

Evidence--Wire-Tapping--Statutory Construction (Nardone v. United States, 58 S. Ct. 275 (1937))

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its own stock to the public,¹⁵ is a "dealer,"¹⁶ within the meaning of the Martin Act was not answered by the court.¹⁷ It should be noted, however, that decisions under the Martin Act have generally tended to favor the public.¹⁸ The decision in the instant case, explainable on the grounds of statutory construction,¹⁹ is an apparent, rather than a real deviation from this general policy. This policy, coupled with an opinion handed down by the Attorney General,²⁰ convinces the writer that when this question is presented to the Court of Appeals, it will probably be resolved in the affirmative.

B. B.

EVIDENCE—WIRE-TAPPING—STATUTORY CONSTRUCTION.—Petitioners were convicted of smuggling alcohol largely upon evidence procured by the tapping of their telephone wires by federal officers. Such tapping was done in the face of the Federal Communications Act¹ which provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the contents * * * of such intercepted communication to any person; * * *." On appeal from a judgment affirming the conviction and approving the admission of such evidence, *held*, reversed. The statute renders in-

¹⁵ *People v. Rutven*, 160 Misc. '112, 288 N. Y. Supp. 631 (1936) (*Held*, that the sale of stock by a corporation to its stockholders, who know that the proceeds of such sale will be used for the purpose of continuing certain litigation, is not a sale to the public within the meaning of the Martin Act. By way of *dicta*, it was also held that in the instant case the sale by the defendant corporation was a sale to the public within the meaning of the Martin Act, because it was willing to sell to anyone interested).

¹⁶ N. Y. GEN. BUS. LAW (1928) art. 23A, § 359e describes a dealer as " * * * every person, partnership, corporation, * * * who engages * * * in the business of trading in securities in such a manner that as part of such business any of such securities are sold or offered for sale to the public in this state; * * *. The business of trading in securities * * * shall not include an isolated transaction in which a specific security is sold or offered for sale * * *." (Italics ours.)

¹⁷ Instant case at p. 130.

¹⁸ *Dunham v. Ottinger*, 243 N. Y. 423, 153 N. E. 298 (1926) (Upheld the constitutionality of the Martin Act); *In re Waldstein*, 160 Misc. 763, 291 N. Y. Supp. 697 (1936). *Held*, that securities included any form of instrument used for the purpose of financing and promoting enterprises. *Cf.* *People v. Federated Radio*, 244 N. Y. 33, 154 N. E. 655 (1926). *Held*, that crimes are not created by implication, and the act does not expressly prohibit fraudulent practices; the statute merely provides a procedure to prevent them. See notes 12, 15, *supra*.

¹⁹ See note 9, *supra*.

²⁰ Corporation marketing its own securities direct to the public is itself a dealer under the definition contained in the Martin Act. REP. ATT'Y GEN. (1925) 187.

¹ 48 STAT. at L. 1069, 1103 (1934), 47 U. S. C. A. § 605.

admissible evidence obtained by wire-tapping, and federal officers are within the purview of the Act. *Nardone v. United States*, — U. S. —, 58 Sup. Ct. 275 (1937).

The general rule at common law is that evidence procured illegally, if not otherwise incompetent, is admissible.² Where no constitutional rights are concerned, the rule is absolute.³ In the United States there are exceptions at least in cases involving evidence procured and used in violation of the Fourth⁴ and Fifth⁵ Amendments to the Constitution.

In the case of *Olmstead v. United States*⁶ defendants were convicted of smuggling alcohol. The evidence upon which this conviction was based was obtained through the tapping of telephone wires by federal officers. In Washington, where the evidence was procured, there was a statute making wire-tapping a misdemeanor.⁷ In that enactment, unlike the Federal Communications Act, above mentioned, there was no provision as to the disposition of the information obtained in violation of the Act. It was decided that the tapping of telephone wires of suspected criminals, off their premises, was not violative of the Fourth Amendment since there was no entry of the houses or offices of the criminals, nor any unlawful search nor seizure.⁸ Neither, it was held, was it repugnant to the Fifth Amendment, inasmuch as the criminals were under no compulsion to engage in telephone conversations.⁹ Therefore, in keeping with the general rule, admission of evidence obtained through wire-tapping was declared proper, even though it was a crime in the state in which it was done. At that time no federal statute applied to such wire-tapping. The question in the

² *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372 (1904); *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (1903); 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2183. The reason is one of expediency, it being felt that the courts should not divert attention from principal issues by inquiring into incidental matters. See *People v. Adams, supra*, at 358, 68 N. E. at 638 (1903).

³ 5 JONES, EVIDENCE (2d ed. 1926) 2075, n.3.

⁴ *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341 (1914); *Gouled v. United States*, 255 U. S. 298, 41 Sup. Ct. 261 (1921); *Amos v. United States*, 255 U. S. 313, 41 Sup. Ct. 366 (1921); *cf. People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926) (wherein it was held that evidence obtained in violation of Civil Rights Law § 8, substantially the same as the fourth amendment, was admissible).

⁵ *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341 (1914).

⁶ 277 U. S. 438, 48 Sup. Ct. 564 (1928).

⁷ "Every person who shall intercept * * * a message over any telephone or telegraph line * * * shall be guilty of a misdemeanor". WASH. COMP. STAT. (Remington, 1922) 2656—18.

⁸ "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. Art. IV.

This was decided not without a vigorous dissent by four justices who took exception to so rigid an interpretation of the amendment; *cf. State v. Hester*, 137 S. C. 145, 134 S. E. 885 (1926) (use of a dictaphone arrangement to obtain evidence was not an unreasonable search or seizure).

⁹ No person " * * * shall be compelled in any criminal case to be a witness against himself * * *." U. S. CONST. Art. V.

instant case arose under the Federal Communications Act, which changed the common law rule,¹⁰ and the difficulty was as to whether the officers of the Federal Government were within the prohibition of the Act.

Though the rule is stated that general words in a statute do not bind the sovereign enacting it, where its prerogatives are involved,¹¹ there are exceptions.¹² In this country the rule has been applied to two classes of cases. The first is where the statute would inhibit the exercise of an established sovereign power.¹³ The second is where application of the act would be inimical to public safety.¹⁴ The rule seems to be less stringent when a statute operates upon the agents of, rather than the sovereign itself.¹⁵

It is a principle of statutory construction that the sovereign is included in acts directed against wrong and oppression.¹⁶ Inasmuch

¹⁰ It provides that there shall be no divulgence to any person of information obtained. "To recite the contents of the message in testimony before a court is to divulge the message". Instant case at 276.

It should be noted that the change is limited to evidence procured by such wire-tapping as is within the scope of the act. Admissibility of evidence procured in violation of other laws is unaffected.

¹¹ 1 BL. COMM. *262; 1 KENT. COMM. *460; BLACK, INTERPRETATION OF LAWS (1896) § 54.

¹² In the Magdalen College Case (11 Co. [K. B.] 66b, 77 Eng. Reprints 1235), one of the earliest cases upholding the rule, were stated three exceptions. They were said to exist when the statute was passed for eleemosynary, religious or educational purposes (71b); or where it was designed for the suppression of wrong (72a); or where the will of a founder or donor would otherwise be rendered ineffectual (73a).

As to the applicability of statutes to the sovereign where prerogatives are conferred, rather than abridged, see BLACK, INTERPRETATION OF LAWS § 54; also Perry v. Eames, 8 App. Cases 360 (1883).

¹³ Dollar Savings Bank v. United States, 19 Wall. 227, 22 L. ed. 80 (U. S. 1874) (a statute prescribing, and thereby limiting remedies did not apply to the government in a suit to collect taxes); United States v. Herron, 20 Wall. 251, 22 L. ed. 275 (1874) (debts due the United States were not barred by a debtor's discharge in bankruptcy). See comprehensive collation of cases in 22 L. ed. 385, 386.

¹⁴ Farley v. New York, 152 N. Y. 222, 46 N. E. 506 (1897) (a statute setting a speed limit of five miles an hour would not be applied to fire apparatus going to a fire); State v. Burton, 41 R. I. 303, 103 Atl. 962 (1918) (military operations, in time of war, exempt from motor vehicle laws); Washington v. Gorham, 110 Wash. 330, 188 Pac. 457 (1920) (sheriff, in line of duty, exempt from speed limitations).

¹⁵ United States v. Arizona, 295 U. S. 174, 55 Sup. Ct. 666 (1935).

¹⁶ BLACK, INTERPRETATION OF LAWS § 54; " * * * the King shall not be exempted by construction of law out of the general words of acts made to suppress wrong, because he is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong, *Solum Rex hoc non potest facere, quod non potest iniuste agere: * * **" Lord Coke, in the Magdalen College Case. 11 Co. [K. B.] 66b, 72a (1615).

as wire-tapping has long been regarded as a reprehensible practice,¹⁷ the principle, in this case, seems to have been justly applied.¹⁸

A. W.

HUSBAND AND WIFE—TRUSTS—DOWER—DECEDENT ESTATE LAW SECTION 18 CONSTRUED.—Ferdinand Straus, three days prior to his death on July 1, 1934, after making his last will, executed a trust agreement wherein he transferred to trustees *all* his real and personal property, reserving the income for life, right to revoke the trust at will, and full control of the trustees. Upon his death, the property was to pass to one other than his wife.¹ The widow has challenged the validity of the transfer to the trustees. *Held*, the husband's conveyance to the trustees, reserving the income, power of revocation and right to control the trustees was illusory and void as to the rights of the surviving spouse under the Decedent Estate Law Sections 18 and 83.² *Newman v. Dore*, 275 N. Y. 371, 9 N. E. (2d) 966 (1937).

Prior to September 1, 1930, a wife was endowed of a life estate in one-third of the real property of which her deceased husband was beneficially seized during coverture.³ While the husband was still alive, dower was an inchoate right, a mere contingent claim and not an estate in land,⁴ yet, it was a subsisting interest which was fully

¹⁷ See N. Y. Times, Edit., Sept. 4, 1931, p. 18, col. 3; *id.* Dec. 3, 1932, p. 36, col. 6; *id.* Edit., Jan. 30, 1933, p. 2, col. 4.

¹⁸ As to effect upon intrastate communications, see Edit., N. Y. L. J., Dec. 29, 1937.

¹ The deceased could not have effectively cut off his wife by a testamentary disposition, nor by dying intestate seized of the property in question. If the agreement effectively divested the settlor of title, then the decedent left no estate and the widow receives nothing.

² N. Y. DEC. EST. LAW § 18. "Where a testator dies after August 31, 1930, and leaves a will thereafter executed and leaves surviving a husband or wife, a personal right of election is given to the surviving spouse to take his or her share of the estate as in intestacy, subject to the limitations, conditions and exceptions contained in this section. * * *." See also DECEDENT ESTATE LAW §§ 82, 83.

³ N. Y. REAL PROP. LAW § 190. "When the parties intermarried prior to the first day of September, 1930, a widow shall be endowed of the third part of all lands whereof her husband was prior to the first day of September, 1930, seized of an estate of inheritance, at any time during the marriage. Except as hereinbefore provided, after the 31st day of August, 1930, no inchoate right of dower shall be possessed by a wife during coverture, and no widow shall be endowed in any lands whereof her husband became seized of an estate of inheritance."

⁴ *Witthaus v. Schack*, 105 N. Y. 332, 11 N. E. 649 (1887); *Moore v. City of N. Y.*, 8 N. Y. 110 (1853).