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Charles B. Hagan

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WIRE COMMUNICATIONS UTILITIES AND BOOKMAKING

CHARLES B. HAGAN*

I. INTRODUCTION

THE presence of an obligation of the utility to serve all comers without discrimination and the absence of an obligation "to furnish service to those who are reasonably sure to use it for illegal purpose"[1] creates a dilemma for the telephone and telegraph utilities. The route out of the dilemma is not without its difficulties insofar as clear cut rules are concerned. It is proposed to examine the developments in recent years in connection with that puzzler. The subject, perhaps it is needless to say, is of more than merely curious interest both to the communications utilities and to bookmakers on horse races. Law enforcing agencies also, as will be seen, have an important role in the relations that might develop between the bookmakers and the utilities.

The business is of more than abstract concern. A considerable amount of activity has developed since 1938 on the horse racing front. The American Municipal Association devoted some attention to interstate aspects of crime in general and bookmaking in particular in its meeting in 1949. In February, 1950, the Department of Justice in Washington sponsored a conference of law enforcing officials from all levels, national, state and local.[2] The conference was concerned with many facets of law enforcement, but one segment of the problem was to be found in the transmission of racing news. Mayor Morrison of New Orleans remarked in the course of the conference,

> "The principal racing wire service in the country is the Continental Press Service, which is the key to the multi-million-dollar betting business. Its 16,000 miles of leased wire service cover 300 key handbook areas. It is difficult to pin down the annual take of this industry, but the best estimates put it at double or treble the volume of pari-mutual betting at legalized race tracks—or from $3,000,000,000 to $8,000,000,000 per year."[3]

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*Associate Professor of Political Science, University of Illinois.

1. People *ex rel.* Restmeyer v. New York Tel. Co., 173 App. Div. 132, 159 N. Y. Supp. 369 (1916). See also Tracy v. Southern Bell Tel. and Tel. Co., 37 F. Supp. 829 (S.D. Fla. 1940).

2. The proceedings of this conference are reprinted in *Hearings before a subcommittee of the Committee on Interstate Commerce and Foreign Commerce on Sen. 3358*, 81st Cong., 2d Sess. 7-46 (1950).

3. Reprint of Mayor Morrison's speech, Cong. Rec. A1219 (Feb. 17,

In the course of this speech Mayor Morrison recommended that the Congress adopt legislation to outlaw dissemination of race results across state lines by telephone, telegraph or radio for illegal gambling purposes.

The Senate of the United States responded to the pressures thus manifested in two ways. Senator Kefauver (Tennessee) introduced in January a resolution calling for a general inquiry into gambling and racketeering activities. The Attorney General requested Senator Johnson (Colorado) to introduce legislation following the above conference. These bills called for the prohibition of transportation in interstate and foreign commerce of gambling devices and the transmission in interstate and foreign commerce of gambling information by communications facilities. Kefauver's resolution resulted in the creation of a special committee which is currently carrying on its investigation. The other bills were referred to the Committee on Interstate and Foreign Commerce which held hearings.[4]

It is proposed here to examine the historical background of the utility's obligation in this area of activity and also to formulate the existing controls that have been developed. Two distinctly different recent situations may be preliminarily outlined. First, there is the local use of the telephone instruments for the placing of bets and for the gaining of information concerning race results immediately after the same have been run. Secondly, there is the firm that undertakes to furnish information concerning various sporting events but with particular attention to horse racing. In the latter case the firm usually publishes a paper or 'scratch sheet' and announces therein that it will answer telephone calls on race results as the firm receives them. A more detailed description of the activi-

1950). In the course of the speech the Mayor connected the Continental Press Service with the Capone Syndicate and bookmaking. The latter charges were denied by the Service. N. Y. Times, Feb. 16, 1950, p. 2. In PUC v. Bell Tel. Co. of Penn., 25 P. U. R. (n.s.) 452, 456 (1938): "It has been estimated that more than $5,000,000 is wagered daily in the pool rooms of the 39 states receiving the gambling service. . . ." The Mayor described the situation in and near New Orleans in these words: "The Continental News Service . . . does not come into New Orleans. Its leased Western Union wires do service just above and below our city. Through batteries of telephone relays they service handbooks below and above our city limits. Despite the continuing enforcement efforts of our police there are still sporadic bookie operations in our city. But the lack of direct phone service and our insistence that the telephone company pull out telephones of all raided establishments has held these operations down to a minimum. . . ."

4. Kefauver's Resolution started out as Sen. Res. 202. The other bills carry numbers Sen. 3357, 3358. The Hearings have been printed, Transmission of Gambling Information; *Hearings, supra* note 2.

ties of such a firm will be given later when its legal standing is examined.

The current developments grow out of an historical background which provides contemporary courts with two lines of approach to a solution of the dilemma. The earliest case that has been found to deal with the use by gamblers of common carrier's communications equipment arose in Kentucky in the eighties and was decided by that state's supreme court in 1887. One Smith sought to compel Western Union to furnish telegraph service. Western Union then was contracting with its customers to become their exclusive means of telegraphic communication. The Company offered to serve on that condition which was refused and the suit to compel service resulted. Smith operated a 'bucket shop' and under the customary operations of such a shop he wagered with his customers on the rise or fall of the prices which would be furnished over the circuits of Western Union. The Supreme Court upheld the Company's refusal to serve and asserted that there was no obligation of a utility to furnish its facilities for illegal uses.[5]

The courts of the same state furnish the premises for a syllogism leading to the opposite conclusion. Some fourteen years after the above decision the Court of Appeals reviewed a case arising out of a demurrer to an indictment. Western Union furnished wires to a gambling house in Louisville in which gambling was facilitated by the data provided by the telegraph service. The Court of Appeals affirmed the lower court's holding that the demurrer was an adequate defense, saying in part,

> ". . . Common carriers are not the censors of public or private morals. . . . It was certainly no wrong *per se* for the appellee to transmit over its line the information which it is charged to have transmitted. The simple fact that persons who received the information, and as a result of it, were guilty of unlawful acts, does not make the appellee a violator of the penal or criminal law. If in doing so it violated the penal or criminal law, it would be likewise guilty in transmitting information to the newspapers of the country as to prospective prize fights and horse races, because the information thus published induced persons to engage in betting on their results. . . ."[6]

5. Smith v. Western Union Tel. Co., 84 Ky. 664, 2 S. W. 483 (1887) (the bucket shop method of operation is described).

6. Commonwealth v. Western Union Tel. Co., 112 Ky. 355, 67 S. W. 59 (1901). Minnesota courts had a similar view dating from 1888. State v. Shaw, 39 Minn. 153, 39 N. W. 305 (1888). The issues were not exactly the same. The question involved the meaning of the word "devices" in the anti-gambling law, and the Court said "A horse race is not a gambling device, nor are the descriptive lists of such races, or statements or announcements of

Contemporary court rulings to substantially the same effect may be found. In the Supreme Court of Florida in 1938 a sheriff was enjoined from seizing telephone equipment which was utilized to gain information which was in turn sold to bookies for use in their gambling activity. The Court thought that the service furnished was not a crime, but that the use made of the information gained was the crime. The conclusion was therefore clear: the sheriff ought to secure indictments against the real criminals, *i.e.,* the bookies.[7]

The most emphatic statement of the rule of law in accord with this conclusion is to be found in *People v. Brophy,* where it is said,

> ". . . The telephone company has no more right to refuse its facilities to persons because of a belief that such persons will use such service to transmit information that may enable recipients thereof to violate the law than a railroad company

the particulars thereof, from which those desiring to bet on the races may more conveniently obtain information in respect to the same and we are unable to see that the boards and lists or records of the pools sold described in the indictment are anything more. There is no element of chance in their use, which we think is the test. The defendant's methods undoubtedly serve to facilitate gambling, and so does the fact that they keep open a place for gambling, and the same may be said also of the published schedules of races and games, and many other acts and things, which, however, cannot be denominated 'gambling devices' within the meaning of the statute. . . ." For a similar ruling see People v. Engeman, 129 App. Div. 463, 114 N. Y. Supp. 174 (1908). Other authorities to the same effect are cited in the Kentucky case *supra*; Ives v. Boyce, 85 Neb. 324, 123 N. W. 318 (1909) (held the telegraph wire, the blackboard and ticker located in a bucket shop not to be a gambling device).

A more recent ruling to the same effect is to be found in *In re* Teletype Machine No. 33335, 126 Pa. Super. 533, 191 Atl. 210 (1937) (*sub nom. In re* American Tel. and Tel. Co.). Here a decision forfeiting the teletype machine was reversed even though the operator of the place where the machine was found pleaded nolo contendere to gambling charges. The court stated ". . . it (the teletype machine) is, in no sense, an article, device, or apparatus to win or gain money, or at which money or other valuable things may be played for a stake or betted upon. It is a machine or apparatus for transmitting or conveying information, not a gambling device or apparatus. . . . The fact that gamblers may use the information thus received in their unlawful business, for the purpose of making bets or wagers or to pay off, does not turn the teletype into a gambling machine. . . . If the legislature sees fit to enact that a machine or instrument knowingly used to furnish or obtain information to be used in gambling may be seized, forfeited, and condemned along with actual devices so used, etc. it may perhaps do so under the police power, but such authority cannot be inferred from an act merely authorizing the seizure and destruction of gambling devices and apparatus. . . ."

7. Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938). As will be related below Hagerty's troubles were not at an end. See also State v. Coleman, 126 Fla. 203, 170 So. 722 (1936) (court relied heavily on the above case); People v. Brophy, 49 Cal. App. 2d 15, 120 P. 2d 946 (1942) (statements to the same effect, it will be discussed below). See cases cited in the Brophy Case, *supra* especially People v. Lim, 18 Cal. 2d 872, 118 P. 2d 472 (1941). The same rule appears to be operative in Canada, see Telephony, Dec. 5, 1942, p. 27; *Id.,* Dec. 19, 1942, p. 26. It is there related that the Bell Telephone Company of Canada was ordered to restore service to a bookie.

> would have to refuse to carry persons on its trains because those in charge of the train believed that the purpose of the persons so transported in going to a certain point was to commit an offense, or because the officers of such company were aware of the fact that the passengers were intent upon visiting a bookmaking establishment upon arrival at their destination, which establishment was maintained for the purpose of unlawfully receiving bets on horse races. Furthermore, the furnishing or receiving of racing or sporting information is not gambling and is not a crime. . . ."[8]

The clearest formulation of a major premise by which an opposite answer can be drawn from the circumstances is provided in *Plotnick v. Bell Telephone Company of Pennsylvania.* The Public Utilities Commission of Pennsylvania said,

> ". . . To get an intelligent idea as to whether or not two telephones which complainant proposes to install at 311 Ludlow building, Philadelphia, and additional telephones as the business develops, may be used in the furtherance of an illegal purpose, one must not isolate the parts that make up the whole of the operation. The race track, the horse races, the publication and distribution of a 'scratch sheet,' the telephone used for obtaining information before making bets and before paying off winners, the bookie that buys the 'scratch sheet' and uses it in carrying on his gambling business, and the betting that results from the publication and distribution and telephone information received from the complainant, must be looked at collectively as a plan and scheme as a whole, aiding and abetting the furtherance of gambling on horse races in this commonwealth."[9]

The Commission moreover refused to order the Company to furnish telephone service even though such service was being furnished simultaneously to another customer. The Commission pointed out that the illegal conduct ought to stop and the proper result would be for the Company to discontinue service to the other customer. The Commission was unsuccessful in its efforts to accomplish that result.[10]

8. People v. Brophy, 49 Cal. App. 2d 15, 27, 120 P. 2d 946, 956 (1942). The proceedings grew out of events arising out of the efforts by the state of California and the national government to discontinue the Nationwide News Service. See below for a more complete account. The opinion in the instant case affords the most elaborate discussion of the legal issues in support of that position. *Accord,* Kreling v. Superior Court of Los Angeles County, 18 Cal. 2d 884, 118 P. 2d 470 (1941); Penn. Publications Inc. v. PUC, 349 Pa. 184, 36 A. 2d 777 (1944) (same case below 25 P. U. R. (n.s.) 452 (1938), 42 P. U. R. (n.s.) 170 (1942), 43 P. U. R. (n.s.) 26 (1942), 152 Pa. Super. 279, 32 A. 2d 40 (1943)).

9. Plotnick v. Bell Tel. Co. of Penn., 35 P. U. R. (n.s.) 87, 93 (1940), *aff'd,* 143 Pa. Super. 550, 18 A. 2d 542 (1941).

10. Penn. Publications Inc. v. PUC, 349 Pa. 184, 36 A. 2d 777 (1944). A more complete record of the proceeding is given in footnote 7 *supra.* The facts are not without their ironical aspects. Plotnick had originally published

The ambiguous situation which thus may be said to exist in Pennsylvania does not prevail in some other jurisdictions. Oklahoma in 1911 had a ruling that the furnishing of communications services to a Turf Exchange where wagers were accepted converted the wire services into gambling devices which were then illegal.[11]

A more elaborate statement of the rule in those jurisdictions may be shown in the following quotation from the District of Columbia court.

> "A public utility, such as a common carrier, a telegraph company, or a telephone company, must serve all members of the public without discrimination or distinction. In this respect, public utilities are different from other businesses, such as stores, restaurants, and theaters, which may select their customers. That fact that a person may be of bad character does not deprive him of the right to receive service from a public utility. On the other hand, the facilities of a public utility may not be used for criminal purposes. A public utility has not only a right but a duty to refuse to render service for criminal purposes. For example, a railroad company may not refuse to carry a passenger merely because he has a criminal record or is engaged in an illegal or immoral business. If, however, the transportation is sought for the very purpose of committing and consummating an illegal act, transportation may and should be refused. Thus, if a person intending to commit a robbery at a distant point gets on a train for the purpose of reaching that place, and information of this fact is in possession of the railroad company, the passenger may be put off the train. On the other hand, he may not be put off the train merely because he is an immoral person or is engaged generally in illegal activities. It clearly follows, therefore, that a telephone company may refuse to furnish or may discontinue service that has been furnished if the service is used for a criminal purpose, such as violation of the gambling statutes. The burden of proof, however, is on the public utility to establish the fact that the service is being used or is about to be used for a criminal purpose. Naturally, since this is a civil matter, such fact need not be established beyond a reasonable doubt. It is sufficient if it is shown by a fair preponderance of the evidence."[12]

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such a sheet in Philadelphia. He accepted employment with Penn. Publications and remained with them for several years. He decided to reenter the business for himself. He had no sheets to show the Commission in his original proceeding for service and displayed Penn. Publications materials as illustrative of the service that he planned to provide.

11. James v. State, 4 Okla. Crim. 603, 112 Pac. 944 (1911).

12. Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. D.C. 1949); Katz v. Chesapeake & Potomac Tel. Co., 80 P. U. R. (n.s.) 76 (D.C. 1949). In *Hearings, supra* note 2, at 888 *et seq.* there is reprinted a Staff Report to the Federal Communications Commission on certain aspects

With a choice available to the states as to which of the two main principles each shall use in making or not making a connection between the communications utility and the illicit bookmaker, attention will be directed first to local service and the local bookmaker and secondly to the wider and somewhat more intransigent problem of the racing news service which does not engage in bookmaking but which certainly simplifies the operating problems of the bookmaker in his daily routine. The news service furnishes an important if not indispensable service, and its legal status is not without some importance.

Some states have enacted statutes prohibiting the public utilities from furnishing its facilities for the purpose of disseminating gambling information.[13]

II.

In the State of New York it has been said by its courts, "It certainly is not an unlawful or oppressive use of police power to interrupt telephone service by arrangement between the police and the telephone company where the telephone is being used, as it was in this case, to carry on a criminal business."[14] The practice of the telephone company and the various police departments to have working arrangements has continued. The usual routine so far as it may be discerned in the reported proceedings operates about as follows. The police, perhaps by tapping a phone,[15] discover what they consider to be bookmaking or acceptance of bets. The company is notified by letter or other communication and requested to remove the phone. The Company removes the phone, and usually will not restore service unless restoration is approved in advance by the police department or alternatively there is a court order. Where the Company refuses to restore service, the

of the use of communications facilities for transmission of racing data. It is there stated "Bookmaking or the practice of accepting wagers on horse races is unlawful in 47 of the 48 states and in the District of Columbia. . . ." Nevada is the exception.

13. Florida in 1949 passed an act which has been sustained in the Supreme Court of the State, McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950). A copy of the opinion is reprinted in the *Hearings, supra* note 2, at 584-88. Nevada has a similar law, *Hearings, supra* note 2, at 826-27. It was also adopted in 1949. An earlier Michigan statute prohibits publication of information about betting odds and related matters. It was upheld on publication of such data prior to the event. Parkes v. Bartlett, 236 Mich. 460, 210 N. W. 492 (1926).

14. People v. New York Tel. Co., 173 App. Div. 132, 159 N. Y. Supp. 369 (1916). See also People v. New York Tel. Co., 119 Misc. 61, 195 N. Y. Supp. 332 (1922).

15. Di Benedetto v. New York Tel. Co., 83 N. Y. S. 2d 920 (1948); Cyprus v. New York Tel. Co., 192 Misc. 671, 84 N. Y. S. 2d 114 (1948).

applicant for service may apply to the courts for such an order.[16] An arrest seemingly coincides with such a request to the Company. A similar set of working arrangements exists in other jurisdictions, although the remedy of the person seeking restoration of phone service may be in the agency regulating the utilities rather than in the courts.[17]

The relationship between the utility and the customer in these circumstances is not so simple. The police department becomes a silent partner to the arrangement. However the latter is not an indispensable party of record in a suit to restore service. The New York Court of Appeals in a per curiam opinion asserts the following rule

> "Whether or not service should be terminated or discontinued is a decision that must be made by the telephone company. That power as well as duty rests with the public utility, and it may not delegate the one or avoid the other. True, the company is free to consult with the police department or with any other law enforcement agency, and may be guided in its action by the advice received. But whether the action is justified or warranted must be determined by the telephone company upon the facts presented. That being so, the telephone company is the only indispensable, necessary or proper party in a proceeding such as that before us."[18]

That ruling would therefore qualify the opinion given three years

16. *In re* Manfredonio, 268 App. Div. 1073, 52 N. Y. S. 2d 393 (1944).

17. Massachusetts, Missouri, District of Columbit, Florida, New Jersey, Louisiana and Ohio have about the same process. In Giordullo v. Cincinnati & Suburban Bell Tel. Co., 71 N. E. 2d 858 (Ohio Common Pleas 1946) the procedure in Cincinnati is put in the following words by Justice Struble, "It is a matter of common knowledge that the city police are engaged in yanking telephones from walls and breaking up telephone equipment when and if the same in their judgment is being used for bookmaking purposes. Counsel for the demurrer argues that such actions by the police constitute police government. . . . The court agrees with counsel for the demurrer that his client was the victim of police government. . . . The telephone company required the plaintiff to get the ok. of the chief of police before it would give plaintiff telephone service and withdrew the same upon the request of the chief of police, all without any hearing as to the gambling charges—that is police government pure and simple. The court agrees with counsel, too, that such a hook-up between the telephone company and the chief of police is in utter disregard of the fundamental rights of the citizenry of this city; but the court must disregard the alleged hook-up in passing upon plaintiff's demurrer except to say that the telephone company cannot excuse its actions in withdrawing plaintiff's telephone service on the claim that it did so upon the request of the chief of police." See also Cologiavanni v. Southern New England Tel. Co., 65 P. U. R. (n.s.) 171, 174 (1946) ("In this instance the telephone company did not remove the telephone, which removal was, in fact, made by the police officers. . . ."); Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938) (the sheriff seized some equipment).

18. Shillitani v. Valentine, 296 N. Y. 161, 71 N. E. 2d 450 (1947); *accord,* Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. D.C. 1949).

earlier in *Dente v. New York Telephone Co.* where the court asserted

> "I hold that the telephone company was within its rights in discontinuing service upon the request of the Police Department without an independent investigation of its own. The Police Department refuses to rescind its request, and the respondent declines to restore the service without such rescission or by order of the court. In this stand, likewise the Court holds that the telephone company was within its rights. . . ."[19]

In a series of cases the New York courts have ordered restoration of service where the petitioner for service had been arrested for bookmaking and subsquently acquitted of those charges.[20] The same result was reached where the charges were dismissed although the police refused to approve the restoration of service.[21] Restoration was ordered where an employee of the telephone Company's customer had used his employer's phone to take bets, seemingly contrary to the latter's wishes. The employee had been discharged and convicted.[22] Likewise service was ordered restored where the court and the police disagreed over the interpretation of a letter in which the petitioner admitted using his phone to place bets. The court construed the letter to be an admission of an individual who occasionally placed a bet which was an entirely legal act. The petitioner in this case had been acquitted after his arrest. Relying on the above cited *Restmeyer Case* the court added, "It is thus evident that the respondent may deny telephone service to a customer only when it is reasonably sure that it will be used for an illegal purpose in the future. It has no authority to deny telephone service as a punishment for past crimes. Presumably the criminal courts inflict punishment commensurate with the crime, and no other

19. Dente v. New York Tel. Co., 55 N. Y. S. 2d 688 (1944). In this proceeding the court ordered the request for restoration of service to a hearing to determine the answer to the question as to whether the phone was being illegally used. It was further observed that the police order ought not to last forever. Other similar cases are cited in this opinion.

20. Feldman v. Wallander, 67 N. Y. S. 2d 395 (1946); M. S. Tavern Inc. v. New York Tel. Co., 82 N. Y. S. 2d 515 (1948).

21. Salter v. New York Tel. Co., 67 N. Y. S. 2d 396 (1946).

22. Knapp v. New York Tel. Co., 83 N. Y. S. 2d 919 (1948). In a somewhat similar factual situation the court ordered service restored. An employee had been arrested for bookmaking and he had not yet been tried. The police had asked and the telephone co. had, in response thereto, discontinued service to the employer. The court somewhat curtly said "The undisputed facts establish that petitioner was not using or permitting his telephone to be used for unlawful acts in violation of the Penal Law. No act on the part of petitioner has been assailed, and continuous uninterrupted service for 40 years should not be terminated because of an isolated, unauthorized act of an employee. . . ." Whyte v. New York Tel. Co., 73 N. Y. S. 2d 138 (1947).

punishment should be meted out by private organizations."[23]

The effect of an acquittal on charges of bookmaking via the telephone on the petition for restoration of service is not always automatic. The telephone company has argued in instances where it has refused to restore service on the police request even though there has been an acquittal: that the acquittal creates no presumption of innocence of the facts charged and merely shows that the guilt was not established beyond a reasonable doubt; that the acquittal does not show that a fair preponderance of the evidence did not point to guilt and that the latter is all that is needed to justify the company in refusal of service. The court's comment on this ingenuous line of reasoning was

> "It is true that petitioner's acquittal creates no presumption in his favor; conversely it creates no presumption against him. Had he been convicted, his conviction would have been prima facie evidence, in this proceeding, of his guilt. His acquittal, while not prima facie evidence of his innocence, at least dispels the presumption against him.
> . . . The petitioner is presumptively entitled, like any other person, to equal telephone service. To deprive him of his right, respondent must go forward and show by at least fair preponderance of the evidence that petitioner has forfeited such right. This the respondent has failed to do."[24]

The courts will not order the restoration of service where they are persuaded that the petitioner has used the facilities for illegal bookmaking. It is conceded that it is not illegal to furnish racing news by the telephone any more than it is illegal to furnish such news by other means such as the radio, television, teletype or in newspapers,[25] but if the proceedings show that the facilities have been used knowingly to furnish information of the above character to bookmakers, such activity constitutes enough to justify refusal of service.

In Massachusetts the practices differ. Petitions for restoration of telephone service are filed with the Department of Public Utilities. The Department has stated in such proceedings

> "The telephone company was justified in discontinuing the service of the petitioner at the request of the police commissioner on the ground stated by the police commissioner, that

23. Cyprus v. New York Tel. Co., 192 Misc. 671, 84 N. Y. S. 2d 114 (1948).

24. Di Benedetto v. New York Tel. Co., 83 N. Y. S. 2d 920 (1948). See also Cologiavanni v. Southern New England Tel. Co., 65 P. U. R. (n.s.) 171 (1946) (it is stated ". . . acquittal in a criminal court may not, of itself, suffice as a reason for restoration of service. . . ."

25. Annette v. New York Tel. Co., 74 N. Y. S. 2d 331 (1947). See also Shillitani v. Valentine, 296 N. Y. 161, 71 N. E. 2d 450 (1947).

> the police knew that the telephone was being used for gaming purposes. The police commissioner of Boston is a public officer charged with a vital responsibility for maintaining law and order and prevention of crime in the city of Boston. As the responsible head of the police department, his official acts are entitled to the greatest respect.
>
> Where no law has been violated and no statute has made good faith essential to valid action, acts of administrative officers cannot be attacked in judicial proceedings on the ground that in fact those officers were not governed by the highest standards of impartial and unselfish performance of public duty."[26]

In a similar proceeding in 1949 the Department refused to order restoration of service where the petitioner had been convicted of taking bets by phone on horse races. The petitioner urged that the police ban on restoration should not continue indefinitely. The record showed convictions for similar offense in 1939 and 1945. The Department then stated, "The first requisite to the restoration of telephone service incumbent on the petitioner is to satisfy the police commissioner that he has in fact mended his ways."[27]

The Department has observed in refusing to grant an order for restoration of service where it had been discontinued on request of the police and after conviction for bookmaking

> "This Department possesses no jurisdiction over the acts of the chief of police of the city of Pittsfield in the performance of his duty nor has the right to review his actions. Our jurisdiction applies only to the telephone company. If a person is aggrieved by the official acts of the chief of police such person may seek relief in the courts rather than from this Department. Unless and until the courts shall decide that the action of the chief of police in requesting the telephone company to discontinue the service to the petitioner unwarranted and baseless, we feel bound to consider that a request such as was made to the telephone company in this case is a necessary incident in the prevention of crime and the maintenance of law and order equally binding upon this Department as upon the telephone company and as controlling in determining that the telephone company has acted justly and reasonably in refusing to furnish telephone service after receiving such a request."[28]

The cases in Massachusetts are presented to the regulatory

26. Carrozza v. New England Tel. and Tel. Co., 61 P. U. R. (n.s.) 249 (1942). See also A. C. Co. v. New England Tel. and Tel. Co., 79 P. U. R. (n.s.) 159 (1949).

27. Rodman v. New England Tel. and Tel. Co., 61 P. U. R. (n.s.) 242 (1945). In this and the preceding case the petitioner was compelled to show that the company's action was unjust and unreasonable whereas the Department takes the position that it is just and reasonable for the company to refuse service when requested by the police commissioner.

28. McCabe v. New England Tel. and Tel. Co., 78 P. U. R. (n.s.) 127 (1949).

authority in a slightly different context than the New York cases. The Department considered whether the company's action in discontinuing service was in agreement with the company's rules. The rules were considered reasonable and compliance therewith was required by that Department. The situation is perhaps stated in historical perspective more clearly in the following Connecticut case. The Southern New England Telephone Company had refused to restore service on the advice of the State's Attorney for Hartford County even though the party seeking restoration had been acquitted of the charges of illegal use of the phone. The Commission ordered service restored. The Commission described the circumstances out of which the Company regulations arose in the following way.

> "The Southern New England Telephone Company has in force a rule respecting the circumstances under which it will refuse or discontinue service where the telephone is used for the dissemination of racing news and bookmakers (*sic*). This rule is embodied in the company's General Bulletin 46, dated February 26, 1945, and is the sequel of a policy of cooperation which the telephone industry throughout the country has generally adopted at the request of the Federal Communications Commission. With respect to preventing the use of telephones for dissemination of racing information, rule 10 of the General Bulletin provides that upon receipt by the company of notice from a law enforcement officer, having jurisdiction, that certain designated service is being used for bookmaking, or aiding and abetting bookmaking, with a request for discontinuance of such service, the company will discontinue the service upon notice thereof to the subscriber."[29]

Such rules do not, of course, supercede the statutory duties of the Commission, or the rights of the person seeking service. A Federal district judge in commenting on this situation has said,

> "True, there is a provision in the tariff of the telephone company to the effect that telephone service may be discontinued and need not be furnished 'if any law enforcement agency, acting within its jurisdiction, advises that such service is being used or will be used in violation of law . . .' Obviously, if this provision of the tariff is to be literally construed, it is not valid.

29. Cologiavanni v. Southern New England Tel. Co., 67 P. U. R. (n.s.) 171, 174 (1946). The Commission discussed the rules of evidence which it should follow and concluded, "While the entire testimony in the proceeding before the Commission awakens suspicion regarding the petitioner's use of telephone service, such testimony nevertheless falls short of proving that he has been using telephone service for unlawful purposes. The benefit of any doubt in the matter should be given to the subscriber since the deprivation of telephone service is of serious consequence to any person, whether for a business or residential use, under present-day reliance upon the telephone as a necessary and rapid means of communication. . . ."

> A public utility may not deprive a member of the public of its rights to service merely because it receives a notice from a law enforcement agency that he is using the service for illegal purposes. A public utility may refuse, and, in fact, must refuse, service if to its knowledge the service is being used for illegal purposes. This fact, however, must be established. To confer what would amount to judicial power on a law enforcement officer and to exercise such power ex parte would be violative of due process of law and would deprive members of the public of their legal rights. A public utility may not do this, and neither may a regulatory administrative body."[30]

The judge in that opinion required that illegal use appear by a preponderance of the evidence. The New Jersey utility agency has phrased the matter in approximately the same way. Ganek had been arrested and pleaded guilty to charges of possessing racing slips. The telephone service was discontinued and restoration was refused by the company when the police officer refused to sanction it. Ganek then filed his petition to secure a commission order for reinstallation of service. The commission denied the petition and at the same time denied Ganek's claim that the Company must show actual illegal use of the telephone to justify its refusal. Instead the Commission found the question to be the reasonableness of the company's rules and the reasonableness of the application in the circumstances. There was no "duty to show actual use of the telephone for the improper purpose before discontinuing the same. The Board holds that if respondent had reasonable cause for believing that its facilities were being used or will be used in furtherance of such illegal purposes, the respondent was justified in invoking its regulations and thus not assume the danger of rendering itself liable to statutory penalties of either a civil or criminal nature."[31]

The New Jersey Board in subsequent proceedings to install service where it had been removed for illegal use seems to have taken recourse to the view that the acts of public officials must be given full effect. To the argument that the police might act unjustifiably at times the Board has answered that such questions should be taken to the courts. The Board concluded that the company is justified in removing telephone service on police request

30. Andrews v. Chesapeake & Potomac Tel. Co., 83 F. Supp. 966 (D. D.C. 1949).

31. Ganek v. New Jersey Bell Tel. Co., 57 P. U. R. (n.s.) 146, 149 (1944). The police captain's refusal to approve restoration was considered to be in support of the company's independent decision. See also the comments of the Vice Chancellor in 1940 denying an injunction against New Jersey Bell in another proceeding. The comment is printed in part in Plotnick v. Bell Tel. Co. of Penn., 35 P. U. R. (n.s.) 87, 92 (1940).

because of the dilemma presented by its own duties on the one side and the authority attaching to the police request on the other.[32]

Despite the above described rulings in the courts of California, the Railroad Commission of that state in 1948 made a ruling which may be summarized: It is in the public interest to prohibit communications utilities from furnishing or continuing to furnish telephone or telegraph service that will be or is being used illegally in connection with bookmaking of race track bets while the latter is illegal under California law. Such utilities have a "positive duty" to exercise vigilance to prevent the unlawful use of its instrumentalities and facilities.[33]

The more typical regulation that is now to be found in the rules of the regulatory agencies or in the filed tariffs of the utility may be indicated by the following excerpt from the Michigan Bell's regulations,

> ". . . Whenever the judge of any court of record in Michigan having jurisdiction over criminal offenses. . . . the attorney general of Michigan, or the United States Attorney in and for any Federal judicial district in Michigan, shall represent in writing to the telephone company that he has probable cause to believe that the service furnished at a designated location is being used in furtherance of the commission of a specified criminal offense and in such writing shall request that such service be discontinued or terminated, the company, if not restrained by order of a court of competent jurisdiction, will so discontinue or terminate such service, with like effect as to both the company and the customer as though the latter had of his own volition directed that the same be done. . . ."[34]

32. Slapkowski v. New Jersey Bell Tel. Co., 67 P. U. R. (n.s.) 33 (1947). See also De Luisa v. New Jersey Bell Tel. Co., 78 P. U. R. (n.s.) 22 (1949). In Berenato v. New Jersey Bell Tel. Co., 76 P. U. R. (n.s.) 1 (1948), Berenato had two phones in adjoining locations, one of which was a restaurant which had a phone in the kitchen. Berenato was convicted of having gambling paraphernalia in the place adjoining the restaurant. The Department without police objection ordered the phone restored in the restaurant providing it was in full view of customers. The other phone was not restored.

33. *Re* Communications Utilities, 77 P. U. R. (n.s.) 581 (1948). See also Millstone v. Pacific Tel. and Tel. Co., 82 P. U. R. (n.s.) 522 (1949).

34. *Re* Michigan Bell Tel. Co., 34 P. U. R. (n.s.) 65, 67 (1940). Attention may be called to the statement in the Staff Report to the FCC, *Hearings, supra* note 2, at 909: "All the Bell system associated companies have advised the Commission that as a policy matter, they will refuse to install service for a person engaged in bookmaking or, having installed service, will discontinue it upon learning of the illegal nature of the subscriber's business. However, only eight companies appear to have instituted routines in effectuation of their stated policies. . . ." It is not clear whether the statement still stands or whether it is true only of the situation in 1943, the date of the report. The Senate Committee Report states: "Thus the communications common carriers are the instrumentalities through which racing in-

III.

The contemporary developments in the regulation of the furnishing of news about horse-racing seem to have had their inception in an investigation initiated by the Pennsylvania commission. The immediate precipitating incidents may have been in connection with an intrastate political party struggle, but its impact has far transcended that immediate issue.[35] The Commission traced briefly the background of the development of Nationwide News Service and its subsidiaries. In 1927 A. T. and T. Co. began to furnish leased wire service to Nationwide from race tracks to other points in the U. S. Beginning with thirteen subscribers in 1927 Nationwide developed by 1935 to the point at which it had leased wire connections with twenty-nine tracks with direct service to 223 cities in thirty-nine states and three Canadian provinces. The local Bell companies then leased circuits to the local pool rooms or other betting places within the cities. The Commission pointed out also that A. T. and T. eliminated the intrastate, *i.e.* Pennsylvania, service terminals after its investigation had gotten underway so that the terminals were located outside the state of Pennsylvania. The information then reached its local destinations via an interstate route and therefore was outside the state control. The Commission had some doubt of its authority to reach the "real root of the offending," but it nonetheless ordered the Bell Telephone Company of Pennsylvania to cease rendering any service to any establishment which has any connection, telegraph or telephone, with the race track circuit of Nationwide News Service or any of its subsidiaries. The basis of the order was the general rule outlined earlier that the utility has no duty to serve for an illegal end.[36]

formation is widely disseminated, and they have important economic interests in maintaining that business. A. T. & T. has testified on numerous occasions that it is not interested in this business; that it does not want it. What they refer to, of course, is the transmission of racing information to bookmakers for illegal purposes, and there can be little question that the A. T. & T. itself does not solicit that kind of business. The evidence, however, also discloses no serious affirmative efforts by the telephone companies to divorce themselves from this business, either on a local or interstate basis. As to Western Union, that company makes no secret of the fact that so long as it remains a legal business, they intend to supply the facilities to carry it out." Sen. Rep. No. 1752, 81st Cong., 2d Sess. 20-21 (1950).

35. See *Wire and Wireless Communication,* 22 P. U. Fort. 701 (1938); Telephony, Oct. 29, 1938, p. 30-31. It is suggested that the investigation grew out of a Democratic clean-up campaign against the Republican leadership of M. L. Annenberg. The bearings of some aspects will be shown in the developments in connection with Nationwide News Service.

36. PUC v. Bell Tel. Co. of Penn., 25 P. U. R. (n.s.) 452 (1938). It is pointed out in FCC, Proposed Report Telephone Investigation, 419 (Govt. Ptg. Office 1938) that the Bell System derived an income of a million

The more or less typical situation that exists in the furnishing of racing information is described in the preceding paragraph. The racing news company has wire service, telephone or telegraph, from a race track and that service is sold to outlets in various cities throughout the country. The local purchaser in turn sells the news to his customers in his area. These customers may be newspapers, radio news casts, or private parties. On occasion the local purchaser has a large number of telephone lines over which he will answer questions as to particular races or over which he relays the news of the race vocally to the customers. In some of the cases the service at each end is denominated 'drops,' *i.e.,* the leased wire at each end is dropped on the premises of the customer.[37] It should be noted that it is not asserted that the company furnishing the racing news service is engaged in anything that is illegal per se. Clearly there is nothing illegal in sending racing information over wires, radio, or by the press. Insofar as the news service is used by newspapers the printing therein of the news is presumably protected by the First Amendment. There is more to the events than meets the eye in any such simplistic account, however, although there are court rulings that support that position.

With the exception of the above cited *Brophy v. California* and *Pennsylvania Publications v. PUC,* all such rulings antedate 1939. In that year a federal-state drive to eliminate the Nationwide News Service culminated in indictments in Chicago. The indictments charged violations of the federal lottery laws, and on the basis of the indictments the Illinois Bell Telephone Company and American Telephone and Telegraph Company were notified by the United States District Attorney and the States Attorney in Chicago of the illegal use of the service. The companies were asked to discontinue the service. There was some preliminary legal skirmishing but on November 14 counsel for Annenberg's Nationwide News Service

and a quarter dollars from such business which was mainly used to service places making books on races. One such service was the sixth largest customer of Bell. The same data is repeated in *Investigation of the Telephone Industry,* H. R. Doc. No. 340, 76th Cong., 1st Sess. fnt. p. 357 (1939). See also Richard J. Beamish, *Responsibility of Utilities for Criminal Use of Service,* 25 P. U. Fort. 586 (1940). An appendix to this piece is a letter of Mr. William H. Lamb, general counsel of the Bell Telephone Company. He comments on Commissioner Beamish's conclusions about the duty of the utility. Mr. Beamish was active in the above cited proceeding.

37. The account rests on the following proceedings: Hagerty v. Coleman, 133 Fla. 363, 182 So. 776 (1938); Hamilton v. Western Union Tel. Co., 34 F. Supp. 928 (N.D. Ohio 1940); Howard Sports Daily Inc. v. Weller, 36 P. U. R. (n.s.) 62 (1940), 179 Md. 355, 18 A. 2d 210 (1941); Partnoy v. Southwestern Bell Tel. Co., 70 P. U. R. (n.s.) 134 (1947); McBride v. Western Union Tel. Co., 171 F. 2d 1 (9th Cir. 1948).

announced that the service was being discontinued.[38] There resulted a series of cases in various parts of the country in which the communications company was requested by either or both the United States Attorney and/or the State Attorney General to discontinue service to the racing news companies. Uniformly the companies indicated their willingness to comply with the request and their customers sought injunctions to restrain the cessation of service. In every instance except the California and the Pennsylvania cases, the courts refused to utilize equity to preserve the racing news business.[39]

A series of related questions have been clarified in the process of deciding the particular proceedings. In nearly all of these cases the Governor or the Attorney General has requested the company to discontinue the service to the news service. Occasionally other state officials have participated in the request, for example in the *McBride Case* the sheriff of Kern County also requested the action by the communications company. The local states' attorney has also on many occasions joined or made the request. It may be said that generally the courts have been willing to accept such requests as valid ground for the discontinuance of the service. The single exception is the *Brophy Case,*[40] wherein the court surveyed the law on the subject and concluded that the Attorney General had no power to order the telephone company to discontinue the service of disseminating the racing information since the Railroad Commission had exclusive authority to control the utilities. It should be noted that in the *McBride Case,* the request of the Attorney General and the Sheriff of Kern County was honored by the Company and the action upheld in the federal courts. The court pointed out that the telegraph company was operating under a Federal Com-

38. Telephony, Nov. 11, 1939, p. 26; *Id.,* Nov. 18, 1939, p. 22.

39. Hamilton v. Western Union Tel. Co., 34 F. Supp. 928 (N.D. Ohio 1940) (Hamilton was regarded as the successor to Nationwide); Fogarty v. Southern Bell Tel. Co., 34 F. Supp. 251 (W.D. La. 1940) (Fogarty was regarded as connected with Nationwide); Tracy v. Southern Bell Tel. Co., 37 F. Supp. 829 (S.D. Fla. 1940); Hagerty v. Southern Bell Tel. Co., 145 Fla. 51, 199 So. 570 (1940). Hagerty also sought in a later suit to enjoin discontinuance of service and was unsuccessful; the federal court also utilized the WPB order issued in 1944. Hagerty v. Southern Bell Tel. Co., 59 F. Supp. 107 (S.D. Fla. 1945); Howard Sports Daily v. Weller, 36 P. U. R. (n.s.) 62, 179 Md. 355, 18 A. 2d 210 (1941); Partnoy v. Southwestern Bell Tel. Co., 70 P. U. R. (n.s.) 134 (1947). This opinion furnishes an excellent description of the workings of the system in Kansas City. See also *Re* Southwestern Bell Tel. Co., 79 P. U. R. (n.s.) 61 (1949) for a description of the operations of the Pioneer News Service in St. Louis. McBride v. Western Union Tel. Co., 171 F. 2d 1 (9th Cir. 1948). See also Kronenberg v. Southern Bell Tel. Co., 36 P. U. R. (n.s.) 513 (1940).

40. People v. Brophy, 49 Cal. App. 2d 15, 120 P. 2d 946 (1942).

munications Commission tariff which provided that its facilities should not be used directly or indirectly in violation of any federal or state law. The company, moreover, reserved the right to discontinue service when notified by federal or state officers that the law is being violated. In this instance McBride collected information from eastern race tracks and sold it to Consolidated Publishing Company of Los Angeles. The latter in turn sent the news to drops in various places in California. The court denied the request for the injunction saying in part, ". . . It is not necessary that there be a guilty participating of the sender or intermediate transmitter of the messages to the drop. The guilty use of the drop in receiving the messages is enough to show an illegal use of the wire's service. . . ."[41]

The constitutional issues that might be raised have been settled in favor of the legality of the orders stopping the service. A rather extensive claim was made in the *Partnoy Case* and was rejected by the Missouri Commission. A more detailed examination of these issues has been made in Maryland, but the result was the same. In this instance the Western Union had discontinued an interstate circuit to the Howard Sports Daily on the basis of a communication from the United States Attorney in Chicago. Howard then gained its out of state racing news via telephone and in the present proceeding sought to compel Western Union to furnish an intrastate circuit so that Howard's customers within the state might be reached. ". . . The reports sent by appellant included entries in races, the positions of the horses at various stages of the races, the final results, and the prizes paid the winning horses. . . . On five of the premises [to which the appellant desired the wire service] gambling was seen by witnesses. . . ."

The commission had refused to order the company to furnish the service and the courts in refusing to overrule the order held: (1) there was no denial of due process and equal protection. ". . . To force a public utility, under the guise of impartial regulation, to furnish service and facilities for unlawful purposes would be contrary to public policy. . . ." (2) There was no denial of freedom of the press since that was construed to mean prior prohibition of publication. ". . . It is obvious that the appellant has not been denied the privilege of expressing its opinion on any subject. It is an ancient doctrine of common law that no court should lend its

41. McBride v. Western Union Tel. Co., 171 F. 2d 1 (9th Cir. 1948). The court assumed that McBride's business was legitimate. Bookmaking was illegal in California.

aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate by improper influences the integrity of our social or political institutions. . . ."[42]

The sweeping victory for the public officials who seek to prevent communication facilities to such services is marred by the defeat in Pennsylvania. Notice was made above to the ambiguous situation in Pennsylvania, and that may have been an overstatement. In *Pennsylvania Publications v. PUC,* the supreme court of Pennsylvania refused to uphold lower rulings which had denied telephone service to the Publications company. The latter distributed a racing news sheet in which horses were given numbers. The sheet was sold at news stands. In the sheet the publisher announced that he would answer telephone calls on the horses listed therein. The telephone numbers were printed in the sheet and calls were answered on races by quoting the horse's numbers as given in the sheet in the order in which the said horses finished in the race. The result was that the answer was useless without the sheet.

It was a matter of record in the present proceedings that the sheet had been found by the police in every bookie establishment that had been raided for the preceding ten years. The court asserted that the publishing business was legal and that the telephone company was not justified in refusing service to legitimate enterprises merely because the subscribers to the telephone service might furnish information to others who would use it for some illegal activity. Nonetheless the court, contrary to all others which have found such service of use primarily to bookmakers, ruled that the service should be continued and rested its views on the lines of reasoning that in general prevailed prior to 1939.[43]

One final aspect of the matter needs recounting. The aid of the national government has been in the attorneys joining with state officers in requesting the communications' companies to discontinue service. Some states have wanted the Federal Communications Commission to enter the picture with a positive function of aiding the state officials. At the 1948 meeting of the National Association of Railroad and Utilities Commissioners the representatives of California asked the adoption by the association of a reso-

42. Howard Sports Daily Inc. v. Weller, 179 Md. 355, 18 A. 2d 210 (1941).

43. Penn. Publications Inc. v. PUC, 349 Pa. 184, 36 A. 2d 777 (1944) (for early stages see footnote 8 *supra*).

lution requesting the Federal Communications Commission to institute an investigation into the use of interstate and foreign communications facilities ". . . to violate or to aid or abet, directly or indirectly, the violation of any state law relating to bookmaking and gambling. . . ." The Executive Committee recommended that the resolution not pass and the association so voted.[44] The Federal Communications Commission early in 1949 rejected a similar plea from the California commission.[45] In its *Annual Report* for that year the Federal Commission commented on the request and justified its refusal to investigate. The Commission pointed out that Western Union had on file tariff regulations which enabled state officers to bring about discontinuance of service as has been indicated above. The Commission further stated that the Bell System had no specific regulations on the subject but ". . . it was understood that, as a matter of policy, the companies had instructed their personnel not to furnish interstate and foreign communication service to persons using the same for unlawful purposes. . . ." The Communication Commission added that it had requested the Bell System to file regulations to that effect and that such regulations had been filed during the course of that year.[46] The Communications Commission thus absolved itself of any responsibility and relegated the matter to the states and local authorities for action.

IV. CONCLUSION

At present the situation is that the communication utility has no obligation to serve local bookmakers. The same utility has no obligation to serve for the distribution of information which will be useful for illegal purposes. At the same time it is not illegal to disseminate information about gambling odds and related data. The bookmaker could operate on the information available in newspapers, but from the evidence presented in the *Hearings* his scale of operations would be small. The communications service is important, if not indispensable, for large scale operations, and the importance is in both areas of activity: local and interstate bookmaking and the speedy informational service on the races themselves.

No law enforcement officer expects to abolish bookmaking.

44. Proceedings, p. 170. See also pages 224-230. It was suggested in the discussion that the matter was political in character.

45. P. U. Fort., 163 (1949). To some degree the state is interested because of parimutuel betting at tracks from which it derives revenue.

46. 15 FCC Ann. Rep. 99-100 (1949).

They do hope to reduce its order of magnitude. The technique for such reduction is to reduce the availability of telephone and telegraph service to local bookmakers and to prohibit the transmission of racing information which is to be used for gambling purposes. In the first activity there is competent authority in local governmental agencies. The distribution of gambling information is an interstate activity and needs congressional sanction. It is quite clear that no national agency is going to interfere with state activity designed to reduce the availability of such information. The state agencies want assistance from the Federal Communications Commission however. The Interstate Commerce Committee of the Senate has recommended that such assistance be made available.

The recommended legislation is the previously mentioned Sen. 3358. The bill proposes to make it illegal to transmit interstate racing information for gambling purposes. At the same time it seeks to allow news agencies to continue their usual activities. In general the theme is to reduce data primarily useful to bookmakers prior to the beginning of the contest. The measure thus moves into the area of freedom of the press and speech. The distinction between the types of information is not a simple one either. Neither the FCC nor the utility companies anticipate the new duties with pleasure. The issue in terms of social pressures is between some groups seeking to reduce conduct regarded as immoral and other groups, who may regard the gambling as immoral, but who desire to escape the responsibilities connected therewith. The outcome of the struggle in Congress is by no means clear.