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The "Fringe Area" of Public Utilities

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cases above, the decisions of the courts have more and more tended to retreat from the free-speech protection first announced in the *Thornhill* case. Although the West Virginia court indicated in the *Blossom Dairy* and *Ohio Valley Advertising* cases that it felt it was strictly bound by the earlier Supreme Court holdings and, therefore, picketing had to be protected as an element of free speech, it is submitted that if the question were to arise today the court could feel free, if it wishes, to follow this indicated trend away from free speech and toward unlawful purpose as the test of the propriety of an injunction against peaceful picketing.

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THE "FRINGE AREA" OF PUBLIC UTILITIES

The United States Supreme Court in *Munn v. Illinois*[1] took the first, and a very important, step in establishing a new concept of public utilities when, on sustaining state rate control of the grain industry, the court recognized that it is the facts that make a business a public utility, not legislation. This decision was followed by a series of decisions which not only firmly entrenched this concept, but established a "fringe area" of regulated industry; an area wherein a business "affected with a public interest . . . is subject to control for the public good".[2] The day has long passed in which there remains any question of the power of the government and the courts to regulate such industries "affected with a public interest." However, there are three questions remaining in relation to such industries: (1) the extent of the regulation in the "fringe area"; (2) what rights the "fringe area" industries have to protection that private industries do not have; (3) when does a private industry enter the "fringe area?".

When radio saw the light of day in 1920 the operators submitted to regulation under the Radio Act of 1912[3] which had been passed by Congress to regulate point to point wireless operators. The introduction of radio brought forth a new problem, that of electrical interference. Regulation of license permits was under

[1] Munn v. Illinois, 94 U.S. 113 (1876).

[2] Nebbia v. State of New York, 291 U.S. 502 (1934), wherein the court said: "We may as well say at once that the dairy industry is not, *in the accepted sense of the phrase, a public utility.*" At 531. (Italics ours.)

[3] 37 STAT. 302 (1912), 47 U.S.C.A. §§ 51-54 (1928).

the supervision of the Secretary of Commerce, however, it had been decided before 1920 that the secretary could not establish any conditions precedent or exercise any discretion in issuing a license.[4] Also, under the act of 1912 a "hands-off" policy as to competition among operators had been adopted. The problem of electrical interference was forestalled by the broadcasters agreeing to observe certain restrictions imposed by the secretary. Voluntary submission was doomed from the beginning and soon radio stations began to interfere with other stations' broadcasts. Finally, in 1926, it was decided in the *United States v. Zenith Radio Corp.*[5] case, and in another opinion by the attorney general,[6] that the Secretary of Commerce was not vested with the power to regulate time limits, operating power, or to designate the frequency band that a broadcaster might use.

In 1927, Congress, to rescue the radio industry from the resulting chaos, passed the Federal Radio Act.[7] This act established the Federal Radio Commission and gave the commission the power to issue and revoke licenses under the standard of public interest, convenience and necessity. Immediate concern and controversy developed as to the commission's power to revoke licenses. Section 14[8] of the act allowed the commission to revoke a license if (1) the licensee failed to provide reasonable facilities; or, (2) made unjust or unreasonable charges; or, (3) had been guilty of unjust discrimination. This section precipitated the argument by many that Congress had classed radio broadcasters as common carriers through an application of the historical concept of the duties of common carriers.[9] This argument was countered with the claim that congress had not intended to class radio broadcasters as common carriers since the act did not regulate rates. The commission took the stand that section 14 applied only to point-to-point operators because at common law the radio broadcasters had not been classed as common carriers since there was not a "holding out to serve all." Under the act of 1927 the issue of the degree of protection afforded existing licensees arose in the case of *FRC v. Nelson Bros. Bond & Mtge. Co.*,[10] in which the United States Supreme Court upheld the com-

[4] 29 OPS. ATT'Y GEN. 579 (1912).
[5] 12 F.2d 614 (N.D. Ill. 1926).
[6] 35 OPS. ATT'Y GEN. 126 (1926).
[7] 44 STAT. 1162, 47 U.S.C.A. § 81 (1927).
[8] *Id.* at 1168, 47 U.S.C.A. § 81 (1927).
[9] See WYMAN, PUBLIC SERVICE CORPORATIONS (1911).
[10] 289 U.S. 266 (1933). The case decided the court's authority on review which is not within the scope of this note.

mission in increasing the power of one station and revoking the license of another station, saying that those who have operated a station have no right superior to the commission's power to regulate, and that any investment by the broadcaster was made subject to this power of the commission. It was obvious, then, by the end of 1933 that neither the Supreme Court nor the Federal Radio Commission considered a radio station as a common carrier or public utility, but preferred to treat it as an outer "fringe area" industry.

By 1934 a new danger had developed in the radio field, that of network control of the various stations, this danger coupled with the popularity of "trust-busting" led Congress to pass the Communications Act of 1934.[11] This act was significant in the field of radio regulation in that it omitted section 14 of the act of 1927, and expressly provided that a radio broadcaster was not a common carrier;[12] and secondly, it gave the commission the power to refuse a license to a petitioner who had been convicted of violating the antitrust laws.[13] The second of the above gave the commission a new ground on which to formulate license policy and one which led to the present day "multiple ownership rule",[14] for the commission at once claimed that this gave it the authority to consider competition and the danger of monopoly in formulating its licensing policy. The United States Supreme Court in the *Pottsville Broadcasting Company*[15] case upheld the commission on this point, saying that Congress in enacting the act of 1934 moved under the widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. It is obvious that by now the commission had adopted a new role in the field, and in this role it was supported by the Supreme Court. Where, originally, Congress had designed radio regulation to prevent electrical interference, the commission had assumed the position that it was to protect the public from monopolistic control of news dissemination by radio broadcasting. The adoption of this approach distinctly nudged the industry closer to the public utility zone, deeper into the "fringe area." Also, although the act of 1934 had expressly stated that radio broadcasters were not to be classed as common carriers, terminology commonly asso-

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[11] 48 STAT. 1064 (1934), 47 U.S.C.A. § 151 (1937).
[12] *Id.* at 1066, 47 U.S.C.A. § 153(h).
[13] *Id.* at 1086, 1087, 47 U.S.C.A. §§ 311, 313.
[14] 47 C.F.R. § 363(a)(1) (1953).
[15] FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940).

ciated with a public utility, "that regulation was to be for the public interest, convenience, and necessity," was used as the guide for the commission in its regulatory activities.

Still lingering in the background was the issue of an existing licensee's right to protection from economic loss caused by the issuance of a license to a new station to operate in the same area as the existing station. The commission steadfastly maintained that it regulated in the public interest, that it was not to consider private interest. The issue was brought to the attention of the United States Supreme Court in the *Saunders Bros. Radio*[16] case, decided in the same year as the *Pottsville* case. The *Saunders Bros.* case on its face, indicated a distinct trend away from the public utility zone. In this case the commission issued licenses to both applicants to serve in the same area, Saunders Bros., one of the applicants who had been broadcasting in the area, appealed from the commission's ruling contending that the commission had not considered the danger of economic injury to the appellant in issuing the second license. The Supreme Court upheld the commission's ruling saying that under the act the commission was not required to consider the danger of economic injury to an existing licensee in granting a license. As strong as the decision appeared to be on its face as pulling the industry away from the public utility zone, the court was thinking in public utility terms when it said that the commission would have to consider "ruinous competition." This is evidenced by the court's statement: "This is not to say that the commission will not consider competition where it will have a vital and important bearing on the ability to serve."[17] The court then went on to distinguish the difference between mere economic injury as such, and the case where the competition would result in both stations "going under" thereby depriving the public of the service it deserved. The case indicating the possibility of an application of a principle that had, for the past few years, been battling for recognition in the public utility field.[18] It is true that the above was only a dictum but it is submitted that it was a recognition of the public utility aspect of the radio industry. Apparently, the court, in reaching the above

[16] FCC v. Saunders Bros. Radio Station, 309 U.S. 470 (1940).

[17] *Id.* at 476.

[18] Hardman, *The Changing Law of Competition in Public Service,* 33 W. Va. L.Q. 219 (1927), *Another Word,* 34 *id.* at 123 (1928); opposed to the author's view is same title, Arnold, *A Dissent,* 34 *id.* at 183 (1928), with a further comment by Mr. Hardman, 34 *id.* at 290 (1928).

result, was considering the radio industry in much the same light that the court had looked at the milk industry in the *Nebbia* case.

The problem of economic harm and protection of existing licensees has always been of great concern to the commission for it was early asserted by such licensees that this was sufficient grounds for intervention in a license hearing. Existing licensees claimed that failure to allow them to intervene on the basis of economic harm and the subsequent issuance of a license to a new station was a denial of due process. This was refuted in *Nelson Bros. Bond & Mortgage* case, in which the court had held that a radio license was not a property right. This was not to be the complete answer though, for the Communications Act of 1934 provided the right of appeal to a person "aggrieved or whose interests are adversely affected by the commission's orders." The Supreme Court, in the *Saunders Bros.* case ruled that a person suffering economic injury would be a person aggrieved or whose interests were adversely affected and could appeal from the commission's orders. It is to be noted that this phrase does not distinguish existing licensees from newspaper owners or others. Enter the possibility that a newspaper, subjected to harmful competition by the commission's awarding a radio station license, would be protected on appeal. What had started out to be a narrow field of protection from electrical interference had slowly developed to a field with unending possibilities. In 1942 the Supreme Court enlarged on this point,[10] when it upheld an order, granted by a district court, staying a license issued by the commission. Here the court held that, although the persons given the right to appeal by the communications act must stand as representatives of the public interest, and that in such a case the court is called upon to enforce public rights, this does not diminish its power to protect private rights. The danger of economic harm to private interests was recognized as grounds to order a rehearing by the commission. The effect being to require the commission to allow intervention in the first instance and to bring to the forefront the effect of competition by the prospective licensee.

By the time that television entered the scene the radio industry stood on the threshold of the public utility zone. It was still a "fringe area" industry but obviously recognized as an industry

[10] Scripps Howard Radio v. Comm'n, 316 U.S. 4 (1942). The issue was the validity of a district court's issuing the order staying the issuance of a license by the commission pending an appeal by an existing licensee.

so affected with the public interest that the Supreme Court had foreseen the danger of ruinous competition. Television automatically came under the jurisdiction of the communications commissions.[20] The introduction of television was the entry of a third medium of news dissemination and enjoyment in a field that had been occupied only by newspapers and radio. But, more important, it introduced a new industry which to sustain itself had to draw from the existing industries' source of revenue, the advertiser—a new source of competition in a field that did not have too much room for competition. Where in 1940 at the time of the *Saunders Bros.* case, ruinous competition was not a pressing danger, with the advent of television, its development and consequent locating of stations in the smaller towns throughout the nation, competition among the three now took on a new hue. The effect of this upon the commission and upon the courts' thinking began to show at once.

Heretofore the newspaper industry had escaped regulation and had been accepted as a private industry,[21] the few cases in which newspapers had entered into the FCC's area of authority having to do with situations wherein the newspaper sought a license to establish a radio station. Fortunately or unfortunately, the foundation had been prepared for intervention by newspapers to protest the issuance of a radio license on the ground of economic loss. A facet of this foundation was apparent in a case decided in 1950.[22] The case is distinguishable from prior cases in that a publisher who was seeking a radio license had resorted to unfair practices in his newspaper in regard to an existing licensee. The commission refused his application and was upheld by the federal court of appeals on the ground that monopoly in the communication of news *and advertising* is contrary to the public interest. The decision is important as prior court decisions had applied this principle to the situation where the radio broadcasting field was in danger of monopolistic control; this decision applied this principle to the field of news and advertising service as a whole, without any distinction as to the method.[23] Prior to this case the point in issue was that of news dissemination. The court in the *Mansfield* case recognized,

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[20] 48 STAT. 1064 (1934), 47 U.S.C.A. § 153(b) (1937).

[21] *In re* Louis Wohl, 50 F.2d 254 (D.C.E.D. Mich. 1931); Uhlman v. Sherman, 22 Ohio N.P. (n.s.) 225 (1920).

[22] Mansfield Journal Co. v. FCC, 180 F.2d 28 (D.C. Cir. 1950).

[23] See Associated Press v. United States, 366 U.S. 1 (1944). Here the court, in a dictum, had said that monopolistic control of news dissemination by newspapers was to be avoided in the public interest.

and rightly, the importance of the advertising service which the three industries render to the public. It would seem that this case indicates a tendency to possible acceptance of all three industries as public utilities.

Again in 1955 the seriousness of the problem created by the entry of television into the advertising field and its effect on the court was borne out in the case of *Metropolitan T.V. Co. v. FCC.*[24] In this case the petitioner, as an existing licensee, was denied the right of a hearing in a license case. On appeal, the appellant contended that the commission's action granting a new license in the same area, to another television broadcaster, would cause a loss of listeners and would thereby impair its competitive position with a newspaper in the same city. The federal court of appeals held that this was sufficient showing to classify the petitioner as a party in interest and to entitle the party to a hearing. The commission was ordered to rehear the case, although the two stations were sufficiently far apart to prevent any competition or electrical interference with each other.

The stage was now set for the latest, and probably the most significant case in this field, *Clarksburg Publishing Co. v. FCC.*[25] In this case the protestant was a newspaper publisher, not an existing licensee; nor was the protestant seeking a license. The petitioner owned stations (radio and television) in a neighboring city and also newspapers in nine cities in the same state. The license application had been opposed by a radio broadcaster, who withdrew from the case on the petitioner's paying its expenses incurred in protesting. Clarksburg Publishing Co. immediately entered a protest. The commission recognized Clarksburg Publishing Co. as an interested party but went on to award the petitioner a license without an evidentiary type of hearing.[26] On appeal, the court remanded the case to the commission for an evidentiary hearing, to allow the protestant to come forward with its evidence. The protestant had entered the case on the basis that to grant a license in the city would result in direct competitive injury to him. The court and the commission recognized this as sufficient grounds to allow Clarksburg Publishing Co. to enter a protest, as a party in interest, since both the television station and the newspaper rely on advertising as a main source of revenue. The court also went on to discuss, and in

[24] 221 F.2d 879 (D.C. Cir. 1955).
[25] 225 F.2d 511 (D.C. Cir. 1955).
[26] 66 STAT. 715, 47 U.S.C.A. § 309(c) (Supp. 1955).

part base its holding, on the fact that the petitioner had a monopoly in certain areas of the state in relation to news dissemination through ownership of the newspapers.[27] The significance of the case lies in the recognition of the protestant, a newspaper, as an interested party purely because to grant the license could result in economic harm to it since both mediums rely on the same sources for revenue. Also, the decision carries the *Mansfield* decision a step further since in the *Clarksburg Publishing Co.* case the question of monopoly in the newspaper field did not arise on any question of unfair practices on the part of the petitioner. It is true that the court did not hold that the commission could not award a license to the television operator in such a situation. If the issue of monopoly was absent, however, the classing of the publisher as a party in interest, with a right to protest, purely on the basis of economic harm, indicates that the court stands ready to protect the investment of a broadcaster or newspaper owner when such investment is endangered due to competition brought about by the entry of television operators. How much closer could the court move to recognition that the facts have brought the three industries to a point where they stand tottering on the dividing line between full-blown public utility status and the "fringe area?"

Clearly, the commission can, by application of the above principles, prevent monopolistic control of the news and advertising dissemination mediums in a certain locale. In the large metropolitan areas this will not be of too great consequence as in those areas there is sufficient revenue to support them. The problem becomes acute in the smaller communities where, generally, the revenue is not sufficient to support all three. One must be aware that in such cases the policy of the commission and the court against monopoly in news and advertising service is bound to conflict with their policy of protecting the existing licensees and publishers, the former policy demanding separate ownership, the latter policy being conducive to single ownership.

The courts have led the three industries down a long road until today they stand at a crossroads. One road means full public utility status while the other means a treading of the dividing line between that and the "fringe area." The side road of private industry has long been passed. To prophesy which way the three will turn would

[27] The court commented strongly on the petitioner's paying the original protestant's expenses, indicating that to be acceptable, the commission should require a detailed statement of the expenses.

be sheer conjecture at this time. However, the tendency is seemingly toward the public utility side. In considering the future trend, one must remember that the Supreme Court forty-one years ago said: "There must be progress, and if in its march private interests are in the way they must yield to the good of the community."[28]

J. W. P.

ORAL CONTRACTS TO DEVISE AND BEQUEATH IN WEST VIRGINIA

Undoubtedly the rule prevails in a majority of jurisdictions in the United States that a contract whereby a person obligates himself for a valuable consideration to make a provision by will is not illegal or against public policy.[1] West Virginia is in accord with this general rule with regard to contracts to devise or bequeath which satisfy the general requirements of a contractual relationship.[2]

When an attempt to contract to devise is made orally however, the promisee in attempting to gain equitable relief or damages at law is faced squarely with statutory barriers which at first blush may appear insurmountable.

In an attempt to secure relief in equity upon an oral contract to devise the proponent in West Virginia is met by not one, but four separate statutes which appear to bar performance of the oral contract. The Code requires that, "no estate of inheritance or freehold or for a term of more than five years . . . shall be created or conveyed unless by deed or will."[3] This statute when read in conjunction with those which explicitly require that, ". . . no will shall be valid unless it be in writing and signed by the testator . . ."[4] and "no contract for the sale of land . . . for more than one year shall be enforcable unless the contract or some note or memorandum thereof be in writing and signed by the party to be charged thereby, or his agent,"[5] as well as that requiring that, "no action shall be brought in any of the following cases:

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[28] Hadachuck v. Sebastian, 239 U.S. 394, 410 (1915).

[1] ATKINSON, WILLS § 48 (2d ed. 1953); PAGE, WILLS § 1707 (3d ed. 1941).

[2] Davidson v. Davidson, 72 W. Va. 747, 79 S.E. 998 (1913).

[3] W. VA. CODE c. 36, art. 1, § 1 (1931).

[4] *Id.* c. 41, art. 1, § 3 (1931).

[5] *Id.* c. 36, art. 1, § 3 (1931).