> following. A high degree of public interest is involved in the effective administration of justice. That a party should be denied relief or should suffer punishment or judgment for lack of evidence when that evidence is in existence is certainly contrary to the public interest. In some cases this might be the result of sustaining the privilege claimed. Such an eventuality could be tolerated only in those special cases where there is a competing public interest involved of even more compelling importance and where production of the document would materially prejudice that interest. No doubt, documents properly immune from production are usually in the custody of a government department but the mere fact that documents are in government custody and not normally made available to the public cannot support immunity. Where therefore it is sought to support immunity by reference to an opinion the nature of the documents in question and the nature of the public injury which is feared should always appear.

The decision of Smithers J. in this case has clearly established the existence and application of the reserve power of the Court in the A.C.T. to safeguard the public interest from prejudice arising from the suppression of a document, where an objection has been taken by a Minister to the document's production. As the Australian Capital Territory is the seat of Commonwealth Government and the source of most Commonwealth ministerial decisions the clear unambiguous decision of Smithers upholding the principles of *Robinson's* case is to be welcomed.

B. MORRIS

INVASION OF PRIVACY : AUSTRALIA'S FIRST TELEPHONE TAPPING PROSECUTIONS

The Supreme Court of the Australian Capital Territory has recently completed the hearing of the first prosecutions under section 5[1] of the Telephonic Communication (Interception) Act 1960 (Cth). The first

[1] Section 5, insofar as is relevant for the purposes of this note provides as follows —' 5.—(1.) A person shall not—(a) intercept ; (b) authorize, suffer or permit another person to intercept ; or (c) do any act or thing that will enable him or another person to intercept, a communication passing over the telephone system. Penalty : Five hundred pounds or imprisonment for two years. A person shall not divulge or communicate to another person, or make use of or record, any information obtained by intercepting a communication passing over the telephone system . . . Penalty : Five hundred pounds or imprisonment for two years.'

Section 3 of the Act contains the following relevant definitions—" ' communication ' includes conversation, message and signal, and any part of a conversation, message or signal ; ' the Department ' means the Postmaster-General's Department ; ' the telephone system ' means the telephone system controlled by the Department." Section 4 of the Act provides, inter alia—' 4.—(1.) For the purposes of this Act, but subject to the next succeeding sub-section, interception of a communication passing over the telephone system consists of listening to or recording, by any means, such a communication in its passage over the telephone system without the knowledge of the person making the communication. (2.) Where a person lawfully on premises to which a telephone service is provided, by means of a telephone instrument or other device that is part of that service—(a) listens to or records a communication passing over a telephone line that is part of that service, being a communication that is being

was *R. v. Hanley*[2] which came before Bridge J. in July 1965 and the second *R. v. Webbie*[3] which was heard before Joske J. and jury in March 1966. Both cases were concerned with a connected series of events which took place in May 1965.

In *Hanley's* case the indictment contained counts charging that Hanley did—(i) intercept a communication passing over the telephone system ; (ii) communicate information obtained by intercepting a communication passing over the telephone system ; (iii) make use of information obtained by intercepting a communication passing over the telephone system. The Crown Prosecutor accepted Hanley's pleas of guilty to counts (i) and (ii) and offered no evidence on count (iii). An acquittal on this latter count was duly recorded.

Counsel for the accused made a long plea for leniency; mainly on the basis that this was the first prosecution under the Telephonic Communications (Interception) Act and that in all the circumstances of the case it was not one that called for a harsh sentence.

In view of the pleas of guilty entered by Hanley, the significance of this case lies mainly in the following remarks of Bridge J. when passing sentence—

> The relevant provisions of the Telephonic Communications (Interception) Act 1960 are obviously designed to give certain protection to Commonwealth property in the telephone installation constituting a vital public utility, and also to the privacy of members of the public using the telephone system. The protection of privacy against unwarranted intrusion is, and for centuries has been, a vital feature of our legal structure. Offences of the kind in question could be, in some circumstances, gravely aggravated by aiding immorality, unlawful gain, or other illegality. I feel bound to take a course which will stress the Court's firm disapproval of conduct of this kind. As this is the first instance in which a Court has been called upon to consider it, I propose to act more leniently than may well be necessary in any future similar cases. Notwithstanding any leniency in this instance, my accompanying expression of emphatic disapproval should serve as a warning that future offences of this kind may be met with greater severity in the light of the warning so given.

In relation to counts (i) and (ii), Bridge J. imposed three months imprisonment and six months imprisonment respectively, to be served concurrently. He then ordered that after Hanley had served one day he could be released conditionally upon his entering into a recognizance

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made to or from that service ; or (b) listens to a communication passing over such a telephone line as a result of a technical defect in the telephone system or the mistake of an officer of the Department, the listening or recording does not, for the purposes of this Act, constitute the interception of the communication.'

[2] 21 July 1965 ; unreported ; S.C.C. No. 45 of 1965.

[3] 8 March 1966 ; unreported ; S.C.C. No. 61 of 1965.

under section 20[4] of the Crimes Act 1914-1950 (Cth) in the sum of £100 to be of good behaviour for three years.

The case of *R. v. Webbie* is of far greater interest; Webbie pleaded not guilty to an indictment that he did communicate information obtained by intercepting a communication passing over the telephone system.

The Crown Prosecutor had possession of a tape recording with short pieces of the telephone conversation still on it. The Crown case was as follows—(a) the evidence of the two people, a man and a woman, involved in the telephone conversation ; that they did not give anyone permission to record their conversation and that they did not know that it was being recorded ; (b) evidence of the woman that Webbie had played the recorded conversation to her ; (c) evidence of an officer of the Postmaster-General's Department to prove that the telephone conversation was one that had passed over the telephone system ; and (d) evidence of Commonwealth Police Officers of interviewing Webbie who denied any part in the alleged offence.

At the close of the Crown case, and in the absence of the jury, counsel for Webbie submitted to Joske J. that the jury should be directed to bring in a verdict for the accused on the following grounds—

(a) there was no evidence that Webbie knew that the contents of the tape recorder were a telephone conversation or were obtained by intercepting a communication passing over the telephone system ;

(b) there was no evidence that Webbie ' communicated ' anything within the meaning of the section ; and

(c) assuming that there was a communication it was not a communication of ' information ' within the meaning of the section.

In relation to ground (b) counsel submitted that the words ' divulge or communicate ' in section 5 (3) were used as synonyms ; he then proceeded to draw on various dictionary references and case references as to the various meanings of ' divulge '. On the basis of these authorities he submitted that ' divulge ' meant ' making known information not previously known '. Accordingly, since ' divulge ' and ' communicate ' were synonyms ' communicate ' had a similar meaning and since the person to whom the recorded conversation was played had participated in it there was no ' communication ' within the meaning of the section.

As to ground (c) it was submitted that in looking at the Act as a whole, in the context of its references to the security of the Commonwealth,

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[4] Section 20 provides, inter alia—' 20.—(2.) If any person who has been released in pursuance of this section fails to comply with the conditions upon which he was released, he shall be guilty of an offence. Penalty : Imprisonment for the period provided by law in respect of the offence of which he was previously convicted . . . (4.) In addition, the recognizance of any such person and those of his sureties shall be estreated, and any other security shall be enforced.'

the Australian Security Intelligence Organization and the Attorney-General, ' information ' as used in section 5 (3) meant something more than ' chit chat or idle social talk '. Alternatively, he submitted that arguments similar to those raised in relation to ground (b) applied and before something could be ' information ' it had to be something not known by the recipient.

Joske J. intimated that he would not entertain grounds (b) and (c) of the above submission. However in relation to ground (a) he ruled that *mens rea* was an essential element of the offence charged. The jury was then recalled and after refreshing the jury's recollection of the charges against Webbie, Joske J. proceeded—

> Now, the essence of that offence . . . is that he must have . . . a guilty mind, and that involves, in the case of this particular offence . . . that he should have knowingly communicated . . . knowingly in the sense that he knew that what he was communicating had passed over the telephone system and that there had been an interception of it. Now, it is not enough . . . simply to say, ' This communication had in fact passed over the telephone system and he had in fact communicated it to her.'

There being no evidence that Webbie actually knew that the tape recording was a tape recording of something that had passed over the telephone system Joske J. directed the jury to return a verdict of not guilty.

A. CIRULIS*

PENNY v. PENNY[1]

Matrimonial Causes—Maintenance—Order to Secure—Nature and effect —Whether personal covenant security—Power of Court to vary Matrimonial Causes Act 1959, *section* 87 (1.) (j), (1.), (2.).

The applicant applied to the court to have previous orders to secure maintenance made against him by the court discharged or varied.

The applicant's first marriage was dissolved in 1952. In 1957 the applicant's second marriage was the subject of a decree of judicial separation.

In 1957 the Registrar made an order against the applicant for the maintenance of his first wife. By this order the applicant was ordered to secure to this wife for her life an annual sum by a deed containing a personal covenant. The applicant executed a deed in compliance with this order. On the same day an order was made by the Registrar for the maintenance of his second wife. By this order the applicant was to pay to this wife for her life an annual sum also. This sum was to be

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* LL.B. (A.N.U.) ; Barrister and Solicitor of the Supreme Court of Victoria.

[1] (1965) 6 F.L.R. 45, 81 W.N. (N.S.W.) 531, Supreme Court of N.S.W. ; Selby J.