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Wire-Tapping Evidence Inadmissible Unless Both Parties Consent

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WIRE-TAPPING EVIDENCE INADMISSIBLE UNLESS BOTH PARTIES CONSENT

Defendants were convicted on evidence gained by recording telephone conversations between them and an informer who gave his consent that federal agents record the conversations over an extension phone. Held, this is illegal wire-tapping and the evidence gained thereby is inadmissible. *United States v. Polakoff*, 112 F(2d) 888, (C.C.A.2d, 1940), *cert. denied*, 61 S. Ct. 41 (1940).

Tapping wires to gain evidence to detect and convict criminals does not violate the Federal Constitution. *Olmstead v. United States*, 277 U.S. 438 (1928). But the Communications Act, 48 STAT. 1103 (1934), 47 U.S.C.A. § 605 (Supp. 1940), renders any information gained in wire-tapping by federal agents or private persons inadmissible in evidence. *Nardone v. United States*, 302 U.S. 379 (1937). A refusal to allow defendant to examine the prosecution to determine the extent to which the case is based on facts gained by wire-tapping is reversible error. *Nardone v. United States*, 308 U.S. 338 (1939). This ban on wire-tapping extends to both intrastate and interstate communications. *Weiss v. United States*, 308 U.S. 321 (1939). In all these cases interception was done secretly, without the knowledge or consent of either communicant. In the principal case, however, the party initiating the conversation authorized the wire-tapping. The Communications Act allows only the "sender" to authorize an interception, but the court solves this case by construing "sender" to mean both communicants. It explains that since every telephone conversation is antiphonal, the parties to it are alternately sender and receiver, and that to allow one party to forfeit the other's privilege would defeat the purpose of the act and the privilege granted. This result makes illegal an effective method of crime detection and law enforcement, but the over-riding policy expressed by the Court in the *Nardone* cases, that of protecting individual liberties and the right of privacy, must prevail. In a concurring opinion, Judge A. Hand proposes that Congress act to allow police officers restricted use of wire-tapping. Professor Wigmore suggests the use of warrants, issued on oath as search warrants are issued. 8 WIGMORE, EVIDENCE, (3d ed. 1940) § 2184b. See Note (1940) 53 Harv. L. Rev. 863; N. Y. CONST. (1938) Art. I, § 12.

W. M. B.