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## Admissibility of Wire-Tapped Evidence At Common Law

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ADMISSIBILITY OF WIRE-TAPPED EVIDENCE AT COMMON LAW.—Wire-tapping, as a technique of law enforcement, first came under public scrutiny when the United States Supreme Court decided the leading case of *Olmstead v. United States*.<sup>1</sup> Since that time there have been several decisions concerning wire-tapping in state courts as well as in the federal courts. The limitations on the scope of this article preclude a development of the federal law or that of state jurisdictions controlled by statute, except insofar as is necessary to understand the common law of the states.<sup>2</sup>

A consideration of the decisions in jurisdictions which have no controlling statutory inhibitions reveals a fairly fixed pattern of questions upon the resolution of which the admissibility of evidence obtained by wire-tapping depends. These questions are as follows:

1. Does unauthorized wire-tapping constitute an "unreasonable search and seizure"?
2. Does unauthorized wire-tapping violate the privilege against self-incrimination?
3. What effect does the Federal Communications Act<sup>3</sup> have upon the admissibility of such evidence in state courts?
  - a. Does it matter that the telephone communication involved was wholly intrastate?
  - b. Is wire-tapping by a state officer and disclosure of the information so obtained in a state court a criminal offense under the Federal Communications Act?<sup>4</sup>
    - (1) If so, is the evidence so obtained nevertheless admissible?
4. Is unauthorized wire-tapping so "unethical" that courts should preclude the use of the information thereby obtained as evidence?

In the *Olmstead* case<sup>5</sup> it was contended that unauthorized wire-tapping violated the guarantees of the fourth and fifth amendments to the Constitution of the United States against unreasonable searches and seizures and compulsory self-incrimination. The fourth amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects against

<sup>1</sup> 277 U.S. 438 (1928); Comment, 35 W. VA. L.Q. 93 (1929); see also "The Legal Intelligencer," December 1, 1954.

<sup>2</sup> For a development of this law see Rosenzweig, *The Law of Wire Tapping*, 32 CORNELL L.Q. 514, 33 *id.* 73 (1947).

<sup>3</sup> 48 STAT. 1064, 1103, 47 U.S.C. § 605 (1934).

<sup>4</sup> 48 STAT. 1100 (1934), as amended, 68 STAT. 30 (1954), 47 U.S.C. § 501.

<sup>5</sup> 277 U.S. 438 (1928).

unreasonable searches and seizures shall not be violated . . ." The fifth amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself." In holding that wire-tapping did not violate these constitutional guarantees the Supreme Court stated: "The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing only. There was no entry of the houses or offices of the defendants. . . The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from defendant's house or office."<sup>6</sup> "There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception."<sup>7</sup> This permissive holding becomes increasingly important with regard to state court utilization of evidence obtained by unauthorized wire-tapping, in view of recent decisions of the United States Supreme Court indicating that the due process clause of the fourteenth amendment imposes the concepts of the fourth<sup>8</sup> and fifth<sup>9</sup> amendments upon the states. The *Olmstead* case has also proved important as an aid to state courts in construing their own constitutional provisions. The recent case of *Commonwealth v. Chaitt*<sup>10</sup> is in point. In this case police officers tapped a telephone wire leading into the apartment of one suspected of gambling activities. The court affirmed the decision of the lower court which had admitted in evidence the testimony of the officers as to what they overheard. Concerning the Pennsylvania constitutional provisions,<sup>11</sup> one of which the dissenting opinion characterized as comparable to the fourth amendment of the United States Constitution, the court held that ". . . the admission . . . of the testimony . . . was not a violation of . . . the State Constitution. . ."

The Federal Communications Act<sup>12</sup> provides in part: ". . . no

<sup>6</sup> *Id.* at 464-465.

<sup>7</sup> *Id.* at 462.

<sup>8</sup> See *Wolf v. Colorado*, 338 U.S. 25, 27-29 (1949).

<sup>9</sup> See *Malinski v. New York*, 324 U.S. 401 (1945).

<sup>10</sup> 380 Pa. 532, 112 A.2d 379 (1955).

<sup>11</sup> PA. CONST. art. 1, § 8 provides in part: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures. . ." Article 1, § 9 provides in part: "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself. . ."

<sup>12</sup> See note 3 *supra*.

person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . ." This section was construed in the case of *Nardone v. United States*<sup>13</sup> as precluding the use of evidence obtained by wire-tapping in federal courts. Until recently the state decisions revealed uncertainty as to the effect of this statute on admissibility of evidence obtained by wire-tapping in state courts. One writer had suggested that: "Both the wording of the statute and the policy behind it indicate . . . that it was intended to apply to state courts as well as federal courts."<sup>14</sup> In accord with this view, though by dictum only, is the case of *People v. Kelley*<sup>15</sup> wherein the court held the evidence obtained by listening on the telephone of the party to whom the defendant thought he was talking, admissible for the reason that under such circumstances defendant was not a "sender" within the meaning of the statute and hence was not protected by it. However, in the case of *Rowan v. State*,<sup>16</sup> the court stated that the Federal Communications Act was not intended to relate to the admissibility of wire-tapped evidence in state courts. It seems pertinent to note, however, that this is only a dictum, because Maryland follows the common-law rule that illegally obtained evidence is nevertheless admissible.<sup>17</sup> The Supreme Court of the United States has apparently supplied the answer to this question by its decision in the case of *Swartz v. Texas*.<sup>18</sup> In this case the defendant was convicted of robbery, and evidence of telephone conversations of the defendant with another party, obtained by tapping the telephone wires, with the consent of the other party, was admitted. On appeal the defendant contended that the Federal Communications Act<sup>19</sup> renders inadmissible in evidence the records of intercepted telephone conversations without the defendant's consent. In holding that the act did not have such effect the Court stated: "We are dealing here only with the application of a federal statute to State proceedings. Without deciding but assum-

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<sup>13</sup> 302 U.S. 379 (1937).

<sup>14</sup> Rosenzweig, *The Law of Wire Tapping*, 33 CORNELL L.Q. 73, 78 (1947).

<sup>15</sup> 22 Cal.2d 169, 137 P.2d 1 (1943); *accord*, *People v. Vertlieb*, 22 Cal. 2d 193, 137 P.2d 437 (1943).

<sup>16</sup> 175 Md. 547, 3 A.2d 753 (1938).

<sup>17</sup> *Ibid.*

<sup>18</sup> 344 U.S. 199 (1952).

<sup>19</sup> See note 3 *supra*.

ing for the purposes of this case, that the telephone communications were intercepted without being authorized by the sender within the meaning of the Act, the question we have is whether these communications are barred by the federal statute, § 605 from use as evidence in a criminal proceeding in a state court. We think not."<sup>20</sup> The same rule applies whether interstate or intrastate calls are concerned.<sup>21</sup> The Court further stated: "Enforcement of the Statutory prohibition in § 605 can be achieved under the penal provisions of § 501. We hold that § 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings."<sup>22</sup> The Court further recognized that the Texas statute rendering inadmissible illegally obtained evidence specifically exempted from such prohibition evidence obtained in violation of the "laws . . . of the United States."

Relying upon the decision in the *Swartz* case,<sup>23</sup> the court in the *Chaitt* case<sup>24</sup> states: "In our opinion Section 605 of the Act was not intended to, and does not, relate to the divulging of the contents of intercepted communications by State agents testifying in the criminal prosecution of a State crime in a State court."

An additional problem raised by the *Swartz* case<sup>25</sup> is whether tapping of telephone lines by state officers and the divulgence in court of that which is overheard, is, nevertheless, a criminal offense under the Federal Communications Act,<sup>26</sup> which provides that a wilful and knowing violation is punishable as a misdemeanor.<sup>27</sup> In this connection the Court in the *Swartz* case<sup>28</sup> stated: "Enforcement of the statutory prohibition in § 605 can be achieved under the penal provisions of § 501." This same thing was apparently recognized by the court in the case of *Rowan v. State*<sup>29</sup> wherein the court acknowledged that a witness who had tapped the telephone wires might be criminally liable under the Federal Communications Act. Assuming then that any unauthorized wire-

<sup>20</sup> 344 U.S. 199, 201 (1952).

<sup>21</sup> See *Weiss v. United States*, 308 U.S. 321, 329 (1939).

<sup>22</sup> 344 U.S. 199, 201-203 (1952).

<sup>23</sup> *Ibid.*

<sup>24</sup> See note 10 *supra*.

<sup>25</sup> See note 20 *supra*.

<sup>26</sup> See note 3 *supra*.

<sup>27</sup> See note 4 *supra*.

<sup>28</sup> See note 20 *supra*.

<sup>29</sup> See note 16 *supra*.

tapping is a violation of the act, any evidence obtained thereby would clearly be illegally obtained. So, this then raises the question of whether evidence, although illegally obtained, is nevertheless admissible. In this connection it is noted that in all of the state decisions herein considered, the courts followed the common-law rule ". . . that the admissibility is not affected by the illegality of the means by which it is obtained."<sup>30</sup> The so-called federal rule, with the foundation case of *Weeks v. United States*<sup>31</sup> is contra to the extent that it provides that evidence obtained by an unreasonable search and seizure is inadmissible.<sup>32</sup> However, as pointed out above, the cases consistently hold that wire-tapping is not a "search and seizure."

The proposition that wire-tapping is "unethical" apparently stems from the remark of Mr. Justice Holmes in the *Olmstead* case that wire-tapping is a "dirty business."<sup>33</sup> However, in this connection Professor Wigmore has this to say: "But so is likely to be all apprehension of malefactors. Kicking a man in the stomach is 'dirty business,' normally viewed. But if a gunman assails you and you know enough of the French art of 'savatage' to kick him in the stomach and thus save your life, is that 'dirty business' for you?"<sup>34</sup>

*West Virginia Code* c. 61, art. 3, § 29 provides in part: "Any person who shall wilfully or maliciously destroy or injure any of the wires, poles, insulators, or other property belonging to any telephone . . . company, shall be guilty of a misdemeanor. . ." Construing a comparable statute<sup>35</sup> the court in the case of *Young v. Young*<sup>36</sup> which concerned the admissibility in probate proceedings of evidence obtained by clamping a radio headphone onto the

<sup>30</sup> *Hitzelberger v. State*, 174 Md. 152, 197 Atl. 605 (1938); *People v. Kelley*, 22 Cal. 2d 169, 137 P.2d 1 (1943); *Commonwealth v. Chaïtt*, 380 Pa. 532, 112 A.2d 379 (1955); see also an interesting tabulation of state views on this question, in the report of *Wolf v. Colorado*, 338 U.S. 25, 29 (1949).

<sup>31</sup> 232 U.S. 383 (1914).

<sup>32</sup> One further exception followed by the federal courts is that any confession obtained while one is unlawfully detained, is likewise, inadmissible, without regard to its voluntary character. See *McNabb v. United States*, 318 U.S. 332, 341 (1943).

<sup>33</sup> 277 U.S. 438, 470 (1928).

<sup>34</sup> 8 WIGMORE, EVIDENCE § 2184 (b) (3d ed. 1940).

<sup>35</sup> R.I. GEN. LAWS c. 608, § 75 (1938), provides in part as follows: "Every person who shall wantonly or wilfully and maliciously cut, destroy, break down or injure . . . any . . . wire . . . used for the purpose of transmitting intelligence by means of . . . telephonic apparatus . . . shall be liable to indictment therefor . . ."

<sup>36</sup> 56 R.I. 401, 185 Atl. 901 (1936); accord, *State v. Nordskog*, 76 Wash. 472, 136 Pac. 694 (1913); see also *Westin, The Wiretapping Problem*, 52 COL. L. REV. 165 (1952).

telephone wires of the testatrix, held that since no part of the wire was damaged or destroyed; the free transmission of the message was preserved, and the communication itself was not diverted or distorted, therefore no crime had been committed and the evidence was admissible. One writer places West Virginia in the category of states that do not have legislation dealing explicitly with wire-tapping, but do have broad "malicious mischief" statutes.<sup>37</sup> He states that "before the modern wiretapping era, a few attempts had been made to bring wiretapping under these statutes. In these cases, however, the courts refused to apply them since the wire-tapping involved neither damaged the wire physically nor interfered with telephone service. It is improbable that future attempts will be made to prosecute wiretappers under such statutes, for induction coil wiretapping now makes unnecessary even the slightest touching of the telephone wires."<sup>38</sup>

Assuming then that we have no controlling statute in West Virginia, what is our common-law position? Our court has long been in accord with the common-law rule that illegally obtained evidence is nevertheless admissible. However, our court has adopted the exception of the federal rule that evidence obtained by an unreasonable search and seizure is not admissible.<sup>39</sup> In view of the decisions that wire-tapping is not a "search and seizure" but only illegal in the sense that it violates the Federal Communications Act, there seems to be no apparent reason why West Virginia could not follow the majority holding in the *Chaitt* case. It should be noted, however, that in his dissenting opinion in the *Chaitt* case, Mr. Justice Musmanno categorizes West Virginia as being a jurisdiction which prohibits the use of evidence obtained by wire-tapping.<sup>40</sup> This writer has been unable to find any West Virginia decision that will support this conclusion.

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<sup>37</sup> Westin, *supra* note 36, at 181-182.

<sup>38</sup> *Ibid.*

<sup>39</sup> "We subscribe to the general doctrine that the admissibility of evidence is not affected by the illegality of the means by which it is secured; but where the evidence is secured by an illegal search or seizure in violation of the Constitution, the article so seized as well as the information so illegally obtained is inadmissible upon a trial of the accused." *State v. Wills*, 91 W. Va. 659, 677, 114 S.E. 261 (1922).

<sup>40</sup> 380 Pa. 532, 112 A.2d 379, 392 (1955). Cited as authority for this statement is the "Legal Intelligencer," December 1, 1954. An examination of this publication reveals the presence of this statement in a published report of a committee of the Philadelphia Bar Association. No authority is cited in this report to support such a conclusion.