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Evidence--Wiretapping--Injunction Against Use of Wiretap Evidence in State Criminal Prosecution Denied (Pugach v. Dollinger, 180 F. Supp. 66 (S.D.N.Y. 1960))

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have been had all assertible deductions been claimed in the federal estate tax return. The court also held that the formula clause did not fall within Section 125 of the Decedent's Estate Law.[22] The court gave as its reasons that the testator was obviously tax conscious and aware of the great distinction between the adjusted gross estate as defined by the Code and the net estate after paying administration expenses. "The direction in the will must be given the operative effect which the testator intended and that is that the marital trust be fixed in an amount equal to one-half the adjusted gross estate determined for tax purposes." [23]

Thus *Levy* has apparently been overruled. But in the instant case, where the will bequeathed to the widow a fund equal to one-half of the entire value of the adjusted gross estate for federal estate tax purposes, and also provided that all values should be as finally determined for estate tax purposes, Surrogate DiFalco distinguished the *Levy* case by holding that the formula clause before him more specifically provided for the determination of values than the clause in *Levy*. He then proceeded to sustain the widow's increased bequest, but directed that the residuary should be reimbursed out of income to the extent that the estate taxes were increased by the election.

Inman and the instant case fairly well establish that the surviving spouse's bequest will be allowed to stand at the amount determined by the adjusted gross estate figure on the federal estate tax return, where the formula clause specifically so provides, even if the option allowed by 642(g) of the Code is exercised. The residuary estate will then be reimbursed out of income to the extent that it was depleted by the increased estate taxes. It is submitted that, even if, as in the case of *Levy,* the testator's intention to take advantage of the maximum marital deduction is only inferred, *Inman* and the instant case indicate that the surviving spouse's bequest will be allowed to stand at the amount determined by the adjusted gross estate figure on the federal estate tax return.

EVIDENCE — WIRETAPPING — INJUNCTION AGAINST USE OF WIRETAP EVIDENCE IN STATE CRIMINAL PROSECUTION DENIED.— Petitioner, indicted by a New York grand jury, brought an action in

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[22] The attempted grant to an executor of the power to make a binding and conclusive fixation of the value of any asset for purposes of distribution or allocation or otherwise is against public policy. N.Y. DECED. EST. LAW § 125.

[23] *In re* Inman, 196 N.Y.S.2d 369, 372 (Surr. Ct. 1959).

a United States District Court against the District Attorney of Bronx County and the Police Commissioner of New York City for a permanent injunction restraining the defendants and their agents from using certain wiretap evidence in petitioner's forthcoming trial. Defendants, or their agents, having procured an order of the Supreme Court of New York County permitting them to do so, tapped petitioner's telephone and divulged the contents of the wiretaps to the grand jury, the press, and others. The District Court for the Southern District of New York denied petitioner's motion for a preliminary injunction and dismissed the complaint. Upon plaintiff's motion for a stay pending hearing of his appeal, a divided Court of Appeals for the Second Circuit *held* that the motion should be granted and an order entered to enjoin the defendants from using and disclosing the wiretap evidence at petitioner's trial pending hearing and determination of petitioner's appeal. Upon the hearing of petitioner's appeal, the stay previously granted was vacated and it was *held,* again by a divided Second Circuit, that a federal court should not enjoin state agents from divulging wiretap evidence in state criminal trials. Nevertheless, the Court subsequently reinstated the stay in the same language pending application by petitioner to the United States Supreme Court for certiorari and final action thereon. Upon the granting of certiorari by the Supreme Court, petitioner made a motion for a modification of the stay, and it was *held* by the Court of Appeals for the Second Circuit that it had power to grant the relief sought, notwithstanding the grant of certiorari, and that the stay enjoined the use of testimony obtained as a result of wiretapping as well as the intercepted communications themselves. *Pugach v. Dollinger,* 180 F. Supp. 66, 275 F.2d 503, 277 F.2d 739, 280 F.2d 521 (2d Cir. 1960), *cert. granted,* 363 U.S. 836 (1960).

The problem of wiretapping first arose in the early part of the twentieth century with the invention of electronic and mechanical listening devices.[1] The conflicting interests of the individual's right to be free from wiretap surveillance and society's need for effective criminal detection were early sought to be adjusted by state action. By 1928 more than twenty states had passed laws making wiretapping an offense.[2] In *Olmstead v. United States*[3] the question was presented whether wiretapping was constitutional, in view of the prohibition of the fourth amendment[4] against unreasonable searches and seizures. The Court there held that wiretapping was constitu-

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[1] Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal,* 52 COLUM. L. REV. 165 (1952).

[2] *Id.* at 173 n.40.

[3] 277 U.S. 438 (1928).

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

tional, and consequently, that evidence secured thereby was admissible in federal courts.

Weeks v. United States,[5] decided in 1914, laid the foundation for the federal courts' policy of excluding wiretap evidence. In that case the rule was set forth that evidence secured in violation of the fourth amendment is inadmissible in federal courts.[6] The ruling was not strictly required by the fourth amendment, nor was it based on a congressional policy favoring the inadmissibility of illegally seized evidence.[7] Rather, it was a matter of judicial implication from which a rule of evidence, designed to deter unreasonable searches, emerged.[8] The later case of *Wolf v. Colorado*[9] held that the *Weeks* doctrine was not necessarily imposed on state courts by the fourteenth amendment. The Court indicated that:

> [G]ranting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective.[10]

In 1934, in response to public protests against the use of wiretapping,[11] Congress enacted the Federal Communications Act.[12] Section 605 of that act forbids any person to intercept and divulge a telephonic communication. This act was not intended to change the existing law on the admissibility of wiretap evidence in federal trials.[13]

Until *Nardone v. United States*[14] was decided in 1937, there was no direct prohibition on the use of wiretap evidence. In this landmark case, the United States Supreme Court, apparently convinced of the desirability of legislation making wiretap evidence inadmissible in federal trials (implicitly recommended in the *Olmstead* case),[15] proceeded to judicially enact such legislation. This was

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[5] 232 U.S. 383 (1914).
[6] *Ibid.*
[7] See Wolf v. Colorado, 338 U.S. 25, 28 (1949).
[8] *Ibid.*
[9] 338 U.S. 25 (1949).
[10] *Id.* at 31.
[11] Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165, 174 (1952).
[12] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). Section 605 states in part: "[N]o 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. . . ."
[13] The managers of the bill repeatedly declared that it was designed solely to transfer jurisdiction over radio, telegraph, and telephone to an agency, the Federal Communications Commission, and that "the bill as a whole does not change existing law." Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 COLUM. L. REV. 165 (1952).
[14] 302 U.S. 379 (1937).
[15] 277 U.S. 438, 465-66 (1928).

done by construing section 605 as prohibiting the admissibility of wiretap evidence in federal prosecutions, despite the absence of such a provision in the section.

The related problem of the admissibility of wiretap evidence in state courts was considered in *Schwartz v. Texas*.[16] The Court there held that section 605, which had been construed to render intercepted communications inadmissible in federal courts, did *not* compel the exclusion of intercepted communications from evidence in the criminal proceedings of state courts. The long-disputed section was considered by the Court as not having been intended to change state rules of evidence.[17] The rationale of the decision was that the enforcement of the statutory prohibitions of section 605 did not necessitate making evidence obtained in violation thereof inadmissible, for the section could be adequately enforced by the penal provisions of section 501 of the act.[18]

The oft-cited decision of *Benanti v. United States*[19] added to the confusion surrounding the already perplexing problem of the effect of section 605 on the admissibility of wiretap evidence in federal and state courts. The holding of that case was to the effect that evidence obtained by means forbidden by section 605, whether by state or federal officers, is inadmissible in a federal criminal trial.[20] The Court also indicated in dictum that in view of the plain terms of the section, Congress did not intend to let stand state legislation permitting wiretapping contrary to section 605 and the public policy upon which it was based.[21] This statement created grave doubts as to the status of state laws permitting wiretap surveillance pursuant to court order. Thus, for example, Justice Hofstadter of the New York Supreme Court, relying on the *Benanti* decision, has indicated that wiretap orders pursuant to Section 813-a of the Code of Criminal Procedure[22] may no longer be lawfully issued.[23] Wiretap evi-

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[16] 344 U.S. 199 (1952).
[17] *Id.* at 203.
[18] *Id.* at 201.
[19] 355 U.S. 96 (1957).
[20] *Ibid.*
[21] *Id.* at 105-06.
[22] Section 813-a of the New York Code of Criminal Procedure is the legal justification for wiretapping by law enforcement officials in New York today. The section provides for the issuance of an *ex parte* order for the interception of telephone and telegraph communications by a judge of a designated court upon the oath or affirmation of qualified law enforcement officials that "there is reasonable ground to believe that evidence of crime may be obtained." The order may not be issued indiscriminately. The applicant must particularly identify the telephone, the persons whose messages are to be intercepted, and the purpose of the interception. The judge may also examine the applicant and his witnesses to see whether in fact there is reasonable ground for expecting to uncover evidence of crime. N.Y. CODE CRIM. PROC. § 813-a.
[23] Matter of Interception of Telephone Communications, 9 Misc.2d 121, 170 N.Y.S.2d 84 (Sup. Ct. 1958).

dence, however, still may be obtained pursuant to court order in New York today, and it is admissible according to New York decisions.[24]

In *Stefanelli v. Minard*[25] an injunction was sought to restrain the admission in a New Jersey criminal proceeding of evidence seized by state police officers who entered into petitioners' homes without lawful authority. In denying the request for injunctive relief, the United States Supreme Court indicated that federal courts should not intervene in state criminal trials even to enjoin the use of evidence obtained by an illegal search. The Court also indicated that equity should refuse to exercise its discretionary power save in exceptional cases. As defined by the Court such exceptional cases would involve situations in which irreparable injury to defendant would otherwise result.

The first decision of the United States Court of Appeals in the instant case,[26] which granted the stay and enjoined the use of wiretap evidence pending appeal, created grave doubts as to the admissibility of wiretap evidence in state courts. These doubts apparently were dispelled upon the determination of the appeal,[27] where it was held that a federal court should not enjoin state agents from divulging wiretap evidence in state criminal trials, notwithstanding that such divulgence would constitute a federal crime. The instant case, however, will soon be passed on by the United States Supreme Court, which has granted certiorari.[28] If the reasoning of the first decision of the Court of Appeals is adhered to by the Supreme Court, the effect of the *Pugach* case would be, in certain instances, to effectively prevent the introduction in state criminal trials of evidence secured in contravention of section 605.

A comparison of the Court of Appeals' decisions in the principal case tends to support the logic of its second decision refusing to enjoin state agents from divulging wiretap evidence in criminal trials.

The first decision, proceeding on the theory that federal courts should not "sit idly by" and countenance violations of federal law by state agents or officials, concludes that federal courts should intervene where such intervention will prevent a further violation of section 605, *viz.*, the divulgence of the wiretaps, and non-intervention would result in irreparable injury to the petitioner.[29] Underlying this posi-

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[24] People v. Grant, 14 Misc.2d 182, 179 N.Y.S.2d 384 (Ct. Gen. Sess. 1958); see Pugach v. Dollinger, 275 F.2d 503, 507 (2d Cir. 1960).

[25] 342 U.S. 117 (1951).

[26] Pugach v. Dollinger, 275 F.2d 503 (2d Cir. 1960).

[27] Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960).

[28] 363 U.S. 836 (1960).

[29] The irreparable injury alleged by petitioner in the instant case was that if the evidence were received at the trial and he were convicted, he would be wholly without remedy; for under Schwartz v. Texas, 344 U.S. 199 (1952), the evidence is admissible under the New York rules of evidence even though illegally obtained, and his conviction would not be reversed.

tion, no doubt, was the Court's view that a criminal prosecution and/or a civil suit against the enforcement officers who violated the law were hopelessly inadequate remedies.[30]

The second decision of the Court of Appeals affirming the district court's denial of permanent injunctive relief, takes a different approach. In this decision the Court underscores the independence of the state court systems from the federal courts. Decrying the granting of injunctive relief in the instant case as unnecessary interference on the part of the federal courts in the states' administration of their criminal law and with crimes solely within the states' power to prosecute, the Court points out that the exercise of the power to grant equitable relief is a matter of discretion, and that, under the circumstances of the instant case, the balance weighs against the granting of such relief.[31] The Court indicates its reluctance to overlook the long recognized principle of equity that a court should not enjoin the commission of a crime because this would make serious inroads on the public policy of preserving the right to jury trial. That the divulgence of the evidence sought to be enjoined would constitute the commission of a federal crime was not regarded as significant, for the Court felt that the plaintiff must prevail, if at all, by vindication of his own rights under section 605, not by collateral enforcement of the rights of the United States. In this way the Court dismissed the petitioner's contention that the present case was to be distinguished from the *Stefanelli* case on the ground that in *Stefanelli* the violation of federal law had already taken place. The Court regarded the *Stefanelli* case as "the expression of a general policy against 'piecemeal' intervention by the federal courts in state proceedings for the purpose of litigating collateral issues." [32]

The logic of the latter decision of the Court of Appeals is clear. The rule that evidence obtained by unreasonable search or seizure, *i.e.*, illegally obtained evidence is inadmissible, emerged by a process of judicial implication.[33] The *Weeks* case merely represented a policy decision—one in which the Supreme Court announced a rule of evidence that would thereafter bind federal courts.[34] However, as the case of *Wolf v. Colorado* points out, the rule was to bind federal courts only, not state courts.[35]

The *Nardone* decision superimposed another judicial implication on the foundation laid by the *Weeks* case. Section 605 makes no mention of the admissibility of evidence obtained by wiretapping. Nor can any sound process of statutory construction justify the interpretation that Congress intended to make wiretap evidence in-

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[30] Pugach v. Dollinger, *supra* note 26, at 506.
[31] Pugach v. Dollinger, *supra* note 27, at 742.
[32] *Id.* at 743.
[33] Wolf v. Colorado, 338 U.S. 25, 28 (1949).
[34] *Ibid.*
[35] *Id.* at 33.

admissible, for the word "divulge" in the section has not been interpreted as referring to admissibility. Nevertheless it is certainly within the province of the Supreme Court's duties to formulate rules of evidence for the federal court system; the Court has "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions," [36] and viewed in this light, the *Nardone* case is more easily supportable.

However, as was pointed out in *Schwartz v. Texas,* section 605 was not intended to change state rules of evidence. The first Court of Appeals decision in the instant case would have that effect in certain instances.[37] That decision may be viewed as an extension of the previous extensions outlined above. It is submitted that perhaps the breaking point has been reached.

FEDERAL JURISDICTION — VENUE — REQUIREMENTS NECESSARY FOR TRANSFER UNDER SECTION 1404(a) OF THE JUDICIAL CODE.— In two cases [1] before the Supreme Court respondents (plaintiffs) served process and brought actions in federal district courts having jurisdiction and proper venue over the adverse parties. The adverse parties (defendants), showing "convenience" and "interests of justice," moved for transfer under Section 1404(a) of the Judicial Code.[2] They admitted that the proposed transferee forums did not originally have venue, but claimed that the clause "where [the action] might have been brought" should not apply solely to the time of the bringing of the action, but also to any subsequent time, when, by their waiver of lack of venue, the proposed transferee forum would be one where the action "might *then* have been brought." Petitioners, both district court judges, granted the motions for transfer, but the Court of Appeals for the Seventh Circuit,[3] in mandamus proceedings,

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[36] McNabb v. United States, 318 U.S. 332, 341 (1943).

[37] These instances would be where federal court intervention would prevent the further violation of § 605, as by the divulgence of the wiretaps, and non-intervention would result in irreparable injury to petitioner. See Pugach v. Dollinger, 275 F.2d 503, 506-07 (2d Cir. 1960).

[1] Hoffman v. Blaski, Sullivan v. Behimer, 363 U.S. 335 (1960) (The cases, numbered 25 and 26 respectively, were treated in one opinion by the majority of the Court, but Justice Frankfurter wrote separate dissenting opinions.).

[2] 28 U.S.C. § 1404(a) (1958). The section reads: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[3] In the *Hoffman* case, the Court of Appeals for the Fifth Circuit had already determined that § 1404(a) applied. *Ex parte* Blaski, 245 F.2d 737