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Case Comments

Dicta Editorial Board

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EVIDENCE: ADMISSIBILITY OF EVIDENCE OBTAINED BY WIRETAPPING—In a recent United States Supreme Court case, *Schwartz v. Texas*,[1] the petitioner, a pawnbroker, became involved in a conspiracy with two men, one named Jarrett and the other named Bennett. The latter two were to rob certain people and, according to the plan, were to bring the loot to the petitioner who was to dispose of it and divide the proceeds.

Pursuant to the plan a woman was robbed of some valuable jewels. The petitioner, after disposing of the jewels, repeatedly delayed settlement with the robbers and the three finally fell out. The petitioner then tipped off the police as to where they could find Jarrett. After Jarrett had been in jail about two weeks he consented to telephone the petitioner from the sheriff's office. With the knowledge and consent of Jarrett a professional operator set up an induction coil connected to a recorder amplifier thereby enabling the operator to overhear and record the conversation between Jarrett and the petitioner. These records were used as evidence when the petitioner was convicted as an accomplice to the crime of robbery. The records, admitted only after Jarrett and the petitioner had testified, corroborated Jarrett and discredited the petitioner.

Seven members of the court, with Mr. Justice Frankfurter concurring in a separate opinion and Mr. Justice Douglas dissenting, held that the federal prohibition of the unauthorized interception of a telephone communication does not bar the use of such communications as evidence in a criminal proceeding in a state court. This is true irrespective of whether the state rule admitting such evidence is established by the legislature or the courts.

The pertinent part of Section 605 of the Federal Communications Act is 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. . . .[2]

This has been construed by the United States Supreme Court to render inadmissible in any federal court intercepted communications when such communication is sought to be divulged in violation of the act.[3] It was later held that this rule applied even though the telephone calls were intrastate.[4]

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[1] Schwartz v. Texas, 344 U. S. 199, 73 S. Ct. 232, 97 L. Ed. 231 (Dec., 1952).
[2] 47 U.S.C. Section 605.
[3] Nardone v. United States, 302 U. S. 379 (1937).
[4] Weiss v. United States, 308 U. S. 321 (1939).

A similar rule was laid down by the United States Supreme Court regarding unlawful searches and seizures under the Fourteenth Amendment to the Federal Constitution. The court held that evidence obtained by a state officer, by means which would constitute an unlawful seach and seizure, is nonetheless admissible in a state court [5] even though it had been established that evidence obtained by such means would clearly be inadmissible in a federal court under the Fourth Amendment.[6]

In the *Schwartz* case the state rule admitting the wiretapping evidence was established by statute.[7] The statute, as amended, rendered inadmissible in criminal trials evidence obtained in violation of the constitution or laws of Texas or of any provision of the Federal Constitution. This statute did not cover evidence obtained in violation of the laws (as distinguished from the Constitution) of the United States. Colorado apparently has no such statutory rule of evidence to bring it within the rule approved in the *Schwartz* case.

Colorado does have a statute which makes it a misdemeanor to tap a telephone or telegraph line. The pertinent part of this statute states:

> Any person who cuts, breaks, taps or makes any connection with any telegraph or telephone line, wire, cable or instrument belonging to another, and wilfully reads, takes or copies any message, communication or report intended for another passing over any such telegraph or telephone line, wire, or cable in this state . . . shall be deemed guilty of a misdemeanor.[8]

In Colorado, therefore, we are governed by a statute which brings about the same result as the Texas statute, in that it prohibits the obtaining of evidence by wiretapping, but does not render such evidence inadmissible in the state courts. The Supreme Court makes it clear that the rule of the *Schwartz* case, in the absence of a direct expression by Congress, is simply an additional factor for a state to consider in formulating a rule of evidence for use in its own courts. The Colorado Supreme Court has not had an opportunity to specifically rule upon the admissibility of evidence obtained by wiretapping. However, the court has held on several occasions that evidence illegally taken from a person against whom it is offered or otherwise unlawfully obtained is nonetheless admissible if pertinent to the issue.[9] It is reasonable to assume that the rule would be followed in a case involving wiretapping and that evidence so obtained would be amissible in crimi-

[5] Wolf v. Colorado, 338 U. S. 25 (1949).
[6] Weeks v. United States, 232 U. S. 383 (1914).
[7] Tex. Laws, 1925, Ch. 49, Sec. 1.
[8] 1935 C.S.A., Chap. 48, Sec. 129.
[9] Wolf v. People, 117 Colo. 279, 187 P. (2d) 926; Massantonio v. People, 77 Colo. 392, 236 P. 1019.

nal trials in the Colorado courts even though the act be a flagrant violation of the Federal Communications Act and the Colorado statute.[10] It is also reasonable to assume that in a prosecution in a state court for a state crime, the Fourteenth Amendment of the Federal Constitution would not forbid the admission of relevant evidence even though obtained by a violation of Section 605 of the Federal Communications Act or the Colorado statute.[11]

After a careful look at the *Schwartz* case, it is apparent that a state may still enact a law which prohibits the obtaining of wiretapping evidence and yet the state criminal courts can admit such illegally obtained evidence without violating the laws or Constitution of the United States. The United States Supreme Court in support of this reasoning said,

> Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute. If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation to do so.[12]

It is clear that Congress has not manifested an intent to supersede the exercised power of a state in this matter, so to this date there is nothing that would bar a state from enacting and enforcing such legislation.

It is interesting to note, in conclusion, that the United States Supreme Court did not decide whether or not Congress has the power to impose a rule of evidence on the courts of a state.

DWIGHT A. HAMILTON.

WRONGFUL DEATH: MEASURE OF DAMAGES FOR DEATH OF A MINOR CHILD—The case of *McEntyre v. Jones*[1] was brought in Conejos County by the mother of a deceased thirteen year old girl. The facts were in dispute, but the jury found that the defendant wife had negligently driven the defendants' truck against the girl, causing her death. Judgment was entered on a verdict of $7,500 for the plaintiff, and the defendants bring error. Affirmed.

The defendants assert that the trial court erroneously instructed the jury as to the measurement of damages. The instruc-

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[10] Hubin v. State, 180 Md. 279, 23 A. (2d) 706; People v. Stemmer, 298 N. Y. 728, 83 N. E. (2d) 141; Harlem v. Bell, 296 N. Y. 15, 68 N. E. (2d) 854; People v. Channell, 101 Cal. App. (2d) 192, 236 P. (2d) 654.

[11] Wolf v. Colorado, 338 U. S. 25 (1949).

[12] Schwartz v. Texas, 344 U. S. 199 (Dec., 1952).

[1] — Colo. —, 263 P. (2d) 313 (1953), 1953-54 C.B.A. Adv. Sh. No. 5, p. 97.

tion was, in part, "In assessing the plaintiff's damages, if any, you should consider the age, health and condition of life of her deceased daughter, her habits of industry, her ability to earn money, her disposition to aid and assist the plaintiff, and the probable duration of the life of the plaintiff and of her deceased daughter, if she had not died as a result of the accident." The Supreme Court holds that the instruction was proper—that damages should be measured by the life expectancy of the deceased child limited to the life expectancy of the beneficiary mother, and not limited to the years of minority of the child.

The cases of *Pierce v. Conners* [2] and *Tadlock v. Lloyd* [3] were contra to this case and expressly limited recovery to the prospective net pecuniary loss during the years of the deceased child's minority.

The cases of *Lehrer v. Lorenzen* [4] and *St. Lukes Hospital Association v. Long* [5] accord with the present case though not expressly so. In both cases the Supreme Court found that the instructions as to the measurement of damages were proper. The instruction in the *Lehrer* case suggested that the jury take "into consideration the child's disposition and ability to contribute to the parents' wants and necessities during their probable duration of life." The instruction in the *St. Lukes Hospital* case was almost identical to the instruction given in the present case. Both of these instructions indicated that recovery was not to be limited to the years of minority of the deceased child. However, in neither case was the Court called upon to decide the exact point.

In the present case, the Court finds that the law in Colorado upon this question has been changed by the above mentioned cases; and the only further justification given for this change is that the rule in Colorado now accords with that in the majority of states.

The Colorado wrongful death statute [6] specifically permits recovery for the wrongful death of a minor child. It seems logical to interpret the statute as permitting recovery for the total net pecuniary loss rather than limiting recovery to an arbitrary period not set by the legislature.

The best argument in favor of limiting recovery to the years of minority is that, while it is difficult for the jury to measure the loss during minority, to permit recovery for the loss beyond the years of minority would open the way for sheer speculation by the jury. In answer to this, it should be pointed out that in all cases the jury is instructed to permit recovery only for proven damages. Where the plaintiff is able to prove a loss beyond the minor years of deceased, e.g., where the twenty year old was mak-

[2] 20 Colo. 178, 37 P. 721 (1894).
[3] 65 Colo. 40, 173 P. 200 (1918).
[4] 124 Colo. 17, 233 P. (2d) 382 (1951).
[5] 125 Colo. 25, 240 P. (2d) 917 (1952).
[6] '35 C.S.A., Ch. 50, Secs. 1, 2 and 3.

ing a substantial contribution to his parents at the time of his death, it would be unjust and against the obvious intent of the legislature to limit recovery to the period of minority.

The better rule, with which Colorado now is in accord, permits the jury, within the legal limit set by the court and legislature, to determine how much loss the plaintiff has proved, without setting up some arbitrary limitation of years between the death of the minor and the estimated life expectancy of the parent.

GEORGE GIBSON

STATUTES: ONLY A PARTY AFFECTED CAN CHALLENGE CONSTITUTIONALITY—The case of *Higgins v. Sinnock* [1] would appear to have been an attempt to accomplish indirectly that which could not have been done directly. This suit was instituted as a class action on behalf of the old age pensioners, and it sought a declaratory judgment on the validity of a recent statute [2] that made elderly inmates of public institutions eligible for old age pensions. Such inmates had previously been excluded, so the result of the statute was to increase the number of persons participating in the state's pension fund. This would appear to give the plaintiffs a sufficient interest for them to challenge the legislature's granting of these pensions, but this question did not come before the court.

Conceding that the extension to these new eligibles was not unconstitutional, the plaintiffs instead challenged a provision of the act that the pension of an inmate would be paid to the chief financial officer of the institution as a trustee. The theory of the plaintiffs' case was that this procedural provision was not separable and the whole act would have to fail if the court should rule that this payment procedure was in violation of the state constitution. This presented to the court the question as to whether the provisions were separable, and the court held that they were, pointing out that the procedure for payment is entirely separate and distinct from the vesting of the rights.

This, then, left the question of whether the plaintiffs were in a position to challenge the payment provision as such. The court pointed out that the plaintiffs were not inmates of an institution and that the method of payments did not affect their interests in any respect. Accordingly, the court ruled that they were not proper parties to bring this challenge. As a result, the court was not called to rule upon the only part of the act that was attacked.

While the trial court declared the act constitutional, and the Supreme Court affirmed the judgment, it is submitted that there was no necessity for a determination of constitutionality. The rulings on the separability and on the requisite interest both appear to be orthodox, and they produce the same result that a direct

[1] 1953-54 C.B.A. Adv. Sh. No. 9, p. 186.
[2] COLO. LAWS, c. 171 (1953).

attack on the legislative grant of the pensions would have as conceded by the plaintiffs. This case was not decided on any principle that one cannot do indirectly that which he cannot do directly, but it is submitted that this is a good example of a case where that result occurs.

T. H. CHRYSLER

To Whom It May Concern:

The Domestic Relations Division of the Second Judicial District has temporarily set up the following schedule which will be in effect until further order:

MONDAYS: Hearings on non-contested divorce actions. The cases will be staggered through the day at twenty-minute intervals to suit the convenience of the parties and of counsel. Counsel for non-appearing defendants will be assigned either upon application of counsel or upon the Court's own motion when it appears necessary or desirable. In all cases where counsel is not assigned to represent the non-appearing defendant, the Court will request plaintiff's attorney to inform defendant by registered mail (return receipt requested) of the time and place the case will be heard, informing him generally of his right to be present, etc.,—and following the hearing, plaintiff's counsel will send the defendant a copy of the interlocutory decree.

TUESDAYS AND FRIDAYS: Hearings on motions for temporary alimony, support, attorney's fees, and court costs, and the hearings will also be staggered through the day to suit the convenience of parties and of counsel. In all such cases the Court is requesting counsel to file at least five days before the hearing a sworn statement of all the assets of his client, and at the same time, furnish a copy thereof to opposing counsel. In general, the affidavits should contain a statement of all assets of both parties, earning capacity, and employment, if any, the woman's minimum needs and requirements to support herself and children, and the husband's estimate of his ability to pay. Also heard on Tuesdays and Fridays will be citations and restraining orders.

WEDNESDAYS AND THURSDAYS: Hearings of contested matters both as to divorce and property settlement.

The Court is asking the cooperation of counsel in this temporary arrangement, and also, full cooperation in attempting reconciliation of the parties whenever possible, and especially where children are involved.

The Court, at a later date, expects to make known to lawyers and the people of the community generally the facilities available for marriage and family counseling, looking toward a broad preventive program, and with the hope of reducing the divorce rate in the community.

JOSEPH E. COOK, Judge.

January 12, 1954.