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DEFAMATORY INTERPOLATIONS IN RADIO BROADCASTS

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I. DIVERGENT ANALYSES EMBODIED IN AVAILABLE AUTHORITIES

In the recent case of *Summit Hotel Co. v. National Broadcasting Co.*¹ the Supreme Court of Pennsylvania held that the radio station operator who had used due care was not liable for a defamatory interpolation by an outside speaker on a commercial program in which was being broadcast a manuscript whose contents were free from objection.

In giving its reasons for this position the Pennsylvania Court asserted that Pennsylvania law of defamation, unlike that of various other jurisdictions, does not involve absolute liability but only a high standard of care.² On that one fundamental ground, therefore, this

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1. 8 A. (2d) 302 (Pa. 1939). For opinion in the trial court see 87 PITTSBURGH LEG. J. 49 (1939).

2. "A close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter." Kephart, C. J., in *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 307 (Pa. 1939). The court in a footnote sets out in support of this statement certain quotations from the earlier cases of *Clark v. North American Co.*, 203 Pa. 346, 53 Atl. 237 (1902) and *Shelly v. Dampman*, 1 Pa. Super. 115 (1896). The court nowhere deals with the suggestions that so far as the *Clark* case is concerned these quoted expressions grew out of a misconstruction of the language in the *Shelly* case, confusing the basis for liability with abuse of privilege, that they were mere *obiter dicta*, and that Justice Holmes in the Supreme Court of the United States had included the *Clark* case among the authorities cited on the proposition that "Whatever a man publishes, he publishes at his peril." See *Peck v. Tribune Co.*, 214 U. S. 185, 189 (1909). So far as the *Shelly* case is concerned, even the excerpt quoted by Judge Kephart shows it was directed to the question of abuse of privilege by failure to use due care, and in nowise supports the proposition that liability for unprivileged defamation rests on failure to use due care. Indeed the opinion in the *Shelly* case itself shows the exact contrary. "It needs no argument or citation of authorities to show that the only way to justify or excuse such a publication would be to prove its truth." *Shelly v. Dampman*, 1 Pa. Super. 115, 124 (1896).

case is at once sharply distinguishable from the case of *Sorensen v. Wood*,³ the original case on defamation by radio. In that case the Supreme Court of Nebraska, a state where the law of defamation involves absolute liability,⁴ held that the radio station operator was liable for defamatory utterances in a manuscript⁵ read into the microphone by a paying outside speaker. The two cases are of course also readily distinguishable on their facts, in that the Pennsylvania case dealt with an impromptu interpolation by an outside speaker while the Nebraska case dealt with the broadcast of a defamatory manuscript read by an outside speaker into the microphone.

Furthermore, in their approach to the problem of defamation by radio, the opinions in these two cases differ widely. The case of *Sorensen v. Wood* treats the station operator as a joint publisher⁶ with the speaker at the microphone. It holds, accordingly, that the law of defamation is applicable to the radio station as well as to the speaker at the microphone.⁷ In applying the law of defamation to the broadcasting station it regards publication by newspaper and by radio as closely analogous.⁸ On the other hand, the case of *Summit Hotel Co. v.*

3. 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1106 (1933).

4. In the course of the opinion in *Sorensen v. Wood*, *id.* at 356, 243 N. W. 82, 86 (1932), the court quoted from Justice Holmes in *Peck v. Tribune Co.*, 214 U. S. 185, 189 (1909), as follows: "If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, 'Whenever a man publishes, he publishes at his peril.'" The court also referred to its earlier opinion in *Walker v. Bee-News Publishing Co.*, 122 Neb. 511, 240 N. W. 579 (1932), wherein it had reviewed the authorities on this point and expressed its adherence to the views expressed by Justice Holmes, and had referred to them as identical with the views expressed by Lord Alverstone, C. J., in the leading English case of *Jones v. Hulton*, [1909] 2 K. B. 444, which was later affirmed on appeal to the House of Lords, [1910] A. C. 20 (especially well expressed in the opinion by Lord Loreburn, L. C.). That this was not a new position for the Supreme Court of Nebraska readily appears, furthermore, from the much earlier case of *Barr v. Birkner*, 44 Neb. 197, 62 N. W. 494 (1895), wherein substantially the same position was taken.

5. The language of the opinion in *Sorensen v. Wood* was regarded by Professor Bohlen as obscure on the point of whether the manuscript was available to the broadcasting company for supervision. 14 *Proc. A. L. I.* 74 (1937). Answering this suggestion Chief Justice Goss, the writer of the opinion, stated before the American Law Institute that it was. *Id.* at 82. The present writer has read through the record of testimony in that case as it appeared in the bill of exceptions. From such reading it is very clear that the manuscript containing the defamatory utterances was available for the broadcasting company's supervision but that it was not asked for nor examined, the company's employees taking the attitude that since it was a political address its content was none of their concern. Identical copies of that manuscript had also been delivered by the speaker to several newspapers, none of which had ventured to use it, recognizing its defamatory character.

6. "The publication of a libel by radio to listeners over the air requires the participation of both the speaker and the owner of the broadcasting station. The publication to such listeners is not completed until the material is broadcasted. As they must co-operate to effect the publication of the libel there cannot be said to be a misjoinder when they are sued together for damages resulting from their acts." *Sorensen v. Wood*, 123 Neb. 348, 357, 243 N. W. 82, 86 (1932).

7. "The underlying basis for liability is libel, and not negligent conduct." *Id.* at 353, 243 N. W. at 85.

8. "It has often been held in newspaper publication, which is closely analogous to publication by radio, that due care and honest mistake do not relieve a publisher from liability for libel." *Id.* at 356, 243 N. W. at 86.

National Broadcasting Co. does not commit itself as to whether or not the radio station operator is under any circumstances to be regarded as a publisher but asserts that the newspaper analogy is inapplicable to radio stations, at least as to impromptu interpolations.⁹ The two cases present sharp contrasts, too, as to their underlying bases of rationalization. *Sorensen v. Wood* recognizes as a matter of course that the law of defamation involves absolute liability in cases of unprivileged publication of defamatory utterances. *Summit Hotel Co. v. National Broadcasting Co.* not only asserts that the law of defamation as recognized in Pennsylvania involves merely a high standard of care, but also asserts in effect that the general rule in tort law is that there is no liability without fault,¹⁰ and intimates that even legislative enactment cannot introduce absolute liability without violating constitutional due

9. "But where the circumstances, like those now presented, are such that the defamation occurs beyond the control of the broadcaster, it is perfectly clear that the analogy between newspapers and broadcasting companies collapses completely." *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 309 (Pa. 1939).

10. "The case of injuries to land may now be said to be the general exception to the modern rule that liability will not be predicated on innocent and diligent conduct. A tort today implies fault or wrong. Tort liability must be founded upon some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others When considering the field of personal injuries there appears no valid exception to the rule that liability can be based only upon intentional wrongdoing or lack of due care." *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 304, 305 (Pa. 1939). How preposterous this pronouncement is as a statement of tort law is neatly brought out in the following excerpt from one of the greatest living American jurists. "It is a practical question of the first importance, as well as a theoretical question of interest, whether we are to generalize our whole system of tort liability by means of one principle of liability for fault and for fault only, as the French sought to do and as we later sought to do largely under their influence, or on the other hand, are to admit another source of delictual liability alongside of fault, as the French law does in fact and is coming to do in theory, and as our law has always done in fact. For in our law as it stands one may perceive readily three types of delictual liability: (1) Liability for intentional harm, (2) liability for unintentional culpable harm, (3) liability in certain cases for unintended nonculpable harm. The first comport with the doctrine of no liability without fault. The third cannot be fitted thereto We are not questioning a long-established dogma in Anglo-American administration of justice, therefore, when we ask whether the orthodox theory of the last generation is adequate as an analytical statement of the law that is, or as a philosophical theory of the law that ought to be. My own belief is that it is neither." POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) 167.

For more elaborate discussion and citation of authorities on the phenomena of absolute liability see, Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases* (1930) 78 U. OF PA. L. REV. 805; Harris, *Liability Without Fault* (1932) 6 TULANE L. REV. 337; Isaacs, *Fault and Liability* (1918) 31 HARV. L. REV. 954; Seavey, *Some Speculation as to Respondeat Superior*, in HARVARD LEGAL ESSAYS (1934) 433, 442; Smith, *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 HARV. L. REV. 241, 319, 409; Takayanagi, *Liability Without Fault in the Modern Civil and Common Law* (1921) 16 ILL. L. REV. 163, 268, (1922) 17 ILL. L. REV. 187, 416; Vold, *The Functional Perspective for the Law of Torts* (1936) 14 NEB. L. BULL. 217, 228-241.

It may be added for good measure that the American Law Institute formulates its general statement of the recognized principle of absolute liability as follows in RESTATEMENT, TORTS (1938) §§ 519, 520:

§ 519. "Except as stated in §§ 521-4, one who carries on an ultrahazardous activity is liable to another whose person, land or chattels the actor should recognize as likely to be harmed by the unpreventable miscarriage of the activity for harm resulting thereto from that which makes the activity ultrahazardous, although the utmost care is exercised to prevent the harm."

process.¹¹ The two cases differ sharply in their views of the seriousness of the harm involved in defamation by radio, the one regarding it as comparable in this respect to that of defamation by newspaper,¹² the other asserting that newspaper defamations possess possibilities for harm far greater than defamations by radio.¹³ The two cases differ sharply even as to their grasp of what are the actual physical facts of radio broadcasting. The Nebraska case recognizes that the speaker and radio station operator participate in the process of broadcasting, that they cooperate to effect the publication.¹⁴ The Pennsylvania case, on the other hand, asserts that the radio station has leased its facilities

§ 520. "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

See also, comments *a-h* to § 520.

11. The court lifts the following from its earlier opinion in *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, 489, 7 A. (2d) 302, 321 (1939): "But in common law actions of tort it is the 'law of the land' that liability cannot be imposed upon one who is without fault. To legislate a person presumptively guilty of either a crime or a tort is an attempted erosion of 'the substance of original justice.'" *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 306 (Pa. 1939). That legislation may constitutionally base liability upon the doing of damage rather than upon the presence of fault is abundantly clear, however, at the present time. See, for instance, the following: "Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common law liability of the carrier, of the innkeeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & S. F. Ry. Co. v. Mathews*, 165 U. S. 1, 22 (1896); *Chicago, R. I. & P. Ry. Co. v. Zernecke*, 183 U. S. 582, 586 (1901)." Pitney, J., in *New York Central R. R. v. White*, 243 U. S. 188, 204 (1916).

12. "The defendant company, like most radio broadcasters, is to a large extent engaged in the business of commercial advertising for pay . . . Such commercial advertising is strongly competitive with newspaper advertising because it performs a similar office between those having wares to advertise and those who are potential users of those wares. Radio advertising . . . competes with newspapers, magazines, and publications of every nature. The fundamental principles of law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another, nor why a broadcasting station should be granted special favors as against one who may be the victim of a libelous publication." *Sorensen v. Wood*, 123 Neb. 348, 357, 243 N. W. 82, 86 (1932).

13. "Newspaper defamations possess possibilities for real harm far greater than defamations by radio, as they constitute permanent, continuing records, which, through circulation, are constantly republished. The radio word is quickly spoken and, generally, as quickly forgotten." *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 310 (Pa. 1939).

In making this offhand generalization on the question of fact Chief Justice Kephart apparently entirely overlooked the circumstance that what appears in newspapers frequently gets equally perfunctory attention from readers and may often not be noticed at all, many readers skimming through headlines, etc., and reading only such portions as happen to appeal to them. The learned judge apparently overlooked also the immeasurably wider diffusion attained by radio transmission than by newspaper, as well as the far greater power of the human voice to stir the interest and emotions of listeners. Who can doubt, for instance, in the light of his own personal knowledge of the phenomenon, that the radio addresses of President Franklin D. Roosevelt are far more impressive to listeners at receiving sets than they are to readers who merely see them in print. See DAVIS, *RADIO LAW* (2d ed. 1930) 102: "One can inflame people with the spoken word in a way in which it cannot be done by the printed word."

14. See note 6 *supra*.

to the advertiser for the time being,¹⁵ and treats the question as one of the answerability of the lessor for the misconduct of his lessee.

If it be conceded that *Summit Hotel Co. v. National Broadcasting Co.* correctly states that the local Pennsylvania law of defamation does not involve absolute liability but merely a high standard of care,¹⁶ the conclusion announced by the court that a non-negligent radio station cannot be held liable for an impromptu defamatory interpolation follows readily. In most jurisdictions, however, the broader view of the law of defamation that the publisher of unprivileged defamatory utterances publishes at his peril prevails.¹⁷ In such jurisdictions, then, how is liability for defamatory interpolation to be dealt with? On that question, manifestly, the Pennsylvania pronouncement is not in point, resting as it does upon a fundamentally different underlying basis for liability.

II. PURPOSE OF THIS ARTICLE

The purpose of this article is to support the view that radio stations under the common law of defamation should properly be held to the same liability for defamatory interpolations as they are for defamatory utterances contained in written or printed manuscripts transmitted to radio listeners by their broadcasting operations.

The arguments on behalf of radio stations encountered in this connection are essentially the same old arguments, slightly adapted as to phraseology, which have previously but unsuccessfully been urged

15. This deceptive expression is used to describe the facts, both at the beginning and toward the close of Chief Justice Kephart's opinion, as well as in his attempt to define the issue in the third paragraph of the opinion. By adopting that deceptive expression Chief Justice Kephart greatly obscured the realities presented to the court for analysis in reaching its decision.

The briefs submitted to the Pennsylvania Court in the *Summit* case used more candid language: "It operated the apparatus which was the means by which Jolson's alleged defamatory utterance reached the public generally." Brief for Appellant, p. 45. *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). "A broadcasting station operates facilities for disseminating speech." Brief for Intervening Appellant, p. 3. In this brief, however, appears the statement that the station's facilities had been temporarily leased to an advertiser. *Id.* at 23.

The deceptive expression that the broadcaster rented its facilities to the speaker at the microphone was urged upon the Nebraska Court without success in *Sorensen v. Wood*. See Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611, 615. See *infra* p. 292.

16. See note 2 *supra*.

17. *Peck v. Tribune Co.*, 214 U. S. 185 (1909); *Washington Post Co. v. Chaloner*, 250 U. S. 290 (1919); *Washington Post Co. v. Kennedy*, 3 F. (2d) 207 (App. D. C. 1925), 41 A. L. R. 483; *Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392 (1895); *Barr v. Birkner*, 44 Neb. 197, 62 N. W. 494 (1895); *Walker v. Bee-News Publishing Co.*, 122 Neb. 511, 240 N. W. 579 (1932); *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1098 (1933); *Hankinson v. Bilby*, 2 Car. & K. 440, 175 Eng. Rep. R. 182 (Ex. 1847), same case, 16 M. & W. 442, 153 Eng. Rep. R. 1262 (Ex. 1847); *E. Hulton & Co. v. Jones*, [1910] A. C. 20; *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K. B. 331 (C. A.); *Morrison v. Ritchie & Co.*, 4 Sess. Cas. 645 (1902).

The problem on the merits is carefully analyzed with a mass of supporting authority in *Smith, Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation* (1912) 60 U. OF PA. L. REV. 365. In addition, see HARPER, TORTS (1935) § 237; RESTATEMENT, TORTS (1938) §§ 563, 564, 579, 580 and comments thereto.

upon the courts in the effort to relieve radio stations from liability where defamatory manuscripts have been broadcast. Accordingly, a comprehensive discussion of the basis of liability for defamatory interpolations must review to a very considerable extent the general field. One way of putting the matter is to ask whether the arguments which up to now have been held by most of the courts to be unsound as applied to broadcasting of defamatory manuscripts can be recognized as sound as applied to defamatory interpolations.

III. THE TYPES OF CASES INVOLVED IN DEFAMATION BY RADIO

Four types of circumstances under which the question of the radio station's liability for defamatory broadcasts may arise may for convenience's sake be distinguished.

1. *Where Radio Station's Own Announcer Speaks Into the Microphone*

In the first type of case the speaker at the microphone is employed by the radio station for that purpose. In such a case the radio station by its own agents not only operates its broadcasting apparatus but also utters into the microphone the speech which is broadcast to the listening public. No one seems to question that where this combination of facts occurs the ordinary law of defamation is applicable if the utterances broadcast are defamatory.¹⁸ In this type of broadcast, accordingly, the radio station is as accountable for a defamatory interpolation as it is for any other part of the broadcast. In such a case the secondary question as to whether a defamatory interpolation not contained in the submitted manuscript is to be dealt with as libel or as slander may require some attention,¹⁹ but in any event the radio station is here subject to liability on the same basis as are other publishers of defamatory utterances.

2. *Where an Outside Speaker Utters Defamatory Statements Contained in a Previously Submitted Manuscript*

In the second type of case the speaker given access to the microphone is an outside speaker, as, for instance, the representative of

18. See *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 312 (Pa. 1939).

That on such facts liability would follow in the absence of an applicable privilege was conceded by the attorneys for the radio broadcasters in the briefs submitted in the *Summit* case. In the Brief for Appellant, p. 44, it was conceded that the newspaper analogy was close even in cases where a defamatory manuscript is read into the microphone by an outside speaker. In the Brief for Intervening Appellant, p. 22, it is conceded that the broadcasting station should be liable for defamatory words spoken over its facilities by its own agents or employees who have been authorized to speak.

19. Vold, *supra* note 15, at 639; Haley, *The Law on Radio Programs* (1937) 5 GEO. WASH. L. REV. 157, 182; cf. *Locke v. Gibbons*, 164 Misc. 877, 299 N. Y. Supp. 188 (Sup. Ct. 1937); *Irwin v. Ashhurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938). In addition, see RESTATEMENT, TORTS (1938) § 568, comment f; Graham, *Defamation and Radio* (1937) 12 WASH. L. REV. 282, 288.

a commercial advertiser, or a political speaker, who reads from a manuscript the defamatory utterances which are then transmitted to the public by the radio station's operation of the broadcasting apparatus. The available cases to date have held that on such facts the station's participation in the transmission of defamatory utterances subjects it to liability as publisher.²⁰

So far as these cases have expressed the legal basis for this conclusion they have invoked the analogy of the newspaper's liability under the law of defamation. As reasons for invoking the newspaper analogy these cases have pointed out that the facts regarding publication, as between newspaper and radio, are here closely analogous, not only with regard to the mechanical details affecting practicable control over the contents to be published²¹ but also, and especially, with regard to the parallel and competing economic services rendered by the newspaper and the radio in the field of advertising and publicity from which both derive their financial support.²² These cases have also pointed out that in defamation by radio the more general considerations supporting the application of strict liability for defamatory utterances come into play rather than the considerations supporting the application of the less exacting rules of negligence law.²³ On the other hand, skeptical critics

20. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934); *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1098 (1933); *Miles v. Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933). This position is also taken for granted in *Irwin v. Ashhurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938) wherein, however, the privilege available to the speaker was held also applicable to the radio station in the broadcasting of courtroom proceedings.

21. This matter was thoroughly examined in the arguments that were urged upon the Nebraska Court in *Sorensen v. Wood*. In the radio station's brief on the first appeal the argument was phrased as follows (p. 21): "A newspaper is printed, and either the proprietor or his agents must necessarily read the matter inserted in the paper before it can be put into type and published. The cases hold that a newspaper owner cannot say that he did not know when it was impossible to print it without knowing. The situation here is entirely different. Granting that this publication was libel, although there is a very grave question as to whether it was libel or slander, it was done in such a manner, that is, by speaking, that it was under the circumstances impossible for the broadcasting station to know in advance what Wood intended to say. The situation is nothing like that of a newspaper proprietor whose publication is by words he or his agents set into type and print." This argument was in that case answered in great detail in briefs submitted on behalf of the plaintiff. *Vold, supra* note 15, at 631.

After this presentation in the briefs, and reference thereto in the oral arguments to the court the Supreme Court of Nebraska spoke as follows: "... newspaper publication . . . is closely analogous to publication by radio." *Sorensen v. Wood*, 123 Neb. 348, 356, 243 N. W. 82, 86 (1932).

22. "The defendant company, like most radio broadcasters, is to a large extent engaged in the business of commercial advertising for pay . . . Such commercial advertising is strongly competitive with newspaper advertising because it performs a similar office between those having wares to advertise and those who are potential users of those wares. Radio advertising is one of the most powerful agencies in promoting the principles of religion and politics. It competes with newspapers, magazines, and publications of every nature." *Sorensen v. Wood*, 123 Neb. 348, 357, 243 N. W. 82, 86 (1932).

23. "... they [the jury] were told in effect that, if the station owner honestly and in good faith exercised due care, he is absolved from liability for transmitting unprivileged defamatory words uttered by a speaker. It has often been held in newspaper publication, which is closely analogous to publication by radio, that due care and honest mistake do not relieve a publisher from liability for libel. In *Peck v. Tribune Co.*, 214

of these decisions, attorneys for, or sympathizers with radio stations in this matter,²⁴ have in their arguments persistently ignored not only the commercial and economic aspects of the question but also the more general considerations supporting the application of strict liability. Instead, they have reasoned from the assumption that fault was the proper criterion for liability and have sought to magnify the differences in mechanical detail involved.²⁵

U. S. 185 (1909), Mr. Justice Holmes said: 'If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." . . . The fundamental principles of the law involved in publication by a newspaper and by a radio station seem to be alike. There is no legal reason why one should be favored over another nor why a broadcasting station should be granted special favors as against one who may be a victim of a libelous publication.' *Sorensen v. Wood*, 123 Neb. 348, 356, 357, 243 N. W. 82, 86 (1932). Most of this language is quoted with approval in *Miles v. Wasmer, Inc.*, 172 Wash. 466, 472, 20 P. (2d) 847, 848 (1933).

"In the case of a newspaper publisher absence of negligence is no defense. . . . Yet he is not helpless. He knows that without any fault of him or any of his employees some one sometime surreptitiously may insert in his paper some line of libel. He takes that risk. He can insure himself against resulting loss through the subscription and advertising rates he charges or otherwise. The owner of a broadcasting station knows that some time some one may misuse his station to libel another. He takes that risk. He too can insure himself against resulting loss." *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934).

24. See *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 308, n. 14, for a purported list of such critical comments. Without lingering over the apparent lack of adequate discrimination in the compilation of that list, it may be pointed out that most of the inspiration for such critical comment in the now available legal literature is traceable to the efforts of attorneys directly in the service of radio broadcasting companies, but whose role as special pleaders has not been directly revealed in the contributions in question. The earliest of these critical comments appeared shortly after the case of *Sorensen v. Wood* was decided, and has been frequently cited by student note writers in law reviews, some of which help to swell the array set out in the above-mentioned footnote. *Sorensen v. Wood* was decided on June 10, 1932. The decision was vigorously assailed in that year's *Report of the Standing Committee on Communications of the American Bar Association* (1932) 57 A. B. A. REP. 423, 445. That year the chairman of that committee was Mr. Louis G. Caldwell, and for a time his successor in that position, Mr. John W. Guider, served as acting chairman. That both these eminent gentlemen were about that time actively engaged as counsel for broadcasting stations is apparent from numerous reported cases. About the same time appeared Mr. Guider's magazine article, *Liability for Defamation in Political Broadcasts* (1932) 2 J. RADIO L. 708, which criticizes *Sorensen v. Wood* with even greater elaboration. This is the article cited by the Pennsylvania Court in the *Summit* case, 8 A. (2d) 302, 311, n. 26 (Pa. 1939) for the proposition that the public interest will be best served by a rule which will release a broadcasting station from liability for remarks made by others where the station has exercised due care. When the matter was first considered before the American Law Institute most of the discussion that took place came from Mr. J. C. Hardgrove, another attorney for a broadcasting station, who in two lengthy talks set forth the radio station's side of the question, 12 PROC. A. L. I. 357-359, 361 (1935), while no one spoke for the other side (see remark by Judge Tuttle, "We are hearing only one side of this thing". *Id.* at 362). To these three "sources", may be added the early speculations in DAVIS, *THE LAW OF RADIO COMMUNICATION* (1927) c. 10, especially pp. 164, 168-170, before any courts had passed on the question, which were based throughout on the palpably erroneous assumption that tort liability must be based on wrongdoing or negligence. This work even rationalizes the absolute liability of the law of defamation in newspaper cases as in reality an application of the law of negligence. These four early "sources" are found to set forth practically every idea that has since been echoed in criticism of the stricter rules of liability applied by the courts to radio stations as to other publishers.

25. See works criticised in note 24 *supra*. Professor Bohlen's remarks as reported in the proceedings of the American Law Institute are of essentially the same character. 12 PROC. A. L. I. 356 (1935); 14 *id.* at 85-86 (1937).

Even severe critics now admit, however, that where an outside speaker given access to the broadcasting apparatus reads into the microphone a defamatory statement contained in the manuscript used for the purpose, the newspaper analogy in defamation is properly applied as the basis for the radio station's liability.²⁶ On such facts it is too clear for argument that the radio station by its employees intended to participate in the transmission of the words found in that manuscript, whether or not anyone connected with the station became personally aware of the exact words. It is equally clear in such cases that the radio station has the same opportunity to guard against defamatory utterances by scrutiny of the manuscript as is available to newspapers by scrutiny of copy submitted for publication. Under these facts, clearly enough, newspaper and radio as publishers of the utterances in question are closely analogous, even without our taking into account the commercial and economic parallel between the two enterprises which compete in the field of advertising and publicity, and without our considering the broad underlying considerations supporting the application of strict liability in the field of defamation.

3. *Where Radio Station Dispenses With Previous Submission of Manuscript*

In the third type of case an outside speaker is given access to the radio station's microphone but the previous submission of a manuscript is not required by the radio station or a manuscript is not used at all. Examples are the practice of interviewing casual strangers selected from the crowd to answer questions on various topics before a microphone brought out to the sidewalk at a busy street intersection and the broadcast of details of athletic events by an observer speaking from the athletic field or stadium as the events are in progress. Somewhat similar aspects are presented in broadcasts of utterances made before microphones placed in pulpits, court rooms, banquet halls and political conventions. In current broadcasting practice the most conspicuous instance of this type is probably found in the so-called relay broadcasting that takes place in the use of chain programs. In such cases the chain program usually originates at a central studio, as for instance in New York. The content of the chain program, which can be supervised there, is then carried over telephone wires to local broadcasting stations

26. "As we have pointed out, however, in all these cases the defamatory statements were contained in the manuscript of the program prepared beforehand and available to the station, which may be presumed to have intended to broadcast whatever was in the script, even if it did not take the care to go over it beforehand. The analogy to a newspaper, which intends to publish whatever its employees set up in type and print in the paper, is therefore close." Brief for Appellant, p. 44, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). See also remarks of Professor Bohlen in 14 *Proc. A. L. I.* 86 (1937).

in various parts of the country. Without any possibility of supervision or control of the content at the local broadcasting stations these programs are transmitted over telephone wires directly from the originating studio to the apparatus of the local stations and transmitted to radio listeners by the broadcasting operations of such local radio stations.

In all cases of this third type it must be recognized that the radio station in the nature of things intends by carrying out the process of operating its broadcasting apparatus to transmit whatever the speaker before the microphone may see fit to utter.²⁷ On the score of intention, therefore, no reason is apparent for distinguishing cases of this third type from cases of the second type where the contents of a manuscript are broadcast. So far as the basis for the radio station's liability for defamation is concerned the policy considerations are also substantially the same in both these types of cases. No duty is by law imposed upon the radio station to make these broadcasts. In such cases the radio station for its own convenience or profit sees fit to broadcast without requiring the previous production of a manuscript or other direct control over the content to be transmitted. That mere circumstance would seem to afford no reason for shifting the burden of defamatory publications from the active perpetrators to their passive innocent victims. Moreover, in all such cases the radio station has the practical alternative of requiring an adequate contract of indemnity from sponsors of such programs as a condition to their being broadcast without the previous scrutiny afforded by the submission of a manuscript. Unless additional elements raising questions of privilege may happen on certain occasions to be involved, therefore, it would seem that the mere circumstance that the manuscript is dispensed with affords no basis for relieving the radio station from the same strict liability for defamation that is applicable when a manuscript is used. The scant judicial authority on this point at present available supports this view.²⁸

27. "Those waves of air he changed into electrical impulses. Then he threw out upon the ether knowing they would be caught up by thousands and changed again into sound waves and into a human voice. He intended to do these things." *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934).

28. "The mere matter of the distance of X from the broadcasting instrumentality when he speaks into it certainly cannot affect the liability of the owner of the station. Whether X's defamatory words reach the broadcasting instrumentality from afar by electric impulses carried by wire or directly through air waves created by his voice certainly cannot affect the liability of the owner of the station. . . .

"The conclusion seems inescapable that the owner of the station is liable. It is he who broadcasted the defamation. He took the utterance of the speaker which came to him in the form of pulsations in the air. Those waves of air he changed into electrical impulses. Then he threw out upon the ether knowing they would be caught up by thousands and changed again into sound waves and into a human voice. He intended to do these things. . . .

"The owner of a broadcasting station knows that sometime some one may misuse his station to libel another. He takes that risk. . . .

4. *Oral Interpolations Without Warning in the Broadcast of Manuscript Utterances*

In the fourth type of case the speaker given access to the microphone is an outside speaker, such as a commercial advertiser or a political speaker, who interpolates without warning a defamatory utterance which is not contained in the manuscript being broadcast. On these exact facts only one recently decided Pennsylvania case is at present available. This case denied the radio station's liability, taking the position that in Pennsylvania the law of defamation rests on the basis of negligence,²⁹ although dicta from the earlier cases wherein the law of defamation was held to involve absolute liability indicate that cases of this type afford no valid basis for distinction.³⁰

It is with reference to cases of this type that the most acute differences of opinion have arisen. Cases involving defamatory interpolations in radio broadcasts therefore most urgently call for clear analysis in the ascertainment of the weight to be given the conflicting considerations involved in the determination of the basis for liability.

IV. THE UNDERLYING DIVERGENT ASSUMPTIONS FOUND IN AVAILABLE CURRENT DISCUSSION OF LIABILITY FOR DEFAMATION BY RADIO

Two fundamental differences in the underlying assumptions from which the course of reasoning starts are sharply manifested in current discussion with regard to the basis of liability properly applicable to the facts of defamation by radio. The first fundamental difference in assumptions is with regard to the physical facts of broadcasting. Does the process of transmission involve the active participation of the operator of the radio station with the speaker at the microphone? If so, the facts readily support the conclusion that each participated in acts of publication. Or, on the contrary, is transmission to radio listeners of

"The case here certainly is not like that in which one only provides another with an instrumentality which that other, all unsuspected by him who furnished it, uses to inflict injury. Here the instrumentality is operated by the owner for another who has hired him to operate it." *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934).

29. *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). See *supra* p. 249.

30. "In my thought, then, I put the primary offender in the local studio of KMBC at Kansas City. I assume his good reputation; I assume that nothing in any former performance by him should put the owner of the station on inquiry; I assume even that he has submitted a manuscript and that nothing in it is questionable; I assume a sudden utterance by him of defamatory words not included in the manuscript, an utterance so quickly made as to render impossible its prevention; I assume, in short, a complete absence of the slightest negligence on the part of the owner of the station. With those assumptions is the owner of KMBC liable to one of whom the primary offender has falsely spoken as an ex-convict who has served time in a penitentiary?"

"The conclusion seems inescapable that the owner of the station is liable." *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934). See also excerpts from *Sorensen v. Wood*, quoted in notes 21, 22, 23 *supra*.

the speaker's utterances into the microphone in substance automatic? If so, it is not so clear how the radio station is technically a publisher. The second fundamental difference in assumptions touches the basis for liability. Is the basis for liability applicable to the radio station under the facts of radio broadcasting to be found in strict liability such as is imposed by the law of defamation? Or, should the basis for such liability be found in the less exacting law of negligence?

These two fundamental differences in underlying assumptions became sharply manifest in the first case of defamation by radio to reach an appellate court, the leading case of *Sorensen v. Wood*.³¹ The Nebraska Court, in deciding this case, regarded the radio station as a participator in the acts of transmission with the speaker at the microphone.³² It thus dealt with the radio station as a publisher of the messages broadcast. However, in giving its reasons for invoking the newspaper analogy in the law of defamation as the basis for the radio station's liability the court strongly emphasized the parallel position of newspapers and radio stations as business competitors in the field of advertising and publicity³³ and emphatically referred to the presence in radio cases of the underlying considerations of policy which require the application of strict liability in defamation cases.³⁴ The Nebraska Court thus incidentally recognized that the law of defamation is but a branch of the wider field of absolute or strict liability, and that the mere resort to novel but highly effective processes for achieving transmission to the public affords no reason for relaxing for radio stations the strict rule of liability applicable as a matter of course to the older familiar methods of publication.³⁵ Several other courts, relying largely on *Sorensen v. Wood*, have adopted the same views.³⁶ Recently, in a taxation case, after careful review of the operative facts of broadcasting, the Supreme Court of the United States pronounced that the broadcasting station as distinct from its customer, the outside speaker at the microphone, is engaged in the business of transmitting the speaker's utterances across state lines to listeners in other states.³⁷

31. 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1106 (1933).

32. See note 6 *supra*.

33. See note 22 *supra*.

34. See note 23 *supra*.

35. See quotation from Justice Brandeis, note 105 *infra*.

36. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934); *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847 (1933). In the first mentioned case, Judge Otis takes careful account of the operative process of broadcasting. In *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938), the same position was recognized, but the defendant broadcasting station was held not liable because of privilege.

37. *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936). Even the operator of a receiving set is a publisher, who can be liable if unprivileged. *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191 (1931) (copyright). In the case of a non-commercial operator of a receiving set, presumably a large range of privilege would be available in the interest of leaving open this way to information, entertainment, and cultural development.

The same two fundamental differences in underlying assumptions have insistently cropped out in most of the subsequent critical discussion.³⁸ Hardly an idea can be found in the discussion to date, whether in the professional literature, before the American Law Institute, or before other courts, which was not in some form included in the material that was urged upon the Nebraska Court in *Sorensen v. Wood*.³⁹

V. THE FACTS OF RADIO BROADCASTING ARE DEVELOPING TOWARD AUTOMATIC TRANSMISSION

Doubtless one of the reasons for the persistence of such widely divergent assumptions regarding the facts of radio broadcasting is that the facts themselves have been rapidly changing. In active life nothing stands still. When controversies arise in a course of an activity the details of which are currently changing, the law is applied while the changes are in progress.

The broadcast which was involved in the case of *Sorensen v. Wood* took place in August, 1930. The record of testimony in that case shows that during this broadcast the radio station's monitor operator was in the control room at the studio and controlled the volume of the broadcast as the speech proceeded. The facts within the range of judicial notice, moreover, made it very clear that this volume control was exercised through the process of readjustment of the modulation of the sound wave from the microphone upon the carrier wave from the transmitter with reference to the varying character of the speaker's voice from moment to moment as the speech proceeded. This process of modulation readjustment so modified the vocal sounds uttered into the microphone that the resulting transmission could be picked up near and far by receiving sets in the form of intelligible and continuously audible speech. This process of modulation readjustment not only increased the range of the broadcast but also avoided gaps in the effective transmission and distortions caused by false and blurring sounds set up in the transmitting process. The substance of these facts of active participation by the radio station in the acts of transmission to the public during this broadcast was admitted by stipulation in the later

38. See notes 24 and 25 *supra*.

39. The substance of the arguments for the plaintiff that were submitted to the court on the two appeals that were made in that case may be found in two law magazine articles by the present writer. Vold, *Defamation by Radio* (1932) 2 J. RADIO L. 673; Vold, *The Basis for Liability for Defamation by Radio* (1935) 19 MINN. L. REV. 611.

The attorneys for the KFAB Broadcasting Co., the substantial defendants in *Sorensen v. Wood*, submitted elaborate briefs on both appeals in that case, but have not otherwise given their views wider professional publicity. It is but due courtesy to them to state as a matter of personal knowledge in this connection that their briefs did contain in some form the counterparts for practically everything that has since appeared in the legal literature in support of a milder rule of liability for radio stations. See also notes 68 and 70 *infra*.

stages of the litigation in *Sorensen v. Wood*.⁴⁰ Essentially the same viewpoint toward the facts of radio transmission has since then been elaborately set out by the Supreme Court of the United States in a taxation case as sustaining the conclusion that the radio station was actively participating in the process of transmitting the speaker's utterances to listeners at receiving sets in other states.⁴¹ It would seem, therefore, that on the physical facts of broadcasting that took place the Nebraska Court in *Sorensen v. Wood* was readily justified in concluding that the owner of the radio station, by its agents, was a participator with the speaker in the publication of the defamatory utterance. While this aspect of the case was treated rather briefly in the court's opinion, Chief Justice Goss, the author of that opinion, later made a more extended statement in regard to the matter in his remarks before the American Law Institute, where the position taken by the court had been criticized by certain speakers. Chief Justice Goss in those remarks asserted that transmission by radio was not a purely automatic process, and vigorously emphasized that the station's liability was based upon the law of defamation and not on the principles of negligence.⁴²

Since the time when the facts of *Sorensen v. Wood* took place, in August, 1930, great improvements in broadcasting apparatus have been made. Transmitters have been so constructed that they can carry a wider range of voice variations than formerly without serious loss or distortion. Within the last year or two, moreover, an instrument, sometimes referred to as an automatic volume compressor, has also made its appearance.⁴³ This instrument, without the aid of the station's monitor operator, to some degree⁴⁴ automatically readjusts the modulation in response to the varying character of the speaker's voice. Moreover, for certain limited types of broadcasting, such as police station calls to its cruiser cars, manual readjustments of modulation during the calls are at least at some stations and in most instances entirely dis-

40. This stipulation is quoted at length in Vold, *supra* note 15, at 617, n. 17.

41. Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650 (1936).

42. 14 Proc. A. L. I. 81-82 (1937).

43. The difficulties involved in securing adequate and accurate modulation readjustments through manual readjustment of the controls from moment to moment by the monitor operator are described in STERLING, THE RADIO MANUAL (3d ed. 1938) 438-439, 466-468. This is followed by a description of the new instrument which is automatically to perform many of the functions which the monitoring operator heretofore has had to perform manually. *Id.* at 468-471.

44. "It provides not less than 3 db improvement in average signal level." *Id.* at 471. (It may be mentioned that db stands for decibel, a term used to designate the amount of variation in sound required for such variation to be discernible by the human ear.) However, the same author indicates that the natural volume in variation of speech and music may be as high as 60 db which must be compressed through modulation adjustment into a range of about 40 db so as to avoid distortion through overmodulation on the one hand and to prevent the program level from going below the noise level on the other. *Id.* at 438-439. Mere automatic readjustment to the extent of 3 db under present conditions is far from adequate for ordinary entertainment and advertising programs.

pensed with, the automatic operation of the broadcasting apparatus being found adequate for the relatively limited purpose at hand.⁴⁵ Further mechanical improvements in broadcasting apparatus doubtless are now in the making and can be expected to take their part in the practical work of broadcasting in the relatively near future.

The physical developments in the technique and apparatus of broadcasting are tending more and more to reduce the scope of the station's detailed and active participation with the speaker in the immediate acts of transmission. It is therefore probable that radio broadcasting is on the way toward becoming to a considerable extent, if not entirely, an automatic process once the machinery supplying the necessary current for transmitter and microphone is set in motion and the adjustments of the apparatus to the speaker's voice have been made at the outset of his speech.

VI. HOW FAR, IF AT ALL, DOES SUCH CHANGE IN THE PHYSICAL FACTS OF BROADCASTING REQUIRE MODIFICATION IN THE APPLICABLE LAW?

1. *General Perspective: Does Such Development Reduce or Accentuate the Need for Protection Against Injury to Reputation?*

It is readily apparent that the above described changes in the facts of broadcasting render the process of transmission increasingly effective. Thus, the danger to innocent victims is increased instead of reduced with every advance in technique which reduces or eliminates the range of effective scrutiny of the contents of broadcasts. Such developments in the physical processes of broadcasting as render radio transmission substantially automatic far from calling for change in the applicable law from defamation to negligence, rather accentuate the broader considerations of policy which in the interest of security of personal reputation require the application to those who make defamatory broadcasts of the traditional strict liability of the law of defamation. It is to be particularly noted, too, in this connection, that the law of defamation is itself a portion of the much wider field of strict liability, which is applied to the facts of defamation in order the more completely to provide practically effective security to the interest in personal reputation.⁴⁶ The security of personal reputation, it may be

45. CUNNINGHAM, *THE RADIO PATROL SYSTEM OF THE CITY OF NEW YORK* (1933)

4. Officers in charge in the City of Lincoln, Nebraska, have stated in conversation that the same is true of police station calls by radio to cruiser cars under the system there in use.

46. "But while the judicial movement, in cases of physical damage, has been from imposing absolute liability toward requiring culpability, the movement as to defamation has been the reverse. . . .

"It seems clear that the reasons given for the milder rule in the case of highway traffic or building operations do not apply to defamation. The utterance of charges

added, has from time immemorial been recognized as an important item in general security.⁴⁷

There is therefore no basis in policy for any gratuitous assumption that any mere change in the physical processes of transmission requires that the basis for the perpetrator's liability for defamatory utterances be shifted from strict liability to negligence.

Put another way, the policy question of whether the strict liability of the law of defamation or the less exacting rules of the law of negligence will attain the greater measure of human welfare will still remain, even though the radio broadcasting process should eventually become practically automatic. *Prima facie*, it is not apparent how the social importance of the interest in personal reputation as a part of the interest in general security is in anywise diminished through improvements in the means of radio transmission which render attacks upon personal reputation all the more effective and dangerous.

The bearing on policy, moreover, of the radio station's readily available alternative of indemnity from the advertiser who supplies the defamatory words broadcast should in this connection not be overlooked.⁴⁸ The rule of strict liability at this point in actual practice results largely in radio stations' requiring indemnity from the advertisers who supply the defamatory utterances transmitted by their broadcasting operations. The final result when the radio station is held to

which are not true in fact and are defamatory in their nature is not essential to the progress of the community in comfort or civilization, nor does it generally tend to promote the public welfare. In some exceptional situations where it is for the general welfare, or is reasonably requisite for the protection of private interests, that men should feel free to make statements which are *prima facie* defamatory, the law affords protection, absolute or conditional. But outside of these exceptional classes I believe that more harm than good would result from making proof of negligence a requisite to the plaintiff's *prima facie* case, or from allowing to the defendant the defense of carelessness." Smith, *supra* note 17, at 470-471. See HARPER, TORTS (1933) §§ 237, 244; notes 22 and 23 *supra*, with accompanying text; quotation from Justice Brandeis, note 105 *infra*.

47. Reference may be made to Van Vechten Veeder, *The History and Theory of the Law of Defamation* (1903) 3 COL. L. REV. 546; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 536-538; 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1923) 382-383; 3 *id.* 410-411.

48. The following form of indemnity clause which was in use by the National Broadcasting Co. in its contracts with its advertisers in 1935, appeared by exhibits presented in the case of Summit Hotel Co. v. National Broadcasting Co., 8 A. (2d) 302 (Pa. 1939).

"Except as otherwise hereinafter expressly provided the Advertising Agency will save the Company harmless against all liability for libel, slander, unfair competition, infringement of trademarks, tradenames or program titles, violation of rights of privacy, and infringement of copyrights and proprietary rights and all other liability to third parties resulting from the broadcasting of the programs herein provided for." From Exhibit "D", Supplemental Record appended to Brief for Appellee, p. 62.

Through the courtesy of counsel for one of the local broadcasting stations the present writer was recently furnished a blank form of the contracts currently in use by the Central States Broadcasting System. Among the conditions in that contract appears the following clause: "The advertiser agrees to save the Station harmless against any claim or liability for libel, slander, or misrepresentation of fact by reason of the advertiser's program or announcement." In addition, see note 104 *infra*.

strict liability is to put the burden of such defamatory utterances on those in whose service they are broadcast. As a matter of social policy that result would seem to be eminently wholesome.⁴⁹

49. The view expressed in the text was referred to with approval by Judge Otis in *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934), as follows: "The owner of a broadcasting station knows that some time some one may misuse his station to libel another. He takes that risk. He too can insure himself against resulting loss . . . The case here certainly is not like that in which one only provides another with an instrumentality which that other, all unsuspected by him who furnished it, uses to inflict injury. Here the instrumentality is operated by the owner for another who has hired him to operate it."

The same view was also referred to with approval by the trial judge in his memorandum opinion denying a motion for a new trial in the *Summit* case, as follows: "The average newspaper publisher insures against resulting loss; there appears to be no legal reason why a broadcasting company cannot do the same. Whether they purchase insurance or carry their own is immaterial. Nor are we impressed by the argument that the cost to a broadcasting company would be prohibitive; no governmental agency regulates the rate it may charge for its services." 87 PITTSBURGH LEG. J. 49, 51 (1939).

"Indemnifying agreements are sometimes taken with respect to particular broadcasts, but the policy of some companies has been not to require such agreements generally except for political programs. These agreements are taken to safeguard the broadcaster's interests and not to license the speaker to defame others. Under such agreements the broadcaster's right is to recoup damages.

"An indemnity agreement may, of course, be required from all speakers or their principals. The value of such agreements is subject to certain limitations depending upon the responsibility of those executing them, but as a restraining and sobering influence they are worth while. They tend to bring home to the speaker the seriousness of any indulgence in defamation and it would seem advisable to require all users of radio facilities to give an indemnity agreement as a matter of course." McDonald and Grimshaw, *Radio Defamation* (1938) 9 AIR L. REV. 328, 350-351. (An appended footnote at p. 328, states that this contribution was written in June, 1937, by two attorneys for the National Broadcasting Co.)

"Under the *Sorensen v. Wood* decision apparently the broadcaster can only protect himself by requiring indemnity from the speaker. The broadcaster can require such a bond from one candidate, provided it requires such a bond from every other candidate who speaks over its station. In other words, the broadcaster must not discriminate between candidates. I have upon occasion advised clients to require indemnifying bonds in bitterly contested campaigns." McMasters, *Radio Law* (1938) 4 JOHN MARSHALL L. Q. 155, 157. See note 115 *infra*.

Against these views the brief for the broadcasting station on the appeal in the *Summit* case submitted two objections. The first objection was phrased as follows: "It is submitted that this argument begs the question of the policy of holding stations liable for utterances they cannot prevent. The question is not whether a person defamed should have a right to recover from some one; it is rather whether an innocent party who could not prevent the defamation should be answerable in damages therefore." Brief for Appellant, p. 49.

This manner of describing the issue, however, itself begs the question, in that it involves either one or both of two ordinarily untenable assumptions, namely, that the station has not itself acted but is being held liable for the act of another, or that the basis for its liability in any event must be negligence rather than the strict liability of the law of defamation. Where it is manifest that the station actively participates in the process of broadcasting, a fact emphasized both in *Sorensen v. Wood* and in *Coffey v. Midland Broadcasting Co.*, it is very clear that when liability is imposed it is for the station's own act, not for the act of another. That the station as a matter of fact does participate was actually admitted, even in the briefs submitted for the broadcasters, in the *Summit* case. ". . . it operated the apparatus which was the means by which Jolson's alleged defamatory utterances reached the public generally." Brief for Appellant, p. 45. "A broadcasting station operates facilities for dissemination of speech." Brief for Intervening Appellant, p. 3. Accordingly, this first objection as phrased in the radio station's brief must depend for its soundness on the position that negligence is the basis for the liability to be imposed. Having already announced that view, the Supreme Court of Pennsylvania in its opinion naturally enough repeated this objection, paraphrasing the language of defendant station's brief. *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 312 (Pa. 1939).

Where the view prevails, however, as it does in most jurisdictions, that the law of defamation involves strict liability and does not rest on negligence, the materiality of

It is not true at the present time that broadcasting of commercial and political publicity has become entirely automatic. Let it be assumed for the purposes of the present discussion, however, that the progress of invention is tending so strongly in that direction that considerable portions of many broadcasts can now be carried out automatically without manual readjustment of modulation once the broadcasting apparatus has been set in motion and preliminarily adjusted to the speaker's voice. On such external facts in the physical process of broadcasting the particular words of which complaint is made may well have been transmitted automatically. The same may be true, of course, of defamatory interpolations orally interjected without warning during the broadcast of a speech which as previously submitted in manuscript form was entirely free from objection.

2. *Where the Broadcasting Station's Own Announcer Utters the Defamatory Words Into the Microphone*

Recalling the several differing types of circumstances under which broadcasting may take place, as classified at the beginning of this paper,⁵⁰ the first step in rationalization is to note that no matter how automatic the immediate process of transmission may become, the newspaper analogy will continue to be applicable to some types of broadcasting. So long as the radio station's own agents supply the speech

the indemnity aspect of the matter is readily apparent. In that situation the availability of indemnity provisions to radio stations demonstrates at once the complete and palpable unreality of the asserted hardship on the radio station which is urged as the reason for relieving the radio station from the same strict liability for its acts of publication which is applicable as a matter of course to its competing publishers.

The second objection to the view of the indemnity contract taken in the text above, was phrased as follows in the radio station's brief in the *Summit* case: "Who would insure against the utterance of defamation except at a great price, which certainly in many cases would be economically prohibitive?" Brief for Appellant, pp. 49, 50. This objection, too, is paraphrased by the Pennsylvania Court. *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 312 (Pa. 1939). To this objection, however, the exhibits in that case furnished a very convincing answer, in that the advertiser himself furnishes the required indemnity as a condition to obtaining broadcasting service. In this respect the practice of requiring indemnity contracts from radio advertisers for whom the broadcasting is done is comparable to the familiar practice of requiring indemnity bonds from execution plaintiffs to save the sheriff or other public officer harmless from liability resulting in the event that the execution levied by the officer turns out to be unprivileged. Current practice in radio broadcasting, as indicated in note 48 *supra*, demonstrates that radio stations have it in their own power to require such indemnity, a power they can exercise whenever they see fit to do so. In the same connection it has been suggested by Mr. Donald G. Graham, who was attorney for the broadcasting station in the case of *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936), that the indemnity bond from speakers furnishes little protection to the broadcaster since speakers ordinarily are financially irresponsible. See Graham, *Defamation and Radio* (1937) 12 WASH. L. REV. 282, 291. To this way of phrasing the objection there are two obvious answers: first, that many commercial advertisers utilizing chain broadcasts, etc., are not in fact as financially irresponsible as is here suggested; second, if the speaker is actually thus irresponsible, the station ought not by its activity to join with him in transmitting utterances which are defamatory of innocent parties without being answerable to such innocent victims who otherwise will be without redress.

50. See *supra* p. 254.

delivered into the microphone as well as operate the broadcasting machinery there can be no question but that the radio station is a publisher of the utterances transmitted.⁵¹ Such broadcasting constitutes a large portion of the current radio advertising. Advertisers submit their copy, to be put on the air through use of the radio station's own announcer, much in the same manner as advertisers submit their copy for publication in newspapers. Even the attorneys for the National Association of Broadcasters admit that under such circumstances the newspaper analogy is properly applicable to radio stations.⁵² Barring changes through legislative enactment, such liability is unaffected by the current scientific and engineering developments toward automatic transmission. Neither in the physical facts involved nor in the policy considerations applicable is there in such cases any significant reason for differentiating the basis for liability applicable to newspaper and to radio publication, the two leading types of commercial advertising. Equally, there is no reason for granting special favors to broadcasting stations as against the victims of their defamatory publications.

3. *Where the Defamatory Words Are Contained in the Manuscript Which Is Broadcast*

a. *Policy considerations remain unaffected*

The second step in the unfolding of the applicable law though radio transmission has tended to become automatic is an equally easy one. The matter which is broadcast may be uttered into the microphone by an outside speaker who reads it from a written or printed manuscript which is made available for the radio station's previous scrutiny. In such cases, irrespective of how automatic the immediate process of transmission may become, the radio station faces merely the same type of mechanical problem as does the newspaper with regard to the detection and elimination of defamatory content in the copy submitted for publication. Moreover, the fact of direct business competition between newspaper and radio in the field of advertising and publicity is not in the least affected by these mechanical distinctions in the methods of operation. The general policy considerations in favor of the security of personal reputation from unprivileged defamation remain in full force.

To be sure, copy readers in such cases cannot in the ordinary course be experts on the law of defamation, whether employed in newspaper plants or in radio stations. In both cases their employer runs

51. See note 18 *supra*.

52. "Manifestly a broadcasting station should be liable for defamatory words spoken over its facilities by its own agents or employees who have been authorized to speak." Brief for Intervening Appellant, p. 22, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

chances that some defamatory item may slip by the readers. In both cases, too, language which to the copy reader may appear innocent may to readers or hearers appear to be defamatory because of their knowledge of facts unknown to the copy reader.⁵³ No reason is apparent on this score why radio stations should enjoy greater consideration than newspapers, nor is any reason apparent why either the newspaper or the radio station should be favored at the expense of the victims of defamatory utterances which they have transmitted for their own profit.

The hardship on the radio stations in these defamatory manuscript cases is in this regard no different and no greater than the corresponding hardship upon their competitors, the newspapers. Moreover, it is already a familiar practice with radio stations to require indemnity from their advertisers. At the same time, the underlying considerations of policy which, in the interest of the security of reputation require the application of the strict liability of the law of defamation in the case of newspapers, are at least as urgently applicable to the even more effective and more dangerous transmission of defamatory utterances by radio.⁵⁴

b. Technical requisites for intentional publication are still fulfilled

The more meticulous analysis of the technical elements involved in publication by radio transmission does not support any relaxation in the strict liability to which the radio station is held in these cases. It continues to be true that the broadcasting apparatus is maintained and its operation carried on by the radio station. It continues to be true, therefore, that by its maintenance and operation of the broadcasting apparatus the radio station actively and intentionally assists the speaker at the microphone in achieving the radio transmission that results. Where the words uttered into the microphone are contained in the manuscript submitted and available for scrutiny, moreover, there can be no question that those are the very words which the radio station by its operations intends to transmit. Whether or not the operators of the transmission apparatus became conscious of the individual words read by the speaker into the microphone is in that event immaterial.⁵⁵ Thus, even though manual modulation readjustment as the speech proceeded

53. *Peck v. Tribune Co.*, 214 U. S. 185 (1909); *E. Hulton & Co. v. Jones*, [1910] A. C. 20. The matter is examined at greater length, with citation of authorities, in *HARPER, TORTS* (1933) §§ 237, 244; *Smith, supra* note 17, at 461; *Vold, supra* note 15, at 623-624. See also *RESTATEMENT, TORTS* (1938) §§ 563, 564, 579, 580.

54. In *Guider, supra* note 24, at 708-713, the author, an attorney for radio broadcasting companies, makes an impressive showing of the dangers to radio stations if the strict liability of defamation is applied. Since that danger is merely the danger of having to compensate injured innocent plaintiffs, it is obvious that such plaintiffs are to the same extent exposed to danger by the radio station's broadcasting operations. See also *Vold, supra* note 15, at 633; note 100 *infra*; note 13 *supra*.

55. See authorities cited in note 53 *supra*.

should be entirely dispensed with, the transmission being then purely automatic, the radio station's participation in the broadcast by operating the transmission apparatus⁵⁶ would still constitute an intentional participation in the communication to others of the contents of the manuscript. Such facts satisfy every technical element of publication.⁵⁷

4. *Where the Radio Station Does Not Require the Submission of a Manuscript by the Advertiser*

a. *Both intentional publication and policy considerations still remain unaffected*

The third step in the unfolding of the applicable law though radio transmission has tended to become automatic is again easily taken. If the radio station does not require the submission of a manuscript by the outside advertiser given access to its microphone, its general intention to participate in the transmission of whatever words such advertiser may see fit to utter into the microphone is still clear. Its physical operations in the process of transmission are here the same as in the case where written manuscripts are used. As in the case of the defamatory manuscript, therefore, there is in this case intentional participation by the radio station's operator in the transmission of the outside advertiser's utterances, whatever the particular words may be. Since submission of a manuscript could have been required but was omitted for the radio station's own convenience or profit, this case from the standpoint of policy is not appreciably different from a case that might be supposed where the manuscript containing defamatory matter was submitted but scrutiny thereof was, for the station's own convenience or profit, omitted.⁵⁸ Moreover, no duty rests upon radio stations to make

56. ". . . the broadcasting of radio emanations, as distinguished from the production of the sounds broadcasted, is effected by appellant and not by its customers They [the sounds] serve only to enable the broadcaster, by the use of appropriate apparatus, to modulate the radio emanations which he generates. These emanations as modulated, are projected through space to the receiving sets On the argument it was conceded that, in broadcasting for its customers, appellant, by generating the necessary electric power and controlling the transmitter, produces the radio emanations which actuate the receiving mechanisms located in other states." Stone, J., in *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650, 653-654 (1936). See also notes 27 and 28 *supra*. For a recent detailed account of the scientific and mechanical factors involved in current operation of broadcasting apparatus, see STERLING, *THE RADIO MANUAL* (3d ed. 1938). See also note 37 *supra*.

57. This view of the facts, it may be noticed, readily brings operations of the radio station in carrying out the process of broadcasting in these defamatory manuscript cases within the definition of publication, as set forth by the American Law Institute: "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." *RESTATEMENT, TORTS* (1938) § 577. See *id.*, § 577, comment k.

As appears from the reports of the discussions before the Annual Meeting of the Institute, the caveat to § 577 was inserted to avoid committing the Institute to any position concerning the liability of radio stations in the case of defamatory interpolations made without warning. See 12 *PROC. A. L. I.* 355-363 (1935); 14 *id.* at 73 (1937).

58. Such in substance were the circumstances in this respect in *Sorensen v. Wood*, for details of which see note 5 *supra*. As to the problem of privilege for political broadcasts, see *infra* pp. 289-292.

such broadcasts, and indemnity contracts from the advertisers of unscrutinized programs can be insisted upon as a condition to such broadcasting service.

It seems unnecessary to elaborate further on this point. The newspaper analogy is found properly applicable to the radio station in the case of broadcasting of defamatory utterances found in manuscripts submitted for scrutiny, whether or not the radio station's own announcer utters them into the microphone. No reason is apparent why the burden of such defamation should be shifted to the innocent victim of such defamatory utterances merely because the radio station for its own convenience or profit has seen fit to dispense with the use of manuscripts. Of course, if certain of such broadcasts involve occasions which on independent grounds are to be regarded as privileged, the question of the application of such privilege on the particular occasion would also require attention.⁵⁹

b. *Application to chain programs and broadcasts of current events*

It would seem to follow, accordingly, that if in chain programs the newspaper analogy is properly applicable to the utterance as published at the originating station, there is no basis for any different or milder basis of liability for the defamatory utterance on the part of the participating local stations to which the program is relayed for broadcasting. Such local stations see fit for their own convenience and profit to participate in the broadcasting of relay programs, the contents of which they well know they have no means to scrutinize or control. Thus there seems to be no reason why the burden of such defamation should be shifted to its victim merely on the score that the local radio station dispenses with the use of manuscript. It may be added that the originators of chain programs being parties of established financial responsibility, local stations that join chains can in such cases readily be afforded ample practical protection through indemnity contracts which would place the ultimate responsibility for defamation upon the sponsors of such programs, the parties who furnish the defamatory utterances for broadcast. Moreover, there is nothing to indicate that chain programs cannot as a practical matter be continued in the face of such liabilities. It was in the face of such liabilities that chain programs were established, developed and expanded to their present proportions.⁶⁰ Those who brought about chain programs have found that

59. If the speaker at the microphone is privileged to utter defamatory statements the radio station operator is *prima facie* entitled to the same privilege. *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938). For further discussion of the problem of privilege, see *infra* pp. 289-292.

60. Such liability was specifically imposed in *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934). Not a trace of judicial authority to the contrary has been found.

the incentive of profit from such operations greatly outweighs any deterrents attributable to the risk of the attached liabilities.

In the absence of special considerations of privilege which may on particular occasions be found applicable,⁶¹ similar considerations are pertinent as applied to the broadcasting of unsupervised utterances spoken into microphones at current happenings such as athletic events, banquet hall programs and proceedings at political conventions.

c. Telephone analogy continues inappropriate

It may be added that the development toward automatic transmission in radio broadcasting does not tend to replace the newspaper analogy with the telephone analogy as the basis for the radio station's liability for defamation where the manuscript is deliberately dispensed with. Three conspicuous aspects in which the telephone is distinguishable from radio on the question of liability for defamation have been historically identifiable. In the first place telephonic transmission was automatic, while in radio broadcasting the operations of the broadcaster were joined with the voice of the speaker at the microphone in order to secure effective transmission. In the second place, the telephone company under the law of public utilities is a common carrier of messages, obligated as such to provide message transmission service for senders. The radio broadcasting company is under no such common carrier obligation. The whole background of policy is thus strikingly different in the two cases. In the third place, the need of innocent victims for redress against defamation by radio is infinitely more urgent than it is against defamation by telephone. As said by Judge Otis: "the telephone company . . . but carries a message (in a sealed envelope, as it were) from the sender to a single person. The operator of the broadcasting station publishes the message to the world. If this distinction is a practical one rather than theoretical, it is nevertheless a most significant distinction and quite enough to support an entirely different measure of responsibility."⁶² Without further exposition,⁶³ it is readily apparent that the different policy consideration as between telephone and radio would still persist, due solely to the second and third distinctions mentioned, quite irrespective of how automatic the process of transmission in radio broadcasting may become.

5. *Where an Outside Speaker without Warning Interpolates Defamatory Utterances in Broadcast of Manuscript That Is Unobjectionable*

Under the foregoing three types of broadcasting facts the elements both of intention and policy leave the newspaper analogy intact as the

61. See *infra* pp. 289-292.

62. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934).

63. This matter is examined at greater length in Vold, *supra* note 15, at 648-652.

appropriate basis for the liability of radio stations for defamatory broadcasts irrespective how automatic the process of transmission may become. The foregoing three types of facts include, be it noted, most of the actual broadcasting that currently takes place.

Is there adequate reason for the contention that another rule should be substituted in the case of impromptu defamatory interpolations by outside speakers in the broadcast of submitted manuscripts that are found unobjectionable?

a. *Asserted bases for distinguishing interpolation cases*

It may be admitted that in interpolation cases, if transmission is in substance automatic, the radio station has neither the specific intention to participate in the transmission of defamatory interpolations nor the opportunity to guard against the defamatory utterance. Therefore, the interpolation case may superficially seem to be distinguishable, in that here is seemingly neither intentional nor negligent publication by the radio station.⁶⁴ While such distinctions on first impression may seem plausible, they are readily shown to lack convincing force.

b. *The external physical facts involved in publication show no distinction in interpolation cases*

In the first place, the external operations of intentional participation by the radio station in the process of broadcasting are precisely the same in the transmission of interpolations as they are in the transmission of words read from manuscript regardless of how automatic the process of transmission may become. The station operates the apparatus by means of which the words uttered into the microphone are transmitted as radio emanations capable of actuating the receiving mechanisms located in the receiving sets of listeners.⁶⁵ Without the radio station's operation of the broadcasting apparatus, the generator, the transmitter, and their controls, there would be no broadcast, whether of manuscript or of interpolations. It therefore seems deceptive to characterize the broadcasting of interpolations as the activity of persons other than the station and to call the imposition of liability upon the station an insurer's burden for another's wrong.⁶⁶ On the contrary, the actual fact is that the radio station by its operation of the broadcasting apparatus is a participator

64. The leading "sources" for the promulgation of such views on the subject of interpolation are referred to, with some critical comment, in notes 24 and 25 *supra*.

65. *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936); *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934); *Sorensen v. Wood*, 123 Neb. 348, 243 N. W. 82 (1932), 82 A. L. R. 1106 (1933). See also note 56 *supra*.

66. Brief for Appellant, pp. 50, 63, 64, 66, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). Similar forms of expression are found in the contributions criticised in note 24 *supra*.

in the broadcasts.⁶⁷ When liability for such broadcasts is imposed upon the radio station as a participator therein, it is being held liable for its own acts, not for the acts of another.

Equally unjustified on the actual facts of current broadcasting is the assertion that radio broadcasting is analogous to the situation where a speaker rents a hall or auditorium⁶⁸ in which the speech he makes turns out to be defamatory, or that it is analogous to the same situation with the added fact that the hall or auditorium thus rented is effectively designed from the standpoint of acoustics⁶⁹ or provided with an automatic loudspeaker system.⁷⁰ In those familiar situations, unlike radio broadcasting, the owner of the hall does not, by operating the transmission apparatus, actively participate in the transmission of the words uttered but merely turns his physical facilities over to the

67. The dictum by Judge Otis in *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934), is directly in point: "I assume a sudden utterance by him of defamatory words not included in the manuscript, an utterance so quickly made as to render impossible its prevention; I assume, in short, a complete absence of negligence on the part of the owner of the station . . . The conclusion seems inescapable that the owner of the station is liable. It is he who broadcasted the defamation. He took the utterance of the speaker which came to him in the form of pulsations in the air. Those waves of air he changed into electrical impulses. Then he threw out upon the ether knowing they would be caught up by thousands and changed again into sound waves and into a human voice. He intended to do these things . . . The case here certainly is not like that in which one only provides another with an instrumentality which that other, all unsuspected by him who furnished it, uses to inflict injury. Here the instrumentality is operated by the owner for another who has hired him to operate it." See also notes 56 and 65 *supra*.

68. This argument was made by Mr. Maxwell V. Beghtol, the alert attorney for the broadcasting station in the case of *Sorensen v. Wood*. "We are in exactly the same situation as the man who owns a hall, or an auditorium. Suppose you own a hall, rent it out for public meetings" Taken from defendant station's argument to the jury, Bill of Exceptions, p. 248. The Nebraska Court rejected this view of the facts, however, and applied the newspaper analogy. The case of *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934), explicitly rejected the view stated in the text and stated that the instrumentality is operated by the owner for another who has hired him to operate it. See note 67 *supra*. Nevertheless, this argument was again repeated in Brief for Intervening Appellant, pp. 23, 26, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

69. J. C. Hardgrove, attorney for a broadcasting station, in remarks before the American Law Institute. 12 PROC. A. L. I. 357-358 (1935). This line of thought was disapproved in the opinion of Justice Brandeis in *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191, 201 (1931).

70. This same point had already earlier been urged by Mr. Beghtol, as attorney for the broadcasting station at the second appeal in *Sorensen v. Wood* (No. 28749, unreported, 1933). "If the owner of a megaphone permits some person to use it for the purpose of so increasing the sound of the voice that a speech may be made to a large audience can it be said that the owner of the megaphone in the absence of negligence or collusion is absolutely liable for defamatory statements made during the speech?" Brief for Appellant, p. 14. It was also urged by Mr. J. C. Hardgrove, as cited in note 69 *supra*, at 358.

After the loudspeaker analogy had been thus proclaimed by attorneys for broadcasting stations it was echoed by Professor Bohlen in *Fifty Years of Torts* (1937) 50 HARV. L. REV. 725, 731, and on his authority in turn echoed by the Pennsylvania Court in the case of *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 308 (Pa. 1939). Mr. Beghtol's ideas in *Sorensen v. Wood*, though not approved by the Nebraska Court to which they were submitted, where defamation involves absolute liability, have thus now by way of Hardgrove and Bohlen found their way to approval by the Pennsylvania Court where the court says the liability for defamation in that state involves only a high standard of care.

speaker's use. They are therefore more nearly comparable to the supplying of pen and paper, or to the rental of cars in the "drive yourself" automobile business. In current radio broadcasting on the other hand, the radio station by its own employees operates the apparatus of transmission. Under the Federal Radio Act, moreover, no one else may lawfully operate it. It may be granted, of course, that it is possible to install a regular radio broadcasting system with appropriate loudspeakers attached to receiving sets in a hall or auditorium to take the place of the familiar automatic loudspeaker system. If this is what is actually done, the radio station operator in that case by his operation of the transmission apparatus is of course just as much a participator in producing the transmission that results as he is in other situations where radio transmission is utilized. So long as the proper functioning of radio transmission apparatus requires such degree and extent of continuous attention as to make necessary the supervision of the radio station's own trained employees, it seems abundantly clear that courts describe the facts with substantial accuracy when they say that the instrumentality is operated by the owner for another who has hired him to operate it.⁷¹

c. The element of intentional publication is readily found in interpolation cases

In the second place, as to the element of intentional publication, it can be readily recognized that in interpolation cases, as in cases where the manuscript is deliberately dispensed with, the radio station necessarily has a general intention to transmit the words the speaker utters into the microphone. Though the station expects the speaker to follow the previously submitted manuscript, it knows full well that not the words in the manuscript but the words actually uttered are the words that will be transmitted by its broadcasting operations. It also knows full well that when outside speakers are given access to its microphone departures from the manuscript can occur at any time. It necessarily

71. Coffey v. Midland Broadcasting Co., 8 F. Supp. 889, 890 (W. D. Mo. 1934). It can also be granted that the further the radio broadcasting process dispenses with manual modulation and the further the automatic loudspeaker system is expanded into complicated apparatus requiring ever more attention to keep it properly adjusted and in working order, the closer will the two approach each other as a matter of degree in regard to participation with the speaker in their use. It was long ago said by the eminent jurist, Oliver Wendell Holmes, that most differences in kind were at the borderlines reducible to differences in degree. In current commercial broadcasting the radio station operator admittedly operates the delicately adjusted and complicated broadcasting apparatus by means of which transmission of the speaker's utterances at the microphone to listeners at receiving sets is effected. This is not true at the present time of the automatic loudspeakers with which the public is generally familiar. If the point should be reached where loudspeakers in this regard become in effect like broadcasting apparatus now is, requiring a trained operator to keep them functioning while in use, can it honestly be said that such operator is not a participant in the transmission that results?

intends that chances as to what is broadcast shall be taken when it thus knowingly and voluntarily for its own convenience or profit participates with outside speakers over whom it knows it has no immediate and direct control.⁷² One way of describing the actual facts as to intention is that the radio station in such cases necessarily intends to transmit the words the outside speaker may utter into the microphone, but that it is willing to take chances of improper statements because of its belief, reasonably entertained, that the speaker will follow the manuscript submitted. In other words, the radio station's intention to transmit the words uttered by the speaker is motivated by its reasonable belief that those words will be the words found in the submitted manuscript.⁷³ Another possible way of putting it is to say that the radio station here has a double intention, to transmit the words uttered by the speaker and to transmit the words contained in the manuscript, that it supposes that these two aspects of its intention will coincide, while in interpolation cases they actually diverge.⁷⁴ So far as the mere technical element of intention on the part of the radio station is concerned, therefore, the actual facts in interpolation cases reveal abundant basis for holding as a matter of law that the radio station is as completely an intentional participator in the transmission of the interpolation as it is in any other part of the broadcast.⁷⁵

72. That radio broadcasters fully realize the presence of the risk of impromptu interpolations when outsiders are admitted to their microphones is readily apparent from the circumstance that, from the very first, arguments about the basis for liability of broadcasting stations have constantly emphasized the risk of interpolation. Indeed, that is the principal reason usually given to support the broadcaster's claim that the newspaper analogy is inappropriate for radio stations. See the works criticized in note 24 *supra*. See also the discussion before the American Law Institute, 12 *Proc. A. L. I.* 355-363 (1935); 14 *id.* 73-89 (1937). If all broadcasters and their protagonists on other occasions are thus keenly aware of the risk of interpolation when the question of liability is under discussion, are they not also equally aware of that risk of interpolation when they admit outsiders to their microphones? The answer clearly must be "yes".

73. The problem of what they intended to broadcast is thus very similar to the familiar problem often encountered in other parts of the law when it becomes important to distinguish between intention and motive.

74. A comparable situation in the law of sales is described by Professor Williston as follows: ". . . if goods are ordered by mail by a fraudulent person, the name of a responsible buyer being used as a fraudulent means of inducing the seller to send forward the goods, the seller's primary intent is to sell the goods to the person whose name appears to be signed to the letter. The seller also intends to sell the goods to the person who wrote the letter. He believes that these two intentions are harmonious because he believes the persons are one and the same. As they are not the same, both intentions cannot be made effectual. . . ." 2 *WILLISTON, SALES* (2d ed. 1924) § 635. The matter is conveniently illustrated for sales transactions in the case of *Phelps v. McQuade*, 220 N. Y. 232, 115 N. E. 441 (1917).

75. Accordingly, the form of definition of what constitutes publication, adopted by the American Law Institute, by its own terms, applies to the radio station which has actively participated by its operations in the "communication intentionally" of the matter which was defamatory. *RESTATEMENT, TORTS* (1938) § 577.

The hesitation manifested by the Institute over this conclusion, as appears from the discussions at the Annual Meetings which resulted in its *caveat* attached to § 577, taking no position either way as to interpolation, was based much less on any clear cut analysis of the operative facts involved in the process of broadcasting than it was on arguments over to what extent it was wise policy to apply the absolute liability of defamation to the business of radio broadcasting under such circumstances. See 12 *Proc. A. L. I.* 355-363 (1935); 14 *id.* at 73-89 (1937).

It is apparent, therefore, that the argument from asserted lack of intention to publish, as an independent matter, is without merit. That argument merely serves as emotional pavement for the contention that there is something unfair or unjust in holding the radio station to strict liability for such intentional publication in interpolation cases. To that aspect of the argument we accordingly turn.

d. *Considerations of fairness and policy: equality with newspapers; danger to victims*

Protagonists for broadcasting stations have insistently repeated the palpably misleading assertion that because of the instantaneous character of the transmission that results, the radio station is in interpolation cases in an entirely different position from the newspaper which can check the copy for defamatory matter before it is released for publication.⁷⁶ Such protagonists are wont to assert as unanswerable logic that this difference between the two types of publication renders it unjust to apply to both the same strict liability. It is asserted that the newspaper by the use of due care in proofreading and checking copy can protect itself against liability, whereas the radio station is utterly helpless in case of defamatory interpolation by outside speakers given access to the microphone.

Such misleading assertions rest upon a misconception, readily exposed, of the range of the newspaper's liability. In the law of defamation the leading case of *Hulton v. Jones*⁷⁷ is a familiar landmark. Another case of the same type, even closer to the present problem, is *Morrison v. Ritchie & Co.*⁷⁸ Under cases of this type it is well established that a newspaper is answerable at its peril for the defamatory meaning reasonably understood by readers of the paper because of extrinsic facts known to the readers, but not discoverable by the newspaper even by the exercise of the highest degree of care.⁷⁹ Moreover, as said by Judge Otis, "He knows that without any fault of him or of any of his employees someone sometime surreptitiously may insert in his paper some line of libel. He takes that risk."⁸⁰ Further still, even by the exercise of the utmost practicable degree of care, it is impossible for newspaper copy readers, not learned in the law, to detect and elim-

76. This contention was apparently first given general currency in the year 1927, before any of the judicial decisions on the subject had been made. In that year this contention made its appearance in DAVIS, *LAW OF RADIO COMMUNICATION* (1st ed. 1927) 164, 168-170. For superficial plausibility in the statement of this contention this work far surpasses most of its later published echoes. For some observations thereon, see note 24 *supra*. This contention was rejected by the Nebraska Court in *Sorensen v. Wood*.

77. [1910] A. C. 20.

78. 4 Sess. Cas. 645 (1902). Other very familiar cases are *Peck v. Tribune Co.*, 214 U. S. 185 (1909) and *Washington Post Co. v. Chaloner*, 250 U. S. 290 (1919).

79. For further authorities and citation to analytical discussion, see note 53 *supra*.

80. *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889, 890 (W. D. Mo. 1934).

inate every instance of language that may by courts be held to be defamatory.⁸¹ It therefore is not true, as asserted by protagonists for the radio station,⁸² that the newspaper in all instances can protect itself by the use of due care while radio stations in interpolation cases cannot.⁸³ In this regard, therefore, newspapers and radio stations, instead of being "entirely different", are in reality closely similar. In the ordinary course each maintains practical control over the content published. In the case of each, occasional situations are presented where no exercise of care, however great, can completely guard against the transmission of defamation. The risk of liability involved in such situations is part of the burden of the enterprise in which both are engaged. The hardship upon the publisher which is involved in strict liability under the law of defamation is therefore not notably different in the two cases.

It may be granted, however, that because of the ease with which interpolations may be made, the range of situations where due care may prove unavailing to exclude defamatory utterances may be somewhat wider in the case of the radio than in the case of the newspaper. To the extent that this may be true, the innocent victim of defamatory utterances is more largely exposed by operation of radio broadcasting than he is by publication through the press. To that extent, therefore, the victim's need for protection against "character assassination" by radio is markedly greater than it is in the case of newspaper publication.⁸⁴ Relieving the participating radio station from strict liability

81. This aspect of the question is examined at greater length in Vold, *supra* note 15, at 631-632.

82. Despite the well-known law on the subject, briefs for radio stations have persistently repeated the palpable misstatement criticized in the text. "Nothing can appear in the paper as printed except as a result of the intention or negligence of the publisher." Brief for Appellant, p. 56, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). "In the case of the newspaper, defamatory words can be published only if there has been wilful wrongdoing or negligence on the part of some one or more employees of the publisher." Brief for Intervening Appellant, p. 4, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

83. The statement in the text has reference, of course, to the ordinary jurisdictions where the law of defamation is understood to involve absolute liability for unprivileged publication of defamatory utterances. If it be true that in some jurisdictions the law of defamation involves no such strict liability but is regarded as involving merely a high degree of care, as was stated recently by the Pennsylvania Supreme Court in the *Summit* case, the statement in the text does not apply in such a jurisdiction. See note 2 *supra*. If such be the basis of liability for defamation under the law of the jurisdiction, both newspaper and radio station can avoid liability by the exercise of due care. Thus, again, the two types of publication continue to be closely analogous.

84. This matter is dealt with at greater length in Vold, *supra* note 15, at 611, 633. In addition, see note 100 *infra*.

For the field of aviation the corresponding problem was phrased by Professor Bohlen as follows: "Judge Lynn in a brief but able opinion turned the defendant's battery upon himself. In substance, he said that, if there was such likelihood that a plane would get out of control notwithstanding the utmost care in its management or preparation, flying is so dangerous an activity that it should be conducted at the risk of the flier and not of the surface owner over whose land the flight is made and who has no interest in it whatever." Bohlen, *Aviation Under the Common Law* (1934) 48 HARV. L. REV. 216.

does not avoid the injury threatened but merely results in relieving the perpetrator at the expense of the innocent victim. On the subject of hardship, too, it is to be remembered that the radio station very readily can protect itself without sacrificing its victim by requiring indemnity from the advertiser in whose interest it transmits the defamatory utterances. On the other hand, in many if not in most instances, there is no practicable relief for the innocent victim if his redress against the participating radio station is denied.⁸⁵

There is no duty imposed upon the radio station to admit outside advertisers to its microphone at all. The station knows full well that when it does so, it thereby takes the chances of transmitting defamatory interpolations to the injury of innocent victims. It takes those chances intentionally.⁸⁶ Under such circumstances, and especially in view of the fact that it is to the radio station's convenience or profit thus to participate with outside advertisers at its microphone, how can we justify shifting the burden of defamatory interpolations from the perpetrators to the victims? Especially, how can such a shift from perpetrator to victim be justified, when in all such cases the victim of such defamation is both passive and helpless while the radio station has the power readily at hand to provide protection for itself from ultimate liability for the damage it perpetrates by simply requiring satisfactory indemnity?

e. Newsvender analogy inappropriate

It is to be noted that in interpolation cases as in other cases the radio station, jointly with the speaker at the microphone, is a first and

"Assuming that it is a good policy to develop aviation, the good to be gained is the good of the public. Even assuming that aviation is an essential activity and that it can be regarded as still in its infancy, there is no reason why the cost of fostering it . . . should be placed on the individuals over whose land the flights are made and who gain nothing from the flights save insofar as they are members of the public." *Id.* at 218.

"So, too, aviation can be subsidized and fostered by relieving it from liability for those injuries to groundowners which by the confession of counsel in the *Dunlop* case cannot be prevented by even the most meticulous care in preparation or flight . . . It is the public as a whole which has an interest in the development of aviation. The interest of any particular groundowner is as one of the hundred or more million inhabitants of the United States. It is the acme of unequal taxation to make him bear the whole loss entailed by the destruction of his property through the crashing of a plane merely because he, as a member of the public, has a hundred-millionth interest in the development of aviation. But there is nothing to show that a subsidy is needed. Experience shows that the development of aviation is not substantially impeded by making it bear the risk of such accidents." *Id.* at 219.

The close parallel in this regard between aviation and radio is readily apparent. Taking Professor Bohlen's own words from the start to the finish of these quoted passages, and substituting the appropriate terms for "radio" instead of "aviation", every statement made would be as true in the case of radio as in that of aviation.

85. The cases already litigated afford excellent illustrations. In *Sorensen v. Wood* the outside speaker at the microphone was a financially irresponsible party. See stipulation filed with the Supreme Court of Nebraska on the second appeal in that case (No. 28749, unreported, 1933). In *Coffey v. Midland Broadcasting Co.*, 8 F. Supp. 889 (W. D. Mo. 1934) the speaker at the microphone at the central studio in a chain program was out of the jurisdiction in which the plaintiff resided, the central studio being located in New York City while the plaintiff resided in Missouri.

86. See *supra* pp. 274-275.

main publisher. There is no publication by anybody until, by the broadcasting process, the speaker's words are transmitted to radio listeners simultaneously with their utterance. Accordingly, the news-vender analogy by its own terms is inapplicable to the radio station.⁸⁷ On the technical side, in interpolation cases as in other cases, the radio station is an intentional participator in the first and main publication. This matter has already been set out in detail above.⁸⁸ It is not taking only a secondary and subordinate part in a later republication of defamatory matter already previously published by others.⁸⁹ On the business side, as distinguished from the technical side, the radio station is more clearly in the same general position as the newspaper. Both provide publication service for advertisers who pay the price therefor as fixed by private contract. Both are direct competitors in the field of providing commercial advertising for pay. Both serve the same function in the advertising field by creating and directing demand for products. In their economic aspects as business enterprises, quite as well as in their technical transmission aspects, radio stations are closely comparable to newspapers as principal publishers of the advertising they transmit to the public for pay. Accordingly, as an original question, no showing of due care such as might excuse a news-vender from liability can in interpolation cases avail the radio station, it being an original and principal publisher, as distinguished from a subsequent republisher who takes only a secondary and subordinate part in a republication of what has already been previously published by others.⁹⁰

f. *Practical convenience requires a simple rule free from subtle complications*

An important additional reason, bearing on practical convenience may be added. It is desirable so far as practicable to have a simple and easily understood rule of liability that can be applied to the practical situations that arise without becoming incessantly entangled in attenu-

87. This general matter is dealt with more at length in Vold, *supra* note 15, at 657-660. As there set out, this contention first appeared in one of the briefs for the broadcasting station in *Sorensen v. Wood*.

88. See *supra* pp. 272-275.

89. Accordingly, it does not fall within the language of RESTATEMENT, TORTS (1938) § 581, which states the rule applicable to news-venders. By the very terms of this section as phrased, it is applicable to dissemination of defamatory matter "which was originally published by a third person". As to § 581, comment f, the identical language there used is applicable to every publisher that falls within the language of § 577.

90. This analogy with regard to publication by radio has never been regarded favorably by any court. Even the Pennsylvania Court, though in various other directions favorably disposed toward the contentions of the broadcasting company, refused to accept this analogy, and cited a relatively early decision of the Supreme Court of the United States, involving radio in a copyright case, as an obstacle to its adoption. *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 309 (Pa. 1939). The later decision of *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U. S. 650 (1936), it may be added, would seem to settle this aspect of the matter beyond a doubt, as under that decision it is perfectly clear that a radio broadcasting station is a principal publisher, being the transmitter of the utterances on the first publication. See *infra* p. 292.

ated fact subtleties.⁹¹ Where the victims of defamatory utterances can know nothing of such fact subtleties, rules of law which distinguish liabilities on such bases readily become pitfalls to injured victims in their quest for effective redress against wrongdoers.⁹²

To the radio listener no difference is perceptible between cases where the manuscript is followed in broadcasting and cases of oral interpolation. The radio listener does not know whether an advertising program is put on through the radio station's own announcer or through outside talent provided by the advertiser. The radio listener knows nothing of such details as which parties at the studio are in the employ of the radio station, or whether certain of the radio station's employees may for the occasion be hired and paid by the advertisers. The set-up at the studio may involve complicated contractual arrangements among the advertisers whose products are advertised in the broadcasts, the advertising agencies who arrange for the particular broadcasts, the talent appearing before the microphone, the radio station's regular employees who operate the transmission apparatus, and the owners of the broadcasting station who reap the profits.⁹³ The radio listener merely hears the content of the broadcast. The victim of a defamatory broadcast in the ordinary case has no way of determining such details.

The newspaper analogy in the law of defamation is admittedly the appropriate basis for liability for radio broadcasts where defamatory statements are uttered into the microphone through the station's own announcer. The same is true where defamatory utterances are contained in manuscripts similarly read into the microphone by outside speakers, and also where defamatory statements are uttered into the microphone by outside speakers in programs where written manuscripts

91. See, for instance, the argument of Donald G. Graham, a lawyer for a broadcasting station, wherein he deprecates the distinction between slander and libel as applied to radio broadcasting, and advocates that all defamation by radio be regarded as libel. "It is difficult to understand why a distinction should be made between an utterance read from a written manuscript and one which is wholly extemporaneous. The damage is precisely the same in both cases. To designate one as 'libel' and the other as 'slander' would seem to be carrying fine-spun distinctions too far. A radio listener cannot possibly know whether what he hears is read or impromptu." Graham, *supra* note 19, at 288.

92. It appears, for instance, when the record is examined in the *Summit* case that the defamed plaintiff when he began his action supposed that the defamatory advertising program had been put on the air by talent in the employ of the broadcasting station. His counsel, accordingly, drafted his pleadings that way. At the trial it appeared, however, that the talent admitted to the microphone were in the employ of an advertising agency that had arranged for the broadcast. Accordingly, among other matters, defendant station claimed a variance between the pleadings and the proof, which, it was claimed, was not curable by amendment. Brief for Appellant, pp. 94-102, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). This technical point was not passed upon in the opinion of the court in the *Summit* case.

93. Thus, in the *Summit* case the talent admitted to the microphone were in the employ of an advertising agency that arranged for such broadcasts. They were in the direct employ of neither the radio station nor the advertiser. See note 92 *supra*.

are deliberately dispensed with. There is, thus, a simple, well understood and easily applied rule of law as to the liability of radio stations for defamatory broadcasts covering most of the situations that actually occur. That rule of law, as already seen, is also technically appropriate for the facts involving defamatory interpolations by outside speakers given access to the microphone. In such cases, too, as already seen, there is intentional participation in the "communication intentionally" of the matter that is interpolated, whatever its content may be. All of the policy considerations, furthermore, that require strict liability in the interest of security of reputation as an important aspect of general security are accentuated in the case of defamatory interpolations. Moreover, indemnity arrangements to throw the ultimate burden in such cases on the advertiser in whose service the defamatory utterances are broadcast by the radio station both can and do cover defamatory interpolations just as readily as they cover defamatory utterances contained in submitted manuscripts. As an original question, why in that special case introduce a mass of complications depending on subtle fact distinctions regarding the arrangements between parties in the studio about which the victim of the transmitted defamation can know nothing? Why in that special case introduce such complications, except for the purpose of obstructing the victim's redress, to the end that radio stations may escape the strict liability of the law of defamation which applies to all other types of publishers?

VII. THE REAL POINT: STRICT LIABILITY OR FAULT AS THE CONTROLLING PRINCIPLE IN LIABILITY FOR DEFAMATION

1. *The Unsupported Assumption That the Formula of No Liability without Fault Is Applicable*

It would seem that the real substance of the arguments for a milder rule of liability in the case of interpolations than in the case of other broadcasts is found neither in the details of fact by which interpolations differ from other broadcasts, nor in the details of fact bearing upon how automatic the immediate process of transmission may be. Whatever there is of substance in those arguments for a milder rule would seem to lie rather in their starting point, the deep-seated underlying conception that justice and public policy require that as a general rule there should be no liability without fault. That familiar conception seems to be the greatest factor in shaping the appraisal of the facts of broadcasting and in giving form to arguments advanced in behalf of radio stations where the aim is to find for them some escape from the strict liability of defamation applied to all other publishers. In practically all of these arguments the familiar principle of no liability with-

out fault is either tacitly assumed or openly avowed as the ultimate criterion of justice to which appeal is made.⁹⁴ In all this type of discussion substantially the same assertions have appeared with monotonous regularity, whether the arguments have been directed broadly toward resting the radio station's liability solely on the negligence basis,⁹⁵ whether they have invoked the variant of the law of negligence which is found in the newsvender analogy,⁹⁶ or whether they have tried to distinguish interpolation cases from other broadcasts in order there to introduce negligence or the newsvender analogy as the basis for the radio station's liability.⁹⁷

When these arguments are subjected to close analysis, however, it is readily apparent that in no instance do they go beyond the unsupported assumption from which they start, that no liability without fault is the general rule of law in the field of torts, which accordingly should be applied to the radio station. At that point in the discussion the victim seems to be utterly forgotten. These arguments seldom attempt to explain why, on the merits, the formula of no liability without fault should be invoked, thus permitting radio broadcasting to be carried on at the expense of its victims,⁹⁸ instead of the rule of strict liability,

94. The works criticized in note 24 *supra* afford fair illustrations. The arguments submitted to the Pennsylvania Court on behalf of the radio station in the *Summit* case afford conspicuous instances. "It is a basic principle of general application in the law of torts that the law imposes no liability without fault." Brief for Appellant, p. 62, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). See also, generally, *id.* at 62-68, and an extensive quotation in DAVIS, *THE LAW OF RADIO COMMUNICATION* (1st ed. 1927) 58-59 (a work criticized in note 24 *supra*). Long quotations from that treatise to the same effect were also quoted in the Brief for Intervening Appellant, pp. 19, 20, 25, 26, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

95. As in the brief submitted for the broadcasting station on the first appeal in *Sorensen v. Wood*.

96. As in the brief submitted for the broadcasting station on the second appeal in *Sorensen v. Wood* (No. 28749, unreported, 1933).

97. As in the briefs submitted on behalf of the National Broadcasting Co. and of the National Association of Broadcasters in the *Summit* case.

98. Even so outstanding a legal scholar as Professor Bohlen at this vital point lapses into complete silence. "To my mind we are imposing a heavy enough responsibility upon them if we require them to exercise reasonable care to ascertain that their facilities will not be and are not being abused." 12 *Proc. A. L. I.* 356 (1935) (no reason for this view stated). "To . . . make the broadcasting company liable for an unknown and unknowable interpolation even if they stop the broadcast as soon as the defamatory character of the thing had become apparent, I think is going far beyond any analogy properly to be drawn to the newspaper publisher." 14 *id.* at 86 (1937) (no reason for this view stated). "It would seem that justice would be done and the good reputation of mankind given sufficient protection by treating the broadcaster as a disseminator rather than a publisher of the defamatory interpolation." Bohlen, *supra* note 70, at 731 (no reason for this view stated).

The present writer ventures the inference that the actual explanation for these views on Professor Bohlen's part in effect appears in another place, as follows: "It is impossible to enter into the causes which led to the astounding revolution in the judicial idea of justice whereby the old concept, that one who did harm should pay for it because he caused it, gave place to the concept that it would be unjust to transfer the harm which had befallen one innocent party to one equally innocent merely because the first was a passive victim while the other had actively caused the damage. . . . But it may be said with some confidence that the conception concerned itself entirely with the injustice of requiring an innocent author of harm to answer for it. . . . An en-

which is applicable to other publishers, under which the publishers who create the risks and reap the profits of the activity which brings about defamation of others are also required to bear its burdens. When reduced to their lowest terms these arguments amount merely to the unsupported assertion that the formula of no liability without fault is the general rule of tort law applicable to all new situations as they arise.

2. *The Fallacy Involved in Such Assumption*

The fundamental fallacy in such assumption is readily exposed. Wide areas of the vast field of tort law present other bases for liability

tirely new system of jurisprudence might well contain, as a fundamental principle, the conception that liability to repair harm done is only to be imposed as a species of punishment for misconduct, moral or social. . . . And while in new actions fault was regarded as essential to recovery, it was still required because it was thought more just to leave the loss where it had fallen than to single out the innocent defendant as the victim simply because he was the author of the loss." BOHLEN, *STUDIES IN THE LAW OF TORTS* (1926) 436-439. In a footnote to these passages Professor Bohlen expands his viewpoint as follows: "The natural tendency in any advancing civilization, to regard the utmost possible freedom of individual activity as essential to the general good, would therefore cause its encouragement to be regarded as paramount to the preservation of the interests of the merely passive citizen; and would tend to the abandonment of a rule of liability which, by making the actor answerable for all the harm he causes, would appear to unduly burden and so discourage individual initiative, and to the adoption in place thereof of a rule which relieved him from liability so long as he in his activities showed a due regard for the interests of others." *Id.* at 438, n. 49.

These quotations appear in the same article, and are parts of the same exposition by Professor Bohlen, which is cited by the Pennsylvania Court in *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 308 (Pa. 1939), for the broad proposition that tort liability must be founded upon some blameworthy conduct, or lack of due care resulting in the violation of a duty owing to others.

It can be readily noticed that these views of Professor Bohlen substantially coincide with the views expressed in *Brown v. Collins*, 53 N. H. 442 (1873) in rejecting the case of *Rylands v. Fletcher*, L. R. 3 H. L. 330 (1868) as authority. That this entire viewpoint is both historically unsound and philosophically indefensible, see quotation from Roscoe Pound, appearing in note 10 *supra*, and POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 105-109. See also citations there listed of studies touching the subject of absolute liability.

That Professor Bohlen is personally inclined to apply these views not only in the traditionally familiar field of negligent conduct but also in the field of defamation seems clear from the following: "For some curious reason one's interest in one's unblemished reputation has, from the time that defamation was taken over by the King's Court, been given an extraordinary extent of protection. There is perhaps this much justification for it. . . . Apart from this there seems very little reason to hold the publisher of a newspaper liable for the innocent insertion of a matter which sometimes is little more than uncomplimentary at the very most, unless some substantial and tangible damage has resulted from it." Bohlen, *supra* note 70, at 730-731. That on the merits the formula of no liability without fault has no such place in the field of defamation, however, see note 46 *supra*, quoting from a careful analysis of the problem by Professor Jeremiah Smith.

With regard to aviation, however, Professor Bohlen has himself taken the view that as an original question absolute liability is properly applied. See excerpts quoted in note 84 *supra*. The formula of "no liability without fault", then does not have such universality of application in controlling novel situations that arise as Professor Bohlen's exposition in his *STUDIES IN THE LAW OF TORTS* would indicate. In addition, see *RESTATEMENT, TORTS* (1938) §§ 519, 520. It would be interesting to know what are Professor Bohlen's actual reasons for distinguishing between the propriety as an original question of absolute liability in aviation crash cases and the propriety as an original question of absolute liability in defamation cases. As indicated in note 84 *supra*, every word of his exposition of absolute liability for aviation crash cases is equally applicable to the facts of defamation by radio.

than negligence. For present purposes it is sufficient to note that the law of defamation itself is a branch of strict liability, not of negligence, and that outside of the law of defamation is a wide and rapidly developing area of strict liability for so-called extra-hazardous activities which are not matters of common usage.⁹⁹ The law of negligence has never in the common law system been the basis for liability for intentional publication of defamatory utterances. On the other hand, strict liability for intentional publication of unprivileged defamatory utterances has in modern times been increasingly accentuated as the methods and range of publication for such utterances have become increasingly far-reaching and dangerous. With the advent of radio broadcasting the danger in this respect to innocent victims is greatly increased.¹⁰⁰

99. RESTATEMENT, TORTS (1938) §§ 519, 520.

100. This simple fact is so familiar as to amount to matter of common knowledge. Nevertheless, a few specifications may be in order by way of authentication.

"Statements are being made over the radio constantly which no newspaper could print even if it so desired. Yet these statements continue to be made oftentimes by irresponsible persons and defamation which they speak is cast upon the highways of the sky to be heard by millions of listeners. . . . The permanence of the written record over the evanescent spoken word has been, we believe, exaggerated. We Americans have become in the last twenty-five years decidedly ear-minded, as the salesman of advertising time on the radio will eloquently convince you. The growing feeling, therefore, that defamation by radio is as heinous as written defamation is not to be denied." Keller, *Federal Control of Defamation by Radio* (1936) 12 NOTRE DAME LAWY. 15, 19.

"Radio has opened up a new and larger opportunity for defamation than has ever existed before. . . . Modern invention has thus arisen as an ally of defamation, and if man's ingenuity continues at its present rate, the vehicles for libel and slander will continue to increase. Television will certainly not lessen the effectiveness of a defamatory imputation. . . . A torrid political campaign is being waged in the city where the broadcast station is located. The most effective way of reaching the largest number of voters is over the air. . . . A strike is on. . . . Broadcast stations are called upon to broadcast programs of one side or the other, or both. Such programs usually involve, in addition to comments on the issues, more or less direct and inflammatory criticism of individuals." Graham, *supra* note 49, at 283.

"The State's Attorney of Chicago listening to the radio in his own home recently had the doubtful pleasure of hearing himself mentioned as one of those present at the cabaret from which the music was broadcasted and where, according to reports, the Volstead law was being violated. A description of a disastrous fire at a named hotel, though the announcer has stated that the occurrence is purely fictitious and without the slightest basis in fact, may well mislead those who 'tune in' while the description is being broadcasted and may result in numerous cancellations of reservations and great financial loss to the hotel. . . . On the mischief side, radio defamation certainly would seem to be more like libel than like slander." ZOLLMAN, *LAW OF THE AIR* (1927) 124, 125. See Vold, *supra* note 15, at 633, 643-644.

"The operator of the broadcasting station publishes the message to the world." Coffey v. Midland Broadcasting Co., 8 F. Supp. 889, 890 (W. D. Mo. 1934).

The pleadings in *Sorensen v. Wood* disclose that between the hours of six and seven o'clock P. M., when the defamatory utterances were broadcast, the station had a radio audience of at least 200,000 individuals in Nebraska as well as numerous listeners in adjoining states, matters not controverted by the defendant station. The record of testimony in that case discloses that the manuscript there broadcast was rejected by several daily papers because of its defamatory character.

The record in the case of *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939) (Record, p. 141a), shows an oral stipulation between counsel in that case that the particular broadcast involving the defamatory utterance there in question was carried over twenty-six different radio stations extending from New York on the east coast to Bismarck, North Dakota. The supplemental record in that case shows that the contract with the advertiser called for a hookup with forty-seven stations throughout the country all the way from Boston, Mass., and Miami, Florida,

Moreover, in our own time in this country the prevalent conceptions of public policy have been increasingly emphasizing the interests of general security and calling for increased protection against the injurious conduct of others even in areas of conduct where formerly it was regarded as not legally improper to inflict damage upon others as a result of careful conduct.¹⁰¹ So far as underlying considerations of policy are concerned, therefore, should the courts now yield to the arguments in behalf of radio stations and substitute some variant of the law of negligence for the strict liability for defamation which is applicable as a matter of course to other publishing enterprises, they would be taking a very conspicuous step backwards. So far as the question of policy is concerned, the considerations which have required the application of strict liability in defamation cases even in the heyday of the much overrated formula of no liability without fault are clearly present in the field of radio transmission which is the strongest and most effective, farflung and dangerous publishing enterprise the world has even seen.

3. *Policy Considerations Support Application of Strict Liability*

Dismissing all technical inquiries, the answer to the question of whether it is socially advantageous to relieve the radio station from the same strict liability for defamation that is applicable to other publishers should be negative. As set forth more at length in another

to Los Angeles and San Francisco in California, and Portland, Oregon, and Seattle, Washington. Brief for Appellee, pp. 57-59.

It is within the recent memory of many thousands that the broadcast on a national hookup of Orson Welles' fanciful play, depicting an invasion of this country by an army of supermen from the planet Mars who wrought havoc with the City of New York and quickly destroyed the nation's military force which was sent against them, caused an enormous amount of consternation and shock to listeners throughout the country.

In view of such uncontroverted facts as the foregoing, which are only samples, can the self-serving declarations by radio stations in their briefs that defamation by radio is so slight as to be inconsequential be accepted as true? Brief for Intervening Appellant, pp. 21, 25, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939). The facts being what they actually are, do such self-serving declarations from broadcasting stations gain any added weight from the Pennsylvania Court's dictum in the *Summit* case, *id.* at 310, that "The radio word is quickly spoken, and, generally, as quickly forgotten"? Further, to be even consistent in their contentions on this matter, how can radio stations in the same breath claim that there is no serious danger to victims from defamation by radio and yet claim that imposing upon radio stations responsibility for the defamatory utterances which they do broadcast imposes extremely dangerous burdens upon radio stations? See also *infra* p. 295.

101. See material quoted and authorities cited in notes 10 and 98 *supra*. See also Vold, *supra* note 10, at 231-240, 244-249.

"Even more significant is the course of American decision since Professor Bohlen's paper was written. . . . But the tide began to turn while he was writing and in the past decade three courts have accepted it while but one has repeated it. . . ." "Presently the exigencies of the general security led courts to adopt the rule [of *Rylands v. Fletcher*] in several jurisdictions where the question remained open. . . ."

" . . . If so, it marks a reaction from the doctrine that liability is to exist only as a corollary of culpability. It subjects the land-owner to a liability at his peril, in the interest of the general security." POUND, *INTERPRETATIONS OF LEGAL HISTORY* (1923) 107-109.

place,¹⁰² "whether viewed from the standpoint of equality before the law, protection to innocent victims, cause of the damage, profit from the operations involved, onesidedness of the risks concerned, ability to bear the loss, ability to prevent its perpetration, or ability to arrange for self-protection through indemnity or insurance, the same conclusion from the standpoint of justice reappears. That conclusion is that radio broadcasting publishers are not entitled to greater favors than other publishers, and that no reason is apparent from the standpoint of justice why in their interest innocent and helpless victims should be sacrificed. When broadcasters and their passive innocent victims are regarded together as parts of the single picture that is viewed, it seems little less than presumptuous to claim in a court of justice that the risk of 'character assassination' created by the commercial activity of broadcasting stations ought, to the greater advantage of such stations, to be thrown on their passive and innocent victims."

4. *The Same Policy Considerations Apply to Oral Interpolations*

All these policy considerations are as applicable to broadcasts of defamatory oral interpolations as to broadcasts of defamatory manuscripts. The danger and the damage to the victim is not less because it is an interpolation. The risk of possible interpolation is knowingly and deliberately created by the radio station's admitting the outside speaker to its microphone and participating with him in making the broadcast. That risk the radio station as a practical matter can very readily avoid or greatly reduce by requiring adequate indemnification from the advertiser whose speaker is admitted to the microphone. In this regard too, strict liability is the best possible assurance that the highest practicable care will be exercised both by radio stations and their advertisers to avoid such mishaps.¹⁰³ Under the newspaper analogy in defamation as the general basis for the radio station's liability, already applied by the courts of several jurisdictions to the other types of broadcasting situations that have been adjudicated, the practice among radio stations has already become widespread to require indemnity from the advertiser before admitting the outside speaker to the microphone. Can it be contended that interpolation cases in this respect do not call for the same protection for innocent victims? Can it be contended that indemnity arrangements cannot as readily include defamatory interpolations as defamatory contents of written manuscripts? As a matter of fact, the indemnity provisions already familiar in broad-

102. Vold, *supra* note 15, at 630-631. See generally, *id.* at 626-639.

103. That the rule as applied to broadcasting actually has a very salutary effect in preventing irresponsible publication of defamatory utterances, see quotation from the article by McDonald and Grimshaw, *supra* note 49.

casting practice actually do cover interpolations.¹⁰⁴ Under the newspaper analogy as already announced in the available judicial decisions, therefore, the ultimate burden of defamatory interpolations not only can be but is thrown upon the advertiser who supplies them and in whose service they are broadcast. Relaxing the strict liability of radio stations in cases of interpolations, therefore, would serve principally to shift that ultimate burden from the advertiser to the victim and thereby greatly increase the incentive to perpetrate defamation. As in the case of the broadcast of defamatory manuscripts so in the case of defamatory interpolations, application of the strict liability of the law of defamation assures that those who create the risks and reap the commercial profits from the publication of defamatory utterances are also required to bear the burdens of damage which such activity inflicts upon their passive and innocent victims. Such has been the traditional view of what is sound public policy in the field of defamatory utterances. No reason is apparent, and none has been suggested, why this broad public policy should be different with regard to defamatory utterances transmitted by radio than for defamatory utterances transmitted through the older familiar modes of publication.¹⁰⁵

104. See the language of standard forms of such contracts now in general use, as set forth in note 48 *supra*. Another form of such contract clause, also said to be in general use, is quoted in Keller, *supra* note 100, at 158.

105. ". . . the novelty of the means used does not lessen the duty of the courts to give full protection. . . ." Brandeis, J., in *Buck v. Jewell-La Salle Realty Co.*, 283 U. S. 191, 198 (1931) (a copyright case). So far as the present writer is aware, protagonists for radio stations have never in their public pronouncements or publications directly faced this question. Instead they have made the unsupported assumption that "no liability without fault" is the general criterion of liability. See *supra* p. 281.

The nearest approach to any definite reason why the rules of negligence rather than the rules of defamation ought to be applied to radio broadcasting, is the asserted opinion that such liability "unduly penalizes a totally new and different form of communication". Brief for Appellant, p. 45, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939), and echoed in the court's opinion at p. 311 without further elucidation or supporting data other than a reference to Mr. Guider's assertion, already mentioned in note 24 *supra*. This, again, is in substance merely another form of words for Professor Bohlen's "To my mind we are imposing a heavy enough responsibility upon them if we require them to exercise reasonable care to ascertain that their facilities will not be and are not being abused". 12 *Proc. A. L. I.* 356 (1935). This excerpt, too, had been quoted to the Pennsylvania Court in the Brief for Intervening Appellant, p. 6, *Summit* case, *supra*.

Even when the contention is phrased in this form, however, the protagonists for radio stations have been unable to adduce even the slightest factual data in its support. The reason for the total absence of supporting data for the assertion that the law of defamation imposes an unreasonably heavy burden upon the radio industry was briefly expressed by Chief Justice Goss, in *Sorensen v. Wood*, 123 Neb. 348, 357, 243 N. W. 82, 86 (1932), as follows: "For it appears that the opportunities are so attractive to investments that the available airways would be greatly overcrowded by broadcasting stations were it not for restriction of the number of licensees under federal authority." The leading case on elimination of radio stations because of overcrowding is *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933). The matter is discussed in greater detail in Vold, *supra* note 15, at 635-637.

5. *The Same Policy Considerations Apply in Case of Automatic Transmission*

These policy considerations all continue to be applicable to defamatory interpolations in radio broadcasts irrespective of how automatic the immediate transmission process itself may become. Attempts to distinguish as a matter of policy between the interpolation case and the manuscript case on the score of the greater dangers of liability to which the radio station as publisher may thus become exposed under the strict liability of the law of defamation¹⁰⁶ are readily met by pointing out that relieving the radio station from liability does not avoid the actual dangers of defamatory interpolations in such cases, but merely shifts the risk of such greater dangers from the active perpetrator to the passive innocent victim. The greater the actual danger to the radio station from strict liability in such cases, the greater the victim's need of protection in such cases.¹⁰⁷

Furthermore, whatever may be the greater danger to the station in cases of interpolation than in cases of defamatory manuscript, such danger, is readily guarded against by requirement of an adequate indemnity provision from the advertiser whose speaker is admitted to the microphone.

6. *The Close Parallel With Ultrahazardous Activities*

Moreover, so far as there is any substance to the argument on behalf of radio stations that the rule of strict liability subjects them to extremely dangerous liabilities against which they cannot protect themselves by the exercise of due care, it tends to establish that the business

106. A variation of this contention is suggested in the opinion of Kephart, C. J., in *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302, 311 (Pa. 1939), to the effect that the radio station is thereby exposed to frauds and perjuries as gross as could be practiced in actions of slander. The answer to this suggestion is twofold. In the first place, the radio station has the same protection against feigned claims afforded other publishers by the rules of evidence and the ordinary processes of legal procedure where it may become necessary to distinguish between truth and falsehood. No showing has ever been made that these are not as adequate for radio stations as for other parties against whom feigned claims may be asserted. In this respect all persons are exposed to imposture through the legal doctrine that a contract is legally binding and enforceable although not evidenced by a writing. In the second place this danger, whatever it be, is covered under the terms of the indemnity contracts which good radio broadcasting practice requires in all cases where outside speakers are admitted to the microphone. See note 49 *supra*. As a matter of fact, the terms of such clauses now in general use already cover such claims made on account of such broadcasts. See the second clause quoted in note 48 *supra*. A clause of similar scope is quoted as one in general use, in Keller, *supra* note 100, at 158. It may be assumed that not even the Pennsylvania Court would take the position that radio stations should not be answerable for defamation uttered into the microphone by their own employees. See closing paragraphs of the court's opinion in the *Summit* case, *supra* at 312. Even where the speaker is the radio station's own employee there is the same opportunity for feigned claims against the radio station as is presented in any other type of broadcasting.

107. See comments on the closely parallel problem in the field of aviation referred to in note 84 *supra*, and in the last paragraph of note 98 *supra*.

of radio broadcasting is in certain respects a business fraught with great danger to others. Due care is here ineffective to protect the radio station against liability to injured parties only because due care is here ineffective to guard against their doing harm to innocent victims. In this regard, too, the more automatic the immediate process of transmission becomes, the greater becomes the danger of defamatory interpolations by outsiders admitted to the microphone.

Therefore the facts of radio broadcasting come readily within the general principles of strict liability applicable to so-called ultrahazardous activities rather than within negligence principles. The metaphorical expression that defamatory utterances may involve "potential dynamite" vividly pictures the realities. As applied to personal reputation, the radio broadcasting business, at least where outsiders are given access to the microphone, is an activity which certainly involves great risk of serious harm to the victim's personality, a danger which cannot be eliminated by the exercise of the utmost care.¹⁰⁸ Also, such activity is not such a matter of common usage that it is customarily carried on by the great mass of mankind, or by many people in the community.¹⁰⁹ Moreover, both as to the profits accruing and as to the risks of defamation involved it is an activity which, as between the perpetrators and their victims, is strictly and wholly one-sided. Therefore, the objections urged to classifying the radio station as a technical publisher of defamatory interpolations where radio transmission is in substance automatic merely serve to accentuate in such cases the applicability of the broader grounds for strict liability which are applicable to all ultrahazardous undertakings not matters of common usage. Those broader grounds for strict liability also underlie the familiar law of defamation. The importance of those broader grounds of public policy in the interest of security of reputation is not reduced but rather greatly accentuated by those improvements in the transmission technique which greatly increase the dangers to innocent victims from such defamatory publications.

VIII. THE QUESTION OF PRIVILEGED OCCASIONS

1. *Arguments Confusing Publication and Privilege*

Some of the arguments in behalf of a milder rule of liability for radio stations than for other publishers have confused and beclouded the discussion by ignoring the well established distinction in the law of defamation between prima facie liability for publication of defamatory

108. See RESTATEMENT, TORTS (1938) §§ 519, 520, quoted in note 12 *supra*.

109. The close similarity between the situation presented in the case of defamation by radio and the situations by definition falling within §§ 519 and 520 of the Restatement of Torts, has been noticed in a slightly different connection by Professor Bohlen himself. 14 PROC. A. L. I. 164 (1937).

utterances and privileged occasions where for special reasons of policy liability for such publication is denied. These arguments for freedom from liability for publication are based on reasons having nothing to do with questions relating to the facts of publication but concerning questions of policy bearing upon privilege for certain types of occasions. Thus, where the policy of facilitating broadcasting of political speeches is involved,¹¹⁰ the question manifestly is whether privilege for such broadcasts should be recognized. So, where public officials in effect commandeer the services of the station for the purpose of addressing the public by radio as a means of performing their official duties,¹¹¹ the question is whether a privilege for the station is under such circumstances to be recognized.

2. *The Application of Privilege to Radio Stations—Public Duty to Broadcast*

It may be admitted without discussion that if the speaker at the microphone was privileged, the radio station is entitled to the same privilege.¹¹² It is also possible that as experience with radio broadcasting increases, certain limited occasions where the reasons for recognizing a privilege may apply to the radio station without being equally applicable to the speaker at the microphone may also eventually be distinguished. Thus, comparably to the privilege of telegraph companies which are under a public duty to accept and transmit messages not on their face defamatory, and comparably to the carrying on of an ultrahazardous activity in furtherance of a public duty, if a duty to broadcast is on some occasion imposed by law, a privilege would follow. It would seem that where public officials resort to the use of radio broadcasting in the performance of their public duties the occasion must on this score be regarded as privileged for the radio station, even though the official may in abuse of the occasion make some defamatory utterance.¹¹³

Somewhat similar questions may be presented in this country in cases where government officials connected with the federal system of

110. See, for example, the arguments set out in the report of the A. B. A. Committee on Communications in 1932, in criticism of the decision in the *Sorensen* case. 57 A. B. A. REP. 446-447 (1932); Guider, *supra* note 24, at 708; Caldwell, in remarks from the floor, before the Annual Meeting of the American Law Institute, 14 PROC. A. L. I. 162-164 (1937).

111. See Hardgrove's remarks from the floor before the American Law Institute, 12 PROC. A. L. I. 361 (1935); Caldwell and Bohlen, in colloquy at Annual Meeting of the American Law Institute, 14 *id.* at 163, 164 (1937).

112. *Irwin v. Ashurst*, 158 Ore. 61, 74 P. (2d) 1127 (1938).

113. The American Law Institute recognizes such privilege for ultrahazardous activity carried on in pursuance of a public duty. RESTATEMENT, TORTS (1938) § 521. In discussion before the American Law Institute, moreover, it was suggested by Professor Bohlen, and specifically acquiesced in by Mr. Caldwell, that this principle would be applicable to radio stations if and when a public duty to broadcast was thrust upon them. 14 PROC. A. L. I. 163-164 (1937).

regulation of broadcasting seek the radio station's service. If it be true that the station cannot refuse such requests for fear of a subsequent refusal to renew its license, then the practical situation is that there is official compulsion to comply. If such official compulsion be also legal, the elements for privilege for the radio station would seem to be made out. Whether or not there may be public duty to broadcast on some particular occasion may involve difficult and delicate questions. If there is such a public duty, it would seem to follow that a corresponding privilege attaches to the station.

3. *Perspective for Privilege for Political Discussion by Radio*

If no legal duty on the part of the station to broadcast can on the particular occasion be made out, no reason is apparent why the radio station should enjoy any greater privilege in the transmission of defamatory utterances than do the speakers given access to its microphone. So far as political discussion is concerned, a considerable number of jurisdictions now regard such discussion as conditionally privileged. In such jurisdictions, accordingly, both speaker and radio station are conditionally privileged. In the opinion of the present writer, such privilege might well be recognized throughout the entire country.¹¹⁴ Possibly the advent of national hookups in the broadcasting of political speeches in national political campaigns may open the way for such general recognition of a conditional privilege for political speeches. Holding that the radio station is not a publisher of the addresses of outside political speakers given access to its microphone would be a sort of blind and left-handed way of reaching the result that a privilege for the station is in practical effect recognized. It would be unfortunate, however, to express the reason for the result in such broad terms as to cover all cases where outside advertisers are given access to the microphone. There is no need, in order to recognize a privilege in the case of political speeches, thus to establish a similar privilege for all defamatory advertising which is not put on the air by the radio station's own announcer. It may be added that insofar as political speeches are not already recognized as conditionally privileged, there is no reason why the radio station may not for the protection both of itself and its victims require indemnity from political speakers given access to its microphone. Such, indeed, has already become familiar broadcasting practice.¹¹⁵

114. The matter of political privilege is discussed at greater length in Vold, *supra* note 15, at 637-639.

115. See notes 48 and 49 *supra*. During the campaign of 1938 a political speaker in a radio broadcast referred to one of the local leaders in Omaha as "a gangster's lawyer". An action was thereupon brought against the speaker and the broadcasting company, the plaintiff understanding the expression to have been "a gangster lawyer" and so alleging in his pleadings. The speaker having provided the radio station with the

It is apparent, therefore, that the same policy considerations are applicable whether or not the political speech is previously submitted in manuscript form, whether or not the defamatory utterance transmitted is found in the manuscript or is interpolated by an outside political speaker, and whether or not the process of transmission is in substance automatic. In all these situations the danger and harm to the victim are the same. In all these situations the broadcast is deliberately undertaken with knowledge that chances are taken when outside speakers are given access to the microphone. In all these situations the radio station may require satisfactory indemnity before admitting the speaker to the microphone. In all these situations the radio station is entitled to enjoy any privilege that the law extends to the speaker himself. Every argument for extending political privilege to the radio station in jurisdictions where it has not heretofore been recognized for political speakers would seem to be equally applicable in favor of the speakers at the microphone. It is therefore not apparent how arguments of this sort as a matter of policy justify any special privilege to the radio station as distinct from whatever privilege is available to the political speaker given access to the microphone. On the other hand, security of reputation from defamatory utterances in the field of general commercial advertising requires that courts should be wary of pronouncements of immunity to broadcasting stations in broader terms than the nature of political privilege itself requires.

IX. SIDELIGHTS FROM TAXATION CASES: DO RADIO STATIONS "LEASE THEIR FACILITIES"?

The arguments in behalf of radio stations when liability for defamation has been in question have persistently taken the direction that the radio station by its mere operation of its apparatus is not a publisher.¹¹⁶ In that view the speaker at the microphone is asserted to be the publisher, and liability on the part of the radio station for the defamatory utterances of the speaker is claimed to rest only on some showing of negligence on its part in permitting the defamatory broadcast by the speaker. The argument has even assumed the phraseology that the station merely supplies its machinery to the speaker, or leases its facilities to him, and the station's activity has often been compared with that of one who rents cars, printing presses or auditoriums.¹¹⁷ Giving the transaction the name of a lease when outside speakers are given access

usual indemnity under his contract for time, and being "good" for it, the radio station concerned itself very little over the matter but left the speaker, who uttered the words into the microphone, to deal with the case as he saw fit. It is understood to be still pending (Oct. 18, 1939).

116. This argument is set out very elaborately in Brief for Appellant, pp. 35-61, *Summit Hotel Co. v. National Broadcasting Co.*, 8 A. (2d) 302 (Pa. 1939).

117. See *supra* notes 15, 68, 70.

to the microphone is of course utterly fallacious, since in all broadcasts the station operators are in charge and control the operation of the transmission apparatus. In the defamation cases, however, it has served the station's purpose of so describing the facts of their activities as verbally to minimize their participation in the acts of transmission, and thus lend support to the contention that the radio station is not a publisher. While that view of the matter has up to now been generally rejected by the courts, the same form of statement has been reasserted as peculiarly and especially applicable to the facts of broadcasting at least so far as defamatory interpolations are concerned.¹¹⁸

At the same time that these arguments have been urged in behalf of radio stations in cases involving defamatory utterances, precisely the reverse of these arguments has been asserted in behalf of radio stations where the effort has been to avoid liability for state occupation taxes on the theory that radio broadcasting activity is interstate commerce. The state authorities in order to show that the business was local have asserted the same kind of arguments as have been asserted on behalf of the radio stations themselves in the defamation cases.¹¹⁹ In these occupation tax cases, however, as in the defamation cases, the opposite view of the facts of broadcasting has prevailed. The matter was carried to the Supreme Court of the United States, where it was held that the radio station's operations of broadcasting constituted interstate commerce. On the question of the radio station's active participation in the process of transmission, as opposed to merely turning its machinery over to the speaker at the microphone, the language of Justice Stone in *Fisher's Blend Station, Inc. v. State Tax Commission*¹²⁰ is highly significant:

"We may assume, although it is not alleged, that appellant's customers produce the sounds which are broadcasted. But it sufficiently appears . . . that appellant, and not the customer, generates the electric current and controls the apparatus (generator,

118. See *supra* pp. 252-253.

119. "Neither does respondent contend that *its facilities are leased to anyone for the purpose* of conducting scientific experiments. It clearly appears from the complaint that respondent's stations are used only for commercial broadcasting, and that branch of the art is the only one with which we are here concerned.

"In so far as the conduct of its business affairs by respondent is concerned, it is all purely intrastate. Its plants are entirely within the state of Washington; its contracts provide only for the use of its stations and the recognized facilities thereof, including their power to project electro-magnetic waves. *Respondent completes its contracts with its patrons when it turns over its stations to them or their agents*, and it is none of respondent's concern, as long as the stations function properly, where or by whom the waves or vibrations *which it causes to be released* are received and transmitted into sound." *Fisher's Blend Station, Inc. v. State Tax Commission*, 182 Wash. 163, 170, 179, 45 P. (2d) 942, 945, 949 (1935). (Italics supplied.) See also *Atlanta v. Oglethorpe University*, 178 Ga. 379, 383, 173 S. E. 110, 112 (1934).

120. 297 U. S. 650 (1936). The quotations in the text which follow are from pp. 653 and 654.

transmitter and their controls) by which the sounds are broadcasted . . . These allegations, read in the light of the statute, which forbids any save licensees to operate broadcasting apparatus . . . and of the facts of which we have judicial knowledge . . . must be taken to state that the broadcasting of radio emanations, as distinguished from the production of the sounds broadcasted, is effected by appellant and not by its customers.

"The sounds broadcasted are not transmitted from the microphone to the ears of listeners in other states. They do not pass as sound waves to the receiving mechanisms. They serve only to enable the broadcaster, by the use of appropriate apparatus, to modulate the radio emanations which he generates. These emanations as modulated, are projected through space to the receiving sets . . . On the argument it was conceded that, in broadcasting for its customers, appellant, by generating the necessary electric power and controlling the transmitter, produces the radio emanations which actuate the receiving mechanisms located in other states"

"Appellant is thus engaged in the business of transmitting advertising programs from its station in Washington to those persons in other states who 'listen in' through the use of receiving sets. . . ."

From the mere standpoint of consistency, without going into other aspects, one may well ask how radio stations in carrying on the broadcasting business can at the same time be engaged in the business of "transmitting advertising programs from its stations . . . to those persons in other states who 'listen in' ", and yet not be transmitters of the interpolations which are contained in and constitute parts of such programs. So far as the operative facts of physical transmission are concerned, as distinguished from policy considerations having a bearing on privilege, all that Justice Stone has said here is as true of interpolations as it is of the contents of manuscripts broadcast. It is as true of interpolations as it is of the contents of submitted manuscripts that "The sounds broadcasted are not transmitted from the microphone to the ears of listeners" In neither case does the sound of the words as uttered into the microphone "pass as sound waves to the receiving mechanisms". In both cases such sounds "serve only to enable the broadcaster, by the use of appropriate apparatus, to modulate the radio emanations which he generates". In both cases "These emanations as modulated are projected through space to the receiving sets".

When the taxation cases and the defamation cases are viewed side by side it is at once plain that the radio stations according to their interests in the particular case have urged upon the courts two diametrically opposite and utterly inconsistent interpretations of the same physical

facts of broadcasting. Manifestly these contradictory interpretations of the facts cannot both be right. Either the radio station actually performs the operations of broadcasting or it does not. It cannot be true that the radio station merely turns over its apparatus to the speaker, as contended in the defamation cases, if it is true, as contended in the taxation cases, that it is the station which by its operations is "engaged in the business of transmitting advertising programs from its stations . . . to those persons in other states who 'listen in' through the use of receiving sets". In addition, the assertion in the defamation cases that the radio station merely turns its machinery over to the speaker in effect implies that the speaker at the microphone is the real and true broadcaster who operates the broadcasting apparatus. As to this point, it is not explained how such conduct can be lawful in the face of the provision in the Radio Act which forbids any save licensees to operate broadcasting apparatus. As a matter of fact, it is not true that the radio station turns its machinery over to the speaker. The operation and control of the broadcasting apparatus is throughout in the hands of the radio station's own employees.

X. OTHER CONSPICUOUS CONTRADICTIONS IN ARGUMENTS ADDUCED IN BEHALF OF RADIO STATIONS

A comparable contradiction in the arguments made in behalf of radio stations appears when defamation cases are compared with rate cases. In the defamation cases it has been unsuccessfully asserted as the foundation for the claim of absolute privilege for the radio station in political broadcasts that the broadcasting station was a common carrier,¹²¹ and that under the Radio Act a duty was imposed to make such broadcasts, a claim which, incidentally, is not maintainable. At the same time, where the question was whether radio broadcasting rates were subject to regulation by the Interstate Commerce Commission, it was stoutly and successfully maintained by the radio interests that radio broadcasting stations were not and could not be regarded as common carriers under the law.¹²²

Another contradiction that has appeared in arguments advanced in behalf of radio stations is so conspicuous as to deserve separate mention. It has been insisted, on the one hand, that holding the radio station subject to liability on the same general basis as newspapers involves extremely great dangers to the radio station against which it cannot protect itself even by the exercise of the utmost care.¹²³ On the other

121. See *Sorensen v. Wood*, 123 Neb. 348, 358, 243 N. W. 82, 86 (1932).

122. *Sta-Shine Products, Inc. v. Carman*, 188 I. C. C. 271 (1932). In this aspect the Commission upheld the contention of the radio interests that a radio broadcasting station was not under a common carrier duty to render broadcasting service for anyone.

123. See, for instance, the works criticized in note 24 *supra*.

hand, in answer to the suggestion that the victim of the defamatory broadcast will be exposed to these same extreme dangers if liability is relaxed, it is asserted that such danger is very slight indeed, and that there is accordingly no social necessity for a stringent rule of liability.¹²⁴ If it be actually true that the problem is of no serious importance, since due care in the practical situations that arise generally affords ample protection, why do radio stations attempt so intensely to overturn the initial case law on the point? Verily, it makes all the difference in the world whose ox is gored.

124. See the last paragraph of note 100 *supra*.