by the wife for divorce or separate maintenance would then be permissible. In such a situation, the wife's prior divorce would, in effect, be recognized, in spite of the New York policy to the contrary. Such a ruling would seem to make the existence of the marriage depend upon which party was the first to institute proceedings in court, rather than on a consideration of the equities involved. A judgment of separation under these conditions, however, would not determine the relation between the plaintiff and her first husband, who are regarded, in New York, as still married.[20]

As long as New York persists in maintaining its strict policy, estoppel exists as a discretionary tool with which the court can prevent extreme hardship resulting from that policy. As estoppel is an equitable instrument, if it is to be used at all, its use should be determined by the presence or absence of equities in the particular case; its application should not be made to depend upon the accidental circumstance of one or the other party's having brought suit first.

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**Evidence—Federal Communications Act—Admissibility of Telephone Conversation Intercepted with Consent of One Party—[Federal].**—An agent of the Federal Bureau of Investigation, by means of an extension, recorded telephone conversations between the defendants and the chief government witness, with the consent of the latter. In criminal proceedings for conspiracy to persuade the prosecuting attorney to recommend a light sentence for the chief government witness in a pending case, the recordings were introduced in evidence over objection of the defendants. On appeal from conviction, *held*, that the admission of the recordings was error because they were obtained by an interception of telephone conversations in violation of Section 605 of the Federal Communications Act. Judgment reversed and new trial ordered, one judge dissenting. *Polakoff v. United States*.[1]

The federal courts, until 1913, followed the common law rule that the admissibility of evidence was not affected by the illegality of the means by which it was obtained.[2] In *Weeks v. United States*[3] the first exception to the common law rule was made by the Supreme Court in holding inadmissible evidence obtained by government officers in violation of the Fourth Amendment.[4] Because of the decision in *Olmstead v. United*

[20] Krause v. Krause, 282 N.Y. 355, 360, 26 N.E. (2d) 290, 292 (1940).

[1] 112 F. (2d) 888 (C.C.A. 2d 1940), cert. den. 61 S. Ct. 41 (1940). In a companion case, United States v. Fallon, 112 F. (2d) 894 (C.C.A. 2d 1940), which was held to be controlled by the principal case, recordings of telephone conversations between the prosecution's chief witness and the accused were made by a federal agent with the cooperation of the witness in the latter's home and summer camp. In United States v. Yee Ping Jong, 26 F. Supp. 69 (Pa. 1939), with facts similar to those in the principal case, the court held there was not an interception since "intercept" means "to take or seize by the way, or before arrival at the destined place." The court in the principal case places emphasis on the consent of the communicants rather than on the location of the recording instrument.

[2] 1 Greenleaf, Evidence § 254(a) (14th ed. 1883). [3] 232 U.S. 383 (1913).

[4] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and persons or things to be seized." As to admissibility in civil proceedings of evidence acquired by unreasonable search and seizure, see Rogers v. United States, 97 F. (2d) 691 (C.C.A. 1st 1938), noted in 6 Univ. Chi. L. Rev. 113 (1938).

*States*[5] that the prohibition of the Fourth Amendment against unreasonable searches and seizures was limited to tangible property and did not include wire tapping, intercepted wire communications continued to be admissible in evidence. In 1934 Congress passed the Federal Communications Act, Section 605 of which made it a crime[6] for a person not authorized by the sender of a wire communication to intercept and divulge it.[7] A second exception was then grafted on the common law rule in *Nardone v. United States*,[8] by excluding evidence of communications intercepted in violation of Section 605 of the Federal Communications Act. Shortly thereafter the exception was expanded to include not only the intercepted communication but also evidence obtained by the use of it;[9] and the exception was held to apply to both interstate and intrastate communications.[10]

Underlying the development of the federal rule of the inadmissibility of illegally acquired evidence is a conflict between the desire to protect citizens against invasions of their right of privacy and the desire for strict enforcement of the criminal law.[11] The role played so far by Section 605 in the field of wire communications is analogous to the role of the Fourth Amendment in the field of tangible property.[12] Of the two, Section

[5] 277 U.S. 438 (1928).

[6] Before the passage of the Federal Communications Act it was held in one case that the tapping of plaintiff's telephone line by a group of persons residing in a nearby house was a tort violating the plaintiff's right of privacy. Rhodes v. Graham, 238 Ky. 225, 37 S.W. (2d) 46 (1931), noted in 45 Harv. L. Rev. 194 (1931).

[7] Section 605 of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C.A. § 605 (Supp. 1939), provides in part 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."

[8] 302 U.S. 379 (1937). The Court, at p. 382, said: "To recite the contents of the message in testimony before a court is to divulge the message."

[9] Nardone v. United States, 308 U. S. 338 (1939), noted in 25 Corn. L. Q. 445 (1940); 38 Mich. L. Rev. 1097 (1940). For a discussion of the federal rule as to admissibility of illegally acquired evidence see 8 Wigmore, Evidence §§2183, 2184, 2287 (3d ed. 1940); Wire Tapping and Law Enforcement, 53 Harv. L. Rev. 863 (1940); Further Restrictions on the Admissibility of Illegally-Obtained Evidence, 34 Ill. L. Rev. 758 (1940).

[10] Weiss v. United States, 308 U.S. 321 (1939). The power by which Congress may make § 605 applicable to intrastate communications is not definitely ascertained. In the Weiss case the argument was advanced that because the interceptor was incapable of distinguishing between inter- and intra-state messages, he must be prohibited from intercepting any message. In the principal case, however, where the interceptor listened, at an extension, to an intrastate telephone conversation pre-arranged by him and one participant, the reasoning of the Weiss case is not applicable. Had this aspect of the case been considered, the court might have been forced to adopt the theory advanced in Sablowsky v. United States, 101 F. (2d) 183, 189 (C.C.A. 3d 1938), that § 605 is a "rule of evidence in the purest sense," deriving its validity from the power of Congress to regulate the admission in a United States court of evidence procured by federal officers.

[11] Compare the dissenting opinion of Mr. Justice Holmes in Olmstead v. United States, 277 U.S. 438, 470 (1928).

[12] Note the statement of Mr. Justice Roberts in Nardone v. United States, 302 U.S. 379, 383 (1937).

605 is the more absolute barrier to invasion of the right of privacy. It does not provide for the issuance of warrants for wire tapping; it applies to all persons; and it directly prohibits an interception and divulgence not authorized by the sender of the communication. The Fourth Amendment, on the other hand, provides for search warrants, applies only to officers of the Federal Government,[13] and prohibits only unreasonable searches and seizures.

The principal case turns upon the question whether, under Section 605, the minimum requirement for the interposition of a third party as a listener to a telephone conversation is the consent of one party or of both parties to the conversation. The majority opinion, proceeding on the theory that an interception of a telephone conversation (in which each party is both a sender and receiver of communications) violates the right of privacy of each communicant,[14] would require the consent of both. In this holding the majority is supported by the language of Section 605; to arrive at the result of the dissenting judge that the consent of one party is sufficient it would be necessary to read the section as permitting interceptions authorized only by the receiver. The majority's position is also supported by the analogy between Section 605 and the Fourth Amendment. The immunity against unreasonable search and seizure under the Fourth Amendment, according to federal decisions, is personal and can be waived only by the person whose rights are to be affected.[15] In the principal case it is the nonconsenting communicant alone whose rights are affected.

The dissenting judge contended that the majority opinion makes it a crime for one to have his stenographer transcribe a telephone conversation between himself and another.[16] That the majority opinion, however, did not contemplate prohibition of all third-party listeners is expressly stated.[17] To reconcile the distinction between the positions of the stenographer and the federal agent with the fact that Section 605 expressly applies to any person, the court pointed out that a party to a telephone conversation may give his consent, express or implied, to the interposition of third persons.[18] But the court recognized that whatever the scope of such implied consent, it

[13] Burdeau v. McDowell, 256 U.S. 465 (1921). Although state officers are generally private individuals for the purpose of applying the Fourth Amendment, the Court held in Gambino v. United States, 275 U.S. 310 (1927), that evidence obtained by state troopers was inadmissible because they made the search and seizure in the performance of a supposed duty to aid in the enforcement of a federal law, "solely for the purpose of aiding in the federal prosecution."

[14] The court says: ". . . . anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts." 112 F. (2d) 888, 889 (C.C.A. 2d 1940). Compare the statement of Mr. Justice Brandeis in his dissenting opinion in Olmstead v. United States, 277 U.S. 438, 475 (1928).

[15] Amos v. United States, 255 U.S. 313, 317 (1921); Cofer v. United States, 37 F. (2d) 677, 679 (C.C.A. 5th 1930). But cf. United States v. Sergio, 21 F. Supp. 553, 554 (N.Y. 1937).

[16] 112 F. (2d) 888, 892 (C.C.A. 2d 1940). [17] Ibid., at 889.

[18] There may be situations in which it can be said that a party has authorized or given his implied consent to a broadcasting of the conversation. For example, in some police stations emergency calls which the operator in the station thinks require prompt attention are broadcast to the radio operator, who obtains the necessary information immediately from the answers given to the questions of the telephone operator and then signals the appropriate cruising car accordingly.

cannot extend to federal agents bent on trapping the communicant criminally.[19] The status of private individuals, however, is left in doubt. It would seem that the implied consent of a communicant does not extend to the interposition of any third person, stenographer or federal agent, bent on obtaining evidence to be used against him in a criminal proceeding. On the other hand, according to this analysis, the interposition of a stenographer would be permitted in the normal course of business affairs.

The dissenting judge in effect also argued that if a party to a telephone conversation is permitted to repeat the conversation to others at will, it is unreal to forbid him to permit others to listen to the conversation since the latter is no greater a violation of the right of privacy than the former. If, however, the foregoing analysis of the status of a private individual as an interceptor is valid, the basis for this criticism is largely removed, because, under the hearsay rule,[20] only those persons who listen to the conversation can give evidence of its content in court. The effect of the majority position is therefore, at the very least, to prevent the interposition of potential witnesses against the non-consenting communicant in a criminal proceeding.[21]

The principal case represents only one aspect, and probably a minor aspect, of the protection given under Section 605 to the right of privacy in a telephone conversation.[22] To achieve a better balance of interest, it has been proposed that wire tapping by warrant be permitted.[23] Such a solution seems desirable in view of the sweeping exclusion by the Supreme Court of evidence obtained, directly and indirectly, through wire tapping. But the present desire for an outlet in the interest of criminal prosecution should not be allowed to confuse the issues in the principal case. If there is a necessity for the use of wire tapping as a means of criminal investigation,[24] there is an equal necessity for its responsible control. One consequence of the dissenting opinion in the principal case is that the consent of one party to a telephone conversation is sufficient to authorize wire tapping. As between the two solutions, judicial authorization of wire tapping seems preferable to authorization by private persons.

[19] In Pavesich v. New England Life Ins. Co., 122 Ga. 190, 199, 50 S.E. 68, 72 (1904) (a tort case), the court said: "The right of privacy .... may be waived for one purpose, and still asserted for another; it may be waived in behalf of one class, and retained as against another class; it may be waived as to one individual, and retained as against all other persons."

[20] 5 Wigmore, Evidence § 1361 (3d ed. 1940). [21] Note 19 supra.

[22] The status of the telegram, as a wire communication under § 605, has not been litigated with respect to the issue of the principal case. A telegram is more like a letter than is a conversation by telephone. In Ex parte Jackson, 96 U.S. 727 (1877), the protection of the Fourth Amendment was held to extend to a letter in the mail.

[23] 8 Wigmore, Evidence 52 (3d ed. 1940); Wire Tapping and Law Enforcement, 53 Harv. L. Rev. 863 (1940). Such a solution has been incorporated in an amendment to the New York Constitution, art. 1, §12, which went into effect in 1939. A bill is pending in Congress which would authorize wire tapping, subject to the direction of the Attorney General, in the interests of national defense. H. J. Res. 571, 76th Cong. 3d Sess. (1940), passed by the House on August 6, 1940.

[24] "Although Thomas Dewey, District Attorney of New York County, has called wire tapping one of the best methods available for uprooting certain types of crime, J. Edgar Hoover, Director of the Federal Bureau of Investigation, terms it 'an archaic and inefficient' practice which 'has proved a definite handicap or barrier in the development of ethical, scientific, and sound investigation technique.' " Wire Tapping, Civil Liberties and Law Enforcement, 1 Bill of Rights Rev. 48 (1940).