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Wire-Tapping--America's Notorious Three-Party Line

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NOTES

Wire-tapping—America's Notorious Three-party Line

> This is our hair-splitting machine . . . Some of us are able to split the splinter of a split hair again into 999,999 parts. The champion receives as a special prize a wreath fashioned out of the hairs he has split.[1]

INSTEAD OF a satire on legal conceptualism, Von Jhering might well have been writing a suitable prologue to the present struggle in the federal courts concerning the admissibility of evidence obtained as a result of wire-tapping.[2] In this struggle which has spanned a quarter of a century, the central figure is section 605 of the Communications Act of 1934,[3] and its interpretation.

1. Von Jhering, *In the Heaven of Legal Concepts*, in COHEN & COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 678, 682 (1953).

2. On December 9, 1957, two wire-tapping decisions were made by the Supreme Court: Benanti v. United States, 355 U.S. 96, and Rathbun v. United States, 355 U.S. 107. The former was a unanimous decision, the latter contained the dissent of two Justices, in which many of the distinctions in the interpretation of the terms of § 605 are pointed out.

3. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).

HISTORICAL NOTE

As an evidentiary problem, the admissibility of wire-tap evidence in the federal courts is an outgrowth of the *Weeks*[4] case, in which the Supreme Court formulated the present federal exclusionary rule, making evidence illegally obtained by federal agents inadmissible in the federal courts. Specifically, it was held that evidence obtained in violation of the prohibition against unreasonable search and seizure of the fourth amendment could not be introduced.

The wire-tapping controversy made its debut in the federal courts in 1928, in *Olmstead v. United States*,[5] although five years earlier, in the court of appeals, such evidence was admitted without question.[6] In the *Olmstead* case, it was decided that wire-tapping did not constitute a search or seizure, and was therefore not within the purview of the fourth amendment. Over the vigorous dissents of Justices Holmes and Brandeis,[7] it was concluded that wire-tap evidence was admissible in the federal courts.

The law remained clear for the next six years,[8] until Congress enacted Section 605 of the Communications Act of 1934:[9]

> . . . No person not being authorized by the sender shall intercept a communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . .

The obvious intendment of Congress was to alleviate the problem created by the decision in the *Olmstead* case. It was an attempt to legislate secrecy into the field of telephone communications. Unfortunately, the language of the present section was lifted from the Radio Act of 1927 — language which is applicable to radio communications, but was never intended to be applied to telephones.[10]

4. Weeks v. United States, 232 U.S. 383 (1914).

5. 277 U.S. 438 (1928).

6. Wallace v. United States, 291 Fed. 972 (6th Cir. 1923).

7. Justice Holmes characterized wire-tapping by government agents a "dirty business." 277 U.S. 438, 470 (1928). Justice Brandeis looked upon it as "a greater instrument of tyranny and oppression than writs of assistance and general warrants." 277 U.S. 438, 476 (1928).

8. Wire-tap evidence was held admissible in Kerns v. United States, 50 F.2d 602 (6th Cir. 1931); Morton v. United States 60 F.2d 696 (7th Cir. 1932); Foley v. United States, 64 F.2d 1 (5th Cir. 1933), *cert. denied*, 289 U.S. 762 (1933). And this was true even though the wire-tap was performed in violation of state laws prohibiting such conduct. Morton v. United States, *supra.*; Olmstead v. United States, 277 U.S. 438 (1928). To tie up any loose ends, it was decided in the Foley case, *supra.*, that a search warrant issued on the basis of wire-tap evidence was valid.

9. 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).

10. Sablowsky v. United States, 101 F.2d 183, 190 (2d Cir. 1938).

In this historical context, Section 605 became the springboard from which the courts immediately plunged into the race for Von Jhering's "wreath of hair."

THE RACE IS ON

Though Section 605 is worded with comparative simplicity, the courts appear to be groping in the dark in an effort to define its terms and interpret them suitably. Several terms of the section have attained unusual notoriety because of their propensity to induce "hair-splitting."

Intercept

Paramount among these terms is "intercept," which has led to endless interpretation, re-interpretation and discord. In the leading case on this point, "interception" was defined as breaking-in *between* the sender and the recipient; to record a conversation *at the recipient's telephone* constituted a recording at the *end* of the line, and not an "interception."[11] However, in a recent case,[12] the recipient recorded the conversation, but he made the fatal mistake of attaching the device to the bell box of the telephone, a point "between the lips of the sender and the ear of the recipient."[13] The court, having determined that Section 605 prohibits an interception *even by the recipient,* held that this conduct constituted an "interception," and the evidence was ruled out as inadmissible.

However, there has been some consistency in the decisions, if only in their naked words. The courts have repeatedly concluded that the mandate of Section 605 applies to a conversation *only* while it is being transmitted over the wire.[14] The disagreement is in the determination as to when the message enters or leaves the "protected" area. Where a detectaphone was attached to a wall in another room and used to overhear telephone conversations carried on in the "wired" room, there was no "interception." The court reasoned that the device had "caught" the words *before* they entered the wire.[15] And where a federal agent listened to the conversation of an extortionist on an extension phone, this was a hearing *after* the words had left the wire, and were no longer protected.[16]

In conflict with the foregoing reasoning, the use of a microphone

11. United States v. Yee Ping Jong, 26 F. Supp. 69 (W.D. Pa. 1939).

12. United States v. Stephenson, 121 F. Supp. 274 (D.C. 1954).

13. United States v. Yee Ping Jong, 26 F. Supp. 69 (W.D. Pa. 1939); United States v. Palakoff, 112 F.2d 888 (2d Cir. 1940).

14. Rathbun v. United States, 355 U.S. 107 (1957); Goldman v. United States, 316 U.S. 129 (1942).

15. Goldman v. United States, 316 U.S. 129 (1942).

16. Rathbun v. United States, 355 U.S. 107 (1957).

and a recorder at the *recipient's* telephone could not be distinguished in principle from a "tap." The court labelled this conduct a "prohibited interception," and the evidence so obtained was inadmissible.[17]

The courts have been faced with many varied situations in which it was necessary to determine whether an "interception" had taken place. For example, a third person who listened at the telephone *held by the recipient* did not "intercept" the message within the meaning of Section 605.[18] Further, a United States Marshal who picked up a telephone and impersonated the party he had just arrested, had not "intercepted" the message.[19]

Conflicting decisions in this area have been rationalized by picayune factual distinctions. In *Goldstein v. United States*,[20] the defendant could not prevent the introduction of wire-tap evidence since he was not a party to the tapped conversation, and a witness who was induced to testify by the government playing a record of the intercepted conversation to him, was permitted to testify. A strikingly similar situation arose in *Weiss v. United States*,[21] but in that case the defendant was successful in excluding the testimony of a witness likewise induced to testify. The only difference in these cases is that in the latter the defendant was a party to the intercepted conversation, while in the former he was not; yet in principle the cases are not distinguishable.

Perhaps the greatest area of contrariety in the interpretation of "intercept" is encountered in the application of Section 605 to the use of extension telephones. In *United States v. Palakoff*,[22] the use of an extension telephone constituted an "interception" within the meaning of the statute. The same court of appeals, seven years later, reiterated its views on this subject, a point on which Justice Chase vigorously dissented.[23] The lower courts have split in the determination of whether listening on an extension is prohibited by Section 605.[24] Recently, in *Rathbun v.*

17. United States v. Hill, 149 F. Supp. 83 (S.D. N.Y. 1957).

18. Rayson v. United States, 238 F.2d 160 (9th Cir. 1956).

19. United States v. Lewis, 87 F. Supp. 970 (D.C. 1950).

20. 316 U.S. 114 (1941).

21. 308 U.S. 321 (1939).

22. 112 F.2d 888 (2d Cir. 1940).

23. Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

24. Holding that listening in on an extension with the consent of one of the parties does not constitute an interception: United States v. White, 228 F.2d 832 (7th Cir. 1956); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955); United States v. Pierce, 124 F. Supp. 264 (N.D. Ohio 1954); United States v. Sullivan, 116 F. Supp. 480 (D.C. 1953). Holding the contrary view, that to listen in on an extension does constitute an interception within the meaning of the statute: Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947); United States v. Fallon, 112 F.2d 894 (2d Cir. 1940), *cert. denied*, 311 U.S. 653 (1940); United States v. Palakoff, 112

United States,[25] the Supreme Court was faced with this problem, and concluded that the evidence was admissible, two Justices dissenting. It is interesting to note, however, that the lower court[26] reached the zenith of "hair-splitting" when it announced that whether the use of an extension telephone would or would not constitute an "interception" is determined by the location of the two receivers in relation to the lead-in wire to the house. In other words, if the wire should attach to the second floor of a house having phones on the first and second floors, evidence obtained by listening on the second floor extension would be inadmissible for that is *between* the sender and the recipient, but listening on the first would be condoned.[27]

It appears that the courts are merely verbalizing to reach their desired results; if a court is particularly inclined to exclude such evidence, it is not a difficult task to interpret Section 605 so as to attain this result. At present, there are no bright prospects for harmony among the courts in their interpretation of this "weasel" word.

Sender

Another jumping-off point in the courts' struggle with Section 605 has been the word "sender." In the *Palakoff*[28] case, Justice Learned Hand contended that *both* parties were alternately senders, and as such, the consent of *both* is necessary to satisfy the conditions of Section 605; *one* party cannot forfeit the privilege of the other. This view has apparently survived the long years since that decision, for in a recent case,[29] the court accepted the notion that both parties to a conversation are senders, and that Section 605 requires the consent of both.

Though this view may be logical in light of the words of the statute, it has not generally prevailed. The courts have been satisfied when *one* party has consented to the overhearing of the conversation, and the statute does not expressly require the consent of *both* senders.[30] While

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F.2d 888 (2d Cir. 1940). It is interesting to note that the three cases here cited were decisions of the same court, and in which the views of Learned Hand played an important role.

25. 355 U.S. 107 (1957). The Court's opinion is apparently greatly influenced by the fact that there has been an increase of 7,000,000 extension telephones since 1934.

26. 236 F.2d 514 (10th Cir. 1956).

27. According to R. K. Huston of the Cleveland office of the Ohio Bell Telephone Company, this opinion reflects a fundamental lack of understanding of the operation of a telephone. (Personal interview March, 1958).

28. United States v. Palakoff, 112 F.2d 888 (2d Cir. 1940).

29. United States v. Hill, 149 F. Supp. 83 (S.D. N.Y. 1957).

30. Rathbun v. United States, 355 U.S. 107 (1957); United States v. White, 228 F.2d 832 (7th Cir. 1956); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955); United States v. Sullivan, 116 F. Supp. 480 (D.C. 1953).

the courts have construed and reconstrued this word, a rather strange interpretation was made when wire-tap evidence was offered in an attempt to impeach a government witness. The court refused to accept the wire-tap evidence because the *witness* did not consent to the interception, but made no mention of the other conversant's consent, nor any mention as to whether the government witness was the "sender." Even more interesting is the fact that it was not an accused, but only a witness who complained of its introduction.[31]

Perhaps the strangest twist of all occurred in the *Reitmeister* case. After concluding that the conduct involved constituted an "interception," the court went on to say that for one party to exclaim, in a fit of anger, "The Hell, use the record,"[32] constituted authorization within the meaning of the statute.

These are a few of the most troublesome aspects of the language which appears in the statute. There appears to be an attempt to justify a given result, often predetermined, by attaching "labels" and engaging in fictitious classifications to attain this end.

WHAT EVIDENCE IS INADMISSIBLE

Assuming that a "prohibited interception" has occurred, evidence obtained in this manner would be inadmissible if the conversation were interstate *or* intrastate, although the words of the statute are limited to *interstate and foreign* messages. This result is based on the rationale that the *means* of communication are interstate even though the particular message may not be.[33] From this reasoning it would appear that a "private" telephone system, such as is found in a factory, would not fall under the sheltering wings of Section 605. But a contrary result would seem to follow if the "private" system were *capable* of being used to place *outside* calls, even though the particular calls were not so placed.

The major problems, however, are not in the admissibility of interstate and intrastate messages, but rather in the determination of what evidence is so tainted with illegality that the mandate of the statute prescribes its exclusion.

In the leading case on this point, the first *Nardone*[34] case, it was held that the intercepted communication itself is clearly inadmissible. In the second *Nardone* case, leads obtained as a result of wire-tapping were excluded because

31. James v. United States, 191 F.2d 472 (D.C. Cir. 1951).

32. Reitmeister v. Reitmeister, 162 F.2d 691, 693 (2d Cir. 1947).

33. Weiss v. United States, 308 U.S. 321 (1939); Massengale v. United States, 240 F.2d 781 (6th Cir. 1957).

34. Nardone v. United States, 302 U.S. 379, 382 (1937).

> . . . to forbid the direct use of [these] methods . . . but to put no curb on their full indirect use would only invite the very methods deemed "inconsistent with ethical standards and destructive of personal liberty". . . . The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.[35]

On this point the courts are in harmony, viz., that not only the conversation, but all leads obtained as a result of wire-tapping are inadmissible. But they have been unable to come to terms as to what constitutes a "lead" so tainted as to make it inadmissible. For example, a search warrant, issued on the basis of wire-tap evidence, is illegally issued and as a result any evidence obtained with the aid of such a warrant is the result of a "lead" illegally obtained through the interception of a communication, and thus inadmissible.[36] Where the government induced a witness to testify by playing a recording of an intercepted communication in which he participated, this was likewise characterized as a "lead" so tainted with illegality as to make it inadmissible.[37]

In principle, the wire-tap cases have followed the doctrine of the Weeks[38] case, a non-wire-tap case, which makes illegally obtained evidence inadmissible. But the general rule of the *Weeks* case has a notable exception, expressed in *Burdeau v. McDowell,*[39] that the federal exclusionary rule does not apply to evidence illegally obtained by third persons, without the participation of the federal government. Such evidence is admissible if turned over to the federal government. The wire-tap cases, however, do not adhere to this exception to the exclusionary rule. In *Benanti v. United States,*[40] the court characterizes wire-tapping evidentiary problems as *sui generis;* such evidence was excluded even though obtained by state officers without any participation by federal agents.

It is evident from the foregoing, that even though a court may successfully clear the hurdle of determining whether given conduct constitutes a prohibited interception, it must still face the difficult task of determining the separate and distinct problem of its admissibility.

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35. Nardone v. United States, 308 U.S. 338, 340 (1939).

36. United States v. Plisco, 22 F. Supp. 242 (D.C. 1938).

37. Weiss v. United States, 308 U.S. 321 (1939).

38. 232 U.S. 383 (1914).

39. 256 U.S. 465 (1921).

40. 355 U.S. 96 (1957). The Court made no mention of *In re* Milbourne, 77 F.2d 310 (2d Cir. 1935), in which it was held that evidence was admissible, even though state officers "tapped" the defendant's wire, and on the basis of this information, made an illegal search, the fruits of which were turned over to the federal authorities. The determinative factor appeared to be that none of this was done on behalf of the federal government, and there was no federal participation. The Benanti case goes one step further, for New York laws authorized the wire-tap.

WIRE-TAP EVIDENCE IN THE STATE COURTS

By no means do the federal courts have a monopoly on the "hair-splitting" in the wire-tap evidence field. A recent New Jersey case points this out lucidly.[41] There, a switchboard operator left her key open and overhead a conversation between the defendant and another. At the trial, the evidence was admitted on the theory that to constitute an "interception" there must be a *mechanical* interposition; to leave a switchboard key open does not meet this requirement.

The Supreme Court has definitely settled the question of admissibility of wire-tap evidence in the state courts in *Schwartz v. Texas.*[42] It was determined that although Section 605 prohibits wire-tapping and divulgence, it does not prescribe a rule of evidence for the state courts, and the admission of such evidence in state tribunals is not error. Admissibility is to be determined by the individual states.

To date, there has been no litigation in Ohio on this point; in the event that our Supreme Court should be faced with this issue, its past conduct would indicate that it will reject the federal exclusionary rule. This conclusion is reached by an analogy to the *Weeks*[43] case. As stated before, the federal exclusionary rule as there expounded — that illegally obtained evidence is inadmissible — does not impose a rule of evidence for the *state courts.*[44] In making a decision on the admissibility of evidence obtained by a legal search and seizure, the Ohio Court rejected the federal exclusionary rule in the leading case of *State v. Lindway.*[45] This was done, notwithstanding an Ohio Constitutional prohibition against unreasonable search and seizure.[46]

It would seem to follow that Ohio would similarly reject the federal exclusionary rule as regards wire-tap evidence. This view is strengthened by the fact that Ohio statutory provisions dealing with such interceptions are not as stringent as those in the federal statute. Although "interceptions" and "wire-tapping" are prohibited by our statutes,[47] divulgence is prohibited *only by an employee of a telephone company.*[48]

In view of the foregoing, it would appear almost certain that Ohio will reject the federal exclusionary rule.

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41. State v. Vanderhave, 47 N.J. Super. 483, 136 A.2d 296 (App. Div. 1957).
42. 344 U.S. 199 (1952).
43. Weeks v. United States, 232 U.S. 383 (1914).
44. Wolf v. Colorado, 338 U.S. 25 (1949).
45. 131 Ohio St. 166, 2 N.E.2d 490 (1936).
46. OHIO CONST. art. 1, § 14.
47. OHIO REV. CODE § 4931.29; § 4931.99 provides a fine of $50 to $300 and/or imprisonment of from one to three years for prohibited intercepting or divulging.

CONCLUSION

The problems created by the enactment of Section 605 and the difficulties in its interpretation in the courts have resulted in a great degree of uncertainty. Much of this uncertainty can be attributed to the unfortunate choice of language in the statute, but in a large measure it is due to the "hair-splitting" among the courts as they apply its mandate to various factual situations.

In the federal ambit, prosecutors cannot be sure which evidence may be stricken by the courts, and they cannot know, authoritatively, whether they have sufficient "admissible" evidence to sustain their case. This leads to much litigation which might have been circumvented. On the other side of the trial table, the accused cannot be sure what his rights are in respect to wire-tap evidence offered against him.

Equally important is the uncertainty in the state spheres. One aspect of the uncertainty in the federal courts has been removed, viz., that wire-tap evidence is admissible in the state courts, at their discretion. However, when such evidence is admitted, is the witness who testifies committing a federal crime, for which he may potentially be prosecuted? And where, as in the *Benanti*[49] case, the wire-tapping was occasioned under a state court order, has the judge who issued the order to have the wires tapped participated in the commission of a federal crime for which he too may be prosecuted?

This problem could be alleviated to some extent, by amending the troublesome clause of Section 605 by adding:

> . . . except under demand of legal authority, properly exercised.

This would permit the issuance of wire-tapping warrants by both state and federal governments, and erase some of the ambiguity which has crept into this field.

Although this may lead to a greater degree of certainty in the wire-tap evidentiary field, there can be no hope for unanimous acceptance of this proposal. Traditionally, we have been concerned with the rights of the accused. It is suggested that too much emphasis has been placed on this aspect of the problem; that society, too, has some rights in this respect. Perhaps we should re-evaluate the various factors to be considered in this determination.

As could be expected, much opposition to such a proposal has come from the telephone companies. They have adopted the position of Justice Holmes, in the *Olmstead* case, that:

> Wire-tapping is . . . "dirty business." We are in complete agreement

49. 355 U.S. 96 (1957).