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Defamation--Broadcaster's Liability--§ 315 of Federal Communications Act Implies Complete Immunity (Farmers Educ. And Co-op. Union v. WDAY, Inc., 360 U.S. 525 (1959))

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In both cases during the questioning the defendants had not been indicted and were considered suspects rather than defendants. Refusing counsel in the pre-trial stage violates due process only if the accused is so prejudiced thereby that his subsequent trial would lack basic fairness.[44] The circumstances of each particular case must be considered.[45]

The majority in the *Spano* opinion advanced a new test to be applied in determining the admissibility of confessions. The courts must now examine whether the confession obtained is in accord with the "traditional principles" of due process. There is no criterion or definition given by the Supreme Court, but on the basis of this study of the recent trend of decisions, the "traditional principle" test appears to be an embodiment of the "fundamental fairness" and "inherently coercive" tests as well as the "totality" norm. It is the first time the Court has so vigorously denounced the use of deceptive practices in extracting confessions and emphasized that the events surrounding the confession took place after a grand jury had found cause to indict him. The result is to be commended. However, it is also possible that the decision might result in an interference with state criminal enforcement if it were construed to mean that no police questioning at all could occur in the absence of counsel. Perhaps the concurring opinion of Mr. Justice Douglas sets a good norm. He states that once Spano had been indicted for a capital crime and was no longer a mere suspect, he was at that point entitled to counsel under the provisions of the fourteenth amendment.

DEFAMATION — BROADCASTER'S LIABILITY — § 315 OF FEDERAL COMMUNICATIONS ACT IMPLIES COMPLETE IMMUNITY. — On the basis of a statement made by a political candidate during a campaign broadcast, defendant-broadcaster was sued for libel. The trial court dismissed the complaint on the ground that Section 315 of the Federal Communications Act[1] rendered the station immune from liability. The Supreme Court of North Dakota affirmed. On appeal to the United States Supreme Court, *held,* since section 315 prohibits the broadcaster from censoring political broadcasts, the privilege of immunity from liability "must follow as a corollary." *Farmers Educ. and Co-op. Union v. WDAY, Inc.,* 360 U.S. 525 (1959).

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[44] Crooker v. California, *supra* note 42, at 439; see Lisenba v. California, 314 U.S. 219 (1941) (dictum).

[45] See, *e.g.,* Crooker v. California, *supra* note 42, at 440; House v. Mayo, 324 U.S. 42 (1945).

[1] 48 Stat. 1088 (1934) (amended by 66 Stat. 717 (1952), as amended, 47 U.S.C. § 315 (1952)).

Section 315 of the Federal Communications Act requires that if a licensee-broadcaster permits a legally qualified candidate for public office to use its facilities, "he shall afford equal opportunities to all other such candidates for that office," and provides that such licensee-broadcaster "shall have no power of censorship over the material broadcast *under the provisions of this section.*" [2] The section expressly states that no obligation is imposed on the broadcaster to make its facilities available to any such candidate.

Defamation by radio has resulted in differences of judicial opinion as to whether the defamatory utterances ought to be classified as libel,[3] particularly when the defamations are read from a script,[4] slander,[5] or accorded a status separate and apart from libel and slander.[6] Disagreement also exists as to whether the broadcaster's liability in general ought to be based on strict liability [7] or negligence.[8]

More specifically within the area defined by section 315, two important questions have arisen: 1) does section 315 bar the deletion of libelous material from the candidate's speech, and 2) if so, does it give the broadcaster immunity from state libel suits?

The Court in the present case, answering the first question in light of legislative history and the purpose for which section 315 was passed, stated that the broadcaster has no power to censor libelous matter. This, of course, excludes language which is not guaranteed by free speech, that is, obscene, indecent or profane language.[9]

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[2] *Ibid.* (Emphasis added.)

[3] Shor v. Billingsley, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (Sup. Ct. 1956), *aff'd mem.*, 4 A.D.2d 1017, 169 N.Y.S.2d 416 (1st Dep't 1957).

[4] Hartman v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947); Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933). See RESTATEMENT, TORTS § 568, comments e, f (1938).

[5] Locke v. Gibbons, 164 Misc. 877, 299 N.Y. Supp. 188 (Sup. Ct. 1937). However, here the court found that since the remarks were not slanderous per se and the plaintiff had not alleged that he had sustained special damages, the complaint was dismissed.

[6] Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939). See also Newhouse, *Defamation by Radio; A New Tort,* 17 ORE. L. REV. 314 (1938).

[7] Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933). See also Coffey v. Midland Broadcasting Co., 8 F. Supp. 889, 890 (W.D. Mo. 1934), where the court explained that both the broadcaster and publisher can protect themselves by insuring against the loss occasioned by strict liability.

[8] Summit Hotel Co. v. National Broadcasting Co., note 6 *supra,* where the court rejected the analogy between the newspaper and the broadcaster, stating that the former is subject to greater scrutiny. See Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948), where the court rejected the absolute liability theory and stated that a broadcaster was analogous to a "disseminator" and consequently was not liable for defamatory statements contained in material published by him unless fault was proven. For a criticism of the *Summit Hotel* distinction, see Donnelly, *Defamation by Radio: A Reconsideration,* 34 IOWA L. REV. 12, 25-27 (1948).

[9] See 18 U.S.C. § 1464 (1958).

Judicial decisions have been incongruous in answering the second question. In *Sorensen v. Wood* [10] the broadcaster was held to the same degree of responsibility for libel as a publisher, namely, absolute liability. However, a qualified privilege against liability was granted the broadcaster over statements which it had no power to control in *Josephson v. Knickerbocker Broadcasting Co., Inc.*[11] The court here felt that when a radio station exercised due care in the selection of the lessee of its facilities and in the inspection of the script, it should not be liable for extemporaneous defamatory remarks. The defense of privilege was also allowed the radio station in *Charles Parker Co. v. Silver City Crystal Co.*[12] in the absence of proof that the broadcaster maliciously permitted its facilities to be used, or acted in bad faith. Disharmony also existed in the federal jurisdiction. The Federal Communication Commission,[13] interpreting section 315 in *In re Port Huron Broadcasting Co.*,[14] stated that the absolute prohibition against censorship would relieve the broadcaster of all liability for defamatory utterances occurring during a political candidate's speech, irrespective of the provisions of state law. In essence, the FCC stated that federal legislation had pre-empted the field and the broadcaster was free from civil liability for any libelous matter broadcast in the course of a speech coming within section 315.[15] Immediately following the FCC ruling, a district court in *Houston Post Co. v. United States* [16] sharply criticized the Commission ruling as being directly contrary to the United States Supreme Court construction [17] and the legislative history of section 315.[18] On the other hand the court in *Felix v. Westinghouse Radio Stations, Inc.*,[19] recognized the authority of the FCC, and stated that where the broadcaster is powerless to censor libelous matter without violating federal law, the broadcaster was without fault.

Mr. Justice Black, delivering the opinion of the Court in the present case,[20] stated that since a broadcaster is required to grant equal time to political candidates and denied the control of allegedly libelous material, it would be unconscionable to permit civil and perhaps criminal liability to be imposed on the broadcaster for the very

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[10] 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933).

[11] 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).

[12] 142 Conn. 605, 116 A.2d 440 (1955).

[13] Hereinafter referred to as FCC.

[14] 12 F.C.C. 1069 (1948) (dictum).

[15] *Id.* at 1074. In 1948, a select committee of the House considered the *Port Huron* ruling and did not propose any change in § 315. Lamb v. Sutton, 164 F. Supp. 928, 933 (M.D. Tenn. 1958).

[16] 79 F. Supp. 199 (S.D. Tex. 1948).

[17] *Id.* at 203.

[18] *Id.* at 204.

[19] 89 F. Supp. 740 (E.D. Pa. 1950).

[20] Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 526 (1959).

conduct that section 315 demands.[21] The Court stated that state laws can and have been abrogated when their enforcement was " 'an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " [22]

Mr. Justice Frankfurter, with whom three other justices dissented,[23] accused the majority of wrongful speculation with regard to a broadcaster's liability in the state courts' application of section 315.[24] Frankfurter stated that state law should be overruled only in the situations where it is absolutely and clearly in conflict with federal law. He maintained that this is not so in the present case.

Prior to the instant case forty-four states had enacted statutes granting various degrees of immunity to broadcasters.[25] This statu-

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[21] *Id.* at 531. As the Court stated, § 18 of the Radio Act of 1927, 44 Stat. 1164, specifically granted the station immunity. This section was adopted by the Senate but was removed by the Conference Committee without any explanation. See H.R. REP. No. 1886, 69th Cong., 2d Sess. 10, 18 (1927). The Court pointed out that Congress since 1948 has made "significant additions to . . . section [315] without amending it to depart from the Commission's view." *Supra* note 20, at 533.

[22] Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959).

[23] *Ibid.* Justices Harlan, Whittaker and Stewart joined in the dissent.

[24] The minority contended that the inactivity of Congress to enact a specific immunity after the *Port Huron* ruling, in the light of a Congressional Report, negated rather than supported the conclusion that Congress acquiesced to the ruling. *Id.* at 539; see H.R. REP. No. 2426, 82d Cong., 2d Sess. (1952).

[25] See Friedenthal and Medalie, *The Impact of Federal Regulation on Political Broadcasting, Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 485 (1959). This article set forth the law regarding immunity in forty-three states and pointed out the absence of immunity statutes in another six states. A breakdown of these statutes is as follows:

a) Fifteen states provide, without mentioning censorship, that stations will not be liable for defamatory broadcasts made by candidates for public office; these included North Dakota.

b) Fifteen other states provide stations with immunity if they have no power to censor either under federal law or FCC regulations.

c) Two states declare that a station will not be liable if it has no power to censor under federal law or FCC regulations, provided that it makes certain announcements during the broadcast period. N.Y. CIV. PRAC. ACT § 337(a) (stations must announce that the views of the speaker are not necessarily those of the station); S.C. CODE § 23-7 (Supp. 1957) (stations must announce that the broadcast was not censored).

d) Three states provide that a licensee is liable if he has not exercised due care, but compliance with federal law or FCC regulations is deemed to constitute due care. Two of these states (Florida and New Mexico) place the burden on the plaintiff to show no due care on the part of the licensee. In the third state, Minnesota, the burden is on the station and thereby it might weaken its statute in providing absolute immunity in cases in which § 315 is held to prevent censorship.

e) Eight states grant some statutory protection such as defense of due care. Presumably if a licensee requests a candidate to delete the defamatory remarks the duty of due care is satisfied.

tory protection did lessen the need for remedial federal legislation but the danger of liability still existed, especially in the six states which did not have protective statutes.[26]

An additional problem arose here concerning broadcasts from a "protected" state which can be viewed and/or heard in an "unprotected" sister-state. What law governed in a situation like this: the law where the broadcast originated, where the suit was brought, or the law of the state in which the defamed party was domiciled?[27] As a result of the diversity of law which governed defamation in the various states some remedial legislation was necessary. Many attempts had been made to place an express immunity clause within section 315 but no law has ever been enacted.[28] A bill[29] introduced in the 80th Congress would have supplied this needed uniformity but unfortunately the bill was not reported out of committee. The law remained in its uncertain position until the Supreme Court, in this decision, declared that complete immunity could and should be implied within section 315. The stabilization of this situation would appear to justify the majority's preclusion of state law from its diverse interferences with federal policy.

The present case does not put forth a talismanic formula to all the questions which might arise under section 315. The section is not entirely clear as to whether the non-censorship provision is applicable to both the initial speaker and the subsequent speeches of opponents, or only to the latter broadcasts. This question arises specifically from attempts to interpret the proviso attached to section 315: *"Provided,* That such licensee shall have no power of censorship over *the material broadcast under the provisions of this section."* (Emphasis added). A literal interpretation of this proviso would imply that the non-censorship provision is all inclusive, prohibiting the broadcaster from censoring either the first or second candidate's speech. If this is the case, applying the reasoning in the present decision, the broadcaster would be immune from liability as to both the

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f) In the six other states mentioned in this report (Alaska, Delaware, New Hampshire, Rhode Island, Vermont and Wisconsin) there appeared to be no statutes regulating political defamation. New Hampshire in 1954 in Daniel v. Voice of New Hampshire, Inc., 10 R.R. 2045, 2046 (N.H. Super. Ct. 1954), indicated that the Communications Act of 1934 does not prevent the imposition of liability. *Contra,* Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958).

g) The Hawaiian statute covering this problem is HAWAII REV. LAWS ch. 294, § 11 (1955). *No defamation by radio.* "The owner, licensee or operator of a visual or sound radio shall not be liable for damages for any defamatory statement published or uttered over the facilities of such station or network by any candidate for public office." *Ibid.*

[26] *Supra* note 25, subd. f.

[27] *Cf.* Dale System, Inc. v. Time, Inc., 116 F. Supp. 527 (D. Conn. 1953).

[28] See Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 532 n.13 (1959).

[29] S. 1333, 80th Cong., 1st Sess., § 14(d) (1947). (White's Bill.)

first and second candidate. A strict interpretation of the proviso, in view of the fact that section 315 was designed to assure equal protection to political candidates, might imply that only when there is a second candidate's speech does the non-censorship clause apply. Following the reasoning that statutes in derogation of the common-law rule (absolute liability for publishers) should be strictly construed, an argument could be presented that Congress did not intend to prohibit censorship or grant immunity with regard to the first candidate's speech.[30]

The apparent weight of authority seems to indicate that the federal government has pre-empted the field of communications and has entrusted the regulating of the area to the FCC.[31] The Communications Act of 1934 [32] was enacted "to provide for the regulation of interstate and foreign communication by wire or radio, and for other purposes." [33] For this objective the FCC was created to "execute and enforce the provisions of this Act." [34] The FCC since 1948 has found an immunity implicit within section 315.[35] The dissent regarded the Commission's statements here as *dictum* and not binding on the states or the lower federal courts.[36] The Commission has stayed with this position, and declared it anew, though perhaps qualifiedly in a subsequent case.[37] What is more important is to view the definite efforts made since *In re Application WDSU Broadcasting Co.*[38] to enact an expressed immunity provision within section

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[30] Cases construing this ambiguity are divided in their holdings. Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313, 315 (9th Cir. 1947), *cert. denied*, 333 U.S. 876 (1948) (this case involved a first candidate's speech and the court ruled that the censorship provision of § 15 did not apply). *Accord*, Daniel v. Voice of New Hampshire, Inc., 10 R.R. 2045, 2046 (N.H. Super. Ct. 1954). *But see* Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958) (the district court intimated that § 315 applies whether there is a second candidate or not).

[31] Federal Radio Comm'n v. Nelson Brothers and Mtge. Co., 289 U.S. 266 (1933) (radio and television falls within the scope of federal regulatory power derived from the commerce clause of the U.S. CONST. art. 1, § 8, cl. 3). *Accord*, Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U.S. 650 (1936). See 67 CONG. REC. 12503 (1926) (FCC alone was intended to prescribe the duties of licensee under § 315). See also Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 113 (1942); Allen B. Dumont Laboratories v. Carroll, 184 F.2d 153 (3d Cir. 1950); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940).

[32] 48 Stat. 1064 (1934) (amended by 50 Stat. 189 (1937), as amended, 47 U.S.C. § 151 (1952)).

[33] *Ibid.*

[34] *Ibid.*

[35] *In re* Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948) (dictum).

[36] Farmers Educ. and Co-op. Union v .WDAY, Inc., 360 U.S. 525, 537-38 (1959). See also Huston Post Co. v. United States, 79 F. Supp. 199, 204 (S.D. Tex. 1948).

[37] *In re* Application of WDSU Broadcasting Co., 7 R.R. 769 (1952). See also Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 538 (1959) (dissenting opinion).

[38] *Supra* note 37.

315. All attempts failed largely due to the inability of the legislators to agree on what the rule should be, rather than whether there should be immunity or not. The legislators seem agreed that specific enactments are needed.

A law enacted to accomplish this need should prevent inequitable liability as well as compensate for injuries after they have occurred. The present ruling seems to accomplish this. The defamed person has recourse against the guilty party who uttered the defamatory remarks, and at the same time the broadcaster, who had no control over the defamations, is relieved of liability. The familiar objection to this situation is that the defamed person may have no remedy because the speaker is impecunious. However, the Court overruled this possible private detriment in favor of greater public benefits. The broadcaster now needs no liability insurance which indirectly might cause the rates for political broadcasts to exceed those of ordinary air time. Higher rates are expressly prohibited by section 315.[39] Also, the broadcaster need not deny all political candidates the use of the station's facilities which is the broadcaster's privilege under section 315.[40] Such action is against congressional intent and FCC policy.[41] Protection for the few who may be deprived compensation is too expensive if the harm which results is the inhibiting of free political expression.

FEDERAL PRACTICE—JURISDICTION—IN DIVERSITY CASES FEDERAL LAW MUST BE LOOKED TO IN DETERMINING FOREIGN CORPORATION'S AMENABILITY TO SERVICE. — The defendant, an Iowa corporation, being sued in the Southern District of New York on the basis of diversity of citizenship, made a motion to dismiss the action for lack of jurisdiction. Service was attempted on the defendant by serving a vice-president of the Rocke International Corporation whose principal place of business was in New York City. For five years Rocke, who was concededly amenable to service, had solicited sales for the defendant on a commission basis all over the world except in the United States, Hawaii, Alaska and Canada. The basis for the defendant's motion was that its activities within New York were insufficient to bring it within the Court's jurisdiction. The Court in

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[39] 48 Stat. 1088 (1934) (amended by 66 Stat. 717 (1952), as amended, 47 U.S.C. § 315(b) (1952)).

[40] *Supra* note 39, § 315(a).

[41] Farmers Educ. and Co-op. Union v. WDAY, Inc., 360 U.S. 525, 534-35 (1959). The FCC "considers the carrying of political broadcasts a public service criterion to be considered both in license renewal proceedings, and in comparative contests for a radio or television construction permit." *Ibid.*