Subject Index.

Interest of amicus curiae 2

Reasons for allowing certiorari 6

Table of Authorities Cited.

Cases.

Commonwealth of Pennsylvania v. Steve Nelson, 377 Pa. 38, 104 A. (2d) 133, reargument denied, 377 Pa. 60 1, 6, 7

Gilbert v. Minnesota, 254 U.S. 325 7

Nelson v. Wyman, —N.H.—, 105 A. (2d) 756 6

People, ex rel. Gilbert, v. Babb, Sheriff, 415 Ill. 349 3

State v. Holm, 139 Minn. 267 7

Statutes, Etc.

Internal Security Act of 1950 4

Smith Act of 1940 (18 U.S.C. sec. 2385) 3, 4, 7

28 U.S.C. sec. 1257(3) 1

G.L. (Ter. Ed.) c. 264, sec. 11, as amended by St. 1948, c. 160, sec. 1 2, 3, 4

G.L. (Ter. Ed.) c. 264, secs. 16, 16A, 19, as inserted by sec. 3 of c. 805 of the Acts of 1951 5

Rules of Supreme Court, Rule 42 1

Supreme Court of the United States.

October Term, 1954.

No. 236.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,
v.
STEVE NELSON,
Respondent.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

This brief of the Commonwealth of Massachusetts is filed under Rule 42 of the Supreme Court of the United States in support of the petition for writ of certiorari filed by the Commonwealth of Pennsylvania in the case of *Commonwealth of Pennsylvania* v. *Steve Nelson,* October Term, 1954, No. 236, reported below in 377 Pa. 38, 104 A. (2d) 133, reargument denied in 377 Pa. at page 60. Jurisdiction of this court was invoked under 28 U.S.C. § 1257(3). Since this brief is sponsored by the Attorney General of Massachusetts, consent of the parties is not required.

Massachusetts adopts the Questions Presented for Review and the Statutes Involved contained in the Brief for

Pennsylvania at pages 4 and 5, and the Statement of the Case in said brief at page 9.

Interest of Amicus Curiae.

1. The Commonwealth of Massachusetts, by indictment returned September 1, 1951, in Middlesex County, charged that one Margaret Gilbert and one Martha H. Fletcher did, on January 1, 1947, and on divers other days between that date and the presentment of the indictment—

> "conspire together and with Dirk J. Struik and Harry E. Winner to advocate, advise, counsel and incite the overthrow by force and violence of the government of the Commonwealth of Massachusetts by speech, exhibition, distribution and promulgation of certain written and printed documents, papers and pictorial representations, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

This conspiracy charge was based on the Massachusetts sedition law, G.L. (Ter. Ed.) c. 264, sec. 11, as appearing in section 1 of chapter 160 of the Acts of 1948.

Section 11 provides:

> "SECTION 11. Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of

> the United States, shall be punished by a fine of not more than one thousand dollars, or by imprisonment for not more than three years, or both; provided, that this section shall not be construed as reducing the penalty now imposed for the violation of any law. It shall be unlawful for any person who shall have been convicted of a violation of this section, whether or not any sentence shall have been imposed, to perform the duties of a teacher or of an officer of administration in any public or private educational institution, and the superior court, in a suit by the commonwealth, shall have jurisdiction in equity to restrain and enjoin any such person from performing such duties thereafter; provided, that any such restraining order or injunction shall be forthwith vacated if such conviction shall be set aside." (As amended by St. 1948, c. 160, sec. 1.)

This statute is similar to the Pennsylvania law in this case (R. 8a).

The Supreme Court of Illinois, on habeas corpus, upheld extradition to Massachusetts in that case on May 20, 1953, rehearing denied September 21, 1953, reported in *People, ex rel. Gilbert,* v. *Babb, Sheriff,* 415 Ill. 349.

A motion to quash said indictment, based on the Nelson decision, has been reported without decision to the Supreme Judicial Court of Massachusetts for a ruling on questions raised by the motion to quash, including the question of whether the Massachusetts law has been superseded by the federal Smith Act of 1940 or any other federal law.

2. The Commonwealth of Massachusetts, in a second case, in Suffolk County, by indictment No. 2457, returned May 20, 1954, charged Daniel Boone Schirmer, Ann Burlak

Timpson, Barbara Bennett Rosenkrantz, Herbert Zimmerman, Edith Abber, Otis Archer Hood and Franklin P. Collier, Jr., on January 1, 1949—

> "and on divers other days and times between that day and the day of the presentment of this indictment, did conspire together to commit thereafter, from time to time and on different occasions as opportunity therefor should offer and not at any times then particularly set and fixed, the crime of advocating, advising, counseling, and inciting, by speech and exhibition, distribution and promulgation of written and printed documents, papers and pictorial presentations, assaults upon public officials, the killing of persons, the unlawful destruction of real and personal property, and the overthrow by force and violence and unlawful means of the government of the Commonwealth of Massachusetts and the government of the United States."

Motions to quash said indictment were reported to the Supreme Judicial Court without decision for a ruling on the questions raised by the motions, including a ruling on the question of whether the Smith Act of 1940 or the Internal Security Act of 1950 has superseded state sedition laws, such as section 11 of chapter 264, quoted above.

3. The Commonwealth of Massachusetts, by indictment No. 1924, returned April 8, 1954, in Suffolk County, charged that one Otis Archer Hood on the 17th day of November, 1951—

> "and on divers other days and times between that day and the day of the presenting of this indictment, did become and remain a member of a certain organiza-

tion, to wit; the Communist Party, knowing it to be a subversive organization."

This indictment was based on General Laws (Ter. Ed.) c. 264, sec. 19, as inserted by section 3 of chapter 805 of the Acts of 1951.

Section 19 provides:

"SECTION 19. Any person who becomes or remains a member of any organization knowing it to be a subversive organization shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than three years or both, provided that this section shall not be construed as reducing the penalty now imposed for the violation of any law." (As amended by St. 1951, c. 805, sec. 3.)

Section 16 provides:

"SECTION 16. The term 'subversive organization' as used in sections seventeen, eighteen, nineteen, twenty-one, twenty-two and twenty-three of this chapter shall mean any form of association of three or more persons, however named or characterized, and by whatever legal or non-legal entity or non-entity it be established, and whether incorporated or otherwise for the common purpose of advocating, advising, counseling or inciting the overthrow by force or violence, or by other unlawful means, of the government of the commonwealth or of the United States." (As amended by St. 1951, c. 805, sec. 3.)

Section 16A provides:

"SECTION 16A. The Communist Party is hereby declared to be a subversive organization." (As amended by St. 1951, c. 805, sec. 3.)

A motion to quash the indictment was reported to the Supreme Judicial Court without decision for a ruling on the questions raised by the motion to quash, including the question of supersession.

This membership section is similar to the membership count in the Nelson indictment (R. 4a).

A ruling by this court on the question of supersession raised in this case would control the decision of the Supreme Judicial Court in the aforesaid cases. Therefore the Commonwealth is vitally interested in having this court hear this case.

Reasons for Allowing Certiorari.

I. The decision of the Pennsylvania Supreme Court in the *Nelson* case conflicts with the decision of the New Hampshire Supreme Court in the case of *Nelson* v. *Wyman,* —N.H.—, 105 A. (2d) 756, decided on April 30, 1954, where the court expressly refused to follow the Pennsylvania court, saying:

> "The enactment by Congress of the Smith Act (18 USC Sec. 2385) which defines and penalizes sedition and subversive activities against the governments of the United States, the states or any of their subdivisions, does not preclude state legislation on the same subject matter. Insofar as Penn. v. Nelson, 104A 2d 133, gives support to the proposition that it does, we do not adopt it." (105 A. (2d) at p. 769.)

Thus a conflict between the states exists which should be resolved by this court.

II. The Pennsylvania Supreme Court has decided a federal question of substance in a way we believe is probably

not in accord with applicable decisions of this court, to wit, that a federal sedition act supersedes state sedition laws.

This seems contrary to the principle of *Gilbert* v. *Minnesota,* 254 U.S. 325.

There the court quoted without disapproval the holding in *State* v. *Holm,* 139 Minn. 267, "where after a full discussion the contention was rejected that the Espionage Law of June 15, 1917, abrogated or superseded the statute, the court declaring that the fact that the citizens of the State are also citizens of the United States and owe a duty to the Nation, does not absolve them from duty to the State nor preclude a state from enforcing such a duty. 'The same act,' it was said, 'may be an offense or transgression of the laws of both' Nation and State, and both may punish it without a conflict of their sovereignties." (254 U.S. at 329.)

III. The Pennsylvania Supreme Court in the *Nelson* case has decided a federal question of substance not heretofore decided by this court, to wit, that the federal Smith Act (18 U.S.C. sec. 2385) has superseded state sedition laws (R. 64a).

It is of the utmost importance to the states that this question should be decided authoritatively by this court, as was pointed out by the concurring justices in the Pennsylvania Supreme Court (R. 80a.)

As of 1949, thirty-seven states had passed laws defining and punishing sedition, syndicalism and other activities aimed at the overthrow of our government by force (R. 90a). The validity of these laws would be questioned if this case is not heard by this court.

The large number of states which have joined in the brief prepared by the Attorney General of New Hampshire and

sponsored by the National Association of Attorneys General indicates the extent of their concern for the effect of the Pennsylvania decision. The Commonwealth of Massachusetts expressly adopts and joins in the arguments and contentions raised and set forth in said brief, and urges that they be adopted and followed by this court.

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