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THE LAW OF RADIO COMMUNICATION WITH PARTICULAR REFERENCE TO A PROPERTY RIGHT IN A RADIO WAVE LENGTH†

JAMES PATRICK TAUGHER*

WHAT, in Heaven's name, as this is merely the beginning of these wonders, will be the end of them? To whom, eventually, will one be able to speak when the radio has grown up, has thrown aside its swaddling clothes and become a middle-aged and accepted fact? . . . the audience of the person who sits in the broadcasting station will not only be on this earth, but on numerous earths; . . . . in time the radio will tune in the beyond, and one night, very soon, millions of astonished listeners will hear Caruso sing again from the plane to which he has been transferred by what is known as death. . . . The voices of long departed people will be heard again—Dickens, Thackeray, Oliver Wendell Holmes, Mark Twain, Lincoln, Alexander Hamilton, Gladstone, Salisbury.

And as for the living, anyone with imagination can see in the greater perfection of this miracle a series of silent revolutions which will do away with the novel, the newspaper, the theater, and the concert room.

Cosmo Hamilton to Station WGN, Chicago

Within the memory of living men the scientist has added to the ever-increasing number of legal problems. Fulton, Stephenson, Morse, Bell and the Wright Brothers have, in turn, created new fields in which the law has been called upon to function. By easy extensions the common law principles were made to fit each new development until terra firma was forsaken and the air above was invaded by inquisitive man. Then, indeed, the ancient principle of law, Cujus est solum, ejus est usque ad inferos, had to give way to the necessities of aerial navigation, and the property owner saw him-

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self relegated to a contemplation of the visible freehold. And today, radio communication, through its four stages of growth—wire-telegraphy, wire-telephony, wireless-telegraphy, and wireless-telephony (or radio)—has attained to an invisible trespass and assault upon the same freeholder’s land and person. The stoutest building, the very earth itself, is pierced by this new medium of commerce which, in less than a decade, has presented a legal field as complex as it is unique.

Whether the owner of broad acres is entitled to all the radio energy that goes with the soil, the manifold problems of radio patents, international radio law, copyright in radio communications (in extenso), will not be discussed in this paper. Suffice it to say that the legal problems now existing in reference to the operation of radio broadcasting stations are sufficiently perplexing in themselves to merit attention and this discussion will be confined to a brief examination of those problems.

Radio broadcasting stations are plants through which programs, messages, and information are disseminated to various privately owned receiving sets by means of a wave of electro-magnetic energy, sent into the ether through an “antenna” or aerial wire, after being generated in the plant itself. By means of coils and condensers contained in the receiving sets, the sets are “tuned” or adjusted to the incoming carrier-wave. It is the function of the receiving sets to retranslate the electro-magnetic energy into sound.

Each broadcasting station operates on what is called a “wave-length,” i.e., the frequency, expressed either in kilocycles or meters, with which the carrier-waves are sent by the transmitting apparatus into the ether. By means of adjustments, as prompted by meter readings, this frequency can be kept constant. It is therefore possible for several broadcasting stations to operate in approximately the same locality at the same time, and for receiving sets to receive the wave of only one of them at a time, by tuning first to one and then to the other frequency—so long as the stations retain their respective wave-lengths.

Within the range of the average radio receiving set broadcasting stations must operate on a wave-length somewhere between the limits of 202.6 and 545.1 meters, or on a frequency somewhere between 1,480 and 550 kilocycles. It has been determined that stations within the geographical range of each other’s carrier-wave should operate as much as ten kilocycles apart to prevent a shrill “heterodyning” whistle

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3 Hearings on Radio Control, S i. and S 1754, p. 248.
5 Hearings on Radio Control, p. 15. Act of 1912; U. S. Comp St., 1916, Sec. 10100-10110, Sec. 10104, Reg. No. 15.
6 Encyc. Britt., supra.
in the receiving sets, caused by the superimposition of a wave of one frequency upon another of the same or a similar frequency except in cases of stations located within a very few miles of each other, in which case as much as thirty to fifty kilocycles separation is necessary.7

In the year 1926 there were some five hundred stations in operation in the United States, with more than four hundred aspirants clamoring for licenses. The available wave-length "channels" number only eighty-nine8 and it has been computed that no more than three hundred and thirty-one stations can operate in the United States without wave interference.9 It is therefore obvious that the proper safeguards against interference could not be taken when, instead of three hundred and thirty-one, over five hundred stations were licensed for broadcasting. Fourteen of these wave-length "channels" are required for foreign stations in the Western Hemisphere.10 A more or less satisfactory assignment was worked out by the Secretary of Commerce as follows: (a) by dividing the time during which two or more stations could use an available wave-length, thereby allowing several stations to be grouped on one frequency in the same locality; and (b) by assigning the same wave-length to stations separated as far apart as possible geographically so that their carrier-waves should not have sufficient power under normal conditions seriously to interfere with each other. It was the pride of the radio industry that until 1926 it had been to a large extent self-regulating, its efficient functioning being discussed and agreed upon, as to most of the regulatory features deemed necessary, at annual conferences rather than imposed by governmental authority.11

In April, 1926, Judge Wilkerson, in the Zenith case12 disturbed the comparative security of the broadcasting situation by declaring that the Secretary of Commerce had no power to compel a station to use

7 Judge Wilson, in Chi. Tribune Co. v. Oak Leaves Broadcasting Co., et al., ordered a forty kilocycle separation to be maintained between the wave-lengths of the two Chi. stations, WGN and WGES (Def.) See Chi. Trib., Nov. 18, 1926.
8 Radio Control, p. 15.
10 There is no international agreement at present with regard to the use of wave-lengths. The last international convention on radio was held in London in 1912 but no attempt was made to apportion wave-lengths. (Treaty printed in full in Precis de Reglementation des Communications Radio-electriques, p. 11 [1924, Avril-Juin], Brun et Gourvenec) (Radio Control, p. 264). The convention saw the impossibility of totally eliminating interference, so the Treaty of July 8, 1913, (38 Stat. 1672) was the result. (See Hoover v. Intercity Radio Co., 286 Fed. 1005 [1923].
11 See Hoover in Radio Control, p. 83.
only the wave-length assigned to it. Recently, there has developed among several of the stations a tendency to disregard the wave-lengths assigned to them and to embarrass the division of channels in either or both of two ways: by greatly increasing the power used to put the carrier-wave on the air, or by abandoning the assigned channel altogether, and by adopting another which is identical with that assigned to some other station, or so close to it as to cause destructive interference.

Such a situation gives rise to the question of a station's rights to priority of the air, and the further question of the legal responsibility of the offending station which has destroyed the program sent out by another station. For the purpose of this discussion, the questions will be divided as follows: What is the responsibility of the offending station to the government? Is there any common law liability as between stations? What will be the effect of the Radio Act of 1927 as viewed in the light of the answers to these questions?

I. RESPONSIBILITY TO THE GOVERNMENT

Previous to the enactment of the Radio Act of 1927 the only Federal Statute governing radio was the Act of August 13, 1912, ch. 287. In brief, it provides that all stations using wireless apparatus for communication between the several states or with foreign countries shall do so under a license, revocable for cause, issued by the Secretary of Commerce; that stations shall operate on stated wave-lengths; that, for wilful or malicious interference with communication of another station, the offender shall be deemed guilty of a misdemeanor, punishable by fine. As will become evident in the course of this discussion, the Act is a penal statute and does not purport to regulate civil rights as such.

This Act was intended to control radio telegraphy only, since radio broadcasting, as we now know it, was unknown in 1912. Nevertheless, Section No. 1 of the Act clearly reaches broadcasting insofar as a license is made a prerequisite to operation.

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34 The first broadcasting may be said to have been the enterprise of Station KDKA, at East Pittsburgh, in dispatching into the night the election returns of Nov. 2, 1920.

35 U.S. Comp. St. 10100—“A person, corporation, . . . shall not use . . . any apparatus for radio communication . . . except under a license . . . granted by the Secretary of Commerce.” That language is broad enough to cover the present situation and so the Attorney General held. (35 Op. Att’y-Gen. 127 (1926) in answer to several questions propounded by Mr. Hoover in June, 1926, after the Zenith decision.)
But with Section 1, the utility of the Act as a means of control, ceased. Once having brought a station into being the authority of the Secretary of Commerce became a nullity except to render information for the indictment of broadcasting stations which operate without a license and those which maliciously interfere with other stations in violation of Section 5 of the Act. Whatever doubts were had as to the Secretary's authority were set at rest by Judge Wilkerson's opinion in United States v. Zenith Radio Corporation. The defendants were indicted for operating their station on a wave-length and at a time not authorized by their license. The court held for the defendants, reasoning that a delegation by Congress to the Secretary of Commerce of the power and discretion to make regulations other than those stipulated in the Act without specifying some test for the exercise of that discretion would be unconstitutional as the delegation of power to create a penal offense, that proper interpretation demanded the presumption that Congress would not intend an unconstitutional provision; and that, therefore, the Secretary of Commerce was not given power to make such regulations as appeared in the defendant's license. But even if the Zenith decision were erroneous in stating that the Act of 1912 contained an unguided discretion that was practically legislative, Regulation Fifteenth of the Act permits stations engaged in the transaction of "bona fide commercial business" to use the wave-lengths capable of being tuned in by the average radio receiver, i.e., wave-lengths in excess of 200 meters without an assignment of a wave-length by the Secretary of Commerce. In view of that regulation the Secretary of Commerce is without power to assign a wave-length, if broadcasting stations are engaged in commercial business.

There are two grounds on which broadcasting stations could be found to be within the class not required to obtain the assignment of a wave-length: (a) The modern broadcasting station is a result of "experimentation in connection with the development and manu-

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16 12 Fed. (2nd) 614 (1926).
17 The license provided that the station should use a wave-length of 322.4 meters "only on Thursday nights from 10 to 12 p.m., central standard time, and then only when the use of this period is not desired by the Gen. Elec. Co.'s Denver Station."—(Copy of license at end of opinion.)
18 Sec. 2 of the Act: "Every such license shall be in such form as the Sec. of Comm. shall determine, and shall contain such restrictions . . . on and subject to which the license is granted."
19 Act of '12, Reg. 15th: "No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave-length exceeding 200 meters—except by special authority of the Sec. of Commerce, contained in the license of the station."
facture of radio apparatus" inasmuch as radio has been a growth through research and experiment in the laboratories of the large commercial and manufacturing concerns. Broadcasting stations (b) are undoubtedly "engaged in the transaction of bona fide commercial business," and could for that reason be placed within the privileged class.

Certainly, broadcasting stations are not eleemosynary institutions operated with the sole idea of spreading the philanthropic good cheer of their benevolent owners. Human nature is not so constituted as to spend $50,000 a year\footnote{Radio Control, p. 237.} for the upkeep of the average station merely for the idle delectation of millions of unknown and unseen listeners. The outpourings of the ethereal cornucopia have a baser and more utilitarian purpose in the main. A station's monetary value, though not to be computed in dollars and cents is actual and tangible and results almost exclusively from its advertising possibilities. Some five or six years ago, in the hey-day of radio's youth, ingenious minds speculated on ways and means of maintaining these costly stations. Some proposed a tax on all radio apparatus, the income to be divided proportionately among the broadcasters.\footnote{Precis de Reglementation des Communications Radio-electriques, p. 1 (Avril-Juin, 1924, Brun et Gourvenec).} Some have suggested and put into practice the selling of annual box seats in an "invisible theater." But most, if not all, present-day stations are organized to sell part of their time on the air to trade-mark advertisers who pay as high as $600 an hour to present their entertainers on the radio.\footnote{Radio Control, p. 92. Sec. pp. 20, 45, 54, 72, 92, 237.} This, too is indirect advertising, gained from the announcements between musical offerings, that "these are the So-and-So Entertainers (or this is the So-and-So Hour), sponsored by the So-and-So Company, makers of So-and-So Products." The rates of the charges for advertising time on the air vary with the hours of the day or evening, as it is known that the size of the audience changes with the different times of day.\footnote{Radio Control, same pages.} The rates also vary with the character of the stations and the number of listeners that will be reached. Thus, the basis for the rates is very much like the basis for an advertising charge in a newspaper.\footnote{Radio Control, p. 93.} Indeed, the business of broadcasting is very much like the publication of a magazine, such as the Saturday Evening Post. A large

\footnote{Radio Control, p. 20.}
quantity of entertainment and instruction is furnished the public in the one case by broadcasting programs and in the other by the publication of stories and articles. In both cases the entertainment and instruction are made the vehicle for carrying advertising to the public, and the public is induced to listen to or see the advertising by the entertainment and instruction which it receives. The only difference is that in the case of the Saturday Evening Post the subscriber pays a very small charge per copy and in the case of broadcasting the listener pays nothing (except the outlay for his receiving set, which in most cases does not go to the broadcasting station). This difference is only superficial, however, because the trifling charge paid for a copy of the Post is but a small percentage of its cost and is charged partly for the reason that it is necessary to obtain second-class postal rates, and partly, it may be supposed, to insure that the magazine will reach only the readers who are interested enough to read it to pay a slight sum for it.

Similarly, the Daily News Almanac furnishes an even more perfect analogy. It is a publication containing entertainment and instruction which is distributed free for the sake of the advertising.

The French look upon broadcasting as an advertising scheme designed principally to stimulate the sales of radio equipment offered on the market by the broadcaster. As was stated in the Revue Juridique Internationale de la Radio-electricite (Avril-Juin, 1926):

Mais lorsque, comme aux Etats-Unis, ou en France, il n’existe pas de contribution obligatoire etablie par la loi, la question de la perception est (plus) delicate . . . dans la plupart des cas les groupements faisant les emissions subventionnes par des dons prives ou par un prelevement conventionnel, librement consenti par les industriels et commerçantes, sur les ventes d’appareils et accessoires fabriques par ou pour la societe d’émission elle-meme. L’émission radiophonique n’est plus dans ce dernier cas, qu’un mode de publicite destine a permettre l’ecoulement de produits dont ils suscitent des modes d’utilisation sans cesse renouveles.

Judge Wilkerson, in United States v. Zenith Radio Corporation,25 stated loosely that broadcasting was not “commercial business” within the meaning of the exception in Regulation Fifteenth of the Act of 1912 allowing “commercial stations” to choose their own wave-length in the 200-500 meter band. But the opinion of Acting Attorney-General Donovan26 is to the contrary and seems to be the better view and the view adopted by the Secretary of Commerce. His opinion was based upon Wetmark v. Bamburger27 and Remick v. American Auto

27 291 Fed. 776.
Accessories Co.,\textsuperscript{28} which was to the effect that a radio program was a "public performance for profit" within the meaning of the Copyright Laws. From these cases it would seem that an indirect charge causes the performance to be considered one for profit. The defendant, in each case, by advertising its name at each performance, was likely to derive benefit by the increased patronage of the listeners. The indirect benefit derived may be as great if not greater than the profit derived from an admission fee and is certainly sufficient to bring the cases within the statutory requirements of an infringement. Radio performances may be philanthropic in some cases, but where, as in these cases, the defendant charged the expenses to the general business expenses the conclusion that the performance was for profit is justifiable.\textsuperscript{29}

The authors of the Radio Act of 1927 saw the growth of "commercial" broadcasting so clearly that they attempted to apply to radio the same test that is now applied in the States generally to public utilities. The Act compels, practically, the issuance of a certificate of

\textsuperscript{28}298 Fed. 628—On appeal, 5 Fed. (2nd) 411. The Wetmark case involved a suit for injunction restraining further infringement of a copyrighted musical composition. The alleged infringement consisted of broadcasting a song from defendant's store. Each performance started and concluded with an announcement that the entertainment was being furnished by the defendant. It was held that there was a public performance for profit, the performance was of a public nature, being heard by the general public by means of private radio apparatus. True, the listeners were not charged any fee. But it has been held that the rendition of a copyrighted song by a restaurant keeper's orchestra, although patrons were not charged therefor, constituted an infringement, the court reasoning that a charge in fact was made by virtue of the comparatively higher price asked because of the entertainment. \textit{Herbert v. Shanley Co.} (1917) 242 U.S. 591, 37 Sup. Ct. 232. Similarly, a proprietor of a moving picture theater was liable for an infringement by his organist in playing a copyrighted song during the performance. \textit{Harms v. Cohen} (D.C. 1922) 279 Fed. 276.

\textsuperscript{29}In the \textit{Remick} case the bill alleged that "defendant manufactured and sold radio products and supplies for pecuniary profit; that it maintained a radio broadcasting station . . . . as a means of advertising and publicity, and as a means of bringing its radio products . . . . to the attention of the public, and of stimulating the sale thereof, and that the maintenance of the station was effective for these purposes; that the license . . . . to operate as a commercial station was issued on application to operate for commercial purposes; that defendant announced its programs to the public by newspaper advertisements and bulletins . . . . ; that defendant charged on its books the radio broadcasting service to its advertising and publicity account." The Copyright Act of March 4, 1907, c. 320 Sec. 1, 35 Stat. 1075 (Comp. St. Sec. 9517) was held applicable on proof of these allegations. "The artist is consciously addressing a great, though unseen and widely scattered, audience, and is, therefore, participating in a public performance for profit." (p. 412). See the first count of the U.S. Att'y's information in \textit{U.S. v. Zenith Radio Corp.}, 12 Fed. (2nd) 624 (1926). See, also, \textit{Col. Law Rev.}, Jan. '24, p. 90.
public convenience or necessity in advance of the obtaining of a license for radio communication.\(^3\)

The above detailed consideration of radio's commercial aspect is deemed necessary by reason of the fact that such commercial business practically emasculates the Act of 1912 and leaves the station owner to choose his wave-length at will, subject to no Federal control whatever (apart from indictment for malicious interference) when once the requisite license has been procured.\(^3\) In brief, the Attorney General\(^3\) has denied the administrative power of the Department of Commerce on matters of division of hours of operation, wave-length, appropriation, duration of license, and limitation of power.\(^3\) And by the decision in Hoover v. Intercity Radio Co., Inc.\(^3\) the Secretary of Commerce can be compelled by mandamus to issue the license since such issuing is a mere ministerial act, the Act of 1912 not indicating in what cases the license should or should not be issued. Thus, it is apparent that judicial decision has emasculated the Act of 1912.

By the Act of 1912 Congress did not take over exclusive jurisdiction of the subject of radio communication; civil rights under the common law\(^8\) (as well as any civil rights created by state legislatures) remain unaffected. The statute, being a penal act,\(^3\) is best understood in this connection by examining other regulatory and penal acts which have been held not to exclude state law and state rights. As was stated generally in the Texas Cattle Fever cases:

Before Congress will be held to have taken over an entire field of interstate commerce to the exclusion of all state law on the subject, it must clearly and affirmatively appear from its enactment that it intends to do so; there must be a direct conflict between the federal legislation and the state law.\(^8\)

\(^{31}\) Radio Control, p. 104.

\(^{32}\) See both U.S. v. Zenith Radio Corp., 12 Fed. (2nd) 614 (1926) and Act of 1912, Reg. 2nd: “In addition to the normal sending wave-length all stations, except as provided hereinafter, . . . . may use other . . . . wave-lengths, etc.”


\(^{34}\) See Reg. 14th, Act of 1912.

\(^{35}\) 286 Fed. 1003 (1923).

\(^{36}\) Discussed, post, II.

\(^{37}\) The Zenith decision was confined to the principle that, in a criminal indictment, based upon the penal provisions of a Federal statute, an administrative ruling, by a strict construction, cannot add to the terms of the statute and make conduct criminal which it leaves untouched.

\(^{38}\) Missouri, Kan. & Tex. Ry. Co. v. Harris, 254 U.S. 412, 582 L. Ed. 1377, 1382: “But the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, unless the act of Congress, fairly
The language in *Reid v. Colorado* is typical of the principle in point:

So that when the entire subject of the transportation of livestock from one state to another is taken under direct national supervision, and a system devised by which diseased cattle may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control.

This language is particularly applicable to the present status of radio communication under the Act of 1912. To the Congress, by its penal act, has not as yet deprived the states of their control over radio by a "paramount, universal and exclusive" rule. Such common law rules as may govern interstation operation must control wave-length disputes untrammelled by Congressional dictates. To the same effect are the Food and Drug Act cases.

Until 1890 and 1899 the states might allow an interstate navigable river to be obstructed because Congress had not exercised its paramount control over the navigable waters, although each case recognized that Congress had the power to do so.

Even after Congress passed the Act of 1890 it was held that federal authorization did not relieve a person from getting the municipality's consent to the erection of an obstruction in the interstate river. The cases construing the Act of 1890 emphasize the point that federal and state powers remain concurrent until Congress has assumed exclusive control.

From the preceding brief discussion it is apparent that where a federal statute has made no provision as to civil rights, it has been interpreted, is in actual conflict with the law of the state." *Missouri, Kan. & Tex. Ry. Co. v. Haber*, 169 U.S. 613, 42 L. Ed. 613, is the case quoted above.

Therefore, a Kansas statute which did nothing more than establish a rule of civil liability in that state did not affect regulation of inter-state commerce made by Congress by a penal act. The police power of the state stood supreme in its sphere because Congress had not imposed a paramount, universal and exclusive rule. *Reid v. Colorado*, 187 U.S. 137, 47 L. Ed. 108 (1902).

Vide discussion, ante, 43: appropriation of wave-lengths by station owners free from government direction or control.


held not to exclude state law on the subject which is not in direct conflict. The corollary to this is also true, i.e., that when Congress has attempted to take over the entire field to the exclusion of state law or civil rights, it has done so by specific provisions relating to such civil rights.45

A license to use an apparatus for radio communication under the Act of 1912 does not give a licensee any right to interfere with the broadcasting of another. As was stated above, substantially the only effect of the license is to avoid a penalty under Section 1 of the Act. Further than that Congress has not assumed control. The business of broadcasting is a perfectly lawful business, not very much different from the publication of a magazine, or the furnishing of entertainment by means of theaters or moving picture shows. Neither the state legislatures nor Congress, therefore, has power completely to forbid a person to engage in this business.46 Congress may, of course, protect government radio communication by reserving a band of wavelengths for use by government stations and, under its power to regulate interstate commerce, may protect stations engaged in interstate commerce from interference by amateurs and others. But whether it be interstate commerce or not, being a lawful business, its pursuit cannot be totally forbidden, or regulated to such an extent as to make its pursuit impossible.

The distinction between businesses which are lawful in themselves and may not be forbidden either by the state legislatures or by Congress and businesses which are of such nature that a state legislature may totally forbid them is of such an elementary character that it would be purposeless to discuss it at length. Suffice it to say that a state may, under its police power, totally forbid the manufacture and sale of liquor (even before the Eighteenth Amendment), gambling houses, pool-rooms, etc. Naturally, therefore, a person having a license to conduct a saloon, gambling house, or a pool-hall cannot set up as a defense this license when by state law the pursuit of these occupations is forbidden.

On the other hand, a lawful calling, whether licensed or not, may not be so forbidden. For example, the following occupations, among others, are licensed: physicians, mid-wives, optometrists, real estate brokers, chiropractors, nurses, dentists, pharmacists, dealers in securities and barbers. None of these licenses has ever been held to be merely permissive. On the contrary, each has been held to involve a pursuit

that is lawful and the right to which may not be taken away without due process of law. This principle has been recognized in a long line of cases in the United States Supreme Court.47

The holding of the license, however, has nothing to do with the civil rights of the parties in any of these cases. While it is necessary that a person should have a license before he will have any standing in court,48 it is not the license which grants or determines civil rights. A physician may enjoin another physician from interfering with his practice by certain unlawful methods; while he must have a license in order to have any standing in court, his right to enjoin the interference does not arise from or have anything to do with the license. And so a license to conduct a radio station does not determine the civil rights of stations inter se. It simply gives the stations existence.49

The special authority given to broadcasting stations by the Secretary of Commerce would not affect civil rights any more than the special authorization of the Secretary of War to an individual to place an obstruction in a navigable river. The license issued at present by the Department of Commerce amounts to nothing more than a perfunctory permission to broadcast. Therefore, the issuing of a second license to use a wave-length already in use by a first licensee could have no effect on the permission of the first licensee to broadcast, the use or abuse of a wave-length being governed solely, at present, by common law principles (if any such exist).50

A state or municipality may enjoin or prevent the erection of obstructions to navigation in navigable waters of the United States even though such obstructions have been affirmatively authorized by the Secretary of War after a hearing.51 Now, as stated in Hoover v. Inter-city Radio Co.,52 the Secretary of Commerce has no power or discretion to refuse a license. Under Section 1 of the Act of 1912, the designation of the normal sending and receiving wave-length is made by the applicant and not by the Secretary of Commerce. The effect of a license, therefore, in which a wave-length is designated, does not repre-

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48 A physician must have a license before he can sue for fees. (147.14 (2) Wis. Stats. 1925.)
49 Post, III.
50 It is still supposed that the Radio Act of 1917 is not in existence.
52 286 Fed. 1003 (1923).
sent by any possible stretch of the imagination a finding that that wave-length or any other will not interfere with wave-lengths used by others.\textsuperscript{53}

In the case of special authorization from the Secretary of War to erect an obstruction to navigation it may with more force be contended that the Secretary of War, under a federal statute, has made a finding that is conclusive against cities and individuals. Yet, (as in the cases cited, \textit{supra}) it has been held that even an individual having such an authorization is not exempted from liability to the state or the municipality (including suits for injunction) unless he has first complied with ordinances and statutes and has obtained the necessary consent.

The rights accorded to telegraph companies by the Act of Congress (1866) do not relieve such companies from respect for the rights of property, public or private, of others.\textsuperscript{54} In \textit{City of St. Louis v. Western Union Tel. Co.},\textsuperscript{55} Mr. Justice Brewer said:

\begin{quote}

It is a misconception, however, to suppose that the franchise granted by the Act of 1866 carries with it the unrestricted right to appropriate the public property of a state. \ldots While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. \ldots No matter how broad and comprehensive might be the terms in which the franchise was granted it would be confessedly subordinate to the right of the \textit{individual} not to be deprived of his property without just compensation.\textsuperscript{56}

Again, a license protects a licensee against complaint on the part of the public at large but it does not relieve him of liability to an individual who sustains some special injury.\textsuperscript{56}

Query:—Are there, then, \textit{private} rights in a radio wave-length apart from rights got by the license and which will govern the rights of stations \textit{inter se}?

\textsuperscript{53} See Sec. No. 2, also.

\textsuperscript{54} 148 U.S. 92, 37 L. Ed. 380.

\textsuperscript{55} \textit{Pensacola Tel. Co. v. Western Union Tel. Co.}, 96 U.S. 1, 24 L. Ed. 708; \textit{St. Louis & San Fran. R.R. Co. v. So. West. Tel. and Tel. Co.}, (C.C.A. 8th Ct.) 121 Fed. 276.

\textsuperscript{56} 37 C.J. 243. Same, \textit{Kurtz v. Southern Pac. Co.}, 80 Ore. 213, 155 Pac. 267, 156 Pac. 794; \textit{Sandstrom v. Oregon-Wash. R. v. Nav. Co.}, 75 Ore. 159, 146 Pac. 803: Authority to occupy a street, whether obtained directly from the Legislature or from a local municipality, only protects the company to the extent of the public right or easement in the street and leaves the company to deal with private rights as in other cases.\textsuperscript{"} \textit{Muhlker v. N.Y. & Harlem R.R. Co.}, 197 U.S. 544, 25 Sup Ct., 522, 49 L. Ed., 872.
To recapitulate:—

(1) No broadcasting station may lawfully operate without a license, according to Section 1 of the Act of 1912, and yet the Department of Commerce may be compelled to issue the license under the decision in the Intercity Radio Case.

(2) The Secretary of Commerce has no discretion to assign any particular wave-length, nor to stipulate any division of time in the license, (as was brought out in the Zenith decision and the Opinion of the Attorney-General based on Regulation Fifteenth of the Act of 1912.

(3) The Act of 1912 is a penal statute; it is to be strictly construed and does not purport to regulate civil rights.

(4) Congress, by the Act of 1912, has not assumed exclusive and universal control over all phases of radio communication, since the appropriation of a wave-length, hours of broadcasting and power are to be governed by civil rights under state control—that control being absent, as to Congress, in the Act of 1912.

(5) The license has, as its only effect, the avoiding of a penalty under Section 1 of the Act of 1912 and does not relieve the licensee from liability to one who sustains a special injury.

It may now be asked: Is there a common law property right in a radio wave-length which will protect the broadcaster who may have no recourse to the Department of Commerce against a later licensee's usurpation of an appropriated wave-length?