RECENT CASES

Administrative Law—

NEWSPAPER PUBLISHER HELD PARTY IN INTEREST TO PROTEST OF TELEVISION LICENSE GRANTED WITHOUT HEARING

Both Ohio Valley Broadcasting Corporation and Clarksburg Broadcasting Corporation applied to the Federal Communications Commission for a permit to operate a new television broadcast station on the same channel in Clarksburg, West Virginia. Clarksburg Broadcasting's application was dismissed at its own request and Ohio Valley's application was granted the next day without a hearing [1] and without prior notice of the dismissal.[2] The Clarksburg Publishing Company, publisher of morning, afternoon and Sunday newspapers in Clarksburg, protested the grant, alleging that the substantial losses which would be caused by competition with Ohio Valley for advertising revenue, together with the adverse effect television usually has upon newspaper circulation, was sufficient economic injury under the Communications Act to make it a "party in interest." [3] The publisher had alleged further that the grant would not be in the public interest in light of Ohio Valley's payment of more than $14,000 to Clarksburg Broadcasting Corporation and in light of the "widespread influence" which the company controlling Ohio Valley would be able to exert throughout West Virginia because of its ownership of all of the daily newspapers in nine West Virginia cities, radio broadcasting stations in Clarksburg and Parkersburg, West Virginia, and its substantial interest in a television station operating in Wheeling which can also be received in Clarksburg. This influence was alleged to be contrary to established FCC policies against multiple ownership of television stations [4] and domination of news dissemination facilities by a single organization.[5] The FCC, with three Commissioners dissenting, held despite Ohio Valley's objections that the Publishing Company was a party in interest, postponed the effective date of the grant, and ordered that a hearing be held on the protest. *Ohio Valley Broadcasting Corp.*, FCC Docket No. 11004, April 15, 1954.

1. 48 STAT. 1085 (1934), as amended, 66 STAT. 715 (1952), 47 U.S.C. § 309(a) (Supp. 1952).

2. 47 CODE FED. REGS. § 1.371 n.10, ¶ e (1949).

3. 66 STAT. 715 (1952), 47 U.S.C. § 309(c) (Supp. 1952).

4. FCC Rule 3.636, 18 FED. REG. 7799 (1953).

5. Mansfield Journal Co. v. FCC, 180 F.2d 28, 33 (D.C. Cir. 1950); Fostoria Broadcasting Co., 13 F.C.C.——(1948); 17 GEO. WASH. L. REV. 130.

In the 1952 amendments to the Communications Act Congress established a procedure to permit protests on grants made without hearing.[6] This right was given to "parties in interest," a term which had received judicial construction in questions of intervention in agency hearings and standing to secure judicial review.[7] The doctrine that economic injury may be sufficient to permit a party to appeal was first enunciated in *FCC v. Sanders Radio Station,*[8] which held that the holder of an existing radio license was a "person aggrieved" who could secure judicial review of an FCC order granting a potentially competing license, even though economic injury to the original licensee was not an independent element in determining whether the license should be granted. In *National Coal Association v. FPC,*[9] relied upon by the FCC in the instant case, an association of coal producers, the United Mine Workers and a representative of railroads which hauled coal were permitted, as "aggrieved persons," to appeal a Federal Power Commission order which authorized construction of a gas pipe line to an atomic energy plant. Other cases have denied an appeal to one whose market would be affected by an order directed to a competitor,[10] but the rule of the *National Coal* case is more widely followed on the theory that, by the term parties in interest, Congress has created a group of "private Attorney Generals" to keep agencies within their statutory bounds and to appeal errors of law which might otherwise go unchallenged.[11] By utilizing the phrase "party in interest," Congress intended to apply the rule of the *Sanders* case to the new protest provisions of the 1952 amendments.[12] To the extent that standard radio broadcasters had been permitted to protest the grant of television licenses,[13] the holding that one in a competing medium of communications may be a party in interest is not novel. How-

6. 66 STAT. 715 (1952), 47 U.S.C. § 309(c) (Supp. 1952). See Wall and Jacob, *Communications Act Amendments, 1952—Clarity or Ambiguity,* 41 GEO. L.J. 135 (1953).

7. WARNER, RADIO AND TELEVISION LAW § 13(d) (1948); DAVIS, ADMINISTRATIVE LAW § 205 (1951). See also Case Note, 49 COL. L. REV. 579 (1949); Note, 52 YALE L.J. 671 (1943).

8. 309 U.S. 470 (1940).

9. 191 F.2d 462 (D.C. Cir. 1951). The fact that appeals from FCC decisions are taken to this circuit court lends added significance to this decision.

10. *Cf.* United States Can & Sugar Refiners Ass'n v. McNutt, 138 F.2d 116 (2d Cir. 1943) (adversely affected); A. E. Staley Co. v. Secretary of Agriculture, 120 F.2d 258 (7th Cir. 1940) (adversely affected). *See* Ex-Cell-O Corp. v. Chicago, 115 F.2d 627 (7th Cir. 1940) (declaratory action). It appears that courts have not differentiated among the various statutory terms describing the group permitted to appeal, whether "aggrieved" or "interested" persons.

11. Associated Industries of N.Y. v. Ickes, 134 F.2d 694 (2d Cir. 1943) (person aggrieved); Reade v. Ewing, 205 F.2d 630 (2d Cir. 1953) (adversely affected); Comment, 34 CORNELL L.Q. 608, 614-5 (1949).

12. SEN. REP. No. 44, 82d Cong., 1st Sess. 8 (1952).

13. Versluis Radio & Television, Inc., 3 PIKE & FISCHER AD. LAW 2d 365 (FCC 1953); T. E. Allen, 18 FED. REG. 2255 (FCC 1953). *But cf.* Yellow Cab Co. of Chicago, 3 PIKE & FISCHER AD. LAW 2d 367 (FCC 1953) (taxicab company may not protest grant of special radio service license to competitor); Kansas State College of Agriculture and App. Sci., 2 PIKE & FISCHER AD. LAW 2d 738 (FCC 1952) (representative of national broadcasters may not petition for reconsideration of grant of an educational television license).

ever, despite the interpretation given *Sanders* by the decision in *National Coal,* the instant case is the first in which the FCC has recognized an unlicensed person as a party in interest under the protest provisions.[14] It is uncertain whether the decision will enlarge the size of this group beyond newspapers to include other competitors for advertising revenues and the public's leisure time.

The rationale of the *Sanders* decision is to provide someone in addition to the agency to represent the public.[15] This is particularly useful in the case of the FCC, which has been ordered by Congress to provide television service to all portions of the country as soon as possible but does not have the manpower to investigate all applications thoroughly.[16] Thus, in localities which have no existing service, unopposed applications may be granted with little or no scrutiny. Although the grant of a license does not give the licensee a property right, it has been difficult to convince the FCC and particularly the courts that a license renewal should be denied merely because an applicant with no substantial investment promises to give better service.[17] Consequently, it may be better to keep some localities temporarily without service rather than grant licenses to the irresponsible or incompetent almost by default. This is the theory on which protest hearings must be conducted, since a protest does not enable new applicants to file and obtain a comparative hearing, but merely postpones the effective date of the original grant.[18] The principal factor against broadening the scope of protest proceedings is the impairment of agency efficiency because of delay and undue complication of issues by persons whose sole purpose is to postpone the date at which any television service may be made available in their market areas.[19] However, established intervention and standing doctrines favor those with the greatest motivation to use such dilatory tactics. Although it is possible that the FCC and the courts had restricted participation in proceedings under the Communications Act to licensees in order to give them some protection from harmful competition, such an approach, or any firm rule, might result in having no qualified person to represent the public. Thus, in the instant case, since the nearest radio and television stations are both associated with Ohio Valley, the protestant might be the only one with sufficient adverse economic interest to object to the grant. To minimize the problem of delay, the FCC may use its

14. *Cf.* Capital Broadcasting Co., 2 PIKE & FISCHER AD. LAW 2d 704 (FCC 1952), 21 GEO. WASH. L. REV. 368 (1953) (representative of riding public protesting grant of a transit radio license).

15. *See* Associated Industries of N.Y. v. Ickes, 134 F.2d 694 (2d Cir. 1943).

16. Congress apparently has not relied solely on the statutory mandate to provide service rapidly. See statement of Commissioner Frieda B. Hennock to a Senate Commerce subcommittee that "senatorial pressure" upon the FCC to speed grants and the procedure for grants of licenses without a hearing do not protect the public interest. Philadelphia Evening Bulletin, May 21, 1954, p. 9, col. 3.

17. Segal and Warner, *"Ownership" of Broadcasting "Frequencies": A Review,* 19 ROCKY MT. L. REV. 111, 120-2 (1947).

18. WHEC, Inc. and Veteran's Broadcasting Co., 18 FED. REG. 2109 (FCC 1953).

19. DAVIS, ADMINISTRATIVE LAW § 203 (1951).

statutory powers to "expedite" protest hearings [20] by testing the legal sufficiency of public interest allegations before beginning lengthy factual investigations. Such a procedure, somewhat analogous to a demurrer, was followed in the instant case.[21] Since all protests must be verified, the agency may avoid frivolous and fabricated issues by utilizing its rules for disbarment.[22]

Charitable Organizations—

NONLIABILITY FOR NEGLIGENCE RULE NOT APPLICABLE TO NUISANCE RESULTING FROM NEGLIGENCE

Plaintiff sued a church congregation for injuries sustained when she slipped and fell on an icy pavement in front of the rectory. The ice resulted from a clogged downspout which channeled water from one corner of the roof onto the sidewalk. The Wisconsin Supreme Court affirmed an order overruling a demurrer, holding that the nonliability of charitable organizations for torts by servants does not extend to suits for injuries resulting from the maintenance of a public nuisance, even though the nuisance was the result of negligence. *Smith v. Congregation of St. Rose*, 61 N.W.2d 896 (Wis. 1953).[1]

Wisconsin and a majority of American jurisdictions have long held that charitable organizations are not liable for the negligence of their servants.[2] Some of these jurisdictions have held charities responsible for nuisances arising from conduct which the actor realized was potentially harmful [3] or from activity normally entailing absolute liability,[4] but these

20. 66 STAT. 715 (1952), 47 U.S.C. § 309(c) (Supp. 1952).

21. These issues were set for oral argument on May 17, 1954, the FCC assuming for purposes of the argument that all facts were undisputed and reserving the power to institute fact finding proceedings later if Publishing Company's allegations were legally sufficient to warrant denial of the application. Ohio Valley Broadcasting Corp., 19 FED. REG. 2594 (FCC 1954).

22. 47 CODE FED. REGS. § 1.714 (1949).

1. *Accord,* Wright v. St. Mary's Hospital, 61 N.W.2d 900, 902 (Wis. 1953) (decided the same day).

2. See Note, 25 A.L.R.2d 29, 142 (1952). For the rule in Wisconsin, see Baldwin v. St. Peter's Congregation, 264 Wis. 626, 60 N.W.2d 349 (1953); Note, 25 A.L.R.2d 29, 198 (1952).

3. Vaughn v. Missouri Power & Light Co., 89 S.W.2d 699 (Mo. App. 1935) (defendant continued to spray chemicals into the air after being notified of injury to plaintiff's land); Peden v. Furman University, 155 S.C. 1, 151 S.E. 907 (1930) (defendant leased land to professional baseball club with knowledge that harm to plaintiff's home must inevitably follow). In some jurisdictions following the majority rule, nonliability extends to torts involving intentional misconduct as well as negligence. See, *e.g.,* Boardman v. Burlingame, 123 Conn. 646, 197 Atl. 761 (1938). In Wisconsin, however, the courts have never had occasion to extend the rule beyond nonliability for negligence.

4. Beecher v. Dull, 294 Pa. 17, 143 Atl. 498 (1928) (blasting); Cumberland Torpedo Co. v. Gaines, 201 Ky. 88, 255 S.W. 1046 (1923) (storing explosives).

decisions provide no authority for the exception made in the present case with respect to negligent torts which are also nuisances. The leading case of *McFarlane v. City of Niagara Falls*[5] recognized that there is often no meaningful difference between those negligent torts which are denominated nuisance and those which are not, and therefore refused to allow recovery by a plaintiff who was contributorily negligent, even though the defendant's negligent conduct could also be labeled nuisance. Certainly the tort in the instant case, properly held to be a nuisance,[6] was caused by the negligence of the employee of the congregation who failed to unclog the downspout or clear the pavement.

Although imposition of liability on charitable organizations diverts funds from their socially desirable activities, their ability to bear the risk of loss by carrying insurance and the value of encouraging caution are ample reason to hold them liable for the torts of their servants.[7] Accordingly, several jurisdictions have abandoned completely the charitable nonliability rule,[8] including one state where the doctrine was as strongly entrenched as in Wisconsin.[9] It seems that the instant court felt unduly bound by precedent in not following that example.[10] Assuming that this judicial restraint was proper, however, the question of whether the court was justified in not assimilating nuisance to negligence, as was done in *McFarlane,* must still be faced. The instant decision imposes liability for negligence resulting in nuisance but not for other equally faulty negligent acts. Since many torts may be called either negligence or nuisance,[11] liability may well depend on the way an attorney draws his complaint.[12] Moreover, the distinction will

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5. 247 N.Y. 340, 160 N.E. 391 (1928).

6. Although there is no Wisconsin case holding that ice on a sidewalk is a nuisance, other jurisdictions have so held. Bixby v. Thurber, 80 N.H. 411, 118 Atl. 99 (1922); Leahan v. Cochran, 178 Mass. 566, 60 N.E. 382 (1901).

7. For a complete presentation of the arguments for and against liability of charitable organizations for the torts of their servants, see Pierce v. Yakima Valley Hospital, 260 P.2d 765, 769 (Wash. 1953); Note, 25 A.L.R.2d 29 (1952).

8. See Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Haynes v. Presbyterian Hospital, 241 Iowa 1269, 45 N.W.2d 151 (1950); Silva v. Providence Hospital, 14 Cal.2d 762, 97 P.2d 798 (1939) (overruling dictum of the California Supreme Court and holdings of lower courts).

9. Pierce v. Yakima Valley Hospital, *supra* note 7.

10. Courts in jurisdictions other than Wisconsin have expressed adversity to the nonliability rule but felt that a change required legislative action. See, *e.g.,* Bond v. City of Pittsburgh, 368 Pa. 404, 407, 84 A.2d 328, 330 (1951). On the other hand, it has been suggested that the courts may change the nonliability rule, since it was their creation. See 38 COL. L. REV. 1485, 1489 (1938).

11. Note, *Nuisance, Negligence and the Overlapping of Torts,* 3 MODERN L. REV. 305 (1940); Comment, 23 CALIF. L. REV. 427 (1935).

12. See McFarlane v. City of Niagara Falls, 247 N.Y. 340, 345, 160 N.E. 391, 392 (1928).

Two justices dissented from the instant decision because the complaint lacked an allegation that the ice had been on the sidewalk an unreasonable amount of time. The majority emphasized language in the complaint which said defendant's servants "allowed and permitted" defective gutters and "knew or should have known" of the hazard to users of the sidewalk. Instant case at 899, 900.

expand the scope of the already vague nuisance concept[13] in order to restrict nonliability as much as possible, just as it has done in the field of municipal immunity.[14] However, *McFarlane* pierced the nuisance label to prevent a careless plaintiff from recovering, while this decision employs the label to reward a deserving plaintiff at the expense of a defendant who would otherwise be protected by the archaic charitable nonliability rule.

Constitutional Law—
Courts—
PENNSYLVANIA COURT RULE BANS OUT-OF-COURT PHOTOGRAPHY

The judges of Westmoreland County, Pennsylvania, acting for the courts of common pleas, oyer and terminer, and quarter sessions of that county,[1] promulgated a rule which prohibits the taking of any photographs in the courthouse, either while court is in session or during recesses, and photographing any inmate or prisoner while in jail or enroute to or from the courthouse.[2] On application of several newspaper publishers, a United States district court granted a temporary restraining order prohibiting enforcement of the rule except as to pictures taken in and near the courtroom. After oral argument, the district court denied a motion to dissolve this order and retained jurisdiction pending a determination by the Penn-

13. That the term nuisance is less definite than negligence is evident from the fact that nuisance law contains no consistently applied criterion like the "reasonable man" standard which has long existed in negligence. "Nuisance" has been variously defined. See, *e.g.*, Waschak v. Moffatt, 173 Pa. Super. 209, 215, 96 A.2d 163, 166 (1953); Levy v. Bryce, 46 A.2d 765, 766 (D.C. Munic. App. 1946). Courts of other states, including Wisconsin, have regarded it as incapable of precise definition. See Lindemeyer v. City of Milwaukee, 241 Wis. 637, 640, 6 N.W.2d 653 (1942); Engle v. State, 53 Ariz. 458, 464, 90 P.2d 988, 991 (1939); Rose v. Socony-Vacuum Corp., 54 R.I. 411, 414, 173 Atl. 627, 628 (1934). Prosser regards public nuisance as a "catch-all." See PROSSER, TORTS 552 (1941). Professors Prosser and Seavey have disagreed as to whether nuisance refers to a type of wrongful conduct or to a type of injurious effect resulting from such conduct. Compare PROSSER, TORTS 553 (1941) with Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 985 (1952).

14. See Note, *Inroads Upon Municipal Immunity in Tort*, 46 HARV. L. REV. 305 (1932).

1. The same judges sit in the three courts. See PA. STAT. ANN. tit. 17, §§ 332, 372 (Purdon 1930).

2. "No one shall take any pictures inside of the courthouse during any session of the court, or the recesses between sessions, and no person, litigant, prosecutor, defendant, plaintiff, claimant or respondent, juror, or witness shall be photographed or have his or her or their pictures taken in a court room or in any of the halls, corridors or approaches thereto during any session of the court or recesses between sessions, and no prisoner, or inmate of the county jail shall be photographed in the jail or in any of the approaches thereto or on his way to or from a session of court." The Tribune Review Pub. Co. v. Thomas, U.S. District Ct., W.D. Pa., March 12, 1954, p. 2.

sylvania Supreme Court of any questions of state law raised by the rule.[3]

Every court has authority to make rules for the fair and expedient administration of justice, but these rules may not change existing substantive law [4] or exceed a court's power to enforce them. In Pennsylvania, the Supreme Court prescribes rules of civil procedure for the common pleas courts,[5] and these lower courts may make additional rules "for the conduct of . . . business," provided they do not conflict with those of the Supreme Court.[6] Since a Supreme Court rule prohibits only photographs taken in the courtroom during trial,[7] it may be argued that a common pleas court is precluded from adopting a broader rule. The county criminal courts are authorized by the legislature to make their own rules "for [the] expediting of . . . proceedings," [8] but it is unlikely that the Westmoreland County court can justify its rule under this statute.[9] Other limitations which may make enforcement of this rule impossible arise from the scope of the contempt power, the court's primary sanction. At common law, out-of-court publications tending to obstruct justice could be treated as constructive contempt and punished summarily.[10] While English courts have retained a strong contempt power in this area,[11] it has been restricted in this country.[12] In Pennsylvania, contempt may be used to punish misbehaviour in the courtroom which obstructs justice [13] and activity outside it

3. The Tribune Review Pub. Co. v. Thomas, *supra* note 2. A petition for a writ of prohibition was filed with the Pennsylvania Supreme Court and was argued in the week of May 24, 1954. Although the district court opinion indicates that only state questions are to be determined in the state court, *id.*, Conclusions of Law 12, 14, petitioner has pressed federal constitutional questions on the Pennsylvania court. An interesting problem will arise if this latter court decides the federal issues. *Cf.* Spector Motor Service, Inc. v. Walsh, 135 Conn. 37, 40-1, 61 A.2d 89, 92 (1948).

4. Kelly v. Pennsylvania Co., 253 Pa. 553, 98 Atl. 767 (1916); see Washington-Southern Nav. Co. v. Baltimore Steamboat Co., 263 U.S. 629, 635 (1924) (rule may not abrogate common law). See also PA. STAT. ANN. tit. 17, §§ 61, 62 (Purdon Supp. 1953).

5. PA. STAT. ANN. tit. 17, § 62 (Purdon Supp. 1953); see 18 U.S.C. §§ 3771, 3772 (Supp. 1952); FED. R. CRIM. P. 57(a).

6. PA. STAT. ANN. tit. 17, § 62 (Purdon Supp. 1953).

7. PA. R. CIV. P. 223(b).

8. PA. STAT. ANN. tit. 17, § 361 (Purdon 1930).

9. If the ban on photographing prisoners purports to regulate the county jail, it would seem to be outside the authority of the county judges acting alone to make such a regulation since the power to make rules for the jail is lodged in a board of of supervisors. See PA. STAT. ANN. tit. 61, §§ 408, 409 (Purdon Supp. 1953).

10. See Note, *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 840, 848 (1950). See also Respublica v. Oswald, 1 Dallas 318 (Pa. 1788).

11. See The King v. Daily Mirror, [1927] 1 K.B. 5 (contempt citation upheld for publishing photograph of accused where an identity question would arise at the trial). See also Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885 (1935).

12. *E.g.*, 18 U.S.C. § 401 (Supp. 1952); PA. STAT. ANN. tit. 17, §§ 2041, 2044 (Purdon 1930). See Nelles and King, *Contempt by Publication in the United States*, 28 COL. L. REV. 401 and 525 (1928) (history of the federal and Pennsylvania statutes). Not all courts have allowed interference by the legislature with the contempt power. See THOMAS, PROBLEMS OF CONTEMPT OF COURT 50-2 (1934).

13. PA. STAT. ANN. tit. 17, § 2041(III) (Purdon 1930).

having the same effect.[14] However, an express statutory provision forbids summary punishment for any out-of-court publication concerning pending cases.[15] Although it was drafted prior to the invention of the art of photography, the language and broad intent indicate a design to prohibit all summary proceedings against any out-of-court publication.[16]

Where freedom of the press is involved, exercise of the contempt power is limited further by constitutional provisions. The United States Supreme Court has held that a court is justified in restricting the press only when confronted with a clear and present danger to judicial administration,[17] a test which has been adopted by Pennsylvania in interpreting its own constitution.[18] The language of the Supreme Court cases interprets broadly the right to publish without restraint,[19] although the factual situations involved attempts to influence decisions of the judge rather than a witness or a jury.[20] In *Baltimore Radio Show, Inc. v. State*,[21] a state court refused to differentiate and held that there was no clear and present danger which justified punishment by contempt even though the defendant alleged that publication of his criminal record and confession made it impossible to get an unbiased jury. The First Amendment is designed to protect all media of expression and, since the Supreme Court has held that motion pictures are within this guarantee,[22] it seems that photography is also included.

Courts have given little consideration to photography's place in reporting judicial proceedings,[23] and, since new modes of expression may give

14. *Compare* PA. STAT. ANN. tit. 17, § 2041(III) (Purdon 1930), *with* PA. STAT. ANN. tit. 17, § 2042 (Purdon 1930). See Greason v. Cumberland Ry. Co., 54 Pa. Super. 595 (1913); *cf.* Marks' Appeal, 144 Pa. Super. 556, 20 A.2d 242 (1941).

15. PA. STAT. ANN. tit. 17, § 2044 (Purdon 1930). This statute apparently leaves as the only remedies civil and criminal libel actions. *Id.* § 2045. See Foster v. Commonwealth, 8 W. & S. 77 (Pa. 1844).

16. See the history of the events leading to the passing of the act in Nelles and King, *supra* note 12, at 409-15. *Cf.* Louka v. Park Entertainments, Inc., 294 Mass. 268, 1 N.E.2d 41 (1936) (unauthorized showing of plaintiff's picture a libellous publication).

17. Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). See Note, *Controlling Press and Radio Influence on Trials*, 63 HARV. L. REV. 840, 850 (1950). The instant rule is similar to a prior restraint on publication which is justified only where there is a clear and present danger which will cause a substantive evil. Near v. Minnesota, 283 U.S. 697, 716 (1931); Schenck v. United States, 249 U.S. 47 (1919).

18. Commonwealth v. Feigenbaum, 166 Pa. Super, 120, 70 A.2d 389 (1950).

19. *E.g.*, Bridges v. California, 314 U.S. 252, 263, 270 (1941).

20. Craig v. Harney, 331 U.S. 367 (1947) (unfair reporting of events in a case and editorial attack on trial judge); Pennekamp v. Florida, 328 U.S. 331 (1946) (editorial attack on trial court actions in nonjury proceedings); Bridges v. California, 314 U.S. 252 (1941) (editorial comment on pending cases and threat to cause labor strike in event of enforcement of court decree).

21. 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

22. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-2 (1952).

23. But see State v. Clifford, 118 N.E.2d 853 (Ohio 1954), affirming a judgment for contempt against violators of a court order which prohibited photographs while court was in session. The order was sustained as preserving a litigant's constitutional right to a fair trial, and not conflicting with freedom of the press.

rise to different needs for control,[24] whether photographs are to receive constitutional protection identical to that given to the press depends on the similarity between these two modes of communication. The extensive use of photographs closely integrated with news reporting indicates that photography has become an essential part of news dissemination. Photography has been accorded different treatment within the courtroom since it creates distractions and noise, and detracts from the decorum of the court.[25] Thus, both Rule 53 of the Federal Rules of Criminal Procedure and the American Bar Association Judicial Canon 35 [26] proscribe taking photographs inside the courtroom. Outside the courtroom, however, with the exception of activity so near the court as to disturb it,[27] this distinction does not seem to exist. So far as privacy is concerned, once it is conceded that public curiosity should be satisfied as to individuals who are involved in legal proceedings, particularly criminal prosecution, the additional notoriety resulting from the use of photographs is no ground for protection.[28] Photographs published prior to trial may influence witnesses or members of a jury, but they are no different from advance publications of other evidence, such as confessions or past criminal records,[29] which have thus far been insufficient to justify restraint.[30] A more serious problem arises when the wrongdoer's identity is in issue because the testimony of a witness, either

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24. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

25. See McCoy, *The Judge and Courtroom Publicity*, 37 J. AM. JUD. SOC'Y 167, 178 (1954); *Report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings*, 77 A.B.A. REP. 607, 609 (1952). Impetus was given to the banning of photographers from the courtroom following the Hauptmann trial for the kidnapping of the Lindbergh baby. State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (Ct. Err. & App.), *cert. denied*, 296 U.S. 649 (1935). See McCoy, *supra* at 169; Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A.J. 301, 304 (1935).

26. 77 A.B.A. REP. 110 (1952). The judicial canon has been adopted in fourteen states and similar provisions have been adopted in several others. Various United States District Courts have promulgated a similar rule. 37 J. AM. JUD. SOC'Y 150, 154, 186 (1954). See State v. Clifford, 118 N.E.2d 853, 855 (Ohio 1954), stating that this rule has received such widespread acceptance as necessary to an impartial administration of justice that it was impossible to hold that the trial court had abused its discretion by promulgating it.

27. See *In re* Seed, 140 Misc. 681, 683-4, 251 N.Y.S. 615, 618 (Sup. Ct. 1931).

28. Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957 (D. Minn. 1948); Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946). *But cf. Ex parte* Sturm, 152 Md. 114, 136 Atl. 312 (1927). Although the language of the *Sturm* case stresses a judicial duty to protect a litigant from adverse publicity, *id.* at 119-20, 136 Atl. at 314, the facts concerned photographs surreptitiously taken in court in violation of a court order, a situation appropriate for action to promote judicial administration.

During oral argument for the writ of prohibition in the *Tribune Review* case (see note 3 *supra*), Chief Justice Stern of the Pennsylvania Supreme Court stated that a man's face is his property and "cannot be photographed without his consent." N.Y. Times, May 26, 1954, p. 31, col. 7.

29. See, *e.g.*, Baltimore Radio Show, Inc. v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950); Robbins, *supra* note 25.

30. Baltimore Radio Show, Inc. v. State, *supra* note 29, at 326-30, 67 A.2d at 509-11; State v. Hauptmann, 115 N.J.L. 412, 444, 180 Atl. 809, 828, *cert. denied*, 296 U.S. 649 (1935); *cf.* Pennekamp v. Florida, 328 U.S. 331, 349 (1946); Bridges v. California, 314 U.S. 252, 278 (1941).

in a police line-up or at trial, may be a mere repetition of his exposure to the accused's picture in a newspaper. The ban on photographing inmates or prisoners apparently is an attempt to solve this problem, although it may not achieve its purpose because it does not include photographs of the accused taken at some previous time. Perhaps a court might sustain a specific ban if it believed that publication of a photograph might deny a defendant a fair trial, but if news photographs are to receive the same constitutional protection given to reporting, it is doubtful that the clear and present danger requirement can be met.

Constitutional Law—

FEDERAL-STATE RELATIONSHIP—PENNSYLVANIA SEDITION ACT HELD SUPERSEDED BY SMITH ACT

Defendant was convicted of attempting to overthrow the Government of the United States by force and violence in violation of the Pennsylvania Sedition Act.[1] Subsequently, on substantially the same evidence, he was convicted[2] of violating the Smith Act.[3] The first conviction was reversed by the Pennsylvania Supreme Court on the ground that the Smith Act superseded and suspended the state act. The court held that congressional intent to supersede could be implied, as the paramount interest in protecting the United States from overthrow lay in the Federal Government and exclusive federal control was required to enforce the Smith Act effectively. *Commonwealth v. Nelson*,[4] 377 Pa. 58, 104 A.2d 133 (1954).

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1. PA. STAT. ANN. tit. 18, § 4207 (Purdon 1945). The Act provides that sedition is any conduct, the intent of which is "[t]o encourage any person to . . . engage in any conduct with a view of overthrowing or destroying or attempting to overthrow or destroy, by any force or show or threat of force, the Government of this State or of the United States."

2. For the history of this case in the federal courts, see United States v. Mesarosh, 13 F.R.D. 180 (W.D. Pa. 1952); United States v. Mesarosh, 115 F. Supp. 332 (W.D. Pa. 1953); United States v. Mesarosh, 116 F. Supp. 345 (W.D. Pa. 1953). The appeal from conviction was heard June 7, 1954, before the Circuit Court of Appeals for the Third Circuit (Nos. 11169-73).

3. 62 STAT. 808 (1948), 18 U.S.C. § 2385 (Supp. 1949), based on 54 STAT. 670, 671 (1940), 18 U.S.C. §§ 10, 11, 13 (1940).

4. The decision was four to one. A collection of state statutes as of 1950 is found in THE STATES AND SUBVERSION 414 *et seq.* (Gellhorn ed. 1952). The right of the state attorney general to investigate subversives under the New Hampshire Subversive Act, N.H. Laws 1951, c. 193, p. 410, was upheld in Nelson v. Wyman, 22 U.S.L. WEEK 2544 (N.H. April 30, 1954). The court stated the New Hampshire Act was not in conflict with the Smith Act.

The court in the instant case did not say whether the entire law was superseded, or only that part dealing with overthrow of the Federal Government. The Smith Act extends protection to ". . . the Government of the United States or the Government of any State, Territory, District or Possession thereof. . . ." 62 STAT. 808 (1948), 18 U.S.C. § 2385 (Supp. 1949).

Not only may state [5] and federal governments [6] legislate against violent overthrow of their respective governments, but each may legislate against overthrow of the other in the absence of the latter's action.[7] However, when both governments exercise these powers at the same time, a question arises of supersession of the state by the federal law,[8] and in case of direct conflict the federal law must prevail.[9] Where no direct conflict exists and both governments have a legitimate interest in the area regulated, courts determine supersession largely by weighing state and federal interests,[10] but explain their results in terms of congressional intent.[11] Since this intent is often unexpressed,[12] the Supreme Court sometimes has found an indication that Congress intended to preempt a field when Congress has regulated in a complete and comprehensive manner [13] or when the provisions and purposes of the state and federal acts are the same.[14] Factually the instant case falls under the latter "rule," but this "rule" has been rejected by the Court in some cases,[15] and its rationale, that adminis-

5. See Gitlow v. New York, 268 U.S. 652, 667-8 (1925).

6. Dennis v. United States, 341 U.S. 494, 501 (1951). See 2 COOLEY, CONSTITUTIONAL LIMITATIONS 898-908 (8th ed., Carrington, 1927), and FREUND, POLICE POWER 507-13 (1904), for the common law background of libels against government and the development of sedition laws in the United States.

7. U.S. CONST. Art. IV, § 4 guarantees each state a "Republican Form of Government." The federal-state relationship is such that any attempt to destroy the United States also imperils state sovereignty. See Gitlow v. New York, 268 U.S. 652, 668 (1925).

8. *Cf.* Mutchall v. City of Kalamazoo, 323 Mich. 215, 35 N.W.2d 245 (1948) (state liquor law held not to bar municipal action in area not covered by state).

9. U.S. CONST. Art. VI (Supremacy Clause).

10. Powell, *Current Conflicts Between the Commerce Clause and State Police Power, 1922-1927,* 12 MINN. L. REV. 607 (1928).

11. See California v. Zook, 336 U.S. 725, 728-33 (1949); Bethlehem Steel Co. v. New York State Labor Relation Board, 330 U.S. 767, 772-6 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156 (1942); Hines v. Davidowitz, 312 U.S. 52, 62 (1941).

12. See Powell, *supra* note 10, at 608-9.

13. This doctrine is often applied in the field of interstate commerce. See Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942), holding that federal regulation of the finished product of renovated butter precludes state action as to any of its components. The decision provoked a strong dissent from Chief Justice Stone and Justice Frankfurter, both of whom have adhered to the view that a state law is superseded only where a direct conflict occurs. For a discussion of cases from 1936 to 1946, see Note, 60 HARV. L. REV. 262 (1946).

The problem of federal preemption of state labor laws by the Taft-Hartley Act is dealt with by Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950). For an attack on their conclusions and on the theory that Congress can preempt a field by enacting a comprehensive law, see Petro, *Participation by the States in the Enforcement and Development of National Labor Policy,* 28 NOTRE DAME LAW. 1 (1952). The problem was recently before the Pennsylvania court in Garner v. Teamsters, Chauffeurs & Helpers Local Union, 373 Pa. 19, 94 A.2d 893 (1953), *aff'd,* 74 S. Ct. 161 (U.S. 1953), which held that the state Labor Relations law was superseded by the federal law.

14. See Hines v. Davidowitz, 312 U.S. 52, 66-7 (1941); Charleston & Western Carolina Ry. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915); Houston v. Moore, 5 Wheat. 1, 22-3 (U.S. 1820).

15. California v. Zook, 336 U.S. 725 (1949); Gilbert v. Minnesota, 254 U.S. 325 (1920).

tration by the states is likely to interfere with the objectives of the national law, is derived from interstate commerce cases. Thus whatever validity this "rule" has is based primarily on the policy of the commerce clause, freedom of commerce from burdens or economic discrimination,[16] rather than on the principal consideration in security cases, effective enforcement of the law.[17]

A state is unable to provide for enforcement of a federal law in its own courts [18] since Congress has specifically limited the forum for federal laws to federal courts.[19] Thus, if the Federal Government fails to enforce a law effectively in an area of vital concern to a state, the only remedy open to the state is to pass a statute parallel to the federal law, and this may be denied because of preemption. The two leading cases in the security field reached opposite, though not necessarily inconsistent, holdings on this point. *Gilbert v. Minnesota,*[20] without discussing preemption in the majority opinion, held a state law punishing interference with recruiting armed forces personnel to be within the state police power, despite congressional legislation on the matter. *Hines v. Davidowitz* [21] held a state alien registration statute superseded by a similar federal act, on the ground that the United States has exclusive power to control foreign relations and that the civil rights of an alien are a federal concern. In *Gilbert,* since any riot or serious disorder caused by interference with recruiting could have been controlled without the state act under the police power to keep public order, the decision, in allowing the state to punish mere oral agitation against recruiting, indicates the Court's feeling that the Federal Government could not or would not enforce the federal law. Thus, if Minnesota were held superseded, there would be no enforcement in an area admittedly of concern to the state. On the other hand, in *Hines* the alien registration law was not directly related to the control of undesirable conduct, and an imperative local enforcement problem was not presented. Also, the Federal Government can enforce a registration law as well as the states and make available to a state such information as it needs. The importance of the enforcement factor is reaffirmed by *California v. Zook,*[22] which upheld a

16. See Southern Pacific Co. v. Arizona, 325 U.S. 761, 767 (1945).

17. Where interstate commerce is directly affected, as by an interstate train, the Court is not greatly concerned with enforcement, except in determining whether states can act at all in the absence of Congressional action. But as commerce affects matters of a more local nature, state enforcement becomes a more important consideration. See California v. Zook, 336 U.S. 725 (1949), discussed in text, at note 22 *infra;* Commonwealth v. McHugh, 326 Mass. 249, 265, 93 N.E.2d 751, 762 (1950).

18. Constitutionally, there is no objection. See Houston v. Moore, 5 Wheat. 1 (U.S. 1820), in which Pennsylvania was allowed to court-martial militia who violated the federal law, because Congress had not limited enforcement to federal courts-martial. Warren, *Federal Criminal Laws and the State Courts,* 38 HARV. L. REV. 545 (1925), gives the early history on enforcement of federal laws in state courts.

19. 62 STAT. 826 (1948), 18 U.S.C. § 3231 (Supp. 1949). Where Congress provides that a federal law may be enforced "in any court of competent jurisdiction," state courts may not decline jurisdiction. Testa v. Katt, 330 U.S. 386 (1947).

20. 254 U.S. 325 (1920).

21. 312 U.S. 52 (1941).

22. 336 U.S. 725 (1949). Consider also the state laws punishing the counterfeiting or passing of counterfeit United States currency. The Supreme Court up-

California law regulating nonscheduled motor carriers, although the ICC had also undertaken to regulate the carriers. The decision turned to a great extent on the fact that the ICC's staff was inadequate to cope with the enforcement problem,[23] and that the state had a strong interest in having the law enforced.[24]

In the instant case, the court rightly found that a propitious field for state action was not presented. State enforcement of a sedition law may conflict with federal enforcement, which is subject to national policy objectives not necessarily known or considered by the states. Also, premature or spasmodic prosecution could cause irreparable harm by revealing informers, and Pennsylvania criminal law, which allows a private person to institute proceedings,[25] could be particularly troublesome in this respect. Thus possible conflicts provide sufficient reason for federal preemption, if effective enforcement is assured. The Federal Government has the facilities for investigating and prosecuting subversion, and has demonstrated both the capacity and intent to deal with a worldwide conspiracy.[26] Since, at this time, it seems clear that such federal action as is necessary will be taken, basing a decision on the probability of federal enforcement, though an ad hoc approach, achieves an effective balance which satisfies the states' primary need and at the same time preserves autonomy of action to the Federal Government. Should it appear at some future date that the Federal Government is not capable of dealing with the problem, sufficient grounds would then exist for allowing states to act.

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held the validity of these laws in Fox v. Ohio, 5 How. 410 (U.S. 1847), and United States v. Marigold, 9 How. 560 (U.S. 1850). Prior to 1860, Congress had provided no special funds for the enforcement of counterfeiting laws, and the United States Secret Service was not founded until July 5, 1865, so that the burden rested almost entirely on the states. See 20 ENCYC. BRITANNICA 261 (1953). The Secret Service apparently is effective now, for research failed to reveal any recent state prosecutions for counterfeiting United States money.

23. California v. Zook, 336 U.S. 725, 737 (1949).

24. *Id.* at 736.

25. See 1 SADLER, CRIMINAL PROCEDURE IN PENNSYLVANIA §§ 72-3 (2d ed., Henry, 1937).

26. REP. ATT'Y GEN. 9-10 (1952).