COMMENT ON RECENT DECISIONS

ADMINISTRATIVE LAW—FEDERAL COMMUNICATIONS COMMISSION—APPEAL BY "PERSON AGGRIEVED"—ECONOMIC INJURY—[United States].—The Telegraph Herald applied to the Federal Communications Commission for a permit to construct a broadcasting station in Dubuque, Iowa. The Sanders Brothers Radio Station, located near Dubuque, intervened to oppose issuance of the permit, contending that it would be financially injured by the proposed new station.[1] The Commission granted the construction permit, but was reversed by the Court of Appeals for the District of Columbia on the ground that the Commission had failed to consider the alleged economic injury to the Sanders Brothers Station.[2] *Held,* that the Commission need not consider the possibility of economic injury to existing stations before issuing a permit for the construction of a new radio station, so long as the injury alleged would not affect the "public interest, convenience, or necessity"; but that an intervenor alleging economic injury may appeal from the Commission's order as a "person aggrieved." *Federal Communications Comm. v. Sanders Bros. Radio Station.*[3]

The Federal Communications Act provides for appeal by applicants refused licenses to build or operate radio stations, by any other person aggrieved or whose interests are adversely affected by any decision of the Commission in granting or refusing such licenses, and by any radio operator whose license has been suspended by the Commission.[4] The instant case is the first to determine that the term "person aggrieved" comprehends one who may be economically injured by the issuance of a license. *Dicta* in prior cases, however, are in accord.[5]

The Commission contended that absence of the respondent's right to have the Commission consider the issue of economic injury *per se,* implies absence of any right of appeal as a person economically aggrieved. In answer, the Court reasoned that this view would deprive the provision for appeal by a "person aggrieved" of any substantial effect; that this section of the Act must mean something; and that, therefore, Congress may have intended that persons economically injured should be allowed to appeal because of the public interest in securing licensing orders free from "errors of law."[6] The Court did not consider expressly the Commission's contention that the provision was purely remedial—that Congress intended merely to

1. Intervention was permitted under the rules of procedure of the Commission. Code of Fed. Regs. (1939) tit. 47, sec. 1.151.

2. Sanders Bros. Radio Station v. Federal Communications Comm. (1939) 106 F. (2d) 321.

3. (1940) 309 U. S. 470.

4. (1934) 48 Stat. 1093, c. 652, sec. 402 (b), 47 U. S. C. A. (Supp. 1939) sec. 402 (b) (2).

5. See: Great Western Broadcasting Ass'n v. Federal Communications Comm. (1937) 94 F. (2d) 244; Pulitzer Publ. Co. v. Federal Communications Comm. (1937) 94 F. (2d) 249; Pittsburgh Radio Supply House v. Federal Communications Comm. (1938) 98 F. (2d) 303.

6. Sanders Bros. Radio Station v. Federal Communications Comm. (1940) 309 U. S. 470, 477. The Court also said there: "We hold, therefore, that

provide for those whose legal interests had been affected a more expeditious method for obtaining judicial review of the Commission's exercise of discretion than the bringing of a separate equitable action in a court of competent jurisdiction.[7] Had the Court adopted this view, the provision would not have been "deprived of any substantial effect." However, there is little basis for the Commission's contention.[8]

The federal courts do not have the power to render advisory opinions; their jurisdiction is confined to justiciable disputes, *i. e.*, disputes involving legal interests.[9] While it is true that there is no limitation on what the courts may decide is an interest sufficient to make a case or controversy, the instant case marks an extension of previous doctrine with regard to justiciable interest in respect of property. Mere financial injury does not confer a standing in court; if there has been no violation of a "legal right," there is simply *damnum absque injuria.*[10] If, on the other hand, financial injury results from the violation of a property interest protected by law, there is a justiciable dispute.[11] Yet, after deciding in the first part of its opinion that the Federal Communications Act conferred upon respondent no property right, the Court went on to allow the appeal. It is also note-worthy that the very case[12] cited by the Supreme Court as prece-

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the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission." *Quaere,* whether "any relevant question of law" includes constitutional, statutory, and procedural questions raised by the conduct of the Commission affecting only the rights of persons other than an appellant under sec. 402 (b) (2).

7. The Commission cited the following cases in support of its contention: United States v. Merchants & Manufacturers Traffic Ass'n (1916) 242 U. S. 178; Edward Hines Trustees v. United States (1923) 263 U. S. 143; Sprunt & Son v. United States (1930) 281 U. S. 249. These cases involved suits to enjoin orders of the *Interstate Commerce Commission,* and were brought under the authority of the Act of June 18, 1910, 36 Stat. 539, c. 309, 28 U. S. C. A. (1927) sec. 41(28), as amended by the Urgent Deficiencies Act (1913) 38 Stat. 208, c. 32, 28 U. S. C. A. (1927) sec. 41 (28).

8. Provisions for direct judicial review of administrative orders are as common as provisions for equitable actions to set aside such orders. See McAllister, Statutory Roads to Review of Federal Administrative Orders (1940) 28 Calif. L. Rev. 129.

9. Muskrat v. United States (1910) 219 U. S. 346. See Coleman v. Miller (1938) 307 U. S. 433, 441: "The principle that the applicant must show a legal interest in the controversy has been maintained."

10. " 'Want of right and want of remedy are justly said to be reciprocal. * * * where, although there is damage, there is no violation of a right no action can be maintained.' " Alabama Power Co. v. Ickes (1937) 302 U. S. 464, 479. Railroad Co. v. Ellerman (1881) 105 U. S. 166; Tennessee Electric Power Co. v. Tennessee Valley Authority (1938) 306 U. S. 118. See Coleman v. Miller (1939) 307 U. S. 433.

11. Frost v. Corporation Comm. (1928) 278 U. S. 515.

12. Interstate Commerce Comm. v. Oregon-Washington R. R. (1932) 288 U. S. 14. This case held that, in a suit to set aside an order of the Interstate Commerce Commission, commissions of interested states are entitled as "aggrieved parties" (under the Urgent Deficiencies Act) to appeal to the Supreme Court, even though the United States will not join in the appeal.

dent for allowing the appeal in the instant case was, in a later case,[13] used to illustrate the proposition that the Court recognizes as a legal interest "the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties."[14] Yet, in the instant case, respondent was not an official charged with the enforcement of any law; it was merely a private person who might suffer financial injury.

The real basis for the Court's holding, and the real significance of this extension of the doctrine of legal interest, is probably to be found in that portion of the original opinion deleted by the Court when it denied the Commission a rehearing:[15] "In this view, while the injury to such person would not be the subject of redress, *the person might be the instrument, upon an appeal, of redressing an injury to the public service* which would otherwise remain without remedy."[16] This novel basis for allowing an appeal from an administrative agency when the term "person aggrieved" is used in the governing statute may prove to be of great importance. Other statutes contain the term and future legislation may incorporate it.[17]

T. B.

AGENCY—SCOPE OF EMPLOYMENT—LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF AGENT COMMANDEERED BY POLICE—[District of Columbia].—The driver of defendant's truck was commandeered by a policeman to chase a traffic violator, and, while driving under the officer's direction, negligently injured plaintiff. *Held*, one judge dissenting, that the principal was not liable for its agent's negligence, since the agent was acting outside the scope of his employment. *Balinovic v. Evening Star Newspaper Co.*[1]

The case is interesting as an expression of two different philosophies, both somewhat obscured by the legal verbiage "scope of employment." This term stands for a legal concept which is stretched, on occasion, to cover situations in which the court, for reasons of policy, feels that the principal should bear the loss.[2] Thus, the principal has been held liable in numerous

13. Coleman v. Miller (1938) 307 U. S. 433.
14. Id. at 442.
15. See 8 U. S. L. Week (1940) 668 (rehearing denied and opinion amended).
16. Federal Communications Comm. v. Sanders Bros. Radio Station (1940) 60 S. Ct. 693, 698 (italics supplied).
17. E. g.: Bituminous Coal Act (1937) 50 Stat. 85, c. 127, sec. 6 (b), 15 U. S. C. A. (1939) sec. 836 (b); Fair Labor Standards Act of 1938, 52 Stat. 1065, sec. 10 (a), 29 U. S. C. A. (Supp. 1939) sec. 210.

1. (App. D. C. 1940) 113 F. (2d) 505.
2. See Gleason v. Seaboard Air Line Railway Co. (1929) 278 U. S. 349, 356, where the court stated: "But few doctrines of the law are more firmly established or more in harmony with notions of social policy than that of the liability of the principal without fault of his own." In Robards v. Bannon Sewer Pipe Co. (1908) 130 Ky. 380, 387, 113 S. W. 429, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394, the court said that the law will not "undertake to make any nice distinctions, fixing with precision the line that separates the act of the servant from the act of the individual. When