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Wire Tapping - A Definition of "Interception," "Divulgence," "Use," "Consent of the Sender," and "Persons Prohibited" since the Nardone Case

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We must correct errors in the law and we must make those recognized and accepted changes with the times which are substantiated by reason and experience. Reason outranks technicality. Public welfare and human rights are far more important than a tenacious adherence to unsound decisions of the past, especially when outmoded or where reasons for their existence are nonexistent today.[38]

CONCLUSION

Thus, in recent years, significant changes have developed in the negligence and warranty cases which have greatly expanded the range of manufacturer's liability as had been manifested by earlier authorities. In fact, the expansion has grown to the point where the courts are at almost hopeless variance as to the present rule in such cases. What is more alarming is that this disagreement will continue and expand to new heights as new occasions arise which make it fitting "to discard legal concepts of the past to meet new conditions and practices of our changing and progressing civilization."[39]

However, in spite of the diversity of reasoning employed by the courts in establishing the rights and duties between manufacturers and consumers, it is safe to assert that almost anyone can recover from the manufacturer of a defective or deleterious article which has been put out in the legitimate channels of trade regardless of the "due care" or "privity" requirements. In the final analysis, any outmoded fictions formerly employed by manufacturers to seek relief from their responsibility to the buying public cannot be asserted in view of the recent findings of the courts which have attempted to keep abreast with our ever-changing ways of life.

[38] 177 N.Y.S. 2d 7 (1958).

[39] Rogers v. Toni Home Permanent Co., 167 Ohio St. 244, 147 N.E. 2d 612, 615 (1958).

WIRE TAPPING—A DEFINITION OF "INTERCEPTION," "DIVULGENCE," "USE," "CONSENT OF THE SENDER," AND "PERSONS PROHIBITED" SINCE THE NARDONE CASE

Congress had enacted what appeared to be a very comprehensive piece of legislation to prohibit the interception of wire communications and their divulgence if either is not authorized by the sender and to prohibit the derivative use of such intercepted communications if that is also not authorized by the sender. A pertinent part of this enactment reads as follows:

[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, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto. . . .[1]

The cases are not in agreement as to the extension of the meaning of "interception" and "consent of the sender" and there are occasions when the courts have permitted "derivative use" to be made of intercepted communications as it will be presently observed. Yet certain basic agreement has been had as to what amounts to "divulgence" and "persons prohibited."

In the first Nardone case,[2] the United States Supreme Court considered the use of a wire tapping apparatus on a telephone wire to listen in on an interstate communication between the petitioners to be an interception of a communication within the meaning of §605. It was held that when federal agents testified in court to the contents of the conversation there was present a divulgence forbidden by §605.[3] Another important holding of the case was that the consent of the sender is required for such interception and divulgence even if the Federal Government sought to engage in such activities for the detection and prevention of crime. Therefore the government was held to be one of the persons prohibited from divulging intercepted messages without consent of the sender.[4]

The same court in the second *Nardone* case[5] stated that the indirect use of the intercepted communication was forbidden as inconsistent with ethical standards and destructive of personal liberty to the same extent as direct use thereof was forbidden, and that knowledge gained from intercepted messages not only cannot be used in court but cannot be used at all. This broad language would appear to prohibit acquiring further information of the whereabouts or activities of one or both of the participants in a wire communication or their associates and to enlarge the meaning of divulgence to include testifying in court as to the substance, content, meaning, existence, or purport of indirect evidence acquired with knowledge gained from an intercepted wire communication.[6]

[1] 47 U.S.C.A. § 605 (Supp. 1956).

[2] Nardone v. United States, 302 U.S. 379 (1937).

[3] Ibid., at 382. "To recite the contents of the message in testimony before a court is to divulge the message. The conclusion that the act forbids such testimony seems to us unshaken by the government's arguments."

[4] Ibid., at 381. " '[N]o person' comprehends federal agents, and the ban on the communication to 'any person' bars testimony to the content of an intercepted message."

[5] Nardone v. United States, 308 U.S. 338 (1939).

[6] Ibid., at 340. "To forbid the direct use of methods thus characterized but to put no curb of their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' "

An important landmark case which broadened the definitions of "interception" and "divulgence" and extended the application of the requirement of "consent of the sender" is *Weiss v. United States*[7] wherein the court was faced with the problem of a wire tap placed on an intrastate telephone conversation by federal agents and a recording of the message made by a stenographer and by a phonograph which message was presented as recorded to two of the defendants to persuade them to turn state's evidence and later presented as recorded into evidence at the trial. Conviction was had of the remaining defendants on the basis of the testimony of Messman and Garrow, who had turned state's evidence, and on the basis of the stenographic and phonographic recordings. The court determined that tapping of an *intrastate* phone call by federal agents was an interception as there was no wording in §605 to limit the meaning of "interception" to interstate and foreign communications and as it was not readily ascertainable whether a given telephone conversation would cross state borders. "Divulgence" prohibited by §605 was had when the government permitted Messman and Garrow, who had been parties to certain conversations, to read the stenographic transcript and also when the prosecutor entered the stenographic transcript and the phonograph records into evidence. The court further held that where the other participants of intercepted phone conversations were ignorant of the interception and did not consent thereto, an agreement on the part of some of the participants to turn state's evidence after they had been apprised of the government's knowledge of their phone talks was not consent to the interception and divulgence on the part of the ignorant participants. Likewise consent of Messman and Garrow is not shown as § 605 requires voluntary consent of a sender.

The foregoing cases have set down basic propositions which it is the purpose of this comment to develop firstly, by presenting cases that follow or extend their concepts; secondly, by examining cases that diverge from them as to permissible uses of intercepted communications; thirdly, by distinguishing cases that are not true wire communication situations at all; and fourthly, by exploring the divergent meanings of "interception" and "consent of the sender."

CASES IN AGREEMENT OR EXTENSION OF ABOVE BASIC CONCEPTS

An important case extending the broad concepts of the foregoing cases is *Benanti v. United States*.[8] There, the New York state police obtained a warrant authorizing them to tap telephone wires in accordance with state law. The police were interested in rounding up narcotics peddlers. The

[7] 308 U.S. 321 (1939).

[8] 355 U.S. 96 (1957). Consult 7 De Paul L. Rev. 267 (1958) for a note on this case.

phone call intercepted contained information that eleven pieces were to be transported. However the police found instead eleven cans of alcohol for which federal tax stamps had not been procured. A federal trial followed. A New York state police officer testified for the government as to the events leading to the discovery of the cans and admitted on cross-examination that wire tapping had given a lead to the discovery. The court said there was an interception forbidden by §605 even if it was committed by state officers and by a tap on intrastate calls and authorized by state law whenever evidence obtained therefrom is presented in a federal trial. The use of the interception to obtain a lead to discover evidence of another crime than the one toward which the interception was directed was considered a derivative use prohibited by §605. And although the words of the conversation were not disclosed to the jury, there was held to be a divulgence prohibited by § 605 upon disclosure to the jury of the existence of the communication because the jury would be free to speculate that the existence of a certain intercepted conversation was further proof of petitioner's criminal activities.

In *Lipinski v. United States*[9] the defendant was convicted of intercepting and conspiring to intercept telephone communications and of divulging them to third persons under 47 U.S.C.A. § 501. All of the interceptions were made on intrastate lines but all of the lines could be used in interstate calls by dialing "O." The court held § 605 applicable to prohibit interception of intrastate calls even if the intrastate system only is being used and stated it was immaterial that the telephone system was made of two independent and constituent parts.

Also in agreement with and in extension of the foregoing concepts is *United States v. Gris*[10] wherein the defendant was convicted for the same crime as the defendant in the *Lipinski* case. The defendant here was a private detective hired by one Fain to obtain evidence against Fain's wife for use in a possible divorce action to be brought by Fain against his wife. The defendant rented an apartment adjoining Mrs. Fain's room, drilled a hole in the wall, and installed a wire tap which would ring a buzzer and cause a neon light to glow whenever Mrs. Fain received a phone call. The conversations were recorded. In sustaining the defendant's conviction, the court considered a private detective to be one of the persons prohibited from intercepting and divulging the contents, substance, purport, meaning, or existence of wire communications. The court also considered it of no consequence that an interception was had on an intrastate conversation; there was an interception nevertheless. The disclosure of the evidence to Fain was a forbidden divulgence.

[9] 251 F.2d 53 (C.A. 10th, 1958).

[10] 247 F.2d 860 (C.A. 2d, 1957).

Diamond v. United States[11] wherein only four or five of some one hundred fifty telephone calls said to have been intercepted by the defendant were made in interstate communications, the court upheld his conviction for the interceptions, stating that privacy of a conduit of interstate commerce was hoped for although the same physical equipment is used in intrastate commerce. To the same effect that punishment under 47 U.S.C.A. § 501 is to be had for intercepting and divulging telephone conversations without authority of the sender whether the call is in intrastate, interstate, or foreign commerce is *Massengale v. United States.*[12]

DERIVATIVE USES PERMITTED

A keynote case giving rise (in many cases following its doctrine) to the permission of one type of derivative use of intercepted communications seemingly prohibited by §605 and the foregoing cases and standing as a precedent for a seemingly unwarranted contraction of the protection of the statute is *Goldstein v. United States.*[13] In that case the defendant was not a party to any of the intercepted telephone messages. The government made the interceptions. The court assumed for purposes of its decision that the government used certain of the contents of some of the intercepted communications to persuade two of the defendants who participated in these conversations to testify for the government and that these interceptions were not authorized by the sender. The defendant was held to have no standing in court to object to the introduction of such evidence. The majority opinion stated:

> [Standing has long been denied] to one not the victim of an unconstitutional search and seizure to object to the introduction in evidence of that which was seized. *A fortiori* the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure.[14]

However, the dissent of Mr. Justice Murphy concurred in by Mr. Justice Frankfurter treated the wire tapping restriction to be different generally from the search and seizure problem. This opinion states:

> In enacting § 605, Congress sought to protect society at large against the evils of wire tapping and kindred unauthorized intrusions into private intercourse conducted by means of modern media of communication . . . To that end the statute prohibits not only the interception and the divulgence of private mes-

[11] 108 F.2d 859 (C.A. 6th, 1938).

[12] 240 F.2d 781 (C.A. 6th, 1957).

[13] 316 U.S. 114 (1942).

[14] Ibid., at 121. The court went on to hold that § 605 does not render inadmissible in a federal criminal trial testimony of a witness induced in advance of trial to testify by use of communications intercepted in violation of the act but to which communications defendants were not parties.

sages without the consent of the sender but also the use of information so acquired by any person not entitled to it. . . . While the sender can render interception, divulgence, or use lawful by his consent, it is a complete *Non Sequitur* to conclude that he alone has standing to object to the admission of evidence obtained in violation of §605.[15]

The majority opinion is, however, currently being accepted as a precedent on the "no standing" issue. *United States v. Lewis*[16] held that two of the defendants implicated in the violation of gambling laws had no standing to object that the telephone lines on which calls were intercepted were not under their control as these defendants were not parties to the intercepted conversations. However, the court also held that there was consent on the part of those defendants who participated in the conversations. Then the presence of consent should mean that there is no violation of § 605. For this reason alone the objection of the non-participating defendants ought to be considered as nugatory.

In *United States v. Gris*[17] the court held that the defendant could not object to the government's offering into evidence the conversations intercepted by the defendant where the defendant was not a party to the conversations. A conviction for the violation of 47 U.S.C.A. § 501 prohibiting unauthorized interception and divulgence of telecommunications was had. However, here the defendant himself made the interception which constituted the crime with which he was charged under a section expressly stating how that crime is committed. In *Goldstein* the government itself made the seizure of the telecommunication which resulted in the defendant's conviction. *Gris* would seem to fit the principle that § 605 was intended to forbid unwarranted intrusions into telecommunications and that § 501 intended to punish these intrusions and not to fit the situation where an intercepted communication is sought to be used against a party other than the party making the unauthorized intrusion.

It would appear that the dissent in *Goldstein* conforms to the broad protection laid down in § 605, in each *Nardone* decision, and in *Weiss*. The court in *Olmstead v. United States*[18] held that wire tapping and kindred interferences with telecommunications does not constitute a search or a seizure within the meaning of the Fourth Amendment of the Federal Constitution. The courts in subsequent decisions have agreed that the problem of interference with wire communications is not a problem of search and seizure but is instead one of protecting the privacy of communications used in interstate commerce against dangerous uses for which people might be tempted to apply them and this protection was afforded

[15] Ibid., at 125.

[16] 87 F. Supp. 970 (D.D.C., 1950).

[17] 146 F. Supp. 293 (S.D.N.Y., 1956).

[18] 277 U.S. 438 (1928).

by § 605 (which Congress had the power to enact under the authority granted it by the commerce clause of the United States Constitution).[19] If Congress had chosen to make an exclusionary rule of evidence more rigid in wire tap situations than normally exists in those cases involving the usual search and seizure, then a person not a party to the intercepted communication should be free to object to its introduction into evidence if consent of none of the participants to the communication has been secured.

CASES PRESENTING NO WIRE COMMUNICATION PROBLEM UNDER § 605

Before examination is made of what constitutes "interception" and "consent of the sender," the cases that seem to present communications problems under § 605 but do not do so should be distinguished.

A frequent source of conflicting statements as to the interpretation of "interception" has been *Goldman v. United States*.[20] In that case, evidence was obtained by federal agents by the use of a detectaphone applied to the wall of a room adjoining the office of the defendant. This device had a receiver so delicate that it could pick up sounds emanating from the defendant's office whenever he spoke into the phone and an amplifier for making the conversations audible. There was a divulgence when the agents dictated the messages to a recording secretary as they were overheard and when the testimony was given as to the contents of the messages in court. The court held that there was no interception explaining that words spoken into a telephone receiver within the listening range of another do not constitute a communication by wire within the meaning of 47 U.S.C.A. § 153.[21] An interpretation of "interception" was given as follows:

> As has rightly been held, this word indicates the taking or seizure by the way or before arrival at the destined place. It does not ordinarily connote the obtaining of what is to be sent before, or at the moment, it leaves the possession of the proposed sender, or after, or at the moment, it comes into the possession of the intended receiver.[22]

It is to be noted that the decision involves a method of eavesdropping whereby one is enabled to seize what is sent at the moment it leaves the

[19] Benanti v. United States, 355 U.S. 96 (1957); Weiss v. United States, 308 U.S. 321 (1939); Rose v. United States, 277 F.2d 448 (C.A. 10th, 1955); Diamond v. United States, 108 F.2d 859 (C.A. 6th, 1938).

[20] 316 U.S. 129 (1942).

[21] 47 U.S.C.A. § 153(a) (Supp., 1956) reads: "Wire communication . . . means the transmission of writing, signs, signals, pictures, and sounds by . . . aid of wire, cable, or other like connection between the points of the origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."

[22] Goldman v. United States, 316 U.S. 129, 134 (1942).

possession of a speaker and what is received at the moment it comes into the possession of a listener without, at the same time, involving an apparatus that is by some method attached to a wire communication in use by the participants to a conversation; hence the situation presents a different problem from the cases involving an apparatus and applying the *Goldman* definition.

A similar type of situation is presented by *Rayson v. United States*[23] wherein it was stated by the court not to be an interception within § 605 for another person to listen to what is said through a telephone receiver held in the hand of the person to whom a message is addressed since the conversation is completed when it is heard and not seized before it reaches the person to whom it is addressed. Again, however, this is a situation where an eavesdropper can seize a conversation by wire at the time it is received into the possession of a listener and at the time it leaves the possession of a speaker without the use of an apparatus attached to or connected with a wire system.

Also presenting a fact situation in the nature of eavesdropping is *United States v. Bookie*.[24] There two policemen went into a store operated by one Hubbard. During the course of their investigation, a telephone call came for Hubbard. As Hubbard engaged in the conversation one of the officers placed his ear near the receiver and overheard the message. The court accepted the *Goldman* definition of "interception" and added that there was no interception within the meaning of § 605, as the message was heard with the receiver's consent at the moment it reached him. However as there was held to be no technical "interception," it seems to be superfluous to present the question of the consent of either party to the conversation, since § 605 reads "no person not being authorized by the sender shall intercept . . ." and the *Nardone*, *Weiss*, and *Benanti* cases have said that the consent of the sender is required for an interception and a divulgence of a wire communication.

In *Irvine v. California*[25] when the defendant was absent from his home policemen bored a hole in the roof of the house and strung wires from a neighboring garage to a microphone placed successively in a hall, a bedroom, and a closet in the dwelling of the defendant. The court explained that there was no interception within the meaning of The Federal Communications Act as there was no interference with any system of communication. All that was overheard was what an eavesdropper stationed in the hall, the bedroom, or the closet might have overheard.

[23] 238 F.2d 160 (C.A. 9th, 1956).

[24] 229 F.2d 130 (C.A. 7th, 1956).

[25] 347 U.S. 128 (1954).

The novel situation presented by *On Lee v. United States*[26] likewise amounted to eavesdropping and not to an interference with a wire communication. In that case a federal narcotics agent had a small microphone on the inside of his coat pocket and a small antenna running along his arm when he entered the defendant's shop. Another federal agent outside the shop used a radio to pick up the conversation taking place inside the shop. The use of a radio to magnify sound was considered to be no different from the use of a telescope to magnify a vision and the evidence was held admissible.

However, there was held to be an interception where a microphone was installed on a desk in the defendant's office when telephone wires were used in connection with the transmission of sounds picked up by the microphone to a federal agent who simultaneously monitored the transmissions in *United States v. Coplon.*[27] The court stated, however, that it could not hold otherwise because of the government's inability to disclose how the microphone was installed and in what manner the connection differed from a wire tapping apparatus.

CONCEPTIONS DEVELOPED TO DEFINE INTERCEPTION AND CONSENT OF THE SENDER

There seems to be an irreconcilable conflict among the courts as to what constitutes an interception where extension telephones are used by third parties and where devices are attached at or near a receiver. However, there seems to be no conflict where a party initiating a phone call reaches a party other than the one with whom he wishes to speak. As to what constitutes consent of the sender, the courts have differed as to whether one or both of the parties to a phone conversation must authorize an interception and a divulgence. There has, at times, also been a conflict in the judicial opinions as to whether the consent must be given not only to the person making the interception and the initial disclosure but also to any other person obtaining information from the authorized person if he desires to make use of that which he has obtained.

This conflict has come to a head in the opinions of three judges who heard *Reitmeister v. Reitmeister.*[28] There Adolph Reitmeister sued to recover damages from Louis Reitmeister, Louis' hired detective Hopp, a Mrs. Lippman and one Nachby for the unauthorized use of intercepted communications. Adolph would telephone Louis and Hopp at Louis' office and use abusive language toward them. On one occasion when Adolph phoned Hopp, Hopp stated that if someone took recordings of Adolph's

[26] 343 U.S. 747 (1952).

[27] 88 F. Supp. 921 (S.D.N.Y., 1950).

[28] 162 F.2d 691 (C.A. 2d, 1947).

conversations Adolph would regret it. To this warning the plaintiff replied, "The hell, use the record, do what you want, I want the world to know about it." Louis had an extension telephone in his office and use was made of this extension whenever Adolph called. Attached to the receiver of the extension was a recording device which recorded the conversations. It had appeared that Adolph knew Louis was recording the conversations. However Adolph did not know that Louis would play the recordings to Hopp or that Louis had informed Mrs. Lippman and her attorney Nachby of the nature of Adolph's conversations and had given them the recordings thereof for Mrs. Lippman's action against Adolph a year later in the Surrogates Court. Mrs. Lippman and Nachby subsequently presented the recordings into evidence in that action. All of the judges in the instant case agreed that the suit should have been dismissed as to Louis because Adolph had given his consent to Louis' recording and divulging of the conversations. This authorization was said to be valid although given in advance and in general terms. But Judge Chase stated as his chief proposition that there was no interception forbidden by § 605. He observed that the messages were received into Louis' office without previous diversion and that their initiation by Adolph included their being received by all receivers in the office. Judge Chase applied the *Goldman* definition of interception and explained that Louis heard the messages at the moment they left Adolph's possession and at the moment they came into the possession of Hopp or Louis' secretary. Judge Learned Hand however held that there was an interception when the recording device was attached to the extension receiver and he defined interception to be an interposition of an independent receiving device between the lips of the speaker and the ear of the listener. Aside from the recording device, he explained that there was no difference between the extension lead off of the main circuit and a wire tap. A conflict also was apparent between Judge Hand and Judge Clark as to the breadth of the consent given by the plaintiff. Judge Hand held that Mrs. Lippman and her lawyer ought to be made to prove that they were in privity with Louis and that if such proof is not made then there was no consent to their publishing the recordings in the Surrogates Court. Judge Clark said that Adolph's consent was in broad enough terms to cover the use of the recordings in that court. It would seem that Judge Clark stated the better view because § 605 ("no person not being authorized by the sender shall intercept . . . and divulge . . . the existence . . . of *such* intercepted communication") seems to say that divulgence of a communication the interception of which is unauthorized by the *sender* is prohibited. Consistent use of language would require a similar construction where § 605 reads "and no person having received *such* intercepted communication . . . knowing that such information was *so* obtained, shall divulge. . . ." The cases have stated that consent of the sender is re-

quired for interception, divulgence and other use to be made of a wire communication.[29]

The situation in *United States v. Yee Ping Jong*[30] involved a conviction of the defendant on the basis of phonographic records of telephone conversations between an informer and the defendant procured by the attachment of a recording device to the telephone wire near the receiver in the informer's hand. At the direction of a federal agent, the informer telephoned the defendant. The court held that there was no interception of a communication but merely a recording of a call near one end of the line and not a seizure between the locality of the call and the locality of the answer.

In *United States v. Lewis*[31] one telephone conversation was recorded by a device attached to or placed in proximity to the receiver, and another was recorded by a stenographer listening on an extension telephone. In both instances one of the conversing parties either knew a recording was being made or acquiesced in the recording. The court said that § 605 is not violated if the conversation is recorded manually, mechanically, or electrically with the consent of one of the parties to the conversation. Consent of both conversing parties was not considered a prerequisite to an interference by a third party. In the same case other phone calls had been received by police officers who had raided a certain hide-out. The court held that there was no interception within the meaning of § 605 but merely a substitution of the police officers for the expected parties as receivers.

The court in *Billeci v. United States*[32] was likewise faced with a situation where police officers answered the phone whenever it rang. The officers would tell whomever called that the person to whom the caller wished to speak was not present but certain of the persons who phoned chose to leave messages with the officers. The court held that there was no interception. It was explained that whenever a person making a telephone call speaks to whomever answers even if he did not wish to speak to the party answering there was a receipt of a message at the moment it leaves the possession of the speaker within the *Goldman* definition. This holding and the holding in the similar situation in the *Lewis* case appear to be sound because only something in the nature of a deception was practiced in each case and there was no interposition of an intercepting device.

The court in *United States v. Guller*[33] held that there was no interception where a narcotics agent listened to a phone conversation on an exten-

[29] Benanti v. United States, 335 U.S. 96 (1957); Goldstein v. United States, 316 U.S. 114 (1942); Weiss v. United States, 308 U.S. 321 (1939); Nardone v. United States, 308 U.S. 338 (1939); Nardone v. United States, 302 U.S. 379 (1937); United States v. Gris, 247 F.2d 860 (C.A. 2d, 1957); Diamond v. United States, 108 F.2d 859 (C.A. 6th, 1938).

[30] 26 F. Supp. 69 (W.D. Pa., 1939).

[31] 87 F. Supp. 970 (D.D.C., 1950).

[32] 184 F.2d 394 (App. D.C., 1950).

[33] 101 F. Supp. 176 (E.D. Pa., 1951).

sion telephone because there was no interposition of an independent receiving device between the mouth of the speaker and the ears of the listener despite the fact that the extension phone had not been connected to the main circuit before and was connected for purposes of overhearing the conversations.

United States v. Pierce,[34] *United States v. Sullivan*,[35] *Flanders v. United States*,[36] *United States v. White*,[37] *Rathbun v. United States*,[38] and *Douglas v. United States*[39] are cases where law enforcement officials listened to telephone conversations on extension telephones with the knowledge or consent of one of the two conversing parties. In all of these cases it was held that there was no interception within the meaning of § 605 where the consent of one of the parties to the conversation was had. In the *Pierce* case the consent was given by a party who had been arrested by the police. In both *Sullivan* and *Douglas* it was given by an informer. A policeman gave the consent in *White* while in the *Rathbun* case it was given by a party who had been intimidated by the defendant. The court in the *Sullivan* case also indicated that there was no interception because there was an obtaining of what was sent at the moment it left the possession of the speaker.

However, there is another group of cases opposed to the explanation of interception and consent of the sender contained in the foregoing cases and much more in agreement with Judge Learned Hand's consideration of interception in the *Reitmeister* case.

A guiding authority for this group of decisions is *United States v. Polakoff*[40] wherein an informer, at the urging of F.B.I. agents, telephoned the defendant and a recording machine was attached to an extension telephone on the same circuit as the main line and the message was recorded. The court held that there was an interception by the recording of the conversation heard on the extension telephone and indicated that the statute does not speak of circuits or taps but does prevent any interference with a communications system whether the interference is accomplished on the same circuit or on another circuit. The language of the majority opinion indicated alternately that both the use of the recording device and the use of the extension receiver constituted an interference with the communication. As to the consent of the sender, the court said that it means that both conversing parties must consent to the interception and divulgence and the fact that the informer had initiated the call does not mean that he alone is the sender. It was said that contrary to communications by

[34] 124 F. Supp. 264 (N.D. Ohio, 1954).
[35] 116 F. Supp. 480 (D.D.C., 1953).
[36] 222 F.2d 163 (C.A. 6th, 1955).
[37] 228 F.2d 832 (C.A. 7th, 1956).
[38] 355 U.S. 107 (1957).
[39] 250 F.2d 576 (C.A. 4th, 1957).
[40] 112 F.2d 888 (C.A. 2d, 1940).

telegram each party to a telephone conversation is alternately a sender and a receiver.

There was held to be an interception where a third party overhead a telephone conversation by means of an office "conference system" apparently involving the same circuit even though one of the conversing parties knew of the arrangement in *United States v. Gruber.*[41] However, the particular interception and divulgence there under consideration was expressly prohibited by another statute.[42]

Where the defendant wanted to play a recording of conversations by telephone between a government witness and two defense witnesses for purposes of impeachment, the court held that this could not be done in *James v. United States.*[43] The court indicated that both conversing parties must consent to the interception and the use of the contents as evidence.

A clarification of the *Goldman* doctrine of interception was attempted in *United States v. Stephenson.*[44] The court acknowledged that an interception does not include taking what is sent before, or at the moment, it leaves the possession of the speaker or after, or at the moment, it comes into the possession of the receiver. But it was said that a moment means the same instant and even if an infinitesimal interval of time elapses between the sending and the receiving there is seizure (by the way a mechanical device was attached to the bell box of the instrument used by the initiator of the call). The court said that each party to a phone conversation is alternately sender and receiver and hence both parties must give consent to an interception and divulgence.

The *Goldman* doctrine was further refined in *United States v. Hill*[45] wherein the court held that placing a microphone against a receiver constituted an interception. The court noted that in *Goldman,* the instrument employed overheard the talk of both conversing parties without at the same time coming in touch with any part of a communications system. The court also followed the *Polakoff* doctrine that both conversing parties must consent to an interception and divulgence.

It would appear that the cases could be resolved if the *Goldman* doctrine with refinements given it by the *James* and *Hill* cases were adhered to strictly as to the meaning of "interception," and if the sender's consent were only considered if an interception has been found to exist. The listening to a phone conversation by a third party by use of an extension receiver regardless of whether it is or is not on the same circuit and

[41] 123 F.2d 307 (C.A .2d, 1941).

[42] 18 U.S.C.A. § 1343 (1948) which prohibits conspiring to defraud the Securities and Exchange Commission of the disinterested services of telephone operators.

[43] 191 F.2d 472 (App. D.C., 1951).

[44] 121 F. Supp. 274 (D.D.C., 1954).

[45] 149 F. Supp. 83 (S.D.N.Y., 1957).

regardless of whether or not it had only recently been installed should not be held to be an interception within the meaning of § 605 since a message is obtained at the moment—the same instant—it leaves the possession of the speaker and after or at the moment—the same instant—it comes into the possession of the other conversing party. For the same reason there should be considered to be no interception where an informer or an investigating agent picks up a receiver in response to the ring of a telephone and the speaker converses with him.

CONCLUSION

Apparently the *Reitmeister*, *Yee Ping Jong*, *Lewis*, *Stephenson*, *Polakoff*, and *Hill* cases should involve interceptions where there is an interposition of an independent device for recording or listening if it is not a part of the communications system and if the interposition of this device is had at any point along the communications system by being attached to or in any contact with any part of the system between the mouth of the speaker and the ear of the listener. There should then be also an interception even if the contact is obtained by any manner at a bell box or a receiver if a seizure is made after a call leaves the possession of a speaker or before it comes into the possession of a listener.

The *Pierce*, *Sullivan*, *Flanders*, *White*, *Rathbun*, and *Douglas* cases involved the use of extension phones and hence did not present interceptions within the *Goldman* definition. If this is so, then the presence of consent on the part of either conversing party was not needed since no interception was present. These decisions are laying down what could be a dangerous proposition if it were to be applied to a true case of interception as it was in the *Lewis* case. All that law enforcement officials would have to do to obtain consent of one of the conversing parties would be to have it given to them by an informer or by applying coercion to persons under arrest or otherwise not in a position to refuse consent to an interception. In addition it would appear that the *Pierce* case violates the clear statement in *Weiss* that the consent of the sender must be voluntary because a party arrested by the police is under no less constraint than a party who is urged to turn state's evidence when confronted with the contents of his conversations. The protection afforded by § 605 against unauthorized interference with wire communications could be assured by requiring consent to an interference by both parties. The *Polakoff* case has offered a logical explanation as to why § 605 was intended to protect both parties to a communication by wire from interceptions and divulgences and to require the consent of both parties to authorize such activities. Each party to a telephone conversation sends his own message either in initiating the conversation or in responding to the other party's message and hence each is a sender of his own message.