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be delayed until his death? It is possible to imply from the will an intention to exclude the husband from the remainder, but this is an exclusionary not a donative intent. An intention to delay the determination of the distributees cannot even be implied from the will. Without a showing of intention to delay, as distinguished from an intention to exclude, the distributees should be determined at testatrix's death, whether or not the husband is excluded from those distributees. A contrary result would fly in the face of testatrix's presumed intention, the rule of early vesting, and the policy reasons behind that rule. In all, it would seem that the grounds for excluding the husband in this case are weak, but the grounds for delaying the determination of the distributees are almost nonexistent. On the latter ground, if not the former, this case is a serious departure from existing law.

Alan Vogt

Defamation in Political Radio Broadcasts: More Grist for the Mill

Section 315 of the Federal Communications Act provides in effect that, when radio time is granted to a candidate for a political office, the station must grant the use of its facilities under substantially the same conditions to opposing candidates.¹ Censorship of the speeches is forbidden but no station is required to grant time for political speeches initially.² A primary candidate for U.S. Senator made use of a station following his opponent's speech. He and the radio station were sued for libel. *Held*: The radio station is immune from suit since in prohibiting censorship, Congress could not have intended that a radio station should be held liable for speech or statement over which it could have no control.³

Defamation by radio is generally determined by the law of libel, although in some instances it has been construed to constitute slander or a completely new and different tort.⁴

Suits against radio stations for defamatory remarks made by political speakers have been comparatively few and have resulted in conflicting rules. The divergence of opinion may be attributed both to different interpretations of section 315

1. 48 STAT. 1088 (1943), 47 U.S.C. §315 (1946).

2. *Ibid.*

3. *Lamb v. Sutton*, 164 F.Supp. 928 (M. D. Tenn 1958).

4. *Sorensen v. Wood*, 123 Neb. 340, 243 N.W. 82 (1932) (libel); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947) (libel, material read from script); *Locke v. Gibbons*, 164 Misc. 877, 299 N.Y.S. 188 (Sup.Ct. 1937) *aff'd mem.* 253 App.Div. 887, 2 N.Y.S.2d 1015 (1st Dep't 1938) (slander, ad lib); *Summit Hotel v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939) (ad lib, held neither libel nor slander, but a different kind of defamation). A discussion of whether defamation by radio is libel or slander is beyond the scope of the note. For a general discussion, see Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. R. 12 (1948). For argument that it is neither libel nor slander, see Newhouse, *Defamation by Radio: A New Tort*, 17 ORE. L.R. (1939).

and to application by state courts of either strict liability⁵ or negligence⁶ theories to defamation by radio.

The first case in this area was *Sorensen v. Wood*⁷ which arose under circumstances almost identical to those of the present case, in the state courts of Nebraska. There, the Supreme Court of Nebraska held for the plaintiff on the theory that the non-censorship provision applied only to "words as to their political and partisan trend" and did not give radio station licensees any privilege to join in publication of a libel or grant any immunity from the consequences of such action. The conclusion was based upon the analogy to newspaper liability for defamation.⁸ On appeal to the U.S. Supreme Court, the appeal was dismissed on the ground that the state court decision was based upon a non-federal ground sufficient to support it.⁹

Until very recently, the majority of courts have tended to follow the *Sorenson* doctrine.¹⁰ The exceptions to the rule have generally arisen in states which have been unwilling to adopt the analogy of strict liability imposed upon

5. *Sorensen v. Wood*, 123 Neb. 340, 243 N.W. 82 (1932).

6. *Summit Hotel v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939); *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 737, 38 N.Y.S.2d 985 (Sup.Ct. 1942).

7. 123 Neb. 340, 243 N.W. 82 (1932). This case concerned §18 of the Federal Radio Act of 1927, 44 STAT. 1162 (1927), which is almost identical to §315 of the Federal Communications Act of 1934.

8. RESTATEMENT OF TORTS §581; PROSSER, TORTS §94 (1955); HARPER AND JAMES, THE LAW OF TORTS, §5.5 (1956). The plaintiffs attorney on appeal was Professor Lawrence Vold of the University of Nebraska who subsequently wrote an article substantiating the holding of the court. See Vold, *Defamation by Radio*, 19 MINN. L.R. 611 (1935).

9. *Appeal denied sub nom. KFAB Broadcasting Co. v. Sorensen*, 29 U.S. 599 (1933). It has been pointed out in *Donnelly, op cit. supra* note 4, that of the eight cases cited by the Supreme Court of the United States in support of dismissal, two of them were cases where there was no bona fide dispute, *Cleveland v. Chamberlain*, 1 Black 419 (U.S. 1861); *East Tenn. V. & G. R.R. v. Southern Telegraph*, 125 U.S. 695 (1887); two involved controversies that had become moot, *Mills v. Green*, 159 U.S. 651 (1895), *Love v. Griffith*, 266 U.S. 32 (1924); and four hinged upon a section of the Judicial Code, 36 STAT. 115b, 28 U.S.C. §344 (1946), authorizing the review of state court decisions which question the validity of a federal treaty, or state statute which questions the validity of a federal treaty or statute, or which hold valid a state statute where its invalidity has been asserted on federal grounds, *Live Oak Water Users' Ass'n. v. R.R. Comm.* 269 U.S. 354 (1926), *Girard Trust Co. v. Ocean & Lake Realty*, 286 U.S. 523 (1932), *Wagner v. Leenhouts*, 287 U.S. 571 (1932), *Real Estate, Land, T. & T. v. Springfield*, 287 U.S. 577 (1932). Consequently, Professor Donnelly concludes that the dismissal could have been based on any one of three grounds, viz: (1) no real dispute between the parties, (2) moot question, or (3) the decision of the Nebraska court did not hold invalid any part of the Radio Act of 1927 or other federal statute, but merely held that the Radio Act was inapplicable, the case being disposed of entirely upon the Nebraska common law of libel.

10. *Coffey v. Midland Broadcasting Co.*, 8 F.Supp. 889 (W.D.M. 1934); *Irwin v. Ashurst*, 158 Ore. 61, 74 P.2d 1127 (1938); *Singler v. Journal Co.*, 218 Wis. 263, 260 N.W. 431 (1935); *Miles v. Wasmer*, 172 Wash. 466, 20 P.2d 847 (1933). None of these cases deal with political broadcasts but all follow the strict liability analogy laid down in *Sorensen*.

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newspapers. The few exceptions have applied a negligence theory,¹¹ and one court has required malice on the part of the radio station.¹² Although section 315 is sometimes mentioned in them, the cases generally have been decided on other grounds. The first voice raised against the *Sorenson* doctrine, at least as to the applicability of section 315 as a defense to libel actions, was in the *Port Huron* case¹³ before the Federal Communications Commission in 1948. The petitioning radio station was before the commission for renewal of its license and was opposed by some local politicians who claimed that section 315 had been violated by the station's cancellation of a contract for radio time. Petitioner defended on the ground that the material intended for broadcast was libelous. The commission took the view that this was censorship despite the libelous nature of the material, but nevertheless granted the license renewal since it was not an intentional violation of section 315. It then declared the intent of Congress in enacting section 315 and its predecessor to be that the non-censorship provision was absolute and that a radio station had a correlative immunity from suit for defamation broadcast in the speech. The commission went into a long discussion of the relative merits of alleviating the station's dilemma by allowing censorship of material which might possibly be libelous on the one hand, and of granting immunity from liability on the other. Considering the possibility of abuse of the censorship privilege and the importance of complete dissemination of ideas in the political arena, the commission felt immunity to be the better solution and therefore found such to have been the congressional intent. Support for the theory that Congress had power to grant such immunity was drawn from the words of *Sola Electric Co. v. Jefferson Electric Co.*:¹⁴

"The prohibition of a Federal statute may not be set at naught or its benefits denied, by state statutes or state common law rules. The doctrine of *Erie v. Tompkins* is inapplicable to those areas of judicial decisions within which the policy of the law is so dominated by the sweep of Federal statutes that legal relations which they affect may be deemed governed by Federal law having its source in those statutes rather than by local law."

Further support was drawn from *O'Brien v. Western Union Telegraph*

11. *Josephson v. Knickerbocker Broadcasting Co.* *supra* note 6; *Summit Hotel v. National Broadcasting Co.*, *supra* note 4. The rationale of the negligence theory is based upon the idea that newspapers have greater control over what is published than do radio stations, plus the element of governmental control of radio stations.

12. *Charles Parker Co., v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955). This was a political broadcast.

13. *In re Application of Port Huron Broadcasting Co.*, 12 F.C.C. 1069 (1948).

14. 317 U.S. 173 (1942). *Sola Electric* was a suit involving the challenge by a licensee under a patent, of the validity of the patent. The conflict was between the common law rule that a licensee is estopped to challenge the validity of a patent and the prohibition of the Sherman Act against price fixing, which the licensing agreement attempted to accomplish.

Co.,¹⁵ a suit for damages in connection with a defamatory telegram transmitted over Western Union's facilities. There it was held that the company's liability must be determined by Federal statute rather than local law, Congress having occupied the field by a fairly comprehensive scheme of regulation.

Shortly after the decision in *Port Huron*¹⁶ was announced, this position was challenged. The Houston Post Co., which owned some radio stations in Texas, brought a suit against the United States under section 402a of the Federal Communications Act¹⁷ to annul the order construing section 315 in *Port Huron*. The District Court dismissed the suit on the ground that the *Port Huron* dictum was not an order and that the plaintiff could not be hurt thereby. The court then went on to criticize the *Port Huron* case, saying:

"If the Supreme Court of the United States had authoritatively so construed §315; if short of this there were a body of decisions uniformly so construing it; if in general, prohibitions against censorship had been uniformly construed as precluding the control of language which is beyond the scope of guarantees of free speech; or if the legislative history of the section clearly showed the path of the law to be that which the commission, in its opinion, has taken; then there might be some basis for the claim that, though in form a mere opinion as to the meaning of the section, the pronouncement was in fact and in law intended to be, and was, an order laying down a positive rule of law."

"When, however, it appears: that the Supreme Court has not construed the section, that there is no body of judicial opinion interpreting it as the F. C. C. has done, but such opinion as there is is directly to the contrary,¹⁸ and that prohibitions of censorship have been uniformly held *not* to prevent the control of language which is beyond the guarantees of free speech, the view that the commission was issuing an order and not merely giving an opinion seems unfounded."

"When it further appears from the legislative history of the Communications Act *not* that Congress has, but that Congress *has not* given any clear indication that in using the word "censorship" in §315, it intended to give it the meaning given by the F. C. C.'s interpretation, the contention that the expression of the F. C. C.'s opinion on such a contro-

15. 113 F.2d 539 (1st Cir. 1940). There is a possible distinguishing feature here in that telegraph companies are considered common carriers who must accept all traffic, whereas, normally, radio stations can pick and choose their customers.

16. *Supra* note 13.

17. 48 STAT. 926 (1934), 47 U.S.C. §402a (1952), as amended 48 STAT. 1093 (1934), 50 STAT. 197 (1937), 63 STAT. 108 (1949), 66 STAT. 718 (1952). This section is the procedure by which an order of the F.C.C. may be enjoined, set aside, annulled or suspended.

18. *E.g.*, Coffey v. Midland Broadcasting Co., 889 F.Supp. 889, (W.D. Mo. 1934); Irwin v. Ashhurst, 158 Ore. 61, 74 P.2d 1127 (1938); Singler v. Journal Co., 218 Wis. 263, 260 N.W. 431 (1935); Miles v. Wasmer, 172 Wash. 466, 20 P.2d 847 (1933); McDonald v. Polk, 346 Mo. 615, 142 S.W.2d 635 (1940); Holden v. American News Co., 53 F.Supp. 24 (E.D. Wash. 1943).

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versial and difficult matter was intended to be and was an order under §402a seems far fetched."¹⁹

Despite this scathing attack, in a case almost identical to *Port Huron*²⁰ appearing before the F. C. C. on application for renewal of a license, the F. C. C. permitted the renewal because it felt that the station had acted in good faith and on the advise of legal counsel. However, it added, sticking to the same guns as in *Port Huron*:

(W)e will. . . in the future consider that there is no open question with respect to censorship on the part of licensees of material broadcast under §315, and licensees will be expected to abide strictly by the provisions of that section."²¹

More recently, the Supreme Court of North Dakota jumped on the *Port Huron* bandwagon in *Farmers' Union v. WDAY, Inc.*,²² a case similar in its facts to the present case. The plaintiff has taken the case to the U. S. Supreme Court where it is now awaiting disposition.²³

The *Port Huron* case²⁴ and those which have adopted its rationale rely upon what is claimed to be the intent of Congress as derived from the legislative history of the section. Investigation of the Congressional Record shows this conclusion to be erroneous, as was pointed out in the *Houston Post* case.²⁵

Section 315 was taken over without change from section 18 of the Radio Act of 1927.²⁶ The Senate draft of section 18 contained a provision for immunity of licensees,²⁷ but doubt was expressed as to the power of Congress to

19. *Houston Post Co. v. U.S.*, 79 F. Supp. 199 (S.D. Tex. 1948).

20. *Supra* note 13.

21. In re Matter of WDSU Broadcasting Corp., 7 Pike & Fischer Radio Reg. 769 (1951). It has been suggested that despite the "no obligation" clause of §315 (i.e. that no station is *required* to accept political speeches in the first place) it is doubtful that the F.C.C. would endorse a policy of not permitting candidates to speak in view of the public service function which radio stations are supposed to fulfill. *Note*, 61 YALE L.J. 87, n.4 (1952).

22. *Farmers Educational and Co-operative Union of America, North Dakota Division v. WDAY, Inc.*, 89 N.W.2d 102 (N.D. 1958). There is a North Dakota statute which protects radio stations from suits for defamatory statements made during *any* broadcast by anyone other than the owner or staff. N. D. REVISED CODE §14-0209, *Supp.* N.D.R.C. 1943. The defendant raised it but plaintiff demurred, the trial court sustaining the demurrer. Defendant took no exception, so it was not in issue on appeal. As yet, its constitutionality has not been tested.

23. *Certiorari granted* 79 S.Ct. 56 (1958). Docket No. 248, Oct 13, 1958. No hearing scheduled as of time of writing.

24. *Supra* note 13.

25. *Supra* note 19.

26. 44 STAT. 1162 (1937).

27. H. R. 9971, §4, 69th Cong. 1st Sess., 67 Cong. Rec. 12356, 12502-505 (1926).

grant it. The legislative history of the 1934 Act does not reveal any consideration of the problem and section 315 followed section 18 practically verbatim.

A number of solutions to the dilemma have been suggested by members of Congress from time to time, but none has ever reached the voting stage. In 1935, Representative Scott of California introduced a bill which would have amended section 315 far beyond the needs of the present problem.²⁸ The White bill in 1947²⁹ was somewhat less extensive but still would protect radio stations from suits resulting from defamatory political broadcasts. The O'Hara bill in 1952 would have afforded equal opportunity to all candidates but would adopt the other approach to protection by prohibiting only partisan censorship, the radio station not being required to broadcast defamatory material. None of these bills has been passed into law and the dilemma of the station owners remains.³⁰ The *modus operandi* of the F. C. C. has been strongly criticized in this area on the ground that it is regulating program content through its supervisory power rather than through its powers of adjudication and rule making.³¹ Since most of the cases before the F. C. C. in this area arise in renewal of licenses, a decision which will guide other applicants in the future is, of course, necessary. Generally, these decisions are not judicially reviewable.³² Although these methods may suffice for F. C. C. purposes, the dicta announced in the cases would appear to be weak authority for a decision concerning an actual legal controversy which involves money damages.

The problem is not so bad as it would appear on the surface, however, since

28. H. R. 9229, 9230, 74th Cong. 1st Sess., 79 Cong. Rec. 14399 (1935):
 "Each licensee of a radio broadcasting station shall be required to set aside regular and definite times for uncensored discussion on a nonprofit basis, of public, social, political and economic problems. . . . and for any controversial issue it shall permit at least one advocate of each opposing viewpoint equivalent facilities. . . . , *Provided* that the licensees shall have no power of censorship of any kind nor shall any licensee be subject to liability, civil or criminal, in any state or Federal court for material so broadcast under the provisions of this section. . . ." Rep. Scott stated that his purpose was to extend the provisions of §315 to speakers other than political candidates and also to protect stations from suit.
29. S. 1333, 80th Cong., 1st Sess., (1947):
 "§14(a). If any licensee shall permit any qualified candidate for public office. . . . to use a broadcasting station, he shall afford equal opportunity to all other candidates for that office. . . .
 (d) The licensee of any station so used shall have no power to censor the material broadcast under the provisions of this section: *Provided*; that licensees shall not be liable in any local, state, or Federal court because of any material broadcast under the provisions of this section except as to such material as may be personally uttered by the licensee or persons under his control."
30. H.R. 7782, 82nd Cong., 2nd Sess. (1952).
31. DAVIS, ADMINISTRATIVE LAW, §41, p.143 (1951).
32. *Ibid.*

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in addition to the jurisdictions adopting the negligence rule,³³ more than thirty states have adopted statutes which in one way or another give protection to the radio stations. Some states have adopted a "due care" provision into their defamation-by-radio statutes³⁴ while others simply grant immunity to radio stations in regard to broadcasts made under section 315.³⁵ By either of these methods, the problem of the scope of section 315, at least as to liability, is obviated.

David C. Fielding

Excludability of Quarters Allowance From Gross Income for Tax Purposes

The taxpayer, a doctor employed by the Veteran's Administration, occupied quarters on hospital grounds owned by his employer. He was required, as a condition of his employment, and in order to perform his duties, to live on the grounds. Under authority of V. A. manuals, rental charges for the quarters occupied by the taxpayer were withheld from his official basic salary before he received it. Thus, instead of his full official salary, the taxpayer received an amount representing the difference between the official salary and the rental value of the premises. Under V. A. Regulations, the rental charges were considered part of taxpayer's compensation, and the V. A. was to be reimbursed for the cost of furnishing quarters to employees by means of payroll deductions. In 1954 and 1955 the taxpayer also made direct rental payments for the use of a garage on the hospital premises. On appeal from a Tax Court decision,¹ refusing to allow

33. *E.g.* New York (Josephson v. Knickerbocker Broadcasting Co., *supra* note 6); Pennsylvania (Summit Hotel v. N.B.C. *supra* note 6), Connecticut (Charles Parker Co. v. Silver City Crystal Co., *supra* note 12).

34. ARIZ. REV. STATS. §12-652 (1952); CAL. CIV. CODE §48.5 (1949); COLO. STAT. ANN. c. 138B §1 (supp. 1949); FLA. STAT. ANN. §770.04 (cum.supp. 1957); GA. CODE ANN. §105-712 (cum. supp. 1957); IOWA CODE ANN. §659.5 (1949); KANS. LAWS 1949 c. 320 §1; LA. REV. STAT. tit. 45 §1351 (1950); ME. LAWS 1949 c. 134; MICH. STAT. ANN. §27.1406 (1957 supp.); MONT. REV. CODE ANN. §§64-205-64-207 (1947) requires malice in addition to the due care requirement; MINN. STATS. c. 544.043 (1957); MISS. ACTS 1954; NEB. REV. STAT. §§86-601-86-603 (1959 re-issue); NEV. REV. STAT. §§41.340-41.360 (1957); N. C. GEN. STAT. ANN. §9915 (cum.supp. 1949); OHIO REV. CODE §2739.03 (1953); ORE. REV. STAT. §30.150 (1957); PA. STAT. ANN. tit. 12 §1583 (1953); S.D. LAWS 1949 c. 206; TEX. CIV. STAT. §5433a (1953 supp.); UTAH CODE ANN. §§45-2-5-45-2-10 (1953 supp.); VA. CODE ANN. §8-632.1 (1950); WASH. REV. CODE §§19.64.010-19.64020 (1952), limited to ad libs and then only if speaker is cut off the air immediately; W. VA. CODE §5482(1) (1955); WYO. COMP. STAT. §§3-8203-3-8204 (1957 cum.supp.).

35. ARK. STATS. §3-1606 (1954 supp.); IDAHO CODE §6-701 (1951 cum. supp.); MD. LAWS, ART. 75, §19A (1952); MO. ANN. STAT. §537-105 (1953); PA. STAT. ANN. tit. 12 §§1585, 1586 (1953); S.C. CODE OF LAWS §237 (1953 supp.). The same approach is taken in the "due care" statutes of the following states: Arizona, California, Colorado, Georgia, Maine, Michigan, Montana, Nebraska, Nevada, Virginia and Wyoming. See *supra* note 36. For a discussion of state legislation up to 1951, see Remmer, *Recent Legislative Trends in Defamation by Radio*, 64 HARV. L.R. 727 (1951), also published in CURRENT TRENDS IN STATE LEGISLATION, University of Michigan Law School, Legislative Research Center, Ann Arbor, 1952.

1. 29 T.C. 813, CCH, Dec. 22, 829 (1958).