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Censorship of Radio Programs and Freedom of Speech

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contract out of the statute of frauds. Realizing, perhaps, the strictness of the rule and the resulting injustice, the court held that the party performing the services is not without a remedy, but may recover the reasonable value of his services. This holding is undoubtedly sound and does not differ from that of other jurisdictions where the pecuniary value of the services can be determined. Specific performance was refused in the principal case for this sole reason.

But where the thing done "is of such nature as not to admit of reduction to monetary value," the Kentucky cases differ greatly from the majority. The former will receive the contract for the purpose of fixing the value of those services. The latter hold, in such event, that specific performance will be granted, because if the plaintiff cannot be compensated in money the transaction will operate as a fraud upon him. If the services themselves cannot be valued in money, how can the contract put such value on them? Moreover, the services are not given for money in these cases, but in expectation of receiving property, and in many of the contracts the value of the services in money is not determined and cannot be inferred therefrom. The court held further, that where land or property is devised, it cannot in itself be recovered, but the value thereof may be paid to the plaintiff. Such recovery will not compensate the plaintiff in all cases. The objection is that in most cases the plaintiff has made the agreement for a particular piece of property, a certain home, and money value in lieu thereof will not be adequate compensation.

The Kentucky cases of parol contract to convey will allow the plaintiff to recover the "value" of what he would have received under the agreement, but in refusing to go further when the circumstances demand it, they are contra to the majority rule and the established principle of equity. If the contract is to be received for the purpose of ascertaining the "compensation" due the plaintiff thereunder, what logical reason can be advanced for refusing to consider it in the light of specific performance? The courts denying the doctrine may be holding the statute as a "shield" to keep out fraud, but under the equities involved it seems that such rule is too narrow to be just. The application of the Minnesota rule offers a better solution to the problem.

GEORGE O. ELDRED.

CENSORSHIP OF RADIO PROGRAMS AND FREEDOM OF SPEECH.—Beginning with the case of *KFKB Broadcasting Association v. Federal Radio Commission*, 47 Fed. (2d) 670 (1931), the eyes of contributors to legal periodicals have been focused with increasing sharpness upon those decisions of the courts which have attempted to resolve the inherent conflict between Section 11 and Section 29 of the Radio Act of 1927. (See 47 U. S. C. A., Sections 91 and 109, respectively.)

Section 11 provides: "If upon examination of any application for a station license or for the renewal or modification of a station license

the licensing authority shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said findings."

Section 29 provides: "Nothing in this chapter shall be understood or construed to give the licensing authority the power of censorship over radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by means of radio communications. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications."

Now it is apparent from the very fact that the licensing authority is given large discretion to grant or deny licenses, that the exercise of a most effective form of censorship is possible. By way of example, the case of *KFKB Broadcasting Association v. Federal Radio Commission*, *supra*, may be considered.

The policy of station KFKB was dictated and controlled by Dr. John R. Brinkley. Dr. Brinkley also operated and controlled the Brinkley-Jones Hospital Association and the Brinkley Pharmaceutical Association. All of these enterprises were operated in a common interest.

In its facts and grounds for decision the Federal Radio Commission held that the practice of a physician who prescribes treatment for a patient whom he has never seen, and who "bases his diagnosis upon what symptoms may be recited by the patient in a letter addressed to him, is inimical to the public interest"; that "the testimony in this case shows conclusively that the operation of station KFKB is conducted only in the personal interest of Dr. John R. Brinkley. While it is to be expected that a licensee of a radio broadcasting station will receive some remuneration for serving the public with radio programs, at the same time the interest of the listening public is paramount, and may not be subordinated to the interests of the station licensee."

In passing upon the decision of the commission, the court said that the finding of the commission that the station is conducted only in the personal interest of Dr. Brinkley is not against the evidence, and that there is substantial evidence in the finding of the commission that the "medical question box" as conducted by Dr. Brinkley "is inimical to the public health and safety, and for that reason is not in the public interest."

Surely, then, the court had sufficient reason for upholding the commission's finding. But not content with these grounds, the court took notice of the contention that the attitude of the commission amounted to a censorship of the station. The court, needlessly, it is believed, answered as follows:

"This contention is without merit. There has been no attempt on the part of the commission to subject any part of appellant's broadcasting matter to scrutiny prior to its release. In considering the question whether the public interest, convenience, or necessity will be served by a renewal of appellant's license, the commission has merely exercised its undoubted right to take notice of appellant's past conduct, which is not censorship."

Limited to the facts of the case, these words mean only that the censorship exercised by the commission was confined to advertising which was on its face misleading and harmful, and to the generally low character of the station's programs considered from the standpoint of public interest, convenience, or necessity. But while the denial of a renewal of an applicant's license on these grounds does constitute censorship, it is censorship such as Section 11 of the Radio Act of 1927, *supra*, specifically authorizes the commission to exercise. The court's denial of any exercise of censorship was generally perceived to be unsound.

Edward C. Caldwell, 1 Journal of Radio Law 470, wrote: "It is difficult to perceive on what grounds the court bases its statement, in the foregoing case, that appellant's station has not been censored. It is true, as the court says, that none of appellant's broadcasting, released in the past, was actually required to be approved before its release. But appellant's application was denied because of appellant's past conduct. The only reason that past conduct was a matter of any concern is because it was assumed that future conduct would be the same . . . This is not something resembling censorship, it is censorship in fact, the very essence of it. To say, under these circumstances, that because past releases had not in fact been subjected to prior scrutiny, therefore there was no censorship, is a misconception of the practical effect of the decision as well as of what constitutes censorship."

But despite the fact that writers in legal periodicals were quick to perceive that the practical effect of the court's decision meant a censorship of radio programs, there was little disposition to regard the decision with alarm. Quite the contrary.

In 66 United States Law Review 589, it was said: "This salutary decision confirms and supports some of the utterances heard at the international conference of radio experts in Washington last year (1931), at which Dr. Lee De Forest was quoted as saying: 'Radio advertising from the local station has become so uncontrolled that one must wonder at the patience of the listening public who listens to these at all.'"

And in 40 Yale Law Journal 967 at 973, it was said: "By making the most of the KFKB decision, however, the commission should be able to effect a long needed regulation of radio programs, a regulation which should be limited only by the magnitude of the task and by

the requirement that at all times such regulations be undiscriminating."

In brief, the decision was hailed as furnishing the radio commission a much needed weapon against "seers, gold brick promoters and quack doctors."

Now no one, it is submitted, other than those affected, could possibly object to this kind of censorship. The public interest, convenience, or necessity, were clearly served by such censorship. It should be emphasized, however, that the decision in the KFKB case, supra, is to be sustained, not on the grounds that no censorship was exercised, but because the censorship in that case was directed at practices which Section 11 of the radio act authorizes the commission to censor. Construed in this manner, the conflict between Sections 11 and 29 of the radio act melts away; it is perceived that the conflict is one of language, not of meaning.

But the chief danger in accepting the court's statement that station KFKB had not been censored lay in its threat to freedom of speech. Critics of the decision awakened immediately to this fact when the court handed down its decision in the case of *Trinity Methodist Church, South, v. Federal Radio Commission*, 62 Fed. (2d) 850 (1932).

In this case, application for a renewal of station KGEF's license was made by the church, lessee of the station. But although leased by the church, evidence showed that the station was in fact owned, and its operation dominated by, "Fighting Bob" Shuler, the church's pastor. The station was operated for a total of 23¼ hours each week. Of this period, Shuler claimed three hours. Apparently, this was three hours too much. The commission concluded, and was sustained in its findings by the court, that Shuler's unbridled attacks upon Catholicism, Judaism, judges and other public officials, and various independent organizations, showed that the station was not operated in the public interest. And answering the applicant's contention that the commission's decision violated the guaranty of freedom of speech as set forth in the First Amendment to the Constitution, the court said:

"If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use the facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the nation a theater for the display of individual passions and the collision of personal interests. This is neither censorship nor previous restraint, nor is it whittling away the rights guaranteed by the First Amendment, or an impairment of their free exercise. Appellant may continue to indulge

his strictures upon the characters of men in public office. He may just as freely as ever criticise religious practices of which he does not approve. He may even indulge in private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand of right, the continued use of an instrumentality of commerce for such purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the commission, may prescribe.”

Seldom has a court used weaker, more illogical, language, to sustain a decision. An everyday sermon by either a Protestant or Catholic minister might offend the religious susceptibilities of thousands; it is the business of opposing political parties to inspire political distrust in the one in power, and the radio was widely used for this purpose during the past year; often as not the price of civic harmony comes too high; the nation will, regardless of what anyone does, remain a theater for the display of individual passions and the collision of personal interests; the railroad, an instrumentality of commerce, is daily used for the purpose of carrying printed matter no whit worse than the words broadcast by Shuler, to all parts of the nation. As to the court's statement to the effect that freedom of speech has not been interfered with because other mediums of expression remain open, this is well answered in 81 Penn. Law Review 471, in the following language: “Nor is the guaranty (constitutional guaranty of freedom of speech) fulfilled by relegating the applicant to other media of publication, since, if it has any vitality whatever, an individual with a message should not be precluded from choosing a medium which will assure him of the largest possible audience. While the present state of the broadcasting art does not permit the operation of an indefinite number of stations, this seems an insufficient justification for holding that Congress may upon specious grounds restrain utterances which are perfectly legitimate when other media of publication are employed. The regulatory power of Congress should be confined to its proper constitutional ambit: punishment after the fact.”

The court's statement that the action of the commission was “neither censorship nor previous restraint, nor is it whittling away the rights guaranteed by the First Amendment, is criticized in 46 Harvard Law Review 987, as follows:

“Moreover, refusal of a license for the purpose of preventing the continued expression of sentiments disapproved by the commission is, in effect, a direct previous restraint upon their publication. Consequently, either radio communication must be found to be outside the protection of the First Amendment, or consideration of program content in the exercise of the licensing power must be justified on the ground of social necessity.”

That radio communication is outside the protection of the First Amendment is hardly conceivable. The United States Supreme Court

has held unconstitutional statutes attempting to impose prior restraints upon radical utterance, the display of symbols of opposition to organized government, and press attacks upon the integrity of municipal officials. *Stromberg v. Calif.*, 283 U. S. 359 (1931); *Near v. Minnesota*, 283 U. S. 697 (1931). It is hardly enough to urge that merely because radio broadcasting is in interstate commerce, it is therefore exempt from the constitutional prohibition for the protection of other media of publication. 81 Penn. Law Review 471. And it is generally recognized that the First Amendment was placed in the Constitution because it was felt that restrictions upon freedom of speech are not socially justified. 2 Cooley, Constitutional Limitations (8th ed.) 876, 959.

The decision of the court in the Shuler case, *supra*, is the more inexcusable when it is realized that the law already affords ample means of reaching and punishing those who publish improper matter, whether by press or radio, through the criminal libel laws, the conspiracy laws, the sedition acts, etc. And the radio act itself prescribes what punishment shall be given for the utterance of obscene, indecent, or profane language. (See 47 U. S. C. A. 113, which fixes the penalty for violation of the above mentioned prohibitions at a fine of not more than \$5,000, or imprisonment for not more than five years, or both such fine and imprisonment.)

That there was, moreover, little reason for anticipating such a decision by the commission and the courts, is shown by a statement issued by the commission in August, 1928. This statement gave one every reason to believe that the commission would make a proper distinction between those cases in which the issue of freedom of speech is involved and cases wherein the only issue is the character of the entertainment, or of the advertising matter, broadcast by the station. The statement follows:

"The commission is unable to see that the guaranty of freedom of speech has anything to do with entertainment programs as such. Since there are only a limited number of channels and since an excessive number of stations desire to broadcast over these channels, the commission believes it is entitled to consider the program service rendered by the various applicants, to compare them, and to favor those which render the best service . . . Entertainment such as music is not speech in the sense in which it is used in the First Amendment to the Federal Constitution.

"Nevertheless, on all matters that seem near the border line the commission will proceed cautiously, and where it feels that it may reasonably be contended that freedom of speech is involved, although the commission may not entirely agree with that contention, it will give the station the benefit of the doubt as has been done in the cases which have come before it."

It is greatly to be regretted that the commission so lightly aban-

done on the solid ground on which it was standing here. But more to be regretted is the stamp of judicial approval which the court placed on the commission's action. In a sense, the court must bear the brunt of the blame, for it was no doubt its definition of censorship in the Brinkley case which encouraged the commission to adopt the course taken by it in the Shuler case.

The writer does not wish to be understood as advocating that the commission must of necessity license those stations used almost exclusively for the spreading of propaganda on the ground that to do otherwise would be a denial of the right of freedom of speech. It is only asked that the commission protect the right of stations which serve as mediums for the expression of the various creeds, doctrines and beliefs, no matter how unpopular they may be, so long as the station is in general devoted to the service of the public. See 40 Yale Law Journal 971, 1 Journal of Radio Law 475-76. It must be remembered that station KGEF's license was not renewed because of the three hours which Shuler broadcast each week. In denying the station's renewal to a license on those grounds a governmental agency took unto itself the power to dictate what utterances the people shall hear. Newspapers serve the public by publishing news and advertisements, but a portion of the paper is reserved for editorial comment. A radio station serves the public by broadcasting entertainment and advertisements. Is it to be denied some portion of its time for editorial comment on the ground that public interest, convenience, or necessity, are not served thereby?

After all, if the radio ever becomes the social factor which it deserves to be, its use as a medium for the dissemination of ideas should at least equal its use as a medium for the broadcasting of entertainment. With the Columbia News Service, a subsidiary of the national broadcasting chain by that name, petitioning for admission to the House and Senate press galleries, it is readily seen that the radio is well on its way toward becoming a formidable competitor of the newspaper. News-Week for November 11, 1933, at page 26. This move is being contested by the representatives of newspapers on the ground that "official recognition of radio broadcasting as a medium of disseminating news would be an official sanction of the censorship of news." Editorial, The Lexington Herald, November 22, 1933.

Fortunately, it is not yet too late to save the right of freedom of speech to the radio. The Supreme Court of the United States has yet to rule on the issue raised in the Shuler case. A proper distinction between the Brinkley and Shuler decisions will protect the public in its right to have radio broadcasting regulated for its benefit, and at the same time will save to the public the right of freedom of speech.

Such a distinction would resolve the apparent conflict between Section 11 and Section 29 of the radio act by pointing out that Section 11 does, in point of fact, authorize the commission to censor stations,

but that Section 29 and the First Amendment to the Constitution limits this right where the issue of freedom of speech is involved.

Specifically, it would be noted in the Brinkley case that (1) advertising is not free speech; (2) that the denial of a license to operate because of the general character of the programs offered by a station has nothing to do with freedom of speech although it does, of course, necessarily involve censorship of such programs.

In the Shuler case it would be noted that (1) the commission did not purport to pass judgment upon the general character of the programs offered by the station, but confined itself exclusively to the three hours during which Shuler broadcast; (2) that comment upon religion, public officials, civic organizations and affairs, comes definitely under the heading of freedom of speech, and that the guaranty in Section 29 of the radio act and in the First Amendment to the Constitution would therefore apply.

BYRON PUMPHREY.

TAXATION: ARE COLLEGE SOCIAL FRATERNITIES EXEMPT FROM TAXATION UNDER SECTION 170 OF THE KENTUCKY CONSTITUTION?—Section 170 of the Kentucky Constitution provides that "there shall be exempt from taxation . . . institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education."

Our problem is to determine whether college social fraternities in Kentucky are exempt from taxation under the above constitutional provision.

For the past half century college fraternities [using the word "fraternity" in its generic sense which includes organizations composed of either or both sexes, *State v. Allen*, 189 Ind. 369, 127 N. E. 145 (1920)], have been playing an increasingly important part in the educational systems of the United States, and of Kentucky. These organizations play an active part in determining the policies of the schools of which they are a part; they are a part of our ever progressing training of men and women to become better adapted to fight life's battles.

Webster's Unabridged Dictionary defines "education" as the importation or acquisition of knowledge, skill or discipline of character. In the case of *German Gymnastic Ass'n of Louisville v. City of Louisville*, 117 Ky. 958, 80 S. W. 201 (1904), the court, holding that a physical culture school was an educational institution within the meaning of Section 170 of the Kentucky Constitution, cited with approval the case of *Ruohs v. Backer*, 6 Heisk (Tenn.) 395, 19 Am. Rep. 598 (1871), which held that in its broadest sense education comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual, or physical.

Who would deny that a college social fraternity falls within the broad definitions of education as given by the dictionary and by the