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EVIDENCE - CRIMINAL LAW AND PROCEDURE - ADMISSIBILITY OF RECORDING MADE ON DEVICE AT RECEIVING END OF TELEPHONE CONVERSATION

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EVIDENCE — CRIMINAL LAW AND PROCEDURE — ADMISSIBILITY OF RECORDING MADE ON DEVICE AT RECEIVING END OF TELEPHONE CONVERSATION — In a prosecution for conspiracy to violate the narcotic laws, defendant objected to the admission of a recorded telephone conversation between himself and an informer, taken down by the latter on a device attached to the receiver. Defendant contended that this was inadmissible under the rule of *Nardone v. United States*.[1] *Held*, the evidence was not intercepted, therefore not within the purview of the Federal Communications Act[2] and, consequently, admissible despite the *Nardone* decision. *United States v. Yee Ping Jong*, (D. C. Pa. 1939) 26 F. Supp. 69.

[1] 302 U. S. 379, 58 S. Ct. 275 (1937). This case held that evidence taken in contravention of the terms of the Federal Communications Act was inadmissible under the rule in Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928), which suggested that evidence obtained by wire tapping, though admissible, might be made inadmissible by direct Congressional action.

[2] 48 Stat. L. 1103 (1934), 47 U. S. C. (1935), § 605. The act provided that, "No person . . . shall intercept any communication and divulge . . . the existence . . . or meaning of such intercepted communication to any person."

Evidence procured by wire tapping in a manner not constituting search or seizure is admissible, despite the federal rule,[3] unless its admission is precluded by the Federal Communications Act. In determining that the evidence here offered was not intercepted, the court defined intercept as "to take or seize by the way, or before arrival at the destined place." [4] On this basis Judge Gibson held that the evidence was not obtained by " 'tapping of the wire' between the locality of the call and the locality of answer by an unauthorized person" [5] and, hence, was not intercepted. It is submitted that, though this construction is not unsupportable, the court could and, in the writer's opinion, should have found that this was within the four corners of the definition of interception. If the court is correct in construing the destined place or the locality of answer as meaning premises, the decision is unimpeachable. However, without straining the judicial imagination, it might have been held to mean "the party to whom the conversation was directed." Under the latter construction a recording taken at any point, before reaching the ear of the informer, would be intercepted; until then it has not arrived at its "destined place." In view of the fact that it has been suggested that the Federal Communications Act was, in part at least, a Congressional attempt to interject a moral standard into methods of procuring evidence,[6] it would seem that the latter construction should have been used. Surely, absent authority from the party against whom it is to be used, no higher moral standard is perceived where the recording is made at a point just before it is heard by the intended recipient, than where the same recording is made at a mid-point between the localities of call and answer. Nor, in the writer's opinion, can it be logically held that this message was authorized. While it is true that it was authorized by the informer, to impute his authorization to a party against whose interest the evidence is taken would appear an imputation devoid of reality. In short, it is submitted that the evidence should have been rejected because the court, in the desire to admit the evidence, is removing from the scope of the Federal Communications Act an area which, in accord with either logic or realism, should be included.

William H. Klein

[3] The federal rule as developed in Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341 (1914), is that evidence taken in contravention of the Fourth Amendment is inadmissible. In Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928), wire tapping was held not to involve search and seizure unless done on the premises of the party against whom it was to be used.

[4] 26 F. Supp. 69 at 70. The definition was derived from Webster's New International.

[5] Ibid.

[6] Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928), refused to apply moral standards to the admission of evidence, but suggested that Congress might, by direct legislation, provide rules of admissibility with such a standard. In applying this dictum to determine that the Federal Communications Act applied to officers, in Nardone v. United States, 302 U. S. 379 at 384, 58 S. Ct. 275 (1937), Justice Roberts said: "For years controversy has raged with respect to the morality of the practice of wire-tapping by officers to obtain evidence. It has been the view of many that the practice involves a grave wrong."