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Evidence--Wire Tapping--Federal Communications Act Not Applicable to Intrastate Communications (United States v. Weiss, 103 F.2d 348 (2d Cir. 1939))

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which obtained jurisdiction over the parties and subject matter.[12] The question when jurisdiction will be exercised is often one of great delicacy,[13] as a conflict of jurisdiction may result by the local court's interference. The power, therefore, is used sparingly,[14] especially, when the foreign court can do as complete justice as the domestic court.[15] The plaintiff has the burden of showing equitable grounds for relief.[16]

In seeking an injunction, it seems that the subject matter[17] and location of the court[18] where the cause of action is pending, is immaterial when there is jurisdiction *in personam.* The purpose of the suit in the foreign jurisdiction and the ends to be attained, however, are of prime importance.

The denial of the injunction was justified because the instant case falls within the general rule that no injunction will be granted unless a clear equity is made out. It does not appear that the foreign suit was fraudulent, instituted in bad faith, or was an attempt to evade New York law.[19] The power of the court to grant such relief in such a case is purely discretionary, and mere convenience is not of sufficient importance to influence the court.

B. R.

EVIDENCE—WIRE TAPPING—FEDERAL COMMUNICATIONS ACT NOT APPLICABLE TO INTRASTATE COMMUNICATIONS.—The defendants were convicted of using the mails[1] in furtherance of a con-

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[12] Royal League v. Kavanagh, 233 Ill. 175, 84 N. E. 178 (1908); Illinois Life Ins. Co. v. Prentiss, 277 Ill. 383, 115 N. E. 554 (1917).

[13] Notes (1928) 57 A. L. R. 77; (1932) 31 MICH. L. REV. 88.

[14] Jones v. Hughes, 156 Iowa 684, 137 N. W. 1023 (1912); Bigelow v. Old Dominion Co., 74 N. J. Eq. 457, 71 Atl. 153 (1908); Carpenter v. Hanes, 162 N. C. 46, 77 S. E. 1101 (1913).

[15] Harris v. Pullman, 84 Ill. 20 (1876); Edgell v. Clarke, 19 App. Div. 199, 45 N. Y. Supp. 979 (1st Dept. 1897).

[16] Carson v. Dunham, 149 Mass. 52, 20 N. E. 312 (1889); Freick v. Hinkley, 122 Minn. 24, 141 N. W. 1096 (1913); Wyeth Hardware Co. v. Lang, 54 Mo. App. 147 (1893), *aff'd,* 127 Mo. 242, 29 S. W. 1010 (1895); Bennet v. LeRoy, 13 N. Y. Super. Ct. 683 (1857); Hymen v. Helm, 24 Ch. D. 531, 49 L. T. R. (N. S.) 376 (1883).

[17] Phelps v. McDonald, 99 U. S. 298 (1878); Williams v. Williams, 83 Misc. 560, 145 N. Y. Supp. 564 (1913); Mead v. Merritt, 2 Paige 402 (N. Y. 1831).

[18] Gage v. Riverside Trust Co., 86 Fed. 984 (D. C. Cal. 1898); Field v. Holbrook, 3 Abb. Pr. 377 (N. Y. 1856); Dainese v. Allen, 3 Abb. Pr. (N. S.) 212 (N. Y. 1867); Carron Iron Co. v. McCaren, 5 H. L. C. 416, 10 Eng. Rep. 961 (1855).

[19] From a study of appellant's brief the above factors do not appear, as defendant contends that the breach of contract giving rise to the suit took place in England where all their important witnesses reside, and the cause of action was brought there in good faith.

[1] 35 STAT. 1130 (1909), 18 U. S. C. § 338 (1934).

spiracy [2] to defraud. The trial court admitted evidence obtained by federal agents by means of wire tapping. An appeal was taken to the Circuit Court of Appeals on the ground that this admission constituted reversible error. *Held,* affirmed. The use of intrastate communications obtained by wire tapping as evidence, is not prohibited by Section 605 of the Federal Communications Act.[3] That section applies only to the inadmissibility of *interstate* communications obtained by federal agents by tapping wires.[4] *United States* v. *Weiss,* 103 F. (2d) 348 (C. C. A. 2d, 1939).

The general rule at common law, is that evidence illegally obtained, but otherwise competent, is admissible,[5] provided no right granted by the Federal Constitution or a federal statute is violated in the procurement of such evidence. Wire tapping is not a violation of the Fourth Amendment [6] to the United States Constitution, nor is the use of evidence so obtained a violation of the Fifth Amendment.[7] This rule was laid down in the case of *Olmstead v. United States,*[8] where the Court, in a 5 to 4 decision,[9] held that the interception of telephone messages by wire tapping was not an "illegal search and seizure" within the meaning of the Fourth Amendment, and that a defendant, against whom evidence had been obtained by such means, was not compelled to be a witness against himself within the meaning of the Fifth Amendment.

The question remains as to whether the introduction of intrastate communication obtained by federal agents by wire tapping as evidence, is a violation of Section 605 of the Federal Communications Act. The pertinent portion of the section provides that "no 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 * * * and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof * * *." The conviction, in the instant case, was affirmed upon the proposition that these provisions do not apply to intrastate communications. In this construction of the section, the Court followed

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[2] 35 STAT. 1096 (1909), 18 U. S. C. § 88 (1934).
[3] 48 STAT. 1103, 47 U. S. C. § 605 (1934).
[4] Nardone v. United States, 302 U. S. 379, 58 Sup. Ct. 275 (1937).
[5] 4 WIGMORE, EVIDENCE (2d ed. 1923) 2183.
[6] U. S. CONST. Amend. IV. "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated * * *".
[7] U. S. CONST. Amend. V. "No person * * * shall be compelled, in any criminal case, to be a witness against himself".
[8] 277 U. S. 438, 48 Sup. Ct. 564 (1928).
[9] The unusually strong dissent found in this case indicates a possibility that this decision may be overruled.

the interpretation of the First Circuit Court.[10] However, there are contrary decisions in the Sixth [11] and Third [12] Circuits. In those Circuits, the courts were of the opinion that Congress intended Section 605 to be remedial and, therefore, to be liberally construed. They believed that Congress was engaged in solving an ethical problem, and that such problem would not be solved if only interstate communications, obtained by wire tapping, were rendered inadmissible as evidence. In view of the fact that the circuit courts are not in accord as to the construction to be given to Section 605, the question whether the introduction of intrastate communications obtained by federal agents by tapping wires is a violation of Section 605 remains an open one.

It may be contended that the construction placed upon the statute by the Court in the instant case was erroneous. This follows from a consideration of the statute. It will be noted that Section 605 is divided into four subdivisions. The first and third subdivisions prohibit the unauthorized divulging or use of any "interstate or foreign communication". The second and fourth subdivisions pertain to the interception of messages. They prohibit the interception of "any communication",[13] and the divulging and use of such intercepted communication. The latter provisions, which are the provisions here involved, may, in the absence of all words of limitation, be construed as applying to all communications, intrastate as well as interstate and foreign. The argument that the basic object of the Act is to protect and regulate interstate and foreign communications,[14] may be met by the argument that the wire-tapping provisions of Section 605 are not regulatory provisions and, consequently, have no bearing upon the construction of that section.[15]

The issue at present seems to rest upon an interpretation of *Nardone* v. *United States.*[16] In *Valli* v. *United States,* the Court

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[10] Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938). Accord: United States v. Bonanzi, 94 F. (2d) 570 (C. C. A. 2d, 1938); United States v. Bernava, 95 F. (2d) 310 (C. C. A. 2d, 1938).

[11] Diamond v. United States, 94 F. (2d) 1012 (C. C. A. 6th, 1938).

[12] Sablowsky v. United States, 101 F. (2d) 183 (C. C. A. 3d, 1938).

[13] Nigro v. United States, 276 U. S. 332, 48 Sup. Ct. 388 (1928) (the natural meaning of "any" was defined as including "all").

[14] 48 STAT. 1064, 47 U. S. C. § 1152 (1934): "The provisions of this chapter shall apply to all interstate and foreign communications by wire * * *".

[15] Sablowsky v. United States, 101 F. (2d) 183, 189 (C. C. A. 3d, 1938) ("It will be noted that the provisions of section 605 are very different in their nature from those of the other sections of the Communications Act. * * * upon the other hand the provisions of the second and fourth clauses of section 605, which upon their face purport to relate to all persons do not relate to the regulation of communication carriers and therefore constitute a rule of evidence in the purest sense").

[16] Defendants were convicted of violating the Anti-Smuggling Act and of conspiracy. At the trial federal agents testified to interstate communications intercepted by wire tapping. The Court, relying on the "clear language" of

construed the *Nardone* case as setting forth the rule that Section 605 of the Federal Communications Act applies only to interstate communications intercepted by government agents by tapping wires, and, therefore, intrastate communications obtained in the same way are admissible as evidence. The instant case is in accordance with the decision in *Valli* v. *United States,* but is opposed to the decision in the *Sablowsky* case.[17]

It is true that Congress has power to prohibit federal agents from divulging intrastate wire communications in district courts of the United States. Congress may impose legislation affecting intrastate commerce whenever it is necessary as a means of exercising control of interstate and foreign commerce.[18] Whether Congress embodied such an intention in Section 605 of the Federal Communications Act, remains unsettled.

The instant case is now before the Supreme Court of the United States on a writ of certiorari to decide the conflict which has arisen among the various circuit courts of appeal in construing Section 605 of the Federal Communications Act.

M. B.

INTERSTATE MOTOR CARRIERS—STATE REGULATION—BURDEN ON INTERSTATE COMMERCE—VIOLATION OF EQUAL PROTECTION CLAUSE OF CONSTITUTION.—For the collection of a tax on one of defendant's trucks, pursuant to the Georgia Maintenance Tax Act,[1] plaintiff obtained an execution and levied upon that vehicle. Defendant, a common carrier for hire engaged exclusively in interstate transportation by motor vehicle, is authorized by the Interstate Commerce Commission to use the state highway system,[2] but such authorization does not extend to the use of the rural post roads. The Georgia Act directs that the tax money be used for the maintenance of the

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§ 605, decided that federal agents were included thereunder and that interstate communications obtained by wire tapping were inadmissible as evidence.

[17] The Court in this case interpreted the *Nardone* case as creating a rule of evidence excluding federal agents from divulging intercepted wire communications. They contended that such a rule of exclusion should apply to federal agents in regard to intercepted intrastate communications.

[18] Southern Ry. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911).

[1] Ga. Laws 1937, pp. 155–167. The Act requires that all who own or have exclusive right to use for more than 30 days a motor bus, truck, or trailer "shall pay a maintenance tax for the operation * * * upon and over the public roads of this State".

[2] MOTOR CARRIER ACT, 49 STAT. 55 (1935), 49 U. S. C. A. § 301 (Supp. 1938). Evidently federal regulation under the Act is not adequate, for the court interpreted subsection (c) of Section 302 as preserving both the right of a state to regulate traffic on the highways as an incident of its police power, and the right of taxation to conserve its highways. Lowe v. Stoutamire, 123 Fla. 135, 166 So. 310 (1936).