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EVIDENCE - FEDERAL COMMUNICATIONS ACT - ADMISSIBILITY OF EVIDENCE WHICH BECAME ACCESSIBLE BY WIRE-TAPPING

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EVIDENCE — FEDERAL COMMUNICATIONS ACT — ADMISSIBILITY OF EVIDENCE WHICH BECAME ACCESSIBLE BY WIRE-TAPPING — Petitioners were convicted under a federal indictment for frauds on the revenue. The United States Supreme Court [1] reversed the conviction on the ground it was obtained by use of evidence secured in violation of section 605 of the Communications Act of 1934 [2] by wire-tapping. A new trial resulted in conviction and

[1] Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275 (1937).

[2] 48 Stat. L. 1103, 47 U. S. C. (1934), § 605. The pertinent part of the act provides: "and no person not being authorized by the sender shall intercept any com-

eventually the Supreme Court granted a writ of certiorari to consider the question whether evidence indirectly obtained by that wire-tapping could be admitted despite the first holding. *Held*, such evidence is inadmissible on the basis that to rule otherwise would largely nullify the doctrine previously laid down. *Nardone v. United States*, 308 U. S. 338, 60 S. Ct. 266 (1939).

It seems that the instant decision illustrates the far-reaching effect of the first *Nardone* holding.[3] Had that decision been confined strictly to its facts so that only intercepted interstate messages derived by federal agents' wire-tapping would be excluded as evidence in criminal trials in federal courts, leaving those courts free to make full indirect use of such evidence, on an analogy with admission of facts derived from inadmissible confessions,[4] it would not have hampered federal agents seriously in their attempts to ferret out law-breakers.[5] Conflicting policies appear to have been weighed by the Supreme Court in arriving at its decision.[6] There was the desire to protect individual liberties as far as possible and to prevent federal officers from resorting to illegal means in apprehending criminals.[7] On the other hand, a need for stern enforcement of the criminal law was recognized. It seems that the Court, in finding the first of these objectives to outweigh the second, was giving undue protection to criminals.[8] The quarrel is not, however, with the holding in the instant case. This decision seems to stem logically from the first *Nardone* decision, which, in finding federal officers included by the terms of the prohibition of the Communications Act, was bound to handicap them severely in their bona fide attempts

munication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person. . . ." The act has reference only to interstate or foreign communications by wire or radio.

[3] It appears that the decision in the first Nardone case, if it was to be anything more than a mere formal holding, necessarily called for the holding in the principal case. The statement of facts set forth above shows that the first interpretation of the Communications Act would be of no real practical effect but for the second one elaborating on it and eliminating use of evidence gained by wire taps of interstate messages altogether, so far as the connection between the proposed evidence and the wire-tapping can be made out by the defendant.

[4] 2 WIGMORE, EVIDENCE, 2d ed., § 859 (1923).

[5] See 86 UNIV. PA. L. REV. 436 (1938); 3 MD. L. REV. 266 (1939).

[6] For excellent discussions of judicial handling of matters of policy, see the articles by Waite, "Public Policy and the Arrest of Felons," 31 MICH. L. REV. 749 (1933), and "Reasonable Search and Research," 86 UNIV. PA. L. REV. 623 (1938).

[7] As pointed out by Professor Waite in a comment, 27 MICH. L. REV. 78 (1928), there is no need to be unduly solicitious of the welfare of criminals. Federal agents do not engage in wire-tapping except for pretty good reasons and when they thus uncover evidence of criminal transactions, it seems such evidence should be admitted on the theory that the social outweighs the private interest.

[8] The Federal Communications Act was readily susceptible to the opposite interpretations of that given it by the Court. Federal agents engaged in tracking down criminals were not expressly included by the words of the act, and on the theory that unless an act includes government officers expressly by its provisions it is not meant to encompass them within its mandate—see 10 ROCKY MT. L. REV. 284 (1938)—the evidence offered here could have been accepted as not secured in contravention of this law.

to break up well-organized crime rings.[9] However, it appears that the present Supreme Court is committed to the view that the unethical aspect of wire-tapping by officers of the law [10] is serious enough to warrant such activity being curbed as far as is possible under section 605 of the Communications Act.[11]

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[9] See WAITE, CRIMINAL LAW IN ACTION 92 (1934), showing how the exclusion rule, where held, has operated to the manifest detriment of police and society with little visible benefit to anyone but the criminal.

[10] The court in Olmstead v. United States, 277 U. S. 438, 48 S. Ct. 564 (1928), recognized the unethical character of securing evidence in this way, but found wire-tapping not to involve a search under the Fourth Amendment so that the evidence thus acquired was admissible against the accused.

[11] The principal case is also discussed in 34 ILL. L. REV. 758 (1940); 53 HARV. L. REV. 863 (1940); 20 BOST. L. REV. 362 (1940); 18 N. C. L. REV. 229 (1940).