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Evidence--Admissibility of Tape Recordings Where Portions Are Inaudible

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the issue was not raised. In *Hess v. Marinari,* 81 W. Va. 500, 94 S.E. 968 (1918), the West Virginia court said, in a case involving joint defendants, that it was proper to consider the social and pecuniary standing of the parties. *Accord, Pendleton v. Norfolk & Western Ry. Co.,* 82 W. Va. 270, 95 S.E. 941 (1918). See also *Binder v. G.M.A.C.,* 222 N.C. 512, 23 S.E.2d 894 (1943).

In the decision in the principal case, the court acknowledged that a malicious or wanton tort-feasor might go unpunished, but on the other hand the court felt that any other result would bring about an unjust punishment of one joint tort-feasor. The court concluded, in accordance with the well recognized principle of justice, that it is better for several guilty persons to go unpunished than to have one innocent person punished. But, should a wanton tort-feasor be under the classification of 'innocent person'? The principal case, in failing to differentiate between cases refusing evidence of wealth and those refusing recovery of punitive damages, may also not be in accord with the majority, as it purports to be. The better result probably is that reached in those states allowing an apportionment of punitive damages among joint tort-feasors. Such a result seems to solve the conflict between a meting out of punishishment on one hand and an undue punishment on the other.

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Evidence—Admissibility of Tape Recordings Where Portions Are Inaudible

Appeal from a conviction on two counts of extortion. Appellant assigns as error the introduction into evidence of a recording, portions of which were inaudible. *Held,* where the inaudible portions cannot be deemed so substantial as to render the whole untrustworthy, the admission into evidence of a tape recording, portions of which were unintelligible, is not prejudicial error. *Cape v. United States,* 283 F.2d 430 (9th Cir. 1960).

The instant case is the latest in a field of evidence law which was virtually unknown in the not too distant past. Technical difficulties aside, the problem of partially inaudible recordings has been raised in a number of recent cases with the question of admissibility usually depending upon the amount of the indistinct portion and the trial court's discretion. Annot., 58 A.L.R.2d 1038 (1958). *Cape*

v. United States reason thusly: If a conversation is overheard by a competent witness, the fact that such a witness was only able to distinguish portions of what was said does not render the whole inadmissible in evidence. By analogy then, the fact that the recorded conversation is only partially complete will not render it inadmissible as to the parts which can be heard. This was essentially the rule set out in *United States v. Schanerman,* 150 F.2d 491 (1945), and the court in the *Cape* case cites that decision with approval.

This view has also found support in a number of state court decisions. In a recent California case, *People v. Dupree,* 156 Cal. App. 2d 60, 319 P.2d 39 (1957), citing also the cases of *People v. Curtis,* 134 Cal. App. 2d 624, 286 P.2d 446 (1955), and *People v. Jackson,* 125 Cal. App. 2d 776, 271 P.2d 196 (1954), the court held that since a witness may testify to a part of a conversation heard by him and such part appears to be intelligible, a tape recording not entirely clear in itself could not be excluded from the jury's hearing. This view was also approved by the Washington court in the case of *State v. Salle,* 34 Wash. 2d 183, 208 P.2d 872, 877 (1949). There the court expressed a strong inclination to allow the use of tape recordings even though parts thereof were indistinct. However, in a later case, *State v. Slater,* 36 Wash. 2d 357, 218 P.2d 329 (1950), the Washington court seems to retreat somewhat from the view expressed in the *Salle* case. In the later case the court observed that where the tapes in question were inaudible to the point of being fragmentary, and where it is the only evidence available as to its contents, then serious doubts are raised as to the advisability of its admission.

Some courts have been extremely wary of the use of these mechanical marvels for the establishment of truth. The same California court mentioned previously, when confronted with a recording which the court declared to be fifty per cent inaudible, reversed a lower court decision based in part on the evidence contained on the tape. In this opinion the court pointed out the danger of the jurors drawing many and varied conclusions from what they heard or thought they heard on the recording. In *Hunter v. Hunter,* 169 Pa. 498, 82 A.2d 401, 403 (1951), the Pennsylvania court in a suit for divorce demonstrated the ease with which tape recordings can be altered by a skillful operator and then held flatly: "In general such conversations are admissible as a whole or not at all."

There seems little doubt that recordings can be extremely valuable additions to the methods used to ascertain facts in judicial proceedings. No matter how valuable, however, their use presents an obvious danger when portions of them are inaudible. There is reason to doubt the validity of the analogy drawn by some of the courts between a witness testifying as to part of what he heard and a recording which is partly indistinct. The sound of the accused's own voice mouthing the incriminating statements should produce a much more profound effect upon the jury than would testimony by a witness who is obviously unsure of what he heard and who is subject to cross-examination designed to illustrate that specific defect. With the recording each jury member is allowed to decide what the indistinguishable words were and their relation to the rest of the conversation. The protection suggested by some courts of omitting the garbled portions and allowing the jury to hear only those sections which are clearly distinct raises the old problem of phrases lifted from their context giving oft times an exactly opposite impression than that for which they were originally intended.

These objections have been raised and set out clearly in the case of *Wright v. State,* 38 Ala. 64, 79 So.2d 66 (1954), a decision by the Supreme Court of Alabama. Prefacing the opinion with the statement that, ". . . enthusiasm for the modern should never be permitted to endanger the safeguards of personal liberties . . . .", the court points out the inherent dangers in the use of recordings, portions of which are inaudible or unclear. The case holds that the value of such evidence depends primarily upon its accuracy, and, where the recording is inacurrate, the truth is more likely to be concealed than produced. While reversing the trial court's judgment because of the use of the inaudible tape, the Alabama court set forth a guide for the use of trial court judges when confronted with the problem of indistinct recordings. The court suggests: (1) That the recording be run off first out of the presence of the jury in order to afford counsel an opportunity to object, and further that a transcript of the audible portions of the tape be made at that time; (2) if the recording is inaudible as to sections likely to be material to the case, and if this is the only evidence of the statements offered, the recording should be rejected; (3) if the parties who were present at the recording are present at the trial, the recording, even though partially inaudible, should be admitted for the purpose of corroborating the evidence of these witnesses, and (4) if the recording contains illegal evidence, it should be rejected in toto unless such illegal por-

tions can be erased from it. The case seems to present a more rational approach to the problem than does the principal case. It is submitted that the caution necessary in the use of inaudible recordings is not provided by the cases which base their admission or exclusion on the analogy used by the court in the *Cape* case, and that a more desirable approach is represented by the *Wright* decision.

John George Van Meter

Federal Courts—Jurisdictional Amount—Legal Certainty

In an action grounded on diversity of citizenship in the District Court of the Southern District of West Virginia, *P* claimed damages in the amount of 6,000 dollars for breach of contract. *P* based his claim on the premise that the statement for 2,960 dollars sent to *D* for professional services as an architect was merely a compromise offer and could not become an account stated without the acceptance by *D*. *D* moved to dismiss, challenging the jurisdiction of the court on the ground that the amount actually in controversy was less than 3,000 dollars because *P* could not recover more than this amount by the terms of the contract. The motion was granted. The Court of Appeals held that the District Court was without jurisdiction where, from a statement sent by *P* to *D*, it appeared as a legal certainty that *P* could not recover the jurisdictional minimum. *Nixon v. Loyal Order of Moose Lodge No. 750,* 285 F.2d 250 (4th Cir. 1960).

A federal court will dismiss a diversity action for want of jurisdiction if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional minimum. *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283 (1938). The federal district court was bound to apply West Virginia law, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and it thus appears that under the facts of the principal case that the Fourth Circuit Court of Appeals held that the plaintiff cannot recover an amount in excess of 3,000 dollars.

The court said that *P's* recovery was limited by the terms of the written agreement. However, *P* contended that the statement he sent was merely a compromise offer to *D* which was not accepted by *D*. Furthermore, *P* contended that there was nothing in the contract which made it incumbent upon him to make the reasonable