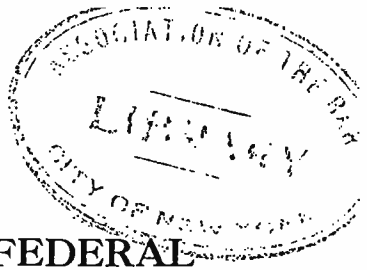

PROCEDURE RULES OF FEDERAL RADIO COMMISSION

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After some years of harassment, not the least of which was its uncertain legislative existence, the Federal Radio Commission on June 25, 1930, promulgated General Order No. 93, Practice and Procedure before the Commission, effective September 1, 1930, consisting of thirteen printed pages, scarcely one of which does not contain matter of doubtful legality. The present practice attempted under these rules is certain to produce considerable litigation, and largely, in my opinion, from the failure of the Commission to appreciate certain fundamentals inherent in our system of jurisprudence, whether administered by courts or commissions.

DUE PROCESS.

It is not here contended that General Order No. 93 might not be so administered, in the main, as to afford due process of law; nor to here question the authority or wisdom of the Commission in making rules of procedure. Some rules are necessary. The Commission is authorized by the Radio Act of 1927 to make necessary rules for the conduct of its work. But the law presupposes that rules so made shall be valid and be not contrary to the Constitution and law of the land.

The Commission may grant a station license, or a renewal or modification thereof, upon examination of the application papers submitted to it.

BUT

> "In the event the licensing authority (the Commission) upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe." (Part of first paragraph Sec. 11, Radio Act. 1927.)

Here we have the legislative authority for the making of procedural rules.

It is here pertinent to quote further from the Radio Act of 1927.

> "Except as otherwise provided in this Act, the Commission * * * shall
>
> "(k) Have authority to hold hearings, summon witnesses, administer oaths, * * *" (Revelant parts first sentence and of paragraph (k), Sec. 4.)
>
> "The Commission may appoint * * * examiners * * *" (Sec. 3.)

It will thus be observed that it is the "Commission" which may "hold hearings" and "administer oaths." The utmost stretch to which this authority might legitimately go is to confer such authority on the individual members of the Commission.

Congress undoubtedly had in mind the necessity of preserving to those who might be affected by the decisions of the Commission that fundamental right of "due process" preserved in the Fifth Amendment of the Constitution of the United States, a part of which reads:

> "Nor (shall any person) be deprived of life, liberty or property, without due process of law."
>
> "Due process of law must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be one that is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary manner prescribed by the law. It must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."
>
> *Burton v. Platter,* 53 Fed. 904.

Here are four "musts," count them. General Order 93 of the Commission as at present administered overlooks a number of them. This order attempts to interject into the procedure, "hearings" before "examiners," although the Radio Act provides only for "hearings" by the Commission.

> "Due process of law also means that the parties or officers authorized * * * shall keep within the authority conferred, and observe every regulation which the act makes."
>
> *Chi. Bur. & Quincy v. Chicago,* 166 U. S. 226.

> "The clause (due process) means, therefore, that there can be no proceedings against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. * * * an opportunity to be heard."
>
> *Hagar v. Reclamation Dist.,* 111 U. S., 701.

Hundreds of other cases, many perhaps of much stronger statement, could be cited.

While perhaps rather ephemeral, broadcasting licenses or other grants under the Radio Act are certainly property upon which millions of dollars have been spent and by and through the means of which much disturbance of the surrounding atmosphere occurs.

Now "hearing has a fundamental meaning in jurisprudence; an unbroken significance throughout juridical history, dating back certainly to the practice of English Chancery.

While the elaborate and extreme formality described in BOUVIER as being the procedure necessary to constitute a "hearing," is not now used, the necessity for a "hearing" by the deciding authority in order to constitute due process of law and afford a basis for a valid judgment is as much of a necessity under our system of jurisprudence as ever.

WHAT CONSTITUTES A HEARING?

Having briefly reviewed the necessity for a "hearing," it now becomes of interest to examine into what constitutes a "hearing."

Let us consider first what is not a hearing. We "hear" a speaker over the radio, but we hardly think that even a Martian barrister would for a moment suggest that such was a judicial "hearing" under even the most modern of systems of jurisprudence.

A hearing is not afforded, unless the party has an opportunity to be heard "upon matters of law."

> "The decisions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegations of fact and upon the matters of law; and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced ex parte and without opportunity of defense."
>
> *Underwood v. McVeigh,* 23 Gratt. 409.

To "hear" requires the exercise of one of the five senses. We do not "hear" when we read, nor do we "hear" when we "feel" disgust or chagrin.

> "The very essence of a hearing, however, is the right, not simply the privilege, 'to support one's contention or position by argument, however brief, and if need be by proof, however informal,' *before a tribunal authorized to act* and willing and ready to do so."
>
> *Denver v. State Invest. Co.* 33 L. R. A. (N. S.) 395, citing *Stuart v. Palmer,* 74 N. Y., 183, 30 Am. Rep. 289.

> "By a hearing is meant a chance to present such arguments and authority as the nature of the case may, in counsel's opinion, war-

rant; not merely the privilege of hearing a judgment pronounced which has already been formed by the court." (Commission)

Crucia v. Behrman, 147 La. 157, 84 Sou. Rep. 523.

It will be observed that it is "counsel's opinion" which must be considered, in reason of course, but nevertheless to be respected.

Certainly, all these rights may be waived or lost through neglect, or substituted methods may be accepted, but their existence continues to surround interested parties like the cloak of presumed innocence about one accused.

Hearing "imports oral argument if seasonably requested."

Niles v. Edwards, 95 Cal. 41, 44, 30 Pac. Rep. 134; *Schmidt v. Boyle,* 54 Neb. 387, 74 N. W. Rep. 964.

"The receiving of facts and arguments thereon for the purpose of deciding correctly."

Merritt v. Portchaster, 8 Hun. (N. Y.) 40, 45; *Lewisburg Bridge Co. v. Union, etc. Counties,* 232 Penna., 255, quoted with approval in *State v. Sechorn,* 223 S. W. Rep. 664, 670.

AUTHORITY TO ADMINISTER OATHS.

While General Order No. 93 nowhere specifically mentions that examiners may or can administer oaths, but only refers to their authority to "hold hearings," in practice, since October 1, 1930, these examiners have been presuming to swear witnesses, issue summons, and do other acts properly within the authority of the Commission.

It is a fundamental rule of law that oaths must be administered by some officer of the law, thereunto so authorized by law. Unless a proper and valid oath be administered, all statements or records so presented are neither under the sanctity, protection, nor responsibility of sworn testimony.

The authority to administer oaths is given by the Radio Act to the Commission and is not given to an Examiner or other employee of the Commission. Such authority may not be extended by the Commission to include its employees, regardless of title, statutory or otherwise.

See, *Herbert v. Roxana Petroleum Corp.* 12 Fed. (2d) 81.

That this rule has been regularly observed and recognized by Congress is shown by the specific authorization to "administer oaths" given to "examiners" by the laws authorizing the appointment of such employees as shown in the Interstate Commerce Commission Act and amendments, and in the Federal Trade Commission Act, but any such authority is nowhere found in the Radio Act. A pending bill which has passed both houses to amend the Radio Act confers authority upon examiners to administer oaths.

Nor is any authority found in the Radio Act for any but the Commission to "hold hearings"; and certainly none but the "Commission" may act upon the issues presented by a hearing upon an application for license under the Radio Act, or the revocation or suspension thereof. The law requires the "licensing authority" (the Commission) to afford such hearing.

General Order No. 93, as it has been and is being applied to hearings, required by law to be had by the Commission, is for an Examiner to preside at such "hearing," swear the witnesses, and at the conclusion of the taking of the testimony, declare the "hearing" ended, and later file his report, to which, under the Order, exceptions may be filed within fifteen days, and if an oral argument is desired same may be "requested" to be had before a quorum of the Commission; whereupon the Commission considers the report of the Examiner, and presumably the exceptions thereto, although the party making such exceptions and desiring to be heard has no way of knowing that such exceptions were ever read, and his request for argument before a quorum of the Commission not having been allowed, he is, by the present practice, by the Commission regarded as having had a hearing. I know of no requests for oral argument and hearing before a quorum of the Commission having been granted since the effective date of this General Order. Of course, if the report of the Examiner is overruled and the applicant sustained by the Commission where the report was adverse, the applicant would doubtless be willing to accept the decision as having afforded a hearing, just as he would have no complaint had his application been granted in the first place. But if the Commission on examination of the report of the Examiner feels that it might be called upon to approve such report, and a request has been made for oral argument and hearing before a quorum of the Commission, unless it grants this request and gives such hearing, there has been no lawful hearing afforded. This may be small comfort to those against whom an Examiner has made an adverse report; to realize that they are approaching a tribunal which presumptively has made up its mind that they have small chance of getting the relief sought.

It certainly cannot be said that a party has had a hearing, necessary to due process, when he has been called to appear, or appears, before a tribunal with power to act upon and decide the issues presented, and finds that he is required to present his evidence without argument before another, who is without authority to administer oaths, but who nevertheless hears those who, as witnesses, may address him, but hears no argument upon the issues presented by the citation and answer, and who thereupon in the

secrecy of his chambers prepares his views upon the matters believed by him to be presented, and who, thereupon lays such views before the authority which under the law must judge and determine, which body thereupon, after request to be heard before a quorum thereof, omits or refuses such hearing and argument, though by law required to "afford such applicant an opportunity to be heard," and which body from the sound-proof seclusion of its chambers announces its decision to a waiting world by means of a press release without ever having come in contact or listened to the applicant or his counsel.

The right to property, and the guaranty that it shall not be taken without due process of law, does not rest upon a basis so unsubstantial.

The clause in Sec. 2, Subtitle A. of General Order 93, reading:

"or by such examiner or other employee as it may designate, hold hearings," has no lawful place therein.

Section 3, of Subtitle B of this order is of doubtful validity, though it may be saved by Sec. 4 of the same title.

Many cases may arise where Sec. 9 of Subtitle B would be invalid. For instance, the party might drop dead pending his appeal, and many other circumstances might arise where this restriction would be wholly unjustified.

Section 12, Subtitle B, relating to witnesses and subpoenas, contains a clause clearly without lawful warrant, which clause reads:

"or by an examiner appointed by the commission."

Section 13, Subtitle B, relating to opening and closing of arguments, contains the following unwarranted clauses: "if any" and "or the person conducting the hearing."

The clause, reading: "or before any examiner appointed by the commission" found in Sec. 4, Subtitle D, should be stricken, as should the clause reading "or before an examiner" in paragraph (b) of this section, and the final clause of the same paragraph, reading "or it may consider and decide such matter without argument" should be stricken. In Sec. 8 of the same title, the words "or examiner" should be deleted.

Section 1 of Subtitle F contains a manifest error wherein it refers to section 16 of the Radio Act of 1927, which section of the Act was stricken and a new section 16 written by the Act of Congress of July 1, 1930.

In the interest of good administration and in the saving to the citizen of unnecessary litigation expense, at least, these indicated changes in procedure and practice should be promptly made.

February, 1931
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