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Defamation: Liability of Station Owners for Political Broadcasts

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litigated poles of fixed-sum life insurance policies and the disability policies with periodic payment provisions, the decision offers encouragement to those who would like to see the rule of Section 318[36] relaxed in respect to insurance cases. The statutes of at least five states and the instalment judgments of Kentucky reflect an acute awareness, in some quarters, that it is the insured, and not the insurer, who is in need of protection. If, as Justice Cardozo[37] says in quoting the *Cobb*[38] case, the law can offer appropriate relief when an insurer withholds compensation in bad faith, then justice can be done. Whether this is done by statutory penalty, installment judgments, or by the invocation of the doctrine of anticipatory breach is immaterial, but the Plaintiff should not be denied a remedy in the other jurisdictions merely because a hard and fast rule exists. The old cliche, "When the reason for a rule ceases, the rule itself ceases," seems to apply with particular vigor here. In decreeing that the future payments are to be made as they fall due, it seems that the court has reached a satisfactory conclusion without damage to the rule.

RUPERT J. GROH, JR.

Defamation—Liability of Station Owners for Political Broadcasts—During the course of a political broadcast, a candidate for the United States Senate made libelous remarks concerning the Plaintiff corporation. The corporation brought suit for defamation against the station owners. The Defendants admitted that the speech was libelous per se but claimed that Section 315 of the 1934 Federal Communications Act[1] relieved them from liability. On appeal, the North Dakota Supreme Court upheld Defendant's contention of immunity. The court construed the prohibition against censorship in Section 315 to be an absolute prohibition which precluded a licensee from deleting even obviously libelous matter. Further, the court held that Section 315 granted complete immunity from liability for defamatory statements made by candidates, if such statements were germane to the political issues involved. *Farmers Educ. and Co-op Union of America, No. Dakota Div. v. WDAY, Inc.*, 89 N. W. 2d 102 (N.D. 1958).

Decisions of state courts, prior to this, have been in conflict as to

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[36] See *supra* note 3.
[37] New York Life Ins. Co. v. Viglas, 297 U.S. 672, 681 (1936).
[38] Cobb v. Pacific Mut. Life Ins. Co., 4 Cal. 2d 565, 51 P.2d 84 (1935).
[1] 48 STAT. 1088 (1934), 47 U.S.C. §315 (1946). "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate."

the meaning and effect of Section 315. In *Sorenson v. Wood*,[2] the Nebraska court construed the "no censorship" clause of Section 18 of the 1927 Radio Act,[3] which was identical to Section 315, to require station owners to refrain from censoring the political content of broadcasts by qualified candidates but rejected the idea that the statute provided a privilege to publish libelous matter. The court stated:

> We do not think congress intended by this language in the radio act 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.[4]

A contrary view was taken in two later state court decisions where Section 315 was deemed to create a qualified privilege on behalf of station owners. In *Josephson v. Knickerbocker Broadcasting Co., Inc.*, the court stated:

> Since this statute creates certain obligations and limitations, it is proper that the owner of the radio station be given corresponding qualified privileges against liability for statements which it has no power to control.[5]

This same reasoning was followed in *Charles Parker Co. v. Silver City Crystal Co.*[6] In that case an action for defamation was brought against a radio broadcasting company because of statements read over its station by a candidate for mayor, during an election campaign. The court decided that since Section 315 placed the defendant company under a legal requirement to permit the broadcast and denied power to censor the script — "There is no reason why it should not be accorded the same qualified privilege as [the candidate]."[7]

In the instant case, however, the North Dakota court did not adopt either of the previous state court views but adhered strictly to the view expressed by the Federal Communications Commission in the controversial *Port Huron* case.[8] There, the Federal Communications Commission held that suppression of a political speech containing libelous material was a violation of Section 315. This conclusion was supported by the following reasoning:

> For as we read the provisions of Section 315, the prohibition contained therein against censorship in connection with political broadcasts appears clearly to constitute an occupation of the field by Federal authority, which, under the law, would relieve the licensee of responsibility for any libelous matter broadcast

[2] 123 Neb. 348, 243 N.W. 82 (1932).
[3] 44 STAT. 1170 (1927).
[4] Sorenson v. Wood, *supra* note 2, at 354, 243 N.W. at 85.
[5] 179 Misc. 787, at 788, 38 N.Y.S. 2d 985 (1942).
[6] 142 Conn. 605, 116 A.2d 440 (1955).
[7] *Id.* at 610, 116 A.2d at 446.
[8] In re Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948).

in the course of a speech coming within Section 315 irrespective of the provisions of State Law.[9]

The *WDAY* case is the first to adopt the Commission's reasoning, that, by Section 315, the Federal government has pre-empted the field of liability for defamation in political broadcasts and thus relieved station owners of potential liability for libelous matter broadcast in a political speech. The North Dakota court held that Congress had the power to exempt a radio licensee from liabiity for defamation by virtue of its power to regulate interstate commerce[10] and Section 301 of the Federal Communications Act[11] which recites the purpose of the act to be — "the maintenance of . . . the control of the United States over all the channels of interstate and foreign radio transmission . . . ."

Authority for this conclusion was gained by reference to the analogous situation which existed in the field of telegraph communications. In *Western Union Telegraph Co. v. Boegli*,[12] a case involving an action for failure to make prompt delivery of a telegram which was sent from Illinois to Indiana, the United States Supreme Court refused to apply Indiana law, stating:

> . . . the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce as well as placing them under the administrative control of the Interstate Commerce Commission so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate. . . .

This principle was later applied in *O'Brien v. Western Union Telegraph Co.*[13] There, plaintiff brought suit for libel against the telegraph company because of its transmission of a telegram which contained on its face defamatory remarks concerning the plaintiff, a candidate for public office. In affirming a judgment for the defendant, the court held that the liability of a telegraph company for libel in the transmission and delivery of messages must be determined by federal law independently of state law.

Although these cases clearly establish that the Federal government regulates the liability for libel in the transmission of telegraph messages, the holding in the *WDAY* case, that by Section 315 Congress has assumed control of liability for defamation in political broadcasts, would seem to be open to question in several respects.

First, is there a need for a uniform federal law to govern liability

[9] *Id.* at 1074.

[10] The United States Supreme Court has held that radio and television broadcasting fall within the scope of the Congressional power to regulate interstate commerce. Fed. Radio Comm. v. Nelson Bros. Bond and Mortgage Co., 289 U.S. 266 (1936).

[11] 47 U.S.C.A. §301 (1946).

[12] 251 U.S. 315, at 316 (1920).

[13] 113 F.2d 539 (1st Cir. 1940).

for defamation in political broadcasts? A negative answer is supported by a reference to cases where the Supreme Court has considered the possibility of conflict between the communications act and state law on matters of fraud[14] and contract rights.[15] In each instance the court has held that state law is competent on these questions. By analogy it would seem that state legislation is also competent to determine liability for defamation in political broadcasts.[16] Defamation actions do not involve the physical facilities of radio transmission nor do they tend to undermine Federal regulation in this area. They deal solely with the protection of the private rights of injured third parties. That defamation properly falls within the ambit of state law was recognized as early as 1926, when a proposal in the House of Representatives that the Federal government regulate defamation was defeated on the grounds that the Common Law and state statutes offered sufficient protection in this area.[17]

Secondly, does Congress have the power to abrogate state defamation laws? It is doubtful whether the Communications Act has conferred such power. It was pointed out in *Weiss v. Los Angeles Broadcasting Co.*[18] that the act was intended merely as an administrative measure and not to confer any rights which would be enforceable in court. Further, there is grave doubt whether Congress could constitutionally abolish the liability of a broadcasting company for defamatory statements made over its station. A contention that such legislation violated the Fifth and Fourteenth Amendments of the Federal Constitution was rejected in the *WDAY* case. However, there is considerable merit in this contention. The practical effect of Section 315, as construed in the *WDAY* case, is to subject the reputations of innocent third parties to defamation and then remove their chief remedy, a suit against the broadcasting station.[19] The court in *Sorenson v. Wood*[20] indicated that such action would be in conflict with the

[14] Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1944).

[15] Regents of the Univ. Sys. of Ga. v. Carroll, 338 U.S. 586 (1949).

[16] At least fifteen states have passed legislation covering the liability of broadcasters for defamatory remarks made by candidates in political broadcasts. WIS. STATS. §331.052 (1957) is typical of this type of legistlation; it provides: "The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employes of any such owner, licensee or operator, shall not be liable in damages for any defamatory statement published or uttered in, or as a part of, a visual or sound broadcast by a candidate for political office in these instances in which under the acts of congress or the rules and regulations of the federal communications commission, the broadcasting station or network is prohibited from censoring the script of the broadcast."

[17] 67 CONG. REC. 5480, 5572, 5646 (1926).

[18] 6 F.R.D. 33 (S.D. Cal. 1946).

[19] The candidate is at all times liable for his remarks, unless privileged. Section 315 does not affect his liability.

[20] *Supra* note 4.

provision of the Fifth Amendment "prohibiting the taking of property without due process or without payment of just compensation."

Another objection to the *WDAY* decision arises. If Congress does not have the power to exempt a radio licensee from liability for defamation, does Section 315 provide such an exemption? This contention stems from the fact that Congress has steadfastly refused to make a clear statement as to the effect of Section 315.

In the past there have been several proposals submitted in Congress which would have clarified the meaning of Section 315, but each time these proposals have been rejected. Immediately after the *Port Huron* decision, Congress refused to pass the so-called *White Bill*, which would have included within Section 315 this provision:

> Provided, that licensees shall not be liable in any civil or criminal action 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.[21]

A very similar provision was proposed in a 1952 bill sponsored by Representative Horan, but this also was rejected.[22]

In the *WDAY* decision, the court construed this congressional inactivity to be an endorsement of the interpretation placed on Section 315 by the Federal Communciation Commission. Nevertheless, it seems just as likely that Congress has refused to act in the belief that federal regulation of defamation was unnecessary. The latter position was endorsed by a Federal District Court in *Houston Post v. U.S.*,[23] which held that the *Port Huron* decision was merely an opinion without any force of law. In *dicta*, the court expressed the view that Section 315 should not, without further action by Congress or a ruling of the United States Supreme Court,[24] be construed as abrogating state laws governing liability for defamation in political broadcasts.

The United States Supreme Court has not passed on the effect of Section 315; however, the court has recently granted a review of the *WDAY* decision.[25] What construction the Supreme Court will place on Section 315 is difficult to predict. The court is faced with the delicate task of balancing two vital interests. On one side is the right of Congress to regulate interstate commerce, on the other is the right of an individual to an undisparaged reputation.

In *Lamb v. Sutton*,[26] a recent Federal District Court decision, the

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[21] S. REP. No. 1333, 80th Cong., 1st Sess. §14 (d) (1947).
[22] H. . REP. No. 7062, 82d Cong., 2d Sess. (1952).
[23] 79 F. Supp. 199 (S.D. Tex. 1948).
[24] It should be noted that the United States Supreme Court refused an appeal of the Sorenson case, *supra* note 2, on the grounds that no federal question was involved. KFAB Broadcasting Co. v. Sorenson, 290 U.S. 599 (1933).
[25] Review granted, 79 S.Ct. 56, 27 U.S.L. Week 3099 (Oct. 13, 1958).
[26] 164 F. Supp. 928 (M.D. Tenn. 1958).

court agreed with the views expressed by the North Dakota Supreme Court in the *WDAY* case. The court stated in its opinion:

> . . . that Congress under the Federal Communications Act of 1934, as amended, completely occupied and preempted the field of interstate communications in radio and television, and that from the censorship provision in Section 315 and other regulatory provisions of the Act, there results by necessary implication an immunity of a broadcaster from liability for defamatory material broadcast by a legally qualified candidate.[27]

It would appear that the Supreme Court should now meet the foregoing issues head on. It should determine the congressional intent in passing this legislation, but, above all, it should determine the power of Congress to deprive an innocent third party of compensation for a tortious wrong.

GEORGE F. GRAF

Consideration in Corporate Stock Option Plans — *Gruber v. Chesapeake and Ohio Railway Company*[1] was a shareholder's derivative suit brought by two joint shareholders on behalf of the Chesapeake and Ohio Railway Company against the directors of that corporaiton, who were alleged to have committed waste of corporate assets through the implementation of an executive stock option plan. In an effort to retain its key executives the railroad adopted a plan which, in general, provided that options to buy company stock might be exercised from year to year, but not completely exercised until four years after the plan had been adopted. The options were issued subject to defeasance by the disapproval of a majority of shareholders, and could not be exercised unless the company's earnings equalled a stipulated amount per year. Essential to participation in the plan was the company's retention of the optionee's services for a certain period after the adoption of the plan. In considering these facts, the United States District Court for the Northern District of Ohio, Eastern Division, found that adequate consideration was received by the company for the options granted under the instant plan, and that therefore they did not constitute a gift or waste of corporate assets for which the directors would be liable.

In the ten year period prior to 1950, stock option plans were relatively rare.[2] However, partly as a result of changes in the Internal Revenue Code, stock option plans since 1950 have become a frequently utilized means of inducing executives to remain

[27] *Id.* at 934.

[1] 158 F. Supp. 593 (N.D. Ohio 1958).

[2] FETTER & JOHNSON, COMPENSATION AND INCENTIVES FOR INDUSTRIAL EXECUTIVES 95 (1952). Only two of 50 companies studied had stock options between 1945 and 1949.