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Liability of Broadcasting Station for Extemporaneous Defamation by One Not in Employ of Station

DEFAMATION—LIABILITY OF BROADCASTING STATION FOR EXTEMPORANEOUS DEFAMATION BY ONE NOT IN EMPLOY OF STATION.—Defendant broadcasting company leased its facilities to an advertising corporation which hired a performer to speak on a series of programs sponsored by another company. Defendant approved a prepared script and a rehearsal of the program. During the actual broadcast the performer made an extemporaneous remark upon which plaintiff brought action in trespass for defamation. Held, defendant not liable. *Summit Hotel Co. v. National Broadcasting Co.* (Pa. 1939), 8 A. (2d) 302.

The principal case presents for the first time the question of liability of a broadcaster for an alleged defamation not in the script, made on an unprivileged occasion,[1] by one not the agent of the broadcaster.[2] One previous case declared radio defamation to be libel and the station responsible in damages where the defamatory remarks appeared in a prepared script available for inspection.[3] In this case and three others approving its reasoning the courts endorse the analogy of the broadcast to newspaper publication.[4] Two cases have held radio defamation to be slander.[5]

Defamation is a false publication made without legal excuse or privilege which is calculated to bring one into disrepute.[6] Publication is the transmission of ideas and thoughts to the perception of a person other than a party to the suit.[7] Heretofore it has been said that due care is not considered in cases of publication.[8] This is clearly true in the cases of newspaper publishers who are held absolutely liable for defamation they print.[9] However, where messengers and news agents have been able to show that without negligence they had no knowledge of the defamation they helped disseminate it has been held a legal excuse or no publication.[10] It would seem clear that

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[1] Irwin v. Ashurst (1937), 158 Ore. 61, 74 P. (2d) 1127. Broadcast of trial proceedings wherein lawyer defamed witness held privileged.

[2] 3 Restatement, Torts (1937) § 577, refuses by means of a caveat to comment as to the law in this exact situation. See also 12 Proceedings American Law Institute 355 and 14 Proceedings American Law Institute 73 for the discussions of the problem where it is brought out that a script was submitted to the broadcaster in Sorenson v. Wood (1932), 123 Neb. 348, 243 N. W. 82.

[3] Sorenson v. Wood (1932), 123 Neb. 348, 243 N. W. 82.

[4] Coffee v. Midland Broadcasting Co. (1934), 8 F. Supp. 889; Miles v. Wasmer (1933), 172 Wash. 466, 20 P. (2d) 847; Irwin v. Ashurst (1937), 158 Ore. 61, 74 P. (2d) 1127.

[5] Locke v. Gibbons (1937), 299 N. Y. S. 188, (where action was not against the broadcaster but against the announcer); Meldrum v. Australian Broadcasting Co. (1932), Victoria L. R. 425 (Australia), 6 Australian Law Journal 431.

[6] 1 Cooley on Torts (4th ed. 1932) § 136.

[7] Harper, The Law of Tort (1933), § 236.

[8] Harper, The Law of Tort (1933), § 237.

[9] Taylor v. Hearst (1895), 107 Cal. 262, 40 P. 392.

[10] Layton v. Harris (1840), 3 Harrington (Del.), 406; Day v. Bream (1837), 174 Eng. Rep. 212; Arnold v. Ingram (1912), 151 Wis. 438, 138 N. W. 111; Emmens v. Pottle (1885), 55 L. J. Q. B. 51, 16 Q. B. D. 354.

the broadcaster is a publisher of all it broadcasts.[11] The question remains whether, under the facts of this case, the broadcaster is absolutely liable as is the newspaper publisher.

The newspaper analogy is consistent in those cases where the defamation is in a written script which may be edited. Such cases may be decided because of failure to exercise due care. In the principal case we have an entirely new type of publication. One cannot conceive of an extemporaneous remark being interpolated into a newspaper. Furthermore, the superior control to prevent publication by printing as compared to the control a station has which has leased all of its facilities is evident. The newspaper analogy cannot be extended to the case being considered.

Actionable defamation requires an intent to publish the defamatory matter. The defendant must have voluntarily published the statement.[12] Obviously here, the defendant intended to publish only what appeared in the script and the extemporaneous remark was not published voluntarily.

Absolute liability is imposed in cases where the insurance of society requires that one engaging in particularly dangerous conduct must assume the risk of damage to others from his conduct irrespective of fault. Unless the risk to others is unreasonable, liability will be imposed only upon showing lack of due care.[13] It is submitted that the court correctly refused to impose absolute liability to a government-regulated industry where defamations have been so infrequent.

An early news dealer case said, "To hold defendant a publisher would make the law unfair, unreasonable and unjust. No proposition which offends in this way can be a part of the common law."[14] Even if one chose to reject the news dealer analogy, to hold a broadcaster liable under facts as in the principal case would seem unreasonable and offensive. The court commendably did not make such a proposition a part of the common law.

Libel, with its greater liability, developed from slander, which upon the invention of the printing press proved an inadequate remedy for the longer deliberated, more permanent, and wider circulated printed defamation.[15] Now we again have a new method of publication differing from those for which the present law of defamation was created. To meet the situation a few states have adopted applicable statutes.[16] However, the suggestion of the court to

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[11] 2 Socolow, Law of Radio Broadcasting (1939), § 466; Remick v. General Electric Co. (1926), 16 F. (2d) 829; Fisher's Blend Station v. State Tax Comm. (1936), 297 U. S. 650, 56 S. Ct. 650.

[12] Harper, The Law of Tort (1933), § 237.

[13] Ames, "Law and Morals" (1908), 22 Harv. L. Rev. 97, 99; Holmes, The Common Law (1881), 108; Harper, The Law of Tort (1933), § 155.

[14] Emmens v. Pottle (1885), 55 L. J. Q. B. 51, 16 Q. B. D. 354.

[15] Veeder, History and Theory of Law of Defamation (1903), 3 Col. L. R. 546.

[16] Ill., Smith-Hurd (State Bar Assn. ed.) 1937, c. 126, §§ 4, 5, p. 3015 (slander); N. Dak., Laws of N. Dak. 1929, c. 117; Iowa, Acts of Reg. Sess. 1937, c. 238, (due care is good defense); Wash., Laws 1935, c. 117, p. 329 (libel, but allows absolute defense of prompt retraction if requested and no knowledge of libelous content); Calif., Statutes 1931 (criminal code), p. 120 (criminal slander upon showing intent to defame); Ore., Laws 1935 (criminal code), c. 366, p. 681 (criminal slander upon showing intent to defame).

create a new tort along the lines of due care to fit radio defamation appears to be the most logical and uniform method of handling the problem.

Indiana's statute regarding radio defamation does not define the liability of the broadcaster.[17] The implication is that it is absolute liability as in libel since it provides for mitigation of damages by retraction, the same as the statute applicable to newspapers.[18]

The few available decisions may be harmonized by adopting the defense of due care. From such a view the present state of the law would appear to be that if the defamation is in a prepared script, available to the broadcaster, he is liable in the absence of privilege because failure to prevent publication is a lack of due care. If the defamation is extemporaneous, the broadcaster is liable for slander upon showing lack of due care. If the speaker is the agent of the broadcaster, of course respondeat superior will apply. R. B. W.

TAXATION—MULTIPLE TAXATION OF INTANGIBLE PROPERTY.—Decedent, domiciled in Tennessee, transferred securities in trust to an Alabama trustee, reserving the power to remove the trustee and to dispose of the trust estate by her will. Decedent bequeathed the trust property to the trustee in trust but in different amounts and by different estates from those provided for by the trust indenture. Both Tennessee and Alabama asserted the right to impose an inheritance tax on the trust property passing under decedent's will. Plaintiffs allege that both states cannot constitutionally place a tax on the property. Held, both states may impose an inheritance tax on the trust property. *Curry v. McCanless* (1939), 307 U. S. 357, 59 S. Ct. 900. Decedent transferred bonds to a Colorado trustee to hold for specified trust purposes reserving the power to change any beneficiary and to revoke the trust and reinvest title in herself. After creating the trust, decedent became a domiciled resident of New York where she died without appointing new beneficiaries of the trust or revoking it. Both states assessed a tax on the transfer at death of the trust fund. Held, not in violation of the Fourteenth Amendment for New York to place an inheritance tax on the trust property after Colorado has already done so. *Graves v. Elliott* (1939), 307 U. S. 383, 59 S. Ct. 913.

Early in this century the Supreme Court held that it was a denial of due process for Kentucky to place a tax on an incorporeal hereditament (franchise) derived from Indiana and owned by a Kentucky corporation because the franchise had a situs in Indiana and had already been taxed by Indiana.[1] Next it was held that coal, property of a Pennsylvania corporation, but stored in other states, could not be used in enhancing the value of the capital stock of the corporation for purposes of taxation.[2] These two decisions were a foundation for the rule that tangible property is subject to taxation only in the state where permanently located and not by the state of the owner's domicile.[3] The court was careful to point out that it was making no rule

[17] Acts 1937, c. 37, § 1, p. 231, Burns '33, § 2-517 (Supp. 38).

[18] Acts 1895, c. 45, Sec. 1, Burns '33, § 2-1043.

[1] Louisville and Jeffersonville Ferry Co. v. Kentucky (1903), 188 U. S. 385, 23 S. Ct. 463.

[2] Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania (1905), 198 U. S. 341, 25 S. Ct. 669.

[3] Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194, 26 S. Ct. 36.