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# POLITICAL DEFAMATION: RADIO'S DILEMMA

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The past quarter-century of American history has witnessed many fundamental changes in our national life, among the most significant of which has been the expansion and growth of the vigorous industry of radio broadcasting. Within the span of a few years radio has assumed a major role in the daily life of the average citizen, and, in a nation of free speech and free elections, it is not surprising that the impact of radio broadcasting on our political elections has been great. Reaching into millions of homes as a highly persuasive medium, radio today probably exceeds even the great newspaper industry in capacity for influencing public opinion.

Congress, recognizing that, although radio properly conducted might be a great boon to our democratic system, yet abused it would be a millstone, as early as 1927 took steps to insure the proper and impartial use of the airwaves for political purposes. It provided, in the Radio Act[1] of that year, that any radio station granting time to a political candidate must grant equal time, under the same conditions, to all other candidates for the same office. This insured equality of opportunity for the candidates, but it was foreseen by Congress that a partisan broadcaster might censor a political speech in accordance with his particular views. To obviate the possibility of this evil, a proviso was appended that radio stations should have no right of censorship over political broadcasts.[2]

Although adequate to accomplish the two important goals considered by Congress, the Radio Act nevertheless contained a dangerous and unsatisfactory ambiguity as to the treatment of defamatory material that quite conceivably might appear in a political broadcast: If the broadcaster should require the deletion from a political speech of obviously actionable matter, it might find its license revoked by the Federal Communications Commission for violation of the prohibition against censorship;[3] if, on the other hand, it should permit the candidate to make defamatory statements in the course of a political broadcast, the broadcaster would probably

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[1]Radio Act of 1927, 44 STAT. 1162, §18.

[2]*Ibid.*

[3]See Note, 9 AIR L. REV. 381 (1938).

*This article was written while the authors were students of the University of Florida Law School.

find itself the unwilling defendant in a defamation suit in the state courts.

Carried over into the Communications Act of 1934[4] without clarification, these provisions still left to the radio stations the difficult decision of whether to risk civil suit or industrial death.

The Federal Communications Commission was confronted with this precise problem for the first time in the recent case of In re *Application of Port Huron Broadcasting Co. (WHLS).*[5] A Michigan broadcasting company granted free radio time to a city commissioner, an announced candidate for re-election, for the limited purpose of discussing a proposed bond issue. Following the broadcast an announcement was made that anyone wishing to present an opposing view on the bond issue would be given equal time without charge, but this offer was not accepted. A short time thereafter the same commissioner entered into a contract with the station for a series of paid political broadcasts in behalf of his candidacy. On receiving the script for the first broadcast the company, considering the content of the speech defamatory, refused to carry the program, canceled the series of proposed broadcasts, and also canceled contracts with other candidates for the same office. Two of the candidates filed a complaint with the Federal Communications Commission, asking that the Port Huron station's license be revoked or renewal refused for this alleged violation of the Communications Act. On a hearing of the application for renewal of the station's license the Commission held that Station WHLS had violated Section 315 of the Communications Act, that the prohobition against censorship of political broadcasts contained in that section was absolute, and that the broadcaster would not have been liable for the defamatory material in a state court, since the Federal Government had so occupied the field of radio broadcasting that state law would be superseded by the conflicting federal policy. The Commission nevertheless granted the license renewal, pointing out that the law had thereunto been ambiguous, and that there was no showing that the station had intentionally violated the law.

Inasmuch as the granting of the license renewal rendered the Commission's views, if not dictum, at least closely akin thereto, the import of this decision remained in doubt until The Houston Post Company, operator of Station KPRC in Houston, Texas, conceiving that the Commission's action had established an erroneous rule of conduct to which it would be held in the future, instituted before a three-judge federal district

[4]48 STAT. 1088, 47 U. S. C. §315 (1934).
[5]FCC Doc. No 6987, File No. B 2-R-976 (June 28, 1948).

court an action to annul the Commission's order[6] under the provisions of Section 402(a) of the Communications Act.[7] The federal court, in a yet-unreported decision, dismissed the action for lack of jurisdiction, on the ground that the decision complained of was not an "order" within the meaning of the Act. The Federal Communications Commission appeared by counsel and, on questioning by the court, stated it had not intended by the Port Huron decision to impose a regulation having the effect of law nor to add anything to the substance of Section 315. The court concluded that the Commission was merely expressing its opinion as to the meaning of Section 315 in accordance with the view which they thought Congress should adopt.

This decision by the federal court, perfectly valid from the standpoint of administrative law,[8] nevertheless leaves the radio industry in an unenviable position. Although the Commission's action does not amount to a binding rule, it clearly indicates that the Commission's view as to the meaning of the law is such that if a broadcaster should in the future require deletion of defamatory material from political broadcasts, its license would probably be revoked. Judicial action could then be instituted to annul such an order,[9] but, should the United States Supreme Court ultimately uphold the Commission, the result of an incorrect guess as to the law would be fatal to the station. Meanwhile, there is reason to suppose that the state courts will not accept the Commission's views short of Congressional action or a decision by the Supreme Court.[10] The federal court itself in the *Houston Post* case indicated by way of dictum that it considered the Commission's position unsupported by authority, and in fact contrary to the tenor of judicial decisions.[11]

Forced to chart a course between the Scylla of license revocation by

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[6]Houston Post Co. v. United States, Civ. Action No. 4367 (D. C. S. D. Tex., Aug. 3, 1948).

[7]48 STAT. 1093, 47 U. S. C. §402(a) (1934).

[8]VOM BAUER, FEDERAL ADMINISTRATIVE LAW §195 *et seq.* (1942).

[9]48 STAT. 1093, 47 U. S. C. §402(a) (1934).

[10]The State of Texas, for example, filed a brief as *amicus curiae* in the *Houston Post* case, contending that the Commission's decision would subject radio stations to defamation suits in Texas courts.

State statutes should be held superseded by act of Congress only when the intention to do so is clearly manifested: Illinois Central R. R. v. State Public Utilities Comm'n, 245 U. S. 493, 38 Sup. Ct. 170, 62 L. Ed. 425 (1918); Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1234 (1947).

[11]Houston Post Co. v. United States, Civ. Action No. 4367 at 10 (D. C. S. D. Tex., Aug. 3, 1948).

the Commission, should they censor a political broadcast for defamatory material, and the Charybdis of ruinous defamation suits in the state courts should they carry, uncensored, defamatory political speeches, one of the nation's most potent vehicles for political expression finds itself, in an election year, in one of the most anomalous legal dilemmas of our time.

## I. The Nature of Defamation by Radio

The whole field of radio defamation has been the subject of numerous conflicting decisions and has occasioned considerable dispute among writers on the subject. The courts have found difficulty in adapting the problems of this new instrumentality to the traditional rules of libel and slander, and the authorities have failed to agree on the proper basis for the liability of the broadcaster that makes possible the publication of defamatory statements. The principles to be drawn from the cases and the views of the law-review writers are summarized here as a background for the consideration of the difficult and narrower question of political defamation by radio.

### *Persons Liable*

The first problem in defamation by radio is that of who may be held liable for a defamatory statement broadcast over the air. It is clear that the person who speaks or reads the defamatory material is, unless privileged, liable for the harm occasioned to another's reputation.[12] If the speaker is the agent of another, such as a commercial sponsor or the station itself, the principal is liable if the words were spoken by the agent while acting within the scope of his authority.[13] The possibility that the speaker may be financially irresponsible has usually led defamed persons to direct their suits, however, against the broadcaster for its part in the publication of the injurious remarks. Although there is disagreement as to the basis of the liability and as to the rules by which the liability is to be measured, the broadcaster is usually held liable for defamatory material broadcast through its facilities,[14] even though the

[12] 2 Socolow, The Law of Radio Broadcasting, 851 (1939)

[13] *Id.* at 856-857.

[14] Sorensen v. Wood, 123 Neb 348, 243 N W 82 (1932); Miles v Wasmer, 172 Wash 466, 20 P 2d 847 (1933).

remark occurs during the course of a network program over which the broadcaster has little or no control.[15]

*The Basis of Liability: Negligence or Defamation*

The second problem arising in radio defamation is whether the broadcaster's liability is to be grounded on the law of defamation or of negligence.[16] The general rule applicable to publishers—that is communicators—of defamatory matter is that they are liable regardless of whether they intended to publish a defamatory remark or of whether there was any negligence on their part in failing to realize that the matter would be defamatory.[17] So long as the publisher intended the statement to be communicated to a third person, or reasonably should have known that publication would result from his acts, he is liable for the resulting harm, if in fact the matter published is defamatory.[18] In the law of negligence, on the other hand, liability for an act which unintentionally injures another follows only in the event due care has not been exercised.[19] It is apparent that if the broadcaster's liability for defamatory material is to be based on the law of defamation, the broadcaster will be subjected to a stricter rule of conduct than if its liability is to be governed by the standard of care expected of the omnipresent Reasonable Man: a remark intentionally broadcast but unintentionally and non-negligently amounting to defamation would carry liability under the strict rule of defamation, while under the law of negligence the broadcaster would be absolved. It has long been held that newspapers are liable absolutely for any defamatory material they print, even in the absence of any negligence on their part.[20] Arguing that radio transmission is not an automatic process,

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[15]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934).

[16]See Vold, *The Basis for Defamation by Radio,* 19 MINN. L. REV. 611 (1935); Note, 33 VA. L. REV. 612 (1947).

[17]The Nitro Glycerine Case, 15 Wall. 524 (U. S. 1872); RESTATEMENT OF TORTS §580 (1938); PROSSER, HANDBOOK OF THE LAW OF TORTS 815 (1941).

[18]RESTATEMENT OF TORTS §577 comment *k* (1938).

[19]RESTATEMENT OF TORTS §282 (1938).

[20]Washington Post Co. v. Chaloner, 250 U. S. 290, 39 Sup. Ct. 488, 63 L. Ed. 987 (1919); Peck v. Tribune Co., 214 U. S. 185, 29 Sup. Ct. 554, 53 L. Ed. 960 (1909); Walker v. Bee-News Pub. Co., 122 Neb. 511, 240 N. W. 579 (1932); Laudati v. Stea, 44 R. I. 303, 117 Atl. 422 (1922). *Contra*: Layne v. Tribune Co., 108 Fla. 177, 146 So. 234 (1933). In holding a newspaper publisher only to a standard of due care in the publication of a libelous dispatch from a news service, Florida follows a distinctly minority view.

but rather that the broadcaster actively cooperates in the delivery of the spoken words to the listener, and pointing out the serious injury to an innocent person's reputation that may follow from a wide-spread defamatory broadcast, some writers have contended that the strict conduct exacted of the newspaper publisher is the proper standard by which to judge the liability of the broadcaster,[21] and the weight of judicial authority is with this view.[22] In *Coffey v. Midland Broadcasting Co.*[23] a federal court carried this rule to its logical extreme. A Missouri station carried a network-broadcast from New York, during the course of which an employee of the New York sponsor falsely termed the plaintiff an ex-convict. Even though the local station had no knowledge that the defamatory remarks would be made, and could not have prevented their utterance, it was nevertheless held liable.

It has been urged, on the other hand, that such a standard is unjust, since radio broadcasting is in fact almost automatic and there is no practical interval between the speaking of the defamatory statement and the receipt of it by the listening audience. Pointing to the more favored position of telegraph[24] and telephone[25] companies and the news vendors,[26] against whom intent to defame or negligent conduct in that respect must be proved, these writers contend that the more reasonable rule would be to hold the broadcaster to a standard of due care.[27] Although this

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[21]Newhouse, *Defamation by Radio: A New Tort,* 17 ORE. L. REV. 314 (1938); Vold, *Defamation by Radio,* 19 MINN. L. REV.. 611 (1935); Vold, *Defamatory Interpolations in Radio Broadcasts,* 88 U. OF PA. L. REV. 249 (1940).

[22]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Miles v. Wasmer, 172 Wash 466, 20 P.2d 847 (1933); *cf.* McDonald v. Polk, 346 Mo. 615. 142 S. W.2d 635. *Contra:* Josephenson v. Knickerbocker Broadcasting Co., 38 N. Y. S.2d 985 (1942); Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

[23]8 F. Supp. 889 (W. D. Mo. 1934).

[24]O'Brien v. Western Union, 113 F.2d 539 (C. C. A. 1st 1940) (citing other cases).

[25]2 SOCOLOW, THE LAW OF RADIO BROADCASTING §472 (1939).

[26]Street v. Johnson, 80 Wisc. 455, 50 N. W. 395 (1891); Emmens v. Pottle, 16 Q. B. D. 354 (1885); 2 RESTATEMENT OF TORTS §581, comment *c* (1938).

[27]Frank, *The Application of the Law of Libel and Slander to Radio Broadcasting,* 17 ORE. L. REV. 307 (1938); McDonald and Grimshaw, *Radio Defamation,* 9 AIR L. REV. 328 (1938); Notes, 18 CORN. L. REV. 124 (1933), 46 HARV. L. REV. 133 (1932), 18 IOWA L. REV. 98 (1932), 12 ORE. L. REV. 149 (1933); Comment, 28 GEO. L. REV. 278 (1939).

The arguments for absolute liability and for the negligence standard are summarized in 39 MICH. L. REV. 1002 (1940-41). The *Restatement of Torts* does not take a stand on the question. *Caveat* to §577.

seems a reasonable solution, at least as to network programs and *ad lib.* remarks, to extend the rule to the ordinary broadcast, where an advance script could have been required, might unjustly subject the individual to grave damage from an irresponsible speaker unless the courts, in delineating the conduct of a "reasonable broadcaster," require considerable care in the editing of script for defamatory remarks.

Still other writers have insisted that radio defamation should constitute a new tort which would recognize the peculiarities of the broadcaster's position.[28]

Several states, including Florida, have statutes which resolve the controversy.[29] By statute in Florida it is provided that a radio station may require the submission of a script by the speaker twenty-four hours in advance of the broadcast, the station thereafter being relieved of all liability for any deviations from the script.[30] Another Florida statute enacts the rule of due care, providing that a broadcaster shall not be liable for defamatory remarks published over its facilities by one other than a licensee, operator, general agent, or employee, unless it is alleged and proved that the station, its agents, or its employees have failed to employ due care.[31]

### *Libel or Slander*

Cutting somewhat across the lines of analysis of radio defamation according to the basis of the liability is the companion problem of whether the rules of libel or slander are to be applied. The legal distinctions between libel and slander are largely historical in origin[32] and provide no easy solution when novel means of defamation develop. Originating in the Star Chamber as a criminal action, libel has traditionally been known

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[28]Meyer, *Radio Defamation: Neither Fish Nor Fowl,* 2 THE LAWYER AND LAW NOTES 7 (1947-8); Newhouse, *Defamation by Radio: A New Tort,* 17 ORE. L. REV. 314 (1938); Note 33 VA. L. REV. 612 (1947); Comment, 12 ORE. L. REV. 149 (1933).

[29]ILL. ANN. STAT., c. 126, §4 (Smith-Hurd, 1935); IND. ANN. STAT. §2-518 (Burns Supp. 1946); IOWA CODE §659.5 (1946); MONT. REV. CODES §5694.1 (Darlington Supp. 1939); N. D. REV. CODE §12-2815 (1943); ORE. COMP. LAWS ANN. §23-437 (1940); WASH. REV. STAT. ANN. §2424 (Remington 1932).

[30]FLA. STAT. 1941, §770.03.

[31]Florida Laws 1947, c. 23802, FLA. STAT. 1941, §770.04 (Supp. 1947).

[32]RESTATEMENT OF TORTS §568, Historical Note (1938); see Notes, 39 MICH. L. REV. 1002 (1941), 33 VA. L. REV. 612 (1947).

as defamation by written or printed word and has always been actionable without proof of special damage,[33] while slander, usually said to be defamation by spoken word, will not lie, except in special cases,[34] without proof of special damage.[35] In rationalizing the historical distinction, courts have frequently pointed to the greater deliberation involved in the printed word and the greater harm possible through wide dissemination and perpetuation of the defamation.[36] Faced with the necessity of choosing between two rules which no longer adequately divide the field, most courts have applied the rule of libel to radio defamation, allowing recovery without proof of special damage.[37] Some courts, however, have expressly decided in favor of the more lenient rules of slander.[38] Florida has not passed on the question, and careful pleading would dictate that an allegation of special damage be included in the declaration in a suit of this nature, particularly in view of the fact that the Florida statutes requiring only due care could lead the court to interpret the legislative intent as being one of encouraging the industry by leniency toward broadcasters in defamation suits.

## II. The Port Huron Problem

Superimposed upon the generally unsatisfactory law of radio defamation, the dilemma of political defamation, which might now be termed the *Port Huron* problem, is a direct result of the ambiguity of Section 315 of the Communications Act:[39]

"If any licensee shall permit any person who is a legally quali-

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[33]See cases cited, Carson, Florida Common Law Pleading, Practice and Procedure 222 (1940); Prosser, Handbook of the Law of Torts 797 (1941).

[34]Prosser, Handbook of the Law of Torts 789 (1941).

[35]McDonald v. Nugent, 122 Iowa 651, 98 N. W. 506 (1904), Brooker v. Coffin, 5 Johns 188 (N. Y. 1809); Harman v. Delany, 2 Strange 898, 93 Eng. Rep. 925 (1731) (trade or profession); see, generally, Prosser, Handbook of the Law of Torts 798 *et seq.* (1941).

[36]Note, 39 Mich. L. Rev. 1002 (1941).

[37]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934), Sorensen v. Wood, 123 Neb. 348, 243 N. W. 82 (1932); Hartman v. Winchell, 296 N. Y. 296, 73 N. E.2d 30 (1947); *cf.* Miles v. Wasmer, 172 Wash. 466, 20 P.2d 847 (1933).

[38]Meldrum v. Australian Broadcasting Co., Vict. L. R. 425 (1926); *accord,* Locke v. Gibbons, 164 Misc. 877, 299 N. Y. Supp. 188 (1937) (distinguishable, however, as an extemporaneous remark).

[39]48 Stat. 1088, 47 U. S. C. §315 (1934).

> fied candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

It certainly could not have been the Congressional intent, in adding the proviso prohibiting censorship of political speeches, to force broadcasters to choose between rejecting all political speeches or alternatively to broadcast and be liable for all material no matter how outrageous. Only two reasonable constructions appear possible: either Congress intended, as the Communications Commission opined in the *Port Huron* case,[40] to absolve broadcasters from liability for political defamation, leaving the defamed citizen to his questionable remedy against the speaker, or, on the other hand, Congress intended that the prohibition against censorship should not prevent the suppression of defamatory material. The legislative history of the Act reveals that amendments clearly stating both of these positions have been offered but always rejected, Congress consistently refusing to clarify the section.[41]

### *Occupation of the Field by Federal Authority*

In reaching the conclusion that broadcasters are not liable in the state courts for political defamation, the Commission in the *Port Huron* case concluded that the Federal Government had so occupied the field that the state laws must bow to federal policy. As authority for this statement the Commission relied on *Sola Electric Co. v. Jefferson Electric Co.*,[42] and *O'Brien v. Western Union Telegraph Co.*[43] The *Sola* case,

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[40] *In re* Port Huron Broadcasting Co. (WHLS), F. C. C. Doc. No. 6987, File No. B. 2-R-976, p. 5 (1948).

[41] 67 CONG. REC. 12503 (1926) (amendment granting immunity from suits in state courts); 89 CONG. REC. 1469 (1943) (authority to delete libelous material); see also, *Hearings before Senate Committee on I. C. C. on H. R. 7716,* 72nd Cong., 2d Sess. (1932); *Hearings before Senate Committee on I. C. C. on* S. *2910,* 73rd Cong., 2d Sess. (1934); H. R. REP. Nos. 9229, 9230, 74th Cong., 1st Sess. (1935).

[42] 317 U. S. 173, 63 Sup. Ct. 172, 87 L. Ed. 165 (1942).

[43] 113 F.2d 539 (C. C. A. 1st 1940).

involving patent and anti-trust laws, laid down the sound principle that, notwithstanding *Erie Railroad v. Tompkins*,[44] state laws would not be allowed to contravene federal policy

> ". . . in those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."[45]

This principle applies, however, only when there has been an occupation of the field; the case offers little assistance in deciding *when* and to what extent federal laws have dominated a given field. The *Sola* case, therefore, can hardly determine the question at hand.

The *O'Brien* case is of more assistance. In that case a libelous telegram was transmitted over defendant telegraph company's facilities. In applying the rule of due care for telegraph companies in defamation cases, the court announced it would not be bound by local state law:

> "Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges, and liabilities of telegraph companies in the transmission of interstate messages must be governed by uniform federal rules."[46]

It was reasoned by analogy that in the radio field, too, federal policy must prevail, and this would seem reasonable in view of the fact that both radio and telegraph are regulated by the same act of Congress.[47] As with most analogies, however, this appears less valid on close examination. The case was before the circuit court of appeals on the question of whether the court below erred in failing to rule as a matter of law that there was no privilege to send the defamatory message. The *ratio decidendi* of the case was that telegraph companies are to be held in the federal courts to the more lenient standard of due care in the transmission of possibly defamatory messages. It was in laying down this rule that the court announced that it would not consider itself bound by state law. A tele-

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[44]304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

[45]Sala Electric Co. v. Jefferson Electric Co., 317 U. S. 173, 176, 63 Sup. Ct. 172, 174, 87 L. Ed. 165, 168 (1942).

[46]O'Brien v. Western Union, 113 F.2d 539, 541 (C. C. A. 1st 1940).

[47]Communications Act of 1934, 48 STAT. 1088, 47 U. S. C. §315 (1934).

graph company is a common carrier,[48] bound to accept for transmission lawful messages which are filed with it.[49] The *O'Brien* case simply holds that with this obligation there is a corresponding conditional privilege that will relieve the company of liability if a libelous message is transmitted, providing there has been no negligence on its part.

A radio station, on the other hand, is not a common carrier[50] and is generally not required to accept any material for broadcast. An occasion for such an obligation arises, however, under Section 315 of the Communications Act when one political candidate has already been granted time. It might be argued, then, that in this particular situation the radio station assumes this characteristic of a common carrier and is thus entitled to the accompanying privilege. But this reasoning would lead only to the conclusion that, notwithstanding the federal rule of strict liability,[51] the standard of due care should be applied to radio stations during political broadcasts. The analogy cannot be stretched to reach the conclusion that there is no liability whatever, even for a negligent transmission. The *O'Brien* case did not hold that a telegraph company is under a duty to transmit a message known to be libelous. It did, in fact, expressly recognize that liability might ensue for such an act.[52] Both state and federal courts have recognized the right of a telegraph company to refuse an obviously libelous telegram.[53]

Since the conclusion that the Federal Government has so occupied the field of radio as to obviate liability for political defamation cannot validly be drawn by analogy to the telegraph cases, the state decisions and the legislative history of the Communications Act must be consulted.

The only case squarely in point that has yet been before a state supreme court was *Sorensen v. Wood*,[54] which presented the other aspect of the identical problem. Plaintiff sued the speaker and the broadcasting company for defamatory remarks made in the course of a political broadcast. The station had not required the submission of an advance script.

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[48]60 STAT. 1352, 47 U. S. C. §153(b).

[49]*See* Tracy v. Southern Bell, 37 F. Supp. 829 (D. C. S. D. Fla. 1940).

[50]60 STAT. 1352, 47 U. S. C. §153(b); F. C. C. v. Sanders Bros. Radio Station, 309 U. S. 470, 60 Sup. Ct. 693, 84 L. Ed. 869 (1940).

[51]Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (1934).

[52]*See* O'Brien v. Western Union, 113 F.2d 539, 543 (C. C. A. 1st 1940).

[53]Nye v. Western Union, 104 Fed. 628 (C. C. D. Minn. 1900); Grisham v. Western Union, 238 Mo. 480, 142 S. W. 271 (1911); *see* Von Meysenberg v. Western Union, 54 F. Supp. 100 (S. D. Fla. 1944).

[54]123 Neb. 348, 243 N. W. 82 (1932).

From a decision in favor of the station, plaintiff appealed to the Supreme Court of Nebraska. In answer to a plea by the broadcaster of privilege under Section 315 of the Communications Act, the court said, in a decision reversing and remanding:

> ". . . We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action. The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances."

The United States Supreme Court thereafter, in a memorandum decision, dismissed an appeal by the station with the statement that the decision of the Supreme Court of Nebraska was based on a non-federal ground adequate to support the judgment.[55] Of course, had there existed in fact a privilege under the Radio Act, granted by Congress in the constitutional exercise of its authority over interstate commerce, then to subject the station to civil liability would have deprived it of property without due process of law. The broadcaster, however, had not been held liable in the lower state court, and the decision of the Nebraska Supreme Court merely rendered the radio station subject to possible liability in a new trial. The broadcaster consequently was denied any standing to raise the question of privilege under Section 315, and a flat decision on the problem by the United States Supreme Court was avoided. The opinion, however, contains at least a faint rejection of the theory of absolute prohibition of censorship. The *Sorensen* case, a leading one on radio defamation, has been frequently cited with approval by both state and federal courts,[56] but always for the rule of absolute liability that it imposes on broadcasters and not for its interpretation of Section 315.

The only other pertinent judicial pronouncement is that of an inter-

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[55]KFAB Broadcasting Co. v. Sorensen, 290 U. S. 599, 54 Sup. Ct. 209, 78 L. Ed. 527 (1933).

[56]Holden v. American News Co., 52 F. Supp. 24 (E. D. Wash. 1943); Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938); Miles v. Wasmer, 172 Wash. 466, 20 P.2d 847 (1933); Singler v. Journal Co., 218 Wis. 263, 260 N. W. 431 (1935); *see* McDonald

mediate New York court.[57] In a case involving an *ad lib.* defamatory remark in the course of a political broadcast, this court held that the obligations of Section 315 necessarily carried a corresponding privilege to broadcast defamatory matter. Since the court also announced that merely the rule of due care would be applied to broadcasters, the force of the decision as interpretative authority for Section 315 is considerably weakened, inasmuch as the due-care rule alone would have excused the radio station for the *ad lib.* remark.[58] A later New York case[59] indicated by way of dictum that censorship of a political speech for defamatory material would be proper.

The legislative history of Section 315 offers little indication that the interpretation preferred by the Commission represents the Congressional will.[60] If the Commission-favored view of a conditional privilege accompanied by an absolute prohibition on all censorship was intended, there seems no reason why a clarifying amendment to that effect should not have been approved.[61] Such a provision has, however, been consistently rejected,[62] and doubts as to its constitutionality have been expressed in Senate hearings. The Commission, it must be observed, was faced with the task of divining the legislative intent of Congress when it appears that Congress itself was, and still is, uncertain as to the purpose of the section. Refusal by Congress to face in either direction has, of course, precipitated the whole problem.

### *The Prohibition Against Censorship*

If the Federal Government has not granted to broadcasters immunity from political defamation suits—and that it has is at least doubtful—the conclusion follows within reason that the prohibition against censorship of political speeches by radio stations is not absolute. The Commission, in finding an uncompromising ban of the blue pencil, accepted the literal wording of the Act; and it is true that this on its face seems definite enough. But even in rendering this opinion, the Commission indicated that it did not intend to hold that there was an obligation to broadcast

v. Polk, 346 Mo. 615, 142 S. W.2d 635 (1940).

[57]Josephenson v. Knickerbocker Broadcasting Co., 38 N. Y. S.2d 985 (1942).

[58]Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

[59]*See* Rose v. Brown, 58 N. Y. S.2d 654 (1945).

[60]See note 41 *supra.*

[61]Senator Fess, 67 CONG. REC. 12503 (1926).

[62]See note 41 *supra.*

obscene matter or any other matter prohibited by federal law.[63] To require a candidate to delete an obscenity would certainly be an act of censorship, and it could hardly be contended that the broadcaster would not have this right.[64] Thus, there is in fact no *absolute* prohibition against censorship.[65] Where the line is to be drawn is a matter of public policy, and in view of the well-established rule that there is no obligation on a telegraph or telephone company to transmit libelous or unlawful messages,[66] it seems that until a clear Congressional pronouncement is forthcoming the more reasonable conclusion is that defamatory material is not protected from censorship by Section 315 of the Communications Act.[67]

## III. Resolving the Dilemma

### *Legislation*

The only real solution of the problem of political defamation by radio is that Congress properly shoulder its responsibility of clarifying the ambiguous Section 315. This might be done in one of several ways. Congress could specifically provide that radio stations complying with

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[63]*In re* Port Huron Broadcasting Co. (WHLS), FCC Doc. No. 6987, File No. B 2-R-976, p. 7 (1948).

[64]48 Stat. 1091, 47 U. S. C. §326.

[65]Other prohibited transmission which would be clearly subject to censorship, even though broadcast by a political candidate: *Lotteries,* 48 Stat. 1088, 47 U. S. C. §316 (1934); *false distress signals,* 48 Stat. 1091, 47 U. S. C. §325 (1934); *cf.* Near v. Minnesota, 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357; Chaplinsky v. New Hampshire, 315 U. S. 568, 62 Sup. Ct. 89, 86 L. Ed. 1031; N. L. R. B. v. Virginia Elec. & Power Co., 314 U. S. 469, 62 Sup. Ct. 344, 86 L. Ed. 348; Federal Trade Comm'n v. Standard Education Soc'y, 86 F.2d 692, *modified on other grounds,* 302 U. S. 112, 58 Sup. Ct. 365, 82 L. Ed. 602 (1937).

[66]Von Weysenberg v. Western Union, 54 F. Supp. 100 (S. D. Fla. 1944); Tracy v. Southern Bell, 37 F. Supp. 829 (S. D. Fla. 1940); Hamilton v. Western Union, 34 F. Supp. 928 (N. D. Ohio 1940).

[67]As is validly pointed out by Commissioner Jones in a separate concurring opinion in the *Port Huron* decision, the whole problem might have been avoided in the case of WHLS's petition on the basis that there had been no violation of Section 315, no candidate having spoken. Supporting this view is the very technically decided case of *Weiss v. Los Angeles Broadcasting Company,* 163 F.2d 313 (C. C. A. 9th 1947), which held that the censorship prohibition of Section 315 did not come into operation until the *second* political speaker's speech is censored. This, however, merely avoids the problem, for it may well happen that the next case will involve the second speaker.

Section 315 are immune to defamation suits growing out of political broadcasts. In spite of legislative qualms as to constitutionality,[68] it would seem, in a day of an elastic commerce clause, that such suits might properly be prohibited as a burden on the interstate commerce of radio broadcasting.[69] The social advisability of this course is, however, questionable. Balanced against the danger of indirect censorship of content is the consideration to be given the personal right to enjoy one's good reputation without irresponsible attack.

Alternatively, the Federal Government might enact legislation covering the whole field of radio defamation, including a clarification of Section 315; and this has been urged by law-review writers.[70]

A compromise could be reached by Congressional enactment, similar to the two Florida statutes,[71] designed to cover the special problem of political defamation. The result would grant radio stations the right to require scripts in advance of the political broadcast, to require the deletion of any defamatory material, and to be absolved thereafter from liability if, in spite of due care on their part, a defamatory remark is interpolated. Abuses by broadcasters of the limited right of censorship could be prevented by a simple method of proceeding before the Commission to enforce punitive provisions, including license revocation, and by giving to a candidate so imposed upon a civil action against the broadcaster in the federal courts.[72]

### *Interim Measures*

Until Congress acts, the broadcasters have but two courses. First, they can refuse all political broadcasts. Both because political broadcasts

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[68]Senator Fess, 67 CONG. REC. 12503 (1926).

[69]*Cf.* National Broadcasting Co. v. United States, 319 U. S. 190, 63 Sup. Ct. 997, 87 L. Ed. 1344 (1943).

[70]See particularly Keller, *Federal Control of Defamation by Radio*, 12 NOTRE DAME LAW. 15 and 134 (1936-37).

[71]FLA. STAT. 1941, §770.03; Florida Laws 1947, c. 23802, FLA. STAT. 1941, §770.04 (Supp. 1947).

[72]That such an action will now lie is not clear. In *Weiss v. Los Angeles Broadcasting Co.*, 6 F. R. D. 33 (S. D. Cal. 1946), a federal district court held that no civil cause of action arose in favor of a candidate whose political broadcast had been censored. On appeal, the circuit court of appeals held, 163 F.2d 313 (C. C. A. 9th 1947), that the court had jurisdiction but that Section 315 had not been violated, since plaintiff was the first political speaker and the prohibition arose only after one candidate had spoken. The inference is that a cause of action might exist in a proper case.

are remunerative, and because the broadcasters recognize their obligation of public service,[73] most stations have been reluctant to follow this course. Second, they can accept political broadcasts and protect themselves as best they can by contract. It seems that the station could require the posting of an adequate bond by all political speakers,[74] although this would work to the inevitable disadvantage of candidates of limited means.

Since most candidates would not be eager to subject themselves to defamation suits, it is probable that they would frequently accede to the advice of the broadcaster's counsel to delete objectionable material, but the problem is of such importance that the law should not be left to fortuitous probabilities.

## IV. Conclusion

The law of radio defamation is presently in some confusion, although the weight of authority is that defamation broadcast by radio is libel, for which the broadcaster is absolutely liable. Florida and several other states, however, hold the broadcaster to a standard of due care only.

One of the most unsatisfactory phases of the problem is that of political defamation. It is not now clear whether, having allowed one candidate for an office to speak, a broadcaster may censor the speech of a second candidate for defamatory material. There is ample reason to hold that there is a qualified right of censorship for such material, although the Federal Communications Commission takes the opposite view. Pending the enactment of much-needed federal legislation clarifying the confusion that Congress has thus far created in this field, the broadcasters can merely seek to protect themselves by contract from defamation suits in the state courts. The question is far from academic, as it involves the welfare of one of our great public-service industries and bears upon the vital institution of our political elections.

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[73] 48 Stat. 1085, 47 U. S. C. §309.

[74] *See* Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

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