of assemblages."

Conclusion.

This case presents, for the first time in this State, so far as counsel have been able to ascertain, the question of where the line is to be drawn between unlawful assembly and the constitutional rights of freedom of speech and assemblage. The offense of unlawful assembly is in its nature incapable of precise definition. Equally incapable of precise definition are the constitutional liberties. The Court may, however, at least lay down as a guiding principle that it will not strain to interpret facts in such a manner as to result in an indirect nullification of those liberties, for they can be as effectively nullified by sedulously seizing upon trivial or isolated circumstances for the purpose of declaring an assembly unlawful as by denying them outright.

On the admitted facts, the crowd assembled in a peaceable manner. The police did not profess to have seen any weapons to have heard any threats. The very fact that it was deemed necessary to have one or two policemen testify they were frightened seems a confession of the flimsiness of the State's case. One of the officers who so testified was a young man, three or four months on the force. The confession would apparently have been too much for the self-respect or the sense of humor of a more seasoned policeman.

It is conceded that the police acted arbitrarily and mistakenly when they stopped the meeting because defendant Butterworth had no permit—none being required. It must be conceded as well that their conduct in rushing the crowd, without giving its members a chance peaceably to disperse, was grossly unjustifiable, and was bound to provoke disorder in the most orderly assembly.

The view of the Supreme Court that the situation presented an analogy to a fire which might spread into a conflagration presents, as has already been indicated, a speculative conclusion involving purely psychological factors of the Court's temper and point of view—a conclusion, conscious or unconscious, as to the amount of liberty it is safe to permit. A more courageous faith in democratic processes, and a less apprehensive view that the crowd would have held its meeting, made its speeches, and quietly dispersed, would seem to be at least equally justifiable. There had been not the slightest disorder during the strike. The very background of the case, to which the Court alludes, justifies the inference that it was not the crowd, but the police, which adopted a truculent attitude. A fair regard for the sanctity of constitutional liberties required that a meeting which had assembled in a peaceable manner for a lawful purpose should not be molested—by the police of all persons—until it had manifested some hostile tendency. Prior to the militant interference by the police, nothing of this sort had occurred.

If, on the admitted facts (for none of the facts are disputed), this conviction can be sustained, it means that there is no lawful method of public, collective protest against suppression of the right of free speech by the police, and that public spirited citizens who endeavor to call attention

in open meeting to invasions of constitutional rights by public officials are criminals in the eye of the law, no matter how peaceful and orderly their action.

The defendant Baldwin is the head of a nation-wide association with 6,000 members covering all sections of the country, including some of the most distinguished and public-spirited citizens of the land. The mission of the Association is to preserve our priceless civil liberties against the aggressions of public officials and legislative bodies. To that end it champions in the courts and before legislatures and public officials causes involving the fundamental principles of civil liberty. It does not deal with private grievances except as they typify broad public questions involving these principles. On this basis it has recently intervened, prepared and submitted evidence, and supplied counsel for the defendants in cases of which that of Scopes is one of many recent instances.

It is important to bear in mind in this connection that neither the defendant, Baldwin, nor the American Civil Liberties Union or any of its members were in any way connected with the Paterson strike. All that Baldwin and his associates knew (and that was quite enough for them, as it should be for every patriotic American citizen) was that the strikers, apparently without reason, were refused by the police the right to enter and continue peacefully to hold their meeting in a hall which they had hired for the purpose, although they had been in the habit of meeting there daily for months, in the presence of the police and a stenographer employed by the police to take down everything that was said, and although these meetings had always been lawfully and peacefully conducted.

It was at this stage—where further admission to the hall hired by the strikers and further meeting there were prohibited without any reason, so far as the record discloses—that the American Civil Liberties Union, believing that a question of civil liberty had become involved, intervened—not for the purpose of holding such a meeting, or any meeting of the strikers—but solely for the purpose of making a public protest against what was, and is, believed to be the grossly oppressive and unlawful action of the police in refusing to the strikers their unquestioned right to hold peaceful meetings, the exercise of which right had not, throughout the months in which they had been held, disturbed or threatened to disturb the peace.

Upon the record it would seem that such a protest was amply justified. But it is immaterial whether the protest was justified. Had the defendant Baldwin and his associates the right to voice it in a hall hired by them for that purpose—the right "freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances"? (Constitution of New Jersey, Art. I, Sec. 18.) Having peacefully submitted to forcible exclusion from the hall, did they offend against the law in seeking to hold the meeting in the public square?

It is undisputed that neither Baldwin nor his associates intended ever to hold such a meeting, or any meeting, notwithstanding its manifestly proper purpose, if objected to by the police authorities. Accordingly, when the police, in the most arbitrary manner, refused to permit them to occupy the hall that they had hired, Baldwin made no effort to hold that meeting. He then decided to try holding the meeting in a public square, accompanied by explicit instructions to

those who were with him not to hold that or any other meeting, or to do any act to which the police authorities objected, regardless of whether they had the right to do so. His sole purpose and that of his associates was simply to appeal to the courts to test the right to hold the protest meeting. It was clearly so understood by the police, especially as there was no show of resistance to the breaking up of the meeting.

He accordingly started to march to the public square. The police offered no objection. Neither the law nor the ordinances of the City of Paterson required a permit for the holding of such a meeting. The moment the police interfered, as the defendant Butterworth was about to open the meeting, the defendants quietly submitted. There was no resistance on the part of anyone identified with the meeting to this unauthorized action.

Such, and such only, are the "criminal" acts and "criminal intent" on which these convictions and the sentence of six months' imprisonment imposed on Baldwin are based.

The conviction should be reversed.

Respectfully submitted,

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APPENDIX A.

Statute Against Unlawful Assemblies.

Assaults, batteries, false imprisonments, affrays, riots, unlawful assemblies, nuisances, cheats, deceits, and all other offenses of an indictable nature at common law, and not provided for in or by this or some other act of the legislature, shall be misdemeanors and be punished accordingly. (Crimes Act, Sec. 215; P. L. 1898, p. 854; Comp. St. (1910), Vol. II, p. 1811.)

APPENDIX B.

Definitions of Unlawful Assembly.

UNLAWFUL ASSEMBLY AT COMMON LAW.

"Unlawful assembly" at common law has a technical and restricted meaning. Nor has the single reported case on the subject in this State enlarged or altered that meaning (*State* v. *Haywood,* not officially reported, Vol. 36, N. J. Law Journal, p. 146). The offense includes an element of illegality and an element of concert. It is not disorderly conduct by individuals at which the statute is aimed but disorderly conduct by *assemblies.*

The inquiry therefore must be whether the assembly, as distinguished from some individual wrongdoer, has conducted itself illegally.

The illegality at which the common law aimed its prohibition is specifically defined. According to Blackstone an unlawful assembly results when

three or more persons assemble "to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it" (*Blackstone's Commentaries,* Chase's 3rd Ed. (1890) Ch. 9, p. 913).

In the absence of this specific proof that the assembly set out upon an unlawful errand, there is only one other test of illegality: *Does the assembly threaten a breach of the peace?* This in turn is determined by definite, objective criteria, the sufficiency of which must be subjected to the reasonable-man test. In other words, *is the conduct of the assembly calculated to alarm reasonable men?*

Hawkins' definition is as follows:

> "An Unlawful Assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion toward the execution of it. But this seems to be much too narrow a definition. For any meeting whatsoever of great numbers of people, *with such circumstances of terror as cannot but endanger the public peace,* and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, *armed in a warlike manner,* in order to consult together, concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly" (Hawkins, Pleas of the Crown (Curw. Ed. 1824), Vol. I, p. 516, Sec. 9).

Wharton puts the same conception in modern form:

> "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, *assemble in such a manner, or so conduct themselves when assembled, as to cause persons in the neighborhood of such essembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously,* or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously" (Wharton, Crim. Law, 11th Ed., Vol. III, p. 2048).

Russell on Crimes and Misdemeanors quotes the following definition:

> "Any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood is an unlawful assembly" (7th Ed., p. 423).

The editor adds:

> "In viewing this question, the jury should take into consideration *the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them;* and then consider whether firm and rational men, having their families and property there, would have a reasonable ground to fear a breach of the peace, as *the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of firmness and courage*" (7th Ed., p. 423).

Stephen gives a similar definition:

> "A large number of persons hold a meeting to consider a petition to parliament

> lawful in itself, but they assemble in such numbers, *with such a show of force and organization, and when assembled make use of such language* as to lead persons of ordinary firmness and courage in the neighborhood to apprehend a breach of the peace. This is an unlawful assembly" (Digest of the Criminal Law, Art. 75, p. 55).

The *temper* of the meeting is to be considered. Thus, Bayley, *J.*, in his charge to the grand jury which investigated one of the many riots in England during the agitation for electoral reform in the first quarter of the nineteenth century, says:

> "If the persons who assemble together say, 'We will have what we want, whether it be according to low or not', a meeting for such a purpose, however it may be masked, if it be really for a purpose of that kind, is illegal."

His charge is reported in a note to *Reg.* v. *Vincent* (9 Carr. & P. 91, 93). Baron Alderson adopted it in the latter case, and it is quoted by Holroyd, *J.*, in *Redford* v. *Birley* (3 Starkie, N. P. 76, at pp. 103, 105; 1 St. Tr. N. S. 1217).

The same thought is expressed by Charles, *J.*, in his charge to the jury in the case of the Trafalgar Square Riots of 1905 (*Reg.* v. *Cunninghame-Graham,* 16 Cox C. C. 420).

In that case, Charles, *J.*, says:

> "The question which I shall presently ask you will be this: whether the defendants really approached the square with the intention of holding the meeting, come what might. Did they, in other words, with those who were following them, or with

> those who they hoped and expected would follow them—did they endeavor, if I may use the phrase, to carry their point, to carry the square? If that is your view of their conduct, then there is hardly much doubt that they are guilty of participating in a riotous assemblage. Because if it was their intention come what might, and if they were strong enough, to carry the square, they or their followers, I tell you, without any doubt or hesitation, that was an illegal act. IF, ON THE OTHER HAND, THEIR INTENTION WAS TO PRESENT THEMSELVES AT THE PLACE, AND REQUEST TO BE ALLOWED TO HOLD THEIR MEETING, AND THEN, ON BEING REFUSED, TO DEPART, WHY THEN I THINK YOU WOULD BE OF OPINION THAT THEY ARE NOT GUILTY OF ANY OFFENSE AT ALL" (pp. 432-3).

The situation assumed by Charles, *J.*—of persons who intend to present themselves at a place, request to be allowed to hold their meeting, and then, on being refused, to depart—is, it will be seen, precisely the situation which, according to the State's own testimony, existed in the present case.

The Element of Co-operative Action.

Unlawful assembly implies concerted action. Not merely wrongdoing, but collective wrongdoing is the gist of the offense. In *People* v. *Most* (128 N. Y. 108), for example, an unlawful assembly case, Most had made an inflammatory speech. To sustain the indictment it was necessary to show that at least two others participated in his act. The Court says:

> "Unless, therefore, the jury were authorized to find that the threat charged in the indictment was made not only by the defendant Most, but also at least by two

other persons, on the occasion in question, the offense was not made out" (p. 114).

State v. *Cole* (13 S. C. Law Reports (2 McCord) 73, 74) holds there must be an understanding "mutually to assist each other."

Bishop states that concert must be *"a mutual understanding in the nature of a conspiracy"* (Crim. Law (9th Ed.), Vol. II, p. 858).

APPENDIX C.

Riot Proclamation.

Act of 1864, P. L. 1864, page 237; Comp. St. (1910), Vol. IV, page 4380.

"1. **Proclamation commanding rioters to disperse; form; justices, etc., to make proclamation.** That from and after the publication of this Act, if any persons, to the number of 12 or more, being armed with clubs, guns, swords or other weapons, or if any number of persons, consisting of thirty or more, shall be unlawfully, routously, riotously, or tumultuously assembled, any justice of the peace, sheriff, undersheriff, or constable of the county, where such assembly shall be, shall, among the rioters or as near to them as he can safely come, command silence, while proclamation is making, and shall, openly, and with a loud voice, make, or cause to be made, proclamation in these or the like words:

State of New Jersey: By virtue of an act of this State entitled, 'An act to prevent routs, riots and tumultuous assemblies,' I am directed to charge and command all persons, being here assembled, immediately

to disperse themselves and peaceably to depart to their habitations, or to their lawful business, upon the pains and penalties contained in the said act, God save the State.

* * * * * * *

4. **Punishment for continuing together after proclamation to disperse.** That all persons, who, for the space of one hour after proclamation made, or attempted to be made, as aforesaid, shall unlawfully, routously, riotously and tumultuously continue together to the number of 12 or more, if armed, or of thirty or more, if unarmed, as aforesaid, then such persons so offending shall be adjudged guilty of a misdemeanor, and, on conviction, shall be punished by fine or imprisonment at hard labor, or both, the fine not to exceed one thousand dollars, nor the imprisonment three years."

N. J. Court of Errors & Appeals

The State of New Jersey, Defendant-in-Error, against John C. Butterworth, Roger N. Baldwin, Geo. Cabrizza, Basil Effsa, and David Nitkin, Plaintiffs-in-Error.	On Writ of Error to Supreme Court

Brief for Defendant-in-Error

An indictment for unlawful assembly (Under Section 215 of the Crimes Act, P. L. 1898, p. 854, Compiled Statutes 1910, Vol. 2, p. 1811) having been found against the defendants together with three other defendants by name, Ferris Drecka, Kerrill Konzer and Bracco Natale, by the Grand Jury of the County of Passaic for the September Term, 1924, upon a trial all of the defendants, including the plaintiffs-in-error, were found guilty by a Judge sitting in the court of Special Sessions, the defendants having waived trial by jury.

All of the said eight defendants prosecuted an appeal by suing out a writ of error from the Supreme Court to the Court of Special Sessions for the County of Passaic, and after argument before the said Supreme Court, the latter court affirmed the conviction of all of said eight defendants, at the May Term, 1927. Vol. 5, N. J. A. R., No. 46, pages 1657, et al.

The defendants together with other persons unknown to the Grand Jury to the number of five

hundred and more were charged by the said indictment of an unlawful assembly on the sixth day of October, 1924, in the City of Paterson and State of New Jersey. The indictment further charges that the defendants assembled together to the disturbance of the public peace by making great noises and disturbance, making and utterin great and loud noises and threatenings to beat and assault and frighten and intimidate certain and quiet orderly persons who had gathered and who were standing and who were passing in and upon the public streets of the City of Paterson and that the defendants had gathered together to disturb the public peace, to commit assault and battery upon the police officers, patrolmen and officers of the police department of the City of Paterson and also to break, injure, damage and destroy and wreck the City Hall, a municipal and public building of the said City of Paterson, to the great terror and disturbance, not only of the citizens being then and there residing but of all the other citizens who were then passing and repassing in and along the public streets and common highways

At the trial the evidence disclosed that on the 6th day of October, 1924, between the hours of seven and eight o'clock in the evening some two or three hundred persons were congregated in the vicinity of the public square in the center of the City of Paterson which was known as the City Hall Plaza in and about the place where the City Hall, a municipal building of the City of Paterson, is located. That several persons were seated about benches, others were walking about and a

considerable number of police officers were standing in and about this Plaza by order of the Chief of Police. That on the date in question, about seven-thirty o'clock in the evening a parade of persons marched in two's along Market Street in the City of Paterson from the Market Street Headquarters of the Associated Silk Workers to the said City Hall Plaza which procession or parade was followed by an increasing number of onlookers; that the procession was led by two young women bearing an American flag and immediately behind them, three of the defendants, Butterworth, Baldwin and Dreeka. That all of these persons who were in the procession had assembled at the City Hall Plaza and at the approach to the Plaza the number of persons in and about had totaled fifteen hundred or two thousand persons. That there were hurrahs and acclamations from among the crowd and that on the approach of the flag in the procession the procession made its way through the crowd across the Plaza to the steps of the City Hall; that police officers were brushed against by the strikers; that the young women carrying the flag and defendants, Butterworth and Baldwin stood on the City Hall steps where the parade or procession had assembled and that Butterworth started to address the gathering. That police officers interfered with the carrying out of the meeting and that other acts of disturbance were carried on by the defendants as particularly enumerated in the State of the Case. It further appeared that for a long time prior to the occasion of the procession and assembly at the City Hall Plaza and for approximately a period of upwards of two months, there had been a

silk strike in the City of Paterson and that the strikers had met from time to time at a building for the purpose of conducting strike meetings. That the Chief of Police had ordered police in attendance at these meetings and that after a time the meetings were not carried on due to the interference of the Chief of Police who prevented the strikers from holding these mass meetings. That subsequent to the interference by the Chief of Police the strikers or those in charge of the strike had caused notices of mass meetings to be held in this same building at which the Chief of Police had prevented mass meetings and the notice was in the form of printed folders which were openly distributed and exhibited and that these notices called to the attention of the public the holding of the intended mass meeting to be held on October 6th, 1924, which was the day that the defendants assembled at the City Hall Plaza, the intention being to protest against the alleged unlawful acts of the police officers in excluding the strikers from the building at which place the Chief of Police had ordered the dispersing of such mass meetings. That this announcement was published in the daily papers of the City of Paterson. That on the evening of the 6th of October, the date of the intended meeting at this building, various persons met at the hour advertised for the meeting and the persons were dispersed by the police authorities. That the attempted meeting then was to be held at the City Hall Plaza in substitution for the advertised meeting at the private building which would not be permitted by the police.

The defendants were all identified as being in and about the City Hall Plaza. The defendants, Butterworth, Baldwin and Dreeka, were in addition to that fact identified as being part of the procession or parade which marched to the City Hall Plaza from the Market St. Headquarters of the Associated Silk Workers. The court sitting as a Judge and Jury (the defendants having waived trial by jury) adjudged the defendants guilty of unlawful assembly as charged against them in the indictment and from the conviction the defendants prosecuted this appeal.

The State maintains and contends that the conviction of the defendants was a just conviction. That the conviction should be upheld by this court as the facts produced before the court justified the court in adjudging the defendants guilty of an unlawful assembly.

Unlawful Assembly has been defined by Brill in his Cyclopedia of Criminal Law, Vol. 2, page 1588 as follows:

> "Unlawful Assembly in General.—An unlawful assembly has been defined to be an assembly of three or more persons with intent either to commit a crime by open force ***or to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it.***"

See also Stephens' Digest of Criminal Law, article 70. And see 3 Inst. 176; 1 Hawk. P. C. c. 65, section 9:

"An unlawful assembly is when three or more do assemble themselves to do an unlawful act,****** and part without doing it or making any motion towards it. 4 Bl. Com. 146."

"A disturbance of the peace by persons barely assembling together with the intention to do a thing which, if executed, would make them rioters, but neither executing it nor making a motion towards its execution." 1 Russ. on Crimes (4th ed.) 387; Beatty v. Gillbanks, 9 Q. B. D. 308, 15 Cox C. C. 138.

"Any tumultuous assembly of three or more persons, brought together for no legal or constitutional object, deporting themselves in such manner as to endanger the public peace and excite terror and alarm in rational and firm minded persons." People v. Judson, 11 Daly (N. Y.) 183.

"If persons assemble to obstruct officers of the law, all parties so assembling are guilty of an unlawful assembly." Reg. v. McNaughten, 14 Cox C. C. 576.

"Any three or more persons, who shall assemble in a violent or tumultuous manner to do an unlawful act, or, ***being together shall make an attempt or motion toward doing a lawful or unlawful act in a violent, unlawful or tumultuous manner, to the terror or distrubance of others, shall be deemed an unlawful assembly.***" Aron v.

City of Wausau, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733.

If the parties assemble in a tumultuous manner and move forward toward the execution of the unlawful design it is a rout, page 1589, Cyc. Crim. Law (Brill) Vol. 2 See Sec. 1011, page 1593; and if they actually execute their purpose with violence, it is a riot. See Sec. 1012, page 1594; but if they merely meet upon a purpose which, if executed would make them rioters, and, having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. See ***District of Columbia.*** Hunter v. District of Columbia, 47 App. Cas. 406. ***New York.*** Slater v. Wood, 9 Bosw. 15; People v. Judson, 11 Daly 183. ***Oregon.*** State v. Stephanus, 53 Ore. 135, 99 Pac. 428, 17 Ann. Cas. 1146. ***Texas.*** Follis v. State, 37 Tex. Cr. 535, 40 S. W. 277. ***Wisconsin.*** Bonneville v. State, 53 Wis. 680, 11 N. W. 427. ***England.*** Rex v. Birt, 5 Car. & P. 154.

Both a rout and a riot include unlawful assembly, and a man may be convicted of the latter on proof of the former. See State v. Stalcup, 1 Ired. *(N.C.)* 30; State v. Sumner, 2 Speers *(S.C.)* 599; 42 Am. Dec. 387.

And under some of the statutes a rout is made an unlawful assembly. Aron v. City of Wausau, 98 *Wis.* 592, 74 N.W. 354, 40 L.R.A. 733; Bonneville v. State, 53 Wis. 680, 11 N.W. 427.

It will be observed that in this country there is no question as to the fact that an unlawful assem-

bly can be made such regardless of the intent to commit a crime or to carry out any common purpose, lawful or unlawful, if the carrying out of the part intended is done so by three or more persons in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

In the case under review there can be no doubt that the defendants being more than three, had assembled together; that they constituted an assembly which finally was made up of a crowd, of a maximum number of 1500 or 2000 persons. (S. of C., p. 13, l. 30-31.) There can be no question that defendants were carrying out a common purpose, which common purpose did not, necessarily, have to include the commission of a crime or some unlawful act, either by force or otherwise. It would be sufficient if the persons constituting the defendants were part of an assembly congregating for the purpose of carrying out a lawful purpose.

The State contends that the character of the acts performed by some of the persons assembled in the crowd or the masses of the people that had congregated at the City Hall Plaza, which crowd or assembly included the defendants, were such acts as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly.

The State further contends that the defendants or some of them had a preconceived plan in mind to openly disturb the police authorities of the City of Paterson by agreeing to hold a mass meeting in the City Hall Plaza in the City of Paterson at a time when the defendants, or some of them, knew that the police authorities had openly expressed themselves as protesting against assemblies of persons in Turn Hall, City of Paterson, of whom the defendants or some of them, were part. That this preconceived plan of the defendants or some of them which finally was carried out was an act which, even lawful in its origin, had for its effect upon persons in the neighborhood, that is, firm and courageous persons in the neighborhood, reasonable grounds to apprehend a breach of the peace in consequence of the carrying out of this plan by holding the assembly at the City Hall Plaza. That the very appearance of the police officers was impliedly an open threat to the persons who had marched from the Market Street Headquarters of the Associated Silk Workers to the City Hall Plaza, which could have but one reaction on the minds of firm and courageous persons of the assembly at the City Hall Plaza and that was that in the event that the persons who had marched from the Market Street Headquarters of the Associated Silk Workers, a procession of about thirty persons (S. of C., p. 20, l. 32-36) had congregated or assembled to the number of three or more at the City Hall Plaza whether for a lawful or an unlawful object would be sufficient to justify but one conclusion by such firm and courageous persons in such neighborhood and that being that such persons would have reason-

able grounds to apprehend a breach of the peace in consequence thereof.

The State further contends that the very act of the defendants, or some of them, to the number of three or more in assembling at the City Hall Plaza in the manner in which they did, did create a breach of the peace in that the individuals composing the procession which marched from the Market Street Headquarters of the Associated Silk Workers to the City Hall Plaza when marching by twos and which marchers, while marching, made their way through the thickening crowds across the Plaza to the steps of the front of the City Hall (page 13, lines 33-37, S. of C.) in doing so brushed against two or three police officers. This action, under the circumstances, was in the opinion of the State a breach of the peace.

The State further contends that the action of the defendants or some of them in indicating opposition to the police officers who began to disturb the crowd which had assembled to a maximum number of 1500 to 2000 persons, was a breach of the peace (l. 21-26 inc., page 14 S. of C).

The State further contends that the proof shows that a young police officer who had been on the police force three or four months, testified that he was afraid until the original ten or twelve police officers were reinforced by thirty or forty police officers (l. 23-28, page 16, S. of C.).

The State contends that this testimony discloses that the condition of affairs or the action of the

persons who had marched in procession and who had assembled was sufficient to alarm the police officer.

The State further contends as additional grounds to justify the conclusion that persons who had assembled in the neighborhood had reasonable grounds to apprehend a breach of the peace in consequence of the procession and the assembling of the persons at the City Hall Plaza which included the defendants were justified in concluding such as will offer fear the testimony of Police Officer Love, that the crowd that had assembled put him in fear, (S. of C., p. 16, l. 29-30).

The State further contends that inasmuch as the defendants submitted to trial before the Jude, by waiving trial by jury, the Judge decided the issues of fact as well as the law and the question or questions arising out of the charges against the defendants which included a determination as to whether or not the defendants did act in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly, were issuable questions of fact and in as much as there was evidence produced by the State to the effect that the defendants were parties to the assembly, at the City Hall Plaza, and as such did commit breaches of the peace, the court was justified in determining that fact against the defendants, and as the Judge acted as the jury in the trial of this cause, the question of fact should not be re-

viewed by the Supreme Court unless grave error was committed by the court in determining the issuable facts against the defendants when there were no grounds upon which the court could determine such against the defendants. Of course, in the case at bar, there were grounds upon which the court had before it, for consideration, facts upon which it was to determine whether the defendants had assembled in such a manner, whether lawful or unlawful, as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly.

On page 41 of the brief of the Plaintiffs-in-Error a definition of Unlawful Assembly is referred to quoting Wharton's Criminal Law, 11th Ed. Vol. 3, page 2048. Upon referring to this volume on page 2050 it is stated as follows:

> ***"Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose; and this has been held to be the case with disorder got up suddenly, though concertedly, at a town meeting,*** (Com. v. Hoxey, 16 Mass. 385, 1820) ***and at a social assembling for dancing*** (Trittipo v. State, 13 Ind. 360, 1859). ***In determining the question of terror, it has been said that the jury are to consider whether rational and firm men, in charge***

> ***of families, would have, under the circumstances, cause for anxiety; and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them,*** (People v. Most, 7 N. Y. Crim. Rep. 376, 8 N. Y. Supp. 625, 1890), ***and the acts done*** (Reg. v. Vincent, 9 Car. & P. 91, 1839). ***An unlawful assembly does not in itself involve any overt act. If overt acts of violence are attempted, the offense is a rout; if such acts of violence are executed, the offense is a riot."***

Attended with circumstances calculated to alarm, an assembly is unlawful. (Reg. v. Neal, 9 Car. & P. 431, 1839.)

Common Law offense of unlawful assembly consists in a disturbance of the peace by persons assembling together, with an intention to do a thing which, if executed, would make them riotous, but neither executing it nor making a motion towards its execution. (People v. Most, 128 N. Y. 108, 26 Am. St. Rep. 458, 27 N.E. 970, 1891.)

Wharton in his volumes aforesaid quotes on page 2049: "A large number of persons hold a meeting to consider a petition to Parliament, lawful in itself; but they assemble in such numbers, with such a show of force and organization, and when assembled make use of such language as to lead persons of ordinary firmness and courage in the neighborhood to apprehend a breach of the peace. This is an unlawful assembly. Redford v. Birley, 3 Starkie, 79, 1839; Reg. v. Vincent, 9 Car. & P. 91." Stephen's Dig. art. 71.

Wharton in defining rout, Volume 3, 11 Ed., page 2050, says:

> "A rout is an attempt at riot made by an unlawful assembly. As for example; a disturbance of the peace by three or more persons assembling together with an intention to do a thing which, if executed, will make them rioters, and actually making a motion to execute their purpose. In fact, it agrees in all particulars with a riot except that it may be complete without the execution of the intended enterprise. 1 Russell, Crimes, 7th Eng. & 1st Can. ed. 422. See 1 Chitty, Crim. Law, 488; 1 Co.,) such preparatory steps must have been taken as would lead, if carried out, to a riot. At least three persons are essential to constitute the offense. (Hawk. P. C. 516, 526.)"

Wharton in defining riot, Volume 3, 11 ed. page 2050 says:

> "A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object. (1 Hawk. P. C. chap. 65, Sec. 1; 1 Russell, Crimes, 7th Eng. & 1st Can. ed. 409; 24 Am. & Eng. Enc. Law, 2d ed. 971; 34 Cyc. 1771. See Bolden v. State, 64 Ga. 361, 1879; Logg v. People, 92 Ill., 598, 1879; State v. Connolly, 3 Rich. L. 337, 1831; State v. Summer, 2 Speers, L. 599, 42 Am. Dec. 387, 1844.) If the object be to overthrow the Government, then the offense, if there be adequate overt acts, is

> treason. The distinction, as has been seen, between rout and riot is that the first involves an attempt at an unlawful act, the second the commission of such act. (Reg. v. Vincent, 9 Car. & P. 91, 1839.)"

Wharton further says as follows in Vol. 3, 11 ed. page 2052:

> "Unlawful assembly is an essential prerequisite; (State v. Stalcup, 23 N.C. (1 Ired. 1.) 30, 35 Am. Dec. 732, 1840. Adamson v. New York, 188 N. Y. 255, 10 L.R.A. (N.S.) 925, 117 Am. St. Rep. 863, 80 N.E. 937, 11 A. & E. Ann. Cas. 183, 1907) but, as we have seen, an assembly meeting lawfully can be converted into one that is unlawful, by the concerted determination, however sudden, to effect tumultuously an unlawful purpose. (1 Hawk. P. C. Chap. 65, Sec. 3; State v. Snow, 18 Me. 346, 1841; State v. Cole, 2 M. Cord, L. 117, 1822, Supra, Sec. 1851.) Hence to constitute a riot it is not necessary that the original intention should have been riotous. (United States v. McFarland, 1 Cranch, C. C. 140, Fed. Cas. No. 15,674, 1803. Darst v. People, 51 Ill. 286.)"

POINT ONE.

THE STATE CLAIMS THAT THE FACTS DO ESTABLISH THAT THE ASSEMBLY WAS UNLAWFUL AND MAINTAINS THAT THE STATE PROVED THAT THE DEFENDANTS ASSEMBLED AND THAT THEY CONDUCTED THEMSELVES AS TO CAUSE PERSONS IN THE NEIGHBORHOOD TO FEAR ON REASONABLE GROUNDS THAT THE ASSEMBLAGE WOULD DISTURB THE PEACE.

Wharton's Treatise on Criminal Law, Vol. 3, page 2048, recites that

> "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, ***assemble in such a manner,*** or so conduct themselves when assembled, ***as to cause persons in the neighborhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously;*** (Defendant in Error inserts the underscoring.) And Wharton refers on the same page to the fact that this definition is adopted from Draft Report of the English Commissioners of 1879. On the same page Wharton refers as follows: "Attended with circumstances calculated to alarm an assembly is unlawful. Reg. v. Neale, 9 Car. & P. 431, 1839."

The State contends that notwithstanding the position maintained by the plaintiffs in error that the meeting was of a lawful purpose or character, still, the manner in which the parties assembled and conducted themselves caused persons in the neighborhood of the assembly to fear on reasonable grounds that the persons assembled ***would*** disturb the peace tumultuously, or, the assembly of the persons including the defendants, under the circumstances, did needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously. With reference to the latter there can be no question as to the fact that if the assembly had not proceeded in the form of the parade or procession through the streets to the City Hall Plaza in the City of Paterson, the plaintiffs in error, Effsa, Konzer, Natale and Nitkin would not have disturbed the peace in the manner in which they did for it cannot be denied that these defendants offered resistance to the police as the latter were trying to disperse the crowd (St. of C., page 14, lines 17-25). This situation presents, without question, a condition of facts which justifies the court in concluding that the assembly of the persons making up the crowd that had proceeded to and had assembled at the City Hall Plaza needlessly without any reasonable occasion provoked these defendants, Effsa, Natale, Konzer and Nitkin (even if these defendants were not part of the procession which the State does not agree to) to disturb the peace tumultuously.

In the case of State v. Haywood, et al., Vol. 36, New Jersey Law Journal, page 146, Hon. Justice

Minturn for the Supreme Court of New Jersey had before him for decision an application on Habeas Corpus to release the defendants. It appeared, in this case, that the defendants were charged with violating section 215 of the "Act for punishment of Crimes," in that they, with one another, did unlawfully assemble in the City of Paterson for the purpose of exciting alarm and terror among the citizens of the City, contrary to the statute.

Justice Minturn further states in the case cited that Section 215 of the Crimes Act is based on what is called the common law, in other words, it leaves the definition of the crime of unlawful assembly to the definition given to it by the courts of England and of this country under what is the common law. In this case, it will be observed, on page 149 of the opinion, Justice Minturn states.

> "An assemblage, to be an assemblage at all, whether an unlawful assemblage or an assemblage of any kind, must be stationary; must be in one place."

Can there be any question in the entire discussion but that the meeting at the City Hall Plaza was an assemblage which was stationary in character? It will be further observed in this opinion of Justice Minturn on page 149 in discussing the facts of the case before him for consideration he says:

> "That crowd undertook to do what crowds generally do, hurrah for somebody who happens to lead the crowd. Or, according to one of the policemen, the crowd hurrahed for the officer as he came up on his motorcycle. But not one of these policemen attempted to say that he was frightened by the condition of things there. One of them says he was not scared in the least. There was nothing there apparently to scare him or anybody else, unless the mere appearance of a crowd on the street may be considered as an occasion for scaring anybody."

Now can it be denied in the case under review but that the evidence which Justice Minturn said was lacking in the Haywood case was supplied in the case under review?

On page 13 of the State of the Case, lines 37-39, two or three police officers were brushed against by the procession but after the procession had assembled at the City Hall steps, the defendant, Butterworth, started to address the crowd, saying, "Fellow Workers," whereupon he was interrupted by police officers who asked him whether he had a permit to hold a public meeting at that time and place; that he replied, "This is my permit," holding up a book in his hand and he was then put under arrest. That the police officers attempted to wrest the flag from the two young women, whereupon there were sounds of disapprobation and protest from among the crowd. Both young women were put under arrest and the police officer then read the Riot Act or proclamation; that the police officers then increase to about forty in number. The defendants, with others, opposed the police in that in the course of the police

dispersing the crowd, the police met with opposition from four or five more individuals standing in the different parts of the crowd; that among the persons so offering resistance were the defendants, Effsa, Natale, Konzer and Nitkin; that Cabbrizza, Effsa, Konzer, Natale and Nitkin were all identified by the State's witnesses as being present among the crowd.

On page 16 of the State of the Case, lines 22-29, it is stated

> "that there was no evidence that any person was alarmed or intimidated by the attempted meeting, except a young police officer, who had been on the police force only three or four months, who testified that he was afraid until the original ten or twelve police officers were reinforced by such additions as made their number to be about forty."

And further on Officer Love also testified the crowd put him in fear. (It will be observed as to the latter officer, no testimony was introduced to prove or show that he was only on the police force three or four months.)

The reason why the State recites the matter shown in parenthesis is due to the statement made by the defendants in error in their brief in which they say on page 31,

> "The only evidence on that subject in the case is the testimony of a young policeman three or four months on the force, that the crowd frightened him."

And going on further in the brief of the defendants it is stated

> "There were forty policemen there," (13; 17-18), not another one of whom testified there was cause for alarm

Of course, it will be readily observed from a reading of the State of the Case that this latter statement in the brief of the defendants is not a correct statement of the facts, for, as previously referred to on page 16 of the State of the Case on lines 29-30 it is stated "Officer Love ***also testified*** the crowds put him in fear" (The underscoring is that of Defendant in Error.)

In referring to the foregoing testimony reference is made to the opinion of Justice Minturn in the case of State v. Haywood, ante, on page 150 the learned Justice says

> "I fail to find from the testimony of the officers here that any one was excited; that any one of them was in fear. I fail to find from the testimony in this case that anybody along the line in the streets where this crowd proceeded was interfered with, or in fear of anything that the crowd had said or were saying, or had done or were likely to do."

The State feels that there can be no question but that Justice Minturn had in mind that if the evidence in the case of State v. Haywood, et al., had disclosed that the officers (police officers) or anyone else was excited or in fear, or, that if anybody along the line in the streets where the crowd pro-

ceeded was interfered with or in fear of anything that the crowd had said or were saying, or had done or were likely to do, then he would have found the defendants guilty and refused to discharge the defendants from custody. Therefore, can it be contradicted but that in the case under review evidence was introduced and considered by the court to the effect that two or three police officers were brushed against by the procession; (S. of C., page 13, lines 5-37) that opposition was met by the police in the form of resistance on the part of Effsa, Natale, Konzer and Nitkin, (S. of C., page 14, lines 25-27, inclusive); that the police officers were put in fear (S. of C., page 16, lines 22-29)?

In view of all the foregoing facts as presented at the trial, can it be denied that the court was anything but correct in adjudging the defendants guilty of unlawful assembly, for all of the foregoing facts clearly indicate that the court could rightfully conclude that the acts of the defendants were such or that the defendants had so conducted themselves as to cause persons of ordinary courage to fear, on reasonable grounds, that the defendants would commit and did commit a breach of the peace?

Any meeting assembled, under such circumstances, as according to the opinion of rational and firm men, are likely to produce danger to tranquility of the neighborhood, is an unlawful assembly. Slater v. Wood, 9 Bosw. (N. Y.) 15; Reg. v. Neale, 9 Car. & P. 431; Reg. v. Vincent, 9 Car. & P. 91; Reg. v. Cunninghame, 16 Cox C. C. 420.

The conduct must be such as would frighten and alarm, not any foolish or timid person, but persons of reasonable firmness and courage. Slater v. Wood, 9 Bosw. (N. Y.) 15.

At common Law an assembly became unlawful alone by the manner of it, as by such circumstances of terror as tended to endanger the public peace and excite fear, alarm and consternation among the people; and there need be no common purpose of such assembly except such as might be implied by assembling in such manner, and which might be either lawful or unlawful. Bonneville v. State, 53 Wis. 680. 11 N. W. 427.

POINT TWO.

THE STATE AGREES THAT THE MEETING WAS NOT ILLEGAL FOR WANT OF A POLICE OR OTHER PERMIT.

As stated in Point III of the brief of the Defendants in Error, the judgment of the court in finding the defendants guilty upon the indictment against them was the judgment of the court sitting as a Judge and Jury. The judgment necessarily determined that the indictment charged the offense alleged against the defendants and all the evidence which was submitted as questions of fact, both by the State and the defendants, were necessarily considered by the Judge in making his decision in finding the defendants guilty of unlawful assembly. So that all such questions of fact which had been presented to the court for its consideration and for the purpose of having

the court adjudicate upon the guilt or innocence of the defendants was necessarily and had to be, of course, considered by the court in its determination of the guilt or innocence of the defendants.

Can there be any question but that there has been a considerable amount of evidence submitted from which the court could conclude that the assembly of the defendants from the time the procession or parade started from the headquarters of the strikers at Market Street, being the headquarters of the Associated Silk Workers (S. of C., page 13, lines 17-20) until the time when the assembly of persons constituting the procession or parade as well as other persons who had assembled at the City Hall Plaza were dispersed by the police officers was intermingled with such acts, circumstances and conditions, all of which are particularly referred to in the State of the Case as to cause firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly?

Can there be any question but that such persons who had assembled in the neighborhood of the assembly it will be recalled that persons in the neighborhood of the Plaza which increased until the maximum number of such persons so assembled were 1500 or 2000 (S. of C., p. 13, l. 28-30) and that the crowd of persons so assembled in and about the Plaza where the procession or parade of persons who had marched from the headquarters of the Silk Workers on Market Street had finally assembled, had reasonable op-

portunity to believe that the advertised meeting of the Silk Workers intended to be held at the City Hall Plaza on that evening was in direct defiance of the police in that the police had prevented the meetings at Turn Hall, the action of the police in preventing such meetings had caused the American Civil Liberties Union to instruct the defendant, Roger N. Baldwin, to call a public meeting in the City of Paterson (S. of C., p. 19, l. 24-31, incl.) to protest against the action of the police in preventing the Silk Workers from having their mass meetings in Turn Hall, and further, the testimony disclosed that the defendant, Baldwin, acting under instructions of the Board of Managers of the American Civil Liberties Union had arranged and advertised a public meeting for the purpose to be held in Turn Hall in the early evening of October 6th, 1924, and caused speakers to be invited to address the proposed meeting. That Roger N. Baldwin caused to be printed and distributed in the City of Paterson, the time, place and object of the meeting and caused notice of the time, place and object thereof to be published in the newspapers of the City of Paterson. That prior to the evening of October 6th, 1924, the police authorities had announced that they would not allow the proposed meeting to be held, and on October 6th, 1924, at and before the advertised meeting, police officers were stationed in front and about Turn Hall with orders to prevent the entrance of any persons into the building, and further that while the defendant, Baldwin, was in the Market Street Headquarters of the Associated Silk Workers, it was reported to him that the proposed public meeting

at Turn Hall would, by order of Chief of Police, be prevented from being held therein; that he the defendant, Baldwin, then determined to attempt to hold a substituted meeting at the City Hall Plaza in the City of Paterson on that evening with the same object of protesting against the said supposed public grievance, resulting from the action of the police authorities of the City of Paterson in preventing the Silk Workers in continuing their daily mass meetings in Turn Hall for the purpose of serving and advancing the interest of their strike and it appeared by testimony of the defendants' witnesses that in accordance with the arrangement then made by the defendant, Baldwin, a procession of about thirty persons marching in twos started from the Market Street Headquarters of the Associated Silk Workers towards the City Hall Plaza (S. of C., p. 19-20).

Can it be said that the action of Baldwin in protesting against the attitude of the police department by advertising the intention of the strikers to hold the public meeting at Turn Hall was in reality an expression of defiance to the police department which could have for its effect upon firm and courageous persons in the neighborhood only one thought and that is that if the strikers did carry out the proposed program of calling the meeting at Turn Hall on the evening of October 6th, that trouble would ensue because of protests or objections of the police department, even assuming that the police department were not justified in objecting to the meetings because there was no ordinance, law or regulation requiring the

persons intending holding such meeting securing such a permit to hold such?

Can it be said that the persons who had assembled at the City Hall Plaza, knowing the facts as they had existed up to the time that the parade or procession had reached the City Hall Plaza, would overlook the fact that if the persons who constituted the parade did assemble at the City Hall Plaza whether for a lawful or unlawful purpose or design, it would create a condition which would act as a defiance to the police and thereby create a condition of disturbance which such persons so assembled could reasonably conclude that a breach of the peace would necessarily result?

The State contends that the action of the persons in assembling at the City Hall Plaza, that is, those persons who formed the parade or procession of which the defendants were a part caused, under the circumstances stated, reasonable grounds for firm and courageous persons in the neighborhood of such assembly to apprehend that a breach of the peace would result, and, in fact, did result, and the court decided as a matter of fact, sitting as a Judge and Jury, that a breach of the peace did occur because of the action of the defendants in assembling in the manner in which they did. Whether the purpose of such assembly was lawful or unlawful, and it makes no difference whether or not the meeting which they held at the City Hall Plaza was legal because of the fact that the assembly did not have a permit from the police as the State previously advanced. The State does not insist or contend that the persons

who had made up the procession and who had gone in the City Hall Plaza for the purpose of expressing their indignation at the action of the police in preventing their holding meetings required a permit from the police. In fact the State feels that this phase of the matter does not enter into the determination of the guilt or innocence of the defendants.

How can it be said that the court sitting as a Judge and Jury decided the guilt of the defendants on the theory that the testimony offered over objection by the counsel for the defendants regarding the subject of a permit had for its effect upon the Judge his conclusion that the defendants were guilty because no permit was secured? As the defendants say in their brief under this point, the State had not charged in its indictment and did not attempt to prove that the defendants had to have a permit to hold the meeting.

POINT THREE.

IIT CANNOT BE SAID, NEITHER CAN IT BE CONCLUDED, THAT THE COURT ADJUDGED THE DEFENDANTS GUILTY FOR THE REASONS ADVANCED BY THE PLAINTIFFS IN ERROR AND AS DISCUSSED UNDER POINT III OF THE ARGUMENT.

How can it be said that the court, sitting as a Judge and Jury, decided against the defendants by finding them guilty on the theory that the defendants had violated a prohibition of the police

against the advertised meeting in Turn Hall, or that the police took offense at the attempt of the defendants to meet in the City Hall Plaza? There is no question but, that the defendants Butterworth, Baldwin and Dreeka were part of a parade or procession (St. of C. page 13, lines 22-24), that this parade or procession, even though of a lawful character or design or purpose, had for its object, an assemblage at the City Hall Plaza. There is no question that the defendants, Butterworth, Baldwin and Dreeka were part of that procession and part of the body making up the procession which had for its purpose an assembly at the City Hall Plaza. That the intent of the procession was to carry out a common purpose. Whether that common purpose was lawful or unlawful was a question of fact from the evidence for the court to decide. The court in finding the defendants guilty, found, as a matter of fact, that the purpose was unlawful. However, it can be further said that even though the court found the defendants guilty, the court could be correct in its determination from the facts in this case in adjudging the defendants guilty even though the carrying out of the common purpose referred to was lawful, for the court had it within its province as a question of fact that even though the assembly was lawful, still, the manner in which the common purpose was carried out by those undertaking to carry out such purpose was to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of it. Therefore, the State contends that it cannot be said that the court took, solely, into ac-

count or even partly into account, the fact that the police prohibited the advertised meeting in Turn Hall, or that the legality of the subsequent attempt to meet in the square was considered by the court, adversely, to the rights of the defendants.

The State further contends that if the facts of the case were solely that the police prohibited the advertised meeting in Turn Hall, or challenged the legality of the subsequent attempt to meet in the square, and under such circumstances the court had found the defendants guilty, probably it could be said that, under such circumstances, the court would be in error, but, as previously stated, it cannot be said that the court decided the case against the defendants on the theory advanced by the defendants under Point III of their argument, for, as previously stated, the court undertook to decide the case adversely to the defendants after hearing all of the facts presented both by the State and the defendants, and in as much as there was considerable evidence advanced to show that the defendants, Butterworth, Baldwin and Dreeka were part of the procession that marched to the Plaza, that their act in being a part of the procession caused a condition to exist among the crowd of persons that had assembled in and about the Plaza of a maximum number of 1500 or 2000 (S. of C., page 13, lines 27-31), that upon the approach of the defendants with the others in the procession there were hurrahs and acclamations among the crowd about the Plaza (S. of C., page 13, lines 31-32), that some of the police officers who were in and

about the front entrance of the City Hall were brushed against by the procession (S. of C., page 13, lines 37-39), and continuing on throughout the State of the Case other acts were submitted to the court which were such acts as the court could decide sitting as a Judge and Jury adversely to the contention of the defendants, that the defendants, Butterworth, Baldwin and Dreeka, as well as the other defendants, who were all identified as being present among the crowd (S. of C., p. 14, l. 30-33), were such acts as to give firm and courageous persons in the neighborhood of the meeting (City Hall Plaza) reasonable grounds to apprehend a breach of the peace in consequence of the meeting.

So, why take a position such as the defendants have and, as advanced under Point III that a constitutional right was vested in the defendants, and that such constitutional right could not be abridged by the prohibition of the police in preventing the advertised meeting in Turn Hall, or, the efforts of the police to maintain order and disperse the crowd at the City Hall Plaza, was an act such as could be decided as an unlawful r'ght on the part of the police to break up the meeting or the subsequent attempt to meet at the City Hall Plaza.

POINT FOUR.

THE STATE MAINTAINS THAT THE MEETING DID LAY OUT A PROGRAM IN DEFIANCE OF THE CONSTITUTED AUTHORITIES BUT CLAIMS THAT THIS PROGRAM WAS NOT WHAT CAUSED THE COURT TO ADJUDGE THE DEFENDANTS GUILTY OF UNLAWFUL ASSEMBLY.

There can be no question but that the court rightfully determined from the facts that there was a violation of the statutory crime of unlawful assembly. If the common law interpretation of unlawful assembly was such that it would be necessary for the State to prove at the trial that the defendants did assemble for the purpose of committing some unlawful act or that the defendants set out upon an unlawful errand or that the meeting laid out a program in defiance of the constituted authorities, probably it could be said, under those circumstances, that the court was in error in adjudging the defendants guilty, but the State maintains that the defendants could be adjudged guilty of an unlawful assembly even though the defendants did not intend, at such assembly, to commit a crime by open force by carrying out any common purpose. The point being that the act of the defendants in assembling to carry out a common purpose even though lawful could be such as adjudged such defendants guilty of the crime of unlawful assembly if the defendants in carrying out such common purpose at such assembly did so in such a manner as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly as stated before in this brief.

The State maintains and charges that the defendants by their act in so assembling did so conduct themselves under the circumstances of the particular case as to give firm and courageous persons in the neighborhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of such assembly.

The proof of the State shows that the acts of the defendants were such as to cause certain police officers as particularly referred to in another part of this brief reasonable grounds to fear the act of the defendants in assembling in the manner in which they did, and, under the particular circumstances as presented by the proofs. It requires the consideration of all the elements proven at the trial to show a situation or condition which taken together leads to but one conclusion and that is that the common purpose of the defendants in assembling in the manner in which they did even though lawful in its inception was such as to create a situation whereby the fear of the people, particularly the police, was expressed.

It cannot be overlooked in this case but that the act of these defendants in assembling at the City Hall Plaza when one takes into account all the circumstances which preceded and which took place at and about the time of the assembly was such as to give firm and courageous persons in the neighborhood of the assembly reasonable grounds to apprehend a breach of the peace.

The State did not charge that the meeting laid out a program in defiance of the constituted authorities, however, it did seem as a fact which did not necessarily have to be shown by the State to support its charge against the defendants of Unlawful Assembly, that the actions of the defendants was in defiance of the constituted authorities as the Supreme Court states in its opinion. However, it cannot be said that these actions of the defendants was what caused the Court, sitting without a jury, to find the defendants guilty of the crime of Unlawful Assembly. It cannot be overlooked that various other facts were shown and proven by the State as existing in the case which could be considered and was considered by the Court in adjudging the defendants guilty. These various facts have been particularly shown by the defendant-in-error in its brief and, surely, present sufficient reasons which caused the Judge to readily reach a decision that an Unlawful Assembly had occurred, whether the meeting laid out a program in defiance of the constituted authorities or not.

As the Supreme Court states in its opinion:

> "The testimony, a consideration of the background of the case and the subsequent events, clearly show that the advertised meeting in the City Hall Plaza, the most conspicuous place in the City, laid out a program in defiance of the constituted authorities."

There is no error on the trial of this cause which prejudiced the defendants in maintaining their defense upon the merits, and the judgment, therefore, should be affirmed.

Respectfully submitted,

J. VINCENT BARNITT,
Prosecutor and of Counsel
with Defendant-in-Error.