

LEGAL RIGHTS OF BROADCASTERS DISCUSSED BY JUDGE DAVIS

New Book by Hoover's Former Aide Contends Ether Belongs to No One—Controversial Phases of Radio Are Covered

WITH radio litigation likely to result from the administration of the new radio law even to the probability of the constitutionality of the act itself being tested, counsel will likely regard the new book of Judge Stephen B. Davis, "Law of Radio Communication," as a valuable precedent, inasmuch as it is believed to be the first study of its kind ever printed.

Judge Davis, during what have been the four most important years in the development of broadcasting, has served as solicitor of the Department of Commerce, and in that capacity has been Secretary Hoover's right hand man in the control of radio. An experienced jurist, having formerly been an Associate Justice in the Supreme Court of New Mexico, Judge Davis became tremendously interested in the legal phases of radio which from the beginning presented numerous problems.

"Starting as a scientific experiment, with unparalleled rapidity radio has gained a high place among the communication systems of the world, but it is still so young that rules for its conduct are yet largely undetermined," Judge Davis says, summing up the situation. "Excepting litigation over patent rights, few controversies have reached the courts. But the extent and intimacy of its activities, the complexity of its operations, the novelty of its characteristics have created new relationships and peculiar problems in the application of established principles, which will inevitably press for solution."

Was Hoover's Chief Aid.

Judge Davis represented Secretary Hoover in the Zenith case at Chicago, where WJAZ appropriated a Canadian wave length. The result of this litigation hastened by years, it is believed, the enactment of the 1927 radio law and the creation of the Federal Radio Commission.

Judge Davis in his new book considers at length most of the controversial phases of radio, such as Federal jurisdiction, State jurisdiction, conflicting rights in reception and transmission, property rights, the broadcasting of copyright matter, the control of broadcasting programs, libel and slander and international law.

It is the contention of Judge Davis that even though the ether had material existence so as to be susceptible to ownership, there would still be a flaw in the argument of those who assert title in either Federal or State Government.

"Certainly it does not belong to the United States, whose limited powers are defined and restricted by the Constitution," contends Judge Davis. "That document will be read in vain in search for any applicable provision. The power to regulate commerce obviously does not confer title to the medium by or through which that commerce is carried on. Sovereignty, police power, and regulatory control are wholly distinct and independent of ownership. The Federal Government exercises full jurisdiction over navigable waters; yet it does not own them, nor their beds, nor their banks. So likewise with the States. They may have sovereignty over everything within, below and above their areas, but not proprietorship."

Discussing the constitutional rights of station owners, Judge Davis declares: "The effect of the 1927 law in terminating existing licenses and requiring the obtaining of new ones is to deprive the station owner of his right to operate his apparatus, whatever that may be, unless he executes the required waiver and is then able to bring himself within the

rule of 'public convenience, interest and necessity.'

"It may be assumed that the requirement of a license, taken by itself, is a legitimate step in the regulation of commerce and therefore within the constitutional power of Congress. If the commission, however, should refuse to issue a license to the owner of apparatus constructed and operating prior to the passage of the law, the question of the constitutional rights of the owner may easily arise. The owner may contend either that he is deprived of his property without due process of law or that his property is taken for public use without just compensation, in either case in violation of the Fifth Amendment to the Federal Constitution."

With regard to the broadcasting of copyright matter, Judge Davis reaches this conclusion:

"Whatever may be argued as to the legal rights to take from the ether and appropriate to one's own unauthorized use matter the existence of which is due to another, few would contend that such an act is within accepted standards of fairness or good morals. It is but a new example of the appropriation of the result of another's skill or labor, the obtaining without effort or expense of that which required both in its creation. The situation is not novel in principle. While the decisions are not wholly in harmony as to the legal grounds for their determinations, they are in accord as to results. In all of them the courts dealt with new methods of invasion of underlying moral rights in an attempt to get something for nothing, and they had no trouble in determining the fundamental question of right and wrong between the parties."

Speaking of libel and slander, Judge Davis declares that radio communication in general and broadcasting in particular furnish a new implement for the ancient art of defamation. If improperly used, it is a wondrous weapon for character destruction.

"The one who utters the defamation before the microphone is, of course, directly liable for it," the Judge continues. "He may not escape by asserting that he spoke in the privacy of a studio and would not have been heard but for the act of the broadcaster who gave his utterance publicity. His purpose was to reach an audience, and he is held to the natural consequences of his acts. He is in the same position as the author of a libelous article who obtains its publication in a newspaper or magazine. He is the moving cause and is primarily liable."

Concluding his discussion of libel and slander, Judge Davis said: "It is apparent that no dogmatic conclusion can be reached on any phase of this subject. The very bases of liability are in doubt. No one can say with certainty whether radio defamation in many instances will be classed as libel or as slander, nor safely predict whether absolute liability will be imposed or only reasonable care required. With these fundamental principles in doubt, the entire situation is permeated with uncertainty."

It is now definitely announced that Judge S. B. Davis Jr., solicitor for the Department of Commerce, who is retiring to private practice, will serve as counsel for the joint committee of National Utility Associations with headquarters in New York. This group represents the electric light, power and street railway companies of the country. It is understood there may also be some work having to do with radio in Judge Davis's new undertaking.