Evidence--Wire Tapping--Admissibility of Matter Illegally Obtained

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the weight and credibility which they may attach to the evidence before them. It is submitted that an instruction which informs a juror that he is to use his "common sense" in weighing and judging the evidence before him is less confusing and imports substantially the same meaning as an instruction on the juror's use of his common knowledge and general experience.

J. D. McD.

Evidence—Wire Tapping—Admissibility of Matter Illegally Obtained.—At D's trial for an alcohol tax violation, testimony was admitted concerning existence of a wire tap which had been operated by state officers in accordance with state law. As a result of the tap, D was picked up by the state officers on a suspected narcotics violation. His cargo was then found to be untaxed alcohol, instead of narcotics, so he was turned over to the federal authorities, who had no knowledge of the wire tap. Trial resulted in a conviction, affirmed on appeal. Held, on certiorari, that evidence obtained by means forbidden by federal statute, whether obtained by state or federal officers, is inadmissible in federal courts. Benanti v. United States, 78 Sup. Ct. 155 (1957).

At common law, evidence was generally admissible on a trial even though obtained illegally. See 8 Wigmore, Evidence § 2183 (3d ed. 1940). In federal courts, however, evidence procured by federal agents in violation of the Constitution is inadmissible. Weeks v. United States, 232 U.S. 383 (1914). This exception to the common law rule has been broadened to include evidence obtained in violation of federal law. E.g., Shinyu Noro v. United States, 148 F.2d 696 (5th Cir. 1945).

Wire tapping is not unconstitutional. Olmstead v. United States, 277 U.S. 438 (1928). A federal statute, however, now provides, in part, that no person not authorized by the sender shall intercept any message and divulge its existence or contents to any person. Communications Act, 1934, 48 Stat. 1103, 47 U.S.C. § 605 (1952). Severe penalties are provided for violation. 48 Stat. 1100, 47 U.S.C. § 501 (1952). Prior to passage of this act, wire tap evidence was admissible in federal courts. Foley v. United States, 64 F.2d 1 (5th Cir. 1933); Kerns v. United States, 50 F.2d 602 (6th
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Cir. 1981). Since this enactment, though, the courts have added more and more restrictions to the use of evidence bearing any taint of wire tapping.


The strict rule as to admissibility has been relaxed only slightly. Testimony induced by knowledge that officers are aware of a message is admissible on the trial of another. *Goldstein v. United States*, 316 U.S. 114 (1942). State courts are not bound by the federal rule. *Schwartz v. Texas*, 344 U.S. 199 (1952). It had also been held in the circuits that evidence obtained solely for state use is admissible in a federal prosecution. *Serio v. United States*, 203 F.2d 576 (5th Cir. 1953); *Butler v. United States*, 153 F.2d 993 (10th Cir. 1946). Apart from these exceptions, the courts have gradually decreased the amount of federal participation allowed in the use of wire tap evidence to the point reached in the instant case, where even a lead illegally obtained by others can not be followed by federal authorities.

If it be conceded that evidence obtained illegally, or with even the slightest suspicion of illegality, should be inadmissible, as the Supreme Court evidently believes, then the instant case is correct. But see 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940). It might be argued however, that wire tapping is merely a means of overhearing a conversation. In a line of cases terminating with *Rathbun v. United States*, 78 Sup. Ct. 161 (1957), decided the same day as the *Benanti* case, the federal courts have generally held, nevertheless, that overhearing a telephone conversation does not amount to interception of the message, and that testimony regarding an overheard message is admissible.
Even where a telephone conversation has been overheard by use of a sensitive microphone in an adjacent room without knowledge of either party, testimony has been admitted concerning the message. Goldman v. United States, 316 U.S. 129 (1942). Where one party has consented, possibly unwillingly, to the over hearing, the courts have found little difficulty in holding that there has been no interception of the message, regardless of how it was over heard. See Rayson v. United States, 238 F.2d 160 (9th Cir. 1956); United States v. Bookie, 229 F.2d 130 (7th Cir. 1956); Flanders v. United States, 222 F.2d 163 (6th Cir. 1955); United States v. Lewis, 87 F. Supp. 970, rev'd on other grounds sub. nom. Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950). Only in the Second and District of Columbia Circuits has it been held that one party to a conversation can not surrender the other's privilege, and that there is interception unless both parties consent to the overhearing. See James v. United States, 191 F.2d 472 (D.C. Cir. 1951); United States v. Polakoff, 112 F.2d 888 (2d Cir. 1940).

It would seem that there is little essential difference between tapping and overhearing a telephone conversation insofar as the sender is concerned. Nor would it seem that there should be more valid objection to a wire tap authorized on probable cause than to a search warrant. Apart from public policy considerations, it is submitted that there is an illegal interception of a communication whenever it is heard by a third party without the consent of the caller and receiver, and that testimony of the third person should be inadmissible under the present rules. See Rathbun v. United States, supra at 165 (dissenting opinion).

R. G. D.

Husband and Wife—Action for Negligence Allowed Against Spouse.—P brought suit to recover for injuries sustained while riding in an automobile being driven by D. While the action was pending, the parties married. Held, that P could continue her action. Koplik v. C. P. Trucking Corp., 135 A.2d 555 (N.J. Super. 1957).

Under the view taken by a majority of the courts in this country, it has been held that neither spouse can maintain an action against the other for a personal tort, whether it was committed before, during or after marriage. Thompson v. Thompson, 218 U.S. 611 (1910); Kelley v. Kelley, 51 R.I. 173, 153 Atl. 314 (1931); Buck-