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MISCELLANEOUS.

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.

This brief of the Commonwealth of Massachusetts is filed as amicus curiae under Rule 42 of the Supreme Court of the United States 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, certiorari granted, 348 U.S. 814. 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 petition for certiorari of Pennsylvania at pages 4 and 5, and the Statement of the Case in said petition 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 pen-

> alty 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. This case has been heard but not decided.

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 organization, 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 will control the decision of the Supreme Judicial Court in the aforesaid cases. Therefore the Commonwealth is vitally interested in having this court sustain the Pennsylvania statute.

Argument.

The precise question here is whether the Pennsylvania Supreme Court erred in quashing the indictment on the ground that the Pennsylvania Sedition Law, Pennsylvania Penal Code, § 4207, was *impliedly* superseded as to sedition against the *federal* government by the corresponding provisions of the *Smith* Act, 18 U.S.C. § 2385.

It is not contended that the Smith Act expressly superseded the state law; only an implied intent is urged. Motion to Quash Indictment, I, i, Appendix to Petition for Certiorari, p. 22a.

Only supersession as to sedition against the federal government was found by the Pennsylvania Supreme Court. Opinion, Appendix to Petition for Certiorari, p. 64a. Consequently supersession as to sedition against the state government will not be discussed here.

The Pennsylvania court found supersession only by virtue of the Smith Act. Opinion, Supreme Court of Pennsylvania, Appendix to Petition for Certiorari, p. 63a. Therefore only the effect of the Smith Act will be dealt with here.

It is clear that Pennsylvania has the power to prohibit sedition against the federal government notwithstanding

that Congress has also prohibited such sedition. This has been settled since the case of *Gilbert* v. *Minnesota,* 254 U.S. 325 (1920), where this court rejected the contention that the Espionage Act of 1917, 40 Stat. 217, abrogated or superseded a state law which prohibited interference with recruiting for federal military forces. Note, "State Control of Subversion: A Problem in Federalism," 66 Harv. L. Rev. 327, 328 (1952).

The only question here is whether Congress intended to supersede state laws forbidding sedition against the federal government.

But where a state is acting under its police powers reserved by the Tenth Amendment this court has said:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed."

Schwartz v. *Texas,* 344 U.S. 199, 202-203 (1952) (federal law forbidding wire-tapping held not to exclude such intercepted communications from evidence in criminal proceeding in state court).

Where the state law conflicts with the federal law, or where the state law imposes greater affirmative burdens on non-criminals in fields peculiarly within the province of the federal government, it is easy to imply an intent to supersede. *Hines* v. *Davidowitz,* 312 U.S. 52, 68 (1941) (state required registration of aliens who were citizens of allied nations).

Here the state and federal laws coincide; both forbid the same type of criminal activity directed against the federal

government. In fact, the respondent claimed double jeopardy in his later trial under the Smith Act. *United States* v. *Mesarosh,* 13 F.R.D. 180, 186 (1952).

Here the case is governed by *California* v. *Zook,* 336 U.S. 725 (1949), where a state court was reversed for dismissing a complaint on the ground that a state law (which prohibited the sale of transportation over the state's highways without a permit from the Interstate Commerce Commission) was superseded by a federal law containing substantially the same provision.

There the court said that—

> "the fact of identity does not mean the automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent. . . . Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." 336 U.S. at 730, 731.

That decision was characterized by Mr. Justice Frankfurter in his dissent in these words:

> ". . . the Court today decides that the States can impose an additional punishment for a federal offense unless Congress in so many words forbids the States to do it." 336 U.S. at 739.

Looking at this case as a whole, ". . . we do not believe that [the Smith Act's] provisions are such as to evidence a 'clear and manifest purpose of Congress' to pre-empt the entire field of legislation and deny the state's right to act in defense of it." *Nelson* v. *Wyman,* 105 A. (2d) 756, 769 (N.H. 1954).

On the contrary, Representative Howard Smith, of Virginia, sponsor of the Smith Act, declared in debate on that bill: "This has nothing to do with state laws." 84 Cong. Rec. 10452 (1939).

Unless this is to be a "hypothetical case on normal Congressional intent," this statement alone should resolve any doubts in this case. See 336 U.S. at 733, note 9, and *Galvan* v. *Press,* 347 U.S. 522, 527 (1954).

Parenthetically it may be noted that, when the Internal Security Act of 1950, 64 Stat. 987 *et seq.,* was debated by the House, sitting as a committee on the Whole House, the chair ruled that ". . . the bill before the committee deals only with the Federal Government of the United States." 96 Cong. Rec. 13762 (1950).

But we will go further.

Another factor in determining the intent of Congress is the fact that Congress may not have the power to supersede state laws that do not conflict with federal laws in this field. United States Constitution, Amendment X.

The state is acting to protect itself when it prohibits sedition against the federal government.

In the first place, an attempted revolution against the federal government caused by sedition would involve physical acts of violence carried on within the boundaries of the states (except for the District of Columbia, etc.). This would include assaults against federal civil officials and federal troops, and attacks on national defense industries and federal office buildings. All this would endanger the lives and properties of the citizens of the states. The revolutionists would have to be very careful not to injure state property by accident. The power of a state to prohibit sedition to prevent such disorders against government was upheld in *Gitlow* v. *New York,* 268 U.S. 652 (1925).

In the second place, a successful revolution against the United States, even one involving no fighting in Pennsylvania, which established a totalitarian dictatorship would jeopardize certain rights guaranteed to citizens of states under our present constitution. These include the right to a republican form of government, the right to elect senators and representatives to Congress to participate in making the laws, the rights guaranteed to states under the Tenth Amendment, and the civil rights of citizens protected from federal encroachment by the first ten amendments.

Relevant here is the nature of the power of Congress to prohibit sedition against the federal government.

Congress does not have the power to provide for the common defense specifically spelled out in the Constitution. It does have the power to "lay and collect Taxes, . . . to pay the Debts and provide for the common Defence . . ." United States Constitution, Art. I, § 8. Madison pointed out the distinction in The Federalist, No. 41, at 269 (Modern Library ed. 1941).

It was assumed in the *Dennis* case that the United States has the power to prohibit armed rebellion without discussing where that power was enumerated in the Constitution. *Dennis* v. *United States,* 341 U.S. 494, 501 (1951).

The duty of the federal government to guarantee to every state in the Union a republican form of government does not give Congress an unlimited power to interfere in the internal affairs of the states. United States Constitution, Art. IV, § 4. The secondary nature of the word "guarantee" here was emphasized by Madison in the Federalist, No. 43, at 283 (Modern Library ed. 1941). The reluctance of the founding fathers to permit federal interference in state affairs is further emphasized in this section by the requirement that the federal government may

protect against domestic violence only "upon application of the Legislature, or of the Executive (when the Legislature cannot be convened) . . ."

Congress therefore would be on shaky ground if it claimed power to forbid states from acting in this field.

If Congress does have the power to prohibit states from protecting their interest in the present form of federal government, then state sovereignty is indeed compressed to the very narrowest of limits. We do not concede that Congress does have such a power. Congress does not need such a power since there is ample room for both the federal and state governments to operate in this field. Cooperation between the federal and state prosecuting officials may be presumed, and the brief of the Solicitor General will reveal whether such cooperation is desired by the federal executive. (Even the United States Attorney General is bound to operate within the terms laid down by Congress, however, and if Congress commands cooperation, he will be bound by the will of Congress.)

But before we decide whether Congress possesses such a power we should determine whether Congress claims such a power.

We would expect long and earnest debate with expressions of strong resistance from exponents of states' rights before words claiming such power were put into the Smith Act. Instead, we find the Act silent, and the sponsor expressly disclaiming any intent to claim such a power.

Is this the sort of record that "is a clear manifestation of intention" to supersede?

To be consistent, this court, if it found that Congress had the power to supersede state laws prohibiting sedition against the federal government, would have to find that state laws supersedeed that part of the Smith Act prohibiting sedition against the state governments.

Such a holding would then conflict with the power of the federal government to guarantee to each state a republican form of government—a valuable protection to the states when they are unable to protect such republican form themselves.

These constitutional questions may explain why Congress did not expressly claim in the Smith Act the power to supersede state laws not in conflict with that Act. In any event, it is clear that Congress did not expressly claim such a power of supersession.

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication [citing cases], should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation. . . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

Penn Dairies, Inc., v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261, 275 (1943).

Intent is the key. Since Congress did not intend to claim a power of supersession as to laws not in conflict with the

Smith Act, this court should hold that the Pennsylvania Sedition Law is not superseded by implication.

Conclusion.

The Supreme Court of Pennsylvania should be reversed.

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