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Federal Control of Defamation by Radio (concluded)

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FEDERAL CONTROL OF DEFAMATION BY RADIO*

(Concluded.)

FEDERAL POLICE POWER

Of course, the Commerce Clause of the United States Constitution does not prohibit a state from exercising its police power to protect the public health, peace, morals or general welfare.[54] Hence, there is no attempt in this writing to demonstrate that the states can not properly operate in this particular field. Rather it is my purpose to show that the federal police power, which undeniably does exist, has, I shall demonstrate, the proper authority for exercising control in this field. It must now be regarded as firmly established that the power of the Federal Government over commerce, while primarily intended to be exercised in behalf of economic interests, may be used for the protection of safety, order and morals.[55] It is commonly said that the Federal Government lacks "police power"; yet, whenever it exerts any of the powers conferred upon it by the Constitution, the Fifth Amendment imposes no greater limitation upon such powers than does the Fourteenth Amendment upon state powers.[56]

The states have always been recognized as possessing a police power in the exercise of which they must always look to the public welfare. Very often, in the exercise of this power, valuable property rights have been taken away without any compensation being made by the state. This is very clearly brought out in the dissenting opinion of Justice Brandeis in *Pennsylvania Coal Co. v. Mahon*[57] wherein he says,

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54 Simpson v. Shepard ("Minnesota Rate Cases"), 230 U. S. 352 (1913); Hannibal & St. Joseph R. R. Co. v. Husen, 95 U. S. 465 (1878).

55 Champion v. Ames ("Lottery Case"), 188 U. S. 321 (1903).

56 *Federal Control of Radio Broadcasting*, 39 YALE L. J. 245, 253.

57 260 U. S. 393 (1922).

"Every restriction on the use of property, imposed in the exercise of the police power, deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the state of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The state does not appropriate it or make any use of it. The state merely prevents the owner from making a use which interferes with paramount rights of the public."

The legislature determines the necessity for, and the courts the proper subject for, the exercise of the police power extending it to the protection of lives, limbs, health, comfort and welfare of society.[58] So I might go on with many other cases in which the Supreme Court has upheld the exercise of the police power as in the case of an ordinance prohibiting the keeping of billiard or pool tables for hire or public use,[59] or an ordinance regulating the sizes of loaves of bread,[60] or a statute forbidding the possession of liquor,[61] or the numerous cases in which zoning ordinances have been upheld.[62] An exhaustive study of innumerable cases in which the police power of the states has been upheld by the United States Supreme Court might easily be given were it properly within the province of this paper. However, before leaving the question it is well to point out that police power of a state, summed up very clearly and comprehensively in the case of *Miller v. Board of Public Works*,[63] is closely analogous to the police power exercised by the Federal Government.

The Federal Government can not exercise police power except in those cases where the power of regulation is granted to the Federal Government, either expressly or by nec-

58 Munn v. People of Illinois, 94 U. S. 77 (1877); Slaughter-House Cases, 16 Wall. 36 (1873).

59 Murphy v. California, 225 U. S. 623 (1912).

60 Schmidinger v. Chicago, 226 U. S. 578 (1913).

61 Samuels v. McCurdy, 267 U. S. 188 (1925).

62 Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

63 195 Cal. 477, 234 Pac. 381, 38 A. L. R. 1479 (1925), *error dismissed*, 273 U. S. 781.

essary implication. Congress is expressly authorized to legislate upon all matters affecting interstate commerce as has already been shown. In those instances in which Congress has not exercised regulation in this field, a state may regulate providing it does not impede interstate commerce.[64] In *Gibbons v. Ogden*[65] it was determined that when Congress does regulate it has primary control over the subject and supersedes any state law which may be in conflict. There is no doubt that the states may exercise control over navigable waters so long as Congress has not acted, but when Congress chooses to act it is not precluded by anything that the states have done from assuming entire control of the matter.[66] Congress has the power to go beyond the general regulation of commerce and to determine even the minute details of such regulation, establish police regulations as well as the states, confining their operations to the subject over which it is given control by the Constitution.[67] Now, there seems to be little doubt that the power of regulating commerce is in the nature of a police power, because it aims directly to secure and promote the public welfare. The Supreme Court considers that Congress has such power as in the *Lottery Case*.[68] There is no logical reason why Congress, which is the only power which can regulate interstate commerce, does not possess over that commerce the full and complete powers of government. This is brought out by Judge McPherson,[69] upholding the federal Pure Food and Drug Act:

"Congress has enacted a safety appliance law for the preservation of life and limb. . . . Congress has enacted the Livestock Sanitation Act to prevent cruelty to animals. Congress has enacted the Cattle Contagious Disease Act to more effectively suppress and prevent the

64 Gilman v. Philadelphia, 3 Wall. 713 (1866).

65 9 Wheat. 1 (1824).

66 Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1 (1888); West Chicago Street R. Co. v. Illinois *ex rel.* Chicago, 201 U. S. 506 (1906); Louisville Bridge Co. v. United States, 242 U. S. 409 (1917).

67 Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885).

68 Champion v. Ames, 188 U. S. 321 (1903); FREUND, POLICE POWER § 66.

69 Shawnee Milling Co. v. Temple, 179 Fed. 517 (C. C. S. D. Iowa 1910).

spread of contagious and infectious diseases of livestock. Congress has enacted a statute to enable the Secretary of Agriculture to establish and maintain quarantine districts. Congress has enacted the Meat Inspection Act. Congress has enacted a Second Employer's Liability Act. Congress has enacted the Obscene Literature Act. Congress has enacted the Lottery Statute. . . . Congress has enacted . . . statutes prohibiting the sending of liquors by interstate shipment. . . . These statutes, police regulations in many respects, are alike in principle to the Act [National Pure Food Law] of June 30, 1906, under consideration."

Since Judge McPherson has made this pronouncement, the Supreme Court has upheld the exercise of the police power in numerous other cases which can not be gone into in detail here but which, nevertheless, point unmistakably to the conclusion that this powerful right of the Federal Government has been exercised in a great many instances to correct evils which menace the public welfare in not nearly so great a degree as the public welfare is menaced by allowing defamation by radio to go uncontrolled without the regulatory benediction of a federal statute.

Citing further cases in which the police power of the Federal Government has been exercised, reference is made to the "White Slave Case";[70] the "Pure Food Case";[71] cases arising under the Sherman Anti-Trust Act,[72] the Federal Safety-Appliance Act,[73] the Federal Hours of Service Act,[74] the National Motor Vehicle Theft Act,[75] the Adamson Act,[76] and the Grain Futures Act,[77] and to the Pipeline Case.[78]

The federal police power has also been exercised by Congress by means of a treaty, and this power is not limited to subjects in which it is empowered to legislate in purely

70 Hoke v. United States, 227 U. S. 308 (1913).

71 Hipolite Egg Co. v. United States, 220 U. S. 45 (1911).

72 Standard Oil Co. v. United States, 221 U. S. 1 (1911); Northern Securities Co. v. United States, 193 U. S. 197 (1904).

73 Southern R. Co. v. United States, 222 U. S. 20 (1911).

74 Baltimore & O. R. Co. v. Interstate Com. Comm'n, 221 U. S. 612 (1911).

75 Brooks v. United States, 267 U. S. 432 (1925).

76 Wilson v. New, 243 U. S. 331 (1917).

77 Board of Trade v. Olsen, 262 U. S. 1 (1923).

78 Prairie Oil & Gas Co. v. United States, 204 Fed. 798 (Com. Ct. 1913).

domestic affairs.[79] The United States Constitution confers upon the Federal Government exclusive powers to make treaties with foreign governments.[80] We have, then, two grounds upon which the right of the Federal Government to exercise its police power in controlling defamation by radio may squarely rest, namely, the power to regulate interstate commerce and the power to make treaties with foreign governments. The *Migratory Bird Case*[81] is the leading one illustrative of the power to enact legislation to effect the execution of a treaty.

It is to be closely noted here that in substantiating the right of the Federal Government to further legislate in this particular field I have not based this right upon any of the emergency powers, so called, which would confer upon the Federal Government complete control in time of a national emergency and which has been severely criticized as an abridgment of the right of freedom of speech of the people of the United States. Thus, it has been claimed [82] that President Roosevelt holds the power of a censor of radio broadcasting by virtue of the authority granted him in the Communications Act of 1934. It is pointed out that the Communications Act gives the President arbitrary and unqualified power to close down and confiscate any radio station during a "national emergency," such as the New Deal proclaims, without giving any explanation for his actions. Objection is made not that this power has been abused but that the power may not properly be granted under our constitutional set-up.[83]

Justification for the exercise of federal police power in respect to control of defamation by radio might have been placed on the right of Congress to pass police restrictions un-

79 Ross v. McIntyre, 140 U. S. 453 (1891).

80 U. S. CONST. Art I, § 10, Art. II, § 2.

81 Missouri v. Holland, 252 U. S. 416 (1920).

82 Caldwell, *Freedom of Speech and Radio Broadcasting*, in "Radio, The Fifth Estate," ANNALS, AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 77, citing section 606 (c) of the Communications Act of 1934.

83 See, in this connection, MILL, ON LIBERTY (Everyman's ed.) 77.

der the taxing power.[84] It might also have been placed upon various other justifiable powers of the Federal Government which, however, fade into insignificance and unimportance in the presence of the thoroughly constitutional right granted under federal control of interstate commerce and the treaty power of the United States. Certainly the Communications Act of 1934, in addition to being enacted pursuant to the right to control interstate commerce, as shown, could logically be held to be valid because it renders effective provisions of international treaty or convention relating to radio entered into by the United States.

Further strengthening the argument for the language used in a number of leading cases to the effect that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by some or all of the incidents which attend the exercise by a state of its police power.[85] Alfred Russell [86] has expressed the thought that as a state develops politically, economically and socially, the police power also develops to meet these changing conditions. Certainly the same thought can be applied to the federal police power, and by the same token such power may be extended to federal control of defamation by radio, for what better exemplification of changing conditions to be covered by political, economic and social development can be found than here?

Much attention has been given by the Supreme Court to demonstrate that vested interest or vested property rights can not, because of conditions once obtaining, be exerted against the proper exercise of the police power.[87] The term "vested right" is here meant to imply a vested interest which

84 Gilmore v. United States, 268 Fed. 719 (C. C. A. 5th, 1920); United States v. Doremus, 249 U. S. 86 (1919); Oliver v. United States, 267 Fed. 545 (C. C. A. 4th, 1920).

85 Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146 (1919); Ruppert v. Caffey, 251 U. S. 264 (1920).

86 RUSSELL, POLICE POWER OF THE STATE (1900).

87 Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67 (1915).

it is right and equitable for the Federal Government to recognize and protect and of which the individual could not be deprived arbitrarily without injustice. But a person has no vested right in a statutory privilege or in a license granted.[88] However, by virtue of a special provision of the Communications Act of 1934,[89] there is no vested right or property interest granted in a license. Further, federal control of defamation by radio does not involve a deprivation of any vested right in property but is only an exercise of the paramount right of the government to so regulate the use of property so as not to be inimical to the public welfare, which is within the province of all police power, state and federal, the power which is the least limitable of the powers of government.[90]

Our argument here gains greater strength when we examine closely the exercise of federal police power under the National Motor Vehicle Theft Act which was upheld by the United States Supreme Court on the theory of a proper exercise of federal police power in the field of interstate commerce.[91] Radio communication legislation is certainly valid under the same process of reasoning.[92]

Persons engaging in a business affected with a public interest must be prepared to accept regulation. All radio licenses are granted only upon this condition and may, therefore, be revoked without liability on the theory of confiscation of property. This doctrine is well established.[93] It has

88 Pratt v. Brown, 3 Wis. 603 (1854); Horn v. State of Ohio, 1 Ohio St. 15 (1852).

89 § 301.

90 District of Columbia v. Brooks, 214 U. S. 138 (1909).

91 Brooks v. United States, 267 U. S. 432 (1925).

92 See: Hamilton v. Kentucky Distilleries & W. Co., 251 U. S. 146 (1919); United States v. American Bond & Mortgage Co., 31 Fed. (2d) 448 (N. D. Ill. 1929).

93 General Electric Co. v. Federal Radio Commission, 31 Fed. (2d) 630 (App. D. C. 1929); Technical Radio Laboratory v. Federal Radio Commission, 36 Fed. (2d) 112 (App. D. C. 1929); City of New York v. Federal Radio Commission, 36 Fed. (2d) 115 (App. D. C. 1929).

been repeatedly held that regulation of radio is a valid exercise of the power of Congress under the Commerce Clause.[94]

Examination of the class of radio communications held to be interstate commerce certainly shows that commercial point-to-point, shore-to-ship, and the ship-to-ship services are within the classification because of the means employed for such communication.[95] Amateur communications are also within the classification as they impose a burden on interstate commerce even though they might of themselves be intrastate only. Certainly defamation by radio is a more direct burden on interstate commerce than were diseased cattle which strayed across a state line and which were held to be a burden on interstate commerce.[96]

State and Municipal Regulation

Whenever the interstate and intrastate transactions of carriers are so related that the movement of one involves the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule, for, otherwise, Congress would be denied the exercise of its constitutional authority and the state and not the Nation would be supreme within the national field.[97] This pronouncement of the Supreme Court of the United States is helpful in viewing, as I intend now to do, the legislation which the various states have enacted with respect to radio broadcasting. In 1929 the statement was made [98] that a surprisingly large amount of radio legislation is to be found in the statute

94 White v. Federal Radio Commission, 29 Fed. (2d) 113 (N. D. Ill. 1928); United States v. American Bond & Mortgage Co., 31 Fed. (2d) 448 (N. D. Ill. 1929).

95 See: Pensacola Tel. Co. v. West. Union Tel. Co., 96 U. S. 1 (1878); Western Union Teleg. Co. v. Missouri *ex rel.* Gottlieb, 190 U. S. 412 (1903); Western Union Teleg. Co. v. Speight, 254 U. S. 17 (1920). See, also, 24 Op. Att'y Gen'l 100.

96 Thornton v. United States, 271 U. S. 414 (1926).

97 Houston, E. & T. R. Co. v. United States, 234 U. S. 342 (1914).

98 Report of the Standing Committee on Radio Law of the American Bar Association, presented at the Annual Meeting at Memphis, Tenn., October 23-25, 1929.

books of the several states and in ordinances of cities, towns and villages. Indeed, in 1930 the State of New Jersey [99] enacted a minature Radio Act of its own restricting its operation of broadcasting. Again the report of the Communications Committee of the American Bar Association,[100] in 1931, stated that the amount of state legislation bearing directly or indirectly on radio communication continues to increase, at least with respect to number of bills introduced in the state legislatures.

The report of the Communications Committee of the American Bar Association for 1932 [101] made this statement:

"In the absence of any pronouncement by the United States Supreme Court and with only a very few decisions by other courts, the boundary line between federal and state jurisdiction in radio regulation continues vague and obscure. As a result, states and cities are continually adding to the list of enactments of doubtful validity. This tendency has been given emphasis during the recent past by legislation imposing license fees or privilege taxes of one sort or another on the operation of broadcasting stations and of receiving sets."

The same trend toward state legislation is noticeable in the Communications Committee Report of the American Bar Association for 1933.[102] The report read, in part:

"Although the past year has seen great activity in the several state legislatures and a great many bills were introduced touching communication agencies, and particularly radio broadcast stations and companies, attempts at such legislation were largely abortive. The demand for such legislation arose generally for a desire and a need for new sources of revenue. The objection to such legislation, which prevailed in practically all instances involving radio, was invalidity as an attempted usurpation of the purely federal function of regulating interstate and foreign commerce."

The year 1934 saw no abatement of the rush for legislation affecting radio by the states. Problems resulting from state legislation have reached the stage where they may represent a new and added burden on the broadcasting in-

99 SENATE 116 (introduced by Mr. Yates, February 3, 1930). See U. S. Daily, Mar. 15, 1930.

100 Presented at the 54th Annual Meeting at Atlantic City, N. J. (1931).

101 Presented at the 55th Annual Meeting at Washington, D. C. (1932).

102 Presented at the 56th Annual Meeting at Grand Rapids, Michigan (1933).

dustry far more serious than any other burden so far placed upon the industry. An interesting summary of some of the more important types of state legislation on this particular subject is contained in a recent report [103] of the National Association of Broadcasters. I quote from the report as follows:

"Arizona H. 118 provides for a general sales tax of 1 per cent on gross revenues, specifically including radio advertising.

"Kansas S. 331 and H. 438 provide for a general sales tax on services, specifically including radio broadcasting. This bill has just been stricken from the calendar but may be introduced again.

"Missouri S. 33 provides for a tax of 3 per cent on gross receipts, specifically including radio advertising.

"New Mexico S. 1, which has passed both houses, provides a 2 per cent sales tax on gross receipts, specifically including radio broadcasting.

"Oklahoma H. 440 provides for a 3 per cent tax on gross sales, specifically including broadcasting.

"Pennsylvania H. 1353, just introduced, provides for special taxes on telephone messages and broadcasting, the tax on broadcasting being 2 per cent of the gross receipts.

"Texas S. 62 and H. 661 provide for general sales taxes, including a tax of 2 3/4 per cent on the gross receipts of radio broadcasting. As a further measure of control, Texas S. 421 provides that every broadcasting station must file detailed semi-annual reports with the state comptroller.

"Washington already has a sales tax bill which, in its application to broadcasting, is now under consideration by the State Supreme Court. In addition, the Washington House, on March 10, passed H. 237, a general tax bill, including a tax on all radio broadcasting stations amounting to 10 cents per watt of rated power annually.

"West Virginia already has a tax on all amusement enterprises, including broadcasting, and H. 527 and S. 274 propose an amendment to this Act making the tax ½ of 1 per cent on gross revenue. Broadcasting is specifically included in both these bills.

"The foregoing outline indicates what the broadcasting industry is immediately facing in the way of taxation if it is found that broadcasting revenues are subject to state taxes. Obviously, however, this would only be the beginning. On the other hand, the whole structure of federal regulation of radio rests on the assumption that all radio transmission, including broadcasting, is exclusively interstate com-

103 3 N. A. B. Rep. 753 (1935).

merce. If it is held by the courts that some broadcasting is intrastate in character, the results, both in imposing enormous additional burdens on the broadcasters, and in breaking down the whole structure of federal regulation, are simply incalculable."

Nor is the state interference in regulation and control of radio limited to the legislative branch of the government. The judicial branch of the state governments is also active. The outstanding development in this field is the announcement on March 11, 1935, that the United States Supreme Court will review the findings of the Supreme Court of Georgia in the case of the *City of Atlanta v. Oglethorpe University*,[104] a case which is of vital importance to the entire broadcast industry. The City of Atlanta imposed a license fee of $300 per year on all broadcast stations. Oglethorpe University, which operates Station WJTL, went to the courts and a first decision was rendered by the Supreme Court of Georgia. This decision held in substance that even though some of the messages from WJTL might go beyond the State lines, that fact would not make the broadcasting of the station interstate commerce. After this first decision the case went back for trial to the lower court on the merits of the case. The trial judge directed a verdict for the defendant, the City of Atlanta, and the case was again appealed to the Supreme Court of the State of Georgia. The decision of this court, handed down January 21, 1935, sustained the trial judge in directing a verdict for the defendant. This decision, manifestly based on an apparent admission in the pleadings that a considerable part of the activity of WJTL is intrastate, appears directly at variance with the many decisions, including the federal,[105] which hold that for purposes of regulation all broadcasting, without exception, is interstate commerce. The same point was in issue in a

104 178 Ga. 379, 173 S. E. 110 (1934), *appeal dismissed, on motion of counsel for the appellant,* on April 8, 1935 (295 U. S. 770).

105 Brown v. Houston, 114 U. S. 622 (1885); Whitehurst v. Grimes, 21 Fed. (2d) 787 (E. D. Ky. 1927); United States v. American Bond & Mortgage Co., 31 Fed. (2d) 448 (N. D. Ill. 1929).

case [106] in the State of Washington. Here the Court granted a permanent injunction restraining the Tax Commission of the State of Washington and its members from collecting a tax on the gross revenues of the broadcasting station provided in the State law. Both of these cases will provide interesting, helpful and significant decisions, which will have a very important effect upon the problem now before us here. It is indeed unfortunate that there is little prospect of any early expression by the Supreme Court of the United States on the question of defamation by radio. But that fact only makes the need for legislation by Congress the more acute. A federal statute controlling defamation by radio, therefore, stands as the only way in which the problem can be satisfactorily solved. It is interesting to note in passing that some of the state legislators have written into their proposed regulatory statutes concerning radio that one of the penalties for nonobservance of the statute will be to declare the broadcasting stations a nuisance and subsequently declare the abatement of this nuisance by refusing to allow the station to broadcast. Here again is a direct challenge to the paramount authority of the Federal Government which, alone, possesses the authority both to revoke and issue broadcast licenses.[107] Of course, we do not mean to deny completely the right of state and municipal regulation of radio communication. In a new field of jurisprudence such as this there is abundant occasion, however, for proceeding thoughtfully and deliberately. This is especially true of radio regulation, which must be based on a recognition of sound engineering as well as legal principles. That this is not completely overlooked by those who have played an important part in writing the early history of radio regulation is evident from a statement made by a former general counsel of the Federal Radio Commission: [108]

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106 Fisher's Blend Station v. Tax Commission of Washington, 45 Pac. (2d) 942 (Wash. 1935).

107 See: COMMUNICATIONS ACT OF 1934, §§ 307 (a-e), 308 (b), 311, 312 (a).

108 Statement made in May, 1929, by Bethuel M. Webster, Jr.

"Since radio is a new art, there is hope for establishing a uniform and scientific system of control. Transmission of intelligence by radio is interstate commerce, and public interest requires congressional action to administer and to conserve the ether for the maximum benefit of the people of the United States. In recognition of local interest, state legislatures and the lesser bodies have framed laws imposing a measure of control on radio transmission and reception and on the use of apparatus causing interference. Some of these measures are legitimate and useful, falling well within the scope of the police power. Some are clearly unconstitutional, since they interefere with federal regulation."

One of the most comprehensive studies of state and municipal regulation of radio communication is that made by Paul M. Segal and Paul D. P. Spearman,[109] of the Legal Division of the Federal Radio Commission, in 1929. In this publication they have shown the wide range of radio laws enacted by states and municipalities by the following classification of some in effect at that time:

"I. Laws providing direct local control of radio transmission or apparatus, such as those
  A. Prescribing local licenses or privilege taxes;
  B. Limiting the operation of reception apparatus;
  C. Restricting the hours of transmission;
  D. Dealing with the location of transmission equipment
    1. To prevent the type of interference known as 'blanketing' (laws limiting the power output of transmitters);
    2. To make zoning laws applicable to radio towers and buildings;
  E. Extending the state's control over public utilities to radio transmission;
  F. Concerning themselves with the subject-matter of radio transmission.

"II. Antinuisance laws:
  A. For the control of locally originating electrical interference with radio reception;
  B. For the control of loud-speaker operation.

"III. Laws dealing with apparatus construction:
  A. As to towers, poles, guy wires, antennas, etc.;
  B. As to wiring (fire hazards)."

It is to be noted that it is true that radio broadcasting stations are licensed in "public interest, convenience and ne-

109 State and Municipal Regulation of Radio Communication (U. S. Government Printing Office, Washington, May, 1929, pp. 2, 3).

cessity," a phrase borrowed by the Congress from public utility law, but it does not follow that the broadcasting station is held out, either by itself or by the law, as a public utility for the transmission of broadcasting. It is certainly charged with a high degree of public responsibility so far as the reception of broadcasting is concerned. When a radio program is broadcast by a station and it is picked up by numberless receiving sets that program must be dedicated to the best interests of the public. And unless the program is so arranged as to interest the public generally it must fail in its purpose. This is the only public utility aspect that radio might possibly possess to our way of thinking and certainly does not bring it under the general classification of a public utility. To hold otherwise would be to invite numerous contradictory situations, impossible of reconciliation, but that may be properly the subject for another paper and is not within my province here, even though the public utility aspect of radio broadcasting will be later touched upon in connection with the subject of censorship.

A valuable conclusion is drawn by the Messrs. Segal and Spearman in the following language, which is of interest in this connection: [110]

"The development of each of the major instrumentalities of interstate commerce in the United States has been accompanied by long and expensive quarrels over the power to regulate them. Thousands of ordinances have been enacted only to be found invalid or unwise. If radio communication is now to traverse the same route, a vital element in the national development will be handicapped. Radio by its physical nature is the most nation-wide of all our commercial agencies. Equally it is the most sensitive to regulation. The guiding principle of attempted local control should be extreme caution."

Extreme caution has not been the rule where local control has been concerned however. In the field of defamation by radio, particularly the state legislation has been noted for its variety rather than for its consistency. As has already been

110 PAUL M. SEGAL AND PAUL D. P. SPEARMAN, STATE AND MUNICIPAL REGULATION OF RADIO COMMUNICATION (U. S. Government Printing Office, Washington, May, 1929, p. 15).

noted, three states have provided for definite laws covering defamation by radio. The California statute [111] persists in defining slander as follows:

"Slander is a malicious defamation, orally uttered, whether or not it be communicated through or by radio or any mechanical or other means or device whatsoever, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or disclose the actual or alleged defects of one who is living, or of any educational, literary, social, fraternal, benevolent or religious corporation, association or organization, and thereby to expose him or it to public hatred, contempt, or ridicule. . . ."

The Statute then goes on to set the penalty for slander and also concerns itself with the venues of criminal slander cases. It is interesting to note that in the matter of venue,[112] the jurisdiction of a criminal action for slander which is uttered into, or is communicated through or by any radio, or connected radios, or any other mechanical or other devices, is in the county where the slander is so uttered, or in the county wherein the person slandered resided, or the educational, literary, social, fraternal, benevolent or religious corporation, association or organization slandered was located at the time of the utterance of the alleged slanderous words. If this same concept of venue were introduced into the federal legislation which ought to be passed, then the need for making this an exclusive matter of federal control can not go by unchallenged.

The introduction of criminal liability and responsibility for defamation by radio indicated that the states are recognizing by statute that the distinctions between libel and slander, which always have been artificial, have been made more so by the advent of radio broadcasting. The differences in the rules of libel and slander have grown up on the theory that more harm results from libel than from slander because persons are liable to attach more weight to a written word, and because there is a probability of a wider circulation as

111 GEN. LAWS OF CAL. (Deering, Supp. 1929) § 258.

112 CAL. STATS. (1931), c. 87, § 784 (a).

well as permanency of the written word. There is a growing tendency to ignore the distinctions between libel and slander, to call them both defamation and to consider the circumstances only in the determination of damages and penalty.[113]

The Illinois Statute [114] has simplified legislation in this field by merely extending by statute the already existing libel law to broadcast defamation. Substantially the same is the tenor of the Oregon Statute.[115] In Ohio a bill [116] defining and providing a penalty for the publishing of libelous or slanderous matter by means of radio broadcasting, although not comprehensive or very much in detail, demonstrated that its Legislature was seriously considering this kind of legislation. That particular Bill referred both to libel and slander and provided a penalty of fine and imprisonment. A Kansas slander bill,[117] making it a criminal offense to utter false or defamatory remarks over the radio, was introduced by Representative Robb and met the same fate as the Ohio bill. In New York an elaborate bill [118] was introduced in the Senate by Mr. Hickey. This bill attempted "to amend the penal law in relation to slander by radio," rather than to libel by radio. It is interesting to note in this Bill, Section 1357, that

"to sustain a charge of slander by radio, it is not necessary that the matter complained of should have been seen by another. It is enough that the defendant, having actual knowledge of such matter, personally originated or disseminated such matter to the public by any means, or that the defendant having actual knowledge of the contents thereof permitted such matter to be originated and disseminated to the public by a radio operated and controlled by such defendant, provided, however, that the provisions of this section shall apply only to matter originated by the owner, operator, or one in control of such apparatus, and shall not apply to matter obtained by or supplied to him from other sources."

The bill also provides in Section 1359 (a and b) for indictment for slander against both resident and nonresident, pro-

113 DAVIS, LAW OF RADIO COMMUNICATION, c. 10, p. 157.

114 ILL. REV. STAT. (Cahill, 1927), c. 38, p. 936.

115 Ore. Laws 1931, c. 366, p. 681.

116 SENATE 316, introduced by Senator Norton. Referred to the Committee on the Judiciary. Favorably reported as amended. Killed in the Senate.

117 House Bill No. 155.

118 Senate Bill No. 1886 (Introduced March 4, 1932).

vided in the latter instance that an action for slander by radio against a person not a resident of this State must be found and tried in the county where the apparatus is located. Minnesota [119] and Texas [120] have proposed statutes covering this question. According to a report in the Houston Chronicle of March 8, 1935, purchasers of radio time for political speeches would be revealed to the public, under a bill introduced by Senator T. J. Holbrook, of Galveston, which is another innovation in the field of control of defamation by radio.

Most recent of all this type of state legislation is that of the State of Washington where a bill [121] introduced by Representative Donald A. McDonald, of King County, makes a speaker guilty of libel who exposes a person to "hatred, contempt, ridicule or deprives him of the benefit of public confidence." Referring to the bill, Representative McDonald [122] says:

"After receiving scores of protests from radio listeners asking that something be done to free the air of slander and vituperation I introduced this bill. Radio speakers are constantly making statements that no newspaper can legally print, even if they desired. We must and will clear the air of slanderous attacks on reputable citizens."

A perusal of the state statutes which have been introduced above must present, even to the casual observer, a striking lack of uniformity of intent, purpose, venue and punishment. Yet we have only a few of the states represented. Let it be pointed out here and made a feature of special note that even though control of defamation by radio has been left, up to the time of writing this article, to the individual states, only three of them have succeeded in affixing any kind of definite legislation to their statute books. In all of the proposed state legislation and in all of the actual statutes there is no sem-

119 Senate Bill 588 (Providing punishment for slander by radio).

120 House Bill No. 326 (Defining and providing punishment for radio slander).

121 House Bill No. 531 (Introduced February 21, 1935).

122 Report of Lester M. Hunt, in the Seattle Post-Intelligencer, February 21, 1935.

blance of uniformity. It is also to be noted here that the states have not legislated in this respect because there was a lack of need for such legislation. Indeed, a summary of the cases of defamation by radio which have been before the courts of the states and which are widely scattered, both as to territory and final determination, demonstrate that the need of control of defamation by radio is of paramount importance, so that the percentage of three states out of forty-eight, which is admittedly not encouraging, need not be discouraging to us in our attempt to secure for the Federal Government the right to exercise exclusive jurisdiction of defamation by radio.

NATURE OF DEFAMATION BY RADIO

Another thing which has been shown by a study of the proposed and actual state statutes and the cases which have been decided in the state courts is the surprising failure of all of them to agree unanimously on whether defamation by radio is libel or slander. Radio broadcasting is, to be sure, a new implement for the ancient art of defamation which men have used in the past and will continue to use in the future. Courts and legislators will be faced with the problem of determining unusual questions in this respect. While the differences between libel and slander must ever remain, both as to the common law and statutory law, as has been shown in another part of this article, yet that is no reason why we should adhere to and insist upon the fundamental element in libel, to be done by adhering to this fundamental distinction was to punish for the wider diffusion and the more serious damage incurred by written defamation over the less serious oral defamation. Radio has quite overcome this distinction. If further argument were needed we might proceed on the theory, held by all text writers,[123] that the oral reading of written libelous matter is itself a libel. After all, many of the rules of the law of libel are illogical and arbitrary, and

123 See, for instance, ODGERS, LIBEL AND SLANDER (4th ed.) 151.

there seems to be no good reason why they should continue to be perpetrated and perpetuated.

Professor Vold [124] has built up a strong argument for his highly tenable thesis that the underlying basis for liability is the law of defamation and not the law of negligence, introducing a logical trend of thought, a line of reasoning which is sure to make itself felt as the law of this important subject continues to develop.

It has been held that the simplest and best method of considering defamation was to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel.[125] In overruling a demurrer to a complaint seeking to hold a radio broadcasting station for publication of libelous statements, a trial court,[126] in Spokane, Washington, answered as follows the contention that language broadcast over the microphone was slander rather than libel:

"If it is written or printed, it has more harmful effects upon the person concerned and it carries with it the inference of deliberation and preparation. Everybody knows that when they hear a statement over the air that statement is not an extemporaneous affair, that it is a prepared statement and that it represents deliberation and reflection and preparation of the announcer or person who has submitted it for broadcasting. It undoubtedly must be true, then, that we will have to regard the prepared statement submitted to the radio company for publication over the radio in the same category with a libel. I don't see how it can be regarded otherwise."

Attention is sometimes given to the general doctrine of "no liability without fault," in this connection, a doctrine which always permits the actor, if careful to throw the risks of his activity on his neighbors while he personally disclaims responsibility. This phase of liability has been discussed comprehensively in a number of scholarly articles,[127] which lead

124 Vold, *Defamation by Radio,* 2 J. RADIO L. (1932) 673 *et seq.*

125 Van Vechten Veeder, *History and Theory of the Law of Defamation* (11) 4 COL. L. REV. 33, 54.

126 Miles v. Wasmer (Unreported. Decided in the Superior Court of the State of Washington for the County of Spokane. Discussed in 3 J. RADIO L. 161, 162).

127 See 2 J. RADIO L. (1932) 687.

to the conclusion that historically the reverse of "no liability without fault" is more nearly true. Some very recent cases on rather novel fact situations have frankly relied on that historical position as the general rule of tort liability.[128] But the doctrine can not fairly apply to defamation by radio.

In general, the legislative proposals that have been introduced are based on the statutes applying to newspaper publication.[129] In some instances existing laws applying to newspapers would simply be amended by adding such a phrase as "or by radio broadcast." In practically every instance there is a clear assumption that newspaper publication and broadcasting are closely parallel. Every student of the law is painfully aware of the truth of the axiom, "All analogies in the law are dangerous." Yet there is a similarity between defamation by newspapers and defamation by radio in spite of the fact that some hold that the parallel breaks down at several points along the line. Let us examine into the analogy to conclude definitely that the comparison is fairly taken.

The law is well-settled that the publisher of false and defamatory utterances is liable at his peril to the victim whose reputation is injured thereby.[130] In the *Peck v. Tribune Co.*[131] Justice Holmes, of fond memory, said:

> "If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whenever a man publishes, he publishes at his peril.' . . . The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual . . . the usual principles of tort will make him liable if the statements are false . . . ."

Mistakes, no matter what their origin or their reason for being present, afford no excuse. Even as between a nonnegli-

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128 Green v. General Petroleum Corporation, 270 Pac. (Cal. 1928) 952; Sussex Land & Live Stock Co. v. Midwest Refining Co., 294 Fed. 597 (C. C. A. 8th, 1923).

129 Bellows, *The Threat of Libel and Slander Laws* (1935) 8 BROADCASTING MAGAZINE, at p. 17.

130 Taylor v. Hearst, 107 Cal. 262, 40 Pac. 392 (1895); Sweet v. Post Pub. Co., 215 Mass. 450, 102 N. E. 660 (1913); Peck v. Tribune Co., 214 U. S. 185 (1909).

131 *Op. cit. supra* note 130.

gent publisher and his passive innocent victim, the law unhesitatingly places the risk of unprivileged defamation by publication upon the active publisher and not upon his passive victim.[132] All this is based on the theory that he whose activity creates the risks and who derives the benefits therefrom, must also bear its burdens. The absolute burden has evidently not been too great, for great newspapers the length and breadth of the land in which this law exists continue to thrive and flourish. The same rule seems applicable to radio broadcasting for if the risk of uncensored defamation of innocent victims is greater in the business of ordinary radio broadcasting than it is in the business of newspaper publication, the general public should have greater and not less protection against being further victimized. And radio stations are commercially minded, let there be no mistake of that fact, and they sell time the same as newspapers and other publications sell space for advertising revenues. It is claimed, with strong reason, that there is complete control of the publisher in both cases and that the broadcasting station publishes or participates in the act of publication quite as effectually as does the newspaper.[133]

Active, joint participation of both the speaker and the broadcaster is evident from an understanding of the technique of broadcasting,[134] as explained in this language:

"In the usual radio transmission there are two parties, the speaker and the broadcaster. If the matter transmitted be defamatory, two must cooperate to create the harm. No other system parallels it. The utterance of the speaker does not leave the studio until transmitted by the operations of the station owner. They must act in concert to complete the publication."

In order not to unduly confuse the analysis here, let us be reminded that what is being written here is an exemplification of abundant reason for saying that a person or persons who defame by radio actually do publish; also, that there is

132 Walker v. Bee-News Pub. Co., 240 N. W. 579 (Neb. 1932).
133 Vold, *Defamation by Radio* (1932) 2 J. RADIO L. 679.
134 DAVIS, LAW OF RADIO COMMUNICATION 162.

a joint liability of the speaker and the broadcaster, as is evident from the nature of their close association. Both of these things must be kept in mind during this phase of the discussion if we are to clearly understand the issue.

In considering this question, we can not escape the broad principle that as to all defamation, all persons are liable in law who are liable in fact. We must be mindful also of the principle that "all who assist in publication are liable." [185] The principle that all aiders and abetters are liable also is inescapable.[186] The familiar saying, "tale-bearers are as bad as tale-makers," is exemplified in the classic lines of Mrs. Can and Sir Pet,[187] repeated here as apropos of the subject:

> "Mrs. Can. But surely you would not be quite so severe on those who only repeat what they hear?
>
> "Sir Pet. Yes, Madam, I would have law merchant for them too; and in all cases of slander currency whenever the drawer of the lie was not to be found, the injured parties should have a right to come on any of the indorsers."

Broadcasters are "indorsers of the scandal" which the speaker pours into the microphone. The broadcaster operating the broadcasting station actively participates with the speaker at the microphone in the publication of the utterances broadcast. While the speaker utters his words into the station's microphone, the station's operators must be actively concerned in carrying out the processes by which the words so uttered by the speaker into the microphone are broadcast to the listening public.[188] Switches provided at the microphone and at various other places in the physical equipment of the broadcasting apparatus always enable the station to shut off the broadcasts if libelous matter is used by the speaker. Thus could the station save itself harmless from liability for such defamation.

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185 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 298.
186 Tucker v. Eatough, 186 N. C. 544, 120 S. E. 57 (1923).
187 Richard Brinsley Sheridan's celebrated play, "The School for Scandal."
188 See 54 A. B. A. REP. 414.

The burden of protecting itself from liability for defamation rests squarely upon the broadcasting station and not upon anyone else. Commercially-minded radio broadcasting, which has become more powerful and gigantic even than newspapers,[139] seems hardly to be in dire need of any favors or concessions in order to permit the industry to prosper. Without relaxation of the law of defamation in their favor, broadcast stations continue to thrive. The demand for station licenses becomes ever greater. In making this statement there is no show of hostility to prosperous broadcast businesses (also a popular habit of the day). It is simply a question on our part of comparative justice and of placing the responsibility squarely where it seems most justly to rest. Assuming any other theory would be fraught with pernicious consequences inimical to the general welfare and would become a monstrous injustice.

Broadcasters set up an imposing defense to this line of argument, showing numerous instances in which the newspaper analogy breaks down. They admit that many programs are prepared with the active cooperation of the station staff and admit in such cases that the newspaper parallel is close. But they disclaim any liability for responsibility for defamation which might occur in the course of a public events broadcast, where the broadcaster is almost invariably unable to know in advance what is going to be said. But the person defamed has no way of knowing either what is going to be said. He can not arrest the libel before it occurs. He deserves

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139 The Crosley Radio Corporation of Cincinnati spent approximately $500,000 for a 500,000-watt transmitter, even though they were given only an experimental authorization to use that great power. The right to use it was subsequently materially revoked, following a protest against use of that great power by Canadian stations. See Crosley Radio Corp. v. Federal Communications Commission, in United States Court of Appeals for the District of Columbia.

Journal Co. v. Federal Radio Commission, 48 Fed. (2d) 461 (App. D. C. 1931). This case brought out fact that the station investment exceeded $300,000. Gross annual operation costs amounted to the same sum.

Great Lakes Broadcasting Co. v. Federal Radio Commission, 37 Fed. (2d) 993 (App. D. C. 1930). This case brought out fact that the station investment exceeded $450,000. Gross annual operation cost was over $300,000.

this measure of protection, this grasp upon those who manage and operate the agencies which are the means of spreading the defamation and of publishing it to ears that would, but for that activity, never hear the libel.

It is also argued,[140] and admittedly with a great deal of popular sympathy, that any speaker over radio may at any moment deviate from his prepared manuscript. Says Dr. Bellows:

"A defamatory statement may be uttered even though the broadcaster has taken every possible precaution to see in advance a copy of what he expects the speaker to say. Since a defamatory statement can be uttered in two or three seconds, the control operator, even if he has strict instructions to switch off the speaker instantly on any deviation from the prepared text, can not always do so before mischief is done.

"If the states enact legislation of the general type now under consideration, the only possible result will be that broadcasters must refuse to allow the use of their facilities in practically all cases where they cannot be absolutely sure in advance as to just what is going to be said. Since broadcasts of this type are precisely the ones most valuable and interesting to the public, it is clear that the public would be the principal loser if such a policy had to be adopted. The remedy for such a situation appears to lie in framing state legislation to provide that broadcasters shall not be liable, either in criminal or in civil action, in the case of broadcasts over which he can have no adequate control."

Dr. Bellows suggests this specific proviso for such contemplated legislation:

"Provided, That no broadcasting station shall be held liable in the case of any defamatory statement uttered by or on behalf of any candidate for public office when such speech falls within the scope of Section 315 of the Communications Act of 1934, nor in the case of any such statement made in any program wherein the broadcasting station cannot, by the exercise of reasonable care, know in advance what is to be said and thus prevent such utterance." [141]

Attention is called to several points raised by Dr. Bellows' proposals. In the first place, he has not suggested that this provision be made the subject of federal legislation. If it is

140 Bellows, *Threat of Libel and Slander Laws* (1935) 8 BROADCASTING MAGAZINE, at p. 17.

141 Section 315 of the Communications Act of 1934 will be discussed in another connection later in this article. See footnote 179, *infra*.

at all worthy and if the Federal Government possesses the authority to act in this respect, as it clearly does, why not concentrate on one single statute rather than attempt to have this provision enacted into 48 separate state codes? In my opinion the proposal here made is not a happy one, because it proceeds from a biased viewpoint and because it attempts to protect the broadcaster from liability which must squarely rest upon his shoulders if we are to take any precaution to protect the general public from allowing the broadcaster to make a noxious use of an instrumentality of commerce which has been entrusted to him by virtue of a federal license.

As to the argument that the control operator can not always shut off the defamatory statements before the message is done, practical demonstration of the operation of a radio station shows that this can be accomplished within a surprisingly short time; but even suppose that it would be impossible for the operator so to act, there is another way in which the broadcaster can protect himself, a method, it is noted, which he has already pursued, namely, to protect himself by special contract with the person speaking over the facilities, thereby enabling him, the broadcaster, to transfer, by this special contract, the liability or, at least, the responsibility for the payment of whatever damages that might result from such defamation over his facilities. The following provision is quoted as indicative of this point:[142]

"The witnesses agree to save the broadcaster harmless against any claims or liability for libel, slander, or infringement of copyrights, or any other demand of any kind whatsoever, brought, claimed, or charged, directly or indirectly, by reason of broadcaster's rendering service in accordance with agreement. It is agreed that nothing will be broadcast in violation of any law or regulation promulgated by any due governmental authority, particularly with reference to libel and slander."

It is evident from this that the broadcaster has two safeguards namely, shutting off the defamatory matter by phys-

142 This clause is to be found in standard contracts used by the leading broadcasting companies.

ical control of the facilities over which the defamation is attempted to be broadcast, and protecting himself from liability by a contract should the defamation be broadcast over his facilities without his being able to prevent such broadcast by actual physical control. It is suggested, also, that insurance against this risk might be taken for such protection, and it is available to him just as it is available to newspapers and other publications. On the one hand, then, we have the broadcaster with all his vast apparatus and facilities having actively participated in defamation by radio hedged about and protected not alone by the financial resources which the operation of a successful business makes possible for hiring competent legal counsel and for taking other means of protecting himself against payment of damages, but also hedged in and protected by other means of escaping payment of damages as I have indicated above. On the other hand, we have the person or persons who is or are defamed by the radio broadcaster, alone and unprotected, without any means of knowing or controlling what is to be broadcast, without any way of effectively striking back or effacing the defamation placed against him or them, and with no way of holding the broadcaster or the speaker, or both, in the absence of any specific and sufficient federal legislation or well-defined body of court determinations which might constitute any substantial body of case law. The inequality here and the injustice of the present situation can not help but convince any fair-minded person that federal control of defamation by radio is the only rational method of correcting this obnoxious situation.

It is also to be noted here, as further exemplification of the inequality between the position of the broadcaster and the injured party where defamation by radio is concerned, that the person defamed is without any tangible proof of the exact nature of the matter broadcast, since broadcasters are neither required to keep stenographic nor mechanical transcriptions of material broadcast. The laws of evidence

meet the problem partly, but do not provide an entirely satisfactory solution. It would appear that rules for the operation of broadcast stations might be further fortified by amendment so as to require broadcasters to keep available a record of material broadcast, at least of advertising continuities, public speeches, political propaganda, and other matter which might appear to contain logically matter which could easily become defamatory.

Argument for relaxing the rule of absolute liability to which the broadcaster should be held is sometimes attempted by resort to comparison to the liability which a telephone company incurs when a slander is published over its facilities. The comparison is not valid, however, because the telephone, as ordinarily operated, is a purely mechanical device so that the agents of the telephone company do not cooperate in any way. With the automatic switchboard and dial system there is not even the necessity for a control operator to make the connection with the person. The situation is exactly the reverse in so far as the broadcasting company is concerned. Again the telephone transmits a message only from one individual to another, whereas in broadcasting the message which the speaker utters into the microphone is actively published by the broadcaster to many listeners. This further defeats the argument with respect to telephone companies.

The same is true of an analogy of radio broadcasting to the modification of the rule of absolute liability enjoyed by telegraph companies. Three interesting cases trace the origin of the exemption of good faith and reasonable care which telegraph companies now enjoy. In the first case [143] the court said:

". . . it is certain that no telegraph company can assume to act as a censor as to the language of messages, or the purpose they are intended to accomplish, yet as a common carrier of persons, though bound to carry everyone who pays the fare, may exclude from his vehicle a per-

143 Nye v. Western Union Tel. Co., 104 Fed. 628 (C. C. D. Minn. 1900).

son having a loathsome, contagious disease, so, equally, it would be the right and duty of a telegraph company to refuse to transmit a message which upon its face is obscene, profane, or clearly libelous and manifestly intended only for the purpose of defamation. . . . Having no duty of censorship, or right to catechise the censor, if he acts in good faith, and the language of the message is such that a person of ordinary intelligence, knowing nothing of the parties or circumstances, would not necessarily conclude that defamation was the object and purpose of the message, it would be his duty to send it, and for his performance of that duty the telegraph company would incur no responsibility."

Another case [144] holds that

"Where a proffered message is not manifestly a libel, or susceptible of a libelous meaning, on its face, and is forwarded in good faith by the operator, the defendant can not be held to have maliciously published a libel, although the message subsequently proves to be such in fact. In such case the operator can not wait to consult a lawyer, or forward the message to the principal office for instructions. He must decide promptly, and forward the message without delay if it is a proper one, and for any honest error of good judgment in the premises the telegraph company can not be held responsible."

Yet a third case [145] gave further weight to this same line of reasoning.

"The company has no right to receive and transmit libelous messages. Its agents are limited in the same way. Like other common carriers, the telegraph company is bound to care and diligence in carrying on its business and to take reasonable care, at least, not to injure others. If a message offered for transmission is anonymous or is libelous on its face, it should not be received and transmitted. The company should so instruct its agents, and the agents should so act."

To attempt to hold a brief for the broadcasters on this same ground and to extend to them the same exemption for good faith and reasonable care becomes an impossibility when we regard the fact that under the Communications Act of 1934 [146] it is specifically declared that radio is not a public utility or a common carrier and that it does not have the responsibility of serving all who present themselves and properly demand service. It is there in the identical position

144 Peterson v. Western Union Tel. Co., 67 N. W. 646 (Minn. 1896).

145 Western Union Telegraph Co. v. Cashman, 149 Fed. 367 (C. C. A. 5th, 1906). See, also, 20 COL. L. REV. 30, at p. 369.

146 § 3 (h).

with a newspaper which may or may not publish as it chooses.[147] We must apply the general rule that the voluntary publisher assumes the absolute risk for that which is published.

As to the question of agency, no situations are possible of conjecture which would not be covered by the same doctrine I have outlined here. If the owner of the broadcast station uses his own facilities for the broadcast, manifestly he would be liable. If he employs another to speak for him, he would be responsible on the ground that the principal is responsible for the wilful or malicious defamation by his agent or employee acting within the scope of his authority.[148] Thus is placed on the broadcaster the burden of choosing responsible assistants to help in the conduct of the broadcasting, those who can be relied upon not to incur additional liability for the principal. If the facilities are loaned or leased or rented to others, there would be no relaxation of the rule of absolute liability either, in my opinion, nor could liability be escaped on the ground that the party or parties using the facilities are independent contractors and are responsible for the defamation. A joint liability, in the interest of the general welfare, must be held to exist in such situation. As has been suggested above, protection from liability for defamation under such a situation is best provided for by having the broadcaster taking the precaution of arranging a special contract whereby the user of the broadcast facilities, no matter what the contract for the use might be, assumes liability for all damages which might result from the use thereof as might be the rule followed in any number of similar situations in our commercial life today.

VENUE

The scope of this particular article does not admit of extended discussion of the question of venue for criminal and

147 HARWOOD, ELEMENTS OF JOURNALISM.
148 NEWELL, SLANDER AND LIBEL (3rd ed.) 459.

civil liability for defamation by radio. This would await determination by specific federal legislation. Certainly it raises intriguing questions and since the questions which are raised but point the clearer to the necessity for federal rather than state regulations I can not resist the opportunity of discussing the question briefly here. It is apparent that one radio broadcast may create both civil and criminal liability in one or more states, since such defamation broadcast is actually or might possibly be heard in one or several states. The question becomes even more pressing when we consider that if defamation occurred during a so-called coast-to-coast network broadcast it would be entirely possible to have liability in all of the states since the essence of the action for defamation is publication and since publication was made in all of the states. Holding the station and the speaker jointly liable for the resulting damage would make it practically essential that regulation in this field be confided to the Federal Government.

Reverting to the newspaper analogy to substantiate this claim, the Supreme Court of Washington,[149] in an interesting opinion, held that a proprietor of a paper published in California and circulated in the State of Washington was subject to criminal liability in Washington for any libelous matter so published, the court saying specifically, that

> "If a person residing without the State publishes a libel against a citizen of the State and circulated such libel within the State, he is as much subject to punishment within the State as any citizen of the State. The mere fact that he resides outside of the State and publishes the libel outside of the State is no excuse for a violation of the law of the State. . . . There can be no doubt of the power of the State to prosecute a nonresident of the State who commits a crime against the law of the State by shooting across the line, or by causing a nuisance in a stream running from one State into another which results in injury to this State. The publishing of a libel stands on exactly the same footing."

It is my opinion that defamation by radio also stands upon the same footing.

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149 State v. Piver, 132 Pac. 858 (Wash. 1913).

By the general federal statute of venue,[150] the venue of civil suits in the United States District Court shall be (1) when jurisdiction is based solely on the fact that the suit is between citizens of different states, the district of the residence of either the plaintiff or the defendant; (2) when jurisdiction may be based on any other ground, the district of the residence of the defendant.

Venue in criminal cases is controlled by the Federal Constitution [151] which provides that federal criminal cases must be tried in the state and district wherein the crime shall have been committed. Under the Federal Judicial Code the trial of crimes begun in one district and completed in another district may be in either district.[152]

Congress, by special statutes, has prescribed the venue in certain classes of cases, thus taking these particular cases from the operation of the general venue statute as, for instance, in patent cases, cases under the anti-trust acts, etc.[153] Whether venue in cases arising under the proposed federal statute for control of defamation by radio should be the same as the established venue in civil and criminal cases or whether the venue should fall within the special provisions such as Congress has made in the past, rests upon the wisdom of the legislators who will have the responsibility for framing and enacting this proposed legislation.

CENSORSHIP

We can not hope to have covered fully the question of control of defamation by radio until we have settled once and for all the vexatious question of censorship. Broadcasters raise their hands in holy horror at provisions of the law which they say specifically demand that they permit certain broadcasts over the air and at the same time hold them

150 28 U. S. C. A. § 112.
151 U. S. Const., Art. III, § 2, par. 3.
152 28 U. S. C. A. § 103.
153 See DOBIE, FEDERAL PROCEDURE 476-518.

responsible for liability for broadcasts which they are required to present. Again, legislators are awed with the imposing argument that to write any kind of federal legislation for control of defamation by radio is to invest immediately the regulating body with powers of censorship which will at once become a menace to freedom of speech and to the fulfillment of the true function of radio in a community. If progress toward our ultimate goal is ever to be made, it must be clearly and unquestionably demonstrated that such proposed legislation does not permit or smack of censorship in any sense of the word. When that fact is clearly shown and understood we will proceed toward an orderly solution of this pressing problem.

Let us begin by determining the origin and definition of a censor, since censorship implies the existence of a censor. Historically, a censor was one of two magistrates of Rome who took a register of the number and property of citizens, and who also exercised the office of inspector of morals and conduct.[154] A censor was also defined to be one who acts as an overseer of morals and conduct; an official empowered to examine written or printed matter as manuscripts of books, plays, foreign newspapers or magazines, etc., in order to forbid publication, circulation, or representation if containing anything objectionable. Censorship is defined to be the office, power or action of a censor; as to stand for a censorship. It is to be clearly understood at the outset that neither the Federal Radio Commission [155] nor its successor, the Federal Communications Commission,[156] had or has any powers of censorship. In fact, they are specifically prohibited from exercising any degree of censorship. Liberty of expression is one of man's richest inheritances, "the most valuable achievement of modern civilization, and as a condition of social progress it should be deemed fundamental." [157]

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154 WEBSTER'S NEW INTERNATIONAL DICTIONARY.
155 Radio Act of 1927, § 29.
156 Communications Act of 1934, § 326.
157 BURY, HISTORY OF FREEDOM AND THOUGHT 240.

The constitutional provision in respect to freedom of speech and liberty of expression has been defended often by the Supreme Court, but nowhere in more striking language than that used by Chief Justice Hughes,[158] when he said that

"In determining the extent of the constitutional protection it has generally, if not universally, been considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. . . . the preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. . . . The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship."

The same sentiments have been expressed by Blackstone [159] in this language:

"This liberty when rightly understood, consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."

Thus is expressed the sentiment that a policy of leaving to correction by subsequent punishment those utterances or publications contrary to the public welfare is, after all, the best policy.[160]

In discussing censorship we must always have before us the problem of whether to choose previous restraint or subsequent punishment. Previous restraint of the press may be defined to be any form of governmental interference which operates to prevent publication without advance government approval either of the publisher himself or of the matter to be published, or to suppress further publication be-

158 Near v. Minnesota *ex rel.* Olson, 283 U. S. 697 (1931).

159 1 BL. COMM. 152-153.

160 KFKB Broadcasting Ass'n v. Federal Radio Commission, 47 Fed. (2d) 670 (App. D. C. 1931). See, also, Trinity Methodist Church, South, v. Fed. Radio Comm'n, 62 Fed. (2d) 850 (App. D. C. 1932), *petition for certiorari denied,* 284 U. S. 685 (1932), *rehearing denied,* 288 U. S. 599 (1933).

cause of matter previously published which does not meet with the approval of the government. Subsequent punishment is that form of government interference which operates to prevent publication solely through fear of consequences in the form of penalties, civil damages, or deprivation of some right or privilege.[161]

The Supreme Court has struck out viciously at previous restraint upon publication,[162] and Mr. Caldwell [163] claims that the refusal of the Federal Communications Commission to renew a license or to refuse applications for improving the facilities or by subjecting the offending licensee to inferior facilities and possibly also by revocation of license,[164] all tend to operate and have the effect of a previous restraint even though appearing under the guise of a subsequent punishment. However, the record of the Commission in this respect has been confined only to the clear-cut cases of stations which were manifestly not operating to serve the public interest, convenience, and necessity, and the federal courts to which appeals were taken have upheld the decisions of the Commission in this respect with a surprising consistency.[165]

It has been held, and by responsible judicial authorities,[166] that free speech is not an absolute right under the Constitution of the United States, either under the First or the Fourth Amendment or any other amendment. Again, it was said by the United States Supreme Court [167] that "the First Amendment of the Constitution, while prohibiting legisla-

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161 Caldwell, *Freedom of Speech and Radio Broadcasting*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 77 (January, 1935).

162 Near v. Minnesota *ex rel.* Olson, *op. cit. supra* note 158.

163 Caldwell, *op. cit. supra* note 161.

164 All are possible under the powers granted the Commission under the Communications Act of 1934.

165 KFKB Broadcasting Ass'n v. Federal Radio Commission, *op. cit. supra* note 160; Trinity Methodist Church, South, v. Fed. Radio Com., *op. cit. supra* note 160.

166 Mutual Film Corporation v. City of Chicago, 224 Fed. 101 (C. C. A. 7th, 1915).

167 Frohwerk v. United States, 249 U. S. 204 (1919).

tion against free speech, as such, can not have been, and obviously was not, intended to give immunity for every possible use of language." In at least one important case the same court upheld the right for film censors to examine, inspect and scrutinize all films prior to their exhibition and held that examination and approval are conditions which must be met before and are prerequisites to exhibition.[168]

Certainly I do not intend to suggest, by giving these citations, that the federal control of defamation by radio should lead to previous restraint of any kind, for such a provision is fatal to the inalienable right of freedom of speech and liberty of expression. But neither do I wish to go to the other extreme and allow unbridled speech over the radio to be made the instrument of incalculable damage and injury to innocent, unprotected citizens, for such would be a mockery upon the social principles of the guarantee of free speech. There will be no attempt to go to either of these extremes. Any proposed legislation should most assuredly not take for its premise the enjoining of slander or libel by radio because to do so "would constitute a deprivation of one's constitutional right to have the question of liability decided by a jury and would be incompatible with the responsibility clauses of the various constitutional guarantees." [169] Examination of the authorities makes it apparent that it is unconstitutional to enjoin slander or libel.[170] Many cases hold that equity will not enjoin defamation because it has no jurisdiction to do so.[171]

My recommendation for federal control of defamation would reserve to the courts rather than to an administrative

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168 Mutual Film Corporation of Missouri v. Hodges, 236 U. S. 248 (1915). See, also: Warren v. United States, 183 Fed. 718 (C. C. A. 8th, 1910); Clark v. United States, 211 Fed. 916 (C. C. A. 8th, 1914).

169 Caldwell, *Censorship of Radio Programs* (1931) 1 J. RADIO L. 457.

170 C. R. Miller Mfg. Co. v. Rogers, 281 S. W. 596 (Tex. Civ. App. 1926); Gompers v. Buck's Stove & Range Co., 221 U. S. 418 (1911); Willis v. O'Connell, 231 Fed. 1004 (S. D. Ala. 1916).

171 Francis v. Flynn, 118 U. S. 385 (1886). See, also: *Ex parte* Rapier, 143 U. S. 110, 133 (1892); Lewis Publishing Co. v. Morgan, 229 U. S. 288 (1913).

body the determination of what is defamatory under the law which will define defamation by radio. It should provide, in so far as is humanly possible, complete guarantees against any type of censorship. "So anomalous is the cry of 'censorship' that a recent commentator while condemning practically every inhibition placed on program material by the Commission and the courts, nevertheless, declares that 'Some sort of censorship is really implicit in the situation.' Complete freedom of the air, in any sense parallel to freedom of the press, is at present impossible because of the physical limitations upon the number of wave lengths or broadcasting channels which can be used simultaneously without interference. Almost all of the difficulties that bedevil the members of the Federal Radio Commission arise out of this basic fact." [172] Other interesting quotations illustrate the same point:

"The free speech secured federally by the First Amendment means complete immunity for the publication by speech or print of whatever is not harmful in character, when tested by such standards as the law affords. . . . Legal talk-liberty never has meant, however, 'the unrestricted right to say what one pleases at all times and under all circumstances.' " [173]

"It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license, that gives immunity for every possible use of language, and prevents the punishment of those who abuse this freedom." [174]

"I am far from intending that these authorities mean, by freedom of the press, a press wholly beyond the reach of the law, for this would be emphatically Pandora's box, the source of every evil. . . . The founders of our government were too wise and too just ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be the lawful vehicle of malicious defamation, or an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion and impurity. . . . I adopt, in this case, as perfectly correct, the comprehensive and accurate definition of one of the counsel at the bar (Gen. Hamilton), that the liberty of the press consists in the right to publish, with impunity, truth, with

172 Dawson, in "The American Mercury," March, 1934.
173 Fraina v. United States, 255 Fed. 28, 35 (C. C. A. 2d, 1918).
174 Gitlow v. New York, 268 U. S. 652 (1925).

good motives, and for justifiable ends, whether it respects government, magistracy, or individuals." [175]

That a sizable group of representative Americans feel that some sort of radio censorship would be a wholesome thing and not much to be feared is apparent from expressions in the public print of leading men of the United States. Thus Cardinal O'Connell,[176] of Boston, asserted recently that some definite form of censorship by radio was needed. "Undoubtedly a time will come," said the Cardinal, "when men with particular ideas can not command the air and attempt to impress those ideas upon others. I see no reason why men with axes to grind, with schemes back in their heads which they are not frank enough to reveal should be allowed to go on the air and scream and battle and belabor each other. To my mind a modified form of censorship must come." To provide this modified form of censorship, Cardinal O'Connell suggests a commission of responsible and honorable men, nonpartisan, and yet able to detect behind what seems to be a plausible speech a clever hiding of fantastic ideas.

In order that this present discussion may not appear to give expression to a desire for even a modified sense of censorship to control defamation by radio, I wish it to be clearly understood that Cardinal O'Connell's statement is introduced merely to show trends of thought among American leaders. His suggestion appears to be primarily an occasion on which he has attempted to choose the lesser of two evils.

Much discussion has arisen in this connection over a section [177] of the Communications Act which provides that any licensee shall permit equal opportunities to candidates for public office to use a broadcasting station and that such licensee shall have no power of censorship over the material broadcast. Broadcasters seize upon this Section of the Act as an example of how the analogy between newspaper pub-

175 People v. Croswell, 3 John. Cas. 337, 393 (1804).
176 New York Times (March 22, 1935).
177 Communications Act of 1934, § 315.

lication and radio broadcasting breaks down completely, claiming that one can easily imagine the outcry that would arise from newspapers if they should be required by a federal law to publish complete and unedited the speech of every political candidate if they gave space to any political speeches at all. But they have not approached the problem in a logical way and their objections here are completely unfounded. When broadcasters claim that under the law they are compelled to permit the speech and under the same law are given no power of censorship and hence that they should not be liable for broadcasting something that they are required by law to broadcast, they are distorting the facts, to put it mildly. There was no such intention in the minds of the legislators to establish such a confusing situation. The Section purposely says nothing about giving the broadcast station any privilege to utter defamation. The legislators try to protect the public interest in this respect rather than to serve the private interests of the broadcasters. If a radio station were given a mandate to broadcast everything which every politician might wish to pour into the microphone, then logically a privilege might be claimed. But as a matter of fact, broadcasting stations do not need to publish *any* political broadcasts, either under this Section of the Act or under the section [178] which says that broadcasting is not a common carrier. The analogy between broadcasting and newspaper publication is, if anything, stronger here than at any other point. Let us examine the facts closely to discover the validity of this analogy.

Newspapers are not required to publish everything submitted to them for publication. In their own interest and in the interest of the public welfare they exercise what has been advantageously termed an "editorial selection." [179] This is a type of private censorship, if you desire to call it such,

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178 Communications Act of 1934, § 3 (h).

179 The term was used by Dr. Henry A. Bellows, in hearings held before the House Committee on Merchant Marine, Radio and Fisheries, in 1933, on H. R. 7986, 73d Cong., 2nd Sess. 158.

a censorship which a newspaper exercises in order to serve good taste and to preserve itself against liability for defamatory or objectional material which might otherwise be published. If a newspaper does undertake to publish political propaganda which is fraught with the possibility of defamation, it takes the precaution to provide by special contract against damage that such material causes when published. But this does not prevent the newspaper from being legally responsible for such defamation to the injured party, even though it does provide for indemnity from the party originating the defamation.

Now a radio station can exercise the same editorial selection and the same means of protecting itself by special contract with those who use the facilities for any purpose whatsoever. If it wants indemnity from candidates for any liability to which it may subject itself in assisting them, the broadcasting station is under complete freedom to limit its services to such candidates as will comply with such requirements. If the profits to be gained thereby are not commensurate with the liability which is assumed, then the broadcaster might well devote his talents to some other type of program which is more lucrative. Certainly this is a better rule than to permit the broadcaster any degree of privilege to defame another simply in order to meet the requirements of a distorted notion or distorted interpretation of existing law. The point is raised in this connection that it will be impossible under this interpretation to ever expose unfitness for public office or corruption and misdeeds of public officials, for all this is technically defamation. But here a choice must be made between two evils again, and would it not be far more harmful to give the speaker and the broadcaster unbridled authority to besmirch any and every person unjustly just because he is running for public office than to restrict such exposition? Abraham Lincoln [180] has said,

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180 Remark made when requested to dismiss Montgomery Blair, Postmaster-General.

"Truth is generally the best vindication against slander."

The proposed legislation should, in order to meet this situation, include guaranties that now exist in the law of defamation where truth is concerned so that truth might be considered an absolute defense in an action for civil damages although in an action for criminal liability truth alone would not be a defense, since it must also be shown that the information was published for good motive and for justifiable ends. Thus, if political corruption or unfitness of candidates for public office would be exposed by a speaker over a broadcast station, certainly there could be no question but that he would be acting for the best interests of the public and so there would be no criminal responsibility. The truth of the statement would be complete defense to any civil responsibility.

Before leaving this question of censorship it is appropriate to discuss an injunction recently granted by Federal Judge Akerman [181] to allow a candidate for state attorney, or some one designated by him, to speak over the broadcasting station four nights previous to the primary election without censoring the speeches. The court acted, so Judge Akerman said, to prevent irreparable damage to the plaintiff's political campaign and right of unrestricted use of the defendant's broadcast station and probable loss of political office. Certainly this injunction is far in excess of any authorization contained in the federal communications law as I have already shown, for no broadcasting station is obligated to provide its facilities without any right of censorship and still be held to absolute liability for damages arising from the use of such station.

Recent Decisions

An examination of some of the recent decisions, both in this country and abroad, which have had a direct bearing

[181] Morris Givens v. Radio Station WFLA, at Clearwater, Florida, 2 N. A. B. Rep. 463-464.

on the question of defamation by radio must be included in any discussion of this kind. In this country the case of *Sorensen v. Wood* [182] is perhaps the most interesting and far-reaching one. An appeal was taken to the United States Supreme Court but was there dismissed for the reason that the judgment of the State court sought to be reviewed was based on "a non-Federal ground adequate to support it." [183] Here the defendant was sued by the plaintiff for alleged libelous utterances during a speech broadcast in a political campaign. The radio station, having allowed Senator Norris, a candidate for Republican nomination, the use of its facilities, also afforded the use of its facilities to senatorial candidate Stebbins who presented Wood as the speaker in his behalf. The lower court assessed damages against Wood for the libel and absolved the radio station, but the Supreme Court of Nebraska held the radio station also liable, Chief Justice Goss saying:

"The plea of the defendant that the words used by Wood were privileged appears to be based upon the theory that Wood's speech could not be censored because made on behalf of Stebbins, a candidate for Senator, who had to be granted the right to speak or to have a speech made favoring his candidacy; Senator Norris having previously spoken over the same station in promotion of his own candidacy. . . . We do not think Congress intended by this language in the radio act [Section 18 of the Radio Act (1927)] to authorize or sanction the publication of libel and thus to raise an issue with the federal constitutional provisions prohibiting the taking of property without due process or without payment of just compensation. Const. Fifth Amendment. This is particularly true where any argument for exercise of the police power and for any public benefit to be derived would seem to be against such an interpretation rather than to be served by it. So far as we can discover, no court has adjudicated this phase of the statute and order. We reject the theory. . . . 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 the 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."

182 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098 (1932).
183 290 U. S. 599 (1933).

The same case, as has already been mentioned, holds that defamation by radio is libel and not slander.

Another interesting case [184] is the one in which damages were sought by the plaintiff as sheriff of Spokane County, Washington, against the proprietor of Station KHQ, who was alleged to have permitted a speech to be broadcast over the station which conveyed the idea that the Sheriff had aided bootleggers. Here the court found that the station operator and his employees were connected not only with the broadcasting and announcing of the matter involved, but also with the preparation thereof. And the court said that if the statements made were defamatory and untrue, they could be jointly charged with libel. The court also held that since statements heard over the radio are regarded by the public as a prepared statement representing deliberation and reflection rather than an extemporaneous affair and that defamation by radio was libel rather than slander it held the statements libelous *per se* and said they were not privileged as a publication relating to matters of public interest.

Interesting sidelights are to be observed in the foreign cases on the question of defamation by radio. Reference is made to Mr. J. A. Redmond's discussion of the case of *Meldrum v. The Australian Broadcasting Company.*[185] The Australian case holds defamation by radio to be slander rather than libel, but attention is called to the fact that whether the defamation is considered to be libel or slander, the Australian courts have seen fit to undertake ways of controlling it. It is also suggested that cases like *Sorensen v. Wood* and *Meldrum v. The Australian Broadcasting Company* present a wider problem of stating, without help from the legislature, a principle for distinguishing defamatory communications of a kind previously unknown and for which no authority exists.

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184 Miles v. Louis Wasmer, Inc., 20 Pac. (2d) 847 (Wash. 1933).

185 AUSTRALIAN LAW JOURNAL (1933) at p. 257.

In *Privat v. Delamare* [186] it was said:

"Is it not more dangerous that a communication, that an emission, be sent by radio waves which will distribute it over the five parts of the world, which will be heard by thousands and thousands of listeners —is it not more dangerous, I say, to be defamed by an emission of this kind than by some worthless sheet which has but a few hundred readers? It seems absolutely necessary to express a desire that a penal law should result from this case. . . . How shall this law be made? That does not concern us, by virtue of the separation of powers—previous to Montesquieu—of the legislative and the judiciary. Several theories may present themselves. During recent days have not people spoken of the necessity of a statute on broadcasting? . . . There is a method. . . . It is to enact a special law regarding defamation and the right of reply by radio."

The strongest argument of all for federal control of defamation by radio is contained in the recent case decided by Federal Judge Merrill E. Otis.[187] The case came before Judge Otis on the question of the jurisdiction of the state court to entertain a suit against Station KMBC for libel resulting from a broadcast over the radio station, a resident corporation, which in no way had control of the program coming over the Columbia Broadcasting System network and sponsored by Remington-Rand, Inc., in its so-called "March of Time" feature presentation. The court held that despite the fact the station had no control over the program and had no way of knowing that the allegedly libelous statement was to be uttered, it was, nevertheless, jointly liable for the defamation. Judge Otis held that the position of the station is analogous to that of the newspaper which is held liable for libelous statements in its columns. The substance of the alleged defamation was that Coffey was an "ex-convict," who had served time in the penitentiary. There was no element of political defamation concerned. Judge Otis, in reaching this decision, assumed a complete absence of the slightest neglect on the part of the owner of the station, saying that

186 Cour d'Appel de Paris (10c Ch. corr.). Translated by Louis G. Caldwell, from REV. JOUR. INT. RADIOEL; 6e anne (1930) p. 36 (Appeal from Tribunal Correctionnel de la Seine).

187 Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W. D. Mo. 1934). See BROADCASTING MAGAZINE Vol. 8, No. 2, p. 8 (January 15, 1935).

"But for what he [the broadcaster] had done the victim of the defamation never would have been hurt. The publisher of a newspaper prints the libel on paper and broadcasts it to the reading world. . . . The owner of a radio station 'prints' the libel on a different medium just as widely or even more widely 'read.' "

There is a strong possibility that an appeal of the case will be taken so that the question may ultimately come before the Supreme Court, but there is no guarantee of an early determination of the question by the Supreme Court nor would there be a necessity for such determination if Congress would, as it should, take the initiative of enacting federal legislation to settle definitely the problem once and for all. There could remain then for the Supreme Court only to pass upon the constitutionality of such legislation, which would ultimately be done.

CONCLUSION

As conditions exist today in the field of defamation by radio the entire situation is literally permeated with uncertainty. No more important problem faces either the broadcaster, the person who would use the broadcaster's facilities, or the federal regulatory authority. We have attempted here conclusively to prove the necessity for federal regulation. In answer to the claims that broadcasting is substantially free of libelous statements, I say that it is substantially, but not absolutely, free of libel and that the proposed legislation is needed to correct whatever percentage of libelous or defamatory matter which might be found to exist in radio broadcasting today. It is possible, and indeed probable, that many radio speakers may defame another over the radio. Ex-President Calvin Coolidge, popularly known as "Silent Cal," whose speech was as guarded as any man ever to hold the high office of President of the United States, nevertheless, is reported to have paid a substantial sum in settlement for alleged defamatory remarks uttered by him in the course of a radio speech.[188]

188 Vold, *Defamation by Radio* (1932) 2 J. RADIO L. 699.

I have attempted to show also that federal control of defamation by radio is peculiarly within the province of the central governing authority, that the authority is easily to be found both within the right to control interstate commerce and within the federal police power, and that for Congress to provide for such federal control would be no usurpation of any state right. The offense of uttering obscene, indecent or profane language [189] is already covered by the federal jurisdiction although it would seem that this might be purely an offense within the scope of the police power of the several states.

As has been indicated before, there is no attempt made here to submit a draft for any proposed federal legislation, tempting as that might be. It is suggested that the proposed legislation should provide definitely for exclusive federal control of defamation by radio, that it should determine defamation by radio to be libel rather than slander, that it should provide for both a civil and a criminal responsibility for defamation by radio, that the question of venue for both civil and criminal actions be thoroughly and definitely determined, all this to the end that there be a uniformity of control which can not help but serve to remove much of the chaos which now exists in the field.

This is not an issue of a tomorrow but rather the issue of a today. This legislation will be enacted ultimately in its time and at its hour. I submit that that time and that hour are now. Nothing can be more helpful in safeguarding the sacred rights of man to the free communication of his ideas in this age of the new and scientific wonder of radio communication than federal control of defamation by radio.

Joseph E. Keller.

Washington, D. C.

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189 The Communications Act of 1934.