

1959

# T. Collins Jackson v. Kenderick Harward et al : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

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Ben D. Browning; John H. Allen; Attorneys for Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

JUL 6 - 1959

T. COLLINS JACKSON,

*Plaintiff and Appellant,* Clerk, Supreme Court, Utah

—vs.—

KENDRICK HARWARD, BLAIN  
C. CURTIS, HEBER CHRISTIAN-  
SON, McKAY LARSON, TEX R.  
OLSEN, SPENCER OLIN,

*Defendants and Respondents.*

Case No. 9000

PETITION FOR A REHEARING AND  
BRIEF IN SUPPORT THEREOF

BEN D. BROWNING, and  
JOHN H. ALLEN

*Attorneys for Appellant,*

1020 Kearns Building  
Salt Lake City 1, Utah

## TABLE OF CONTENTS

	<i>Page</i>
PETITION FOR REHEARING .....	1
STATEMENT OF POINTS .....	2
 ARGUMENT	
POINT I. THE COURT ERRED IN FAILING TO CONSIDER APPELLANT'S FOURTH CAUSE OF ACTION, THAT OF INDUCING THE BREACH OF CONTRACT BY APPELLANT'S CUSTOMERS .....	2
POINT II. THE COURT ERRED IN HOLDING THAT APPELLANT HAD NO PROTECTABLE RIGHT THAT COULD RESULT IN INJUNC- TIVE RELIEF AND RESPONDENTS HAD NO DUTY TO REFRAIN FROM DOING THAT WHICH WAS NOT PROHIBITED BY ANY PROPER AUTHORITY .....	4
CONCLUSION .....	9

### CASES CITED

C. J. Community Services v. F.C.C., 246 F. 2d 660 .....	5, 8
C. Ed. Lewis Co. v. Dragos, 1 Utah 2d 238, 266 P. 2d 499.....	3

### STATUTES CITED

Sec. 11-2-2, U.C.A., 1953, as amended .....	5
47 U.S.C.A., Sec. 151 .....	5

### OTHER AUTHORITIES CITED

Harper on Torts, Section 227 .....	3
Restatement of Torts, Section 766 .....	3

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T. COLLINS JACKSON,  
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PETITION FOR A REHEARING AND  
BRIEF IN SUPPORT THEREOF

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Comes now the plaintiff and appellant in the above  
entitled action and respectfully petitions the court to  
grant a rehearing for the reasons and upon the ground  
that in its opinion heretofore written the court erred in  
the following particulars:

## POINT I

THE COURT ERRED IN FAILING TO CONSIDER APPELLANT'S FOURTH CAUSE OF ACTION, THAT OF INDUCING THE BREACH OF CONTRACT BY APPELLANT'S CUSTOMERS.

## POINT II

THE COURT ERRED IN HOLDING THAT APPELLANT HAD NO PROTECTABLE RIGHT THAT COULD RESULT IN INJUNCTIVE RELIEF AND RESPONDENTS HAD NO DUTY TO REFRAIN FROM DOING THAT WHICH WAS NOT PROHIBITED BY ANY PROPER AUTHORITY.

We, the undersigned attorneys for the plaintiff and appellant herein, certify that in our opinion there is merit to the foregoing claim and that the court committed errors in the particulars above specified.

BEN D. BROWNING, and  
JOHN H. ALLEN  
*Attorneys for Appellant,*  
1020 Kearns Building  
Salt Lake City 1, Utah

## POINT I

THE COURT ERRED IN FAILING TO CONSIDER APPELLANT'S FOURTH CAUSE OF ACTION, THAT OF INDUCING THE BREACH OF CONTRACT BY APPELLANT'S CUSTOMERS.

Appellant's fourth cause of action was founded on the very basic tort principal that one who intentionally or negligently induces another to break a valid contract is, unless his conduct is privileged, liable for damages

legally caused thereby (See Harper on Torts, Sec. 227). This basic tort is clearly recognized in American law, as indicated by the American Law Institute in Section 766 of the Restatement of Torts:

Except as stated in Section 698 (dealing with alienation of affections), one who without privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another, or

(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby. The rationale behind such a cause of action is fully explained in the comments following this section.

The nature of the cause of action as presented in the instant case has not been directly ruled upon by the Utah Supreme Court, but in *C. Ed. Lewis Co. v. Dragos*, 1 Utah 2d 238, 266 P.2d 499 (1954), the court recognized that such a cause of action does exist in this state, although the actions of the defendants did not constitute tortious interference with a possible contractual right in that case.

Assuming, for the purpose of arguing this point, that appellant did not have a property right in the television signal which he was distributing to his customers, he does have a cause of action against respondents if they did in fact induce appellant's customers to breach their contracts. Appellant should have an opportunity

to try this issue and introduce the available evidence as to the facts which give rise to this cause of action. The allegations of appellant's complaint have not been admitted or denied, and it is therefore apparent that there are definitely issues of fact outstanding as to this cause of action. By ignoring this fourth cause of action the court has denied appellant due process of law on this important issue.

## POINT II

THE COURT ERRED IN HOLDING THAT APPELLANT HAD NO PROTECTABLE RIGHT THAT COULD RESULT IN INJUNCTIVE RELIEF AND RESPONDENTS HAD NO DUTY TO REFRAIN FROM DOING THAT WHICH WAS NOT PROHIBITED BY ANY PROPER AUTHORITY.

The opinion of the court seems to reflect a misconception of the authority under which the booster stations operated by Respondents were conducted. There was present a violation of both Utah law and the Federal Communications Act of 1934, as amended. In addition, the appellant had the same right that all businessmen have to enter a legitimate field of business. The laws of the state of Utah cannot be argued to have authorized illegal conduct by respondents, or by an agency of the state or the employees of the county in violation of fed-

eral authority. The laws of Utah permitted only the operation of UHF translator station, 11-2-2, UCA, 1953, as amended, which, by definition and rule of the FCC, can operate only on the top 14 UHF channels (Channels 69 thru 83). These channels could not possibly interfere with the appellant's operation because they were specifically selected by the FCC so that destructive interference could not result (see Appendix A). In fact, the FCC has consistently refused to license stations of the type operated by the county and has expressed its intention to force them to stop operation unless the law is changed by Congress. (See Report No. 3349, filed as supplement to Respondent's reply brief.) Any future change of the federal law cannot cure the violation heretofore incurred. There can be no question but that the county operation was in violation of the laws of the state of Utah and of the Communications Act of 1934, as amended, which prohibits the operation of the radio or television transmitter which is not licensed by the Commission. The defendants had no license and claimed none. Again, there can be no question but that the FCC has complete control over the interstate channels of communication (see Section 1, 47 U.S.C.A., Sec. 151), and that it has the jurisdiction to prohibit unlicensed operation. (*See C J Community Services v. F.C.C.*, 246 F. 2d 660.) In view of the foregoing case it cannot be argued that Respond-



ents' conduct, even if intrastate in nature, was and is not subject to FCC regulation. One of the facts assumed in that decision was that the booster station there involved "does not transmit detectable energy or communications beyond the borders of that State." That decision makes clear that jurisdiction for licensing purposes and rules of operation of such a booster, even if operation is intrastate, is with the Federal Communications Commission. The Utah Statute provided *only* for use of translators authorized by law. There are no boosters authorized by law; only translators are authorized by law.

Even if the Utah statute sought to authorize VHF booster operation of the type employed by the respondent, it would be void as being in conflict with the commerce clause of the Federal constitution.

Plaintiff's business here is as legal as the business of selling roof-top antennas. He is regulated by the FCC, which prohibits him from radiating signals from his system into the air which would interfere with direct broadcast reception. (See Part 15 of the Communications Rules and Regulations pertaining to incidental radiation devices filed as Appendix B.) It seems incredible to suggest that Appellant may not be protected in any lawful business conducted in accordance with both the state

and federal statutory schemes where rules and regulations for the conduct of all parties are prescribed.

It is equally incredible to suggest that subscribers of the master antenna service will not likewise be entitled to interference free reception, particularly from illegal stations. The right of appellant to do business is founded on the right of the people to receive television programs broadcast over the public spectrum under the authority of the federal Congress as set forth in Section 30 of the Communications Act of 1934, as amended.

When this Court in its decision concluded, "Preliminarily, it may be pointed out that the state statute authorizes no clash with any federal legislation having to do with interstate airwave activity. The pleadings and answers to interrogatories reflect no such interference by defendants or by plaintiff, both appearing to have operated intrastate. Even otherwise, arguendo, there is absent anything to demonstrate 1) a "booster" operation, or a means of relaying the impulses that was inimicable to Utah legislation or 2) submissive to federal control," it apparently overlooked the fact that paragraph 5 of Ap-

pellant's Complaint specified the violation of Federal authority; paragraph 3 set forth allegations of state authority authorizing translators and paragraph 4 and 5 alleged operation of Boosters. The plain import is that their operation is illegal. Under these pleadings proof would be adduced and the law applied thereto to supply just precisely what the court says is lacking. Also incredible to us is the fact that this matter under the existing state of the law can be disposed of by Summary Judgment. Perhaps a Motion to Dismiss for Failure to State a Cause of Action, or a Judgment on the Merits would lie, but our contention on this point is that Respondent's operation of their broadcaster is illegal for want of a license under Federal law; illegal for failure to comply with Utah law not being a translator, or otherwise authorized by law; and physically destroys Appellants means of doing business. If the court had before it the highly specialized physical facts of this matter it would then be able to perceive very readily the reason for the Utah legislation and precisely why the booster operation is inimical thereto. The statutes cited in paragraph 5 of the Complaint, and the *C J Community Service* case, cited *supra*, make it clear that the booster operation is submissive to federal control.

CONCLUSION

For the foregoing reasons we petition this Court to rehear this case and thereafter render its decision in accordance with the law extant.

Respectfully submitted,

BEN D. BROWNING, and  
JOHN H. ALLEN  
*Attorneys for Appellant,*  
1020 Kearns Building  
Salt Lake City 1, Utah

## Appendix A

## TITLE 47 — TELECOMMUNICATION

Chapter I — *Federal Communications Commission*  
(Docket No. 11611; FCC 56-488)  
(Rules Amdt. 4-4)

Part 4 — *Experimental, Auxiliary, and Special Broad-  
cast Services*  
*Miscellaneous Amendments*

. . . 3. Translators would employ relatively inexpensive, low-powered equipment designed to receive the signals of existing television stations and convert them for retransmission on one of the upper 14 UHF channels—Channels 70-83. It is possible, by confining translators to this less congested portion of the television band, to relax generally the operating requirements for translators and to obtain maximum flexibility in the assignment of channels since the required number of protective spacings from existing stations is reduced substantially. With this in mind, the proposed rules reduce the translator operating requirements of the barest minimum consistent with dependable service and protection of other services.

. . . 9. We believe the above proposals that translators be authorized on VHF channels and all UHF channels

are unsound. They overlook the fact that only by confining translators to the less congested top 14 UHF channels can we find a sufficient number of channels meeting the required protective spacings and generally relax operating and licensing requirements to make the authorization of translators possible. Also, VHF translators would require extensive engineering measurements to determine interference with existing stations and the use of such channels would be highly inefficient when considered in terms of the overall frequency allocation requirements. Moreover, we are convinced that Channels 70-83 are completely adequate to meet the needs of the translator service. With respect to the contentions that suitable equipment for operation on Channels 70-83 is lacking, Adler Electronics has represented that equipment is now ready for type testing. We are confident the television industry can furnish low cost equipment to provide satisfactory translator service. While UHF equipment at this stage in its development may be somewhat more expensive than comparable VHF equipment, and UHF translators will necessitate the purchase of UHF receivers or conversion of outstanding sets, these disadvantages are more than offset by the fact that only by confining translators to this band can the operating requirements be sufficiently relaxed to make translator operation economically feasible in small communities.

(47 CFR Part 4)

(Docket No. 11331; FCC 57-700)

*Experimental and Auxiliary Broadcast Stations  
Operating of co-channel amplifying transmitters in con-  
junction with main transmitter.*

. . . 8. In the course of the translator rule making proceeding in Docket No. 11611 we considered proposals for translators in the VHF as well as UHF. We concluded, however, for reasons detailed in our Report and Order, that these proposals were unsound. We noted that proposals for VHF translators overlook the fact that only by confining translators to the top 14 UHF channels can a sufficient number of channels be provided to meet the required protective spacings and to allow the operating requirements to be reduced sufficiently to make the operation of such stations practicable. Our decision points out that VHF translators would require extensive engineering measurements to determine interference with existing stations and that employing VHF channels for this purpose would be highly inefficient.

9. Prior to our issuance of the Notice in the subject proceeding proposing the authorization of UHF boosters, we considered the possibility of proposing the use of VHF boosters as well. We are unable to conclude, however, that VHF boosters would be feasible; and our

proposal was confined to UHF. Nevertheless, many parties have filed comments in this Docket urging the authorization of VHF boosters. But the bulk of these comments are not supported by engineering data depicting the technical characteristics of the apparatus to be used, nor do they contain suggested performance standards. While some of the comments suggest that VHF boosters should be permitted to operate with "approved equipment" they fail to submit a basis for such "approval." Many parties urge merely that the Commission license the unauthorized boosters now in operation.

10. The Commission staff has investigated a number of unauthorized VHF booster installations. Many of these were found to consist of apparatus designed for use in conjunction with community antenna systems, where the amplified signals were transmitted through carefully shielded cable to individual receivers. No particular attention was given, in the design of the apparatus, to such important matters as limiting the overall band width to insure that only the desired channel is transmitted or to the maintenance of linearity in order to minimize the generation of intermodulation products. No automatic circuits were incorporated to render the apparatus inoperative in the event it fails to function properly, nor was any provision made to turn the apparatus off when not in use. In many cases the apparatus is merely connected to a radiating antenna



and left unattended. The only form of malfunctioning which would be detected under these arrangements would be one which disrupted reception of the desired signal. Transmission outside the band interfering with other vital services, would not be detected. Nor would interference to other television stations be detected.

11. For these important reasons we are compelled to reject the proposals which urge that we authorize the type of operation now being conducted by the unauthorized VHF boosters. Nor would applying the same types of restrictions to the operation of VHF boosters as have been applied to the operation of UHF translators offer a solution. Since translators operate in the upper 14 UHF channels where the spectrum is not congested, it has been possible to reduce the technical and supervisory requirements to the barest minimum. However, it would not be possible, as a practical matter to relax the requirements for the operation of VHF boosters to the same extent since they would operate in the very congested VHF portion of the spectrum. The VHF channels allocated for the television broadcast service are not in a continuous band and are interspersed with frequencies allocated for other important use, including services devoted to the protection of life and property. It would be essential, therefore, that boosters operating in the crowded VHF spectrum have more refined equipment and greater technical supervision when in operation. To operate VHF boosters without such safeguards

would run the risk of causing harmful interference to other important radio services. On the other hand, applying the same types of restrictions and safeguards to the operation of VHF boosters as those that are applied to translators, would make the operation of VHF boosters impracticable. In view of these serious shortcomings to the use of VHF boosters, the proposals for their authorization must be rejected. However, it should be emphasized that the translator service has been established to provide a low-cost means for bringing television service to small communities and outlying areas beyond the reach of existing stations. We see no necessity for running the risk of causing harmful interference to other radio services by the operation of VHF boosters when translators provide an excellent means for doing the job of providing service.

## APPENDIX B

### *47 C.F.R. 843, Subpart D. Community Antenna Television Systems*

15.164 Responsibility for receiver generated interference. Interference originating in a radio receiver shall be the responsibility of the receiver operator in accordance with the provisions of Subpart C of this part: Provided, however, That the operator of the community antenna television system to which the receiver is con-

nected shall be responsible for the suppression of receiver generated interference that is distributed by the system when this interference is conducted into the system at the receiver.