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THE BASIS FOR LIABILITY FOR DEFAMATION BY RADIO

By Lawrence Vold*

The rapid and effective development of radio broadcasting from rudimentary beginnings to gigantic proportions that has taken place in the last decade has exposed innocent victims as never before to the ravages of "character assassination" by far-flung radio publication of defamatory utterances. The facts in-

*Professor of Law, University of Nebraska College of Law, Lincoln, Nebraska.

In explanation of any contentiousness unwittingly coloring the argument in the present paper, the writer deems it proper to submit the following personal statement. In the later stages of the litigation in Sorensen v. Wood, here discussed, after the arrangements for the contemplated test case on the second appeal had been completed by the parties, he was called in as attorney for the plaintiff to prepare and present to the higher courts the plaintiff's side of the argument on the applicable law. He accordingly prepared the plaintiff's brief on the second appeal to the supreme court of Nebraska and appeared before that court as the plaintiff's attorney when that appeal was called for argument.

The writer's first direct connection with this interesting litigation was in the character of amicus curiae on the first appeal. The present paper aims in the spirit of that character to set forth the various considerations involved.

Broadcasting was unknown until the fall of 1920. In 1927, at the time of the adoption of the Federal Radio Act, there were 733 broadcasting stations. Interference with reception of programs occasioned by far too many improperly located and improperly conducted stations was the immediate inducement to the resort to federal regulation under the Federal Radio Act. In 1928 the number of stations had through administration of the Federal Radio Act been reduced to 696, in 1930 to 618, and in 1932 to 607. (Data taken from (1929) 54 A. B. A. Rep. 439, 442, 443, 447; (1930) 55 Ibid 405; (1932) 57 Ibid 455.)

A recent summary by the American Bar Association's Standing Committee on Communications vividly indicates the magnitude of the present radio broadcasting industry as follows:

"Actual investments (571 stations and the major chain companies) total $48,000,000.00. During 1931 gross receipts amounted to $77,758,048.79; gross expenditures, to $77,995,403.68 which included $20,159,656.07 for talent and programs, $16,884,436.91 for regular employees, $4,725,168.32 for equipment, and $36,226,144.47 for miscellaneous expenditures.

"Profits without counting depreciation were reported for 333 stations aggregating $5,451,717.05 and varying from $13.94 to $376,279.00 for particular stations. Losses similarly computed were reported for 180 stations,
volved in such publication by radio are in the instance new. What is the proper application of the already established law to the novel facts involved in defamation by radio? Faced with lack of direct precedent in point as to the facts, and with various sharply conflicting analogies available as possible persuasive authority, a court in such cases necessarily must make some sort of choice among possible alternatives as to what basis for liability is in the instance properly to be regarded as applicable.\(^2\)

The case of *Sorensen v. Wood*,\(^8\) recently decided by the supreme court of Nebraska, seems to have been the first case to reach an appellate court on this question. This case held that the aggregating $2,200,743.76 and varying from $22.50 up to $178,535.72 in the case of a company operating two stations." (1932) 57 A. B. A. Rep. 455, 461.

As recorded by the census of 1930 there were 15,000,000 radio receiving sets with an estimated total of 50,000,000 radio listeners. See U. S. Daily, Oct. 17, 1932, at p. 1481.

For a wealth of general information and bibliographical material touching the radio industry, see Journal of Radio Law, volumes 1 and 2. See also current numbers of the Air Law Review.

"The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process." Cardozo, J., in *Clark v. United States*, (1933) 289 U. S. 1, 13, 53 Sup. Ct. 465, 77 L. Ed. 993, 999.

"It is a familiar maxim of the common law that when the reason of a rule ceases the rule also ceases." Hughes, C. J., in *United States v. Chambers*, (1934) 291 U. S. 217, 54 Sup. Ct. 434, 436, 78 L. Ed. 763.


Since the problem presented in cases of defamation by radio involves such a choice among possible alternatives for controlling application in this new instance, the discussion in the present paper is devoted to analysis of the facts and of the underlying conflicting considerations at stake in the choice of analogy to be adopted as controlling. Accordingly, familiar and leading representative authorities are cited for the familiarly recognized rules of law invoked in the course of this discussion, but no attempt is made at exhaustive citation of authorities for such familiarly recognized rules of law.

\(^8\)(1932) 123 Neb. 348, 243 N. W. 82, 82 A. L. R. 1098. An attempted second appeal in this case (no. 28749, unreported) was by the Nebraska supreme court dismissed on May 18, 1933, the court considering that this case had become moot by reason of asserted satisfaction of the plaintiff's judgment by defendant station pending appeal. An order denying a rehearing on that question was later entered. From this order the defendant station appealed to the Supreme Court of the United States, but its appeal was there dismissed for the reason that the judgment of the state court sought to be reviewed was based on a non-federal ground adequate to support it. See *K F A B Broadcasting Co. v. Sorensen*, (1933) 290 U. S. 599, 54 Sup. Ct. 209, 78 L. Ed. 527.
broadcasting station was subject to liability under the law of defamation for unprivileged defamatory utterances spoken into its microphone by a paying political speaker and transmitted to the radio public by its broadcasting operations. The case also held that the broadcasting station was not entitled to any privilege for defamatory utterances under the terms of the Federal Radio Act. In reaching its conclusion the court intimated that defamation by radio is properly to be dealt with as libel rather than as slander, at least where the defamatory utterances broadcast are read into the microphone from a prepared manuscript. In taking its position regarding the underlying basis for liability the court followed the analogy of the law of defamation as applied to newspapers, the direct business competitors of broadcasting stations in the dissemination of commercial advertising for profit.

It is the purpose of this paper to support the conclusion that radio stations are properly subjected to the same basis for liability for publication of defamatory utterances that is applied to newspapers. 4

I. Defamation, Not Negligent Conduct, Is the Underlying Basis for Liability

Under the law of defamation as ordinarily applied the publisher is held absolutely liable for the publication of unprivileged defamatory utterances no matter how careful he may have been. 5 Under the law of negligence, on the other hand, liability to injured parties is imposed upon the perpetrator of damage only in case of failure to use due care. 6

4 The discussion in the present paper proceeds on the assumption that where the broadcasting station’s own announcer for the occasion speaks the unprivileged defamatory words into the microphone, the publication of which is complained of, the basis for liability of the broadcasting station is the law of defamation. In this paper it will be indicated that the law of defamation is equally applicable where the unprivileged defamatory utterances of others spoken into the microphone are transmitted to the understanding of radio listeners by the voluntary active broadcasting operations of the radio station.


6 The instances are innumerable. A few leading cases are the following: Brown v. Kendall, (1850) 60 Mass. 292; The Nitro-Glycerine Case, (1872) 15 Wall. (U.S.) 524, 21 L. Ed. 206; Losee v. Buchanan, (1873) 51 N. Y. 476; Brown v. Collins, (1873) 53 N. H. 442.
The problem of choice between these two alternatives as the basis for liability in cases of defamation by radio involves two quite distinct phases. 1. Do the physical operations performed by the broadcaster in transmitting by radio the defamatory utterances spoken by outsiders given access to the microphone amount to publication by the broadcaster as well as by the speaker? Obviously, unless the broadcaster is a publisher, the traditional law of defamation is not, without more, applicable to him. 2. Would it be socially advantageous in the instance, as a matter of policy, to excuse the radio broadcasting publisher from the strict law of defamation applicable to other publishers, and instead to apply to him the law of negligence? More especially, should this be the conclusion when in the instance the utterances are spoken by an outsider given access to the broadcaster's microphone? 7

Stated in another way, these questions involve the problem of how wide or how narrow a range it is socially advantageous to include within the term "publication" when applying the already established law to the novel facts of radio broadcasting.

1. Broadcasting Operations Involve Both Speaker and Broadcaster.—The popularly familiar mechanical arrangements connected with radio broadcasting readily lend themselves to the misconception that, like ordinary telephonic transmission, the process of broadcasting is purely automatic. Persons who are misinformed as to the exact details often imagine that the highly sensitive broadcasting equipment, when charged with a current of electricity, automatically transmits to the far-flung radio audience the words of the speaker as uttered into the microphone. This erroneous popular impression regarding the physical operations of broadcasting has become the basis for an argument or assumption that the radio broadcaster, as distinguished from the speaker

7When inquiry regarding the basis for liability is followed out in this systematic manner, several problems regarding possible incidental application of the law are readily clarified, the intermingling of which in loose discussion of defamation by radio has occasioned much confusion. There is thus readily identified in the first place the original and vital underlying question of whether defamation or negligence is to be recognized as the applicable basis for liability. That inquiry is dealt with herein at footnotes 8-82, with accompanying text. Quite distinct, in the second place, is the question of to what extent one's negligent conduct in connection with publication by others, as in the case of the carrier or news vendor, may render the negligent party also liable for another's publication. That inquiry is dealt with herein, at footnotes 135-153, with accompanying text. Equally distinct, in the third place, is the bearing of negligent conduct as constituting abuse of privilege to publish defamation on an otherwise privileged occasion. That inquiry is not dealt with herein. For some reference thereto in this connection see Vold, Defamation by Radio, (1932) 2 J. Radio L. 673, 705.
at the microphone, does not publish at all but merely supplies the broadcasting facilities to the speaker.\textsuperscript{8} It is either contended or assumed accordingly that as the radio broadcaster never himself publishes, the broadcaster should not be subject to the law of defamation at all, but should be subjected to liability merely on the basis of negligence in permitting the speaker to publish by using his facilities.\textsuperscript{9}

The actual fact is that transmission by radio of intelligible and continuously audible speech is not a purely automatic reaction of the electrically charged apparatus to the words of the speaker as uttered into the microphone. Effective broadcasting requires not only utterance by the speaker but much conscious assistance from the broadcaster, especially in reshaping of vocal sounds by the operations of the broadcaster in such appropriate adjustments of the modulation while the speech proceeds as to render the sounds transmitted intelligibly and continuously audible to the far-flung radio audience. The broadcaster thus actively participates with the speaker in bringing about the transmission by radio that occurs.

The details of active participation by the broadcaster in the

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\textsuperscript{8}This position was deliberately asserted by counsel for the broadcasting station in the case of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82. Typical excerpts from the argument to the jury and from the brief on that appeal are the following: "We didn't do any talking, we didn't do any writing. What we did was to furnish the facilities by which these words were broadcast." (Bill of Exceptions, p. 48.) "This case did not show any right on the part of Sorensen to hold the defendant broadcasting station for the act of Wood." "In other words, plaintiff says defendant [station] was at fault in not acting to prevent Wood from defaming Sorensen." "He sues Wood for slander, and in the same action sues the station for negligence in failing to keep Wood from slandering plaintiff." (Defendant station's brief on the first appeal, pp. 17, 19 and 33.)

\textsuperscript{9}This erroneous assumption regarding the facts of publication by radio transmission seems to underlie the comments found in the following notes on the case of Sorensen v. Wood: (1932) 46 Harv. L. Rev. 133, 135, 136, 137, 138; (1932) 18 Iowa L. Rev. 98; (1932) 18 Corn. L. Q. 124; (1932) 66 U. S. L. Rev. 637, 642; (1933) 12 Oreg. L. Rev. 149, 153.

The same erroneous fact assumption seems to underlie the comment on Miles v. Wasmer, Inc., (1933) 172 Wash. 466, 20 P. (2d) 847 appearing in (1934) 7 So. Cal. L. Rev. 346, 348.

The same erroneous fact assumption seems to underlie the elaborate criticism of the case of Sorensen v. Wood by Mr. John W. Guider, Chairman of the American Bar Association's Standing Committee on Communications, contained in his article on Liability for Defamation in Political Broadcasts, (1932) 2 J. Radio L. 708. In that article the author urges (p. 712) "a rule which will release a broadcasting station from liability for defamatory remarks made by others," etc., where due care has been used by the station. Similar looseness of statement regarding the case of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, appears in the report of the Standing Committee on Communications, (1932) 57 A. B. A. Rep. 446. The same is true of Caldwell, Freedom of Speech and Radio Broadcasting, (1935) 177 Annals of the American Academy of Political and Social Science, 1, at p. 6.
transmission of utterances by radio may be found partly in acts of the announcer in adjusting the speaker's position with reference to the microphone and otherwise assisting him regarding the proper manner of delivery in order to render the broadcast of the best technical quality.\textsuperscript{10} The announcer may also listen in on a receiver in the control room attached to the studio in order to test the quality and tone of the broadcast and to make such adjustments with reference thereto as are within his competence.\textsuperscript{11} Where the studio is located downtown and connected by wire with the main station, additional operators at the main station where the broadcast is "put on the air" may also take part, checking the quality of the broadcast and making such adjustments as at the main station appear to be needed from moment to moment in order to assure satisfactory and wide range broadcasting.\textsuperscript{12} It is also to be noticed that switches are provided at the microphone, at the apparatus in the control room, and at the apparatus in the main station, which at all times enable the station operators to shut off the broadcast if for any reason it is deemed obnoxious.\textsuperscript{13}

Much more significant, however, than the assistance rendered to the speaker at the microphone by the announcer or other operators is the current participation in the broadcast by the radio station's monitor in the control room while the speech proceeds in the studio. While this monitor may as one of his incidental duties turn a switch and thereby shut off the broadcast\textsuperscript{14} if found to be obnoxious, the monitor's principal participation while the speech proceeds takes a much more active and significant form. By his continuing appropriate readjustments\textsuperscript{15} of the modulation\textsuperscript{16} with

\textsuperscript{10}Testimony of defendant radio station's announcer, preserved in bill of exceptions in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82.

\textsuperscript{11}Bill of exceptions, at pp. 64-65.

\textsuperscript{12}Bill of exceptions, at p. 70.

\textsuperscript{13}Bill of exceptions, at p. 70.

\textsuperscript{14}Bill of exceptions, at p. 70.

\textsuperscript{15}"The gentleman in the control booth controls the volume of the broadcast." Testimony of radio station's announcer, preserved in bill of exceptions, at p. 62.

"The process of broadcasting as actually carried on in the instance was not purely mechanical. It included the services of the broadcasting company's announcer.... It included, in addition, the customary operations of the broadcasting company's monitor in adjusting and controlling the extent or volume of modulation in the broadcast through the interval of time while the speech proceeded." Stipulation filed in the case of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, on the second appeal. See no. 28749, unreported.

"There are today in the United States over 690 broadcasting stations. ... In general, they all require the same essential pieces of apparatus which may be classified as below: (a) The studio, microphone and speech amplifier; (b) The radio-frequency system including oscillators and modulators; (c)
reference to the varying character of the speaker's voice as the speech proceeds the monitor so corrects and reshapes the vocal sounds uttered by the speaker into the microphone that the resulting transmission can be picked up near and far by receiving sets in the form of intelligible and continuously audible speech.\textsuperscript{17}


"This [the volume control] is an extremely important feature in broadcasting as it is in general necessary for the operator to decrease the range of intensity impressed on the microphone. The pianissimo and fortissimo passages of a selection are equalized to a certain extent by the radio operator." Morecroft, Principles of Radio Communication, 3rd ed., p. 847.

"Commercial transmitting equipment is ordinarily mounted on a framework of structural-steel members fronted by a vertical metal panel containing the controls and meters necessary for adjusting and monitoring the transmitter." Terman, Radio Engineering 421.

"At the studio control room, the volume indicator measures the level in T\textsubscript{U} [telephonic transmission units] delivered to the line; and at the station, it measures the level delivered to the transmitter. These units give visual indication of the signal level and allow the operators to adjust the 'gains' of the amplifiers to the desired amount." Little, Speech Input Equipment, as reported in (1929) 17 Proceedings of the Institute of Radio Engineers, 1986, 1995.

\textsuperscript{16}"Modulation—the method of impressing a sound wave upon a radio frequency carrier wave at the transmitting station." Moyer & Wostrel, The Radio Handbook 38.

"In radio communication 'modulation' is the process of producing variations of a required form in the amplitude of the wave which is radiated." Moyer & Wostrel, The Radio Handbook 451.

"The current before modulation is called the carrier current because it is the medium which transmits the variations of the sound wave in the form of current. The current after modulation is considered to consist of two parts: (1) the carrier current and (2) the modulating current. The ability of the carrier to transmit the modulation depends on the amplitude of the modulating current compared to that of the carrier current." Moyer & Wostrel, The Radio Handbook 481.

\textsuperscript{17}"The two following paragraphs set forth with substantial accuracy a brief description of the customary operations of such monitor and the effects achieved thereby in the process of broadcasting of utterances spoken into the broadcasting company's microphone:

"In order adequately to appreciate the station monitor's active participation in the making of a radio broadcast, it is needful to call to mind a few more technical facts involved in the radio broadcasting process. It is well known that in radio broadcasting what is called a radio carrier wave of a certain frequency or wave length often loosely called an ether wave, is developed by the action of a generator at the station. On the edges of this radio carrier wave from the station's generator there is impressed in the broadcasting process certain wave variations corresponding to the sound waves transmitted from the microphone. Impressing the sound wave variations on the edges of this radio carrier wave is called modulation. The depth to which these wave variations are impressed upon the edges of the radio carrier wave is called the extent or volume of modulation. The volume of modulation that automatically takes place when the sound wave is impressed upon the radio carrier wave under given fixed conditions of the radio apparatus varies greatly with the variations in position, voice and manner of utterance which may be employed from moment to moment by the speaker at the microphone. The constantly varying position of the modulation indicator needle attached to the monitoring apparatus is readily apparent to any
Through the process of modulation readjustment currently performed by the radio station's monitor as the speech proceeds appropriate portions of the sounds uttered into the microphone are reduced or eliminated while others may be accentuated. This observer in the control booth as the broadcast proceeds. It is also clear that the distance range covered by the broadcast from moment to moment largely depends upon the volume of modulation.

"To secure satisfactory and uniform wide range broadcasting, therefore, apparatus to regulate the volume of modulation has been provided, and such apparatus includes as one of its parts a so-called monitoring device. The monitor, an operator in the control room quite distinct from the announcer, watches the broadcast as reproduced there and carefully observes the continual variations in position of the modulation indicator needle in order to make from moment to moment such adjustment of the modulation as is required by the varying character of the speaker's voice at the microphone. Under present conditions in the art of broadcasting the regular practice is for a monitor in the control booth to attend carefully to the quality of the broadcast as it is reproduced there, even if need be to the extent of keeping his hands continuously on the regulating controls of the monitoring device, and to make from moment to moment any needed adjustments of the volume of modulation to secure so far as possible the technically most effective and uniformly wide range broadcasting." Stipulation filed in the case of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, on the second appeal. See no. 28749, unreported.

"While this [volume control] might be thought to distort the true character of a rendition the actual result in the receiving set is more pleasing than if the practice were not resorted to. The power range of an orchestral selection may frequently be 100,000 to 1 and the ear of the listener in the concert hall changes its sensitiveness automatically as these intensities occur. In the radio amplifier such power ranges would result in unsatisfactory operation, tending to 'block' some of the tubes or give so little intensity to the low passages that the radio listener gets nothing. It has been found that a power range of 1,000 to 1 is plenty to give a radio reproduction reasonable similarity to the actual rendition and this is about the range used in practice.

"Furthermore, there is always a certain 'background' of noise in a radio channel due to atmospherics, etc., and the low passages must be kept louder than this background of noise. An operator constantly keeps watch on the amplifier output and by manipulating the controls . . . he keeps the amplification within the proper range." Morecroft, Principles of Radio Communication, 3rd ed., pp. 848-849.

"In the transmission of speech and music of high quality, sideband components extending at least 5,000 cycles on each side of the carrier frequency must be employed. Such a band provides for the transmission of audio-frequency sounds having pitches up to 5,000 cycles, and while the human voice and music contain frequencies up to approximately 15,000 cycles these higher pitch sounds are not absolutely essential for reasonably satisfactory results. Understandable speech requires the reproduction of all frequencies from about 250 to 2,700 cycles, or side-band frequencies ranging from 250 to 2,700 cycles above and below the carrier frequency." Terman, Radio Engineering 359-360.

"In radio-telephone transmitters the character of the signals being sent is checked by rectifying a small part of the energy delivered to the radiating system. . . . All modern broadcast transmitters include a monitoring rectifier as part of the transmitter equipment. . . . In operating radio-telephone transmitters it is necessary to maintain continuous observation of the power level of the speech input to the audio system. The volume should be adjusted so that the audio power is sufficient to modulate the transmitter completely during the loud passages." Terman, Radio Engineering 450-451.
selection and reshaping of the sounds through the processes of modulation readjustment as the speech proceeds is carried out in order that intelligibly audible and continuous reception may be interrupted neither by false and blurring sounds set up in the transmitting process nor by broken gaps in the effective transmission. Without these continuing, deliberate, conscious and voluntarily controlled operations of modulation readjustment as the speech proceeds, the speaker's words, through the mere fixed conditions of the radio apparatus, would be so mutilated in transmission as to be for practical purposes unintelligible. Only in the form of disjointed broken fragments would the speaker's words be recognizably audible even to nearby radio listeners. The far-flung audience of radio listeners at more distant points would not hear the utterances at all. Thus in present conditions of radio

19"Fig. 33 shows three kinds of distortion occurring in modulation. Case A has greater increases in radio frequency amplitude than decreases, and Case B has the opposite condition; both of these conditions will cause the receiver to pick up audio tones which were not in the original modulation. If the original modulation frequency was 100 cycles the listener will hear not only this frequency, but also a large component of 200-cycle frequency, as well as a series of others.

Case C represents over-modulation; the signal received from such a station will be unusually loud, but of disagreeable quality. Many notes and tones will be heard by the listener which were not in the sound in the studio of the transmitting station." Morecroft, Principles of Radio Communication, 3rd ed., p. 811.

20"The function of the control operators, whether in the field or at the studio, is partly co-ordinative, as in connection with interstudio contact and switching, and partly regulative, in that it is found necessary to compress the natural volume variations of speech and music which may be as high in some cases as 60 T U [Telephonic transmission units] into a compass of about 40 T U, if overloading is to be avoided on the one hand and noise interference on the other. . . . The rule is for the operator to handle the gain control as little as possible, but to regulate it when necessary to avoid overloading or the loss of low passages. . . ." Dreher, Broadcast Control Operations, as reported in (1928) 16 Proceedings of the Institute of Radio Engineers 490, 508. See also footnote 18 above.

21"It is evidently important for a station operator to know to what extent his carrier wave is being modulated; some performers talk loudly, close to the microphone, and others talk softly farther away. The microphone response might well be one hundred times as great for the first as for the second, so that one would cause much overmodulation or the other would be much undermodulated." Morecroft, Principles of Radio Communication, 3rd ed., p. 810.

"The degree of modulation of the carrier in a radio telephone transmitter is a somewhat intangible factor which necessarily varies rapidly through wide limits during the rendition of a program." Nelson, Broadcasting Transmitters and Related Transmission Phenomena, as reported in (1929) 17 Proceedings of the Institute of Radio Engineers 1949, 1951.

22"By allowing for complete modulation an effective means is introduced for increasing the range." Moyer & Wostrel, The Radio Handbook 501.

"Increased modulation is particularly advantageous under present day
broadcasting it is only by the combination of the voluntarily controlled, deliberate and continuing efforts of both speaker and broadcaster, each doing his part in conjunction with the other as the speech proceeds, that the utterances delivered into the microphone can be effectively transmitted.\textsuperscript{23}

The continuous joint participation of both the speaker and the radio station’s monitor in the acts of publication by radio broadcasting has no direct parallel in other forms of publication now familiar. It is therefore impossible to find in other forms of publication any complete and perfect analogy as to the facts involved in the physical operations of broadcasting.\textsuperscript{24} To state that the broadcaster merely furnishes to the speaker facilities in the form of amplifying machinery for his use, comparable to supplying a printing press\textsuperscript{25} or a megaphone\textsuperscript{26} for another's use conveys a broadcasting conditions, since it affords a means of almost doubling the range of a given station without a corresponding increase in the beat note interference.” Moyer & Wostrel, The Radio Handbook 506.

\textsuperscript{23}"The oscilloscope provided with this transmitter is an almost indispensable instrument in obtaining the full benefit of high modulation. . . . By means of this device the peak and average modulation can be accurately gauged at all times and a high average level maintained from minute to minute with no danger of peak distortion.” Duncan & Drew, Radio Telegraphy & Telephony 897-898.

In the usual radio transmission there are two parties, the speaker and the broadcaster. If the matter transmitted be defamatory, two must cooperate to create the harm. No other situation parallels it. The utterance of the speaker does not leave the studio until transmitted by the operations of the station owner. They must act in concert to complete the publication.” Davis, The Law of Radio Communication 162.

"The conclusion seems inescapable that the owner of the station is liable. It is he who broadcasted the defamation. . . . Here the instrumentality is operated by the owner for another who has hired him to operate it.” Otis, District Judge, in Coffey v. Midland Broadcasting Co., (1934) 8 F. Supp. 889, 890.

\textsuperscript{24}"No other situation parallels it.” Davis, The Law of Radio Communication 162.

\textsuperscript{25}"Suppose you own a printing press and somebody rents it from you and that man takes the printing press and prints a lot of defamatory and scandalous stuff, do you think that he [you] should be held when he [you] didn’t know what he was going to print, when he [you] had no word of warning of this thing?” From defendant station’s argument to the jury in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, bill of exceptions 250.

\textsuperscript{26}"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? If the owner of an auditorium rents
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grossly erroneous impression of the facts involved. The broadcast-
caster supplies to the speaker not only the mechanical facilities
but also the necessary services in operating the broadcasting appa-
ratus to reshape the spoken sounds to such form in transmission
as to render them intelligibly and continuously audible to the far-
flung public of radio listeners. In terms of the printing press
analogy, it is rather as if the broadcaster not only supplies the
press but also furnishes the service necessary to its operation by
setting in type, printing and mailing out the defamatory utterances
in question. That the broadcaster's operations in publication by
radio bring about instantaneous transmission does not make that
transmission of the utterance any the less a publication thereof
than in other cases where the transmission may occupy a longer
interval of time.

The fact of the joint participation of the speaker and the broad-
casting station's monitor, but not of course the legal basis for
liability, is somewhat loosely comparable to the joint activity of
two parties in driving an automobile if one handled the steering
wheel while the other manipulated the clutch and the brakes and
operated the accelerator controlling the variable supply of gasoline
currently necessary for maintaining a reasonably uniform speed
over an uneven roadbed. Again, with reference to the voluntary
operations of the broadcasting station's monitor, the joint partici-
pation of speaker and broadcaster may be somewhat loosely com-
pared to the acts of pitcher and batter in a baseball game. The
pitcher pitches the ball; the batter bats the pitched ball, by his
operations propelling it to the place where it hits the ground or is
intercepted by others. The batter's stroke, far from being a purely
automatic operation, is delivered with specific reference to the
character of the pitched ball in the instance encountered.27

2. Operations of the Broadcaster Constitute Publication of
the Speaker's Utterances.—It is well settled that a voluntary par-
it for purpose of holding a political meeting, is he liable for defamatory
matter spoken at the meeting? From appellant station's brief, p. 14 on
the second appeal in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W.
82 to the supreme court of Nebraska, No. 28749 (May, 1933) (unreported).
27It cannot safely be assumed that in the first instance either juries or
courts will be minutely familiar with the detailed scientific processes in-
volved in the operations of radio broadcasting. It would therefore seem
tactically very important for injured plaintiffs in cases of defamation by
radio to prove by convincing evidence in the record the vital facts regarding
both the presence and the significance of the active and continuous voluntary
operations of the radio station's monitor from moment to moment in reshap-
ing the sounds for efficiency in radio transmission as the speech proceeded.
ticipator with another in the acts of publication of defamatory utterances is as a general rule under the law of defamation liable as publisher.\textsuperscript{28}

The position that voluntary transmission of defamatory utterances to the understanding of the recipient (such recipient being another than the party defamed) is enough to constitute publication is also readily demonstrated by a few very simple observations on the available authorities.

In the first place, the authorities are clear that without voluntary transmission by the defendant to the understanding of the recipient there is no publication by the defendant. Thus the mere projection of sensory impressions on the recipient's eye or ear drum without communicating the defamatory utterances to the recipient's understanding does not constitute publication.\textsuperscript{29} Similarly, where defamatory utterances have in the instance been communicated to recipients by the acts of others but their transmission was not made by the defendant, the authorities hold that the defendant is not the publisher of such utterances,\textsuperscript{30} even though he may have been their author.

In the second place, the authorities are equally clear that where


For a case where the sound of voices was heard but the words were not distinguished or understood, see Giveen v. Matthews, (1929) 118 Neb. 125, 223 N. W. 649.

\textsuperscript{30}Weir v. Hess, (1884) 6 Ala. 887 (publication by thief of a defamatory writing does not constitute publication by its author); Olson v. Molland, (1930) 181 Minn. 364, 232 N. W. 625 (addressee of defamatory letter placed it in desk drawer after reading it. Stranger later opened the drawer and read it. Held writer did not publish to the stranger); Bigley v. National Fidelity and Casualty Co., (1913) 94 Neb. 813, 144 N. W. 810 (writer of defamatory letter not accountable for subsequent publication thereof to others by addressee where not induced by him); Riley v. Askin & Marine Co., (1926) 134 S. C. 198, 132 S. E. 584, 46 A. L. R. 558 (writer of defamatory letter addressed to young woman of 17 or 18 years of age, having no reason to believe it would be opened by others, not accountable as publisher when it was opened and read by the girl's parents).

For discussion of the problem of negligent participation in publication made by others, see footnotes 135-153 below, with accompanying text.
DEFAMATION BY RADIO

a defendant voluntarily does transmit defamatory utterances to the understanding of recipients there is publication by the transmitter. Authorship by the transmitter is not required to constitute publication. Voluntary transmission alone by the defendant of another's speech or writing is enough. So, in the absence of privilege, the repeater is liable for his own repetition to others of defamatory statements previously published to him by the original author, even though he evowedly merely repeats the statements of another.

In the third place, what particular acts are used as the means for transmission of defamatory utterances is immaterial. Cases of spoken or written language are too familiar to need elaborate citation in this connection. Transmission by means of intended or expected combination of the defendant's acts with the acts of others in enabling the utterances to reach the minds of recipients is matter of constant occurrence. In addition to spoken and written language, various items of conduct, conveying the defamatory impressions to the recipient's understanding, have also from time to time been held to render the defendant resorting to them liable as publisher.

In the fourth place, understanding by the voluntary transmitter of the meaning reasonably understood by recipients is under the available authorities not necessary in order to establish the transmitter's liability as publisher in cases of defamation. Thus, it is abundantly established that utterances are transmitted at the peril of the voluntary transmitter with respect to the defamatory meaning reasonably understood therefrom by recipients. It is

31Forrester v. Tyrrell, (1893) 9 T. L. R. 257, 57 J. P. 532 (reading aloud to third parties another's defamatory letter); Hird v. Wood, (1894) 38 Sol. J. 234 (pointing at a defamatory placard, thereby attracting attention of passersby to its contents is publication).
equally well established that utterances are transmitted at the peril of the voluntary transmitter with respect to the person who is reasonably understood by recipients to be referred to therein. As the actual decisions on the law of defamation now stand, therefore, questions of due care in connection with acts of publication are immaterial on the question of liability under the law of defamation.

For authorities, see footnotes 34 and 35 above. The problem on the merits is carefully analyzed, with a wealth of supporting authority in Smith, Jones v. Hulton, (1912) 60 U. of Pa. L. Rev. 365, 461. See also Harper, Torts, sec. 237.

For the sake of completeness it seems desirable here to mention two special arguments that sometimes have been urged to avoid the conclusion that with respect to the defamatory meaning reasonably understood by recipients the publication is at the publisher's own risk.

The first of these arguments is built upon the literal meaning of the word "malice." Briefly stated, this argument asserts that malice is the gist of the action, and that to publish maliciously the publisher must have knowledge of the defamatory meaning. Obviously this argument misuses the term "malice." As a requisite for the existence of a cause of action for defamation the term "malice" in its literal sense has long since become immaterial, a result often expressed in the fictitious form that its presence is conclusively presumed whenever there is publication of defamatory utterances without legal justification. The materiality of "malice" in its literal sense is now limited to cases of exemplary damages and to cases of abuse of privilege. See Bromage v. Prosser, (1825) 4 B. & C. 247, 3 L. J. O. S. K. B. 203; Coleman v. MacLennan, (1908) 78 Kans. 711, 98 Pac. 281, 20 L. R. A. (N.S.) 361. This feature is explained in detail on historical grounds in Smith, Jones v. Hulton, (1912) 60 U. of Pa. L. Rev. 365, 370-373. See also Veeder, The History and Theory of the Law of Defamation, (1904) 4 Colum. L. Rev. 33, 35-36; & Holdsworth, History of English Law 371-375.

The second argument occasionally advanced to avoid the conclusion that the reasonably understood meaning of defamatory utterances is at the publisher's risk is an argument of an entirely different nature. Certain speculative contentions have in some quarters been advanced in recent years which in this regard seek an interpretation of the legal materials limiting the transmitter's liability to cases involving guilty knowledge or negligent conduct. Such speculation would, in effect, re-interpret the legal materials in the field of defamation in order to bring the law of defamation into accord with the law of negligence. See case notes in (1910) 22 Jurid. Rev. 254, 259; (1916) 29 Harv. L. Rev. 533; (1925) 38 Harv. L. Rev. 1100; (1929 17 Calif. L. Rev. 684. These attempts at reinterpretation of the legal materials make much of the discredited cases of Smith v. Ashley, (1846) 52 Mass. 367 and Hanson v. Globe Newspaper Co., (1893) 159 Mass. 293, 20 L. R. A. 856 and seek to explain away the well established course of adjudication to the contrary found in the type of cases cited in footnotes 34 and
Taking the physical facts of radio broadcasting operations just as they are, and taking the already established law of defamation just as it is, therefore, the conclusion is very clear that the radio broadcaster as well as the speaker at the microphone is a publisher of the utterances broadcast. The broadcaster is not an author, but authorship is not necessary. By the current operations of modulation readjustment as the speech proceeds the broadcaster so selects and reshapes the sounds uttered into the microphone as to render the sounds transmitted intelligibly and continuously audible to the far-flung radio audience. By his operations the radio broadcaster is thus an active transmitter of the speaker's utterances to the understanding of radio listeners.\footnote{\textsuperscript{37}}

That radio transmission is accomplished through novel means not formerly familiar should not affect the question of the transmitter's responsibility as publisher. What particular means are resorted to for transmission is immaterial on the question of the publisher's liability for defamation.\footnote{\textsuperscript{36}} Radio broadcasting as the means of transmission is in fact deliberately sought and the advertising rates therefor paid as a commercial matter because of its superior effectiveness for various occasions in conveying to the understanding of radio listeners the statements thus transmitted.\footnote{\textsuperscript{39}} For the reaping of income from these rates commercial broadcasting stations are operated.\footnote{\textsuperscript{40}} The fact that the commercial broad-

\footnote{\textsuperscript{35}} above with the assertion that in many of such cases the result might have been rested on the ground of some element of negligence asserted to have been present in the facts involved. It may be added as a remark on the merits that such speculation seems wholly fallacious. Judged by the expressions used by its authors in its promulgation, such speculation is based on the unexamined assumption that justice requires that there should be no tort liability in the absence of intentional wrongdoing or negligent conduct. Such speculation so based can be no more convincing than its unexamined underlying assumption upon which it is erected. That such assumption itself is utterly erroneous is set forth in considerable detail in another portion of the present paper. See footnotes 43-57 below, with accompanying text.

\footnote{\textsuperscript{37}} See footnotes 15 to 23 above, with accompanying text.

\footnote{\textsuperscript{38}} See footnote 33 above, with accompanying text.

\footnote{\textsuperscript{39}} See footnote 1 above for data regarding the rapid growth of the broadcasting industry, constituting the most cogent practical indication of its greatly superior effectiveness within its own business range as compared with its commercial competitors.

\footnote{\textsuperscript{40}} "The only manner in which this station can continue to furnish entertainment to the public without cost to the listener is by selling a part of its time on the air to people desiring to advertise themselves or their goods." (From defendant station's exhibit 6, Bill of Exceptions, at p. 97, in record of Sorensen v. Wood, (1932) 123 Neb. 348, 143 N. W. 82.

"The question affects every radio owner in the United States as well as radio broadcasters, because the revenue derived from political broadcasts is one of the means which enables broadcasters to continue furnishing radio
caster has adopted the novel but most effective means for accomplishing the transmission service which he renders is by itself no reason for relieving that commercial transmitter from the ordinary liability for defamation that would be applicable as a matter of course had the older and more familiar but less effective means for transmission been in the instance employed.

That the broadcaster in the instance may pay no particular attention to the meaning of the utterances involved but intentionally transmits to the listening radio public whatever the paying speaker may happen to utter into the microphone equally can afford no basis for relieving the transmitter's responsibility as publisher. Good faith, due care, or honest mistake here afford no excuse. Under the law of defamation publication of utterances reasonably conveying to recipients a defamatory meaning is at the risk of the publisher, not at the risk of the victim. 41

In the absence of some independent controlling reason for applying a more lenient rule to the broadcaster, therefore, both the speaker and the broadcaster as active participants in the publication of defamatory utterances are under the law of defamation equally liable as publishers. 42

3. The Assertion that Negligence is the General Rule of Tort Liability—Requirements of Justice.—The most adroit as well as the most frequently encountered argument for the desired change

41 See footnotes 34 and 35 above, with accompanying text.

42 The foregoing discussion has been designed to demonstrate that in the present state of the art of broadcasting the broadcaster's voluntary operations of radio transmission constitute the broadcaster an active publisher of the utterances delivered by the speaker into the microphone.

It should not be supposed, however, that were radio transmission of the speaker's utterances a purely automatic process the broadcaster could in that case avoid strict accountability therefor. It is conceivable that invention of improvements in radio apparatus may some day provide automatic corrective readjustments of the modulation as the speech proceeds, thereby dispensing with the active services of the radio station's monitor in that connection. Under such facts, the direct application of the law of defamation would not be so clear. Under such facts, however, the constantly increasing array of analogies from the field of strict liability, indicated in footnotes 44 to 52 below, with accompanying text, would be available as persuasive authority for application to the broadcasting station. The courts would face the necessity of making some choice of alternatives among the available authorities for controlling application to the novel situation. Under such facts the same considerations of public policy indicated in footnotes 44 to 82 below, with accompanying text, would call for the application of the law of strict liability rather than of negligence, as the measure of the broadcaster's responsibility.
from defamation to negligence as the basis for the radio broadcaster's liability seems to be the mere unsupported assumption that the law of negligence is the general rule of tort liability, coupled with the equally unsupported conclusion rested thereon that accordingly justice requires the application of that rule to the business of radio broadcasting as it is applied to every other legitimate business.43

The assumptions, however, on which these adroit arguments are based are wholly fallacious. It manifestly is not the case, in the first place, that the law of negligence is the general rule of tort liability. The law of torts covers a vast field of injurious interference with the interests of others. In different portions of the vast field comprehended in the law of torts the bases of liability often differ from negligence. Negligence is a portion, but only a portion, of the law of torts. In large portions of the law of torts, such as assault, battery, imprisonment, trespass to realty and trespass to personalty, the actual interference is intentional. In these familiar matters it is too clear to need citation of authority that the actor acts at his peril with respect to the existence of legal justification for his conduct, even though proceeding under a supposed claim of right, reasonably relied upon. Likewise, the owner's liability for trespassing or dangerous animals does not depend on fault.44 A similar strict liability regardless of due care is imposed

43"To impose liability under such circumstances is to penalize in the absence of blameworthiness—not the usual principle in the law of torts." Davis, Law of Radio Communication 164.

"To impose a rule of absolute liability under such circumstances is somewhat shocking. It might make the station owner subject to the payment of damages for an injury which he could not prevent and which involves neither wrongdoing nor negligence on his part. It is an easy answer to say that he need not broadcast and if he does he must suffer all the consequences. But this is not the rule applied to the conduct of other business no more legitimate, in which under the law of tort liability depends upon fault. Justice seems to require the application of the due care doctrine." Davis, Law of Radio Communication 168.

"The problem, novel in its application to the duties and liabilities of the owners of a broadcasting station, is not fundamentally different from countless instances that may be found in the body of the law of torts . . . release a broadcasting station from liability . . . whenever it appears that the management of the station exercised due and reasonable care to avoid the utterance of defamation." Guidry, Liability for Defamation in Political Broadcasts, (1932) 2 J. Radio L. 708, 712-713.

44 A leading case on trespassing cattle is Noyes v. Colby, (1855) 30 N. H. 143. See also, for special problems of application, Tillett v. Ward, (1882) 10 Q. B. D. 17, 52 L. J. Q. B. 61 (driven animal trespassing at edge of highway), and Delaney v. Erickson, (1880) 10 Neb. 492, (1881) 11 Neb. 533 (herding cattle on another's land in open range territory).

Leading cases on dangerous animals are: May v. Burdett, (1846) 9
in nuisance cases, and in the expanding field of so-called extra-
hazardous undertakings. Of the same kind is the principal's
liability for the torts of his agents, and, in the field of non-
delegable duties, the employer's responsibility for the torts of
independent contractors. Again, statutory provisions abound requiring
conduct falling within their range to be taken at the risk of
the actor wholly regardless of questions of due care on his part.
So, too, in the familiar field of libel and slander itself, publication
of unprivileged defamatory utterances is made at the risk of the
publisher, who cannot throw the risk of injury upon his passive

Q. B. 101, 16 L. J. Q. B. 64 (monkey); Vrendenburg v. Behan, (1881) 33

45Ball v. Nye, (1868) 99 Mass. 582 (filth from the defendant's privy
percolating through the ground and polluting the plaintiff's well); Ferrea
v. Knipe, (1863) 28 Cal. 340 (backing up water in stream, thereby flooding
plaintiff's land); Kroecker v. Camden Coke Co., (1913) 82 N. J. Eq. 373,
88 Atl. 955 (smoke); Cumberland Grocery Co. v. Baugh, (1913) 151 Ky.
641, 152 S. W. 565 (stenches); McGill v. Pintsch Compressing Co., (1908)
140 Iowa 429, 118 N. W. 786, 20 L. R. A. (N.S.) 466 (noise).

46Fletcher v. Rylands, (1866) L. R. 1 Ex. 265; same case on appeal to
the House of Lords, (1868) L. R. 3 H. L. 330, 37 L. J. Ex. 161 (water
reservoir); Exner v. Sherman Power Const. Co., (C.C.A. 2nd Cir. 1931)
54 F. (2d) 510, 80 A. L. R. 686 (dynamite); Green v. General Petroleum
Corporation, (1928) 205 Cal. 328, 270 Pac. 952, 60 A. L. R. 475 (blowing
out of an oil well).

N. Y. S. 469, the operator of an airplane was held liable for damage to land
caused by his non-negligent crash. This position is also supported by the
American Law Institute, Restatement, Torts, sec. 159, comment g and sec.
165, illustration no. 8. To the same effect, see Thurston, Trespass to Air
Space, in Harvard Legal Essays, 501-536, and Bohlen, Aviation under the

47"In accordance with the rules stated in sections 219-267, a master or
other principal may be liable to another whose interests have been invaded
by the tortious conduct of a servant or other agent, although the principal
does not personally violate a duty to such other nor authorize the conduct
of the agent causing the invasion." Restatement, Agency, sec. 216.

"What we have [in the principal's liability for agent's misconduct] is a
discipline of liability without regard to fault imposed upon those who conduct
enterprises by employing others. At bottom the principle is the same as
that in the doctrine of Rylands v. Fletcher—that one who maintains some-
thing which if not kept in hand may endanger the general security, must
keep it in hand at the risk of responding for resulting injuries if he does
not." Pound, Interpretations of Legal History 110.

48The leading case is Bower v. Peate, (1876) 1 Q. B. D. 321, 45
L. J. Q. B. 446. For a convenient relatively recent case see Hussey v. Long

49Workmen's compensation acts are conspicuous illustrations with refer-
ence to the relations of master and servant. For a penetrating analysis and
discussion of the broader problem see Thayer, Public Wrong and Private
Actions, (1914) 27 Harv. L. Rev. 317.
innocent victim by acting with due care. In many large portions of the law of torts it is thus very clear that conduct is in the instance carried on at the risk of the actor and that accordingly liability for injury done is based on other grounds than negligence. The sweeping assumption that negligence is the general rule of tort liability is therefore wholly fallacious.

Equally fallacious is the assumption that justice requires the application of the rule of negligence to the radio broadcasting industry as it is applied to every other legitimate business. Since many other commercial undertakings, and notably publishing enterprises, are not free from liability to injured parties for the damage perpetrated through their operations even though they had exercised due care, conceptions of equality before the law do not demand that the radio industry be accorded milder treatment. Broadcasting companies as a class are outstanding financial and business giants as compared with many of their com-

50 See footnotes 34 and 35 above.
52 In Green v. General Petroleum Corporation, (1928) 205 Cal. 328, 270 Pac. 952, 60 A. L. R. 475, the court said, "That an injury may exist without liability under some circumstances is certain. But such rule is contrary to the general rule of liability," citing Sussex, etc., Co. v. Midwest Refining Co., (C.C.A. 8th Cir. 1923) 294 Fed. 597, 34 A. L. R. 249.
53 Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking.
54 "There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there is no fault." Pound, The End of Law, (1914) 27 Harv. L. Rev. 195, 233.
55 "In fact, legal fault upon which liability is based has little connection with personal morality or with justice to the individual; it is always tinctured with a supposed expediency in shifting the loss from one harmed to one who has caused the harm by acting below the standard imposed by the courts or legislators. But even this emasculated form of fault, while very important in the hierarchy of legal ideas, plays no part in many situations. . . Without considering the field of vicarious liability, therefore, it would appear that after nearly a century and a half devoted to this philosophic conception that there should be liability only if there is fault, the net result has been only to make a modified form of it an inlay in the common law idea that the price of action is liability for harm caused by it." Seavey, in Harvard Legal Essays 442, 445. See also footnote 154 below.
56 See for instance the passages cited in footnote 43 above.
57 See data set forth in footnote 1 above.
petitors for commercial or political advertising, small publishers
of books and newspapers to whom the law of defamation with its
strict liability for unprivileged defamatory utterances is applied
as a matter of course. Equality as a measure of justice requires
the application of the strict law of defamation to the strongest as
well as to the weakest of the commercial competitors in the busi-
ness of publication.\footnote{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. \ldots
There is no legal reason why one should be favored over another. \ldots"
86.}

Moreover, the innocent victim of the broadcaster's operations
would, by the suggested change, be left to bear the risk and suffer
the injury without redress though entirely passive throughout,
although nowise burdening or endangering the active publisher,
and although without even a possibility of gain from being thus
 victimized.\footnote{"From the viewpoint of the broadcasting station the situation teems
with dangerous possibilities." Guider, Liability for Defamation in Political
Broadcasts, (1932) 2 J. Radio L. 708, 712. The writer here quoted uses the danger to
the broadcasting station as an argument for releasing the station from liability in the absence of
negligence, without seeming to notice that the alternative urged merely leaves
the passive innocent victim of the broadcaster's operations exposed to the
identical dangers without effective redress.}

Yet it is the broadcaster's voluntary operations which
actively create the danger and cause the damage, in course of com-
mercial operations carried on for his own profit. The broadcaster
is by comparison a relatively well organized, wealthy, and semi-
monopolistic perpetrator. He can best guard against the injurious
deed. He can best spread the loss involved when it occurs. He
can in any case readily protect himself as a practical matter by
requiring indemnification in advance from advertisers or by
arranging for insurance to cover.\footnote{See footnote 74 below, with accompanying and following text.} The suggested change would
shift the loss from such a perpetrator to the relatively poor and
weak victim who is entirely passive and entirely innocent and who
as a practical matter can do none of these things.

Whether viewed, therefore, from the standpoint of equality
before the law, protection to innocent victims, cause of the dam-
age, profit from the operations involved, one-sidedness of the risks
concerned, ability to bear the loss, ability to prevent its perpetra-
tion, 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
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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 Assertion that Impossibility of Program Control Requires Application of the Negligence Rule.—Unsupported assertion has again been substituted for rational argument on the facts as they really are in the contention that the broadcaster's inability to control the utterances broadcast requires in its case the application of the negligence rule. It has been asserted that newspapers and other printers can in advance control the contents of the "copy" to be published, through scrutiny of the copy before it is set in type, and through proof reading, a control asserted to be impossible in the case of broadcasting where utterance of the speech into the microphone and its transmission to the listening public are simultaneous. It has accordingly been asserted that while the strict law of defamation may be properly applicable to printers and newspapers, it is harsh and unfair to apply that rule to radio stations, requiring them to do the impossible or to be penalized in the absence of blameworthiness.

As a matter of fact there are no such decisive differences between the physical facts involved in the operations of publication by newspaper and by radio. To be sure, the newspaper by previous scrutiny of the copy, proof reading, and so forth, can exercise such practical control as to avoid in most instances the publication of defamatory matter. It is clear, however, that such control cannot be complete. Those in charge cannot have the skill of experts, nor can they always know in what sense the published statements will be reasonably understood by readers. Further, under the rushing pressure for time frequently encountered in going to press.

56"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." Goss, C. J., in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, 86.

59This contention is set out at considerable length, but without a shadow of support from judicial authority, in Davis, Law of Radio Communication 164, 168-169.
it often happens that only the most casual editorial attention can
be given to various items of late copy that certain advertisers want
included. Even when using due care, therefore, the newspaper is
still subject to the risk, very real but usually not very great, of
answering for occasional defamatory matter.

In radio broadcasting the physical facts involved in publication,
while differing in detail, are strikingly similar with regard to
opportunity to know and control the contents actually published.
Here, as in the case of the newspaper, a large measure of control
is exercised, but, as in the case of the newspaper, such control
cannot be complete. It is well recognized practice to require the
previous submission of the manuscript to be broadcast. Frequently,
too, the advertising programs are uttered into the microphone by talent in the employ of the broadcasting station. Such
deliberate deviations from instructions as may occasionally occur
on the part of outside advertising talent given access to the micro-
phone are in practice easily dealt with by exclusion from future
programs. Practical program control must necessarily be main-
tained by the radio station in its ordinary advertising programs
in order to preserve the goodwill of its service with the public of
radio listeners. Both newspaper and radio broadcaster maintain
practical control of the contents published. Both are subject to

Leading libel cases involving newspapers readily afford illustrations:
Barnes v. Campbell, (1879) 59 N. H. 128; Morse v. Times-Republican
Printing Co., (1904) 124 Iowa 707; Morrison v. Ritchie & Co., (1902) 4 F.
(Scot.) 1016, 39 Sc. L. R. 432; E. Hulton & Co. v. Jones, [1910] A. C. 20,
79 L. J. K. B. 198; Cassidy v. Daily Mirror Newspapers, [1929] 2 K. B.
331, 98 L. J. K. B. 595.

Q. 968. "I will ask you if, when your deposition was taken, this ques-
tion, being numbered 58 if you want to refer to it, was not asked of you:
'Well, you have frequently asked for the manuscript and received the manu-
script before the speech was delivered haven't you?' and your answer was
'Yes'?”
A. “You asked me so many questions it is rather hard to remember
them definitely.”
Q. 969. "Refreshing your memory, I will ask you whether or not ques-
tion 58 was asked and answered as therein stated?"”
A. “Yes.”
(From testimony in Sorensen v. Wood, (1932) 123 Neb. 348, 143 N. W.
82, Bill of Exceptions, pp. 201, 202.)

The ordinary practice followed by the radio station as described in
Miles v. Louis Wasmer, Inc., (1933) 172 Wash. 466, 20 P. (2d) 487, readily
serves as illustration.

"I had always made an attempt to broadcast material over KFAB
that is the very best in the interest of the public and our listeners." (From
testimony in Sorensen v. Wood, Bill of Exceptions, p. 192.)

See also remarks on this feature in statement of Federal Radio Com-
misson, quoted in footnote 121 below.
the risk of occasional lapses which no care practically exercisable can completely guard against.

Furthermore, even should it be assumed as a fact that complete control involves greater difficulty in publication by radio than by newspaper, the law of negligence should not on that account be substituted for the law of defamation in order to relieve the commercial broadcaster from the usual liability. Radio broadcasting as now developed constitutes the most powerful and the most dangerous agency for defamation ever designed; for it is the most rapid, the most intimate, and the most far-reaching instrumentality of communication at present available. The danger to innocent victims from such publication of defamatory utterances has been many times multiplied. Greater difficulties of program control in radio broadcasting, if actually involved, far from going to relieve the broadcaster from the usual liability, rather require even more strict application of the law of defamation to accomplish the needful greater protection to passive innocent victims.

No judicial authority has been found to support the assertion that the strict law of defamation is too harsh a rule for application to the broadcaster.64 This same contention, often in almost identical language, has frequently been urged in favor of immunity for newspaper publishers, but has been unhesitatingly rejected by the courts.65

64Only three decisions on the question appear as yet to have been handed down by appellate courts in this country; in each case approving the application of the newspaper analogy to publication of the speaker’s defamatory utterances through transmission to the radio public by the operations of the broadcasting station. See Sorensen v. Wood, (1932) 123 Neb. 349, 243 N. W. 82, 82 A. L. R. 1098; Miles v. Wasmer, Inc., (1933) 172 Wash. 466, 20 P. (2d) 847; Coffee v. Midland Broadcasting Co., (1934) 8 F. Supp. 889.

In Meldrum v. Australian Broadcasting Co., Ltd., [1932] Victorian Law Reports, 425, the court intimates its opinion that the defamation involved is slander rather than libel, basing its conclusion on the palpable misconception of the analogy of oral speech. As to this question, see footnotes 85-88 below with accompanying text.


The only case in which the contention referred to in the text has been judicially recognized appears to be Layne v. Tribune Co., (1933) 108 Fla. 177, 146 So. 234, 86 A. L. R. 466. This case is expressly repudiated on substantially identical facts in Oklahoma Pub. Co. v. Givens, (C.C.A. 10th Cir. 1933) 67 F. (2d) 62. In 86 A. L. R. 475-477, too, are cited a number of cases directly contrary to the case of Layne v. Tribune Co. on substan-
That the burden of responsibility for defamation is not too heavy as a practical matter for newspapers to bear is conclusively demonstrated by the manifest fact that the newspaper business has grown and flourished to its present gigantic proportions under the law of defamation as it now stands. It may be added that the radio broadcasting industry has under the same law enjoyed an even more phenomenal growth in a much shorter time.\(^66\)

5. The Conflicting Interests at Stake—Individual Interests.

Would it be socially advantageous to apply to the broadcaster the more lenient rules of the law of negligence? Would more important interests be conserved by such a change in the applicable law than the interests necessarily sacrificed in the process?

Manifestly the private interest of the broadcaster is to be free from liability to the victims of his defamatory publishing operations.\(^67\) Equally clear is the individual interest of the victim in personal protection in the form of a recovery of compensation from the financially responsible publisher.\(^68\) Unless the inquiry

\(^{66}\)See footnote No. 1 above for statistical details.

\(^{67}\)That the broadcasting industry has been keenly conscious of this interest is readily apparent from the resolutions of the National Association of Broadcasters at its Annual Convention in October, 1931:

"Resolved, That in any proposed state legislation seeking to extend state libel or slander laws to cover utterances by radio ... such proposed state legislation should specifically relieve the broadcaster of any liability in respect to utterances regarding which he could not, with the exercise of reasonable care, have had knowledge in advance of the actual broadcast thereof." (Part of Resolution No. 7, reported in (1932) 2 J. Radio L. 178.)

Essentially embodying the same viewpoint is the elaborate argument of John W. Guider on this point in favor of broadcasting stations, as appearing in (1932) 2 J. Radio L. 708, especially 711-713.

\(^{68}\)While unsuspecting potential victims as a class in the nature of things can have no formulated opinions on the matter, individual parties who have been thus victimized readily manifest their consciousness of this interest after the injury has been inflicted. The following statement may conveniently serve as illustration. "I therefore prosecuted an appeal to the supreme court in order to secure, if possible, a rule of law which would protect myself and other persons from libelous attacks over the air by irresponsible
is carried further, therefore, than the mere matter of the conflicting individual interests of the publisher and his victim, no case for change from the rules applicable to other publishers is made out in connection with defamation by radio. Here, as in other defamation cases, relaxing the rule of strict liability involved in the law of defamation in order to afford more leniency to the active publisher under the milder rules of negligence would be directly at the expense of the passive innocent victim of his defamatory publications.

6. The Social Interests Affected—Promotion of Broadcasting Enterprise.—Is special leniency to broadcasters desirable in order to promote broadcasting enterprise? The change from defamation to negligence as the basis for liability is not needed in order to secure ample broadcasting service in the interest of the public of radio listeners. The business of radio broadcasting has already attained the proportions of a very large and powerful business. The commercial opportunities for profit in this business, despite unknown risks of all sorts, have been so great as to attract investments in broadcasting enterprises far too numerous for the available broadcast band to carry. It has been necessary for the Federal Radio Commission to eliminate many stations. Applications for new stations have often been rejected on the broad ground, character assassins who are barred from using newspapers.” (Statement of C. A. Sorensen, plaintiff and appellee, filed in connection with the defendant station’s motion for a rehearing in the second appeal in the case of Sorensen v. Wood, No. 28749, unreported, as reprinted in appellant’s brief for rehearing at p. 10.)

That speakers at the microphone are frequently if not usually persons of no financial responsibility is notorious.

“When outside speakers not in the employ of the broadcasting company are given access to the microphone for the broadcasting of their speeches for a consideration paid to the broadcasting company, it may at times occur that among such outside speakers there may be persons without substantial financial responsibility.” (From stipulation filed in the second appeal to the supreme court of Nebraska in Sorensen v. Wood, no. 28749, unreported.)

69 See footnote no. 1 above.
70 The prevailing chaos before the Federal Radio Act of 1927 is vividly described in the first report of the American Bar Association’s Standing Committee on Radio Law. See (1929) 54 A. B. A. Rep. 442.
71 See footnote 1 above. In Sproul v. Federal Radio Commission, (1931) 60 App. D. C. 333, 54 F. (2d) 444, an application for renewal of the broadcasting license was denied by the Federal Radio Commission and its action was upheld by the court on the ground of the licensee’s insolvency. That overcrowding may justify the deletion of existing stations though in other respects efficiently and satisfactorily operated, see Federal Radio Commission v. Nelson Bros. Bond and Mortgage Co., (1933) 289 U. S. 266, 53 Sup. Ct. 627, 77 L. Ed. 1166.
among others, that the field is already overcrowded with broadcasting stations. The radio industry has in some respects attained even semi-monopolistic proportions. For supplying the public of listeners with efficient broadcasting service the radio industry needs no new special favors at the expense of passive innocent victims of its defamatory publications.

Nor is such a change needed in order to provide reasonably effective protection for the broadcaster himself with respect to his transmission of utterances without his realizing at the moment their defamatory character. Through scrutiny of the manuscript to be transmitted the broadcaster can protect himself approximately as may the newspaper by scrutiny of the "copy." The broadcaster can also at his discretion require indemnity in advance from the speaker or advertiser who furnishes the words to be transmitted by the operations of the broadcaster. Alternatively, the broadcaster can in addition arrange for insurance against liability for defamatory broadcasts, charging the expense of such insurance protection as an overhead expense to be reimbursed in the rates charged for broadcasting service. Through such devices the broadcaster can shift the risk of defamation by his broadcasting operations from himself as immediate perpetrator to his advertisers who furnish the defamatory utterances and in whose interest he performs the broadcasting operations which transmit those utterances to the world. There is no necessity for throwing the risk and damage upon his passive and innocent victims.

Nor is the change from defamation to negligence as the basis for liability needed in order to protect broadcasting stations against feigned claims for damages from defamation. Such a consideration has not greater but less weight in the case of radio broadcasters than it has in the case of newspapers, where it has often been rejected. Radio broadcasters have the same protection against feigned claims afforded to all publishers by the rules of evidence and the ordinary processes of legal procedure where it may become necessary to distinguish truth from falsehood.

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73 See footnotes nos. 34, 35, and 60 above.
Furthermore, the removal of absolute legal responsibility for such defamatory utterances from the only party to their publication that has any substantial financial responsibility would greatly increase the incentive to such defamation while leaving innocent victims without effective redress. The superior convenience and effectiveness, for many occasions, of personal speech transmitted by radio over the printed page or platform address has tremendously multiplied the dangers to victims of such defamation. The change from defamation to negligence would in large measure abrogate the law of defamation for precisely those cases where its application is most needed. By such a change the elements of general welfare involved in protection to the public of innocent victims against such "character assassination" would be ruthlessly sacrificed.

7. The Social Interests Affected—Promotion of Public Discussion.—A contention has in certain quarters been urged that special leniency ought to be accorded to the broadcaster, beyond what is accorded to the individual speaker, in order to promote free public discussion by radio of matters of public interest. This contention, reduced to its lowest terms, is that unless negligence is substituted for defamation as the basis for liability the broadcaster will be forced to the alternative of either exercising censorship or refusing to broadcast political speeches.

That this argument as a common law matter is without substance is readily demonstrable. In the first place, the unsupported conjecture that broadcasting service must be withdrawn from public discussion of political questions if the law of defamation is applied is completely belied by the actual facts. The incen-

76See statements quoted in note 68 above.

77"If the broadcaster has no power of censorship over political candidates, but still is responsible for what he says, then radio must be closed as an avenue for circulation of platforms and campaign material." Appellant station's statement as to jurisdiction, in KFAB Broadcasting Co. v. Sorensen, (1933) 290 U. S. 599, 54 Sup. Ct. 209, 78 L. Ed. 526.


78That such arguments are without merit even as applied to the radio station's claim of special privilege under sec. 18 of the Federal Radio Act of 1927, see Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82. The radio station's contention under the Federal Radio Act is examined at some length in Vold, Defamation by Radio, (1932) 2 J. Radio L. 673, 692-702.
tive of profits obtainable in political broadcasting as an induce-
ment to engaging therein has from the beginning far exceeded the
deterrent effect of possible liability that has been involved.\footnote{7} 

Again, it is very clear that broadcasters need not, as a prac-
tical matter, exclude political broadcasts from their programs in
order to protect themselves against the burdens of accountability
for their transmission of defamatory utterances. Through indem-
nity\footnote{8} or insurance the broadcaster can arrange for the desired
practical protection for himself without any necessity whatever of
choosing between exercising censorship or refusing to broadcast
political advertising. By such means the burdens of accountability
can in cases of this type be shifted from the broadcaster who per-
forms the operations of transmission to the party who supplies
the defamatory utterances and for whom the broadcast is made.
It is by no means necessary for the broadcaster's protection to
throw the burden on the helpless public of innocent victims.

The argument for greater leniency to the broadcaster in order
to promote freedom of public discussion rests on the contention
that radio broadcasts of political utterances ought, in the interest
of the general welfare, to be regarded as privileged occasions for
the broadcaster. It is to be noted, however, that in the majority
of American jurisdictions political utterances are not as such
regarded as privileged.\footnote{81} Where political utterances as such are
in the particular jurisdiction regarded as privileged, the broadcaster,
of course, enjoys such privilege to the same extent as does the
speaker at the microphone. Where no such privilege is recognized

\footnote{7} It is matter of common knowledge how very widespread was the use of
radio broadcasting in the presidential campaign of 1932 as contrasted
with the earlier presidential campaign of 1928, and how insignificant as
compared with these was its use in the presidential campaign of 1924. There
was no political broadcasting in the campaign of 1920, the first experiments
at broadcasting being undertaken in that year for dissemination of election

\footnote{8} See footnote 74 above.

\footnote{81} Leading cases are Post Publishing Co. v. Hallam, (C.C.A. 6th Cir.
leading case presenting the minority view is Coleman v. MacLennan, (1908)
78 Kans. 711, 98 Pac. 281. For a convenient compilation of authorities, see
Speech and Radio Broadcasting, (1935) 177 Annals of the American
Academy of Political and Social Science, 1-29, is given an elaborate argu-
ment against government censorship of radio broadcasting, with the inci-
dental position included that all broadcasting of political utterances ought
to be privileged on the part of the broadcaster. The present writer can
approve the policy of establishing a wide application for privilege for all
publishers of political utterances, without being able to see any reason for
making the broadcaster's privilege wider than the speaker's.
for the political speaker, it is clear that in such jurisdictions the utterance of political charges false in fact and defamatory in character is not regarded as being in the public interest. Such false and defamatory utterances cannot be regarded as being in the public interest merely because they are published through radio broadcasting operations if they are not to be so regarded if published through other forms of communication. The only ground suggested for such a special privilege to the broadcaster not equally applicable to the speaker at the microphone is the totally erroneous and unsupported assumption that otherwise broadcasting service must be withdrawn from all political discussion. This assumption, as already seen, is directly contrary to the actual facts in the broadcasting industry.

II. The Application of the Law of Defamation to the Facts of Defamation by Radio

Granting that the law of defamation, not the law of negligence, is applicable as the basis for the broadcaster's liability for defamation by radio, the question of what branch of the law of defamation is properly to be invoked in the instance still remains to be explored.

1. Defamation by Radio is Equivalent to Libel Rather than Slander.—The broad and loose popular generalization that spoken defamation is slander and written defamation is libel fails to indicate how defamation by conduct ought to be classified. As a matter of fact, however, defamatory impressions may be communicated not only through unassisted oral speech and through the written and printed page, but also through a multitude of other devices. Familiar today among such other devices for conveying impressions are pictures, effigies, mechanical noises, talking pictures, phonograph records. New fact combinations in this regard may be expected to arise as human ingenuity applied to current mechanical progress recognizes new opportunities and seeks to utilize them for the achievement of ends in view. Many cases are now of record where defamation has been perpetrated not by mere speech but by conduct. New phases of defamation by conduct must be dealt with as they arise.

In radio broadcasting, as already pointed out, the speaker's

82 See footnote 79 above, with accompanying text.
83 See footnote 33 above.
mere oral utterances spoken into the microphone do not automatically and unassisted result in satisfactory transmission of intelligible and continuously audible speech. As already set out in detail above, there are required in addition the broadcaster's delicate, continual operations of modulation readjustment as the speech proceeds. The further circumstance may also be noticed that the utterance in question frequently consists of a written or printed composition which the speaker reads from the manuscript into the microphone. Obviously, the broadcaster's operations transmitting the speaker's utterances to the radio audience, whether or not the speaker uses a manuscript, constitute neither speaking nor writing but are much more accurately described as "conduct."

It is therefore very clear that attempts to classify defamation by radio "on principle" as constituting slander because of the oral utterance of words into the microphone are hopelessly erroneous. It is not true as a fact that defamation by radio is oral defamation even in cases where the speaker at the microphone delivers impromptu utterances without the use of any prepared manuscript. Radio transmission in that case, as in every other, takes place through active operations by the broadcaster which manifestly constitute "conduct" on his part rather than mere speech. Unless

84 See footnote 14 to 26 above, with accompanying text.

85 The interesting question of oral publication of written defamation is thus brought into the range of attention regarding its application. That such publication is itself libel as well as slander seems to be well settled, the decisions being rendered, however, in cases where the existence of the writing was known to the listener. Case de Libelles Famosis, (1605) 5 Co. Rep. 125a; Lamb's Case, (1610) 9 Co. Rep. 59b, Moore K. B. 813; Snyder v. Andrews, (1849) 6 Barb. (N.Y.) 43; Forrester v. Tyrrell, (1893) 57 J. P. 532, 9 T. L. R. 257.

Whether the same conclusion can be supported in cases where the listener is not aware of the writing has been ingeniously argued. Compare opinions in Osborn v. Thomas Boulter & Son, [1930] 2 K. B. 226, 99 L. J. K. B. 556, and in Meldrum v. Australian Broadcasting Co. Ltd., [1932] V. L. R. (Aust.) 425, described in (1932) 6 Aust. L. J. 301. See also observations in footnotes 86 and 87 below.


All these attempts at classification of publication by radio broadcasting as slander have gone on the unexamined and totally erroneous assumption that transmission by radio of the speaker's utterances into the microphone is purely automatic. The conclusions rested thereon are therefore without value, whether with reference to the speaker's liability or with reference to the broadcaster's liability. That transmission by radio is not thus automatic, see footnotes 8-27 above, with accompanying text.

87 See footnote 84 above.

Publication of defamation by radio amounting to publication of libel by
the term “slander” is to be so enlarged as to cover not only oral speech but defamation by conduct as well, the facts of radio transmission of defamatory utterances do not fall within it. On the other hand, defamation by conduct has ordinarily by the authorities been held equivalent to libel.88

The law of defamation has been extended from relatively narrow beginnings in early slander cases to much wider grounds of liability in the libel cases. This difference in the form of publication became conspicuous when writing and printing first came into general use, following upon the invention of the printing press. The difference in form was seized upon as the occasion for enforcing a wider liability for written defamation than was available under the older more narrowly confined slander precedents.89 There can thus be no question that the wider liability was grounded in the recognition of need for greater protection against written defamation, however inadequate in detail may at times have appeared the explanations often set out that the deliberation involved was greater, the diffusion wider and the resulting damage consequently more serious.90 There has been a clear-cut his-


89 "The invention of the separate tort of libel for the first time put the most important branch of the law of defamation on a satisfactory footing." 8 Holdsworth, History of English Law 366.

"The modern torts of slander and libel represent two different strata of legal development. Slander represents the tort developed in the sixteenth and early seventeenth centuries in and through the action on the case. Libel represents the tort created by the judges of the latter part of the seventeenth century in order to remedy those defects of the tort developed in the earlier period. . . . Their action put the tort of libel on the right lines, and if ever an assimilation between the two torts is effected by the Legislature, it will be taken as the model." 8 Holdsworth, History of English Law 367.

"The distinction between slander and libel grew up in English law early in the 17th century. Judges, frightened as it were, by the power of the printed word, decided that printed slander should be considered greater in effect than oral slander. From it grew the principle that a thing may be libel when written which would not be slander if spoken." Davis, Radio Law, 2nd ed., p. 101.

90 In Thorley v. Lord Kerry, (1812) 4 Taunt. 355, 3 Camp. 214, n.
historical trend from the narrow beginnings in the old slander cases to wider grounds of liability in the more dangerous wrong of libel. As applied to the present question this clear-cut historical trend in the law of defamation would therefore indicate that the wider grounds of liability found in the law of libel rather than the narrower grounds in the law of slander are applicable to the still more dangerous form of defamation by conduct now presented in transmission by radio.\(^9\)

Again, novel forms of publication of defamatory matter through conduct, where neither mere writing nor mere speech have been involved, have in common law adjudications almost invariably been held equivalent to libel rather than slander.\(^9\) Statutory definitions of libel have also strongly indicated the same trend.\(^9\) The seriousness of the damage involved through defamation by conduct, even though there may have been no permanent record, has usually been regarded as sufficient reason for treating variant and odd cases of publication of defamation in the same way Mansfield, C. J., sets forth a dictum that the generally asserted reasons for distinguishing slander and libel are not in their details consistently convincing, but admits that the distinction has become established as a matter of authority.

\(^{91}\) "So far as concerns defamatory matter, the common law distinctions between libel and slander (both as to criminal and civil responsibility) seem to be based upon the more permanent nature and the wider dissemination of libelous statements. The invention of radio broadcasting has created a means of giving to oral defamatory utterances a wideness of circulation greater than that now generally given to written defamation." Davis, Radio Law, 2nd ed., 69.

"Libel is more heavily punished than slander, because of its greater possibility of harm, and the greater deliberateness on the part of the perpetrator. . . . On the mischief side, radio defamation certainly would seem to be more like libel than like slander." Zollman, Law of the Air 125.

"If, indeed, the distinction between libel and slander truly lies in the fact that the former is more likely to cause mischief than the other, then it might seriously be argued that broadcasting defamatory statements constitutes a libel and not a slander. The time would indeed appear to be now ripe for the abolition of this distinction altogether." (1926) 70 Sol. J. 613.

\(^{92}\) See authorities cited in footnote 88 above.

Various additional illustrations are enumerated in Odgers, Libel and Slander, 5th ed., pp. 13-14.

In Gutsole v. Mathers, (1836) 1 M. & W. 495, 501, 5 L. J. Ex. 274, however, occurs a dictum that a gesture is equivalent to slander.

\(^{93}\) Typical of the most advanced statutory definitions of libel is the following:

"Every malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which shall expose . . . to hatred, contempt, ridicule, or obloquy . . . shall be a libel. . . ." Mason's 1927 Minn. Stat., sec. 10112. (Criminal libel).

Substantially to the same effect are Washington, Compiled Statutes, (Remington 1922), sec. 2424, and New York, Consolidated Laws (Cahill 1930), ch. 41, sec. 1340.
as libel. On this basis, too, the highly dangerous publication of defamation by radio, involving transmission by conduct on the part of the broadcaster rather than merely by oral speech, must be regarded as equivalent to libel rather than slander.

On the mischief side, it is well again to emphasize, defamation by radio under present conditions has infinitely larger possibilities of harm than either of the familiar older types of defamation. Its potentialities as a blaster of reputations are by comparison boundless. Libel was at the outset regarded as a more serious wrong than slander partly by reason of the greater damage from wider diffusion and greater permanence of the written word. Similarly, defamation by radio is manifestly an even more serious wrong than ordinary libel by reason of its immeasurably wider diffusion. To this must be added the far greater power of the understood human voice to stir the emotions of listeners. Furthermore, defamation by radio is in the ordinary course not impulsive, but represents quite as much deliberation as does the ordinary written message. Defamation by radio, infinitely more serious than

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94 See footnotes 88 and 92 above.
95 Recognition of such danger with specific application to radio is already manifest in legislation, enacted or proposed, to extend the law of criminal libel to radio broadcasts. Legislation to this general effect has been enacted in California. See California, Penal Code (Chase 1931), sec. 258, which is discussed at some length in Davis, Radio Law 99-107. Similar legislation was enacted in Oregon in 1931. See (1931) 1 J. Radio L. 574, 577, 578. Bills to the same general effect have been actively introduced in the legislatures of several other states though without at the time culminating in enactment. See, for Minnesota, (1931) 1 J. Radio L. 576-577; for New York, (1932) 2 J. Radio L. 403-404; for Ohio, (1931) 1 J. Radio L. 401; for Texas, (1931) 1 J. Radio L. 401-402.
96 See footnotes 84-88 above, with accompanying text.
98 "One can influence people with the spoken word in a way in which it cannot be done by the printed word." Davis, Radio Law, 2d ed., 102.
99 In overruling a demurrer to a complaint seeking to hold a radio station accountable for defamatory utterances broadcast, one trial court answered as follows the contention that language broadcast by radio was slander rather than libel:
"If it is written or printed it has more harmful effects upon the person concerned and it carries with it the inference of deliberation and preparation. We all discount things that are said on impulse, perhaps in the course of a quarrel, but when we read a thing in print or in writing we realize then that that has been given consideration and that the consequences have been undoubtedly reflected upon.
"Everybody knows, I think, or most people know when they hear a statement over the radio that that statement is not an extemporaneous affair, that it is a prepared statement and that it represents deliberation and
either slander or libel as a blaster of reputations, might appropriately be given the distinctive name "blaster." The need for protection against such "blaster" is by reason of its conspicuously greater possibilities of mischief at least as great as it is in cases of ordinary libel. Every substantial reason historically familiar for imposing a wider liability for libel than for slander is manifestly at hand to indicate that publication of defamatory utterances by radio must be regarded as at least equivalent to libel.

The leading commentators on the historical development of the law of defamation regard the narrow restrictions of the law of slander as unsound and obsolescent. They do not hesitate to commend the viewpoint that the broader rules of libel should as an original question be applied throughout the entire field of defamation. However that may be, such a viewpoint would clearly require the application of the law of libel rather than slander to novel conduct controlled by no previous authority and involving a "blaster" of reputation through defamation by radio.

2. The Newspaper Analogy.—The newspaper analogy is very close to the facts of publication by radio with respect to shaping the form in which the transmitted message is conveyed. When a manuscript is submitted to a newspaper for publication, it is readily understood that the newspaper publisher contributes no authorship to the composition published. The newspaper publisher, however, does set in type, print and distribute the statement contributed by the advertiser or other contributor in manuscript form. Incidentally, in such processes of setting in type and printing, the news-

reflection and preparation of the announcer or person who has submitted it for broadcasting.

"It undoubtedly must be true, then, that we will have to regard the prepared statement submitted to the radio company for publication over the radio in the same category with libel. I do not see how it can be regarded otherwise." (From account of the hearing on the demurrer unreported in Miles v. Wasmer as given in (1932) 2 J. of Radio L. 161, 162.)

When the case of Miles v. Wasmer later came before the appellate court, that court on this point expressed itself as follows: "The reading of that manuscript over the broadcasting station is the basis of this action. In the briefs, there is some discussion as to whether the action is one for libel or for slander. This question we shall not decide, because, in so far as this case is concerned, it is immaterial." Miles v. Wasmer, (1933) 172 Wash. 466, 20 P. (2d) 847, 848.

100"The third method, which is alike the simplest and the best, is to abolish at once the distinction between libel and slander, and assimilate the law of slander to that of libel." Veeder, History and Theory of the Law of Defamation, (1904) 4 Col. L. Rev. 54.

"Their action put the tort of libel on the right lines, and if ever an assimilation between the two torts is effected by the Legislature, it will be taken as the model." 8 Holdsworth, History of English Law 367.
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paper publisher may correct the spelling or improve the punctuation found in the manuscript in order to make the statements contained in the manuscript more readily intelligible to readers who will see them in the printed form. The newspaper publisher thus, while in the instance contributing no authorship, does, by his operations of publication, give shape to the printed form, many times multiplied, through which the writer's message is transmitted to recipients of the paper.

When attention is given to this aspect in radio broadcasting as now conducted, it is manifest that the broadcaster by his operations very similarly shapes the form of the sounds through which the speaker's utterances at the microphone are transmitted to the radio audience. As already set out above,\(^1\) it is necessary for the broadcaster through the delicate operations of continual modulation readjustment as the speech proceeds so to reshape the sounds as uttered into the microphone that the resulting transmission can be picked up by receiving sets in the form of intelligible and continuously audible speech. By the delicate operations of modulation readjustment as the speech proceeds the broadcaster as it were selects\(^2\) from the sounds uttered into the microphone by the speaker those portions most suitable for transmission. In addition he so rearranges\(^3\) those portions as to secure their effective reception both by near and more distant radio listeners in the form of intelligible and continuously audible speech. Comparable to the printed form contributed by the newspaper publisher as the vehicle for transmission of the author's manuscript, the operations of the broadcaster contribute the particular form to which the sounds uttered by the speaker into the microphone must be reshaped in order by radio transmission to secure their effective reception by radio listeners as intelligible and continuously audible speech.

The newspaper is also very close to the facts of publication by radio with respect to control over the contents published. It is readily understood that the newspaper publisher under ordinary circumstances through scrutiny of manuscript and proof reading can exercise very effective control over the contents published through his operations. He can not, however, as a practical matter recognize and stop every statement that may turn out to be

\(^1\)See footnotes nos. 8-25 above, with accompanying text.
\(^2\)As to both selection and rearrangement, see footnotes nos. 18-20 above.
\(^3\)See footnote 102 above.
defamatory. Under the circumstances the newspaper publisher makes the best he can out of the practical situation. Using due care, he nevertheless runs the risk, very real but usually not very great, that he may be answerable for occasional defamatory matter inadvertently published.

From the standpoint of program control the situation of the radio broadcaster is not strikingly different but closely similar. Under ordinary circumstances, as in the case of the newspaper publisher, the broadcaster exercises complete control. True, also as in the case of the newspaper, occasional lapses may occur which no amount of care on its part practically exercisable can completely guard against. In both cases, under the policy embodied in the law of defamation, such risks must be borne by the commercial publisher whose active operations created the risks and caused the damage instead of being thrown without redress upon his passive innocent victims.

The newspaper analogy is also very close to the facts of publication by radio with respect to competition in business. Newspaper publication and publication by radio are strikingly similar from the standpoint of the commercial facts of direct business competition in the service rendered by each type of publication. Each acts as an advertising medium in the creation of consumer demand by those who have something to sell. The profits of such advertising furnish the major business income for the sake of which each type of publishing business is undertaken and maintained. Each charges as advertising rates such amounts as it sees fit. The newspaper sells "space" to its advertisers. The

104 See footnotes 60-63 above, and accompanying text.
105 See notes 61-63 above, with accompanying text.
106 Even a casual glance over the details of the schedule of an ordinary day's broadcasting program is enough to verify this statement.
107 "The only manner in which this station can continue to furnish entertainment to the public without cost to the listener is by selling a part of its time on the air to people desiring to advertise themselves or their goods." From defendant station's exhibit No. 6, as appearing in the Bill of Exceptions at page 97, in the case of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82.
108 "...the revenue derived from political broadcasts is one of the means which enables broadcasters to continue furnishing radio entertainment." From appellant station's statement as to jurisdiction, p. 6, in KFAB Broadcasting Co. v. Sorensen, (1933) 290 U. S. 599, 54 Sup. Ct. 209, 78 L. Ed. 527.
109 In the case of In re Complaint of Sta-Shine Products, Inc., (1932) 188 I. C. C. 271, the Interstate Commerce Commission held, by a divided membership, that it had no jurisdiction under the Interstate Commerce Act to deal with the rates charged for broadcasting.
110 It is common knowledge that the broadcasting rates for advertising are in this country fixed as a matter of course by private contract.
broadcasting station sells "time" to its advertisers. Not only are the two publication services in direct competition for the business profits to be derived from publication of commercial advertising, but they are also to a considerable extent in direct competition in the dissemination of current news as a means for attracting attention to the advertising furnished. News items as well as music or other entertainment features have often been interspersed between the commercial advertising utterances as the carrying bait to induce radio listeners to turn to or remain in touch with the particular broadcasting station. Within the last year or two such news features in radio broadcasts have become sufficiently conspicuous to provoke efforts on the part of press associations to stop their recurrence.

Finally the newspaper analogy is also very close to publication by radio with respect to the need for protection for passive innocent victims. Reference may again be briefly made to the fact, elucidated more at length in other connections, that defamation by radio is even more dangerous to innocent victims than is defamation by newspaper. As compared with defamation by newspaper, passive innocent victims of defamation by radio require not less but greater protection.

Whether viewed, therefore, from the standpoint of active shaping of the form of the transmitted message, from the standpoint of practical control over its content, from the standpoint of the commercial facts of direct business competition between newspaper publication and publication by radio, or from the standpoint of needed protection for passive innocent victims of defamation, it is emphatically true that the two types of publication are very closely analogous. Unless some convincing reason of policy can be adduced to the contrary, unless some convincing

109 "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 of politics. It competes with newspapers, magazines and publications of every nature." Goss, C. J., in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, 86.

110 Press items relating to the national meeting of the Associated Press in the Spring of 1933 reported the passage there of a resolution that "it is the sense of this meeting that the board of directors shall not allow any news distributed by the Associated Press, regardless of source, to be given to any radio chain or chains." The resolution also provided that no member newspaper of the Associated Press should be allowed to broadcast other than brief bulletins.

111 See footnotes 56, 95, 97, 98, 99, above, with accompanying text.
reason involving the general welfare can be shown to require special favors for broadcasting publishers, it would seem clear that both types of publishers with respect to liability for defamation should be treated alike. Such equal treatment is required not only for the elementary justice of equal treatment before the law for direct commercial competitors, but such equal treatment is also required in order to provide in each case equal protection for the passive innocent victims of such defamatory publications.\footnote{12}

3. The Telephone Analogy.—Radio broadcasting is not analogous to telephone service. No cases have been found holding telephone companies responsible for defamatory utterances occurring in telephone conversations between users of telephones. It is therefore natural for spokesmen for radio broadcasters to suggest the telephone as a possible analogy\footnote{13} by the application of which to hold that no liability rests on the broadcaster for defamation by radio. This suggestion also takes advantage of such familiar similarity in popular thought between the two services as is indicated in the descriptive term “radiophone.” Closer examination of the operating facts for the two services, as well as comparison of the business factors involved, readily demonstrate, however, that the claimed analogy is extremely far-fetched. It is equally clear that the application of the telephone analogy to the question of defamation by radio would be productive not only of injustice to passive innocent victims but also of pernicious consequences inimical to the general welfare.

In the first place, telephone transmission and radio transmission are conspicuously different in the vital circumstance that ordinary telephone transmission is a purely automatic process.

\footnote{12} “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.” Goss, C. J., in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, 86.

\footnote{13} “This is exactly like a friend renting a telephone, slandering somebody over it, and the plaintiff attempts to hold the telephone company in damages.” From defendant station’s argument to the jury. Bill of Exceptions, page 248, at the original trial of Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82.

“If it is important in solving the rules of law which must apply to this case to compare a broadcaster with something else, the broadcaster might with much more exactness be likened to the owner of a telephone company who furnishes machinery permitting speech to be heard at distant points from its origin.” From defendant station’s brief on appeal in the second appeal in Sorensen v. Wood, no. 24749 (unreported, 1933) at p. 14.
while radio transmission is not. Merely the connection between the parties is arranged by the telephone operator. Indeed, in many modern telephone exchanges a dial system is employed by the operation of which even the connections between parties are made by the parties themselves. It is literally true in ordinary telephone service that the company places the use of its equipment at the disposal of subscribers for the purpose of telephonic communication and that the communication of words uttered by the parties is automatically carried out by the equipment thus furnished. The telephone company thus does not directly participate in the acts of ordinary transmission of telephone messages. In the case of radio broadcasting, on the contrary, as has already been elaborately set out, the process of transmission as currently conducted is not purely automatic. The radio broadcaster by his voluntary active operations of transmission being himself a publisher of the defamatory utterances broadcast, he must on the score of equality before the law be subject to the same liability as other publishers unless he can show convincing reasons for special favors not accorded by the law to other publishers.

In the second place, a telephone company is a common carrier of messages, bound under the law applicable to such public utilities to provide message transmission service for senders of messages. As intimated both by a state court and by the Interstate Commerce Commission, the radio broadcasting company is under no such common carrier obligation. The whole background of policy is thus strikingly different between the two services. It is a matter of common knowledge that broadcasting stations control their own commercial advertising programs, exclude or deal with individual advertisers, and by private contract fix rates for their services as they see fit. It is in actual broadcasting practice insisted that in the nature of things there cannot be any obligation to serve any individual advertiser since stations must control their own programs in order to preserve their good will with the radio audience which makes their business commercially valuable. The National Association of Broadcasters has itself in

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114See footnotes 10-27 above, with accompanying text.
115"We are of the opinion that the defense of the company that it is a common carrier is not available here." Goss, C. J., in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82, 87. See also action of Interstate Commerce Commission, referred to in footnote No. 108 above.
116See footnote No. 108 above.
117"It has been the constant effort of this station to keep its entertainment entirely free from any objectionable matter." From defendant station's
other connections very definitely taken the position that broadcasting stations are not common carriers and cannot properly be so regarded under the law.\footnote{The professional opinion has also been expressed by counsel eminent in the field of radio law that while radio broadcasting stations are affected with a public interest with regard to the listening radio public they cannot be regarded as common carriers owing any duties as such to any class of senders of messages.\footnote{The same position has been in substance approved in resolutions adopted by the American Bar Association, Resolution No. 10 adopted at the Ninth Annual Convention of the National Association of Broadcasters reads as follows: "Resolved, By the National Association of Broadcasters, in convention assembled, that the executive committee of this association be, and it hereby is, authorized and directed to make application to the Interstate Commerce Commission for permission to appear as intervener in the hearing of any complaint before the said Interstate Commerce Commission in which the alleged right or duty of said commission to establish or regulate rates for broadcast advertising service appears to be an issue, for the purpose of presenting before the Interstate Commerce Commission the claim of this Association that a radio broadcasting station is not and cannot be regarded as a common carrier under the law." Quoted from (1932) 2 J. Radio L. 178.}

\footnote{Resolution No. 10 adopted at the Ninth Annual Convention of the National Association of Broadcasters reads as follows: "Resolved, By the National Association of Broadcasters, in convention assembled, that the executive committee of this association be, and it hereby is, authorized and directed to make application to the Interstate Commerce Commission for permission to appear as intervener in the hearing of any complaint before the said Interstate Commerce Commission in which the alleged right or duty of said commission to establish or regulate rates for broadcast advertising service appears to be an issue, for the purpose of presenting before the Interstate Commerce Commission the claim of this Association that a radio broadcasting station is not and cannot be regarded as a common carrier under the law." Quoted from (1932) 2 J. Radio L. 178.}

\footnote{\textit{I have always made an attempt to broadcast material over KFAB that is the very best in the interest of the public and our listeners.} From testimony of defendant station's manager as appearing in the bill of exceptions at page 192 in Sorensen v. Wood, (1932) 123 Neb. 348, 243 N. W. 82.}

\footnote{\textit{... the self-imposed censorship exercised by the program directors of broadcasting stations who, for the sake of popularity and standing of their stations will select entertainment and educational features according to the needs and desires of their invisible audiences.} From statement filed by the Federal Radio Commission with the court of appeals of the District of Columbia in the case of Great Lakes Broadcasting Co. v. Federal Radio Commission, (1930) 59 App. D. C. 197, 37 F. (2d) 993, and copied in (1931) 1 J. Radio L. 39-40.}

\footnote{The requirement of serving all who wish to speak over the transmitter, however, is highly inconsistent with what, in the opinion of the committee, ought to be the end to be achieved in broadcasting, namely, good service consisting of entertainment, instruction, etc. to the listening public. The broadcaster, by reason of his close contact with his listening public and his selfish motive for desiring popularity for his station, is in the best position to determine what form that service shall take; he should be allowed to exercise the same discretion that the editor of a newspaper or magazine, or the proprietor of a theatre, exercises. The only restriction should be to the end that, so far as the station's program consists of discussion of public questions, it be fair alike to all candidates and to opposing points of view. ... Broadcasting stations may be called 'public utilities,' but they should be treated not as the common carrier group of public utilities, such as telephone and telegraph lines, but as the public service type, such as those engaged in furnishing light, heat, water and power to a consuming public..." From Report of the American Bar Association's Standing Committee on Radio Law, Louis G. Caldwell, Chairman, as appearing in (1929) 54 A. B. A. Rep. 490-491. To the same effect, see (1931) 56 A. B. A. Rep. 98-100, being remarks by Chairman Caldwell before the annual meeting of the American Bar Association.}
sociation on recommendation of its then functioning Committee of Radio Law. The Federal Radio Commission has also emphatically expressed the same view.

It is abundantly clear, therefore, that the telephone company as a common carrier of messages owes to the public of senders the duty of furnishing them transmission service while the broadcasting company as a mere private business in this respect is under no such obligation. Accordingly, even if the telephone company was by its operations a technical publisher of such messages, which is by no means clear, it could much more persuasively claim to be entitled to a privilege in cases of defamatory utterances than can the radio broadcasting company which is under no legal duty to any sender to transmit the message offered.

In the third place, the need of innocent victims for redress against defamation by radio is infinitely more urgent than against defamation by telephone. In telephonic defamation the message reaches one individual listener. In the ordinary course the extent of its diffusion without further repetition by the hearer is therefore in such cases negligible. In consequence the actual damages to reputation from such telephonic defamation, as distinguished from damages from subsequent repetition, are as a practical matter in most cases entirely lacking. In defamation by radio broadcasting, on the other hand, utterances delivered by the speaker into the microphone are by the active operations of the broad-

120"Resolved, That the Association adopts and approves Part IX of the report of the Committee on Radio Law, and instructs the Committee on Radio Law ....

(c) To oppose the enactment of any bill declaring broadcasting stations to be common carriers or to be subject to a common carrier obligation with respect to the transmission of communications." (1929) 54 A. B. A. Rep. 90.

121"... The public would be deprived of the advantage of the self-imposed censorship exercised by the program directors of broadcasting stations who, for the sake of the popularity and standing of their stations will select entertainment and educational features according to the needs and desires of their invisible audiences. ... To pursue the analogy of telephone and telegraph public utilities is, therefore, to emphasize the right of the sender of messages to the detriment of the listening public. The commission believes that such an analogy is a mistaken one when applied to broadcasting stations; the emphasis should be on the receiving of service, and the standard of public interest, convenience, or necessity should be construed accordingly." From statement of the Federal Radio Commission filed with the court of appeals of the District of Columbia in the case of Great Lakes Broadcasting Company v. Federal Radio Commission, (1930) 59 App. D. C. 197, 37 F. (2d) 993 as appearing in (1931) 1 J. Radio L. 39-40.

122For the corresponding privilege to telegraph companies, based on their duty as common carriers, see footnotes 126-129 below, with accompanying text.
caster transmitted without limit to all the members of the radio public who have been induced to listen in for the time being, with consequent widespread injury to the plaintiff's reputation. Taken as a class, telephonic defamation as such is thus relatively harmless while defamation by radio constitutes the most dangerous form of defamatory publication that the world has ever seen.

Applying the telephone analogy as a basis for determining the broadcaster's liability is also open to the same objections from the standpoint of the general welfare as have already been set out above in dealing with the contention that negligence should be regarded as the underlying basis of liability.

4. The Telegraph Analogy.—Radio broadcasting is not analogous to telegraph service. The contention has occasionally been made that the analogy of the telegraph company ought to be applied to determine the liability of broadcasting stations for the publication of defamatory statements uttered by others into their microphones. That wireless communication first was introduced as wireless telegraph also lends a connotation of verbal familiarity to this contention that may make it appear plausible.

It is very clear in telegraph cases that the customer furnishes the message to be sent but that the telegraph company by its voluntary active operations transmits the message to the recipient. In this respect telegraph messages are strikingly different from telephone messages where the transmission in the instance is automatic. In this respect, therefore, the radio broadcaster does resemble the telegraph company.

It is clear that the basis for the telegraph company's liability is the law of defamation. It is plain that if the sender of the message was entitled to the defense of a privileged occasion the telegraph company as transmitter of that privileged message is entitled to the same privilege. There seems also to be no question that if the message as such does not in the instance fall within a recognized privileged occasion the telegraph company as transmitter is not entitled to any privilege where the defamatory character of the message was clearly apparent on its face. Whether

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123 See footnotes 43-82 above, with accompanying text.
124 See Davis, Law of Radio Communication 116-169, where the author argues for the telegraph analogy as a means of avoiding the strict liability under the law of defamation and applying instead "the more reasonable rule of due care." In his discussion this author seems, however, to ignore completely the passive innocent victim. For detailed analysis and criticism of that viewpoint, see footnotes 43-66 above, with accompanying text.
125 Authorities are carefully compiled in Smith, Liability of a Telegraph
any separate privilege should be recognized for the telegraph company when the defense of privileged occasion does not apply to the sender of the message but the defamatory character of the message is not clearly apparent on its face is a question on which there is a sharp conflict of authority.126 In some jurisdictions a conditional privilege is accorded to the telegraph company in such cases even though the sender of the message is not within any recognized privileged occasion.127 The basis for such a special privilege to the telegraph company is that as a common carrier of messages it is bound, under the law applicable to such public utilities, to provide telegraph service for the senders of such messages. The conditional privilege thus recognized is accorded to the telegraph company not for its financial profit but in the interest of prompt and efficient service to the public of senders for whom telegraph messages are required by law to be sent.128 It may in this connection also be noticed that any publication of such messages that actually occurs, to which the special conditional privilege for the telegraph company may be held applicable, is an extremely limited publication. It is therefore very unlikely in most ordinary cases, in the absence of subsequent repetition, to result in appreciable damages.129

With reference to the question of special conditional privilege, for the transmitter of messages, it is at once apparent that the telegraph company and the radio broadcasting station stand in diametrically opposite positions. The telegraph company is a common carrier of messages. The radio broadcasting station is not. The one is under a duty to senders to accept messages for transmission; the other is not. The special conditional privilege to the telegraph company in case of defamatory messages is based on this duty.130 No such duty existing in the case of the radio

Company for Transmitting a Defamatory Message, (1920) 20 Col. L. Rev. 30, 369. See also elaborate annotation of authorities in 63 A. L. R. 1118-1127. 126See footnote 125 above.

127A recent case taking this position after elaborate consideration of the merits is Flynn v. Reinke, (1929) 199 Wis. 124, 225 N. W. 742, 63 A. L. R. 1113.

128"The promptness with which it dispatches its business is the test of its efficiency and the measure of its service to public needs. Its service should not be hampered without deliberation nor for light and transient causes. . . . It seems apparent that the tendency of this rule [denying privilege] would be to limit service and to deprive communities of the privileges which it affords." Owen, J., in Flynn v. Reinke, (1929) 199 Wis. 124, 225 N. W. 742, 63 A. L. R. 1113, 1116, 1117.

12963 A. L. R. 1117.

130See footnotes 115-121 above.

131See footnote 128 above. See also statement of the Federal Radio Commission, quoted in footnote 121 above.
broadcasting station, no basis for such a privilege to the broad-
caster for defamation by radio is available under the analogy of
the telegraph cases.

Again, radio broadcasting differs sharply from telegraphic
transmission with respect to the possible damage from such pub-
lication. As in the case of telephonic defamation, defamation by
telegraph in the ordinary course is published only to a very nar-
row range. The consequent damage to reputation, in the absence
of subsequent repetition, is therefore in most cases likely to be very
slight indeed.\textsuperscript{122} On the other hand, in broadcasting by radio the
extent of publication takes the widest possible range and thereby
exposes innocent victims of such defamation to infinitely greater
damages to reputation. This constitutes a further reason why the
telegraph company's special conditional privilege cannot properly
be applied to broadcasters in cases of defamation by radio.

Furthermore, when comparison is made between the business
factors encountered in telegraph cases and the business factors en-
countered in connection with radio broadcasting, the two lines
of business are readily seen to be strikingly different in their
essential characteristics. The type of service rendered by each
is entirely different, is largely rendered to a different class of cus-
tomers, and serves entirely different functions in the business to
which it is applied. Telegraph service is largely confined to ur-
gent business correspondence between the individual sender and
his addressee. Radio broadcasting, on the other hand, in its busi-
ness aspects is primarily an advertising medium. In its business
aspect radio broadcasting does not appreciably compete with the
telegraph company, but with newspapers, magazines, and other
advertising media. It performs the business functions and dis-
places the business services not of the telegraph but of the com-
peting publishers of commercial advertising. On the business side,
therefore, radio broadcasting is very remote from the analogy of
the telegraph company, but is very close to the analogy of the
newspaper.\textsuperscript{133}

It may be added that a special conditional privilege to the
radio broadcaster comparable to that allowed to the telegraph
company going beyond any privilege for the speaker in the in-
stance would be open to the same objections from the standpoint
of the public welfare that apply to the contention that in such

\textsuperscript{122}See footnote 129 above.
\textsuperscript{133}See footnotes 106-110 above, with accompanying text.
cases negligence should be regarded as the underlying basis for liability.\footnote{See footnotes 43-82 above, with accompanying text.}

5. Negligent Conduct as Publication—Carriers.—As already seen, without transmission by the defendant to the understanding of recipients there is no publication by the defendant.\footnote{See footnote 29 above.} Where the defendant by his voluntary acts intentionally transmits utterances which are defamatory or intentionally procures their transmission by others to the understanding of recipients, the defendant is accountable as publisher.\footnote{See footnotes 31 and 33 above, with accompanying text.} On the other hand, where a defendant's proper and non-negligent acts, not in themselves constituting transmission of utterances to any one, provide the means or facilities seized upon by others for transmitting defamatory utterances, the defendant is not accountable for such publication by other parties.\footnote{See footnote 30 above.}

The manufacturer of the printing press for instance would not without more be accountable for libels appearing in a newspaper later printed on that press. So the manufacturer of typewriter paper would not without more be accountable for libels later typed thereon and communicated by a purchaser of the typewriting paper.

Between these relatively clear cases of accountability and lack of accountability for the transmission that in the instance takes place are some situations more difficult to analyze. The defendant's conduct in connection with the defamatory utterance in question by itself may be neither intended nor sufficient to bring about the transmission that results. The actual transmission may come about by the apprehendable intervention of acts of others. Where intervention of acts of others with the defendant's acts in bringing about the transmission that results is reasonably apprehendable under the circumstances in question, the defendant is held accountable as a publisher.\footnote{See footnotes 139 and 140 below.} Holding the defendant liable as a publisher under such circumstances rests on the analysis that his act negligently contributed to publication of defamatory utterances by the acts of another. Such liability for negligent though unintended contribution to another's publication of defamatory utterances may be imposed for conduct of the defendant which occurs either at the originating or at the transmitting stage of the publication. Thus the defendant in keeping the custody of a
defamatory writing, or in addressing it for mailing to the addressee, may fail to use due care to avoid reasonably apprehendable interception by acts of other parties. Likewise, the defendant, in carrying on other activities not in themselves involving transmission of any utterances to the understanding of anyone, may fail to exercise due care to avoid reasonably apprehendable utilization of his activity by others for accomplishing the transmission of their defamatory utterances.

It is therefore clear that responsibility for the publication of defamatory utterances may rest not only on voluntary transmission to the understanding of recipients but also on negligent conduct. Where there is voluntary transmission to the understanding of recipients of utterances that are defamatory and unprivileged, the voluntary transmitter under the law of defamation publishes at his peril, and questions of due care are in that regard immaterial.

Where the party's conduct in question does not by itself constitute publication, he is still held accountable as a publisher where through his lack of due care in that regard he permits his conduct to be utilized by others in achieving the publication that takes place.

Conspicuous among the instances where the defendant's acts do not by themselves without more constitute publication is the case of the mere carrier. Mere carriage of parcels obviously is not publication, not being in itself any transmission of any contents to the mind of anyone. Such carriage may be utilized, however, by those who seek circulation for libelous contents of letters, newspapers or books thus entrusted to the carrier for transportation. Accordingly, if the circumstances are such that the carrier in the

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141 See footnotes 34, 35, and 36, above.

142 See footnotes 139 and 140 above.

143 Among the leading authorities are the following: Day v. Bream, (1837) 2 Mood. & R. 54; Layton v. Harris, (1842) 3 Harrington (Del.) 406; Arnold v. Ingram, (1912) 151 Wis. 438, 138 N. W. 111; Emmens v. Pottle, (1885) 16 Q. B. D. 354, 55 L. J. Q. B. 51 (dicta).
instance knows of the defamatory character of the contents of the parcel carried, he is said to be accountable as a participator by his acts in the transmission that resulted. Where the contents of the parcels carried are known to be reading matter and such reading matter is defamatory, the carrier having assisted in the circulation is said to be prima facie liable as a publisher thereof. If he shows, however, that he neither knew nor had occasion to know that the contents were defamatory, it is said that he is not accountable as publisher merely because of his acts of transportation alone, which have been seized upon by other parties as means or facilities for achieving their desired publication.144

Negligent conduct as publication, and the mere carrier analogy, obviously have no application to the question of the radio broadcaster’s liability for defamation by radio. Mere transportation of a parcel by carrier does not constitute transmission of utterances to the understanding of anyone, while radio broadcasting of utterances deliberately does that very thing. Such transmission in radio broadcasting being intentional, the intentional transmitter under the law of defamation is accountable as publisher irrespective of questions of negligent conduct in the manner of carrying out the operations of transmission.145

6. The News Vender Analogy.—Under the current authorities the vender of newspapers and books is usually said to be prima facie liable for publishing a defamatory statement contained therein, every sale being regarded as a new publication. To this is added the qualification, however, that distributors of such materials, if they are not the original or main publishers, are not regarded as having published them if they prove that they neither knew nor in the exercise of reasonable care should have known of the defamatory contents of the book or paper sold.146 That under certain circumstances news venders are permitted to escape liability on proof of due care has suggested the news vender analogy as a hopeful alternative under which broadcasters have asserted the claim to escape from the more burdensome liability involved under the newspaper analogy which courts have already applied to defamation by radio.147 Can such a contention be

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144 See footnote 143 above.
145 See footnotes 34, 35, and 36 above, with accompanying text.
147 "The broadcaster is in exactly the same situation as the news vender."
sound? By what criteria can the soundness of that contention be tested?

It may be noted at the outset that the physical facts involved in the case of the news vender in their bearing upon publication resemble but remotely, if at all, the physical facts of broadcasting. The news vender does not directly transmit utterances to the purchaser's understanding, but rather delivers the parcel or jacket in which the utterance is wrapped up. The purchaser of the newspaper or book must himself by his own subsequent act open this parcel and read the statement contained therein before that statement can reach his understanding. Transmission by broadcasting carries the utterances in question directly to the understanding of the radio listener. There is no delay and no dependence on any subsequent act of the listener to apprise him of the contents. Furthermore, the broadcaster's active operations, as already seen, deliberately so shape the form of the transmitted sound as to make it intelligibly and continuously audible to radio listeners. The news vender takes no part in shaping the form of the defamatory utterance. Further still, and most important, the broadcast is the first and only active publication. The broadcaster's voluntary active operations of broadcasting as the speech proceeds simultaneously transmit the speaker's previously unpublished utterances directly to the understanding of the far-flung radio audience. The broadcaster is an original and principal publisher. He does not, like the news vender, play a merely subordinate part in the dissemination of statements published in the first instance by another who is the first or main publisher. In all these aspects regarding the physical operations involved in publication the radio broadcaster is a much closer, more active, and more important participator than is the news vender. So far as the traditional language of the news vender cases itself goes, the broadcaster clearly is not within it. As a shaper of the form of the utterances transmitted, and as a principal publisher in the instance, the radio broadcaster much more closely resembles the newspaper than the news vender.


148 For the physical facts of broadcasting see footnotes 8-27 above, with accompanying text.
149 See footnotes 14-23 above, with accompanying text.
150 This feature on which to support the milder rule for news vender cases is especially emphasized in Vizetelly v. Mudie's Select Library, Ltd., [1900] 2 Q. B. 170, 69 L. J. Q. B. 645.
DEFAMATION BY RADIO

When attention is given to the business aspects involved, it is even more clearly manifest that the radio broadcaster much more closely resembles the newspaper than the news vender. In both cases advertisers pay for the publication service provided. The news vender as a rule is not paid by advertisers but must himself acquire at his own expense the publications to be resold to his customers. The radio and the newspapers provide actively competing business services both in the broad fields of commercial advertising and in other systematically arranged publicity for reaching or affecting public opinion. The news vender takes but a subordinate part in the dissemination of the publications of others. He furnishes commercial competition neither for the newspaper nor for the radio. Whether the comparison be made, therefore, from the standpoint of the physical operations of publication or from the standpoint of the business service and business competition involved, it is clear in either aspect that the position of the radio broadcaster much more closely resembles the position of the newspaper than it does that of the news vender.

So far as the leading news vender cases themselves express the reasons upon which those cases rest, such reasons manifestly have no application to radio broadcasting. Not the mere lack of knowledge of the contents but the peculiarly subordinate part taken by the news vender in the dissemination of statements transmitted by other parties is the key to the application of the news vender analogy.\textsuperscript{151} If the defendant's acts have played but a subordinate part in the dissemination of statements published by others, his knowledge of the contents may still under the carrier and news vender cases be the occasion for enforcing liability as publisher. If his part has been that of printer or first or main

\textsuperscript{151}"The decisions in some of the earlier cases with which the courts had to deal are easy to understand. Those were cases in which mere carriers of documents containing libels, who had nothing to do with and were ignorant of the contents of what they carried, have been held not to have published libels. Then we have the case of Emmens v. Pottle. . . . The decision in that case, in my opinion, worked substantial justice; but, speaking for myself, I cannot say that the way in which that result was arrived at appears to me altogether satisfactory; I do not think that the judgments very clearly indicate on what principle courts ought to act in dealing with similar cases in the future. That case was followed by other cases, more or less similar to it [citing three cases]. The result of the cases is, I think, that, as regards a person who is not the printer or the first or main publisher of a work which contains a libel, but has only taken what I may call, a subordinate part in disseminating it, in considering whether there has been publication of it by him, the particular circumstances under which he disseminated the work must be considered." Romer, J., in Vizetelly v. Mudie's Select Library, Ltd., [1900] 2 Q. B. 170, 179-180, 69 L. J. K. B. 645.
publisher, the news vender cases do not apply at all, but he is subject to the ordinary strict liability imposed by the law of defamation upon all principal publishers for the greater protection of their passive innocent victims. The radio broadcaster is emphatically a principal publisher to whom, therefore, the news vender cases do not apply. He is even more emphatically a principal publisher than is the printer. As already set forth at length above, he not only transmits the utterances, but his voluntary operations also deliberately so shape the sounds transmitted that they become intelligibly and continuously audible by radio listeners both near and far. No transmission of intelligible utterances to the mind of any one takes place except by his voluntary broadcasting operations deliberately adapted to that end. The broadcaster is very clearly a principal publisher, to whom, therefore, the news vender cases by their own terms are inapplicable.

Applying the news vender analogy as a basis for determining the broadcaster's liability in defamation cases is also open to the same objections from the standpoint of the general welfare as have already been set out above in dealing with negligence as the basis for liability. The object sought through such argument is in both cases the same, to relieve the broadcaster from liability for defamation by radio. The answer, too, from the standpoint of the general welfare, is equally cogent in either case. In both instances the same considerations in the background are involved, that there is no need and no justification for such sacrifice of passive and innocent victims in order to favor the most powerful and most dangerous agency for defamation that the world has ever seen.

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152 See footnotes 14-23 above, with accompanying text.
153 See footnotes 43-82 above, with accompanying text.
154 "The extent to which one man in the lawful conduct of his business is liable for injuries to another involves an adjustment of conflicting interests. The solution of the problem in each particular case has never been dependent upon any universal criterion of liability [such as 'fault'] applicable to all situations. If damage is inflicted, there ordinarily is liability, in the absence of excuse. When, as here, the defendant, though without fault, has engaged in the perilous activity of storing large quantities of a dangerous explosive for use in his business, we think there is no justification for relieving it of liability, and that the owner of the business, rather than a third person who has no relation to the explosion other than that of injury, should bear the loss." Hand, C. J., in Exner v. Sherman Power Construction Co., (C.C.A. 2nd Cir. 1931) 54 F. (2d) 510, 514, 80 A. L. R. 686. See also footnotes 44 to 52 above, with accompanying text.