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Evidence - Admissibility in Federal Courts of Record of Telephone Conversation-Meaning of "Interception"

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EVIDENCE—ADMISSIBILITY IN FEDERAL COURTS OF RECORD OF TELEPHONE CONVERSATION—MEANING OF "INTERCEPTION"—In a prosecution for perjury committed before a subcommittee of Congress, defendant filed a motion to suppress the record of a telephone conversation which had been made by the other party to the conversation without defendant's knowledge or consent. *Held,* motion granted. To record a telephone conversation in this manner is to intercept it within the meaning of section 605 of the Communications Act;[1] under the Supreme Court's ruling in *Nardone v. United States,*[2] divulgence in court of a conversation so intercepted would be a violation of the Communications Act.[3] *United States v. Stephenson,* (D.C. D.C. 1954) 121 F. Supp. 274.

This decision was reached by construing the statutory terms "any person," "intercept," and "consent of sender" in a way which does not appear unreasonable when each is considered separately. However, the result viewed as a whole might indicate that an error was made somewhere along the way. In effect, the decision holds not only that one party to a telephone conversation can "intercept" that conversation, but that one party to such a conversation does not necessarily authorize the other party to "intercept" and divulge the message. Surprising as this conclusion may seem, it is not without precedent of sorts. In *United States v. Polakoff,*[4] an informer called the defendant from the offices of the Federal Bureau of Investigation, knowing that government agents were going to record the conversation from an extension in the next office. The court, with one judge dissenting, held that the record was inadmissible as being obtained by "intercepting" the telephone conversation.[5] Although the court in the principal case recognized that there are serious doubts as to the continued vitality of the *Polakoff* decision,[6] it chose to rely on it.

The discussion in these cases has usually centered on the meaning of the word "intercept." There is no dispute with the dictionary definition; intercept

[1] 48 Stat. L. 652, §605 (1934), 47 U.S.C. (1952) §605.

[2] 302 U.S. 379, 58 S.Ct. 275 (1937).

[3] This is approached as a rule of evidence for federal courts. Admission of such evidence in state courts does not raise any federal question. Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232 (1952).

[4] (2d Cir. 1940) 112 F. (2d) 888, cert. den. 311 U.S. 653, 61 S.Ct. 41 (1940).

[5] Judge A. Hand stated simply that the case was controlled by the decision in the Nardone case. Judge L. Hand held that in telephonic communications, the parties are ordinarily both sender and receiver so that consent to interception and divulgence which, according to the statute, must come from the sender, must in this type of communication come from both parties. He went on to say, however, that an interception occurs *whenever* there is any interference with the communication without the consent of both parties. Query why the determination of interception should be dependent upon consent?

[6] In Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942), the Supreme Court approved the dictionary definition of "intercept" as stated in United States v. Yee Ping Jong, (D.C. Pa. 1939) 26 F. Supp. 69. In two later cases, Reitmeister v. Reitmeister, (2d Cir. 1947) 162 F. (2d) 691, and United States v. Sullivan, (D.C. D.C. 1953) 116 F. Supp. 480, it has been suggested that the Polakoff case was overruled on this point by the Goldman case.

means "to take or seize by the way, or before arrival at the destined place."[7] But there is dispute as to whether the destined place is the ear of the party called, as held in the principal case, or the telephone installation and all the extensions attached to that installation.[8] It would seem, however, that the real question involves the *nature* of the protection intended to be afforded by section 605. It has been held that section 605 was intended to prevent interference with the agencies of transmission,[9] but the tendency of the principal case is to create a privilege for communications which have been transmitted by means covered in the act merely because they have been so transmitted. That this was not the intent should be clear from the first clause of section 605, which prohibits the divulgence of communications by persons to whom they have been given for transmission, but permits such divulgence when required by legal process.[10] The second clause of the section is directed at the interception of a communication by someone who is not involved in its transmission and who has not been authorized to intercede by either of the communicants. There is no exception to this clause to allow divulgence on legal demand, indicating that it was the interception itself which was intended to be prohibited.[11] The action here proscribed should not be confused with the *Polakoff-Stephenson* type of case where one of the parties to the conversation has made a record of it or is otherwise responsible for making it available to another person.[12] In one case, someone not a party to the communication gains information by means of his own interference, without which interference he would have had no knowledge of the communication. In the other case, the existence and purport of the communication is already available to the outsider from one of the parties, and the only reason for interfering with the means of communication is to obtain a permanent record.[13] The difficulty is that wire-tapping shades almost imperceptibly from highly objectionable intrusions upon privacy to virtually unobjectionable instances of recording such as that found in the principal case.[14] As a result, a rule designed to protect *communications media* from interference by persons who are not parties to the communication is employed to exclude evidence where there has been no interference in a way deemed objectionable. The sole effect of such exclusion is to protect a perjurer who wishes to misrepresent the nature or content of the communication because he would be undone by admission

[7] This was the definition given in United States v. Yee Ping Jong, note 6 supra.

[8] See Reitmeister v. Reitmeister, note 6 supra.

[9] "The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation." Goldman v. United States, note 6 supra, at 133. Compare United States v. Polakoff, note 4 supra, at 889.

[10] Newfield v. Ryan, (5th Cir. 1937) 91 F. (2d) 700, cert. den. 302 U.S. 729, 58 S.Ct. 54 (1937).

[11] For an excellent discussion of the wire-tapping problem, see Donnelly, "Comments and Caveats on the Wire Tapping Controversy," 63 YALE L.J. 799 (1954).

[12] United States v. Lewis, (D.C. D.C. 1950) 87 F. Supp. 970.

[13] This distinction between obtaining information and preserving evidence was suggested in a note on the Polakoff case in 19 TEX. L. REV. 203 (1941).

[14] United States v. Sullivan, note 6 supra, at 481.

into evidence of a record verifying the version given by the other party to the conversation.[15]

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[15] ". . . Every bit of evidence of this kind must be illegal save only that given orally by the party himself. And yet this last reservation makes all the other exclusions unreal, as though the trial must be a kind of game where one party may pit his recollection or his untrustworthiness against the other party, with the impartial record which would settle the question resolutely excluded. That is, the best evidence must be rejected, contrary to all modern trends in the law of evidence." Judge Clark dissenting in United States v. Polakoff, note 4 supra, at 891.