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is not amply solvent to cover the other debts. To be deprived of his recourse against the tort-feasor in such cases could be a grave financial blow to the husband. On the other hand, if the husband and the wife both are allowed separate recoveries for the same medical expenses, the defendant is forced to pay twice.

No North Carolina case has been found which is decisive on the point discussed in this Note, and while trends suggesting contrary possibilities have been explored, it is submitted that the North Carolina position is that only when the injured plaintiff-wife has paid the medical bills with her own funds, or is solely liable therefor, may she recover them from the tort-feasor; otherwise, the husband on whom the liability falls may recover.

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Evidence—Admissibility in Federal Prosecution Where Procured by State Authorized Wire Tapping

In *Benanti v. United States*,¹ the Supreme Court of the United States reversed the Court of Appeals for the Second Circuit² and held that evidence obtained as the result of state authorized wire tapping by New York law enforcement officers, even though without participation by federal officials, was inadmissible in federal courts.³

In the Supreme Court the Government attempted to justify admission of the evidence on the basis of *Schwartz v. Texas*⁴ and by drawing an analogy to fourth amendment cases in which evidence illegally procured by state officers acting in their own behalf and without federal participation was admissible in federal prosecutions.⁵

In the *Schwartz* case the Supreme Court held that evidence obtained by wire tapping by state officials was admissible in state courts. The Court in the *Benanti* case distinguished the *Schwartz* case on the ground that in the latter “due regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect.”⁶ In the *Benanti* case

¹ 355 U.S. 96 (1957).
² Benanti v. United States, 244 F.2d 389 (2d Cir. 1957).
³ The wire tapping was by state officials who had obtained a warrant in accordance with state law authorizing the wire tapping. The petitioner was suspected of violating the New York narcotics laws. When the state officers made their arrest, they found the petitioner was not transporting narcotics in violation of state law, but was transporting nontaxed alcohol in violation of federal law. Evidence of this violation was turned over to federal authorities who began this prosecution. Although the New York police were acting pursuant to state law, N.Y. Const. art. 1, § 12; N.Y. Code Crim. Proc. § 813-a (1942), both the court of appeals and the Supreme Court found they violated section 605 of the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952).
⁴ 344 U.S. 199 (1952).
⁵ 355 U.S. at 101.
⁶ Ibid.
the state's side of the federal-state conflict was not as compelling as in
Schwartz, for in Benanti the problem was whether in a federal prosecu-
tion a state statute required the Court to refuse to implement the pro-
hibition of a federal law. Since it had been held in an earlier case\(^7\) that
section 605 was applicable to intrastate as well as to interstate com-
 munications and since section 605 is not limited to federal agents, but
also applies to state officials,\(^8\) the state law authorizing wire tapping was
manifestly contrary to controlling federal law.\(^9\) In the Schwartz case
the Court was not faced with the relatively simpler problem of a conflict
between state and federal legislation in a field in which Congress was
authorized to act, but with the problem of the effect to be given to viola-
tion of a federal statute in state proceedings. Although admitting a vi-
olation of section 605 occurred in the state tribunal,\(^10\) the Court held
that section 605 would not be construed to bar the evidence in the
absence of a clear intent on the part of Congress to impose a rule of
evidence upon state courts. In so holding the Court avoided a con-
struction of the statute which would have raised the constitutional
question of whether Congress had the authority under the commerce
clause to invade the police power of the states in determining the ad-
missibility of evidence in state courts.\(^11\) Since the Benanti case in-
volved a federal prosecution and, therefore, did not present the same
grave problem in federal-state relations, the Court did not hesitate to
distinguish it from the Schwartz case.

The decision in Benanti is particularly significant in that the lower
federal courts in cases arising under the fourth amendment have ad-
mitted evidence illegally obtained by state and other nonfederal officials
acting in their own behalf and turned over to federal authorities when
the latter did not participate in the wrongdoing.\(^12\)

\(^7\) Weiss v. United States, 308 U.S. 321 (1939).
\(^8\) See Schwartz v. Texas, 344 U.S. 199 (1952), involving state law enforcement
officers, and in which the Court acknowledged that the divulgence of the wire
tapping by these state officials was a violation of Section 605.
\(^9\) 355 U.S. at 105, where the Court stated: "[W]e find that Congress, setting out
a prohibition in plain terms, did not mean to allow state legislation which would
contradict that section. . . ." In In re Telephone Communications, 9 Misc. 2d 121,
170 N.Y.S.2d 84 (Sup. Ct. 1958), it was held that any future applications for
orders authorizing interceptions of telephone messages within New York would be
denied on the ground that Benanti held such orders to be contrary to federal law.
\(^10\) 344 U.S. at 201.
\(^11\) See Adams v. New York, 192 U.S. 585, 599 (1904), where the Court said:
"[I]t is within the established power of the State to prescribe the evidence which
is to be received in the courts of its own government." See also Scott, Federal
Restrictions on Evidence in State Criminal Cases, 34 Minn. L. Rev. 489, 507-
08 (1950).
\(^12\) Jones v. United States, 217 F.2d 381 (8th Cir. 1954); Jaroshuk v. United
States, 201 F.2d 52 (9th Cir. 1953). See Harno, Evidence Obtained by Illegal
Search and Seizure, 19 Ill. L. Rev. 303 (1925).
The fourth amendment of the United States Constitution prohibits unreasonable searches and seizures. The Supreme Court has taken the position that evidence secured in violation of the fourth amendment is not admissible in federal courts if federal officers participated in the illegal search and seizure. Exclusion of such evidence rests upon a court created rule of evidence designed to implement this amendment's prohibition. In the Benanti case the Court, citing Lustig v. United States, stated that the question of whether evidence illegally obtained by state officials is admissible in the federal courts is an open one in the Supreme Court. Although this question has not been decided by the Supreme Court, the Court has on several occasions used language indicating that evidence secured by state officers would be admissible; and in Burdeau v. McDowell the Court held that evidence secured in an illegal search by a private detective was admissible in a federal prosecution. As previously stated, the lower federal courts, to which the question has been presented on several occasions, have generally admitted the evidence.

The lower court realized that wire tapping did not involve a violation of the fourth amendment and that evidence secured by wire tapping was admissible until passage of the Federal Communications Act. However, the court of appeals, believing there should be no distinction between the policy as to state procured evidence in violation of the fourth amendment and that procured by state officers in violation of the Federal Communications Act, held the evidence was admissible.

13 U.S. Const. amend. IV.
14 Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921).
16 338 U.S. 74 (1949).
17 355 U.S. at 102, n. 10.
18 See, e.g., Byars v. United States, 273 U.S. 28 (1927), where the Court said: "[W]e do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account." Id. at 33.
19 256 U.S. 465 (1921).
20 See note 12 supra.
21 Olmstead v. United States, 277 U.S. 438 (1928). In the Olmstead case the defendant contended that wire tapping was an unreasonable search and seizure and that evidence so obtained by federal officials was not admissible in the federal courts. The Court rejected this contention on the ground that the fourth amendment was not violated unless there was a search or seizure of one's person or papers or an actual physical invasion of one's home. It was not until several years after the Olmstead decision that Congress enacted the Federal Communications Act, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1952). The pertinent part of the statute 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."
22 Benanti v. United States, 244 F.2d 389, 393 (2d Cir. 1957).
On appeal the Supreme Court found that it was neither appropriate nor necessary to delve into an analogy between the Communications Act and the fourth amendment and decided the case solely on the basis of the statute.\(^{23}\)

The plain meaning of the statute\(^{24}\) supports the decision of the Supreme Court and justifies the refusal to admit evidence secured by wire tapping regardless of the policy in the lower federal courts in fourth amendment cases. Whereas the United States Constitution protects individuals only from illegal searches and seizures conducted by federal officials and not from such acts by state officials,\(^{25}\) except in instances where the latter are guilty of such gross misconduct as to deprive the aggrieved party of due process,\(^{26}\) the Communications Act by its express terms makes no distinction between federal and state officials. Another factor calling for a reversal of the conviction was that at the very moment the state official "divulged" the "existence" of the wire tapping to the jury he violated the Communications Act.\(^{27}\) The conviction, said the Court, was "brought about in part by a violation of federal law, in this case in federal court."\(^{28}\) Accordingly, the Court held that the express prohibition in the statute was a bar to the conviction.

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\(^{23}\) 355 U.S. at 102.
\(^{24}\) See note 21 supra.
\(^{25}\) Wolf v. Colorado, 338 U.S. 25 (1949), where the Court stated: "[T]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again . . . ." Id. at 26.
\(^{26}\) The Court has made the following statement as to the limitations imposed on the states by the fourteenth amendment: "[T]his clause extracts from the States . . . all that is 'implicit in the concept of ordered liberty'". Id. at 27.
\(^{27}\) After pointing out that section 605 contains an express prohibition against the divulgence of the existence of an interception, the Court said: "Disclosure of the existence of the communication was the prejudicial error that was not overcome." 355 U.S. at 101, n. 6. On the basis of this statement it would seem that the primary reason for forbidding the evidence secured by the wire tapping was revelation of the existence of the interception in court. But the Court explicitly reserved what conclusion it would have reached had the divulgence been out of court. "The first divulgence appearing on the record occurred in court, but we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction." Id. at 102, n. 9. Apparently a divulgence out of court would also lead to a reversal of any conviction. In Benanti the Court said that evidence acquired by wire tapping should not be used at all. This could be construed as meaning that regardless of where the violation occurs, the Court will implement the prohibition of the Federal Communications Act by excluding such evidence. This would not be a new step, since as stated previously, this is the policy as to evidence secured by federal officials in violation of the fourth amendment. However, since the Communications Act is not limited only to federal officials as is the fourth amendment, evidence obtained in violation of the former would probably be excluded regardless of who violated the statute.
\(^{28}\) Id. at 102.