# A Lawyer's Views on CONTR

By HICKS EPTON, '32Law

With the advances in television and press photography putting a new emphasis on news by pictures, clash between the Press and the Bar was inevitable. Thus far the Bar has been able to hold the line against Press agitation to get its cameras into the courtroom. But even with the Oklahoma Supreme Court adoption of the Bar's Canon 35, the fight is far from over.

Here the *Sooner* brings you the first of a two-part story on "The Controversial Canon"—a lawyer's view—by Wewoka attorney Hicks Epton, '32Law. Carter Bradley, '40journ, chief of the Oklahoma City bureau of United Press International, will bring a newsman's views into focus in the March issue of *Sooner Magazine*.

## The Canon

On September 30th the Oklahoma Supreme Court adopted Canons of the American Bar Association. Among them was the controversial Canon 35 which stops all courtroom photography and recording of courtroom proceedings. Recess photography is permitted at the discretion of the presiding judge. The language adopted by the court is as follows:

*Proceedings in court should be conducted with fitting dignity and decorum. The broadcasting, televising, or the taking of photographs in the courtroom should be done only during recesses of the court with the consent of and under the supervision of the court, and at such time or times as may be authorized by the court.*

*The broadcasting, televising or photographing of active court proceedings serve to detract from the essential dignity of the proceedings, distract the witnesses and attorneys in the performance of their duties, create misconceptions with respect thereto in the mind of the public, and for these reasons should not be permitted.*

*Providing that this restriction shall not apply to the photographing, broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization; and provided further that nothing herein is intended to prevent the photographing, televising and broadcasting of ceremonial proceedings conducted in the court room.*

PRESUMPTUOUS indeed is the lawyer who pretends to speak for all his brethren. They are by training and experience, and sometimes I think by nature, individualists, who make up their own minds and speak for themselves. Having disclaimed the voice of unanimity I must in candor say that in their essence these views on Canon 35 perhaps are held by the great majority of practicing lawyers whose primary interest is in the law rather than politics or other mass appeal activities.

If all lawyers are not favorable to Canon 35 perhaps the dissenters are outnumbered by members of the news media who are favorable to Canon 35. We have noted with satisfaction the approval of the Canon by a growing minority of the press. Thoughtful editorials supporting its principles have appeared in many Oklahoma newspapers.

The American Bar Association many years ago promulgated Canons of Professional Ethics which control the conduct of practicing lawyers. In 1924 it promulgated the Canons of Judicial Ethics. They had been prepared by a committee appointed in 1922 of which Chief Justice Taft was chairman. Since that time minor revisions and amendments have been made. Canon 35 was originally adopted in 1937. These canons have received almost universal approval from the bench and bar—and if not approval, at least no opposition from the news media until very recently.

The preamble of the Judicial Canons of Ethics succinctly states the proposition that "the character and conduct of a judge shall never be objects of indifference." They are offered "as a proper guide and reminder to judges, and as indicating what the people have a right to expect of them."

What is Canon 35? In essence Canon 35 bars photography, radio broadcasting and televising from the courtroom with exceptions of ceremonial and citizenship proceedings. The reasons for the Canon may be awkwardly or inadequately stated in the Canon, but the purpose is plain. It is to keep from the courtroom these physical and psychological disturbances.

When properly understood, there is and can be no conflict between freedom of the press and fair trial. The ideals of thoughtful men of the press and the law must be the same. The news media have no less re-

# /ERSIAL CANON 35

sponsibility than the judiciary, even if it is indirect, in the preservation of safeguards for a fair trial. It follows that the bar and judiciary have an equal responsibility with the news media for freedom of the press.

These rights are not mutually exclusive. On the contrary, they supplement each other. Some courts do not and cannot function in a vacuum. The law needs the enlightened understanding of the press. It has no public relations experts of its own to interpret it to the public. Furthermore, freedom of expression is preserved ultimately in the crucible of the courtroom. These rights are not self-perpetuating. They must be rewon by every generation and defended in every courtroom.

Historically in America there has been a close affinity between the press and the bar. Too many people forget that in Philadelphia it was first established that a publisher had the right to print the truth regardless of the consequences; that truth was an absolute defense to libel. The publisher, Zenger, risked his liberty; and his lawyer, Hamilton, risked his reputation, if not his own freedom, in establishing that new and novel principle. The whole stream of judicial decisions since that eventful day has favored the right of free comment by news media on judicial and other governmental proceedings.

One has only to examine the English procedures and decisions to see how much more latitude has been allowed by the courts in America to the American news media. In Great Britain and the other Commonwealth countries which follow the British procedure, an editor who so much as indicates how a case should be decided is summarily punished for contempt. Publication of little more than the actual fact of the trial, the nature of the case and the parties involved is allowed. Those gentlemen of the press who are galled by the minor restrictions on their courtroom conduct in American courts should read the English decision of Rex v. Davies (1945) K.B. 435.

The first amendment of the federal constitution guarantees freedom of press and speech. The due process clause of the 14th amendment makes these guarantees applicable to the states as well as the federal government.

The American courts, having given full life and vitality to the constitutional guarantees of freedom of speech and press, at the same time recognize that they have the co-equal responsibility of guaranteeing a fair trial to all.

In this perspective there is and can be but one real issue: Is Canon 35 likely to contribute to the orderly and effective administration of justice? The federal courts of the United States and the highest courts in the several states, with the exception of the Colorado Supreme Court, have all said that the principles stated in Canon 35 are essential to the proper administration of justice. These decisions are not mere judicial fiat. They are bottomed on basic principles. We must be satisfied to state them without elucidation or elaboration.

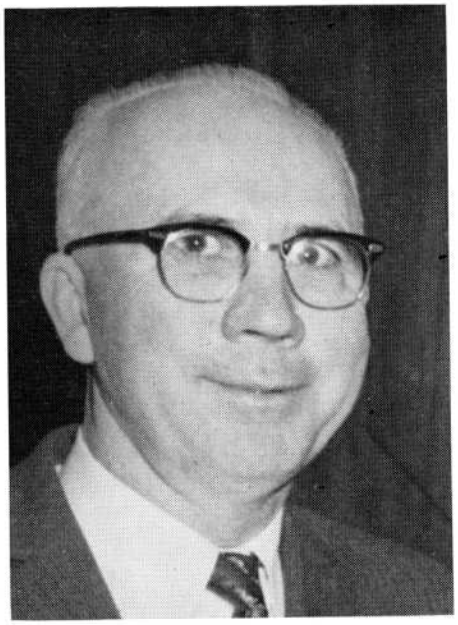
At the outset we ask ourselves the purpose of a trial. Surely it is not entertainment or amusement or the satiation of idle curiosity. Its purpose is and must remain the ascertainment of truth and the application of legal principles thereto.

It is readily admitted that certain salacious court proceedings may be entertaining, amusing, or exciting to certain members of the public; and the exhibition of these may be financially profitable. Nevertheless, the fundamental issue remains: Does photographing, televising and broadcasting of court proceedings aid and assist, or are they likely to interfere to some degree, at least occasionally, with the orderly and effective administration of justice?

We have found no responsible critic who has yet argued that the televising and broadcasting of court preceedings are likely to aid and assist in the ascertainment of truth in a particular trial. Vague statements are sometimes made, without any support of authority, that somehow or other televising or broadcasting of a few minutes of many hours of court proceedings will in some vague, unexplained way improve the administration of justice. No argument occurs to us to support this generality which would not apply with equal force to a surgical operation.

On the contrary, the long experience of the legal profession and of the judiciary has demonstrated that the injection in judicial proceedings of these outside and foreign

Continued on Page 30



## Hicks Epton

*Presenting the lawyer's views on controversial Canon 35 is noted alumnus Hicks Epton, '32Law, Wewoka attorney. Epton is well-acquainted with the Canon's tumultuous career. He is one of three attorneys who filed a brief before the Oklahoma Supreme Court for the Oklahoma Bar Association, urging the Court to uphold its stand in adopting Canon 35. Co-authors were Garrett Long, '23Law, Tulsa, and Coleman Hayes, '24ba, '26Law, Oklahoma City.*

*Epton has been active in Bar affairs throughout his professional life. He was a member of the first Board of Bar Examiners, under the integrated Bar ordered by the Oklahoma Supreme Court, serving as board chairman for three years. He was president of the Oklahoma Bar Association in 1953 and president of the Oklahoma Bar Foundation, 1953-56. A member of the American College of Trial Attorneys, he was a commissioner on Uniform State Laws from 1945-59 and has been active in the American Bar Association.*

*A past president of the O.U. Alumni Association, Epton has also been active in law alumni affairs. This fall he served on the committee which planned the 50th anniversary celebration of the college.*

# Controversial Canon 35

Continued from Page 17

elements is likely to interfere with the search for truth. That photographing, televising and broadcasting are not always inimical to the rights of the parties and do not always result in a miscarriage of justice is beside the point. Surely it is enough to condemn the practice if there is a real possibility this may be the occasional result.

The conduct of the participants in a trial is restricted and limited. The litigant, the lawyers, the jury, the attaches, even the judges, each and all are restricted and limited by definite and positive rules of conduct. Their speech and writing, their curiosity as to facts not admissible in evidence, the places where they eat and sleep, even their freedom of association, all are directly, positively and properly limited to the end that truth more likely may triumph over error. Surely, the members of the general public and the news media, non-participants in the actual trial, should and can have no greater rights.

Those apparently unacquainted with the judicial decisions on the subject have asserted that the denial of photographers, radio and television cameras in the courtroom is a denial of public trial. But the public trial is guaranteed by the 6th amendment to the constitution. This guarantee is for the benefit of the accused and not the public. This was specifically held in United Press v. Valente, 308 N. Y. 71. This freedom certainly does not guarantee that every curious member of the public should be able to see and hear a trial over the air waves—that it should be piped into his living room.

The doors of the courtroom are open. If the desire for drama is still unsatiated one can avail himself of the many dramatic productions dealing with courtroom trials now interspersed between the westerns and the cartoons on the television screen. To assert that a trial is not open and public merely because a certain medium is not allowed to ply its own trade in the courtroom during a trial must insult the intelligence of impartial observers.

Judge Harold R. Medina, who presided at the trial of the 11 Communist leaders in 1949, and whose experience in that trial alone is enough to qualify him as an expert, has this to say:

*Because courtrooms are open to the public some people seem to think that the public has a right to have the proceedings televised and sent out over the radio, but there just isn't any such right. The reason our courts are open to the public is not to provide recreation or instruction in the ways of government but to prevent the possibility of Star Chamber proceedings where everything is secret and corruption or flagrant judicial abuses might flourish unseen and be impossible of detection and exposure.*

Carried to its logical conclusion, the argument for televising or broadcasting is reduced to the absurd. A motion was made and denied during these Communist trials to transfer the case from the courtroom to Madison Square Garden so all those who were interested might attend the trial. Indeed Fidel Castro in Cuba has done just this during the last few months with amazing and sickening results.

In 1934 the U. S. Board of Steamboat Inspectors held public hearings in the Morro Castle disaster. They allowed the proceedings to be broadcast on the radio. In the midst of his testimony one witness shouted, "Mom—how am I doing?" Another said, "I hope the red headed girl and all the other girls and those I met on shipboard will remember me and the pleasant times we had and send me some postal cards."

How much did these humorous asides contribute to the ascertainment of truth, or the dignity of the proceedings? How must the witnesses have been affected by the presence of radio? When did they cease to be solemn witnesses of known facts and when did they become actors? This was only radio. Television was not there to accentuate the ham in this type of witness, or to cause the reticent and sensitive witness to cower.

The argument is often advanced with surface plausibility that there has been vast technological improvement in televising and photographing which now make the inhibitions of Canon 35 outdated. This argument misapprehends the entire basis for the rule. Under ideal circumstances and with ideal equipment in the hands of the most competent technicians noiseless photography is possible. This is the most that the media assert.

In passing it must be clear that this ideal equipment is not always—indeed not often available, nor will it always be used by trained technicians under ideal circumstances. The courts are asked not merely to allow photography under ideal circumstances but, subject to the control of the trial judges alone, to allow it under all circumstances, some of which admittedly can be disturbing and outright confusing.

But noise and confusion are not the sole nor even the principal objection. The fallacy of this argument is that silent photography is harmless. It may be less confusing and disturbing to the eyes and ears than a physically noisy performance. The psychological disturbance is nonetheless present and often is more potent and disturbing than the turbulent and noisy intrusion. The most dangerous gases are those without odor. The British stood up under the noisy V-1 rockets far better than they did under the silent V-2.

It is the fact of photography, the fact that the intrusion is present, the fact that all the principals to the trial—judge, witness, lawyer, jury—are "on stage" which is inescapably distracting from the task at hand. It is the fact that these participants are made actors which is dangerous and disturbing. If unwilling actors, then their essential dignity as human beings is being violated. If willing actors, then they may be far more dangerous to the life, liberty and property of the litigants because their principal concern will not be compliance with their oath, but with the question of their effectiveness as actors. The manner or method of making them actors is beside the point.

It is true that the participants may once be photographed without knowing it—but only once. Secretly allow it once, and the participants in every trial that follows will expect it or wonder if it is taking place. The element of surprise is forever gone. In many respects the open, non-secretive, even noisy intrusion is preferable. Then the participants would at least know when they were actors and when they were "off camera."

In 1952 a special committee of the American Bar Association, headed by the late great John W. Davis, studied every aspect of the proposal to relax the rules against broadcasting and televising trials. We quote a brief extract from that report:

*The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself, and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude.*

In a recent address at the University of New Hampshire, Mr. Justice William O. Douglas of the United States Supreme

Court in discussing the effect of radio and television in a trial said:

*The already great tensions on the witnesses are increased when they know that millions of people watch their every expression, follow each word. The trial is as much of a spectacle as if it were transferred to Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth.*

Some have objected that Canon 35 denies to other media rights presently enjoyed by the working press. The objection is not valid for obvious reasons. The press may abuse its privilege at times and may overdramatize events or testimony and give undue publicity to salacious aspects of the trial. But it does not make live actors out of the participants in the trial. Judge Harold R. Medina has this to say:

*. . . the comings and goings of the members of the press are orderly and easily controlled. They present no such psychological barrier to the ascertainment of truth as do the radio and television.*

Many members of the media acknowledge the basic correctness of these views but assert that the responsibility for supervising the production should be added to the other duties of the trial judge. This is completely unrealistic. The judge has enough to do in supervising the jury, holding in check the passions of the parties, ruling on evidence and maintaining general decorum without being made a production manager. These judges are human. They unhappily are not always impervious to the powers of the news media. Understandably some of them will be reluctant to offend the broadcaster or photographer or his bosses. Justice Douglas, commenting on this proposal, said:

*Imagine the pressure that judges standing for election would be under in communities where the dominant paper owns the radio and television station.*

Even if an extra judge were assigned to supervise the news media, he could at best hope to reduce the physical distractions but could not hope to remove the psychological disturbances.

In Brunfield v. Florida, 108 SE 2d 33, the Florida Supreme Court said:

*There is little justification for a running fight between the courts and the press (and other media) on this question of fair trial and a free press. Both are sacred concepts in our system of government. Both are in one constitution and govern one nation of millions of individuals. All that is required to preserve both is for the press and the courts to place the emphasis on the Constitution instead of themselves.*

A vast majority of the bar and bench, not actively engaged in politics, and many members of the press hold the firm conviction that the intrusion of mass media and the stimulation of mass opinion on the technical aspects of a trial are highly inimical to the administration of justice. They believe the courtroom is a cathedral of justice, not to be invaded by foreign influences, silent or noisy, which may interfere with the administration of justice—the only purpose in building courtrooms and holding trials.

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## THE AMERICAN IMAGE

Continued from Page 15

Crockett at the Alamo; the discovery of gold in California; the surrender of Lee to Grant; the assassination of Lincoln.

A progression of scenes culminates in a realistic depiction of the four Army chaplains who gave their life vests to soldiers aboard a torpedoed troop ship in World War II, an action which Dennis says "epitomizes the ideal in personality, patriotism, and religion."

An example of the meticulous effort taken to make the appearance of persons and objects authentic is that a cross-section of the ship in the Four Chaplains scenes is constructed from the original blueprint, obtained from the shipbuilding firm.

In addition to the various tableaux, the museum contains the likenesses of numerous individual Americans who have contributed greatly to American life (as George Washington Carver) or who have been outstanding in a particular activity. Thus Oklahoma is represented by Jim Thorpe, born on a Sac and Fox reservation near Prague, whom many believe was the greatest of all football players. He is in a sports group which includes Bobby Jones, Babe Didrickson, Jack Dempsey, and Babe Ruth. Another Oklahoman is on the list for early presentation, Sequoyah, the Cherokee who created an Indian alphabet.

The museum continues to grow. The first year's response dictated a 50 per cent expansion last winter. Crowds sometimes reach 1,900 a day. In March a trainload of 1,500 to 1,800 Richmond, Virginia, schoolchildren is scheduled to go to the museum in one afternoon.

Right now the artists are creating a tableau showing Helen Keller with Alexander Graham Bell, inventor of the telephone, who worked with Miss Keller to devise new ways for the deaf and dumb to communicate. The most recent figure added was Colonel Drake, the first man to drill successfully for oil.

Ultimately it is hoped to have all those who have made significant contributions to American life—including the first man to be shot into space, a few days after the event. The artists already have the pictures, physical data, etc., of the seven men in training from whom the first will be selected.

The art of making waxen figures has been an important one for thousands of years, Dennis says. "An enlightened Egyptian Pharaoh began the practice of substituting waxen figures as sacrificial effigies in place of real people. Early anatomists helped teach by use of wax likenesses. We believe our museum is making a contribution by stimulating interest in American history—as well as by preserving the authentic images of the great. Our Henry Ford, for instance, is modeled on the data he gave on his 1916 driver's license.

"Mrs. Dennis has a fine idea for creating an Indian museum in Oklahoma, a museum of tribesmen, modeled on fullbloods, made before they all disappear.

"As for the museum here in Washington, it is a lot of fun, probably because someone else has to deal with its troubles."

Dennis' full-time occupation is as special assistant for Washington affairs to the president of the American Petroleum Institute, Frank M. Porter of Oklahoma City.

"The museum is an entertaining avocation, because all sorts of odd things keep happening," says Dennis. "For instance, one night the police telephoned about 2 a.m. to say that they had found the front door unlocked. When I went down, the policeman and I decided that we had better search the place to be sure no intruder was hiding there. This involved counting the figures in every tableau. I'm sure that if one of those in the St. Valentine's Day massacre scene had stirred, we both would have run.

"And one day last summer a man fleeing the police actually did take refuge in the museum, and it took the cops an hour to find him, hidden in some attic space we didn't even know was there.

"Of course, that caused a lot of publicity, which didn't do the museum any harm, either."