Comedian Charlie Chaplin, Chief Justice Philip Gibson, of the California Supreme Court, and songwriter Irving Berlin *(from left to right)* arrive at Federal Court in New York on March 31, 1941, to appear as character witnesses in the income tax evasion trial of movie executive Joseph M. Schenck. *Photo: AP Photo.*

When Chief Justice Gibson Joined Hollywood Stars to Testify at a Movie Mogul's Tax Evasion Trial

BY DAVID S. ETTINGER

Charlie chaplin, irving berlin, and the Chief Justice of California walk into a New York City courtroom. No joke.

In 1941, the three luminaries were in town to testify on behalf of Joseph Schenck and a co-defendant, who were being tried for tax evasion in the federal district court.

Schenck was no ordinary defendant. His *New York Times* obituary 20 years later described the Russian-born Schenck as "one of the last surviving giants of the motion picture industry," having been a former president and chairman of the board at United Artists and a founder of Twentieth-Century Fox.[1] On the other hand, this movie pioneer was also quoted in 1928 as predicting, "I don't think people will want talking pictures [for] long."[2]

Another Schenck lapse in judgment was taking fraudulent six-figure deductions on his income tax returns. That's what he was on trial for.[3] And the trial is what prompted Phil Gibson, then California's Chief Justice, to travel across the country to support an old friend as a character witness.

Gibson's testimony was brief, taking up only several pages of a very lengthy reporter's transcript. But it illuminated both his sense of the scope of his office's powers and also confidence in the length of his future tenure.

Establishing his credentials, Gibson — who had been on the court for less than two years — explained that the Supreme Court was California's highest court, that he was an associate justice before becoming Chief, and that he was California's director of finance prior to joining the court. Gibson also testified that, as Chief Justice, he chaired the state Judicial Council, and he agreed with defense counsel's characterization of the job as giving Gibson "jurisdiction and personal supervision of all the other state judges throughout the state of all courts." "That is true," he said.

The Chief Justice was also apparently feeling sanguine about a relatively recent change in California judicial elections. In 1934, the state went from contested elections for Supreme Court and Court of Appeal justices (in which candidates ran against each other for places on the bench and sitting justices were not infrequently defeated) to the current retention election method (in which, instead of having opponents on the ballot, justices appointed or nominated by the governor are given a "yes" or "no" vote by the electorate).[4] After having

1. "Joseph M. Schenck, 82, Is Dead; A Pioneer in the Movie Industry," *N.Y. Times*, Oct. 23, 1961, p. 1.

2. "'Talkies' Just A Fad, Says Joseph Schenck," *N.Y. Times*, Aug. 22, 1928, p. 25.

3. *U.S. v. Schenck* (2d Cir. 1942) 126 F.2d 702, 705.

4. The change was made by initiative, adding section 26 to article VI of the California Constitution. See Gerald Uelmen, "Symposium, California Judicial Retention Elections" (1988)

Gibson confirm that he was elected to the court, the defense attorney asked, "You have some years still to serve, have you?" The Chief responded confidently, "It is virtually a life position." And, in fact, he would go on to serve 23 more years, until his 1964 retirement.[5]

The preliminaries over, discussion turned to Schenck. Gibson testified that he had known Schenck for almost 20 years, having had "business contacts, social contacts and hav[ing] been associated with him in charity work," including the Community Chest and the Infantile Paralysis Campaign.[6]

Schenck's attorney then invited the Chief Justice to expound on Schenck's "reputation in California for honesty and integrity." Before Gibson could answer, the district court judge, seemingly intent on heading off a long and glowing narrative, instructed the Chief Justice to answer, "Good or bad? Is his reputation good or bad." "Good," Gibson responded. He was, however, allowed to answer whether he had "any question about it." "None whatever," the Chief said, ending the direct examination.

The cross-examination was even briefer. The prosecutor asked if Gibson had heard and taken into account that Schenck had made false statements to Justice and Treasury Department officials. Gibson replied he had heard only "the statements that I have read in the papers since I came to New York City" and he had "[c]ertainly not" taken those into account in assessing Schenck's reputation because "[h]is reputation as I knew it included no such thing."

Redirect examination established that Gibson as an attorney had never done legal work for Schenck or his companies, leaving undescribed the prior "business contacts" between the two that Gibson had mentioned on direct. He also explained that he had come to New York voluntarily and not under subpoena: "I came here at the request of Mr. Schenck. He asked me if I would be willing to come here and testify with respect to his reputation and I told him that I would."[7]

Gibson's credentials were no doubt compelling, but he probably couldn't compete with the star power of other character witnesses, Charlie Chaplin, who also testified for Schenck, and Irving Berlin, who testified for Schenck's co-defendant.

When defense counsel asked Chaplin to name some of his most popular pictures, Chaplin replied, "Well, modesty forbids," but — possibly with a wink or a smile — he then immediately listed seven movies. He was also asked whether "there is a picture now being shown of yours," to which he answered, "Yes, sir, called 'The Great Dictator.'" He then proceeded to name-drop Rudolph Valentino, Gloria Swanson, Douglas Fairbanks, Mary Pickford, and Al Jolson, among others. Not to be outdone, Berlin testified to having written "God Bless America," "Easter Parade," and "Alexander's Ragtime Band" ("White Christmas" wouldn't come out until the following year), and he said he had done Astaire–Rogers and Sonja Heine pictures. They vouched for the good characters of Schenck and Schenck's co-defendant, respectively.

Apparently trying to compete, the government called as witnesses two of the Marx Brothers, Harpo and Chico. Yes, Harpo spoke. He testified to having gambled with Schenck. When Harpo said that during one time span he had received much more money from Schenck than he had paid to Schenck, the prosecutor asked, "What is that, luck, or perspicacity?" "Holding plenty of aces," Harpo explained.

Whatever influence the star witnesses might have had, the jury convicted both Schenck and his co-defendant.[8] Both defendants' appeals failed.[9] Schenck was sentenced to three years in prison and a $10,000 fine,[10] but his sentence was reduced for cooperating in the extortion prosecution of two union leaders.[11] He was paroled after serving four months, and President Harry Truman pardoned him a few years later.[12]

It's not every day that a California chief justice is a trial witness anywhere, let alone outside his or her jurisdiction. But after his New York experience, the next time Chief Justice Gibson walked into a courtroom, he was probably on the side of the bench to which he was more accustomed and he was not in danger of being outshone by Hollywood stars. ✯

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28 *Santa Clara L. Rev.* 333, 339–40; see now art. VI, § 16(d)(1) & (2); Elec. Code, §§ 9083, 13204(a), 13208(a).

5. For more about Phil Gibson, see 5 *Cal. Legal Hist.* (2010) 1–62.

6. Many years later, Gibson identified Schenck as a "pretty able fellow" who was one of Culbert Olson's "leading supporters" when Olson successfully ran for California Governor in 1938. Oral History of Chief Justice Phil S. Gibson, 5 *Cal. Legal Hist.*, p. 16. It was Governor Olson who made Gibson director of finance and who then appointed Gibson a Supreme Court associate justice and elevated him to Chief Justice. *Id.* at pp. 18–19, 24–26.

7. Under current ethics rules, Gibson could not have testified for Schenck voluntarily. See Cal. Code Jud. Ethics, canon 2B(2)(a) ["A judge may testify as a character witness, provided the judge does so only when subpoenaed"]. There was no such prohibition in 1941.

8. *U.S. v. Schenck*, 126 F.2d at p. 704.

9. *Id.* 126 F.2d at p. 702.

10. *Id.* 126 F.2d at p. 704.

11. "Schenck Goes To Prison," *N.Y. Times*, May 3, 1942, p. 48.

12. "Schenk Is Paroled; In U.S. Jail 4 Months," *N.Y. Times*, Sept. 9, 1942, p. 26; "J. M. Schenck Pardoned," *N.Y. Times*, Jan. 4, 1947, p. 9.