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Article 19

Evidence--Wire Tapping--Interpretation of Federal Communications Act (Nardone v. United States, 308 U.S. 338 (1939); Weiss v. United States, 308 U.S. 321 (1939))

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It is more difficult to follow the reasoning of the court in respect to the other ground on which it based its decision, and which appears somewhat unusual. The court cites Sections 626 and 629 of the Restatement of the Law of Torts [10] under the topic of Trade Libel. Section 629 defines "disparagement" as "matter which is intended by its publisher to be understood or which is reasonably understood to cast doubt on another's property in lands, chattels or intangible things, or upon their quality * * *." Courts in this country have consistently denied injunctions against trade libels as they have against other libels,[11] in order to uphold the constitutional guaranty of freedom of the press. However, where the libel has been incidental or instrumental to another tortious transaction equity has intervened.[12] Therefore, it does not seem in line with the great weight of judicial authorities [13] that the cause of action should have been sustained on the separate ground that the defendant was disparaging the plaintiff's business. But the court may have construed the libelous acts as falling into the latter category and enjoined them only as an incident of the tort of inducing the breach of the plaintiff's contract.

B. S.

EVIDENCE — WIRE TAPPING — INTERPRETATION OF FEDERAL COMMUNICATIONS ACT.—(First Case) Defendants appeal from a judgment convicting them of smuggling and concealing alcohol and of conspiracy to do so. An earlier conviction under the same indictment was reversed by the Supreme Court on the ground that the admission of evidence directly procured by means of wire-tapping was

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Book Co., 97 Fed. 533 (1899); Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co., 114 Md. 403, 80 Atl. 48 (1911); Beekman v. Marsters, 195 Mass. 205, 80 N. E. 817 (1907).

[10] RESTATEMENT, TORTS (1938) §§ 626, 629.

[11] Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873); Marlin Fire Arms Co. v. Shields, 171 N. Y. 384, 64 N. E. 163 (1902); Balliet v. Cassidy, 104 Fed. 704 (1900); American Malting Co. v. Kreitel, 207 Fed. 351 (C. C. A. 2d, 1913); Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (D. C. Mo. 1912); (1927) 75 U. OF PA. L. REV. 258, 260.

[12] Nann v. Raimist, 255 N. Y. 317, 174 N. E. 690 (1931) (Equity does not interfere to restrain the publication of words on a mere showing of their falsity. It intervenes in those cases where restraint becomes essential to the preservation of a business or other property interest threatened with impairment by an illegal combination or other tortious acts, the publication of the words being merely instrumental and incidental); Gompers v. Buck Stove Co., 221 U. S. 418, 31 Sup. Ct. 492 (1910); Casey v. Typographical Union, 45 Fed. 135 (C. C. S. D. Ohio 1891); Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888).

[13] Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1915) 29 HARV. L. REV. 640; (1927) 75 U. OF PA. L. REV. 258.

illegal [1] and contrary to the Federal Communications Act.[2] The Circuit Court of Appeals has affirmed the introduction of evidence procured derivatively and made accessible through the forbidden interstate interceptions and has refused to allow the defendants to question its employment.[3] On appeal to the United States Supreme Court, *held,* one justice dissenting, reversed. The statute interdicts the derivative use of the tainted evidence as well as the illegal interceptions. *Nardone* v. *United States,* 308 U. S. 338, 60 Sup. Ct. 266 (1939).

(Second Case) Petitioners were convicted for using the mails to defraud and for conspiracy to defraud. Evidence obtained by federal agents through the interception of *intrastate* telephone communications was admitted by the trial court. The Circuit Court of Appeals affirmed the decision.[4] On appeal to the United States Supreme Court, *held,* reversed. Section 605 of the Federal Communications Act applies to the inadmissibility of *intrastate* as well as interstate communications procured by the unauthorized wire-tapping of federal officers. *Weiss* v. *United States,* 308 U. S. 321, 60 Sup. Ct. 269 (1939).

The instant cases concern the efforts of the Federal Government to utilize evidence obtained by wire-tapping. The decision in each case hinged on the interpretation of Section 605 of the Federal Communications Act. In both cases the prosecution sought to utilize the evidence made accessible and derived through wire-tapping, under the general rule that all relevant evidence is admissible even though illegally obtained, unless the procurement was directly opposed to public policy as expressed in the Federal Constitution or some federal statute.[5] The case of *Olmstead* v. *United States* [6] decided that

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

[2] 48 STAT. 1103, 47 U. S. C. § 605 (1934):

"(1) No person receiving or assisting in receiving or transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, * * *; (2) and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, * * * to any person; (3) and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; (4) and no person having received such intercepted communication or having become acquainted with the contents, substance, * * * shall divulge or publish the existence, contents, * * * for his own benefit or for the benefit of another not entitled thereto. * * *." (*The numerical arrangement of the clauses is my own.*)

[3] 106 F. (2d) 41 (C. C. A. 2d, 1939).

[4] 103 F. (2d) 348 (C. C. A. 2d, 1939).

[5] 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2183.

[6] Olmstead v. United States, 277 U. S. 438, 48 Sup. Ct. 564 (1928) (Wiretapping did not violate the "illegal search and seizure" clause. U. S. CONST.

neither wire-tapping nor its employment as evidence was contrary to the Constitution. Consequently, the only remaining ground for an exclusion depended on the construction of Section 605.

The United States Supreme Court, without resorting to a technical interpretation of the legislation, reasoned that Congress had been faced with an ethical problem, and that the law was primarily designed as a remedial measure to curb the evils arising from wire-tapping, which were causing the loss of individual freedom, and the destruction of personal liberty. Although admitting that any claim for the exclusion of evidence was carefully scrutinized, the Court declared that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all." [7] It was further held that the burden of proof with regard to the unlawful use of wire-tapping rested on the accused and that any objection to the use of such illegal evidence must be timely and not a "feeler" as to the prosecution's case.

The *Weiss* case was brought before the Supreme Court to make a final ruling with regard to the conflict that had arisen in the Circuit Courts of Appeal as to whether Section 605 prohibited intrastate as well as interstate wire-tapping. The First Circuit Court [8] favored the admission of intrastate interceptions as evidence on the ground that Section 605 only applied to the inadmissibility of interstate evidence. The Third [9] and Sixth [10] Circuits opposed it by holding that the purpose of the section was remedial and regulatory, and therefore should be liberally construed. Having adopted the latter view in deciding the *Nardone* case,[11] the Court pursued the same line of reasoning and found that both interstate and intrastate wire-tapping were intended to be interdicted by the second clause of the section.[12] The words "any communication" were meant to include interstate and intrastate communications. Such legislation was within the power of Congress under the "commerce clause" of the Constitution.[13] The assent of the defendants to the wire-tapping in the hope of leniency, after being

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Amend. IV. Wire-tapping did not compel a defendant "to be a witness against himself". U. S. CONST. Amend. V).

[7] Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 Sup. Ct. 182 (1920).

[8] Valli v. United States, 94 F. (2d) 687 (C. C. A. 1st, 1938).

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

[10] Diamond v. United States, 94 F. (2d) 1012 (C. C. A. 6th, 1938); see (1939) 14 ST. JOHN'S L. REV. 179.

[11] Nardone v. United States, 308 U. S. 338, 60 Sup. Ct. 266 (1939).

[12] "* * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, * * * to any person, * * *."

[13] U. S. CONST. Art. I, § 8. "The Congress shall have the power * * * to regulate commerce with foreign nations, and among the several states and with the Indian tribes * * *." Congress can regulate intrastate commerce when necessary to protect interstate commerce. Southern Ry. v. United States, 222 U. S. 20, 32 Sup. Ct. 2 (1911).

confronted with the evidence, was not deemed a sufficient satisfaction of the authorization clause of the section.

Meaning has been given to what Congress has written so as to accomplish the policy that Congress formulated.[14] It appears that enforcement of the criminal law and the protection of rights of privacy granted by the Constitution have been harmoniously fused.

A. B.

GIFTS CAUSA MORTIS—TESTAMENTARY DISPOSITION AS AFFECTING WIDOWS' STATUTORY RIGHTS.—Administrator of deceased seeks to have a trust declared with respect to a sum given by decedent to the defendant, his brother, shortly before the decedent's death, contending said transaction to be a gift *causa mortis* [1] and as such is testamentary in character and must be subject to rights which the law grants to widows.[2] The evidence established that deceased having become so ill that "death could be expected at any time" gave said gift, the sum of two thousand dollars, to defendant "so that he could have it in case anything happened". Defendant maintains that said

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[14] "Congress may have thought it less important that some offenders go unwhipped of justice than that officers should resort to methods deemed inconsistent with ethical standards and destructive of personal liberty." Nardone v. United States, 302 U. S. 379, 383, 58 Sup. Ct. 275, 277 (1937).

[1] *Donatio mortis causa* is defined as: "A gift made by a person in sickness, who apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, to keep as his own in case of donor's decease. 2 BL. COMM. 514. The civil law defines it to be a gift under apprehension of death; as when anything is given upon condition that, if the donor dies, the donee shall possess it absolutely, or return it if the donee should survive or should repent having made the gift, or if the donee should die before the donor." BLACK'S LAW DICTIONARY (3d ed. 1933) 612. In Gymes v. Hone, 49 N. Y. 17, 20 (1892), the court in defining gifts *causa mortis* said: "Three things are necessary. 1. It must be made with a view to donor's death. 2. The donor must die of that ailment or peril. 3. There must be a delivery." Where donor feared death from an operation but died from a heart attack the court held that a valid gift causa mortis was created despite the fact that donor died from a different ailment or peril. Redden v. Thrall, 125 N. Y. 572, 26 N. E. 627 (1890).

A gift *causa mortis* where donor took his own life was held invalid as against public policy. Bainbridge v. Hoes, 163 App. Div. 870, 149 N. Y. Supp. 20 (2d Dept. 1914).

[2] It is fundamental that the law always seeks to provide for a widow from the estate of her deceased husband. Today this tendency is strongly evidenced by the New York statutes in relation thereto. See N. Y. DECEDENT ESTATE LAW §§ 18, 83. N. Y. DECEDENT ESTATE LAW § 18 amounts in effect to a statutory limitation on the power of an owner to direct the mode of distribution of his net estate subsequent to his death, and renders invalid as to a surviving spouse, at his or her election, a will, which is executed after the effective date of this section, and which fails to make the specified minimum provision for his or her benefit. *In re* Lavine's Will, 167 Misc. 879, 4 N. Y. S. (2d) 923 (1938).